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**OVERSIGHT HEARING:
FEDERAL LAW ENFORCEMENT PROGRAMS AT THE
BUREAU OF LAND MANAGEMENT AND THE U.S. FOREST SERVICE
BEFORE THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES'
SUBCOMMITTEE ON PUBLIC LANDS, FORESTS, AND MINING
WRITTEN STATEMENT OF PAUL J. LARKIN, JR.
MAY 9, 2018**

Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee:

My name is Paul J. Larkin, Jr. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at The Heritage Foundation.¹ Most of my career has involved working in the criminal justice system in one capacity or another. For example, I worked at the Department of Justice in the Organized Crime and Racketeering Section of the Criminal Division and in the Office of the Solicitor General. Later, I was Counsel to the Senate Judiciary Committee when Senator Orrin Hatch was the Chairman. Finally, I was a Special Agent-in-Charge in the EPA Criminal Investigation Division. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Thank you for the opportunity to testify about the organization of federal law enforcement at proprietary or regulatory agencies. Although I did not work for the Bureau of Land Management or the U.S. Forest Service, I believe (and hope) that my experience and opinions will prove helpful to you.²

INTRODUCTION

The federal government has what has been described as “a dizzying array” of federal investigative agencies, some of which have limited, specialized investigative authority.³ More than 30 federal agencies are authorized to investigate crimes, execute search warrants, serve subpoenas, make arrests, and carry firearms.⁴ Some of those agencies—such as the Federal Bureau of Investigation (FBI), the U.S. Secret Service (Secret Service or USSS), and the U.S. Marshal’s Service

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² I have written about this subject in my work at the Heritage Foundation. See Paul J. Larkin, Jr., *Reorganizing the Federal Administrative State: The Disutility of Criminal Investigative Programs at Federal Regulatory Agencies*, THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 208 (July 12, 2017), <http://www.heritage.org/sites/default/files/2017-07/LM-208.pdf> (hereafter Larkin, *Reorganizing the Federal Administrative State*).

³ 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.

⁴ 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 in Larkin, *Reorganizing the Federal Administrative State* contains a list of such agencies. The powers noted in the text are the traditional ones vested in federal law enforcement officers. See,

(USMS)—are well known.⁵ A few—such as the criminal investigative programs at the National Park Service, the U.S. Forest Service, and the U.S. Postal Service—are fairly well known, especially by people who live in western states, because those states have a large number of sizeable federal parks and forestlands.⁶ Other similar programs—such as the Environmental Protection Agency (EPA) Office of Criminal Enforcement, Forensics, and Training (OCEFT)—are largely unknown.⁷

The current assortment of federal law enforcement agencies has come to exist over time in a random manner. There has been no recent systematic congressional or presidential analysis of their overlapping responsibilities, their comparative advantages and disadvantages, and their authority under statutes, rules, tradition, and practice. Even the best-known federal law enforcement agencies—the FBI and Secret Service—are 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.⁸ 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 1901.⁹ To my knowledge, 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, might be better accomplished by combining different agencies or by transferring authority from one agency to another.

Numerous nontraditional or regulatory agencies have a criminal investigative division with sworn federal law enforcement officers even though the parent agency’s principal function is to manage federal property or 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 the latter is likely to hamper effective law enforcement. In particular, 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 proprietary and regulatory agencies.

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).

⁵ *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).

⁶ *See* 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).

⁷ *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).

⁸ *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. §§ 402–404, §§ 1801–1812 (2012).

⁹ *See, e.g.*, 18 U.S.C. § 3056 (2012).

I. CRIMINAL INVESTIGATIVE PROGRAMS AT PROPRIETARY OR REGULATORY AGENCIES¹⁰

Congress could have tasked traditional law enforcement agencies with the responsibility to investigate all crimes committed on federal property and federal regulatory offenses. By and large, however, that is not how federal law enforcement has worked out.¹¹ Instead, Congress created numerous investigative agencies as components of the agencies that are responsible for managing federal lands or promulgating rules that 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 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 200.¹² 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.

II. THE BENEFITS OF ESTABLISHING CRIMINAL INVESTIGATIVE PROGRAMS AT PROPRIETARY OR REGULATORY AGENCIES

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

First, the agency might have particularized, technical, or scientific knowledge that is necessary to understand what is and is not an offense and therefore also possess a peculiar ability to know how an offense can and should be investigated. Unlike the conduct made an offense by common law and state criminal codes (murder, rape, robbery, fraud, and so forth), regulatory

¹⁰ The threshold question in this regard is whether, and, if so, to what extent and how, the federal criminal law should be used as a regulatory tool. The May 2, 2018, letter from Committee Chair Senator Lisa Murkowski did not identify that issue as a subject of this hearing. *See* Letter from Senator Lisa Murkowski to Paul Larkin (May 2, 2018) (“The purpose of this hearing is to examine the law enforcement programs at the Bureau of Land Management and the U.S. Forest Service, coordination with other federal, state, and local law enforcement, and the effects on rural communities.”). For some of my publications on those subjects, see, for example, Paul J. Larkin, Jr. & John-Michael Seibler, *Sturgeon v. Frost: Alaska’s Wild Lands and Wild Laws Prove the Need for a Mistake of Law Defense*, 73 WASH. & LEE L. REV. ONLINE 376 (2016); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065 (2014); Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715 (2013); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725 (2012); Larkin, *Reorganizing the Federal Administrative State*, *supra* note 2.

¹¹ 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.

¹² *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).

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 agency subject matter experts with the special agents who investigate regulatory crimes. If so, it also may make sense to situate those experts and agents in the same overall agency.

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 crimes. 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 makes sense to combine investigators with the lawyers who will advise them about the laws’ meaning.

Third, proprietary or 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*. To the extent that law enforcement agencies assign their investigative resources according to the perceived short-run reaction of legislators to reports of local crimes, regulatory offenses could wind up being shortchanged on an ongoing basis to the long-term detriment of a large number of people.

III. THE COSTS OF ESTABLISHING CRIMINAL INVESTIGATIVE PROGRAMS AT PROPRIETARY OR 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, such as the FBI or the U.S. Marshals Service.

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. To take advantage of the nimbus that law enforcement officers radiate, Congress may create a misdemeanor or minor offense¹³ so that a regulatory agency can call on its criminal investigative arm to conduct an inspection and interview company officials,¹⁴ even though Congress may believe that most regulatory offenses should not be investigated and prosecuted as crimes.

¹³ 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”).

¹⁴ 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 prison).

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 1978:¹⁵ a loss of perspective.¹⁶ 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 justify its continued existence.¹⁷

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.'"¹⁸ 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."¹⁹ 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.'"²⁰

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 proprietary and 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),

¹⁵ 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)).

¹⁶ See *Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting).

¹⁷ 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/gJQAsRnEX_story.html (last accessed Apr. 28, 2017).

¹⁸ 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).

¹⁹ *Id.*

²⁰ *Id.*

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. 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 about 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.²¹

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 (particularly a corporation), requiring the latter to pay large fines, and every fine recovered by the government in a plea bargain is found money.

Seventh, criminal law enforcement is not a core function of the mission for a proprietary or regulatory agency. That creates difficulties within an agency when it must decide how to allocate emphasis and assets. 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.²² Those cultures help to implement and reinforce the agency's "mission"—that is, "a widely shared and endorsed definition of the agency's core tasks."²³ Criminal law enforcement rests uneasily within an agency characterized by a non-law enforcement culture. Law enforcement seeks to punish, not manage land or regulate an activity. The difference makes for an uneasy fit. That is particularly true if Congress assigns a law enforcement responsibility to an agency *after* it was born because it is difficult to change an agency's mission, particularly one that is deeply entrenched.²⁴ As Professor Wilson noted, "developing a sense of mission is easiest when an organization is first created."²⁵ 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."²⁶ Put another way, a baseball

²¹ For examples, see Larkin, *Reorganizing the Federal Administrative State*.

²² "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).

²³ *Id.* 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).

²⁴ *Id.* at 96.

²⁵ *Id.*

²⁶ *Id.*

team plays away games for only half of the season (before an often hostile crowd), but some agency criminal programs have been playing nothing but away games since Day One.

Eighth, federal law enforcement officers at proprietary and regulatory agencies 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 respect their position. Their culture—whether environmental, regulatory, scientific, or social worker—does not have room for people who place their hands on others. In fact, in my opinion, 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 the regulatory culture at an administrative agency 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.²⁷ All that is the consequence of trying to fit a square peg into a round hole.²⁸

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

²⁷ 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.washington-times.com/news/2013/oct/11/epa-facing-fire-armed-raid-alaska-mine/>.

²⁸ *See* WILSON, *supra* note 22, 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.*

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.²⁹

IV. A REMEDY: TRANSFER FEDERAL PROPRIETARY AND REGULATORY AGENCIES' CRIMINAL INVESTIGATIVE DIVISIONS TO THE FBI OR THE U.S. MARSHALS SERVICE

One way to fix those problems is to transfer the criminal enforcement authority of regulatory agencies 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 proprietary or 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) regulatory offenses.

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. It also 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 law enforcement agency combating international and 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, an assignment that former President Barack Obama carried forward, and that, to my knowledge, President Donald Trump has not changed. 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.³⁰

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 1789,³¹ U.S. marshals and their deputies have exceptionally broad law enforcement authority—the same authority

²⁹ *Id.* at 101.

³⁰ 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.

³¹ Ch. 20, § 27, 1 Stat. 73, 87 (1789).

as FBI agents³² as well as the authority possessed by their respective state law enforcement counterparts.³³ The principal mission of deputy marshals is to assist the federal courts,³⁴ but they also are generalists.³⁵ The Marshals Service has offices nationwide. It would expand the coverage that non-traditional law enforcement agencies 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 proprietary and regulatory agents. Deputy marshals and regulatory criminal investigators undergo the same basic criminal investigator training at the Federal Law Enforcement Training Center (FLETC), while 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 proprietary and 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.

³² 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.”).

³³ 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.

³⁴ 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.”).

³⁵ “[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).

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.