

SPECIAL REPORT

No. 193 | JUNE 30, 2017

Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

Edited by David B. Muhlhausen, PhD

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This paper, in its entirety, can be found at:
<http://report.heritage.org/sr193>

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Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

David B. Muhlhausen, PhD

Introduction

President Donald Trump has called for a systematic restructuring of the executive branch, led by the Office of Management and Budget (OMB). The President's Executive Order No. 13781 is "intended to improve the efficiency, effectiveness, and accountability of the executive branch."¹ More important, the OMB is directed "to propose a plan to reorganize governmental functions and eliminate unnecessary agencies."²

The OMB was instructed to present President Trump with a comprehensive executive branch-wide reorganization plan. Paraphrasing the executive order, the OMB's recommendations are to be guided by the following key considerations:

- Whether the functions of an agency are appropriate for the federal government or would be better left to state and local governments or to the private sector;
- Whether the functions of an agency are redundant with the functions of other agencies;

- Whether administrative functions for operating an agency are redundant with those of other agencies;
- Whether the costs of an agency are justified by the public benefits it provides; and
- What it would cost to shut down or merge agencies.³

This document, "Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues," is a follow-up report to "Blueprint for Reorganization: An Analysis of Departments and Agencies."⁴ The initial report contains numerous bold and timely recommendations to downsize and reform the executive branch. However, the success of the President's executive order faces considerable obstacles, which can be overcome with legislative changes that are explained in this follow-up report.

Chapters 1 to 4 of this report discuss the problems of a cluttered and overgrown federal government,

the history of executive branch reorganizations, and the various pathways for how a successful reorganization can take place today.

Chapters 5 to 12 detail cross-cutting issues that cut across a broad array of departments and agencies within the executive branch. Packed within these chapters are innovative ideas to fundamentally reshape the executive branch in order to achieve a more efficient and streamlined federal government. While the task at hand is daunting, achieving meaningful reform is possible—and critical for right-sizing the federal bureaucracy, as well as unleashing economic growth and prosperity for the American people.

Endnotes

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Chapter 1: The Problem with a Bloated, Ineffective Government

Rachel Greszler and David B. Muhlhausen, PhD

The U.S. government is enormous. It employs more people than the combined populations of Wyoming, Vermont, Alaska, North Dakota, and South Dakota,¹ and it consumes more than 20 cents of every dollar of American gross domestic product (GDP).² Its services expand far beyond national security and the rule of law—the federal government’s tentacles reach into virtually every sector and industry of the American economy.

This is not what America’s Founding Fathers envisioned. In his first inaugural address, Thomas Jefferson rhetorically asked, “[W]hat more is necessary to make us a happy and a prosperous people?” His answer:

A wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned.³

In many ways, the U.S. government lacks the sensibility and frugality envisioned and desired by the Founding Fathers. Americans clearly sense that the federal government has gone astray. According to a 2015 Gallup poll, 60 percent of Americans think the federal government has accumulated too much power.⁴ Similarly, a 2017 Rasmussen Report survey found that 52 percent of Americans favor a smaller government with fewer taxes, compared to 36 percent preferring more services and higher taxes.⁵

Today, federal departments and agencies perform functions for which they were never intended. This mission creep means that many departments perform functions that are extraneous to their original purposes. Moreover, related functions are scattered throughout the federal government. An example of this mission creep and scattering are the 47 job-training programs operated by the Departments of Labor, Education, Health and Human Services, Agriculture, the Interior, Veterans Affairs, Defense, Justice, and the Environmental Protection Agency.⁶ Putting aside the wisdom of government intervention for job training, such dispersion of job-training programs make no sense.

Scattering and mission creep among the various departments means that the President has inadequate control of the executive branch. Reorganizing the executive branch around the core missions of departments should contribute to better management. Additionally, a more coherently structured executive branch should make oversight by Congress easier.

Led by the Office of Management and Budget (OMB), President Donald Trump has embarked on what he intends to be an unprecedented restructuring of the executive branch of the federal government. As specified in the President’s executive order on this matter, the goal is a leaner, more efficient, and more accountable federal government that provides uniquely federal services not available in the private sector or through state and local governments. This includes modernizing the federal workforce and eliminating barriers to delivery of effective government services. Although not the primary goal, it will also include an overall reduction in the federal workforce.⁷

In response to the OMB’s request for ideas from any and all individuals and organizations, The Heritage Foundation has prepared these “Blueprint for Reorganization” reports to help achieve a leaner, more efficient, and more accountable federal government. America is still a great nation, but the federal government’s massive size and inefficient operations are increasingly preventing it from serving its people the way the Founding Fathers intended.

Scale of Government Employment

The federal government directly employs about 4.1 million workers, including about 1.4 million uniformed military members.⁸ Although direct civilian employment has not changed substantially over the past decades, the federal government’s de facto employment has grown substantially. Millions of workers rely either in part or entirely on federal contracts for their paychecks. Between just 2000 and 2012, federal spending on contracts increased by 87 percent, to \$518 billion in 2012.⁹ Moreover, the federal government provides roughly \$550 billion in aid to state and local governments. These funds indirectly pay all or some of the salaries of many state and local

government workers.¹⁰ The federal government also subsidizes certain private-sector workers and businesses through its many programs and tax credits and deductions. For example, the government directly funds certain research projects and its select tax credits and deductions subsidize workers in industries, such as farming, higher education, and housing.

Consequently, when policymakers consider reducing total federal spending, federal workers are not the only ones who object. The government's massive reach into nearly every state, city, and industry creates inertia in an ever-expanding government. When everyone has a stake in one government program or another, no one wants comprehensive government reform.

Provider of Everything But the Kitchen Sink

Once the provider of a national defense and judicial system, the federal government now directly provides or subsidizes just about every aspect of American life—from food, health care, housing, childcare, and transportation to cell phones, television and radio broadcasting, video games, and yoga classes.

Former Senator Tom Coburn (R-OK) and current Senator Rand Paul (R-KY) have documented some of the most egregious uses of federal taxpayer dollars. Senator Paul's most recent "Festivus" report documented the federal government paying for: Pakistani children to travel to the U.S. to attend space camp and visit Dollywood; Albanian tourism promotion; a winemaking curriculum; a flower show; and a study on whether college students' friends have an impact on their weight gain in their freshman year.¹¹

Notion of Free Services. A significant problem with government spending is that most people view government services as free. As any economist will point out, however, there is no such thing as a free lunch, or, in this case, a free government service.

An estimated 12.5 million¹² households receive "free" cell phone services through the Lifeline program, while all *other* cell phone users pay about \$2.50 per month to cover Lifeline and other federal communications programs.¹³ What is "free" to one person cannot be free to every person.

Spread across roughly 125 million households across the U.S.—and in comparison to the federal government's \$4.0 trillion in total spending—many of the government's spending line items can be

reduced to marginal, "free" services. Whereas individuals or companies would have to invest millions to undertake certain projects, special interests can petition the government to socialize—or marginalize—those costs into spare change for average Americans.

The problem is, however, that all of the government's special interests' unnecessary, wasteful, and duplicative spending quickly adds up. The sum of all of the government's "spare change" spending leaves the average American with little change to spare.

Spending Other People's Money. As the late Nobel Laureate Milton Friedman observed, we never spend other people's money as carefully as we spend our own.¹⁴ Individuals experience this as they dine out with the corporate credit card, as do children when they spend their parents' money. If a person does not have to earn the money he spends, he will not fully appreciate its value. Likewise, individuals in charge of spending taxpayers' dollars do not apply the same prudence they do in spending their own dollars.

Massive Budget Marginalizes Monumental Costs. That lack of prudence applied to the government's \$4.0 trillion budget marginalizes otherwise monumental decisions. If an individual had \$1,000 on the line, or a business had \$100,000 on the line, the individual and business would devote significant time and effort to that task or decision. With agency budgets in the hundreds of millions and hundreds of billions, it is not in many politicians' or bureaucrats' interest to devote significant time and resources to saving \$1 million here or even \$100 million there. This is especially true under the federal government's broken budget process which, due to lack of regular oversight and a misguided focus on outputs rather than outcomes, penalizes savings with smaller future budgets and rewards overruns with budget increases.

Monopoly on Federal Tax Collection. Individuals and businesses have to compete for limited financial resources. If a family does not spend its money wisely, it cannot just simply request a bigger paycheck the next month. Similarly, if a company spends money needlessly or pays for things that benefit only one or two people in the organization, it cannot just increase prices to cover those costs—at least not without losing customers. Even state and local governments face some competition to keep their residents from moving across state or county lines.

The federal government, however, has very little competition. Most U.S. citizens cannot freely pick up and move to another country of their choosing. If the government spends money on wasteful, inefficient, unnecessary, duplicative, and crony things, it can just raise taxes or deficits with little or no immediate consequence. This lack of competition and consequence establishes a lower bar for federal spending. That lower bar causes individuals, businesses, and state and local governments—and the federal lawmakers who represent them—to seek federal provision of goods and services that should instead be paid for by those who stand to benefit.

Deadweight Costs and Improper Payments.

Government redistribution involves significant leakage. That is, when the government takes \$1 from John to give to Sue, Sue ends up with significantly less than \$1. That is because it takes time and effort—that is, money—to collect that dollar, determine who is eligible to receive it, and ultimately deliver what is left of that dollar to Sue.

Take the example of the Lifeline program mentioned above which provides “free” cell phones and cellular service to as many as one-third of all U.S. households. A report by the non-partisan Government Accountability Office¹⁵ said that the Lifeline program is an inefficient and costly program, and an economic study found that every dollar of actual Lifeline support results in 65 cents of administrative costs.¹⁶ In other words, \$1 taken from John provides Sue with only 35 cents in benefits. That’s 65 cents in deadweight loss.

While the government spends vast sums of money administering programs and trying to make sure the money it collects goes only to the intended recipients, it still delivers tens of billions of dollars in improper payments each year. The federal government spends more than \$80 billion a year in Child Tax Credits and Earned Income Tax Credits, of which about \$21 billion—more than 25 percent—goes to improper payments.¹⁷ In 2016, the Medicare program doled out \$41 billion in improper payments.¹⁸

Costly and Inefficient Tax Subsidies. At least in principle, the federal government uses tax deductions and credits to encourage what it considers favorable behaviors. While some of those credits and subsidies do help to generate their intended effect, they do so with significant cost and sometimes adverse consequences, and others, such as the state and local tax deduction, are outright counterproductive.

By allowing federal taxpayers to deduct their state and local taxes, the federal government effectively pays for up to 40 percent of state and local government services.¹⁹ This encourages state and local governments to spend more than they otherwise would, and it causes them to turn appropriately private services into inappropriately public ones. For example, many jurisdictions provide public trash collection. That effectively reduces taxpayers’ trash collection costs by up to 40 percent, but it does so by shifting those costs to federal taxpayers. Why should residents in Wheeler County, Georgia, have to pay for a portion of the trash collection of residents in Montgomery County, Maryland—one of the richest counties in America?

While most federal spending redistributes money from higher-income Americans to lower-income ones, the state and local income tax does the opposite. Residents in the high-income states of New York and California receive 30 percent of all state and local tax deductions,²⁰ and according to the Congressional Budget Office, 80 percent of the value of the state and local tax deduction goes to the top 20 percent of taxpayers.²¹

Although not a direct part of government organization, a more efficient tax system—one that does not exclude large portions of the tax base and one that does not tax savings twice—could help limit the federal government’s size and improve its productivity.

Diminished Federalism

Congress has persistently expanded the scope and power of the federal government beyond its proper constitutional purview. The largest expansion in federal spending since World War II has occurred due to the creation of programs to address numerous social and economic concerns. This large and overextended federal bureaucracy fails at its most basic functions for being distracted by matters that belong in the proper purview of states, localities, and the private sector.

As Heritage’s *Index of U.S. Military Strength* demonstrates, America’s military services and the United States’ nuclear enterprise is suffering from force degradation resulting from many years of underinvestment, poor execution of modernization programs, and the negative effects of budget sequestration (cuts in funding) on readiness and capacity.²² Congress should refocus on its core constitutional responsibility to provide for the

nation's defense. Moreover, in order to make good on the promise to "care for him who has borne the battle," Congress also needs to exercise more oversight over the Department of Veterans Affairs (VA), to ensure the VA pursues reforms aimed at providing timely access to quality care for current veterans and a reassessment of how best to serve the health care needs of future veterans. Excessively long wait lines that have caused too many veterans to die before ever receiving care are completely unacceptable. These are just a few of the areas where the federal government has fallen short, as funding and congressional oversight resources have been stretched over an increasingly expansive federal bureaucracy.

Federal government activities should be strictly limited to those assigned to it by the Constitution. The tendency to search for a one-size-fits-all solution at the national level to a variety of economic and social concerns is misguided and harmful.

Compassion is often used as justification for federal expansion into the constitutional purview of state and local governments, and those suffering from problems such as crime and poverty deserve compassion. However, the federal government is handicapped at addressing these problems because it is not close to them. Just as a parent is better equipped at addressing the needs of his own child living in his home than of a distant relative living hundreds of miles away, state and local governments and private sector organizations are better-equipped to deal with the unique social and economic needs of the people in their immediate surroundings.

Although the federal government has an advantage in *funding* such programs—through its monopoly on federal taxation and seemingly limitless deficit-financed spending—its bankrolling ultimately inflates costs because those administering federal programs (often state and local officials) have little incentive to restrain expenses. This leaves current and future federal taxpayers with the tab for inefficient programs that are of little benefit—and potentially even detrimental—to them. Moreover, when the federal government intervenes in the provision of appropriately state and local or private services, it displaces existing programs, many of which better accommodate individuals' needs, and squelches innovation and experimentation that help determine best practices which ultimately can improve programs and services across the country.

One of the most egregious areas of government intervention in this way is in energy markets and research. By playing market investor through loan programs, research, development, and commercialization, the federal government jeopardizes taxpayers' dollars and positions itself in direct competition with businesses, entrepreneurs, non-profits, and universities. Both public and private investment dollars are drawn to politically preferred projects and technologies. Other potentially promising technologies lose out and artificially look more risky simply because they lack the full faith and credit of the federal government to back them. Government intervention in the energy economy is also entirely unnecessary. Energy is a multi-trillion-dollar international market, and the U.S. is home to one of the world's most attractive energy sectors. The private sector is capable in meeting energy needs and looking to the future. Congress should remove all policies that subsidize specific energy technologies, whether through the tax code or through government programs to research, develop, and commercialize energy technologies.

Ultimately, federal intervention into constitutionally state and local issues or private markets is a disservice to all Americans. Current and future federal taxpayers are forced to pay inflated costs for inefficient programs that are of little benefit—and potentially even detrimental—to them, and those who are supposed to benefit from newly federal programs instead receive subpar services through one-size-fits-all programs that fail to accommodate their unique needs and that lack the flexibility to adjust to changing circumstances and incentives.

While social and economic problems, such as poverty and crime, are serious and common to all states, these problems are almost entirely and inherently local in nature and should be addressed by state and local governments and the private sector. Moreover, federal intervention in private markets disrupts those markets and leaves taxpayers financing potentially inefficient resources and technologies and insolvent companies. Pouring federal funding into routine state and local or private operations misuses federal resources, distracts from the federal government's primary concerns, and squelches innovation and experimentation.

President Trump's executive order offers a rare opportunity to revive true federalism by refocusing the federal government on its essential responsibilities.

Summary

The U.S. federal government is simultaneously 10 times the government it once was and half the government it used to be. The government's massive growth and tremendous spending have made it bigger but not better. The good news is, with so much inefficiency and unnecessary spending, there is plenty of room for improvement.

President Trump has directed the OMB to embark on a wide-scale, unrivaled government reorganization. Only time will tell how much the Administration can achieve. As the President works with agencies as well as Congress, the perfect should not be the enemy of the good. There is no such thing as a perfect government. While government failures will always exist (just as market failures will always exist), there are seemingly endless ways to improve upon the current system. This document aims to provide policies and pathways to a better government that serves the whole of its people without imposing unjustified levies and burdens on them.

Endnotes

1. Total federal employment was about 4.9 million at the end of 2016. This includes 2.8 million civilian employees (including 619,000 postal employees) plus 2.1 million active-duty and reserve military workers (1.32 million active-duty and 817,000 reserves). Excluding military reserves, total federal employment was 4.1 million at the end of 2016. The combined populations of Alaska, North Dakota, South Dakota, Vermont, and Wyoming equal 3.575 million. Federal employment data for December 2016 is from the Bureau of Labor Statistics database, <https://data.bls.gov/pdq/SurveyOutputServlet> (accessed June 4, 2017). Military employment levels are from the Department of Defense's Defense Manpower Data Center, "DoD Personnel, Workforce Reports and Publications," https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (accessed June 1, 2017). Population data is from the U.S. Census Bureau, "State Population Totals Tables, 2010-2016," Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016, <https://www.census.gov/data/tables/2016/demo/popest/state-total.html> (accessed June 1, 2017).
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Chapter 2: Pathways to Reform

John W. York and David B. Muhlhausen, PhD

A major executive reorganization is long overdue. Republicans and many Democrats agree that the wasteful redundancies, stultifying layers of oversight, and inefficient divisions of labor that exist today contribute to a less effective and more expensive federal government. There is no shortage of ideas for how to pare down the overgrown administrative state and President Donald Trump has expressed a clear determination to lead such an effort.¹ The Office of Management of Budget (OMB) under the leadership of Director Mick Mulvaney is responsible for developing the Administration's executive branch reorganization plan.² In this chapter we explore the two pathways to reform that are available to the new Administration.

Unfortunately, the President, who has the strongest incentives to restructure the sprawling federal bureaucracy, is effectively barred from taking a comprehensive approach to reorganization. This is a change from the recent past. For most of the 20th century, Presidents had great leeway to rearrange the executive branch as they saw fit, subject to approval by Congress.³ But this authority expired in 1984 and has not been renewed by Congress.

Though executive reorganization is more difficult procedurally than in the past, it is still possible, as the creation of the Department of Homeland Security (DHS) and Consumer Financial Protection Bureau (CFPB), and President Bill Clinton's National Performance Review (NPR) demonstrate. However, these efforts fall far short of the broad aspirations of the Trump Administration. In fact, modern efforts to reform the federal government have been counterproductive in the sense that they have grafted massive new appendages onto the administrative state rather than reducing and consolidating functions. To make a more comprehensive and positive contribution than recent presidential Administrations, the Trump Administration will have to avoid the pitfalls that have forestalled serious reform in the recent past.

An Abbreviated History of Executive Reorganization

Despite the fact that the President presides over the executive branch, the bulk of the administrative

state is not of the President's creation. Most agencies are given life and form via legislation, are funded by appropriations from Congress, and enforce regulations authorized by statute. As such, the President cannot independently construct and reconstruct the branch over which he presides unless Congress authorizes him to do so. In 1932, Congress did just that. In that year, a heavily Democratic Congress drafted legislation to allow Herbert Hoover to draft a plan for the reorganization of the executive branch to be considered under expedited parliamentary procedures.⁴ From 1932 to 1983, Congress reauthorized the President's reorganization authority, with periodic adaptations, 16 times.⁵ With the exception of Gerald Ford, every President from Herbert Hoover to Ronald Reagan has had reorganization authority. Over time, however, Presidents were granted less latitude to restructure the executive branch, and plans were submitted to more rigorous procedural requirements before implementation.⁶

Presidents made frequent use of their reorganization power. On average, four reorganization plans were submitted each year the President had authority from Congress to submit such plans.⁷ Congress ordinarily allowed these plans to go into effect. Of the 126 plans submitted to Congress from 1932 to 1984, 93 of them—roughly 73 percent—went into effect.⁸ These plans varied greatly in terms of their scope and significance. Some plans involved relatively minor changes within a single agency, while others created agencies out of whole cloth as with the Department of Health, Education, and Welfare, the Environmental Protection Agency, and the Federal Emergency Management Agency.

The Supreme Court's 1983 decision in *Immigration and Naturalization Services (INS) v. Chadha* brought to a close the period of regular President-led executive branch reorganization. In a seven-to-two decision, the court ruled that the congressional veto, the procedure by which Congress could reject *ex post facto* reorganization plans submitted by the President, were unconstitutional. In light of the *INS v. Chadha* decision, Congress amended the 1939 Reorganization Act in 1983 to require both houses of Congress to vote to approve a President's plan. While in the past inaction on the part of Congress

would result in the President's plan going into effect, now congressional inaction would result in a plan's death. Perhaps due to the significantly higher procedural hurdle, President Reagan did not propose any reorganization plans after 1983. When the statutory window for new reorganization plans closed in 1984, Congress did not extend it. Though the Reorganization Act remains in the U.S. Code, Congress has not revisited it since.

While the President's reorganization authority is much diminished today, Presidents have led reorganization efforts—sometimes aided by congressional action—in the years since 1984. The Clinton Administration undertook one of the most persistent efforts to reform the federal bureaucracy in history. After the completion of a six-month study, the NPR made 1,200 proposals to cut unneeded regulations, improve “customer service,” expand the use of the Internet and digital technology across the federal government, eliminate unnecessary levels of bureaucracy and oversight, and increase coordination between federal, state, and local government.⁹ Nevertheless, the NPR focused more on reforming the bureaucracy to improve customer service rather than rethinking the organizational structure of the executive branch.

The impact of this effort is disputed. Vice President Al Gore, who oversaw the NPR, claimed it led to the elimination of 282,000 civil service jobs, but of that number 96 percent were part of the military's civilian workforce, which was reduced following the conclusion of the Cold War.¹⁰ Nonetheless, over a dozen badly outdated departments were eliminated with the help of newly elected congressional Republicans.¹¹ As important, the federal government began the transition from the analog to the digital age. Also, by some accounts, the NPR effectively addressed the growing sense of contempt among federal regulators for the private-sector businesses they oversaw.¹²

According to some analysts, President Clinton's reform effort was hampered by his Administration's deference to organized labor. Due to the influence of public-sector unions, the NPR did not impose any real consequences for poor performance or wastefulness on the part of civil servants nor did they create any incentives for outstanding work or thriftiness. In effect, the Clinton Administration attempted to change the way government functions without changing the incentives that drive its functionaries.

Further, the Clinton Administration did not try to reorganize the executive branch by consolidating departments and agencies by function.

In the post-Reorganization Act era, changes to the processes and procedures of government can be largely orchestrated from the Oval Office, though changing the architecture of government almost always requires coordination with Congress. While much of the NPR was accomplished without the assistance of Congress, the creation of DHS, a major goal of President George W. Bush, as well as of the CFPB promoted by Barack Obama, were accomplished legislatively. It is important to note that in both cases, an ordinarily lethargic Congress was spurred to action by existential threat: in the former case, 9/11; in the latter case, the Great Recession.

Lessons from the Past

The history of past executive reorganizations gives a sense of the opportunities and obstacles that await the new Administration. The good news is if history is any guide, executive branch reorganization may represent an opportunity for bipartisan action. Some of the most dogged efforts to reform the executive branch in recent years were undertaken by Democratic Presidents. Even President Obama put forward a sensible reorganization plan, which would have combined the six agencies primarily concerned with trade and commerce into one department, saving an estimated \$3 billion, and eliminated 1,000 federal jobs.¹³ Early in his presidency, Obama also admitted the need to shift the civil service from a seniority-based pay structure to a performance-based system in the public school system, something conservatives have long supported.¹⁴

Lesson #1: Iron Triangles Will Fight to Protect the Status Quo. Despite a surprising degree of bipartisan consensus on the need to address the unwieldy and too-often incompetent administrative state, serious reorganization efforts face stiff resistance. This is especially true of reforms that seek to shift authority from one agency to another, merge agencies, or eliminate agencies and departments altogether. In fact, over the last half century, only one cabinet-level department has been eliminated: the Post Office Department in 1971, which was immediately refashioned as an independent agency rather than eliminated altogether.¹⁵

The reason for resistance is clear: Once an agency is in existence, the administrators employed by

that agency, interest groups served by them, and the Members of Congress whose subcommittee oversees their work all have an interest in perpetuating it. These three elements—agency administrators, interest groups, and subcommittee members—are sometimes referred to collectively as “iron triangles”¹⁶ and they represent a formidable obstacle to eliminating even the most obviously outdated department (of which there are many).¹⁷ Any serious effort to reorganize the fragmented and hapless organization of the executive branch will disrupt long-established alliances between the bureaucracy, congressional committees, and special interest groups.

Lesson #2: Creating New, Redundant Entities Is Easier than Consolidating and Eliminating Existing Agencies. Due to the strong resistance to consolidating and eliminating existing agencies, reorganization efforts have focused on building new agencies and adding new layers of bureaucracy. Creating a new department or agency—as President Bush did with DHS and President Obama did with the CFPB—does not ignite nearly the same resistance. Though some will bridle as regulatory responsibility is transferred from old agencies to a new creation, there are typically at least as many Members of Congress, interest groups, and administrators who see a new agency as an opportunity to advance their career or expand their influence.

An additional reason why agencies and bureaus tend to proliferate is the difficulty of changing the organizational culture in an existing bureaucracy. Though un-elected bureaucrats are theoretically the agents of the elected representatives of the public, in reality regulators sometimes act according to their own preferences.¹⁸ This is especially true of agencies like the Environmental Protection Agency that tend to attract committed ideologues. Agencies may also adopt the viewpoint of the industry they are meant to regulate and, as a result, adopt a hands-off mentality vis-à-vis enforcement. When an agency ceases to faithfully carry out the intentions of elected officials, it is very difficult for either Congress or the President to reassert control, since firing recalcitrant bureaucrats is nearly impossible, and monitoring their every activity is equally inconceivable. It is much easier to build a new agency that will (it is hoped) develop an organizational culture and ideological bent that is in line with the preferences of the elected officials creating it.

Lesson #3: Not Everyone Wants to Rein in Bureaucrats. While, at least in theory, there is widespread support for addressing redundancies, overlap, and fragmentation caused by the federal bureaucracy’s unwieldy structure, progressives and conservatives tend to part ways when it comes to reining in the discretion of bureaucrats. Progressive advocacy of bureaucratic autonomy is rooted in both theoretical principle and pragmatic self-interest. Since the late 19th century, progressives have avowed faith in the expertise of a career civil service trained in the social sciences and a distrust of elected officials. Where politicians are focused on pleasing constituents and special interests, bureaucrats are focused only on crafting good public policy; where politicians are generalists, bureaucrats are subject matter experts; where politicians are driven by ideology, bureaucrats are driven by science. Thus, according to Woodrow Wilson, “the greater part of their affairs is altogether outside of politics.”¹⁹

Bureaucratic autonomy not only resonates with many progressives’ theories of government, it also accords with their self-interest and tends to advance their policy goals. By promising career bureaucrats limited oversight and accountability, progressives have forged a very close relationship with public-sector unions.²⁰ Some politicians who clearly understand the need to reform the career civil service have been unwilling to jeopardize relations with such powerful coalition partners.²¹ Further, because their natural tendency is to support progressive policy priorities and undercut conservative solutions, progressive elected officials understand that granting civil servants more autonomy means that their policy agenda will move forward even if their electoral fortunes sag.²²

Lesson #4: The Administration Should Engage Congress Early to Gain Support. The road to congressional acceptance of any meaningful reorganization of the executive branch will be paved with many obstacles and road blocks. In order to navigate this road, the Administration should actively engage Congress and seek its support. Any proposed plan created in a political vacuum may not be received well by Congress. Given the entrenched interests of congressional committee members to protect their turf and deliver programs to special interests, the Trump Administration will have to accurately gauge Congress’s tolerance for reform,

and in many cases, persuade recalcitrant Members of Congress to support meaningful reform.

By seeking out the views of Congress and other important stakeholders, the Administration can potentially achieve buy-in from Congress and avoid getting blindsided by unanticipated criticism and opposition. A savvy effort to foster political support early in the process will build a foundation that will pay dividends to the Administration and taxpayers.

Lesson #5: Relying on the Departments to Develop Their Own Reform Is Fraught with Risk. A new Administration with few political appointees in place should be wary of proposals for organizational reform coming from the depths of the bureaucracy. The goal of the President’s Executive Order No. 13781 is to fundamentally rethink the organization of the executive branch, not to protect and increase bureaucratic turf.

First, department heads may respond defensively to being asked to rethink how their departments are structured, and apprehensive about closing down agencies or seeing entities transferred from their control.²³ This is because, as Anthony Downs of the Brookings Institution observed, bureaucrats are not simply conduits for the policy choices of politicians, nor vessels for a political ideology that animates their every action. They are also motivated to preserve their jobs, work as they please, and defend their turf—what Downs calls “bureau territoriality.”²⁴ According to the Ronald Moe, “Reorganizations that are designed and implemented by the agencies themselves tend to meet parochial needs that may or may not be in concert with the President’s interests.”²⁵ Second, department heads may see an executive order as a chance for enlarging their departments.²⁶ According to Moe’s review of the history of reorganization efforts, previous “plans submitted by the departments generally called for the aggrandizement of their functions. In no instance did a department propose to limit or shed one of its functions.” For example, when President Warren Harding asked his department heads to develop an executive branch reorganization plan, Secretary of Commerce Herbert Hoover took the “opportunity to recast his Department as the centerpiece of a completely redesigned government” where the Commerce Department “would become a ‘super department’ responsible for government’s activities in industry, trade, and transportation.”²⁷

Principles of Reform

The most recent reorganizations of the executive branch have been hampered by the challenges described above. Instead of simplifying and streamlining government, massive new departments and agencies have been added; instead of taking on entrenched interests, obsolete agencies have been left intact; and instead of confronting ideological agencies head on, politicians have allowed increasing insulation of career civil servants from elected officials. In contrast, future reform must accomplish the following:

- Downsize government and reduce spending;
- Ease the regulatory burden on businesses and citizens;
- Prevent creation of new agencies;
- Reward performance and fiscal discipline of career civil servants;
- Re-establish elected officials’ control of career civil servants; and
- Make independent agencies accountable to the executive branch.

Downsizing Government and Reducing Spending. The first objectives of any executive branch reorganization should be to reduce the size of the federal government and save the taxpayer money. Cutting redundant and wasteful agencies and offices will not cure the country’s budget woes alone, but it is a critical first step to restoring fiscal responsibility in Washington. Stripping away layers of bureaucracy will likely improve the life for the average citizen and build credibility to tackle other fiscal challenges.

In addition, meaningful reform should eliminate agencies and programs that are ineffective or have no demonstrable and credible record of effectiveness. Far too frequently, the amount of money spent to alleviate social problems and the good intentions of the government-program advocates are considered measures of success. Instead, the degree to which social problems are reduced should be the measure of success. While continually spending taxpayer dollars on government programs may symbolize the

compassion of program advocates, it does not mean that social problems are being alleviated. Intentions are often confused with results.

For decades, large-scale evaluations using the “gold standard” of random assignment have consistently found that federal social programs are ineffective.²⁸ For example, a scientifically rigorous evaluation of Head Start, a pre-K education program for disadvantaged children, demonstrated that almost all the benefits of the program disappear by kindergarten.²⁹ Alarming, Head Start actually had a harmful effect on participants once they entered kindergarten, with teachers reporting that non-participating children were more prepared in math skills than the children who attended Head Start.

These failures extend to numerous other federal social programs. For instance, large-scale experimental evaluations of federal job-training programs intended to help individuals find jobs and increase their earnings have consistently failed.³⁰ Federal training programs intended to boost entrepreneurship and self-employment of the unemployed have not worked, either. And federal job-training programs targeting teens and young adults have been found to be extraordinarily ineffective.

The simple fact is that when it comes to federal social programs, there is a dearth of evidence suggesting that these programs work. Americans should not fear eliminating ineffective federal government programs.

Easing the Regulatory Burden on Businesses and Citizens. Overlap and fragmentation between executive agencies have real consequences for citizens and businesses.³¹ When multiple agencies are given nearly equivalent areas of responsibility—as is too often the case—the result is duplicative paperwork, unnecessary regulatory hurdles, and long work delays as permit requests make their way up and down labyrinthine flow charts. Any reorganization should approach reform from the perspective of the private landowner, taxpayer, or entrepreneur who bears the brunt of the cumbersome administrative state.

Preventing Creation of New Agencies. Creating new agencies, as both Presidents Bush and Obama did, may be easier than cutting obsolete or obstinate ones, but this does nothing to “drain the swamp” as President Trump memorably pledged to do. At best, a new agency can build a bridge across the most festering sections of the quagmire. More

often, new agencies end up reflecting the same perverse incentives and ideological biases that infest the rest of the administrative state.

Rewarding Performance and Fiscal Discipline of Career Civil Servants. In order for a reform of the bureaucracy to have meaningful and lasting consequences, it must do more than shuffle departments around and redraw organization charts. Without changing the incentives that drive career civil servants—especially mid-level and upper-level managers—structural changes will have little substantive impact on the way government actually operates. The new Administration should undertake not just structural and procedural reform, but also an *incentive-based reform* that will change government from the bottom up. By rewarding outstanding career civil servants, motivating those who have not realized their full potential, and incentivizing fiscal responsibility on the part of managers, civil servants will become integral partners in the reinvention of government. Chapter 8 (“Human Resources”) of this volume will discuss in more detail how this can be accomplished.

Re-Establishing Elected Officials’ Control of Career Civil Servants. Though most civil servants seek to carry out the law in accordance with the wishes of the people’s elected representatives, some seek to scuttle programs they disagree with and sabotage politicians they dislike. This behavior is not only undemocratic, it is dangerous. While no one wants to return to the spoils system of the 1800s, reforms initially meant to assure a non-partisan civil service by protecting bureaucrats from being fired without cause are now having the exact opposite effect. The new Administration must defend the principle that elected officials, not un-elected bureaucrats, are responsible for setting public policy. Career civil servants who seek to advance their own agenda instead of faithfully carrying out the policies set by the President and Congress should pay serious consequences. Further, independent agencies—the existence of which is premised on the idea that some government functions are too important to be left to the political process—should be brought back under the control of Congress and the President.

Making Independent Agencies Accountable to the Executive Branch. Independent agencies, such as the Federal Reserve, the Federal Communications Commission (FCC), and the Securities and Exchange Commission (SEC), were founded on the

faulty premise that some functions of the federal government are so technical and so important that they should be wholly insulated from popular opinion and elected officials. Admittedly, some policy areas demand extraordinary expertise that most legislators and Presidents, let alone average citizens, do not possess. In these areas, highly trained and experienced career civil servants are invaluable. But un-elected bureaucrats should always work at the behest of elected representatives, never the other way around.

Congress has attempted to make independent agencies more accountable in the recent past. The Independent Agency Regulatory Analysis Act of 2015 would have authorized the President to require independent regulatory agencies to comply with cost-benefit analysis requirements applicable to other federal agencies.³² Reviving such a statute would be a solid step in the right direction. A more thoroughgoing program of reform would include (1) bringing independent agencies under the purview of cabinet secretaries and (2) giving the President the power to dismiss agency heads and commission members just as he can the head of the Federal Bureau of Investigation and Central Intelligence Agency—positions that demand at least as much subject matter expertise and partisan neutrality as the SEC or FCC.

Pathways to Reform

Two pathways to reform are available to the new Administration. First, the President can act alone within the constraints imposed by existing statutes and the federal budget, which together limit the basic outline of the federal bureaucracy. Second, the President can enlist the support of Congress to implement truly transformative change.

Change by Presidential Action Only. The President can act alone within the constraints imposed by existing statutes and the federal budget, which together limit the basic outline of the federal bureaucracy. As Chapter 3 (“The President’s Reorganization Authority”) shows in depth, the President’s latitude to reorganize the federal government is constrained by federal statute. However, some smaller agencies—for example, the Citizen’s Stamp Advisory Committee and the Delaware River Basin Commission—are not specifically mentioned in the U.S. Code and were not created by Congress. Such agencies are the creation of the executive branch and can be dismantled without Congress’ permission. These branches of the federal government are, however, small in number and size.

While few agencies rest on an entirely extra-legal foundation, almost every agency’s organizational structure, mission, and operating procedures are determined largely by regulations and internal guidance. As many analysts and academics have noted, Congress too often crafts vague statutes filled with aspirational language but very light on detail. This leaves regulators to fill in the gaps.³³ Irresponsible as this practice is, it gives Presidents significant latitude to reform the bureaucracy without overstepping legal bounds. President Trump has already discovered how much can be done to reverse bad policies through executive order, but he has yet to use the considerable authority permitted by loosely worded statutes to change the structure of agencies.

Transformative Change Requires Congressional Support. Though the President can make some headway acting alone, truly transformative change will require Congress. Acting alone, the Trump Administration will not be able to implement an overarching, government-wide reorganization, and will have to pick targets of opportunity and act in piecemeal fashion. Given the amount of duplication, overlap, and fragmentation in the federal government, the Trump Administration needs congressional approval to achieve the goals of the executive order. The bureaucracy’s structure is long overdue for the sort of thorough overhaul that was common before 1984. Entrenched interests, intent on maintaining the status quo, will be a significant obstacle to major reform legislation in Congress. However, as Chapter 4 (“Congressional Action Needed for Reform”) shows, there are creative ways to structure legislation so that loftier motives win the day in Congress.

Conclusion

While most modern Presidents, both Republican and Democrat, have attempted to reinvent government, the federal bureaucracy has proven very resistant to thoroughgoing change. To succeed where so many others have failed, the Trump Administration will have to carefully plot a new course bearing in mind the problems that scuttled prior reform efforts. The overarching lesson to draw from the recent past is that despite near-unanimous agreement that the federal bureaucracy has become unwieldy and inefficient, no one wants cuts and consolidations to come at their expense. No matter how sensible a change to the status quo, fierce resistance from at least one

set of stakeholder interest groups, Members of congressional committees, and agency bureaucrats is all but guaranteed.

While vexing, these obstacles to executive reorganization must not deter the Trump Administration. Overlap, duplication, fragmentation, and the continuance of obsolete agencies makes the federal government both costly and ineffective. The American people deserve much better. Moreover, there are pathways to reform that have not yet been explored; Chapters 3 and 4 discuss several such avenues. Until every possible option is exhausted, there is still cause for hope. In fact, there is more cause for optimism today than any time in the recent past. As President Trump's electoral victory demonstrated, there is increasing frustration among the public with "the swamp." While the arcane details of executive reorganization are not generally the stuff of political slogans and campaign advertisements, they are now. Palpable pressure from the grassroots will give this President leverage in his negotiations with entrenched interests that no President in the recent past as enjoyed.

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Chapter 3: The President's Reorganization Authority

Paul J. Larkin, Jr., and John-Michael Seibler

Introduction

What is the President's authority to reorganize the executive branch? The Constitution vests authority in Congress as an instance of its power to enact legislation; to create the departments, agencies, and offices within the executive branch; to define their duties; and to fund their activities. The President may create, reorganize, or abolish an office that he established, but he cannot fundamentally reorganize the executive branch in direct violation of an act of Congress.

The President traditionally has "acquiesce[ed] in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch."¹ Prior Reorganization Acts were valuable to the President, in part because they incorporated expedited parliamentary procedures, and to Congress because they included a one-house legislative veto. But in 1983, the Supreme Court of the United States, in *INS v. Chadha*, found the legislative veto to be unconstitutional.² While Reagan-era legislation purported to offer a procedure to preserve presidential reorganization authority, that authority has never been used and so remains untested.³ The most recent Reorganization Act expired in 1984.

The President retains whatever reorganization authority Congress has delegated to him by law, as well as the ability to develop task forces and commissions and to work with Congress on reorganization plans. The exact limits of the President's authority to reorganize the executive branch "can properly be analyzed only in light of the particular changes which are proposed" and the relevant statutory authority.⁴

Does the President Have Authority Under Article II of the U.S. Constitution to Reorganize the Executive Branch on His Own?

Article II of the U.S. Constitution provides three potential sources of authority for the President to reorganize the executive branch on his own. Each, however, falls short of that goal.

First, the Executive Vesting Clause specifies that "[t]he executive Power shall be vested in a President

of the United States of America."⁵ This grants the President "those authorities that were traditionally wielded by executives" subject to constitutional constraints.⁶ The Founders did not leave this as a kingly power to change government functions at will. Rather, the power to execute the laws extends only as far as the laws allow.⁷ For entities created by Congress, the power to enact, amend, or abolish these executive departments and agencies and their functions belongs to Congress.⁸ Article II's Take Care Clause—that "[The President] shall take Care that the Laws be faithfully executed"⁹—refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."¹⁰

Yet the U.S. Supreme Court has recognized that the Executive Vesting Clause did not compel the President to execute the laws alone.¹¹ "To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders."¹² May the President therefore reorganize the executive branch through subordinates in executive departments and agencies? Two more Article II clauses are pertinent, but the answer remains no.

Second, the Appointments Clause reads, "The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... [the] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."¹³ That provision enables the President to select officers who will implement his policies.¹⁴ Subject to statutory restrictions,¹⁵ the President may remove those who prove obstinate,¹⁶ but the power to appoint and remove officers "alone does not ensure that all decisions made by administrative officials will accord with the President's views and priorities."¹⁷

Third, the Opinion Clause enables the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."¹⁸ This allows the President to obtain information from, and to "consult with and try to

persuade,” his subordinates in the course of their official conduct.¹⁹ President George Washington used this process to direct subordinates’ official actions, but the relevant statutes “commonly delegated final authority directly to him.”²⁰ These provisions do not enable the President to reorganize the executive branch on his own or through subordinates.²¹

Congress, not the President or the U.S. Constitution, creates and organizes the offices and departments that the Appointments and Opinion Clauses address by virtue of the Necessary and Proper Clause.²² “The organizational function of this clause was recognized from the outset. Among Congress’s first acts were establishing executive departments and staffs.”²³ When the First Congress created the Treasury Department, for example, it established therein “distinct offices—Secretary, Comptroller, Auditor, Treasurer and Register—and their duties.”²⁴ Congress sets “to whatever degree it chooses, the internal organization of agencies,” their missions, “personnel systems, confirmation of executive officials, and funding, and ultimately evaluates whether the agency shall continue in existence.”²⁵

Congress may delegate broad authority to executive branch officials to implement, change, and even reorganize their functions.²⁶ The First Congress, however, “set a precedent” of delegating “statutory powers and instructions...to specified officials of or below Cabinet rank, rather than to the President.”²⁷ The President’s Article II authority to oversee those powers does not amount to directing every decision that is made by someone within the executive branch.²⁸

Congress can also use the Appropriations Clause to curb the President’s reorganization efforts, even efforts authorized by substantive statutes.²⁹ The power of the purse remains “the most complete and effectual weapon” against “carrying into effect” an executive reorganization plan and any other “just and salutary measure.”³⁰ An executive branch officer’s statutory authority to execute reorganization schemes “can only be affected by passage of a new law.”³¹ But Congress can simply amend an appropriations law if it does not like where reorganization is headed,³² and the Anti-Deficiency Act prohibits officers and employees of the U.S. government from going around the will of Congress in any way that involves incurring obligations in excess of appropriated funds.³³

The result is that the President does not have constitutional authority to reorganize the executive branch on his own.

Does the President Have Statutory Authority to Reorganize the Executive Branch?

Under current law, the President has no statutory authority to reorganize the executive branch, except where acts of Congress delegate authority to make particular changes.³⁴

In 1932, Congress first enacted law delegating to the President broad authority to reorganize the executive branch according to specific guidelines.³⁵ Since then, nine Presidents have sought and secured similar authority from Congress.³⁶ The last to exercise that authority was Jimmy Carter; the last to receive it was Ronald Reagan. The most recent Reorganization Act expired in December 1984.³⁷ Since then, Presidents George W. Bush and Barack Obama sought reorganization power from Congress,³⁸ which introduced but did not enact legislation that would have granted them reorganization authority.³⁹

The history of delegated legislative authority for Presidents to reorganize the executive branch is informative for future usage with one caveat. Those acts were valuable in part because they provided expedited parliamentary procedures—in particular, a one-house legislative veto, which enabled either house of Congress to reject a President’s reorganization plan.⁴⁰ In 1983, the U.S. Supreme Court held that the one-house veto violated the U.S. Constitution’s bicameralism and presentment requirements for lawmaking.⁴¹ In 1984, Congress enacted an alternate procedure along with reorganization authority: “that a joint resolution be introduced in both the House and Senate upon receipt of a reorganization plan.”⁴² No vote, no plan; no presidential signature, no plan. While that seems to follow the constitutional lawmaking process, President Reagan never used his reorganization authority, and these procedures remain untested.⁴³

As a result, the President currently has no general statutory authority to reorganize the executive branch.⁴⁴ Yet Congress could decide to enact a law similar to the last-used Reorganization Act of 1977 or one of its progenitors.⁴⁵ Even without statutory authority, the President may convene a task force or commission to study concerns within the executive branch and recommend changes to Congress.⁴⁶ History provides several examples that met with varying degrees of success.⁴⁷

Conclusion

The President may be able to accomplish some reorganization goals through particular statutory delegations of authority, executive orders, department memos, management policies, and other devices. But to accomplish major reorganization objectives, he will need explicit statutory authority from Congress, a viable post-*Chadha* procedure to enact reorganization plans,⁴⁸ and a feasible implementation strategy.⁴⁹ As for the details of any reorganization plan, exact limits on the President's authority to reorganize the executive branch "can properly be analyzed only in light of the particular changes which are proposed" and the relevant constitutional provisions and statutory authority.⁵⁰

Appendix

Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984))

5 U.S.C. § 903—Reorganization plans:

(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary. Any plan may provide for—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the authorization of an officer to delegate any of his functions; or

(6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.

The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reorganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title.

(b) The President shall have a reorganization plan delivered to both Houses on the same day and to each House while it is in session, except that no more than three plans may be pending before the Congress at one time. In his message transmitting a reorganization plan, the President shall specify with respect to each abolition of a function included in the plan the statutory authority for the exercise of the function. The message shall also estimate any reduction or increase in expenditures (itemized so far as practicable), and describe any improvements in management, delivery of Federal

services, execution of the laws, and increases in efficiency of Government operations, which it is expected will be realized as a result of the reorganizations included in the plan. In addition, the President's message shall include an implementation section which shall (1) describe in detail (A) the actions necessary or planned to complete the reorganization, (B) the anticipated nature and substance of any orders, directives, and other administrative and operational actions which are expected to be required for completing or implementing the reorganization, and (C) any preliminary actions which have been taken in the implementation process, and (2) contain a projected timetable for completion of the implementation process. The President shall also submit such further background or other information as the Congress may require for its consideration of the plan.

(c) Any time during the period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it, but before any resolution described in section 909 has been ordered reported in either House, the President may make amendments or modifications to the plan, consistent with sections 903–905 of this title, which modifications or revisions shall thereafter be treated as a part of the reorganization plan originally transmitted and shall not affect in any way the time limits otherwise provided for in this chapter. The President may withdraw the plan any time prior to the conclusion of 90 calendar days of continuous session of Congress following the date on which the plan is submitted to Congress.

5 U.S.C. § 908—Rules of Senate and House of Representatives on reorganization plans:

Sections 909 through 912 of this title are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any reorganization plans transmitted to Congress (in accordance with section 903(b) of this chapter [1]) on or before December 31, 1984; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

5 U.S.C. § 909—Terms of resolution:

For the purpose of sections 908 through 912 of this title, “resolution” means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: “That the Congress approves the reorganization plan numbered _____ transmitted to the Congress by the President on _____, 19____,” and includes such modifications and revisions as are submitted by the President under section 903(c) of this chapter. The blank spaces therein are to be filled appropriately. The term does not include a resolution which specifies more than one reorganization plan.

5 U.S.C. § 910—Introduction and reference of resolution:

(a) No later than the first day of session following the day on which a reorganization plan is transmitted to the House of Representatives and the Senate under section 903, a resolution, as defined in section 909, shall be introduced (by request) in the House by the chairman of the Government Operations Committee of the House, or by a Member or Members of the House designated by such chairman; and shall be introduced (by request) in the Senate by the chairman of the Governmental Affairs Committee of the Senate, or by a Member or Members of the Senate designated by such chairman.

(b) A resolution with respect to a reorganization plan shall be referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolution’s introduction.

5 U.S.C. § 911—Discharge of committee considering resolution:

If the committee to which is referred a resolution introduced pursuant to subsection (a) of section 910 (or, in the absence of such a resolution, the first resolution introduced with respect to the same reorganization plan) has not reported such resolution or

identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to be discharged from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

5 U.S.C. § 912—Procedure after report or discharge of committee; debate; vote on final passage:

(a) When the committee has reported, or has been deemed to be discharged (under section 911) from further consideration of, a resolution with respect to a reorganization plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The motion shall not be subject to amendment, or to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

(b) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is passed or rejected shall not be in order.

(c) Immediately following the conclusion of the debate on the resolution with respect to a reorganization plan, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(d) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a reorganization plan shall be decided without debate.

(e) If, prior to the passage by one House of a resolution of that House, that House receives a resolution

with respect to the same reorganization plan from the other House, then—

(1) the procedure in that House shall be the same as if no resolution had been received from the other House; but

(2) the vote on final passage shall be on the resolution of the other House.

Endnotes

1. Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation, 9 Op. O.L.C. 76, 78 (1985).
2. *INS v. Chadha*, 462 U.S. 919 (1983).
3. See Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984)), pertinent parts published *supra* as appendix; RONALD C. MOE, ADMINISTRATIVE RENEWAL: REORGANIZATION COMMISSIONS IN THE 20TH CENTURY 114-117 (2003).
4. President's Authority to Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission, 1 Op. O.L.C. 248, 251 (1977).
5. U.S. CONST. art. II, § 1, cl. 1.
6. "Hence the President cannot declare war, grant letters of marque and reprisal, or regulate commerce, even though executives had often wielded such authority in the past." And "the President cannot make treaties or appointments without the advice and consent of the Senate. Likewise, the President's pardon power is limited to offenses against the United States and does not extend to impeachments or violations of state law." Sai Prakash, *Executive Vesting Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, <http://www.heritage.org/constitution/#!/articles/2/essays/76/executive-vesting-clause> (last visited May 9, 2017).
7. See, e.g., Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. O.L.C. 22 (2002); Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Prakash, *supra* note 6 (arguing that the U.S. Supreme Court "apparently has accepted the notion that the Executive Vesting Clause grants powers beyond those enumerated in the remainder of Article II") (citing *Myers v. United States*, 272 U.S. 52 (1926); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Morrison v. Olson*, 487 U.S. 654 (1988)).
8. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that the President's line-item veto granted by the Line Item Veto Act of 1996 was unconstitutional).
9. U.S. CONST. Art. II, § 3. "The Take Care Clause...is best read as a duty that qualifies the President's executive power." Sai Prakash, *Take Care Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, <http://www.heritage.org/constitution/#!/articles/2/essays/98/take-care-clause> (last visited May 13, 2017).
10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); see also Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 60-69 (1994).
11. "He must execute them by the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).
12. *Marbury v. Madison*, 5 U.S. 137, 166 (1803).
13. U.S. CONST. art. II, § 2, cl. 2.
14. Alexander Hamilton explained that department heads "ought to be considered as the [President's] assistants or deputies...and on this account they...ought to be subject to his superintendence." THE FEDERALIST No. 72, at 436.
15. See *Morrison*, 487 U.S. 654 ("independent counsel provisions of the Ethics in Government Act of 1978" did not violate separation of powers); Sunstein & Lessig, *supra* note 10, at 116-17.
16. See *Myers*, 272 U.S. at 135; *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 489 (1831) (the President's power of "removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law").
17. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2385 n.307 (2001).
18. U.S. CONST. art. II, § 2, cl. 1. See also Akhil R. Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 8 (2002) (The "clause implies the specification of orders to, and the evaluation of the performance by, someone to whom the President has delegated executive power. The analogy is to a principal and agent relationship.").
19. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 669 (1984). Executive branch "officers cannot keep the President in the dark about how their departments are operating." Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1879 (2015).
20. Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 L. & CONTEMPORARY PROBLEMS 462, 463 (1970).
21. See Amar, *supra*, note 18, at 653 ("Even as the sole apex of awesome [executive] powers...the President appears as a limited figure—as a Generalissimo, CEO, and Executioner *under law*."); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 60 n.264 (2009) (citing *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981), for the idea that "an administrative rulemaking may be overturned on the grounds of political pressure if 'the content of the pressure...is designed to force [the agency] to decide upon factors not made relevant by Congress in the applicable statute' and if the agency's determination was actually affected by the 'extraneous considerations.'").
22. U.S. CONST. art I, § 8, cl. 18 ("The Congress shall have Power To...make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *M'Culloch v. Maryland*, 17 U.S. 316 (1819); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 83 (1948).

23. David Engdahl, *Necessary and Proper Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, <http://www.heritage.org/constitution/#/articles/1/essays/59/necessary-and-proper-clause> (last visited May 13, 2017).
24. Mansfield, *supra* note 20, at 463.
25. CONG. RES. SERV., RL30876, THE PRESIDENT'S REORGANIZATION AUTHORITY: REVIEW AND ANALYSIS 2 (Mar. 8, 2001) (hereafter CRS 2001).
26. See Kendall v. U.S. *ex rel.* Stokes, 37 U.S. 524, 610 (1838) ("There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper...and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1937) (upholding a secretarial order enforced after an executive reorganization plan).
27. Mansfield, *supra* note 20, at 463.
28. See Kagan, *supra* note 17.
29. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").
30. James Madison, THE FEDERALIST No. 58. For instance, in 1989, the U.S. Department of Justice sent Congress its plans to reorganize the Office of Legal Policy under statutory authority to undertake "significant reprogramming, reorganizations, and relocations" within the department. "[C]ertain Congressmen" disapproved and barred any further implementation of departmental reorganization schemes by writing the following into appropriations law: "None of the funds provided in this or any prior Act shall be available for obligation or expenditure to relocate, reorganize, or consolidate any office, agency, function, facility, station, activity, or other entity falling under the jurisdiction of the Department of Justice." See Department of Justice Authority Regarding Relocations, Reorganizations, and Consolidations, 13 Op. O.L.C. 280, 281 (Aug. 28, 1989).
31. 13 Op. O.L.C. at 283 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).
32. See *United States v. Dickerson*, 310 U.S. 554, 555 (1940).
33. 31 U.S.C.A. § 1341 (West) (1990).
34. See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POLITICS 1095, 1096 (2002) (identifying "over 240 administrative agencies" that Presidents "constructed" after 1950 "through executive orders, orders issued by department secretaries or agency heads, and reorganization plans"); John Yoo & Todd Gaziano, PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS, AM. ENTERPRISE INST. 8 (Mar. 2017) ("A basic principle of the Constitution is that a branch of government can reverse its earlier actions using the same process originally used."); Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. Rev. 523 554-59 (2008) (criticizing unilateral executive reorganization).
35. See *Isbrandtsen-Moller*, 300 U.S. 147 (noting that a 1932 appropriations law authorized the President to abolish or transfer functions of "any commission, board, bureau, division, service, or office in the executive branch of the Government").
36. They are Presidents Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, Jimmy Carter, and Ronald Reagan. See CONG. RES. SERV., RL31446, REORGANIZING THE EXECUTIVE BRANCH IN THE 20TH CENTURY: LANDMARK COMMISSIONS (June 10, 2002) (hereafter CRS 2002). Past reorganization plans have shaped much of the modern executive branch. For example, they created the Department of Health, Education and Welfare; Drug Enforcement Agency; Environmental Protection Agency; and Federal Emergency Management Agency (see Howell & Lewis, *supra* note 34, at 1097) and established the Executive Office of the President. See CONG. RES. SERV., R42852, HENRY B. HOGUE, PRESIDENTIAL REORGANIZATION AUTHORITY: HISTORY, RECENT INITIATIVES, AND OPTIONS FOR CONGRESS 31-32 (Dec. 11, 2012) (hereafter CRS 2012).
37. See CRS 2001, *supra* note 25, at n.1. Presidents George H. W. Bush and Bill Clinton did not seek statutory reorganization authority. See CRS 2012, *supra* note 36.
38. CRS 2012, *supra* note 36, at 32.
39. See H.R. 10, § 5021 (108th Congress) and S. 2129 (112th Congress) and H.R. 4409 (112th Congress).
40. See *Chadha*, 462 U.S. 919; CRS 2012, *supra* note 36; Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMPORARY PROBLEMS 273 (1993).
41. *Chadha*, 462 U.S. 919. *But see* Effect of *INS v. Chadha* on the Authority of the Secretary of Defense to Reorganize the Department of Defense Under U.S.C. § 125, 8 Op. O.L.C. 82, 93 (1984) (arguing that prior "reorganization authority survives the fall of the veto").
42. CRS 2001, *supra* note 25, at 8. See Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984)), pertinent parts published *infra* as appendix.
43. See MOE, *supra* note 3, at 114-117.
44. Arguably, "what little advantage remained in the reorganization plan process, namely an expedited procedure with a guaranteed vote, was more than matched by the disadvantages of" other procedural and substantive requirements. *Id.* at 116-17. So "[i]n short," it may be easier "to simply follow the regular legislative process." *Id.* But if left entirely to Congress, "we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere." Fisher, *supra* note 40, at 278 (citing 75 Cong. Rec. 9644 (1932) (statement of Sen. David Reed (R-PA))).

45. See generally CRS 2012, *supra* note 36. The 1977 Act offered broad authority to consolidate inter- and intra-agency functions as well as “the abolition of all or a part of the functions of an agency, except” for any “enforcement function or statutory program.” 5 U.S.C. § 903. It also prohibited the President from certain actions such as creating, abolishing, or completely consolidating any executive departments. See 5 U.S.C. § 905 (1977); CRS 2001, *supra* note 25, at 6.
46. For instance, in 1993, President Bill Clinton “simply announced” the creation of a National Performance Review with “no statutory authority,” staff, funding, or “work plan.” CRS 2002, *supra* note 36, at 91. Vice President Al Gore shaped it into an interagency task force to make the executive branch leaner and more entrepreneurial. It eventually claimed to have ended “the era of big government,” “reduced the size of the federal civilian workforce by 426,200 positions,” and delivered “savings of more than \$136 billion...by eliminating what wasn’t needed.” *Id.* at 96.
47. See generally Mansfield, *supra* note 20; John W. Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQ. L. REV. 89, 91 (1949); HARRY S. TRUMAN LIBRARY INST., *Truman and the Hoover Commission*, 19 WHISTLE STOP (1991), <https://www.trumanlibrary.org/hoover/commission.htm>.
48. See CRS 2001, *supra* note 25, at 8 (discussing H.R. 1314 and the Reorganization Act of 1984).
49. See GGD-81-57, REPORT OF THE U.S. GENERAL ACCOUNTING OFFICE TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, IMPLEMENTATION: THE MISSING LINK IN PLANNING REORGANIZATIONS (Mar. 20, 1981), <http://www.gao.gov/assets/140/132455.pdf> (advising that implementation plans will help to avoid past staffing, funding, office space, accounting systems, and other problems that distracted officials from their missions).
50. 1 Op. O.L.C. 248, 251.

Chapter 4: Congressional Action Needed for Reform

John W. York and David B. Muhlhausen, PhD

As Chapter 3 illustrates, President Donald Trump needs the cooperation of Congress to significantly reorganize the federal bureaucracy. To truly fulfill his promise to “drain the swamp,” he will need to enlist the help of Congress by treating it, correctly, as a coequal branch. After all, the President may supervise and direct the executive branch, but its major contours are determined by statute. Recent Presidents have found Congress to be an insuperable obstacle to their plans for sweeping transformation of government.¹ Lest President Trump’s plans also end up in the dustbin of history, his Administration will have to find a way to entice Congress to act—despite the strong incentives for remaining inert.

Obstacles to Reform in Congress

There are at least three major obstacles that stand in the way of major legislation to reorganize the executive branch:

- Turf protection;
- (Dis)trust of the civil service; and
- Polarization of presidential support.

Turf Protection. The most trenchant of these obstacles is the desire of Members of Congress to retain the size and strength of the agencies under their committee or subcommittee’s purview. While all Members of Congress might agree that something must be done to pare back the sprawling federal bureaucracy in principle, each individual Member of Congress is likely to adopt a “not in my backyard” attitude to any concrete proposal.

(Dis)trust of the Civil Service. The second obstacle to congressional action on reorganization is partisan disagreement about the degree of oversight under which civil servants should operate. Democrats generally trust career civil servants to enforce the law as drafted by Congress and as clarified by the President’s guidance. Republicans tend to view careerists with more suspicion, believing they sometimes follow their own lights rather than working in good faith to enact and enforce the will of elected officials. As a result, Democrats often see layers

of oversight, various reporting requirements, and other procedural speed bumps as so much bureaucratic red tape, whereas Republicans see them as necessary constraints.

Polarization of Presidential Support. A third obstacle to significant congressional action on reorganization is partisan opposition to the President himself. As an example, President Barack Obama asked for reorganization authority in order to consolidate six agencies that primarily regulate trade and commerce. Congressional Republicans, who support cutting waste and consolidating duplicative agencies in principle, did not lend their support during the 112th Congress to the Reforming and Consolidating Government Act of 2012 (S. 2129) that would have empowered President Obama to make these changes, and it died long before reaching the floor for a vote. Today, Democrats in Congress may act in the same manner. Not wanting to hand a Republican President a political victory, they may stand against a reorganization plan even if they support some of its provisions.

Recent efforts to reorganize the executive branch have not fallen short for a lack of good ideas or a lack of will on the part of the President. They have fallen short because of the political realities described above. While it is important to have a clear and detailed plan that will animate reform, it is equally important to have a sense of how to get there. There are at least four routes the Trump Administration and Congress can take to legislation on executive branch reorganization:

- Congress could draft a reorganization plan itself;
- Congress could reauthorize the President to present his own reorganization plan as he could prior to 1984;
- Congress could reauthorize and enhance the President’s executive reorganization authority, allowing the President to draft a more thoroughgoing plan and opening up a fast track to approval; or
- Congress could create a bipartisan committee or convene an expert commission to devise a

reorganization plan while providing some incentive to enact the final recommendations.

The merits and disadvantages of each of these plans are discussed below.

Congress-led Reorganization

One option available to the President is to present Congress with a set of priorities, allowing Members to work out the details, or simply ask them to draft a plan of their own. One major advantage of taking this route is that Members of Congress may be less inclined to resist a plan that originated from their branch. Instead of asking them to simply give their stamp of approval to the President's plan, they would be integral partners in refashioning government and could trumpet their successes to their constituents. Especially if the Trump Administration stayed relatively aloof from the process, Democratic Members of Congress may be able to vote for—or even sponsor—such legislation without feeling as though they were handing President Trump a significant political victory.

These advantages aside, detailing the responsibility for reorganization to the dozens of authorizing committees will not solve the current duplicative and incoherent structure of the executive branch. For these very congressional committees, with their narrowly focused view of the executive branch and inherent tendency to protect turf, are responsible for the current state of executive branch. Instead, reorganization efforts in Congress should be assigned to committees with a government-wide perspective, such as the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform.

Further, a comprehensive reorganization of the federal bureaucracy is unlikely to make it through the regular parliamentary hurdles ordinary legislation is subject to. Members of Congress are unlikely to agree to dissolving or moving agencies under their jurisdiction. They may also be hesitant to threaten a colleague's turf for fear that such an attack would be repaid in kind. Even if Congress had the will to orchestrate a reorganization of the executive branch, it is not clear it has the institutional capacity.

The federal bureaucracy is overwhelming in both size and scope. A thoroughgoing reorganization of the executive will require a detailed knowledge of the administrative state that only career civil servants

and some very experienced senior political appointees are likely to have. In other words, no matter who is nominally in charge of reorganization, the expertise of the executive branch will be indispensable.

Despite these challenges, Congress has passed legislation to significantly reorganize the executive branch in recent years. In 2002, Congress passed the Homeland Security Act, which, among other things, created the Department of Homeland Security (DHS). Most of the agencies that comprise DHS were pulled from other departments, not created from whole cloth. So, how did this reorganization overcome the tendency of Members of Congress to oppose bills that move agencies from the departments they oversee? Jurisdiction of the two largest agencies that migrated over to DHS—the Coast Guard and Customs and Border Protection—were not transferred to the newly formed House Homeland Security Committee and Senate Homeland Security and Governmental Affairs Committee. To this day, the Coast Guard remains under the jurisdiction of the House's Transportation Committee and the Senate's Commerce, Science, and Transportation Committee, while the House and Senate Judiciary Committees still oversee Customs and Border Protection. While the Homeland Security Act may not have passed otherwise, the result of this nod to political expediency is a committee structure that does not fit into the administrative state very neatly. This sort of compromise solution was only possible in the case of the Homeland Security Act because the bill created new agencies and shifted existing ones. No such deal could be struck to secure passage of legislation that threatens to terminate an agency entirely.

Reauthorization of Executive Branch Reorganization as It Existed Prior to 1984

In the past, Congress recognized the President's comparative advantage vis-à-vis planning the reorganization of the executive branch by routinely granting him authority to propose reorganization plans to be considered under expedited parliamentary procedures. Over time, Congress limited the sorts of provisions the President could include in such a plan.² Originally, the President could create, consolidate, abolish, or rename departments or agencies. By 1984, the last year the President had statutory authority to submit a reorganization plan,

the President's proposal could not contain any of these provisions.

Not only could the President accomplish less via reorganization by 1983 and 1984, but his plans were less likely to go into effect. Prior to 1983, executive reorganization plans went into effect unless one chamber of Congress voted to veto the plan. But that year, the Supreme Court ruled in *Immigration and Naturalization Services v. Chadha* that the legislative veto was unconstitutional. In response, Congress amended the Reorganization Act requiring that any reorganization plan would take effect only if both the House and Senate passed a joint resolution approving the plan within 90 days of receiving it from the President.

Restoring the President's authority to submit reorganization plans to Congress would be a relatively easy lift for Congress. The statutory language regarding reorganization plans is still in the U.S. Code. Congress would simply need to update the statute by changing the two sentences denoting December 31, 1984, as the expiration date for the President's reorganization authority.³ Going this route would not only require minimal effort on the part of Congress; simply reauthorizing a statute already on the books would lend a sense of continuity with the past. It would reinforce the accurate perception that presidential reorganization plans have a long history and well-established provenance going back to the Franklin D. Roosevelt Administration.

Another advantage of this plan is it would allow the President to take charge of the reorganization of the branch he manages. This makes sense. The President, his White House staff, and political appointees in the departments are more deeply embedded in, intimately familiar with, and prepared to diagnose the ailments of, the administrative state.

However, reauthorizing statutory language regarding executive reorganization plans without substantive amendment will not allow the President to propose a plan that has the scope and depth he seems eager to pursue. As discussed, by 1983 the President could not propose a plan to create a new department or agency, consolidate two departments, or even rename a department. Nonetheless, within these limitations, much can be done. Below the department level, the President would have somewhat wider discretion. He could, for instance, call on Congress to abolish most agencies (though independent regulatory agencies are protected by 5 U.S.

Code § 905 (a)(1)), consolidate or coordinate all or part of an agency, or transfer regulatory authority from one agency to another.⁴ However, the latest authorization of presidential reorganization authority expressly forbids the President from proposing a plan that continues an agency or a function thereof beyond the period authorized by law, authorizing an agency to exercise a function that is not expressly authorized by law, or creating a new agency.⁵ According to current statutory language, the President is also forbidden from submitting a plan "dealing with more than one logically consistent matter,"⁶ and no more than three plans may be pending before Congress at one time.⁷ Therefore, a comprehensive plan of the sort President Trump seems to favor would likely require submitting not one, but many, reorganization plans staggered across a significant length of time.

One additional weakness of reauthorizing restarting the clock on the presidential reorganization authority as it currently exists in statute is that the law does not clear an expedited pathway to adoption. In fact, the procedural hurdles facing such a plan are somewhat higher than they are for an ordinary statute because of a stipulation that the House and Senate must approve a plan within 90 days of receiving it from the President, or the plan dies automatically.⁸

Enhancing Presidential Executive Reorganization Authority

An alternative to simply reauthorizing the President's reorganization authority as it last existed is to pass a bill that reinstates many of the provisions contained in the original 1932 legislation. In the 112th Congress, Senator Joseph Lieberman (I-CT) introduced a bill to this end known as the Reforming and Consolidating Government Act (RCGA) of 2012, but it made little progress. As Chairman of the Senate Committee on Homeland Security and Governmental Affairs, Senator Lieberman held a hearing on the legislation but failed to report it out of committee. Similar legislation for the current Congress would make a comprehensive reorganization of the executive branch much easier to accomplish by allowing the President to propose more thoroughgoing changes and allowing expedited consideration of his plan in Congress.

If the Trump Administration and Congress decide to pursue this path to executive branch

Why BRAC Succeeded

With the end of the Cold War, Congress recognized the need to reduce the number of military bases and reorganize the remaining bases to meet the current defense needs of the nation. However, Members of Congress with military bases in their districts, while recognizing the need for cost-savings, fought against closures that affected their districts. Thus, legislative tactics, such as “logrolling” (the exchange of legislative favors between Members of Congress), kept obsolete military bases from closing, and others from being realigned. While Members of Congress recognized an overall need to close bases, no one wanted to be responsible for closing a base in his or her own district. The solution to this dilemma was one that needed to break the legislative deadlock.

Created in 1988, the Base Realignment and Closure (BRAC) Commission was just such a solution.* The commission, created by Congress, was composed of independent experts tasked with selecting military bases to be closed or realigned. The commission assessed lists of recommended closures and realignments compiled by the Pentagon. The commission made its recommendations to the President, who then reviewed and transmitted the decisions to Congress. Congress, not allowed to amend the lists of bases, could either do nothing and let the bases close, or reject the entire list by passing a joint resolution that must sustain a presidential veto. The resulting five rounds of BRACs that occurred from 1998 to 2005 were successful at closing 130 major bases and many more minor installations.†

By asking Members of Congress to vote on (a) the creation of the BRAC Commission, and (b) a fast-track approval process for the commission’s recommendations rather than generating a list of unneeded bases themselves, BRAC put difficult votes on the right side of public choice theory. Constituencies that benefit from federal spending, in this case communities with military bases, try to influence Congress to continue the spending, even if the spending is ineffective, wasteful, or a questionable use of federal resources. Members of Congress, beholden to these constituencies, ensure continued spending. The beneficiaries of concentrated benefits, like communities with military bases, have strong incentives to influence decisions made by Congress.

* Romina Boccia, “How Congress Can Improve Government Programs and Save Taxpayer Dollars,” Heritage Foundation *Background* No. 2915, June 10, 2014, <http://www.heritage.org/taxes/report/how-congress-can-improve-government-programs-and-save-taxpayer-dollars>.

† U.S. Government Accountability Office, “Military Bases: Analysis of DOD’s 2005 Selection Process and Recommendations for Base Closures and Realignments,” GAO-05-785, July 2005, p. 18, Table 1, <http://www.gao.gov/assets/250/246994.pdf> (accessed May 26, 2017).

reorganization, the RCGA would be a fine piece of model legislation. This bill promised to remove several major limitations on a President’s reorganization authority. Most important, it permitted Presidents to propose the creation, abolition, and consolidation of departments and agencies alike, though it left in place limitations on abolishing independent agencies.

While Senator Lieberman’s bill generally expanded the President’s latitude, it did propose one important new restriction. Under the RCGA, presidential reorganization plans submitted to Congress must be deemed “efficiency enhancing”—they must either decrease the number of agencies or lead cost savings

by other means—by the Director of the Office of Management and Budget. This clause would rule out the possibility that Presidents would use their new authority to build up the administrative state, an outcome contrary to the purpose of the legislation.

In addition to the provisions of the RCGA, new legislation should include the assurance that a President’s reorganization plan will actually be considered in Congress. As a result of the Supreme Court’s decision in *Chadha*, it is no longer constitutionally permissible to allow a presidential reorganization plan to go into effect in the absence of a vote of disapproval in one house of Congress. However, new legislation could guarantee a plan an up or down vote.

Conversely, the costs of military bases are spread thinly across all federal taxpayers. To diffuse the cost of these bases means that federal taxpayers are unlikely to be mobilized to influence congressional decisions regarding particular funding decisions, while the beneficiaries of the individual bases have strong incentives to influence funding decisions.

While the public agrees that Congress spends too much, there is little agreement on where to cut funding. The BRAC strategy broke the legislative impasse that prevented Congress from closing and realigning military bases. According to David Primo, professor of political science at the University of Rochester, “By shifting agenda-setting power to an outside agent, making approval the default outcome, and preventing Congress from amending recommendations, the rule achieved its end.”[‡]

Another key to BRAC’s success has been Congress’ decision to lower the procedural hurdles that new statutes usually face. Once the BRAC Commission submits recommendations for a round of base closures, the proposal goes into effect automatically unless Congress passes a joint resolution disapproving of the entire package within 45 days of the plan’s submission.[§] Thus, the consequence of gridlock and congressional inaction is the passage of BRAC recommendations rather than the reversion to the status quo, as is the case under ordinary parliamentary procedures.

‡ David M. Primo, *Rules and Restraint: Government Spending and the Design of Institutions* (Chicago: University of Chicago Press, 2007), p. 11.

§ Christopher M. Davis, “‘Fast Track’ Legislative Procedures Governing Congressional Consideration of a Defense Base Closure and Realignment (BRAC) Commission Report,” *Congressional Research Service Report for Congress* No. R43102, June 10, 2013, <https://fas.org/sgp/crs/natsec/R43102.pdf> (accessed June 16, 2017).

Such a provision would greatly increase the likelihood that a reorganization plan would go into effect by requiring Members of Congress to publicly stake out a position instead of letting a plan die a quiet death in committee.

Another improvement would allow the President to submit amendments to his submission to Congress to address unforeseen objections and include suggestions offered by Congress within a specified time frame. Such a power would allow the President to more ably foster consensus while taking advantage of congressional expertise. President Jimmy Carter requested such an instrument that was enacted as part of the Reorganization Act of 1977.⁹

While restoring the President’s reorganization authority to its original 1932 level would be the most efficient means of effecting a reform of the administrative state, such a statute is unlikely to pass. The last bill that attempted to do this made hardly a wave in Washington. Even though Republicans voice support for winnowing the overgrown bureaucracy and cutting red tape in theory, in 2012, they were unwilling to sign up as co-sponsors of the RCGA (as were nearly all Democratic Senators) and entrust President Obama with this task. Today, will Democrats and Republicans in Congress support similar legislation?

Members of both parties understand there is significant waste and inefficiency in the federal bureaucracy that could be cleared up, but the specific contours of a reorganization plan are bound to reflect the prejudices and policy priorities of the party controlling the process. Which agencies are downsized and which are passed over, which inefficiencies are deemed too great to ignore, and which departments and agencies gain and lose authority and manpower—these are issues that will look different depending on whether they are handled by a Republican or Democratic Administration. Members of Congress are well aware of these facts. Given the contentiousness of the last election and the intense mobilization of the Left’s grassroots, the Trump Administration can rely on fierce obstinacy from Democrats if a bill like the 2012 RCGA is proposed.

Giving Reorganization Authority to a Committee or Commission

As discussed, a successful reorganization plan will need to circumvent not only partisan opposition but also opposition born of each Member of Congress’s desire to maintain the power and prestige of his or her assigned committee. One way to avoid both of these pitfalls is to call on Congress to form

a bipartisan committee or empanel a commission of outside experts to generate a reorganization plan.

Relying on a bipartisan committee or commission of outside experts to draft a proposal might defuse much of the partisan resistance that would likely forestall a proposal to empower President Trump to submit his own reorganization plan. It may also take advantage of the fact that both Republicans and Democrats voice support for reorganization. Addressing fragmentation, redundancy, and overlap in the bureaucracy is not a partisan issue. While there is clearly no perfect agreement on what areas need cutting most, executive reorganization is one of the rare policy issues where Republicans and Democrats could feasibly strike a meaningful compromise.

Still, the track record of purpose-formed congressional committees is far from perfect. Most recently, the Joint Select Committee on Deficit Reduction, popularly known as the Supercommittee, failed to produce the deficit reduction package the Budget Control Act of 2011 tasked it with generating.¹⁰ Congressional committees like this fail for predictable reasons. The Members of such committees face the same set of incentives and limitations that any Member of Congress faces. Simply being chosen for a select committee does not inure a Member to the risk of getting voted out of office, the need to raise campaign contributions, or a desire to curry favor with colleagues who might be useful allies down the road. The Members of Congress selected for a bipartisan committee on reorganization would not be any more willing than Congress as a whole to move agencies from one committee's jurisdiction to another, or strip whole agencies away from their colleagues' purview. Further, the Members of Congress chosen to serve on a select committee may not have the intimate and granular knowledge of the federal bureaucracy that the task demands. For these reasons, the more promising path to executive reorganization may be empaneling a special commission of experts who do not currently hold elected office.

Congress has relied on commissions of outside experts to craft recommendations on contentious or technical issues in the past, and reorganizing the federal bureaucracy certainly meets these criteria.¹¹ One of the most successful expert commissions in recent memory was the Base Realignment and Closure (BRAC) Commission, which successfully broke the political deadlock that kept obsolete military bases open. Given the parallels between eliminating

superfluous military bases and reducing superfluous federal agencies and bureaus, Congress should use BRAC as a model for an executive reorganization commission. Like BRAC, an executive reorganization commission could overcome reluctance among Members of Congress to cut government waste that benefits them.

Incentivizing Adoption of a Commission or Committee's Proposals

All too often, the recommendations of expert commissions and special congressional committees are ignored. The interesting findings and innovative solutions they produce never actually affect policy. To ensure that such a commission or committee is more than an academic exercise, Congress may provide for fast-track legislative procedures, as it did when authorizing BRACs, or create an incentive for action that outweighs the natural bias in favor of the status quo.

A statutory incentive to adopt the recommendations of either a congressional committee or a commission could come in many forms. Budget sequestration—across-the-board budget cuts automatically triggered if and when Congress fails to comply with spending targets—is the most common incentive. The Balanced Budget and Emergency Deficit Control Act of 1985, the Pay-As-You-Go Act of 2010, and the Budget Control Act of 2011 all relied on sequestration to enforce Congress' compliance with the bills' substantive provisions.¹²

By including a strong incentive to act on a commission's or committee's plan once devised, executive reorganization may overcome the thorniest source of obstinacy: committee and subcommittee assignments. In effect, such legislation would put Members of Congress in the position of either pledging support to executive branch reorganization before it was clear which committees would gain or lose power, or making a principled defense of the status quo. Such a plan bets on the likelihood that Members of Congress will not be able to mount a defense of the bloated federal bureaucracy that will resonate with their constituents.

The major weakness of this option is that the Administration would lose the ability to carefully tailor executive reorganization to its tastes. Once a commission is selected, the planning of the executive branch would largely be in the commission's hands. Several safeguards could be put in place to ensure that an executive reorganization plan accomplishes

Congress' and the Administration's broad objectives. Just as Congress limited what sorts of provisions a President's reorganization plan may include, a congressional committee or expert commission could be given set parameters. For instance, legislation could specify that a commission's or committee's plan enhance efficiency, that it not create any new agency, that it save the taxpayers a set number of dollars, or that it spare certain departments from personnel cuts.

Conclusion

The obstacles that stand in the way of legislation authorizing an executive reorganization are numerous and profound, but not insurmountable. As with any bill, partisanship may militate against a plan submitted by President Trump or Republicans in Congress. Not only do Democrats and Republicans have different views on how to structure the federal bureaucracy and where to make the deepest cuts, Democrats will be hesitant to hand Republicans a political victory even if a proposal steers clear of partisan friction points.

Worse still, President Trump will not be able to rely on unanimous support from his own party. A comprehensive executive reorganization plan that streamlines the federal bureaucracy by eliminating redundant agencies and consolidating like functions will make enemies of every Member of Congress whose committee stands to lose power and oversight. Senators and Representatives who agree that

the bloated federal bureaucracy should be cut to size in theory may not be willing to sacrifice any of the bureaus or agencies under their jurisdiction. Fearing that they might be on the chopping block, Members of Congress may short circuit the reorganization process before it even begins.

Daunting as these obstacles may seem, Congress has overcome similar challenges in the past. Close analogues, such as military base reduction via BRAC, show that cleverly constructed legislation can stack the deck in favor of reform rather than the status quo. Like BRAC, executive reorganization has the best chance of succeeding if legislation is structured such that Members of Congress are asked to vote on behalf of the public interest without knowing how their own particular interests will be affected.

These difficulties must be taken head-on. Comprehensive executive reorganization requires congressional action, as it should. Because bureaus differ in their organizational culture and bureaucrats differ in their worldviews, the structure of the federal government—how resources are allocated, to whom statutory authority is assigned, and how the federal chain of command is structured—determines how statutes are interpreted and enforced. In other words, refashioning the bureaucracy is not simply a matter of executive branch housekeeping. Structure, process, and personnel are integrally linked to policy. As a coequal branch of government, Congress should engage constructively with the President in the reorganization process.

Endnotes

1. For more on relatively recent reorganization efforts, see Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (Lanham, MD: University Press of America, 2003).
2. Ibid.
3. 5 U.S. Code § 905, and 5 U.S. Code § 908 (1).
4. 5 U.S. Code § 903 (a).
5. 5 U.S. Code § 905 (a)(1-6).
6. 5 U.S. Code § 905 (a)(7).
7. 5 U.S. Code § 903 (b).
8. 5 U.S. Code § 906 (a).
9. Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1906-1996*, 2nd ed., revised (Lawrence, KS: University Press of Kansas, 1998), and Public Law 95-17.
10. The Supercommittee was tasked with devising a grand bargain that would cut \$1.2 trillion from the deficit over 10 years. The Budget Control Act included a powerful incentive for the Supercommittee to draft a plan and for Congress to pass it. If a plan was not devised and approved by December 31, 2011, nearly across-the-board cuts (a few programs—mostly guaranteed entitlements—were exempt from sequestration) would automatically go into effect. While the amount of spending under sequestration was equal to the amount the Supercommittee was tasked with saving, the indiscriminate nature of the sequestration cuts was meant to be so unpopular that Republicans and Democrats were forced to find common ground in order to avoid it.
11. Recent examples include the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack and the U.S.-China Economic and Security Review Commission, both established pursuant to the National Defense Authorization Act of 2001; the National Commission on Terrorist Attacks Upon the United States, popularly referred to as the 9/11 Commission; and the Financial Crisis Inquiry Commission.
12. Karen Spar, "Budget 'Sequestration' and Selected Program Exemptions and Special Rules," Congressional Research Service, June 13, 2013.

Chapter 5: Budget Process Reform

Justin Bogie and Romina Boccia

The congressional budget process provides the framework for regular and orderly debate of fiscal issues with the goal of guiding agency and programmatic appropriations. The budget process determines the steps that are necessary for adopting a budget, and for adopting or changing legislation. A well-functioning budget process would encourage debate and strong oversight on fiscal issues and spur negotiations over the trade-offs for congressional spending and taxing.

Congress has all but abandoned the budget process and regular order. Rather than authorizing agencies and programs on a regular basis and passing individual appropriations bills, lawmakers have instead allowed continuing resolutions and massive omnibus spending bills to reign supreme for much of the past two decades. With deficit and debt levels projected to rise sharply over the next decade,¹ the presidency should once again play a larger role in reining in federal spending and bureaucratic overgrowth.

Recognizing this, in March, the President issued an executive order requiring the Office of Management and Budget to develop a comprehensive plan to reorganize the federal government.² Undertaking budget process reforms will be an essential part of any successful plan, as much of the growth and inefficiency amongst federal agencies can be directly attributed to the near total breakdown of the budget process. Reviving long-standing policies as well as implementing new ideas will play a crucial role in correcting the nation's wayward fiscal path.

To make this plan a reality, Congress should immediately adopt several key reforms to enhance a President's ability to reshape the size and scope of the federal government and enforce budget discipline and accountability:

Reauthorize the President's Reorganization Authority. Congress should grant the President wide latitude in reshaping and streamlining the nation's ever-expanding bureaucracy. Historically, this has not been a partisan or divisive issue and Congress has granted wide reorganization authority to both Republican and Democratic Presidents. In fact, the campaign promises of reorganization heard over the course of Donald Trump's 2016 campaign mirrored closely those of Jimmy Carter 40 years

earlier. At that time, Carter described the federal government as "a horrible bureaucratic mess," and pledged that he would "have a complete reorganization of the Executive Branch of government [and] make it efficient, economical, purposeful, simple, and manageable."³

The ability of the President to greatly reshape federal agencies and programs is not a foreign concept. From 1932 to 1984, Presidents were granted much power to do just that. With the exception of Gerald Ford, all Presidents from Herbert Hoover to Ronald Reagan possessed reorganization authority, and all besides Reagan used that power. Since 1984, President George W. Bush and President Barack Obama both tried to reassert presidential reorganization authority and introduced legislation to do so. Congress failed to act on the legislation in both cases.

In an effort to improve government efficiency and reduce waste of taxpayer resources, Congress should enact legislation to restore the President's reorganization authority. In doing so, there should be mechanisms to expedite the legislative steps of the process and force an up or down vote on any proposals. With government spending expanding at a growing rate, virtually unchecked, steps must be urgently taken to reduce wasteful and inefficient programs.

Restore Presidential Impoundment Authority. Prior to 1974, Presidents had, and often made use of, the power of impoundment, which allowed them to prevent executive branch agencies from spending part or all of the funds previously appropriated to them by Congress. It served as a tool for Presidents to make generally small cuts to federal spending for programs that they deemed too costly or unnecessary.⁴ This process continued on a bipartisan basis for the better part of two centuries.

This all changed in 1972 with the passage of the Clean Water Act (CWA). President Richard Nixon, originally a supporter of the legislation, vetoed the bill when the costs ballooned to around \$24 billion, calling it "budget-wrecking."⁵ Congress eventually overrode his veto, leading Nixon to invoke his impoundment authority and withhold about half of the funding for the CWA.⁶

In response to Nixon's impoundment of CWA funds, Congress decided to entirely revamp the

congressional budget process by enacting the Congressional Budget and Impoundment Control Act of 1974. The act made major changes to the budget process, including drastically reducing the President's impoundment authority. Under the 1974 act, the President may request that funds designated for an agency or program be rescinded, but ultimately Congress must pass legislation for the rescission to become a reality.⁷ Nixon, less than a month away from his resignation and mired in scandal, signed the bill into law.

Since then, both Democratic and Republican Presidents and Members of Congress have pushed for impoundment authority to be reinstated. Unfortunately Congress' insatiable thirst to keep spending has prevented this from happening. With the nation \$20 trillion in debt and the congressional budget process utterly broken, the President needs this tool to help correct the country's fiscal path. Congress has the opportunity to follow budget order and timelines, doing its job of providing oversight and budget controls. Since Congress continues to fail to live up to this responsibility, the President needs the power and authority to do so.

Require User Fees and Other Federal Agency Collections to be Subject to the Appropriations Process. The "power of the purse" is one of the fundamental responsibilities delegated to Congress by Article 1 of the U.S. Constitution.⁸ The Supreme Court has consistently reaffirmed this power, including in 1976 when the court declared: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."⁹

Unfortunately, as the federal bureaucracy has continued to grow, Congress has ceded more and more of this responsibility to federal agencies. Under current law, agencies have the ability to use funds received through fines, fees, and proceeds from legal settlements without going through the formal appropriations process, thus avoiding congressional oversight. In fiscal year (FY) 2015 alone, agencies collected \$516 billion through a wide array of user fees.¹⁰ Between 2010 and 2015, agencies collected an additional \$83 billion from fines. According to the House Oversight and Government Reform Committee, the amount of power given to agencies to pursue penalties and legal settlements allows them to act as both judge and jury.¹¹

Numerous federal agencies, including the Consumer Financial Protection Bureau and the Financial Stability Oversight Council, are funded solely through fines and fees and receive no annual appropriations from Congress, resulting in almost no congressional involvement in the way these agencies are run.

Congress should enact legislation requiring that any fees, fines, penalties, or proceeds from a legal settlement collected by a federal agency be deposited into the Treasury's general fund and subject to the annual appropriations process. This would allow Congress to carefully determine how best to use these funds, rather than leaving it up to the respective agencies to do as they see fit. With about two-thirds of the annual federal budget already consisting of "auto-pilot" mandatory spending, Congress should not allow any additional spending to fall outside its control.

Enact a Statutory Spending Cap Enforced by Sequestration. Congress should enforce fiscal discipline with spending caps. Spending caps motivate Congress to prioritize among competing demands for resources. Designed properly, spending caps curb excessive spending growth over the long run. The Budget Control Act of 2011 (BCA) has shown this to be an effective tool to control spending. When enacted, the Congressional Budget Office estimated that the legislation would save more than \$2 trillion over 10 years.¹² While the legislation has been amended and the spending caps have been modified, it has kept spending levels below what they would have otherwise been and, especially in regards to discretionary funding, reduced spending growth.¹³

Congress should expand upon the BCA and adopt a statutory spending cap that encompasses all non-interest outlays and achieves budget balance—given current projections about the economy, revenues, and interest costs—by the end of the decade, or before. Defense and non-defense spending should be considered under the same aggregate spending cap, allowing defense to be funded as Congress sees fit, and without arbitrary limitations that are purely political in nature.¹⁴

Spending-cap enforcement by sequestration promises to spur negotiations to avoid automatic spending reductions in favor of a more deliberate approach. In the absence of legislative agreement, sequestration ensures that spending reductions take place regardless of the adoption of targeted

reforms. This process should spur fiscal reforms to limit the growth in government and achieve budget balance.

Once the budget balances, spending should be capped at a level that maintains balance, allowing certain annual adjustments. In the long run, during periods of normal economic activity, and absent exigent national security demands, the spending cap should grow no faster than the U.S. population and inflation. The cap should bind more stringently when debt or deficits exceed specific targets.

Move Toward a Balanced Budget Amendment. One limitation of a statutory law imposing an aggregate cap on non-interest spending is that a future Congress can amend the law. Deficit spending almost always favors the current generation over future generations, who will pay for the spending of today. Ultimately, then, a balanced budget amendment will be necessary to constrain future attempts at eliminating the spending cap and abandoning fiscal discipline.

A balanced budget amendment to the U.S. Constitution is important because it can help to bring long-term fiscal responsibility to Americans' futures. America should not raise taxes to continue its overspending because tax hikes reduce people's ability to spend their own money as they see fit, shrink the economy, and expand government. America should not borrow more to continue overspending because borrowing puts an enormous financial burden on younger generations and expands the size and scope of the federal government. Americans need their government to spend less—because less government spending will advance the interests of the American people through limited government, individual freedom, civil society, and free enterprise.

The balanced budget amendment must control spending, taxation, and borrowing; ensure the defense of America; and enforce the requirement to balance the budget.¹⁵ The constitutional-amendment-ratification process may take time: The fastest ratification took less than four months (the Twenty-Sixth Amendment on the voting age of 18), and the slowest took 202 years (the Twenty-Seventh Amendment on congressional pay raises).¹⁶ Thus, House and Senate passage of a balanced budget amendment must be in addition to, not an excuse to avoid, current hard work to cap and cut federal spending, balance the federal budget through congressional self-discipline, and reform and reduce taxation.

Discontinue Spending on Unauthorized Appropriations. House and Senate rules require that an authorization for a federal activity precede the appropriation that allows agencies to obligate federal funds for that activity. When appropriation bills provide new budget authority for activities whose statutory authorization (the legal authority for the program to continue) has expired, or which were never previously authorized, this is known as an unauthorized appropriation.¹⁷ In FY 2016, lawmakers appropriated about \$310 billion for programs and activities whose authorizations of appropriations had expired.¹⁸ These so called zombie appropriations are a violation of congressional rules and evade prudent deliberation of federal funding priorities.

Authorizations define the priorities of agencies and the activities that the government carries out to meet those priorities. Expiring authorizations provide Congress an important oversight opportunity in which Members can take a close look at the agency and re-evaluate the mission and purpose so that it can evolve with changing priorities and technology. Expiring authorizations also ensure that Congress stays aware of the size and scope of these programs and ensures that they do not turn into zombie programs—spending billions of dollars on auto-pilot with little government review or oversight.¹⁹

Lawmakers should discontinue funding for unauthorized appropriations, as such funding evades the careful congressional scrutiny of programs required by the authorization process. Congress should authorize only those programs that represent federal constitutional priorities—and should eliminate funding for activities that the federal government should not undertake in the first place. The authorization process helps Congress identify the programs that deserve renewed federal funding and those that should be eliminated or reformed.

Congress should reduce the discretionary spending limits provided by the Budget Control Act of 2011 by the amount of current unauthorized appropriations. Congress should then provide for a cap adjustment up to 90 percent of the previous year's funding level if the program is re-authorized. Instead of cutting reauthorizations across the board, Congress may prioritize among reauthorizations as it deems appropriate.²⁰ If adopted, this policy would discourage Congress from appropriating money for unauthorized programs, since Congress would be forced

to cut funding for authorized programs to provide an appropriation.

Unless Congress takes decisive action to enforce its rules forbidding unauthorized appropriations, these zombie programs will continue to expand unchecked. Oversight is one of the fundamental duties of Members of Congress, and by failing to take action for or against authorizations, they are doing a disservice to taxpayers and being poor stewards of those taxpayers' money.

Congress Must Empower the President to Tackle Reforms. The near-complete breakdown of congressional budgeting—at a time when fiscal discipline is growing ever more important, and as automatic spending on entitlement programs threatens to overwhelm the federal budget and the U.S. economy—shows the need for a fundamental reform of the budget process. The inherent power of the presidency, and the platform of the bully pulpit that accompanies it, makes presidential leadership essential for a successful government reorganization effort. Thus, Congress must return that power (one enjoyed for centuries) to the President and take the following steps to ensure fiscal discipline and accountability: lessen the burden on the President's ability to reorganize agencies and programs; reinstitute the President's historical impoundment authority; require that revenues collected by agencies be subject to the annual appropriations process; implement an aggregate spending cap limiting the federal budget, enforced by sequestration; move towards a balanced budget amendment; and eliminate unauthorized appropriations.

These much-needed reforms will help to streamline the federal bureaucracy and spur debate and negotiations over how taxpayer dollars should be spent and prioritized, resulting in a leaner government that is better able to serve the fundamental needs of America's citizens.

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Chapter 6: Federal Regulatory Power

James Gattuso and Diane Katz

Americans have never been as subservient to government as they are today. So expansive has the administrative state become that no one even knows the precise number of departments, agencies, and commissions from which thousands of regulations materialize each year. The volume and scope of this rulemaking imposes a staggering economic burden on the nation. But loss of individual freedom and the flagrant breach of constitutional principles constitute a far greater cost.

The *Federal Register*, the daily journal of government actions, lists 440 federal agencies and sub-agencies in its index.¹ From them came more than 23,000 new regulations under the Obama Administration alone—at a very conservatively estimated cost to the private sector of \$120 billion.² And, in 2015 alone, Americans devoted nearly 9.8 billion hours to federal paperwork.³

The threat posed by this administrative excess goes well beyond rulemaking. More broadly, it represents what Alexis de Tocqueville termed “soft despotism,”⁴ that is, a society controlled by un-elected experts who somehow know what our best interests are better than we do. This progressive paradigm demands that said experts wield all of the powers otherwise constitutionally separated among the executive, legislative, and judicial branches as a check against tyranny. With decades of cooperation from activist judges and weak-willed members of Congress, thousands of civil servants across dozens upon dozens of federal agencies are doing exactly that.

President Donald Trump inherited 1,985 regulations in the rulemaking pipeline—966 in the proposed stage, and 1,019 in the final stage. The White House alone cannot rescind regulations mandated by statute, but there are several actions outlined below that the President can take unilaterally to rein in the regulators. Other reforms require congressional action.

But it is not enough to simply reshuffle the rule-making process. The nation must address the extent to which federal agencies contravene the U.S. Constitution on a daily basis by autonomously issuing edicts, monitoring compliance, and punishing transgressors. Unless constrained, the administrative state

will extinguish America’s entrepreneurial spirit and the freedoms on which this nation was founded.

Costs

Regulation acts as a stealth tax on Americans and the U.S. economy. The weight of this tax is crushing, with independent estimates of total regulatory costs exceeding \$2 trillion annually—more than is collected in income taxes each year. As the number of regulations has grown, so, too, has spending on government bureaucracy. Based on fiscal year (FY) 2017 budget figures, administering red tape will cost taxpayers nearly \$70 billion—an increase of 97 percent since 2000.⁵

Regulatory compliance requires the private sector to shift an enormous amount of resources away from innovation, expansion, and job creation. These costs ripple across the economy and soak consumers: higher energy rates from the Environmental Protection Agency’s global warming crusade; increased food prices resulting from excessively prescriptive food production standards; restricted access to credit for consumers and small businesses under Dodd–Frank financial regulations; fewer health care choices and higher medical costs due to the misnamed Affordable Care Act; and reduced Internet investment and innovation under the network neutrality rules imposed by the Federal Communications Commission (FCC).

While a burden for all, overregulation harms low-income families and fixed-income seniors the most: The costs translate to higher consumer prices that exhaust a relatively larger share of their personal budgets.

Benefits (Justifications)

Proponents claim that regulation is necessary to protect citizens from their inherent irrationality and the imperfections of a market economy.⁶ This dogma is largely rooted in the Progressive Era, at the turn of the 20th century, when massive industrialization and waves of immigration contributed to enormous wealth creation, but also to deterioration of living conditions in major cities and dangerous factory work. Reformers promised a better future for all once human foibles were exorcised by the state.⁷

All of which, in the minds of progressive apostles, rendered representative government and the separation of powers obsolete.

The stock market crash of 1929 and the ensuing Great Depression likewise prompted a slew of federal rules. Another regulatory wave was unleashed in the early 1960s, beginning with President John F. Kennedy's 1962 "Special Message to the Congress on Protecting the Consumer Interest,"⁸ and the publication of Ralph Nader's *Unsafe at Any Speed*, which exposed the design flaws of the Chevrolet Corvair (and its rear engine) and detailed automakers' purported resistance to installing safety features.

But 40 years of command-and-control regimes have led to massive, ineffective, and unaccountable bureaucracies. The centralization of administrative authority in Washington subverts direct accountability—taxpayers are unable to identify the officials responsible for regulatory policies, and the people making those regulatory decisions do not have to live with the consequences. Nor are regulators immune to political or ideological biases.

In contrast, the well-being of societies and individuals has long been enhanced by individual freedom, free markets, property rights, and limited government.⁹ Heritage's annual *Index of Economic Freedom*, for example, documents that the degree of poverty in countries whose economies are considered "mostly free" or "moderately free" is only about one-fourth the level of that found in countries that are rated less free.¹⁰ Moreover, per capita incomes are much higher in countries that are economically free.

Reforms

The challenge before the nation is to divest the administrative state of its powers. This is no easy task given the decades of judicial precedents and multitude of statutory delegations that have empowered it.

President Trump can take a variety of actions to curb the regulatory frenzy unleashed by his predecessors, but no President enjoys free rein. The U.S. Constitution, if honored, limits a President's power to act unilaterally.

Executive orders represent a direct means of establishing his policies, although the President cannot override statutory directives to agencies unless the law expressly grants that power.

President Trump's first actions included a

regulatory freeze in the form of a memorandum to executive departments¹¹ directing agency heads to:

1. Refrain from sending regulations¹² to the Office of the Federal Register until a department or agency head designated by the President reviews and approves it. (Publication in the *Federal Register* is required to finalize a rule.)
2. Withdraw regulations that had been sent to the Office of the Federal Register but have not yet been published.
3. Postpone, for 60 days, regulations that have been published in the *Federal Register* but have not yet taken effect, for the purpose of reviewing questions of fact, law, and policy (as permitted by law).

Also in his first month, the President issued an executive order¹³ that directs agencies to identify for elimination at least two prior regulations for every one new regulation issued, and to manage and control regulatory costs through a budgeting process. For the current fiscal year, the total incremental cost of all new regulations, including repealed regulations, shall be no greater than zero (unless otherwise required by law).

Other executive orders issued by President Trump direct agency officials to review IRS regulations;¹⁴ designate a Regulatory Reform Officer to oversee the implementation of regulatory reforms;¹⁵ and review rules that burden the development or use of domestically produced energy resources and to suspend, revise, or rescind those that "unduly burden" domestic energy production.¹⁶

For regulations that conflict with the new Administration's policies, agencies may propose either to further delay the effective date or to rewrite or repeal a rule. However, this requires following the rulemaking process and providing justification subject to public notice and comment. Though time-consuming, the effort is justified to overturn particularly egregious regulations.

The President also wields budgetary influence over regulatory agencies. Individual agencies submit budget requests to the Office of Management and Budget (OMB), which formulates a proposed budget in accordance with the Administration's priorities. The President's budget submitted to Congress

will reflect, in part, the extent to which he or she approves or disapproves of various agency actions—regulatory and otherwise. Ultimately, however, Congress determines the level of appropriations.

Another tool is control of litigation through the Department of Justice. Generally speaking, Cabinet agencies rely on the Justice Department to litigate on their behalf, which means that the President (through his appointees) can influence how cases are prioritized and resources are deployed.

The President is also free to rescind any of his predecessors' orders—many of which deserve to be hastily dispatched.

The ultimate White House influence on rulemaking may well be the regulatory review process. The power of regulatory review is evidenced by the attention paid to it by each new Administration: Every President over the past four decades has customized regulatory review procedures. And no wonder. The OMB's Office of Information and Regulatory Affairs (OIRA) determines whether agencies have complied with rulemaking requirements, including the integrity of risk assessments and cost-benefit analyses, and controls if and when a regulation is finalized. That is real power in an era of regulatory overload.

The stringency of OIRA's regulatory review is largely the prerogative of the President, and is established by executive order. In its current incarnation, OIRA's regulatory review is overwhelmed by the volume of rulemaking. With a staff of about 50, it is reviewing the work of agencies that employ 279,000 personnel, a ratio of more than 5,600 to 1.

The Trump Administration should issue another executive order to replace the existing regime with stricter standards for review, a broader scope of review, and greater transparency in the review process. Among other elements, the new order should:

- Require independent agencies to comply with all rulemaking requirements under the Paperwork Reduction Act, the Unfunded Mandates Reform Act, the Data Quality Act, and all other rules that apply to executive branch agencies.
- Require agencies to submit all regulations, not just significant regulations, to OIRA.
- Require agencies to conduct a regulatory impact assessment for guidance documents, policy memos, and rule interpretations.
- Require agencies to base decisions on factual data, and to fully disclose any such data and the basis of a proposed decision in a manner that allows critical review by the public.
- Disallow rulemaking that assesses risk based on a “No Safe Threshold” linear regression analysis, which assumes that any chemical posing a health threat at a high exposure will also pose a health threat at any exposure level, no matter how low.
- Reject any rulemaking for which the benefits exceed the cost only by reliance on “co-benefits.” (The term refers to ancillary outcomes that are quantified to make it appear that the rule's benefits exceed the costs when the actual focus of the regulation does not justify the regulatory cost.)

The Congressional Review Act provides a legislative means of repealing regulations that have been finalized within the past 60 days (with exceptions). Doing so requires a resolution of disapproval passed by Congress, and the President's signature. Only a simple majority threshold is required for passage of the resolution (218 votes in the House; 51 votes in the Senate). Approval of a resolution prohibits an agency from issuing a substantially similar regulation unless authorized by Congress, and the resolution is not subject to judicial review.

The Trump Administration should also promote congressional consideration and passage of the following regulatory reforms:

- **Require congressional approval of new major regulations issued by agencies.** Congress, not regulators, should make the laws and be accountable to the American people for the results.
- **Do not allow any major regulation to take effect until Congress explicitly approves it.** Legislation to require such congressional approval for all major rules, known as the Regulations from the Executive in Need of Scrutiny (REINS) Act, passed the House in July 2015,¹⁷ but is still awaiting action in the Senate. In addition, legislators should include requirements for congressional approval of rules in every bill that expands or reauthorizes regulation. Such an approach would demonstrate how REINS Act requirements work in practice, paving the way for their broader application.

- **Create a congressional regulatory analysis capability.** In order to exercise regulatory oversight, especially if the REINS Act is adopted, Congress needs to be able to analyze various regulatory policies objectively. Congress currently depends on OIRA, or the regulatory agencies themselves, for analyses, and needs an independent source of expertise. This could be accomplished through an existing congressional institution, such as the Congressional Budget Office or the Government Accountability Office, or through a new unit established by Congress. This new capability need not require a net increase in staff or budget, but could easily be paid for through reductions in existing regulatory agency expenses.
- **Set sunset dates for all major regulations.** Rules should expire automatically if not explicitly reaffirmed by the relevant agency through the formal rulemaking process. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some regulations. Congress should make them the rule, not the exception.
- **Codify regulatory impact analysis requirements.** All executive branch agencies are currently required to conduct a regulatory impact analysis (including cost-benefit calculations) when imposing any major regulation. Codifying these requirements would ensure that they cannot be rolled back without congressional action, and provides the basis for judicial review of agency compliance.
- **Subject “independent” agencies to executive branch regulatory review.** Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies, such as the FCC, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau, are not subject to review by OIRA or even required to undergo a cost-benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as executive branch agencies. Such a requirement has broad support, even from President Barack Obama’s former OIRA chief, Cass Sunstein.¹⁸
- **Codify stricter information-quality standards for rulemaking.** Federal agencies too often mask politically driven regulations as scientifically based imperatives. In such cases, agencies fail to properly perform scientific and economic analyses or selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda. Congress should impose specific strict information-quality standards for rulemaking, and conduct oversight to ensure that federal agencies meet these standards. Congress should also make compliance with such standards subject to judicial review, and explicitly state that noncompliance will cause regulation to be deemed “arbitrary and capricious.”
- **Reform “sue and settle” practices.** Regulators often work in concert with advocacy groups to produce settlements to lawsuits that result in greater regulation. Such collaboration has become a common way for agencies to impose rules that otherwise would not have made it through the regulatory review process. To prevent such “faux” settlements, agencies should be required to subject proposed settlements to public notice and comment. The Sunshine for Regulatory Decrees and Settlements Act (H.R. 712) would do just that.
- **Increase professional staff levels within OIRA.** OIRA is one of the only government entities in Washington that is charged with limiting, rather than producing, red tape. More resources should be focused on OIRA’s regulatory review function. This should be done at no additional cost to taxpayers: The necessary funding should come from cuts in the budgets of regulatory agencies.

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Chapter 7: Restructuring Federal Financial Regulators

Norbert J. Michel, PhD

Financial intermediaries serve a key role in the U.S. economy because they facilitate commerce among nonfinancial firms. Various types of financial firms, such as banks and investment companies, provide financial services. Broadly speaking, they pool individuals' funds and channel the money to others who need capital to operate.

For at least a century, the U.S. regulatory framework has been increasingly hindering the financial-intermediation process. The current regulatory regime is counterproductive, in part, because there are too many regulators with overlapping authority. There is no good reason, for example, to have seven federal financial regulators layered on top of individual state regulatory agencies.¹ Similarly, allowing the monetary authority, the Federal Reserve, to regulate financial firms gives rise to unnecessary and potentially dangerous conflicts of interest.

Consolidation vs. Competition

After the 2008 crisis, Congress considered creating a single consolidated financial regulator.² However, the ultimate product of that debate—the Dodd–Frank Wall Street Reform and Consumer Protection Act³—did not create such a super regulator. Instead, Dodd–Frank increased the scope of the Federal Reserve's authority by including an explicit systemic-risk mandate. It also gave the Fed supervisory authority over new entities, such as savings-and-loan holding companies, securities holding companies, and systemically important financial institutions (SIFIs).⁴

If these trends continue, financial markets could end up under the de facto control of a super regulator: the Board of Governors of the Federal Reserve. Though the U.S. financial regulatory structure needs reform, a single “super” regulator with a banking mindset and a ready safety net would not improve economic outcomes. Thus, any structural reorganization of financial regulators should guard against the current tendency of bank regulation to seep into capital markets regulation.

There are many arguments for and against regulatory consolidation. Critics of consolidation believe that a structure based on multiple regulatory agencies is good because it allows regulators

to specialize in particular types of institutions,⁵ it allows regulatory experimentation and competition,⁶ and it helps highlight one regulator's mistakes. Also, if a regulator does make an error, only the subset of entities it regulates will be directly affected. Finally, maintaining distinct capital markets and banking regulators creates speed bumps to banking regulators' efforts to apply bank-like regulation more broadly.⁷

One argument for consolidating regulators is to avoid “charter-shopping” or a “race to the bottom” among regulators.⁸ This argument, however, assumes a degree of competition between financial regulators that is at odds with the existing regulatory system. During the recent financial crisis, contrary to the charter-shopping argument, banks failed at roughly similar rates across the various bank regulators.⁹ Furthermore, as professors Henry Butler and Jonathan Macey have so aptly observed, competition among banking regulators is largely a myth.¹⁰

In surveying the literature of state corporate governance and banking laws, one recent study found that such competition did not generally lead to a “race to the bottom” but rather to a sorting into alternative regulatory systems.¹¹ Although full regulatory consolidation could harm financial markets, some streamlining is important because the current framework embodies inefficiencies and redundancies. The U.S. banking regulatory structure, for example, is complex, with responsibilities fragmented among the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Federal Reserve.¹² The following list summarizes these agencies' overlapping authorities:

- The FDIC, in charge of maintaining the Federal Deposit Insurance Fund, has backup supervisory authorities over all banks and thrifts that are federally insured. This responsibility creates overlap between the FDIC's authorities and those of the Federal Reserve and OCC as the primary prudential regulators of insured depository institutions.

- The NCUA supervises only federally chartered credit unions, but it is the deposit insurer for both federal credit unions and most state-chartered credit unions. Its role as deposit insurer creates overlap with state credit union regulators.
- The Federal Reserve has consolidated supervision authority over most holding companies that own or control a bank or thrift and their subsidiaries. This authority creates overlap because the Fed's role is in addition to the oversight provided by the banks' primary federal regulator.
- State banking regulators share oversight of the safety and soundness of state-chartered banks with the FDIC and the Federal Reserve.

This fragmentation and overlap has a long history of creating inefficiencies in regulatory processes, as well as inconsistencies in how regulators oversee similar types of institutions. Even when these overlapping authorities do not lead to inconsistencies, coordination among agencies requires considerable effort that could be directed to other activities. Inconsistencies create an uncertain operating environment for regulated entities, as well as an uncertain environment for regulators when their decisions are contradicted by those of other regulators. The following points summarize some of the best-known historical examples of these inefficiencies and inconsistencies:¹³

- Differences in examination scope, frequency, documentation, guidance, and rules among the FDIC, OCC, and the Fed;
- Inconsistent methods for assessing loan loss reserves;
- Inconsistent guidance and terminology for Bank Secrecy Act examinations *and* compliance;
- Inconsistencies with oversight and compliance of federal consumer financial protection laws (such as fair lending laws);
- The Fed and other primary regulators have not, though they have tried, successfully coordinated their supervision and examination responsibilities.

- Duplication in the examinations of financial holding companies, despite the OCC's and the Fed's efforts to coordinate;
- Conflicting guidance from the Fed and the OCC; and
- Requirements by prudential regulators of regulated entities to report the same data in different formats.

It makes sense to fix these problems by having one federal banking regulator, but that banking regulator should not be the Federal Reserve.

Removing the Federal Reserve's Regulatory and Supervisory Powers

As the United States central bank, the Federal Reserve's primary role is, and should remain, monetary policy. The Federal Reserve Act directs the central bank to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices and moderate long-term interest rates."¹⁴ The Federal Reserve has struggled to fulfill these macroeconomic responsibilities, and its supplementary regulatory and supervisory responsibilities—particularly as they have expanded since the financial crisis¹⁵—are simply unnecessary for conducting monetary policy.

Dodd-Frank, in conjunction with increasing the responsibilities it placed on the Federal Reserve, established a new, Senate-confirmed position—Vice Chairman for Supervision.¹⁶ This still-vacant position is to be filled by one of the Federal Reserve Board of Governors, whose ability to focus on monetary policy would therefore be attenuated. Perhaps worse, allowing the same entity to exercise regulatory and monetary functions gives rise to unnecessary and potentially dangerous conflicts of interest. A central bank that is also a regulator and supervisor could be tempted to use monetary policy to compensate for mistakes on the regulatory side, and financial stability concerns could lead to regulatory forbearance.

The current system is far from ideal, and the Fed's responsibilities overlap with those of other financial regulators.¹⁷ The overlap results in inconsistencies and duplicative efforts by both regulators and regulated entities.¹⁸ Efforts at inducing coordination,

including the Federal Financial Institutions Examination Council's (FFIEC's)¹⁹ and the Financial Stability Oversight Council's (FSOC's) mandate to encourage cooperation among regulators, have not addressed this problem adequately. Removing the Federal Reserve's regulatory and supervisory powers would allow it to focus on monetary policy, and shifting the Fed's regulatory and supervisory responsibilities to either the OCC or the FDIC would reduce duplicative regulations.

Merging the SEC and the CFTC

Similar to the consolidation of federal banking regulators, it makes sense to have one federal capital markets regulator. Congress has, on several occasions, contemplated merging the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) into one capital markets regulator.²⁰ The SEC and CFTC regulate markets that have increasingly blurred into one another over the years, and yet the two agencies have approached their regulatory responsibilities in different and sometimes conflicting ways.²¹ There is a theoretical case for allowing the two regulators, which historically have employed very different regulatory approaches,²² to exist side by side. If one regulator's approach is flawed, for instance, regulated entities may be able to migrate to the markets in the other regulator's purview. In practice, however, the bifurcated responsibility has resulted in tense regulatory battles and duplicative effort by regulators and market participants.

Periodic attempts to address the problem have helped calm some of the interagency fighting, but the agencies' closely related mandates promise continued discord.²³ For example, the Shad-Johnson Jurisdictional Accord of the early 1980s brought a measure of peace, but jurisdictional disputes continued. Dodd-Frank, which awkwardly split regulatory responsibility for the over-the-counter derivatives market between the two agencies, only compounded the problem with overlapping authorities.²⁴ The CFTC, although built on the hedging of agricultural commodities, now is primarily a financial markets regulator. The markets it regulates are closely tied—through common participants and common purposes—with SEC-regulated markets. The U.S. is unusual in having separate regulators for these markets.

A merged SEC and CFTC might be better able to take a complete view of the capital and risk-transfer markets. A single regulator could conserve resources in overseeing entities that are currently subject to oversight by both the SEC and CFTC. In addition, a unified regulator would eliminate discrepancies in the regulatory approaches that can frustrate good-faith attempts by firms to comply with the law.

Conclusion

Many of the changes discussed in this chapter will be contentious and difficult for Congress to implement. One approach that might help facilitate these changes is to revive the reorganization authority codified at 5 U.S. Code §§ 901 et seq. that has been used by past Presidents of both parties.²⁵ Granting this authority, consistent with prudent protections, would require the Trump Administration to submit reorganization plans for consideration by Congress.

Regardless, the President should work with Congress to implement the following two policy changes:

- Establish a single capital-markets regulator by merging the SEC and the CFTC; and
- Establish a single bank and credit union supervisor and regulator by merging the OCC, the FDIC, and the NCUA—and transferring the Federal Reserve's bank supervisory and regulatory functions to it.

For at least a century, the U.S. regulatory framework has been increasingly hindering the financial-intermediation process. The current regulatory regime is counterproductive, in part, because there are too many regulators with overlapping authority. Consolidating regulatory authority in one federal banking regulator and one federal capital markets regulator, respectively, would help improve the U.S. regulatory framework.

Endnotes

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3. Public Law 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S. Code).
4. For a discussion of this expansion, see Hester Peirce and Robert Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd-Frank," Mercatus Center at George Mason University, November 13, 2013, <http://mercatus.org/publication/federal-reserves-expanding-regulatory-authority-initiated-dodd-frank> (accessed October 8, 2016).
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12. States also have their own banking regulatory agencies, and banks are subject to various rules and regulations promulgated by the Consumer Financial Protection Bureau (CFPB), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Federal Housing Administration (FHA), the Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD).
13. U.S. Government Accountability Office, "Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness," GAO-16-175, February 2016, <http://www.gao.gov/assets/680/675400.pdf> (accessed April 4, 2017).
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17. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 28, which explains that "[a]ll forms of consolidated supervision by the Federal Reserve create overlap with authority of the primary regulators of the holding company's regulated subsidiaries."
18. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 36, which noted that "the Federal Reserve's data requests can be very similar to the OCC's requests and that often the two requests will ask for the same data but in different formats." See also memorandum from the Office of the Inspector General to the Board of Governors of the Federal Reserve System, "2015 List of Major Management Challenges for the Board," September 30, 2015, <https://oig.federalreserve.gov/reports/board-management-challenges-sep2015.pdf> (accessed October 8, 2016). Among the items in the list was "maintaining effective relationships with other regulators." The Inspector General noted: "While the Board has taken steps to improve interagency collaboration and cooperation...continued coordination with other federal supervisory agencies, such as the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, is crucial to implementing the financial stability regulatory and supervisory framework." *Ibid.*, p. 6.
19. The FFIEC is "a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by" the Board of Governors, the FDIC, the NCUA, the OCC, and the CFPB.
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21. See, for instance, U.S. Government Accountability Office, "Financial Regulation," p. 41, which observes: "Over time, separate regulation of the securities and futures markets has created confusion about which agency has jurisdiction and has raised concerns about duplicative or inconsistent regulation of entities that engage in similar activities."
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Chapter 8: Human Resources

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With roughly two million civilian employees, the United States federal government is one of the largest employers in the world. This massive workforce creates high stakes—in terms of the need for efficiency and accountability—for federal taxpayers. Unfortunately, the federal government operates on a faulty business platform that wastes taxpayer dollars by failing to optimize its human resources.

Despite paying its workers a hefty compensation premium, the federal government is rusty and sluggish.¹ Burdened by excessive red tape, inefficient and outdated practices, and lack of sufficient ways for rewarding high-performing employees or penalizing low-performing ones, federal managers and federal employees alike express widespread frustration with government practices that prohibit them from doing their jobs effectively.

The federal government is a unique entity and there are certain private business practices that are inappropriate for the federal government. However, there are many ways that the federal government can improve its efficiency, accountability, and achievements by making its employment model function more like the private sector.

Bringing Federal Compensation in Line with Private-Sector Compensation

The federal government significantly overcompensates federal employees. According to a 2017 report by the Congressional Budget Office, federal government employees receive 17 percent more, on average, than their private-sector counterparts. This costs taxpayers \$31 billion per year in added compensation costs. Reports by The Heritage Foundation² and American Enterprise Institute³ find significantly greater overall compensation premiums of 30 percent to 40 percent, and 61 percent, respectively. Those reports suggest that federal compensation premium costs two or three times as much—an amount between \$50 billion and \$81 billion per year.

One component of this overcompensation is higher salaries. A 2011 Heritage Foundation analysis of the gap between federal and private-sector compensation found that much of the unexplained wage premium in the federal government comes from federal employees advancing up the pay scale

more quickly than private-sector workers.⁴ Congress should remove the automatic nature of within-grade-increases (WIGIs) and allow federal managers to determine (within reasonable guidelines) the rate at which particular employees advance up the GS grades and steps.

Benefits are the biggest component of federal employees' overcompensation. On average, federal employees receive 47 percent more in benefits than private-sector workers, and this figure does not even take into account student loan repayment and forgiveness, transportation and childcare subsidies, retiree health benefits, and many other factors such as preferable work schedules. The biggest driver of the gap in benefits is retirement benefits—primarily the government's defined benefit pension plan. Federal workers receive between three and five times as much as the private sector.

Congress should switch all new hires and non-vested federal employees into an exclusively defined contribution system by increasing the federal contribution to employees' thrift savings plan (TSP).⁵ Workers with five to 24 years of employment should have the option of keeping their existing benefits with some changes (including higher employee contributions), or shifting entirely to the TSP with higher government contributions. No changes should be made for workers with 25 years or more of government service. Full details of proposed retirement changes can be found in the 2016 Heritage Foundation *Backgrounder* on reforming federal compensation.⁶

Congress should also reduce the amount of paid leave for federal employees by eight days (an employee with three years of service currently receives 43 days of paid leave), eliminate future retirement health benefits for new hires, and provide a flat subsidy for health insurance premiums, regardless of which plan employees choose. Taken together, the compensation changes proposed by Heritage would save \$333 billion over 10 years.⁷

Performance Rating System Should Reward and Discipline Employees Accordingly

According to a 2013 Government Accountability Office report, 99.6 percent of federal employees were

rated at least “fully successful” while only 0.3 percent were rated “minimally successful,” and 0.1 percent “unacceptable.”⁸ Federal employees’ so-called performance-based pay increases are tied to these ratings, meaning that these pay increases are effectively automatic.

Managers in the private sector have market incentives to elevate talent and cut dead weight. Instead of bottom lines, federal managers face significant legal constraints and a burdensome process if they rate federal employees anything less than “fully acceptable.” In addition to having to develop a performance-improvement plan for those workers, federal employees can appeal a less-than fully acceptable rating through multiple forums. Consequently, a study by the Office of Personnel and Management (OPM) found that 80 percent of all federal managers have managed a poorly performing employee, but fewer than 15 percent issued a less-than fully successful rating, and fewer than 8 percent attempted to take any action against the problematic employees.⁹ Among those who did attempt action, 78 percent said their efforts had no effect.¹⁰

The federal government requires a different system for performance ratings and pay increases. First, the burden on federal managers for rating an employee anything less than “fully successful” must be reduced. Managers should only have to develop time-consuming and burdensome Performance Improvement Plans (PIPs) for employees whose shortcomings are serious enough to result in termination if they are not addressed. Moreover, employees who receive anything less than “fully successful” ratings should only be allowed to appeal that rating through one internal forum (as opposed to four different ones).

Additionally, federal managers need some incentive to identify weak performers despite their hesitance to assume the role of disciplinarian. A forced ratings distribution would accomplish this. The OPM currently bans forced distributions, but there is no statutory basis for this regulation. In fact, the OPM regulation banning forced distributions arguably contravenes the law. According to the authorizing statute (5 U.S. Code § 4302), the OPM is responsible for establishing performance standards that “permit the accurate evaluation of job performance on the basis of objective criteria” and that help agencies in “recognizing and rewarding employees whose performance so warrants.” In practice, the

current rating system falls short of these statutory requirements.

The Office of Management and Budget (OMB) should eliminate the ban on forced distributions and provide a recommended distribution system (including a range to allow for differences in workforce performance across agencies). Moreover, federal managers who do not judge an employee as warranting a scheduled pay raise should not be discouraged from making toughminded managerial decisions by overly burdensome reporting requirements.

Improving and Expanding Pay-for-Performance Compensation Programs

Without adequate means of rewarding good work, performance assessment is little more than an academic exercise, as nearly all of federal employees’ pay increases are determined by seniority as opposed to merit. Currently, a manager can only reward a strong performer with a year-end bonus equaling 1.5 percent of the employee’s total salary. High-level managers in the Senior Executive Service (SES) can receive a larger bonus equal to 7.5 percent of salary.

The Trump Administration should push for legislation that changes the basis of federal compensation from seniority to performance. In so doing, the Administration and Congress should avoid the pitfalls that hampered previous efforts instituted by the Civil Service Reform Act of 1978 and modified in 1984 via the Performance Management and Recognition System. Neither system affected a broad enough swath of the civil service (it only applies to managers in the GS 13–15 pay bands), and both failed to effectively identify truly outstanding civil servants or to sufficiently reward superior achievement.¹¹

The Department of Homeland Security (DHS) and the Department of Defense both developed successful merit pay systems. Despite the OPM’s conclusion that those compensation programs “drive improvements in managing performance, recruiting and retaining quality employees, and achieving results-oriented performance cultures,”¹² public-sector union opposition caused these successful systems to be eliminated by the National Defense Authorization Act of 2009.

Even without congressional action, the Trump Administration can and should increase the size of year-end bonuses available for high achievers under the condition that such rewards are reserved for truly excellent public servants. Today, performance-based

bonuses are awarded far too routinely to make them an adequate inducement. In fiscal year 2015, for instance, 71.2 percent of SES managers received a performance bonus.¹³ According to an OPM report, 45 percent of employees below the senior levels received bonuses averaging close to \$1,000.¹⁴ To limit awards to truly excellent service, the OMB can provide a similar recommended distribution schedule for bonuses, and require managers who deviate from those schedules to provide sufficient evidence for doing so.

Make It Less Burdensome to Dismiss Chronic Low Performers

While high-performing civil servants are not rewarded sufficiently for their good work, underperforming employees rarely face serious consequences. While the risk of getting fired in the private sector is 1 in 77, the odds of being removed from public-sector employment are 1 in 500.¹⁵ Holding on to inadequate employees not only leads to wasted taxpayer dollars and poorly administered government programs, it also poisons the workplace climate as other employees learn that misconduct is tolerated and high performers are called on to pick up the slack.

The Trump Administration should bring public-sector employee accountability in line with that of the private sector. The Administration can do this reform three ways. First, the current probationary period for newly hired civil servants should be extended from one year to three. During this initial probationary period, a government employee does not have the same legal protections against removal as a fully instated employee. It is critical that managers have a longer period to observe an employee's work before handing him or her what amounts to a tenured position in the federal government.

Second, the federal government should simplify and streamline the appeals process available to terminated government employees. Federal employees currently have four venues for fielding their grievances—the Merit Systems Protection Board, the Federal Labor Relations Board, the Office of Special Counsel, and the federal division of the Equal Employment Opportunity Commission. Excessive grievance and appeals options contribute to the prohibitively burdensome and costly process of removing poor performers or problematic employees—a process that takes a year and a half, on average, to complete.¹⁶ Congress should reduce the number of grievance and appeals venues to one.

Lastly, the Trump Administration should shorten the period of time that managers are required to give employees to improve performance before dismissing them. Currently, a manager must provide an underperforming employee with a PIP and give him or her no fewer than 90 days to address his or her shortcomings. This Performance Appraisal Period (PAP) should be shortened to 60 days. As demonstrated by the fact that only 0.4 percent of public-sector employees are rated less than “fully successful” by their managers, it is safe to assume that when a performance issue is finally addressed, it is serious and probably not a new development. Further, the current 90-day PAP has no statutory basis in 5 U.S. Code § 4302.

Ensuring Sufficient Non-Career Executive Staff to Carry Out the President's Agenda

The President promised major change and has an ambitious agenda that requires a strong cadre of non-career (political) appointees who are committed to his agenda, and who are in the appropriate managerial positions throughout the federal departments and agencies.

There is a clear line between career and non-career functions and responsibilities. The career civil service enjoys the protection of the laws, rules, and regulations of the merit system, and they are duty-bound to carry out their responsibilities—including executing the Administration's policies as directed. At the same time, the President's appointees are the ones that must advance those policies through appropriate administrative actions, as well as advocating those policies to Congress. Career bureaucrats cannot perform these key management and policy functions.

Current law provides that 10 percent of the total SES can consist of non-career appointments. The President should make sure that he has the full complement of senior executives within the federal departments and agencies. Moreover, the President should instruct the OPM to undertake a personnel audit within federal departments and agencies to make sure that there are sufficient non-career personnel positions, including both Schedule C and SES, to execute the President's policy agenda. At the same time, the President should emphasize that each of his Cabinet and agency head appointments make every effort to ensure a bright line between career and non-career functions and responsibilities in order to advance his policy agenda while preventing politicization of career staff.

Seeking Opportunities to Expand Automation

Automation has transformed large swaths of the American economy. While automation does contribute to significant job loss and economic displacement, it also saves companies enormous sums of money, and they pass those savings on to consumers.¹⁷ Certain automations could help reduce the government's annual deficits, which the Congressional Budget Office estimates will average \$943 billion over the next 10 years.¹⁸ OMB should commission a report examining existing government tasks performed by generously paid government employees that could be automated. For example, one of the Social Security Administration's largest functions is providing replacements for lost or damaged Social Security cards. Kiosks in Post Offices (which already service U.S. passports) or malls could provide this service instead.

Studies suggest that the potential savings could be significant. According to an economy-wide analysis by McKinsey & Company, 49 percent of the activities that American workers currently perform could be automated by adapting and implementing existing technology.¹⁹ Upon investigating the United Kingdom's civil service, Deloitte researchers determined that up to 861,000 (of 5.4 million) public-sector jobs could be automated by 2030, resulting in a £17 billion (roughly \$21.5 billion) savings in wage costs.²⁰ Automating a similar percentage of American public-sector jobs would reduce the federal workforce by 288,000 employees. Even if all of these workers had no more education than a high school diploma, this measure would reduce federal personnel costs by \$23.9 billion.²¹

Consider a Contractor Cloud

The fact that the size of the *official* federal workforce has not changed significantly over the past decades hides the true size of the federal workforce. In addition to employing about 2 million civilians,

the federal government provides contracts that support far more than 2 million jobs.²² Between just 2000 and 2012, federal spending on contracts increased by 87 percent to \$518 billion in 2012.²³

Without assessing whether this growth in the number of federal contracts is appropriate or efficient, the fact remains that the federal government spends about one of every seven dollars on contracted goods and services (and one out of every five dollars based on revenues it collects). It is important that these contracting (taxpayer!) dollars are spent wisely.

The Administration should consider the use of a "contracting cloud" that would allow agencies and departments to hire directly from a pre-screened group of workers. This could help save agencies time and money by not having to obtain services through one or more layers of contractors and subcontractors. It could also result in a wider, more skilled set of available federal contractors. The cloud would identify security clearances and other necessary contractor attributes. In some cases, if agencies could directly hire contractors for, say, website design and maintenance, they could cut the cost and the time for projects by more than half.

Conclusion

In many regards, the federal government operates on a severely flawed business model that unnecessarily drives up costs (burdening American taxpayers), fails to encourage excellence, hinders output and efficiency, and lacks certain innovations. Although the federal government is unique, it could benefit significantly from adopting many features of the private sector, including its compensation platform and employee assessment, and its reward and discipline system. Adequate non-career staff to carry out the President's agenda, and the use of 21st-century innovations, will also help to improve the efficiency and accountability of the federal government.

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Chapter 9: Reducing the Federal Government's Footprint

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In March 2017, President Trump issued Executive Order No. 13781 calling for a “Comprehensive Plan for Reorganizing the Executive Branch.”¹ The order instructs the Director of the Office of Management and Budget (OMB), Mick Mulvaney, to improve the accountability, effectiveness, and efficiency of federal agencies. The executive order tells Director Mulvaney to consider “whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector through free enterprise.”²

The federal government owns and operates far too many assets that could be better managed by the private sector. Quite simply, they are private-sector endeavors that do not belong under the purview of the federal government. Congress and the Trump Administration should privatize the following federal assets and take aggressive steps to downsize the federal government's physical footprint.

Energy and Environment

It is neither necessary nor appropriate for the federal government to intervene in energy markets. The U.S. enjoys diverse and abundant sources of energy and a robust global energy market. The supply of affordable, reliable, and efficient energy technologies is a multi-trillion-dollar private-sector enterprise in which the United States is “one of the world's most attractive market[s].”³ The federal government is engaged in a number of roles and responsibilities that, while perhaps having merit of their own, are not appropriate to the federal government, and place the government in direct competition with the private sector. The Trump Administration should eliminate programs that intervene in energy markets, and allow free-market competition and innovation.

Power Marketing Administrations (PMAs). The four PMAs—the Southeastern Power Administration, the Southwestern Power Administration, the Western Area Power Administration, and the Bonneville Power Administration—were intended to provide cheap electricity to rural areas, development in economically depressed regions, and to pay off the costs of federal waterway projects, such as

federal irrigation and dam construction. They operate electricity generation, reservoirs, land, waterways, and locks.

PMAs sell deeply subsidized power to municipal utilities and cooperatives in the Southeast and West; they do not pay taxes and enjoy low-interest loans subsidized by taxpayers. Originally intended to recover the costs of federal waterway construction projects and to provide subsidized power to poor communities, the PMAs now supply such areas as Los Angeles, Vail, and Las Vegas. Generating and distributing commercial electricity should not be a centralized, government-managed activity; neither should taxpayers be forced to subsidize the electricity bills of a select group of Americans. Both the Reagan and Clinton Administrations proposed PMA privatization, and the Alaska Power Administration was successfully divested in 1996.⁴ The four PMAs that remain today should also be sold under competitive bidding.

Tennessee Valley Authority (TVA). The TVA is a federal corporation that provides electricity, flood control, navigation, and land management for the Tennessee River system. Although the TVA does not receive direct taxpayer funds, the corporation benefits from a number of special advantages not enjoyed by other utilities. The TVA has independence from the oversight, review, and budgetary control of a more traditional federal agency, as well as from the rigors of operating as a private shareholder-owned utility.⁵ This lack of effective oversight from either the government or the private sector has resulted in costly decisions, excessive expenses, high electricity rates, and growing liabilities for taxpayers.

Tennesseans have not received economic benefits from the TVA, either. The TVA enjoys exemptions from federal statutes and its many federal subsidies are conservatively estimated at 10 percent to 15 percent of the TVA's average wholesale power price. Yet Americans serviced by the TVA pay some of the highest electricity prices in the region. Despite three major debt-reduction efforts in recent history, the TVA has still not reduced its taxpayer-backed and ratepayer-backed debt.⁶ The TVA has had ample time to reduce debt, reduce operating costs, and reform and fully fund its pension fund. The most

effective way to restore efficiency to the TVA system is to sell its assets via a competitive auction and bring it under the rigors of market forces and public utility regulation.⁷

The Strategic Petroleum Reserve (SPR), the Northeast Home Heating Oil Reserve, and the Gasoline Supply Reserves. As part of the U.S. commitment to the International Energy Agency, the federal government created the SPR through the Energy Policy and Conservation Act (EPCA) in 1975.⁸ Congress initially authorized the SPR to store up to one billion barrels of petroleum products, and mandated a minimum of 150 million barrels of petroleum products. The SPR, which opened in 1977, has the capacity for 727 million barrels of crude oil, and currently holds 685 million barrels.⁹ The Northeast Home Heating Oil Reserve and the Gasoline Supply Reserves were established by EPCA and are held by the Department of Energy. They contain 1 million gallons of diesel and 1 million gallons of refined gasoline to prevent supply disruptions for homes and businesses in the Northeast heated by oil, to be used at the President's discretion.

The SPR has been a futile tool for responding to supply shocks, and disregards the private sector's ability to respond to price changes. Whether a shortage or a surplus of any resource exists, the private sector can more efficiently respond to changes in oil prices, whether it is unloading private inventories, making investments in new drilling technologies, or increasing the use of alternative energy sources. Congress should authorize the Department of Energy to sell off the entire reserve, specifying that the revenues go solely toward deficit reduction. Congress should instruct the Energy Department to sell the oil held by the SPR by auctioning 10 percent of the country's previous month's total crude production until the reserve is completely depleted. The Energy Department should then decommission the storage space or sell it to private companies.

The department should also liquidate or privatize the Northeast Home Heating Oil Reserve and the Gasoline Supply Reserves. Private companies respond to prices and market scenarios by building up inventories and unloading them much more efficiently than government-controlled stockpiles.

Commercial Nuclear Waste Management. Management of nuclear waste from commercial nuclear power reactors is a business activity, not an inherent government function.¹⁰ Yet the Nuclear

Waste Policy Act, as amended, established a system where the Department of Energy is legally responsible for collecting and storing waste from commercial nuclear reactors. Decades of dysfunction demonstrate the federal government's inability to manage nuclear waste rationally, economically, or at all. Should the Nuclear Regulatory Commission (NRC) grant a license to build a repository at Yucca Mountain as proposed, this would not solve the nuclear-waste-management challenge. It merely provides a short-sighted solution rather than an innovative, multi-dimensional market with an array of management opportunities for the future nuclear industry.

The private sector should ultimately take responsibility for managing its own nuclear waste, in addition to having the greatest incentive and expertise to reach solutions. The ultimate goal should be to create a competitive market where waste management companies compete to provide services to utilities. The federal government's role should be limited to providing regulatory oversight and taking final title of any waste upon final disposal. A possible model is the Finnish one, where the nuclear industry is responsible for management, and also where the first long-term repository in the world is being built.¹¹

To this end, the Department of Energy and the NRC should complete the licensing-review process for a Yucca Mountain repository as the law requires.¹² If a facility at Yucca Mountain is permitted and built, it should be done with the participation and ownership by Nevada to the fullest extent possible. While there are a number of ways to transition to privatization, industry must be responsible for negotiating market prices directly with waste management providers, and must hold the federal final title for the waste.¹³ All fees already paid to the nuclear waste fund for the purpose of a repository should remain connected to existing waste. Nuclear waste management funds should be placed in company-controlled escrow accounts for all new fuel.¹⁴

Income Security and Retirement

With the goal of improving individuals' financial security, the federal government has ventured into multiple areas of individuals' lives that would be better left to the private sector or state and local governments. Setting aside the often problematic and unnecessary nature of federal mandates for certain

income-insurance programs, the federal government's commandeering role as the provider and administrator of these programs is the primary reason why these programs fail to provide the income security they promise.

Virtually every federal program aimed at providing income security operates in the red, accumulating massive unfunded liabilities that will result in either failure to deliver the promised level of insurance or saddling massive debts on future workers. The federal government should devolve income security programs that provide a false sense of security to the private sector, where individuals can receive greater benefits at lower costs, and taxpayers can avoid multi-billion-dollar and multi-trillion-dollar bailouts.

The Pension Benefit Guaranty Corporation (PBGC). The PBGC is a self-financed government entity that provides insurance to private-sector pension plans.¹⁵ Under congressional oversight, the PBGC cannot operate like a real insurance company. Most problematic is its multiemployer program, which charges an excessively low, flat-rate premium to all pension plans regardless of their funding status.¹⁶ This would be like selling car insurance at \$100 per year to anyone who wants it, with no difference in price for a 16-year-old male and a 40-year-old woman.

Moreover, when a multiemployer pension plan becomes insolvent and the PBGC has to step in to pay insured benefits, the trustees who oversaw the plan's demise do not lose their jobs. Instead, the PBGC pays them to *continue* overseeing the plan. Consequently, the PBGC's multiemployer program faces an estimated deficit of \$58 billion to \$101 billion, and that only includes the liabilities of plans that become insolvent between 2017 and 2026.¹⁷ The only way to make the PBGC solvent (and therefore ensure that pensioners receive their insured benefits and that taxpayers do not have to pick up the tab) is to make the PBGC function like a private insurance company. That is not possible if it has to petition Congress to make a change.

Therefore, Congress should establish a path to divest the PBGC's role to the private sector. After addressing its existing deficits, Congress should end the PBGC. In its place, Congress should establish minimum required insurance that private pensions must purchase, similar to how state governments require certain levels of car insurance. Private

insurers would do a better job of appropriately pricing insurance and would incentivize plans to maintain higher funding levels. Moreover, taxpayers would be less likely to have to pick up the tab for underfunded pensions.

Social Security Disability Insurance (SSDI). Aside from inefficiencies in the Social Security Administration's (SSA's) operations, the SSDI program's problems and unchecked growth boil down to two factors: too many people get on the rolls, and too few ever leave them. The private sector offers solutions to both of those problems. In contrast to SSDI, private disability insurance (DI) does a significantly better job of identifying eligible individuals who suffer from permanent and deteriorating conditions from those who could be helped with accommodations and rehabilitation. Private DI also helps about four times as many people return to work, provides a more efficient and timely determination process (taking no more than 45 days for a determination compared to more than a year for most SSDI applicants), and provides about 33 percent more in benefits for about half the cost of SSDI.¹⁸

The SSA should implement a demonstration project to test the viability of providing an optional, private disability insurance component within the current SSDI program. The SSA should use its authority under Section 234 of the Social Security Act¹⁹ to implement a demonstration program that would test the viability—including the budgetary impact for the SSDI system and the economic and physical well-being of potential SSDI beneficiaries—of an optional, private DI component by allowing a limited number of companies and workers to participate in an optional private DI system for their first three years of benefits.²⁰ If mutually beneficial to the SSDI program's finances and to individuals' well-being, Congress should make private DI an option for all companies and workers.

Subjecting these assets to market forces will result in competitive processes that yield efficient outcomes. In some cases, divesting some of these assets may result in lower prices through increased operational efficiency because private actors are incentivized to reduce costs rather than rely on the preferential treatment from the government. In other cases, privatization may result in higher prices, at least in the short term, as the preferential treatment is stripped away. Ultimately, however, taxpayers will not be subject to paying for concentrated benefits

accrued to those parties receiving special privileges. Notably, taxpayers will be protected from decades of government mismanagement where growing liabilities of government-owned assets would likely result in taxpayer-funded bailouts. Privatization will result not only in a leaner federal government, but will incentivize government-owned assets that have received decades of preferential treatment to operate more efficiently and effectively.

Transportation Infrastructure

Although the federal government is extensively involved in funding and regulating the nation's infrastructure, it directly owns few assets. Indeed, only 3 percent of U.S. infrastructure is federally owned, while the remaining 97 percent is under the stewardship of states, local governments, and the private sector.²¹ However, the assets that the federal government does own and operate are of vital interstate importance, and could substantially benefit from improved management and market incentives. The Administration should comprehensively privatize the federally owned infrastructure in the following areas:

Amtrak. Established in 1971, Amtrak is a federally funded government corporation that holds an effective monopoly on intercity passenger rail. The majority of Amtrak lines provide poor service and require large taxpayer subsidies, largely due to its monopoly status and government mismanagement.²² Ideally, Congress and the Administration should eliminate federal subsidies for Amtrak, privatize any viable lines (chiefly the Northeast corridor), and open up intercity passenger rail to competition. Management of current state-supported routes could be turned over to the states, which would then have the option to cover the full cost of providing passenger rail service.

If complete overhaul is not politically possible, an alternative approach would be to lower federal subsidies for the long-haul and state-supported routes, allowing states to replace the subsidy difference if desired, and Amtrak to shutter underperforming routes. The Northeast corridor could also be entered into a public-private partnership by bidding out the right to operate and maintain the Northeast corridor for a set period to a private firm, under the condition that the operator maintain a certain level of service and infrastructure condition.²³

Allowing firms to compete to provide service would not only decrease costs to taxpayers and improve service for customers, but would also add an additional element of accountability that is currently non-existent for the railway in its current monopoly form.

Air Traffic Control. The Federal Aviation Administration's Air Traffic Organization (ATO) is responsible for providing air traffic control services. Worldwide, it is one of the last air-navigation service providers that is housed within an aviation-safety regulatory agency, and indeed, there is bipartisan agreement that air traffic control is not inherently a government function.²⁴ Government bureaucracy has led to an ATO that is slow to react, mired in red tape, and managed by Congress, when it should be run like an advanced business. Billions of dollars have been spent on technology modernization, and the ATO struggles with basic business functions, such as hiring employees, investing in capital improvements, and improving efficiency in its current structure.²⁵ Full privatization of air traffic control would bring private-sector flexibility and efficiency to the essential service and allow it to innovate outside the realm of federal bureaucracy.

Saint Lawrence Seaway Development Corporation (SLSDC). Congress and the Administration should privatize the SLSDC, which maintains and operates the U.S. portion of the Saint Lawrence Seaway under 33 U.S. Code § 981 and 49 U.S. Code § 110. The privatization would end taxpayer contributions for maintenance and operating activities, mirroring the SLSDC's Canadian counterpart, which was privatized in 1998.

Inland Waterways. The Army Corps of Engineers owns and manages the bulk of the United States' vast inland waterways infrastructure, covering an estimated \$264 billion of water resources infrastructure—such as locks and dams—across 12,000 miles of waterways.²⁶ However, the Corps has done a poor job of updating and maintaining this vital infrastructure, the majority of which is past its intended design age of 50 years, resulting in substantial delays and bottlenecks.²⁷ The waterways suffer from a lack of user-funded financing stream and market incentives to maintain the infrastructure. The waterways rely on a \$0.20 tax on commercial fuel on certain segments of the waterways. These taxes cover only 50 percent of capital costs of the inland waterways, and 0 percent of operating

costs. Federal taxpayers pick up the remaining share, resulting in an effective 90 percent subsidy—by far the most of any freight infrastructure.²⁸ This reliance on general revenues can explain the poor condition of the waterways infrastructure, especially compared to that of highways and freight rail, the maintenance of which is primarily—entirely in the case of freight rail—funded by the users.

Modern freight infrastructure does not come for free. If the inland waterways are to be modernized, a substantial shift in the funding paradigm is required. Congress and the Administration should completely transition away from the inadequate fuel tax to a direct user-fee system. This approach has bipartisan appeal, garnering support from both the Trump and Obama Administrations.²⁹ Following the authorization of user fees, the federal government should privatize the locks, allowing private companies to operate and maintain the locks, dams, and other inland waterways infrastructure. If outright privatization is not politically feasible, the Corps should bid out the right to operate and maintain waterway infrastructure under certain specifications to private operators. Moving away from the current outmoded funding system toward one of market incentives is the best option for waterways infrastructure modernization.

Federal Property

The federal government owns vast tracts of land and real property assets that could be put to better use, and in doing so would reduce the burden on taxpayers. Federal lands face multi-billion-dollar maintenance backlogs, and management agencies are increasingly spending resources to meet regulatory reporting requirements and fight lawsuits.³⁰ Taxpayers also bear the cost of mainlining underutilized or vacant buildings—which could be put to better use through leasing or sale.

Federal Lands. The federal estate is massive, consisting of some 640 million acres. The effective footprint is perhaps even larger as limitations on federal lands often affect the use of adjacent state and private lands, and as government agencies lock up lands through informal designations and study areas. The sheer size and diversity of the federal estate and the resources both above and below ground are too much for distant federal bureaucracies and an overextended federal budget to manage effectively.

Further, both the executive branch and Congress have irresponsibly increased the size of federal land holdings without providing for their maintenance over the years. The federal government can simply pass on the costs of poor land management to federal taxpayers, but private citizens, businesses, and nonprofit organizations have powerful incentives to manage resources better.³¹ Private actors are more accountable to the people who will directly benefit from wise management decisions or be marginalized by poor ones.

The President and Congress should keep the size of the federal estate in check by abstaining from adding new properties, and expeditiously devolving those already designated as not needed. Congress should explore avenues to reduce the size of the federal estate, including privatization, but also land transfers to states and county commissioners, and increasing the use of private land trusts. Congress should also give federal land managers more autonomy in setting user fees in order to make them more competitive with the private sector and incentivize better management.

Federal Real Property. The federal government holds a vast array of real property—leasing or owning approximately 273,000 buildings in the United States.³² Despite recent efforts to downsize the government’s inventory of vacant and underutilized property, the most recent data from 2010 suggests that a substantial amount of property—as many as 77,700 buildings—remains vacant or underused.³³ However, significant hurdles exist for the government to offload real property, which would save taxpayers money and provide a boon to local economies. Federal law forces agencies to undergo a time-consuming and inefficient process when trying to offload property by first requiring the property owner to offer the facility to another federal agency, state and local governments, or qualified nonprofits.³⁴ Specific laws and regulations that hinder property disposal include:

- The National Environmental Protection Act (NEPA), which provides many agencies with a direct disincentive to offload old properties;³⁵
- The National Historic Preservation Act of 1966, which requires agencies to register historic properties and consult with various stakeholders before taking action on disposing or altering the property;³⁶

- The Stewart B. McKinney Homeless Assistance Act of 1987, which requires agencies to offer properties to organizations alleviating homelessness;³⁷ and
- Budget scoring rules that act as disincentives to agencies to incur short-term expenses to sell or demolish surplus properties, but lead to greater long-term costs of maintaining suboptimal properties.³⁸

In order to expedite the process of offloading surplus real property, the Administration should improve data collection and reporting to adequately quantify the nature of the federal government's properties that are vacant or underutilized, as required by the Federal Assets Sale and Transfer Act of 2016.³⁹ The Administration and Congress should then further expedite or waive the procedural hurdles facing the federal government from offloading the properties to private ownership. Undertaking a BRAC-like process to dispose of a large number of surplus property is another approach.⁴⁰ Facilitating easier disposal of federal real properties would shrink the footprint of the federal government, save long-term budget resources, and allow the free market to make better use of underutilized federal properties.

The benefits of privatization far outweigh the immediate pain of upfront "costs" to privatization, such as caused by budget scoring rules that make privatization unnecessarily difficult politically. While by no means an all-inclusive list, Congress and the Trump Administration could make important headway in reducing federal assets and activities that belong in the private sector. Subjecting these functions to market competition will not only protect taxpayers from current expenditures and future liabilities, it will improve efficiencies that will ultimately benefit the consumers connected with these assets, whether through electricity consumption, air travel, or disability insurance. Congress and the Trump Administration should not treat Executive Order No. 13781 as a bureaucratic thought experiment, but as a true opportunity to make the federal government leaner. Reining in government spending and responsibilities will allow the federal government to focus on more priority issues and better management of the assets that remain. Reducing federal assets that drain public resources could be of great use to the private sector.

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Chapter 10: Deputizing Federal Law Enforcement Personnel Under State Law

Paul J. Larkin, Jr.

The Legislative Response to Unsettling Crimes

The criminal law has always sought to prevent wrongdoing and redress grievances.¹ Both the federal and state governments have that responsibility, with the states doing the lion's share of the work.² The reason is that states have a general "police power"—that is, the inherent authority to legislate on any subject to protect the health, safety, and well-being of the public³ unless the Constitution gives a particular subject matter exclusively to the federal government.⁴ This police power enables any state to make it a crime to murder, rape, rob, or swindle anyone within its territory.⁵

The federal government, by contrast, has no general police power.⁶ It can define crimes only in connection with one of the powers given to it by the Constitution.⁷ Certain crimes—such as treason, espionage, the counterfeiting of U.S. currency, or the murder of federal officials—are natural candidates for federal offenses whether or not they are also crimes under state law.⁸ For most of our history, the federal criminal code focused on matters of peculiar interest to the federal government.

But no more. It is not uncommon today to see Congress enact a new federal criminal law in response to a surge of media attention to a problem or a noteworthy event. In 1992, the problem was "carjacking," and the event was a carjacking in the Washington, D.C., region of a mother's car with her child still in it. To signal its disapproval, Congress gave us a federal carjacking statute,⁹ even though kidnapping and the interstate transportation of a stolen vehicle were already federal offenses¹⁰ and kidnapping and theft were crimes in all 50 states.¹¹ Ten years later, large-scale corporate fraud prompted Congress to enact the Sarbanes–Oxley Act of 2002,¹² even though there already were dozens of federal fraud statutes on the books¹³ and both fraud or larceny have been crimes in one form or another since the common law.¹⁴

Today, the problem is the rise in assaults against police officers, and the events were the murders of officers in San Antonio, Texas, and Baton Rouge, Louisiana, as well as the ambush murders of several officers in Dallas. Together, those incidents have led

some Members of Congress to introduce legislation that would make it a federal crime to kill a state or local police officer if his department receives federal funds,¹⁵ even though every state criminal code already outlaws murder.¹⁶ It would not be unreasonable for anyone to conclude that Congress no longer feels itself bound by the principle that there is a limit as to how far it should extend federal criminal jurisdiction in the service of a healthy system of federalism.

Although the reflexive desire to address the murder of state and local police officers through new federal legislation is misguided, the sentiment behind such legislation can be noble. Police officers are "the foot soldiers of an ordered society,"¹⁷ and there is reason to believe that they have recently been under assault. Preliminary data for 2016 recently published by the Federal Bureau of Investigation (FBI) indicate that 66 police officers were feloniously killed in the line of duty, 17 of them by ambush, for a 61 percent increase over the 41 killed in 2015.¹⁸ Also troubling is the trajectory of those numbers. Over the past decade, the number of officers killed in the line of duty peaked at 72 in 2011 and then declined to 27 in 2013 before the recent uptick beginning in 2014, which saw an increase to 51.¹⁹ We are not in the same position today that we found ourselves in during the 1960s, when the Black Liberation Army targeted members of the New York City Police Department for assassination,²⁰ but the current trend is one that any responsible party wants to see reversed.

Some commentators have concluded that the rise in murders of police officers is due to the vocal outcries made by leftist groups to defy and confront the police, such as clamors heard after a white police officer shot and killed Michael Brown, a black assailant, in Ferguson, Missouri. The private condemnations of the Ferguson incident began before all of the facts were in and, some could argue, were intended to generate media attention and throw back on their heels any politicians who might otherwise automatically support the police for using force in self-defense or to arrest a suspect.²¹ The constant reiteration of those claims by the media in their 24/7/365 news cycle only aggravated the harm. It is true

that the police have abused their authority in some well-publicized cases²² (and others unknown), but the Michael Brown incident was not one of them.²³ Moreover, it is in the nature of things that calls by extremists for the on-sight murder of white police officers²⁴ will have an effect on at least some portion of the target audience.²⁵ When anything can be said—however incendiary, however inciting, however dangerous—there is a real risk that whatever is said will be done. The result is that to some elected officials, the only effective response is new legislation making the strong statement that “This conduct stops *here and now!*”

Yet there is more than one way to address a crime problem. (In fact, the addition of a new provision to the federal criminal code is sometimes the least desirable option.) Congress, like any state or local assembly, can always address a criminal justice problem in several ways. For example, it can increase the number of law enforcement officers (e.g., authorize additional investigators); attract better-quality personnel by increasing the salaries of current investigators (e.g., create a new GS scale level); recruit experts to perform closely allied tasks (e.g., hire forensics or computer personnel); reassign investigators from one agency to another (e.g., shift the Bureau of Alcohol, Tobacco, Firearms, and Explosives from the Treasury Department to the Justice Department); and upgrade the physical assets that investigating officers need to enhance their efficiency (e.g., purchase upgraded patrol car computers or smart phones).²⁶ Or, alternatively, Congress could leave to the Attorney General the responsibility for designing a solution.

In this case, that last course may be the optimal one. The Attorney General can arrange with state and local governments for the latter to cross-designate federal investigators as state investigators and federal prosecutors as state prosecutors, thereby enlarging the pool of personnel handling violent crimes. Cross-designation would enable the Justice Department to investigate and to prosecute violent crimes in state court, including assaults on police officers, using existing state laws in the applicable jurisdiction.²⁷

The Ubiquity of Law Enforcement Task Forces

Federal law enforcement agencies commonly use task forces to bring together different investigative

agencies with concurrent jurisdiction over certain offenses or subjects for the purpose of investigating a common problem. For example, the FBI, Drug Enforcement Administration (DEA), and Immigration and Customs Enforcement (ICE) may become partners on a drug task force to conduct a particular investigation or series of investigations. To ensure that the agencies cooperate effectively, they often enter into a formal memorandum of understanding (MOU), which is an agreement among different law enforcement agencies spelling out how they will work cooperatively. MOUs often resolve a number of issues, such as which agency has primary investigatory jurisdiction; which agency is in charge of operations, seizures, evidence collection, and storage of forfeited items; what notice should be given to other federal, state, and local agencies; how to coordinate; and how interagency disputes will be resolved. For example, in 1990, the Secretary of the Treasury, Attorney General, and Postmaster General entered into an MOU regarding money-laundering statutes to “reduce the possibility of duplicative investigations, minimize the potential for dangerous situations which might arise from uncoordinated multi-bureau efforts, and to enhance the potential for successful prosecution in cases presented to the various United States Attorneys.”²⁸ Similarly, in 1984, the Department of Justice entered into an MOU with the Department of Defense to establish policy with “regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction.”²⁹

Federal and State Collaboration via Task Forces

The federal government often partners with state and local law enforcement agencies to address a common problem. For example:

Organized Crime Drug Enforcement Task Forces. A well-known example of strong cooperation among federal, state, and local law enforcement officers can be seen in the Organized Crime Drug Enforcement Task Forces Program (OCDETF). These task forces were formed in recognition that no single government agency is “in a position to disrupt and dismantle sophisticated drug and money laundering organizations alone.”³⁰ The program is a coordinated effort between several federal agencies and state and local law enforcement authorities to combat organized drug trafficking.³¹ It allows

government agencies to share information, coordinate resources and work side-by-side to further each organization's shared law enforcement goal.

The National Infrastructure Protection Plan. The National Infrastructure Protection Plan (NIPP) is an example of a collaborative effort between federal and state officials.³² Under the NIPP, the Department of Homeland Security (DHS) formulated a "largely voluntary" plan for securing the nation's critical infrastructure and key resources by coordinating with other federal agencies and state governments.³³ The NIPP identifies the roles and responsibilities of the federal, state, and local governments in order to coordinate federal and state resources and share information. It encourages states to facilitate "the exchange of security information, including threat assessments and other analyses, attack indications and warnings, and advisories, within and across jurisdictions and sectors therein."³⁴

FBI Violent Gang Task Forces. The FBI created the Safe Streets Violent Crime initiative in January 1992 to bring federal, state, and local law enforcement agencies to bear on "violent gangs, crime of violence, and the apprehension of violent fugitives."³⁵ This initiative ensures that law enforcement officials at all levels of government collaborate in an effort to eliminate violent, gang-related crime in their communities. The task forces are organized by state; for example, Arizona has the Phoenix Violent Gang Task Force and the Northern Arizona Violent Gang Task Force. This initiative focuses on prosecuting racketeering, drug conspiracy, and firearms violations, specifically.³⁶ According to FBI testimony, the initiative benefits local law enforcement because it eliminates unnecessary spending and overlap between the federal and state levels. In addition, non-federal law enforcement agencies receive federal support that might not otherwise be readily available.³⁷

Disaster Fraud Task Force. The Disaster Fraud Task Force (DFTF) was created on September 8, 2008, to combat various instances of fraud in relation to Hurricane Katrina and other natural disasters,³⁸ such as the submission of benefit claims on behalf of people who did not exist.³⁹ In 2006, the Government Accountability Office "estimated that perhaps as much as 21 percent of the \$6.3 billion given directly to victims might have been improperly distributed."⁴⁰ By working together with local law enforcement, as well as the Federal Trade Commission and the Securities and Exchange Commission

(among others), the DFTF is able to combat a wide array of thefts and frauds from both Katrina and subsequent natural disasters.⁴¹

Fusion Centers. By integrating intelligence and evidence from across government agencies, federal law enforcement can share important counterterrorism and threat information with state and local officials. That is why fusion centers were established pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004,⁴² which required the President to facilitate the exchange of information regarding terrorism and homeland security by linking together information and people in the federal, state, local, and tribal communities, along with the private sector.⁴³ As of 2006, fusion centers were operating in 37 states.⁴⁴ Those centers have provided the resources and assistance to local officials that have allowed them to apprehend terrorist suspects.⁴⁵

Intellectual Property Task Force. Law enforcement agencies at the federal, state, and international levels have joined forces via the Intellectual Property Task Force. Intellectual property crimes have been on the rise due to increasing globalization and international trade, among other factors.⁴⁶ In 2010, the Intellectual Property Task Force played a part in the arrest of multiple storeowners and subsequent seizure of almost \$100 million in counterfeit merchandise in San Francisco, California.⁴⁷

National Explosives Task Force. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) heads this federal task force, which is designed to use a "whole of Government"⁴⁸ approach to combat criminal and terrorist attacks using explosives. Like many other task forces, its goal is to fight dangerous threats against our nation while efficiently consolidating the personnel and assets of different government agencies. For example, as the Government Accountability Office has reported, the BATFE and FBI divisions of the National Explosives Task Force are located in the same headquarters to reduce jurisdictional confusion.⁴⁹ Other evidence of the high level of collaboration between BATFE and FBI officials can be seen in the consolidation of explosives training, databases, and laboratories.⁵⁰

ICE: Customs Cross-Designation. The office of Homeland Security Investigations (HSI) under ICE is authorized to "cross-designate other federal, state and local law enforcement officers to investigate and enforce customs laws."⁵¹ Those cross-designated officers⁵² can conduct customs searches,

serve customs-related arrest warrants, and carry firearms, just as a standard ICE officer can.⁵³ Overall, this means that HSI has a much greater reach than it would at just the federal level, and more officers can be utilized in positions where they are needed that would normally be outside their jurisdiction.

Various states have also created their own task forces. For example:

California: Proactive Methamphetamine Laboratory Investigative Task Force. This task force operates on the state level but works with the U.S. Department of Justice and the Bureau of Narcotics Enforcement of the California Department of Justice. The Orange County Proactive Methamphetamine Laboratory Investigative Task Force was established in 1998 to “provide support and enhance the existing efforts of the BNE Clandestine Laboratory Program, with the interdiction and eradication of the small to medium size ‘stove top’ methamphetamine labs.”⁵⁴

Pennsylvania: Crimes Against Children Task Force. Created on September 23, 1999, this task force was designed to bring together not only the federal, state, and local governments, but also medical experts, hospitals, and victims’ services groups in order to further the fight against the sexual exploitation of underage victims.⁵⁵ There are similar task forces at the state and federal levels addressing the same type of crime. As one example, the Alabama and Georgia Internet Crimes Against Children Task Force, a component of the much broader Internet Crimes Against Children Task Force,⁵⁶ arrested 29 suspects on the charge of possession and distribution of child pornography.⁵⁷

Virginia: Northern Virginia Regional Gang Task Force. Created to address the growing threat of gangs in Northern Virginia, this task force is a collaboration of federal, state, and local officials that aims to educate on, prevent, and infiltrate gangs in the area.⁵⁸ This task force is unique in that its jurisdiction does not extend across state lines and it assists local police departments only when needed.⁵⁹ A multijurisdictional task force is important where culprits can easily move across state lines.⁶⁰

The Benefits of Deputizing Federal Investigators and Prosecutors as State Investigators and Prosecutors

There will be occasions when the federal government will want to be involved in the investigation

or prosecution of what is, at bottom, an ordinary “street crime.” For example, a suspected terrorist might commit an attempt under state law in a field where there is no federal law making an attempt a crime. While that offense would be only a state crime, the federal government would have a strong interest in bringing a terrorist to justice—if for no reason other than to demonstrate to other would-be terrorists that it will pursue and prosecute them for their crimes, whatever they are, wherever they may be—or in assisting a locale, such as Chicago, that is swamped with violent crime. Rather than invent some new arcane statute justified by a tenuous theory of federal jurisdiction—a statute that would remain on the books as a trap for the unwary long after the need for it has passed—Congress could expressly authorize federal law enforcement officers to be deputized under existing state law. Through appropriate use of cross-designation, the federal government could ensure that defendants of particular federal interest get the attention they deserve while also helping states and localities to bring common criminals to book.

The Attorney General, the nation’s senior federal law enforcement officer,⁶¹ has the authority under Title 28 of the U.S. Code to manage the conduct of all federal investigations and litigation.⁶² The Intergovernmental Personnel Act⁶³ empowers the Attorney General to assign federal personnel to states or localities “for work that [he or she determines] would be of mutual concern to [both parties].”⁶⁴ If so, the Attorney General should be free to enter into an MOU with a senior state official—perhaps the governor or the state attorney general—granting federal investigators and prosecutors the same authority enjoyed by their state counterparts. Where federal and state law enforcement personnel are working on a case or problem of interest to both, cross-designation would be a sensible decision.⁶⁵ Federal law expressly allows the Attorney General to appoint state or local prosecutors as Special Assistant U.S. Attorneys (SAUSAs), and those SAUSAs may prosecute cases in federal court.⁶⁶ The proposal outlined in this paper is to regularize the same process, just in reverse.

One benefit of a cross-designation program is that it would enhance the federal government’s ability to address violent crime while avoiding the statutory and constitutional shortcomings that can keep it from addressing that problem under existing

federal law. Those statutes often do not empower the Justice Department to prosecute someone for what would normally be seen as a state law crime,⁶⁷ in part because Congress lacks the Article I authority to make such conduct a federal offense.⁶⁸ In some circumstances, Congress can condition the disbursement of federal funds on a state's willingness to adopt a new state law, even a new criminal law.⁶⁹ That proposition, however, cannot be stretched indefinitely. Using the receipt of federal funds simpliciter as a basis for extending the reach of the federal criminal code might be an unconstitutional exercise of federal power. It certainly is an unwise one. It would enable Congress, for example, to make it a crime to murder anyone who is a recipient of any federal payments (or credits) through federal programs such as Social Security, Medicare, Medicaid, Pell Educational Grants, or scores of other similar undertakings. The effect would be to empower Congress to make any conduct a crime despite the limitations expressed by the explicit and particularized grants of power in Article I, Section 8 of the Constitution.

The Role for Congress

Is there a role for Congress? Yes, but adding to the federal criminal code is not it. Instead, Congress should expressly authorize the Attorney General to pursue agreements with state authorities in which federal law enforcement officials are designated with state law enforcement authority. The states have the power to respond to ordinary "street" crimes. Neither the Constitution nor any federal law expressly prohibits states from sharing their authority with federal agents and Justice Department lawyers. Nonetheless, federal legislation would be valuable. It would powerfully signal congressional and executive approval of deputization as a valuable law enforcement option and would eliminate any claim that a particular federal law enforcement officer violated federal law in making an arrest, executing a search, or questioning a suspect for a purely state law crime.

The Constitution. Not surprisingly, while the Constitution does not expressly authorize federal officials to act under state law, it also does not prohibit them from doing so. The Constitution left that issue up to the new national government and the states. Only one provision in the Constitution—the Article I Incompatibility Clause—advertises to the possibility that a federal official could hold another

position simultaneously, and it does not speak to the issue here. The clause provides specifically that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his continuation in Office.⁷⁰

The text of the Incompatibility Clause is no bar to the deputization option recommended in this paper. It addresses only interfederal office-holding, not the scenario discussed here, which would involve federal–state power sharing. The clause denies Senators and Representatives the ability to hold any office created "under the Authority of the United States" while they are serving in Congress and imposes a corresponding restraint on members of the executive branch also simultaneously serving in Congress.⁷¹ There is no parallel bar on holding a position in the federal and state governments at the same time.

Allowing a federal official to possess state-delegated authority also does not run afoul of the purposes of the Incompatibility Clause. The Framers intended for the clause to achieve two goals. On the one hand, by denying members of the Senate and House of Representatives any opportunity to serve simultaneously in a position in the Articles II and III branches, it prevents the President from buying votes in Congress by offering members attractive positions and a double salary elsewhere in government. On the other hand, by keeping officials in the executive and judicial departments from serving as Senators or Representatives, it keeps the President and federal bench from infiltrating Congress with their cronies. Neither purpose is offended by allowing officers in Article I, II, or III to serve at the same time in a position in state government.

Ethical problems could arise if, for example, a federal agent or prosecutor were subject to a conflict of interest or if inconsistent demands pulled him in two different directions. For instance, a state, county, or city might try to force a federal agent to assist in the investigation of so many open state cases that the agent could not properly perform

his responsibilities as a federal law enforcement officer.⁷² Or the federal government might want to use a particular offender as an informant on the street rather than see him wind up in prison for a state offense.

Those problems, however, are practical ones, not constitutional ones. The Constitution does not establish a code of ethics for federal officials. That is a task for Congress or the heads of the various federal agencies. The Incompatibility Clause is the only provision in the Constitution that is analogous to a canon of ethics, and it is concerned not with morality but with power—in particular, the risk of compromising Congress’s ability to operate independently of the President. The cross-designation of law enforcement officers proposed in this paper does not remotely resemble the problem that the Incompatibility Clause avoids.

The Federal Code. There are two relevant issues. One involves the substantive authority of federal agents to enforce state law. The Justice Department, through its Office of Legal Counsel, has concluded that federal agents lack inherent state law enforcement power; they must receive that authority from another source.⁷³ The second issue concerns the proper use of federal funds. Federal agency expenditures must be expressly authorized by, or at least fully consistent with, an appropriations bill passed by Congress.⁷⁴ As the Justice Department has explained: “If the agency believes that [an] expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency’s mission, the appropriation may be used.”⁷⁵ Otherwise, any enforcement of state laws must bear a clear and logical relationship to the agency’s purpose, which in almost all instances is to enforce federal law, not state law.

Those conclusions are sensible ones. Congress is limited to the authority granted by the Constitution, and federal law enforcement officers—e.g., federal agents and Justice Department lawyers—are limited to the authority that Congress assigns them.⁷⁶ The Constitution does not grant Congress the power to create state law, so federal law enforcement officers cannot claim to possess an inherent federal right to exercise state law enforcement authority. For example, because Congress cannot make simple common-law crimes—such as murder, rape, robbery, and burglary—federal offenses (unless the victims are federal officials or the crime occurs on federal

property),⁷⁷ it cannot authorize federal agents to investigate such violations of state law.

In a few instances, Congress has authorized the Attorney General to provide federal law enforcement assistance to states or localities. The Emergency Law Enforcement Assistance Act authorizes the Attorney General to use federal law enforcement personnel during a state or local “law enforcement emergency.”⁷⁸ The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988⁷⁹ would empower the President to use federal law enforcement officers to help a state protect the public during a disaster or emergency.⁸⁰ The Protection of Children from Sexual Predators Act of 1998⁸¹ authorizes the Attorney General and FBI director, upon request by a senior state or local law enforcement officer, to assist in the investigation of “serial killings.”⁸²

Those, however, are baby steps. Congress took a giant step toward granting federal agents plenary authority to act under state law in the Anti-Drug Abuse Act of 1988.⁸³ The act added a new Section 564 to Title 28, which provides that U.S. Marshals and Deputy U.S. Marshals may exercise “the same powers which a sheriff of the State may exercise in executing” state law when a marshal or deputy is engaged “in executing the laws of the United States.”⁸⁴ That provision does not completely turn federal agents into police officers—a federal agent must be in the process of executing federal law to be deemed a state sheriff—but it does signal that Congress does not object to that proposition in appropriate circumstances.

It could be said that by tasking federal law enforcement officers with the responsibility to assist states and localities, Congress has impliedly granted federal officers whatever authority is necessary to assist in the enforcement of state law, including the power to make arrests or execute search warrants. In *Maul v. United States*,⁸⁵ Justices Louis Brandeis and Oliver Wendell Holmes agreed that certain law enforcement powers, including the authority to arrest someone for a crime, “inhere” in that office itself and should be assumed to exist unless there is a statutory provision to the contrary.⁸⁶ The argument would be that Congress, the President, and the Attorney General know how and when federal law enforcement officers could be useful and would not involve them in a law enforcement setting if they lacked the express or implied authority to carry out the mission for which they are suited.

But that is merely an argument; it is not a statute. New legislation expressly approving this practice would settle the issue without the need to await the outcome of what could be years of litigation. It would empower the Attorney General from the day it is signed into law to enter into deputization or cross-designation agreements with state officials. Those agreements would eliminate any doubt about whether federal law enforcement officers can make an arrest or execute a search warrant solely for a state law crime. And that would go a long way toward assuaging any concern that reliance on federal agents would create problems when it comes to the prosecution of a case and toward eliminating any claim that those agents were engaged in an unauthorized use of federal funds.

Practical Implementation of This Proposal

It may be necessary for the Attorney General to enter into an agreement with a senior state official, whether the governor, the attorney general, or the chief of the state police. Municipalities are merely corporations created by the state, and officers within municipal police departments may not possess statewide law enforcement authority.

One option would be to use the model created by the Anti-Drug Abuse Act of 1988, but with a slight twist. To eliminate all uncertainty, legislation could vest U.S. officials with the power to receive from a state the same authority possessed by a sheriff, state police officer, or state prosecutor in any state willing to deputize federal officials. At common law, the sheriff, then known as the shire reeve, was the king's agent, responsible for handling "all the king's business" and maintaining "the king's peace."⁸⁷ Different states may assign their sheriffs different law enforcement authority, but a number of them grant their sheriffs and deputies law enforcement authority throughout the state. The alternative of making federal officials state police officers or prosecutors should eliminate any doubt on this score. In sum, an agreement for identified federal agents to receive the same delegated statewide authority would eliminate any question about their authorization.

Conclusion

The use of federal-state task forces is a widespread practice in contemporary law enforcement and offers promise as an alternative to the passage of new federal criminal legislation if the federal government is to tackle violent crimes as one of its principal missions. The authority for such cooperation, including cross-designation of federal authorities to investigate and prosecute alleged violations of state law (and vice versa), exists. Nonetheless, Congress could eliminate any doubt on that score by expressly authorizing federal investigators and prosecutors to be cross-designated as state law enforcement officials.

Federal legislation encouraging deputization would materially assist federal, state, and local law enforcement efforts both by putting the weight of congressional approval behind the practice and by resolving certain questions that would arise when federal agents pursue someone who has violated only state law. An act of Congress would eliminate any risk that authorization could be challenged in a criminal prosecution or that a federal official could be said to have spent federal funds for an unauthorized purpose. Before reflexively adding to the federal penal code and exacerbating the existing overfederalization problem, Congress should expressly allow federal authorities to be deputized to act under state law in order to bring offenders to justice in appropriate cases in state courts.

Endnotes

1. See, e.g., Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATHOLIC U. L. REV. 293, 328–30 (2016) (so describing the origin of the English common law of crimes).
2. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 33 (2017) (noting that approximately 87 percent of all American prisoners are confined in state facilities).
3. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (noting that each state possesses “the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution,” which includes “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety”).
4. See, e.g., U.S. CONST. art. I, § 9, cls. 5 (prohibiting the states from imposing a tax or duty on exported goods) & 6 (same, from granting a preference to particular ports).
5. See WAYNE R. LAFAVE, CRIMINAL LAW § 4.4, at 223–24 (5th ed. 2010); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 342 & n.19 (2015) (discussing the territorial basis for criminal jurisdiction).
6. See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a police power.... The Federal Government, by contrast, has no such authority and can exercise only the powers granted to it, including the power to make all Laws which shall be necessary and proper for carrying into Execution the enumerated powers.... For nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally.... A criminal act committed wholly within a State cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.”) (citations and internal punctuation omitted).
7. See, e.g., U.S. CONST. art. I, § 8, cls. 1–17 (identifying the powers of Congress); *id.* § 8, cl. 18 (“The Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.”); *Morrison v. United States*, 529 U.S. 598, 607 (2000) (holding unconstitutional, as beyond Congress’s Commerce Clause power, a statute making rape a federal offense); *United States v. Lopez*, 514 U.S. 549, 552, 566 (1995) (same, a federal statute making it a crime to possess a firearm in the vicinity of a school).
8. See, e.g., 18 U.S.C. § 472 (2012) (issuing counterfeit U.S. currency); *id.* § 794 (supplying defense information to the advantage of a foreign nation); *id.* § 1114 (murdering a federal official); *id.* § 2381 (treason).
9. See the Anti-Car Theft Act of 1992, Pub. L. No. 102–519, title I, subtitle A, § 101(a), 106 Stat. 3384 (1992) (codified as amended at 18 U.S.C. § 2119 (2006)).
10. See 18 U.S.C. § 1201 (2012) (kidnapping); *id.* § 2312 (interstate transportation of a stolen motor vehicle).
11. See WAYNE R. LAFAVE, *supra* note 5, § 18.1, at 933–47, § 19.1–19.8, at 966–1030.
12. Pub. L. No. 107–204, 116 Stat. 745 (2002).
13. See, e.g., 18 U.S.C. § 1341 (2012) (mail fraud); *id.* § 1343 (wire fraud); STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 152 & n.23 (2006); Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 730–31, 740 (1999).
14. See, e.g., LAFAVE, *supra* note 5, §§ 19.1–19.5, at 966–95, § 19.7, at 1006–24.
15. See the Back the Blue Act of 2017, S. 1134, 115th Cong. (2017).
16. See LAFAVE, *supra* note 5, §§ 14.1–14.7, at 764–816 (murder).
17. *Roberts v. Louisiana*, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting).
18. See FBI NAT’L PRESS OFFICE, FBI RELEASES 2016 PRELIMINARY STATISTICS FOR LAW ENFORCEMENT OFFICERS KILLED IN THE LINE OF DUTY (May 15, 2017), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty>; Christopher Ingraham, *Ambush Killings of Police Officers Has Hit a 10-Year High*, WASH. POST, Nov. 21, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/21/ambush-killings-of-police-officers-has-hit-a-10-year-high/?utm_term=.5f3fafc6d9e8; Christopher Ingraham, *Fatal Shootings of Police Officers Are up More Than 50 Percent from Last Year*, WASH. POST, Nov. 2, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/02/fatal-shootings-of-police-officers-are-up-more-than-50-percent-from-last-year/?tid=a_inl&utm_term=.e243c2376866 (hereafter Ingraham, *Fatal Shootings*). For the statistics for 2002–2015, see FBI, UNIFORM CRIME REPORTS, ABOUT LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2015 (Oct. 2016), <https://ucr.fbi.gov/leoka/2015> (hereafter LEOKA).
19. *Id.*, Tbl. 23, https://ucr.fbi.gov/leoka/2015/tables/table_23_leos_fk_circumstance_at_scene_of_incident_2006-2015.xls.
20. See ROBERT DALEY, TARGET BLUE: AN INSIDER’S VIEW OF THE NYPD (1974).
21. See, e.g., HEATHER MACDONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016) (hereafter MACDONALD, *WAR ON COPS*); Sheriff David Clarke, *This Is a War, and Black Lives Matter Is the Enemy*, THE HILL, July 18, 2016, <http://thehill.com/blogs/pundits-blog/civil-rights/sheriff-david%20clarke-black-lives-matter-baton-rouge-civil-war>; see also, e.g., HEATHER MAC DONALD, ARE COPS RACIST? (2010).

22. See, e.g., Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES, Aug. 9, 2007, <https://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/comment-page-1/>; John Marzulli, *The Abner Louima Case: 10 Years Later*, DAILY NEWS, Aug. 10, 2007, <http://www.nydailynews.com/news/crime/abner-louima-case-10-years-article-1.237985>; Editorial, *An End to the Louima Case*, N.Y. TIMES, Sept. 24, 2002, http://www.nytimes.com/2002/09/24/opinion/an-end-to-the-louima-case.html?rref=collection%2Ftimestopic%2FLouima%2C%20Abner&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=14&pgtype=collection.
23. See, e.g., DEP'T OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI, POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf; Jack Healy et al., *Ferguson Report Puts "Hands Up" to Reality Test*, N.Y. TIMES, Mar. 5, 2015, https://www.nytimes.com/2015/03/06/us/in-ferguson-both-sides-see-vindication-in-justice-department-reports.html?_r=0; Sari Horwitz, *Justice Department Clears Ferguson Police Officer in Civil Rights Probe*, WASH. POST, Mar. 4, 2015, https://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239_story.html?tid=a_inl&utm_term=.d48facbf699a.
24. See John G. Malcolm, Book Review of MACDONALD, *WAR ON COPS*, 17 FED'T SOC. REV. Issue 3, 68, 68-69 (2016) ("The public should be, but too often is not, horrified by spectacles such as Black Lives Matter (BLM) activists in St. Paul, Minnesota marching in the streets yelling, 'Pigs in a blanket, fry 'em like bacon'; or BLM protestors in New York City chanting, 'What do we want? Dead Cops! When do we want it? Now!'; or a message posted by the African American Defense League urging its followers to 'hold a barbeque' and 'sprinkle Pigs Blood!'; or the Facebook posting by a man in Detroit following the slaying of five Dallas police officers which read, 'All lives can't matter until black lives matter. Kill all white cops.' One would think that, in any civilized society, such sentiments would be universally condemned as barbaric. Instead, such deplorable rhetoric is met with sympathy and tolerance by some on the Left. One can acknowledge, as former Speaker of the House Newt Gingrich did recently, that '[i]f you are a normal white American, the truth is you don't understand being black in America and you instinctively under-estimate the level of discrimination and the level of additional risk.' But one should also acknowledge, as Gingrich did, that, from the perspective of the police, '[e]very time you walk up to a car you could be killed. Every time you go into a building where there's a robbery you can be killed.' The hateful rhetoric quoted above only serves to incite violence, and, to put it mildly, generates more heat than light.") (footnotes omitted).
25. See Ingraham, *Fatal Shootings*, *supra* note 18 ("There have been two high-profile instances this year in which multiple police officers were targeted and killed by black male suspects with a history of antipathy toward law enforcement. In Dallas in July, Micah Johnson shot and killed five police officers and wounded nine others, telling authorities he 'wanted to kill white people, especially white officers.' [¶] Later that month in Baton Rouge, Gavin Long killed three police officers and wounded three others after leaving behind a long trail on social media arguing that violence was the solution to the oppression of black Americans.").
26. See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 735-37 (2013).
27. The Heritage Foundation has previously urged the federal government to pursue such undertakings. See Paul J. Larkin, Jr. & Daniel J. Dew, *Making Crime Fighting a Team Effort: Cross-Designating Federal Law Enforcement Officers as State Officers*, HERITAGE FOUND. LEGAL MEMORANDUM No. 100 (Aug. 14, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm100.pdf.
28. See OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS MANUAL, 9-2186, <https://www.justice.gov/usam/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures> (last visited June 26, 2017).
29. See OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS MANUAL, 9-669, <https://www.justice.gov/usam/criminal-resource-manual-669-prosecution-military-personnel> (last visited June 26, 2017).
30. U.S. DEPARTMENT OF JUSTICE, *PRIVACY IMPACT ASSESSMENT FOR THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE FUSION CENTER AND INTERNATIONAL ORGANIZED CRIME INTELLIGENCE AND OPERATIONS CENTER SYSTEM 2* (June 1, 2009), available at <http://www.justice.gov/opcl/crime-taskforce.pdf> (last visited Mar. 25, 2013).
31. See U.S. Department of Justice, *Organized Crime Drug Enforcement Task Forces*, available at <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Mar. 25, 2013).
32. See U.S. DEPARTMENT OF HOMELAND SECURITY, *NATIONAL INFRASTRUCTURE PROTECTION PLAN: PARTNERING TO ENHANCE PROTECTION AND RESILIENCY* (2009), available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (last visited Mar. 22, 2013).
33. *Id.* at iii. DHS has the responsibility to support "the formation and development of regional partnerships, including promoting new partnerships," and to enable "information sharing." *Id.* at 17.
34. *Id.* at 22.
35. See Federal Bureau of Investigation, *Violent Gang Task Forces*, <https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces> (last visited May 24, 2017).
36. *Id.*
37. Grant D. Ashley, Ass't Director, Criminal Investigative Division, FBI, *Testimony Before the Senate Judiciary Committee*, Federal Bureau of Investigation (Sept. 17, 2003), <https://archives.fbi.gov/archives/news/testimony/the-safe-streets-violent-crimes-initiative>.
38. See U.S. Dep't of Justice, *Disaster Fraud Task Force*, <https://www.justice.gov/criminal-disasters> (last visited May 24, 2017).

39. Eric Lipton, "Breathhtaking" Waste and Fraud in Hurricane Aid, N.Y. TIMES, June 27, 2006, <http://www.nytimes.com/2006/06/27/washington/27katrina.html>.
40. *Id.*
41. See U.S. Dep't of Justice, Disaster Fraud Task Force, <https://www.justice.gov/criminal-disasters> (last visited May 24, 2017).
42. 108 Pub. L. No. 458, 118 Stat. 3868 (2004).
43. Michael C. Mines, Deputy Ass't Director, Directorate of Intelligence, Federal Bureau of Investigation, *Statement Before the House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment*, Federal Bureau of Investigation (Sept. 27, 2007), <https://archives.fbi.gov/archives/news/testimony/the-fbi-and-fusion-centers> (last visited June 5, 2017).
44. Mary Beth Sheridan and Spencer S. Hsu, *Localities Operate Intelligence Centers to Pool Terror Data*, WASH. POST, Dec. 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html> (last visited June 5, 2017).
45. *Id.*
46. Jerry Markon, *11 in San Francisco Charged with Trafficking in Knockoffs Worth Millions*, WASH. POST, Aug. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/03/AR2010080304739.html> (last visited June 5, 2017).
47. *Id.*
48. See U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, National Explosives Task Force, <https://www.atf.gov/explosives/national-explosives-task-force> (last visited June 5, 2017).
49. See U.S. GOV'T ACCOUNTABILITY OFFICE, HOMELAND SECURITY/LAW ENFORCEMENT: EXPLOSIVES INVESTIGATIONS (Mar. 6, 2013), http://www.gao.gov/duplication/action_tracker/Explosives_Investigations/action1 (last visited June 5, 2017).
50. *Id.*
51. See Dep't of Homeland Security, Customs Cross-Designation, <http://www.ice.gov/customs-cross-designation> (last visited June 5, 2017).
52. See 19 U.S.C. § 1401(i) (2012).
53. Customs Cross-Designation, *supra* note 51.
54. See Specialized Task Forces, Orange County Sheriff's Department, <http://www.ocsd.org/gov/sheriff/divisions/fieldops/investigations/sib/stf/default.asp> (last visited May 24, 2017).
55. See U.S. Dep't of Justice, U.S. Attorney's Office, Western District of Pennsylvania Task Forces, <https://www.justice.gov/usao-wdpa/task-forces#child> (last visited May 25, 2017).
56. See Internet Crimes Against Children Task Force, <https://www.icactaskforce.org/> (last visited June 5, 2017).
57. *Alabama, Georgia Task Forces Honored for Child Porn Investigation*, GADSDEN TIMES, May 24, 2017, <http://www.gadsdentimes.com/news/20170524/alabama-georgia-task-forces-honored-for-child-porn-investigation> (last visited June 5, 2017).
58. See Northern Virginia Regional Gang Task Force Resource Website, <http://www.preventgangsnova.org/index.html> (last visited June 5, 2017).
59. Jerry Markon, *Va. Task Force, Agencies Unite to Take on Gangs*, WASH. POST, June 6, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A8540-2004Jun2.html> (last visited June 5, 2017).
60. *Id.*
61. The President appoints the Attorney General, U.S. Attorneys, the Director of the FBI, and other senior federal law enforcement officials. Those officials, in turn, appoint subordinate federal officers. See, e.g., 28 U.S.C. §§ 503, 532-533, 541-542 (2006).
62. See 28 U.S.C. §§ 503, 506, 509-519 (2006).
63. 5 U.S.C. §§ 3372-73 (2012).
64. *Id.* § 3372(a)(1) (2006); see also *id.* § 3373.
65. The Attorney General has assigned Justice Department lawyers to act as local prosecutors. See PETER F. NERONHA, UNITED STATES ATTORNEY, U.S. DEP'T OF JUSTICE, *State, Federal Prosecutors Cross-Designated to Prosecute Drugs, Firearms and Neighborhood Crimes*, NEWS RELEASE (Mar. 9, 2010) ("U.S. Attorney Peter F. Neronha and R.I. Attorney General Patrick C. Lynch today jointly announced the cross-designation of several senior prosecutors to bolster the prosecution of neighborhood crimes, particularly crimes involving drugs and firearms. * * * Cross-designation permits prosecutors to cross-over and prosecute cases in either a state or federal court. Targeted cases are jointly reviewed to determine appropriate charges, appropriate jurisdiction and in which court appropriate penalties are likely to be realized. Senior prosecutors experienced in firearms, drugs, organized crime and neighborhood prosecution have been cross-designated.").
66. See 28 U.S.C. § 543 (2012); Victoria L. Killion, Comment, *No Points for the Assist: A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789 (2009).
67. See, e.g., *Jones v. United States*, 529 U.S. 848 (2000) (the arson of an owner-occupied dwelling not used for commercial purposes does not involve property used in interstate commerce or in an activity affecting interstate commerce and therefore cannot be prosecuted under 18 U.S.C. § 844(i) (2006)).

68. See, e.g., *Morrison v. United States*, 529 U.S. 598 (2000) (holding unconstitutional, as beyond Congress’s Commerce Clause power, a statute making rape a federal offense); *United States v. Lopez*, 514 U.S. 549 (1995) (same, a federal statute making it a crime to possess a firearm in the vicinity of a school).
69. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (ruling that under its Article I Spending Clause power, Congress can condition the receipt of a portion of federal highway funds on the adoption of a speed limit identified by federal law).
70. U.S. CONST. art. I, § 6, cl. 2.
71. Of course, a person could resign from Congress or the Executive branch to accept or stand for election to a position in the other branch, as members of both parties have done.
72. In the 19th century, the Supreme Court noted that problem in the context of the opposite problem—namely, the federal government’s attempt to impose a burden on state officers. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 674-78 (1978) (discussing 19th century cases). The problem is the same here, just in the opposite direction.
73. See U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments 4-5* (Mar. 5, 2012) (concluding that federal law enforcement officers have only the arrest power granted them by federal law; also citing earlier OLC opinions to that effect) (hereafter OLC STAFFORD ACT MEMO).
74. See U.S. CONST. Art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); 31 U.S.C. § 1301(a) (2012) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”).
75. OLC STAFFORD ACT MEMO 8 (internal quotations omitted).
76. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act...unless and until Congress confers power upon it”).
77. See *supra* notes 6-7.
78. 42 U.S.C. § 10501 (2012) provides as follows: “(a) State as applicant ¶ In the event that a law enforcement emergency exists throughout a State or a part of a State, a State (on behalf of itself or another appropriate unit of government) may submit an application under this section for Federal law enforcement assistance. ¶ (b) Execution of application; period for action of Attorney General on application ¶ An application for assistance under this section shall be submitted in writing by the chief executive officer of a State to the Attorney General, in a form prescribed by rules issued by the Attorney General. The Attorney General shall, after consultation with the Assistant Attorney General for the Office of Justice Programs and appropriate members of the Federal law enforcement community, approve or disapprove such application not later than 10 days after receiving such application. ¶ (c) Criteria ¶ Federal law enforcement assistance may be provided if such assistance is necessary to provide an adequate response to a law enforcement emergency. In determining whether to approve or disapprove an application for assistance under this section, the Attorney General shall consider—(1) the nature and extent of such emergency throughout a State or in any part of a State, (2) the situation or extraordinary circumstances which produced such emergency, (3) the availability of State and local criminal justice resources to resolve the problem, (4) the cost associated with the increased Federal presence, (5) the need to avoid unnecessary Federal involvement and intervention in matters primarily of State and local concern, and (6) any assistance which the State or other appropriate unit of government has received, or could receive, under any provision of title I of the Omnibus Crime Control and Safe Streets Act of 1968 [42 U.S.C. § 3701 et seq.].
79. Pub. L. No. 100-707, 102 Stat. 4689 (1988).
80. See 42 U.S.C. § 5192(a) (2012) (“In any emergency, the President may—(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations[.]”); *id.* § 5201 (“The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency or agencies as he may designate.”); *id.* at § 5195 (“The purpose of this subchapter is to provide a system of emergency preparedness for the protection of life and property in the United States from hazards and to vest responsibility for emergency preparedness jointly in the Federal Government and the States and their political subdivisions. The Congress recognizes that the organizational structure established jointly by the Federal Government and the States and their political subdivisions for emergency preparedness purposes can be effectively utilized to provide relief and assistance to people in areas of the United States struck by a hazard. The Federal Government shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance, as authorized in this subchapter so that a comprehensive emergency preparedness system exists for all hazards.”).
81. Pub. L. No. 105-314, 111 Stat. 1294 (1998) (codified at 28 U.S.C. § 540B (2012)).
82. See 28 U.S.C. 540B (2012) (“(a) In general.—The Attorney General and the Director of the Federal Bureau of Investigation may investigate serial killings in violation of the laws of a State or political subdivision, if such investigation is requested by the head of a law enforcement agency with investigative or prosecutorial jurisdiction over the offense. ¶ (b) Definitions.—In this section: ¶ (1) Killing.—The term ‘killing’ means conduct that would constitute an offense under section 1111 of Title 18, if Federal jurisdiction existed. ¶ (2) Serial killings.—The term ‘serial killings’ means a series of three or more killings, not less than one of which was committed within the United States, having common characteristics such as to suggest the reasonable possibility that the crimes were committed by the same actor or actors. ¶ (3) State.—The term ‘State’ means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.”).

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83. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at various sections of 42 U.S.C. (2012)).
84. See 28 U.S.C. § 564 (2012) (“United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.”).
85. 274 U.S. 501 (1927).
86. *Id.* at 744 n.32 (“The power of the ordinary peace officers to arrest and to seize does not seem to have been conferred originally by statute. As to the sheriff, statutes dealt with the method of appointment, tenure of office, and qualifications, but not with the extent of his powers.... Similarly as to constables and watchmen.... These powers, including of course the power to arrest, are in this country thought to inhere in these offices, except in so far as they may be limited by statute.”) (Brandeis & Holmes, JJ., concurring) (citations omitted).
87. 1 WILLIAM BLACKSTONE, COMMENTARIES *328, 332; *McMillian v. Monroe County*, 520 U.S. 781, 793 (1997).

Chapter 11: Reorganizing the Federal Clemency Process

Paul J. Larkin, Jr.

Western civilization has always encouraged anyone in a position of authority to “temper... Justice with Mercie.”¹ “The extraordinary power to grant clemency,” which is an integral part of this tradition, “allows a chief executive to play God on this side of the River Styx by forgiving an offender’s sins or remitting his punishment.”² Clemency was a settled feature of English common law³ and a feature of criminal justice during the early days of our nation.⁴ The Framers saw a host of benefits in being able to extend offenders “forgiveness, release, [and] remission”⁵ from a conviction or punishment,⁶ and they vested that prerogative in the President by Article II of the Constitution.⁷

Criticisms of the Federal Clemency Process

Of late, however, the federal clemency process has come under considerable criticism.⁸ Three charges in particular stand out. The first one is that Presidents have granted clemency too infrequently for it to serve its most beneficial and needed goal: expressing forgiveness and wiping the slate clean for an offender, particularly one who is simply an average person rather than a celebrity, who has admitted his wrongdoing and who has turned his life around.⁹ Consider President Barack Obama. He commuted the terms of imprisonment imposed on more than 1,700 offenders whom he believed received unduly stiff sentences under the federal drug laws, but neither he nor his predecessors over the past three-plus decades have pardoned offenders at the rate that we saw for most of our prior history.¹⁰ President Donald Trump should renew a hallowed tradition.

The second fault is that Presidents have used their clemency power in dishonorable ways, such as repaying old political debts or making new political allies.¹¹ Bill Clinton is Exhibit A (and B). He offered conditional commutations to the members of a Puerto Rican terrorist group, very possibly to enlist the support of the Puerto Rican community for Hillary Clinton’s New York Senate race and Vice President Al Gore’s presidential campaign. He also granted pardons and commutations during his last 24 hours in office to cronies, people with White House connections, or individuals who had contributed

to his party or presidential library.¹² Such a tawdry practice dishonors a noble, revered criminal justice instrument.

The first and second criticisms focus on the actions of our Presidents, and it may not be possible to answer them without improving the character of the people we elect to that office.¹³ The third criticism, however, targets a structural flaw in the federal clemency process: the doorkeeping role played by the Department of Justice.¹⁴

The President relies on the Justice Department to filter out ineligible applicants¹⁵ and to recommend from the remainder which ones should receive clemency in some form or other, whether a pardon, commutation of sentence, rescission of a fine or forfeiture, general amnesty, or merely a stay in the execution of sentence.¹⁶ The problem with that arrangement, however, is that the Justice Department suffers from an actual or apparent conflict of interest.

The Department of Justice is effectively an adversary to each applicant because it prosecuted every one of them.¹⁷ That fact creates a serious risk that the department would be unlikely to look neutrally and dispassionately on an offender’s claim that he should never have been charged with a crime; that he is innocent; that there was a prejudicial error in his proceedings; that his sentence was unduly severe; or that for some other reason, such as his post-conviction conduct, he should be excused or his conduct forgiven.¹⁸ In any other decision-making process, critics maintain, a neutral party would play the role now performed by the department to avoid the appearance of a conflict of interest. The department should remain free to offer a recommendation as to whether the President should award clemency to a particular applicant, but it should not be in a position where it can decline to forward to the White House applications that a reasonable person would support.¹⁹

The President represents the nation when making clemency judgments. He is entitled to receive unbiased recommendations, and the nation is entitled to believe that those decisions are based on their merits. Granting the Justice Department a privileged position in the clemency process cannot provide the necessary confidence that those goals will be achieved.

Potential Remedies

A Clemency Board. One proposed remedy for this problem would be for Congress to create an independent, multimember advisory board like the U.S. Sentencing Commission that would review every clemency application and offer the President its recommendations.²⁰ By being independent of the Justice Department, the board would avoid the conflict of interest afflicting the latter. By being a collegial entity, the board could include a broad range of people—former law enforcement officials, defense attorneys, members of the clergy, criminologists, and so forth—with the types of diverse backgrounds and perspectives that best represent the varied opinions of the American public on clemency. The President, the applicant, and the public, the argument concludes, would be well served by such a commission.

A formal clemency board created by statute, however, would pose several problems for the President that he would rather avoid.²¹ Principal among them would be the risk that the board or some of its members would use its existence and mission as a political platform to criticize a President's general clemency philosophy or individual decisions. That is a risk even if the President himself can freely select and remove board members, but the risk becomes a certainty once Congress becomes involved. In any implementing legislation, Congress might demand, expressly or impliedly, the right for each chamber and party to select a certain number of board members or at least to have a role in approving commission members.²² Politics would inevitably come to play a role in the board's decisions as members campaigned for clemency to be awarded for certain types of offenses (e.g., street crimes vs. white-collar crimes vs. drug crimes); to certain types of offenders (e.g., offenders identified by race, ethnicity, income level, and so forth); or to certain types of constituents (e.g., rural vs. suburban vs. urban offenders).

There is no legal or moral justification for using a spoils system to decide whether someone deserves forgiveness.²³ Besides, the President could always establish his own advisory board if he believed that it would be helpful. Just as the President does not dictate to Congress whether it should use committees and subcommittees to decide how to legislate, Congress should not dictate to the President whether he should use an advisory board to execute one of his prerogatives.

The Vice President. A better alternative would be for the President to move the Office of the Pardon Attorney into the Executive Office of the President and use the Vice President as his principal clemency adviser.²⁴ Unlike the Attorney General, the Vice President would be seen as impartial. He has no law enforcement responsibility and so lacks an institutional conflict of interest.

The Vice President also enjoys several institutional and practical benefits shared by no one else in the executive branch. He is a constitutional officer who serves the same four-year term as the President, which is generally longer than most Attorneys General serve. He has the stature necessary to referee disputes between White House Clemency Office staff and Justice Department officials, even if one of the latter is the Attorney General. He has ideal access to the President because he has an office in the West Wing. His judgment would be valuable to the President, particularly if he had served previously as a governor, because he would have made clemency decisions in that role.

There are, of course, occasions in which the President might value the opinions of someone else more than those of the Vice President. The classic example occurred when the Attorney General—Robert Kennedy—was the brother of the President—John Kennedy. But those scenarios may be few and far between. That one, after all, has not reappeared in the 50-plus years since it first occurred. Until then, it makes sense for the President to rely on the Vice President as the head of a White House Clemency Office and the President's principal clemency adviser.

Conclusion

The Vice President can offer the President several benefits in the clemency decision-making process that no one else in the government possesses. President Donald Trump should seriously consider using Vice President Mike Pence as his principal clemency adviser. Trump, future Presidents, clemency applicants, and the public would all benefit from that new arrangement.

Endnotes

1. John Milton, *Paradise Lost*, Book X, in 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed. 1931); see also, e.g., WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 (“The quality of mercy is not strained. / It droppeth as the gentle rain from heaven / Upon the place beneath. It is twice blest: / It blesseth him that gives and him that takes.... / It is an attribute to God himself, / And earthly power doth then show likest God’s / When mercy seasons justice.”).
2. Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J. L. & PUB. POL’Y 237, 239 (2017) (hereafter Larkin, *The Vice President and Clemency*).
3. See, e.g., United States v. Wilson, 32 (7 Pet.) 150, 160 (1833) (“[T]his power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance.”); 4 BLACKSTONE, COMMENTARIES *401; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 233 (Lawbook Exchange, Ltd. 2002) (1817); NAOMI D. HURNAND, THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307 (1969).
4. See, e.g., Herrera v. Collins, 506 U.S. 390, 411–12 (1993); *Ex parte Wells*, 59 U.S. (18 How.) 307, 319–15 (1855); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 54 (2002); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 845 & nn. 32–41 (2016) (collecting authorities discussing the historical, legal, policy, and philosophical discussions for the use of clemency in America) (hereafter Larkin, *Revitalizing Clemency*). In fact, the practice likely began long before recorded history. See, e.g., Genesis 4:8–16 (“Cain said to the Lord, ‘My punishment is greater than I can bear! Today you have driven me away from the soil, and I shall be hidden from your face; I shall be a fugitive and a wanderer on the earth, and anyone who meets me may kill me.’ Then the Lord said to him, ‘Not so! Whoever kills Cain will suffer a sevenfold vengeance.’ And the Lord put a mark on Cain, so that no one who came upon him would kill him. Then Cain went away from the presence of the Lord, and settled in the land of Nod, east of Eden.”).
5. *Ex parte Wells*, 59 U.S. (18 How.) at 310.
6. Clemency was not a controversial issue for the Framers. The Articles of Confederation did not create a chief executive and did not empower the legislature to exercise clemency. The issue was the subject of little action or debate at the Constitutional Convention of 1787. Aside from vesting a clemency power in the newly created President, the Framers excluded cases of impeachment from the pardon power and rejected two other proposed restrictions. One would have required the Senate to approve clemency; the other would have exempted treason. See, e.g., JEFFREY P. CROUCH, THE PRESIDENTIAL PARDON POWER 14 (2009); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1345 n.55 (2008); Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228–35 (2003). The Framers believed that clemency could serve “as a correction for an errant conviction or unduly severe punishment, as a decision that a lesser punishment better serves the nation’s interests, as a means of demonstrating that he oversees the operation of the criminal law, or simply as an act of grace.” Larkin, *Revitalizing Clemency*, *supra* note 4, at 849–50.
7. See the Pardon Clause, U.S. CONST. art. II, § 2, cl. 1 (“The President...shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”). The President’s authority is plenary. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) (“This power of the President is not subject to legislative control.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (2011) (4th ed. Thomas M. Cooley ed., 1873) (“Congress cannot limit or impose restrictions on the President’s power to pardon.”).
8. See, e.g., Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447 (2009); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2012).
9. See, e.g., MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 97 (2002) (“[T]his power is hardly ever used.”); Love, *supra* note 8, at 1169 (“For most of our nation’s history, the president’s constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive’s policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians’ fear of making a mistake, and subverted by unfairness in the way pardons are granted.”); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003) (“The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy.”), <http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp08-09-03> [<https://perma.cc/6EJN-ZWBE>].
10. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 4, at 854–55 (“From President Reagan through President Obama, the pardon power has fallen into desuetude. In fact, through his first term, President Obama granted fewer clemency applications than any full-term President since George Washington.”); Love, *supra* note 8, at 1193–95, 1200–08. Obama increased the number of commutations, but not pardons, during his second term. Larkin, *The Vice President and Clemency*, *supra* note 2, at 237–38 & n.3.
11. See, e.g., STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 24 (2012) (“Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich.”); Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010); Love, *supra* note 8, at 1195–1200.
12. Larkin, *Revitalizing Clemency*, *supra* note 4, at 881.
13. *Id.* at 913–16.

14. See, e.g., Alschuler, *supra* note 11, at 1164; Barkow & Osler, *supra* note 8, at 13–15, 18–19; Larkin, *Revitalizing Clemency*, *supra* note 4, at 903–06; Kobil, *supra* note 8, at 622; Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89 (2015); Rosenzweig, *supra* note 8, at 609–10; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. St. THOMAS L.J. 446, 446–47 (2016); Editorial, *It's Time to Overhaul Clemency*, N.Y. TIMES (Aug. 18, 2014) (“Even if the [Obama Clemency Project 2014] succeeds, it is a one-time fix that fails to address the core reasons behind the decades-long abandonment of the presidential power of mercy. A better solution would be a complete overhaul of the clemency process. First and foremost, this means taking it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications. Instead, give it to an independent commission that makes informed recommendations directly to the president.”), http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0 [https://perma.cc/7ZTM-A7NW].
15. For example, the President can grant clemency only to parties who have been convicted of “Offences against the United States,” U.S. CONST. art. II, § 2, cl. 1, so offenders convicted of state-law crimes are ineligible for federal relief.
16. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 4, at 846–47 (discussing the different forms of federal clemency). Clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. See 28 C.F.R. §§ 0.35, 1.1 to 1.11 (2011); *Office of the Pardon Attorney*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/pardon/>. For an excellent historical discussion of how the federal clemency process has worked, see Love, *supra* note 8, at 1175–1204.
17. Clemency petitions were initially considered by the Department of State, but the responsibility was transferred to the Justice Department after it was created in the 19th century. The Office of the Pardon Attorney came into being to assist the Attorney General in managing the clemency process for the President. That process worked well until Attorney General Griffin Bell transferred management to the Deputy Attorney General, who is responsible for overseeing all criminal prosecutions brought by the department and the U.S. Attorney’s Offices. Combining the two responsibilities in one department official creates an actual or apparent conflict of interest, since few officials in that position, critics argue, would be willing to recommend that the President exonerate or grant leniency to someone whom a colleague has sent to prison. Concern with this conflict of interest has existed for some time. See William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 549, 557 (1911) (criticizing the notion that “it is frequently considered advisable to consult the prosecuting attorney” due to the “common belief” that he is “disinterested”; “this is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion [on clemency] should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility.”).
18. See, e.g., Rosenzweig, *supra* note 8, at 609–10 (“[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.”).
19. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 290 (2013) (“Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House.”) (footnote omitted).
20. See, e.g., Barkow & Osler, *supra* note 8, at 1.
21. See Larkin, *The Vice President and Clemency*, *supra* note 2, at 249–53.
22. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (the President can appoint “Officers” of the United States “by and with the Advice and Consent of the Senate”); 47 U.S.C. § 154(b)(5) (2012) (“The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.”); 52 U.S.C. § 30106(a)(1) (2012) (“There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.”); *Buckley v. Valeo*, 424 U.S. 1, 113 (1976) (noting that, under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (held unconstitutional in part by *Buckley*), the President pro tempore of the Senate appointed two members of the Federal Election Commission “upon the recommendations of the majority leader of the Senate and the minority leader of the Senate.”). In that regard, if a clemency commission did not exercise governmental power, the Appointments Clause might not legally bar the Senate and House of Representatives from demanding authority to appoint some of its members. Nothing, however, prevents Congress from making such a demand as a matter of politics.
23. The U.S. Sentencing Commission occupies a different position. It is a collegial body, but its sentencing guidelines must comply with the punishments defined by the federal criminal code. Larkin, *Revitalizing Clemency*, *supra* note 4, at 252. A clemency commission would not have to operate within those guardrails because there are and can be no statutory restrictions on who may receive clemency. See *supra* note 7.
24. See Larkin, *The Vice President and Clemency*, *supra* note 2, at 241–48; Larkin, *Revitalizing Clemency*, *supra* note 4, at 900–03.

Chapter 12: Reorganizing the Federal Administrative State: The Disutility of Criminal Investigative Programs at Federal Regulatory Agencies

Paul J. Larkin, Jr.

Introduction

Large American cities—such as New York City, Chicago, and Los Angeles—have municipal police departments as their principal criminal investigative authorities. The federal government, by contrast, does not have a national police force. Instead, there is “a dizzying array” of federal investigative agencies, some of which have limited, specialized investigative authority.¹ More than 30 federal agencies are authorized to investigate crimes, execute search warrants, serve subpoenas, make arrests, and carry firearms.² Some of these agencies—such as the Federal Bureau of Investigation (FBI), U.S. Secret Service (Secret Service or USSS), and U.S. Marshal’s Service (USMS)—are well known.³ A few—such as the National Park Service, U.S. Coast Guard, U.S. Forest Service, and U.S. Postal Service—are fairly well known, especially by people who live in western states, which have a large number of sizeable federal parks and forestlands.⁴ Others—such as the Environmental Protection Agency (EPA) Office of Criminal Enforcement, Forensics, and Training (OCEFT)—are largely unknown.⁵

Each agency has a criminal investigative division with sworn federal law enforcement officers even though the parent agency’s principal function is to regulate some aspect of the economy or contemporary life. That assignment creates a problem. The law enforcement and regulatory cultures are markedly different, and attempting to cram the former into an agency characterized by the latter hampers effective law enforcement. It dilutes the ability of a law enforcement division to accomplish its mission by housing it in an organization that is not designed to support the specialized mission of federal criminal investigators. Accordingly, Congress and the President should reexamine the placement of federal criminal investigative units within regulatory agencies and reassign the members of those units to a traditional federal law enforcement agency.⁶

Use of the Criminal Law as a Regulatory Tool

Beginning in the mid-19th century, legislatures concluded that industrialization and urbanization

had generated widespread harms that no tort system could adequately recompense. That belief led legislators to use the criminal law to enforce regulatory programs by creating what came to be known as “regulatory offenses” or “public welfare offenses.” Initially, the category of those crimes was small, limited to building code offenses, traffic violations, and sundry other comparable low-level infractions.⁷ But the list of strict liability offenses grew over time. Today, the corpus of regulatory offenses is considerably larger than anyone initially envisioned.⁸

The creation of administrative agencies to implement regulatory programs also added a new feature to the category of federal offenses: crimes defined by regulations. That phenomenon was not the inevitable consequence of creating administrative agencies or authorizing them to promulgate regulations. Articles I, II, and III of the Constitution strongly imply that the legislative, executive, and judicial powers can be exercised only by the particular branch to which they are assigned,⁹ but the law did not work out that way.

Early in the 20th century, the question arose whether only Congress has the authority to define the elements of a federal offense. The Supreme Court of the United States could have ruled that the power to define federal crimes is a prerogative of Congress that it cannot delegate to administrative agencies. After all, in 1812, the Court held in *United States v. Hudson & Goodwin* that the federal courts lack the authority to create “common law crimes” because only Congress can define a federal offense.¹⁰ It would have been only a small step to apply the rationale of that case to an executive branch agency and decide that the President also may not define a federal offense. Nonetheless, the Court declined the opportunity.¹¹ In *United States v. Grimaud*,¹² the Court held that Congress may delegate law-creating power to an agency by enabling it to promulgate regulations and that an agency may use that authority to define conduct punishable as a crime.¹³

The *Grimaud* decision was flatly inconsistent with Madisonian separation-of-powers principles. Under *Hudson & Goodwin*, Congress cannot share its power to define a federal offense with the judiciary because it is a congressional prerogative. Yet *Grimaud* ruled that

Congress may empower the executive to create federal offenses. James Madison would have grimaced at the concept of a shared prerogative. He would have been particularly aghast at the notion that the executive branch, which was intentionally and textually limited to enforcing the law, could also make unlawful the very conduct that it would later enforce. Reconciling *Grimaud* with *Hudson & Goodwin* is no easy task. One decision or the other seems wrong.

Despite its analytical weaknesses, *Grimaud* remains “good law” today. The Supreme Court has shown no inclination to reconsider and overturn it. The result has been that federal agencies have taken full advantage of that new power. *Grimaud* erased any hope of building a dam that could have held back administrative criminal lawmaking, and the legislative and executive branches have combined to establish a sub-statutory criminal code. Some commentators have estimated that the Code of Federal Regulations contains hundreds of thousands of regulations that serve as a tripwire for criminal liability.¹⁴ The result is that individuals and businesses, large or small, must be aware of not only the penal code, but also books of federal rules that can occupy multiple shelves in any law library.¹⁵

Criminal Investigative Programs at Federal Regulatory Agencies

Congress could have tasked the traditional law enforcement agencies with the responsibility to investigate regulatory offenses. By and large, however, it has not done so.¹⁶ Instead, Congress created numerous investigative agencies as components of the administrative agencies that are responsible for promulgating the underlying rules that now carry criminal penalties. According to a 2006 report by the Government Accountability Office, approximately 25,000 sworn officers are spread over numerous administrative agencies, commissions, or special-purpose entities. Some of those components consist of relatively unknown investigative divisions, such as the Fish and Wildlife Service (USFWS), National Oceanographic and Atmospheric Administration (NOAA), and National Gallery of Art.

Over time, the size of some of those criminal investigative divisions has increased. For example, the EPA had two criminal investigators in 1977; it now has more than 200.¹⁷ But the number of investigators at any one of the traditional federal investigative agencies (e.g., the FBI) is considerably

larger than the number at any one regulatory criminal program.

The Pluses of Establishing Criminal Investigative Programs at Federal Regulatory Agencies

There are various reasons why Congress may decide to create a separate, specialized criminal investigative division within an administrative agency rather than direct a regulatory agency to call on one of the traditional federal law enforcement agencies when it believes that a regulatory crime may have occurred.

First, the agency might have scientific knowledge that is necessary to understand what is and is not an offense and therefore also possess a peculiar ability to guide how an offense can and should be investigated. Unlike the conduct made an offense by common law and the state criminal codes (murder, rape, robbery, fraud, and so forth), regulatory crimes (e.g., the illegal disposal of “hazardous” waste) may require technical know-how beyond what the average federal agent learns during basic training. It therefore may make sense to pair those experts with the agents who investigate regulatory crimes. If so, it also may make sense to situate those experts and agents in the same program.

Second, and closely related, is the need for specialized and focused legal training on the meaning of the various regulatory statutes and rules that undergird regulatory offenses. Here, too, the relevant offenses may use abstruse concepts that an attorney can learn only with the specialized training and experience that comes with practicing law in a specific regulatory field. Only the general counsel’s office at a particular agency may have attorneys who are sufficiently versed in the relevant statutes and regulations to be able to help federal investigators identify what must be proved to establish an offense. For that reason, too, it therefore makes sense to combine investigators with the lawyers who will advise them about the laws’ meaning.

Third, regulatory offenses might not receive the attention they deserve if they are just one type of a large category of crimes that a traditional law enforcement agency is responsible for investigating. Environmental crimes, for instance, may threaten injury to the life or health of residents who use a water supply polluted with toxic waste, even though the harmful effects may not become observable for

years or even longer. By contrast, violent crimes cause obvious injury to readily identifiable victims *now*. Those victims not only enjoy media access, but also possess a powerful voice in the legislature, which may fear angering them unless violent crimes are given a priority higher than regulatory offenses.¹⁸

Similarly, drug offenses can produce a large number of victims both in the long term (e.g., people with substance abuse problems) and in the short term (e.g., victims of the violence that accompanies drug trafficking). By contrast, environmental crimes might not have immediate, obvious victims. They might pose only a marginally greater risk of injury (e.g., 10 percent) to only a small number of people (e.g., a local community) only in the long term (e.g., 10 years out) and result in a disease that could befall its victims who were never exposed to that toxic substance (e.g., cancer suffered by smokers), making it difficult to blame the violation for the harm. To the extent that law enforcement agencies assign their investigative resources according to the perceived short-run threat of injury to the public and short-run reaction of legislators to reports of local crimes, regulatory offenses could wind up being short-changed on an ongoing basis to the long-term detriment of a large number of people.

The Minuses of Establishing Criminal Investigative Programs at Federal Regulatory Agencies

At the same time, there is a powerful case to be made that federal law enforcement should be left to traditional investigative agencies.

First, the public likely believes that crimes of violence (e.g., robbery) or deceit (e.g., fraud) are more serious and should be given greater attention than regulatory offenses. Members of Congress may agree with that attitude but nonetheless create regulatory crimes for other reasons. For example, adding criminal statutes to an otherwise civil regulatory scheme allows Congress to cash in on the leverage that a criminal investigation enjoys with the public and the media.¹⁹ Federal agents (think Jack Taggart in *Fire Down Below*²⁰) will receive considerable respect from the public and the press; civil inspectors (think Walter Peck in *Ghostbusters*²¹) won't. That is particularly true when agents wear "raid jackets" emblazoned with the agency logo and the word "POLICE." To take advantage of the nimbus that law enforcement officers radiate, Congress may

create a misdemeanor or minor offense²² so that a regulatory agency can call on its criminal investigative arm to conduct an inspection and interview company officials²³—all that even though Congress may believe that most regulatory offenses should not be investigated and prosecuted as crimes.

Second, creation of specialized law enforcement agencies raises a problem analogous to one that existed with respect to the independent counsel provisions of the now-expired Ethics in Government Act of 1978:²⁴ a loss of perspective.²⁵ Agencies with wide-ranging investigative responsibility see a broad array of human conduct and can put any one party's actions into perspective. Agencies with a narrow charter see only what they may investigate. Because the criminal division of an administrative agency might have only a limited number of criminal offenses within its jurisdiction, the division might well spend far more resources than are necessary to investigate minor infractions to obtain the "stats" necessary to justify its continued existence.²⁶

Of course, a focus on statistics is endemic to federal law enforcement. The reason is that federal law enforcement investigative and prosecutorial agencies measure their success by focusing on the *outputs* rather than the *outcomes* of their efforts. Federal law enforcement agencies operate under an incentive structure that forces them to play the numbers game and "focus on the statistical 'bottom line.'"²⁷ Statistics—the number of arrests, charges, and convictions; the total length of all terms of incarceration; and the amounts of money paid in fines or forfeited to the government—"are the Justice Department's bread and butter."²⁸ Just read any criminal law enforcement agency's annual report or congressional budget submission. "As George Washington University Law School Professor Jonathan Turley puts it, 'In some ways, the Justice Department continues to operate under the body count approach in Vietnam.... They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.'"²⁹

To be sure, even traditional federal investigative agencies like the FBI need to prove to Congress—particularly during the budget submission period—that they have made efficient use of the funds Congress appropriated for them. But the numbers problem is greatly exacerbated in the case of regulatory agency criminal investigative divisions because they do not have a goodly number of traditional, nonregulatory

offenses within their jurisdiction. They might have to pursue minor or trivial cases as the only way to generate the type of numbers that they can use to persuade congressional budget and appropriations committees that they have spent the taxpayers' money wisely.

Third, that loss of perspective generates miscarriages of justice. Perhaps the "body count" approach would not be a problem if agencies pursued only cases involving conduct that is physically harmful like murder or assault, morally reprehensible like fraud, or both like rape, but regulatory agencies do not investigate those crimes. The conduct outlawed by regulatory regimes can sometime fit into one of those categories (e.g., dumping toxic waste into the water supply), but regulatory criminal statutes cover a far broader range of conduct than is covered in the common law or state criminal codes. Environmental statutes, for example, are sometimes written quite broadly in order to afford the EPA authority to address unforeseen threats to health and safety. That is valuable from a regulatory perspective but quite troubling from a criminal enforcement perspective. Broadly written statutes embrace conduct that no one would have anticipated falling within their terms.

Fourth, the numbers game encourages regulatory agencies to pursue trivial criminal cases that should be treated administratively or civilly, or perhaps with no more than a warning and guidance how to operate in the future. Morally blameless individuals get caught up in the maw of the federal criminal process for matters that would never be treated as a crime by a traditional law enforcement agency.³⁰ For example:

- Skylar Capo, an 11-year-old girl, rescued a woodpecker about to be eaten by a cat. Rather than leave the bird at home, Skylar carried it with her when she and her mother Alison went to a local home improvement store. There, an agent with the U.S. Fish and Wildlife Service stopped Skylar and told her that transporting a woodpecker was a violation of federal law. Two weeks later, the agent went to Skylar's home, delivered a \$535 ticket, and informed Alison that she faced up to one year's incarceration for the offense. The USF&WS dropped the charges only after the case made headlines.³¹
- Abner Schoenwetter was a small-business owner who imported lobsters from Honduras. An anonymous tip to agents of the National Marine and Wildlife Fishery Service said that Schoenwetter intended to import Honduran lobsters that were too small to be taken under Honduran law and that would be packed in plastic rather than in boxes as required by Honduran law. The agents seized Schoenwetter's cargo, and an inspection confirmed the anonymous tip. The government charged Schoenwetter with violating the federal Lacey Act on the ground that he imported lobsters that were taken in violation of Honduran law. After he was convicted (with three other defendants), the district court sentenced him (and two of the other defendants) to *more than eight years' imprisonment for that crime* (the third co-defendant received a two-year sentence). On appeal, the Eleventh Circuit, by a two-to-one vote, upheld their convictions *even though the Honduran Attorney General had informed the court that the Honduran regulation that was the basis for the charge was invalid under Honduran law*.³²
- USF&WS employees and the U.S. Attorney in North Dakota investigated and filed criminal charges against seven oil and gas companies for violating the Migratory Bird Treaty Act because 28 migratory birds flew into oil pits without encouragement or action by the companies.³³
- Three-time Indianapolis 500 champion Bobby Unser and a close friend nearly died when caught in a blizzard while snowmobiling in the mountains. Forced to abandon his vehicle and seek help, Unser was later investigated by U.S. Forest Service agents for trespassing onto a protected wilderness area. The government could not prove a felony violation, but Unser was convicted of a misdemeanor.³⁴
- While camping in the Idaho wilderness, Eddie Anderson and his son searched for arrowheads, which Eddie collected as a hobby. Unbeknownst to them, the Archaeological Resources Protection Act of 1979³⁵ regulates the taking of archaeological resources on public and Indian lands. The Andersons found no arrowheads but were nonetheless charged with the offense of attempting to obtain them in violation of that act.³⁶ They

pleaded guilty to misdemeanors and were fined \$1,500 and placed on one year's probation.³⁷

- Nancy Black, a marine biologist, was charged with making a false statement as a "Thank you" for voluntarily providing an edited video of noisemaking on a whale-watching tour to federal investigators and employees of NOAA. She wound up pleading guilty to a misdemeanor to avoid the risk of a felony conviction.³⁸

Fifth, legislators also may see constituent benefits from giving regulatory agencies criminal enforcement tasks. Making a regulatory violation a crime adds a certain respectability to the relevant field, thereby satisfying one or more interest groups by publicly declaring that their most important concerns are also society's most important.

Sixth, Congress may believe that regulatory law enforcement divisions are a moneymaking activity. The government may negotiate a plea bargain with a defendant requiring the latter to pay large fines rather than suffer incarceration, and every fine recovered by the government in a plea bargain is found money.³⁹

An Example: The EPA's Office of Criminal Enforcement, Forensics, and Training

Consider the EPA criminal program.⁴⁰ The contemporary environmental movement was born in the last third of the 20th century, with most of the major laws being enacted in the decade from 1969 to 1979.⁴¹ Unlike common-law crimes such as assault or theft, but consistent with other modern regulatory schemes, the early environmental laws did not assume that the primary enforcement mechanism would be criminal prosecutions brought by the government against parties who failed to comply with the new legal regimen. Instead, the environmental laws used a traditional regulatory, top-down, command-and-control approach to govern business and industrial operations that discharged pollutants into the air, water, or ground. The primary enforcement devices were to be government-initiated administrative or civil actions along with private lawsuits brought against alleged wrongdoers. There were some strict liability criminal provisions in the early federal environmental laws, but they started out as misdemeanors; Congress did not elevate them to felonies until later.⁴²

By so doing, Congress significantly changed the nature of those offenses. Traditionally, imprisonment had been an optional penalty only for serious wrongdoing.⁴³ Now it could be used as a punishment without proving that a defendant intended to break the law or knew that his conduct was blameworthy or dangerous. The result was to make it easier to convict and imprison a defendant for regulatory crimes than would be true if those crimes were treated in the same manner as ordinary federal offenses.⁴⁴ The stiffer penalties, coupled with creation of a criminal enforcement program at the EPA, upped the ante for large companies and the individuals they employ.

The Pollution Prosecution Act of 1990⁴⁵ created a criminal investigative program at the EPA. The act required that the EPA criminal program have at least 200 federal agents as of October 1, 1995,⁴⁶ and the number has not increased greatly since then. The agents are assigned to various field offices in such cities as Boston, New York City, Philadelphia, Seattle, and Anchorage. From those offices, they investigate crimes committed in different states within their respective EPA regions.

A mere 200 agents is an insufficient number of criminal investigators. If those agents were spread out evenly across the nation, there would be only four per state. Agents not located in a particular state must travel interstate to interview witnesses, collect evidence with an agency specialist, and partner with local law enforcement. Traveling to another state is not like driving around the Manhattan South Precinct. The agent's office may be a long distance from the site of the crime. Travelling back and forth not only takes a considerable period of time, but also eats up a sizeable portion of a field office's budget. Crimes can go uninvestigated simply because of the difficult logistics involved. That does not benefit either the public or the EPA agents.

Of course, the statutory designation of 200 agents does not take into account several factors. It does not account for the need to have some agents work in management capacities, both in the field offices and in Washington, D.C. It does not account for the need to have some agents work in an internal affairs or professional responsibility office. It does not consider the need for some agents to be assigned to the Federal Law Enforcement Training Center (FLETC) in Glynnco, Georgia, to arrange for the necessary basic criminal investigator training and coordinate with the FLETC officials serving as

instructors. The result is that a 200-agent number does not accurately represent the number investigating environmental crimes. Even if only 10 percent of the EPA's criminal investigative personnel are involved in noninvestigative activity, the EPA has only 180 agents to investigate environmental crimes—less than four per state.

But there is more.

Federal law enforcement agencies also have a considerable number of nonagent employees working in a variety of investigation-related activities, such as scientists, technicians, and office support personnel. The Pollution Prosecution Act of 1990 did not authorize the EPA to hire personnel to fill those slots. To some extent, EPA special agents can draw on evidence-collection and analytical experts at one of the agency's regional laboratories or elsewhere within the EPA.⁴⁷ Unlike the forensic service components of the FBI⁴⁸ and the Secret Service,⁴⁹ however, the EPA regional laboratories are not dedicated exclusively to supporting the criminal investigation program. Special agents need to compete with the agency's civil components for resources and the time of laboratory personnel. The point is that the Pollution Prosecution Act of 1990 did not create a full-scale EPA criminal investigation program along the lines of the FBI or the Secret Service.

There are several reasons why having a criminal program at the EPA is a problem. As noted, it forces the EPA criminal program to operate with an inadequate number of personnel and an inadequate amount of resources. This gives the public the impression that there is a robust criminal environmental investigation program when, in fact, that is not true. It also shortchanges the agents tasked with carrying out that assignment by forcing them into an agency where they do not belong and where they might not always be welcome. The reason is that criminal law enforcement is not part of the EPA's core mission.

As Harvard Professor James Q. Wilson once explained, every agency has a "culture" or "personality"—that is, a widespread, settled understanding of the agency's identity and manner of operations.⁵⁰ The EPA has four separate but related cultures: environmental, scientific, regulatory, and social worker.⁵¹ Each of them combines with the others to implement and reinforce the agency's "mission"—that is, "a widely shared and endorsed definition of the agency's core tasks."⁵² Criminal law enforcement rests uneasily within an agency characterized by these

four cultures. Law enforcement seeks to punish, not discover, advise, or regulate. It focuses on an actor's immediate effect and intent, not the long-term consequences of his actions for society regardless of his state of mind. It requires mastery of what we learned in high school (reading people), not graduate school (studying ecology).⁵³

Remember that unlike the FBI or the Secret Service, the EPA as an institution was not created to investigate crimes; that assignment was added two decades *after* the agency was born.⁵⁴ The EPA already had a settled mission, and it is difficult to change an agency's mission, particularly one that is so deeply entrenched.⁵⁵ As Professor Wilson noted, "developing a sense of mission is easiest when an organization is first created."⁵⁶ Because "most administrators take up their duties in organizations that have long histories," they have "reduce[d]...opportunities for affective culture at all, much less making it into a strong and coherent sense of mission."⁵⁷ Put another way, a baseball team may play away games for only half of the season (before an often hostile crowd), but the EPA criminal program has been playing nothing but away games since Day One.

As an "add-on," criminal enforcement has been and will always be subordinated to the EPA's mission and will wind up shortchanged. One way involves the budget. Agencies generally tend to give preference to their core functions when haggling with the Office of Management and Budget (OMB) or Congress over appropriations.⁵⁸ The environmental, regulatory, scientific, and social-worker cultures at the EPA will always (or nearly always) win the budget battles. As a result, the EPA's criminal program will never be the effective unit that it could be and that the agents and public deserve.

Another way the EPA criminal investigation program will be shortchanged is the reserve of goodwill that it can draw on if something goes very wrong. That requires some explanation. The mission of a criminal investigative agency is to deal with people who break the law. As the tip of the law enforcement spear, investigating officers deal with offenders outside the niceties of a courtroom, sometimes with the worst of people but, if not, then with good people at their worst. Even the EPA criminal investigation program has that problem.

Consider this example: Hazardous waste has that name for a reason; it is dangerous, and not just for the public. Some business operations (the plating process

is one example) are dangerous because the chemicals needed to create a finished product (a circuit board) are highly acidic or alkaline. The working conditions are ones in which you will need to get your hands dirty but also will need to be particularly careful how and with what. In addition, employees working in those businesses make less than hedge fund managers earn. Now ask yourself two questions:

- *Question:* What type of person works in those jobs?
- *Answer:* Someone who cannot get a different job.
- *Question:* What type of person cannot get a different job?
- *Answer:* Often someone with a criminal record, maybe for the same type of violent crime that traditional law enforcement officers investigate (e.g., robbery).

The lesson is this: The conventional wisdom is wrong. Businessmen in suits are not the only, or often the principal, suspected perpetrators of an environmental crime. The issue is more complicated. The risk that a criminal investigation might pose a danger to the agents involved often turns more on the nature and history of the suspects than on the elements of the offense.⁵⁹

EPA agents could find themselves in a predicament. Given the realities of their job, law enforcement officers may need to use force when making an arrest, collecting samples, executing a search warrant, interviewing a suspect, or doing one of the other activities that law enforcement officers perform. The use of force is not a pleasant component of the job, but sometimes it cannot be avoided. A traditional investigative agency understands and appreciates the demands placed on its investigators, so such occurrences are not seen as unthinkable. Moreover, when a traditional law enforcement officer uses force, his parent agency and his colleagues will presume that he acted properly until an internal investigation determines otherwise. He will not automatically and immediately become a pariah.

Regulatory agencies, by contrast, do not have the same law enforcement culture or mission, let alone the corresponding esprit de corps, that is embedded in the DNA of traditional law enforcement agencies like the FBI and Marshals Service. Most agency

personnel work in offices. Their principal interactions are with colleagues, members of industry and their lawyers, Members of Congress and their staffs, political superiors within the agency, and officials at OMB or the White House Office of Information and Regulatory Affairs. They are accustomed to seeing outsiders respect their authority, even when the outsiders disagree with them. They are strangers to being placed in situations in which words or numbers will not suffice to deal with a problem or in which outsiders refuse to defer to their position. Their culture—whether environmental, regulatory, scientific, or social worker—does not include people who place their hands on others. In fact, it would be seen as a sign of intellectual weakness and professional failure.

Those cultures have no room for law enforcement officers. Trying to force the latter into one of the cultures at the EPA puts criminal investigators in the difficult position of feeling that they are out of place in their own organization. There is even a risk that the agents in regulatory programs who use force might fear that they will be “hung out to dry” by the agency’s senior political officials, particularly if there is public blowback from such an event.⁶⁰ All that is the consequence of trying to fit a square peg into a round hole.⁶¹

To summarize, when deciding whether it is a good idea to have a criminal investigation division in a regulatory agency, consider the words of Professor Wilson describing the costs of that arranged marriage:

First, tasks that are not part of the culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it. Second, organizations in which two or more cultures struggle for supremacy will experience serious conflict as defenders of one seek to dominate representatives of the other. Third, organizations will resist taking on new tasks that seem incompatible with the dominant culture. The stronger and more uniform the culture—that is, the more the culture approximates a sense of mission—the more obvious these consequences.⁶²

A Potential Remedy: Transfer Federal Regulatory Agencies’ Criminal Investigative Divisions to the FBI or Marshals Service

The way to fix these problems is to transfer the criminal enforcement authority of regulatory

agencies such as the EPA to a traditional law enforcement agency. The question is, which one?

A few can be eliminated at the outset. Several traditional investigative agencies have missions that do not readily accommodate regulatory enforcement. The Secret Service (protection and counterfeiting); Drug Enforcement Administration (drug trafficking); Bureau of Alcohol, Tobacco, Firearms, and Explosives (the subjects in the agency's name); Bureau of Immigration and Customs Enforcement (same); and Border Patrol (same) are not good matches for agents who have spent their careers investigating (for example) environmental crimes.

The FBI might be a reasonable home for criminal regulatory enforcement. It has the largest portfolio of federal offenses to investigate, including conduct underlying some regulatory crimes, and has numerous field offices across the country, which would reduce the disruption following the transfer of agents from one agency to another. But forcing the FBI to absorb regulatory investigators would create several sizeable problems. One is that the number of new agents could exceed the number of existing agents. That poses a risk over time of shifting the FBI's focus. Another problem is that since 9/11, the FBI has been the nation's principal federal investigative agency combating domestic terrorism. Adding regulatory responsibilities to the FBI's plate is inconsistent with the principal assignment given the Bureau by former President George W. Bush. Finally, regulatory investigators would need to undergo full-field background investigations and complete FBI agent training at Quantico, Virginia, before becoming FBI agents. That would impose a considerable delay and require an appreciable expenditure before the transferred agents would be able to come on board.⁶³

While transferring such duties to the FBI is certainly a viable option, an alternative that may make more sense is to transfer those agents to the U.S. Marshals Service. With an organizational bloodline that begins with the Judiciary Act of 1789,⁶⁴ U.S. marshals and their deputies have exceptionally broad law enforcement authority—the same authority as FBI agents⁶⁵ as well as the authority possessed by their respective state law enforcement officers.⁶⁶ The principal mission of deputy marshals is to assist the federal courts,⁶⁷ but they also are generalists.⁶⁸ The Marshals Service has offices nationwide. It would expand the coverage that agencies like the

EPA can provide and reduce the number of necessary geographic transfers, benefiting both the agents involved and the public.

In addition, the Marshals Service would be a cost-effective option as the home for regulatory agents. Deputy marshals and regulatory criminal investigators undergo the same basic criminal investigator training at FLETC, and former regulatory investigators already have the additional education and training needed to enforce regulatory criminal codes. On a prospective basis, the cost of adding that training to the basic training afforded deputy marshals is likely to be less than the cost of expanding the training programs at the FBI's Quantico facility because FLETC already accommodates numerous federal agencies.

In sum, transferring criminal programs and their agents from regulatory agencies to the Marshals Service would benefit the public and the agents at a potentially lower cost than would result from giving criminal regulatory responsibilities to the FBI.

Conclusion

President Donald Trump has directed federal agencies and has invited the public to suggest ways to reorganize the federal government to make it more effective and efficient. One possibility is to reorganize at least part of federal law enforcement. Numerous federal regulatory agencies have criminal investigative divisions. Congress and the President should consider consolidating those programs and transferring them to a traditional federal law enforcement agency. The FBI is a possible home for those agents, but the U.S. Marshals Service may have certain advantages that the FBI does not possess, including the possibility of a less costly transition. Either agency would make a more suitable home for investigative programs currently housed in administrative agencies.

Appendix: List of Federal Law Enforcement Agencies

Departments

Department of Agriculture

Animal and Plant Health Inspection Service (APHIS)
Office of the Inspector General
U.S. Forest Service, Law Enforcement and Investigations

Department of Commerce

Bureau of Industry and Security, Office of Export Enforcement
National Institute of Standards and Technology
National Marine Fisheries Service, Office of Law Enforcement
Office of Security
Office of the Inspector General

Department of Education

Office of the Inspector General

Department of Energy

National Nuclear Safety Administration, Office of Secure Transportation, Office of Mission Operations
Office of Health, Safety and Security, Office of Security Operations
Office of the Inspector General

Department of Health and Human Services

Food and Drug Administration, Office of Regulatory Affairs (ORA)/Office of Criminal Investigations
National Institutes of Health
Office of the Inspector General

Department of Homeland Security

Citizenship and Immigration Services
Customs and Border Protection, Office of Customs and Border Protection Air and Marine
Customs and Border Protection, Border Patrol
Customs and Border Protection, Office of Field Operations/CBP Officers
Federal Emergency Management Agency, Security Branch
Federal Law Enforcement Training Center
Office of the Inspector General

Transportation Security Administration, Office of Law Enforcement/Federal Air Marshal Service
U.S. Coast Guard, Investigative Service
U.S. Coast Guard, Maritime Law Enforcement Boarding Officers
U.S. Immigration and Customs Enforcement, Office of Detention and Removal
U.S. Immigration and Customs Enforcement, Office of Federal Protective Service
U.S. Immigration and Customs Enforcement, Office of Intelligence
U.S. Immigration and Customs Enforcement, Office of Investigations
U.S. Immigration and Customs Enforcement, Office of Professional Responsibility
U.S. Secret Service

Department of Housing and Urban Development

Office of the Inspector General

Department of the Interior

Bureau of Indian Affairs, Office of Law Enforcement Services
Bureau of Land Management, Office of Law Enforcement and Security
Bureau of Reclamation, Hoover Dam Police
National Park Service, Ranger Activities
National Park Service, U.S. Park Police
Office of Law Enforcement, Security and Emergency Management
Office of the Inspector General
U.S. Fish and Wildlife Service, National Wildlife Refuge System
U.S. Fish and Wildlife Service, Office of Law Enforcement

Department of Justice

Bureau of Alcohol, Tobacco, Firearms, and Explosives
Drug Enforcement Administration
Federal Bureau of Investigation
Federal Bureau of Prisons
Office of the Inspector General
U.S. Marshals Service

Department of Labor

Employee Benefits Security Administration
Office of Labor Management Standards
Office of the Inspector General

Department of State

Bureau of Diplomatic Security, Diplomatic Security Service
Office of the Inspector General

Department of Transportation

Maritime Administration, Academy Security Force
National Highway Traffic Safety Administration, Odometer Fraud
Office of the Inspector General, Investigations
Office of the Secretary of Transportation, Executive Protection

Department of Treasury

Bureau of Engraving and Printing, Police Officers Internal Revenue Service, Criminal Investigative Division
Office of the Inspector General, Office of Investigations
Treasury Inspector General for Tax Administration
U.S. Mint, Police Division

Department of Veterans Affairs

Office of Security and Law Enforcement
Office of the Inspector General

Nondepartmental Entities

Administrative Office of the U.S. Courts (AOUSC)

Office of Probation and Pretrial Services

Agency for International Development

Office of the Inspector General

Corporation for National and Community Service

Office of the Inspector General

Environmental Protection Agency

Criminal Investigation Division
Office of the Inspector General

Equal Employment Opportunity Commission

Office of the Inspector General

Federal Communications Commission

Office of the Inspector General

Federal Deposit Insurance Corporation

Office of the Inspector General

Federal Reserve Board

Chairman's Protection Unit
Office of the Inspector General
Reserve Banks Security
Security Unit

General Services Administration

Office of the Inspector General

Government Accountability Office

Controller/Administrative Services, Office of Security and Safety
Financial Management and Assurance, Forensic Audits and Special Investigations

Library of Congress

Office of Security and Emergency Preparedness-Police
Office of the Inspector General

National Aeronautics and Space Administration

Office of the Inspector General

National Archives and Records Administration

Office of the Inspector General

National Gallery of Art

National Railroad Passenger Corporation (AMTRAK)

AMTRAK Police
Office of Inspector General

National Science Foundation

Office of the Inspector General
Polar Operations, Antarctica

Nuclear Regulatory Commission

Office of Investigations
Office of the Inspector General

Office of Personnel Management

Office of the Inspector General

Peace Corps

Office of the Inspector General

Railroad Retirement Board

Office of the Inspector General

Small Business Administration

Office of the Inspector General

Smithsonian Institution

Office of Protection Services

Social Security Administration

Office of the Inspector General

Tennessee Valley Authority

Office of the Inspector General
TVA Police

U.S. Capitol Police

U.S. Government Printing Office

Office of the Inspector General
Police

U.S. Postal Service

Office of Inspector General
U.S. Postal Inspection Service, Inspector
U.S. Postal Inspection Service, Postal Police

U.S. Supreme Court

Marshal of the Supreme Court

Source: U.S. Government Accountability Office, Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities (Dec. 19, 2006), Appendix II: Number of Federal Civilian LEOs with the Specified Authority, as of June 30, 2006, as Reported by the Federal Components.

Endnotes

1. Louise Radnofsky, Gary Fields & John R. Emshwiller, *Federal Police Ranks Swell to Enforce a Widening Array of Criminal Laws*, WALL ST. J., Dec. 17, 2011, at A1.
2. See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL LAW ENFORCEMENT: SURVEY OF FEDERAL CIVILIAN LAW ENFORCEMENT FUNCTIONS AND AUTHORITIES (Dec. 19, 2006), <http://www.gao.gov/new.items/d07121.pdf> (last accessed Apr. 19, 2017). The Appendix *supra* contains a list of such agencies. The powers noted in the text are the traditional ones vested in federal law enforcement officers. See, e.g., 18 U.S.C. § 3052 (2012) (FBI agents); *id.* § 3053 & 28 U.S.C. §§ 564, 566(c)-(d) (2012) (United States Marshals and deputy marshals); 18 U.S.C. § 3056 (2012) (Secret Service agents).
3. See, e.g., 6 U.S.C. 381 (2012) (U.S. Secret Service); 28 U.S.C. § 3053 (2012) (U.S. Marshals Service); *id.* § 3052 (FBI).
4. See 14 U.S.C. § 2 (2012) (empowering Coast Guard members to “enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States”); 16 U.S.C. § 559c (2012) (identifying law enforcement authority of U.S. Forest Service officers); 18 U.S.C. § 3061 (2012) (identifying powers of Postal Inspection Service officers); 54 U.S.C. § 102701(a) (2012) (empowering the Secretary of the Interior to designate law enforcement officers).
5. See 18 U.S.C. § 3063 (2012) (identifying authority of EPA law enforcement officers); EPA, CRIMINAL ENFORCEMENT, <https://www.epa.gov/enforcement/criminal-enforcement> (last accessed Apr. 29, 2017).
6. Another, more general issue is also worth noting. The assortment of federal law enforcement agencies mentioned in the text has come to exist over time in a random manner. There has been no recent systematic congressional or presidential analysis of their overlapping responsibilities and comparative advantages that they possess by statute, rule, tradition, and practice. Even the best-known federal law enforcement agencies—the FBI and Secret Service—are best known today for missions that differ greatly from the ones they had at their birth. The FBI has the broadest range of responsibilities, such as counterterrorism, counterespionage, and complex white-collar crime. See, e.g., 18 U.S.C. §§ 351(g), 3052, 3107 (2012); 28 U.S.C. §§ 533, 540, 540A, 540B (2012); 50 U.S.C. §§ 402-404o-2, §§ 1801-1812 (2012). Yet, today’s FBI began as the Bureau of Investigation, which had no law enforcement function and was limited to conducting background investigations of potential federal employees. The Secret Service was created to investigate the rampant counterfeiting seen after the Civil War. It became responsible for protecting the President, Vice President, their families, and visiting heads of state only after the assassination of President William McKinley in 1901. See, e.g., 18 U.S.C. § 3056 (2012). But no one has ever inquired whether the responsibilities that each of those agencies has, as well as the ones that other federal law enforcement agencies possess, are better accomplished by combining different agencies or by transferring authority from one agency to another.
7. See, e.g., Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1072-79 (2014) (hereafter Larkin, *Strict Liability*); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56-67 (1933). For an explanation of the rationale for those laws, see, for e.g., *Morrisette v. United States*, 342 U.S. 246, 253-56 (1952); Larkin, *Strict Liability*, *supra*, at 1072-79, 1081-83.
8. See, e.g., Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing of Economic Regulations*, 30 U. CHI. L. REV. 423, 424-25 (1963); Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) (“Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.”) (footnote omitted).
9. See, e.g., Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 354-58 (2015); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).
10. 11 U.S. (7 Cranch) 32 (1812).
11. The Court strongly suggested in *United States v. Eaton*, 144 U.S. 677 (1892), that an agency could *not* issue regulations that created federal crimes: “It is well settled that there are no common-law offenses against the United States. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Britton*, 108 U. S. 199, 206; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 26, and cases there cited. [¶] It was said by this court in *Morrill v. Jones*, 106 U. S. 466, 467, that the secretary of the treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what congress has enacted. Accordingly, it was held in that case, under section 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the secretary of the treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States. [¶] Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted ‘in violation of a public law, either forbidding or commanding it.’ 4 Amer. & Eng. Enc. Law, 642; 4 Bl. Comm. 5. [¶] It would be a very dangerous principle to hold that a thing prescribed by the commissioner of internal revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing ‘required by law’ in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act; particularly when the same act, in section 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue, with the approval of the secretary of the treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article. [¶] It is necessary that a sufficient statutory authority should exist for declaring any act or omission a

criminal offense, and we do not think that the statutory authority in the present case is sufficient. If congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the commissioner of internal revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890. [¶] Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." *Id.* at 687-88.

12. 220 U.S. 506 (1911).
13. *Id.* at 521 ("[T]he authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.").
14. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 728-29 (2013) (hereafter Larkin, *Overcriminalization*). As Stanford Law School Professor Lawrence Friedman once colorfully wrote: "There have always been regulatory crimes, from the colonial period onward.... But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation.... Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 282-83 (1993).
15. See Michael B. Mukasey & John G. Malcolm, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, in *LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* 283-98 (Dean Reuter & John Yoo, eds., 2016).
16. Insofar as regulatory offenses involve the same type of lying, cheating, and stealing that also falls under other federal criminal laws, such as fraud, traditional law enforcement agencies like the FBI would also have jurisdiction to investigate the wrongdoing.
17. See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE, *FEDERAL LAW ENFORCEMENT: SURVEY OF FEDERAL CIVILIAN LAW ENFORCEMENT FUNCTIONS AND AUTHORITIES* (Dec. 19, 2006), <http://www.gao.gov/new.items/d07121.pdf> (last accessed Apr. 19, 2017); GENERAL ACCOUNTING OFFICE, *FEDERAL LAW ENFORCEMENT: INFORMATION ON CERTAIN AGENCIES' CRIMINAL INVESTIGATIVE PERSONNEL AND SALARY COSTS* (Nov. 15, 1995), <http://www.gao.gov/assets/110/106306.pdf> (last accessed Apr. 19, 2017); GENERAL ACCOUNTING OFFICE, *FEDERAL LAW ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL AT 13 AGENCIES* (Sept. 30, 1996), <http://www.gao.gov/assets/230/223212.pdf> (last accessed Apr. 19, 2017); GENERAL ACCOUNTING OFFICE, *FEDERAL LAW ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL AT 32 AGENCIES* (July 22, 1997), <http://www.gao.gov/assets/230/224401.pdf> (last accessed Apr. 19, 2017).
18. See, e.g., Larkin, *Overcriminalization*, *supra* note 14, at 742-43.
19. See Lynch, *supra* note 8, at 23, 37. That phenomenon may explain the provenance of the criminal provisions of the federal environmental laws. Initially, those laws created only misdemeanors. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2446-47 (1995).
20. See *Fire Down Below* (Warner Bros. 1997). Steven Segal played Jack Taggart, an EPA Special Agent.
21. See *Ghostbusters* (Columbia Pictures 1984). William Atherton played Walter Peck, an EPA official.
22. Generally, felonies are crimes punishable by death or imprisonment for more than one year, misdemeanors are crimes punishable by a fine or by confinement in jail for one year or less, and petty offenses are crimes punishable by a fine or confinement for less than six months. See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.6(a), at 36-38, §1.6(e), at 43-44 (5th ed. 2010); 18 U.S.C. § 19 (2012) (defining "petty offense").
23. That rationale may explain why we see small-scale criminal penalties in regulatory bills. See, e.g., the Contaminated Drywall Safety Act of 2012, H.R. 4212, 112th Cong. (2012) (creating a strict liability offense for importing contaminated drywall, punishable by 90 days in custody); the Commercial Motor Vehicle Safety Enhancement Act of 2011, S. 1950, 112th Cong. (2011) (punishing violations of the bill with up to 90 days in custody).
24. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 49, 591 *et seq.* (1982)).
25. See *Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting).
26. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970) (police departments measure efficiency by arrests, not convictions); George F. Will, *Blowing the Whistle on the Federal Leviathan*, WASH. POST, July 27, 2012, http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gJQAAsRnEX_story.html (last accessed Apr. 28, 2017).
27. Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, in *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* 105-06 (Gene Healy ed., 2004).
28. *Id.*
29. *Id.*
30. Part of the problem is caused by the needless use of the criminal law to enforce rules that (for several reasons) should not be subject to criminal enforcement at all, a phenomenon known as "overcriminalization." Over the past decade, several former senior Justice Department officials, the American Bar Association, numerous members of the academy, and a number of private organizations with diverse viewpoints have roundly criticized overcriminalization. See, e.g., Zach Dillon, *Symposium on Overcriminalization: Foreword*, 102 J. CRIM. L. & CRIMINOLOGY

525, 525 (2013) (“The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored.”); Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTARIES 1, 1-2 & nn.2-7 (2014) (collecting authorities). There are numerous examples of needless criminal statutes or regulations:

- Making unauthorized use of the 4-H Club logo, the Swiss Confederation Coat of Arms, or the “Smokey the Bear” or Woodsy Owl” characters.
- Misusing the slogan “Give a Hoot, Don’t Pollute.”
- Transporting water hyacinths, alligator grass, or water chestnut plants.
- Possessing a pet (except for a guide dog) in a public building, on a beach designated for swimming, or on public transportation.
- Operating a “motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner...[t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet.”
- Failing to keep a pet on a leash that does not exceed six feet in length on federal parkland.
- Digging or leveling the ground at a campsite on federal land.
- Picnicking in a nondesignated area on federal land.
- Polling a service member before an election.
- Manufacturing and transporting dentures across state lines if you are not a dentist.
- Selling malt liquor labeled “pre-war strength.”
- Writing a check for an amount less than \$1.
- Installing a toilet that uses too much water per flush.
- Rolling something down a hillside or mountainside on federal land.
- Parking your car in a way that inconveniences someone on federal land.
- Skiing, snowshoeing, ice skating, sledding, inner tubing, tobogganing, or doing any “similar winter sports” on a road or “parking area... open to motor vehicle traffic” on federal land.
- Allowing a pet “to make a noise that...frightens wildlife on federal land.”
- Bathing or washing food, clothing, dishes, or other property at public water outlets, fixtures, or pools not designated for that purpose.
- Allowing horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle.
- Operating a snowmobile that makes “excessive noise” on federal land.
- Using roller skates, skateboards, roller skis, coasting vehicles, or similar devices in nondesignated areas on federal land.
- Failing to “turn in found property” to a national park superintendent “as soon as practicable.”
- Using a surfboard on a beach designated for swimming.
- Certifying that McIntosh apples are “extra fancy” unless they’re 50 percent red.
- Labeling noodle soup as “chicken noodle soup” if it has less than 2 percent chicken.
- Riding your bicycle in a national park while holding a glass of wine.
- Failing, if a winemaker, to report any “extraordinary or unusual loss” of wine.

See, e.g., Larkin, *Overcriminalization*, *supra* note 14, at 750–51; John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 279–81 (2016); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 740–41 (2012).

31. See THE HERITAGE FOUND., *USA vs. YOU 4* (2013); Joe Luppino-Esposito & Raija Churchill, *Overcriminalization Victimizes Animal-Loving 11-Year-Old and Her Mother*, THE HERITAGE FOUND., THE DAILY SIGNAL (Aug. 05, 2011), <http://dailysignal.com/2011/08/05/overcriminalization-victimizes-animal-loving-11-year-old-and-her-mother>.
32. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *as amended on denial of rehearing*, 2003 WL 21233539 (May 29, 2003); ONE NATION UNDER ARREST 3–11 (2d ed. Paul Rosenzweig ed., 2013); *USA vs. YOU*, *supra* note 31, at 20; Meese & Larkin, *supra* note 30, at 777–82.
33. See Joe Luppino-Esposito, *A Bird-Brained Use of the Migratory Bird Treaty Act*, THE HERITAGE FOUND., THE DAILY SIGNAL (Feb. 6, 2012), <http://dailysignal.com/2012/02/06/a-bird-brained-use-of-the-migratory-bird-treaty-act/>.
34. *USA vs. YOU*, *supra* note 31, at 15.
35. 16 U.S.C. § 470aa–470mm (2012).
36. 16 U.S.C. § 470ee(a).
37. See *USA vs. YOU*, *supra* note 31, at 11.
38. See Paul J. Larkin, Jr. et al., *Time to Prune the Tree, Part 3: The Need to Reassess the Federal False Statements Laws*, HERITAGE FOUNDATION LEGAL

MEMORANDUM No. 196 (Dec. 15, 2016), <http://www.heritage.org/crime-and-justice/report/time-prune-the-tree-part-3-the-need-reassess-the-federal-false-statements>. The states also have their own share of insane criminal laws. See, e.g., Evan Bernick, “Drop the Cabbage, Bullwinkle!”: Alaskan Man Faces Prison for the Crime of Moose-Feeding, THE HERITAGE FOUND., THE DAILY SIGNAL (Jan. 22, 2014), <http://dailysignal.com/2014/01/22/drop-cabbage-bullwinkle-alaskan-man-faces-prison-crime-moose-feeding/> (noting that a 67-year-old man faced state misdemeanor charges, punishable by a maximum \$10,000 fine and one year in jail, for feeding vegetables to a moose).

39. *Id.* There is an additional point worth noting: It might often be the case that regulatory infractions should be subject only to administrative or civil sanctions, not penal ones. That is true for several reasons. *First*, the criminal law should reflect the moral code that everyone knows by heart. Turning regulatory infractions into strict liability crimes because criminal enforcement is more efficient than civil enforcement may be fiscally responsible, but it does not reflect society’s serious, sober, and moral decision that incarceration is an appropriate sanction. If the latter is what we are concerned with, then the ubiquitous presence of strict liability crimes authorizing incarceration does not represent that type of judgment by a mature society, a judgment that finds regulatory infractions to be as serious as traditional blue- or white-collar crimes. *Second*, regulatory crimes can spur companies to seek their own industry-specific law for anticompetitive purposes, to garner economic rents—supernormal profits obtained because of government regulation. For example, a business threatened by a particular imported commodity may persuade the government to impose strict regulations on importing that item, backed with criminal sanctions, to restrict competition. Antitrust experts have long believed that businesses will use the regulatory process as a form of economic predation, especially if a company can persuade the government to bear the investigative and prosecutive costs by bringing a criminal prosecution against a rival. See, e.g., W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 375, 381–92 (4th ed. 2005) (collecting authorities); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); see generally Larkin, *Overcriminalization*, *supra* note 14, at 744–45. The point is not that there is something illegitimate about using law enforcement officers to enforce civil laws. The federal, state, and local governments may empower their officers to enforce the full range of provisions in the criminal and civil codes for whatever reasons those governments see fit. Whether the police can arrest someone for a purely civil infraction raises a different question. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that the Fourth Amendment does not forbid the warrantless arrest of a person suspected of committing a crime for which incarceration is not an authorized penalty). The point is that calling a civil or administrative infraction a crime should make us wary of what elected officials are doing. Tacking a term of confinement onto an administrative misstep or breach of contract is not a response signifying the same type of moral disapproval that people naturally feel at the sight of dangerous, harmful, or repulsive conduct. There should be more than the desire merely to enhance the U.S. Treasury as the justification for exposing people to criminal liability. Authorizing and imposing incarceration on a particular individual is a moral judgment about his actions and character. Imprisonment represents an extreme form of societal condemnation, one that should be seen as necessary only when an offender is deemed not fit to live free for a certain period. No court or legislature should make that judgment just to save or make a few bucks here and there.
40. For a discussion of the development of federal environmental criminal law, see, e.g., Richard J. Lazarus, *supra* note 19; Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 Loy. L.A. L. REV. 867 (1994). The author of this Legal Memorandum was a Special Agent in the EPA criminal investigation program from 1998 to 2004 and draws on his experiences there as a basis for the recommendations contained herein.
41. For a discussion of the development of federal environmental regulation, see, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).
42. There has been no shortage of criticisms of strict liability offenses. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 77 (1969) (“Strict criminal liability has never achieved respectability in our law.”); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (1968) (“Strict liability is odious[.]”); see generally Larkin, *Strict Liability*, *supra* note 7, at 1079 n.46 (2014) (collecting authorities). Common-law courts and scholars since William Blackstone have consistently and stridently disparaged liability without culpability, by which they have meant without proof of a wicked state of mind. At one time, even the Supreme Court wrote that it would shock a universal “sense of justice” for a court to impose criminal punishment without proof of a wicked intent. See *Felton v. United States*, 96 U.S. 699, 703 (1877) (“But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one.”). As argued elsewhere: “Critics maintain that holding someone liable who did not flout the law cannot be justified on retributive, deterrent, incapacitative, or rehabilitative grounds. By dispensing with any proof that someone acted with an ‘evil’ intent, strict liability ensnares otherwise law-abiding, morally blameless parties and subjects them to conviction, public obloquy, and punishment—that is, it brands as a ‘criminal’ someone whom the community would not label as blameworthy. By imposing liability for conduct that no reasonable person would have thought to be a crime, strict liability also denies an average person notice of what the law requires. The result is to violate a principal universally thought to be a necessary predicate before someone can be convicted of a crime and to rob people of the belief, necessary for the law to earn respect, that they can avoid criminal punishment if they choose to comply with the law. By making into criminals people who had no knowledge that their conduct was unlawful, strict liability violates the utilitarian justification for punishment, since a person who does not know that he is committing a crime will not change his behavior. Lastly, strict criminal liability flips on its head the criminal law tenet that ‘[i]t is better that ten guilty persons escape than that one innocent suffer.’ Strict liability accomplishes that result because it sacrifices a morally blameless party for the sake of protecting society. In sum, by punishing someone for unwittingly breaking the law, strict criminal liability statutes mistakenly use a legal doctrine fit only for the civil tort purpose of providing compensation as a mechanism for imposing criminal punishment. By so doing, they unjustifiably impose an unnecessary evil. Strict liability for a criminal offense is, in a phrase, fundamentally unjust.” Larkin, *Strict Liability*, *supra* note 7, at 1079–81 (footnotes omitted).

43. See, e.g., Meese & Larkin, *supra* note 30, at 734–36, 744–46. The concern with strict liability exists not only when a criminal statute dispenses altogether with proof of any mental element, but also when a statute does not require proof of mens rea in connection with a fact relevant to a defendant’s culpability. Mistakenly taking someone else’s umbrella does not constitute theft. See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 122 (1968). Eliminating proof of that fact abandons the precept that the criminal law should punish only culpable behavior.
44. That prospect is terrifying enough for people who believe that the criminal law must give the average person adequate notice of what is and is not a crime without the need to resort to legal advice to stay out of jail, but there is more. Regulations do not exhaust the number and type of administrative dictates that can define criminal liability. Agencies often construe their regulations in the course of applying them, and the interpretations that agencies give to their own rules receive a great degree of deference from the courts. The Supreme Court has explained that an agency’s reading of its own regulations should be deemed “controlling” on the courts unless that interpretation is unconstitutional or irreconcilable with the text of the regulation. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417–18 (1945). If an agency’s interpretations of its regulations were to be applied in a criminal prosecution, the result would be the development of a body of private agency “case law” that a person must know to be aware of the full extent of his potential criminal liability. In an opinion accompanying the denial of certiorari, Justices Antonin Scalia and Clarence Thomas wrote that the courts should never give deference to the government’s interpretation of an ambiguous criminal law because the “rule of lenity” demands the exact opposite result. See, e.g., *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (statement by Scalia & Thomas, JJ., respecting the denial of certiorari; concluding that courts should never give deference to the government’s interpretation of an ambiguous criminal law because the “rule of lenity” demands the exact opposite result).
45. The Pollution Prosecution Act of 1990, Tit. II of the Act of Nov. 16, 1990, §§ 201–05, 101 Pub. L. No. 593, 104 Stat. 2954 (1990).
46. *Id.* § 202(a)(5).
47. U.S. Environmental Protection Agency, “Environmental Management Systems at Regional Laboratories,” <https://www.epa.gov/ems/environmental-management-systems-regional-laboratories> (last accessed June 28, 2017).
48. See FBI, LABORATORY SERVICES, <https://www.fbi.gov/services/laboratory> (last accessed May 1, 2017).
49. See U.S. SECRET SERVICE, THE INVESTIGATIVE MISSION, FORENSIC SERVICES, <https://www.secretservice.gov/investigation/> (last accessed May 1, 2017).
50. “Every organization has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all.” JAMES Q. WILSON, *BUREAUCRACY* 91 (1989).
51. I use the term “social worker” not to malign EPA employees with that mindset, but to describe a culture that, in the vernacular, might be referred to as a “do-gooder” enterprise. In my experience, EPA personnel see the agency’s mission as protecting the environmental integrity of the nation and planet, goals that should be pursued above all others that the agency has been tasked with achieving and that are more important than most of the nation’s other goals.
52. WILSON, *supra* note 50, at 99; see also *id.* at 95 (“When an organization has a culture that is widely shared and warmly endorsed by operators and managers alike, we say that the agency has a sense of mission. A sense of mission confers a feeling or special worth on the members, provides a basis for recruiting and socializing new members, and enables the administration to economize on the use of other incentives.”) (emphasis in original; footnote omitted).
53. Also keep in mind that the special agents at the EPA criminal division have the authority to initiate criminal investigations of EPA employees who violate the environmental laws. So far, they have not done so. See Paul J. Larkin, Jr., & John-Michael Seibler, *Agencies Not Coming Clean About the EPA’s Responsibility for Poisoning the Animas River*, HERITAGE FOUND. LEGAL MEMORANDUM No. 170 (Dec. 8, 2015), <file:///C:/Users/Larkin/AppData/Local/Temp/LM-170.pdf>; Paul J. Larkin, Jr. & John-Michael Seibler, “*Sauce for the Goose Should Be Sauce for the Gander*”: Should EPA Officials Be Criminally Liable for the Negligent Discharge of Toxic Waste into the Animas River?, HERITAGE FOUND. LEGAL MEMORANDUM No. 162 (Sept. 10, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM162.pdf. But the possibility exists.
54. President Richard Nixon created the agency out of parts taken from several other agencies (such as the Department of Agriculture; the Department of Health, Education, and Welfare; and the Department of the Interior; the Atomic Energy Commission; and the Council on Environmental Quality) that he (with Congress’s blessing) combined together as the EPA. See REORGANIZATION PLANS NOS. 3 AND 4 OF 1970, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Comm. on Government Operations, H.R. Cong. Doc. No. 91-366, 91st Cong. (July 9, 1970).
55. WILSON, *supra* note 50, at 96.
56. *Id.*
57. *Id.*
58. See *id.* at 101.
59. For example, the author was involved in the execution of a search warrant at a plant where a majority of the more than 100 employees had criminal records.
60. Which can happen. See, e.g., Sean Doogan, *Alaska Governor Calls for Investigation of Armed, EPA-led Task Force*, ALASKA DISPATCH, Sept. 5, 2013, <https://www.adn.com/alaska-news/article/governor-calls-special-counsel-investigate-actions-armed-epa-led-task-force/2013/09/05/>; Valerie Richardson, *EPA Facing Fire for Armed Raid on Mine in Chicken, Alaska: Population, 7*, WASH. TIMES, Oct. 11, 2013, <http://www.washingtontimes.com/news/2013/oct/11/epa-facing-fire-armed-raid-alaska-mine/>.

61. See WILSON, *supra* note 50, at 95 (“Since every organization has a culture, every organization will be poorly adapted to perform tasks that are not part of that culture.”). As an example, Professor Wilson pointed to the Tennessee Valley Authority (TVA). “[F]or a long time [it] has had (and may still have) an engineering culture that values efficient power production and undervalues environmental protection.” *Id.* For that reason, he concluded, it is unreasonable to expect that the TVA will treat environmental protection on a par with efficient power production, the mission for which Congress created it. *Id.*
62. *Id.* at 101.
63. It would be most unwise to exempt the newly added criminal investigators from the same education and training requirements demanded of FBI recruits. That would create two tiers of agents at the Bureau, which would generate a host of undesirable results such as ill will, ostracism, and so forth.
64. Ch. 20, § 27, 1 Stat. 73, 87 (1789).
65. Compare 18 U.S.C. § 3053 (2012) (“United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.”), and 28 U.S.C. § 566(c) (2012) (“Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.”); *id.* § 566(d) (“Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony.”), with 18 U.S.C. § 3052 (“The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.”).
66. See 28 U.S.C. § 564 (2012) (“United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.”). In *Cunningham v. Neagle*, 135 U.S. 1 (1890), the Supreme Court recognized the broad authority that U.S. marshals and their deputies enjoy under federal and state law in finding justified the decision of a deputy marshal to use deadly force to protect Justice Stephen Field from a murderous assault. *Id.* at 52-76.
67. See 28 U.S.C. § 566(a) (2012) (“It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.”).
68. “[The Marshals] were law enforcers, but also administrators. They needed to be adept in accounting procedures and pursuing outlaws, in quelling riots and arranging court sessions. The legacy of their history was the avoidance of specialization. Even today, in this age of experts, U.S. Marshals and their Deputies are the general practitioners within the law enforcement community. As the government’s generalists, they have proven invaluable in responding to rapidly changing conditions. Although other Federal agencies are restricted by legislation to specific well-defined duties and jurisdictions, the Marshals are not. Consequently, they are called upon to uphold the government’s interests and policies in a wide variety of circumstances.” U.S. MARSHALS SERVICE, HISTORY—GENERAL PRACTITIONERS, https://www.usmarshals.gov/history/general_practitioners.htm (last accessed May 5, 2017).



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