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Federalism in Flux: Addressing State Oversight of National Security Facilities

John White*

Abstract

This Article explores the legal tension posed by state-issued injunctions under federal environmental laws on national security facilities. It argues that the Constitution's assignment of military control to the federal government is at odds with states' broad enforcement authority when applied to facilities that are vital for national security. This uncertain enforcement regime negatively impacts both effective environmental controls and national security.

The Article proposes to resolve the issue through an Executive Branch-designated list of national security facilities that would fall solely under federal enforcement jurisdiction. The proposal would be implemented through the President's statutory authority to exempt federal facilities from state regulation and would create an interagency process for determining the facilities to exempt from state injunctive authority. Five factors would guide the interagency analysis: a facility's contribution to national security; the risk of environmental harm; the effectiveness of alternative arrangements; environmental justice; and the anticipated impact on the federal-state relationship.

Using a recent case study to demonstrate how the framework could be applied, this Article examines the state of Hawaii's attempt to force the military to close a fuel facility that contaminated Oahu's drinking water supply. In place of the confusion and contentiousness that followed the state's order, the proposed framework would have provided greater clarity to all parties involved – state authorities, federal regulators, military leadership, and the public. It concludes that resolving the Constitutional tension through the proposed federal enforcement mechanism would improve the "cooperative

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federalism" model of regulation to safeguard national security without sacrificing environmental protection.

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INTRODUCTION

Following revelations that the U.S. Navy had contaminated Oahu's drinking water with jet fuel, the state of Hawaii issued an order on December 6, 2021, directing the Navy to "immediately suspend operations" and empty the fuel tanks that had caused the leak.[1] The state's order targeted the Red Hill Bulk Fuel Storage Facility, a crucial supply node for the Navy's Pacific Fleet.[2] The facility provided fuel to the warships and aircraft responsible for responding to crises emanating out of East and South Asia — including China and North Korea.[3] Consequently, a shutdown of the fuel facility could have significant geopolitical ramifications.

The Navy initially challenged the state's order in federal district court, claiming that "[t]he Final Order Directives . . . are in excess of [the Department of Health's] statutory authority," disputing the ability of the state to unilaterally issue injunctions over military facilities.[4] Months of stalemate followed, with Hawaiian residents getting increasingly upset at the inaction, while lawyers representing the federal government fought with state attorneys over the authority of a state to shut down the fuel depot.[5]

That challenge was ultimately mooted by the Department of Defense's ("DoD") decision to close the facility.[6] Yet the fundamental question remains unresolved as to whether federal environmental statutes give state governments the legal authority to enjoin or close a national security facility. This paper argues that, if they do, that delegation of injunctive enforcement authority conflicts with the Constitution's assignment of military control to the federal government. The systemic confusion created by this framework has undermined the public's faith in cooperative

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1 Emergency Order, Haw. Dep't. Health v. U.S. Navy, No. 21-UST-EA-02 (Dec. 6, 2021), https://health.hawaii.gov/about/files/2021/12/Emergency-Order-12.05.2021-signed.pdf.

2 *Id.* at 3–5.

3 *About Us,* U.S. PAC. FLEET, https://www.cpf.navy.mil/About-Us/ (last visited Apr. 17, 2023) (stating that the U.S. Pacific Fleet is the "world's largest fleet command" with approximately 200 ships, 1,500 aircraft and 150,000 personnel).

4 Compl. for Declaratory and Injunctive Relief at 26, United States v. Haw. State Dep't of Health, No. 1:22-CV-00051 (D. Haw. Feb. 22, 2022).

5 *See, e.g.,* Colonel Ann Wright, *Tone-Deaf Navy Lawsuit Calls State of Hawai'i Shut Down of Leaking Jet Fuel Tanks as "Erroneous; Arbitrary, Capricious, and an Abuse of Discretion; Clearly Unwarranted" as no "Imminent Peril,"* CODE PINK (Feb. 4, 2022), https://www.codepink.org/tone_deaf_navy_lawsuit.

6 *See* Press Release, Statement by Secretary of Defense Lloyd J. Austin III on the Closure of the Red Hill Bulk Fuel Storage Facility (Mar. 7, 2022), https://www.defense.gov/News/Releases/Release/Article/2957825/statement-by-secretary-of-defense-lloyd-j-austin-iii-on-the-closure-of-the-red/.

federalism to both prevent environmental damage and simultaneously provide for the common defense.

Accordingly, this Article proposes that the Executive Branch create a list of critical national security facilities that are subject to exclusive federal environmental control. The framework would be set out in an Executive Order, relying on the President's statutory authority to exempt federal facilities from state environmental enforcement. The register of facilities would be determined by an interagency collaborative process, chiefly between the DoD and the Environmental Protection Agency ("EPA"), and it would rely on a clear set of factors to determine which facilities merit inclusion. The Article concludes by applying the proposed framework to the environmental crisis at Red Hill to demonstrate how the framework could provide a clearer path to resolution when state environmental authorities potentially affect the military's operational needs.

I. CONSTITUTIONAL AUTHORITY OVER MILITARY FACILITIES AND COOPERATIVE FEDERALISM

The text of the Constitution clearly places the military under federal control. Article I, Section 8, Clause 14 grants Congress alone the power "[t]o make Rules for the Government and Regulation of the Land and Naval Forces."[7] A few clauses later, in the Enclave Clause, the Constitution grants to Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other Needful Buildings."[8] The President is given Executive power over the military as the Commander in Chief in Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[9]

When determining the relationship between the state governments and the federal government, the framers made clear in Article VI, Clause 2 of the Constitution (the Supremacy Clause) that the federal government is the higher sovereign: "This Constitution, and the Laws of the United

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7 U.S. CONST. art. I, § 8, cl. 14.

8 U.S. CONST. art. I, § 8, cl. 17. *See also* Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885) (providing that when land on military bases is being used for federal purposes, the federal government retains exclusive jurisdiction); James Stewart & Co. v. Sadrakula, 309 U.S. 94, at 103–04 (1940) (holding that a state law conflicting with "the carrying out of a national purpose" is invalid within the Enclave).

9 U.S. CONST. art. II, § 2, cl. 1.

States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[10] Taken together, the Constitution clearly places control of the military in the hands of the federal government, and gives the federal government primacy over the authority of the states.

However, many states host military bases, and the operation of military bases necessarily implicates environmental hazards. Military bases routinely handle toxic fuels and munition components. They conduct construction projects that affect air and water quality, and the instruments of war include large, loud, polluting equipment that can harm local wildlife and disrupt the sanctity of nearby neighborhoods.[11] So, it is vital for the health, safety, and happiness of the local communities that the facilities are well supervised and compliant with environmental standards. State and local governments are the government systems closest to the affected communities, so they are necessarily heavily invested in providing that legal oversight, even while the Constitution has set out the federal government as "sovereign" over the states.

With this and the practicality of enforcement in mind, Congress designed the vast majority of federal environmental statutes to utilize a system of "cooperative federalism," whereby the federal government sets out a comprehensive regulatory scheme in a particular area, with the option for states to take over enforcement of the scheme, assisted by federal financial incentives to incentivize participation.[12] Environmental statutes that use this approach include the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation,

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10 U.S. CONST. art. VI, cl. 2.

11 John Lindsay-Poland & Nick Morgan, *Overseas Military Bases and Environment*, INST. FOR POL'Y STUD. (June 1, 1998), https://ips-dc.org/overseas_military_bases_and_environment/.

12 The Constitutional authority for cooperative federalism comes from a combination of the Commerce Clause and the Spending Clause. *See* Sporhase v. Nebraska, 458 U.S. 941, 951 (1982) (holding that Congress has the authority to issue regulations impacting water quality and use under the Commerce Clause); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) (upholding the Clean Water Act's application to "nonnavigable intrastate waters whose use or misuse could affect interstate commerce."); Clean Water Act § 106, 33 U.S.C. § 1256 (2018) (granting funds to states for the development of water pollution control programs under the Spending Clause); Clean Air Act § 103, 42 U.S.C. § 7403 (2018) (similarly granting funds to states for air pollution control programs).

and Liability Act ("CERCLA"), and the Safe Drinking Water Act ("SDWA").[13]

The general setup of the cooperative federalist program found in these statutes starts with the federal government creating standards (e.g., a maximum ceiling on a particular pollutant in an environmental medium), then participating states promulgate regulations that reflect the federal standards, then the states ask the federal implementing agency (the EPA) to certify their program as compliant; once certified, the state gains the imprimatur of the federal government and is legally delegated the authority to enforce the federal law "in lieu" of the federal agency.[14] Enforcement authority includes the authority to issue administrative penalties, including fines, permit modifications or revocations, and civil and criminal penalties, which may also include fines or imprisonment.[15]

While there have not been significant attempts to move away from cooperative federalism, it has proved an imperfect system when it comes to preventing environmental harms. The cooperative federalism model has several advantages—it sets out uniform standards, combined with flexible enforcement to account for local vagaries; the economies of scale provided by the federal government to tackle large-scale environmental problems that would be beyond the scope of the state or local governments; and the checks and balances provided by giving the two types of government complementary and overlapping authorities. In terms of environmental outcomes, proponents of the system point to the general success of the CAA and the CWA to dramatically improve the nation's air and waterways since their passage in 1970 and 1972, respectively.[16] While the air and water are clearly still polluted in parts of the country and progress has proved slow

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13 State enforcement provisions are contained in following U.S. Code sections: 33 U.S.C. §§ 1319, 1342 (2018); 42 U.S.C. §§ 7410, 7413 (2018); 42 U.S.C. § 6926 (2018); 42 U.S.C. §§ 9621, 9613 (2018); and 42 U.S.C. §§ 300g-2, 300g-3 (2018).

14 *See, e.g.*, 40 CFR § 281.11(c) (2015) ("States with programs approved under this part are authorized to administer the state program in lieu of the federal program and will have primary enforcement responsibility with respect to the requirements of the approved program. EPA retains authority to take enforcement action in approved states as necessary and will notify the designated lead state agency of any such intended action.").

15 *See, e.g.*, 42 U.S.C. § 7413(c) (listing the penalties available for states or the federal government to issue for violations of the CAA).

16 *See, e.g., Minority Report: Cooperative Federalism*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS 11 (Oct. 31, 2013), https://www.epw.senate.gov/public/_cache/files/b/a/baee029a-8455-4b36-bbbd-90ab7cea91c1/01AFD79733D77F24A71FEF9DAFCCB056.cooperativefederalism.pdf; and Andrew Lewis, *The Clean Water Act at 50: Big Successes, More to be Done*, YALE ENVIRONMENT 360, (Oct. 13, 2022), https://e360.yale.edu/features/delaware-river-clean-water-act.

in some areas, every national-level statistic indicates that pollution is down significantly from the early 1970s.[17]

However, cooperative federalism can also lead to inconsistent enforcement by state authorities; the federal approval process is slow and bureaucratic, and when a program is approved, the federal government loses significant legal authority to step back in to act on behalf of the environment. The Flint Water Crisis, for example, highlights how cooperative federalism allowed the inaction of the Michigan Department of Environmental Quality ("MDEQ") and the failure of the EPA to intervene to precipitate a drinking water crisis that sickened hundreds of people, and hampered hundreds of children's development from extreme lead exposure.[18]

Flint City lost the authority to govern itself, due to the city's prolonged financial deficit.[19] The state appointed an Emergency Manager who attempted to save the city money by switching the city's water supply from treated Detroit River water to untreated water from the Flint River in April 2014.[20] The higher acidity of the Flint River corroded lead pipes, contaminating the drinking water with lead.[21]

A year into the water contamination crisis, in June 2015, EPA staff raised concerns with the MDEQ over the high levels of lead in Flint's water, but the MDEQ did not act to resolve the issue until another eight months had passed, in December 2015, when the mayor declared an emergency, following the discovery of elevated levels of lead in the blood of Flint children.[22] The EPA, for its part, did not formally intervene until the following month, when President Obama declared a federal state of emergency.[23] The prolonged crisis has sickened hundreds of people,

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17 *See, e.g., Benefits of the Clean Air Act: Our Nation's Air*, ENV'T PROT. AGENCY, https://gispub.epa.gov/air/trendsreport/2019/#air_pollution (last visited Nov. 9, 2023) (showing a net decrease in air pollution since passage of the Clean Air Act through 2018).

18 Carla Campbell et al., *A Case Study of Environmental Injustice: The Failure in Flint*, INT'L. J. ENV'T RSCH. & PUB. HEALTH, Sept. 2016, at 4.

19 Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 8, 2018), https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know.

20 *Id.*

21 *Id.*

22 Merrit Kennedy, *Lead-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis*, NATIONAL PUBLIC RADIO (Apr. 20, 2016), https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis.

23 *Emergency Administrative Order in The Matter of City of Flint, Michigan*, ENVIRONMENTAL PROTECTION AGENCY (Jan. 16, 2016), https://www.epa.gov/sites/default/files/2016-01/documents/1_21_sdwa_1431_emergency_admin_order_012116.pdf ("EPA Emergency Order").

permanently stunted the mental development of Flint children, the remediation cost taxpayers at least $45 million, and the citizens' trust in the environmental protection apparatus has been understandably destroyed.[24]

The inaction at both the state and federal level has been broadly criticized, and a state-sponsored investigation did not pull its punches when it described the crisis as "a story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice."[25] This saga serves as an indictment of the cooperative federalist model, as the purported benefits of a division of authority clearly failed to serve the citizens of Flint County. An empowered federal government could have rapidly reacted, without waiting for the concurrence of the state; alternatively, a purely state-based system may have been more accountable to local concerns. As it stands, the interwoven system of authorities created confusion over who was responsible, hindering action while children drank lead-tainted water for months and leaving a lasting legacy on a traumatized community.[26]

II. STATE REGULATION OF FEDERAL FACILITIES

If the governance scheme over local water suppliers is muddled, the enforcement mechanisms of cooperative federalism are even more challenged when the subject of an environmental enforcement action is a federal facility. When a state brings an enforcement action against the federal government, it upends the traditional Constitutional hierarchy with the federal government as "Supreme" over the state.[27] Here enters the doctrine of sovereign immunity, which would normally bar state enforcement

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24 Ryan Felton, *How Flint Traded Safe Drinking Water for Cost-Cutting Plan That Didn't Work*, THE GUARDIAN, (Jan. 23, 2016), https://www.theguardian.com/us-news/2016/jan/23/flint-water-crisis-cost-cutting-switch-water-supply.

25 *See Final Report Executive Summary*, FLINT WATER ADVISORY TASK FORCE (Mar. 2016), https://www.michigan.gov/-/media/Project/Websites/formergovernors/Folder6/FWATF_FINAL_REPORT_21March2016.pdf.

26 *Drinking Water Contamination in Flint, Michigan Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public*, ENVIRONMENTAL PROTECTION AGENCY, Oct. 20, 2016, https://www.epa.gov/sites/default/files/2016-10/documents/_epaoig_20161020-17-p-0004.pdf (determining that the EPA believed it did not have the authority to intervene given the state's delegated role and responsibility for drinking water in Flint); and Mays v. City of Flint, 871 F.3d 437 (6th Cir. 2017) (finding that the state officers involved in the Flint water crisis were not acting as federal officers, despite the EPA's oversight, delegation of authority and funding for the program through the SDWA's use of the cooperative federalism model).

27 Hancock v. Train, 426 U.S. 167, 178 (1976) (quoting Mayo v. United States, 319 U.S. 441, 445 (1943)) ("[t]he activities of the Federal Government are free from regulation by any state").

actions against the federal government. However, the courts have determined that Congress may constitutionally waive sovereign immunity for federal facilities so long as there is a "clear and unambiguous" waiver in the text of a statute.[28] The waiver must be "unequivocal," and courts will "construe any ambiguities in favor of immunity" in order to provide states the authority to enforce their regulations against the arms of the federal government.[29]

The Supreme Court's analysis in *Hancock v. Train* demonstrates how closely the Court will scrutinize a purported waiver of sovereign immunity. In that case, the state of Kentucky argued that the Clean Air Act's requirements that federal facilities "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution" required federal facilities, including a U.S. Army base, to obtain a permit from the state prior to emitting air pollutants.[30] The federal facilities disagreed, arguing that they did not need to follow state permit processes, only to substantively follow the air pollution controls the state required.[31]

The Court closely parsed the statutory language in the Clean Air Act, and concluded that that language did not require federal facilities to obtain permits from the state before conducting operations.[32] The Court reasoned that the amended statutory language did not specifically require the federal government to follow all of the states' *procedural* requirements, only the *substantive* requirements regarding control and abatement of air pollution.[33] An important factor to the Court was that allowing the state to require the federal government to follow the state's procedural requirements would wholly subject federal facilities to state control, running contrary to the Constitutional hierarchy of federal supremacy over state governments.[34]

Congress responded directly to *Hancock* by amending the Clean Air Act, using the precise language the Court indicated that Congress suggested they could have used to ensure total compliance with state requirements: "[Federal facilities] shall be subject to, and comply with, *all* Federal, State, interstate, and local requirements, administrative authority, and

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28 *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation.").

29 United States v. Williams, 514 U. S. 527, 531 (1995).

30 Hancock v. Train, 426 U.S. 167, 176 (1976).

31 *Id.*

32 *Id.* at 198–99.

33 *Id.* at 183.

34 *See id.*

process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity."[35] Finally, with this broad language, Courts have found that Congress provided the necessary "clear and unambiguous" waiver of sovereign immunity under the Clean Air Act, giving states the authority to regulate federal facilities.[36]

A similar back-and-forth took place between the Supreme Court and Congress over the language of the sovereign immunity waiver in RCRA. In 1992, the Supreme Court faced the issue of state enforcement of retrospective fines under RCRA in *Department of Energy v. State of Ohio*.[37] The Court again studied the statutory language and found variances in the definition of the word "person" throughout the text to either include or not include "the United States."[38] Because the civil penalties section failed to include "the United States" explicitly, the Court determined that Congress had failed to make the necessary explicit waiver of sovereign immunity.[39] Congress responded to that decision by passing the Federal Facilities Compliance Act of 1992, amending RCRA to fix the variation and to make it pellucid that it intends to subject federal facilities to the entire scope of penalties available to the states.[40] The amended form of the sovereign immunity waiver states, in a single subparagraph (broken up here for readability):

> *Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government* (1) having jurisdiction over any underground storage tank or underground storage tank system, or (2) engaged in any activity resulting, or which may result, in the installation, operation, management, or closure of any underground storage tank, release response activities related thereto, or in the delivery, acceptance, or deposit of any regulated substance to an underground storage tank or underground storage tank system *shall be subject to, and comply with, all Federal, State, interstate,*

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35 42 U.S.C. § 7418(a) (emphasis added).

36 *See, e.g.*, California v. United States, 215 F.3d 1005 (9th Cir. 2000) (recognizing that the statutory waiver provides the states authority to obtain civil remedies). There is still a Circuit split on whether this language sufficiently constitutes a waiver for states' "punitive" fines. *See Clean Air Act Legal Update*, ASS'N AIR POLLUTION AGENCIES (Sept. 2022), https://cleanairact.org/wp-content/uploads/2022/10/15_Spiller_2022-09-28-Spiller-AAPCA-Legal-Update.pdf.

37 Dep't of Energy v. State of Ohio, 503 U.S. 607 (1992).

38 *See id.*

39 *Id.* at 624.

40 *See* United States v. Colorado, 990 F.2d 1565, n.4 (10th Cir. 1993) ("However, Congress recently amended [RCRA] §6961 to clearly provide that federal agencies are not immune from such penalties.").

and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting underground storage tanks in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, *all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations.*

The United States *hereby expressly waives any immunity* otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local underground storage tank regulatory program.

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. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local law concerning underground storage tanks with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State law concerning underground storage tanks, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction.[41]

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[41] 42 U.S.C. § 6991f(a) (emphasis added) (formatted for easier reading).

It would be difficult to imagine clearer language waiving sovereign immunity; indeed, courts have found that this revision made it as "clear as humanly possible" that Congress waived sovereign immunity for federal facilities facing state and local regulation.[42]

III. TENSION BETWEEN STATE ENVIRONMENTAL ENFORCEMENT AUTHORITY AND NATIONAL SECURITY

When it comes to national security facilities, however, this complete waiver of federal enforcement authority to the states is at odds with the Constitutional assignment of military control to Congress and the President. Supreme Court jurisprudence supports the legal position that the military is unique in the role it plays on behalf of the nation, and that state-issued injunctions against the military require close scrutiny.[43] A clear articulation of the tension was given by the Supreme Court in an environmental enforcement case against the Navy, *Weinberger v. Romero-Barcelo*.[44] There, the Navy was accused of violating the Clean Water Act's NPDES permit requirement by dropping bombs into the waters around Puerto Rico during target training on a small island.[45] The district court found that the Navy had, in fact, violated the Clean Water Act, but refused to enjoin the activity due to its importance to maintaining military readiness: "Because of the importance of the island as a training center, the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation."[46]

On appeal, the Supreme Court conducted a balance of the harms inquiry in denying the injunction, weighing the interest of the territory in keeping its waters free from unpermitted munitions and the importance of the military's training requirements.[47] The Court struck an equitable arrangement that avoided enjoinment: "An injunction is not the only means of ensuring compliance. The [Clean Water Act], for example, provides for

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42 *See* U.S. v. Manning, 527 F.3d 828, 832 (9th Cir. 2008).

43 *See* Perpich v. Dep't of Def., 496 U.S. 334, 351 (1990) (recognizing "the supremacy of federal power in the area of military affairs" over that of state governments).

44 Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

45 *Id.* at 307–08.

46 *Id.* at 310 (internal quotation marks omitted).

47 *Id.*

fines and criminal penalties."[48] The Navy ended up seeking a NPDES permit, but was allowed to continue its training regimen while pursuing the permit, demonstrating that courts are willing to be flexible in designing equitable outcomes for national security cases.[49]

The Supreme Court struck a similar tone in *Winter v. NRDC, Inc.*, where it overturned a preliminary injunction against the Navy's use of mid-frequency sonar during a large scale training exercise.[50] The Court again stressed how evaluating injunctive relief requires a close examination of "the public consequences in employing the extraordinary remedy of injunction," and found that "even if plaintiffs have shown irreparable injury [to marine mammals] from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[51] Despite the Supreme Court's explicit deference to the national interest served by military facilities and operations, this crucial analysis from the Court is often missing from lower courts' review of state injunctions on military facilities.[52]

IV. STATE ACTIONS AGAINST FACILITIES WITH A "NATIONAL PURPOSE"

The Constitution provides another endorsement of exclusive federal authority over federal facilities in the Enclave Clause. In *James Stewart & Co. v. Sadrakula*, a case related to the enforcement of state labor laws within a federal enclave, the Supreme Court held that the Enclave Clause means "the authority of state laws or their administration *may not interfere with the carrying out of a national purpose.* Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."[53] Cases dealing with

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48 *Id.* at 314 (The court did emphasize that the Navy's violations in that case were "technical" and that the water quality was not impacted by the munitions that landed in the ocean near Vieques island. "Here, however, the discharge of ordnance had not polluted the waters . . ." *Id.* at 315. The Navy ultimately pursued a permit, while continuing to bomb Vieques.)

49 *Id.* at 315.

50 Winter v. NRDC, Inc., 555 U.S. 7 (2008).

51 *Id.* at 23 (The Navy did ultimately agree to several of the training modifications requested by NRDC, but those changes were not mandated or noted by the Court).

52 *See, e.g.*, People ex rel. Ingenito v. United States Army, 91 F. Supp. 3d 1185, 1188 (E.D. Cal. 2015); United States v. N.M. Env't. Dep't., No. 19-cv-46, 2022 U.S. Dist. LEXIS 149031, at *25 (D.N.M. Aug. 18, 2022) (evaluating claims by military facilities as simply whether or not sovereign immunity was waived).

53 James Stewart Co. v. Sadrakula, 309 U.S. 94, 103–04 (1930). *See also* Paul v. United States, 371 U.S. 245, 268 (1963) ("Since a State may not legislate with respect to a

jurisdiction over crimes committed on federal property have also consistently held that state enforcement authority ends at the fence line. "When the United States acquires title to lands, which are purchased by the consent of the legislature of the state within which they are situated . . . the Federal jurisdiction is exclusive of all State authority . . . the state may [only] impose conditions which are not inconsistent with the carrying out of the *purpose of the acquisition.*"[54]

This forms another legal obstacle to states' ability to frustrate a national purpose by enjoining military facilities, despite the extremely broad waiver of sovereign immunity in federal environmental statutes. This has not formed a typical basis of defense in environmental enforcement cases, but the legal principle provides some logical guidance for how the federal-state relationship could be managed. If a particular facility does provide a "national purpose," then the state's decision to completely enjoin the activities therein should be heavily scrutinized or denied in lieu of issuing a fine or alternative remediation plans. This is not necessarily a broad prohibition on state authority on military bases, as not every facility on a military base has a clear connection to the "national purpose." There are clearly many buildings and facilities on military bases that lack a nexus to the "national purpose" for a military base, including golf courses, bowling alleys, and grocery stores, that could be fully enjoined by a state enforcement action without frustrating the national mission of the base.

Determining which facilities should be shielded from injunctions can be further guided by the language in the Enclave Clause, as the text states that the federal government's exclusive control is "for the Erection of Forts, Magazines, Arsenals, Dockyards, and *other needful Buildings.*"[55] The plain text of the clause could guide the inquiry into whether a facility that is subject to an injunction is a "fort, magazine, arsenal, dockyard, or other needful building" and thereby evaluate the nexus to national security and the potential harm posed by an injunction. The Supreme Court in *James v. Dravo Contracting Co.* examined what "needful buildings"

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federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws.").

54 *See* United States v. Unzeuta, 281 U.S. 138, 142 (1930) (emphasis added). The rule continues into the modern era; *see, e.g.,* State ex rel. Laughlin v. Bowersox, 318 S.W.3d 695, 699 (Mo. 2010) (denying state jurisdiction over a defendant who committed burglary within a federal enclave). This rule does only apply to land where federal control predates statehood, or when a state has waived its exercise of jurisdiction following a grant or purchase of land for federal purposes. The determination of jurisdiction over military bases can be complex and goes beyond the scope of this paper, however, most military bases contain some areas of exclusive federal jurisdiction.

55 U.S. CONST. art. I § 8 cl. 17 (emphasis added).

means, determining that it "embrac[es] whatever structures are found to be necessary in the performance of the functions of the federal government."[56]

Therefore, under the proposed model, if a state attempts to order an injunction against a military facility or operation on a base that is "necessary in the performance of the functions of the Federal Government," there is a Constitutional basis for the military to raise the defense that such an injunction would violate the national purpose of the military base.[57] A reviewing court could then determine whether a claim of "needfulness" is truly connected to the military purpose or if the facility provides only marginal support to the military mission that the particular base supports.

V. PRESIDENTIAL EXEMPTIONS

While the Enclave Clause provides a viable and creative approach, Congress provided more explicit mechanisms for the Executive Branch to re-assert its authority over federal facilities in the environmental context by granting the President an overriding authority to exempt a facility from state or local regulations.[58] For example, the Clean Air Act and the Clean Water Act's chapters on federal facility compliance include provisions for the President to exempt "any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) . . . if *he determines it to be in the paramount interest of the United States* to do so."[59] Similarly, RCRA,[60] the Safe Water Drinking Act,[61] the Noise Control Act,[62] and the Coastal Zone Management Act[63] use the same standard for granting exemptions for any federal facilities (not just for military equipment), the "paramount interest of the United States." CERCLA refers more broadly to "national security interests," but kept the approval level at the desk of the President.[64]

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56 James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

57 *Id.*

58 Note that this authority is not limited to military facilities but would apply to any federal facilities (e.g., Department of Energy, Department of the Interior, etc.).

59 42 U.S.C. § 7418(a) (emphasis added); *see also* 33 U.S.C. § 1323(a).

60 42 U.S.C. § 6991f(a).

61 42 U.S.C. § 300h–7(h).

62 42 U.S.C. § 4903(b)(2).

63 16 U.S.C. § 1456(c)(1)(B).

64 42 U.S.C. § 9620(j)(1). The Endangered Species Act and the Marine Mammal Protection Act also allow for exemptions for "national security" or "national defense" but they

Despite their frequency of appearance in federal environmental statutes, the President has granted exemptions from environmental statutes only three times. One was by President Carter in 1980, when he waived compliance with the Clean Air Act, Clean Water Act, and the Solid Waste Disposal Act at Fort Allen in Puerto Rico.[65] That waiver was part of a broader Executive Order that directed the transfer of Cuban and Haitian refugees from the state of Florida to a military base in Puerto Rico, which appeared to have a political motivation during President Carter's campaign for reelection.[66] The second waiver exempted a classified Air Force facility in New Mexico ("Area 51"), that was the focus of a citizen suit under RCRA, when President Bush found that subjecting the facility to discovery obligations in the lawsuit would require disclosure of classified information.[67] The third and final exemption was for the Navy to continue using mid-frequency active sonar for a large training exercise despite acoustic limitation requirements of the Coastal Zone Management Act.[68] All three of these exemptions were challenged in court, and each time, the judiciary deferred to the President's decision, as Congress clearly empowered the President with complete discretion in this area.[69]

The fact that this legal authority appears in every major federal environmental statute but has only been utilized three times indicates that it deserves revisiting. The only public policy document available related to this Presidential authority is Executive Order 12088, which President Carter issued in 1978.[70] It states, in relevant part, that the Director of the Office of Management and Budget ("OMB") must present the proposed exemption to the President, and the "Administrator [of the EPA] shall advise the President . . . whether he agrees or disagrees with [the]

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are approved by Endangered Species Council and the Secretary of Defense, respectively. 16 U.S.C. § 1536(j), 16 U.S.C. § 1371(f).

65 Exec. Order No. 12244, 45 Fed. Reg. 66,443 (Oct. 7, 1980).

66 *Id. See also* Exec. Order No. 12246, 45 Fed. Reg. 68,367 (Oct. 15, 1980); Exec Order No. 12251, 45. Fed. Reg. 76085 (Nov. 18, 1980). The actions were affirmed in Colon v. Carter, 633 F.2d 964, 967 (1st Cir. 1980). The move appeared to be a bald political gambit to gain votes from the state of Florida by rounding up Cuban and Haitian refugees and moving them to Puerto Rico, which does not participate in the Presidential election.

67 Kasza v. Browner, 133 F.3d 1159, 1164 (9th Cir. 1998).

68 Presidential Exemption from the Coastal Zone Management Act, 1 PUB. PAPERS 90 (Jan. 16, 2008).

69 *See* Kasza v. Browner, 133 F.3d at 1173 (determining that what is considered a "paramount interest of the United States" is a matter entirely left to the President's discretion); Colon v. Carter, 633 F.2d at 967 ("It is difficult to imagine a determination more fully committed to discretion or less appropriate to review by a court."); Winter v. NRDC, Inc., 555 U.S. at 18.

70 Exec. Order No. 12088, 3 C.F.R. § 1-702 (1978).

recommendation."[71] Notable here is that President Carter did not allow the Secretary of Defense to make the recommendation despite the statutory language pointing to a national security nexus; routing the recommendation outside the traditional national security apparatus may help explain why the military has not sought more exemptions through this legal avenue. However, the Executive Order envisioned the exemption as the product of robust interagency discussions, which have not been reflected in the three historical uses discussed above.

VI. PROPOSED FRAMEWORK FOR EXECUTIVE BRANCH MANAGEMENT OF CRITICAL NATIONAL SECURITY FACILITIES

To provide clarity and Constitutional rigor to the current model of environmental enforcement, this Article recommends that the Executive Branch conduct a review of the facilities vital to national security, and designate a list that would be subject to exclusive federal environmental oversight.[72] The preclusion of state enforcement would be legally effectuated via the Presidential exemption, guided by a new Executive Order that outlines the process for a national security facility or operation to be included on the list of facilities under the exclusive jurisdiction of the federal government. Inclusion on this "Federal National Security Facilities Register" (the "Register") would not completely exempt a facility from environmental compliance, as the EPA would still have oversight and enforcement authority; rather, it would make clear that those facilities are not subject to an injunction by state governments.

Following an environmental incident, such a designation would provide clarity as to who is responsible for assigning remediation actions and holding the military accountable while preserving the national, i.e. federal, mission of the military, as the Supreme Court has urged. It also helps to cure the noted gap in cooperative federalism, where the federal government lacks the ability to quickly reassert control over a state environmental program that has gone astray.

To outline the process for inclusion on this proposed Register, the President should issue an Executive Order to provide factors that help determine what is considered "in the paramount interest of the United States," and outline the interagency process for formulating the list.

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71 *Id.*

72 Use of the word "facility" here would include not only standing structures but also national security operations, such as training exercises and emergency responses.

Surprisingly, what "in the paramount interest of the United States" means is not currently clarified by statute or by case law. It would benefit the interagency discussion contemplated above to provide a definition. To avoid tying the hands of the Executive, it would make sense to take the approach of providing a non-exclusive list of factors for the interagency to consider. The following factors are proffered as potentially useful guiding points that could help form the basis of deciding whether removing a facility from state enforcement authority would be in the "paramount interest of the United States."

A. Impact on National Security

The primary concern when evaluating a military or other national security-aligned facility for exclusive federal jurisdiction would be the impact of an injunction on national security. The military should be able to come up with a list of critical nodes that, if shut down, would severely undermine the military's ability to rapidly deploy in the event of a crisis. These facilities do not need to pose a particularly dire threat to the environment, but rather, shutting them down would undermine the "national purpose" of the U.S. military force. A part of this inquiry should be whether there are adequate alternatives that would mitigate the impact of an injunction on a particular facility or event. This factor may end up being dispositive, as the purpose of the Presidential exemption authority is rooted in the protection of the nation. If a facility is deemed critical enough to the nation's survival, this factor may well overwhelm the others. Nevertheless, in most instances, this factor may be counterbalanced with competing interests below.

B. Environmental Risk

The President and the interagency should next look at the environmental risks posed by a national security facility. There may be some facilities that provide clear, direct support to national security, but the environmental risks they pose are such that the interagency could determine that it would be valuable to maintain both state and federal oversight. Drinking water regulations, for instance, are so intimate to local communities that exerting exclusive federal control should be reserved only for egregious situations. Yet, as the Supreme Court has held, the government needs to conduct a balancing test that evaluates national security needs and the health of the human and ecological environment.[73] Putting a facility on the Register would not necessarily put a thumb on the scale in favor of

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[73] *See supra* notes 40–48.

national security, as the EPA would retain enforcement authority and may still ultimately issue an injunction, but the decision would be held by the federal government.

C. Alternatives

Following a general principle underlying the National Environmental Policy Act, the Executive Branch should next evaluate alternative arrangements before concluding that a facility should be exempted from state authority through the Presidential exemption. For instance, the state and federal environmental agencies could agree under a Consent Order, Memorandum of Agreement, or similar arrangement, whereby the state acknowledges the national security value of a facility and agrees to work with the federal government before attempting to enjoin operations under its delegated enforcement authority. The military could also provide the state assurances that a particularly harmful activity will only be conducted in certain conditions, as the Navy attempted to arrange with the Natural Resources Defense Council ("NRDC") regarding its use of active sonar near marine mammals. Such alternative arrangements could avoid the bureaucratic exercise of utilizing the Presidential exemption, with its concomitant Congressional reporting requirements and potential political costs.

D. Environmental Justice

There is growing recognition of the harms of environmental injustice, namely that disadvantaged communities have been disproportionately harmed by environmental degradation. The Executive Branch should consider whether allowing state or local enforcement would be more supportive of environmental justice, or if the federal government would be the more appropriate enforcement authority to ensure that disadvantaged communities are protected while national security is maintained. The Biden Administration has already reinvigorated the federal government's efforts on environmental justice through Executive Order 14096, which charged federal agencies, including DoD, with appointing a Chief Environmental Justice Officer and ensuring that government actions do not perpetuate previous disparate environmental impacts.[74] Accordingly, the decision to exercise exclusive federal jurisdiction must also take this into account.

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[74] Exec. Order No. 14096, 88 F.R. 25251 § 7 (2023).

E. Federal-State Dynamic

Exempting a facility from state enforcement may complicate the relationship with state environmental and political leaders, so the Executive Branch should also consider the particular dynamics for the state host of each proposed national security facility. Some states are cooperative with federal authorities and may not require formal action to pull the authority back from the state government. Similarly, other states may be grateful to have the federal government intervene to regulate national security facilities, where the authority to regulate is already fraught.[75] If the EPA has not yet approved a state's program and granted it enforcement authority, exclusive federal jurisdiction is already a fact, and the national security facilities in that state likely do not require inclusion on the list. Generally recognizing the federal-state dynamic is a secondary but important factor in evaluating a national security facility for inclusion on the Register.

In the event a facility is determined to warrant exemption from state enforcement, it is nonetheless imperative that the military, the federal overseers, and the state government agencies regularly communicate on issues related to the facility, to ensure that information is not siloed and enforcement activity is as transparent as possible while still protecting the national mission. Alternatively, if a facility is *not* determined to warrant exemption from state enforcement, it becomes clearer to the military and the public that the state enforcement agency *does* have the authority to adjudicate the full gamut of accountability measures against military facilities, ideally in coordination with federal authorities and with the impact of national security in mind.

VII. CASE STUDY OF STATE ENFORCEMENT OF FEDERAL ENVIRONMENTAL STATUTES AT THE RED HILL BULK FUEL STORAGE FACILITY

Having explored the legal and normative framework around state enforcement of military facilities and provided a potential rubric for understanding what "in the paramount interest of the United States" may mean for Presidential exemptions, this Article now turns to its practical application in the recent crisis surrounding the Red Hill Bulk Fuel Storage Facility.

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75 *See supra* notes 26–30 and associated discussion about the state of Texas and its sometimes-adversarial relationship with the EPA.

The Navy constructed a sprawling underground fuel storage facility uphill from Pearl Harbor during World War II for gravity-assisted fuel distribution, buried under 100 feet of bedrock to protect the facility from aerial bombardment.[76] The facility consisted of twenty steel-lined storage tanks measuring 250 feet tall and 100 feet in diameter, providing a storage capacity of 12.5 million gallons of fuel per tank.[77] When in service, the facility had a total storage capacity of 250 million gallons, storing both diesel fuel for warships and jet fuel for air units.[78]

Over the intervening eighty years since its construction, the facility has aged significantly. A 2008 comprehensive inspection indicated that over their long history, the facility has experienced several significant leaks, with some tanks having reached the end of their operational life, which sit atop an extremely valuable freshwater aquifer.[79] In addition to slow seepage, acute incidents have also taken place, largely due to human error. For example, in 2014, the Navy undertook major upgrades to the facility, but when fuel was reintroduced into the tanks, the pressure fractured a pipe and released tens of thousands of gallons of fuel within the facility.[80] That release led to the state of Hawaii, the EPA, and the Navy entering into an Administrative Order on Consent ("AOC") in 2015, where the Navy and Defense Logistics Agency agreed to a host of improvements to monitoring and structural upgrades to the facility.[81]

One of the upgrades mandated by the AOC was the installation of a fire suppression system, including an aqueous film forming foam (AFFF)

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76 *Red Hill Underground Fuel Storage Facility*, AM. SOC'Y OF CIVIL ENG'RS https://www.asce.org/about-civil-engineering/history-and-heritage/historic-landmarks/red-hill-underground-fuel-storage-facility.

77 *Id.*

78 *Final Environmental Assessment for Red Hill Defueling and Fuel Relocation Joint Base Pearl Harbor-Hickam*, JOINT TASK FORCE RED HILL, at 1-3, https://www.pacom.mil/Portals/55/JTF-RH/.PDF/NEPA-EA/FEA-FOEA Red Hill Defueling and Fuel Relocation.pdf [hereinafter "*Environmental Assessment*"].

79 *Red Hill Bulk Fuel Storage Facility Final Groundwater Protection Plan*, NAVAL FACILITIES ENG'G COMMAND, at 20–22 (Jan. 2008), https://health.hawaii.gov/ust/files/2014/08/2008-Final-Groundwater-Protection-Plan.pdf.

80 Emergency Order, Haw. Dep't. Health v. U.S. Navy, No. 21-UST-EA-02 (Dec. 6, 2021), https://health.hawaii.gov/about/files/2021/12/Emergency-Order-12.05.2021-signed.pdf.

81 *See generally, Administrative Order on Consent Between the EPA, State of Hawaii, U.S. Navy and the Defense Logistics Agency*, EPA Docket No. RCRA 7003-R9-2015-01, DOH Docket No. 15-UST-EA-01 (Sept. 11, 2015), https://health.hawaii.gov/ust/files/2015/09/Red-Hill-SOW_11SEP15.pdf. Notably, the AOC cites to the State of Hawaii's authority to enforce RCRA's standards of USTs. *Id.* at 2.

retention system, which the Navy contracted for installation in 2016.[82] The AFFF retention line was originally required to be made of steel, but the installation contractors substituted cheaper PVC pipe instead.[83]

In May, 2021, an internal malfunction caused 19,377 gallons of fuel to be pumped into that PVC pipe retention line.[84] Then, in November 2021, a staff member driving a train through the tunnels collided with a low point of the PVC pipe line and cracked it, releasing the fuel in the line.[85] A groundwater drainage system within the facility allowed some of the fuel to seep from a low point in the facility into the outside environment, directly above that valuable freshwater aquifer .[86] Between November 21 and 27, thousands of gallons of jet fuel entered the aquifer, ultimately getting pumped to the taps and showerheads of residents of the military bases on Oahu.[87]

Complaints to Navy leadership started pouring in over the smell of gasoline in drinking water, but the crisis took place over Thanksgiving weekend, so staffing was light at the headquarters, and the full scale of the spill at Red Hill had not been widely circulated among the staff.[88] As a result, initial communications from Navy leadership attempted to reassure base residents that the water was safe to drink.[89] But as both adults and children started to be admitted to the hospital with a wide range of symptoms, including skin irritation, thyroid inflammation, and gastrointestinal problems, tested water samples came back showing the presence of jet fuel (JP-5) in the drinking water.[90] At that point, the Navy leadership finally concluded that it had, in fact, contaminated the community's drinking

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82 *Command Investigation into the 6 May 2021 and 20 November 2021 Incidents at Red Hill Bulk Fuel Facility*, U.S. DEP'T NAVY, at 57 (June 13, 2022), https://www.secnav.navy.mil/foia/readingroom/HotTopics/RED HILL INVESTIGATION/ FOIA Release-Red Hill CI (June 2022).pdf [hereinafter "*Navy Investigation*"].

83 *Id.* at 58, 60.

84 *Id.* at 25.

85 *Id.* at 25.

86 *Id.* at 46.

87 *Id.*

88 *Id.* at 35.

89 *Id.* at 41. The Commanding Officer of the base at Pearl Harbor posted on the base Facebook page a full nine days after the fuel leak had occurred: "[t]here are no immediate indications that the water is not safe... My staff and I are drinking the water on base this morning, and many of my team live in housing and drink and use the water as well." Haley Britzky, *The Navy told this military family they were safe from toxic water. Then both their children ended up in the ER*, TASK & PURPOSE (Jan. 6, 2022, 12:23 PM) https://taskandpurpose.com/news/navy-water-contamination-crisis-hawaii/.

90 *Id.*

water, and faced the earned outrage of local citizens, state representatives, and national leadership.[91]

VIII. STATE RESPONSE AND THE UNCERTAIN STATUS OF THE STATE'S ENFORCEMENT AUTHORITY

In response to the news of the fuel leak, the Governor of Hawaii issued the Emergency Order outlined at the outset of this Article.[92] The order required the Navy to "immediately suspend operations" at the Red Hill facility, and, "within 30 days of completion of required corrective actions. . . defuel the Bulk Fuel Storage Tanks at the Facility."[93] The legal support referenced in the order pointed solely to a state statute, Hawaii Revised Statutes ("HRS") 342L-9, which provides the Governor of Hawaii emergency authority to order an operator of an underground storage tank in Hawaii to cease operations that pose an imminent threat to the environment.[94] HRS 342L-9 is part of the underground storage tank program that was submitted to the EPA for review and approval under RCRA's cooperative federalism system, whereby the state could act "in lieu" of the federal government to regulate facilities that fall under RCRA's regulation.[95]

The Red Hill facility does indeed fall under Section I of RCRA, as it is principally made up of underground storage tanks ("UST").[96] But it appears that Hawaii did not have an approved program under RCRA to regulate field-constructed tanks, like Red Hill's, at the time of the Emergency Order, as the EPA only granted final approval to Hawaii's UST regulatory scheme in March of 2022.[97] That means that the state likely had to rely on state authority alone to enjoin the Navy's activities at Red Hill. The extremely broad sovereign immunity waiver provision in RCRA (as

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91 *Navy Investigation*, *supra* note 89, at 49.

92 Emergency Order, Haw. Dep't. Health v. U.S. Navy, No. 21-UST-EA-02 (Dec. 6, 2021), https://health.hawaii.gov/about/files/2021/12/Emergency-Order-12.05.2021-signed.pdf.

93 *Id.*

94 *Id.* at 1. HAW. REV. STAT. § 342L-9.

95 *See* Approval of State Underground Storage Tank Provisions; Hawaii, 87 Fed. Reg. § 12593 (Mar. 23, 2022) (listing the Hawaii Revised Statutes sections that were part of the EPA's review of the underground storage tank program).

96 42 U.S.C. § 6991c (authorizing state underground storage tank detection, pretention, and correction programs, if the Administrator determines that the "the State program includes [listed] requirements and standards and provides for adequate enforcement of compliance with such requirements and standards[.]")

97 87 Fed. Reg. § 12593 (approving Hawaii's application for final re-approval of its Underground Storage Tank Program following the 2015 changes).

discussed above) is likely sufficient to support the state's authority alone over federal facilities, but when a state lacks the imprimatur of the EPA's approval and the regulated facility is arguably an important national security facility, the authority becomes less clear cut.

It was under this cloudy legal framework that the Navy filed a complaint in federal district court to strike down Hawaii's Emergency Order.[98] It then attempted to walk a difficult line: reassuring Hawaiian citizens that it would be transparent and work with the local authorities to fully remediate the contamination, while also pushing back on the state's authority to dictate the outcome at Red Hill.[99] Between December 6, when the Emergency Order was issued, and March 7, when the Secretary of Defense issued an order to the military to close the facility, confusion reigned and anger mounted. No one on Oahu knew what was to become of the Red Hill facility, who held the authority to order fixes to the facilities and clean up the water supply, whether the leaks would continue to threaten the island's very limited fresh water supply, whether the fuel storage facility would be shut down, or whether the Pacific Fleet would have sufficient fuel in the event of a military crisis in the Pacific.[100]

IX. APPLICATION OF THE FEDERAL NATIONAL FACILITY REGISTER TO RED HILL

Those months of anxiety and uncertainty could have been prevented if the federal government had previously provided guidance on whether the Red Hill facility was under exclusive federal control or if it was clearly subject to state authority. Using the factors above, it seems apparent that the state's desired outcome (the closure of the Red Hill facility) prevailed. However, exclusive federal control would have allowed the closure to have taken place much faster, created less contention on all sides, and relied less on the maintenance of federal-state cooperation.

The following section will speculate as to how the proposed interagency Register process would have evaluated the Red Hill facility.

Impact on National Security: Red Hill provided fuel for the Navy's ships and many of the jets associated with the Pacific Fleet, which is the

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98 Compl. for Declaratory and Injunctive Relief, United States v. Haw. State Dep't of Health, No. 1:22-CV-00051 (D. Haw. Feb. 22, 2022).

99 *See, e.g.*, Wright, *supra* note 6.

100 *See, e.g.*, Scott Maucione, *Massive Unanswered Questions Remain as Navy Begins Process to Defuel Red Hill*, FED. NEWS NETWORK (Jan. 11, 2022, 3:19 PM), https://federalnewsnetwork.com/navy/2022/01/massive-unanswered-questions-remain-as-navy-begins-process-to-defuel-red-hill/.

principal U.S. military force in the Western Pacific.[101] Without the fuel supply provided by Red Hill, the Pacific Fleet could have been marooned in the harbor, unable to deploy without fuel shipped from the mainland, dramatically reducing the military's ability to respond to a crisis in the South China Sea. Overall, the impact on national security would be very high if the Red Hill facility was closed, weighing in favor of granting an exemption.[102]

Environmental Risk: As discussed above, the facility has been in use for eighty years and has had substantial leaks of volatile chemicals in recent years, and the most recent leak led to thousands of sick servicemembers, family members, and children. The age of the facility and the history of leaks guarantee that there would be more fuel leaks in the future. As the sea level rises, the freshwater aquifers will be increasingly susceptible to saltwater intrusion, further threatening the limited supply of freshwater on Oahu. Therefore, the environmental impact of maintaining the facility would also be high, weighing against granting the exemption from state enforcement.

Alternatives: There are potential alternative fuel sources available to the Pacific Fleet beyond the Red Hill Bulk Fuel Storage Facility, including aboveground fuel storage tanks around Hawaii, and utilizing other storage facilities around the Pacific.[103] Those alternatives are not nearly as secure as the underground tanks in Red Hill, as it would be relatively simple to attack an aboveground fuel storage facility, but their availability does weigh against removing the facility from state enforcement authority.

Environmental Justice: Starting with the military's role in the coup d'état that overthrew Hawaii's native monarch in 1893, the military has been perceived as the major source of oppression to the Native Hawaiians throughout the modern era.[104] The military's many bases across the islands of Hawaii, often on prime land, stand as daily reminders of the military's disruption of the native people's way of life, as does the still-unlivable island of Kaho'olawe, which the military used as a bombing range from World War II until 1990.[105] Given the already troubled history the military has in Hawaii, the federal government's decision to strip the state government of its ability to regulate the activity of the Navy at Red Hill would be tremendously challenging to support when the facility threatens the island

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101 *See generally*, U.S. PACIFIC FLEET, *supra* note 4.

102 *See supra* notes 43–47 and related discussion.

103 *Environmental Assessment*, at ii.

104 Kajihiro Kyle, *Nation Under the Gun: Militarism and Resistance in Hawai'i*, CULTURAL SURVIVAL (Apr. 2, 2010), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/nation-under-gun-militarism-and-resistance-hawaii.

105 *Id.*

of Oahu's limited fresh drinking water supply. This factor would weigh heavily against the inclusion of Red Hill on the Register.

Federal-State Dynamic: The state of Hawaii and the federal government have worked collaboratively on Red Hill in the past, most notably evident in the 2015 Administrative Order on Consent, where the Hawaiian Department of Health, the EPA, and the U.S. Navy all jointly signed an administrative order providing for specific improvements and oversight at the Red Hill facility.[106] This cooperative history would weigh in favor of allowing the state to maintain its regulatory authority over national security facilities in Hawaii, as it demonstrates that the state and federal government can work together constructively and the state government may be willing to keep federal regulators informed when it is contemplating a particularly controversial enforcement action. At the same time, the contentious relationship between the military and the state population may give the federal government some pause in letting Hawaii have a free hand to close military facilities. Overall, this factor would weigh in favor of allowing the state to retain its enforcement authority over national security facilities in Hawaii, but a proactive Executive Branch would seek to reach a Memorandum of Agreement or other informal agreement to establish a regular line of communication between the DoD, the EPA, and the state enforcement agencies.

Taken in sum, while the national security implications of allowing the Red Hill facility to be shut down would be tremendous, the remaining factors of the suggested rubric (environmental impact, availability of alternatives, environmental justice, and state-federal cooperation) would weigh against placing the Red Hill facility under exclusive federal enforcement authority. The framework suggested by this Article would support the President's decision that an exemption in this case would not be "in the paramount interests of the United States." This decision would indicate to both Navy leadership and the Hawaii Department of Health that the state clearly has the authority to order the facility closed, and that the military should have immediately moved to comply with that order. That would have prevented the public's perception of military intransigence and stonewalling that took place following the State's order and the eventual acquiescence by the Secretary of Defense.

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106 *Administrative Order on Consent Between the EPA, State of Hawaii, U.S. Navy and the Defense Logistics Agency*, EPA Docket No. RCRA 7003-R9-2015-01, DOH Docket No. 15-UST-EA-01 (2015), https://www.epa.gov/red-hill/2015-administrative-order-consent.

X. DoD's Decision and Plan to Empty the Red Hill Fuel Facility

The showdown between the state of Hawaii and the DoD has been resolved for now, as the DoD announced in March 2022 that it would permanently close the Red Hill facility.[107] Following that announcement, Hawaii rescinded its December 2021 Emergency Order and replaced it with an updated order on May 6, 2022, which is now supported by a fully EPA-approved regulatory system under RCRA.[108] The state's updated order mirrored the timelines and requirements in the Secretary of Defense's order, so when the Navy complies with the DoD order, the State can declare victory to its constituents as well.[109]

Similarly, the DoD's defueling plan references the mandate of both the Secretary of Defense and the state of Hawaii's May 6 Emergency Order, so there is an explicit acknowledgment by the Navy that the state of Hawaii has a role to play in deciding the fate of the Red Hill Facility.[110] Ultimately, while the facility is scheduled to be emptied and closed in the coming years, this saga has exposed legal tension between the state of Hawaii and the federal government, with the pending closure of Red Hill feeling more like a détente than a final resolution.

Conclusion

The delay, confusion, and litigation following the Red Hill Bulk Fuel Storage Facility's contamination of Oahu's drinking water and the subsequent Hawaiian state Emergency Order to close the fuel facility reveal that more clarity is needed in this fraught area of state authority over federal

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107 Memorandum, *Immediate Actions to Permanently Close the Red Hill Bulk Fuel Storage Facility at Joint Base Pearl Harbor-Hickam and to Redistribute Fuel in Accordance with INDOPACOM Plans for Strategic Fuel Storage in the Pacific Region*, Off. Sec'y Def. (Mar. 7, 2022), https://media.defense.gov/2022/Mar/07/2002951821/-1/-1/1/immediate-actions-to-permanently-close-the-red-hill-bulk-fuel-storage-facility-at-joint-base-pearl-harbor-hickam-and-to-redistribute-fuel-in-accordance-with-indopacom-plans-for-strategic-fuel-storage-in-the-pacific-region.pdf.

108 Emergency Order, Haw. Dep't. Health v. U.S. Navy, No. 21-UST-EA-02 (May 6, 2022), https://health.hawaii.gov/about/files/2022/05/DOH-Emergency-Order-Final-May-6-2022.pdf.

109 *Id.*

110 *Red Hill Bulk Fuel Storage Facility, Oahu, Hawaii Defueling Plan*, Dep't of Def., at 1 (June 30, 2022), https://cnrh.cnic.navy.mil/Portals/79/CNRH/Documents/red_hill/Defueling Plan page contents/2022-06-30-defueling-plan.pdf?ver=6b3by-pVrfLXnXRuLbAwPdQ== ("In accordance . . . with the requirements in Directive 4 of the State of Hawaii Department of Health's May 6, 2022 superseding Emergency Order . . .").

facilities. While federal courts have largely supported the cooperative federalism model and its delegation of federal enforcement authorities to state agencies, the Supreme Court has recognized the dangerous impacts of injunctive relief on national security. Furthermore, the exclusive federal jurisdiction exercised within federal enclaves that serve a "national purpose" both highlights the tension inherent in the cooperative federalism model and points to a potential solution.

This Article proposes establishing a framework for placing critical national security facilities under exclusive federal enforcement jurisdiction, to ensure that state injunctions do not jeopardize the national mission of the military. The framework relies on the authority of the President to exempt federal facilities from state and local environmental requirements when the facilities are "in the paramount interest of the United States." Determining exactly which facilities merit exclusive federal enforcement authority should be an interagency decision, turning on five key factors: (1) a facility's role in national security; (2) the risks it poses to the environment; (3) whether viable alternatives exist in the event of an injunction; (4) environmental justice; and (5) the extent to which state and federal authorities can be expected to cooperate with or without the exemption.

The proposed process would remove the uncertainty surrounding state authority over national security facilities, working to protect both the natural environment and national security.