The Clean Air Act, Sovereign Immunity, and Sleight of Hand in the Sixth Circuit: *United States v. Tennessee Air Pollution Control Board*

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THE CLEAN AIR ACT, SOVEREIGN IMMUNITY, AND SLEIGHT OF HAND IN THE SIXTH CIRCUIT: UNITED STATES V. TENNESSEE AIR POLLUTION CONTROL BOARD

"Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable."¹

INTRODUCTION

On July 22, 1999 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court of the Middle District of Tennessee² and found that the Clean Air Act "unequivocally and unambiguously" waived the United States' sovereign immunity to purely punitive civil penalties arising from solely past pollution.³ While the Clean Air Act makes clear that these federal facilities must comply with a state's regulatory scheme,⁴ as any other non-governmental entity, it has been unclear by which methods a state may enforce this scheme against the federal government in light of the doctrine of sovereign immunity.⁵ Congress' piece-meal—and reactionary—inclusion of often-ambiguous immunity waivers in the so-called "federal facilities" provisions of several environmental statutes⁶ suggests that at least some waiver of immunity was intended.

³ See United States v. Tennessee Air Pollution Control Bd., 185 F.3d 529 (6th Cir. 1999).
⁴ See Clean Air Act § 118, 42 U.S.C. § 7418 (1994); see also infra.
⁵ There are three primary methods, short of criminal prosecution, of enforcing environmental regulation: injunction, coercive monetary penalties to compel compliance with an injunction, and punitive fines for past violations. See generally ARNOLD W. REITZE, JR., AIR POLLUTION LAW § 20 (1995) (summarizing the Clean Air Act's civil enforcement mechanisms).
Determining the extent to which the Federal government's immunity has been waived, thereby exposing the government to varying levels of sanction, has been more difficult for courts to determine.

The federal government owns and operates nearly 16,000 facilities in the United States at which it conducts a wide range of activities. Some of these facilities are as benign as post offices or court-houses, others, like chemical or nuclear weapons plants, are inherently toxic; most of these facilities, however, such as federal prisons or military bases, fall somewhere in between. Because of the size and nature of a number of these facilities, their activities are regulated by a number of the federal environmental statutes. Furthermore, many of these facilities and installations have a history of a lower level of environmental compliance than related non-governmental enterprises, and some even affirmatively resist environmental regulation.

decision in Ohio v. Dep't of Energy, while others post-date it. Regardless, the proper interpretation of both has proven to be unclear. See infra.

7 This Comment will refer generally to facilities owned or operated by the federal government as "federal facilities." While "federal facilities" are not formally defined by the environmental statutes at issue here, other statutory provisions suggest a broad and inclusive reading of the term. See infra notes 49, 58 and 73 (quoting portions of the so-called "federal facilities provisions" of the Clean Water Act, Resource Conservation and Recovery Act, and the Clean Air Act).


While federal facilities only constitute 5% of the regulated facilities in the United States, that seemingly modest figure conceals the true magnitude of the environmental management challenges faced by federal facilities. Many [Department of Energy] and [Department of Defense] facilities are massive by comparison to facilities in the non-federal sector. For example, DOE's Savannah River Site covers 310 square miles—an area the size of entire counties in many states. In addition, DOE and DOD facilities typically have a broader array of operations than facilities in the non-federal sector—ranging from typical industrial processes, to municipal operations, to unique military operations. Finally, DOE facilities in particular deal with some of the most dangerous and pernicious wastes imaginable.

Id. (citing U.S. EPA, FEDERAL FACILITIES SECTOR NOTEBOOK: A PROFILE OF FEDERAL FACILITIES, 2-5 (Jan. 1996) and Karen Lowrie & Michael Greenberg, Placing Future Land Use Planning in a Regional Context: The Savannah River Site, 8 FED. FACILITY ENVTL. J. 51, 52 (1997)). It has been estimated that facilities dedicated to nuclear weapons research alone constitute 2.4 million acres and are spread across thirty-four states. See id.


10 See, e.g., supra Part II.B (recounting the Department of Energy's violation of RCRA and the Clean Water Act in their operation of a uranium processing plant in Ohio); supra Part III.A (recounting the Army's violation of the Clean Air Act by removing asbestos without first obtaining a permit).

11 See DYCUS, supra note 9, at 5 (noting that "[t]he Department of Energy has admitted that until recently it had a policy of resisting efforts by the Environmental Protection Agency (EPA) and state governments to make it comply with applicable federal environmental statutes") (footnote omitted); 5 MICHAEL B. GERRARD, ENVIRONMENTAL LAW PRACTICE GUIDE § 32A.01[1] (1999) (noting that federal compliance rates with the Clean Air Act is 87.4%, while the non-federal average is 89.6%) (citing U.S. EPA, THE STATE OF FEDERAL FACILITIES: AN OVERVIEW OF ENVIRONMENTAL COMPLIANCE AT FEDERAL FACILITIES, FY 1993-94, III-14, 25,
Because of the number and scope of these federal installations, exposure to environmental liability is a major concern for both the federal enterprise under scrutiny and the environmental regulator responsible for enforcing compliance within the region in which the federal facility is situated. Environmental agencies, both federal and state, however, have been unsure which of the means created by statute were at their disposal to compel federal facilities' compliance. For example, as early as 1978, the United States Environmental Protection Agency had opined that sovereign immunity had been waived in its entirety by the Clean Air Act, yet several federal district courts, reviewing nearly identical state enforcement efforts, have found the opposite. The Sixth Circuit's decision in *United States v. Tennessee Air Pollution Control Bd.* (hereinafter "*Tennessee Air*") is significant in that it found, despite the Supreme Court's recent interpretation of similar passages of the Clean Water Act and Resource Conservation and Recovery Act ("RCRA"), that sovereign immunity had been fully waived by the Clean Air Act. More importantly, however, the decision highlights the difficulty of an important element of the Supreme Court's canon of sovereign immunity interpretation: the refusal to permit any consideration of the statute's legislative history, even when intent to waive immunity seems clear (as it is in the Clean Air Act).

The purpose of this Comment is to discuss briefly the doctrine of sovereign immunity and the difficulties presented by the current Supreme Court's canon of interpretation as illustrated by the Sixth Circuit's recent decision of the issue in *Tennessee Air*. Part I of the Comment will provide a brief primer on the relevant portions of the Clean Air Act, while Part II will provide an historical overview of this confusing extra-constitutional doctrine as well as a discussion of the relevant Supreme Court precedent on the subject. Part III of this piece will discuss the holding and basis of the Sixth's Circuit's opinion in *Tennessee Air*, while Part IV will attempt to provide an analysis of

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12 See *In re National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards*, 1978 WL 9814 (C.G. 1978) (opining that 42 U.S.C. §§ 7418 and 7604(e) serve to waive the United States sovereign immunity to civil fines resulting from violations of local air quality regulations).

13 See infra Part II.C (discussing two notable examples).

how the Tennessee Air decision sheds light on the dilemmas created by the Court’s current approach to sovereign immunity and its waiver.

I. THE CLEAN AIR ACT: AN EXERCISE IN DELEGATION

The Clean Air Act, to a greater extent than other environmental statutes, delegates to the states the primary responsibility for enforcing the National Ambient Air Quality Standards ("NAAQS") promulgated by the Environmental Protection Agency. The delegation of this fundamental responsibility for air quality includes the authority to take enforcement action against polluters. In enforcement actions against private parties, this historically has included the ability to seek injunction of the polluting activity, so-called "coercive" monetary penalties to enforce the injunction, and "punitive" civil penalties to sanction the polluter for the past violation.

Under the Clean Air Act’s statutory scheme, the states must first craft a State Implementation Plan ("SIP") and then create a system for enforcing it. A state is first divided into Air Quality Control Regions, which are then tested and ranked by the extent to which they meet the NAAQS. For regions not meeting the NAAQS, the EPA has developed several policies intended to improve ambient air quality including stricter technology-based emissions levels and a sys-

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15 See 42 U.S.C. § 7410 (1994) (requiring that every state establish a “plan which provides for implementation, maintenance, and enforcement of such [National Ambient Air Quality Standards] in each air quality control region (or portion thereof) within such State”).


17 See 42 U.S.C. § 7410 (1994) (requiring that each plan include “enforceable emissions limitations” means and incentives to compel compliance with the limitations, “schedules and timetables for compliance,” provisions for adequate monitoring, and an enforcement program); see also 42 U.S.C. § 7416 (granting the states authority to create standards stricter emissions standards); and McGregor, supra note 16, at 18 (noting state air pollution standards may be significantly more strict than that imposed by the federal administrator). The SIP is reviewed and approved by the EPA but the states have “virtually absolute power in allocating emissions limitations so long as the national standards are met.” Union Electric Co. v. EPA, 427 U.S. 246, 266 (1976).


To develop an acceptable SIP, each state first has to determine existing and projected levels of the criteria air pollutants in each [Air Quality Control Region] within the state’s boundaries. These data are used to determine what emissions reductions are necessary to comply with the NAAQS for the pollutant. The state has to inventory sources of emissions and project their expected future growth. It then must confront the politically sensitive task of deciding what control strategies to employ and how to allocate the burden of emissions reductions among sources. Finally, the state must demonstrate to EPA that the measures adopted in its SIP are adequate to attain and maintain compliance with the NAAQS.

Id.

19 See 42 U.S.C. § 7503(a)(2) (1994) (providing that new sources in “non-attainment” areas comply with the “lowest achievable emissions rate” technology-based standard);
tem of "offsetting" for new development within an air quality region.\textsuperscript{20} The offset policy requires that "for each criteria pollutant put out by a new plant, there must be a reduction at facilities owned by the applicant, by past reductions, or by claiming reductions at other sources."\textsuperscript{21} In the absence of a market for such reductions, offsetting can be quite difficult and may be a deterrent to development. Thus, a state with poor air is economically punished for their ambient air, but authorized by § 7604 to sue violating sources to enforce compliance with federal regulation and the state's SIP.\textsuperscript{22}

Punitive fines are an important aspect of this statutory scheme. Injunctions, and the coercive penalties fashioned to compel future compliance, do no more than force polluters to comply with federal regulation in the future—something they should have been doing from the start. Such regulatory avoidance may be aggravated by the difficulty with which environmental violations are detected. Therefore, a polluter faced with costly pollution abatement may quite reasonably calculate that because there is little chance of getting caught, and no real sanction for non-compliance, the logical choice is to avoid compliance as long as possible.\textsuperscript{23} Thus, without more, a polluter may quite reasonably decide to continue to violate the statute, knowing that the worst it faces is future compliance. Punitive fines imposed for this past pollution, however, make such a gambit significantly more risky to the polluter and create an incentive to comply from the beginning.\textsuperscript{24}

Section 7418 of the Clean Air Act requires that facilities owned or operated by the federal government comply with a state's SIP as would any other non-governmental entity operating in the state.\textsuperscript{25} The provision goes on to provide that the federal facility "shall be subject to, and comply with, all Federal, State, interstate, and local

\footnotesize{Percival, supra note 18, at 814-15 (explaining that the 1990 Amendments provided for stricter review of new source emissions as well as other pollution-reducing regulations).}  
\footnotesize{20 See 42 U.S.C. § 7503(c) (1994).}  
\footnotesize{21 McGregor, supra note 16, at 17.}  
\footnotesize{22 See 42 U.S.C. § 7604 (1994) (permitting remedies of both injunction and punitive civil penalties, payable to the federal treasury). The Act further includes states in its definition of "persons" permitted to sue polluters. 42 U.S.C. § 7602 (e) (1994). For text and discussion of § 7604 see infra Part III.B.}  
\footnotesize{23 See Tennessee Air, 967 F. Supp. at 983 (stating that "analysts have concluded that injunctive relief is frequently not a sufficient deterrent to federal polluters").}  
\footnotesize{24 See id. ("Civil penalties pose a more credible threat to federal facilities, as they are assessed immediately and accrue over the time in which the violator fails to respond . . . . The fact that private industries comply with the CWA at two times the rate of federal facilities indicates that punitive fines, which are applied to the former group, and from which the latter group are exempt, are a more effective incentive.") (citations omitted). But see infra note 119 (noting that some commentators find the opposite more likely).}  
\footnotesize{25 42 U.S.C. § 7418 (1994). For text and discussion see infra note 73 and accompanying text.}
requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity." As discussed above, states are delegated significant authority to compel compliance among non-federal polluters, but, in light of § 7418, what happens when the federal government is the polluter being sued?

II. SOVEREIGN IMMUNITY

A federal district court hearing a claim for punitive fines against a federal entity must thus choose between two conflicting doctrines: Congress' clear delegation of authority to the states to regulate the environmental compliance of federal facilities, and the doctrine of sovereign immunity. Sovereign immunity is premised on the legal fiction that the "king can do no wrong." While the United States' immunity from suit in its own courts is not contained in the United States Constitution, the Supreme Court has recognized and consistently enforced this federal protection since 1821. The basis of the rule rests both in tradition and "practical administration" and is currently justified as a means of providing a space wherein a public servant may act in good faith without undue fear of litigation and also to protect the "public treasury." Because the doctrine is extra-constitutional, however, Congress is free to waive the protection and has done so on numerous occasions. As a result, as it affects the instant issue, federal facilities are subject to the environmental regulatory scheme "only to the extent specified by Congress." It is unclear however, exactly what steps Congress must take in order to waive the immunity. Recently, Congress has illustrated an intention to waive

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26 42 U.S.C. § 7418(a) (1994). While the quoted language would seem to settle the matter, the ambiguous meaning of "process and sanction" and a Supreme Court opinion interpreting similar language in the Clean Water Act, has rendered the section's meaning unclear. See Parts II.B-C. & III.

27 See Stevens, supra note 1, at 1124 (citations omitted).

28 See Nagle, supra note 1, at 777 (citing Cohens v. Virginia, 16 U.S. (6 Wheat.) 264 (1821)).

29 See Stevens, supra note 1, at 1124 (citing United States v. Shaw, 309 U.S. 495, 500-01 (1940)).

30 See Nagle, supra note 14, at 814 (noting also that many commentators find that "sovereign immunity may be seen to protect the constitutional protection of powers").

31 See id. at 777 (outlining several recent congressional attempts at waiver and discussing their importance to would-be litigants because "[t]he United States can only be sued if it has consented to be sued").


33 See Nagle, supra note 14, at 777.
the United States’ immunity in a number of statutes, yet the Supreme Court has repeatedly frustrated such attempts.

A. The Present Doctrine

In the last decade, the Supreme Court’s jurisprudence on the issue has significantly curtailed the situations in which a court may find that Congress has waived the United States’ sovereign immunity. In Lane v. Pena, the Supreme Court summarized its previous holdings concerning sovereign immunity and suggested the existence of four rules by which purported waivers are to be interpreted. First, “a waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in the statutory text.” Second, “a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” Third, when involving a suit claiming monetary damages, “the waiver must extend unambiguously to such monetary claims.” Finally, the Court has stated that “[a] statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text.” At least one district court has interpreted this last rule to provide that “[i]f legislative history is needed to determine the extent or existence of a waiver of sovereign immunity, the statutory text necessarily is ambiguous and the waiver of sovereign immunity has not been unequivocally expressed.”

34 See Cheng, supra note 32, at 860; see generally 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROEDURE: JURISDICTION AND RELATED MATTERS § 3656 (3d ed. 1998) (summarizing these recent Congressional attempts).
37 Id. at 192 (citing United States v. Nordic Village, Inc., 503 U.S. 30 (1992)).
38 Id. (citing United States v. Williams, 514 U.S. 527, 531 (1995), for the proposition that a court must “construe all ambiguities in favor of immunity”).
39 Id. (citing Nordic Village, 503 U.S. at 34, and noting further that “Congress is free to waive the Federal Government’s sovereign immunity against liability without waiving its immunity from monetary damages awards”).
40 Id. (citing Nordic Village, 503 U.S. at 37).
But must a court really ignore the legislative history of a statute purporting to waive sovereign immunity, even when the intent to waive is clear, as in the Clean Air Act? The Court has consistently held that the answer is “yes.” Such a rule of interpretation renders the waiver provisions of the Clean Air Act (and other environmental statutes) questionable despite the stated purpose of the regulation at issue or the clear legislative history. As a result, courts must either strain to find a waiver in the text of the statute or deny a state a remedy that seems clearly intended by the drafters. This resulting difficulty of such a cannon of interpretation is highlighted by both the Supreme Court’s recent interpretation of RCRA and the Clean Water Act, as well as by the Sixth Circuit’s reading of the Clean Air Act in Tennessee Air.

B. United States Dep’t of Energy v. Ohio

In 1986 the State of Ohio sued the United States Department of Energy in federal district court for violating portions of the Clean Water Act and RCRA in the operation of its uranium processing plant in Fernald, Ohio. The Department of Energy conceded that the relevant portions of the acts had indeed been breached and that the Clean Water Act and RCRA had waived the federal government’s immunity to both injunctive relief and “coercive” penalties to prospectively enforce an injunction. The Department of Energy claimed, however, that neither act waived the federal government’s sovereign immunity from punitive civil penalties. In a 6-3 decision drafted by Justice Souter, the Supreme Court found that neither the Clean Water Act nor RCRA waived the United States’ sovereign immunity to purely punitive civil penalties arising from solely past violations. In so holding, the Court discussed the statutory language of both the “citizen suit” and “federal facilities” provisions of the Acts.
In finding no waiver in the Acts' civil suit provisions, the Court acknowledged that the civil suit provisions of the Clean Water Act provided that "any citizen may commence a civil action . . . against any person (including . . . the United States)" and the RCRA similarly permitted "any person" to do likewise. The Court further noted that "[a] State is a 'citizen' under the CWA and a 'person' under RCRA, and thus entitled to sue under these provisions" and that "each civil penalties provision authorizes fines of the punitive sort." The Court found, however, that while the language of the citizen suit provisions authorized coercive penalties, the waiver could not be extended to

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(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment of the Constitution) who is alleged to be in violation of (A) an affluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . . The district courts shall have jurisdiction . . . to enforce such an affluent standard or limitation, or such an order . . . and to apply any appropriate civil penalties under section 1319(d) of this article.


Similarly, the civil suit provision of RCRA provides:

[A]ny person may commence a civil action on his own behalf—

(1)(A) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment of the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . . .

. . . . The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.


41 See, e.g., 33 U.S.C. § 1323(a) (1994). Section 313 of the Clean Water Act provides:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants. . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of any such agencies, officers, agents or employees under any law or rule of law.

Id.

50 See Dep't of Energy, 503 U.S. at 615-28.

51 See id. at 615.

52 Id. at 616.

53 Id. at 617.
punitive ones.\textsuperscript{54} This was so because both citizen suit provisions expressly referenced the “civil penalties” provisions of both acts,\textsuperscript{55} which unlike the citizen suit provisions’ special explicit inclusion of the United States, utilized the general statutory definition of “person,” which did not include the federal government.\textsuperscript{56} By incorporating the general statutory definition of “person,” the citizen suit provisions of both the Clean Water Act and RCRA did not waive the sovereign immunity of the federal government beyond injunctive relief and purely coercive fines.\textsuperscript{57}

Likewise, the Majority found that the “federal facilities” provision of the Clean Water Act did not waive the federal government’s sovereign immunity.\textsuperscript{58} The Court noted that Congress had indeed provided that a federal facility would be subject “to any process and sanction” but noted that “a ‘sanction’ carries no necessary implication

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\textsuperscript{54} See id. at 619.
\textsuperscript{55} The civil penalties section of the Clean Water Act provides:

\textbf{Any person} who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342 (b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider... such... matters as justice may require.


\textsuperscript{56} See Dep't of Energy, 503 U.S. at 618-19 (finding that because the definition of “person” capable of being sued under the civil suit provision was preceded by the limitation that it be only “for the purposes of this section” the sections referenced need not depart from the overall statutory definition of “person” under 42 U.S.C. § 1362, which included “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body,” but did not mention the United States).

\textsuperscript{57} See id, at 619 (“Thus, in the instance before us here, the inclusion of the United States as a ‘person’ must go to the clauses subjecting the United States to suit, but no further.”).

\textsuperscript{58} In a less controversial portion of the decision, the court found that the federal facilities provision of RCRA clearly did not waive immunity from punitive fines in that the final sentence of the provision provides that the federal government “shall [not] 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.” Id. at 627-8 (citing 42 U.S.C. § 6961 (1976)) (emphasis added). Furthermore, Congress responded to this portion of the Dep't of Energy decision by enacting the Federal Facilities Compliance Act of 1992. See Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386 § 102, 106 Stat. 1505 (codified as amended 42 U.S.C. § 6961 (1994)). The current federal facilities provision of RCRA provides, in part:

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 and 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 ... .

of the punitive as against the coercive.\textsuperscript{59} The Court reasoned that the coupling of the terms "process" and "sanction" suggested that the "sanction" was meant as coercive only.\textsuperscript{60} Further, the Court reasoned that "the very fact . . . that the text speaks of sanctions in the context of enforcing 'process' as distinct from substantive 'requirements' is a good reason to infer that Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines."\textsuperscript{61} The Court went on to note that the statute authorized that "the United States shall be liable only for those civil penalties arising under Federal law" but found that such an expansive phrase contrasted the narrow meaning of the antecedent "process and sanction" language of the statute.\textsuperscript{62} The Court resolved this perceived "tension" by interpreting the ambiguity narrowly and therefore finding no waiver beyond that subjecting the government to coercive fines.\textsuperscript{63}

Perhaps not surprisingly, the Sixth Circuit's opinion, overturned by the Supreme Court, made much of the seemingly clear "underlying congressional policy" in their determination that sovereign immunity had been waived.\textsuperscript{64} The Circuit Court found that the 1977 Amendment to the Clean Water Act,\textsuperscript{65} which had been amended in response to the Supreme Court's finding that immunity had not been waived,\textsuperscript{66} demanded a finding that immunity had been waived as to civil penalties.\textsuperscript{67} Essentially, because the amendment had come as a congressional response to the Court's finding of no waiver, it was reasonable to read the new provision as waiving immunity. This seemingly logical train of reasoning was echoed in the district court's

\textsuperscript{59} Id. at 622.
\textsuperscript{60} See id. at 623 (finding that "'process' normally refers to the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides").
\textsuperscript{61} Id.
\textsuperscript{62} See id. at 627.
\textsuperscript{63} See id. The court explained that:

We do, however, have a response satisfactory for sovereign immunity purposes to the tension between a proviso suggesting an apparently expansive but uncertain waiver and its antecedent text that evinces a narrower waiver with greater clarity. For under or rules that tension is resolved by the requirement that any statement of waiver be unequivocal: as against the clear waiver for coercive fines the indication of a waiver as to those that are punitive is less certain. The rule of narrow construction therefore takes the waiver no further than the coercive variety.

\textsuperscript{67} See Dep't of Energy, 904 F.2d at 1061 ("The fact that the Amendment was provoked by a Supreme Court decision protecting sovereign immunity underscores Congress's determination to waive sovereign immunity for civil penalties."). Cf. Part IV.B.2 (discussing the impact of Hancock v. Train, 426 U.S. 167 (1976) on the development of the Clean Air Act).
opinion in *Tennessee Air* eight years later.\(^6^8\) The Supreme Court in *Dep't of Energy*, however, failed to even discuss this portion of the lower court's reasoning, and instead focused solely on a strict reading of the statutory text discussed above.

**C. Post-*United States Dep't of Energy v. Ohio Clean Air Act Cases***

The effect of the *Dep't of Energy* opinion on other similarly phrased statutes, such as the Clear Air Act, was unclear. The United States Army's position was that because the waiver provisions of the Clean Water Act were "virtually identical to the waiver in the [Clean Air Act]," the *Dep't of Energy* decision was controlling.\(^6^9\) Some commentators, on the other hand, argued that the acts were different enough that waiver of immunity as to punitive fines could be found in the Clean Air Act regardless of the *Dep't of Energy* decision.\(^7^0\) The matter seemed settled, however, when district courts began to read the Supreme Court's holding expansively, thereby finding it to be controlling precedent.

**1. United States v. Georgia *Dep't of Natural Resources***

In *United States v. Georgia Dep't of Natural Resources*,\(^7^1\) the State of Georgia sought to impose punitive fines on the United States Army and Federal Bureau of Prisons for allegedly modifying their boiler systems without first obtaining a permit and while failing to maintain accurate records of fuel consumption.\(^7^2\) In finding that the Supreme Court's interpretation of the Clean Water Act was controlling as to the similar language of the Clean Air Act, the district court for the Northern District of Georgia compared the federal facilities provisions\(^7^3\) of the two acts and found that "to the extent that the language of the Clean Air Act is similar to the CWA and the RCRA, this court adopts the rationale of the Supreme Court in [*Dep't of Energy*]."\(^7^4\)

In so finding, the court expressly rejected the holding of *State of Ohio ex rel. Celebrezze v. Dep't of the Air Force*, an earlier district court opinion that had ruled the opposite, finding that it had been overruled by the subsequent Supreme Court holding.\(^7^5\) The court reasoned that the earlier opinion impermissibly rested on both the court's expansive interpretation of the "process and sanction" language of the citizen suit provision—expressly rejected in *Dep't of Energy*—and the legislative history of the Clean Air Act—which was impermissi-

\(^{6^8}\) See infra Part III.A (discussing the district court's opinion in *Tennessee Air*).


\(^{7^0}\) See DYCUS, supra note 9, at 54-55.
ble in sovereign immunity disputes after *Nordic Village*.

As a result, the court held that under the Clean Air Act, as under the Clean Water Act, only *coercive* fines were permissible against the federal government.

2. California *ex rel. Sacramento Metro. Air Quality Management Dist. v. United States*

Similarly, in *California ex rel. Sacramento Metro. Air Quality Management Dist. v. United States* a municipal air quality district attempted to levy punitive fines against the Department of the Air Force for operating eight natural gas heaters so as to exceed the limits set forth in their permits. Like the court in *Georgia Dep't of Natural Resources*, the Eastern District of California here found that the Court's 1992 interpretation of the waiver in the federal facilities provision of the Clean Water Act was controlling. Additionally, the court found the relevant language of the Clean Water Act to be "similar, and in some cases identical, to those contained in the federal facilities provision."
facilities provisions of the CAA.” As a result, “[t]he Supreme Court’s holding in United States Dep’t of Energy is clear and unequivocal. And, because the federal facilities provision of the CAA parallels, if not mirrors, the federal facilities provision of the CWA, the court finds the Supreme Court’s analysis and holding therein applicable to the instant action.” As a result, it seemed clear that the Clean Air Act did not serve to waive the sovereign immunity of the federal government to punitive fines levied against purely past violations.

III. UNITED STATES V. TENNESSEE AIR POLLUTION CONTROL BD.

In late 1992 the Technical Secretary of the Tennessee Air Pollution Control Board notified the United States Army that they were in violation of several sections of the Tennessee Air Quality Act. Nearly a year later, the Technical Secretary assessed a $2,500 civil penalty against the Army, and the Army appealed the penalty to an administrative law court. The administrative law judge affirmed the assessment upon finding that the federal facilities provision of the Clean Air Act had waived the United States’ sovereign immunity to purely punitive fines. The Army again appealed the decision to the District Court for the Middle District of Tennessee.

A. The District Court Opinion

The district court had determined, on cross-motions for summary judgment, that the Milan Army Ammunition Plant had violated the Tennessee Air Quality Act by removing asbestos without formal notice. In so finding, the court affirmed the state’s assessment of a punitive fine against the base. While the punitive civil penalty levied against the United States by the state administrative agency was a

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81 Id. at 655.
82 Id. at 657.
83 See Tennessee Air, 967 F. Supp. at 977 (noting that the Army conceded the truth of the state’s assertion that the Army had failed to comply with the asbestos handling requirements).
84 See id.
85 See id.
86 See id. The United States conceded that “although sovereign immunity has been waived to the extent that a state may seek injunctive relief against the United States for a present violation of state air pollution standards—and may impose a fine incident to the injunction to secure prospective compliance,” the United States maintained that “civil monetary penalties may not be imposed against the United States for past violations.” Tennessee Air, 185 F.3d at 531 (emphasis added); see also Cotell, supra note 69, at 40-41 (summarizing several recent district court decisions and stating that it is the position of the United States Army that sovereign immunity has not been waived as to purely punitive fines).
88 See Tennessee Air, 967 F. Supp. at 977.
89 See id.
mere $2,500, eighteen states perceived the appeal of *United States v. Tennessee Air Pollution Control Board* important enough to warrant participation as *amici curiae*.90

The district court found that by the "plain language" of the federal facilities provision and the "repeated use of inclusive language, such as ‘any’ and ‘all,’ Congress here sought to effect a far-reaching waiver of sovereign immunity to requirements, sanctions, and penalties."91 In so finding, the court emphasized the differences between the federal facilities provisions of the Clean Air Act and the Clean Water Act as interpreted by the Supreme Court in *Dep’t of Energy*. Significantly, the district court found that the Clean Water Act contained the "unique stipulation absent from the CAA" that the civil penalties may "‘arise under federal law’ or be imposed to enforce an order of a state or local court."92 As a result, the court here did not find the "link" between "sanctions" and "coercive" enforcement penalties, which it believed to be the crux of the Supreme Court’s interpretation of the Clean Water Act’s (and pre-Federal Facilities Compliance Act RCRA’s)93 federal facilities provision, and therefore found that it was not bound by the Supreme Court’s earlier holding.94

Additionally, the district court relied heavily on the legislative history and the stated congressional intent of the 1977 Amendments to the Clean Air Act.95 The court noted that the federal facilities provisions of the Act had been amended in response to the Supreme Court’s holding in *Hancock v. Train*,96 which had found in 1976 that the Clean Air Act had not waived the United States’ sovereign immunity to the Clean Air Act’s permit requirements.97 The court also examined at length the stated (and unstated) goals of the Clean Air Act and several public policy arguments justifying the imposition of purely punitive fines to compel federal compliance.98 Interestingly, if

90 See *Tennessee Air*, 185 F.3d at 530 (listing Ohio, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Minnesota, Montana, Nevada, New Mexico, New York, North Carolina, Virginia, Washington, West Virginia, and numerous metropolitan districts in California as *amici curiae*).
91 See *Tennessee Air*, 967 F. Supp. at 979 (citing United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990), a pre-*Dep’t of Energy* Clean Air Act case finding a broad waiver of sovereign immunity).
92 Id. at 980 (citing 33 U.S.C. § 1323(a) (1994)).
93 See supra note 58 (quoting the text of RCRA’s federal facilities provision as amended by the Federal Facilities Compliance Act of 1992).
94 See *Tennessee Air*, 967 F. Supp. at 980 ("The CAA does not contain additional language confining ‘sanctions’ to ‘coercive’ or process related penalties.").
95 See id. at 982-83.
97 See *Tennessee Air*, 967 F. Supp. at 979.
98 See id. at 982-84 (noting that federal compliance is lower than that among non-governmental entities and finding that this is likely due to the punitive fines levied against the latter).
the Georgia Dep't of Natural Resources court's reading of the Supreme Court's holding in Nordic Village is correct—and considering the implicit rejection of the Sixth Circuit's analysis in Dep't of Energy by the Supreme Court's subsequent opinion—such an analysis of legislative history was wholly improper.99

B. 42 U.S.C. § 7604(e): The Clean Air Act's "State Suit" Provision

On appeal, the Sixth Circuit first reiterated the principle that "[a]ny waiver of sovereign immunity must be 'unequivocally expressed in the statutory text' . . . [and] must be strictly construed in favor of the United States."100 Like the district court, the Sixth Circuit found that "[t]he Clean Air Act, as we read it, meets these stringent rules; its text unequivocally and unambiguously effects a waiver of sovereign immunity extending to the civil penalties in question here."101 In so finding, however, the appellate court found it unnecessary to analyze the language of the federal facilities provision but instead focused on the Clean Air Act's so-called "state suit" provision.102

The court found that while the language of subsection (a) of the citizen suit provision of the Clean Air Act was nearly identical to the Clean Water Act section interpreted in Dep't of Energy, the Clean Air Act contained an additional provision not found in the other statute.103 Specifically, the court looked to subsection (e) of the citizen suit provision, which provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any state or local court, or

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99 See supra notes 40-41 and accompanying text.
100 Tennessee Air, 185 F.3d at 531 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)).
101 Id.
102 See id. at 531-33 (discussing 42 U.S.C. § 7604(e) (1994)).
103 See id. at 532-33.
(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction on any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner of nongovernmental entities, see section 7418104 of this title.  

The court found that the provision regarding "any other law" clearly anticipated the doctrine of sovereign immunity and stated that "[i]f words have meaning, this says that no law shall restrict the state of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter."  

C. Distinguishing United States Dep't of Energy v. Ohio

Additionally, the Sixth Circuit expressly rejected the government’s argument that they were bound by the holding in Dep’t of Energy. While stating that the above interpretation of the "state suit" provision made analysis of the federal facilities provision unnecessary, the court went on to address the issue. While conceding that the federal facilities provisions of the Clean Water and Clean Air Acts were very similar, the court found one significant divergence. The court found that federal facilities portion of the Clean Water Act provided that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." The court found this to be an express limitation not found in the parallel provision of the Clean Air Act. Additionally, the court found that, because the Clean Air Act contained § 7604(e), not found in the Clean Water Act, the pairing of “process and sanctions” could not be given the same effect as in Dep’t of Energy. The court found that by examining the
context of the pairing in the Clean Air Act, the terms were given "a clarity that the term[s] lack in isolation."\(^{110}\)

IV. THE IMPORTANCE OF THE SIXTH CIRCUIT'S ANALYSIS IN TENNESSEE AIR: FINDING "UNEQUIVOCAL EXPRESSIONS" OF WAIVER

The Sixth Circuit's decision in *Tennessee Air* is an important one in that, for the first time, a federal circuit court has formally permitted an aggrieved state to seek purely punitive damages against the federal government for a Clean Air Act violation. But more importantly, however, the decision illustrates nicely the dilemma facing lower federal courts following *Dep't of Energy* and the Court's other recent sovereign immunity cases.\(^{111}\) When faced with an arguably ambiguous waiver provision in which Congress seems to have intended to waive immunity—as in the Clean Air Act—a federal court must choose one of two options. The court can either engage in "analytic gymnastics" and a "tortured discussion" of the statutory text\(^{112}\) in order to find a the requisite "unequivocal expression,"\(^{113}\) or ignore the clear legislative history and reach a result that is likely contrary to the legislative intent. Both of these features of the Sixth Circuit's decision will be discussed in turn.

A. The Sixth Circuit Affirms the Permissibility of Another Weapon in a State's Effort to Control Air Pollution

The *Tennessee Air* decision is an important one in that states may, at least in the Sixth Circuit,\(^ {114}\) fine federal agencies for past violations of the Clean Air Act and its state counterparts. State administrative agencies, responsible for enforcing the Clean Air Act may now seek an injunction against a violating federal agency, compel future compliance with monetary penalties, and seek punitive fines for past violations of the federal and state statutory system. In so holding, the Sixth Circuit focused on the interplay of the federal facilities provision of § 7418 and the so-called state suit provision of § 7604(e). This reasoning is strikingly similar to that of the 1978 opin-

\(^{110}\) Id. (quoting Ohio v. Dep't of Energy, 503 U.S. 607, 622 (1992)).

\(^{111}\) See supra Part II.A.

\(^{112}\) See *Dep't of Energy*, 503 U.S. at 631 (White, J. dissenting in part).


\(^{114}\) The states included in the Sixth Circuit include: Kentucky, Michigan, Ohio and Tennessee. As the case law illustrates, the federal government engages in a significant amount of potentially polluting activity within these states. See, e.g., Ohio v. Dep't of Energy, 503 U.S. 607 (1992) (uranium processing plant in Ohio); Hancock v. Train, 426 U.S. 167 (1976) (several military bases and weapons depots, two power plants, and uranium processing plant in Kentucky); *United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529 (1999) (ammunition plant in Tennessee).
ion of the Comptroller General, but which had been expressly rejected in *Georgia Dep’t of Natural Resources* and *Sacramento Metro* by federal district courts who had felt obligated to follow the *Dep’t of Energy* decision. Furthermore, the very existence of § 7604(e), not present in the Clean Water Act, may truly make the Clean Air Act’s waiver unambiguous and, therefore, different enough from *Dep’t of Energy* to justify the circuit court’s holding.

Additionally, the decision in *Tennessee Air* was a unanimous one, and a rehearing *en banc* was denied on November 5, 1999. Thus, it seems likely that district and circuit courts facing similar issues may find the Sixth Circuit’s reasoning in *Tennessee Air* quite attractive. It seems clear that Congress intended to open federal agencies to this sort of sanction, but the actual efficacy and desirability of such an enforcement mechanism in practice remain to be seen.

### B. The Tennessee Air Holding Illustrates the Dilemma Facing Federal Courts Following Dep’t of Energy: What to Do When the Legislative History Is Clear

When examining the relevant portions of the Clean Air Act, it seems clear that Congress did, in fact, intend to waive the sovereign immunity to the whole panoply of state enforcement mechanisms. It is in this way that the Sixth Circuit’s opinion in *Tennessee Air* is “correct”: it reached the intended result. Such congressional intent can be seen in a number of ways in the Clean Air Act. First, the stated pur-

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116 See *Georgia Dep’t of Natural Resources*, 897 F. Supp. at 1468 (relying on *Dep’t of Energy*, 503 U.S. at 620); *Sacramento Metropolitan*, 29 F. Supp. 2d at 654 n.3 (citing *Georgia Dep’t of Natural Resources*, 897 F. Supp. at 1470, for the proposition that the sovereign immunity question is to be resolved by an analysis of the federal facilities provision rather than the state suit provision).

117 See *United States v. Tennessee Air Pollution Control Bd.*, 1999 U.S. App. LEXIS 29804 (6th Cir. Nov. 5, 1999). Additionally, as of the writing of this piece (early February, 2000) this case has received absolutely no negative treatment by either courts or commentators.

118 See infra Part IV.B.


The wisdom of allowing states to fine facilities must be evaluated not only from the perspective of whether fines will increase compliance, but also whether the state imposed fines will be overly burdensome and expensive for federal agencies without concomitant improvements in environmental compliance. . . . First, states may be tempted to impose excessive fines on federal agencies. Second, states may fine agencies which are institutionally incapable of compliance in terms of resources and existing institutional structure. Third, agencies have incentives to engage in costly litigation when faced with fines. Fourth, states may affect detrimentally the focus of environmental funding.

*Id.* at 706-07 (footnotes omitted).
pose of Act, and the overarching structure of the Act, suggest that such a result was intended. Second, the circumstances under which the 1977 Amendments to that act, as well as the recorded history of the drafters, suggest that the waiver was intended to be interpreted broadly. And finally, other related passages of the Clean Air Act suggest that federal liability was to be the rule, not the exception.

1. The Purpose and Structure of the Clean Air Act

The stated intent of the Clean Air Act is laid out clearly in the first section of the statute. The Act states that “[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention.”120 This clear intent to include federal facilities in the regulatory framework of the Clean Air Act is further underscored by the very existence of a federal facilities provision. The Clean Air Act provides that the United States shall be subject to sanction for violation of the Act,121 and includes punitive monetary penalties as a permissible sanction.122 Further, the Act simply states that no part of the Act or other law shall prohibit such an enforcement action.123 The Tennessee Air court here has, arguably, merely accorded these sections their plain meaning.

Presumably, inherent in the statutory framework created by Congress was the realization that federal facilities are major polluters, which have traditionally resisted environmental compliance at rates higher than their non-governmental peers.124 Furthermore, the Act is structured so as to economically penalize states for failing to meet federal ambient air quality standards and requires states to strike their own balance of development and environmental conservation.125 Thus, states must have access to the entire panoply of enforcement mechanisms in order to police the balance they have carefully opted to strike. It would seem unfair for a federal agency to punish the state for failing to meet its SIP, while at the same time denying it the ability to fully police the polluters within its boarders.

Also, Congress expressly noted this significant delegation in its findings and provided that “air pollution control at its source is the

120 42 U.S.C. § 7401(c) (1994).
123 See 42 U.S.C. § 7604(e).
124 See supra notes 9, 11 and accompanying text. But see Gross, supra note 119, at 701 (finding that federal compliance with the Clean Air Act was only 1% lower than non-federal compliance).
125 See supra Part I.
primary responsibility of States and local governments." While similar statements are found in the Clean Water Act and RCRA, the statutory scheme created by Congress in the Clean Air Act, delegates to a state a level authority to create and police its own regulatory system not found in either of the other two statutes. Under the Clean Water Act, for example, a state may be delegated the responsibility of administering the National Pollution Discharge Elimination System program ("NPDES"), but the permit amount for each "point source" within a state is determined by the federal EPA. Thus, unlike the Clean Air Act wherein a state may strike its own balance of which emitters will be permitted to pollute and to what extent, in the Clean Water Act, states have no such discretion. States have even less involvement in RCRA's administration. Thus, because of the structural differences between the statutes at issue in Dep't of Energy and Tennessee Air, perhaps the decisions can be logically reconciled, and the distinctions made by the Sixth Circuit, justified.

2. The 1977 Amendments and Hancock v. Train

Additionally, the legislative history, which resulted in the 1977 amendment of the federal facilities provision to the Clean Air Act is also clear. In 1976 the Supreme Court held in Hancock v. Train that while the Clean Air Act compelled federal facilities to comply with state air pollution standards and regulations, the federal government was not bound by the State of Kentucky's permit requirement. Thus, states were still responsible and accountable for the enforcement of the Clean Air Act, but, in the absence of a clear waiver of immunity, the Act was a mere guideline for federal agencies emitting air pollution. Congress responded immediately by enacting § 7418 in 1977. The stated purpose in so doing was "to overturn the Hancock case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local require-

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128 See 33 U.S.C. § 1342(b), (c) (1994).
130 It must be noted that even a state-crafted SIP must be approved by the EPA, but the Supreme Court had made it very clear that such a review should be merely cursory. See Union Electric Co. v. EPA, 427 U.S. 246 (1976) (finding that EPA may not reject a SIP on the ground that it is technologically or economically infeasible, so long as the NAAQS are met).
131 As was seen in Dep't of Energy, however, both statutes permit states to act as "citizens" under their respective citizen suit provisions. See supra note 47.
133 See id. at 196-99.
ments—procedural, substantive, or otherwise—process and sanctions.” Thus, this course of events sheds light on what Congress meant by amending the federal facilities provision, and suggests that Congress did, in fact, intend to waive sovereign immunity.


Finally, the exemption section of the Clean Air Act’s federal facilities provision, discussed only briefly by the Middle District of Tennessee in its opinion in *Tennessee Air*, may further suggest a congressional intent to provide a full waiver of sovereign immunity. The Middle District of Tennessee found that the exemption of individuals from personal liability for civil fines suggested persuasively that the individual’s agency would instead be liable. If such liability did not attach to an agency, such an exemption would be unnecessary. Additionally, subsection (b) of § 7418 provides that “the President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement . . . .” The exemption permits the President to exempt certain polluters if it is in the “paramount interests of the United States.” If such exemptions were deemed necessary for individual actors and situations of emergency, it seems logical that Congress intended (or at least assumed) that waiver of immunity as to federal entities would be the rule. Why else would such exceptions be necessary?

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136 See *Tennessee Air*, 967 F. Supp. at 981 (discussing the exemption of individuals from personal liability found in § 7418(a)(2)(D)).

137 See id. The court found that:

Congress clearly exempted particular individuals, but not agencies, from one type of possible sanction, to wit, civil penalties. Established statutory construction rules against interpretations which would render statutory words or phrases meaningless. Unless sovereign immunity for purposes of assessing civil penalties against the federal government by virtue of the language of [42 U.S.C. § 7418], there is no conceivable reason why Congress would have included language exempting certain individual governmental actors from those penalties, and the phrase would be superfluous.

Id.


139 This is not to say that a counter-argument does not exist, but merely that such a reading is not an unreasonable one.
C. The Resulting Judicial Dilemma

In finding a waiver of the United State's sovereign immunity to civil penalties, has the Sixth Circuit merely heeded Justice White's advice that the statute "must be read as a whole" and that "each word in a statute should, if possible, be given effect"? Or, is the court's confusing discussion of the Clean Air Act's "state suit" and "federal facilities" provisions merely a way of meeting the required justification for a finding of waiver—clearly intended by Congress—in the wake of Dep't of Energy?

Strict compliance to so-called "clear statement" rules for interpreting waivers of sovereign immunity may be inherently problematic and thus threaten the "legislative supremacy" intended by the Framers. This is so because every issue of statutory interpretation or application cannot be anticipated by Congress ex ante, and some words are inherently imprecise. Often, legislative history is necessary to choose between plausible alternate readings of a statute, thereby effecting a waiver's efficacy. This is so because "a clear statement rule may produce a result contrary to the better reading of the statutory text itself because the existence of another, less plausible reading may create a fatal ambiguity under a clear statement rule." Such an effect seems to have resulted from the interpretive regime utilized in Dep't of Energy.

Additionally, Justice Stevens, a frequent dissenter in sovereign immunity cases, has stated that the doctrine of sovereign immunity rests on nothing more than "the interests of the stronger" and, as such, undermines Constitutional requirement of "justice" stated in the Preamble. While the doctrine may have been justifiable when the sov-

140 Dep't of Energy, 503 U.S. at 630-31 (White, J. dissenting in part) (quoting Crandon v. United States, 494 U.S. 152, 171 (1990) (Scalia, J. concurring)).

141 See Nagle, supra note 14, at 821-22 (noting that the courts have undermined legislative supremacy by interpreting the scope of a given waiver narrowly).

142 See id. at 819-21. Nagle further notes:

But clear statement rules can produce results contrary to legislative intent. Congress faces both linguistic and institutional limits on its ability to write legislation that accurately resolves future events. "Not only is it too costly to address all foreseeable problems, but also some problems are unforeseeable at the time the legislation is written." Congress may even intend that the courts resolve difficult, unexpected questions. In such cases, the structure, history or purpose of a statute may provide evidence of legislative intent when the text itself is ambiguous. Clear statement rules ignore that evidence, and in doing so, they necessarily produce results which do not reflect accurately the legislative intent revealed by those sources.

Id. at 819-20 (footnotes omitted).

143 Id. at 821.

144 See Dep't of Energy, 503 U.S. at 626-27 (finding "tension" between two readings of 33 U.S.C. § 1332(a) and interpreting the scope of the waiver quite narrowly). See supra Part II.B.

145 See generally, Stevens, supra note 1 (citing U.S. CONST. preamble for the proposition that the Union was formed "in Order to form a more perfect Union, establish Justice, insure
ereign was perceived to have received his power from God, "when the government receives its power from the people, it maintains credibility by subjecting itself to the laws to the same extent as they are applied to the people."

D. Congress and the Court Must Reevaluate the Doctrine of Sovereign Immunity, Particularly as It Applies to Environmental Regulation

The most important feature of the Sixth Circuit’s holding in Tennessee Air is that it serves to point out the inherent difficulties of the Supreme Court’s recent approach to the issue of sovereign immunity and the inconsistency of the piece-meal legislative response. Since the Court decided Dep’t of Energy in 1992, Congress has responded by passing the Federal Facilities Compliance Act. The Act amends RCRA to explicitly waive sovereign immunity for punitive fines arising from hazardous waste violations. Likewise, the 1996 Amendments to the Safe Drinking Water Act clarify that statute’s waiver of immunity. The immunity waiver provisions of several significant environmental statutes, however, remain to be equally “clarified.”

In light of the present Supreme Court’s posture on sovereign immunity, Congress must learn to be more clever in the drafting of waiver provisions.

It is also time for the Court to reexamine its interpretation of the extra-constitutional doctrine of sovereign immunity. This is especially true in situations like environmental regulation where the relevant federal actors—often potential tortfeasors capable of injuring a huge number of people—admit of a policy of resisting compliance. Any doctrine, which as a tenet ignores the inherent limitations of linguistics, the necessity of imperfect ex ante drafting, and refuses to entertain clear legislative history in interpreting perhaps misstated congressional intent, must be reexamined.

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146 Cheng, supra note 32, at 861 (footnote omitted). “While an occasional government violation might be a tolerable quid pro quo for a government able to operate without interference, such a trade off must be reexamined when the government becomes capable of inflicting widespread harm on society.” Id. at 860.


148 For example, despite the Court’s holding in Dep’t of Energy, the Clean Water Act has not been clarified as had RCRA by the Federal Facilities Compliance Act of 1992 and several commentators have argued that CERCLA’s waiver is also greatly in need of clarification. See Peters, supra note 134, at 10604-05 (noting that the Department of Defense continues to resist the EPA’s CERCLA enforcement efforts and arguing that “[t]o ensure that the Federal government is subject to civil penalties to the same extent as private parties, Congress must clarify the waiver in CERCLA to specifically cover punitive as well as coercive fines”).

149 But see supra note 142 (noting the linguistic limitations of any legislature).
V. CONCLUSION

The Sixth Circuit’s finding that the Clean Air Act waived the sovereign immunity of the federal government can be successfully distinguished from the Supreme Court’s opposite interpretation of the Clean Water Act in Dep’t of Energy. The decision recognizes that the Act implores states to seek their own balance of economic development and environmental conservation and affirms the congressional grant of authority to enforce that balance among federal and non-federal facilities. As a result, states within (at least) the Sixth Circuit now have had affirmed their use of yet another weapon in striking and enforcing that balance. The wisdom of such a mechanism, however, remains to be seen. The Tennessee Air decision further illustrates the difficult task facing federal courts adjudicating sovereign immunity issues. As a result, the Supreme Court must reevaluate its current application of the doctrine of sovereign immunity in such a way to recognize a congressional intent to waive the immunity in a wide range of statutes. Short of this, however, Congress must respond and clarify those environmental statutes in which courts have been reluctant to find waiver.

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