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Recommended Citation

Stefan A. Noe, *"Willful Blindness": A Better Doctrine for Holding Corporate Officers Criminally Responsible for RCRA Violations*, 42 DePaul L. Rev. 1461 (1993)

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"WILLFUL BLINDNESS": A BETTER DOCTRINE FOR HOLDING CORPORATE OFFICERS CRIMINALLY RESPONSIBLE FOR RCRA VIOLATIONS

INTRODUCTION

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA)¹ in response to the serious threat to human health and the environment posed by the several million tons of hazardous waste that were literally dumped on the ground each year.² Reacting to growing concerns that waste disposal practices were still out of control,³ Congress, in 1980, amended RCRA to include criminal enforcement provisions that imposed stiff felony sanctions.⁴ Today, in addition to enormous fines, these sanctions include imprisonment for up to five years,⁵ or fifteen years if the violator knowingly placed another person in imminent danger of death or serious bodily injury.⁶

Under the amended RCRA criminal provisions and other environmental statutes, the federal government is prosecuting polluters with increased frequency and vigor.⁷ The Justice Department has claimed that the "increased commitment of resources to environmental criminal enforcement [would] continue in 1991 and beyond as a potent and productive legal force standing guard over our environment."⁸ This increased commitment was also spurred by the en-

1. 42 U.S.C. §§ 6901-6902 (1988).

2. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249 (stating that RCRA was enacted to provide "a multifaceted approach for solving the problems associated with the 3 to 4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% increase in the volume of such waste).

3. See Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The 'Knowledge' of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 205-07 (1988) (stating that the public perceived the threat of harms as "real and imminent").

4. *Id.* at 206-07.

5. 42 U.S.C. § 6928(d) (1988).

6. *Id.* § 6928(e).

7. See generally Dick Thornburgh, *Criminal Enforcement of Environmental Laws — A National Priority*, 59 GEO. WASH. L. REV. 775 (1991) (stating that the Department of Justice's budget for enforcing environmental crimes has increased ten-fold since 1983).

8. *Id.* at 779.

actment of the Pollution Prosecution Act of 1992,⁹ which provides for an increase in the number of criminal investigators to two hundred by 1995, more than triple the number required in 1992.¹⁰

Many of these criminal prosecutions will continue to be directed towards corporate officers because they have primary decisionmaking authority and the deterrent function that is the goal of environmental criminal enforcement is better served by actions against them.¹¹ To convict a corporate officer under RCRA, the government must prove that the crime was committed "knowingly."¹² Prosecutors contend, however, that proving upper-level employees possess actual knowledge of RCRA violations is difficult because they can shield themselves from liability by delegating "hands-on" responsibilities to subordinates.¹³

For this reason, prosecutors support the use of certain judicial doctrines, conceived in criminal jurisprudence, which allow the trier-of-fact to infer a defendant's knowledge based on circumstantial evidence.¹⁴ The federal government has attempted to utilize two such doctrines under RCRA, the responsible corporate officer (RCO) doctrine and the willful blindness doctrine.¹⁵ The application of

9. 42 U.S.C. § 4321 (1988).

10. The Pollution Prosecution Act also increased the number of civil investigators and established the National Training Institute to train federal, state, and local lawyers, inspectors, and technical experts in the enforcement of federal environmental laws. *Id.*

11. See Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991). Jane Barrett is an Assistant U.S. Attorney in the District of Maryland, and Veronica Clarke was formerly an Assistant U.S. Attorney in the same office. The authors were the prosecutors in *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990). See *infra* notes 189-203 and accompanying text.

12. 42 U.S.C. § 6928(d)-(e). Other environmental statutes with a knowledge requirement include: Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1361(b) (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2614, 2615(b) (1988); Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (1988); Clean Air Act, 42 U.S.C. § 7413(c) (1988); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603 (commonly referred to as "Superfund"); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11045(b)(4); Clean Water Act, 33 U.S.C. § 1319(c)(2)-(3) (1988).

13. See Barrett & Clarke, *supra* note 11, at 883 (contending that although it is often relatively easy to assign knowledge to the low-level employee who dumped or buried the waste, it is much more difficult to climb up the corporate ladder and prove that a corporate executive had knowledge of a RCRA violation).

14. *Id.*

15. See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (instructing the jury on both the willful blindness doctrine and the RCO doctrine); see also Barrett & Clarke, *supra* note 11, at 885-86 n.128 (discussing *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991), in which the court instructed the jury on the willful blindness doctrine).

these doctrines to RCRA, however, has raised concern that they fail to give effect to the knowledge requirement that Congress has expressly included in the statute, and that they thereby convict individuals for conduct that is, at worst, negligent.¹⁶

With this concern as the underlying focus, this Comment examines the "knowledge" requirement of section 6928(d) of RCRA. Section I provides a brief overview of RCRA and outlines the substantive law that defines the current scope of the "knowledge" requirement under RCRA. In addition, Section I sets forth both the RCO doctrine and the willful blindness doctrine.¹⁷ Section II suggests not only that proper use of the willful blindness doctrine is consistent with the knowledge requirement under section 6928(d), but also that Congress intended for it to be used under that section. In contrast, this section demonstrates that the RCO doctrine requires a lower evidentiary showing which not only discourages the use of the willful blindness doctrine, but also creates a negligence, if not strict, standard of liability for corporate officers, not intended by Congress.

I. BACKGROUND

A. *An Overview of RCRA*

The Resource Conservation and Recovery Act was enacted in 1976 as a congressional response to the growing number of hazardous waste sites resulting from unregulated waste disposal practices.¹⁸ Congress intended RCRA to serve as a regulatory scheme that would control hazardous materials from "cradle-to-grave" in order to provide "nationwide protection against the dangers of im-

16. See Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, [1992] 22 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,0999, 10,1000 (stating that application of the RCO doctrine "has tilted the balance in the criminal justice arena away from due process safeguards, which are intended to protect the innocent while allowing for the just punishment of truly guilty individuals"); Jed S. Rakoff, *Moral Qualms About Environmental Prosecutions*, N.Y.L.J., June 11, 1991 (arguing that the ultimate effect of applying the RCO doctrine to RCRA is to open the way for corporate officers to be convicted of environmental crimes that they neither know of nor caused); see also Karen M. Hansen, "Knowing" *Environmental Crimes*, 16 *WM. MITCHELL L. REV.* 987, 1023 (1990) (commenting that a willful blindness instruction should not be used where a statute requires knowledge and where facts and circumstances are such that the defendant's mental state is merely one of mistake, reckless disregard of the truth, or negligent failure to inquire).

17. The willful blindness doctrine is also referred to by commentators as the "conscious avoidance" or "deliberate ignorance" doctrine.

18. H.R. REP. NO. 1491, *supra* note 2, at 2-4, reprinted in 1976 U.S.C.C.A.N. at 6240-42.

proper hazardous waste disposal."¹⁹ To achieve this purpose, the statute established both a permit requirement for facilities that treat, store, or dispose of hazardous wastes²⁰ and a comprehensive system for tracking all hazardous wastes.²¹

Under the permit scheme, the Environmental Protection Agency (EPA) identifies and lists solid wastes that meet the statutory definition of a hazardous waste.²² To date, the EPA has described and listed hundreds of different noxious substances as such.²³ Because these hazardous wastes vary immensely in terms of toxicity and other characteristics, the manner in which facilities can safely treat, store, or dispose of them differs. Therefore, a facility must always obtain a proper permit to ensure hazardous wastes are directed to and maintained by a suitable facility.²⁴ To obtain a permit, a facility must satisfy stringent regulatory requirements promulgated by the EPA for each type of hazardous waste being handled.²⁵

In addition to the permit scheme, the statute establishes a system for tracking hazardous wastes.²⁶ This system requires generators and transporters of hazardous waste and owners and operators of treatment, storage, and disposal facilities to maintain a shipping record referred to as a "hazardous waste manifest."²⁷ The manifest identifies the type of hazardous waste being handled and tracks the waste from production, through its transportation, to its final destination.²⁸ The information gathered in these manifests satisfies the statutory purpose of controlling the hazardous waste from "cradle to grave."

Originally, compliance with this regulatory scheme was enforceable only through the assessment of civil penalties.²⁹ In 1980, how-

19. *Id.* at 11, *reprinted in* 1976 U.S.C.C.A.N. at 6249. RCRA was enacted to provide "a multifaceted approach for solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste." *Id.* at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6239.

20. 42 U.S.C. § 6925 (1988).

21. *Id.* § 6922 (1988).

22. *Id.* § 6921 (1988).

23. *Id.* The first major regulations promulgated pursuant to RCRA Subtitle C (or hazardous waste) became effective on November 19, 1980. 40 C.F.R. §§ 260-268 (1989).

24. 42 U.S.C. § 6925.

25. *Id.*

26. *Id.* § 6922.

27. *Id.* §§ 6922(5), 6923(3), 6923(4), 6924(2).

28. *Id.* §§ 6922(5), 6923(3), 6923(4), 6924(2).

29. Under the civil enforcement provisions, the EPA may issue an order assessing a civil penalty for any past or current violation, or it may commence a civil action in the U.S. district court

ever, in reaction to growing concerns that waste disposal practices were out of control,³⁰ Congress amended RCRA to include criminal enforcement provisions.³¹ Any person convicted under these criminal provisions is guilty of a felony and is subject to severe penalties. For instance, a conviction under section 6928(d),³² which generally pro-

seeking appropriate relief, including a temporary or permanent injunction. 42 U.S.C. § 6928(a)(1). In the order, the EPA may suspend or revoke any permit and may assess a fine not to exceed \$25,000 for each day of noncompliance for each violation. In assessing the penalty, however, the EPA is required to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." *Id.* § 6928(a)(3). In addition, failure to take corrective action in the time specified in the compliance order can result in additional penalties of not more than \$25,000 for each day of continued noncompliance. *Id.* § 6928(c).

30. See Harris et al., *supra* note 3, at 205-07 (stating that the public perceived that pollution was out of control).

31. 42 U.S.C. § 6928(d)-(e).

32. *Id.* § 6928(d). The criminal penalties section provides:

Any person who —

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter —

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit;

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transporta-

hibits any person from knowingly treating, storing, transporting, or disposing of any hazardous waste without a permit,³³ may result in both a penalty of up to \$50,000 for each day of a violation and imprisonment for two or, in some cases, five years.³⁴ Moreover, both the fine and imprisonment are doubled for subsequent convictions.³⁵

A second provision, section 6928(e),³⁶ referred to as the "knowing endangerment" provision,³⁷ carries even harsher penalties for violators. To be convicted under this section, a person must "know" at the time he or she violated a criminal proscription set forth in section 6928(d) that another person was placed in "imminent danger of death or serious bodily injury."³⁸ If convicted, the offender faces a maximum of fifteen years imprisonment and a fine not to exceed \$250,000 for individuals and \$1,000,000 for organizations.³⁹ Moreover, in sentencing those convicted under both subsections 6928(d)

tion, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter-

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall upon conviction

Id.

33. *Id.*

34. *Id.*

35. *Id.*

36. 42 U.S.C. § 6928(e). This section provides in part:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction

Id.

37. *Id.*

38. *Id.* When the knowing endangerment provision was originally enacted in 1980, not only did the government have to prove knowledge concerning the underlying activities, but it also had to show that the defendant's conduct manifested either "unjustified and inexcusable disregard for human life" or "an extreme indifference to human life." *Id.* Recognizing the general reluctance to enforce this provision given the government's heavy burden, Congress in 1984 repealed the "extreme reluctance" and "unjustified disregard" elements of the provision. See Harris et al., *supra* note 3, at 208-14, for a more extensive overview of the knowing endangerment provision.

39. 42 U.S.C. § 6928(f)(5). An organization is defined as "a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons. *Id.*

and (e), federal judges must follow the Federal Sentencing Guidelines issued in 1990.⁴⁰ These guidelines call for mandated prison sentences and significantly increase the amount of fines assessed.⁴¹

B. *The Knowing Mental State*

Before a person can be convicted under either criminal enforcement provision and be subject to a fine or imprisonment, the government must prove that a violation was committed "knowingly."⁴² Although these provisions unequivocally require proof of knowledge, considerable uncertainty remains as to what constitutes a knowing mental state sufficient to convict a person under RCRA. Speaking generally of all federal criminal laws, the Supreme Court, in *Liparato v. United States*,⁴³ noted that when Congress uses the word "knowingly," some level of mental culpability is intended.⁴⁴ Although this much is true, courts have interpreted the term to encompass a variety of mental states.⁴⁵

Under the modern view, reflected in the *Model Penal Code*, the word "knowingly" requires actual awareness of the nature of the act or omission, the results that follow from an act or omission, or the circumstances indicating an act or omission.⁴⁶ Therefore, the know-

40. See UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (1990) (commenting that the sentencing guidelines were issued by the U.S. Sentencing Commission, whose authority is derived from the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017 (codified at 28 U.S.C. §§ 991-998 (1988))) [hereinafter GUIDELINES MANUAL].

41. *Id.* Under the sentencing system, the Commission sets a "base level" period of imprisonment and fine amount for every federal criminal offense. GUIDELINES MANUAL, *supra* note 40, § 1B1.1. The judge may add or subtract from this base level depending on the presence or absence of specific offense characteristics such as the defendant's role in the offense, the number of counts upon which the defendant has been convicted, and the defendant's willingness to accept responsibility for the wrongdoing. *Id.*

42. 42 U.S.C. § 6928(d)-(f).

43. 471 U.S. 419 (1985).

44. *Id.* at 424. Referring to the federal statute governing food stamp fraud, 7 U.S.C. § 2024(b)(1) (1988), the Supreme Court stated that "Congress certainly intended by use of the word 'knowingly' to require *some* mental state with respect to *some* element of the crime defined." *Id.*

45. See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.5(b), at 307 (1986). In addition to proof of actual knowledge,

cases have held that one has knowledge of a given fact when he has the means for obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of that fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed.

1 *Id.*

46. 1 *Id.*; MODEL PENAL CODE § 2.02(2)(b) (1985).

ing mental state requires subjective awareness or personal knowledge of facts or circumstances. As a result, proof of objective fault (i.e., that a reasonably prudent corporate officer should have known of the RCRA violation) usually associated with mere negligence, would not satisfy the requirement.⁴⁷

This personal or actual knowledge requirement is also consistent with the basic tenet of criminal law that wrongdoing must be conscious to be criminal.⁴⁸ According to the Supreme Court, by using the term "guilty knowledge" to signify mental culpability, courts have "sought to protect those who were not blameworthy in mind."⁴⁹ However, even where mens rea is required, the Supreme Court has also held that "the Government may prove by reference to facts and circumstances surrounding the case that [the defendant] knew that his conduct was unauthorized or illegal."⁵⁰ Prosecutors may therefore satisfy the mens rea requirement in the absence of direct proof of guilty knowledge by utilizing circumstantial evidence.

Even with the benefit of circumstantial evidence, however, in the context of environmental criminal enforcement, federal prosecutors claim that satisfying the knowledge requirement can be particularly difficult with respect to corporate executives.⁵¹ This difficulty has been explained as follows:

Although it is often relatively easy to assign knowledge and blame to the low-level employee who dumped or buried hazardous waste, or to prove that a shift foreman or plant manager personally directed the employee's actions, it is much more difficult to climb up the corporate ladder and prove that a corporate executive had knowledge of a RCRA violation. Often corporate

47. See 1 LAFAYE & SCOTT, *supra* note 45, § 3.4(c), at 360 (stating that a "negligent" mental state involves "objective fault in creating an unreasonable risk" through either acting, failing to act, or causing a result).

48. *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952). In *Morrisette*, the Court stated: The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id.

49. *Id.* at 252.

50. *Liparota v. United States*, 471 U.S. 419, 434 (1985).

51. See Barrett & Clarke, *supra* note 11, at 883.

executives are successful at insulating themselves from culpability by delegating "hands-on" business responsibilities to subordinates.⁵²

To address this problem, the government advocates the use of both the willful blindness doctrine and the responsible corporate officer doctrine.⁵³ These prosecutorial doctrines attempt to satisfy the mens rea requirement without direct proof of knowledge of material elements of the crime by allowing jurors to infer knowledge based on circumstantial evidence.⁵⁴

C. *The Willful Blindness Doctrine as a Basis for Criminal Liability*

The willful blindness doctrine developed in modern criminal jurisprudence as an important exception to direct proof of personal knowledge. The doctrine is grounded in the notion that "deliberate ignorance and positive knowledge are equally culpable."⁵⁵ The theory is derived from the common understanding that a person "knows of facts of which he is less than absolutely certain" when that person is aware of a high probability of the existence of such facts.⁵⁶ On this basis, the doctrine allows the trier-of-fact to infer guilty knowledge where there is evidence that the defendant consciously avoided discovering the existence of illegal activity.⁵⁷

Therefore, under the willful blindness doctrine, a corporate officer may become criminally culpable by intentionally shielding herself from positive knowledge in hopes of creating a defense from prosecution. For instance, in *United States v. MacDonald & Watson Waste Oil Co.*,⁵⁸ the First Circuit upheld the use of the willful blindness doctrine under section 6928(d) of RCRA.⁵⁹ The district court had instructed the jury as follows:

52. *Id.*

53. For example, in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), the instruction at issue instructed the jury on both the RCO doctrine and the willful blindness doctrine. *Id.* at 50-52. The jury was also instructed on both doctrines in *United States v. Dee*. See Barrett & Clarke, *supra* note 11, at 884-85.

54. See *infra* notes 54-113 and accompanying text (discussing the willful blindness doctrine and the RCO doctrine as bases for criminal liability).

55. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

56. *Id.*

57. *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir.), *cert. denied*, 487 U.S. 1222 (1988).

58. 933 F.2d 35 (1st Cir. 1991).

59. Brief for the United States at 49, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991).

In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposely avoiding learning the truth. However, mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge.⁶⁰

In upholding this instruction, the *MacDonald & Watson* court simply held that circumstantial evidence of "willful blindness to the facts constituting the offense may be sufficient to establish knowledge."⁶¹

The *MacDonald & Watson* decision is consistent with the expressed intent of Congress in favor of the willful blindness doctrine's application to both subsections 6928(d) and (e) of RCRA.⁶² Reporting on the 1984 amendments of section 6928(d), the criminal sanctions section, the House Judiciary Committee explicitly stated that "[t]he term 'knowing' includes the concept of 'willful blindness'. . . so that it will not be possible for someone to avoid criminal responsibility by deliberately remaining ignorant about the material conditions and requirements of permits and of interim status regulation."⁶³ Moreover, with respect to section 6928(e), the knowing endangerment section, the statute itself specifically provides for the use of the willful blindness doctrine under the special rules provision.⁶⁴ Congress adopted the special rules provision to clarify the

60. *Id.*

61. *MacDonald & Watson*, 933 F.2d at 54-55.

62. H.R. REP. NO. 198, 98th Cong., 2d Sess., pt. 3, at 8-9 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5643-44.

63. *Id.* at 9, *reprinted in* 1984 U.S.C.C.A.N. at 5644.

64. 42 U.S.C. § 6928(f). This special rules section provides in pertinent part:

For the purposes of subsection (e) of this section —

(1) A person's state of mind is knowing with respect to —

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury —

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant; *Provided*, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

concept of knowledge in the context of an endangerment offense. The provision states in part, "[I]n proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information."⁶⁵

Although Congress seemed to approve of, if not encourage, the use of the willful blindness doctrine under RCRA, many courts have strongly urged that the doctrine be used sparingly.⁶⁶ Such caution is founded on the belief that a willful blindness instruction presents "a risk that the jury will convict on a standard of negligence."⁶⁷ In *United States v. Pacific Hide & Fur Depot, Inc.*,⁶⁸ a case involving an environmental criminal provision of the Toxic Substances Control Act (TSCA) that requires guilty knowledge, the Ninth Circuit commented as follows:

A [willful blindness] instruction is properly given only when defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance. It is not enough that defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire. Instead, the government must present evidence indicating that defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution. Absent such evidence, the jury might improperly infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance.⁶⁹

Under this view, the circumstances that support the willful blindness instruction are those that involve conscious action by the defendant.⁷⁰ Consistent with this notion, a threshold test is used to determine if the instruction is appropriate.⁷¹ This test requires that the evidence at trial raise two inferences: "(1) the defendant was subjectively aware of a high probability of the existence of the illegal

65. 42 U.S.C. § 6928(f). In discussing this section, the Report of the Conference Committee on the 1980 RCRA Amendments emphasized the difficulty in finding direct evidence of what a person actually knew and thus wanted "to avoid any implication that the requirement of actual knowledge would render inadmissible any otherwise probative evidence on this element." See S. REP. NO. 172, 96th Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S.C.C.A.N. 5039.

66. *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988), cert. denied, 487 U.S. 1222 (1988).

67. *Id.*

68. 768 F.2d 1096 (9th Cir. 1985).

69. *Id.* at 1098 (citations omitted).

70. *Id.* at 1099.

71. See *United States v. Lara-Velasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990).

conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct."⁷²

The language of the first prong of this test, derived from the *Model Penal Code*,⁷³ acts to narrowly circumscribe application of the doctrine.⁷⁴ In *United States v. Lara-Velasquez*,⁷⁵ the Fifth Circuit explained that the first prong protects the defendant from being convicted for mere negligent conduct by requiring the government to present facts that support the inference that the defendant had *subjective* knowledge of the illegal activity.⁷⁶ Requiring evidence of subjective awareness prevents the government from establishing guilty knowledge by simply demonstrating objective fault on the basis of what a reasonable person should have known.⁷⁷

The *Lara-Velasquez* court further noted that the second prong of the test can be reached only if the first prong is satisfied: "[A] defendant could not purposely avoid learning of illegal conduct unless he were subjectively aware that the high probability of illegal conduct exists."⁷⁸ The court identified two situations where courts have found the second prong satisfied: (1) where the defendant admits an intent to avoid incriminating knowledge and (2) where the defendant's involvement in the criminal offense is so "overwhelmingly suspicious" that his failure to question the suspicious circumstances establishes the purposeful contrivance.⁷⁹ Under either situation, the primary concern — that there is sufficient evidence to prove that the

72. *Id.* at 951.

73. MODEL PENAL CODE § 2.02(7) (1985) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

74. See 1 LAFAYE & SCOTT, *supra* note 45, § 3.5(b).

75. 919 F.2d 946 (5th Cir. 1990).

76. *Id.* at 952.

77. *Id.*

78. *Id.*

79. *Id.* For examples of the first situation, see *United States v. Peddle*, 821 F.2d 1521 (11th Cir. 1987), and *United States v. Batencort*, 592 F.2d 916 (5th Cir. 1979). In *Peddle*, the defendants suspected that a boat they were hired to sail concealed illegal substances but did not inspect the boat because they "didn't even want to know." 821 F.2d at 1523. In *Batencort*, the defendant who was hired to transport a suitcase admitted that "he had something in the suitcase that he shouldn't, but he didn't know exactly what." 592 F.2d at 918.

For examples of the second situation, see *United States v. de Luna*, 815 F.2d 301 (5th Cir. 1987), and *United States v. Restrepo-Granda*, 575 F.2d 524 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978). In *de Luna*, the defendant was offered \$10,000 to deliver a load of cabbage into the United States — in a truck which concealed marijuana — even though the job usually paid only \$1,000. 815 F.2d at 302. In *Restrepo-Granda*, the defendant was given a set of coat hangers on which to carry his clothes into the United States; the coat hangers, which concealed cocaine, were noticeably oversized and unusual. 575 F.2d at 527.

defendant's failure to act was deliberate and not negligent — is satisfied. This two-prong test, therefore, safeguards against the indiscriminate use of the willful blindness doctrine in order to avoid the prosecution and conviction of negligent or innocent defendants.

D. The Responsible Corporate Officer Doctrine as a Basis for Criminal Liability

While proper use of the willful blindness doctrine can safeguard against convicting defendants for mere negligence, application of the responsible corporate officer doctrine may be unable to prevent such a conviction. Under the RCO doctrine, a corporate officer may be criminally culpable if, by reason of his position and authority, he had the power or capacity to prevent or correct the violation complained of and failed to do so.⁸⁰ This criminal culpability arises even when the corporate officer did not actively participate in the commission of the offense.⁸¹

Two Supreme Court cases, *United States v. Dotterweich*⁸² and *United States v. Park*,⁸³ provide the foundation for the RCO doctrine. Both of these cases involved misdemeanor offenses under provisions of the Federal Food, Drug, and Cosmetic Act (FDCA)⁸⁴ that do not include a scienter requirement.⁸⁵ In *Dotterweich*, the Supreme Court upheld the conviction of the president and general manager of a pharmaceutical company for shipping adulterated and mislabeled drugs in interstate commerce even though he was unaware of the facts that led to the violation.⁸⁶ The Court found that those who simply have "a responsible share in the furtherance of the transaction which the statute outlaws," regardless of whether there is awareness of wrongdoing, commit an offense.⁸⁷ Relying on the overriding interest of protecting human health and welfare,⁸⁸ the Court found it permissible for Congress to place such a burden on "a person otherwise innocent but standing in responsible relation to

80. *United States v. Park*, 421 U.S. 658, 673-74 (1975).

81. *Id.* at 670, 674.

82. 320 U.S. 277 (1943).

83. 421 U.S. 658 (1975).

84. 21 U.S.C. §§ 301-393 (1988).

85. *See id.* § 331.

86. 320 U.S. at 278.

87. *Id.* at 284.

88. The Court emphasized that the purposes of the Federal Food, Drug and Cosmetics Act "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." *Id.* at 280.

a public danger.”⁸⁹ Consequently, for the first time, the Supreme Court accepted the notion that an individual could be criminally liable as a result of his mere function in an organization, without regard to his mental state.

In *United States v. Park*,⁹⁰ the Supreme Court reaffirmed and further defined the RCO doctrine. The defendant, Park, was chief executive officer and president of a national retail food chain with approximately 36,000 employees, 874 retail outlets, and 16 warehouses.⁹¹ Although the defendant worked out of the national headquarters in Philadelphia, he was charged with multiple violations of the FDCA as a result of rodent infestation in a Baltimore warehouse.⁹² The evidence showed that Park had been informed by the Federal Food and Drug Administration on previous occasions of contamination discovered during warehouse inspections.⁹³ The evidence also showed that although Park was not directly in charge of day-to-day sanitation management, he did have general supervisory authority over that function.⁹⁴ In his defense, Park presented evidence that he had been informed by in-house legal counsel that immediate corrective action would be taken by the Baltimore division vice president.⁹⁵ In addition, he stated that he believed nothing more could have been done constructively than what he found was being done.⁹⁶

The Supreme Court affirmed Park's conviction, though not “solely on the basis of [his] position in the corporation.”⁹⁷ Instead, the Court found that Park “‘had a responsible relation to the situation,’ and ‘by virtue of his position . . . had . . . authority and responsibility’ to deal with the situation.”⁹⁸ Cloaked with this authority and responsibility, Park had a duty not only to implement measures to prevent violations, but to seek out and remedy violations that occurred.⁹⁹ The Court felt that, although these duties “are beyond question demanding, and perhaps onerous, . . . they are no more

89. *Id.* at 281.

90. 421 U.S. 658 (1975).

91. *Id.* at 660.

92. *Id.*

93. *Id.* at 661-62.

94. *Id.* at 662-64.

95. *Id.* at 663-64.

96. *Id.* at 664.

97. *Id.* at 674.

98. *Id.*

99. *Id.* at 672.

stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."¹⁰⁰

Of special importance, however, in considering the RCO doctrine's applicability to RCRA violations are the Court's comments respecting the historical significance of imposing the doctrine only where the statute dispenses with *mens rea*.¹⁰¹ Referring to cases holding managers criminally liable for the acts of their agents, the Court noted:

[T]he liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability.¹⁰²

This language brings into question whether the doctrine can be applied to statutes such as RCRA that include a scienter requirement. Moreover, both *Dotterweich* and *Park* involved misdemeanor offenses, and the Court has stated that "the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty."¹⁰³ This historical justification for holding responsible parties liable would not be present where, as with RCRA, severe felony sanctions are imposed.¹⁰⁴ These considerations raise serious questions concerning the compatibility of the RCO doctrine with the criminal provisions of RCRA.¹⁰⁵

Perhaps based on these considerations, Congress has eliminated

100. *Id.*

101. *Id.* at 670-71; see also *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (stating that "such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing").

102. *Park*, 421 U.S. at 670-71.

103. *Dotterweich*, 320 U.S. at 281 (citing *United States v. Mills*, 32 U.S. (7 Pet.) 138, 141 (1833)).

104. See *id.* At least one court, however, has held that the RCO doctrine is not limited to misdemeanor offenses. In *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir.), cert. denied, 479 U.S. 985 (1986), the founder of a meat packing and distribution company was charged with various intentional and fraudulent acts in violation of the Federal Meat Inspection Act. 793 F.2d at 234. On appeal from his conviction, the defendant argued that the RCO instruction was improperly given because it only applies to misdemeanor offenses. *Id.* at 240. Although there was substantial evidence of intentional wrongdoing, and thus some question as to whether the RCO doctrine was actually applied, the Tenth Circuit opined that nothing in the *Park* decision limits the doctrine's application to misdemeanor offenses. *Id.*

105. See *Onsdorff & Mesnard*, *supra* note 16, at 10,102-03.

any possibility that the RCO doctrine could be applied to RCRA's "knowing endangerment" offense, defined under section 6928(e).¹⁰⁶ Congress adopted a "special rules" section to define the state of mind necessary for an endangerment crime.¹⁰⁷ These special rules specifically provide that a person is responsible only for the actual awareness or actual belief that he or she possessed, and not for knowledge possessed by another person.¹⁰⁸ Discussing these rules, the Report of the Conference Committee on the 1980 RCRA Amendments stated that the actual knowledge requirement "may be established by direct or circumstantial evidence, but not constructive or vicarious knowledge."¹⁰⁹ Therefore, "knowledge that the defendant should have had, could have had, or would have had under various circumstances does not suffice if he did not actually have the requisite knowledge about the danger at the time he acted."¹¹⁰ The conferees emphasized that "[a] supervisor . . . who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed."¹¹¹

Therefore, as evidenced by the Conference Report, use of the RCO doctrine is clearly prohibited with respect to the "knowing endangerment" provision. The conferees declined to provide any guidance, however, as to the applicability of the RCO doctrine to the "criminal penalties" section.¹¹² Rather, the report stated that "[t]he conferees have not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles."¹¹³ Therefore, the courts have been delegated sole authority to interpret the scope of the knowledge requirement under section 6928(d), including whether knowledge may be imputed merely from corporate responsibility.

106. 42 U.S.C. § 6928(f).

107. *Id.*; see *supra* notes 63-65 and accompanying text (explaining the concept of "knowledge" in the special rules section).

108. 42 U.S.C. § 6928(f). However, as noted before, under these rules, the government may prove actual knowledge by use of circumstantial evidence, including evidence that the defendant took affirmative steps to shield himself from relevant information. See *supra* notes 71-80 and accompanying text (discussing the application of a two-prong test to prove actual knowledge).

109. See S. REP. NO. 172, *supra* note 65, at 37, reprinted in 1980 U.S.C.C.A.N. at 5037.

110. *Id.* at 39, reprinted in 1980 U.S.C.C.A.N. at 5038.

111. *Id.* at 40, reprinted in 1980 U.S.C.C.A.N. at 5039.

112. See *id.* at 39-40, reprinted in 1980 U.S.C.C.A.N. at 5038-40.

113. *Id.* at 39, reprinted in 1980 U.S.C.C.A.N. at 5038.

E. Judicial Interpretation of the Knowledge Requirement Under Section 6928(d) — the Criminal Penalties Section

In exercising this grant of interpretive authority, the courts have grappled with several issues that generally arise in the context of an action by the federal government enforcing section 6928(d) against corporate officers. One issue, of course, is whether guilty knowledge may be imputed by use of the RCO doctrine. The courts have also been forced to determine what constitutes sufficient proof of a corporate officer's knowledge. For example, the courts have had to decide whether the government must prove the corporate officer had knowledge: (1) that violating RCRA is a crime; (2) that a permit is required for his activities; (3) that he was acting without the proper permit; and (3) that the materials he or she was handling were "hazardous" within the meaning of the statute.¹¹⁴ As will be more fully discussed, the courts' answers to these questions have been greatly influenced by RCRA's status as a public welfare statute.¹¹⁵ The manner in which the federal courts have resolved these questions provides the proper context in which to consider the application of the RCO doctrine.¹¹⁶

1. The Relationship Between RCRA's Status as a Public Welfare Statute and the Knowledge Requirement

Since RCRA's enactment, federal courts have characterized it as a public welfare statute, referring to its overall purpose of promoting and protecting human health and the environment.¹¹⁷ Relying

114. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 n.5 (11th Cir. 1986); *United States v. Liparota*, 471 U.S. 419, 424 n.7 (1985).

115. See *infra* notes 117-34 and accompanying text (discussing the relationship between RCRA's status as a public welfare statute and the knowledge requirement).

116. To date, only ten federal appellate court decisions have addressed the mens rea requirement of § 6928(d) of RCRA: *United States v. Dean*, 969 F.2d 187, 190-92 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); *United States v. Speech*, 968 F.2d 795, 796-97 (9th Cir. 1992); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 47-50 (1st Cir. 1991); *United States v. Sellers*, 926 F.2d 410, 414-17 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745-47 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Hoffin*, 880 F.2d 1033, 1036-39 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-05 (11th Cir. 1986); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666-68 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

117. See *MacDonald & Watson*, 933 F.2d at 46 (stating that "RCRA is a public welfare statute 'enacted to protect the national health and environment'") (quoting *Wycoff Co. v. EPA*, 796 F.2d 1197, 1198 (9th Cir. 1986)); see also *Hayes Int'l*, 786 F.2d at 1503 (stating that the

on this characterization and purpose, federal courts have taken a less restrictive interpretation of the knowledge requirement as it applies to section 6928(d).¹¹⁸ Consequently, the mens rea requirement necessary to support a conviction has been essentially reduced to knowledge of facts or circumstances pertaining to the RCRA violation, instead of knowledge of the regulatory scheme.¹¹⁹

The justification for interpreting the knowledge requirement of public welfare statutes less restrictively comes from the seminal case of *United States v. International Minerals & Chemical Corp.*¹²⁰ In *International Minerals*, the Supreme Court affirmed the conviction of a corporate officer under a statute that punished anyone who knowingly violated any regulation issued by the Interstate Commerce Commission.¹²¹ The defendant had shipped sulfuric acid and hydrofluosilicic acid in interstate commerce and knowingly failed to show on the shipping papers that the cargo was corrosive liquid.¹²² The Supreme Court rejected the defendant's argument that actual knowledge of the provision must be proved and held instead that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."¹²³ It is only the regulatory scheme, however, and not other facts and circumstances, that the defendant is presumed to know.¹²⁴ As the Court pointed out, mistake of fact could be a defense, for example,

statute is "undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety"); *Baytank*, 934 F.2d at 613 (same); *Johnson & Towers*, 741 F.2d at 667-68 (same). The statutory language states that the "disposal of . . . hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment" and that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and environment." 42 U.S.C. § 6901(b)(2), (5).

118. See *infra* notes 120-37 and accompanying text (discussing the development of the Supreme Court's interpretation of the knowledge requirement).

119. See, e.g., *Baytank*, 934 F.2d at 613 (holding that under § 6928(d)(2)(A), the word "knowingly" means no more than that the defendant knows factually what he is doing — storing, what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit — and it is not required that he know that there is a regulation which says what he is storing is hazardous under RCRA").

120. 402 U.S. 558 (1971).

121. *Id.* at 558.

122. *Id.* at 558-59.

123. *Id.* at 564-65.

124. The Court found such a presumption to be consistent with the general principle of criminal jurisprudence that ignorance of the law is no defense. *Id.* at 563.

where a person in good faith believed he was shipping distilled water when in fact he was shipping sulfuric acid.¹²⁵

In deciding to apply the presumption created by *International Minerals* to the criminal provisions of RCRA, the courts declined to follow another Supreme Court case. In *Liparota v. United States*,¹²⁶ the defendant was indicted for acquiring and possessing food stamps in violation of a federal statute governing food stamp fraud.¹²⁷ Relying on *International Minerals*, the government argued that the defendant could be convicted under the statute if it proved he knew that he acquired or possessed food stamps.¹²⁸ The Supreme Court, however, was unwilling to relieve the government of the burden of proving that the defendant knew possession of food stamps was unauthorized by the statute.¹²⁹ The Court believed that this would only "criminalize a broad range of apparently innocent conduct."¹³⁰ Moreover, the Court did not feel that the prosecution was being overly burdened since knowledge of illegality may be proved simply "by reference to facts and circumstances surrounding the case."¹³¹

Of critical importance, however, were the grounds upon which the *International Minerals* decision was distinguished. The Court held that acquiring and possessing food stamps was not "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety."¹³² Lower courts have seized upon this language as the basis for following *International Minerals* in interpreting RCRA's knowledge requirement.¹³³ As one court stated, RCRA "is undeniably a public welfare statute, involving a heavily regulated area with great ramifications to public health and safety . . . it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions."¹³⁴

125. *Id.* at 563-64.

126. 471 U.S. 419, 432-33 (1985).

127. *Id.* at 421.

128. *Id.* at 423.

129. *Id.* at 426.

130. *Id.*

131. *Id.* at 434.

132. *Id.* at 433.

133. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-03 (11th Cir. 1986); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 612-13 (5th Cir. 1991).

134. *Hayes Int'l Corp.*, 786 F.2d at 1503.

2. Knowledge That Violation of RCRA Is a Crime

By concluding that *International Minerals*, and not *Liparota*, controlled in interpreting RCRA, federal courts have limited the mens rea requirement to knowledge of facts and circumstances, rather than requiring knowledge of the regulatory scheme.¹³⁵ Consequently, the government is not required to prove that the defendant knew that violating the statute could result in criminal punishment.¹³⁶ Consistent with *International Minerals*, courts have reasoned that since hazardous wastes are dangerous and deleterious materials that can have a severe adverse impact on human health and the environment, it is fair and reasonable to presume that a defendant has knowledge of RCRA's criminal provisions.¹³⁷ Therefore, a defendant cannot escape criminal liability by claiming that he did not know or realize that the activity at issue was illegal.

3. Knowledge of the Permit Requirement and a Facility's Permit Status

The majority of criminal actions brought under section 6928(d) of RCRA involve permit violations. The two criminal provisions of RCRA that govern permit violations are subsection 6928(d)(1) and subsection 6928(d)(2).¹³⁸ Subsection 6928(d)(1) pertains to transporters of hazardous waste (transporter provision), and subsection 6928(d)(2) pertains to persons who treat, store, or dispose of hazardous waste at a facility (facility operator provision).¹³⁹ With respect to the facility operator provision, the federal circuits are in conflict as to its proper construction.¹⁴⁰ Under this provision, it is unlawful to "(2) knowingly treat[], store[], or dispose[] of any haz-

135. See *supra* notes 120-37 and accompanying text (discussing the Supreme Court's reasoning in *International Minerals* and *Liparota*).

136. *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (holding that the government did not need to prove that the defendants knew a violation of RCRA was a crime), *cert. denied*, 111 S. Ct. 1307 (1991).

137. See *supra* notes 120-24 and accompanying text (discussing the facts of *International Minerals*).

138. 42 U.S.C. § 6928(d).

139. *Id.* § 6928(d)(1).

140. Compare *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668-69 (3d Cir. 1984) (finding it unlikely that Congress could have intended to subject persons to criminal prosecution who acted without a permit irrespective of their knowledge), *cert. denied*, 469 U.S. 1208 (1985) with *United States v. Hoffin*, 880 F.2d 1033, 1038 (9th Cir. 1989) (declining to follow the *Johnson & Towers* analysis, reasoning that, had Congress intended knowledge of the lack of a permit to be an element of the offense, it easily could have said so), *cert. denied*, 493 U.S. 1083 (1990).

ardous waste . . . (A) without a permit . . . ; or (B) in knowing violation of any material condition or requirement of such permit."¹⁴¹ Given the manner in which this section is drafted, the question arises as to whether the word "knowingly" was intended to modify the permit language.

In *United States v. Johnson & Towers, Inc.*,¹⁴² the Third Circuit held that "knowingly" does modify the permit language.¹⁴³ The court reasoned as follows:

It is unlikely that Congress could have intended to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit unless that action was knowing (subsection (B)). Thus, we are led to conclude either that the omission of the word "knowing" in (A) was inadvertent or that "knowingly" which introduces subsection (2) applies to subsection (A).¹⁴⁴

Using this reasoning, the *Johnson & Towers* court concluded that the government must prove that the defendant knew that a permit was required and that the facility did not have a proper permit.¹⁴⁵

In *United States v. Hoflin*,¹⁴⁶ however, the Ninth Circuit reached the opposite conclusion, expressly rejecting the Third Circuit's analysis.¹⁴⁷ The court pointed out that the absence of the word "knowing" in subsection (A) is in stark contrast to its presence in subsection (B) and concluded:

Had Congress intended knowledge of the lack of a permit to an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the "knowingly" modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out.¹⁴⁸

Therefore, under this interpretation of the facility operator provision, neither knowledge of the permit requirement nor knowledge of

141. 42 U.S.C. § 6928(d)(2).

142. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

143. *Id.* at 669.

144. *Id.* at 668.

145. *Id.* at 669. The court stated that "it is evident that the district court will be required to instruct the jury, *inter alia*, that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit." *Id.*

146. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

147. *Id.* at 1038.

148. *Id.*

the permit status of the facility is an element of the offense.¹⁴⁹ To date, the other federal circuits that have considered this issue have chosen to follow the construction adopted by the *Hoflin* court.¹⁵⁰

With respect to the transporter provision of section 6928(d), however, the Ninth Circuit, in *United States v. Speech*,¹⁵¹ held that the government must prove that the defendant had knowledge of a facility's permit status.¹⁵² Under the transporter provision, it is unlawful to "knowingly transport[] or cause[] to be transported any hazardous waste . . . to a facility which does not have a permit."¹⁵³ The *Speech* court found that, unlike the facility operator, a transporter of hazardous waste is not in the best position to know the facility's permit status.¹⁵⁴ This decision was consistent with an earlier decision by the Eleventh Circuit in *United States v. Hayes International Corp.*¹⁵⁵ In *Hayes International*, the court found that knowledge of the permit status is required because the precise wrong that Congress intended to combat was transportation to an unlicensed facility, and to otherwise remove the knowing requirement would criminalize innocent conduct.¹⁵⁶ As an example of an innocent defendant, the court alluded to the transporter who reasonably believes that a site has a permit but in fact has been misled by the people at the site.¹⁵⁷

Although knowledge of the permit status is required under section 6928(d)(1), *Hayes International* made clear that the government is not required to prove the defendant had knowledge of the permit requirement.¹⁵⁸ The court reasoned, consistent with *International Minerals*, that where a transporter is dealing with hazardous mater-

149. *Id.* at 1038-39.

150. See *United States v. Dean*, 969 F.2d 187, 191-92 (6th Cir. 1992) (concluding that knowledge of the permit requirement does not need to be proved), *cert. denied*, 113 S. Ct. 1852 (1993); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991) (concluding that under § 6928(d)(2) the government need only prove factually that the defendant has no permit).

151. 968 F.2d 795 (9th Cir. 1992).

152. *Id.* at 796-98.

153. 42 U.S.C. § 6928(d)(1).

154. 968 F.2d at 796-97.

155. 786 F.2d 1499, 1503-04 (11th Cir. 1986).

156. *Id.* at 1504.

157. *Id.* In dicta, the First Circuit in *United States v. MacDonald & Watson Waste Oil Co.* also seemed to favor this interpretation because it "would eliminate the danger of convicting some hypothetical transporter who lacked information that the disposal facility was without the proper license." 933 F.2d 35, 47-48 (1st Cir. 1991). The court went on to note that "a person [] who treat[s], store[s], or dispose[s] of hazardous wastes will obviously be better positioned than at least some transporters to know what materials a particular permit covers." *Id.* at 48.

158. *Hayes Int'l*, 786 F.2d at 1504-05.

ials that pose a severe threat to public welfare, he can be *presumed* to be aware of the regulatory scheme.¹⁵⁹ Therefore, under the transporter provision, knowledge of the permit status is required but knowledge of the permit requirement itself is not.

4. *Knowledge That Materials Are Hazardous Wastes*

The final question of construction is whether the term "knowingly" modifies "hazardous wastes" or, in other words, whether the government must prove that the defendant knew that the materials he handled were hazardous.¹⁶⁰ Courts have agreed that knowledge of the hazard is an element of the offense, but only to the extent that the defendant was aware that the materials being handled had the "potential" for harm to others or the environment.¹⁶¹ Therefore, the government need not prove that the defendant actually knew that the waste was hazardous within the meaning of the regulations. Once again, the courts relied on *International Minerals*¹⁶² to reach this conclusion, whereby the defendant is presumed to be aware of the regulatory scheme.¹⁶³ Consequently, as long as the defendant has knowledge of the general nature of the materials and is not

159. *Id.* at 1502-03.

160. The term "hazardous waste" is defined under RCRA as:

[A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may — (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

161. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 612-13 (5th Cir. 1991) (holding that the word "knowingly" means no more than that the defendant knows factually that what is being stored has the potential for harm to others or the environment, and it is not required that he know that there is a regulation which says what he is storing is hazardous under RCRA); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (stating that the defendant does not have to know "that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes," but does have to know that chemicals in question are "hazardous" — inferentially approving the *Hoffin* and *Greer* definitions of "hazardous" as having "potential to harm others or the environment"), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Hoffin*, 880 F.2d 1033, 1039 (9th Cir. 1989) (approving a jury instruction which stated that the defendant must know the substance "had the potential to be harmful to others or to the environment"), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988) (affirming an instruction which stated that the defendant need only know that the chemical waste has the potential to be harmful to others or the environment); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502-05 (11th Cir. 1986) (stating that the defendant need not know "that the paint waste was a hazardous waste within the meaning of the regulations").

162. 402 U.S. 558 (1971).

163. *Id.* at 564-65.

under a mistaken belief that he is dealing with an innocuous substance (e.g., distilled water), he can be held criminally culpable.¹⁶⁴

F. *The Use of the Responsible Officer Doctrine to Impute Guilty Knowledge Under Section 6928(d)*

As the preceding discussion demonstrates, the courts interpret the "knowing" requirement broadly in order to effectuate its regulatory purpose as a public welfare statute. This has decreased the prosecutor's burden of proof so that the government may successfully prosecute a corporate officer based only on her knowledge of facts and circumstances, rather than knowledge of the regulatory scheme.¹⁶⁵ Even with this relaxed burden, however, federal prosecutors argue that it is difficult to prove corporate officers had actual knowledge of a RCRA violation because they often shield themselves from criminal liability by delegating "hands-on" responsibilities to subordinates.¹⁶⁶

To address this problem, aggressive prosecutors advocate the use of the responsible corporate officer doctrine under section 6928(d).¹⁶⁷ As discussed before, the doctrine serves to satisfy the knowledge requirement by allowing the fact-finder to infer guilty knowledge based on a corporate officer's position of responsibility.¹⁶⁸ Therefore, a defendant can be completely unaware of any facts or circumstances resulting in the offense but still be criminally liable since he should have known of the offense given his responsible position in the corporation.¹⁶⁹ Whether the RCO doctrine can be applied to RCRA's knowledge requirement has been left to the courts to decide under general legal principles.¹⁷⁰ The courts have not been completely consistent, however, in the manner in which they have

164. *Id.* No federal circuit court has yet been confronted with a case in which the defendant knew of the chemical but did not know it has the "potential to be harmful to others or the environment." However, in dicta, the *Baytank* court suggested that a finding that the defendant knew that the regulations listed it as a hazardous waste under RCRA might both be required and sufficient. 934 F.2d at 613 n.25.

165. *See, e.g., Baytank*, 934 F.2d at 612-13.

166. *See* Barrett & Clarke, *supra* note 11, at 883.

167. *Id.*

168. *See supra* notes 80-112 and accompanying text (discussing the RCO doctrine).

169. *See supra* notes 81-104 and accompanying text (discussing the application of the RCO doctrine in *Dotterweich* and *Park*).

170. *See supra* notes 108-12 and accompanying text (discussing the Report on the Conference Committee on the 1980 RCRA amendments on the issue of applicability of the RCO doctrine to the criminal penalties section).

exercised this authority. In *United States v. MacDonald & Watson Waste Oil Co.*,¹⁷¹ the First Circuit expressly held that the RCO doctrine may not be applied to section 6928(d) of RCRA.¹⁷² Although no decision has explicitly held otherwise, two other circuit court decisions, *United States v. Dee*¹⁷³ and *United States v. Baytank (Houston), Inc.*,¹⁷⁴ implicitly upheld the use of the doctrine.¹⁷⁵

1. *United States v. MacDonald & Watson Waste Oil Co.*

In *United States v. MacDonald & Watson Waste Oil Co.*,¹⁷⁶ D'Allesandro, the president and owner of MacDonald & Watson, was convicted under section 6928(d) of RCRA.¹⁷⁷ The company had a valid permit to transport and dispose of waste oils and soils contaminated with nonhazardous wastes on property known as the Poe Street Lot.¹⁷⁸ D'Allesandro, however, was convicted of transporting and disposing of toluene-contaminated soil (a listed hazardous waste) at the Poe Street Lot without the proper permit.¹⁷⁹ Although the prosecution had no direct evidence that D'Allesandro actually knew of this shipment, there was evidence that he was a "hands-on" manager of this relatively small firm.¹⁸⁰ In addition, there was proof that a consultant warned him on two earlier occasions that other shipments of toluene-contaminated soil had been received from other customers in violation of the permit.¹⁸¹

The First Circuit reversed D'Allesandro's conviction because the district court incorrectly charged the jury regarding the element of knowledge in the case of a corporate officer.¹⁸² The court instructed the jury as follows:

When an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in

171. 933 F.2d 35 (1st Cir. 1991).

172. *Id.* at 55; see *infra* notes 175-87 and accompanying text (discussing the facts and holding of *MacDonald & Watson*).

173. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

174. 934 F.2d 599 (5th Cir. 1991).

175. See *infra* notes 188-215 and accompanying text (discussing the facts of *Dee* and *Baytank*).

176. 933 F.2d 35 (1st Cir. 1991).

177. *Id.* at 39.

178. *Id.*

179. *Id.*

180. *Id.* at 42.

181. *Id.*

182. *Id.* at 50-51.

question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown.

[1] it must be shown that the person is an officer of the corporation, not merely an employee.

[2] it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.

And [3] . . . the officer must have known or believed that the illegal activity of the type alleged occurred.¹⁸³

The *MacDonald & Watson* court found that this instruction did more than simply permit a jury to decide whether to infer knowledge from relevant circumstantial evidence.¹⁸⁴ Instead, the court felt it created a "mandatory" presumption of guilty knowledge based on proof that a responsible corporate officer knew or even erroneously believed that illegal activity of the same type had occurred on another occasion.¹⁸⁵ The court reasoned that application of the RCO doctrine is limited to misdemeanor offenses under public welfare statutes that impose no scienter requirement.¹⁸⁶ Thus, the court refused to apply the doctrine to a felony provision of RCRA that has a knowledge requirement and carries possible imprisonment of five years and, for a second offense, ten.¹⁸⁷ The First Circuit reversed D'Allesandro's conviction and held that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility . . . is not an adequate substitute for direct or circumstantial proof of knowledge."¹⁸⁸

183. *Id.* The court noted that the third element as phrased seemed ambiguous at first glance because it could be read to require actual knowledge of the illegal activity. *Id.* at 51. However, because the district court earlier instructed the jury on actual knowledge, the First Circuit decided it was meant to convey only what it literally said: "D'Allesandro must have known or believed that illegal shipments of the type alleged had previously occurred." *Id.* (second emphasis added). This tied into the evidence that D'Allesandro had been advised on two earlier occasions that other shipments of toluene-contaminated soil had been received from other customers in violation of the permit. *Id.*

184. *Id.* at 52.

185. *Id.* at 53.

186. *Id.* at 51-52.

187. *Id.*

188. *Id.* at 55. The court did note, however, that willful blindness to facts constituting the offense may be sufficient to establish knowledge. *Id.*

At least one district court has also refused to allow the government to use the RCO doctrine as a means of satisfying the knowledge requirement. In *United States v. White*, four individuals and PureGro, Inc., their employer, were charged with violations of RCRA and the Federal Insecticide,

2. United States v. Dee

In *United States v. Dee*,¹⁸⁹ the Fourth Circuit affirmed the convictions of three individuals, Dee, Lentz, and Gepp, who were civilian engineers of the U.S. Army assigned to the Chemical Research, Development, and Engineering Center (Center) at Aberdeen Proving Ground in Maryland.¹⁹⁰ The defendants were involved in the development of chemical warfare systems.¹⁹¹ They were responsible for ensuring that the provisions of RCRA were fulfilled within their departments and that their subordinates were aware of and in compliance with those regulations.¹⁹² Gepp was responsible for the plant's daily operations.¹⁹³ Dee and Lentz were high-ranking managers who were aware of the storage problems, but neither personally supervised the treatment, storage, or disposal of hazardous waste nor involved himself with daily activities at the plant.¹⁹⁴

Dimethyl polysulfide was a chemical that was placed in drums and stored at the Center after a canceled weapons program eliminated the chemical's usefulness.¹⁹⁵ Lentz and Gepp failed to move the drums from a storage plant even though they were warned by a safety inspector that the plant's roof might collapse.¹⁹⁶ The roof ultimately did collapse, and the drums were crushed, causing the dimethyl polysulfide to leak into the floor drains.¹⁹⁷ Several months passed before the defendants responded to the spill, even though employees had complained of noxious odors.¹⁹⁸

The government prosecuted all three defendants for RCRA violations. Even though Dee and Lentz were not aware of the daily waste

Fungicide and Rodenticide Act. 766 F. Supp. 873 (E.D. Wash. 1991). The individuals loaded a tank of waste pesticide materials and rinseates onto a truck and sprayed them on a field, presumably to kill insects. *Id.* at 877. The defendants, including one corporate officer, were charged with conspiring to violate RCRA and with storing, transporting, and disposing of hazardous waste without a permit. *Id.* The government argued that the corporate officer should be criminally liable for the actions of all his employees because he knew, or should have known, of their actions by virtue of his position of responsibility. *Id.* at 894-95. The court held that "[t]he 'responsible corporate officer' doctrine would allow a conviction without showing the requisite specific intent. . . . [I]t is 'knowing,' not 'should have known' as the prosecution suggests." *Id.* at 895.

189. *Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

190. *Id.* at 743.

191. *Id.*

192. *Id.* at 744.

193. See Barrett & Clarke, *supra* note 11, at 865 (discussing the factual background of *Dee*).

194. *Id.* at 870.

195. *Dee*, 912 F.2d at 746.

196. *Id.*

197. *Id.*

198. *Id.*

disposal and storage activities of the plant, the government secured their convictions by convincing the district court to instruct the jury on the RCO doctrine.¹⁹⁹ The instruction read as follows:

Among the circumstances you may consider in determining the defendant's knowledge are their positions in the organization, including their responsibilities under the regulations and under any applicable policies. Thus you may, but need not, infer that a defendant knew facts which you find that they should have known given their positions in the organization, their relationship to other employees, or any applicable policies or regulation.

. . . .
[A]s managers . . . , defendants may be found guilty . . . if you find that the government has proved each of the following beyond a reasonable doubt:

First, that each defendant has a responsible relationship to the violation. That is, that it occurred under his area of authority and supervisory responsibility.

That each defendant had the power or the capacity to prevent the violation. That each defendant acted *knowingly* in failing to prevent, detect or correct the violation.²⁰⁰

Based on this instruction, the defendants may have been convicted because they "should have known," given their positions and responsibility, that the Center was failing to prevent, detect, or correct the RCRA violations.

This instruction would, therefore, seem to allow convictions based on a negligence standard of liability. The prosecutors in this case, however, contended that the defendants were not convicted for mere negligence because the district court properly emphasized that the defendant must have knowingly acted or failed to act.²⁰¹ Nevertheless, language in the *Dee* decision suggests that the defendants may have, in fact, been convicted based on their negligent conduct.²⁰² The court stated that "[n]egligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious conduct a crime."²⁰³ This statement brings into question whether the Fourth Circuit, in considering the appeal, actually found knowledge to be a requirement at all.

199. See Barrett & Clarke, *supra* note 11, at 884-85.

200. *Id.*

201. *Id.* at 885-86.

202. 912 F.2d at 747.

203. *Id.*

3. United States v. Baytank (Houston), Inc.

In *United States v. Baytank (Houston), Inc.*,²⁰⁴ the Fifth Circuit broadly interpreted the knowledge requirement. In so doing, the court implicitly applied the underlying theory of the RCO doctrine without specifically acknowledging its use.²⁰⁵ The government prosecuted Baytank, a company that deals in chemical transfer and storage, and three individual employees for violations of various environmental statutes.²⁰⁶ Two of these employees, Baytank's executive vice president and its operations manager, were found guilty under RCRA for knowingly storing hazardous wastes in drums and tanks without a permit.²⁰⁷ The district court, however, acquitted the two defendants, and the government appealed.²⁰⁸

The Fifth Circuit reversed the acquittals, relying heavily on the corporate officer's intimacy with, and responsibility for, Baytank's storage operations and their involvement with environmental compliance efforts.²⁰⁹ According to the court, these factors provided sufficient evidence to connect the two defendants with the violations.²¹⁰ The court stated:

There was evidence that during the periods covered by those counts both individuals were intimately versed in and responsible for Baytank's operations. Johnsen, as Operations Manager, had direct responsibility for most of the facility's day-to-day operations, including the filing of environmental compliance forms. Nordberg, as Executive Vice President, also was involved in the operations and had submitted the application for an NPDES permit under the Clean Water Act. The testimony was sufficient to allow the conclusion that both Nordberg and Johnsen knew of the storage of hazardous wastes in violation of the requirements for storage without a permit. Given the evidence of their detailed knowledge of and control over the storage operations at Baytank, the jury was entitled to conclude that they participated in the illegal storage charged²¹¹

Under *Baytank*, then, the government may not have to explicitly argue for the application of the RCO doctrine if it can persuade the courts to apply the doctrine implicitly through the use of circum-

204. 934 F.2d 599 (5th Cir. 1991).

205. *Id.* at 616-17; see Onsdorff & Mesnard, *supra* note 16, at 10,103-04.

206. *Baytank*, 934 F.2d at 599.

207. *Id.*

208. *Id.*

209. *Id.* at 616-17.

210. *Id.*

211. *Id.*

stantial evidence.²¹²

In sum, this Background section has demonstrated that by characterizing a violation of RCRA as a "public welfare offense," the federal circuit courts limited the mens rea requirement to knowledge of facts and circumstances, instead of requiring knowledge of the regulatory scheme.²¹³ This has significantly reduced the prosecutor's burden of proof. Even so, prosecutors have attempted to utilize both the willful blindness doctrine and the RCO doctrine.²¹⁴ These doctrines satisfy the mens rea requirement under section 6928(d) without proof of actual knowledge of material elements of the crime by allowing jurors to infer knowledge based on circumstantial evidence.²¹⁵ The use of these doctrines, however, has raised some concern that they may effectually lower the "knowing" standard of liability prescribed by Congress, so that individuals may be convicted for conduct that is, at worst, negligent.²¹⁶ The following analysis considers the legitimacy of these concerns.

II. ANALYSIS

Protecting human health and the environment is a legitimate and desirable objective of the federal government. Prosecuting corporate officers for crimes committed against the environment no doubt plays a significant role in achieving this objective. Moreover, because corporate officers have primary decisionmaking authority, the deterrent function that is the goal of environmental criminal enforcement is better served by actions against them. Therefore, it is important that upper-level employees not be allowed to insulate themselves from guilty knowledge by delegating "hands-on" responsibilities to subordinates. On the other hand, it would be grossly unfair to convict and imprison a corporate officer who was neither aware of the truth nor deliberately avoided learning the truth about a RCRA violation. Although the officer may have been negligent,

212. See Onsdorff & Mesnard, *supra* note 16, at 10,104 ("In *Baytank*, the Justice Department apparently applied the doctrine implicitly, presumably under the guise of circumstantial evidence, and the government was successful.").

213. See *supra* notes 117-33 and accompanying text (discussing generally the knowledge requirement).

214. See *supra* notes 51-54 and accompanying text (discussing the government's advocacy of both the willful blindness doctrine and the RCO doctrine).

215. See *supra* notes 53-112 and accompanying text (discussing generally the willful blindness and RCO doctrines).

216. See *supra* note 16 and accompanying text (pointing out the concern that merely negligent conduct may satisfy the knowledge requirement through the use of these doctrines).

reckless, or just plain stupid, Congress requires that he commit the offense "knowingly" to be culpable.²¹⁷

The willful blindness doctrine was developed in criminal jurisprudence to deal with these competing concerns.²¹⁸ This section therefore suggests both that proper application of the willful blindness doctrine does not offend the knowledge requirement and that Congress intended its use with respect to section 6928(d). In contrast, however, this Comment argues that crimes requiring knowledge do not provide the proper context for application of the RCO doctrine. The RCO doctrine requires a lower evidentiary showing that not only discourages the use of the willful blindness doctrine, but also creates a negligence, if not strict, liability standard for corporate officers.²¹⁹

A. The Proper Use of the Willful Blindness Doctrine Is Consistent with the Knowledge Requirement

The obvious defense to a criminal charge under section 6928(d) of RCRA is that the defendant lacked the knowledge required under the provision. A corporate officer might establish such a defense if he consciously avoided learning whether activities delegated to subordinates resulted in illegal conduct. The willful blindness doctrine was conceived in criminal jurisprudence to deal with this type of unfair practice.²²⁰ Under the doctrine, positive knowledge of an offense is not required.²²¹ Instead, the defendant is considered equally culpable for his deliberate ignorance.²²² Thus, under this doctrine, a jury may infer guilty knowledge from evidence that the defendant's suspicions were aroused but that he consciously avoided learning of illegal activity.

If the evidence at trial does not support an inference of willful blindness, however, the judge must refrain from using the instruction. Otherwise, the judge creates a substantial risk that the jury will infer guilty knowledge on the basis of mere negligence.²²³ For instance, consider a situation where a defendant who is responsible

217. See *supra* notes 42-54 and accompanying text (discussing the "knowing" mental state).

218. See *supra* notes 55-79 and accompanying text (discussing the willful blindness doctrine).

219. See *supra* notes 80-113 and accompanying text (discussing the RCO doctrine).

220. See generally *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (affirming the willful blindness doctrine when deliberate ignorance was present), *cert. denied*, 426 U.S. 951 (1976).

221. *Id.* at 700.

222. *Id.*

223. See *United States v. Lara-Velasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990).

for the overall operation of a large waste disposal facility is unaware that a subordinate employee allowed a customer to illegally dump hazardous waste. Assume that at trial, the government does not present evidence indicating that the defendant's suspicions were aroused or that he avoided learning of the illegal dumping. But assume further that the government does convince the jury that a reasonable person in the defendant's position should have known of the illegal dumping. Under these circumstances, the jury might improperly conclude that since the defendant should have known of the illegal activity, his lack of awareness must have been the result of deliberate ignorance. Thus, the jury will have inferred knowledge based on an objective negligence standard of liability, rather than from circumstantial evidence that tends to prove actual awareness.

To safeguard against this indiscriminate use of the willful blindness doctrine, courts should use the threshold test to determine the appropriateness of the instruction. Under this test, two inferences must be raised by the evidence at trial: 1) the defendant was subjectively aware of a high probability of the existence of the illegal activity; and 2) the defendant purposely contrived to avoid learning of the illegal activity.²²⁴ As discussed earlier, the first prong of this test is derived from the *Model Penal Code*, and acts to avoid convictions of merely negligent defendants by requiring evidence of subjective awareness.²²⁵ Therefore, it would not be enough for the government to merely present facts that tend to support an inference that a reasonable person would have known of the illegal activity. Instead, the facts must tend to support an inference that the defendant was actually aware of a high probability of the illegal conduct. For example, in the *Dee* case, the two corporate officers, Dee and Lentz, admitted that they were aware of the storage problems at the Aberdeen Proving Ground.²²⁶ Based on this evidence, a jury might properly infer that the two defendants were actually aware of a high probability that the dimethyl polysulfide was being improperly stored. If so, the first prong would be satisfied.

Once this first prong is established, the same evidence is likely to satisfy the second prong of the test as well. More specifically, when

224. *Id.* (citing *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988)); see *supra* notes 71-79 and accompanying text (discussing this threshold test).

225. See *supra* notes 73-77 and accompanying text (discussing the purpose of the first prong of this threshold test).

226. *United States v. Dee*, 912 F.2d 741, 748 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

a defendant is aware of a high probability of illegal activity, a failure to question the suspicious circumstances suggests that he purposefully contrived to avoid guilty knowledge.²²⁷ For instance, once the government established that Dee and Lentz were aware of a high probability that the dimethyl polysulfide was being improperly stored, they could point to the defendants' failure to investigate and remedy the illegal storage as suggestive of an intent to remain ignorant of the violation. This second prong cannot be ignored, however, because it is possible that a defendant could actively question or investigate suspicious circumstances, but not actually come to know of the illegal activity. Therefore, before a court gives a willful blindness instruction, the facts must tend to support the inference that the defendant's ignorance was purposeful and not merely the result of unfruitful inquiries or the deceptive practices of others.

Where both prongs of this threshold test are satisfied, the jury should be instructed on the willful blindness doctrine in cases brought under section 6928(d) of RCRA. As the foregoing analysis demonstrates, proper application of the doctrine avoids the risk of convicting merely negligent or innocent defendants. Moreover, use of the willful blindness doctrine ensures that prosecutors can effectively convict corporate officers under section 6928(d). Use of this doctrine provides a legal device for prosecuting upper-level employees who attempt to shield themselves from criminal liability by consciously avoiding guilty knowledge.

Most importantly, however, the applicability of this doctrine to RCRA is what Congress seems to have intended.²²⁸ As discussed earlier, reporting on the 1984 amendments of section 6928(d), the House Judiciary Committee explicitly stated that "[t]he term 'knowing' includes the concept of 'willful blindness.'"²²⁹ The Committee Report emphasized that it wanted knowledge to include willful blindness "so that it will not be possible for someone to avoid criminal responsibility by deliberately remaining ignorant about the material conditions and requirements of permits and of interim status regulation."²³⁰ This clear expression of legislative intent should

227. *Lara-Velasquez*, 919 F.2d at 952; see *supra* notes 78-79 and accompanying text (discussing the second prong of this threshold test).

228. H.R. REP. NO. 198, *supra* note 62, at 9, reprinted in 1984 U.S.C.C.A.N. at 5644 (discussing congressional intent regarding the willful blindness doctrine).

229. *Id.* Unlike the willful blindness doctrine, the Committee Report makes no mention of the RCO doctrine and its application to the criminal penalties section.

230. *Id.*

not be ignored.

B. The RCO Doctrine Is Inconsistent with the Knowledge Requirement

As much as the proper use of the willful blindness doctrine is consistent with the mens rea requirement of section 6928(d), the very nature of the RCO doctrine causes it to be incompatible with statutes requiring knowledge. The RCO doctrine, as it was conceived in *Park*, placed an affirmative duty on responsible corporate officers not only to prevent, but also to seek out and remedy violations that threaten public health and welfare.²³¹ This is essentially a strict liability concept in the sense that once responsibility is established, the defendant's mental state has no bearing on criminal liability. The *MacDonald & Watson* court correctly reasoned that because the RCO doctrine was established in respect to public welfare statutes with no scienter requirement, the very nature of the doctrine assumes that no inquiry into knowledge — actual or constructive — is necessary.²³² Moreover, the RCO doctrine originated in the context of misdemeanor crimes and was to some extent premised on “the historic conception [that] a ‘misdemeanor’ makes all those responsible for it equally guilty”²³³ There is no similar justification for failing to give effect to the knowledge requirement under RCRA, especially since the crime imposes harsh felony sanctions carrying possible imprisonment for up to ten years.

In addition, applying the RCO doctrine to RCRA will cause corporate officers to be subject to these harsh criminal sanctions as a result of conduct that is, at worst, negligent. As evidenced by the jury instruction given in *Dee*, a jury can infer knowledge where a corporate officer “should have known,” given his position and responsibility, that his company was failing to prevent, detect, or correct a RCRA violation.²³⁴ Despite the prosecutors' contrary contentions, this instruction by its very language encourages the jury to posit criminal liability based on a defendant's negligence. To secure a conviction, the government needs only to convince the jury at trial

231. *United States v. Park*, 421 U.S. 658, 672 (1975); see *supra* notes 83-105 and accompanying text (describing *Dotterweich* and *Park* as providing the foundation for the RCO doctrine).

232. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991); see *supra* notes 182-88 and accompanying text (noting that when knowledge is an express element of the crime, application of the RCO doctrine is inadequate).

233. *Dotterweich*, 320 U.S. at 281 (citation omitted).

234. See *Barrett & Clarke*, *supra* note 11, at 884-85 (providing the text of jury instructions).

that a reasonable person in the defendant's position "should have known" of the RCRA violation. Thus, this instruction permits the jury to infer knowledge based on an objective negligence standard of liability, rather than from circumstantial evidence that tends to prove knowledge.

Perhaps the most convincing evidence that the doctrine imposes a negligence standard of guilt is the comment made by the *Dee* court in affirming the defendants' convictions. The court stated that "[n]egligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious conduct a crime."²³⁵ Since the court itself is confused over the appropriate level of culpability, jurors can hardly be expected to preserve the elusive concept of mens rea under a RCO instruction.

In summary, because the RCO doctrine was developed under statutes with no mens rea requirement, crimes requiring knowledge simply do not provide the proper context for the doctrine's application. As a result, use of the doctrine fails to give effect to the knowledge requirement that Congress has expressly included under section 6928(d). Instead, defendants are susceptible to criminal conviction by virtue of what they should have known as a responsible corporate officer, regardless of whether they were actually aware of any facts or circumstances that led to the crime. This creates a negligence standard of liability for corporate officers under RCRA that was not intended by Congress.

*C. The Willful Blindness Doctrine Should Be the Sole
Prosecutorial Device Against Corporate Officers Who Shield
Themselves from Criminal Liability*

As discussed above, proper application of the willful blindness doctrine avoids the risk of convicting merely negligent defendants,²³⁶ but at the same time provides an alternative way of convicting corporate officers who shield themselves from guilty knowledge by delegating "hands-on" responsibilities to subordinates. Moreover, Congress approves of its use under section 6928(d).²³⁷ The willful blindness doctrine, however, will not become the dominant prosecutorial device for convicting corporate officers under RCRA

235. *United States v. Dee*, 912 F.2d 741, 747 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

236. *See supra* notes 54-79 and accompanying text (discussing the willful blindness doctrine).

237. H.R. REP. NO. 198, *supra* note 62, at 9, *reprinted in* 1984 U.S.C.A.N. at 5644.

unless courts diligently refuse to apply the RCO doctrine either explicitly or, as in cases such as *Dee* and *Baytank*, implicitly. This is because the evidentiary showing necessary to convict a corporate officer under the RCO doctrine is much less than is required under the willful blindness doctrine.

Under the RCO doctrine, prosecutors only need to present evidence that the defendant held a position of responsibility, allowing the jury to infer from that evidence that the officer should have known of the RCRA violation.²³⁸ Therefore, prosecutors do not have to prove that the defendant had personal knowledge of any facts or circumstances that resulted in the RCRA violation. In comparison, proper application of the willful blindness doctrine would require prosecutors to prove the defendant had personal knowledge of facts and circumstances in order to establish that the defendant was subjectively aware of a high probability of illegal activity.²³⁹ Therefore, the willful blindness doctrine's subjective standard of guilt is more difficult to prove than the RCO doctrine's objective standard and thus requires a higher evidentiary showing.

Given this disparity, the practical effect of the RCO doctrine is to render the willful blindness instruction superfluous. As a result, not only is the RCO doctrine's use inconsistent with the knowledge requirement because it creates a negligence standard of liability, but it further undermines the effective use of the willful blindness doctrine. Since Congress has endorsed the willful blindness doctrine under section 6928(d), the explicit or implicit application of the RCO doctrine undermines this congressional intent.

CONCLUSION

By following the reasoning in *International Minerals*, the federal circuit courts limited the mens rea requirement of section 6928(d) to knowledge of facts and circumstances, rather than requiring knowledge of the regulatory scheme. These decisions significantly reduced the government's burden of proof. Even with this relaxed burden, however, prosecutors argue that use of the RCO doctrine is necessary to convict corporate officers who insulate themselves from culpability by delegating "hands-on" responsibilities to subordi-

238. See *supra* notes 80-113 and accompanying text (discussing generally the applicability of the RCO doctrine as a basis for criminal liability).

239. See *supra* notes 54-79 and accompanying text (discussing generally the willful blindness doctrine).

nates. Unfortunately, this argument ignores that the willful blindness doctrine was conceived in criminal jurisprudence to deal with this very type of unfair practice. Moreover, the proper application of the willful blindness doctrine is consistent with both the knowledge requirement of section 6928(d) and congressional intent. In contrast, the RCO doctrine was developed under the provisions of the FDCA, which have no scienter requirement. As a result, the doctrine is not consistent with the mens rea requirement of knowledge under section 6928(d) of RCRA. Moreover, the doctrine requires a lower evidentiary showing that not only discourages the use of the willful blindness doctrine, but also creates a negligence standard of liability for corporate officers which was not intended by Congress.

Stefan A. Noe

