OVERSIGHT HEARING:
"ACCOUNTABILITY, POLICIES, AND TACTICS OF LAW ENFORCEMENT WITHIN THE DEPARTMENT OF THE INTERIOR AND THE U.S. FOREST SERVICE"
TESTIMONY BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
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WRITTEN STATEMENT OF PAUL J. LARKIN, JR.

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

My name is Paul J. Larkin, Jr. I am a Senior Legal Research Fellow at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.[1]

Thank you for the opportunity to testify about law enforcement issues that arise in connection with the federal land management agencies. I have written on some of the issues relevant to the Committee's hearing,[2] and I will draw on those publications for this testimony. I will address three issues identified in the headings below.

I. THE PROBLEM OF USING THE CRIMINAL LAW FOR REGULATORY AND NONTRADITIONAL CRIMES

A. THE DIFFERENCES BETWEEN COMMON LAW CRIMES AND REGULATORY OR NONTRADITIONAL CRIMES

1. USING THE CRIMINAL LAW TO ENFORCE REGULATORY SCHEMES

The threshold question is whether it is sensible to use the criminal law to enforce a regulatory program. In my opinion, the answer is "No" unless there are special circumstances present. The reason why is that the two enforcement schemes differ in several important ways that

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[2] *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 (2015) (hereafter Larkin, *Dynamic Incorporation*); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065 (2014) (hereafter Larkin, *Strict Liability*); Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014) (hereafter Larkin, *Prohibition, Regulation, and Overcriminalization*); Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 B.Y.U. J. of Pub. L. 71 (2014); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715 (2013) (hereafter Larkin, *Overcriminalization*); Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A.J. Criminal Justice 10 (Spring 2013).

make any attempt to marry the two likely to fail in most cases. Resorting to criminal law to enforce regulatory programs poses numerous problems not present in the case of traditional "blue-collar" offenses or even standard "white-collar" crimes. Those problems stem from several defining features of regulatory laws that increase the difficulty placed on an average person to understand precisely where the line is drawn between lawful and illegal conduct.

The criminal law prohibits conduct in order for civil society to exist and avoid *bellum omnium contra omnes*.[3] By and large the criminal code addresses the moral code that every person knows by heart and that the private components of a civil society—families, friends, neighbors, members of religious or social organizations, and so forth—teach the young to incorporate into their everyday behavior. By contrast, contemporary regulatory schemes have a very different history and purpose. Regulatory programs grew up, largely in the twentieth century and seek to efficiently manage industries and activities via regulations, policy statements, civil rules, rewards, and penalties to incentivize desirable behavior without casting aspersions on violations attributable to ignorance or explanations other than defiance. Statutes creating those regulatory schemes define the circumstances in which regulated conduct may and may not be undertaken, delegate authority to agencies to promulgate regulations filling out statutory terms, establish permitting and monitoring protocols to ensure that the amount and type of regulated activity does not exceed tolerable limits. Almost without exception, regulatory programs authorize administrative agencies to pursue enforcement through civil processes, not criminal.[4]

The distinction between the civil and criminal laws is an ancient one, with state-administered punishment traditionally reserved only for a violation of the latter.[5] Yet, today many contemporary regulatory programs define unlawful conduct not just as a civil wrong, but also as a crime, and empower the government to penalize regulatory infractions through the same criminal process historically used to investigate, prosecute, and imprison parties for murder, rape, robbery, theft, and a host of other offenses known today as "street" crimes or "blue-collar" crimes. In fact, regulatory criminal laws have become a settled feature of modern-day statutory codes, and they often impose criminal liability for a host of actions that historically would have been considered only civil infractions.

2. Using the Criminal Law to Create Nontraditional Crimes

The second category of problematic uses of the criminal law is in the case of what I will call "nontraditional crimes." I would use the term "traditional crimes" to refer to three subsets of offenses: (a) the crimes that existed at common law—such as murder, rape, robbery, and the like, (b) the similar offenses that contemporary society has added to that list—such as kidnapping, child abuse, peonage, and so forth, and (c) and the crimes that everyone knows are part of today's penal codes, but are not strictly analogous to the type of violent offenses or "street crimes" that that would fit into the two subsets just noted—such as trafficking in controlled substances like heroin. The offenses in this category could overlap with the category of regulatory crimes discussed above, because agency rules may define relevant terms or set limits to the amount and type of such conduct that may permissibly be done. But some nontraditional crimes will be de-

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[3] *See* Thomas Hobbes, Leviathan 80 (1651).

[4] *See* Max Minzner, *Why Agencies Punish*, 53 Wm. & Mary L. Rev. 853, 858-59 (2012).

[5] *See* Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 Colum. L. Rev. 753, 757-58 (1943).

fined by statute without the assistance of supporting regulations.[6] The common denominator for crimes that fit into this category is that they address conduct that is not always unlawful.

B. THE IMPORTANCE OF THOSE DIFFERENCES

Resorting to criminal law to enforce regulatory programs poses numerous, difficult compliance problems not present in the case of traditional "blue-collar" offenses or even standard "white-collar" crimes. Those problems stem from several defining features of regulatory laws that increase the difficulty placed on an average person to understand precisely where the line is drawn between lawful and illegal conduct. Treating regulatory crimes as if they were no different than "street crimes" ignores the profound difference between the two classes of offenses and puts parties engaged in entirely legitimate activities without any intent to break the law at risk of criminal punishment. In fact, many of the features that make the administrative process a desirable, and sometimes necessary, means for implementing acts of Congress render inappropriate use of the criminal process as an enforcement mechanism.

Consider this example. Congress may, and often does, use a broadly defined term (for example, "solid waste") in a statute (for example, the Resource Conservation and Recovery Act) that delegates to an agency (for example, the EPA) the power to implement that law by elaborating or refining the definition of a term (for example, "hazardous waste"), by creating a list of specific examples of what that term means (for example, "listed hazardous wastes"), or by specifying exemptions from the term (for example, "recyclable materials").[7] By legislating in that fashion, Congress can grant the executive branch considerable regulatory flexibility. An agency can adapt existing regulations or promulgate new ones whenever necessary to address worsening or newly emerging hazards without having to return to Congress for specific supplemental regulatory authorization. That practice also enables the agency to invoke its superior technical and scientific expertise regarding a particular substance, production process, or medical risk whenever a new problem pops up or an old one takes a turn for the worse. Broadly written regulatory statutes granting administrative agencies room to maneuver are valuable because society wants agencies to be able to respond quickly (for instance) to serious health threats by revising the rules necessary to forestall or remedy a problem. At the same time, the freedom to respond quickly can place individuals at risk of criminal punishment for guessing mistakenly about what the law requires because regulatory developments can outpace their knowledge of the law.

The evolving nature of regulations, however, is only one aspect of the notice problem. An elementary principle of criminal and constitutional law is that the government must clearly identify particular conduct as criminal so that the average person, without resort to legal advice, can comply with the law.[8] Historically, that requirement posed little difficulty. The government ordinarily could satisfy that obligation simply by enacting and making public a statute that was written in terms the average person could readily understand. Throughout Anglo-American legal history, contemporary mores condemned certain conduct as harmful, dangerous, or blameworthy,

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[6] The Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2012), is an example. It prohibits only certain uses of computers and does not delegate authority to an administrative agency to define precisely what uses are impermissible. *See generally* Paul J. Larkin, Jr., United States v. Nosal: *Rebooting the Computer Fraud and Abuse Act*, 8 SETON HALL CIR. REV. 257, 260-261 & nn.11-13 (2012) (collecting authorities interpreting the CFAA).

[7] *See* Larkin, *Strict Liability*, *supra* note 1, at 1088-89.

[8] *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 459 (2001).

such as murder, rape, robbery, and burglary.[9] A legislature could readily draft a straightforward, easily comprehensible ordinance outlawing those actions by drawing on language widely understood in the community. That is not the case, however, in fields that are subject to regulation or that criminalize nontraditional conduct.

Start with the quantity of relevant laws. The total number of federal statutes and regulations relevant to criminal conduct is unknown but likely is immense.[10] Some commentators have estimated that there are more than 4,450 federal criminal statutes and more than 300,000 federal regulations that define conduct as criminal or otherwise bear on the proper interpretation of the laws that do.[11] No one—no lawyer, no judge, no law professor—has that knowledge. As the distinguished academic and late Harvard Law School professor William Stuntz put it: "Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions."[12] Permitting the government to rest criminal liability on the fiction that the average person is conversant with the ins and outs of federal regulatory statutes, let alone the thousands of potentially relevant regulations, borders on the obscene.

If it is unreasonable to expect that everyone already knows the law, people must be able to find it. Yet, even finding every pertinent regulation can be an onerous task. Few people are aficionados of the U.S. Code, let alone the Code of Federal Regulations or the Federal Register. Given the massive increase in the number of federal regulations over the last century, there is a potentially enormous number of ways that someone can violate criminal statutes today. The result makes it almost certain that the average person will be completely unaware of some of those ways that he or she can break the law.

There is an additional complicating factor. Federal government officials responsible for implementing domestic statutory programs often construe relevant acts of Congress and agency regulations in publicly issued "guidance documents" or "compliance manuals," as well as in internal memoranda.[13] Interpretations that have not been promulgated as regulations do not have the same legal status as agency rules, of course, but they still may have considerable legal effect. An agency's construction of its own regulations is generally deemed controlling on the courts unless that interpretation is unconstitutional or contrary to the plain text of the rule itself.[14] An agency's interpretive memoranda that are not publicly available are tantamount to a form of "secret" or "underground" law.[15]

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[9] *See, e.g.*, Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 644 (1941) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"); Larkin, *Dynamic Incorporation*, *supra* note 1, at 382 (collecting authorities).

[10] *See* Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, The Heritage Foundation, Legal Memorandum No. 146, at 1-2 & nn.6-7 (Feb. 12, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf'; *see id.* at 1-2 nn.6-8.

[11] *See id*.

[12] William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000).

[13] *See, e.g.*, Larkin, *Dynamic Incorporation*, *supra* note 1, at 384.

[14] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997).

[15] *See* Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 502–03 (1996).

Even if the average person can find all of the pertinent regulations and internal agency guidance documents, however, there is no guarantee that he or she can *understand* them, given the often-recondite rules that agencies adopt for subjects that are technical or scientific in nature. The relevant statutes vest broad authority and discretion in the expert agencies in order to permit them the flexibility deemed necessary for them to respond to advances in scientific and medical knowledge and changes in manufacturing or other productive mechanisms. Regulations promulgated by agencies can form highly reticulated networks demanding a sophisticated understanding of technical subjects beyond the ken of the average person.[16] The result often is that agency rules, such as the ones promulgated under the federal environmental laws, can be extraordinarily abstruse, demanding almost as much scientific or technical knowledge as legal skill to ensure their proper interpretation.[17] Yet, fair notice of what the law forbids is a longstanding requirement for imposing criminal punishment. It is settled law that the government cannot criminally enforce a law that cannot be understood by a person "of ordinary intelligence."[18] A technical set of rules thus can create the same notice problems that we already acknowledge to exist when a statute is unduly vague. In both cases the average person would not know what has been made a crime. Just as the criminal law does not require a person to consult with an attorney in order to avoid liability, so, too, it should not demand that an individual resort to a biologist, geologist, or hydrologist before undertaking facially reasonable activity in a legitimate business.

Another complicating factor with regulatory or nontraditional crimes is that their prohibitions may not apply across the board. Murder is always a crime; the criminal law prohibits every instance of this conduct, not merely the ones that exceed a defined limit. Every rape is a crime; other factors may aggravate that offense, but the basic crime exists in every criminal code. Robbery fits into the same category; no one can apply for a permit to commit robberies. By contrast, not every use of a computer is a federal offense, the disposal of household garbage is not the same as the dumping of hazardous waste, and a party can apply for a permit to pollute the nation's waterways.

The raison d'être of a regulatory program is that certain conduct cannot or should not be forbidden in all circumstances and so must be managed, controlled, or supervised to limit the instances in which it occurs or poses a hazard. A statute may empower an agency to issue a permit to conduct certain activity, and the agency's rules may define when, where, how, and by whom that conduct may be done. But it is more difficult to comply with a carefully nuanced rule than with a diktat forbidding any and all instances of identified conduct. Even the lawyers who practice in a regulated industry may not know all of the statutes, rules, regulations, and agency interpretations—which makes hopeless the plight of the average person who lacks legal training, or ready and inexpensive access to an attorney.[19] The result is that it can be difficult for the average person to know when he or she has crossed over the line into forbidden territory.[20]

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[16] *See* Larkin, *Strict Liability*, *supra* note 1, at 1092-93.

[17] For a good example, see Vidrine v. United States, 846 F. Supp. 2d 550, 561-69 (W.D. La. 2011) (involving the issue whether used oil was a recyclable product or hazardous waste).

[18] United States v. Harriss, 347 U.S. 612, 617 (1954).

[19] *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 742-43 (2012).

[20] *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (defendant sentenced to eight years in prison for importing undersized, egg-bearing lobsters from Honduras in violation of Honduran law). In the Gibson Guitar case,

Historically, mens rea requirements have mediated between the need for flexibility and the duty to notify the public what the law forbids by limiting criminal liability to someone who intentionally violates a known legal duty or commits easily recognizable blameworthy conduct. At common law, a crime consisted of "a vicious will" and "an unlawful act consequent upon such vicious will."[21] That principle still has resonance today.[22] The criminal law traditionally has looked askance on negligence as a basis for liability and has treated strict liability crimes with outright scorn.[23]

Regulatory programs, however, often do not treat scienter with the same respect.[24] The reason for that slight is that regulatory laws see their goal as protection of the public against particular insults or hazards, such as carcinogens, that cause insidious short- or long-term harm regardless of the intent or knowledge of the party responsible for their creation or misuse.[25] Public health programs, for example, seek to empower agencies such as the Food and Drug Administration or the Environmental Protection Agency to intervene in the manufacturing, distribution, or disposal processes in order to prevent adulterated drugs from entering the stream of commerce, or to keep hazardous waste from poisoning the water supply, regardless of whether the party involved was aware of or oblivious to the dangers that his conduct posed.[26] Injunctive remedies are reasonable devices for preventing public injury, and after-the-fact civil or administrative fines serve reasonable educative and deterrent purposes.[27] But the criminal law is society's most powerful weapon against conduct deemed unlawful and traditionally has been brought to bear on an individual only when he acted with a wicked intent, rather than merely negligently, let alone when no blame at all can be attributed to him. Regulatory laws do not see it that way. That creates serious notice and compliance problem for small businesses and individuals.

II. THE MULTIPLICATION OF FEDERAL LAW ENFORCEMENT AGENCIES

Most Americans have heard of a small number of federal law enforcement agencies, such as the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Secret Service, the U.S. Marshal's Service, and perhaps one or two others. What they do not know is that there is "a dizzying array" of other federal investigative agencies,[28] more than 100

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the Department of Justice investigated Gibson Guitar for a violation of the laws of Madagascar even though at least one of the relevant laws had to be translated into English. *See* Letter Containing a Deferred Prosecution Agreement from Jerry E. Martin, U.S. Attorney, M.D. Tenn., et al., to Donald A. Carr & William M. Sullivan Jr. App. A, at 6 (July 27, 2012) [hereinafter GIBSON GUITAR DPA] (referring to "the Department's translation of Interministerial Order 16.030/2006"), http://www.legaltimes.typepad.com/files/gibson.pdf [http://perma.cc/RQV9-F2WB].

[21] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21(1979).

[22] *See, e.g.*, McFadden v. United States, 135 S. Ct. 2298, 2304 (2015); Elonis v. United States, 135 S. Ct. 2001, 2008-10 (2015).

[23] *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 421-22 (1958); Larkin, *Strict Liability*, *supra* note 1, at 1079 n.46 (collecting authorities).

[24] *See* Meese & Larkin, *supra* note 20, at 744-45.

[25] *Id.* at 744.

[26] *See id.*

[27] Hudson v. United States, 522 U.S. 93, 102 (1997) ("all civil penalties have some deterrent effect").

[28] 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 *available at* http://online.wsj.com/article/SB10001424052970203518404577094861

of them. The total number of agents could fill out 10 divisions of armed federal law enforcement officers. The multiplication of federal law enforcement agencies can lead to numerous problems.[29]

A. THE NUMBER OF FEDERAL LAW ENFORCEMENT AGENCIES AND OFFICERS

The Bureau of Justice Statistics (BJS), a component of the U.S. Department of Justice, conducted a census in September 2008 of 73 agencies and 33 inspector general's offices. BJS concluded that there were approximately 120,000 full-time federal law enforcement officers, parties authorized to make arrests and carry firearms in the United States.[30] The bulk of those officers—roughly 45,000 or 37%—conducted criminal investigations and enforcement duties. The second largest category consisted of police response and patrol officers—about 28,000 officers or 23% of the total. Next came immigration or custom inspection officers—approximately 18,000 in number or 15%—followed by officers performing correctional or detention-related duties—about 17,000 or 14%.[31]

Putting aside inspector generals' offices, 24 federal agencies employed 250 or more full-time law enforcement personnel—that is, personnel with arrest and firearms-possession authority—with the four largest agencies fitting into two parent organizations; the Departments of Homeland Security and Justice. The U.S. Customs and Border Protection (CBP) (36,863 full-time officers) and the U.S. Immigration and Customs Enforcement Agency (ICE) (12,446) are components of the Homeland Security Department, while the Federal Bureau of Prisons (BOP) (16,835) and the FBI (12,760) are units within the Justice Department. The Homeland Security Department also contains the U.S. Secret Service (5,213) and the Federal Protective Service (900). The Justice Department also housed the DEA (4,308), the U.S. Marshal's Service (3,313),

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497383678.html#project%3DREGS121520111215%26articleTabs%3Darticle ("For years, the public face of federal law enforcement has been the Federal Bureau of Investigation. Today, for many people, the knock on the door is increasingly likely to come from a dizzying array of other police forces tucked away inside lesser-known crime-fighting agencies. They could be from the Environmental Protection Agency, the Labor or Education Departments, the National Park Service, the Bureau of Land Management or the National Oceanic and Atmospheric Administration, the agency known for its weather forecasts.").

[29] The General Accounting Office and its successor the Government Accountability Office have conducted several studies of the issues posed by numerous federal law enforcement agencies. *See*, *e.g.*, GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL LAW ENFORCEMENT: SURVEY OF FEDERAL CIVILIAN LAW ENFORCEMENT FUNCTIONS AND AUTHORITIES, GAO-07-121 (Dec. 19, 2006), available at http://www.gao.gov/new.items/d07121.pdf; GOVERNMENT ACCOUNTABILITY OFFICE, RESULTS OF SURVEYS OF FEDERAL CIVILIAN LAW ENFORCEMENT COMPONENTS, AN E-SUPPLEMENT TO GAO-07-121, GAO-07-223SP (Dec. 19, 2006), available at http://www.gao.gov/special.pubs/gao-07-223sp/index.html; GENERAL ACCOUNTING OFFICE, FEDERAL LAW ENFORCEMENT TRAINING CENTER: CAPACITY PLANNING AND MANAGEMENT OVERSIGHT NEED IMPROVEMENT, GAO-03-736 (July 24, 2003), available at http://www.gao.gov/assets/240/239049.pdf; GENERAL ACCOUNTING OFFICE, INSPECTORS GENERAL: COMPARISON OF WAYS LAW ENFORCEMENT AUTHORITY IS GRANTED, GAO-02-437 (May 22, 2002), available at http://www.gao.gov/assets/240/234071.pdf; GENERAL ACCOUNTING OFFICE, FEDERAL LAW ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL AT 32 ORGANIZATIONS, GAO/GGD-97-93 (July 22, 1997), available at http://www.gao.gov/assets/230/224401.pdf; GENERAL ACCOUNTING OFFICE, FEDERAL LAW ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL AT 13 AGENCIES, GAO/GGD-96-154 (Sept. 30, 1996), available at http://www.gao.gov/assets/230/223212.pdf.

[30] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT, 2008, NCJ 238250, at 1 (June 2012).

[31] *Id.*

and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (2,541), three other agencies in the 24 largest federal law enforcement agencies. In addition, 16 federal agencies employ fewer than 250 full-time officers.[32] Among them are the Environmental Protection Agency (EPA) and the Food and Drug Agency (FDA).[33]

Several federal law enforcement agencies appear to be within the Committee's jurisdiction. A few of them are listed among the agencies employing 250 or more full-time law enforcement personnel: the National Park Service Rangers (1,404), the U.S. Forest Service (644), the U.S. Fish & Wildlife Service (598), the National Park Service Park Police (547), the Bureau of Indian Affairs (277), and the Bureau of Land Management (255).[34] Two agencies among those with fewer than 250 full-time officers also appear to fit within the Committee's jurisdiction: the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (149) and the Bureau of Reclamation (21).[35] Finally, the Office of the Inspector General for the Department of the Interior (66) would seem to fit within the Committee's jurisdiction.[36] In sum, there are approximately 3,700 officers under this Committee's oversight jurisdiction.

B. PROBLEMS CREATED BY GRANTING FEDERAL REGULATORY AGENCIES LAW ENFORCEMENT AUTHORITY

Congress could use civil investigative units for federal agencies and grant them the power to compel private parties to submit to on-site civil inspections.[37] Civil compliance officers, however, lack the authority and respect given to federal agents. In comparison to civil inspectors, FBI agents wearing "raid jackets" emblazoned with the Bureau's logo will receive far more deference from a judge, a corporation, and the public. To take advantage of the nimbus that law enforcement officers radiate, Congress may create a minor crime (that is, a misdemeanor or minor offense) so that a regulatory agency can call on the full federal investigative apparatus for inspection purposes, instead of being forced to show up at a plant with hat in hand to negotiate with a corporation's lawyers over the scope of an inspection. Adding criminal statutes to an otherwise entirely civil regulatory scheme allows Congress to cash in on the leverage that a criminal investigation enjoys with the public and the media.[38]

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[32] *Id*. at 5 Tbl. 2.

[33] *Id*. at 3, 5 Tbl. 2.

[34] *Id*. at 2 Tbl. 1, 4.

[35] *Id*. at 5 & Tbl. 2.

[36] *Id*. at 6 Tbl. 3.

[37] *See, e.g*., the Antitrust Civil Process Act of 1962, Pub. L. No. 87-664, 76 Stat. 548 (codified in various sections of 15 U.S.C. § 1311) (authorizing Justice Department attorneys to issue civil investigative demands to obtain documents from the target of a civil antitrust investigation); New York v. Burger, 482 U.S. 691 (1987) (upholding state law authorizing the warrantless search of the premises of vehicle dismantlers and junkyards).

[38] *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997). 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) (footnotes omitted).

A closely related factor is the growth of specialized federal investigative agencies. Federal law enforcement agencies differ from state and local police departments with respect to the scope of their authority. As an incidence of a state's "police power," a state can authorize state and local police forces to investigate any and all violations of state law. This is not the case for federal investigators. Just as the federal government is a polity of limited powers, so too, federal law enforcement agencies have only the authority that Congress grants them. Most people are familiar with agencies, such as the FBI, which has broad investigative authority.[39] The creation of specialized law enforcement agencies, however, raises a problem analogous to one that existed with respect to the independent counsel provisions of the Ethics in Government Act of 1978[40]: loss of perspective.[41] Agencies with wide-ranging investigative responsibility see the entire range of human conduct and can put any one party's actions into a broad perspective. Agencies with a narrow charter see only what they investigate. If the only tool that one has to use is a hammer, everything looks like a nail. The result is that specialized agencies may wind up pursuing trivial criminal cases to justify their existence and continued federal funding.[42]

It also is difficult to change a criminal investigation into a civil inquiry midstream. Differences in evidentiary rules, sources of information, and the certainty required to impose sanctions all complicate a hand off between federal agents and administrators. Crimes committed in regulated industries are generally "white-collar" in nature, which means that federal investigators need to wade through a sea of documents. The easiest way to get documents from the target of an investigation is by issuing the company a grand jury subpoena because a federal grand jury has broad investigative authority and there is little that a firm can do to challenge a subpoena.[43] Once the federal government gets its mitts on subpoenaed documents, however, it is extremely difficult for the government to transfer them to civil enforcers.[44] Federal law enforcement officers cannot routinely disclose grand jury materials to their civil colleagues; the government must instead make a showing of "particularized need" for grand jury materials in order to make use of them in a civil proceeding.[45] This difficulty gives the government a strong incentive to maintain as a criminal investigation any inquiry begun as such.

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[39] The FBI has the broadest authority of any federal law enforcement agency. The Secret Service and Marshals Service are close behind. *See* Larkin, *Overcriminalization*, *supra* note 1, at 739 n.95.

[40] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

[41] *Cf.* Morrison v. Olson, 487 U.S. 654, 727–32 (1988) (Scalia, J., dissenting).

[42] "Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical 'bottom line.' Statistics on arrests and convictions are the Justice Department's bread and butter. They are submitted to the department's outside auditors, are instrumental in assessing the 'performance' of the U.S. Attorneys' Offices, and are the focus of the department's annual report. 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.'" 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).

[43] *See* Fed. R. Crim. P. 6, 17(c); United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

[44] *See* PETER C. YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 35 (1991).

[45] *See* United States v. Sells Eng'g, Inc., 463 U.S. 418, 443 (1983).

C. Problems Created by Having Multiple Federal Law Enforcement Agencies

The large number of federal law enforcement agencies can lead to a variety of problems.

First, the large number of agencies makes it difficult for the public to know whether a particular federal officer in fact is a federal agent. The public can readily identify local law enforcement officers. Whether police officers or deputy sheriffs, state and local police officers dress in easily recognizable uniforms, they interact with the public during the course of official business, and they often are friends or neighbors in the community. The public is also familiar with officers performing purely investigative functions, such as "detectives" or "inspectors," because numerous films and television shows have portrayed those officers in action. As far as federal law enforcement officers go, the public also knows about the FBI, the DEA, the U.S. Marshal's Service, and perhaps one or two others, but is wholly unaware that a vast number of other federal agencies, such as the EPA, the FDA, and NOAA, also employ agents with criminal investigative authority. To most members of the public, those are purely regulatory agencies with responsibilities that have nothing to do with the criminal law (for NOAA, the public thinks of dolphins) or that are more a source of amusement than respect (for the EPA, the public thinks of Walter Peck in "*Ghostbusters*"). The public's inability easily to identify as legitimate members of the law enforcement community parties claiming to be federal agents working for nontraditional law enforcement agencies, to my knowledge, has led to dangerous confrontations and, in my view, is certain to ultimately result in an unfortunate incident where one party or the other is shot.

Second, the large number of agencies leads to needless waste. Keep in mind that agents are not the only personnel at a law enforcement agency. The problem with more than 100 federal law enforcement agencies is that they may be considerable overlap or "slack" in the system that should be alleviated by combining functions. For example, while it is important to have lawyers dedicated to working exclusively with agents, there may be no need for a separate cadre of lawyers at each federal law enforcement agency. Consolidating agencies could eliminate expenditure on needless resources.

Third, adding criminal divisions to regulatory agencies is hardly a guarantee that regulatory crimes will be adequately investigated. That is true for several reasons. To start with, there is no guarantee that the agency will have the necessary resources to investigate crimes. There may be an equal or greater number of ancillary support personnel who perform missions critical to the success of the agency. As far as personnel goes, any agency must have lawyers, evidence collection experts, laboratory technicians, training officers, and administrative personnel in addition to the parties authorized to make arrests and carry firearms. (Of course, some agents also will perform supervisory functions and therefore would not be available for fieldwork.) Agencies must also have offices, vehicles, computers, and other equipment. Moreover, criminal investigation units may not even be welcome in a regulatory agency. They may be seen as a drain on agency resources, as a sop to whatever parties want the relevant conduct to be made a crime, or as a diversion from the agency's primary mission of pursuing the requisite scientific, technical, or economic inquiries necessary to justify promulgating regulations to govern private conduct. Some regulatory agency criminal programs may be little more than Potemkin Villages, units designed to display an interest in criminal enforcement that is not genuine, or serve as the threatened agency component to which a matter will be referred if a party refuses to accept a civil or administrative settlement of a matter.

Fourth, the large number of agencies makes congressional oversight difficult, particularly when different Congressional committees have jurisdiction over different federal agencies.

III. THE OVERMILITARIZATION OF FEDERAL LAW ENFORCEMENT

Media images of tanks and armored personnel carriers in urban streets, heavily armed government agents clad in helmets, BDUs, and other military-style gear, and sharpshooters waiting patiently for "Execute" orders bring to mind images of the Russian Federation's annexation of the Crimea in 2014 or the former Soviet Union's invasions of Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1979. Unfortunately, the images also occasionally describe stories about the civil unrest that has periodically rent our society or the unnecessary and unwise use of SWAT units for law enforcement purposes. Traditional federal law enforcement agencies—the FBI, the Secret Service, the Marshal's Service, for example—have need of SWAT units for the different type of work they do. Entering structures where terrorists are plotting their crimes, where violent criminal are "holed up," or where large quantities of controlled substances are being held for distribution—those and some other instances are classic examples of the need for the specialized training and equipment that SWAT units have. Unfortunately, however, other federal agencies may also seek to have comparable units of their own. The proliferation of these units can create terrible problems for federal law enforcement, not the least of which is the increasing perception of the American public that law enforcement officers have taken on the image and attitude of military Special Forces units.

Militarization of law enforcement will inevitably lead to incidents that no one wants to see happen but that everyone, if honest, knows will inevitably occur. Once an agency has a SWAT team, the team will deploy frequently. The team members will want to work in that capacity as often as possible because it is far more fun to break down a door than to review the boxes of papers that are the grist for the mill in a white-collar criminal investigation. The unit's supervisors will want to deploy the team to prove that it is a necessity. But there are only so many heavily fortified biker meth labs, so agency SWAT units will wind up being deployed in settings where there is no good reason for them to be called out—like the incident in which suburban Maryland officers mistakenly made a dynamic entry into the home of the local mayor and shot his two Labrador Retrievers.[46] The result will be needless deaths.

There are a few additional points to keep in mind. *First*, there is likely to be a very small number of instances in which regulatory and nontraditional crimes need the special skills of a SWAT team and only a small number of federal agencies that need such a unit on call. *Second*, there are several federal agencies, such as the FBI and Marshal's Service, with officers dedicated to the work done by a SWAT team. A federal agency that believes a SWAT team is necessary can call on one of those agencies for assistance.[47] *Third*, federal agencies need to accept the fact that going without your own SWAT team does not make you an inferior law enforcement agency. There is nothing remotely degrading about working in a field that is dedicated to the investigation of white-collar crimes. Keeping your neighbors safe from grifters is a noble undertaking. *Fourth*, despite what Ben Franklin said, we need to make a tradeoff between security and free-

[46] *See, e.g.*, RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2014).

[47] In some instances, a federal regulatory agency also may be able to enlist state or local police officers for assistance. For example, the New York City Police Department has an Emergency Services Unit that functions as a SWAT unit.

dom. Militarizing federal law enforcement agencies will engender suspicion, hostility, and resentment, all of which will poison the relationship that the federal agents need in order to carry out their investigative responsibilities.

Does this mean that there never will be an occasion in which a SWAT team is necessary to enforce a regulatory scheme or a nontraditional crime? Of course not. Whether such a unit is necessary must be answered in each case based on its own facts. After all, violent criminals can commit regulatory or nontraditional crimes. But there are federal agencies with trained personnel, like the FBI and Marshal's Service, which can assist when such units are necessary.

CONCLUSION

Thank you for the opportunity to offer the Subcommittee my views on these law enforcement issues. I am glad to answer any questions that members of the Subcommittee may have, and I also am willing to help the Subcommittee in its work.