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

Paul J. Larkin, Jr.

Abstract

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.

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

Key Points

- Today, more than 30 federal agencies are authorized to investigate crimes, execute search warrants, serve subpoenas, make arrests, and carry firearms.
- 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.

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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] The law did not work out that way, however, and regulatory agencies today have considerable lawmaking authority.

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 Sates 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 entitles. Some of those components consist of relatively unknown investigative divisions, such as the Fish and Wildlife Service (USFW&S), 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 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 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 offense[22] so that a regulatory agency can call on its criminal investigative arm to conduct an inspection and interview company officials[23]—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 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 1979[35] 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 1990[45] 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 far 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 Glynco, 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—now less than four per state.

But there is more.

Federal law enforcement agencies also have a considerable number of non-agent 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 people 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 FBI[48] 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 what hedge fund managers earn. With that in mind, 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 have room for 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. 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

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 agents[65] 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.

*—**Paul J. Larkin, Jr.,** is Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.*

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.*, Morissette 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 are 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. See EPA, Environmental Management Systems at Regional Laboratories, https://www.epa.gov/ems/environmental-management-systems-regional-laboratories (last accessed June 30, 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/Larkinp/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).