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EXAMINING OMB'S MEMORANDUM ON THE FEDERAL WORKFORCE PART II: EXPERT VIEWS ON OMB'S ONGOING GOVERNMENT-WIDE REORGANIZATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 13, 2017

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Committee on Homeland Security and Governmental Affairs

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EXAMINING OMB'S MEMORANDUM ON THE FEDERAL WORKFORCE PART II: EXPERT VIEWS ON OMB'S ONGOING GOVERNMENT–WIDE REORGANIZATION

WEDNESDAY, SEPTEMBER 13, 2017

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Heitkamp, and Harris.

OPENING STATEMENT OF SENATOR LANKFORD[1]

Senator LANKFORD. Good morning, everyone. Welcome to today's hearing entitled "Examining OMB's Memorandum on the Federal Workforce Part II: Expert Views on OMB's Ongoing Governmentwide Reorganization." Thank you all for being here, for our witnesses to be here, and for others that are engaged in this. This is the Subcommittee's second hearing on the Office of Management and Budget (OMB's) ongoing governmentwide reorganization effort. Let me give you some quick context.

Three months ago, we heard from four Executive Branch agencies regarding their plans and progress toward achieving the targets and deadlines outlined in OMB's memorandum titled "Comprehensive Plan for Reforming the Federal Government and Reducing the Civilian Workforce."

In our first hearing on the reorganization, the Departments of Commerce, Justice (DOJ), Agriculture (USDA), and Homeland Security (DHS) praised OMB's leadership and inclusive approach in managing the reorganization process to improve the effectiveness and efficiency of the Federal Government. These four agencies lauded OMB's decision to collect input from Federal employees, managers, executives—and most importantly—the American people to streamline operations, eliminate duplicative programs, and reduce wasteful spending.

Further, we learned that OMB provided agencies with an aggressive yet achievable timeline to complete and submit their proposals

[1] The prepared statement of Senator Lankford appears in the Appendix on page 27.

for consideration. Agencies were to submit three items to OMB by June 30, 2017: draft agency reform plans, plans to maximize employee performance, and progress reports on "near-term workforce reduction actions." All four of those agencies we asked when they were here if they were going to meet their deadlines. All four agencies said, yes, they would meet those deadlines. By the end of September, agencies are supposed to incorporate OMB's feedback and submit their refined draft reform plans to OMB.

At this point in the reorganization efforts, this Subcommittee has heard positive news from many Federal agencies regarding their progress toward achieving the OMB reorganization's goals. We are also well aware of the costly duplication of programs performed by different agencies across government—the reason for this whole study. Let me give you an example of that. The Government Accountability Office (GAO) keeps a running list of duplicative Federal programs. They have already identified 79 new examples this year, and currently GAO estimates that 395 such examples have not been fully addressed, that is, duplicative Federal programs. For example, the Federal Transit Administration (FTA) administers $3.6 billion in grants to be awarded toward transit resiliency projects. However, GAO reports that it is likely that the Federal Transit Administration grants duplicative funding that is also coming from other agencies. In addition to the Department of Justice Criminal Division, DOJ has four Divisions which operate their own separate criminal sections.

Timely and common sense reorganization is something we should work towards in order to make government more responsive to the people it serves. Congress needs to be included in this process, especially if OMB plans to request executive reorganization authority or other legislative changes.

The reformation of Federal bureaucracy should not be a partisan issue. In fact, it is something Presidents from both parties have done for more than 20 years. In his State of the Union address in 1996, President Clinton famously declared that the era of big government is over. He committed—this was his quote—"to give the American people a smaller, less bureaucratic government in Washington and one that lives within its means." Similarly, President Obama remarked that "we live in a 21st Century economy, but we have still got a government organized for the 20th Century." President Obama went on to say, "our economy has fundamentally changed—as has the world—but the government has not . . . The needs of our citizens have fundamentally changed but their government has not. Instead, it has often grown more complex."

Presidents Clinton, Bush, and Obama all sought to reform the Federal Government to make it leaner and more efficient for the American people. All of them took steps to modernize and reform government, but the job is clearly not complete. We have a duty to put partisanship aside so that we can accomplish reform that is still so necessary.

The Subcommittee intends to continue to work with this Administration to ensure this reorganization effort is transparent and ultimately successful. We look forward to hearing testimony from OMB on this matter in the near future.

Thankfully, our four expert witnesses today are from a diverse array of outside groups, and they will provide the needed insight into OMB's approach and central role in implementing the reorganization. Today's witnesses possess prior Executive Branch experience and management reform expertise, which enables them to offer valuable perspectives on the reorganization.

I have the privilege of serving thousands of Federal civil servants from Oklahoma, and I will seek to ensure this reorganization hears their input, improves their effectiveness as they serve the American people. That is what they love to do and what they are being impeded to do by our organizational structure. I look forward to hearing from our witnesses today on how we can work together to deliver a successful reorganization to the American people.

With that, I recognize Ranking Member Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP[1]

Senator HEITKAMP. Thank you, Chairman Lankford. I think in the last 2 weeks, we have seen no greater examples of the critical need for a trained, experienced, compassionate, and empathetic Federal workforce. And my great applause goes out to all the men and women of every agency of the military who have worked so hard to protect lives, protect property, and offer hope to so many people who are now in the process of recovery from both Hurricane Harvey and Hurricane Irma.

And so I think it is a wonderful backdrop to have this discussion because I think way too often hearings like this tend to be perceived to be critical of our great Federal workforce, and as Chairman Lankford just said, we represent amazing people who do amazing work who could find much more lucrative careers in the private sector, but choose instead to serve our public. And so my kudos and my great gratification for the work that is being done by the Federal workforce.

I continue to believe that our Subcommittee's oversight of agency reorganization is absolutely essential. Federal employees are a critical part of the Federal Government. We cannot have government, our Nation, and citizens need without a strong, focused, and vibrant Federal workforce.

While I greatly appreciate the time and insight from today's witnesses, I am disturbed that the Office of Management and Budget has declined our invitation to appear before the Subcommittee on this timely subject. There is no one closer to the heart of what is going on in this reorganization than OMB, and it is vital for our Subcommittee to understand the interplay between OMB and the Federal agencies that it is now seeking reform recommendations from. It is unacceptable that OMB chose to not testify at this hearing, and I am going to do everything that I can to try to ensure their presence at our next hearing on this topic, and I hope Chairman Lankford will join me in that effort.

I also will be doing all that I can to protect our Federal workers, and I look forward to hearing about the impact that the reorganization process has on those workers thus far in today's hearing.

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[1] The prepared statement of Senator Heitkamp appears in the Appendix on page 29.

Again, I thank the witnesses for their testimony. I greatly appreciate all of the time that it takes to participate in a hearing like this. I know it is not easy. Preparation of testimony is a critical component, and I look forward to your thoughtful comments on this reorganization process.

Thank you, Mr. Chairman.

Senator LANKFORD. I am glad to and I would say, Senator Heitkamp, absolutely we will engage with OMB. They are a critical aspect of this. The Administration and OMB sparked this. They have been receiving input from the agencies, and I would completely agree we need to be able to hear their input, what they are seeing in the direction they will go, especially, as I mentioned in my opening statement, if they are pursuing executive authority to do reorganization or certainly legislative authority to be able to do it. We have to be able to partner together.

I would like to proceed to the testimony from our witnesses, and let me introduce all four of them. We will have the swearing in of those witnesses, and then we would be glad to be able to receive your testimony.

Robert Shea is a principal at Grant Thornton where he leads the public sector strategy practice. Prior to that, he served in the Office of Management and Budget as Associate Director for Administration and Government Performance. Thanks for being here.

Rachel Greszler is the research fellow in economics, budgets, and entitlements in the Institute for Economic Freedom and Opportunity at the Heritage Foundation. Before joining Heritage in 2013, she served as a senior economist on the Congressional Joint Economic Committee. Thanks for being here.

Chris Edwards is the director of tax policy studies at Cato Institute. Before joining Cato, he served as a senior economist on the Congressional Joint Economic Committee. Thank you as well for your insight again.

Tony Reardon is a 25-year veteran of the National Treasury Employees Union (NTEU), where he has worked in a variety of leadership roles. He has served as the national president of the union since his election in August 2015. Thanks for bringing your insight to us today.

It is the custom of this Subcommittee to swear in all witnesses that appear before us, so if you would please stand and raise your right hand. Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SHEA. I do.

Ms. GRESZLER. I do.

Mr. EDWARDS. I do.

Mr. REARDON. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect all witnesses answered in the affirmative.

We are very pleased that you are here. You all have given tremendous written testimony to us already which will be a part of the permanent record, and we are looking forward to your oral testimony and then Senator Heitkamp and I peppering you with questions on this as we walk through the process together. So, Mr. Shea, you are first up.

TESTIMONY OF ROBERT SHEA,[1] PRINCIPAL, GRANT THORNTON PUBLIC SECTOR

Mr. SHEA. Thank you, Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, for the privilege of testifying before you today.

If implemented properly, the President's Executive Order (EO) on reorganization could be the most ambitious reorganization of the Federal Government in its history. To be successful, a great deal of collaboration with myriad stakeholders within and outside the Executive Branch will be critical, and that is just on the front end. The real work begins when organizations launch the process of integration and optimization. But we should not even begin this process unless we agree on what outcomes we are trying to accomplish.

Optimizing business structures to maximize results is ongoing in the private sector. The Federal Government lacks such agility, so policymakers are constantly working to find ways to overcome these bureaucratic barriers to change. Overlap and duplication among government programs continues to grow. We are lucky that this Committee has helped lay the groundwork for substantial reorganization of the Executive Branch. You stole a lot of my thunder, Mr. Chairman, which is your prerogative. GAO's most recent report included 79 new actions across 29 new areas for Congress or Executive Branch agencies to reduce, eliminate, or better manage fragmentation, overlap, and duplication.

Now, GAO is quick to point out that not every area in which there is overlap or duplication would benefit from a reorganization or restructuring. This Committee, among few in Congress with broad cross-government jurisdiction, can play an important role in pushing agencies just to improve their collaboration among overlapping and duplicative programs.

Though GAO has done a great job highlighting areas of overlap and duplication, a robust, consistent inventory of government programs would help even more. If OMB is unwilling to untangle this important requirement, the Committee should consider asking an independent entity to do the work to produce the required inventory.

The most recent, memorable reorganization, of course, was the establishment of the Department of Homeland Security. We are still working to get the benefits of integration we had hoped to gain when DHS was created. The intent was to improve coordination among disparate entities responsible for securing the homeland, then scattered across the government. If connecting the dots to anticipate threats was difficult before, it would be easier, presumably, if the entities were together under one cohesive organizational roof.

Many reports highlight the difficulty achieving the vision of an effective homeland security enterprise even after consolidating these 22 different entities, and we can always do better. That is why when President Bush proposed the creation of the Department, he also sought permanent reorganization authority. We knew what was proposed would not always work most effectively, and the ability to reorganize the Department's agencies would strengthen the Nation's security.

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[1] The prepared statement of Mr. Shea appears in the Appendix on page 31.

Trust is important in reorganizations, and trust is developed in government policy formulation by creating a transparent structure for communication and sharing of information with key stakeholders.

This Committee knows well that up until the 1980s, as you said, Mr. Chairman, Congress granted the President reorganization authority, and since then, every President has sought it. Congress has not adequately trusted the President to grant it. We will need to overcome this level of mistrust to get very far on the reorganization path.

So it is important to document some of the things we have learned from past reorganization efforts:

It is crucial that we agree on the outcomes we are trying to achieve before embarking on a reorganization;

Before announcing a reorganization proposal, engage in active collaboration with internal and external stakeholders;

Do not expect savings early in a reorganization. Reorganizations are expensive;

And enactment of a reorganization is just the beginning. As we have seen with DHS, the benefits of reorganization or restructuring come long after enactment.

I would be remiss not to mention the recent recommendations of the Commission on Evidence-based Policymaking, of which I served as a member. We have been hard at work over the past year to develop practical recommendations you can act on to strengthen evidence-based practices across government. And among some of the recommendations we made, establishing a National Secure Data Service by bringing together existing statistical expertise now across government, improving privacy protections with better technology and greater coordination, and aligning capacity for statistics evaluation and policy research within and across departments. There is more detail in my testimony, but I am happy to answer more questions about that important work.

The President's Executive Order on Government Reorganization presents us an enormous opportunity. Whether we take the opportunity depends in large part on the collaborative approach the Administration takes with its proposals and the willingness of this Committee to enact them. The benefits of reorganization will not be realized for years. It is my hope we will see the leadership and commitment necessary to make these long-overdue changes to our Federal Government.

Thank you.

Senator LANKFORD. Thank you. Ms. Greszler.

TESTIMONY OF RACHEL GRESZLER,[1] RESEARCH FELLOW IN ECONOMICS, BUDGETS, AND ENTITLEMENTS, HERITAGE FOUNDATION

Ms. GRESZLER. Thank you for the opportunity to be here today. I would like to spend my time this morning focusing on three different things.

[1] The prepared statement of Ms. Greszler appears in the Appendix on page 40.

So first is to provide a summary of some of the recommendations that we have made at the Heritage Foundation in our reorganization blueprints.

Second is to look at some of the past reorganization efforts and their obstacles.

And then third is to recommend what I see as the best pathway forward toward meaningful reform.

So, first, in response to the President's Executive Order to reorganize the Federal Government, the Heritage Foundation researched and compiled two blueprint for reorganization documents.[2] In doing so, we sought the advice and expertise of people with "in the trenches" Federal Government experience, and they provided invaluable insight to these documents here.

Our first analysis of Federal departments and agencies contains about 110 specific recommendations. Some of those include: eliminating the Federal Housing Administration and the Consumer Financial Protection Bureau (CFPB); transferring non-Federal functions such as police and fire protection and low-income housing assistance to State and local governments. We also recommend streamlining certain offices, such as many of the Department of Veterans Affairs (VA's) 42 different veterans services programs, consolidating them into one integrated service system to better serve those veterans.

We also recommend moving the Food and Nutrition Services—a welfare program—from the Department of Agriculture to the Department of Health and Human Services (HHS) and also transferring the student aid programs from Education to the Treasury Department.

And, finally, we recommend eliminating programs that unjustly subsidize certain industries over others, such as the Corporation for Public Broadcasting, the Export-Import Bank of the United States (Ex-Im) bank, and the energy loan programs.

Without going into detail, our second report, "Pathways to Reform and Cross-Cutting Issues," includes proposals for budget process reform, regulatory reform, restructuring financial regulators, reducing the Federal Government's footprint, and, most importantly, in my opinion, is transforming the Federal Government's personnel policies.

Next, I would like to look at some of the past efforts in the obstacles to reorganization. Despite the fact that government reorganization has bipartisan support, it has always faced significant obstacles. Probably the most significant is the iron triangle made up of Federal agency administrators, interest groups served by those agencies, and then the Congressional committees that oversee them.

For each of these groups, changes to or elimination of specific agencies or departments could result in the loss of government-protected jobs, special taxpayer-funded benefits and services, as well as power.

For example, even when Congress created the new Department of Homeland Security, something that is a lot easier to do than eliminating a department, the outcome was an irrational structure.

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[1] The documents referenced by Ms. Greszler appears in the Appendix on page 273.

Although the Coast Guard and the Customs and Border Protection (CBP) agencies became part of the DHS, their jurisdiction remains within that of their previous committees that did not want to give up their oversight.

So in recent history, both Presidents Clinton and Obama have embarked on well-intended reorganization efforts. The Clinton Administration's National Performance Review (NPR) was one of the most persistent reorganization efforts. It generated 1,200 proposals to improve government, and with the help of Congress, many of the NPR's recommendations were enacted, including the elimination of over 250 programs and agencies. Now, while the NPR was successful on many fronts, Clinton's deference to opposition from public sector unions prevented necessary and meaningful personnel reforms.

President Obama also wanted to reorganize parts of the Federal Government, and he asked Congress for the executive authority to do so. He even stipulated that his plan would reduce the number of agencies and save taxpayers' dollars, and he proposed things that Republicans supported, like eliminating the Department of Commerce. Nevertheless, Republicans refused to grant him reorganization authority.

Congress has also attempted reorganization. When Republicans took over Congress in 1995, they attempted to eliminate multiple agencies. The House spent months passing legislation through 11 committees to eliminate the Department of Commerce. But when it got to the Senate, a single Republican Senator blocked its passage.

So I would like to wrap up by proposing what I see is the best pathway toward meaningful reform. I recommend a congressionally created and bipartisan reorganization commission consisting of independent experts with fast-track authority. This type of commission would avoid most of the pitfalls that have hampered previous efforts, and it would provide an insightful and necessarily independent review and set of recommendations.

After receiving the commission's recommendations, both Congress and the President could have an opportunity to submit their suggested changes, and the commission would be able to accept or deny those.

Although the obstacles to successful governmentwide reorganization are significant, both the consequences of failing to act and the benefits of establishing a more efficient, accountable, and right-sized Federal Government are too great to do nothing.

Thank you.

Senator LANKFORD. Thank you. Mr. Edwards.

TESTIMONY OF CHRIS EDWARDS,[1] DIRECTOR, TAX POLICY STUDIES, CATO INSTITUTE

Mr. EDWARDS. Mr. Chairman and Members of the Committee, thank you for inviting me to testify today on the OMB-led effort to improve Federal management and cut spending. As members know, Federal spending and deficits are soaring in coming years, and it is threatening a financial crisis down the road unless we

[1] The prepared statement of Mr. Edwards appears in the Appendix on page 51.

make reforms. The OMB effort can help avert the risk of a Federal financial crisis in the future.

OMB-led reforms can also tackle another problem, which is the bloated scope of Federal activities. The Federal Government today funds 2,300 different aid and benefit programs. That is twice as many as just as recently as the 1980s. All 2,300 Federal programs are susceptible to management and performance problems.

The April OMB memo said that there is a "growing citizen dissatisfaction with the cost and performance of the Federal Government." That is certainly true when you look at polling data.

Here is the irony: As the size of the Federal Government has grown in recent decades and in theory is providing more services to citizens, trust in Federal competence has plunged, according to the polling data. So why is that happening? I think the Federal Government has grown far too large, frankly, to adequately manage and oversee all this vast array of programs that it runs.

Consider this: The Federal budget of $4 trillion a year is 100 times larger than the average State budget in the United States of about $40 billion. So you folks oversee an empire essentially that is 100 times greater than the typical State legislator. So the OMB-led effort makes sense. The government would perform better with fewer failures if it were smaller.

So work in Congress and agencies finds savings. The OMB memo discusses workforce reforms, and I think there are lots of reforms there we can make to save money. I think Federal pension benefits, for example, are excessive. I also think that there is a problem in disciplining poorly performing Federal workers. One statistic that has really struck me is that the firing rate for poorly performing Federal workers is only one-sixth as high as the firing rate in the United States private sector. So I think there is a real problem there.

Another issue is the excess layers of Federal management. Academic research has found that American corporations have much flatter managements today than in the past, but research by Paul Light of Brookings has found that the number of management layers in a typical Federal agency today is twice as large as the 1960s. We are adding layers of middle management in the Federal Government. Light thinks that is a cause of increasing Federal failure. So we should focus on reducing Federal management layers.

All that said, Federal spending on compensation and procurement is really only one-quarter of the entire Federal budget. Three-quarters of Federal spending is cash at the door and benefit programs for individuals and businesses and State governments. So how do we reform that spending? Two areas are of particular interest to me.

One is reviving federalism. Rachel touched on this. The OMB memo suggests focusing Federal activities more where there is a "unique Federal role" and consider devolving other activities to State and local governments. The Federal Government funds more than 1,100 State aid programs. There are many problems with State aid programs, as I have written about extensively. I think they reduce State policy freedom, I think they breed bureaucracy, and I think they distract Federal policymakers, frankly, from focusing on truly national issues.

The OMB memo says that agencies should do "fundamental scoping" of their activities, and I certainly agree, and I think we ought to look at State aid programs that the Federal Government ought to devolve to State and local governments.

So a last point is that the OMB memo touched on the idea of comparing the costs of Federal programs to the benefits. Are the costs of particular programs justified by the benefits they produce to society? Well, cost-benefit analysis is a standard tool of economics that tries to judge the overall net value of programs. Since 1981, Federal agencies have been required to perform cost-benefit analysis for major regulatory actions. So we often see news stories about whether the Environmental Protection Agency (EPA) cost-benefit analysis and, the results of those analyses show for regulations. There is no general requirement, however, to perform cost-benefit analysis on Federal spending programs. The Congressional Budget Office (CBO) and the GAO do not generally do cost-benefit analysis.

So supposing the Congress is considering spending $10 billion on an energy program. Does the program make any economic sense? Right now, we are flying blind. There is no overall analysis that would show. A cost-benefit analysis would look at whether the program's expected benefits were higher than the costs of the $10 billion in tax funding plus the additional damage caused, called "deadweight losses" of taxation. I think policymakers should require agencies to evaluate more programs with full cost-benefit analysis.

There is disagreement about the results of such studies. They can be very complicated. But I think the whole cost-benefit analysis process is useful because it would require the government to at least try to quantify the merits of its policy actions.

That is all I have, and thanks for holding these important hearings.

Senator LANKFORD. Thank you very much, Mr. Edwards. Mr. Reardon.

TESTIMONY OF ANTHONY M. REARDON,[1] NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. REARDON. Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, thank you for allowing NTEU to share its thoughts on the Administration's plans to reorganize the Federal Government.

NTEU is in favor of improving the efficiency and effectiveness of Federal agencies to ensure that they are providing the services that Americans rely upon and that taxpayer dollars are spent wisely. However, we are deeply concerned with the agencies being directed to make reductions in the workforce based only on proposed budgets that do not yet have congressional approval, which will drastically impact the ability of agencies to meet their missions. Additionally, it is our fear that staffing reductions are being proposed with the aim of outsourcing functions and services that, based on past experience, will only cost taxpayers more money and will provide the public with less transparency and accountability.

[1] The prepared statement of Mr. Reardon appears in the Appendix on page 60.

It is important, however, that such reform efforts not take place in a vacuum. Rather, we believe that only by having senior officials working closely with front-line employees and their representatives will real positive reform take place. Federal employees are an essential source of ideas and information about the realities of delivering government services to the American people.

Experience has shown that involving employees and their representatives in pre-decisional discussions concerning workplace matters results in better, higher-quality decisionmaking, more support for those decisions, and more timely implementation.

It is in this vein that I reached out to and met with then-OMB Senior Advisor Linda Springer to discuss our desire to be part of the reorganization planning. I also asked our chapters to provide ideas that I could share with agency heads. I am pleased to say that the response from our members was overwhelming. After collecting these ideas, I wrote letters to agencies and offered to meet to discuss these suggestions. The recommendations provided were generally as follows:

To increase telework and/or hoteling to reduce real estate costs and increase employee productivity;

To consolidate management layers, because we continue to see top-heavy management organizations with higher-than-need-be supervisor-to-employee ratios;

To hire more support staff so that employees with more complex work could spend less time performing administrative functions;

To empower front-line decisionmaking in order for agencies to breed individual and group confidence, enabling people to work both more efficiently and more effectively;

And, finally, to fill existing vacancies so that agencies can meet their missions.

One of the major concerns NTEU has with the reorganization effort is its call for increased outsourcing of government functions. NTEU has long maintained that Federal employees, given the appropriate tools and resources, do the work of the Federal Government better and more efficiently than any private entity. When agencies become so reliant on Federal contractors, the in-house capacity of agencies to perform many critical functions is eroded, jeopardizing their ability to accomplish their missions.

NTEU has witnessed prior efforts to improve government services fail. We have seen overly ambitious efforts to reform the civil service that eroded employee rights and morale, as well as haphazard efforts to reduce the number of Federal workers by cutting an arbitrary number of personnel, implementing a hiring freeze, or failing to replace departing employees.

In fact, one of the biggest failures of the Clinton-Gore Administration's so-called Reinventing Government initiative was the hollowing out of agencies, leaving them unable to conduct proper workforce planning, and without a skilled workforce in place.

Finally, it should be noted that the Federal Government's current inability to carry out its basic functions without threats of a default or shutdown undermines any confidence that massive reform efforts can be successfully achieved.

Thank you again for the opportunity to share my views with you today, and I am happy to answer any questions.

Senator LANKFORD. Thank you all for your testimony.

This conversation will be a conversation. I am going to make a couple of questions here, pass it to Ranking Member Heitkamp, to do some questions, and then we will just have an open dialogue, and we will go back and forth. So I would like for this to be a dialogue not only among the four of you, but with us, and then we will be able to keep that moving, because this is exceptionally important that we get some context areas.

So from my perspective, the things that I want to be able to gain from today is not only a set of ideas that you have already presented, the things to be able to notice and to be able to watch for in a reorganization, but obviously, we are going to work with the legislative issues, not only executive authority and releasing that to the Executive Branch of what authorities they have to be able to accomplish that, but actually putting into legislative action whatever has to be put into structure. All of these agencies were created by Congress. All of the structures were created by Congress. Congress should still be involved in the engagement of how the oversight is done.

So there are often executive agencies where the Executive Branch is given the responsibility to run it, they were created by Congress. The parameters that were done for them were created by Congress, that is, the American people were speaking into it. So there is still a responsibility to be able to engage in that issue. So ideas and insight that you may have in structure and format are exceptionally helpful to us in that.

Mr. Reardon, I want to be able to make a couple comments to you, and I appreciate your comments and your list on it. It is very interesting to me, because very often I will visit with our front-line employees, as you mentioned as well. And I have the habit of when I go into agencies in Oklahoma to not just meet with the people that I am assigned to meet with, but to get past that and to get to cubicle world and get a chance to visit with many of our great employees that are in cubicles.

This is a comment I heard from the last place that I visited, and I will leave the places and people out on it because I have not asked them specifically to mention it publicly. I remember walking into a place, and when I am walking through just meeting people on it, I had a Federal employee that came and caught me, introduced themselves, and said, "We have a lot of work to be able to do. There are a lot of things we are doing we should not do. There are a lot of things that we are doing that are wasteful, that I know I am filling out papers that no one is reading. I want to do purposeful work. That is why I came." And there were just a million things that she had on her mind.

I put that in context with a previous place that I had gone to, when I am walking around through the cubicles, and I walked up to a lady that was in one of the spots, and I said, "Tell me what you do." She looked up from her desk and smiled at me, and she said, "I do what we should not do. I love my job. I love the people I work with. But the tasks that I do the Federal Government should not do at all. But I do it every day."

I want to make sure their opinions are being heard, because they have ideas. They know the loss that is happening and where they

are spinning their wheels and not accomplishing things. How can we pull those opinions out and get them to a larger voice? And is it your perception at this point that OMB is hearing from those individuals who have those practical ideas?

Mr. REARDON. Mr. Chairman, I very much appreciate your question, and I, too, agree that front-line employees need to be heard from. And I do not believe that at the present time that is occurring effectively.

I believe that, without question, agency management and front-line employees must engage, work together, and figure out some of those things that you are talking about. Where paperwork is unnecessary or duplicative, or they are doing work that, as the young lady mentioned, they should not be doing, I totally agree. That all has to be worked out, and those changes must be made.

But one of the things that I am concerned about is that front-line employees are not really being heard. I can tell you that I have those same conversations. In fact, I recently had a conversation with some Internal Revenue Service (IRS) employees from Oklahoma, and——

Senator LANKFORD. Great folks, by the way.

Mr. REARDON. They are great folks, along with—we have many CBP employees, Office of Field Operations employees in Oklahoma as well.

Senator LANKFORD. Which, by the way, while you are mentioning that, some of them are in an office complex that they should not be in, and we are in the process of trying to get them out of that space because their space is the problem.

Mr. REARDON. The IRS folks?

Senator LANKFORD. Yes.

Mr. REARDON. I am in 100 percent agreement. That, in fact, is why I was speaking to them yesterday in Tulsa. Thank you.

Senator LANKFORD. Yes.

Mr. REARDON. So I believe that many of our Federal employees, certainly those in the 31 agencies where we represent folks, they do not feel that they are being listened to. They do not feel as though they have a voice. And I think one of the important elements that we bring is that, as I said, we represent employees in 31 agencies, so we have a very interesting perspective. We know what is going on in all those agencies. And so where our front-line employees in a particular agency would be involved in some reforms, we would be able to deliver some best practices that are occurring in different agencies and bring them to the debate. But I do not believe that is happening.

Senator LANKFORD. Well, OMB has promised us that they are in the process of that. The four agencies that we visited with, one of the questions that Senator Heitkamp and I had for them specifically when they came is: How are the Federal employees that work in these agencies, how are they contributing to the ideas? They talked through how they are doing it, through online, through emails, how they are reporting that back up, how they are receiving it, the thousands of comments they are receiving. So it is our hope that not only are they being heard, but that OMB will actually apply some of those things, because there are some very prac-

tical, specific reforms that can be done if those individuals are heard.

Mr. REARDON. Can I offer one other thing?

Senator LANKFORD. Sure.

Mr. REARDON. One of the models that I think is really outstanding is, for example, in the Federal Deposit Insurance Corporation (FDIC). They have these workforce excellence committees that bring together front-line employees as well as management groups. And I will tell you, I have seen it firsthand and Chairman Marty Gruenberg and I see this firsthand: that these front-line employees and these managers get in these committees, and they operate not as labor and management. They operate as FDIC employees, and they tackle really important issues within the FDIC, bringing about efficiencies, doing work that says how should we do things to make it better for our operation, for the banks, so on and so forth. That for me is a real model and something that we should be looking across government to emulate.

Senator LANKFORD. Senator Heitkamp.

Senator HEITKAMP. I think there are two steps to this process, and the first step is the low-hanging fruit, where we could all sit down, across the ideological spectrum, and say, "This is crazy. Why are we doing it this way? Why can we not be more efficient in what we do? Why do we have to have three agencies that do exactly the same function that are just in the business of turf protecting when we have so much other important work to do?" And so, there is enough work to do in this country. We do not need to make work. And I think we can all agree that that is the baseline.

Another really interesting kind of parallel here is this agreement that we are management heavy, that we have too many layers of management. It probably creates little fiefdoms. It probably creates more competition for protection of that function than what it should.

And so I want to explore the management structure and what you perceive, I think, Mr. Reardon, because you are probably closest to what is happening with reorganization right now. Is this an issue that is being tackled by any of these agencies that are now looking at government efficiency?

Mr. REARDON. Thank you, Ranking Member Heitkamp. I am close to this, and from what I have seen in my experience, agencies are not tackling it effectively enough.

If, for example, you look at CBP, right now in CBP there is something on the order of one supervisor for every 5.7 employees. In 2003, I believe it was, that number was one supervisor for every 12 employees.

Now, I ask you to couple that with the fact that across CBP, we are short something on the order of 4,000 CBP officers and 631 agriculture specialists. And it is important to recognize what these folks do. Not only do they help protect our country through the ports of entry (POE), but they also protect us, insofar as the agriculture specialist, making sure that pests do not come in and ruin our crops and so forth. And so there is also an economic element to this because they help move people, tourists, as well as freight into and out of our country.

So it is important to make certain that we have the staffing that we need for these agencies such as CBP.

Senator HEITKAMP. I just want to kind of add to my frustration about what happens to Border Patrol and agents who are front line. When we had the surge at the border of unaccompanied minors, they carry a gun, but they were changing diapers. That makes no sense.

Mr. REARDON. Right.

Senator HEITKAMP. That is not the function that they signed up for, and it creates morale problems, and it creates real challenges for those Border Patrol agents. So getting them back on patrol should be our top priority.

But if you take a look at reorganization coming from Congress, probably the worst example, in my opinion, is the Department of Homeland Security. Why is that? Because as Ms. Greszler said, there was no oversight. There is no consistent oversight from Congress. We shoved all these agencies together, said, "Good luck." We bring them in and we beat them because, your morale is poor, you are not functioning the way you want to function. But we take no responsibility on this side of the dais for the challenges that we have created with no commitment to overall oversight. And I think you see that repeatedly.

And what I would like to just reiterate, this Subcommittee, is incredibly committed to actually creating an oversight system of the work that is being done right now, whether it is in the planning or whether it is in the implementation of this oversight. We cannot just have this oversight, this new reorganization, been there, done that, now we all can take a bow when we go out to talk to the cameras, and then behind it is chaos. We need to take responsibility here for what we are not getting done, and I think the Department of Homeland Security is a critical component.

Mr. Edwards, you raised this question of the tiered management system. How pervasive, when you do the judgment—you just heard Mr. Reardon say, 1:6, 1:12. When you think about benchmarks for management to front-line workers, what do you think that ratio—let us assume you agree that these are all functions we should be performing in the Federal Government. What do you think that ratio should be?

Mr. EDWARDS. I do not know what it should be precisely. I mean, there is a whole academic literature on span of control and the like.

Senator HEITKAMP. Right.

Mr. EDWARDS. But there is academic research that I have looked at major U.S. corporations. They are flattered that their spans of control have increased.

Senator HEITKAMP. Can you give the numbers you gave in your testimony again? You said the United States Government——

Mr. EDWARDS. So Paul Light of Brookings has found that the number of layers in the typical Federal agency has doubled since the 1960s, and he has done this interesting analysis looking at titles of Federal employees, and there are far more employees today than in the past that have long, fancy titles like Assistant Deputy, da, da, da, rather than front-line folks.

One of the points he makes is that—and we saw this after Hurricane Katrina, which I read quite a bit about and looked at the offi-

cial reports on. There is no doubt in my mind that one of the chief screw-ups, Federal screw-ups after Hurricane Katrina was that the Department of Homeland Security was new, there were so many different layers, that the communication became very difficult. And there was this huge complexity of decisionmaking. No one knew who was responsible for what.

So I think communication flows more quickly when you have fewer layers of management. I think rules and regulations are easier because everyone knows who is responsible.

Senator HEITKAMP. I just want to tell kind of a personal story before we hear from Mr. Shea. I once was a Federal attorney, and every time I wrote a letter, I had a routing slip, and it had to be signed off by four levels. And, of course, you have to justify your existence, so you send it back with changes. And by the time the top guy changes what you just did, the bottom guy does not like it. And so you can imagine the lack of number one efficiency, but accountability, at the end who was really accountable for that letter? There was no one accountable for that letter.

And when I went to State government as an attorney, I went into my supervisor, and I said, "Can I have the routing slip?" And he said, "The what?" I said, "The routing slip where I have to get approval to send this letter out." And, I am 25 years old or 26 years old, and he looked at me and goes, "Well, did you research that letter?" I said, "Yes." "You think you said the right thing in that letter?" I said, "Well, yes, I worked pretty hard on it." He goes, "Then sign it and send it."

And you know what? The message to me was, look, you are accountable. And when you add those layers of supervision, you eliminate accountability for the work that is being done, and I think it creates an attitude that maybe I do not have to take responsibility for this because it is going to be the guy at the top.

Mr. Shea, you wanted to comment before I turn it back over to Senator Lankford.

Mr. SHEA. You just reminded me of my first days at OMB when every memo or circular had to be signed off on in physical hard copy, and you had some documents literally as high as the dais that some bloke had to carry around from office to office to get signed. Luckily, we have gone electronic. I am sure they are giving it the same diligent review they did then.

I think it is important to note—and Rachel said this in her testimony—that if we do not tackle fundamental personnel reform in conjunction with reorganizations, you will not get the benefits that you hope. Agencies cannot recruit and retain the workforce they need to accomplish their missions. It is the chief challenge we find when we survey chief human capital officers (CHCO), chief financial officers (CFO), chief information officers (CIO).

So unless agencies have the flexibility to mold the workforces they need to accomplish the mission you hope they will accomplish when you reorganize them, you will not get there.

Senator HEITKAMP. But I do want to make this point, that we have created an atmosphere where a mistake could be catastrophic. So people are afraid of making mistakes, and that creates paralysis. We have to have a level of tolerance for things not always being perfect. And I think when you look at management struc-

tures, if you want a zero mistake tolerance standard, you will get nothing done. I had a Governor who had a sign on the wall that said, "If you made no mistakes today, you really did not get anything done."

Mr. SHEA. You are talking about the culture of an organization.

Senator HEITKAMP. Right.

Mr. SHEA. And leadership can overcome structural barriers to creating that culture in organizations with sustained leadership. We get to manage in an environment where senior leadership turns over sometimes as frequently as every 18 months. So you can play an important role in making sure there is a sustained attention to whatever culture it is you want to see in an organization, including one that is risk tolerant.

Senator LANKFORD. So how much common ground do we have on personnel policies? Let me just talk hiring for a moment. If I remember the number correctly, because we have done a lot of studies on this, off the top of my head I think it is 120 different hiring authorities that are out there. No one can keep track of 120 different hiring authorities, and it has reached a point that those 120 different hiring authorities, every agency contacts us and says, "We want direct hire authority." In other words, "We want to do none of the above." How do we fix that? Let us just start with that, because going back to your Customs and Border Patrol Statement, we had some of the folks here after the President made the announcement we need to hire—you said 4,000, he said 5,000 additional people that need to be there. Our response was, "Good luck." Right now, Customs and Border Patrol, it takes 450 days to hire one person. It is one of the worst areas we have in government for hiring people and the length of time it takes to hire somebody. How do we solve that?

Mr. SHEA. So we do not have a lot of common ground. I broke my pick on trying to get a lot of personnel flexibilities in place across government. You could rewrite personnel rules in such a way that made it much easier to hire people, to retain people. But if you ask—and veterans' preference is a major barrier, both to hiring people and to hiring veterans. So it is a major stumbling block in improvement to the Federal hiring——

Senator LANKFORD. By the way, privately, agencies will tell us that.

Mr. SHEA. But if you ask Gene Dodaro and if you find agencies that have been able to figure this out, leadership commitment can overcome a lot of existing barriers. So if people make it a priority—frankly, not a sexy agenda item for many political appointees, but if you make it a priority, you can really improve things.

Senator LANKFORD. OK. Any other comment on that from anyone? Because I want to be able to move on. We have a million topics to be able to go through as well.

All right. So let me ask a process question. Ms. Greszler, one of the things that you focused in on in your report—and thank you for pulling all those things together—are the practical aspects and the process things. Today is more process-oriented for us because we are trying to work through the specifics. Obviously, the Administration is going to make their proposal on the specific things in it.

About 6 years ago, I am a young Congressman, and I saw a major issue in the Department of Transportation (DOT) where they were overreaching and really doing something that States should do, not the Federal Government at all. So I had this great idea and put a bill together and got cosponsors and dropped the bill. We started building momentum on it to be able to put it onto a highway bill. And I have an appointment show up on my calendar from someone from the U.S. Department of Transportation, and they wanted to come in and visit with me on the importance of this program. And I described where I was on it, and they said where they were on it. We were going back and forth, and it was very polite. And I said, "I do not understand, because the States all do this already. Why do we have to have this additional layer on the Federal level when every State already does this? Is there any State that is not doing it well?" And he said, "No. Every State is doing it well." I said, "Then why do we have to do this?" And his exact response to me was, "I have people that do that every day." And I thought that is not the answer I was looking for. I was looking for safety, soundness, some essential thing. He was, like, "No, I have people for that, so we need to do that."

I fought my way through that bill and lost, because many in my party and others all said, "No, we need to keep doing that because we have people for that."

One of the things that you tried to identify in your report was the challenge of process trying to move things. You proposed this commission to do it, and Congress has a love-hate relationship with creating commissions to be able to do things. But I would be very interested in process things. When there is an idea that enough of us can look at and say, "Yes, that is an idea we need to seriously take on," what would you suggest based on studying this has been an effective mode for actually moving the idea into reality?

Ms. GRESZLER. I think so many times when there is an idea, even if there is a lot of support for that idea, it ends up getting tied up in that committee process, because ultimately you are going to have somebody that comes in, somebody is going to lose a job. Even if it is a function that everybody agrees does not need to be performed, there is somebody doing it. And that is a loss for them, and they are going to argue a lot harder than the rest of Americans or the other committees.

And so I just see it as so difficult to get little things through Congress. Even last week the House voted some of the proposals we include in here, just eliminating or reducing some of the funding for things like essential air services that provide up to $200 subsidies for these flights in the middle of nowhere or Amtrak funding, and, overwhelmingly, that amendment was voted down. And so things that make sense and that the Federal Government should not be doing are so difficult to get through Congress. And that is why ultimately I think, going forward, if we want to see a big governmentwide reorganization, you kind of have to step back. I mean, one thing to do would be to put it in the hands of committees like your own that have broad jurisdiction, government oversight as opposed to the more particular ones that would be more inclined to protect their turf. But even that I think you would face some significant obstacles, and so that is why I think if you have an inde-

pendent commission, it is bipartisan, both sides can elect people from previous Administrations to look at the idea, I think there is a broad set of ideas available that everybody largely agrees on. But you put them in one package, and then it is about reform. It is not about 5 jobs or 10 jobs there. It is about making the government as a whole work better for the people, and I think that is when you can have some people swallow a little bit of a loss in one area or another.

Senator HEITKAMP. I would resist a little bit what you are saying, Rachel, because I am a huge proponent of the Ex-Im Bank. You mentioned the Ex-Im Bank in your testimony. I do not think that is a waste of manpower. I think it is a critical piece of our trade infrastructure. I am frustrated because we reauthorized the Ex-Im Bank by almost a 60-percent majority here, making a statement, hearing all of the arguments, and it was a tough fight, and we still do not have a fully functioning bank, because on the outside we have challenges coming from a number of the groups that are represented here. I get it.

And so, there comes a time when you have to say, look, we lost that fight. Let us focus on the things that we can agree on. Let us focus on duplicative programs. Let us focus on not the ideological programs. Maybe those come later. But we do not have a big discussion in this country very often about where are the boundaries.

I will give you a for instance. We had a Banking Committee where we talked about bitcoins, and everybody was talking about how they are going to regulate bitcoins. They got to me, and I said, "Stop it. It is buyer beware." You want to deal in bitcoins and you lose your life savings, that is not on me. But the minute the government touches it, it says it is OK, we are regulating it, therefore, you can now have some sense of security around using this currency.

So I think we do not have those foundational arguments, and those foundational arguments, when we get into it, distract from where the soft spot is, where we can all agree across ideological barriers.

And so I would say that instead of fighting the fights about whether we are going to have a Consumer Financial Protection Bureau or an Ex-Im Bank, let us talk about how we can reduce the frustration of front-line employees in performing these functions, how we can identify what Senator Lankford just talked about, places where we do not need these folks to be doing what they are doing. We have a lot of other things they could be doing. And why does anyone want to spend their life doing something that does not add value to the American public? They do not. These employees do not.

And so, I think that one of the things that we could do is lower the ideological barriers and really get to that efficiency measurement that we could all agree on. And when you are talking about cost-benefit analysis, I mean, there is a lot of discussion here. I am all for that. You know who should be performing cost-benefit analysis on existing Federal expenditures? The Appropriations Committee, the oversight committees that authorize these programs. And we should have a greater sense of skepticism about the pro-

gram. We should be a much more critical reviewer of these programs regardless of our ideology.

And so I would say that we could really do some great work here if we just agreed that the hard-line, hard-fought ideological battles about various agencies got set aside and we could work on the low-hanging fruit, build trust, build relationships, and then continue the discussion.

Ms. GRESZLER. I do think you could structure a commission. You could give it a narrow window: These are things that you are going to address, and these are things that are off limits. But I would worry a little because there are so many of the issues that are ideological. I see Federal personnel and compensation reform as crucial to this. No matter how many agencies you eliminate or reorganizations or duplications you get rid of, if you do not change the personnel structure, the way that we hire and fire employees, the way that we compensate them, I mean the government cannot attract and retain the best and brightest employees that they want to right now, and it cannot get rid of the ones that it needs to. And that is something that, even if you have the perfect structure and you are only performing the functions you should, you still need the appropriate personnel organization and way to go about that. And so I think that, yes, you can limit the functions of a commission or whatever reorganization plan it is, but there are always going to be some partisan issues in there.

Senator HEITKAMP. Mr. Reardon.

Mr. REARDON. I think it is important to recognize that a lot of these workload and personnel issues really come down to a need of process improvements, not really an overhaul of laws. We can hire people, we can pay them, but the fact is that it has to be funded. And, when I talk to my members, what I hear from them are things like, they do not have the resources that they need to do their jobs. I think I have mentioned this before, and it still is stunning to me, that, for example, in the IRS there are people, many people—all over the country—that do not have office supplies to do their jobs. So, funding to have the tools and the resources to do the job is important.

I would also mention to you training dollars. Not only training dollars for front-line employees so that they have the knowledge to do the work—times are changing, and people need to be trained to move along with those times, but also training for managers. Managers have a lot of the tools at their disposal right now to deal with problem employees. But the fact of the matter is they are not sufficiently trained to do that work.

And, ultimately a lot of this, candidly, comes down to staffing. I mentioned CBP. IRS, for example, since 2010 has lost on the order of 20,000 employees, 20 percent of its workforce. And that is obviously the organization that brings in 93 percent of our country's revenue. Something is wrong there.

Senator HEITKAMP. I think Mr. Shea had a comment.

Senator LANKFORD. Mr. Shea, were you going to comment on that? And then I want to add a question if you——

Mr. SHEA. Sure. I just want to endorse Rachel's idea. A similar bill we proposed during the Bush Administration to create a commission that would produce recommendations and go to Congress

for an up-or-down vote, and you could narrow the scope of that commission in such a way, and that is based on the success of the Base Realignment and Closure (BRAC) Commissions, which were specifically designed to overcome potential road blocks that they would face in the Congress.

On the cost-benefit analysis, I mentioned in my testimony the Commission on Evidence-based Policymaking. The government is investing more and more to rigorously evaluate its programs. They generally are found not to be effective, but it is really hard, expensive, and takes a long time to do these evaluations. It is our hope that if the recommendations of the Commission are implemented, it will be easier to get that data so that you can find the few diamonds in the rough that are actually having an impact and at what cost so that you can compare the cost-effectiveness of programs across government.

Senator LANKFORD. OK. So, interestingly enough on that, I posted on my Facebook page, which I do at times, the topic of this hearing and just ask folks that are on it any of their ideas and thoughts on it. Lucy Perez of Oklahoma City posted this question: "Why do we not consolidate agencies and Federal departments that perform similar duties?" And I think it was an honest question. Why do we not do that?

When I talk to anyone who has ever been with OMB, they see the issues and say this function is done loosely by four different entities. Now, all of them will have a little slight variation on it, but four different entities basically do the same thing on it. The American people, definitely the people in Oklahoma see it; people all over the country see it. We have a bill called "The Taxpayers Right-to-Know" that passed unanimously in the House and over here is being held up by, I think, five of my colleagues that do not want to do it. But it basically forces a list of all of the things the Federal Government does just so we can set them side by side and Congress can evaluate just for transparency's sake what are all the things that we do, where are they. We cannot even get that list at this point.

So the question is: Help me and help her hear this answer. What is the issue of why, as it is called, cross-cutting, where you are looking at different agencies, an agency's silo can evaluate it, but dealing with duplication in multiple agencies becomes harder? And how do we get through that?

Mr. SHEA. It is kind of a philosophical question. I think, once a government institution is created, its ecosystem develops around it. It has offices in OMB that are responsible for overseeing its management and budgeting. It has oversight committees in Congress. It has contractors—not like Grant Thornton, of course, but other contractors who have an interest in doing business with that organization, so those tentacles make it really difficult to reform those organizations. Everybody, I think, has good intent. They want the mission to succeed. But they become too aligned to the status quo to want to move to something different. There is an enormous fear about what will result afterwards. Who will lose? Someone will have to lose. I do not think that necessarily has to be the case, but that is the fear.

Mr. EDWARDS. Can I make a quick comment?

Senator LANKFORD. Mr. Edwards.

Mr. EDWARDS. Sort of maybe obvious points, but, if you have two $1 billion programs in different agencies that essentially do the same thing, the GAO would say that they are overlapping, etc. Maybe they are under the auspices of different congressional committees. The folks who protect both programs, of course, in Congress would want to defend them both. And if you combine them to eliminate duplication, people would argue, well, we should spend $2 billion on the total because they were each $1 billion programs. So there is an issue saving money.

On the bigger sort of philosophical questions, Robert said—I have a stat in my testimony that in the private sector, there is just this automatic renewal that happens. As we all know, bankruptcy in the private sector in America is absolutely enormous. There is a pretty standard statistic that 10 percent of all U.S. businesses go out of business every year, either through bankruptcy or something else. If the demand for a product falls, if the costs go too high, it just disappears in the private sector. And the government, unfortunately, it is very difficult to shift resources. They get sort of stuck where they get originally put.

Senator HEITKAMP. I think if you go back and take a look, let us talk about supervision. I have a bill that has been supported by a lot of folks on supervision. We are going to reintroduce it this Congress, because I agree with you, I think—people used to tell me in State government, when I ran agencies, that you could not fire people in State government. I said, "That is news to me because I fired a lot of people who were not functioning." I mean, there is a process. And I think that we sometimes hide behind that process to avoid that confrontation. And I think front-line workers who tend to get promoted, if they are good at what they do, may not be the best supervisors. And we need to move that along.

But when you look at duplication, we are going through this whole exercise. We do not need all of this review to know that there is duplication. We have had GAO come in here incredibly frustrated because they say the same things over and over again, the same report over and over again, and nothing happens. And why is that? Because we do not do appropriate oversight here. There are no cameras that are going to come in here—if we were having a Committee hearing on Equifax, we would have tons of people waiting outside that door. It is the issue du jour, it is the topic du jour that sucks the oxygen out of the room in Congress when we should be doing the yeoman's like work on this side of the dais to improve the quality and competence of the Federal Government building, again, the commitment that the American public has and the sense that they have that we are doing the right thing. It is not a sexy thing. I think what we are doing here is not sexy. But we are committed to doing it the right way and making sure that we have some results that we can build on when we build on the trust.

And so, Mr. Reardon, you wanted to comment?

Mr. REARDON. Yes, one of the other things that I would add that I think that we all kind of run into is this notion that the Federal Government is somehow bad, that Federal employees are somehow bad, they are swamp creatures, they are in the swamp.

Senator LANKFORD. They are right now because of hurricane relief.

Mr. REARDON. Well, that is exactly true. You are exactly right about that. They are some of our greatest first responders, without question. So I think the political rhetoric—and it has been around for decades, but it has really taken hold to the point where I have a lot of meetings with our members, and I routinely have people say to me, "Why does Congress feel this way about us?" And they just cannot get their minds around why so many in Congress, based on some of the public statements that are made in the media or maybe by some in OMB, why people feel so negative about them. And so our Federal employees, in large measure, do not feel valued.

There has been a lot of talk here about trust. Federal employees do not really feel as though they trust management either. So there are some things that I think we really need to pay attention to in our current system, and the trust between the front lines and management I think is certainly one of those things.

And I would add that, when we talk about first responders and we talk about CBP officers from San Francisco and around the country going to help in Hurricane Harvey or Hurricane Irma, I would also like to point out that the Federal Emergency Management Agency (FEMA) brings people in to answer phones, and one of the groups that they brought in were a number of employees from the IRS. And the IRS did really a great job of providing people so that they could help.

So there are all kinds of Federal employees who are not only pulling people out of floods but that do a lot of different kinds of important work. And so I hope the day comes where we value the whole Federal workforce.

Senator LANKFORD. I think trust builds trust, and when so many Federal employees also share with their family and relatives how frustrated they are—because they are and they are stuck in a bureaucracy. They see things that need to change. They see someone sitting next to them that they cannot figure out why that person is not working hard and I am working really hard, that just continues to build this conversation that happens, that people know some of those issues and want to be able to work through the process.

So Members of Congress beating up people they have never met is not appropriate. But the real issues that we need to address is the effectiveness of what we are doing, the bureaucracy of what is happening, when we are slowing down our economy waiting on multiple layers. All those things need to be addressed.

My question to this group is—and we need to wrap up, and I want to honor your time as well. OMB is in a process right now, and part of the reason that we want to be able to have this conversation and that we look forward to having the conversation with OMB sitting at that same table to talk through how they are handling it and what they are doing is counsel OMB to make sure you do not miss this, and to Congress for this to have lasting change, you have to do this. So what I would be interested in is very specific counsel beyond what you have in your written statements, because your written documents are all in, or if you want to reinforce something you have written, counsel to OMB that now that they

are looking at the things that are coming in from all the agencies, they have to help determine those cross-cutting, because at the end of the day we have asked OMB to be the one that has the big picture and the White House to have the big picture to say bring us a set of recommendations where you see recommendations. I will keep working on Taxpayers Right-to-Know where we can force those same things out so every entity, every think tank, every American, all Members of Congress can also see all of the duplication, and we can have a national conversation on it. But until that time we get all that, OMB has it, counsel you would have for OMB as they are handling this and then counsel you would have for Congress as we try to walk through and codify the issues that are needed. And I would be interested from any of you or all of you on that.

Mr. Shea, you have uniquely got the ball, being in that chair before.

Mr. SHEA. So make sure they know what outcome they are trying to accomplish and whether what they are proposing is going to accomplish it better than we are doing it today. Implement the recommendations of the Commission on Evidence-based Policymaking so you can actually evaluate whether or not what we are doing is accomplishing the intended goal. And for Congress and this Committee in particular, you have to commit to sustained oversight of the reorganization to ensure that we adjust in real time to make sure we actually get to where we are trying to go.

Senator LANKFORD. Can I ask a quick question on that? Then I want to move on. For OMB, is it important that they say what they are going to do before they ask for executive authority to do it? Because that has been some of the challenge as well. As you mentioned before, many times Congress will not give the executive authority because there is an uncertainty of what is going to happen.

Mr. SHEA. So it is really difficult for me to imagine Congress granting the President reorganization authority at this time in our history. But perhaps they could enact it for a future Administration.

Senator LANKFORD. If this Administration were to take it on, obviously they are pulling the things together on it. What do they need to list out specifically to say here is what we want to do, give us authority to do this?

Mr. SHEA. You mean broadly speaking or with each individual——

Senator LANKFORD. Broadly speaking.

Mr. SHEA. I think, as Rachel suggested and we proposed during the Bush Administration, an independent commission to make recommendations that get an up-or-down vote in the Congress. It can be very narrowly tailored to reducing overlap and duplication among programs or agencies.

Senator LANKFORD. OK. All right. Thank you. Ms. Greszler.

Ms. GRESZLER. And I will just pick up on that. I think that if they were required to submit detailed—like a list by list, this is exactly what we want to do, there is not much chance of Congress granting executive authority.

To OMB, I would say two things. First, just the process in which they are taking in, they have received over 100,000 recommenda-

tions, and so I do not know what they have in place over there, but something that would categorize them and, where do we have 1,000 people that are saying do the same thing and kind of to break it out and here are our broad goals, here are some more specific things. Where do we have a lot of agreement? And then also considering making some of those available to Congress and to the public and just say these were submitted by public institutions, here is what they are saying.

To Congress, I think it is a big thing on the process, and so if Congress is going to have to take on some of this, whether it comes from the President and hear his proposals—there is going to be something in there that needs congressional action. I would say the best way to go about that is through oversight in the Governmental Affairs Committees because you have the broader jurisdiction; otherwise, I think everything is just going to get so tied up in the process that you will not see much come out of it.

Senator LANKFORD. OK. Thank you. Mr. Edwards.

Mr. EDWARDS. Robert mentioned the Commission report last week, the Murray-Ryan Commission on Evidence-based Policymaking, which I went through, and it is very good, although it mainly focuses on generating more data. I do not think that is what we need. I think we need more evaluations, and as I said in my testimony, I think it is a cost-benefit analysis which is a standard tool of economics. Some Federal agencies, like DOT, the Army Corps, already do detailed cost-benefit analysis. We know how to do this. I think that is where we ought to put resources.

Looking around on the Internet in the last few days, the State of Washington has this fantastic website. You go to it; it has all—I do not know whether it is all, but many of their major agencies and programs. They have the full cost-benefit analysis results right there. This program costs the average taxpayer $100; the benefits are $150; it makes sense. That is, I think, what we need, and to inform the public about these programs.

Senator Heitkamp and Rachel had strongly held views about the Ex-Im Bank, both, I am sure, very knowledgeable viewpoints. But, we needed hard data in that debate. We needed the CBO or someone to do the evaluation with a bottom-line number, and then we can debate over what the numbers are. So I think we need to quantify the benefits of these programs.

Senator LANKFORD. OK. Thank you. Mr. Reardon.

Mr. REARDON. OK. Thank you. The first thing that I would suggest is that OMB instruct agencies to work with us on the recommendations that we provided those agencies, and they were contained in my testimony, so I will not go through all of those again.

To Congress, I would suggest that Congress fund agencies appropriately, first thing.

The second thing is to enact Senator Heitkamp's forthcoming supervisor training bill that you had put forward last year.

Finally, I would say it is important to involve front-line employees and their representatives in whatever work is being done so that, without question, front-line employee perspectives are included and taken very seriously.

Senator LANKFORD. OK.

Senator HEITKAMP. We received some great comments from the Partnership for Public Service, and so I want to ask unanimous consent to enter that testimony into the record.[1]

Senator LANKFORD. Without objection.

Senator HEITKAMP. Thank you.

I have no further questions.

Senator LANKFORD. OK. Thank you for the work leading up to this. You did tremendous work in your written testimonies, and I appreciate that very much. I appreciate the ongoing dialogue as you have specific recommendations or ideas. Please continue to be able to bring those. This Committee is very committed not only just to the philosophical argument but to actually the practical implementation of what those things will really mean. Many of the things that you brought up demand really an hour-long conversation on each of those issues alone. We are actually just skimming the surface today. But I appreciate the ongoing dialogue both with our staff and with us as members as well.

Before we adjourn, I do want to announce that next month the Subcommittee will hold a hearing to examine how various State legislatures review administrative rules and how they interact with State regulators.

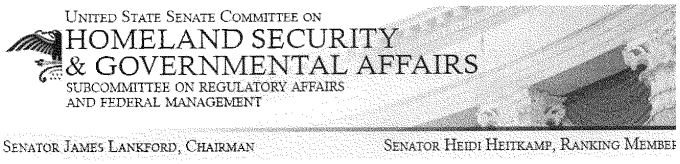
That concludes today's hearing. Again, I want to thank our witnesses for this. The hearing record will remain open for 15 days until the close of business on September 28th, my wife's birthday, for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 11:19 a.m., the Subcommittee was adjourned.]

[1] The statement from the Partnership for Public Service appears in the Appendix on page 374.

APPENDIX



Opening Statement

Hearing before the Regulatory Affairs and

Federal Management Subcommittee,

Wednesday September 13th at 10:00 AM

"Examining OMB's Memorandum on the Federal Workforce, Part II: Expert Views on OMB's Ongoing Government-wide Reorganization"

Good morning and welcome to today's hearing titled "Examining OMB's Memorandum on the Federal Workforce, Part II: Expert Views on OMB's Ongoing Government-wide Reorganization." This is the subcommittee's second hearing on OMB's ongoing government-wide reorganization effort.

Three months ago we heard from four executive branch agencies regarding their plans and progress towards achieving the targets and deadlines outlined in OMB's memorandum titled "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce."

In our first hearing on the reorganization, the Departments of Commerce, Justice, Agriculture, and Homeland Security praised OMB's leadership and inclusive approach in managing the reorganization process to improve the effectiveness and efficiency of the federal government. These four agencies lauded OMB's decision to collect input from federal employees, managers, executives—and most importantly—the American public to streamline operations, eliminate duplicative programs, and reduce wasteful spending.

Further, we learned that OMB provided agencies with an aggressive, yet achievable timeline to complete and submit their proposals for consideration. Agencies were to submit three items to OMB by June 30, 2017: draft agency reform plans, plans to maximize employee performance, and progress reports on "near-term workforce reduction actions." OMB then consulted with these agencies on their proposals, especially regarding cross-cutting issues affecting multiple agencies and programs across the federal government. By the end of this month, agencies are supposed to incorporate OMB's feedback and submit their refined draft reform plans to OMB.

At this point in the reorganization efforts, this subcommittee has heard positive news from many federal agencies regarding their progress towards achieving the OMB reorganization's goals. We are also well aware of the costly duplication of programs performed by different agencies across government. For example, the Federal Transit Administration administers $3.6 billion in grants to be awarded toward transit resilience projects. However, GAO reports that it is likely that the Federal Transit Administration grants duplicate funding from other agencies.

But duplication doesn't just happen across agencies; it exists within agencies as well. For instance, in addition to the Department of Justice Criminal Division, DOJ has four divisions which operate their own, separate criminal sections.

These are not isolated examples. GAO keeps a running list of duplicative federal programs. They have already identified 79 new examples this year, and currently, GAO estimates that 395 such examples have not been fully addressed.

Timely and common sense reorganization is something we need to work towards in order to make government more responsive to the people it serves. Congress needs to be included in this process, especially if OMB plans to propose executive reorganization authority or other legislative changes which would be necessary to improve the effectiveness and efficiency of the federal government.

The reformation of federal bureaucracy should not be a partisan issue. In fact, it is something Presidents from both parties have tried to do for more than 20 years. In his State of the Union address in 1996, President Clinton famously declared that "the era of big government is over. He committed "to give the American people a smaller, less bureaucratic government in Washington and one that lives within its means." Similarly, President Obama remarked that "we live in a 21st century economy, but we've still got a government organized for the 20th century." He went on to say "our economy has fundamentally changed – as has the world – but the government has not . . . . The needs of our citizens have fundamentally changed but their government has not. Instead, it has often grown more complex."

Presidents Clinton, Bush, and Obama all sought to reform the federal government to make it leaner and more efficient for the American people. We have a duty to put partisanship aside so that we can accomplish the reform that has been so necessary and yet so elusive for more than 20 years.

The Subcommittee intends to continue to work with this Administration to ensure this reorganization effort is transparent and ultimately successful. We look forward to hearing testimony from OMB on this matter in the near future.

Thankfully, our four expert witnesses today, from a diverse array of outside groups, will provide much-needed insight into OMB's approach and central role in implementing the reorganization. Today's witnesses possess prior executive branch experience and management reform expertise, which enables them to offer valuable perspectives on the reorganization. Drawing on lessons from the successes and failures of past attempts to reorganize and streamline the government, we look forward to discussing the issues surrounding government reorganization.

I have the privilege of serving tens of thousands of federal civil servants from Oklahoma and seek to ensure this reorganization improves their effectiveness as they serve the American people. I look forward to hearing from our witnesses today on how we all can work together to deliver a successful reorganization for the American people.

With that, I recognize Ranking Member Heitkamp for her opening remarks.

Opening Statement of Ranking Member Heidi Heitkamp

Subcommittee on Regulatory Affairs and Federal Management

Examining OMB's Memorandum on the Federal Workforce, Part II: Expert Views on OMB's Ongoing Government-wide Reorganization

Wednesday, September 13, 2017

As Prepared

Thank you Chairman Lankford.

I continue to believe that our Subcommittee's oversight of this agency reorganization process is essential.

Federal employees are an absolutely critical part of the federal government. We can't have the government our nation and citizens need without a strong, focused, and vibrant federal workforce.

While I greatly appreciate the time and insight from today's witnesses, it is critical that the Office of Management and Budget (OMB) appear before this Subcommittee on this topic in a timely fashion.

There is no one closer to the heart of what is going on in this reorganization than OMB, and it is vital for our Subcommittee to understand the interplay between this agency and federal agencies as reform plans are developed.

It is unacceptable that OMB chose not to testify at this hearing, and I will be doing all that I can to ensure their presence at our next hearing on this topic. I hope Chairman Lankford will join me in that effort.

I also will be doing all that I can to protect federal workers, and I look forward to hearing about the impact that the reorganization process has had on those workers thus far during today's hearing.

Again, I thank the witnesses for their testimony, and greatly appreciate you all taking the time to be here today.

Thank you.

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Grant Thornton

Statement of

Robert Shea
Principal
Grant Thornton Public Sector

before the

Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate

September 13, 2017

Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, thank you for the privilege of testifying before you today. I'm happy to have the opportunity to share my views on what it will take to successfully reorganize the Executive Branch of the Federal Government.

If implemented properly, the President's Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch (Executive Order Number 13781) could be the most ambitious reorganization and restructuring of the federal government in its history. Countless reports and recommendations demonstrate that the government's performance and efficiency could be improved if the impact of extensive overlap and duplication was minimized. To be successful, a great deal of collaboration with myriad stakeholders within and outside the Executive Branch will be critical. And that's just on the front end. The real work begins when organizations launch the process of integration and optimization. But we shouldn't even begin this journey unless we agree on what outcomes we are trying to accomplish and have evidence to suggest a reorganization will contribute to accomplishing them.

Optimizing business structures to maximize results is ongoing in the private sector. Eliminating units or creating new organizations to improve performance are part of the DNA of business operations. The federal government lacks such agility, so policymakers are constantly trying

to find ways to overcome such bureaucratic barriers to change. Because they haven't succeeded, overlap and duplication among government programs continues to grow.

Government Accountability Office (GAO) and the Annual Inventory of Overlap and Duplication

We're lucky that this committee has helped lay the groundwork for substantial reorganization and restructuring of the Executive Branch. As the Comptroller General reported to this Committee last spring, GAO had identified "645 actions in 249 areas for Congress or executive branch agencies to reduce, eliminate, or better manage fragmentation, overlap, or duplication; achieve cost savings; or enhance revenue." GAO's most recent report (http://gt-us.co/2eCXOMv) included "79 new actions across 29 new areas for Congress or executive branch agencies to reduce, eliminate, or better manage fragmentation, overlap, and duplication and achieve other financial benefits." In its most recent report, GAO highlighted a few, new examples of the need for better coordination of potentially overlapping and duplicative programs:

- GAO suggested the Army and Air Force need to improve the management and oversight of their virtual training programs to avoid fragmentation and potential wasteful acquisition of virtual devices. GAO said the government could save tens of millions of dollars.
- GAO warned that the National Park Service, the Fish and Wildlife Service, the Food and Nutrition Service, and the Centers for Disease Control and Prevention do not have a way to ensure their grants are reviewed for potential duplication and overlap.
- GAO recommended the Department of Transportation assess the $3.6 billion it awards to "transit resilience projects" to ensure it does not duplicate other resilience efforts. Such duplication could include investments by the Federal Emergency Management Agency, the Small Business Administration, the Department of Housing and Urban Development, or others.

These are small examples that illustrate the bigger issue of widespread overlap and duplication among government agencies and programs that GAO has documented for years.

GAO is quick to point out that not every area in which there is overlap or duplication would benefit from a reorganization or restructuring. Simply improving collaboration or coordination, in many cases, would go a long way to improving the government's performance and efficiency. It takes leadership and commitment to overcome bureaucratic barriers and bring

about that kind of collaboration. This committee, among the few in Congress with broad, cross-government jurisdiction, can play an important role in pushing agencies to improve collaboration among overlapping and duplicative programs and agencies.

The Need for a Robust Program Inventory

Though GAO has done a great job highlighting areas of overlap and duplication, a robust, consistent inventory of government programs would help even more. If we do not know what the extent of the duplication and overlap problem is, we will be hard pressed to make progress solving it. The GPRA Modernization Act (Public Law 111-352 -- http://gt-us.co/2xhn7PC) included this simple requirement. However, GAO concluded the approach the Executive Branch used to develop the list "has not led to the inventory of all federal programs, along with related budget and performance information, envisioned by the GPRA Modernization Act."

This list may seem trivial, but it is crucial in the effort to create and manage a more efficient and effective government, especially when it comes to reducing redundancy in government programs across agencies. I know the legislative calendar is full and there are a multitude of priorities across all the members of Congress, but highlighting this requirement and pursuing its completion would provide this committee and other committees of Congress an important tool with which to conduct its oversight, creating a baseline from which to work to improve government performance over the long term. If the Office of Management and Budget (OMB) is unwilling to untangle this important requirement, the Committee should consider asking an independent entity, like the National Academy of Public Administration, to do the work to produce the required inventory.

Recent Experience with Government Reorganization

The most recent, memorable reorganization of Executive Branch agencies was the establishment of the Department of Homeland Security (DHS). After resisting recommendations to rationalize the Homeland Security enterprise and suffering the attacks of September 11th, President George W. Bush and Congress agreed to consolidate 22 different federal departments and agencies that shared the mission of protecting our homeland. Because of the drive to ensure 9/11 would never happened again, agreement and enactment of legislation establishing the new agency was swift. Barely six months after President Bush proposed it (http://gt-us.co/2xMRD0H), Congress enacted it.

We are still working to obtain the benefits of integration we hoped to gain when DHS was created. The intent was to improve coordination among disparate entities responsible for security the homeland then scattered across the government. If connecting the dots to anticipate threats was difficult before, it would be easier, presumably, if the entities were together under one cohesive organizational roof.

Coordinating the nation's homeland security enterprise will continue to be an ongoing challenge. In fact, Grant Thornton has partnered with the Homeland Security & Defense Business Council on a five-year initiative (http://gt-us.co/2gIM2or) that consists of a series of surveys and reports we intend to "serve as a foundation of information, education, and suggested action for the entire Homeland Security Enterprise to continue to mature and provide the highest level of security and safety." In our most recent report, we made a number of important conclusions:

- Joint task forces and other structural coordination mechanisms for collaboration and information sharing should continue to improve and can break down bureaucratic and cultural barriers to mission effectiveness—while preserving complementary authorities, cultures and perspectives.
- Communicating the homeland security story is important. The Homeland Security Enterprise should prioritize communications, both internal and external, to promote work being done across the enterprise to build credibility for the systems in place, support employee morale, and educate and engender support from Congress and the public.
- The Unity of Effort initiative was well received within DHS, particularly its management initiatives such as joint requirements definition. The Trump Administration should build on past efforts to continue the needed streamlining and integrated management approach.
- Overall management and oversight continue to mature and improve. Numerous examples of excellent management practices exist across DHS that should be acknowledged, examined and replicated. Among these are joint requirements definition, interagency collaboration and strategic sourcing.

Our report and many others highlight the difficulty in achieving the vision of an effective Homeland Security Enterprise, even after consolidating its 22 different federal entities. It will be

hard to say when we are there, although I think we would all agree we owe a great deal to the amazing professionals on the front lines protecting us from terrorist attacks every day.

We can always do better. The terrorist threat is evolving constantly. That's why when President Bush proposed the creation of the new DHS, he also sought permanent reorganization authority. We knew what was proposed wouldn't always work most effectively and the ability to reorganize the Department's agencies would strengthen the nation's security. Congress granted the Secretary of Homeland Security this authority (http://gt-us.co/2w2oxZp), underscoring the rare trust Congress placed in the Executive Branch at the time. Relinquishing such authority to the new Department was an anomaly.

The Need for Transparency and Collaboration

But trust is not just important between Congress and the current administration. State and local governments, the public, federal employees and their unions, interest groups, key thought leaders, and other external stakeholders all play a key role in the success or failure of ambitious government reorganization and restructuring efforts. And trust is developed in government policy formulation by creating a transparent structure for communication and sharing of information with key stakeholders.

The effort to create the new Department was done in strict secrecy. Relevant officials exclusively within the Executive Office of the President met literally in an undergrown bunker – the Presidential Emergency Operations Center – to draw up plans for reorganizing our homeland security enterprise. When it was proposed publicly, it was a surprise. But as I mentioned, it was enacted within months. 9/11 produced near unanimity that we needed to do something to shore up our nation's protection, so resistance to the new organization was limited. That is not going to be true in most reorganizations.

During the Bush Administration, we invested a lot to improve the performance and management of every program. With the Program Assessment Rating Tool (http://gt-us.co/2wPFA2K), we assessed each program's goals, management and results. After several years, we had a basis with which to compare like programs. Based on our analysis in one area, we proposed the consolidation of 18 community and economic development programs into a two-part grant proposal called the "Strengthening America's Communities Initiative" (http://gt-us.co/2wCnnHG). Programs managed by five federal agencies -- the Department of

Housing and Urban Development, the Economic Development Administration in the Department of Commerce, the Department of the Treasury, the Department of Health and Human Services, and the Department of Agriculture – would have been transferred to the Commerce Department. We also proposed a net reduction in funding. Our logic was that programs with less than superior performance would benefit from being consolidated with higher performing ones. And, if they were better performing, we would get better results with less money. Pristine logic with which not everyone agreed.

The Strengthening America's Communities Initiative got a cool reception. Among the programs we were consolidating was the very popular Community Development Block Grant program. And like with DHS, the proposal was developed within the Executive Branch without the benefit of collaboration with external stakeholders, including Congress. Hearings on the proposal highlighted its lack of stakeholder consultation, dramatic reduction in funding, and alteration of eligibility formulas. The only impact stakeholders could see was negative, because they hadn't been sold on the benefits. The proposal never really had a chance.

Recent Requests for Reorganization Authority

I've mentioned the issue of trust. And this committee knows well that up until the 1980s, Congress granted the President reorganization authority (http://gt-us.co/2eBZ16U). Since then, every President has sought it, but Congress has not adequately trusted the President to grant it. President Bush proposed the Federal Agency Performance Review and Sunset Act (http://gt-us.co/2wC3gJs). It was introduced in both the House and the Senate. It would have established a commission, modeled after Sunset Commissions operating at the time in many states, with the job of reviewing programs and recommending them for reform, revision, or termination. It's important to note that about half of the states successfully administer sunset-like commissions today. Combined with BRAC-like expedited Congressional consideration, a federal Sunset Commission could be a powerful device to reorganize, restructure, and reform government. Like BRAC, it could have depoliticized the reorganization debate. But the bill didn't get very far. In one insightful Rolling Stone magazine story (http://gt-us.co/2vQCFJU), the legislation was described in menacing terms:

> *The Sunset Commission would go even further. The panel — which will likely be composed of "experts in management issues," according to one senior OMB official — will enable the administration to terminate entire government programs that protect citizens against injury and death.*

I assure you that was not our goal. But it highlights that we will need to overcome this level of mistrust to get very far on the reorganization path. Partisanship certainly has not abated much since then.

Lessons Learned from Government Reorganizations of the Past

I am not sure Presidential reorganization authority is likely to be enacted by Congress anytime soon. But tweaking the Executive Branch's structure and governance will continue. So it is important to document some of the things we have learned from past reorganization efforts:

- It is crucial to have agreement on what outcomes we are trying to achieve before embarking on a reorganization or restructuring. Not until you agree on the outcome can you really assess whether what you are proposing is going to help or hurt.
- Before announcing a reorganization proposal – perhaps even before fully developing a reorganization proposal, engage in active collaboration with internal and external stakeholders – bring them into the conversation and solicit their input. In most cases, with the exception of those driven by crises, a surprise reorganization proposal will be met with substantial opposition. And with so many avenues available to those who would block it, it is essential that stakeholders be on board before proposals are publicly announced. In particular, if members of Congress are not at the table as current reorganization proposals are being developed, prospects for their success are dim.
- Do not expect savings early in a reorganization. Reorganizations are expensive. Workforces need to be moved and right-sized, infrastructures need to be consolidated, and cultures must be unified. These changes, even when implemented efficiently, can take years. We will not be balancing the budget on reorganizations.
- Enactment of a reorganization is just the beginning. As we have seen with DHS, the benefits of reorganization or restructuring come long after enactment.

Rarely mentioned, but perhaps just as important as Executive Branch reorganization or restructuring, is Legislative Branch reorganization. Every agency has multiple committees of jurisdiction. More than 90 committees and subcommittees have some jurisdiction over DHS. The government's performance and efficiency would benefit from streamlining the way Congress authorizes, oversees, and appropriates.

Recommendations of the Commission on Evidence-based Policymaking

I'd be remiss not to mention in my testimony the recent recommendations (http://gt-us.co/2eMekgY) of the Commission on Evidence-based Policymaking, of which I served as a member. The Commission was a product of bipartisan collaboration between Speaker of the House Paul Ryan and Senator Patty Murray and sought recommendations on ways to improve access to data for use in analysis of program performance and integration of the resulting evidence in policymaking. I was proud to be nominated to the Commission by Senate Majority Leader McConnell and we've been hard at work over the past year to develop practical recommendations you can act on to strengthen evidence-based practices across government.

Among the recommendations we made in last week's report:

- Establish a National Secure Data Service by bringing together existing expertise now across government.
- Resolve inconsistencies and barriers in law for better use of existing data.
- Streamline the process by which researchers access data.
- Conduct and disclose comprehensive risk assessments for publicly released de-identified confidential data.
- Improve privacy protections with better technology and greater coordination.
- Strengthen OMB's existing guidance on maintaining public trust by codifying Statistical Policy Directive 1.
- Align capacity for statistics, evaluation and policy research within and across departments and tailor administrative processes to make these efforts less costly for government to execute.
- OMB should coordinate these efforts and consider strategies to prioritize evidence-building within OMB.

You can find a lot more detail about our findings and recommendations in the report we released last week. You can find the report here: http://gt-us.co/2eMekgY. Ultimately, our hope is Congress and the President can work together to rationalize the ad hoc way in which researchers access data for the purposes of conducting analysis and evaluation and agencies drive the development and use of evidence in their operations. If you are successful, you will have a lot better information with which to make decisions, including about potential reorganizations.

Conclusion

The President's Executive Order on Government Reorganization presents our government with an enormous opportunity to fix glaring deficiencies that have significantly worsened in recent decades. Whether we take that opportunity depends in large part on the collaborative approach the Administration takes with its proposals and the willingness of this committee to enact them. And as I noted previously, the benefits of reorganization or restructuring will not be realized for years. However, it is my hope we will see the leadership and commitment necessary to make these long-overdue changes to our federal government, so that it works more effectively and efficiently for the American people.

The Heritage Foundation

CONGRESSIONAL TESTIMONY

Recommendations for Government Reorganization And Lessons from Past Reorganization Efforts

Testimony before the Homeland Security and Government Affairs Committee

U.S. Senate

September 13, 2017

Rachel Greszler
Research Fellow in Economics, Budgets and Entitlements
The Heritage Foundation

My name is Rachel Greszler. I am a Research Fellow in Economics, Budgets and Entitlements 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.

Why A Government-Wide Reorganization Is Necessary

Among many problems contributing to the federal government's inefficiencies, lack of accountability, and unwarranted costs are its excessive growth, diminished federalism, mission creep, scattering, and flawed personnel policies.

The federal government has grown too large. It directly employs over 4 million people and indirectly employs millions more contractors and state and local government employees.[1] Moreover, the *Federal Register* lists 440 federal agencies and sub-agencies.[2] As federal government has grown, the role for state and local governments, as well as private-sector businesses, has diminished. Crime and poverty, for example, are better handled by state and local governments who are closer to the problems and can better address their residents' unique needs.

Not only are many of the functions the federal government performs unneeessary at the federal level, but they are scattered across the government. Despite proven ineffectiveness, the federal government continues to operate 47 different job-training programs dispersed across nine different agencies and departments.

[1]David B. Muhlhausen, *Blueprint for Reform: Pathways to Reform and Cross-Cutting Issues*, Heritage Foundation *Special Report* No. 193, June 30, 2017, http://thf-reports.s3.amazonaws.com/2017/SR193_web.pdf.

[2]*Federal Register*, https://www.federalregister.gov/agencies (accessed September 6, 2017).

Another big source of inefficiency and waste in the federal government is its flawed civil service system as well as an overly generous and unresponsive compensation scheme. The federal government's hiring and firing and compensation structures neither reward hard work and success nor penalize low performance and failure. Consequently, the federal government does a great job attracting and retaining lower-performing and lower-skilled workers, but it has a much harder time employing high-performing and highly skilled workers.

Federal government activities should be strictly limited to those assigned by the Constitution and a single agency or department should be responsible for performing similar functions. Moreover, the federal government should reform its civil service laws and compensation structure to more closely resemble that of the private sector.

Summary of Blueprints for Reorganization

In response to the President's Executive Order No. 13781[3] to reorganize the federal government—including a call for proposals from the public—the Heritage Foundation researched and compiled two Blueprint documents: *Blueprint for Reorganization: An Analysis of Federal Departments and Agencies*, and *Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues*. The President's executive order effectively instructs the Office of Management and Budget (OMB) to make recommendations based on: (1) whether current functions are within the federal government's constitutionally assigned activities (or if they would be better left to state and local governments or to the private sector); (2) whether functions or agency administration are redundant with other agencies; (3) whether the public benefits of an agency exceed its taxpayer costs; and (4) what it would cost to shut down, merge, or reorganize agencies.

The Heritage Foundation pursued a similar set of criteria when compiling our earlier *Blueprint for Balance* documents. We looked through all the programs and function of current departments and agencies and asked: (1) whether current federal functions would be more appropriately managed by state and local governments or the private sector; (2) whether current policies represent favoritism toward few instead of opportunity for all; and (3) whether current federal spending and policies are wasteful, inefficient, or duplicative. Many of the proposals we made in our *Blueprint for Balance* publication are also contained in our *Blueprint for Reform* document, but with specific note to what authority the President has or does not have to affect particular recommendations.

In compiling our *Blueprint for Reorganization*, we sought the advice of individuals with "in the trenches" federal government experience. While Heritage has many policy experts, including former federal government employees and agency officials, we are not experts in government organization, so we reached out to more than a dozen individuals who have substantial knowledge and experience in government-wide and agency-specific operations. These experts provided invaluable insight and recommendations, many of which are contained in our reports.

Our first report, *Blueprint for Reorganization: An Analysis of Federal Departments and Agencies*, contains about 110 specific

[3]News release, "Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch," The White House, March 13, 2017, https://www.whitehouse.gov/the-press-office/2017/03/13/presidential-executive-order-comprehensive-plan-reorganizing-executive (accessed September 6, 2017).

recommendations for agencies and departments. Many of these recommendations are to eliminate, reduce, or consolidate federal programs, offices, and agencies.

Our second report, *Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues*, discusses the potential pathways to reform as well as recommendations for larger-scale, cross-cutting reforms that would affect most federal agencies and employees (such as regulatory and budget process as well as federal personnel reforms).

Highlights of Agency and Department Recommendations

Among our roughly 110 specific recommendations for departments and agencies are:

Eliminating Whole Departments and Functions. In many instances, the federal government has taken on functions that are unnecessary and often counterproductive. We recommend eliminating the Federal Housing Administration and Financing Agency and the Consumer Financial Protection Bureau. When necessary, core functions within these agencies should be transferred to other offices or departments.

Transferring Non-Federal Functions. The federal government has taken on too many appropriately state and local government functions. Although federal intervention or financial assistance is often done in an altruistic spirit of trying to help, the result is often more costly and less effective services. Functions such as low-income housing assistance and local fire protection should be fully transferred to state and local governments, which have better knowledge of how best to finance and implement these programs to serve their unique communities.

Eliminating Offices and Departments Within Agencies. Even where departments and agencies have proper federal roles, certain offices and functions within them are often unnecessary or duplicative. For example, Veterans Affairs (VA) has at least 42 different offices—including 14 health-related ones—that create a bureaucratic nightmare for veterans who need integrated services and responses instead of isolated ones. We recommend eliminating unnecessary offices and streamlining necessary ones.

Closing and Consolidating Physical Office Space. Without shutting down entire agencies or units, we recommend closing certain physical offices, such as the Department of Education's 24 regional and field offices. The rise of technology and the Internet make these additional locations unnecessary and inefficient.

Streamlining Functions. Some functions are needlessly scattered across agencies and departments, requiring more labor and paperwork and making it harder to coordinate efforts. For example, the Department of Justice has four separate criminal sections spread over four different divisions. Those criminal sections should all be located together in the criminal division.

Moving Functions to Their Appropriate Department. In some cases, programs lack efficiency because they are housed in the wrong agency altogether. That is why we recommend things like moving the Food and Nutrition Services—a welfare program—from the Agriculture Department to the Department of Health and Human Services, and putting Student Aid programs in the Treasury, which has both the financial information and the funds necessary to service student loans.

Defense Optimization. While we do not recommend overall cuts to defense spending, there are areas in which the Department of

Defense (DOD) could optimize spending by focusing on its highest priorities. For example, it should eliminate excess infrastructure that is costly to maintain and the DOD should not spend money on non-defense items such as research on ovarian and prostate cancer or pursuing Obama-era environmental and energy initiatives.

Ending Programs that Favor a Select Few. Too many of the federal government's programs benefit a select few. That is why we recommend eliminating programs that unjustly subsidize certain industries and businesses over others. Instead, the private sector should fully finance these programs and services based on market demand. Some of those programs include: the Corporation for National and Community Services; the Corporation for Public Broadcasting; the National Foundation on the Arts and Humanities; the Export-Import Bank; the Minority Business Development Agency; and the Department of Energy's loan programs.

Oversight and Accountability. Efficiency is not just about right-sizing government—it is also about making sure government is doing its job through oversight and accountability. That is why we recommend making regulations subject to meaningful review, including tax regulations by the IRS that currently have a special exemption. Programs that have proven ineffective at accomplishing their goals should be eliminated. Furthermore, accountability programs that do exist should be run efficiently. There is no reason for the VA to have at least 31 different performance analysis and accountability offices. Those offices should be merged to better serve veterans and taxpayers.

Highlights of Cross-Cutting Issues
Some of our recommended cross-cutting reforms include:

Budget Process Reform. Much of the growth and inefficiency in federal agencies can be attributed to Congress's effective abandonment of the budget process and regular order. By enforcing budget discipline and accountability, several reforms could help achieve the President's reorganization plans. Those include: (1) reauthorizing the President's Reorganization Authority (discussed in more detail in the following section); (2) restoring Presidential impoundment;[4] (3) subjecting federal agency collections and user fees to the appropriations process so that Congress has a say in how federal revenues are spent; (4) enacting a statutory spending cap with an automatic sequestration mechanism in order to force fiscal discipline upon Congress; (5) beginning the process towards a balanced budget amendment; and (6) stopping the practice of providing funds for unauthorized spending programs.[5]

Regulatory Reform. Federal regulations cost Americans an estimated $2 trillion annually and require 9.8 billion hours per year in paperwork.[6] The Obama Administration issued more than 23,000 new regulations, leaving the Trump Administration with 1,985 regulations in the rulemaking pipeline. The Trump Administration should put the brakes on new regulations and withdraw or postpone unnecessary and costly regulations that remain in the pipeline. Furthermore, any major regulations: (1) should be subject to congressional approval (with regulatory

[4]Impoundment authority allowed Presidents to eliminate or reduce spending on programs they deemed unnecessary or too costly. This authority ended in 1974.
[5]Unauthorized programs are those whose authorization has expired. In 2016, Congress appropriated $310 billion for unauthorized programs.

[6]Office of Management and Budget, Office of Information and Regulatory Affairs, "Information Collection Budget of the United States Government," 2016, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/icb/ich_2016.pdf (accessed June 19, 2017).

analysis capabilities given to Congress); (2) independent agencies of the executive branch should be subject to regulatory review; (3) "sue and settle" practices should be reformed; (4) and professional staff levels for the OMB's Office of Information and Regulatory Affairs (OIRA) should be increased.

Restructure Financial Regulators. The current financial regulatory structure has become increasingly obstructive as it has seven financial regulators on top of state regulators, with the Federal Reserve—intended only as a monetary authority—also regulating financial firms. The President and Congress should work together to establish two entities: (1) a single capital-markets regulator by merging the Consumer Financial Protection Agency and the Securities and Exchange Commission and (2) a single bank and credit union supervisor, merging the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration while transferring the Federal Reserve's regulatory and supervisory functions to that supervisor.

Human Resources. As the saying goes in Washington, "personnel is policy." Consequently, a comprehensive government reorganization must address the flawed, inflexible, and inefficient structure and systems that govern federal employees. For starters, Congress needs to bring federal compensation in line with the private sector so that the government can attract and retain high-quality workers without overpaying lower-skilled ones and needlessly retaining poor-performing employees. Furthermore, federal managers need to have the ability to do their jobs, which includes: a less burdensome process for dismissing low performers; sustaining adequate non-career staff; improving and expanding pay-for-performance compensation; and seeking opportunities to modernize and economize federal functions.

Reducing the Federal Government's Footprint. The federal government owns and operates far too many private-sector endeavors. Congress and the President should work together to privatize: the Power Marketing Administrations; the Tennessee Valley Authority; the Strategic Petroleum Reserve; the Northeast Home Heating Oil Reserve; the Gasoline Supply Reserves; commercial nuclear waste management; Amtrak; Air Traffic Control; the Saint Lawrence Seaway Development Corporation; and Inland Waterways. The federal government should also seek pathways to shift retirement and disability insurance programs such as the Pension Benefit Guaranty Corporation and Disability Insurance programs to the private sector and it should sell off costly and underutilized federal lands and real estate.

Brief History of Executive Authority

In 1932, a heavily Democratic Congress passed legislation to grant Republican President Herbert Hoover the authority to draft a government reorganization plan to be considered under expedited procedures. From 1932 to 1983, Congress reauthorized this presidential reorganization authority 16 times (granting it to all Presidents from Hoover to Reagan, with the exception of Ford),[7] but tied increasing restrictions to that authority along the way.

During that time, presidential reorganization authority was a frequently used tool, with Presidents submitting an average of four reorganization plans per year. Most presidential reorganization plans—73 percent of them—went into effect, in part, because the default, if Congress did not act to disapprove of the plans, was for them to go into effect.

[7]Gerald Ford did not have reorganization authority.

That changed in 1983 because of the Supreme Court's ruling in *Immigration and Naturalization Services (INS) v. Chadha*, which deemed the legislative veto, and hence, Congress's check against a presidential reorganization they did not specifically approve of, unconstitutional. Thus, Congress amended the Reorganization Act to require both houses of Congress to vote to approve a President's plans before they could be enacted. The higher hurdle for enacting Presidential reorganization plans made Executive Reorganization Authority less valuable, which is likely part of the reason Congress did not reauthorize the Reorganization Act in 1984. The act does, however, remain on the books and could be reinstated by changing just two lines in the act to reflect the new date.

The fact that Congress creates agencies, specifies their functions and missions, and establishes their internal organization leaves little room for the executive to manage the federal government's operations. So without statutory reorganization authority, what power does the President have to implement reorganizational reforms?

Pathways to Reform

Executive-Only Reorganization. Without Congress, the President has limited means to reorganize the federal government, but his efforts could still result in positive, consequential reforms. Using his existing authority, the President has some power to: (1) reassign functions; (2) relocate an agency; and (3) reallocate human resources. These shifts within or across agencies are all subject to statutory limits; however, if Congress has already specified in statute a particular function that an agency must perform, the President cannot reassign that function.

Already, the President and his appointees have undertaken some of these actions within the Departments of State and Interior.

Additionally, if a particular agency or office has not been created by an act of Congress, is not mentioned anywhere in statute, and does not have a line item in the last budget, the President can eliminate that office or agency without congressional action.[8] Some examples include the Department of Energy's Office of Civil Rights and the Energy Policy and Systems Analysis Office.

Finally, the President could form a commission or task force to study and make recommendations to Congress related to government reorganization. Without any binding constraint to vote on these recommendations, and with the ability to pick and choose recommendations as opposed to accepting or denying the whole package, any such commission is unlikely to result in anything other than a dead-on-arrival document.

Re-enacted Executive Authority. Congress could reenact the previous, post-*Chadha* executive authority that remains in the U.S. code by changing the two lines that designate December 31, 1984, as the expiration date. In doing so, the cumulative limits that developed over the five decades of the executive authority's existence would still be in place and both houses of Congress would have to proactively approve of the President's plan for it to be enacted (failure to vote would prevent its implementation).

Enhanced Executive Authority. Instead of reenacting the most recent and more limited version of executive authority that existed in 1984, Congress could enact more meaningful executive authority such as allowing the President to submit plans that address more

[8]In general, however, if the office or agency being eliminated is responsible for carrying out a regulation, enforcement of that regulation must be passed to another office or agency.

than one "logically consistent matter," as specified by statute in the most recent version of Executive Authority, and allowing him to consolidate departments.[9] Senator Lieberman introduced a bill in 2012—the Reforming and Consolidating Government Act (RCGA) of 2012—that would grant presidential reorganization authority with many of the provisions and powers that existed in the original 1932 legislation.

Congressionally Led Reorganization. Instead of the President submitting a plan to Congress, he could propose a set of priorities and direct Congress to specify the details of a government reorganization, or request Congress to take up a reorganization effort on its own. This would alleviate partisan resistance to a presidentially led reorganization. However, attempting a congressionally led reorganization through the dozens of authorizing committees would do little or nothing to solve the current problems of inefficiency, duplication, and incoherence that plagues the federal government as each committee has a narrow focus and a tendency to protect its own turf. That is why a congressionally led reorganization effort would need to be assigned to committees with government-wide perspectives, such as the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform.

A Congressionally Created Reorganization Commission with Fast-Track Authority. Instead of taking the reins itself, or designating the President to do so, Congress could create an independent, BRAC-like Government Reorganization Commission to evaluate and propose a comprehensive set of recommendations. The Commission could be made up of individuals with prior executive-level experience in various agencies and departments under previous Administrations and both Democrats and Republicans in Congress could appoint members in equal representation, perhaps with the President appointing the chair of the commission. The process could provide an opportunity for Congress and the President to make recommendations to the commission, but the commission would have the final say in its recommendations, which would be subject to approval or denial by the President. With fast-track authority, Congress would then have a specified period of time in which it could pass a joint resolution of disapproval to prevent the recommendations from taking effect, but the President would have to sign that resolution of disapproval to prevent enactment.

A reorganization commission would eliminate some of the partisan opposition to granting the President Executive Reorganization Authority. By putting the decisions about which specific programs and offices to cut or merge in the hands of independent experts, a commission would also avoid the pitfalls of leaving reorganization to congressional committees. Furthermore, the specified process would prohibit amendments, so that no one lawmaker could tie up the entire package with requirements of special favors regarding his or her concerns. Similarly, a commission's recommendations would also avoid the potential pitfalls of having to go through the regular committee process. Finally, the requirement of approval or denial of the package as a whole—as opposed to piecemeal legislation—would create wider support by making the vote about improving the efficiency and accountability of the federal government as opposed to eliminating a particular agency or changing a particular policy or process.

To help ensure meaningful reforms actually take place, a similar measure used in the Budget Control Act of 2011 could be taken, tying disapproval of the commission's reforms

[9] 5 U.S. Code § 905 (a)(7).

to some form of sequestration. The federal government has so much room for improvement that real reforms would generate significant savings (and just as importantly, better services). Thus, Congress could specify that if the commission's recommendations are not enacted, all agencies and departments would be subject to a specified sequester, which could include both overall budgets as well as personnel reductions.

Past Efforts: Why They Failed and How to Learn from Their Mistakes

While ample opportunities exist for significant, even bipartisan, reorganizational reforms, such efforts will not be without significant obstacles.

Iron Triangles. Perhaps the most significant obstacle to reform today is iron triangles—that is, the threesome of federal agency administrators, congressional committees that oversee each agency, and interest groups served by the agencies. For members of the iron triangle, changes to or elimination of specific agencies or departments could result in the loss of government-protected jobs, special taxpayer-funded benefits and services, and power.

Agency Administrators. Agency administrators, as well as career bureaucrats, are likely to resist change and to outright oppose eliminations. Thus, when tasked with developing reorganization plans of their own, they are more likely to propose plans that protect their jobs, defend their turf, and allow them to work as they please than they are to recommend substantial and efficiency-enhancing reforms. This is particularly true in the current environment where agencies lack non-career (political) appointees and are instead filled with career bureaucrats who are most resistant to change. In a review of historical reorganization efforts, Ronald Moe found that plans submitted by agencies primarily called for their enlargement, and, "[i]n no instance did a department propose to limit or shed one of its functions."[10]

Congressional Committees. Committee members—even those who support reorganization in principle—will typically oppose changes that limit or transfer their authority. The creation of the Department of Homeland Security (DHS) in 2002 is a perfect example. Although this dealt with the creation of a new department, and thus was very different from trying to eliminate a department, it involved the transfer of the U.S. Coast Guard (USCG) and the Customs and Border Protection (CBP) agencies to DHS. The subcommittees that governed the USCG and CBP, however, did not want to give up their jurisdiction of them. Consequently, these two functions that now operate within DHS are not governed by the same committees as all other components of DHS (the House's Homeland Security and the Senate's Homeland Security and Government Affairs Committees). Instead, they remain under their previous jurisdictions: the USCG belongs to the House's Transportation Committee and the Senate's Commerce, Science, and Transportation Committees while the CBP is under the purview of the House and Senate Judiciary Committees. Scattering the functions of one department across different congressional committees makes no sense and can create roadblocks, a lack of cohesion, and inefficiencies. Reorganization efforts to consolidate or eliminate agencies would face significantly greater opposition, and the committee process would likely thwart such plans altogether.

[10]Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (Lanham, MD: University Press of America, 2003).

Interest Groups. Interest groups that benefit from the government's current largess, inefficiencies, and duplication will also want to squash reorganizational efforts. For example, strong lobbying from federal employees' unions significantly limited the Clinton Administration's efforts at governmental reform as they opposed any changes to federal employee compensation or personnel policies. Likewise, interest groups that either receive benefits from particular departments or agencies, or which receive business by providing services to those agencies will certainly lobby against any changes that could reduce the benefits or business they receive from those agencies.

Among other obstacles to reform, the iron triangle demonstrates why it is far easier to create new, often redundant agencies than to consolidate or eliminate them. In fact, over the last half-century, only one department has been eliminated—the Post Office Department in 1971. Instead of truly eliminating the department, however, Congress immediately refashioned it into an independent agency—the United States Postal Service (USPS)—that still plagues taxpayers. With such strong resistance to eliminating or consolidating federal departments and agencies, it is no wonder why the *Federal Register* lists 440 different agencies and sub-agencies!

Recent Efforts at Reorganization

Government reorganization is not a partisan issue as both Republicans and Democrats agree that significant inefficiencies, duplications, and waste exist within the federal government. Not surprisingly, both Democrat and Republican Presidents have embarked on significant government reorganization efforts.

Under the post-*Chadha* environment, both President Clinton and President Obama initiated government reorganizations. The Clinton Administration's National Performance Review (NPR) was one of the most persistent reorganization efforts, consisting of a six-month study that resulted in 1,200 proposals that, among other things, sought to: (1) improve "customer service"; (2) utilize new technologies to modernize the federal government; (3) reduce unnecessary regulations; (4) eliminate needless bureaucracy and oversight; and (5) improve coordination of federal, state, and local governments. With the help of Congress, the NPR initiative spurred elimination of 250 programs and agencies, closing of nearly 2,000 field offices, and modernization of many federal functions.[11] While the NPR was successful on some fronts, Clinton's deference to public-sector unions' opposition prevented necessary and meaningful reforms that would have created incentives for exceptional work and frugality as well as consequences for poor performance and wastefulness.[12]

President Obama also wanted to reorganize parts of the federal government. He asked Congress for reorganizational authority over the executive branch, so that he could have the authority that every business owner has "to make sure that his or her company keeps pace with the times."[13] Moreover, he promised to use such authority only "for reforms that

[11]Elaine C. Kamarack, "Lessons for the Future of Government Reform," testimony before the Government Affairs Committee, U.S. House of Representatives, June 18, 2013, https://www.brookings.edu/wp-content/uploads/2016/06/Kamarck_Jun-18-House-Committee-Prepared-Statement_Final-1.pdf (accessed September 7, 2017).

[12]See George Nesterczuk, "Reviewing the National Performance Review," Cato Institute, 1996, and Donald J. Devine, "Why President Clinton's Reinventing of Government Is Not Working," *The Wall Street Journal*, 1994.

[13]News release, "President Obama Announces Proposal to Reform, Reorganize and Consolidate Government," The White House, January 13, 2012, https://obamawhitehouse.archives.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov (accessed September 6, 2017).

result in more efficiency, better service, and a leaner government," and he stipulated that any plan must reduce the number of agencies and save taxpayers' dollars.[14] Among his proposed reforms was merging six business and trade-related agencies into one agency to replace the Department of Commerce. Despite the fact that these were all initiatives most Republicans support, they nevertheless refused to grant President Obama Executive Reorganization Authority.

Congress has also attempted government reorganization, but usually unsuccessfully. For example, when Republicans took over Congress in 1995, they attempted to eliminate multiple agencies. Led by Congressman Sam Brownback (now the Republican Governor of Kansas), the House spent months passing legislation to remove the Department of Commerce through 11 relevant committees, but when the bill made its way to the Senate, a Republican Senator from Alaska prevented its passage because of the negative impact it could have on his state.[15] This shows how easy it is to stop any particular reorganization component from being enacted. Although a single, comprehensive reorganization plan would incite a larger group of opposed constituents, the fact that many people have something to lose but everyone has a lot to gain could make a comprehensive package easier to pass than piecemeal bills. Avoiding amendments and the committee process altogether through an independent commission would further increase the chances of enacting meaningful government reorganization.

Congressional and Public Involvement Needed

There are some changes that the President can make on his own without any approval from Congress or the public, but more substantial government reform—that which the President's executive order calls for—will require support from Congress, which could be buoyed by public support. The more say Congress has in the process, particularly in light of the highly partisan state of the federal government today, the better the chances will be for a meaningful reorganization.

Even if Congress were to act on its own, coordination with the Executive would be both helpful and prudent as it is an *Executive* Branch reorganization that is in play. Additionally, members of the public—particularly those who have been affected by inefficiencies and waste in the federal government—as well as those with experience as government employees and administrators can provide valuable input in the process for reform. The OMB has received more than 100,000 submissions from the public on how to improve the federal government, and it would be helpful to have a logical review process for these recommendations and to make them available to Congress.

An Independent Commission with Fast-Track Authority Is the Best Pathway to Meaningful Reform

I recommend a congressionally created bipartisan Reorganization Commission consisting of independent experts with fast-track authority as the best way to achieve meaningful government reorganization. Such a commission would minimize or avoid most of the pitfalls that hampered previous government reorganization efforts and would provide for an insightful and necessarily

[14]Ibid.

[15]Tamara Keith, "Why Eliminating Government Agencies Is a Lot Easier Said than Done," National Public Radio, March 17, 2017, http://www.npr.org/2017/03/17/520483474/why-eliminating-government-agencies-is-a-lot-easier-said-than-done (accessed September 6, 2017).

independent review and set of recommendations.

The incentive to enact meaningful reforms could be buoyed by tying disapproval of the Reorganization Commission's recommendations to an automatic sequester, proportionally reducing both funding and employment levels across all non-defense departments and agencies. To help ensure that the commission did not miss anything or fail to adequately consider important factors, both Congress and the President could have a 30-day period to review the commission's recommendations and provide suggestions for improving its plans. The commission would then have 30 days to decide whether to adapt any of those recommendations or make other changes.

Although the obstacles to a successful government-wide reorganization are significant, both the consequences of failing to act and the benefits of establishing a more efficient, accountable, and right-sized federal government are too great to do nothing.

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Trump Administration Efforts to Reform and Cut the Government

Statement of Chris Edwards, Cato Institute

before the Subcommittee on Regulatory Affairs and Federal Management,

Senate Committee on Homeland Security and Governmental Affairs

September 13, 2017

Mr. Chairman and members of the committee, thank you for inviting me to testify. I will discuss the Trump administration's efforts to reform the government by improving management efficiencies and cutting programs. The administration's agenda for reform was laid out in an April memo from the Office of Management and Budget (OMB) entitled "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce."[1]

The OMB memo directs federal agencies to assemble Agency Reform Plans (ARPs), which will become input to the administration's 2019 budget. Among other requirements, agencies should consider "fundamental scoping questions" to determine whether some activities would be better performed by state and local governments or the private sector.

Spending Reform Is Needed

Without reforms, federal spending as a share of gross domestic product (GDP) is expected to grow from 21 percent today to 27 percent by 2040, according to the Congressional Budget Office (CBO) baseline.[2] As spending rises, deficits and debt will increase. Debt held by the public is expected to soar from 78 percent of GDP today to 123 percent by 2040.

Our fiscal path will be even more troubling than the CBO is projecting if:

- Policymakers continue to break discretionary spending caps.
- The United States faces unforeseen wars and military challenges.
- The economy has another deep recession.
- Future presidents and congresses launch new spending programs.
- Interest rates are higher than projected, raising interest costs further.

Given these possible scenarios, the administration's efforts to improve agency efficiencies and cut low-value programs and activities is greatly needed.

As the size of the government has grown over the decades, so has the scope of its activities. The federal government funds about 2,300 aid and benefit programs today, more than twice as many as in the 1980s.[3] The federal budget has grown too large for Congress to adequately monitor or review. Consider, for example, that the federal budget at $4 trillion is 100 times larger than the budget of the average U.S. state of about $40 billion.

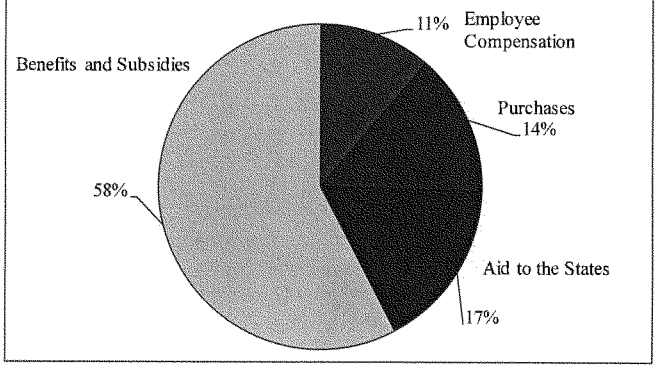
All 2,300 programs are susceptible to management and performance problems. Because the government is so large, problems may fester within agencies for years without Congress taking action. The management breakdowns leading to the scandals at the Secret Service and Department of Veterans Affairs are examples. Furthermore, the more activities in society that the federal government intervenes in, the less time Congress has to focus on core federal roles such as national defense.

For these reasons, the OMB-led effort to identify programs to eliminate and consolidate makes a lot of sense. The government will never operate as efficiently as a private business, but it would perform better with fewer failures if it were much smaller. When it comes to the federal government, less is more.

Where to Find Savings

When looking for savings in the federal budget, policymakers often look at particular departments to find savings, or particular categories such as mandatory and discretionary. Another way to look at the budget is to put all federal spending, other than interest, into four boxes: employee compensation, purchases (procurement), aid to the states, and benefit and subsidy programs. Figure 1 shows the share of total noninterest federal spending on each item.

Figure 1. Shares of Total Noninterest Spending by Type of Activity, 2016



Source: Bureau of Economic Analysis. Total 2016 noninterest spending was $3.7 trillion.

Employee Compensation. Federal wages and benefits for 3.6 million federal employees accounts for 11 percent of noninterest spending. There are 2.1 million civilian workers and 1.5 million uniformed military.[4] There are savings to be found in staffing levels and compensation. Federal benefits, such as pension benefits, are excessive compared to the private sector.[5]

Purchases (Procurement). This category accounts for 14 percent of noninterest spending. Budget experts have long criticized the inefficiencies of federal purchasing. Large cost overruns on major projects, for example, have long been a problem at the Pentagon and other agencies.[6] A 2014 Government Accountability Office report noted, "Weapon systems acquisition has been on GAO's high risk list since 1990 … While some progress has been made on this front, too often we report on the same kinds of problems today that we did over 20 years ago."[7] Another problem is poor management of the government's bloated real property holdings of 275,000 buildings and 481,000 structures.

Aid to the States. The federal government funds more than 1,100 aid programs for the states, including programs for highways, transit, education, and other activities.[8] Federal aid to the

states totals more than $600 billion a year, and accounts for 17 percent of noninterest spending. The OMB memo directs agencies to consider federalism as a factor in their Agency Reform Plans, and to focus resources on activities where there is a "unique federal role." Agencies should consider which current activities could be performed better by the states or the private sector.

Benefits and Subsidies. The largest portion of federal spending—at 58 percent—is payments to individuals and businesses in benefit and subsidy programs, such as Medicare and farm aid. Management reforms could save money by cutting fraud, abuse, and erroneous payments to individuals and businesses. More important, policymakers should scrutinize every benefit and subsidy program with respect to OMB's criteria of federalism and cost-benefit analysis.

Agency Reform Plans (ARPs)

The OMB memo discusses factors for agencies to consider in assembling their ARPs, and it discusses reform options for failing programs. Table 1 summarizes the OMB's six proposed factors and four reform options.

Table 1. OMB's Guidance for Agency Reform Plans

Factors to Consider in Program Reviews	Reform Options			
	1. Eliminate	2. Restructure	3. Improve Efficiency	4. Workforce Management
1. Duplicative	✓	✓		
2. Non-Essential	✓			
3. Federalism	✓	✓		
4. Cost-Benefit	✓	✓	✓	
5. Effectiveness	✓	✓	✓	✓
6. Customer Service		✓	✓	

The OMB analysis is fine as far as it goes, but I would suggest a simpler review matrix for federal programs, as shown in Table 2. The table includes OMB's criteria for federalism and cost-benefit, but suggests two new review criteria.

Table 2. Proposed Program Review

Factors to Consider in Program Reviews	Reform Options		
	1. Eliminate	2. Restructure	3. Improve Management
1. Federalism	✓		
2. Cost-Benefit	✓		
3. Freedom and Fairness	✓		
4. Failing but Possibly Useful	✓	✓	✓

To reform the government, Congress and agencies should review programs and activities with an eye to the four factors in Table 2, which are discussed in the following sections.

Federalism: Under the Constitution, the federal government was assigned specific limited powers, and most government functions were left to the states. But federalism has been increasingly discarded as the federal budget has grown. Through grant-in-aid programs, Congress has undertaken many activities that were traditionally reserved to state and local

governments. Grant programs are subsidies combined with regulatory controls that micromanage state and local affairs.[9] Federal aid to the states totals more than $600 billion a year.

The OMB memo directs agencies to consider federalism as a factor in their ARPs. It asks agencies to consider whether each program could be better handled by state and local governments or the private sector. In my view, for most aid programs, the answer is yes.

Federal aid has many disadvantages. It encourages overspending by the states. The aid shares allotted to each state do not necessarily match need. The regulations tied to aid programs reduce state policy freedom and diversity. Aid breeds bureaucracy as multiple levels of government must handle the paperwork. Aid programs distract federal policymakers from national concerns such as defense. And aid programs make political responsibilities unclear—they confuse citizens about who is in charge.

The federal aid system is a roundabout way to fund state and local activities, and it should be downsized. So the OMB is on the right track asking agencies to look for activities to eliminate that are not properly federal in nature.

Cost-Benefit Analysis. The OMB memo asks agencies to evaluate whether the costs of agencies and programs are justified by the benefits they provide. Cost-benefit analysis is a standard tool of economics that could give decisionmakers in agencies and Congress better information about the overall value of programs.[10]

Since 1981, federal agencies have been required to perform such analyses for major regulatory actions.[11] However, there is no general requirement for federal agencies to perform cost-benefit analysis for spending programs. The scorekeeper of Congress, the CBO, generally does not perform them either. Some agencies perform cost-benefit analyses for some programs and projects, but there is no mandate to do so for most programs.

Thorough cost-benefit analyses would take into account the full costs of funding programs, including the direct tax costs and the "deadweight losses" of taxes on the economy. Deadweight losses stem from changes in working and other productive activities that occur when taxes are extracted from the private sector. Economic studies of income taxes have found, on average, that the deadweight loss of raising taxes by one dollar is about 50 cents.[12]

Suppose that Congress is considering spending $10 billion on an energy subsidy program. Does the program make any economic sense? The program's benefits would have to be higher than the total cost on the private sector of about $15 billion, which includes the $10 billion direct taxpayer cost plus another $5 billion in deadweight losses. OMB Circular A-94 establishes guidelines for federal cost-benefit analyses, and it suggests agencies use a deadweight loss value of 25 cents on the dollar.[13]

The 2018 federal budget includes a chapter on using data and research to improve government effectiveness.[14] And in September, a congressional commission released a major report on evidence-based policymaking.[15] The report focused on generating better data for program evaluations, but had less to say about how to increase the government's use of evaluations to eliminate low-value programs. More program evaluations are needed, and they should be better integrated into the actual decisionmaking of agencies and Congress.

Policymakers should require agencies to evaluate more of their programs with full cost-benefit analyses and to release the results. There can be substantial disagreement about the results of such studies, but the process is useful because it requires the government to at least try to quantify the merits of its policy actions. Without considering the full costs of programs, including deadweight losses, policymakers are biased toward supporting programs that do not generate net value.

That said, evaluating programs with cost-benefit analysis is a secondary concern compared to issues of constitutional federalism and defending individual freedom against government encroachment. It is also true that, effective or not, spending programs need to be downsized if we are to ward off the federal debt crisis that is projected in the years ahead.

Freedom and Fairness

The OMB memo lays out criteria for evaluating programs based on practical and economic considerations. However, there are also qualitative criteria—such as fairness and personal freedom—that federal officials and members of Congress should always consider when evaluating programs. For one thing, federal programs and activities should not abridge fundamental rights, such as free speech rights. In that area, the IRS targeting scandal illustrated why we need rigorous oversight of agencies, especially agencies handed exceptional powers.

In reviewing programs, policymakers should consider broad freedom issues, such as personal privacy. As an example, policymakers should be skeptical of programs and activities that require the collection of substantial amounts of personal data on Americans. In this age of computer hacking, such activities create threats if agency protections break down, as they often do.

In his 1962 book, *Capitalism and Freedom*, economist Milton Friedman talked about the costs and benefits of government action. He said that in evaluating policies, we should always count the cost of "threatening freedom, and give this effect considerable weight."[16] While "the great advantage of the market … is that it permits wide diversity," he said, "the characteristic feature of action through political channels is that it tends to require or enforce substantial conformity."[17] The individual mandate under the Affordable Care Act is the sort of freedom violation that expansive government results in.

Programs that violate our personal freedoms are morally wrong, but they also tend to be impractical.[18] As Friedman noted, policies fail when they "seek through government to force people to act against their own immediate interests in order to promote a supposedly general interest."[19] Economist Thomas Sowell noted similarly that supporters of government mandates seem to think "people can be made better off by reducing their options."[20] Rather than making people better off, government mandates and interventions often lead to social conflict.

Another qualitative aspect of federal programs to consider is fairness. Of course, that word has a loose meaning, and the political left and right often disagree about the fairness of particular programs. However, nearly everyone would agree that equality before the law should be considered when reviewing federal activities. And many Americans of all political stripes would agree that programs which hand out subsidies to businesses and the wealthy are dubious. Thus, even if such programs are run efficiently, the government should not be running them at all.

Failing but Possibly Useful

The OMB memo says that there is "growing citizen dissatisfaction with the cost and performance of the federal government." That is true.[21] Only one-third of Americans think that the federal government gives competent service, and, on average, people think that more than half of the tax dollars sent to Washington are wasted.[22] The public's "customer satisfaction" with federal services is lower than their satisfaction with virtually all private services.[23]

In his book, *Why Government Fails So Often*, Yale University's Peter Schuck concluded that federal performance has been "dismal," and that failure is "endemic."[24] In a 2014 study, Paul Light of the Brookings Institution found that the number of major federal government failures has increased in recent decades.[25]

Some agencies and programs are performing poorly, but they are important federal functions, and so they should be overhauled to fix problems. Repeated Secret Service failures, for example, have led to calls to restructure that agency.[26] Improving federal management is an ongoing challenge, and it is more difficult the larger the government grows.

There are basic structural reasons why the federal government will always be less efficient than the private sector.[27] Federal agencies do not have the goal of earning profits, so they have little reason to restrain costs or improve service quality. And unlike businesses, poorly performing programs do not go bankrupt. If program costs rise and quality falls, there are no automatic correctives. By contrast, businesses abandon activities that are failing, and about 10 percent of all U.S. companies go out of business each year.[28]

There are other causes of poor federal management. Government output is difficult to measure, and the missions of federal agencies are often vague and multifaceted making it hard to hold officials accountable. Federal programs are loaded with rules and regulations, which reduces operational efficiency. One reason for all the rules is to prevent fraud and corruption, which are concerns because the government hands out so much money.

All that said, there are ways to reduce federal bureaucracy and improve agency incentives. Research has found that American businesses have become leaner in recent decades, with flatter managements.[29] By contrast, the number of layers of federal management has increased. Paul Light found that the number of management layers in a typical federal agency has more than doubled since the 1960s, and he believes that this is one cause of federal failure today.[30] So reducing management layers in agencies should be a goal for the OMB to emphasize.

Congress should reform federal compensation. One issue is that employee pay is mainly based on standardized scales generally tied to longevity, not performance. The rigid pay structure makes it hard to encourage improved work efforts, and it reduces morale among the best workers because they see the poor workers being rewarded equally.

Congress should make it easier to discipline and fire poorly performing federal workers. When surveyed, federal employees themselves say that their agencies do a poor job of disciplining poor performers.[31] *Govexec.com* noted, "There is near-universal recognition that agencies have a problem getting rid of subpar employees."[32] Just 0.5 percent of federal civilian workers get fired each year, which is just one-sixth the private-sector firing rate.[33]

In sum, OMB efforts to reform the federal workforce and improve agency management are greatly needed. However, there are limits to how much federal management can be improved. The government has simply become too large to manage effectively, and many of its activities

could be better performed by the states and private sector. As such, legislative action to eliminate agencies and programs is more important than just making agencies work more efficiently.

Thank you for holding these important hearings.

Chris Edwards
Director, Tax Policy Studies
Editor, www.DownsizingGovernment.org
Cato Institute
202-789-5252
cedwards@cato.org

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[2] Congressional Budget Office, "The 2017 Long-Term Budget Outlook," March 2017.
[3] Chris Edwards, "Independence in 1776; Dependence in 2014," Cato at Liberty, Cato Institute, July 3, 2014. The current federal program count is available at www.cfda.gov.
[4] Bureau of Economic Analysis data. Excludes the U.S. Postal Service.
[5] Chris Edwards, "Reducing the Costs of Federal Worker Pay and Benefits," DownsizingGovernment.org, Cato Institute, September 20, 2016.
[6] Chris Edwards and Nicole Kaeding, "Federal Government Cost Overruns," DownsizingGovernment.org, Cato Institute, September 1, 2015.
[7] Government Accountability Office, "Defense Acquisitions," GAO-14-563T, April 30, 2014, p. 1.
[8] Federal aid programs are discussed in Chris Edwards, "Fiscal Federalism," DownsizingGovernment.org, Cato Institute, June 2013.
[9] Federal aid programs are discussed in Chris Edwards, "Fiscal Federalism," DownsizingGovernment.org, Cato Institute, June 2013. And see Chris Edwards, "Federal Aid to the States: Historical Cause of Government Growth and Bureaucracy," Cato Institute, May 22, 2007.
[10] Most public finance textbooks provide background on cost-benefit analysis. See David N. Hyman, *Public Finance: A Contemporary Application of Theory to Policy* (Mason, Ohio: Thomson South-Western, 2005), Chapter 6. Or see Harvey S. Rosen, *Public Finance: Sixth Edition* (New York: McGraw-Hill, 2002), Chapter 11.
[11] President Reagan issued Executive Order 12291 in 1981 mandating the use of cost-benefit analysis for significant regulatory actions, which are those that have an impact of more than $100 million a year. The order was superseded by President Clinton's Executive Order 12866 in 1993. "Independent" federal agencies are exempt from the requirements. For background, see Susan E. Dudley, Testimony to the Joint Economic Committee, "Reducing Unnecessary and Costly Red Tape through Smarter Regulations," June 26, 2013. And see Robert W. Hahn and Erin M. Layburn, "Tracking the Value of Regulation," *Regulation* 26, no. 3 (Fall 2003).
[12] Chris Conover surveyed the literature and reported an average of 44 cents for the marginal cost of all federal taxes, and 50 cents for federal income taxes. Christopher J. Conover, "Congress Should Account for the Excess Burden of Taxation," Cato Institute Policy Analysis no. 669, October 13, 2010. See also Edgar K. Browning, *Stealing From Ourselves: How the Welfare State Robs Americans of Money and Spirit* (Westport, CT: Praeger Publishers, 2008), pp. 156, 166, 178. The Congressional Budget Office has stated, "Typical estimates of the economic cost of a

dollar of tax revenue range from 20 cents to 60 cents over and above the revenue raised." Congressional Budget Office, "Budget Options," February 2001, p. 381.

[13] Deadweight losses are also referred to as excess burdens. Office of Management and Budget, "Circular No. A-94 Revised," October 29, 1992. A review by the author of a small sample of cost-benefit analyses of federal programs found that none included the deadweight losses of taxes. As an example, Mathematica did a 98-page analysis of Job Corps on contract to the Department of Labor in 2006. It found that the benefits of the program were $3,544 per participant, while the costs were $13,844, for a net loss of $10,300 per participant. The inclusion of deadweight losses would have made the losses higher. See Peter Z. Schochet, John Burghardt, Sheena McConnell, "National Job Corps Study and Longer-Term Follow-Up Study," Mathematica Policy Research, Inc., August 2006.

[14] *Budget of the U.S. Government, Fiscal Year 2018, Analytical Perspectives* (Washington: Government Printing Office, 2017), Chapter 6.

[15] Commission on Evidence-Based Policymaking, "The Promise of Evidence-Based Policymaking," September 2017, www.cep.gov/content/dam/cep/report/cep-final-report.pdf.

[16] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 32.

[17] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 15.

[18] The relationship between government force and program failure is explored in Chris Edwards, "Why the Federal Government Fails," Cato Institute, July 27, 2015.

[19] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 200.

[20] Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1980), p. 173.

[21] After his examination of polling data, Yale University law professor Peter Schuck concluded, "the public views the federal government as a chronically clumsy, ineffectual, bloated giant that cannot be counted upon to do the right thing, much less do it well." Peter H. Schuck, *Why Government Fails So Often* (Princeton, NJ: Princeton University Press, 2014), p. 4.

[22] John Samples and Emily Ekins, "Public Attitudes toward Federalism," Cato Institute Policy Analysis no. 759, September 23, 2014, Figures 24 and 27.

[23] American Customer Satisfaction Index, "ASCI Federal Government Report 2014," January 27, 2015, www.theacsi.org.

[24] Peter H. Schuck, *Why Government Fails So Often* (Princeton, NJ: Princeton University Press, 2014), pp. 371, 372.

[25] Paul C. Light "A Cascade of Failures," Brookings Institution, July 2014, p. 1.

[26] Louis Nelson, "Chaffetz: Secret Service reforms possible after latest fence jumping incident," *Politico*, March 20, 2017.

[27] Chris Edwards, "Bureaucratic Failure in the Federal Government," DownsizingGovernment.org, Cato Institute, September 1, 2015.

[28] Brian Headd, Alfred Nucci, and Richard Boden, "What Matters More: Business Exit Rates or Business Survival Rates?" BDS Brief 4, U.S. Bureau of the Census, 2010.

[29] Raghuram Rajan and Julie Wulf, "The Flattening of the Firm," National Bureau of Economic Research, Working Paper 9633, April 2003.

[30] Paul C. Light "A Cascade of Failures," Brookings Institution, July 2014, p. 11. And see Paul C. Light, "Perp Walks and the Broken Bureaucracy," op-ed, *Wall Street Journal*, April 26, 2012.

[31] Paul Light's research cited in Peter H. Schuck, *Why Government Fails So Often* (Princeton, NJ: Princeton University Press, 2014), p. 322.

[32] Eric Katz, "Firing Line," *Government Executive*, January–February 2015.

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NTEU
The National Treasury Employees Union

Testimony of

Anthony M. Reardon
National President

National Treasury Employees Union

Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

"Examining OMB's Memorandum on the Federal Workforce, Part II: Expert Views on OMB's Ongoing Government-wide Reorganization"

September 13, 2017

Chairman Lankford, Ranking Member Heitkamp and members of the Subcommittee, thank you for allowing NTEU to share its thoughts on the Administration's plans to reorganize the federal government. As National President of NTEU, I represent over 150,000 federal employees in 31 agencies and I appreciate the opportunity to discuss this important issue.

As the Subcommittee is aware, on April 12, 2017, the Office of Management and Budget (OMB) issued agency guidance on how to fulfill the requirements of both the January 23, 2017, Presidential Memorandum imposing a hiring freeze and the March 13, 2017, Executive Order directing OMB to submit a comprehensive plan to reorganize federal agencies while aligning those initiatives with the President's March 16, 2017, Fiscal Year (FY) 2018 Budget Blueprint. This guidance required all agencies to:

- Begin taking immediate actions to achieve near-term workforce reductions and cost savings, including planning for funding levels in the President's FY 2018 Budget Request;
- Develop a plan to maximize employee performance by June 30, 2017; and
- Submit an Agency Reform Plan to OMB in September 2017 as part of the agency's FY 2019 Budget submission to OMB that includes long-term workforce reductions.

With the issuance of this new guidance, the government-wide hiring freeze for federal agencies was lifted and in its place, agencies were told to adhere to the principles, requirements, and actions laid out in the new guidance when hiring new employees. It is also important to note, however, that some agencies, such as the Environmental Protection Agency, continue to operate under a virtual hiring freeze. At the same time, the memo noted that the President's FY 2018 Budget request would propose decreasing or eliminating funding for many programs across the Federal government, and in some cases, redefine agency missions, which should drive agencies' planning for workforce reductions and inform their Agency Reform Plans.

In addition, OMB laid out a series of guidelines for determining how to eliminate positions in the long term. Specifically, OMB urged agencies to use data-driven workforce planning; to consider consolidating higher-grade positions and downgrading management-level positions; to ensure that they have the fewest amount of management layers needed to provide for appropriate risk management, oversight and accountability; to eliminate redundancies; and to review positions as they become vacant to ensure they are relevant and reflect current mission needs.

NTEU is in favor of improving the efficiency and effectiveness of federal agencies to ensure that they are providing the services that Americans rely upon and that taxpayer dollars are spent wisely. However, we are deeply concerned with agencies being directed to make reductions in the workforce, based only on proposed budgets that do not have congressional approval, which will drastically impact the ability of agencies to meet their missions. Additionally, it is our fear that staffing reductions of federal employees are being proposed with the aim of outsourcing agency functions and services, that, based on past experience, will only cost taxpayers more money and will provide the public with less transparency and accountability.

Agencies Consulting with Employee Representatives

As I stated previously, NTEU supports efforts to make federal agencies more effective and efficient. However, we believe that reform efforts should not take place in a vacuum. Senior agency officials and new political appointees do not have all of the relevant information or ideas on where to focus reform efforts. Rather, we believe that only by having senior officials working closely with front-line employees and their representatives will real positive reform take place. Front-line federal employees and their union representatives are an essential source of ideas and information about the realities of delivering government services to the American people.

In 2009, President Obama issued Executive Order (EO) 13522, Creating Labor-Management Forums to Improve Delivery of Government Services. As E.O. 13522 makes clear, pre-decisional involvement (PDI) is an important component of the implementation of labor management forums, and therefore calls for agencies to involve employees and their union representatives in pre-decisional discussions concerning all workplace matters to the fullest extent practicable. Front-line employees and their union representatives have essential ideas and information about delivering quality government services to the public and the PDI process allows employees, through their labor representatives, to have meaningful input resulting in better quality decision-making, more support for decisions, timelier implementation, and better results for the American people.

According to the October 2014 Labor-Management Relations in the Executive Branch report, there are numerous instances where PDI and employee engagement efforts have been successful. These examples demonstrate how PDI has increased agency productivity as well as significantly increased employee satisfaction and morale. I see no reason why similar success cannot be had with this new government-wide reform effort.

On May 15, 2017, I met with then OMB Senior Advisor Linda Springer and discussed our desire to be part of reorganization planning and how our chapter leaders were soliciting reform recommendations from our members. However, we have not hear back from OMB regarding our request to have OMB counsel agencies to reach out and involve front-line employees. We fear that such reform efforts without employee involvement will fail; adversely impacting the morale of the federal workforce as well as the services we provide to the American people. Not deterred, I then sent a memo to our chapters, asking them to provide ideas I could share with agency heads. I am pleased to say that the response from our members was overwhelming. After collecting these ideas, I then wrote letters to agency heads summarizing our members' suggestions and offering a meeting to discuss them in depth and answer any questions they might have so that they could fully appreciate how these recommendations will improve Agency and employee performance. Unfortunately, other than a meeting with Customs and Border Protection (CBP) and a perfunctory response in a few cases, we have not heard back from agencies and are concerned about the proposals they are submitting to OMB. While we hold no illusions that all of our ideas will be accepted, it is important for agencies, the Administration, Congress and the public to understand that when it comes to meeting the public's expectations for their government, front-line federal employees have much to offer.

Suggestions for Agency Reform Plans

In June, I sent letters to CBP, the Internal Revenue Service (IRS), Commodity Futures Trading Commission (CFTC), the Environmental Protection Agency (EPA), the Social Security Administration (SSA), and the Department of Health and Human Services (HHS), among others, to share our members' recommendations for the agency reform plans. Although the recommendations were specific to each agency, they fell into similar themes.

Increase telework and/or hoteling to reduce real estate costs and wasted travel time

At the IRS, we recommended eliminating the requirement that employees report to their assigned posts-of-duty (POD) at least two days each pay period. Many employees report that they do not have any work-related need for reporting physically to work, and that it is sufficient that the Agency have the ability to direct telework-eligible employees to report to their POD on special circumstances. In addition, it would also include expanding the "Home as POD" program to include any employee who volunteers to telework full-time and is willing to surrender their permanent office space/cubicle. These changes would increase employee morale and reduce Agency rent expenses.

Similarly, at the CFTC we recommended an increase in telework. With increased telework, CFTC could promote office sharing and reduce rented office space. In addition, one additional telework day per week could save up to an estimated $300,000 per year in transit subsidies. We also recommended increased flexibility in work schedules, which would increase productivity and staff retention as well as reduce the amount the Agency spends on transit subsidies.

Consolidate Management Layers

According to the OMB memorandum, as part of their reform plans, agencies are to consider consolidating higher-grade positions, downgrading management-level positions, and ensuring that they have the fewest amount of management layers needed to provide for appropriate risk management, oversight and accountability.

For example, at CBP we continue to see a top-heavy management organization. In terms of real numbers, since its creation, the number of new managers has increased at a much higher rate than the number of new frontline CBP hires. CBP's own FY 15 end of year workforce profile (dated 10/3/15), shows that the supervisor to frontline employee ratio was 1 to 5.6 for the total CBP workforce, 1 to 5.7 for CBP Officers, and 1 to 6.6 for CBP Agriculture Specialists. Prior to 2003, supervisor to frontline ratio was closer to 1 supervisor to 12. It is also NTEU's understanding that nearly 1,000 CBP Officers are serving either at CBP headquarters or non-Office of Field Operations locations. This means that nearly 4,000 CBP Officers are serving in supervisory positions.

The tremendous increase in CBP managers and supervisors has come at the expense of border security preparedness and frontline positions. Also, these highly paid management positions are straining the CBP budget. CBP's top heavy management structure contributes to

the lack of adequate staffing at the ports, excessive overtime schedules and flagging morale among the rank and file and is something we have routinely raised with CBP leadership.

In another example, units such as the National Case Assistance Centers (NCAC) in the Office of Disability Adjudication and Review (ODAR) at the SSA have four layers of management ranging from GS 13s to GS 15s. First line supervisors are GS 13s. They directly interact with and supervise bargaining unit employees. The group supervisor reports to a unit manager, who reports to an associate director, who then reports to the Director. The multiple layers of management in these offices are not only wasteful, but also make communication less effective and efficient.

In addition, the Baltimore NCAC was initially set up to manage approximately 300 employees. Due to transfers and attrition, the Baltimore NCAC employs approximately 181 employees. Despite the reduction in the frontline workforce, NCAC management remains at the same level. The Baltimore NCAC, as well as the St. Louis NCAC, have four levels of management- 1 Director, 1 Deputy Director, 2-3 Unit Managers, and a number of Group Supervisors. NTEU proposes eliminating the NCAC Unit Manager position. These are GS 14 positions and the resulting savings would total $698,495 to $778,338 annually. NTEU also proposes eliminating the two NCAC Deputy Director Positions, which would result in additional saving totaling $208,794 to $271,437 annually.

At the Farm Service Agency at the United States Department of Agriculture (USDA), NTEU is concerned with the reorganization plan for its Office of Budget and Finance. On May 15, 2017, USDA submitted a reorganization proposal to the Senate Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, for approval. This reorganization produces a higher manager to employee ratio than OPM recommends. The manager to employee ratio in this reorganization is 1 to 5, instead of OPM's recommendation of 1 to 11. NTEU was only provided a copy of this plan after it was submitted to the Subcommittee for approval. Nonetheless, we suggested to USDA that the reorganization be revised to consolidate units where the manager has less than 5 employees reporting to them in order to bring the manager to employee ratio at least somewhat closer to OPM's staffing recommendation.

At ODAR, NTEU proposes eliminating the Quality Review Officer (QRO) positions in the Regional Offices and shifting oversight of the quality review specialists to the Regional Attorney. The Regional Attorney position description outlines that one task to be performed is to "coordinate and evaluate the work of Attorney Advisors and other support staff." Often Regional Attorneys review cases sent to them by hearing offices asking for guidance on issues identified in decisional drafts. They provide guidance and feedback to the hearing offices. These duties go hand in hand with the duties performed by the QRO, which results in duplicative processes. QROs are GS 14 positions. Eliminating the 6 QRO positions would result in savings ranging from $598,710 to $779,338, based on the Rest of the US pay scale.

Furthermore, at the IRS Office of Chief Counsel, we recommend eliminating the approximately 200 non-bargaining unit (NBU) GS-15 905 Senior Technician Reviewer and Special Counsel, and Special Trial Attorney positions in Chief Counsel and converting these positions to bargaining unit (BU) GS-15 Senior Counsel positions. These positions are not used or needed for management functions, but are needed for performing complex legal and review work. The Office has too many GS-15 attorneys designated as NBU who are not really managers. These employees generally do not perform or are not needed to perform managerial

functions. They act as reviewers and lead attorneys and work on the more complex matters. Essentially, they perform functions that are substantively indistinguishable from Senior Counsel BU attorneys. All of these positions should be converted to a single Senior Counsel bargaining unit position both in the National Office and the Field offices.

In addition, NTEU recommends reducing the number of front line managers in the Field Offices, Associate Area Counsel (AAC), and Deputies/Assistants NBU GS-15 905 positions at the IRS and converting them to BU Senior Counsel positions. Field attorneys should continue to perform litigation functions and not only administrative managerial tasks. The Assistant Branch Chief or Assistant to the Branch Chief NBU GS-14 position could be eliminated.

Hire more support staff

For many agencies, we recommended the hiring of additional support staff so that staff members with more complex work could spend less time performing administrative functions. At ODAR, for example, we believe that by simply focusing on hiring more Administrative Law Judges (ALJs) without the support staff of Attorney Advisors and Decision Writers is counter-productive to reducing the backlog.

Empower front-line decision making

We believe that by empowering employees, agencies breed individual and group confidence, enabling people to work both more efficiently and more effectively. When employees are confident within their work and with their employer, they are more willing to identify problems and suggest ways to improve the quality of their work.

Fill existing vacancies

While this recommendation may seem counter to the goals of the agency reorganization efforts by the Administration, we believe that efficiencies can be achieved by fully staffing agencies so that agencies can meet their missions. For example, we recommend ODAR staff approximately 200 unfilled Senior Attorney Advisor (SAA) positions via promotion. Filling these SAA positions with current Attorney Advisors will allow a number of significant tasks to be performed which will improve case processing.

A Senior Attorney just about anywhere can do prehearing conferences with unrepresented claimants just about anywhere – using the phones or video hearings or other modalities. Feedback indicates that unrepresented claimants appreciate the opportunity to talk to someone about their appeals and what to expect. This provides excellent public service and the data we have seen indicates prehearing conferences reduce the numbers of no shows/continued hearings to obtain representatives, allowing ALJs to be more efficient. Moreover, rocket dockets for unrepresented claimants can be set with Senior Attorneys and after a prehearing conference type meeting, could go to an ALJ hearing when appropriate or possibly an on-the-record (OTR) recommendation.

At the IRS, we recommend increasing the number of Department of the Treasury, Office of Tax Policy GS-15 docket attorneys to expedite work on published guidance regulations and legislation. The Office of Tax Policy attorneys in TLC (Tax Legislative Counsel), BTC (Benefits Tax Counsel) and ITC (International Tax Counsel) work with IRS Office of Chief Counsel attorneys in publishing tax guidance including regulations, revenue rulings, notices and announcements. Inadequate staffing in the Office of Tax Policy results in a bottleneck in issuing

tax guidance to the public. Hiring attorneys for very short term tenures (1 – 2 year stints) further exacerbates the problem.

Another option is to insource work currently being performed by contractors. Contracting companies charge overhead costs while contract employees lack the accountability, expertise, and institutional knowledge of federal employees. Moving these contractor responsibilities in-house would translate into improved productivity, better work product, and savings in overhead costs. The CFTC currently has just under 700 full-time equivalent employees and 400-600 contractors and could realize significant savings by insourcing work.

Concerns Over Outsourcing

Relatedly, one of the major concerns NTEU has with the reorganization efforts taking place in federal agencies is that such plans will lead to increased outsourcing of government functions. In fact, the OMB Reorganization Memorandum states that agencies should consider leveraging outsourcing to the private sector when the total cost would be lower. It also states that agencies should consider government-wide contracts for common goods and services to save money and free-up acquisition staff to accelerate procurements for high-priority mission work.

NTEU has long maintained that federal employees, given the appropriate tools and resources, do the work of the federal government better and more efficiently than any private entity. When agencies become so reliant on federal contractors, the in-house capacity of agencies to perform many critical functions is eroded, jeopardizing their ability to accomplish their missions. It has also resulted in the outsourcing to contractors of functions that are inherently governmental or closely associated to inherently governmental functions.

Over the years, we have seen at agencies delivering vital services, contractors perform critical and sensitive work such as law enforcement, government facility security, prisoner detention, budget planning, acquisition, labor-management relations, hiring, and security clearances. According to the Government Accountability Office (GAO), the Department of Homeland Security has used contractors to prepare budgets, develop policy, support acquisition, develop and interpret regulations, reorganize and plan, and administer A-76 efforts.

One of the most egregious examples of the outsourcing of inherently governmental functions was the 2006 IRS private tax collection program. The program, under which private collection agencies were paid to collect taxes on a commission basis, was an unmitigated disaster. The program resulted in a net loss of almost $5 million to the federal government and lead to taxpayer abuse. Further, at one juncture in the program, the IRS had to assign 65 of its own employees to oversee the work of just 75 private collection agency employees. Given the obvious failures of this undertaking, and in the face of strong opposition by NTEU and a broad range of consumer and public interest groups, Congress voted to cut off funding for the program. Then, in March 2009, after conducting a month-long, comprehensive review of the program, including the cost-effectiveness of the initiative, the IRS announced it was ending the program. Yet, Congress reinstated the program in late 2015 to offset the costs of the long-term highway funding bill, and NTEU remains highly concerned by the use of private collection agencies, which not only are costly to taxpayers, but run the risk of exposing the public to scam artists.

The aggressive targeting of federal jobs for public-private competition is not new. During the Administration of President George W. Bush, competitive sourcing was one of its top initiatives. As part of their efforts, we saw the rules of competition overhauled, quotas set for competed jobs, and grades given to agencies on their efforts in conducting competitions. The changes undoubtedly had the desired effect: between 2000 and 2008, spending on contracting doubled, since 2001, reaching over $500 billion in 2008. The explosion in contract spending also led to a drastic increase in the size of the contract workforce in addition to waste, fraud and abuse.

The Obama Administration, noting several issues with the A-76 process, instilled a moratorium on outsourcing while it looked to improve the competitive process. I urge this Subcommittee to ensure that the current A-76 moratorium be continued. In addition to the concerns with the A-76 process and issues with cost overruns and proper contractor oversight, ethical issues are also of concern as contractor employees are working for the benefit of their employer company—not the benefit of the American people. Such initiatives also have a demoralizing impact on the existing federal workforce as they wonder if their job is the next to be outsourced.

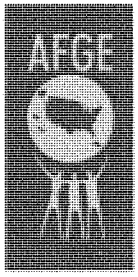
By ensuring that the outsourcing process is fair and that federal employees are able to compete for work with contractors on an even playing field, federal agencies will be better able to provide high quality services and will save taxpayer dollars and achieve the goals for the OMB Memorandum.

Conclusion

NTEU has always supported efforts to improve agency performance and eliminate government waste and inefficiencies. However, previous reform and reorganization efforts failed to accomplish these goals. Instead, we've seen overly ambitious efforts to reform the civil service that eroded employee rights and employee morale or haphazard efforts to reduce the number of federal workers by cutting an arbitrary number of personnel, implementing a hiring freeze, or failing to replace employees who had retired resulting in gutted agencies and largely contributing to the looming retirement crisis facing the federal government today. In fact, one of the biggest lessons and failures of the Clinton-Gore Administration's so-called "Reinventing Government" initiative was the hollowing out of positions, leaving agencies unable to conduct proper workforce planning, and without a skilled workforce in place. I fear that the efforts of this Administration, with its ongoing limitation on hiring, will only contribute to agencies inability to meet their missions.

There are many challenges facing the federal government; the inability of our government to carry out the basic functions without threats of a default or shutdown undermines any confidence that massive reform efforts can be successfully achieved. If the Administration is planning to make drastic reductions in the workforce without real input from federal employee representatives, and without congressional approval, we fear a real opportunity for change will be wasted along with taxpayer dollars.

Thank you again for the opportunity to share my views with you today. I am happy to answer any questions.



CONGRESSIONAL TESTIMONY

STATEMENT BY

J. DAVID COX SR., NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO (AFGE)

BEFORE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

ON

EXPERT VIEWS ON OMB'S ONGOING GOVERNMENT-WIDE REORGANIZATION

September 13, 2017

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W., Washington, D.C. 20001 (202) 737-8700 www.afge.org

Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee. My name is J. David Cox, Sr. and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 700,000 federal and District of Columbia workers represented by our union, I thank you for the opportunity to submit testimony regarding the status of the Trump Administration's plans for "reorganizing the executive branch."

BACKGROUND

The President's March 13th Executive Order[1] directed the Director of the Office of Management and Budget (OMB) and the heads of executive branch agencies to create agency reorganization plans within 180 days. In April, the OMB Director issued a memorandum[2] with instructions regarding what reorganization plans were supposed to include and the policies they were supposed to implement. We have arrived at the 180 day mark from the issuance of the President's Executive Order, and thus while it is appropriate to assess the administration's performance so far, it is also important to assess the April OMB memorandum's instructions.

First, although the April OMB memorandum includes the following sentence: "When developing their Agency Reform Plan in coordination with OMB, agencies should consult with key stakeholders including their workforce," almost no agency has complied. We have surveyed not only our national AFGE bargaining councils, but also our AFGE locals. With a few rare exceptions, they have reported back that agency management has not approached AFGE to "consult" or even inform affected employees regarding reorganization plans. This is true not only for the June 30 "high level" conceptual plans, it is also true for the more detailed plans that are due and the end of this month.

AFGE locals and bargaining councils have tried to discuss the development of the plans and have requested copies of the plans submitted in June, but have in each case been rebuffed. I have attached for your consideration a memorandum prepared by AFGE's Housing and Urban Affairs Department (HUD) bargaining council. The memorandum was prepared as part of the union's request to sit down with HUD management to discuss the agency's budget and reorganization plans. HUD management never responded to the memorandum or the request for meeting and consultation. As the substance of the memorandum makes clear, management would have benefited greatly from the insights and recommendations of the agency if it had any serious intention about meeting the professed purpose of the OMB reorganization agenda, to improve agency efficiency and effectiveness.

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[1] EO 13781

[2] OMB M-17-22, April 12, 2017

The agencies that have engaged in some communication include the Air Force and the National Institutes of Health and the Social Security Administration. In each of these cases, the communication was high level and perfunctory, never a formal solicitation of views from the employees. Indeed, at the Social Security Administration, I'm told that the agency attempted to bypass the union, the duly elected exclusive representative of the agency's workforce, and sought information directly from employees using "Idea Scales" to collect data.

That agencies have not bothered to engage employee representatives in the development of plans to "reduce the federal civilian workforce" through outsourcing and potential dismantling of agencies or components, and making the workforce more productive through staffing cuts and position downgrades is not surprising. Nevertheless, it would be constructive to consult with union representatives as agencies further develop their plans in preparation for the President's Fiscal Year 2019 Budget.

The downsizing and downgrading of federal employee jobs, and privatization of federal government work contemplated in the April OMB memorandum are reminiscent of failed management agendas pursued in the recent past. Both the Clinton and the George W. Bush administrations had management agendas that included some of these elements. In both cases, many produced costly failures.

The George W. Bush administration's effort to subject fully half of all federal jobs to privatization studies is a particularly bad precedent. Currently, there is a moratorium on the use of A-76, and AFGE is hopeful that this moratorium will remain in place in the next fiscal year. Nonetheless, despite the fact that Congress has seen the wastefulness and inequities inherent in the A-76 process, in far too many cases agencies seem committed to outsourcing more of their functions, including core capabilities. It is no wonder that some scholars, including former Bush Administration officials, speak of a hollowed-out federal government.[3]

MERGING ADMINISTRATIVE MANAGEMENT

The April OMB memorandum is filled with the usual jargon and bromides that so typify "management speak" in government circles: Eliminate redundancies, improve performance, use "best in class" practices, rely more on the private sector, and other meaningless feel good phrases. What is clear from the OMB memo is that the Administration has learned little, if anything, from the many failed attempts to "reform" government service delivery. Doing more with less is not a strategy. It is a slogan. Relying more on the private sector may make sense when buying common commodities, it has little application to reality when agencies use contractors to develop

[3] See generally, "Bring Back the Bureaucrats," John J. Dilulio Jr. Templeton Press. 2014.

basic policies, including Congressional testimony, budgetary documents, and other programmatic work relating to an agency's underlying mission. From AFGE's viewpoint, the OMB memorandum is another thinly veiled attempt to further outsource government agency functions to preferred private sector contractors, a strategy that has so often proved to be wasteful, inefficient and costly for taxpayers.

The OMB memo also speaks to streamlining and/or leveraging agency mission support and shifting to alternative delivery models. No one opposes streamlining in principle. In practice, however, "streamlining" often just means reduction or degradation of service delivery. The OMB guidance seems to endorse a particularly pernicious governmentwide "consolidation" of so-called "shared services."

The substance of this concept is that all federal administrative service functions including financial management, human resources management, acquisition, information technology, property and logistics management, and such other "administrative services" should use or will be required to use centralized cross-agency administrative support for these "common functions" of government.

The theory behind the "shared services" concept is allegedly based on economies of scale. Because all federal agencies make use of administrative services functions, centralizing these services in a limited number of providers and requiring that every agency use the centralized source(s) to obtain the services will supposedly reap cost savings.

However, AFGE believes that the OMB memo takes the notion of consolidating federal administrative services a step beyond mere centralization. It encourages private sector entities to either compete with government-sponsored service providers or to enter into "partnerships" with government agencies to provide the services. It is not efficiencies that drive OMB's quest for consolidation, but rather profits.

Under existing law and practices, agencies may enter into shared-service provider agreements with other federal agencies, provided that the shared service provider has been approved by OMB. Most shared-service provider arrangements are optional for agency use, although in a few cases, an agency must use a shared-service provider for limited service transactions (e.g., OPM for posting of vacancies and a Treasury approved servicing agency for disbursal of funds).

The concept of cross agency administrative servicing has been around for a number of decades, and some functions of government are particularly well-suited to centralization. For example, the disbursal of federal funds must be approved by a

Treasury servicing agency, such as the Bureau of the Public Debt (BPD) or the Defense Finance and Accounting Service (DFAS). Similarly, existing law requires that the Office of Personnel Management post agency vacancy announcements unless otherwise exempted. In general, the services provided by these centralized agency service functions are quite narrow, and do not impinge on agency administrative authorities and responsibilities not otherwise authorized by law.

However, mindless consolidation of these services is actually at odds with maximizing flexibility and agency responsiveness. For example, during the Clinton "Reinventing Government" program, and as a part of the George W. Bush "Management Agenda," delayering of government agencies functions was an important concept and priority of management. The Trump Administration seems to be turning these ideas on their head. AFGE does not oppose consolidation when it makes sense, but mandatory centralization of administrative services has proven to result in less responsive government, and will have a negative impact on agency head accountability for the efficient and effective administration of their own Departments. This is the antithesis of sound management principles. It is management by fiat. Agency heads should retain both the authority and responsibility for managing their operations. This is the essence of accountability. Mandating use of so-called shared service providers is simply a way to shift some of the work (and profits) to the private sector.

Cross-agency servicing has turned into big business in the last few decades. Agencies such as GSA, NASA, NIH and others are earning tens of millions and sometimes hundreds of millions of dollars per year in fees from servicing the administrative requirements of other agencies. For example, GSA's Federal Acquisition Service charges non-GSA agencies between $200 - $400 million per year in procurement transaction costs. This is a money-maker for GSA. NASA and NIH, two agencies that are supposed to focus on space and medical scientific investigation respectively, each earn tens of millions of dollars per year from providing procurement information technology services to other federal agencies. Much of this money is shared with private contractors serving as subcontractors or vendors to these shared-service providers.

AFGE represents tens of thousands of employees who perform specialized management services in federal agencies, including contract specialists, personnel management specialists, financial management specialists and information technology specialists. These dedicated federal employees provide expert services to their agencies based on years of experience and specialized knowledge of agency needs. They respond quickly to agency requirements, and understand the unique situation within their agency/division. Outsourcing these critical functions to service providers located hundreds or even thousands of miles away from the requiring office will lead to an erosion of service, a de-linkage from agency missions, and a one-size-fits-all

methodology that will degrade both the quality and timeliness of agency delivery of services.

WORKFORCE REDUCTIONS AND ELIMINATING AGENCY FUNCTIONS

AFGE notes that the OMB guidance encourages eliminating agencies, programs or activities, and especially focuses on reducing the size of the federal workforce. Workforce reductions cannot be accomplished without abandoning agency functions, or alternatively, by resorting to use of contractors. As for eliminating or reducing programs, AFGE simply notes that one recent proposal put forth was to cut almost one billion dollars from the Federal Emergency Management Agency's disaster relief account. This was only a short time before Hurricanes Harvey and Irma devastated Texas and Florida, respectively. Needless to say, programmatic reductions may sound good in principle until citizens needs those programs. We would encourage Congress to carefully examine all proposed program cuts that emanate from OMB's latest management by fiat initiative. AFGE's review of the Administration's 2018 budget proposal strongly suggests that many of the proposed cuts were for the sake of saying that something was cut. That is neither a sound budget process nor a way to provide citizens with needed services.

Similarly, federal workforce reductions that are divorced from the reality of citizens' needs are neither sound policy nor realistic goals. Whether providing medical services to veterans, resolving social security disability claims, or ensuring border security and the national defense, cuts cannot be made without sacrificing services to the most vulnerable, and/or shortchanging necessary national priorities. The alterative -- outsourcing work to the private sector -- rarely results in cost savings, and frequently transfers important federal priorities to contractors accountable only to their shareholders. It is a recipe for more spending and less accountability.

CONCLUSION

AFGE strongly supports improvements in agency performance management systems and a more effective approaches to accomplishing government work. We look forward to working with lawmakers and others to see this carried-out. AFGE also supports better training of both supervisors and employees so that clear expectations are established and performance is measurable. AFGE also recommends that Congress focus more on empowering and improving the quality of the federal workforce rather than mindlessly consolidating and cutting services in order to achieve dubious and often illusory savings, not to mention degradation of program quality. This starts with better supervision and management.

OMB's management plan "du jour" is another mindless attack on government programs and the civil service. These attacks make for good politics, but bad government.

AFGE recommends improving employee training, and providing meaningful expectations and feedback to the frontline workforce as the best way to improve the performance of agencies. Managers and supervisors must have the training and will to implement programs effectively. We share the concerns of Congress that agencies be well-managed, efficient and effective, and we will work with you as we strive to motivate and maintain high quality government services provided by dedicated public servants.

Thank you for considering our comments.

ATTACHMENT: AFGE HUD Council 222 Statement on the FY 2018 HUD Budget Request

National Council of HUD Locals
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH AFL-CIO
Council 222

AFGE HUD Council 222 Statement on the FY 2018 HUD Budget Request

and Agency Reform

The proposed fiscal year 2018 HUD budget severely reduces funds available to help America's poorest meet their basic needs. The $40.7 billion proposed for HUD programs in 2018 is $7.4 billion, or 15%, below what was approved for 2017.[1] While it may be true that there's always a way to improve current programs, the drastic reduction in important support for the needy is not an improvement and does not represent any elimination of wasteful spending. AFGE Council 222 agrees with National Low Income Housing Coalition (NLIHC) President and CEO Diane Yentel, who criticized the budget's "cruel indifference to the millions of low income seniors, people with disabilities, families with children, veterans, and other vulnerable people who are struggling to keep a roof over their heads."[2] AFGE Council 222 deplores the cuts that will hurt America's poor, disabled, elderly, and veterans.

Almost half of the reduction comes from eliminating the $3 billion Community Development Block Grant (CDBG) program. CDBG, as *The Washington Post* explains, "provides cities with money for affordable housing and other community needs, such as fighting blight, improving infrastructure and delivering food to homebound seniors."[3] As the recent confirmation hearing of Deputy Secretary nominee Pam Patenaude disclosed, there is widespread Congressional support for the CDBG program. As Congressional leaders know, CDBG funds promote development in urban areas, resulting in more jobs and infrastructure improvements. In addition, widespread support for CDBG funding reflects an awareness of the benefit of local community input into how and where grant monies are spent, ensuring wise utilization of taxpayer dollars.

According to the NLIHC, 7.4 million out of the 11.4 million extremely low-income households in the U.S. currently lack access to affordable homes.[4] The budget plan makes it harder for needy households by cutting rental assistance by over $2 billion. Part of that reduction is accomplished by increasing tenant contributions toward rent

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[1] Rice, Douglas. "Trump Budget Would Increase Homelessness and Hardship in Every State, End Federal Role in Community Development." *Center on Budget and Policy Priorities*. May 23, 2017. http://www.cbpp.org/blog/trump-budget-would-increase-homelessness-and-hardship-in-every-state-end-federal-role-in

[2] National Low Income Housing Coalition. "President Trump's Budget Proposes to Slash Affordable Housing and Other Essential Programs." May 30, 2017. http://nlihc.org/article/president-trump-s-budget-proposes-slash-affordable-housing-and-other-essential-programs

[3] Jan, Tracy. "Trump wants more people who receive housing subsidies to work." *Washington Post*. May 23, 2017. https://www.washingtonpost.com/news/wonk/wp/2017/05/23/for-the-first-time-poor-people-receiving-housing-subsidies-may-be-required-to-work/?utm_term=.71315730cf70

[4] National Low Income Housing Coalition. "Urge Congress to Protect and Expand the National Housing Trust Fund." June 5, 2017. http://nlihc.org/article/urge-congress-protect-and-expand-national-housing-trust-fund-0

from 30% to 35% of adjusted income--a 17% increase in expenses for those who can least afford it. It also requires impoverished renters to pay a minimum rent of $50/month, even if that's more than 35% of the income.

The Section 8 Rental Assistance program will be funded at only $60 million, one-fourth the amount of its 2017 total resources. In short, HUD's FY 2018 budget cuts are accomplished by "shifting more than $2.5 billion in program costs onto vulnerable seniors, people with disabilities, and families with children."[5]

To give you an idea of the impact that these budget cuts will have on communities, Washington, D.C., Maryland, and Virginia together will lose over 12,300 housing vouchers and almost $90 million in public housing funding. New York alone will lose 26,530 vouchers and over $409 million in public housing funds. Illinois will lose 10,734 vouchers and more than $107 million in public housing funds. Those reduced funds don't include the CDBG or HOME funding cuts.[6]

Funding for the Public Housing Capital Fund is cut by almost 70% from FY 2017: from $1.9 billion to less than one-third of that at $564 million. This fund provides money to public housing authorities (PHAs) to address the most acute needs for capital repairs and replacements in public housing developments. This drastic funding cut comes at a time when industry figures place unmet capital improvement needs for public housing at $26 billion.

Among the other effects of the proposed HUD budget:

- Eliminate Housing Choice Vouchers for more than 250,000 low-income households. The budget cuts almost $800 million from the current funding levels, and will be $2.3 billion less than what is needed to renew all vouchers.[7] The program primarily helps extremely low-income seniors, people with disabilities, and working families with children; the proposed budget will increase homelessness and other hardships.[8]

- Reduce public housing funding by $1.8 billion, or nearly 29 percent, from 2017 levels. This will hurt the health and safety of public housing's 2.2 million residents by not providing the money to fix leaky roofs or replace outdated heating systems and electrical wiring in public housing.[9]

- Cut $133 million (5.6 percent) from homeless assistance grants, which provide critical support for communities' efforts to prevent homelessness, help homeless families move from shelters to stable homes, and reduce long-term or

[5] Rice.
[6] Rice.
[7] Rice.
[8] Rice.
[9] Rice.

repeated homelessness among people with mental illness and other disabilities.[10]

- Eliminate the HOME, Community Development Block Grant, and Choice Neighborhoods programs that help poor communities improve basic infrastructure like streets and water and sewer lines and provide affordable housing for low-income residents.[11] Notably, defunding of the Choice Neighborhoods initiative (funded in 2017 at $257 million) eliminates a program which leverages federal and non-federal funding to help rehabilitate, in innovative ways, some of the most disadvantaged neighborhoods in the nation.
- Eliminate the Section 4 Capacity Building program, and the Self-Help Homeownership Opportunity Program.[12]
- Reduce funding of Section 811 Housing for People with Disabilities program to $121 million, $25 million (17%) less than the 2017 level.[13]
- Eliminate the National Housing Trust fund, described by the NLIHC as "the first new housing resource in a generation exclusively targeted to help build and preserve housing affordable to people with the lowest incomes, including those who are homeless."[14] The HTF's first $174 million were allocated to the states in 2016.
- Cut funding for the Office of Lead Hazard Control and Healthy Homes grants by more than 10%, a reduction of $15 million.[15]
- Cut funding for the Housing Opportunities for People with AIDS by $26 million, about 7%.[16]
- Cut funding for the Native American Housing Block Grant program by $54 million, about 8%.
- Eliminate funding for the Native Hawaiian Housing Block Grant program.[17]

The proposed 2018 HUD budget eliminates critical funding without providing viable alternatives to support those in need. It ignores the fact that federal assistance has been necessary because states and local communities do not have the money to provide safe, clean, affordable housing for families with children, the elderly, and the disabled.

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[10] Rice.
[11] Rice.
[12] National Low Income Housing Coalition. "President Trump's Budget."
[13] National Low Income Housing Coalition. "President Trump's Budget."
[14] National Low Income Housing Coalition. "Urge Congress."
[15] National Low Income Housing Coalition. "President Trump's Budget."
[16] National Low Income Housing Coalition. "President Trump's Budget."
[17] National Low Income Housing Coalition. "President Trump's Budget."

Suggested Agency Reforms

Rather than cutting aid to needy populations, HUD should be taking measures to restructure the clearly dysfunctional bureaucracy that has been in place at the Agency for years. HUD is notorious for its mismanagement and inability to properly manage its human capital. These problems were detailed by HUD's Inspector General in his March 16, 2017, testimony before Congress.[18] In particular, the Inspector General referenced several GAO studies pointing to a "lack of human capital accountability and to insufficient strategic management of pervasive problems at HUD."[19] Under former Deputy Secretary Nani Coloretti, unresolved disagreements with OIG audit recommendations skyrocketed to 16, nearly doubling disagreements in the previous three years.[20]

It was the Inspector General's opinion that this spike in disagreements "resulted from a negative culture created by former Deputy Secretary Coloretti and some of her staff that appeared to produce a distrust of the OIG and an atmosphere where career staff were not allowed to work with the IG...."[21]. Interestingly, the same officials who assisted the previous administration with its agenda, including the Chief Human Capital Officer, remain in key positions at the Agency. Those collecting data for the reform plan to be submitted to OMB are the same officials who assisted former Deputy Secretary Nani Coloretti with her obstructionist policies. Ms. Coloretti's failures are well documented in the Inspector General's report, yet her closest aide "burrowed in" at the agency and remains in a management position.

The Union has not been invited to meet with the new Deputy Secretary nominee, Pam Patenaude, despite the fact that Ms. Patenaude has been at HUD Headquarters for weeks, meeting with the career employees who directly assisted former Deputy Secretary Coloretti. Accordingly, due to this lack of access, Council 222 submits the following suggestions for reform at HUD, and requests their inclusion in the plan submitted to OMB:

1. Increase Supervisory Ratios

In Headquarters and in Regional offices, the Agency is saturated with management positions and multiple layers of management. Supervisory ratios of one manager to 20 employees suggested by the Bush administration have never been implemented. As long time HUD employees are aware, and as the Union has consistently advised management, Deputy positions, "team leaders" and other management positions are created and filled to give employees GS-15 grades. HUD has consistently been top-

[18] Testimony of The Honorable David A Montoya, Inspector General, Office of the Inspector General, U.S. Housing and Urban Development (March 16, 2017, U.S. House of Representatives Committee on Appropriations, Subcommittee on Transportation, Housing and Urban Development)

[19] Montoya, page 3.
[20] Montoya, page 14.
[21] Montoya, page 14.

heavy with manager positions, and de-layering is necessary. Dynamics are different in smaller field offices and supervisory autonomy should remain in place regardless of ratios. As field offices shrink due to attrition and supervisory roles diminish, field offices lose the ability to operate on the ground without Headquarters or Regional interference. Supervisory ratios should be adjusted, primarily in Headquarters and the Regions.

2. Workforce Analysis

The Agency needs to conduct a thorough workforce analysis that includes a review of work actually performed. As pointed out by the Inspector General, "HUD continues to lack a valid basis for assessing its human resource needs and allocating staff within program offices." (Inspector General Testimony, page 3). In particular, the Agency needs to review positions that have a high grade level, but only perform a single work function/activity in the field such as Management Analyst and Program Analyst. These positions and duties need to reflect the program areas and employees need to be moved to areas where there are staff shortages. Job duties need to be clearly defined to ensure efficient service delivery. The focus should be on front-line delivery of services.

3. Protecting the Trained Workforce and Institutional Knowledge

The loss of experienced and highly trained employees, and the ensuing training costs for replacements, needs to be addressed. OMB Memo M-17-22, has instructed Agencies to develop a plan for long-term workforce reduction. HUD has given no indication that they are working on a long-term plan to successfully manage the impending mass depletion of institutional knowledge at the Agency. In his May 18, 2017, testimony before the House of Representatives Committee on Government Oversight and Reform, Robert Goldenkoff, Director, Strategic Issues, U.S. Government Accountability Office, stated the following: *"According to our analysis of OPM data, government-wide more than 34 percent of federal employees on-board by the end of fiscal year 2015 will be eligible to retire by 2020. Some agencies, such as the* ***Department of Housing and Urban Development****, will have particularly high eligibility levels by 2020."* Mr. Goldenkoff went on to emphasize: *"But if turnover is not strategically monitored and managed, gaps can develop in an organization's institutional knowledge and leadership."* One of HUD's most valuable assets are its career employees - custodians of the Agency's institutional knowledge. HUD needs to immediately address this looming crisis and strategize on a plan to ensure a successful mass transfer, not depletion, of institutional knowledge.

4. Settle the Fair and Equitable Case

As the new Deputy Secretary nominee is well aware, there is longstanding litigation involving hundreds of HUD employees, with a potential liability for the Agency in excess of $700 million dollars. The Agency lost at an arbitration in this matter, and has lost every appeal to the FLRA seeking to overturn the arbitrator's decision. These

delay tactics have only served to increase damages, as interest on the back pay award continues to accrue on a daily basis. The Union would like to settle the case. Many employees are waiting to retire until this case comes to a conclusion. Until the case is settled, the Agency cannot engage in meaningful workforce planning.

5. Reduce Supervisors and SES Staff

While there is an oft-cited narrative of the difficulty of terminating front-line Federal employees, the real cost savings lies in dealing with the numerous non-functional SES positions across the Department. It is a long HUD tradition that, when an SES employee is not performing, that employee gets moved to a position that is essentially non-functional. The Employee and Labor Relations Division at HUD, has issued an edict that bargaining unit employees should be terminated for non-performance, rather than being given a second chance to perform in another division. However, this same edict does not appear to apply to managers. The Agency, and Congress, should take a close look at the number of SES positions at HUD, and what work is actually being performed by employees in those positions.

6. Reduce SES and Supervisory Travel

While there has been considerable pressure at HUD to force the Union to waive its contractual rights to conduct face-to-face bargaining, there has been no examination of the amount of money expended by supervisors traveling for meetings, conferences, "listening" and informational visits. In this era, with the availability of Virtual Meeting, SharePoint and other electronic mediums, it is difficult to understand why OCHCO, OGC and other service units feel the need to conduct on-site meetings with field personnel.

7. Reduce the Number of Contractors

Contractors are historically more expensive than employees and require monitoring and oversight. They are less knowledgeable about HUD programs and practices and thus make mistakes that would not be made by HUD employees. Per the Inspector General, errors in HUD financial reports were attributable, in part, to HUD management outsourcing "roles to staff and contractors who were unfamiliar with HUD's financial reporting processes and did not receive adequate training."[22] Particularly concerning has been the performance of the Bureau of Fiscal Services (BFS) in its employee selection practices. BFS has repeatedly erred in culling the best qualified list from all applications, has been extremely slow in providing information to managers and employees alike on the selection process, and has provided incorrect information to those who inquire about vacancy announcements. Shared services contracts make sense for programs that are identical from agency to agency, but they are destructive when agency-specific expertise is required. An accounting and analysis of contract dollars spent and benefit gained should be conducted before engagement of additional contractors. The agency has better control of outcomes and expenses with in-house work.

[22] Montoya, page 4.

8. Provide Flexibility in Budgetary and Personnel Practices

Budgetary restrictions on the funding of positions by cylinder leads to inflexibility in moving personnel. We have seen one program area run out of work for employees in certain jobs, while other program areas desperately need help, and, although the near-idle employees want to work, they are prohibited from helping their sister program offices. This flexibility should be requested from Congress.

9. If staff reductions are necessary, incentivize staff to retire through incentives and retirement options that have real value.

We recommend that HUD offer buyouts in the amount of $40,000, as authorized for Dept. of Defense employees. HUD has a high proportion of retirement-eligible employees, and it has been recently reported that many fewer employees have retired from federal agencies than at this time last year. With respect to retirement, the 2018 budget proposal to eliminate cost-of-living adjustments on FERS pensions and to decrease them on CSRS pensions understandably is causing employees to re-think their ability to retire. The COLAs in social security cannot possibly make up for the reduction in the value of employee pensions that would be caused by this mean-spirited elimination or reduction in the pension COLAs.

9. Space Management

The Agency should seek to reduce its space footprint by moving personnel to government-owned buildings. Millions could be saved by eliminating leased office spaces and renegotiating existing leases. Reduction of space and renegotiation of leases were touted as justifications for the Multi-family Transformation, yet lease renegotiations seldom occurred. The agency also needs to aggressively promote its telework program, to reduce the need for office space.

10. Eliminate Presidential Management Fellows Program

The Agency needs to temporarily suspend its participation on the Presidential Management Fellows Program. At this Agency, millions of dollars are spent annually bringing on Presidential Management Fellows who historically don't stay beyond five years. These positions have grade levels that increase at a higher and faster rate than Civil Service positions. The Presidential Management Fellows Program has not proven to be an effective vehicle for transfer of institutional knowledge at HUD. Money would be better invested in training employees who already have the institutional knowledge, are planning on staying at HUD and ready to learn new skills. Under this CHCO, there has been no viable upward mobility program instituted. Historically, these upward mobility programs have proven to be the most cost effective training investment for the Agency.

11. Better Management Training

While there is a continuing narrative about holding employees "accountable" and getting rid of "poor performers," the Agency has failed to address the obvious

problems with its managers which have resulted in costly litigation. The Agency has paid millions of dollars in EEO judgments and settlements over the past few years, yet has taken no action to address this problem. The Agency has a number of managers who simply don't know how to manage. Better training and holding such managers accountable would result in significant cost savings Department-wide.

12. Process Reasonable Accommodation Requests in a Timely Manner

The Reasonable Accommodation office in OCHCO appears to be both inadequately staffed and infused with a desire to avoid accommodating employees' disabilities. Processing requests timely and appropriately crediting the expertise of medical professionals would result in fewer EEO complaints for delays and denials of Reasonable Accommodation requests.

13. Increased use of Alternative Dispute Resolution

HUD reports to Congress annually on its use of Alternative Dispute Resolution (ADR) in EEO proceedings. HUD reports tens of millions of dollars in supposed savings, with no apparent benefit. The source and means of calculating the numbers reported to Congress is unknown to the Union. ADR should be increased to include most employee disputes, and closely tracked to reduce costs. Allowing front-line managers and employees to work things out saves money.

14. Employee Involvement in IT Improvements

Procurement protocols for IT systems need to be improved to allow front-line employees input at the front end, to reduce contract change costs. Historically, installation of new computer systems results in an immediate apparent need for modifications, which could be avoided. IT contracts typically require payment to private contractors for additional work or system modifications, and changes are often slow, costly or can't be made at all. Working with system users during the procurement process to ensure that appropriate work features are included in new computer systems will eliminate frustration, save money and increase efficiency.

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Blueprint for Reorganization: An Analysis of Federal Departments and Agencies

Edited by David B. Muhlhausen, PhD

The Heritage Foundation

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Contributors

David B. Muhlhausen, PhD, is Research Fellow in Empirical Policy Analysis in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, at The Heritage Foundation.

Alden F. Abbott is Deputy Director of, and John, Barbara, and Victoria Rumpel Senior Legal Fellow in, the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.

Daren Bakst is Research Fellow in Agricultural Policy in the Center for Free Markets and Regulatory Reform, of the Institute for Economic Freedom

Romina Boccia is Deputy Director of the Roe Institute and Grover M. Hermann Research Fellow.

Justin Bogie is Senior Policy Analyst in Fiscal Affairs in the Roe Institute.

Lindsey M. Burke is Director of Education Policy Studies, and Will Skillman Fellow in Education, of the Institute for Family, Community, and Opportunity, at The Heritage Foundation.

David R. Burton is Senior Fellow in Economic Policy in the Roe Institute.

Michaela Dodge is Senior Policy Analyst in the Center for National Defense, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.

Marie Fishpaw is Director of Domestic Policy Studies and Preston A. Wells, Jr. Fellow in the Institute for Family, Community, and Opportunity.

James L. Gattuso is Senior Research Fellow for Regulatory Policy, in the Center for Free Markets and Regulatory Reform.

Robert Gordon is Senior Research Fellow in Regulatory Policy, in the Center for Free Markets and Regulatory Reform.

Rachel Greszler is Senior Policy Analyst in Entitlement Economics in the Roe Institute.

David Inserra is Policy Analyst for Homeland Security and Cyber Policy, in the Douglas and Sarah Allison Center for Foreign Policy, of the Davis Institute.

Diane Katz is Senior Research Fellow in Regulatory Policy at the Center for Free Markets and Regulatory Reform.

David Kreutzer, PhD, is Senior Research Fellow in Labor Markets and Trade at the Center for Free Markets and Regulatory Reform.

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.

John L. Ligon is Senior Policy Analyst and Research Manager in the Center for Data Analysis, of the Institute for Economic Freedom and Opportunity.

Nicolas D. Loris is Herbert and Joyce Morgan Fellow in Energy and Environmental Policy, at the Center for Free Markets and Regulatory Reform.

Mollie McNeill is Research Assistant for Economic Budget Policy in the Roe Institute.

Norbert J. Michel, PhD, is Research Fellow in Financial Regulations in the Roe Institute.

Robert E. Moffit, PhD, is Senior Fellow for Health Policy Studies in the Institute for Family, Community, and Opportunity.

John O'Shea, MD, is Senior Fellow in Health Policy in the Center for Health Policy Studies, of the Institute for Family, Community, and Opportunity.

David Paschane, PhD, is an Organizational Scientist in the commercial and government sectors.

Bryan Riley is Jay Van Andel Senior Policy Analyst in Trade Policy in the Center for Free Markets and Regulatory Reform.

Michael Sargent is Research Associate in the Roe Institute.

Brett D. Schaefer is Jay Kingham Senior Research Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Davis Institute.

John-Michael Seibler is a Legal Fellow in the Meese Center.

Jason Snead is a Policy Analyst in the Meese Center.

Thomas W. Spoehr is Director of the Center for National Defense.

Katie Tubb is Policy Analyst for Energy and Environmental Issues in the Roe Institute.

Hans von Spakovsky is manager of the Election Law Reform Initiative, and Senior Legal Fellow in the Meese Center.

John W. York is Research Assistant, at the Center for Principles and Politics, in the B. Kenneth Simon Center for Principles and Politics, of the Institute for Constitutional Government

Rachel Zissimos is Research Associate in National Defense in the Center for National Defense.

Introduction

Despite an ever-growing public debt—almost $20 trillion at the latest count1—federal policymakers have failed to think seriously about the size and scope of the executive branch. Today, there are 22 departments, agencies, and offices that rise to Cabinet level in the executive branch, with hundreds of subagencies underneath them. The fact that Americans are living under a federal government that knows no fiscal bounds, with bureaucratic decisions affecting nearly every aspect of their lives, clearly demonstrates that a major overhaul of the executive branch is long overdue.

Led by the Office of Management and Budget (OMB), President Donald Trump has called for a systematic restructuring of the executive branch. The President's Executive Order No. 13781 is "intended to improve the efficiency, effectiveness, and accountability of the executive branch."[2] Further, OMB is directed "to propose a plan to reorganize governmental functions and eliminate unnecessary agencies."[3]

Tinkering around the edges of the executive branch will not rein in the excessive growth of a federal government that has become bloated and lethargic. Instead, executive branch reorganization should encompass bold actions to terminate or significantly reform federal agencies and programs that function outside of the federal government's core constitutional responsibilities. The following section contains numerous bold and timely recommendations to downsize and reform the executive branch. However, the success of the President's executive order faces considerable obstacles.

Government Programs Never Die. While the old adage that death and taxes are the only two certainties in life, there is perhaps a second: Government programs never die.[4] The termination of government programs is such a rare phenomenon that its occurrence is hardly studied by social scientists.[5] As acknowledged decades ago, the rare elimination of government programs usually occurs "with either a bang or a very long whimper."[6] When government programs have been terminated, immediate elimination has been the most common strategy.[7] This appears to be the most successful method, since it does not give special interests the time to pressure Congress into reversing its decision.

Concentrated Benefits and Diffuse Costs. The congressional legislative process generally favors keeping failed or outdated government programs alive, often with growing budgets, due to the dilemma of concentrated benefits and diffuse costs. Because of this dilemma, appropriations legislation that continues an ineffective or outdated program is unlikely to raise the ire of taxpayers. Those who are receiving concentrated benefits through government programs are more likely to lobby Congress for continued and increased funding than are taxpayers who pay for the diffused costs of those programs.

The beneficiaries of government programs, as Princeton University Professor of Politics R. Douglas Arnold has demonstrated, "are often organized into groups and easily mobilized for action."[8] Further:

Even when these concentrated interests are not well organized, legislators know that the affected publics are both more attentive to Washington action

and more likely to show their appreciation at the polls than are those citizens who have less at stake and who are less attentive to what happens in Congress.[9]

Concentrated interests are highly organized and entrenched in Washington, D.C., which allows them to have access to and sway over policymakers. Any time Congress attempts to downsize or terminate ineffective or constitutionally questionable programs, special interests predictably rise to the defense of these programs. The all too frequent result is that fiscally and constitutionally responsible decisions are defeated and the fleecing of American taxpayers continues.

Due to the intense nature of special-interest coalitions that benefit from them, politicians tend to be reluctant to eliminate government programs, even if there is strong evidence that a particular department or agency wastes taxpayer dollars or has no constitutional authorization underpinning its existence. The current appropriations process makes it easier for Members of Congress to approve generous budget increases year in and year out instead of exercising wise stewardship of Congress' power of the purse. Rather than regularly authorizing or terminating agencies and programs, along with passing individual appropriations bills, Congress has practiced ineffectual oversight and allowed continuing resolutions and enormous omnibus spending bills to dominate the legislative process.

Because of this dilemma, Americans should welcome President Trump's call to rethink how the executive branch does business. If the following recommendations are adopted, Americans will see a leaner, more efficient federal government that is focused more on performing core constitutional missions and less on serving special interests.

—David B. Muhlhausen, PhD

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Department of Agriculture

Significantly Reduce the Size of the Farm Service Agency

RECOMMENDATION

The Farm Service Agency (FSA), which administers the farm commodity programs and some conservation programs,[1] should be significantly reduced. This action can be achieved by Congress eliminating many of the commodity subsidy programs that the FSA administers.

RATIONALE

Agricultural producers, and primarily the largest producers,[2] receive handouts that go beyond any reasonable concept of a safety net. Instead of assisting producers to get back on their feet after major crop losses, the current system tries to insulate farmers from managing even ordinary business risk. The current system deems large agribusinesses incapable of managing in a market economy, as other businesses do.

In the 2014 farm bill, Congress created two massive new handout programs for farmers: the Agricultural Risk Coverage (ARC) and Price Loss Coverage (PLC) programs. The ARC program helps to ensure that farmers meet expected revenue targets by providing payments if they incur "shallow losses," which simply means that revenue is a little lower than expected. The PLC program triggers payments when commodity prices fall below a set price in statute. Both of these programs, premised on central planning and anti-market philosophies, are now projected[3] to cost nearly double the original estimates[4] at the time of passage of the 2014 farm bill ($32 billion instead of $18 billion over the first five years of the program).[5]

Other programs that should be eliminated include the dairy and sugar programs. The U.S. sugar program takes central planning to a new level. The program uses price supports, marketing allotments that limit how much sugar processors can sell each year, and import restrictions that reduce the amount of imports. As a result of government attempts to limit the supply of sugar, the price of American sugar is consistently higher than world prices; domestic prices have been as high as double that of world prices.[6]

This big government policy may benefit the small number of sugar growers and harvesters, but it does so at the expense of sugar-using industries and consumers. An International Trade Administration report found that "[f]or each sugar-growing and harvesting job saved through high U.S. sugar prices, nearly three confectionery manufacturing jobs are lost."[7] The program is also a hidden tax on consumers. Recent studies have found that the program costs consumers as much as $3.7 billion a year.[8] Further, the program has a disproportionate impact on the poor because a greater share of their income goes to food purchases than it does for individuals at higher income levels.[9]

In the next farm bill, which is expected in 2018 when many programs are required to be reauthorized, Congress should eliminate these costly market-distorting handouts. In doing so, the role of the FSA will be significantly reduced, and its size and organization should reflect these policy changes.

ADDITIONAL READING

- Daren Bakst, ed., *Farms and Free Enterprise: A Blueprint for Agricultural Policy*, The Heritage Foundation, Mandate for Leadership Series, 2016.

Streamline the Risk Management Agency

RECOMMENDATION

Congress should streamline and simplify the operations of the Risk Management Agency (RMA).

RATIONALE

The RMA administers the federal crop insurance program. Congress should maintain the federal crop insurance program, but a specific type of policy known as revenue-based policies should be eliminated,[10] which would help streamline and simplify the RMA's operations. To the extent that there is any federal role in assisting agricultural producers in managing risk, it should be to help farmers when they experience a major crop loss. These revenue policies can provide farmers with indemnities even when farmers have record production and the weather is perfect; like most of the commodity programs, these policies are anti-market and assume that farmers are unable to operate in a capitalist system as other businesses do.

There are generally two types of federal crop insurance policies: yield-based and revenue-based. Yield-based policies assist farmers when there are crop losses, whereas revenue-based policies do not require any crop loss. Congress should eliminate these revenue-based policies and have yield-based policies only. It was not that long ago when there were only yield policies; revenue-based policies are relatively new, created in 1997,[11] and only became more popular than yield-based policies in 2003.[12]

The subsidies for yield policies should be limited to coverage levels that would require major crop losses before farmers receive the help of taxpayers. By simplifying the federal crop insurance system, the RMA should be able to streamline and simplify operations.

ADDITIONAL READING

- Daren Bakst, ed., *Farms and Free Enterprise: A Blueprint for Agricultural Policy*, The Heritage Foundation, Mandate for Leadership Series, 2016.

Eliminate the Center for Nutrition Policy and Promotion

RECOMMENDATION

Congress should eliminate the Center for Nutrition Policy and Promotion and get the federal government out of providing dietary and nutritional advice.

RATIONALE

The federal government should not be in the nutritional advice business.[13] The Dietary Guidelines for America that are developed by this agency (along with the Department of Health and Human Services (HHS)) are emblematic of nutritional advice in general. The most recent Dietary Guidelines Advisory Committee that made recommendations to both the U.S. Department of Agriculture (USDA) and HHS on the Guidelines veered away from its dietary and nutrition mission and considered environmental concerns when developing its recommendations. Diet, according to this committee, should not just focus on human health, but also on issues such as sustainability and global warming.[14]

Believing that the government can provide a definitive source of nutritional advice when such information is constantly changing requires a significant level of arrogance. Numerous sources of quality information on nutrition already exist, and the public can easily access them. Such services also do not have the imprimatur of the federal government providing unwarranted legitimacy.

Eliminate the Agricultural Marketing Service

RECOMMENDATION

Congress should eliminate the Agricultural Marketing Service (AMS).

RATIONALE

The AMS performs numerous tasks, including developing grade standards for food and running the national organic program. These tasks, and others, could be run by private entities if there is the requisite demand. Other programs, such as grant programs to help farmers market their food, and the Farmers Market Promotion Program, are inappropriate roles for government. The AMS also runs the infamous marketing orders that can trigger volume controls (supply restrictions) on the sale of fruits and vegetables.[15]

ADDITIONAL READING

- Daren Bakst, "The Federal Government Should Stop Limiting the Sale of Certain Fruits and Vegetables," Heritage Foundation *Issue Brief* No. 4466, September 29, 2015.

Eliminate the Rural Business Cooperative Service

RECOMMENDATION

Congress should eliminate the Rural Business Cooperative Service (RBCS).

RATIONALE

The RBCS is an agency of the U.S. Department of Agriculture that has a wide range of financial assistance programs for rural businesses. It also has a significant focus on renewable energy and global warming, including subsidizing biofuels. Rural businesses are fully capable of running themselves, investing, and seeking assistance through private means. The fact that these businesses are in rural areas does not change the fact that they can and should succeed on their own merits like any other business. Private capital will find its way to worthy investments. The government should not be in the business of picking winners and losers when it comes to private investments or energy sources.

Instead of handing taxpayer dollars to businesses, the federal government should identify and remove the obstacles that it has created for businesses in rural communities.

ADDITIONAL READING

- Daren Bakst, "Addressing Waste, Abuse, and Extremism in USDA Programs," Heritage Foundation *Backgrounder* No. 2916, May 30, 2014.

Move the Functions of the Food and Nutrition Service to the Department of Health and Human Services

RECOMMENDATION

Congress should move the work of the Food and Nutrition Service to the Department of Health and Human Services (HHS).

RATIONALE

The Food and Nutrition Service administers the food and nutrition programs, including the food stamp program. The work of this agency, including the food stamp program, should be moved to HHS, the primary welfare department of the federal government. Other programs, like the school meal programs, should also be moved to HHS.

Further, the USDA has veered off of its mission by working extensively on issues unrelated to agriculture. This is mostly due to the nutrition programs. By moving this welfare function to HHS, the USDA will be better able to work on agricultural issues impacting all Americans.

Eliminate the USDA Catfish Inspection Program

RECOMMENDATION

Congress should eliminate the USDA catfish inspection program.

RATIONALE

The USDA catfish inspection program, which is still in the process of being fully implemented,[16] is a textbook example of cronyism and trade protectionism.

The Food and Drug Administration (FDA) inspects seafood for safety. The 2008 farm bill, however, included a provision that would move catfish inspection from the FDA to the USDA. This move was not in response to a catfish-safety crisis. The FDA and Centers for Disease Control and Prevention consider commercially raised catfish to be a low-risk food.[17] The Government Accountability Office (GAO) has said that such a switch to the USDA will not improve safety.[18]

Moving catfish inspection to the USDA requires foreign countries to develop new catfish inspection schemes that are the regulatory equivalent[19] of the more burdensome USDA system. If they do not meet the USDA's requirements, foreign exporters from various countries that currently supply the United States with catfish will be blocked from selling their catfish in the U.S. Some countries may not even bother to go through the regulatory equivalence process. Domestic catfish producers might benefit as a result of less competition, but they would do so at the expense of consumers. The program risks trade retaliation from other countries since it is merely a non-tariff trade barrier;[20] such retaliation would likely focus on other agricultural interests, such as meat packers and soybean farmers.

The program is also duplicative. As a result of this program, the USDA inspects catfish, and the FDA inspects all other seafood. This creates duplication because seafood-processing facilities that process both catfish and any other seafood will have to deal with two different types of seafood regulatory schemes, instead of just one.[21]

The GAO has repeatedly been critical of the program.[22] President Obama called for eliminating the program in his FY 2014 budget.[23] President Trump called for eliminating the program in his FY 2018 budget.[24] In May 2016, the Senate, in a bipartisan manner, passed legislation that would have effectively eliminated the program.[25] In the House, a bipartisan group of 220 members went on record[26] asking House leadership to take up the Senate bill. (House leadership failed to do so.)

Congress needs to eliminate this program, and there is wide bipartisan agreement to do so.

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Department of Commerce

Eliminate the Hollings Manufacturing Extension Partnership

RECOMMENDATION

Eliminate the Hollings Manufacturing Extension Partnership.

RATIONALE

The Hollings Manufacturing Extension Partnership is a federally funded management consulting operation directed at manufacturers. It is managed by the National Institute of Standards and Technology (NIST). The Hollings Manufacturing Extension Partnership provides subsidies to consultants, manufacturers, and business advisers with the goal of improving the business practices of small and medium-size businesses. The government should not play a role in the development of business. Federal involvement distorts market outcomes and picks winners and losers among businesses—which is corporate welfare, pure and simple, and should end.

Eliminate the International Trade Administration

RECOMMENDATION

Eliminate the International Trade Administration (ITA).

RATIONALE

The ITA serves as a sales department for certain businesses, and promotes investment in the U.S., offering taxpayer-funded subsidies for businesses that promote their products overseas. Promoting U.S. exports is also a task carried out by the Department of Agriculture and the State Department, causing large areas of government overlap. One ITA program is the International Buyer Program (IBP) through which the ITA sets up a space "where foreign buyers can obtain assistance in identifying potential business partners, and meet with U.S. companies to negotiate and close deals." Private companies should facilitate their own business meetings or do so through voluntary trade associations—not on the taxpayers' dime.

Furthermore, the ITA's protectionist policies, including antidumping and countervailing duty laws, interfere with free trade and drive up costs for both consumers and businesses, and merit being eliminated. At the very least, if they are not fully repealed, the antidumping and countervailing duty statutes should be fully rewritten to eliminate their current protectionist orientation and align them with free-market principles. If that is done, authority to make dumping and countervailing duty findings based on market principles should be transferred to the U.S. International Trade Commission, a more neutral independent agency that is already charged with deciding whether domestic companies are being injured by foreign dumping or subsidies.

ADDITIONAL READING

- Michael Sargent, Romina Boccia, Emily J. Goff, David B. Muhlhausen, and Hans A. von Spakovsky, "Cutting the Commerce, Justice, and Science Spending Bill by $2.6 Billion: A Starting Point," Heritage Foundation *Issue Brief* No. 4220, May 12, 2014.
- Alden F. Abbott, "U.S. Antidumping Law Needs a Dose of Free-Market Competition," Heritage Foundation *Backgrounder* No. 3030, July 17, 2015.

Eliminate the Economic Development Administration

RECOMMENDATION

Eliminate the Economic Development Administration (EDA).

RATIONALE

The EDA provides taxpayer money and technical assistance to economically distressed areas in the form of "grants" and "investments" for local projects, including the private sector. The EDA uses taxpayer dollars to target local political pet projects with a very narrow benefit—in many cases for just one particular company or small segment of the population. The EDA is just one of about 180 federal economic development programs, including the Small Business Administration's disaster assistance loans, the Agriculture Department's rural development programs, and others that Congress should eliminate.

ADDITIONAL READING

- U.S. Government Accountability Office, "Economic Development Administration: Documentation of Award Selection Decisions Could Be Improved," GAO-14-131, February 6, 2014.

Eliminate the Minority Business Development Agency

RECOMMENDATION

Eliminate the Minority Business Development Agency.

RATIONALE

The Minority Business Development Agency hands out grants and runs federally funded management consulting operations, called business centers, in over 40 locations. Part of the Department of Commerce, the Minority Business Development Agency helps businesses identify and respond to federal procurement opportunities. By targeting certain racial and ethnic groups for special government assistance, the agency is one key component of the federal government's affirmative action approach. The federal government should not provide special assistance to businesses to procure federal contracts; neither should the federal government base such assistance on racial or ethnic considerations.

Eliminate the National Network for Manufacturing Innovation

RECOMMENDATION

Eliminate the National Network for Manufacturing Innovation (also called Manufacturing USA).

RATIONALE

Manufacturing USA is an interagency initiative made up of public-private partnerships that "bring together innovative manufacturers, university engineering schools, community colleges, federal agencies, non-profits, and regional and state organizations to invest in unique, but industrially relevant, manufacturing technologies with broad applications." The Manufacturing USA network is operated by the interagency Advanced Manufacturing National Program Office, which is headquartered in the National Institute of Standards and Technology, in the Department of Commerce. It doles out money to politically connected businesses and universities to undertake commercial research and development at taxpayer expense. The program should be terminated.

Eliminate Census Bureau Funding for the Annual Supplemental Poverty Measure Report

RECOMMENDATION

Eliminate U.S. Census Bureau funding for the annual supplemental poverty measure (SPM) report.

RATIONALE

The SPM is a relative poverty measure; rather than determining whether a household is poor based on its income, as the official U.S. poverty measure does, the SPM determines a household's poverty status by comparing its income to the income of other households. The SPM undergirds a "spread-the-wealth" agenda, and it should be eliminated.

ADDITIONAL READING

- Robert Rector and Rachel Sheffield, "Obama's New Poverty Measure 'Spreads the Wealth,'" Heritage Foundation *Commentary*, November 9, 2011.

Eliminate National Telecommunications and Information Administration Grant Programs

RECOMMENDATION

Eliminate the National Telecommunications and Information Administration's (NTIA's) grant programs. In addition, reconstitute the NTIA as an independent executive branch establishment outside the Commerce Department, and transfer the Federal Communication Commission's remaining regulatory functions (including private-sector-spectrum management as well as policy and Communications Act enforcement) to the newly independent NTIA.

RATIONALE

The NTIA oversees $4 billion in grant programs (many already fully funded under the American Recovery and Reinvestment Act of 2009) that support broadband deployment projects within individual states, as well as a $121.5 million program designed to assist regional, state, local, and tribal government entities as they plan for a nationwide public safety broadband network. Federal taxpayer funding of broadband projects is unjustifiable, as market-driven broadband deployment has proceeded rapidly in recent years. (If anything, government-sponsored broadband initiatives, many of which occur at the municipal level, may compete unfairly with private-sector projects, leading to reduced competition as well as the waste of taxpayer monies.)

The National Weather Service (NWS) provides information and services to news media, airlines, the merchant marine and others that have value. Recipients and beneficiaries of this information and these services would pay for them. Thus, the NWS could become self-sustaining. The Commerce Department should study the feasibility of privatizing the NWS.

Conduct a Comprehensive Review of NOAA's Grant-Making Programs

RECOMMENDATION

Conduct a comprehensive review of the National Oceanic and Atmospheric Administration's (NOAA's) extensive grant-making programs.

RATIONALE

NOAA is an umbrella agency for a number of smaller agencies, the most prominent of which is the National Weather Service. Others include the National Environmental Satellite, Data, and Information Service, the National Marine Fisheries Service, the National Ocean Service, the Office of Marine and Aviation Operations, and the Office of Oceanic and Atmospheric Research. NOAA accounts for over three-fifths of the Commerce Department budget.

NOAA conducts or funds research on climate, weather, oceans, and coasts. It regulates coastal and marine fisheries and seeks to protect endangered marine species and habitats. Some of these grant-making programs are warranted, but many are slush funds to conduct politically motivated research and to reward or fund political allies.

Department of Defense

Cut Non-Defense Programs from the Defense Budget

RECOMMENDATION

The Secretary of Defense should establish a team focused on improving the mission effectiveness of the Department of Defense (DOD). A small, high-caliber team should focus on reform as a means, not of saving money, but of improving how efficiently the DOD achieves its mission.[1] Priorities should be to identify excess infrastructure across DOD installations,[2] eliminate non-defense programs in the DOD budget, and focus funding on rebuilding U.S. military strength.[3]

RATIONALE

The size and strength of the U.S. military declined dramatically since the passage of the Budget Control Act of 2011 (BCA). In order to rebuild the military in a constrained fiscal environment, the Trump Administration should optimize spending decisions to minimize waste and ensure that limited funds are directed toward the DOD's highest priorities.

Military leaders have documented 22 percent excess infrastructure across DOD installations.[4] Maintaining this excess costs billions of dollars per year. This is funding that could be directly applied to DOD priority needs, including training and procurement of weapon systems.[5]

Congress and previous Administrations have used DOD funding to sponsor programs unrelated to military capabilities. These programs, including non-defense medical research, "civil-military programs," the Junior Reserve Officer's Training Corps, and Obama-era energy and environmental initiatives, do not benefit military service members, nor do they contribute to national security requirements.

The DOD should focus on providing a sufficiently large, modern, and combat-ready military force to protect the vital interests of the United States.[6] Improving efficiencies and decreasing waste can put some money back in DOD pockets, and those savings should be shifted to higher priority defense programs to help achieve a stronger national defense. However, savings alone will not be enough to rebuild the military.[7] In its review of executive branch departments and agencies, the Trump Administration should evaluate U.S. defense requirements, and submit a budget request that reflects those requirements.

ADDITIONAL READING

- Thomas Spoehr and Rachel Zissimos, "Preventing a Defense Crisis: The 2018 National Defense Authorization Act Must Begin to Restore U.S. Military Strength," Heritage Foundation *Backgrounder* No. 3205, March 29, 2017.

ENDNOTES

1. "Blueprint for a New Administration: Priorities for the President," The Heritage Foundation, November 1, 2016, http://www.heritage.org/conservatism/report/blueprint-new-administration-priorities-the-president.
2. Ibid.
3. Thomas Spoehr and Rachel Zissimos, "Preventing a Defense Crisis: The 2018 National Defense Authorization Act Must Begin to Restore U.S. Military Strength," Heritage Foundation *Backgrounder* No. 3205, March 29, 2017, http://www.heritage.org/defense/report/preventing-defense-crisis-the-2018-national-defense-authorization-act-must-begin.
4. U.S. Department of Defense, "Department of Defense Infrastructure Capacity," March 2016, http://defensecommunities.org/wp-content/uploads/2015/01/2016-4-Interim-Capacity-Report-for-Printing.pdf (accessed March 9, 2017).
5. Spoehr and Zissimos, "Preventing a Defense Crisis."
6. "Blueprint for a New Administration: Priorities for the President," The Heritage Foundation.
7. "A Blueprint for Balance: A Federal Budget for 2017," The Heritage Foundation, February 23, 2017, http://www.heritage.org/budget-and-spending/report/blueprint-balance-federal-budget-2017.

Department of Education

Streamline Department of Education Program Office Structure to Better Coordinate Services

RECOMMENDATION

In order to better coordinate services, the President and Congress should consolidate Department of Education agencies and White House initiatives that have similar missions:

1. Transition the Performance Improvement Office, Risk Management Service, and Office of Small and Disadvantaged Business Utilization into the Office of Management and into a public-private partnership;
2. Eliminate the Office of Educational Technology;
3. Scale back the Office for Civil Rights;
4. Consolidate the Office of Innovation and Improvement into the Office of Elementary and Secondary Education;
5. Transition the Office of English Language Acquisition and the International Affairs Office into a public-private partnership;
6. Consolidate the Office of Career, Technical, and Adult Education with the Office of Postsecondary Education;
7. Consolidate the White House Initiative on Educational Excellence for African Americans, the White House Initiative on Asian Americans and Pacific Islanders, the White House Initiative on Educational Excellence for Hispanics, the White House Initiative on Historically Black Colleges and Universities, the White House Initiative on American Indian and Alaskan Native Education, and the Center for Faith-Based and Neighborhood Partnerships into a single office of outreach.

RATIONALE

Consolidating offices can help better coordinate services while reducing duplication of services. Offices such as the Office of Technology are not the appropriate function of the federal government, and should be eliminated. Over the years, the federal Department of Education has grown in size and scope, interfering to a greater and greater extent with local school policy while failing to improve the educational outcomes of students. That growth has rendered state departments of education and local school districts mere compliance mechanisms to Washington. Streamlining the Department of Education by merging some program offices and eliminating others will help better serve students by focusing the department on core agency functions.

ADDITIONAL READING

- Lindsey M. Burke, "Reducing the Federal Footprint on Education and Empowering State and Local Leaders," Heritage Foundation *Backgrounder* No. 2565, June 2, 2011.

Eliminate Competitive and Project Grant Programs and Reduce Formula-Grant Spending

RECOMMENDATION

Congress should eliminate competitive and project grant programs that fall under the Every Student Succeeds Act (ESSA), and reduce spending on formula-grant programs managed by the Department of Education by 10 percent.

RATIONALE

If the federal government is to continue spending money on this quintessentially state and local function, federal policymakers should limit and better target education spending by streamlining the existing labyrinth of federal education programs. Federal competitive grant programs authorized under the Elementary and Secondary Education Act (ESEA), now known as ESSA, should be eliminated, as they are duplicative and ineffective, and federal spending should be reduced to reflect remaining formula programs authorized under Title I of ESSA and the handful of other programs that do not fall under the competitive or project grant category. Remaining programs managed by the Department of Education, such as large formula-grant programs for K–12 education, should be reduced by 10 percent.

Since the 1970s, inflation-adjusted per pupil federal education spending has nearly tripled. Spending increases reflect the number of federal education programs that have amassed over the decades. ESSA—just one federal education law—authorizes dozens of competitive and formula-grant programs, many of which are redundant and ineffective. The numerous federal education programs have not only failed to improve K–12 education nationally, but have levied a tremendous bureaucratic compliance burden on states and local school districts. In order to stop the federal education spending spree, and to ensure that state and local school leaders focus on meeting the needs of students and parents—not on satisfying federal bureaucrats—program count and associated federal spending should be curtailed.

ADDITIONAL READING

- Lindsey M. Burke, "How the A-PLUS Act Can Rein in the Government's Education Power Grab," Heritage Foundation *Backgrounder* No. 2858, November 14, 2013.
- Lindsey M. Burke, "Reducing the Federal Footprint on Education and Empowering State and Local Leaders," Heritage Foundation *Backgrounder* No. 2565, June 2, 2011.

Eliminate New ESSA Programs

RECOMMENDATION

Congress should eliminate new programs added under the Every Student Succeeds Act (ESSA).

RATIONALE

Although ESSA (the most recent reauthorization of the ESEA) eliminated roughly two dozen programs, most of those programs were shell programs that had not been funded since 2013 or earlier. When considering just those programs that actually had funding behind them, ESSA eliminated only two that had been funded under No Child Left Behind in recent years. It also added several new federal programs. Newly added programs increase federal intervention in K–12 education, including Preschool Development Grants (which will be managed by the Department of Health and Human Services) and Presidential and Congressional History Teaching Academies, and should be eliminated.

ADDITIONAL READING

- Lindsey M. Burke, The Every Student Succeeds Act: More Programs and Federal Intervention in Pre-K and K-12 Education, Heritage Foundation *Backgrounder* No. 3085, December 2, 2015.

Reduce Funding for the Department of Education Office for Civil Rights

RECOMMENDATION

Congress should reduce the Department of Education Office for Civil Rights (OCR) budget by 50 percent.

RATIONALE

The OCR is tasked with ensuring equal access to education and enforcing civil rights laws. In recent years, it has abused its power by interpreting "sex" to mean "gender identity" for purposes of enforcing Title IX, essentially rewriting the law to require access to intimate facilities, dorms, and sports programs to students based not on biology, but on self-declared gender identity. Furthermore, the OCR has violated the principles of due process by requiring an unfairly low burden of proof for adjudicating claims of sexual harassment or assault, and making it exceedingly difficult for the accused to defend themselves. Schools are threatened with the loss of federal funding if they do not cave to these one-size-fits-all policies. The OCR's actions undermine the rule of law and prevent Americans from being able to make policies that will best serve all members of their communities. Its budget should be significantly cut.

ADDITIONAL READING

- Ryan T. Anderson, "Obama Unilaterally Rewrites Law, Imposes Transgender Policy on Nation's Schools," The Daily Signal, May 13, 2016.
- Samantha Harris, "Campus Judiciaries on Trial: An Update from the Courts," Heritage Foundation *Legal Memorandum* No. 165, October 6, 2015.

Eliminate the Parent and Graduate PLUS Loan Programs

RECOMMENDATION

Congress should eliminate Parent and Graduate Parent Loan for Undergraduate Students (PLUS) loans.

RATIONALE

Parent PLUS loans are available to parents of undergraduate students; they are able to borrow up to the cost of attendance at a given college. The loans are available in addition to federal loans that are already available to the students themselves. The availability of Parent PLUS loans, created in 1980, has resulted in families incurring substantial debt, while failing to ease the cost of college over time. Similarly, the Graduate PLUS loan program, open to graduate students who choose loans to finance graduate school, enables students to borrow up to the full cost of attendance. These programs have fueled borrowing and debt among students and their parents, while incentivizing colleges to raise costs. As a considerable driver of higher education costs that also shifts the burden of paying for defaults to the American taxpayer, the PLUS loan programs should be eliminated.

ADDITIONAL READING

- Jamie Hall and Mary Clare Reim, "Time to Reform Higher Education Financing and Accreditation," Heritage Foundation *Issue Brief* No. 4668, March 28, 2017.

Direct the Department of Education to Rescind the "Gainful Employment" Regulations

RECOMMENDATION

The Secretary of Education should direct the Department of Education to rescind the "gainful employment" regulations placed on for-profit higher education institutions.

RATIONALE

The Higher Education Act stipulates that in order to be eligible for federal student aid, colleges must prepare students for "gainful employment in a recognized occupation." The U.S. Department of Education aggressively promulgated rules concerning gainful employment during the Obama Administration, and on July 1, 2015, gainful employment regulations primarily affecting for-profit institutions went into effect. The rule could limit opportunities for non-traditional students in particular, who may choose a for-profit institution because of its flexibility and affordability. The Trump Administration should enable private for-profit and vocational colleges to continue to serve students who have been historically underserved by traditional universities by repealing the gainful employment regulations that took effect on July 1, 2015.

ADDITIONAL READING

- Lindsey M. Burke, "Reauthorizing the Higher Education Act—Toward Policies that Increase Access and Lower Costs," Heritage Foundation *Backgrounder* No. 2941, August 19, 2014.

Eliminate the Department of Education's 24 Regional and Field Offices

RECOMMENDATION

Congress should eliminate the 13 field offices and the 11 regional offices maintained by the U.S. Department of Education.

RATIONALE

In addition to its Washington, DC, headquarters, the Department of Education maintains 13 field offices and 11 regional offices. The field office staff largely works on issues that fall under the Office for Civil Rights, Federal Student Aid, and the Office of the Inspector General. Such regional and field offices may have been necessary before the advent of the Internet, but make little sense today. These offices should be eliminated.

Move Federal Student Aid to the Treasury Department

RECOMMENDATION

Congress should authorize the transfer of the federal student aid program from the Department of Education to the Department of the Treasury.

RATIONALE

The federal government should not be the first place to which borrowers turn for student loans. Yet today, more than 90 percent of all student loans originate and are serviced by the U.S. Department of Education, crowding out private lending, raising higher-education costs, and leaving taxpayers on the hook for defaults and generous loan-forgiveness programs. The Department of Education lends to as many students as possible, increasing its intervention in the student loan market while failing to ensure protection for American taxpayers when borrowers default on those loans.

Additionally, the Department of Education has an uneven track record of effectively collecting student debt. Transferring this responsibility to the Treasury Department should ensure that student debt is treated as such, while considerably downsizing the Department of Education.

ADDITIONAL READING

- Mary Clare Reim, "Private Lending: The Way to Reduce Students' College Costs and Protect America's Taxpayers," Heritage Foundation *Backgrounder* No. 3203, April 27, 2017.

Transition Impact Aid Funding into Education Savings Accounts

RECOMMENDATION

Congress should repurpose the $1.3 billion Impact Aid Program in education savings accounts (ESAs) for federally connected children and shift oversight and management of the repurposed Impact Aid program to the Department of Defense Education Activity (DODEA).

RATIONALE

Instead of filtering the $1.3 billion in federal Impact Aid funding to district schools, and then assigning students to those schools based on where their parents are stationed, Impact Aid dollars should be directed to eligible students. All Impact Aid dollars for federally connected children (largely comprised of military-connected children) should go directly into a parent-controlled ESA, which the family could then use to pay for any education-related service, product, or provider that meets the specific needs of the child. Oversight and management of the repurposed Impact Aid Program should be transitioned to the DODEA.

The schooling options for military-connected children can play a role in whether a family accepts an assignment, even factoring into decisions to leave military service altogether. Yet as important as education is to military parents, more than half of all active-duty military families live in states with no school choice options at all. The $1.3 billion federal Impact Aid Program, which was designed largely with military-connected children in mind, should be repurposed into student-centered ESAs to allow military families to exercise school choice. Since it pertains to the U.S. military, Impact Aid represents one of those few cases where federal involvement in education has a clear constitutional warrant.

ADDITIONAL READING

- Lindsey M. Burke and Anne Ryland, "A GI Bill for Children of Military Families: Transforming Impact Aid into Education Savings Accounts," Heritage Foundation *Backgrounder* No. 3180, June 2, 2017.

Department of Energy

Reduce Bureaucracy at the Department of Energy's National Laboratories

RECOMMENDATION

Reduce bureaucracy at the Department of Energy's (DOE's) national laboratories.

RATIONALE

The DOE national labs house exceptional staff and research facilities. The operating culture and business model of the national labs need to be transformed to engage more with the private sector. Increased access through contract agreements would unlock valuable research and resources for the private sector to develop advances in human knowledge and innovative technologies. It would also leverage private-sector investments to help maintain lab infrastructure.

However, both private-sector access to the labs' assets and research and lab employees' ability to turn research into market applications are stifled by complex and overly restrictive conflict-of-interest and intellectual-property-rights regulations. For example, current contract structures between labs and the private sector are rigid and complex, effectively discouraging private-sector engagement. Draconian intellectual-property rules are still on the books in some labs, acting as a disincentive to individuals with patents from working in related fields at a national lab.[1]

In order to increase access to national lab resources, DOE Secretary Rick Perry should:

- Adopt reforms to increase lab autonomy;
- Engage in contractual work with the federal government, private sector, nonprofits, and universities;
- Implement alternative financing options;
- Explore ways to consolidate overhead spending; and
- Encourage a strong culture in the labs of active engagement with the private sector.

More independence and flexibility at the national labs will extend the value of research funding and infrastructure. Furthermore, additional managerial and financial authority to the lab contractors would empower them to effectively manage capabilities and create a quicker process for collaborative efforts with third parties, whether with another government agency, another lab, or the private sector. Although these activities are occurring now, such cooperation should become part of the culture of the national labs rather than the occasional exception.

ADDITIONAL READING

- James Jay Carafano, Jack Spencer, Bridget Mudd, and Katie Tubb, "Science Policy: Priorities and Reforms for the 45th President," Heritage Foundation *Backgrounder* No. 3128, June 13, 2016.
- Nicolas Loris, "INNOVATES Act Creates a More Effective National Lab System," Heritage Foundation *Issue Brief* No. 4141, January 30, 2014.
- Katie Tubb, Nicolas Loris, and Jack Spencer, "DOE Reset: Focus the Department of Energy on Core Missions and Decrease Distractions," Heritage Foundation *Backgrounder* No. 3196, March 2, 2017.

Prioritize Office of Science Spending

RECOMMENDATION

Prioritize Office of Science spending.

RATIONALE

The DOE manages one of the largest research and development (R&D) budgets in the federal government.[2] While much of the DOE's R&D infrastructure grew out of a mission to support World War II and Cold War efforts, it has since lost focus. The DOE has become notorious for spending R&D resources on commercial energy technologies that may be promising but are nevertheless well beyond the constitutional role of the federal government. To carry out its programs of basic and applied research, the DOE has a National Laboratory system. Seventeen labs around the country conduct research to advance understanding and discovery in a variety of fields, including basic energy sciences, high-energy physics, fusion power, biological and environmental research, nuclear physics, and advanced scientific computing research.

The DOE should engage in R&D only when meeting a clear government objective and when the private sector is not already involved. Government objectives could, for instance, include research, development, and demonstration of technology to meet national security needs, support nuclear stockpile cleanup efforts, or advance human knowledge through basic research where the private sector is not engaged.

No matter how diligent or transparent an Administration is, federal funding for R&D beyond these basic conditions will pick winners and losers among companies and technologies. Activities with the purpose of commercialization, regardless of where they lie on the technological development spectrum, are not legitimate functions of the federal government.

Secretary Perry can move forward confidently with reform, knowing that the private sector is more than capable of financing R&D. According to the National Science Foundation:

- Total research and development funding in the U.S. was $456.1 billion in 2013, 65 percent of which came from the business sector.
- The federal government came in a distant second with $127.3 billion in R&D funding.[3]

The perception of spending within the Office of Science is that the federal government is allocating money to research that is basic and far removed from increasing the technological readiness of certain energy sources. In some instances, this is true; research at the national laboratories focuses on scientific discovery. Infrastructure at the national labs, such as the photon light source or the synchrotron light source, enables scientists to study the basic elements of matter, explore new scientific frontiers, and cultivate new discoveries. In other instances, however, the funded research may be basic in nature but has an end goal of creating a cost-effective alternative energy source. In such cases, Congress should call even the basic research into question. For instance, Congress tasks scientists at the DOE with studying the basic elements of biological matter but with the objective of creating a cost-effective biofuel—a policy priority that should not exist in the first place. Congress should eliminate all Office of Science spending on activities that are aimed at promoting specific energy sources and technologies.

ADDITIONAL READING

- James Jay Carafano, Jack Spencer, Bridget Mudd, and Katie Tubb, "Science Policy: Priorities and Reforms for the 45th President," Heritage Foundation *Backgrounder* No. 3128, June 13, 2016.
- Nicolas Loris, "INNOVATES Act Creates a More Effective National Lab System," Heritage Foundation *Issue Brief* No. 4141, January 30, 2014.
- Katie Tubb, Nicolas Loris, and Jack Spencer, "DOE Reset: Focus the Department of Energy on Core Missions and Decrease Distractions," Heritage Foundation *Backgrounder* No. 3196, March 2, 2017.

Eliminate the Office of Nuclear Energy

RECOMMENDATION

Eliminate the DOE Office of Nuclear Energy and shift funding for some of its programs to the Office of Science's Office of Civilian Radioactive Waste Management (OCRWM).

RATIONALE

The Office of Nuclear Energy aims to advance nuclear power in the U.S. and address technical, cost, safety, security, and regulatory issues. As is the case with spending on conventional fuels and renewables, it is not an appropriate function of the federal government to spend tax money on nuclear projects that should be conducted by the private sector. For example, the Office of Nuclear Energy includes tens of millions of dollars for small modular reactor (SMR) licensing and support programs. While SMRs have great potential, commercialization must be shouldered by the private sector. Government funding should be redirected to the Nuclear Regulatory Commission for SMR-licensing preparation. Work that clearly falls under basic R&D should be moved to the OCRWM.

Congress should reprogram some of the funds to reconstitute the statutorily required OCRWM, and support the Nuclear Regulatory Commission's license review of Yucca Mountain. Before the Obama Administration eliminated the OCRWM, the office was responsible for overseeing the DOE's activities for storage of nuclear waste from commercial nuclear power plants. In particular, the OCRWM managed the permit application for a deep geologic repository at Yucca Mountain. Despite the Obama Administration's refusal to support the program, the 1982 Nuclear Waste Policy Act, as amended, legally mandates that the DOE carry out a licensing process for a repository at Yucca Mountain in Nevada. Regardless of the ultimate fate of Yucca Mountain, completing the review makes all of the information available for how to proceed with the geologic repository. Ultimately, the DOE should work with Congress to initiate market reforms for long-term waste management, establishing industry responsibility for managing waste, market pricing, and giving Nevadaus more control over any nuclear waste facility there.

ADDITIONAL READING

- Katie Tubb, Nicolas Loris and Jack Spencer, "DOE Reset: Focus the Department of Energy on Core Missions and Decrease Distractions," Heritage Foundation *Backgrounder* No. 3196, March 2, 2017.

Eliminate the Office of Fossil Energy

RECOMMENDATION

Eliminate the Office of Fossil Energy (FE), eliminating DOE spending on all fossil-fuel-related activities and technologies.

RATIONALE

The federal government's involvement in fossil energy dates back more than a century. After the Department of Energy's creation in 1977, fossil energy programs fell under the Assistant Secretary for Energy Technology, and two years later, the fossil energy program was created with an Assistant Secretary of its own.[4] Through FE, the federal government has spent billions of dollars on fossil-fuel research and development, including funding for unconventional oil, gas, and coal exploration. FE spends money on a clean-coal power initiative, fuels and power systems to reduce fossil power plant emissions, innovations for existing plants, integrated-gasification-combined-cycle (IGCC) research, advanced turbines, carbon sequestration, and natural gas technologies. Part of the DOE's strategic plan is to bring down the cost and increase the scalability of carbon-and-capture sequestration. FE also authorizes imports and exports of natural gas and manages the government-controlled stockpile of oil, the Strategic Petroleum Reserve.

Coal, oil, and natural gas provide nearly 80 percent of America's energy needs and more than 80 percent of the world's energy needs. Each year, fossil fuel companies operating in the United States and Canada alone stand to make hundreds of billions of dollars in profits.[5] These companies can invest their own money to innovate and meet consumers' energy needs. The federal government has already wasted money attempting to commercialize carbon-capture-and-sequestration technology and should not throw good money after bad. Proponents of government funding for energy technologies argue that the DOE was integral in promoting the hydraulic fracturing (fracking) revolution in the United States.[6] Though the government assisted in the fracking boom and helped George Mitchell, the pioneer of fracking, it is a mistake to attribute the company's success to the DOE role. If anything, the money spent by the DOE was a subsidy to Mitchell Energy, a company destined for a large-scale success. As former vice president of Mitchell Energy, Dan Steward said, "George probably could have done it without the government. The government would not have done it without George."[7] No matter what role the federal government played in any company's success, it does not justify the legitimacy of the spending or future spending. The office should be eliminated.

ADDITIONAL READING

- James Jay Carafano, Jack Spencer, Bridget Mudd, and Katie Tubb, "Science Policy: Priorities and Reforms for the 45th President," Heritage Foundation *Backgrounder* No. 3128, June 13, 2016.
- Nicolas D. Loris, "Department of Energy Budget Cuts: Time to End the Hidden Green Stimuls," Heritage Foundation *Backgrounder* No. 2668, March 26, 2012.

Liquidate the Strategic Petroleum Reserve

RECOMMENDATION

Liquidate the Strategic Petroleum Reserve (SPR) and other petroleum reserves.

RATIONALE

As part of the U.S. commitment to the International Energy Agency, the federal government created the SPR through the Energy Policy and Conservation Act (EPCA) in 1975.[8] Congress initially authorized the SPR to store up to one billion barrels of petroleum products, and mandated a minimum of 150 million barrels of petroleum products.[9] The SPR, which opened in 1977, currently has the capacity for 727 million barrels of crude oil and currently holds 685 million barrels.[10]

Created in response to the Arab oil embargo and the creation of OPEC in the 1970s, the SPR has been a futile tool for responding to supply shocks. The free market is much more effective at responding to price signals. The United States is awash in natural resources and holds more crude and petroleum products in private inventory than it does under government control. Furthermore, prices play a critical role in the market by efficiently allocating resources to their highest valued use. Whether a shortage or a surplus exists, the federal government should not distort the role of price signals.

Congress should authorize the DOE to sell off the entire reserve, specifying that the revenues go solely toward deficit reduction. Congress should instruct the DOE to sell the oil held by the SPR by auctioning 10 percent of the country's previous month's total crude production until the reserve is completely depleted. The DOE should then decommission the storage space or sell it to private companies.

Similarly, Congress should also authorize the depletion of the Naval Petroleum & Oil Shale Reserves.

ADDITIONAL READING

- Nicolas D. Loris, "Why Congress Should Pull the Plug on the Strategic Petroleum Reserve," Heritage Foundation *Backgrounder* No. 3046, August 20, 2015.

Eliminate the Advanced Research Projects Agency-Energy

RECOMMENDATION

Eliminate the Advanced Research Projects Agency-Energy (ARPA-E).

RATIONALE

ARPA-E, which President George W. Bush created through the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act in 2007,[11] spends money on high-risk, high-reward energy projects in which the private sector ostensibly would not invest on its own. ARPA-E's mission is to reduce energy imports, increase energy efficiency, or reduce energy-related emissions, including greenhouse gases. Congress allocated $400 million to ARPA-E in FY 2009 and the program has funded more than 400 projects since its initial funding. Some of the successes of the program that the DOE identifies are that it:

- Developed a 1 megawatt silicon carbide transistor the size of a fingernail;
- Engineered microbes that use hydrogen and carbon dioxide to make liquid transportation fuel; and
- Pioneered a near-isothermal compressed air energy storage system.[12]

ARPA-E has experience several problems. The purpose of ARPA-E is to fund technologies through the alleged investment valley of death where good ideas cannot secure private finance. However, the Government Accountability Office found that 18 projects previously received private-sector investment for a similar technology and 12 companies received private-sector funding prior to their ARPA-E award.[13] A DOE Inspector General (IG) report also found that taxpayer money spent under ARPA-E was used for "meetings with bankers to raise capital" and a "fee to appear on a local television show." The DOE IG noted in its report that ARPA-E cited the two tasks as allowable costs under its Technology Transfer and Outreach policy.[14]

More problematic than the flaws of the program, however, is the legitimacy of the program. ARPA-E is not a legitimate function of the federal government. The number of investment opportunities is broad and expansive, but the capital to finance them is not. This requires that choices be made among the different investments. Whether a technology ultimately fails or succeeds, it is not the role of the federal government to skew those decisions through programs like ARPA-E. Good investment ideas will overcome the investment valley of death through private financing. ARPA-E should be eliminated.

ADDITIONAL READING

- James Jay Carafano, Jack Spencer, Bridget Mudd, and Katie Tubb, "Science Policy: Priorities and Reforms for the 45th President," Heritage Foundation *Backgrounder* No. 3128, June 13, 2016.
- Nicolas D. Loris, "Department of Energy Budget Cuts: Time to End the Hidden Green Stimulus," Heritage Foundation *Backgrounder* No. 2668, March 26, 2012.

Eliminate the DOE Loan Programs Office

RECOMMENDATION

Eliminate the Loan Programs Office and transfer existing loan management and oversight to private banks.

RATIONALE

The DOE has a loan portfolio that includes Sections 1703 and 1705 of the Loan Guarantee Program[15] and the Advanced Technology Vehicles Manufacturing (ATVM) loan program. The 1703 loan guarantee, created under the Energy Policy Act of 2005, offers taxpayer-backed loans for politically preferred sources of energy, including "biomass, hydrogen, solar, wind/hydropower, nuclear, advanced fossil energy coal, carbon sequestration practices/technologies, electricity delivery and energy reliability, alternative fuel vehicles, industrial energy efficiency projects, and pollution control equipment."[16] The ATVM program, established in Section 136 of the Energy Independence and Security Act of 2007, provides direct loans for alternative-vehicle technologies and for manufacturers to retool their factories to produce qualifying vehicles.[17]

- Several patterns and problems stand out throughout the portfolio, which are discussed in more detail following the review of each project. When analyzing all of the projects, the following themes are pervasive:
- Failed companies that could not survive even with the federal government's help.
- Projects labeled as success stories but are still in the infancy of their operation. It is too early to tell if they will succeed in the long run.
- Projects that have the backing of companies with large market capitalizations and substantial private investors. These companies should have no trouble financing a project without government-backed loans if they believe it is worth the investment.
- Private investors hedging their bets and congregating toward public money. These projects appear on the surface to be financial losers, but government involvement entices companies to take a chance on them.
- Companies and projects that benefit from a plethora of federal, state, and local policies that push renewable energy.
- Government incompetence in administering and overseeing the loans.

Eliminating the Loan Programs Office would revoke any existing ability to administer government-backed loans or loan guarantees. Congress should empower the Secretary to auction the servicing rights of existing loans and loan guarantees to private banks.

ADDITIONAL READING

- Nicolas D. Loris, "Examining the Department of Energy's Loan Portfolio," testimony before the Subcommittee on Energy and Subcommittee on Oversight, Committee on Science, Space and Technology, U.S. House of Representatives, March 3, 2016.

Eliminate the Office of Electricity Deliverability and Reliable Energy

RECOMMENDATION

Eliminate the Office of Electricity Deliverability and Reliable Energy (OE).

RATIONALE

In 2003, the DOE created the Office of Electric Transmission and Distribution to advance and modernize America's power grid, and an Office of Energy Assurance to coordinate federal responses during energy emergencies.[18] In 2005, the DOE merged the offices and established the Office of Electricity Delivery and Energy Reliability. Under the Obama Administration, through the American Recovery and Reinvestment Act of 2009, OE spent $4.5 billion to promote electric vehicles, renewable energy, and grid modernization. OE focuses on advanced grid technology R&D, transmission permitting and assistance for states and tribes, infrastructure security, and cybersecurity R&D.

While upgrading the nation's electricity grid to enable more competition and innovation, investment should occur at private, local, state, and regional levels. OE's role is redundant with the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), regional independent system operators (ISOs), and the private sector. Rather than subsidizing advanced renewable energy resources or smart-grid technology, the federal government's role should be to reduce unnecessary regulatory burden on grid siting and upgrades. National security concerns, for example in cybersecurity or for a cooperative public–private role for grid protection, could very well fall under the Department of Homeland Security's purview. The office should be eliminated.

ADDITIONAL READING

- Steven P. Bucci, Paul Rosenzweig, and David Inserra, "A Congressional Guide: Seven Steps to U.S. Security, Prosperity, and Freedom in Cyberspace," Heritage Foundation *Backgrounder* No. 2785, April 1, 2013.
- Nicolas D. Loris, "Department of Energy Budget Cuts: Time to End the Hidden Green Stimulus," Heritage Foundation *Backgrounder* No. 2668, March 26, 2012.

Privatize the Power Marketing Administrations and the Tennessee Valley Authority

RECOMMENDATION

The federal government should not be in the business of managing and selling power. The Trump Administration should state that the missions of the four power marketing administrations (PMAs) and the Tennessee Valley Authority (TVA) have been completed, and propose legislation to Congress for the sale of PMA power-generation assets and the TVA to the private sector. It should also end appropriations to the PMAs and any new borrowing privileges from the Treasury Department.

The DOE should prepare legislation for transmittal to Congress to achieve the sale and begin collecting information on each PMA needed for prospective bidders.

RATIONALE

The four PMAs—(1) the Southeastern Power Administration, (2) the Southwestern Power Administration, (3) the Western Area Power Administration, and (4) the Bonneville Power Administration—and the TVA, a federal corporation, were intended to provide cheap electricity to rural areas, development in economically depressed regions, and to pay off federal irrigation and dam construction. They operate electricity generation, reservoirs, land, waterways, and locks. They sell deeply subsidized power to municipal utilities and cooperatives in their regions that include the Southeast and West.

Three of the four PMAs are funded annually by appropriations to the Department of Energy; the Bonneville Power Administration and TVA are self-financed. The PMAs use revenues generated from electricity sales to reimburse construction and operation costs financed and subsidized by taxpayers through DOE appropriations and Treasury loans at below-market interest rates. They also are exempt from federal and state taxes and many other federal regulations, including antitrust and labor regulations.

The four PMAs and TVA are outmoded forms of providing rural areas with electricity. First, their mission has more than been completed. The PMAs now supply power to areas like Los Angeles, Vail, and Las Vegas, and the region serviced by the TVA has long been economically competitive with neighboring states since the Great Depression when the TVA was conceived.

Second, electric power generation and distribution is a private-sector function and has been for decades. The federal government should not be in the business of generating and distributing electric power and in the process providing subsidized power to politically favored groups at the cost of U.S. taxpayers.

Third, political management has had unintended economic and environmental consequences. Subsidized loans from the Treasury Department, and tax exemption privileges, have interfered with market competition. The PMAs' funding mechanism also provides little or no incentive to innovate, as investments must be justified to and financed by the government. In the case of the TVA, lack of effective oversight from either the private sector or government has resulted in costly decisions, environmental damage, excessive expenses, high electricity rates, and growing liabilities for all U.S. taxpayers.[19] It has not reduced its taxpayer-backed debt despite three major debt-reduction efforts in recent history.

The Reagan and Clinton Administrations attempted to divest the PMAs, and the Clinton Administration was successful in privatizing the Alaska Power Administration. Its FY 1996 budget request recommended privatizing all but Bonneville, with expected proceeds of $3.7 billion,[20] and proposed legislation for privatizing Southeastern in FY 1997, and Southwestern and Western Area in FY 1998. A November 1997 Congressional Budget Office report valued them at $23 billion to $31 billion.[21]

ADDITIONAL READING

- Ken G. Glozer, "Time for the Sun to Set on the Tennessee Valley Authority," Heritage Foundation *Backgrounder* No. 2904, May 6, 2014.

Privatize the Energy Information Administration

RECOMMENDATION

Congress should privatize the Energy Information Administration (EIA).

RATIONALE

The EIA is a relic of policies responding to the 1970s energy crisis.[22] It collects and publishes data on energy sources and trends "to promote sound policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment." The EIA provides information on the sources and uses of energy technologies, market trends and forecasts, short-term and annual energy outlooks, production and consumption trends, environmental data, state-level data, and international data.

The EIA provides quality data on energy markets, but that does not need to be a function of the federal government. Members of Congress do not need information on energy market trends to create sound policy. In fact, the federal government should have a minimal, if any, role in energy markets. Further, information has value. Investors who need this information can and do obtain it from private parties. Should the federal government need information on energy markets, it can pay for it as well.

ADDITIONAL READING

- The Heritage Foundation, *Blueprint for Reform: A Comprehensive Policy Agenda for a New Administration in 2017*, July 14, 2016, pp. 50 and 51.

End Executive Branch Use of the "Social Cost of Carbon" Metrics

RECOMMENDATION

To improve the accountability and accuracy of agency regulatory impact analyses, all executive branch departments and agencies should cease use of social cost of carbon (SCC) metrics and revisit existing regulations that employed them. This is consistent with the President's executive order dated January 27, 2017.

RATIONALE

In response to a 2008 federal court decision, agencies began incorporating the social cost of greenhouse gases in regulatory cost-benefit analyses.[23] So-called social costs of carbon dioxide, methane, and nitrous oxides attempt to assign a dollar value to emissions as an alleged cost to society, on the premise that emissions exacerbate dangerous amounts of global warming over the next 300 years.[24] These metrics amplify the benefits of regulations that decrease greenhouse gas (GHG) emissions and the costs of government actions that increase emissions. The DOE has used SCC in regulations more than any other federal agency, particularly in setting energy-efficiency regulations, but SCC and GHG metrics are also employed by the Environmental Protection Agency and the Departments of Agriculture, Housing and Urban Development, the Interior, and Transportation.[25]

Wildly different estimates for these metrics result from minor adjustments to the underlying models. For example, using the Office of Management and Budget recommended discount rate of 7 percent and more recent equilibrium climate-sensitivity distributions[26] can yield negative values for these metrics, indicating that emissions are a net *benefit* to society.[27] Because the underlying modeling assumptions of these metrics are arbitrary and employ outdated climate data, using these metrics miscommunicates projected costs and benefits of regulations and other government actions.

ADDITIONAL READING

- Kevin D. Dayaratna, "An Analysis of the Obama Administration's Social Cost of Carbon," testimony before the Committee on Natural Resources, U.S. House of Representatives, July 23, 2015.
- Kevin D. Dayaratna and Nicolas D. Loris, "Rolling the DICE on Environmental Regulations: A Close Look at the Social Cost of Methane and Nitrous Oxide," Heritage Foundation *Backgrounder* No. 3184, January 19, 2017.

Eliminate the Office of Energy Efficiency and Renewable Energy

RECOMMENDATION

Eliminate the Office of Energy Efficiency and Renewable Energy (EERE), considering the mission of all research, development, and demonstration programs to be completed. Until Congress reforms the Energy Conservation and Production Act, such as proposed in the Energy Efficiency Free Market Act,[28] the DOE should meet the minimum requirements of the law while refraining from tightening existing efficiency standards or creating testing procedures or standards for additional ones.

RATIONALE

The DOE's EERE houses research, development, and demonstration programs for hydrogen technology, wind energy, solar energy, biofuels and bio-refineries, geothermal power, advanced manufacturing, vehicle technology, and building and weatherization technologies. It further collaborates with the private sector to inform energy-efficiency provisions in building codes and implements the Energy Policy and Conservation Act of 1975.

These functions are redundant with activities by and information from the private sector and states. The federal government should have no role in energy efficiency outside the scope of improving the efficiency of federal facilities.[29] Efficiency regulations take away consumer choice hy prioritizing the DOE's definition of energy efficiency over other preferences of customers and businesses, such as safety, size, convenience, and durability. They also ignore and undermine the natural incentive of customers and businesses to move toward efficiency. Thanks to advances in technology, Americans have become almost 60 percent more energy efficient over the past half century.[30]

Further, most of the technologies in which EERE is engaged have existed for decades, and market opportunities for clean-energy investments abound in the United States and abroad. DOE interference in renewable technology commercialization or energy markets directs private-sector investment toward politically preferred technologies, potentially narrowing the scope of innovation.[31] These programs also harm the long-term health of the very industries the government intends to help by propping up companies and technologies that are less competitive, and rewarding political connections rather than innovation.[32]

Government funding for commercial energy technology research, development, and demonstration was never appropriate and is now even less necessary. Many of the programs initiated under EERE were developed under the premise that the U.S. lacked domestic supplies of energy resources. The Solar Energy Research, Development, and Demonstration Act of 1974 was intended to address a perceived extreme shortage in domestic energy supplies and investment in solar technology with $1 billion from the federal government.[33] This work should be considered accomplished.

Regardless of any energy shortage in 1974, that certainly does not accurately describe energy markets today: America is experiencing an energy revolution in traditional fuels, there are over 9,000 solar companies in the U.S.,[34] and U.S. renewable energy infrastructure investments totaled $59 billion in 2016.[35] Adequate funding also exists for science and technology R&D. According to the National Science Foundation, the business sector funded $297.3 billion in research and development in science and technology, or 65 percent of the total $456.1 billion spent in 2013.[36]

Rather than a value statement on the merit of renewable energy technologies, closing out EERE activities is a recognition of the appropriate roles of the federal government, states, and the private sector. Doing so will also enable the DOE to better focus on what ought to be its central focus—maintaining the nuclear weapons complex and nuclear clean-up.[37]

ADDITIONAL READING

- James Jay Carafano, Jack Spencer, Bridget Mudd, and Katie Tubb, "Science Policy: Priorities and Reforms for the 45th President," Heritage Foundation *Backgrounder* No. 3128, June 13, 2016.
- Nicolas D. Loris, "Department of Energy Budget Cuts: Time to End the Hidden Green Stimulus," Heritage Foundation *Backgrounder* No. 2668, March 26, 2012.
- Nicolas D. Loris, "Examining the Department of Energy's Loan Portfolio," testimony before the Subcommittees on Energy and Oversight, Committee on Science, Space, and Technology, U.S. House of Representatives, March 3, 2016.

Focus National Nuclear Security Administration Spending on Weapons Programs

RECOMMENDATION

The Administration should halt growth in DOE National Nuclear Security Administration (NNSA) programs that do not directly contribute to advancing the country's nuclear weapons programs. The primary goal of the NNSA must be to prioritize funding that keeps the U.S. nuclear weapon stockpile safe, secure, and reliable.

RATIONALE

The DOE is responsible for the Navy's nuclear reactors program and the weapons activities program. Nuclear warheads themselves are operated by the Defense Department. Each year, the DOE is allotted roughly between $16 billion and $17 billion to fund defense-related activities. This figure, however, includes funding for activities that do not directly contribute to the maintenance of the U.S. nuclear weapon stockpile but rather advance nonproliferation and arms control objectives, thus inflating the true cost of U.S. nuclear warhead-related activities. Instead of prioritizing activities related to creating conditions for a world without nuclear weapons—the previous Administration's misguided priority—the Trump Administration ought to emphasize programs that are directly related to U.S. nuclear warheads and disentangle them from other activities.

ADDITIONAL READING

- Michaela Dodge, "The Trump Administration's Nuclear Weapons Policy: First Steps," Heritage Foundation *Issue Brief* No. 4634, November 30, 2016.
- Michaela Dodge and Baker Spring, "Bait and Switch on Nuclear Modernization Must Stop," Heritage Foundation *Backgrounder* No. 2755, January 4, 2013.

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Environmental Protection Agency

Initiate Reorganization of the Environmental Protection Agency

RECOMMENDATION

The budget of the Environmental Protection Agency (EPA) is small relative to total federal spending, but its regulatory actions have enormous consequences, including the erosion of individual liberty and tremendous costs to the economy. Extensive reforms are needed to return the agency to a proper limited role. The following changes would constitute incremental progress toward that goal:

- Eliminate the Office of Public Engagement and Environmental Education, which is largely focused on generating agency propaganda;
- End the EPA's control of state funds for implementing regulatory dictates and to support environmental advocacy groups;
- Defund all agency activities related to the Renewable Fuel Standard, which constitutes a subsidy for the production and consumption of ethanol and other biofuels;[1]
- Close the EPA's 10 regional offices that micromanage states' environmental policies;
- Devolve to states all authority to manage Superfund cleanups; and
- Devolve to states all authority for implementation and enforcement of the Safe Drinking Water Act.

RATIONALE

The environment shows vast improvement by nearly every objective measure,[2] making the environmental statutes crafted 40 years ago largely obsolete. Reforms are needed that reflect today's cleaner conditions and technological innovations, and that account for the regulatory experience of the past four decades.

A major part of the problem with current policy is the centralization of regulatory power in Washington. But federal bureaucrats hardly possess sufficient information and expertise to impose controls on hundreds, if not thousands, of dissimilar locations across the 50 states.

Regulatory goals are often based on politics, not empiricism. Moreover, the EPA often fails to properly perform scientific analyses before imposing rules, and many of the analyses that are conducted are biased toward regulation. The agency has been thoroughly captured by environmental activists, politicians, and corporate interests.

OPEE. The EPA's Office of Public Engagement and Environmental Education (OPEE) prodnces curriculum and training materials that are highly politicized and contradict scientific principles. The Government Accountability Office determined that the agency engaged in covert propaganda aud violated federal anti-lobbying prohibitions with respect to its "waters of the United States" rulemaking.[3]

The office is also mismanaged: A report by the agency's Office of Inspector General concluded that the "OEE is significantly impaired in its ability to provide evidence of program results and benefits, manage the program to achieve results, or spot waste and abuse."[4]

Categorical Grants and Regional Offices. Many of America's environmental statutes were based on the principle of cooperative federalism, that is, shared responsibility between the federal government and the states. Over time, however, an excess of judicial deference and congressional delegation of lawmaking powers has turned the EPA from collaborator to dictator—including its control of billions of dollars in "categorical grants" doled out to states and special interests to carry out the agency's bidding.

The extent to which the EPA has abandoned any pretext of federalism is evident in its deep reach into local affairs, such as school curricula, and programs to "enhance the livability aud economic vitality of neighborhoods" and "promote more sustainable, healthier communities."[5]

States are better equipped to customize policies for local conditions, and land owners have greater incentives than the government to protect private property. Both groups can act regionally when there are cross-border components to environmental issues. There is no need for the EPA's 10 regional offices, which interfere with state conservation activities and expose citizens to regulatory redundancy.

A less-centralized regime would mean more direct accountability—taxpayers would have an easier time identifying the officials responsible for environmental policies, and the people making those regulatory decisions would have to live with the consequences. Property owners would be held accountable through common law.

Renewable Fuel Standard. Congress created the Renewable Fuel Standard to force refiners to blend gasoline with corn-based ethanol. Because of the artificial demand for corn and other biofuel "feedstocks," farmers devoted evermore acres to biofuel crops. The consequent reduction in U.S. supplies of soybeans and other displaced crops propelled commodity prices.

Biofuel mania is hardly environmentally benign. Researchers have documented the fact that the cultivation of corn for ethanol and other biofuel feed stocks substantially increases emissions of the greenhouse gases that are supposedly causing climate change. (The excess emissions result from land conversions that are driven by demand for corn and other crops used to produce "renewable" fuels.) The National Academy of Sciences has reported that ethanol production is draining water supplies, while the boom in corn and other feed-stock production fosters soil erosion and fertilizer runoff.[6]

The EPA has not complied with the requirement to report to Congress every three years on the impacts of biofuels.[7] Nor has the agency fulfilled anti-backsliding requirements to analyze and address any negative air-quality impacts of the RFS.[8]

Superfund. The Superfund program for cleaning and redeveloping contaminated and hazardous waste sites is inefficient and ineffective.[9] Funds are consumed by environmental studies, compliance with handbooks, regulations and guidance, and lawsuits. From FY 1999 through FY 2013, the total number of nonfederal sites on the National Priorities List remained relatively constant, while the number of completions declined. Funding for the programs should be eliminated, and responsibility for program functions should be shifted to the states. The EPA has had more than 35 years to perfect the program, and it has failed.

Safe Drinking Water Act. The EPA has failed to keep America's drinking water safe—one of its primary functions. For example, the agency had the authority, and sufficient information, to issue an emergency order to protect residents in Flint, Michigan, from lead-contaminated water a full year before the agency took action.[10] The EPA's Office of Inspector General also documented inconsistencies in the agency's adherence to enforcement policies; only three of 20 enforcement orders reviewed by the Inspector General met the timeliness standard, and few cases were escalated by the EPA or state when noncompliance persisted.[11]

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10. Environmental Protection Agency Office of Inspector General, "FY 2017 EPA Management Challenges, May 18, 2016," https://www.eenews.net/assets/2017/05/18/document_gw_07.pdf (accessed May 31, 2017).
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Department of Health and Human Services

Sunset Head Start to Make Way for State, Local, and Private Alternatives

RECOMMENDATION

Congress should reduce funding for Head Start by 10 percent in fiscal year (FY) 2019, and by an additional 10 percent every year thereafter until the program is sunset in 2028.

RATIONALE

In addition to its questionable status as a function of the federal government under the Constitution, the federal Head Start program has failed to live up to its stated mission of improving kindergarten readiness for children from low-income families. In December 2012, the Department of Health and Human Services (HHS), the agency that administers Head Start, released a scientifically rigorous evaluation of more than 5,000 children participating in the program. It found that Head Start had little to no impact on the cognitive skills, social-emotional well-being, health, or parenting practices of participants. Low-income families should not have to depend on distant, ineffective federal preschool programs.

As such, Congress should sunset the federal Head Start program over a period of 10 years. The sunset provision will provide states with adequate time to determine whether they need to provide additional state funding to subsidize day care for low-income families. To begin phasing out the program, Congress should reduce Head Start funding by 10 percent in FY 2019, completely restoring revenue responsibility for the program to the states within 10 years.

ADDITIONAL READING

- Lindsey M. Burke and David B. Muhlhausen, "Head Start Impact Evaluation Report Finally Released," Heritage Foundation *Issue Brief* No. 3823, January 10, 2013
- David B. Muhlhausen, "The Head Start CARES Demonstration: Another Failed Federal Early Childhood Education Program," Heritage Foundation *Backgrounder* No. 3040, August 6, 2015.
- David B. Muhlhausen, "Head Start Program: Fraudulent and Ineffective," Heritage Foundation *WebMemo* No. 2919, May 28, 2010.

Medicare Reform: Slow Down the Rate of Spending and Preserve the Program for Future Retirees

RECOMMENDATION

Undertaking a comprehensive reform of Medicare is a major policy challenge. Meeting that challenge is a national necessity. It will require the President, working with Congress, to adopt and carefully implement several inter-related policy recommendations:

- **Unify Medicare Part A and Part B.** The Medicare program is divided into four programs: Part A (hospitalization); Part B (physician services); Part C (comprehensive private Medicare plans); and Part D (prescription drug coverage). Congress should combine Medicare Part A and Part B into a single plan and streamline Medicare's cost sharing with one premium, one deductible, uniform cost sharing, and add a catastrophic limit. This would remove Medicare's outdated silo structure and provide seniors with a more coherent program that integrates both hospital and physician services, reduces its array of confusing cost-sharing requirements, and secures protection against the financial devastation of catastrophic illness.
- **Gradually raise the standard age of Medicare eligibility.** The average life expectancy has increased greatly since Medicare was created in 1965, but the program's age of eligibility (age 65) has remained the same. Congress should gradually increase the age of eligibility to 68 years of age and then index it to life expectancy. This change better reflects today's life expectancy, and better aligns Medicare eligibility with Social Security eligibility.
- **Gradually increase Medicare enrollee premiums based on income.** Medicare Parts B and D are voluntary programs, and they are financed by beneficiary premiums and taxpayer subsidies drawn from the Treasury. For the vast majority of Medicare enrollees, these taxpayer subsidies for Parts B and D premiums amount to 75 percent of their total Part B and Part D premiums. Under current law, wealthy Medicare recipients are required to pay more for these Medicare benefits: Single individuals with an annual income of $85,000 and couples with an annual income of $170,000 are thus required to pay higher premiums for physician and outpatient services and drugs.[1] About 6 percent of the total Medicare population thus receives fewer taxpayer subsidies for their Parts B and D benefits. Congress should expand the income thresholds for these premium subsidies so that approximately 10 percent of the total Medicare population would pay higher income- related premiums. Medicare premiums should increase gradually with incremental increases in annual income. This would ensure that limited taxpayer resources are distributed more evenly based on income, and would target subsidies to those who need them most.
- **Allow private contracting in Medicare.** In 1997, Congress, working with the Clinton Administration, imposed an unprecedeuted restriction on the right of doctors and patients to privately contract for medical services outside the Medicare program. Congress should eliminate the statutory and regulatory restrictions or penalties on the right and ability of Medicare enrollees and their physicians to contract privately outside the Medicare program for Medicare-covered services. Restoration of this freedom would improve seniors' access to medical care.
- **Allow specialty hospitals to participate in Medicare.** Under the Affordable Care Act of 2010, Congress restricted payment to emerging specialty hospitals, even though they had an outstanding record of performance in delivering highly specialized quality care. Congress should eliminate statutory restrictions on Medicare payment to specialty hospitals, including physician-owned hospitals. Eliminating these barriers would intensify much-needed competition in the hospital sector and stimulate innovation in the delivery of high-quality care to seniors.

RATIONALE

All Americans ages 65 and older who have paid into Social Security, as well as some Americans classified as disabled, are entitled to enroll in Medicare, the giant government health program for senior and disabled citizens. Medicare spending will rise from an estimated $716.8 billion in 2017 to almost $1.3 trillion by 2025.[2] Yet its long-term unfunded obligations—the benefits promised but not paid for out of dedicated revenues over the next 75 years—range from $32.4 trillion to $43.5 trillion, depending upon the assumptions used; in other words, an enormous programmatic debt.[3]

Meanwhile, Medicare spending growth will outpace that of all other health care programs, as well as inflation and the general economy. At the same time, a rapidly aging population will require more intensive medical services, and the quality and efficiency of care delivery will be of paramount concern.

The rapid aging of the American population is the main driver of rising Medicare spending. Members of the baby boom generation—the 77 million Americans born between 1946 and 1964— are retiring at the rate of roughly 10,000 per day. While there are roughly 58 million persons enrolled in Medicare today, by 2030, approximately 81 million will be enrolled in the program.[4] The President and Congress must cope with Medicare's rising spending, which threatens the fiscal welfare of the country, as well as preserve the program for current and future generations. To accomplish these goals, Congress, working with the President, should take the steps detailed above to change federal law.

Medicare Advantage Reform: Expand Premium Support Financing

RECOMMENDATION

Replace the Medicare Advantage payment system with a new market-based payment system. Congress should replace the current Medicare Advantage (Part C) payment system with a new benchmark based on regional market-based bids from competing private health plans to provide traditional Medicare benefits.

Extend the new Medicare Advantage payment system to all of Medicare. Under this new defined contribution ("premium support") system, a beneficiary who chose a plan that was more expensive than the market-based benchmark would pay the difference. If a beneficiary chose a less expensive plan, he or she would receive the difference in a cash rebate that could be used to offset other health costs.

RATIONALE

Medicare Advantage (Medicare Part C) is a large and growing system of competing private health plans, with comprehensive benefits and protection from catastrophic illness. Financed on a defined contribution basis, it is an alternative to enrollment in traditional Medicare, sometimes called Medicare Fee for Service (FFS). Between 2006 and 2016, enrollment in these private Medicare plans jumped from 6.9 million to 17.2 million beneficiaries, 31 percent of all Medicare enrollees.[5] Both the Congressional Budget Office and the Medicare Trustees project Medicare Advantage to continue to grow. Nonetheless, the program's payment system is not as economically as efficient as it could be. The reason: Government payment to these plans is still tied to the relatively inflexible administrative payment system of traditional Medicare instead of being based on pure market competition among these plans. Extending a defined contribution payment system to all of Medicare would intensify competition among plans and providers, spur innovation in care delivery, and control costs.

ADDITIONAL READING

- Walton Francis, *Putting Medicare Consumers in Charge: Lessons from the FEHBP* (Washington, DC: AEI Press, 2009).
- Robert E. Moffit, "Medicare's Next 50 Years: Preserving the Program for Future Retirees," Heritage Foundation *Special Report* No. 185, July 29, 2016.

Eliminate the Teen Pregnancy Prevention Grants

RECOMMENDATION

Congress should eliminate funding for the Teen Pregnancy Prevention (TPP) grants.

RATIONALE

HHS's Office of Adolescent Health operates Teen Pregnancy Prevention (TPP) grants. TPP is an "evidence-based" grant program that rigorously evaluates the effectiveness of the programs it funds.

TPP has two funding streams: Tier I and Tier II grants. According to HHS, Tier I grants are awarded to grantees replicating programs that "have been shown, in at least one program evaluation, to have a positive impact on preventing teen pregnancies, sexually transmitted infections, or sexual risk behaviors."[6] Thus, Tier I grants are supposed to be evidence-based. The belief is that these grants will be effective because they are replicating programs labeled evidence-based. Is this assumption correct?

Each of the Tier I grantees is supposed to evaluate the impact of the evidence-based model it is replicating. So far, from 2015 to May 2017, 13 experimental evaluations of nine evidence-based models have been published by HHS or in the *American Journal of Public Health*.[7] Overwhelmingly, these evaluations demonstrated that replicating evidence-based models failed to affect the sexual behavior of participants. Clearly, replicating an evidenced-based program model does not guarantee similar results.

The reason for this failure may be the inconsistent evidence used to label the program models as evidence-based. For example, HHS used contradictory evidence of the effectiveness of the Becoming a Responsible Teen (BART) program to label this model evidence-based. Of the three randomized experiments that were classified with a "high ranking" for scientific rigor, two of the studies found the model to be ineffective.[8] How can the body of research on BART that leans strongly toward the program being ineffective be used to promote it as an evidence-based model?

Just because an evidence-based program appears to have worked in one location, does not mean that the program can be effectively implemented on a larger scale or in a different location. Proponents of evidence-based policymaking should not automatically assume that pumping taxpayer dollars toward programs attempting to replicate previously successful findings will yield the same results.

The other set of TPP grants (Tier II) fund demonstration programs that do not meet HHS's evidence-based definition, but are considered by HHS to be innovative programs worthy of funding. The majority of experimental evaluations of the Tier II grants find more failures than benefits.

ADDITIONAL READING

- Evelyn Kappeler, "Building the Evidence to Prevent Adolescent Pregnancy: Office of Adolescent Health Impact Studies (2010–2014)," *American Journal of Public Health*, Vol. 106, No. S1 (September 2016).
- David B. Muhlhausen, "Evidence-Based Fiscal Discipline: The Case for PART 2.0," Heritage Foundation *Backgrounder* No. 3158, September 27, 2016.
- U.S. Department of Health and Human Services, Office of Adolescent Health, "Grantees FY 2010–2014."

Transfer Low-Income Housing Assistance to the States and Relevant Departments

RECOMMENDATION

In order to better coordinate services, the President and Congress should eliminate the major functions or transfer responsibility of the major subsidized-housing assistance programs from the Department of Housing and Urban Development (HUD) to the state governments and the Departments of Health and Human Services (HHS), Veterans Affairs (VA), and the Interior. Specifically:

1. **Transfer financial responsibility to the states for subsidized housing programs that support the non-elderly:** the Housing Choice Voucher Program ("Section 8 vouchers"); the Project-Based Voucher Program; the Public Housing Capital Fund; the Public Housing Operating Fund; Choice Neighborhoods; HOPE VI; the Family Self-Sufficiency Program; Homeownership Voucher Program; Public Housing Homeownership (Section 32); the Section 8 Moderate Rehabilitation Program; the Public Housing/ Section 8 Moving to Work Demonstration Program; the Neighborhood Networks Program; the Resident Opportunity and Self-Sufficiency program; and the HOME Investment Partnerships program;
2. **Eliminate or transfer to the Department of the Interior Native American housing programs:** the Tribal Housing Activities Loan Guarantee program (Title VI); the Indian Community Development Block Grant program; the Indian Housing Block Grant program; Loan Guarantees for Indian Housing (Section 184); Loan Guarantees for Native Hawaiian Housing (Section 184A); and the Native Hawaiian Housing Block Grant program;
3. **Transfer to HHS programs for homeless assistance and Housing Opportunities for Persons with AIDS;** and
4. **Transfer to the VA the HUD-Veterans Affairs Supportive Housing Vouchers,** a veteran's assistance program that operates in conjunction with the Housing Choice Voucher program.

RATIONALE

Transferring programs and functions to the appropriate responsible agency can help people who need housing by better coordinating services while reducing duplication of services.

Eliminating offices such as the Federal Housing Authority is appropriate because they have had minimal impact on homeownership rates in return for substantial costs to the taxpayer.

Returning financial responsibility for subsidized housing programs to the states is appropriate because housing needs, availability, and costs vary significantly across states and localities, as do the levels of needed and available assistance. Instead of primarily federally funded programs that often provide substantial benefits for some while leaving others in similar circumstances with nothing, the federal government should begin transferring the responsibility for both the administration and costs of low-income housing programs to the states. States are better equipped to assess and meet the needs of their populations, given their unique economic climates and housing situations. With the fiscal responsibility of paying for their housing programs, states will have the incentive to run them much more efficiently and effectively.

ENDNOTES

1. For a more detailed description of this proposal, see Robert E. Moffit, "Medicare's Next 50 Years: Preserving the Program for Future Retirees," Heritage Foundation *Special Report* No. 185, July 29, 2016, p. 22, http://www.heritage.org/health-care-reform/report/medicares-next-50-years-preserving-the-program-future-retirees.
2. Centers for Medicare and Medicaid Services, *2016 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medicare Insurance Trust Funds*, June 22, 2016, https://www.cms.goviresearch-statistics-data-and-systems/statistics-trends-and-rgportstreportstrustfundgdownloadsitr2016.pdf (accessed May 31, 2017).
3. For a discussion of Medicare's long-term obligations over the years, see Moffit, "Medicare's Next 50 Years," p. 11.
4. Ibid., p. 3.
5. Medicare Payment Advisory Committee, *A Data Book: Health Care Spending and the Medicare Program* (Washington, DC: MedPac, June 2016), p. 131, http://www.medpac.govidocsidefault-source/data-bookhune-2016-data-book-health-care-spending-and-the-medicare-program.pdf (accessed May 31, 2017).
6. U.S. Department of Health and Human Services, Office of Adolescent Health, "Evidence-Based TPP Programs," http://www.hhs.gov/ash/oah/oah-initiatives/tpp_program/db/ (accessed July 22, 2016).
7. U.S. Department of Health and Human Services, Office of Adolescent Health, "Grantees FY 2010–2014," http://www.hhs.gov/ash/oah/oah-initiatives/evaluation/grantee-led-evaluation/grantees-2010-2014.html (accessed September 26, 2016), and "Building the Evidence to Prevent Adolescent Pregnancy: Office of Adolescent Health Impact Studies (2010–2014)," *American Journal of Public Health*, Vol. 106, No. S1 (September 2016).
8. The two studies that found BART to be ineffective are Angela R. Robertson et al., "The Healthy Teen Girls Project: Comparison of Health Education and STD Risk Reduction Intervention for Incarcerated Adolescents Females," *Health Education & Behavior*, Vol. 38, No. 3 (2011), pp. 241–250, and Janet S. St. Lawrence et al., "Sexual Risk Reduction and Anger Management Interventions for Incarcerated Male Adolescents: A Randomized Controlled Trial of Two Interventions," *Journal of Sex Education and Therapy*, Vol. 24, No. 1–2 (1999), pp. 9–17. The study that found at least one beneficial effect is Janet S. St. Lawrence et al., "Cognitive-Behavioral Intervention to Reduce African American Adolescents' Risks for HIV Infection," *Journal of Consulting and Clinical Psychology*, Vol. 63, No. 2 (1995), pp. 221–237.

Department of Homeland Security

Empower Department of Homeland Security Management and Streamline Congressional Oversight

RECOMMENDATION

Empower Department of Homeland Security (DHS) Management. DHS managers should be empowered to ensure that department-level directives and unity of action are accomplished. Secretary John Kelly should provide more authority to centralized service components, such as the General Counsel, the Chief Financial Officer, the Chief Procurement Officer, the Office of Policy, and International Affairs, over their respective component offices. Re-organization is not enough—the Secretary must give his personal support to these offices.

Streamline Congressional Oversight of DHS. Oversight of DHS should resemble that of the Departments of Justice and Defense, being comprised of one primary homeland security committee in the House, and one in the Senate, with some additional oversight by the Intelligence Committees and a homeland security appropriations subcommittee in both chambers.

RATIONALE

DHS's organizational cohesiveness and central leadership continue to face serious challenges that include financial management, acquisitions, information technology, planning, and budgeting. The Obama Administration attempted to remedy some of these problems through its Unity of Effort initiative to make the department work as a more cohesive whole, but much more remains to be done. For DHS to become a cohesive organization, core functions such as international affairs, financial management, information and technology policies, and legal counsel must be primarily handled by DHS headquarters rather than by each DHS component. Such reorganization should not exclude component heads from exercising their authority, but rather should ensure that department-level directives and procedures are followed. Another good step would be completing the headquarters campus in Washington, DC, a project for which President Obama requested and Congress provided additional funding in FY 2016. With a history of cost overruns, DHS should ensure that this and future funding is well spent.

Beyond this, additional measures need to be taken by Congress to improve the authority of DHS's central leadership. This includes reforming congressional oversight of DHS. Labyrinthine layers of congressional oversight are consuming the department's time and resources, and there is bipartisan agreement among former and current DHS officials, think tanks, and the 9/11 Commission that this system of congressional oversight is harming security. It is time for parochial interests and battles over jurisdiction to give way to commonsense oversight and security.

ADDITIONAL READING

- David Inserra, "Congress Must Re-Set Department of Homeland Security Priorities: American Lives Depend on It," Heritage Foundation *Special Report* No. 175, January 3, 2017.
- Paul Rosenzweig, Steven Bucci, and David Inserra, "Reforming DHS: Missed Opportunity Calls for Congress to Intervene," Heritage Foundation *Issue Brief* No. 4336, January 26, 2015.
- Jessica Zuckerman, "Politics Over Security: Homeland Security Congressional Oversight in Dire Need of Reform," Heritage Foundation *Issue Brief* No. 3722, September 10, 2012.

Streamline Federal Emergency Management Agency Disaster Management

RECOMMENDATION

Return More Responsibility for Disasters to State and Local Governments. The Federal Emergency Management Agency (FEMA) has the authority to reduce FMEA's involvement in small disasters by increasing the threshold for federal aid to $3 per capita in damages with a $5 million minimum threshold (under which a federal disaster is never declared) and a $50 million maximum threshold (over which a disaster declaration is always issued). Alternatively, a deductible idea currently being considered by FEMA could accomplish a similar outcome.

Reduce the Disaster Cost Share for Smaller Disasters. Congress should change the cost-share arrangement so that the federal government would only cover 25 percent of the costs for small disasters, with the cost share rising up to 75 percent for truly catastrophic disasters.

RATIONALE

FEMA is the lead federal agency in preparing for and responding to disasters. It provides critical resources and expertise during disasters, but is overtasked and crowding out state and local preparedness. After passage of the Stafford Act in 1988, the number of declared federal disasters changed dramatically, rising steadily from an average of 28 per year under President Ronald Reagan to an average of 130 per year under Presidents George W. Bush and Barack Obama.

The Stafford Act shifted most of the costs of a federalized disaster away from states and local governments to the federal government, and FEMA regulations made it relatively easy to qualify as a federal disaster. This combination has put FEMA in high demand, leaving it unprepared—in terms of both readiness and money—for truly catastrophic disasters in which its services are most needed. Reform of FEMA requires a greater emphasis on federalism and state and local preparedness, leaving FEMA to focus on large, widespread disasters.

ADDITIONAL READING

- David Inserra, "Congress Must Re-Set Department of Homeland Security Priorities: American Lives Depend on It," Heritage Foundation *Special Report* No. 175, January 3, 2017.
- David Inserra, "FEMA Reform Needed: Congress Must Act," Heritage Foundation *Issue Brief* No. 4342, February 4, 2015.

Consolidate FEMA Grant Programs

RECOMMENDATION

Consolidate Homeland Security and Emergency Preparedness Grant Programs and Allocate Funds in a Risk-Based Manner. Rather than being treated as federal dollars that should be spread around, federal grants should be focused on the highest-risk areas and issues. As part of this consolidation, grant programs should be evaluated, and ineffective ones, such as Staffing for Adequate Fire and Safety (SAFER), Fire Prevention and Safety (FP&S), and Assistance to Firefighter Grants (AFG), should be cancelled. Congress has prohibited such consolidation in the past and should reverse course.

RATIONALE

FEMA also administers most of DHS's grant programs, and not all of these programs are effective or the best use of limited homeland security dollars. Grants should be allocated in a risk-based manner and must be effective. For example, Heritage Foundation research has found that a variety of firefighter and emergency personnel grants—including SAFER, FP&S, and AFG—are not effective in reducing fire casualties. Given that there are other areas in DHS, and even other grant programs, where this funding could be used more effectively, Congress should require the consolidation of the grant programs and elimination of ineffective grants.

ADDITIONAL READING

- David Inserra, "Congress Must Re-Set Department of Homeland Security Priorities: American Lives Depend on It," Heritage Foundation *Special Report* No. 175, January 3, 2017.
- David B. Muhlhausen, "Fire Grants: Do Not Reauthorize an Ineffective Program," Heritage Foundation *Issue Brief* No. 3788, November, 29 2012.

Refocus the Transportation Security Administration

RECOMMENDATION

Refocus the Transportation Security Administration (TSA) on Security Regulations and Oversight. The TSA should focus on ensuring that security standards are being met and heading off the next generation of threats.

Replace TSA Screeners with Private Screeners in One of Two Ways:

1. **Mandate that the Screening Partnership Program (SPP) cover all airports.** The TSA will turn screening operations over to airports, which will hire security contractors that meet TSA regulations.
2. **Adopt a Canadian-like system.** The TSA will turn over screening operations to a new government corporation that contracts out screening service to private contractors. Contractors would bid on providing their services to a set of airports in a region, likely around 10 regions in the U.S.

RATIONALE

The U.S. holds the dubious honor of being one of only a handful of Western nations that use government employees as airport screeners. Created after 9/11, the TSA assumed the important role of providing security at airports, but this is not the best way to accomplish this goal. Most European countries and Canada allow airports to provide their own screening force or hire their own contractors. In the U.S., the limited SPP provides private screeners, with TSA oversight, in place of TSA screeners. The SPP has resulted in reductions in cost, as well as increased customer satisfaction and productivity, while performing no worse than government screeners in terms of security. While this would seem like an easy decision for most airports, the regulations and past TSA decisions regarding SPP have made it difficult to implement, as it can take as long as four years to join or renew an SPP contract that is micromanaged by the TSA.

Alternatively, the U.S. could look to the Canadian model. Transport Canada (TC) acts as the security regulator; a government corporation, CATSA, is responsible for technology and equipment and hiring private contractors for screening services. Rather than bidding on one airport at a time, contractors bid to provide screening services within one of four regions. This provides some economies of scale and provides contractors with additional flexibility in managing their workforce. Within the bounds of TC-set security regulations, CATSA sets standard operating procedures and efficiency standards for the private screening force at airport security checkpoints. This model is more effective and less costly than the one in the U.S. Researchers in Canada found that from 2005 through 2014, Canada spent around 50 percent less per capita on aviation security than did the United States. Over the same period, Canada spent approximately 20 percent less per traveler than the U.S.

The U.S. would realize significant benefits by switching to private screeners through an expansion of the SPP or a move to a Canadian-like system.

ADDITIONAL READING

- David Inserra, "Congress Must Re-Set Department of Homeland Security Priorities: American Lives Depend on It," Heritage Foundation *Special Report* No. 175, January 3, 2017.

Eliminate Fire Grants

RECOMMENDATION

Congress should eliminate the fire grant program administered by the Federal Emergency Management Agency (FEMA).

RATIONALE

Fire grants encompass a number of programs. The Assistance to Firefighters Grant (AFG) program subsidizes the routine activities of local fire departments and emergency management organizations. The Fire Prevention and Safety (FP&S) grants fund projects to improve the safety of firefighters and protect the public from fire and related hazards, while the Staffing for Adequate Fire and Emergency Response (SAFER) grants are intended to increase staffing levels by funding the salaries of career firefighters and paying for recruitment activities for volunteer fire departments.

The Heritage Foundation's Center for Data Analysis (CDA) evaluated the effectiveness of fire grants by matching fire grant award data to the National Fire Incident Reporting System, an incident-based database of fire-related emergencies reported by fire departments. Using panel data from 1999 to 2006 for more than 10,000 fire departments, the CDA assessed the impact of fire grants on four different measures of fire casualties: (1) firefighter deaths, (2) firefighter injuries, (3) civilian deaths, and (4) civilian injuries. The CDA compared fire departments that received grants to fire departments that did not receive grants. In addition, the CDA compared the impact of the grants before and after grant-funded fire departments received federal assistance.

The evaluation showed that AFG, FP&S, and SAFER grants failed to reduce firefighter deaths, firefighter injuries, civilian deaths, and civilian injuries. Without receiving fire grants, comparison fire departments were just as successful at preventing fire casualties as grant-funded fire departments.

ADDITIONAL READING

- David B. Muhlhausen, "Do DHS Fire Grants Reduce Fire Casualties?" Heritage Foundation *Center for Data Analysis Report* No. 09-05, September 23, 2009.
- David B. Muhlhausen, "Fire Grants: Do Not Reauthorize an Ineffective Program," Heritage Foundation *Issue Brief* No. 3788, November 29, 2012.

Streamline Science and Technology R&D at DHS

RECOMMENDATION

Streamline and Focus DHS Research and Development (R&D). DHS should consider folding the Domestic Nuclear Detection Office (DNDO) and the Office of Health Affairs (OHA) into the Science and Technology Directorate (S&T). This reorganization must be accompanied by significant policy reforms that focus S&T on delivering helpful products to DHS operational components.

RATIONALE

Within DHS, multiple organizations, including the DNDO, the OHA, the Coast Guard, the TSA, and the Customs and Border Protection, conduct research that is to be coordinated by S&T. The case for reorganization can best be made for combining OHA and DNDO with S&T, as both OHA and DNDO are fairly small offices with research functions. Past reorganization efforts have considered moving the DNDO and the OHA into S&T to benefit from greater efficiencies of a single R&D organization while reducing the sheer number of direct reports to the DHS Secretary. The nuclear-detection, health, biological, and chemical research conducted by these organizations can and should continue within S&T, but should take place within a more holistic view of research and the needs of the department.

This reorganization, while potentially helpful from an organizational efficiency perspective, is not enough. Indeed, one significant problem with S&T research is that it does not adequately meet mission needs or benefit national security. According to the Government Accountability Office, DHS components that were surveyed "consistently said they were aware of few or no products that S&T had transitioned from one of S&T's R&D projects to their respective components." As a result, S&T customers are likely to view S&T as not meeting end-user needs.

Toward the end of the Obama Administration, DHS Under Secretary for Science and Technology Reginald Brothers tried to better focus S&T's efforts by reducing the overall number of research programs in order to ensure more attention for the remaining programs. S&T also started a pilot program that assigns S&T researchers to components' laboratories in order to give researchers a better understanding of what is occurring at, and what is needed by, that component. Similarly, S&T has begun focusing on what it calls "technology foraging," which seeks out existing or emerging technologies that could be adapted to meet DHS's needs. These efforts are good first steps but must be expanded in order to help DHS components field useful and innovative technology. While DHS should continue to conduct some longer-term research, the pendulum must swing toward meeting operational needs of components.

ADDITIONAL READING

- Brian Finch and David Inserra, "Expand the SAFETY Act to Make the U.S. More Secure," Heritage Foundation *Issue Brief* No. 4662, March 9, 2017.
- David Inserra, "Congress Must Re-Set Department of Homeland Security Priorities: American Lives Depend on It," Heritage Foundation *Special Report* No. 175, January 3, 2017.

End the National Flood Insurance Program

RECOMMENDATION

The National Flood Insurance Program (NFIP) should be phased out to allow private insurers to assume the disaster risks now borne by taxpayers. Toward that end, Congress must eliminate a variety of barriers to entry, including taxpayer subsidies for NFIP coverage. Other necessary actions for transition include:

- **Require FEMA to share with private insurers** its aggregate premium and claims data, and supply property-specific data at the request of a property owner.
- **Confirm that private insurance policies will satisfy mortgage requirements** for mandatory coverage. This could prompt private insurers to market new insurance products.
- **Allow state insurance regulators to oversee** solvency and capital requirements for insurance companies in their jurisdictions. This would increase accountability and reduce insurer uncertainty related to federal agencies issuing conflicting rules.
- **Allow policyholders to submit premium payments in monthly installments,** which could make unsubsidized coverage more manageable.

RATIONALE

Virtually all flood insurance is issued by the federal government under the National Flood Insurance Act of 1968. By providing coverage at rates that do not reflect flood risk, the program subsidizes development in flood zones. More development in flood zones worsens the devastation of disasters. And because the subsidized insurance premiums are actuarially unsound, FEMA requires taxpayer bailouts.

The NFIP currently owes taxpayers $24 billion. With direct access to the Treasury, FEMA has little budgetary discipline. For example, the fees paid to private insurers to sell and service the policies on behalf of the government consume more than a third of all premiums.[1]

Other structural elements render the program fatally flawed, including:

- **Wealth redistribution.** The NFIP charges the same rates for vacation homes and owner-occupied structures. However, a significant proportion of homes built on coastal barrier islands are expensive vacation homes. The use of taxpayer funds to subsidize the lifestyle preferences of a select few is inherently unjust.
- **Dysfunctional pricing.** A large proportion of the FEMA risk maps are obsolete. For example, they assume that levies and dikes will protect the properties near them regardless of whether they are adequate and in good repair.
- **Moral hazard.** Property owners expect the government to provide disaster assistance regardless of their insurance status. Consequently, NFIP enrollment is skewed to the most flood-prone properties.
- **Repetitive claims.** A small percentage of properties experiencing repeated flood damage comprise a large proportion of total claims.
- **Incomplete coverage.** Many NFIP policies only cover the remaining balance on a structure's mortgage, not the cost of actually replacing it. This protects the lender but can leave homeowners with a ruined property that they cannot afford to rebuild.

ADDITIONAL READING

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- Diane Katz, "No Retreat on Flood Insurance Reform," Heritage Foundation *Issue Brief* No. 4153, February 21, 2014.

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Department of Housing and Urban Development

Eliminate the Federal Housing Administration

RECOMMENDATION

Federal lawmakers should eliminate the Federal Housing Administration (FHA). In so doing, Congress should preclude the transfer of any functions carried out by the FHA to a separate federal government agency, government-sponsored institution, or government-owned corporation.

Until Congress dissolves the FHA, the Secretary of Housing and Urban Development should instruct the FHA to implement the following reforms.

- Increase the initial collateral requirements, interest rates, and premiums to properly account for borrower risk within the mutual mortgage insurance program;
- Decrease the loan limits for program eligibility;
- Cease all new refinance activity; and
- Cease all new activity within its multifamily and health-care-facility mortgage insurance and guarantee programs.

RATIONALE

Congress created the FHA in 1934 in response to the distressed housing market conditions of the early 1930s. There is often confusion, though, about the early mission of the FHA single-family mortgage program in the mistaken belief that the federal government created the FHA to offer access to mortgages to underserved groups of individuals. In fact, the National Housing Act of 1934 authorized the FHA to cover most of the housing market at that time, where the maximum loan amount was approximately three times the then-current median home prices,[1] which underscores the notion that a main goal of the FHA was to stimulate construction jobs, not to assist low-income individuals.

While the focus of the FHA's single-family home loan program extended to high-cost homes in the early years, the FHA did, however, begin with relatively strict underwriting standards compared with those required of most loans today. Indeed, the FHA's history exhibits a long-term drift in underwriting standards and the quality of loans insured under the program. Starting in the mid-1950s, the FHA began to reduce the level of up-front collateral—the down payment—required to take on a home loan through its single-family mortgage program. By 1961, the maximum loan-to-value ratio allowed for new and existing homes was 97 percent (in other words, a 3 percent down payment). More broadly, annual loan data from 1990 to 2014 shows that fewer than 10 percent of FHA-insured loans during those years would have qualified for eligibility during the first two decades the FHA's existence.[2]

Consequently, despite various reform initiatives since the 1930s, the FHA has had trouble meeting safety and soundness guidelines, has undermined the stability of the housing market, and in recent years has needed several billion dollars to cover its losses. In fact, in recent years the FHA required several billion in appropriated funds to cover deficits in the Mutual Mortgage Insurance Fund and the lack of loss reserves in the capital reserve account.[3] In return for the substantial costs to taxpayers, the FHA's mortgage insurance programs have had minimal impact on homeownership rates—indeed, the U.S. homeownership rate is at the same today as it was in the mid-1960s. Research has shown that the FHA's single-family mortgage insurance portfolio has had little effect on increasing total homeownership, and the FHA's home loan program at best accelerated the take up of a mortgage by only a few years.[4]

Moreover, the FHA has expanded the scope of its insurance and guarantee portfolio to include mortgages used in the financing of multifamily (rental) housing and health care facility structures. The FHA explicitly claims that it has a unique market advantage in providing "long-term loan amortization [up to 40 years in some cases] not found with conventional lending sources" regarding the financing of various commercial-based development initiatives in the construction of multifamily and health care facility structures.[5] Yet all of these projects together comprise a small share of the overall FHA mortgage portfolio. These programs have also had the most problems with corruption and waste, and they have a longer history of needing

appropriated capital transfers to cover financial shortfalls. Even though the FHA has made recent efforts to increase efficiency in managing these mortgage programs, they are not necessary to maintain robust financing within the housing-finance system.

Overall, in return for the substantial costs to taxpayers, the FHA's mortgage insurance programs have had minimal impact on homeownership rates. This suggests that additional FHA reforms would provide merely temporary financial improvements without adding appreciable benefits to the housing market. Congress should take the steps necessary to shut down the FHA and get the federal government out of the home-financing business.

ADDITIONAL READING

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- Norbert J. Michel and John L. Ligon, "Five Guiding Principles for Housing Finance Policy: A Free-Market Vision," Heritage Foundation *Backgrounder* No. 4259, August 11, 2014.

Eliminate the Community Development Block Grant

RECOMMENDATION

Congress should eliminate the Community Development Block Grant (CDBG), which provides money to state and local governments for low-income housing, infrastructure development, public services, and other activities.

RATIONALE

This program has been in place since 1974 and has cost taxpayers more than $100 billion during the course of its lifetime. The CDBG is not well-targeted to low-income communities, and due to a lack of transparency in the data, it is difficult to assess whether the program is meeting its stated goals of, among others, creating jobs for low-income individuals and eliminating "slums and blight."

ENDNOTES

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3. Ibid., pp. 7–10.
4. Ibid., pp. 3 and 4.
5. Ibid., p. 11.

Department of the Interior

Initiate Reorganization of the Department of the Interior

RECOMMENDATION

The budget of the Department of the Interior (DOI) is small relative to total federal spending, but the DOI's management of a vast portion of federal lands and regulatory actions, particularly under the Endangered Species Act (ESA), have enormous consequences, including the erosion of property rights and impediments to development of energy and other natural resources, as well as tremendous economic costs. Extensive reforms are needed to return the agency to a proper limited role. The following changes would constitute incremental progress toward that goal:

- Correct abusive national monument designations;
- Use performance standards or consolidation to address chronic maintenance backlogs;
- Dispose of excess Bureau of Land Management (BLM) lands;
- Eliminate the unnecessary National Landscape Conservation System;
- Make DOI landholdings and federal regulatory reach transparent;
- Make proposed settlement agreements transparent;
- Require agency science-based decisions to comport with the Information Quality Act;
- Control grants directly through the office of the Secretary of the Interior;
- Aggressively implement Executive Order 13777; and
- Improve implementation of the Endangered Species Act at the administrative level.

RATIONALE

Among its many and expanding missions, the DOI is responsible for the stewardship of the majority of federal lands. In order of size, these include lands under the BLM, the U.S. Fish and Wildlife Service (USFWS), and the National Park Service (NPS), as well as the Outer Continental Shelf. All told this is over 480 million acres[1]—almost the size of Mexico[2]—excluding some 1.7 billion acres of the Outer Continental Shelf.[3]

While these lands occur disproportionally in the western U.S., the long-term management trend has been to centralize control in Washington. The federal estate suffers from chronic maintenance backlogs, overregulation, bureaucratization, politicization, and other forms of mismanagement. Over the long run, the size of the federal estate needs to be reduced to those lands that uniquely merit federal ownership. For example, more than 85 percent of Nevada cannot be so special as to justify federal ownership.[4] Many federal lands are a result of historical legacy rather than a rational choice that was driven by some larger policy objective. As a first step, the Interior Secretary should not initiate actions that increase the total acreage held by any DOI agency. With a no-net-growth policy in place, potential avenues for responsible devolution of management and ownership of excess lands should be explored. A number of other initial steps can be taken to more responsibly manage DOI lands; address wasteful grants, stifling regulations, lawsuit abuse, and poor scientific standards; and improve implementation of the Endangered Species Act at the administrative level, although correcting the law's more fundamental flaws will require substantial legislative change.

Correct Abusive National Monument Designations. The Interior Secretary should rescind some national monument designations and reduce others in size. Opponents of rescinding or revising past designations have relied on a 1938 Attorney General's opinion that asserts that such changes cannot be made under the Antiquities Act. This assertion is baseless, as numerous national monuments have been reduced substantially.[5] Additionally, a thorough legal analysis has discredited the arguments put forth in the 1938 opinion[6] and provoked only ineffectual rebuttals.[7]

National monuments are to be designated on "lands owned or controlled" by the federal government, yet several of the largest monuments are ocean areas including two jointly administered by the USFWS and National Oceanic and Atmospheric Administration.[8] One, Northeast Canyons and Seamounts Marine National Monument, is 4,913 square miles[9] and the

subject of a lawsuit brought by a coalition of New England fishermen because of the harm the designation poses to commercial fishing.[10] This monument should be rescinded. National monuments are also supposed to "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[11] Numerous Administrations have abused the act, essentially establishing large parks by fiat rather than through Congress. Bears Ears National Monument is one whose size should be substantially reduced.

The White House should work with Congress to correct the shortcomings of the Antiquities Act. At a minimum, no designations should be made over the objection of the governor of the state in which a national monument would be established. Additionally, national monument designations should be provisional, requiring ratification by Congress within a year to remain in effect.

USE PERFORMANCE STANDARDS OR CONSOLIDATION TO ADDRESS CHRONIC MAINTENANCE BACKLOGS.

Deferred maintenance of federal land and assets is a chronic problem. The NPS reported $11.3 billion in deferred maintenance in 2016.[12] The USWS and BLM also have substantial backlogs.[13] The Secretary should aggressively address backlogs by incorporating appropriate performance measures into consideration for bonuses, step increases, or promotions for appropriate decision makers. Alternatively, the Secretary could remove the maintenance budget from all or specific management units with particularly large or chronic maintenance issues and administer maintenance directly through the Secretary's office.

Dispose of Excess BLM Lands. The BLM incorporates into land management plans lists of land that may be suitable for disposal.[14] Given the age and accuracy of plans varies—lands so identified should be reviewed and to the maximum extent possible those lands that can be sold, transferred, or otherwise removed from BLM's roles should be. A reauthorized Federal Lands Transaction Facilitation Act should provide that funds generated from land sales are available to address maintenance backlogs.

Eliminate the National Landscape Conservation System (NCLS). The NLCS is an unnecessary program through which the BLM bundles lands for promotional purposes, and which nudges the agency into becoming another version of the NPS. All NLCS lands already have special designations and management regimes, including national monuments, wilderness areas, wild and scenic rivers, and national scenic and historic trails.[15] The White House should seek elimination of this program.

Make DOI Landholdings and Regulatory Reach Transparent. The DOI's geographic information systems (GIS) data on federal landholdings, including easements, land management, and special designations that are both regulatory and non-regulatory, should be aggregated and presented prominently in a way that the non-specialist can access this data and get an accurate picture through an online searchable map.[16] A number of different online mapping tools are available on DOI websites, such as the U.S. Geological Survey's map of ownership patterns,[17] the USFWS's designated critical habitat map[18] and National Wetlands Inventory,[19] and the NPS's national heritage area map.[20] Some designations (critical habitat and wetlands) include lands not owned by the federal government but show areas that are subject to federal environmental regulation.

Make Proposed Settlement Agreements Transparent. The USFWS has a history of entering into settlement agreements with extreme environmental groups. For example, more than half of the ESA lawsuits involving statutory timelines were brought by just two organizations—Wild Earth Guardians and the Center for Biological Diversity.[21] Respectively, 83 percent and 93 percent of these suits were settled by the DOI. Such settlements can have broad legal and regulatory consequences. The Secretary should make it departmental practice that no settlement agreement is signed until the proposed agreement has been published, either in the *Federal Register* or prominently posted on the department's website, after the public has had 60 days to comment.

Require Agency Science-Based Decisions to Comport with the Information Quality Act. The Secretary should ensure that the best science is being used by requiring as a matter of policy that all decisions ostensibly based on science comply with the Information Quality Act (IQA). This would ensure that data underlying agency actions are generally available to the public, and that failure to comply with IQA guidelines would be arbitrary and capricious. DOI agencies have a history of making purportedly scientific decisions for which the underlying data are essentially secret, making substantial reproduction by qualified third parties impossible.[22]

Control Grants Directly Through the Office of the Secretary. A large and wide variety of grants are administered by the many DOI bureaus.[23] Determining the nature and extent of the DOI's grants will

be both complicated and time consuming. As a first step, to the degree allowed by law, secretarial approval should be required before any grant is issued, and unnecessary grant programs should be terminated.

National heritage areas (NHAs) were originally anticipated to receive seed money only and no further federal funding. In practice, once designated by Congress, appropriations to NHAs continue to flow after the initial authorizations expire. Administrations that favored the program and Administrations that opposed the program have proposed eliminating funding, knowing that Congress will restore it. The NPS has furthered perpetual funding with implausible analysis of NHA economic benefits. For example, advocates for funding of five Pennsylvania NHAs assert that NPS studies show that funding has resulted in nearly $1 billion in economic activity, more than 11,000 jobs, and nearly $70 million in local tax revenues.[24] This would be an amazing rate of return given that the FY 2016 appropriation to nearly 50 NHAs was $19.8 million.[25] If NHAs were truly this valuable, the NPS should be able to raise substantial revenues from agreements for use of its logo and consultation reimbursements. As if to provide an illustration of how unnecessary this program is, the entirety of Tennessee was designated the Tennessee Civil War National Heritage Area.

The NPS should focus on its core mission of managing some 59 national parks and 358 other units, as well as its massive maintenance backlog.[26] This program is essentially tourism promotion, and the White House should seek elimination of federal funding for NHAs, if not the program itself.

Climate research programs have spread throughout the federal bureaucracy, and the DOI is no exception. The DOI's Cooperative Landscape Conservation and Tribal Climate Resilience programs are unnecessary and should be eliminated.

Aggressively Implement Executive Order 13777. Executive Order 13777 requires the appointment of regulatory reform officers and regulatory reform task forces within each federal agency to advance a deregulatory agenda.[27] Regulatory reform officers should establish and maintain regular contact with counterparts at agencies with overlapping or coinciding regulatory programs. For the DOI, regulatory reform officers and task forces should have regular lines of communication and cooperate with their counterparts at the Department of Agriculture and the U.S. Forest Service, the Environmental Protection Agency, the Department of Defense and the U.S. Army Corps of Engineers, the Department of Commerce and the National Marine Fisheries Service, and the Department of Transportation. Regular exchange of information will improve the likelihood of successful deregulatory efforts.

Improve the Endangered Species Act at the Administrative Level. Under the ESA, the Secretary of the Interior is vested with authorities to conserve endangered and threatened species. One such responsibility is to ensure that federal agencies' discretionary actions do not jeopardize endangered or threatened species or adversely modify their critical habitat.[28] Rather than delegate the authority for these often-significant decisions to low-level field biologists, the determinations should be made by the Secretary with the advice of the Director of the U.S. Fish and Wildlife Service as necessary. Additionally, rather than depending on USWFS staff to assess the impact of agency actions in biological assessments or biological opinions, the Secretary could require the agencies undertaking the actions to provide these reviews, upon which the Secretary's determination would then be based.

By a blanket regulation,[29] the USFWS applied the more stringent protections provided for endangered species to all threatened species, directly subverting the system established by the ESA. The Secretary should replace this regulation with one that ensures that a prohibition against the "take"[30] of threatened species is applied to individual species by promulgation of a unique 4(d) rule for the species. Such rules should only be promulgated when clearly needed and supported with data.

As a matter of policy, prior to reintroducing endangered or threatened species into any state, the Secretary should require the approval of the governor of the affected state.

ADDITIONAL READING

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- The Heritage Foundation, "Blueprint for Reform: A Comprehensive Policy Agenda for a New Administration in 2017."
- The Heritage Foundation, "Environmental Conservation: Eight Principles of the American Conservation Ethic," 2012.
- Diane Katz, "An Environmental Policy Primer for the Next President," Heritage *Backgrounder* No. 3079, December 14, 2015.

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4. Nevada Legislative Counsel Bureau, Research Division, "Public Lands and General Natural Resources Issues," Policy and Program Report, April 2016, https://www.leg.state.nv.us/Division/Research/Publications/PandPReport/35-PLGNR.pdf (accessed June 2, 2017).
5. There is a history of substantial reductions to national monuments on both a percentage basis, almost 90 percent in one case, and, in terms of gross acreage, another national monument reduced by over 300,000 acres. National Park Service, "Antiquities Act 1906–2006: Monuments List," https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (accessed June 2, 2017).
6. John Yoo and Todd Gaziano, "Presidential Authority to Revoke or Reduce National Monument Designations," American Enterprise Institute, 2017, https://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf (accessed June 2, 2017).
7. Robert Rosenbaum, "No, President Trump Can't Revoke National Monuments," The Washington Post, March 29, 2017, https://www.washingtonpost.com/opinions/no-president-trump-cant-revoke-national-monuments/2017/03/29/35e53336-10cd-11e7-ab07-07d9f521f6b5_story.html?utm_term=.e375c46201cf (accessed June 2, 2017), and John D. Leshy and Mark Squillace, "The Endangered Antiquities Act," The New York Times, March 31, 2017, https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html?_r=1 (accessed June 2, 2017).
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29. 50 C.F.R. § 17.31. Prohibitions. "U.S. Fish and Wildlife Service, Protection for Threatened Species of Wildlife," Federal Register Vol. 43 (April 28, 1978), 1818. For a discussion, see Johnathan Wood, "Take it to the Limit: The Illegal Prohibiting of Take and Threatened Species under the Endangered Species Act," Pace Environmental Law Review, 2015, https://www.animallaw.info/article/take-it-limit-illegal-regulation-prohibiting-take-any-threatened-species-under-endangered (accessed June 6, 2017).
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Department of Justice

Eliminate the Federal Equitable Sharing Program and the Assets Forfeiture Fund

RECOMMENDATION

First, the President should instruct the Attorney General and the Secretary of the Treasury to eliminate the federal "equitable sharing" programs they administer. Federal law allows, but does not require, the sharing of proceeds derived from successful civil forfeiture cases with state and local law enforcement agencies that "participated directly" in the case.[1]

Second, the President should direct federal agencies to improve the administrative forfeiture process, to ensure that property owners are fully apprised of their right to contest a forfeiture action, and to provide transparency in administrative forfeitures. The President should also order new reporting requirements in all civil forfeiture cases, to track whether property seizures are tied to criminal investigations, and whether said investigations result in convictions.

Third, Congress should adopt comprehensive civil forfeiture reforms. In addition to codifying the above presidential actions, such legislation should eliminate the forfeiture financial incentive by terminating the Justice Department's Assets Forfeiture Fund, as well as its Treasury Department counterpart, the Treasury Forfeiture Fund. Congress should permanently rescind the funds contained in these accounts and deposit them—along with all future forfeiture proceeds—into the General Fund. Legislation should also adopt improved procedural protections for property owners in civil-forfeiture cases, including a heightened evidentiary requirement and guaranteed indigent defense.

RATIONALE

In 1984, Congress ramped up federal forfeiture activities with the Comprehensive Crime Control Act, empowering federal law enforcement agencies with the ability to seize the property and ill-gotten gains of the worst categories of offenders—drug kingpins, criminal organizations, and money launderers. It also granted agencies the novel authority to retain and spend forfeited assets. This financial incentive has, in some cases, warped law enforcement priorities, encouraging cash seizures at the expense of traditional law enforcement activities. Some agencies have become dependent on the funds generated by asset forfeiture, and the lack of accountability has resulted in high-profile instances of abuse or misuse of forfeiture-derived funds. Additionally, forfeiture activities are no longer concentrated on the most serious offenders; today, federal civil-forfeiture law is commonly used to seize relatively small amounts of cash. Seizures require little or no evidence of criminal misconduct, and insufficient due-process protections exist to ensure that innocent property owners do not suffer confiscation of their assets or property.

In addition to seizing and forfeiting assets directly, federal officials coordinate with state and local law enforcement authorities, and divide proceeds with these agencies. Equitable sharing funds must be spent by the receiving agency for law enforcement purposes, regardless of state law. The program has been criticized as providing state and local agencies with a means of circumventing state laws that, relative to federal forfeiture law, are more restrictive in how forfeiture funds may be spent, or are more protective of property owners. In recent years, 20 states have reformed their civil forfeiture laws, and federal law should not provide a means to bypass state law.

The Justice Department does not track the percentage of civil forfeiture cases tied to criminal prosecutions or convictions. However, it is estimated that nearly 90 percent of federal cases end in administrative forfeiture, meaning there is no judicial involvement in the case.[2] A recent report by the Department of Justice Inspector General concluded that, of a representative sampling of Drug Enforcement Administration seizures, officials could only demonstrate that 44 percent of seizures furthered a criminal investigation.[3]

The policy changes outlined above will provide greater transparency, eliminate the financial incentive for federal agencies to employ dubious or abusive practices to seize and forfeit property, and afford

property owners greater legal protections. These actions will also end the ability of state and local law enforcement agencies to circumvent more restrictive state forfeiture laws, and return oversight and budgetary authority to elected lawmakers, at all levels, who are accountable to the public for their appropriations.

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- Jason Snead, "Instead of Raiding the Assets Forfeiture Fund, Congress Should Simply Discontinue It," Heritage Foundation *Issue Brief* No. 4469, November 20, 2015.

Eliminate the Community Relations Service

RECOMMENDATION

Eliminate the Department of Justice's Community Relations Service (CRS).

RATIONALE

The CRS budget should be entirely eliminated. Rather than fulfilling its mandate of trying to be the peacemaker in community conflicts, the CRS has raised tensions in local communities in recent incidents. In the Zimmerman case in Florida, the CRS helped organize and manage rallies and protests against George Zimmerman, who was found "not guilty" of murder for shooting Trayvon Martin, thereby interfering with the objective administration of the justice system.[4] Other employees inside the CRS have cited a culture of incompetence, political decision making, and gross mismanagement, leading the employees to send a complaint letter to the Attorney General.[5]

ADDITIONAL READING

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Eliminate the Legal Services Corporation

RECOMMENDATION

Eliminate the Legal Services Corporation (LSC). This proposal saves $484 million in FY 2018.

RATIONALE

The LSC was created by the Legal Services Act of 1974 as a means to provide civil legal assistance to indigent clients. It does so by distributing federal grant funds in one-year to three-year increments to service areas throughout the United States and its territories. The annual appropriations legislation specifies the types of activities for which the funds may be used, and also restricts certain uses, such as for political activities, advocacy, demonstrations, strikes, class-action lawsuits, and cases involving abortion, partisan redistricting, and welfare reform.

LSC grants do help provide high-quality civil legal assistance to some low-income Americans. Nevertheless, the Congressional Budget Office (CBO) has repeatedly listed LSC elimination among its deficit-reduction options, citing that many programs receiving LSC grants already receive resources from state and local governments and private entities.

LSC also should be abolished because state and local governments, supplemented by donations from other outside sources, already provide funding for indigent legal assistance in civil cases and are better equipped to address the needs of those in their communities who rely on these free services. By giving local entities sole responsibility for these activities, funds can be targeted in the most efficient manner, and the burden can be removed from the federal deficit. Access to justice is an important issue, and the responsibility for providing such assistance should lie with state and local governments, not the federal government.

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- National Legal and Policy Center, "What the Legal Services Corporation Doesn't Want Congress to Know," March 22, 2012.

Eliminate the Office of Community Oriented Policing Services

RECOMMENDATION

All grants provided by the Office of Community Oriented Policing Services (COPS) should be eliminated.

First, President Trump should consolidate COPS grants into the Office of Justice Programs. Grants for subsidizing the hiring of state and local police officers were authorized by Congress with the passage of the Violent Crime Control and Law Enforcement Act of 1994. While the act only authorized the grant funding, it did not establish the COPS office as an official agency within the Department of Justice. Then-Attorney General Janet Reno established COPS as an official agency within the Department of Justice with its own leadership and staffing. However, COPS does not actually perform the crucial task of managing the grants that it doles out. Instead, the Office of Justice Programs (OJP) manages the awarded grants. In order to decrease unnecessary duplication, Attorney General Jeff Sessions should consolidate COPS grants into the OJP, thus reducing administrative costs.

Second, Congress should eliminate all funding for COPS. The authority for the Attorney General to award specific grants for police officer salaries expired on September 13, 2000.[6] Further, congressional authority for COPS grants expired in FY 2009.[7]

RATIONALE

Created in 1994, COPS promised to add 100,000 new state and local law enforcement officers to the streets by 2000. COPS not only failed to add 100,000 additional officers, it was also failed at reducing crime.

State and local officials, not the federal government, are responsible for funding the staffing levels of local police departments. By paying for the salaries of police officers, COPS funds the routine, day-to-day functions of police and fire departments. In *Federalist* No. 45, James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

When Congress subsidizes local police departments in this manner, it effectively reassigns to the federal government the powers and responsibilities that fall squarely within the expertise, historical control, and constitutional authority of state and local governments. The responsibility to combat ordinary crime at the local level belongs almost wholly, if not exclusively, to state and local governments.

The COPS program has an extensive track record of poor performance and should be eliminated. COPS grants also unnecessarily fund functions that are the responsibility of state and local governments.

ADDITIONAL READING

- David B. Muhlhausen, "Byrne JAG and COPS Grant Funding Will Not Stimulate the Economy," statement before the Judiciary Committee, U.S. Senate, May 12, 2009.
- David B. Muhlhausen, "Impact Evaluation of COPS Grants in Large Cities," Heritage Foundation *Center for Data Analysis Report* No. 06-03, May 26, 2006.

Eliminate Violence Against Women Act Grants

RECOMMENDATION

Congress should eliminate Violence Against Women Act (VAWA) grants.

RATIONALE

VAWA grants should be terminated because these services should be funded and implemented locally. Using federal agencies to fund the routine operations of domestic violence programs that state and local governments could provide is a misuse of federal resources and a distraction from concerns that are truly the province of the federal government.

The principal reasons for the existence of the VAWA programs are to mitigate, reduce, or prevent the effects and occurrence of domestic violence. Despite being created in 1994, grant programs under the VAWA have not undergone nationally representative, scientifically rigorous experimental evaluations of effectiveness.

The Government Accountability Office concluded that previous evaluations of VAWA programs "demonstrated a variety of methodological limitations, raising concerns as to whether the evaluations will produce definitive results." Thus, the evaluations could not be used to credibly assess the performance of the evaluated programs.

ADDITIONAL READING

- Paul J. Larkin Jr., "Send in the Lawyers: The House Passes the Senate's Violence Against Women Act," The Daily Signal, March 1, 2013.
- David B. Muhlhausen, "Violence Against Women Act Gives Grant Money to Misleading Organizations," The Daily Signal, February 13, 2013.
- David B. Muhlhausen and Christina Villegas, "Violence Against Women Act: Reauthorization Fundamentally Flawed," Heritage Foundation *Backgrounder* No. 2673, March 29, 2012.
- U.S. General Accounting Office, "Justice Impact Evaluations: One Byrne Evaluation was Rigorous; All Reviewed Violence Against Women Office Evaluations Were Problematic," March 2002.

Transfer the Special Litigation Section to the Office of the Deputy Attorney General

RECOMMENDATION

Transfer the Special Litigation Section of the Civil Rights Division to the Office of the Deputy Attorney General. The Special Litigation Section handles extremely sensitive matters involving state and local law enforcement and should be under the supervision of a top Justice official whose duty is to ensure the proper administration of the criminal justice system.

RATIONALE

The Special Litigation Section is responsible for enforcing federal laws governing the behavior of prison officials and law enforcement agencies. This is the section that sues such state and local agencies when they engage in a "pattern and practice" of unlawful or unconstitutional behavior. In other words, the section polices the standards and practices of police and correctional departments all over the country. Yet none of the lawyers inside the section have any law enforcement or corrections experience, or even any experience as criminal prosecutors enforcing criminal laws and evaluating the behavior of law enforcement personnel. The section has often been criticized for going far beyond what the law requires and trying to impose its own idea of what national standards should apply, even though that is neither its role nor its responsibility. It has imposed enormous costs on local police departments with draconian consent decrees that have restricted the ability of law enforcement to protect the safety of the public.

It would be more efficient and effective for the Special Litigation Section to report directly to the Office of the Deputy Attorney General, which can draw on the experience of the Civil Rights Division as needed, but also the Criminal Division and its professional criminal prosecutors who understand the workings of the criminal justice system and the standards and requirements that should govern the behavior of law enforcement and corrections officers. Given the vital importance to the safety and security of the public of well-functioning, professional law enforcement, this section should be under the direct supervision of the Deputy Attorney General, the number two position at the Justice Department.

ADDITIONAL READING

- John Fund and Hans von Spakovsky, *Obama's Enforcer: Eric Holder's Justice Department* (New York: HarperCollins/Broadside, 2014), chapter 4.
- Heather MacDonald, "Targeting the Police: The Holder Justice Department Declares Open Season on Big City Police Departments," *The Weekly Standard*, January 31, 2011.
- Hans von Spakovsky, "*Every Single One*: The Politicized Hiring of Eric Holder's Special Litigation Section," PJ Media, August 16, 2011.
- Hans von Spakovsky, "What the Ferguson Report Really Exposed," *The National Interest*, March 13, 2015.
- Hans von Spakovsky and Brad Schlozman, "The 'Ferguson Effect': Restricting Law Enforcement's Ability to Protect Americans," The Heritage Foundation *Legal Memorandum* No. 184, June 23, 2016.

Transfer the Criminal Section of the Civil Rights Division and All Other Criminal Sections of All Divisions within the Justice Department to the Criminal Division

RECOMMENDATION

Transfer the Criminal Section of the Civil Rights Division, the Criminal Section of the Antitrust Division, the Criminal Enforcement Section of the Tax Division, and the Environmental Crimes Section of the Environment & Natural Resources Division to the Criminal Division of the Department of Justice.

RATIONALE

These criminal sections are responsible for prosecuting criminal civil rights, antitrust, tax, and environmental laws in contrast to the civil enforcement that predominates these divisions. The investigation and prosecution of criminal violations of the law is very different both substantively and procedurally from the civil enforcement of federal laws.

It would be more efficient and effective for all of the sections in different divisions that are responsible for criminal law enforcement to be consolidated inside the Criminal Division of the Justice Department. That division is staffed by experienced law enforcement personnel and professional criminal prosecutors who have a much better grasp of the requirements of the criminal justice system and the standards that govern the administration of criminal justice.

ADDITIONAL READING

- John Fund and Hans von Spakovsky, *Obama's Enforcer: Eric Holder's Justice Department* (New York: HarperCollins/Broadside, 2014), chapter 4.
- Hans von Spakovsky, "*Every Single One*: The Politicized Hiring of Eric Holder's Criminal Section," PJ Media, September 14, 2011.

Transfer the Immigrant and Employee Rights Section of the Civil Rights Division to the Executive Office of Immigration Review

RECOMMENDATION

Transfer the Immigrant and Employee Rights Section of the Civil Rights Division to the Executive Office of Immigration Review. This will place the Immigrant and Employee Rights Section in the Justice Department office whose personnel have actual experience in the enforcement of federal immigration law, unlike the Civil Rights Division.

RATIONALE

The Immigrant and Employee Rights Section is responsible for enforcing the anti-discrimination provisions of the Immigration and Nationality Act. No other sections inside the Civil Rights Division have anything to do with federal immigration law. In contrast, the Executive Office for Immigration Review is the office within the Justice Department that is responsible for fairly, expeditiously, and uniformly interpreting and administering all federal immigration laws. That includes conducting immigration court proceedings, appellate reviews, and administrative hearings.

It would be more efficient and effective for the Immigrant and Employee Rights Section to be housed in the Executive Office of Immigration Review with experienced immigration lawyers who have a much better grasp of the workings of the federal immigration enforcement system and of the standards and requirements that should govern such enforcement. Given the vital importance of a well-functioning federal immigration process, this section should be under the direct supervision of the office within the Justice Department that specializes in, and is responsible for, administering the immigration court system.

ADDITIONAL READING

- Richard Pollock, "*Every Single One*: The Politicized Hiring of Eric Holder's Immigration Office," PJ Media, August 12, 2011.
- Hans von Spakovsky, "Department of Justice Fines Sheriff Department for Hiring Only US Citizens," The Daily Signal, Nov. 23, 2016.]

Transfer Authority to Investigate Attorney Wrongdoing to the Inspector General of the Justice Department

RECOMMENDATION

Transfer the authority of the Office of Professional Responsibility (OPR) to investigate and punish professional malpractices and ethical violations by Justice Department lawyers, paralegal, legal assistants, and other staff to the Office of the Inspector General (OIG) of the Justice Department.

RATIONALE

The OPR has sole authority to investigate and punish unprofessional behavior by Justice Department personnel. It has been repeatedly criticized for its bias, failure to take action, and the incompetence of its personnel. Other Justice Department lawyers generally view the office with contempt because they believe it lacks the level of professional competence found elsewhere in the frontline divisions within Justice. It has demonstrated on numerous occasions that it is incapable of handling politically charged issues in an even-handed manner, particularly because the Attorney General appoints the head of the OPR, which is supposed to be the DOJ's internal policeman. As just one example, former Attorney General Michael Mukasey and Deputy Attorney General Mark Filip scathingly criticized the OPR for its erroneous, biased, and error-filled report in 2009 on John Yoo and Jay Bybee, the Bush Administration lawyers who wrote the memos analyzing the legality of enhanced interrogation techniques.

These problems with OPR lawyers and the conflict of interest inherent in having the OPR's director report directly to the Attorney General prompted the Inspector General of the Justice Department, Michael Horowitz, in 2013 to ask that his office be given authority to investigate the misconduct of Justice lawyers. He pointed out that the "institutional independence of the OIG...is crucial to the effectiveness of our misconduct investigations." Unlike the IG, "OPR does not have that statutory independence" since the "Attorney General appoints and can remove OPR's leader."

ADDITIONAL READING

- John Fund and Hans von Spakovsky, *Obama's Enforcer: Eric Holder's Justice Department* (New York: HarperCollins/Broadside, 2014), pp. 202–209.
- "Top Management and Performance Challenges Facing the Department of Justice-2013," Memorandum to the Attorney General, the Deputy Attorney General, from Michael E. Horowitz, Inspector General, U.S. Department of Justice, December 11, 2013 (re-issued December 20, 2013).
- "Vindicating John Yoo," *The Wall Street Journal*, February 22, 2010.
- Hans von Spakovsky, "Revenge of the Liberal Bureaucrats," *The Weekly Standard*, January 2, 2009.

ENDNOTES

1. 18 U.S. Code 981(e)(2).
2. Marian R. Williams et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture," Institute for Justice, March 2010, http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf (accessed May 3, 2017).
3. U.S. Department of Justice, Office of Inspector General, "Review of the Department's Oversight of Cash Seizure and Forfeiture Activities," March 2017, https://oig.justice.gov/reports/2017/e1702.pdf (accessed May 3, 2017).
4. Hans von Spakovsky, "Zimmerman Trial: The Holder Justice Department's Latest Abuse of Power," The Daily Signal, July 10, 2013, http://dailysignal.com/2013/07/10/zimmerman-trial-the-holder-justice-departments-latest-abuse-of-power/.
5. Hans von Spakovsky, "Corruption, Incompetence Scandal at DOJ's Ferguson Unit Widens," PJ Media, April 18, 2016.
6. [Name redacted], "Community Oriented Policing Services (COPS): In Brief," Congressional Research Service, *CRS Report*, February 2, 2016, p. 1, footnote 4.
7. Ibid., p. 1.

Department of Labor

Eliminate the Office of Federal Contract Compliance Programs

RECOMMENDATION

Congress should eliminate the Office of Federal Contract Compliance Programs (OFCCP).

RATIONALE

In 1965, President Lyndon Johnson signed Executive Order No. 11246, prohibiting federal contractors from engaging in racial discrimination. The OFCCP enforces these requirements. At the time Johnson promulgated this executive order, the Civil Rights Act provided only weak enforcement powers. Since then, Congress has given the Equal Employment Opportunity Commission (EEOC) strong enforcement powers. Federal employees frequently appeal allegedly discriminatory actions to the EEOC. The OFCCP has become redundant. Taxpayers should not fund two separate and duplicative anti-discrimination agencies, one for federal contractors and one for all employers.

Eliminate the Women's Bureau in the Department of Labor

RECOMMENDATION

Congress should eliminate the Labor Department's Women's Bureau.

RATIONALE

The Women's Bureau examines challenges facing women in the workforce. It was created in 1920 when few women worked outside the home. Today, women make up half of the workforce. The challenges facing female employees are the challenges facing workers as a whole. The Women's Bureau has become obsolete. Issues surrounding gender discrimination are handled by other offices and agencies, such as the Equal Employment Opportunity Commission.

Eliminate Funding for the International Labor Affairs Bureau

RECOMMENDATION

Congress should eliminate funding for the International Labor Affairs Bureau (ILAB).

RATIONALE

The ILAB monitors foreign compliance with labor obligations under trade treaties. It also hands out grants to unions and aid organizations to promote the welfare of foreign workers. The effectiveness of these grants is unclear and a poor use of U.S. taxpayer dollars in times of tight budgets. Congress should eliminate ILAB funding for grant making and restore it to its core purpose of monitoring treaty compliance.

Eliminate Susan Harwood Training Grants

RECOMMENDATION

Congress should eliminate Susan Harwood Training Grants.

RATIONALE

The Department of Labor has a history of operating ineffective job-training programs. The evidence from every multi-site experimental evaluation of federal job-training programs published since 1990 strongly indicates that these programs are ineffective. Based on these scientifically rigorous evaluations using the "gold standard" of random assignment, these studies consistently find failure.

Since 1978, the Occupational Safety and Health Administration (OSHA) has provided Harwood grants to nonprofit organizations to provide safety training to workers. Despite existing for decades, OSHA does not have any credible evidence that these training grants are effective. Case in point is the FY 2015 Department of Labor performance report that relies solely on the number of people trained to assess performance of the grant program.[1] The number of people trained does nothing to determine whether trainees learned anything to make workplaces safer.

Measuring the number of people trained does not measure program "impact," it measures an output. The number of people trained is not a measure of effectiveness. It would be like a drug company claiming a new drug is successful simply because the drug was provided to a large number of people. Whether the drug cured or treated a disease is unknown.

Instead, the effectiveness of the Harwood grants should be assessed by the program's actual impact on participants. Program impact is assessed by comparing outcomes for program participants with estimates of what the outcomes would have been had the participants not partaken in the program. Did participation is the training increase earnings and employment? Without a valid comparison, performance monitoring based on "outputs," such as number of people trained, cannot provide valid estimates of program effectiveness.

Eliminate the Workforce Innovation and Opportunity Act's Job-Training Grants

RECOMMENDATION

Congress should eliminate the Workforce Innovation and Opportunity Act's (WIOA's) adult, dislocated worker, and youth job-training grants.

RATIONALE

The Department of Labor has a history of operating ineffective job-training programs. The evidence from every multi-site experimental evaluation of federal job-training programs published since 1990 strongly indicates that these programs are ineffective. Based on these scientifically rigorous evaluations using the "gold standard" of random assignment, these studies consistently find failure.

On Election Day November 8, 2016, while Americans were focused on who was going to move into the White House, the U.S. Department of Labor publicly released 15-month findings of the Workforce Investment Act (WIA) Gold Standard Evaluation. However, the report had already been finalized in May 2016. The peculiar timing and months-long delay occurred despite the Labor Department's official policy of releasing reports within two months of a report's completion.[2]

The WIA Gold Standard Evaluation assessed the effectiveness of WIA Adult and Dislocated Worker programs. The 15-month findings continue a decades-long trend of dismal results. The findings are highly relevant to policymakers today, because the authorization of the WIOA did not substantially alter the types of employment services offered by the Adult and Dislocated Worker programs.

The most important test of the WIA's effectiveness is the comparison of full-WIA services—intensive services (skills assessments, workshops, and job-search assistance) plus job training—to core services that offered mostly information and online tools for participants to plot their careers and find employment. During the five quarters of the follow-up period, members of the full-WIA group failed to have statistically different earnings than the core group members. In the fifth quarter, the earnings of the full-WIA group, on average, were indistinguishable from the earnings of the core group. Despite being more likely to enroll in training, and receive one-on-one assistance and other employment services, participation in full-WIA had no effect on earnings.

Full-WIA participants did not believe that the services provided to them resulted in finding jobs in any occupation. A solid majority of 57 percent of full-WIA participants believed that the services provided to them was unrelated to finding employment. Perhaps more important, participants in the WIA were largely unable to find employment in occupations related to their training. Only 32 percent of full-WIA participants found occupations in the area of their training. Thus, 68 percent were unable to find employment in their intended occupations. Full-WIA participants were no more or less likely to find employment in their planned occupation than the other groups.

Federal job-training programs targeting youth and young adults have been found to be extraordinarily ineffective. According to a 2009 report by the Government Accountability Office:

> [L]ittle is known about what the workforce system is achieving. Labor has not made such research a priority and, consequently, is not well positioned to help workers or policymakers understand which employment and training approaches work best. Knowing what works and for whom is key to making the system work effectively and efficiently. Moreover, in failing to adequately evaluate its discretionary grant programs, Labor missed an opportunity to understand how the current structure of the workforce system could be modified to enhance services for growing sectors, to encourage strategic partnerships, and to encourage regional strategies.[3]

There is abundant evidence suggesting that federal job-training programs do not work.

ADDITIONAL READING

- David B. Muhlhausen, "Do Federal Social Programs Work?" Heritage Foundation *Backgrounder* No. 2884, March 19, 2014.
- David B. Muhlhausen, "Federal Job Training Fails Again," Heritage Foundation *Backgrounder* No. 3198, March 10, 2017.
- Sheena McConnell et al., *Providing Public Workforce Services to Job Seekers: 15-Month Impact Findings on the WIA Adult and Dislocated Worker Programs* (Washington, DC: Mathematica Policy Research, May 2016).
- U.S. Government Accountability Office, "Workforce Investment Act: Labor Has Made Progress in Addressing Areas of Concern, But More Focus Needed on Understanding What Works and What Doesn't," February 26, 2009.

Let Trade Adjustment Assistance Expire

RECOMMENDATION

Congress should eliminate the entire Trade Adjustment Assistance (TAA) program by letting its authorization law expire.

RATIONALE

TAA provides overly generous government benefits to American workers who lose their jobs when foreign companies prove more competitive than their American employers. The program encourages recipients to participate in job training. As a result, they spend considerable time in job training that could have been spent looking for work or working. Most participants never recover this lost income, and their federal subsidies only partially offset these financial losses. Participating in TAA costs the average participant approximately $25,000 in lost income over four years. Congress should not spend taxpayer dollars actively hurting unemployed workers' job prospects.

Program evaluations of TAA find no evidence that this assistance and training improves earnings based on newly acquired job skills. This finding should not be surprising, because scientifically rigorous evaluations of federal job-training programs have consistently found these programs to be highly ineffective.

A 2012 quasi-experimental impact evaluation of TAA by Mathematica Policy Research and Social Policy Research Associates builds on the consensus of three previous quasi-experimental impact evaluations that have found TAA ineffective at improving the employment outcomes of participants.[4]

Overall, there is little empirical support for the notion that TAA improves the employment outcomes of displaced workers. In fact, TAA participants are more likely to earn *less* after participating in the program. TAA failed a straightforward test of determining whether the program produces more benefits than costs.

Furthermore, TAA benefits often go to politically connected unions and firms that did not experience layoffs caused by foreign competition. The Labor Department only requires showing a correlation between increasing foreign imports and a firm's loss of sales. These correlations are often coincidental, or unrelated to the firm's financial woes. This allowed the Obama Administration to award TAA benefits to Solyndra and Hostess despite foreign competition having little to do with the bankruptcies of these companies.

ADDITIONAL READING

- David B. Muhlhausen, James Sherk, and John Gray, "Trade Adjustment Assistance Enhancement Act: Budget Gimmicks and Expanding an Ineffective and Wasteful 'Job-Training' Program," Heritage Foundation *Issue Brief* No. 4396, April 28, 2015.

Eliminate Job Corps

RECOMMENDATION

Congress should eliminate Job Corps.

RATIONALE

The National Job Corps Study, a randomized experiment—the "gold standard" of scientific research—assessed the impact of Job Corps on participants compared to similar individuals who did not participate in the program. For a federal taxpayer investment of $25,000 per Job Corps participant, the study found:

Compared to non-participants, Job Corps participants were less likely to earn a high school diploma (7.5 percent versus 5.3 percent);

Compared to non-participants, Job Corps participants were no more likely to attend or complete college;

Four years after participating in the evaluation, the average weekly earnings of Job Corps participants were a mere $22 higher than the average weekly earnings of the control group; and

Employed Job Corps participants earned only $0.22 more in hourly wages compared to employed control group members.

If Job Corps actually improved the skills of its participants, it should have substantially raised their hourly wages. A paltry $0.22 increase in hourly wages suggests that Job Corps does little to boost the job skills of participants.

A cost-benefit analysis based on the National Job Corps Study found that the benefits of Job Corps do not outweigh the cost of the program. Job Corps does not provide the skills and training to substantially raise the wages of participants. Costing $25,000 per participant over an average participation period of eight months, the program is a waste of taxpayers' dollars.

ADDITIONAL READING

- David B. Muhlhausen, "Do Federal Social Programs Work?" Heritage Foundation *Backgrounder* No. 2884, March 19, 2014.
- David B. Muhlhausen, "Job Corps: An Unfailing Record of Failure," Heritage Foundation *WebMemo* No. 2423, May 5, 2009.

ENDNOTES

1. U.S. Department of Labor, *U.S. Department of Labor FY 2015 Annual Performance Report*, https://www.dol.gov/sites/default/files/documents/general/budget/CBJ-2017-V1-01.pdf (accessed January 3, 2017).
2. U.S. Department of Labor, "U.S. Department of Labor Evaluation Policy," November 2013, https://www.dol.gov/asp/evaluation/EvaluationPolicy.htm (accessed January 3, 2017).
3. Statement by George A. Scott, "Workforce Investment Act: Labor Has Made Progress in Addressing Areas of Concern, But More Focus Needed on Understanding What Works and What Doesn't," U.S. Government Accountability Office, February 26, 2009, http://www.gao.gov/new.items/d09396t.pdf (accessed May 25, 2017).
4. Peter Z. Schochet et al., "Estimated Impacts for Participants in the Trade Adjustment Assistance (TAA) Program Under the 2002 Amendments," Social Policy Research Associates and Mathematica Policy Research, August 2012, http://wdr.doleta.gov/research/FullText_Documents/ETAOP%5F2013%5F10%5FParticipant%5FImpact%5FReport%2Epdf (accessed January 8, 2016).

Small Business Administration

Eliminate the Small Business Administration Disaster Loans Program

RECOMMENDATION

Congress should eliminate the Small Business Administration's (SBA's) Disaster Loans Program (DLP).

RATIONALE

After federally declared disasters, SBA disaster loans offer taxpayer-funded direct loans to assist businesses, nonprofit organizations, homeowners, and renters in repairing damaged and replacing destroyed property. Unfortunately, the generous federal disaster relief offered by the DLP creates a "moral hazard" by discouraging individuals and businesses from purchasing insurance for natural catastrophes. Currently, SBA disaster loans are awarded regardless of whether the beneficiaries previously took steps to reduce their exposure to losses from natural disasters.

While SBA disaster loans are intended to help applicants return their property to the same condition as before the disaster, the unintended consequence of this requirement is that borrowers are forced to rebuild in disaster-prone locations. For example, instead of moving from a town located in a major flood zone, applicants are required to rebuild in the exact same location. Thus, applicants are still located in a high-risk area. In many cases, the loans fail to offer a long-term solution.

ADDITIONAL READING

- David B. Muhlhausen, "Business Disaster Reform Act of 2013: Review of Impact and Effectiveness," testimony before the Committee on Small Business and Entrepreneurship, U.S. Senate, March 14, 2013.

Department of State

Department of State, Foreign Operations, and Related Programs

RECOMMENDATION

The Department of State, foreign assistance programs, and contributions to international organizations are the primary vehicles for advancing U.S. interests and policies through diplomacy, communications, and economic engagement, as well as initiatives and policies that contribute to those interests by encouraging market reforms, good governance, and the rule of law in developing countries. While America remains a global superpower, there is a clear sense that U.S. influence falls short of what it should wield, and that some of the blame is due to inefficiencies and structural problems in the Department of State and America's foreign-assistance programs. As a matter of due diligence, Congress and the Administration should evaluate these programs to determine which changes should be made to address those failings.

In this vein, the Trump Administration has proposed a number of reforms in its FY 2018 budget proposal. Congress should work with the Administration on crafting changes to:

- Restructure the Department of State;
- Clarify and, to the extent possible, codify the treaty process;
- Place U.S. economic and development assistance more directly under the control of the State Department to better coordinate its activities with U.S. policy priorities;
- Conduct an independent evaluation of all U.S. assistance programs;
- Replace or comprehensively update the 1961 Foreign Assistance Act;
- Reform America's food assistance programs;
- Establish a dedicated unit for international organizations in the Office of Inspector General for the Department of State;
- Conduct a periodic cost-benefit analysis of U.S. participation in all international organizations; and
- Enforce the 25 percent cap on America's peacekeeping assessment.

RATIONALE

The perception that U.S. influence falls short of what it should wield is not new. Fifteen years ago, the U.S. Commission on National Security/21st Century (the Hart–Rudman Commission) described the State Department as a "crippled institution" suffering from "an ineffective organizational structure in which regional and functional policies do not serve integrated goals, and in which sound management, accountability, and leadership are lacking."[1] As it further observed:

> Foreign assistance is a valuable instrument of U.S. foreign policy, but its present organizational structure, too, is a bureaucratic morass. Congress has larded the Foreign Assistance Act with so many earmarks aud tasks for the U.S. Agency for International Development ([US]AID) that it lacks a coherent purpose. Responsibility today for crisis prevention and responses is dispersed in multiple [US]AID and State bureaus, and among State's Under Secretaries and the [US]AID Administrator. In practice, therefore, *no one is in charge.*

Neither the Secretary of State nor the [US]AID Administrator is able to coordinate these foreign assistance activities or avoid duplication among them. More important, no one is responsible for integrating these programs into broader preventive strategies or for redeploying them quickly in response to crises.[2]

Similarly, despite generally being the largest financial contributor, the ability of the U.S. to guide policy decisions and reform international organizations has proven to be limited. Efforts by multiple Administrations and Congress to convince international organizations to improve efficiency, exercise budgetary restraint, and enhance accountability have made only sporadic progress—often later reversed—despite repeated examples and reports of poor management,

limited impact, and even reprehensible behavior like ongoing revelations of sexual exploitation and abuse by United Nations civilian personnel and peacekeepers.[3] A complicating factor is that U.S. policy priorities must pass muster with other U.N. member states that often have countervailing interests, which leads to dilution of those policies or prevents their implementation entirely.

The Hart–Rudman Commission called for a significant restructuring of the State Department and America's foreign-assistance programs stating that funding increases could only be justified if there was greater confidence that those institutions would use its funding more effectively. The opposite has occurred—with increased funding provided while reforms to improve focus and effectiveness and to establish clearer lines of authority and responsibility have languished.

The bureaucratic and institutional structure has become even more complex. For instance, in addition to the old foreign-assistance programs, new initiatives have been established, including the President's Emergency Plan for AIDS Relief (PEPFAR) in 2003, the Millennium Challenge Corporation in 2004, and the President's Malaria Initiative in 2005. Meanwhile, the Department of State has created new bureaus and offices absent explicit congressional authorization.

According to the Congressional Budget Justification for the Department of State, Foreign Operations, and Related Programs, the FY 2016 total budget estimate for International Affairs (150 Account), which provides funding to the State Department and USAID, was $55.2 billion.[4] Between FY 2000 and FY 2016, the International Affairs budget increased by nearly 135 percent in nominal terms from $23.5 billion.[5] The number of full-time permanent State Department employees in FY 2000 was 25,239, which included 9,023 Foreign Service members, 6,590 Civil Service members, and 9,852 Foreign Service Nationals.[6] An apples-to-apples comparison with current employment was not possible because the State Department would provide that data only through a FOIA request. However, State did report that Foreign Service employment in 2015 totaled 13,760 and Civil Service employees totaled 10,964. Thus, growth in these two categories was, respectively, 52.5 percent and 66.4 percent between 2000 and 2015.

Over the years, too much focus on reforming the State Department and assistance programs has concerned funding levels. While this is important, as demonstrated by the increases in staff and budgets over the past 16 years, insufficient resources have not been the cause of the problems in these institutions. In terms of personnel and funding, Congress and the Trump Administration should work together to implement reforms targeted to address more fundamental structural and legislative problems by:

- **Restructuring the Department of State.** This restructuring should strengthen U.S. bilateral and multilateral diplomacy over thematic bureaus and offices to ensure that the State Department's focus is first on foremost on the interests and foreign policy priorities of the United States. State should work with Congress to eliminate unnecessary bureaus and offices, merge complementary bureaus and offices, and trim the use of special envoys to reduce costs and clarify lines of authority.[7]
- **Clarifying and, to the extent possible, codifying the treaty process.** The matter of which international agreements constitute treaties requiring Senate advice and consent in accordance with Article II of the Constitution is often subject to dispute. This ambiguity ill-serves the constitutional process and America's negotiating partners who cannot be certain of the status, permanence, and legality of an agreement with the U.S.
- **Placing U.S. economic and development assistance directly under the control of the State Department to better coordinate its activities with U.S. policy priorities.** As noted by the Hart–Rudman Commission, "Development aid is not an end in itself, nor can it be successful if pursued independently of other U.S. programs and activities.... Only a coordinated diplomatic and assistance effort will advance the nation's goals abroad, whether they be economic growth and stability, democracy, human rights, or environmental protection."[8] The President's FY 2018 budget proposal to merge several economic and development assistance programs into the Economic Support and Development Fund is a reasonable approach in addressing this problem.
- **Conducting an independent evaluation of all U.S. assistance programs to eliminate unnecessary U.S. assistance agencies and programs and merge duplicative ones.** As stewards of American taxpayer dollars, Congress and the Administration have a responsibility to ensure that assistance is effectively and

efficiently achieving its intended purpose—whether it is augmenting economic development, alleviating suffering during a crisis, or supporting America's national interests. As a matter of due diligence, Congress and the Administration should evaluate all U.S. assistance programs to determine whether they are doing what America needs them to do and, if not, implement changes to address those failings.

- **Replacing or comprehensively updating the 1961 Foreign Assistance Act.** This act, which is the legislative foundation of America's foreign-assistance programs, is antiquated and burdened with 50 years of various instructions, reporting requirements, mandates, and tweaks added over time. Congressional earmarks (mandates that certain funds be spent in certain countries or on specific purposes) can exceed total available funds, can be contradictory, and undermine effective use of U.S. assistance.
- **Reforming America's food assistance programs.** As the President's FY 2018 budget proposes, the U.S. should make U.S. foreign-assistance programs more efficient—reaching more people with less money—by eliminating costly legal requirements for the use of U.S. food and shipping, or making use of the International Disaster Assistance program, which is not burdened by those requirements, instead of Public Law 480 food assistance programs, which are subject to those restrictions.
- **Establishing a dedicated unit for international organizations in the Office of Inspector General for the Department of State.** The U.S. remains dependent on the internal U.N. oversight mechanisms, many of which lack independence, have inadequate resources, or face problems with competence, corruption, or bias.
- **Conducting a periodic cost-benefit analysis of U.S. participation in all international organizations.** Although a number of U.N. organizations provide important contributions to U.S. diplomatic, economic, and security interests, not all do. The U.S. lacks a comprehensive analysis of whether these contributions are advancing or undermining U.S. interests, or being used to maximum effect.[9] The last time the U.S. conducted a similar exercise, albeit in a far less rigorous manner, was under the Clinton Administration in 1995, which led directly to the U.S. decision to withdraw from the United Nations Industrial Development Organization. High on the list of international organizations from which the U.S. should withdraw are the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the United Nations Framework Convention on Climate Change (UNFCCC), to which the U.S. can no longer legally provide funding, due to their decision to grant full membership to the Palestinians.
- **Enforcing the 25 percent cap on America's peacekeeping assessment.** As passed in the FY 2017 omnibus and recommended in the President's FY 2018 budget proposal, the U.S. should resume pressure on the U.N. to fulfill its commitment to lower the U.S. peacekeeping assessment to 25 percent by enforcing the 25 percent cap enacted in 1994.[10]

ADDITIONAL READING

- The Heritage Foundation, "Solutions 2016: Foreign Assistance."
- Brett D. Schaefer, "How to Make the State Department More Effective at Implementing U.S. Foreign Policy," Heritage Foundation *Backgrounder* No. 3115, April 20, 2016.
- Brett D. Schaefer, "Key Issues of U.S. Concern at the United Nations," testimony before Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy, Committee on Foreign Relations, U.S. Senate, May 6, 2015.
- Brett D. Schaefer, "United Nations Peacekeeping Flaws and Abuses: The U.S. Must Demand Reform," Heritage Foundation *Backgrounder* No. 3131, August 3, 2016.
- The United States Commission on National Security/21st Century, "Road Map for National Security: Imperative for Change," Phase III Report, February 15, 2001, p. xi.

Eliminate the Overseas Private Investment Corporation

RECOMMENDATION

The Administration should work with Congress to eliminate the Overseas Private Investment Corporation (OPIC) by amending the statute to prohibit new financing, insurance, and reinsurance operations, and limiting its authority to managing its current portfolio. OPIC should be instructed to divest current activities where possible with the goal of winding down OPIC as quickly as practicable.

RATIONALE

OPIC was created in 1969 at the request of the Nixon Administration to promote investment in developing countries. OPIC provides loans and loan guarantees; subsidizes risk insurance against losses resulting from political disruption, such as coups and terrorism; and capitalizes investment funds.

While there may have been legitimate need for government services of this kind in 1969, in today's global economy, many private firms in the developed and developing world offer investment loans and political-risk insurance. OPIC displaces these private options by offering lower-cost services using the faith and credit of the U.S. government (that is, the taxpayers). Indeed, OPIC products may actually undermine development by accepting customers who might otherwise use financial institutions in middle-income countries, such as Brazil and India, which have reasonably sound domestic financial institutions. Moreover, OPIC's subsidized prices do not fully account for risk. By putting the taxpayer on the hook for this exposure, OPIC puts the profits in private hands but places the ultimate risk on the taxpayer.

Worse, OPIC rewards bad economic policies. Countries with the best investment climates are most likely to attract foreign investors. When OPIC guarantees investments in risky foreign environments, those countries have less reason to adopt policies that are friendly to foreign investors. Companies that want to invest in emerging markets should be free to do so, but they are not entitled to taxpayer support. Investors should base their decisions not on whether a U.S. government agency will cover the risks, but on whether investment in a country makes economic sense.

OPIC directs only a small share of its portfolio to least-developed countries, even though OPIC was established to "contribute to the economic and social progress of developing nations" that lack access to private investment, which today are overwhelmingly the least-developed countries. Further undermining the basis for OPIC's continuation, the need for OPIC even in least-developed countries is decreasing, as private capital investment has been increasing in those countries.

Finally, it is far from clear that OPIC projects support U.S. economic security or interests. OPIC claims of support for U.S. jobs are dubious and, even if valid, cost hundreds of thousands of dollars per job "supported." Thus, even if OPIC supports U.S. jobs, it is massively inefficient. Specific examples of projects that OPIC supports that should raise questions in Congress are:

- $67 million to finance 13 projects in the Palestinian territories while a unity government was formed with Hamas;
- Financing for Papa John's pizza franchises in Russia; and
- $50 million of financing for a Ritz-Carlton hotel in Istanbul, Turkey; and

In 1996, Milton Friedman concluded: "I cannot see any redeeming aspect in the existence of OPIC. It is special interest legislation of the worst kind, legislation that makes the problem it is intended to deal with worse rather than better.... OPIC has no business existing."

The Trump Administration's budget for FY 2018 "proposes to eliminate funding for several independent agencies, as well as funding to support new loans and guarantees at the Overseas Private Investment Corporation."[11] In pursuit of this goal, the budget requests sufficient funds for managing OPIC's portfolio and to "initiate orderly wind-down activities in FY 2018." Congress should support this request.[12]

ADDITIONAL READING

- Bryan Riley and Brett D. Schaefer, "Time to Privatize OPIC," Heritage Foundation *Issue Brief* No. 4224, May 19, 2014.
- Brett D. Schaefer and Bryan Riley, "8 Reasons Congress Should End Taxpayer Support for the Overseas Private Investment Corporation," The Daily Signal, September 30, 2015.
- Ryan Young, "The Case Against the Overseas Private Investment Corporation: OPIC Is Obsolete, Ineffective, and Harms the Poor," Competitive Enterprise Institute *On Point* No. 208, September 24, 2015.

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1. The United States Commission on National Security/21st Century, "Road Map for National Security: Imperative for Change," Phase III Report, February 15, 2001, p. x, http://govinfo.library.unt.edu/nssg/PhaseIIIFR.pdf (accessed June 12, 2017).
2. Ibid., p. 53.
3. Brett D. Schaefer, "Key Issues of U.S. Concern at the United Nations," testimony before Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy, Committee on Foreign Relations, U.S. Senate, May 6, 2015, http://www.heritage.org/research/testimony/2015/key-issues-of-us-concern-at-the-united-nations.
4. U.S. Department of State, "Congressional Budget Justification Department of State, Foreign Operations, and Related Programs: Fiscal Year 2018," Table: Diplomatic Engagement and Foreign Assistance Request FY 2016-FY 2018, pp. 2-4, http://www.state.gov/documents/organization/252179.pdf (accessed June 12, 2017).
5. U.S. Department of State, "Budget Tables: FY 2002 International Affairs Summary," http://www.state.gov/s/d/rm/rls/iab/2002/2104.htm (accessed June 12, 2017).
6. U.S. Department of State, "Accountability Report: Fiscal Year 2001," Table: Summary of Full-time Permanent Employees, p. 9, http://www.state.gov/documents/organization/9373.pdf (accessed June 12, 2017).
7. For more details, see Brett D. Schaefer, "How to Make the State Department More Effective at Implementing U.S. Foreign Policy," Heritage Foundation *Backgrounder* No. 3115, April 20, 2016, http://www.heritage.org/research/reports/2016/04/how-to-make-the-state-department-more-effective-at-implementing-us-foreign-policy.
8. The United States Commission on National Security/21st Century, "Road Map for National Security: Imperative for Change," p. xi.
9. An example of what the U.S. should do is the Multilateral Aid Review conducted by the United Kingdom's Department for International Development that assessed the relative value for U.K. aid money disbursed through multilateral organizations. This review identified those U.N. agencies providing poor value for money and led to the decision to zero-out funding for four U.N. agencies. United Kingdom Department for International Development, "Multilateral Aid Review," https://www.gov.uk/government/publications/multilateral-aid-review (accessed Jun 12, 2017). The original review cited was released in 2011. The review was updated in 2013 and followed by the "Multilateral Development Review" in 2016, https://www.gov.uk/government/publications/raising-the-standard-the-multilateral-development-review-2016 (accessed June 12, 2017).
10. Brett D. Schaefer, "U.S. Must Enforce Peacekeeping Cap to Lower America's U.N. Assessment," Heritage Foundation *Backgrounder* No. 2762, January 25, 2013, http://www.heritage.org/research/reports/2013/01/us-must-enforce-peacekeeping-cap-to-lower-americas-un-assessment.
11. U.S. Department of State, "Congressional Budget Justification: Department of State, Foreign Operations, and Related Programs, Fiscal Year 2018," p. 390, http://www.heritage.org/budget-and-spending/report/blueprint-reform-comprehensive-policy-agenda-new-administration-2017 (accessed June 5, 2017).
12. Ibid.

Department of Transportation

Evaluate and Consolidate Transportation Safety Programs

RECOMMENDATION

The Secretary of Transportation should undertake a comprehensive evaluation of all transportation safety programs for effectiveness, redundancy, and suitability in respect to the proper federal role of overseeing strictly interstate aspects of transportation. Following review, the Secretary should recommend the elimination of any ineffective or harmful safety activities—acting unilaterally when the case permits—and consulting the states to relinquish those activities more appropriately handled at the state level. Congress should then eliminate the identified ineffective activities and compile appropriate safety responsibilities under a new agency, the Interstate Transportation Safety Administration, which would encompass all federal transportation safety programs.

RATIONALE

As with other federal regulatory agencies, the Department of Transportation's (DOT's) sub-agencies are given broad authority to regulate a vast and growing array of activities related to transportation. While the federal government properly maintains jurisdiction over regulating interstate activities, many of these regulations—such as spurious commercial aviation regulations promulgated under the guise of consumer protection—are burdensome, inappropriate, or could be handled more accountably by local governments. Indeed, the DOT has layered on roughly $20 billion in new regulatory costs from major rules since 2009, the second most of any department over that time.[1] Reviewing and consolidating these regulatory functions would save money for the transportation sector, its users, and taxpayers.

ADDITIONAL READING

- James L. Gattuso and Diane Katz, "Red Tape Rising 2016: Obama Regs Top $100 Billion Annually," Heritage Foundation *Backgrounder* No. 3127, May 23, 2016.
- Michael Sargent, "Senate's FAA Authorization Perpetuates Big-Government Intrusion into Aviation Industry," Heritage Foundation *Issue Brief* No. 4546, April 11, 2016.

Privatize or Devolve Federal Management of Transportation Services

RECOMMENDATION

The DOT and its sub-agencies own and operate a limited but diverse number of transportation services. Where viable, these assets should be transferred to private-sector management or returned to the states to own and operate. These include the National Passenger Railroad Corporation (Amtrak), Air Traffic Control, and the Saint Lawrence Seaway Development Corporation.

RATIONALE

The federal government's ownership of various transportation services has delivered poor performance for users and taxpayers alike. These failures derive from a lack of proper incentives, excessive bureaucracy, an uncertain budget process, and micromanagement by members of Congress and other politicians.

Amtrak. Almost all of Amtrak's lines provide poor service and require heavy taxpayer subsidies, largely due to its monopoly status and government mismanagement.[2] Ideally, Congress and the Administration should eliminate federal subsidies for Amtrak, privatize any viable lines (chiefly the Northeast corridor), and open up intercity passenger rail to competition. Management of current state-supported routes could be turned over to the states, which would then have the option to cover the full cost of providing passenger rail service.

If complete overhaul is not politically possible, an alternative approach would be to lower federal subsidies for the long-haul and state-supported routes, allowing states to replace the subsidy difference if desired and Amtrak to shutter underperforming routes. The Northeast corridor could also be entered into a public-private partnership by bidding out the right to operate and maintain the Northeast corridor for a set period to a private firm, under the condition that the operator maintains a certain level of service and infrastructure condition.[3]

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

Air Traffic Control. The Federal Aviation Administration's (FAA's) Air Traffic Organization (ATO) is responsible for providing air-traffic-control services. Worldwide, it is one of the last air navigation service providers that is housed within an aviation safety regulatory agency, and indeed, there is bipartisan agreement that air traffic control is not inherently a government function.[4] Government bureaucracy has led to an ATO that is slow to react, mired in red tape, and managed by Congress when it should be run like an advanced business. Billions of dollars have been spent on sluggish technology modernization efforts, and the ATO struggles with basic business functions, such as hiring employees, investing in capital improvements, and improving efficiency in its current structure.[5] Full privatization of air traffic control would bring private-sector flexibility and efficiency to the essential service and allow it to innovate outside the realm of federal bureaucracy.

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

ADDITIONAL READING

- The Heritage Foundation, *Blueprint for Balance: A Federal Budget for 2018*, Mandate for Leadership Series, March 28, 2017.
- Robert Poole, "The Urgent Need to Reform the FAA's Air Traffic Control System," Heritage Foundation *Backgrounder* No. 2007, February 20, 2007.

Downsize the Federal Role in Highway Funding

RECOMMENDATION

Congress and the Administration should transfer the bulk of transportation funding responsibility to states and localities while focusing the federal government on the National Highway System (NHS), with an emphasis on the Interstate system. This rebalancing would be achieved by phasing down the federal gas tax from its current 18.4 cents per gallon to 5 cents per gallon or less over a period of five years. Other taxes would be reduced correspondingly or eliminated. The limited revenue is reserved exclusively for the core NHS programs, thus eliminating all other programs funded by the Highway Trust Fund, including funds provided to the Appalachian Regional Commission.

RATIONALE

Federal involvement in highway spending since the completion of the Interstate Highway System in the early 1990s has been marked by irresponsible fiscal management, misallocation of resources, and continuous overreach into projects beyond the proper scope of government. Congress has overspent from the Highway Trust Fund, requiring more than $140 billion in general fund transfers since 2008. The Fixing America's Surface Transportation (FAST) Act (Public Law 114–94) diverts nearly 30 percent of autborized spending allocations to programs unrelated to highway construction or rehabilitation.[6] In FY 2013, less than 50 percent of spending went toward road construction, and only 6 percent went to major (at least $500 million) construction, reconstruction, or rehabilitation projects.[7] Revenue drawn from federal taxes on motorists is likewise diverted to activities that are strictly local in nature, such as bike paths, sidewalks, and historical restoration projects. Reforming these shortcomings by downsizing the bloated highway program would bring much-needed efficiency, affordability, and accountability to surface transportation spending.

ADDITIONAL READING

- Michael Sargent and Nicolas Loris, "Driving Investment, Fueling Growth: How Strategic Reforms Can Generate $1.1 Trillion in Infrastructure Investment," Heritage Foundation *Backgrounder* No. 3209, May 8, 2017.
- Ronald Utt, "'Turn Back' Transportation to the States," Heritage Foundation *Backgrounder* No. 2651, February 6, 2012.

Eliminate Unnecessary and Improper Federal Transportation Agencies

RECOMMENDATION

Following the consolidation of the DOT's safety regulatory functions, privatization of transportation services, and rightsizing of the highway program, the rest of the department and its activities should be eliminated.

RATIONALE

Federal Transit Administration (49 U.S. Code § 107). The Federal Transit Administration (FTA) improperly funds local projects that fall outside the appropriate role of the federal government. The agency's spending has also proven ineffective: Despite billions of dollars in federal subsidies, mass transit's share of commuter trips is lower than it was in 1980.[8] Worse, federal grants for mass transit introduce perverse incentives that encourage localities to build new, expensive transit systems that rarely meet ridership projections and leave localities on the hook for exorbitant future operating and maintenance costs.[9] These federally induced projects end up crowding out maintenance on existing infrastructure. The Administration should aim to eliminate the FTA, including its formula and discretionary grant programs. States and localities would then be responsible for crafting and funding their own local mass transit agendas, bringing greater accountability to both riders and taxpayers.

Federal Railroad Administration (49 U.S. Code § 103). The Administration and Congress should prepare a proposal to eliminate the Federal Railroad Administration (FRA) and the various grant programs it administers. Most federal rail funding is directed to subsidize Amtrak, which receives over a billion dollars in federal subsidies each year. Other grants and subsidized loans, such as safety grants, subsidies for Class II and III Railroads, and the Railroad Rehabilitation and Improvement Financing Program, should also be eliminated. Finally, the FRA's research and development facilities should be sold to the private sector. Following the transfer or elimination of any safety duties, the FRA should be dissolved.

Federal Aviation Administration (49 U.S. Code § 106). In addition to privatizing air traffic control, the Administration should eliminate all federal grants to airports, including the Airport Improvement Program and Essential Air Service (which the DOT Secretary could initially curtail by enforcing the $200 per passenger subsidy limit).[10] Following the elimination of federal aviation grants, the privatization of the ATO, and the relocation of safety programs, the FAA should be disbanded and its aviation taxes wound down.[11]

Maritime Administration (49 U.S. Code § 109). New legislation should shutter the Maritime Administration (MARAD) and transfer any programs that have a vital security component to the Department of Defense, the Coast Guard, or another security agency. This elimination includes the preferential Maritime Guaranteed Loan Program (Title XI) as well as improper activities including the Maritime Heritage Education and Preservation Projects.

ADDITIONAL READING

- Wendell Cox, "America Needs a Rational Transit Policy," Heritage Foundation *Issue Brief* No. 4368, March 24, 2015.
- The Heritage Foundation, *Blueprint for Balance: A Federal Budget for 2018*, Mandate for Leadership Series, March 28, 2017.
- Ronald Utt and Wendell Cox, "How to Close Down the Department of Transportation," Heritage Foundation *Backgrounder* No. 1048, August 17, 1995.

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1. James L. Gattuso and Diane Katz, "Red Tape Rising 2016: Obama Regs Top $100 Billion Annually," Heritage Foundation *Backgrounder* No. 3127, May 23, 2016, http://www.heritage.org/research/reports/2016/05/ red-tape-rising-2016-obama-regs-top-100-billion-annually.
2. The Heritage Foundation, *Blueprint for Balance: A Federal Budget for 2018*, Mandate for Leadership Series, March 28, 2017, http://www.heritage.org/budget-and-spending/report/blueprint-balance-federal-budget-fiscal-year-2018.
3. For one proposal, see R. Richard Geddes, "Making Amtrak Compete Would Benefit All," American Enterprise Institute, June 8, 2015, https://www.aei.org/publication/making-amtrak-compete-would-benefit-all/ (accessed June 2, 2017).
4. Dorothy Robyn, "It's Time to Corporatize Air Traffic Control (the Right Way)," Brookings Institution, Monday, September 28, 2015, https://www.brookings.edu/blog/fixgov/2015/09/28/its-time-to-corporatize-air-traffic-control-the-right-way/ (accessed June 2, 2017).
5. U.S. Department of Transportation, Office of the Inspector General, "FAA Continues to Face Challenges in Ensuring Enough Fully Trained Controllers at Critical Facilities," *Report* No. AV-2016-014, January 11, 2016, https://www.oig.dot.gov/sites/default/files/FAA%20Controller%20Stafng%20at%20Critical%20Facilities%5E1-11-16.pdf (accessed June 2, 2017), and U.S. Department of Transportation, Office of the Inspector General, "FAA Reforms Have Not Achieved Expected Cost, Efficiency, and Modernization Outcomes," *Report* No. AV-2016-015, January 15, 2016, https://www.oig.dot.gov/sites/default/files/FAA%20Organizational%20Structure_Final%20Report%5E1-15-16.pdf (accessed June 2, 2017).
6. Michael Sargent and Nicolas Loris, "Driving Investment, Fueling Growth: How Strategic Reforms Can Generate $1.1 Trillion in Infrastructure Investment," Heritage Foundation *Backgrounder* No. 3209, May 8, 2017, http://www.heritage.org/sites/default/files/2017-05/BG3209_0.pdf.
7. Government Accountability Office, "Highway Trust Fund: DOT Has Opportunities to Improve Tracking and Reporting of Highway Spending," GAO-15-33, October 2014, http://www.gao.gov/assets/670/666442.pdf (accessed June 2, 2017), and Bob Poole Jr., "Rethinking the Highway Trust Fund," testimony before the Committee on Ways and Means, U.S. House of Representatives, June 17, 2015, http://waysandmeans.house.gov/wp-content/uploads/2015/06/Poole-Testimony.pdf (accessed June 2, 2017).
8. Wendell Cox, "America Needs a Rational Transit Policy," Heritage Foundation *Issue Brief* No. 4368, March 24, 2015, http://www.heritage.org/research/reports/2015/03/america-needs-a-rational-transit-policy.
9. Randal O'Toole, "'Paint Is Cheaper than Rails': Why Congress Should Abolish New Starts," Cato Institute *Policy Analysis* No. 727, June 19, 2013, https://www.cato.org/publications/policy-analysis/paint-cheaper-rails-why-congress-should-abolish-new-starts (accessed June 2, 2017).
10. Michael Sargent, "Senate's FAA Authorization Perpetuates Big-Government Intrusion into Aviation Industry," Heritage Foundation *Issue Brief* No. 4546, April 11, 2016, http://www.heritage.org/research/reports/2016/04/senates-faa-authorization-perpetuates-big-governmentintrusion-into-aviation-industry.
11. Correspondingly, the Administration's plan should localize airport funding by reducing or removing restrictions on allowing airports to collect revenue (by repealing the Anti-Head Tax Act of 1973), thus giving states, localities, and the airports themselves greater ability to provide funding for airport improvements. Given government ownership and the market power of many airports, legal precautions should be taken to ensure that government-owned airports do not abuse their monopoly power in order to generate revenue for local coffers or unrelated local projects.

Department of the Treasury

Make Tax Regulations Subject to Meaningful Review

RECOMMENDATION

Internal Revenue Service (IRS) and Treasury Department tax regulations should be subject to review by the Office of Management and Budget's (OMB's) Office of Information and Regulatory Analysis (OIRA) to the same extent as other agency regulations.

RATIONALE

Under Executive Order 12866 (relating to Regulatory Planning and Review, as amended) and various other OIRA guidance, agency rules are subject to cost-benefit analysis and other review.

IRS regulations have been largely exempt from review by OIRA since an April 29, 1983, Memorandum of Understanding (MOU) between the Treasury and the OMB regarding Implementation of Executive Order 12291. This MOU was reconfirmed by the two agencies in 1993 with additional exemptions in an addendum. IRS rules are deemed "interpretive" and largely exempt from OIRA review. Few other agencies enjoy such an exemption.

IRS rules impose an estimated $400 billion annually in costs on the economy, which is more than 2 percent of gross domestic product. The IRS and Treasury have significant discretion in how they draft tax rules. Serious review of existing and proposed regulation should be undertaken to reduce compliance costs. The MOU should be terminated, and OIRA should commence review of IRS and Treasury Department tax regulations.

ADDITIONAL READING

- Scott A. Hodge, "The Compliance Costs of IRS Regulations," Tax Foundation *Fiscal Fact* No. 512, June 2016.

Make the Internal Revenue Service Publicly Accountable

RECOMMENDATION

Increase the number of presidentially appointed Senate-confirmed positions in the IRS to make the agency more accountable to the public.

RATIONALE

Of the roughly 78,000 IRS employees (in 2016), only two are political appointees—the Commissioner and the Chief Counsel. They are appointed by the President with the advice and consent of the Senate. In addition, the independent Treasury Inspector General for Tax Administration is a presidential appointee subject to Senate confirmation.

It is unrealistic to expect two people to exercise meaningful administrative and policy control over an agency the size of the IRS. The bureaucracy has proven it is unaccountable and unresponsive to the public. An agency as enormous as the IRS, with a function as important and subject to abuse as tax collection, has to be subject to greater public accountability.

At the very least, the Deputy Commissioner for Services and Enforcement and the

Deputy Commissioner for Operations Support should be presidential appointees subject to Senate confirmation. In addition, the Division Commissioners should probably be presidential appointees subject to Senate confirmation. Those divisions are the Wage and Investment Division, the Large Business and International Division, the Small Business/Self Employed Division, and the Tax Exempt and Government Entities Division.

ADDITIONAL READING

- David R. Burton, "IRS Politicization Is Inappropriate in a Democratic Republic," The Daily Signal, May 12, 2014.
- Hans A. von Spakovsky, "The IRS Just Admitted They Could Resume Targeting Conservatives," *Conservative Review*, August 9, 2016.
- Hans A. von Spakovsky, "Protecting the First Amendment from the IRS," Heritage Foundation *Legal Memorandum* No. 104, October 2, 2013.

Make FinCEN Regulations Subject to Cost-Benefit Analysis

RECOMMENDATION

Financial Crimes Enforcement Network (FinCEN) regulations should be subject to meaningful cost-benefit analysis.

RATIONALE

The current anti-money laundering/know your customer (AML/KYC) regime administered by FinCEN costs the American economy an estimated $4.8 billion to $8 billion annually. Yet, this AML/KYC system results in fewer than 700 convictions annually, a large proportion of which are simply additional counts against persons charged with other predicate crimes. Thus, each conviction costs at least $7 million, and potentially much more. Each year the rules grow more onerous and affect more people and more businesses. Yet FinCEN has never conducted a meaningful cost-benefit analysis of these rules, nor sought less-costly ways of achieving their objectives. Congress should require FinCEN to do so. In addition, outside analysts, such as from the Government Accountability Office or OIRA should review FinCEN's analysis.

ADDITIONAL READING

- David R. Burton and Norbert J. Michel, "Financial Privacy in a Free Society," Heritage Foundation *Backgrounder* No. 3157, September 23, 2016.

Department of Veterans Affairs

Eliminate Department of Veterans Affairs Offices that Block Integrated Responses to Veterans

RECOMMENDATION

The Department of Veterans Affairs (VA) has retained many offices that were created to address single issues. These same offices become barriers to timely, effective, and integrated responses to veterans. In name, each office sounds valuable, but in practice they are adding to the bureaucratization of veteran services. The effectiveness of the VA is increased as it relies on the expertise of employees and dynamic teams, rather than the lengthy, unnecessary transactions between organizational units.

RATIONALE

Many of the VA's expert employees are unable to fully apply their skills because they are trapped in organizational units that require their ongoing attention to justify the budgets of contracts and staff. An effective alternative is to actively register the expertise among employees, and make such staff readily available through work details, consultations, dynamic teaming, and the widespread reuse of their insights and respective artifacts through an enterprise-level Learning Integrated Network, as has been tested by the VA in the past.[1]

At least 42 offices should be eliminated to allow barrier-free access to expert employees, including the

- Offices of Business Compliance;
- Commission on Care;
- Compliance Improvement;
- Connected Health;
- Cooperative Studies;
- Diversity and Inclusion;
- Ethics in Healthcare;
- Faith-Based and Neighborhood Partnerships;
- Geriatric Research Education Clinical Center;
- Health Equity;
- Health for Integrity;
- Health for Organizational Excellence;
- Health Informatics;
- Health Promotion and Disease Prevention;
- Healthcare Transformation;
- Healthcare Value;
- Hepatitis C/HIV;
- High Reliability Systems and Consultation;
- HIV, Hepatitis and Public Health Pathogens;
- Homelessness;
- ISO 9001 Consultation;
- Joint Incentive Fund;
- Lesbian, Gay, Bisexual and Transgender;
- Minority Veterans;
- Mission Ready Consultation Strategy;
- MyVA;
- National Center for Organizational Development;
- Navigation, Advocacy, and Community Engagement;
- OEF/OIF Outreach;
- Overarching Integrated Process Team;
- Population Health Services;
- Post Deployment Health Services;
- Program for Research Integrity Development and Education (PRIDE);
- Program Management Office;
- Public Health;
- Smoking;
- Strategic Integration;
- T- New Models of Care;
- VA Center for Innovation;
- Web Communications; and
- Women Veterans.

In addition, the work of the Office of Construction and Facility Management should be transferred to the General Services Administration, which ultimately manage these. An integrated servicing office should operate under the Deputy Secretary.[2]

ADDITIONAL READING

■ David M. Paschane, "A Theoretical Framework for the Medical Geography of Health Service Politics," dissertation, University of Washington, June 1, 2003.

Consolidate VA Employee Investments for Cross-Operational Capability

RECOMMENDATION

The public investment in keeping 340,000 professionally diverse employees qualified and effective across 2,100 locations is high. The estimated annual cost for the VA is more than $2 billion. At least nine VA offices should be consolidated to allow the VA to make cost-effective investments in training employees in cross-operational capabilities.

RATIONALE

VA employees experience inconsistent development for cross-operational capability. The training services that are provided tend to be misaligned to work operations, lack consistent up-skilling for career advancement, and are easily abused as means of avoiding work responsibilities. A single VA office, responsible for measurably increasing the value of employees within their mix of operational requirements, could create an engaged and devoted workforce, uniformly qualified to provide services to veterans.

Among the VA training offices, there are notable strengths that can be combined to prescribe and manage training investments in a consolidated and effective operation. One example is the Employee Management Analytic Platform.[3]

At least nine offices should be consolidated to enable the VA to make cost-effective investments in training employees in cross-operational capabilities:

- Corporate Senior Executive Management Office;
- Corporate Travel and Reporting;
- Credentialing and Privileging;
- Employee Education Service;
- Healthcare Leadership Talent Institute;
- Human Resources Management;
- National Center for Ethics in Health Care;
- VA Learning University; and
- Workforce Management and Consulting.

A consolidation of employee investments would provide an analytic foundation for examining and responding to the emerging cross-operational gaps across the VA. Likewise, measurable capability allows operational offices to more easily acquire staff for projects, as they can identify the experts within the larger pool of employees. An integrated employee investment office should operate under the Deputy Secretary.[4]

ADDITIONAL READING

- David M. Paschane, "Performance Leadership," paper presented at the European Institute for Advanced Studies in Management, March 9, 2012.

Consolidate Analyses of Performance and Accountability Across the VA

RECOMMENDATION

With more than 400 internal organizations, the VA has significant differences and disconnections among the methods it uses to analyze its operational capability and performance. The analytic differences undermine employees' leadership in performance improvement, complicate reporting to stakeholders, and weaken operational and outcome accountability. Consolidation of analyses will enable the methodological standards and completeness to support employees and stakeholders, such as veteran service organizations and Members of Congress.

RATIONALE

Analytic rigor requires accuracy and completeness, and such is not possible if disparate offices develop limited analyses. The VA has demonstrated that Management Analytic Platforms, with unadulterated data, are effective,[5] but require integrated measurement across operations and organizations to result in improved capability, performance, and accountability.

At least 31 additional offices should be consolidated to improve analyses of performance and accountability across the VA. Twenty-one of these offices are in the Veterans Health Administration:

- Office of Academic Affiliations;
- Analytics and Business Intelligence;
- Chief Improvement Officer;
- Compliance and Business Integrity;
- Data Quality and Analysis;
- Enterprise Data Intelligence and Governance;
- External Accreditation Services and Programs;
- Health Information Governance;
- Health Services Research and Development Service;
- Healthcare Value;
- Informatics and Analytics;
- Policy Analysis and Forecasting;
- Quality Standards and Programs;
- Quality, Safety and Value;
- Rural Health Operations;
- Safety and Risk Awareness;
- Standards and Regulatory Governance;
- Strategic Investment Management;
- Systems Redesign and Improvement;
- Utilization and Efficiency Management; and
- Value Measurement and Results.

The other 10 offices are:

- Offices of Business Process Integration;
- Field Operations;
- Interagency Collaboration and Integration;
- Management, Planning and Analysis;
- Performance Analysis and Integrity;
- Performance Management;
- Programming, Analysis and Evaluation;
- Quality, Performance and Oversight;
- Regulation Policy Management; and
- Data Governance and Analysis.

The integrated analytic office should operate under the Deputy Secretary.[6]

ADDITIONAL READING

- David M. Paschane, "Performance Leadership," paper presented at the European Institute for Advanced Studies in Management, March 9, 2012.

ENDNOTES

1. VA cases using efficient, integrated Learning Integrated Networks are reported in *ComputerWorld*, June 3, 2013.
2. Under the GPRA Modernization Act of 2010, the Deputy Secretary is the Department's Chief Operating Officer, responsible for performance improvement.
3. VA cases using the Events Management Analytic Platform are reported in *ComputerWorld*, June 3, 2013.
4. Under the GPRA Modernization Act of 2010, the Deputy Secretary is the Department's Chief Operating Officer, responsible for performance improvement.
5. VA cases using efficient, integrated Management Analytic Platforms are reported in *ComputerWorld*, June 3, 2013.
6. Under the GPRA Modernization Act of 2010, the Deputy Secretary is the Department's Chief Operating Officer, responsible for performance improvement.

Consumer Financial Protection Bureau

Eliminate the Consumer Financial Protection Bureau

RECOMMENDATION

The Consumer Financial Protection Bureau (CFPB) is likely the most powerful and unaccountable regulatory agency in existence. It unduly restricts access to credit without oversight from either Congress or the executive branch.

Congress should eliminate the CFPB and transfer enforcement authority for consumer protection statutes to the Federal Trade Commission, which has a long history of promoting consumer welfare and market competition. Americans would be just as protected against unfair, deceptive, and fraudulent practices as they are today—without the harmful constraints imposed by the CFPB.

RATIONALE

The CFPB was established in the wake of the 2008 financial crisis to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[1] Before its creation, authority for some 50 rules and orders stemming from 22 consumer protection statutes[2] was divided among seven agencies.[3]

The Dodd–Frank Act granted the new agency unparalleled rulemaking, supervisory, and enforcement powers over virtually every consumer financial product and service. It was designed to evade the checks and balances that apply to most other regulatory agencies.

The CFPB has restructured the mortgage market by broadening lenders' fiduciary responsibilities and standardizing home loans. There are new restrictions on credit cards, ATM services, auto lending and leasing, electronic funds transfers, and student loans. More rules are in the pipeline for credit reporting, overdraft coverage, arbitration, debt collection, and general-purpose reloadable cards.

The CFPB is also amassing the largest government database of consumer data ever compiled to monitor virtually every credit card transaction.[4] And, it is aggressively soliciting unverified complaints from consumers with which to impugn the reputations of lenders and creditors.[5]

CFPB advocates claim that the agency is vital for protecting consumers against "vulture capitalism."[6] But if Congress reforms the CFPB or even eliminates it altogether, consumers will be just as protected against unfair, deceptive, and fraudulent practices as they are today.[7] In addition to the 22 federal statutes, consumers are protected under state laws and regulations and local ordinances too numerous to count.[8]

Prior to the 2008 financial crisis, there certainly was a need to modernize the federal consumer protection regime. But a lack of consumer protection was not a major factor in the 2008 financial crisis.[9] Now, however, the structural flaws of the CFPB are contributing to a different crisis: an ever-expanding administrative state that is suffocating free enterprise and individual liberty.

ADDITIONAL READING

- Alden F. Abbott and Todd J. Zywicki, "How Congress Should Protect Consumers' Finances," chap. 19, in Norbert J. Michel, ed., *Prosperity Unleased: Smarter Financial Regulation* (Washington, DC: The Heritage Foundation, 2017).
- Diane Katz, "Consumer Financial Protection Bureau: Limiting Americans' Credit Choices," Heritage Foundation *Backgrounder* No. 3102, April 28, 2016.
- Diane Katz and Norbert J. Michel, "Consumer Protection Predates the Consumer Financial Protection Bureau," Heritage Foundation *Backgrounder* No. 3214, May 11, 2017.
- Norbert J. Michel, "Opportunities to Reform the Federal Financial Regulatory System," testimony before the Financial Institutions and Consumer Credit Subcommittee, Committee on Financial Services, U.S. House of Representatives, April 6, 2017.

ENDNOTES

1. H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 111th Cong., July 21, 2010, 124 Stat. 1376, 12 U.S. Code § 5301, Title X, Section 1011(a).
2. Including the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, and the Electronic Funds Transfer Act, among others.
3. (1) The Board of Governors of the Federal Reserve; (2) the Federal Deposit Insurance Corporation; (3) the Office of the Comptroller of the Currency; (4) the Office of Thrift Supervision; (5) the National Credit Union Administration; (6) the Federal Trade Commission; and (7) the Department of Housing and Urban Development.
4. News release, "CFPB's Mass Data Collection Threatens Consumers' Financial Safety," House Financial Services Committee, December 16, 2015, http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=400102 (accessed May 30, 2017).
5. Jonathan Thessin, "Request for Information Regarding Consumer Complaint Database," American Bankers Association, August 31, 2015, http://www.aba.com/Advocacy/commentletters/Documents/cl-ConsumerComplaintDB-Aug2015.pdf#_ga=1.88021978.353812757.1444751158 (accessed May 30, 2017).
6. K. Sabeel Rahman, "The Return of Vulture Capitalism," *The Boston Review*, April 25, 2017, http://bostonreview.net/class-inequality/k-sabeel-rahman-return-vulture-capitalism (accessed May 31, 2017).
7. Diane Katz and Norbert J. Michel, "Consumer Protection Predates the Consumer Financial Protection Bureau," Heritage Foundation *Backgrounder* No. 3214, May 11, 2017, http://www.heritage.org/government-regulation/report/consumer-protection-predates-the-consumer-financial-protection-bureau.
8. Thomas A. Durkin, Gregory Elliehausen, Michael E. Staten, and Todd J. Zywicki, *Consumer Credit and the American Economy* (New York: Oxford University Press, 2014), p. 417.
9. Norbert J. Michel, "The Myth of Financial Market Deregulation," Heritage Foundation *Backgrounder* No. 3094, April 28, 2016, http://www.heritage.org/research/reports/2016/04/the-myth-of-financial-market-deregulation.

Corporation for National and Community Service

Eliminate the Corporation for National and Community Service

RECOMMENDATION

Congress should eliminate the Corporation for National and Community Service (CNCS).

RATIONALE

The CNCS is a federal agency that aims to promote public service and support civil society institutions. The CNCS operates four main programs—(1) AmeriCorps, (2) Senior Corps, (3) the Social Innovation Fund, and the (4) Volunteer Generation Fund—as well as other public-service-oriented programs. These programs are funded by federal dollars, in-kind donations, and public-private partnerships. Civil society is critical to a strong and prosperous United States. Yet, it is outside the proper scope of the federal government to fund activities in this sector.

Americans give to charity and volunteer their time, generously. According to the Charities Aid Foundation *World Giving Index*, in 2016, 63 percent of Americans donated money to charity, and 44 percent spent time volunteering.[1] It is neither necessary nor prudent for the federal government to "mobilize Americans into service."[2]

Volunteering time and donating money to moral causes is a long and well-established tradition in America. Most Americans, when given the choice, give time and money to causes they support. The CNCS uses taxpayer dollars to subsidize particular charities, chosen by the government. Participants in national community service programs receive compensation in the form of wages, stipends for living expenses, training, and subsidies for health insurance and child care.[3] Using taxpayer dollars for what are fundamentally voluntary contributions in civil society warps the value and meaning of service and charity, and can undermine the powerful forces that enable the genuine building of character that comes with showing generosity to others.[4]

Funding for the CNCS should be eliminated. If the hand-picked charities included in the CNCS provide valuable charitable services that Americans deem worthy of their time and money, those charities will have the opportunity to maintain their operations through private donations—the same way that other charitable organizations receive their funds.

ADDITIONAL READING

- Arthur Milikh, "Should We Compel Volunteerism?" Heritage Foundation *Commentary*, October 8, 2015.

ENDNOTES

1. Charities Aid Foundation, *2016 Annual Report*, https://www.cafonline.org/about-us/publications/2016-publications/caf-world-giving-index-2016 (accessed May 9, 2017).
2. Corporation for National and Community Service, "Legislation," https://www.nationalservice.gov/about/legislation (accessed on May 9, 2017).
3. Congressional Budget Office, "Options for Reducing the Deficit: 2017 to 2026—Option 19. Eliminate Federal Funding for National Community Service," December 8, 2016, https://www.cbo.gov/budget-options/2016/52216 (accessed May 9, 2017).

Corporation for Public Broadcasting

Eliminate the Corporation for Public Broadcasting

RECOMMENDATION

Congress should eliminate the Corporation for Public Broadcasting (CPB).

RATIONALE

It is outside the proper scope of the federal government to fund broadcasting and news sources. Congress should eliminate the CPB.

The CPB was created at a time when U.S. households faced very limited broadcasting options. As technology has grown since the corporation's inception, media sources for accessing the news and broadcasting have greatly increased.

Without federal funding from the CPB, services such as the Public Broadcasting Service (PBS) and National Public Radio (NPR) would operate like any other news or broadcasting source in the private sector. Both organizations could make up the lost funding by increasing revenues from corporate sponsors, foundations, and members.

ADDITIONAL READING

- Emily Goff, "Why Big Bird's Federal Subsides Need to Go," The Daily Signal, October 14, 2012.
- Mike Gonzalez, "Trump Should End Government Funding of NPR's Biased News," The Daily Signal, January 21, 2017.

Export–Import Bank

Eliminate the Export–Import Bank

RECOMMENDATION

The Export–Import Bank (Ex-Im) provides loans and loan guarantees as well as capital and credit insurance to "facilitate" U.S. exports. The financing is backed by the "full faith and credit" of the U.S. government, which means that taxpayers are on the hook for losses that bank reserves fail to cover.

Lawmakers should repeal the bank charter and focus on reducing tax and regulatory barriers to exports. For example, the flood of Dodd–Frank regulations is constraining private-sector credit, while the costs of Obamacare weigh heavily on U.S. firms.

RATIONALE

The Export–Import Bank primarily benefits multinational corporations—primarily Boeing, the world's largest aerospace company (with a market capitalization exceeding $108 billion). Proponents claim that such taxpayer bankrolling creates jobs and fills "gaps" in private financing.[1] In fact, the bank is a conduit for corporate welfare beset by unreliable risk management, inefficiency, and cronyism.

There is no shortage of private export financing: U.S. exports totaled $2.2 trillion in fiscal year 2016, with Ex-Im supporting just 0.22 percent ($5 billion).[2]

Bank officials and advocates emphasize that Ex-Im financing creates jobs. In fact, the bank does not count actual jobs related to its projects but simply extrapolates numbers based on national data. This formula does not distinguish among full-time, part-time, and seasonal jobs. It also assumes that average employment trends apply to Ex-Im clients (who may not be typical).

In some cases, Ex-Im financing even puts U.S. workers at a disadvantage by providing overseas competitors, including governments, with billions of dollars in discounted financing.

Ex-Im proponents also claim that small business is the bank's "core mission." That simply is not the case. In most years, just 20 percent or less of total financing has gone to small businesses. Even that number is artificially inflated by the bank's expansive definition of "small," which includes firms with as many as 1,500 workers, as well as companies with revenues of up to $21.5 million annually.

In the event that a small business cannot access private capital, it can seek to export through wholesalers or associate its business operations with larger firms or with global supply chains.

Ex-Im benefits just 2 percent of exports. And, to claim that the entire 2 percent would vanish without Ex-Im subsidies is preposterous. Finance costs are only one among a variety of factors that affect a purchaser's choice of supplier. Availability, reliability, and stability all play significant parts in purchase decisions. There should be no question that U.S. firms are capable of competing successfully without corporate welfare.

Export subsidies create economic distortions that harm the U.S. economy and consumers more than they help. As noted by the Congressional Research Service, "Ex-Im Bank's credit and insurance programs...draw from the capital and labor resources within the economy that would be available for other uses, such as alternative exports and employment."[3]

ADDITIONAL READING

- Diane Katz, "U.S. Export-Import Bank: Corporate Welfare on the Backs of Taxpayers," Heritage Foundation *Issue Brief* No. 4198, April 11, 2014.

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1. Export-Import Bank of the United States, "About Us," http://www.exim.gov/about (accessed May 25, 2017).
2. U.S. Department of Commerce, International Trade Administration, "December 2016 Export Statistics," *U.S. Export Fact Sheet*, February 7, 2017, https://ibc-static.broad.msu.edu/sites/DEC/images/resources/1159b5b1-8a59-47a1-b988-4bb1836c9904us-exports-factsheet.pdf (accessed May 25, 2017).
3. Shayerah Ilias Akhtar et al., "Export-Import Bank Reauthorization: Frequently Asked Questions," Congressional Research Service, April 13, 2016, http://fas.org/sgp/crs/misc/R43671.pdf (accessed May 25, 2017).

Federal Communications Commission

End Redundant Review of Telecom Mergers by the Federal Communications Commission

RECOMMENDATION

Eliminate the Federal Communications Commission's (FCC's) merger review authority.

RATIONALE

Mergers and acquisitions among communications firms today typically undergo a double review process. First, they must be approved by the relevant antitrust authority (either the Antitrust Division of the Department of Justice or the Federal Trade Commission). Then, they undergo scrutiny by the FCC.

The Communications Act does not mandate that the FCC review mergers. The merger review is an outgrowth of the FCC's authority to approve license transfers that the merging firms may hold. These licenses, however, may represent a minimal part of the merger and present no issues in themselves. Instead, they are a hook for the FCC to embark on its own lengthy review of such transactions.

For the most part, the FCC review is redundant, covering much of the same ground as the antitrust agencies, but the "public interest" standard used by the FCC is broader than the competition-based standard used under antitrust law. This has provided the FCC with virtually unlimited discretion to examine any issue or demand any concession from the merging firms, even if it has little or nothing to do with the economic effect of the merger on the marketplace.

The FCC's merger review process is unnecessary and harmful, and should be eliminated, leaving merge review with the antitrust authorities.

ADDITIONAL READING

- Harold Furchtgott-Roth, "The FCC and Kafkaesque Merger Reviews," *Forbes*, April 19, 2016.
- Harold Furchtgott-Roth, "The FCC Racket," *The Wall Street Journal*, November 5, 1999.
- James Gattuso, "AT&T and T-Mobile: Good Deal, Bad Process," Heritage Foundation *WebMemo* No. 3252, May 13, 2011.
- James L. Gattuso, "AT&T-Bell South Merger: Regulation Through the Backdoor," American.com, January 6, 2007.

Transfer Broadband Competition Authority to the Federal Trade Commission

RECOMMENDATION

Return broadband competition policy enforcement from the FCC to the Federal Trade Commission (FTC).

RATIONALE

In 2015, the FCC imposed new "open-Internet" (or "net-neutrality") rules on broadband Internet service providers (ISPs). These rules prohibit these ISPs from engaging in any conduct that would favor one type of Internet content over another. Among these rules are a ban on blocking content; "throttling" or slowing down the delivery of content; and "paid prioritization," under which content providers pay a fee to have their content delivered on an expedited basis.

These rules are misguided. The banned activities present little danger to consumers, and in fact are a feature of most well-functioning markets. Premium pricing (and discounting) adds to consumer choice and provides a way for challengers in an industry to differentiate themselves and compete with bigger, more established firms. Because of this, the FCC has already proposed repealing the rules.

This is not to say that ISPs could never successfully abuse their market power. However, eliminating FCC network-neutrality rules need not leave consumers without recourse. Broadband consumers could still be protected from harm by the competition laws, which have applied to most other areas of the economy for over a century. (The competition laws also applied to the ISPs until the 2015 net-neutrality rules were adopted.)

Competition laws generally require evidence that a company is abusing its dominant role in the marketplace rather than imposing arbitrary bans on categories of activity. While not without flaws, these laws are ultimately based on economic analysis applied on a case-by-case basis, rather than sweeping prohibitions of the FCC's rules.

The agency best suited to administer competition law is the FTC, which has focused on such policy issues for over a hundred years—and in fact had responsibility for broadband-competition policy before 2015.

Institutionally, the FCC is less suited to this job. Not only does it have a history of politicized decision making, but—because its purview is limited to communications—it focuses disproportionately on that sector, rather than on other marketplace problems. The FTC, while not immune from politics, has by contrast, relied more on economic analyses. And, because of the broad scope of jurisdiction, it is better able to assess the relative need for intervention.

The FCC should return broadband oversight responsibilities to the FTC.

ADDITIONAL READING

- Alden F. Abbott, "Time to Repeal the FTC's Common Carrier Jurisdictional Exemption (Among Other Things)?" Heritage Foundation *Commentary*, October 18, 2016.
- Alden F. Abbott, "You Don't Need the FCC: How the FTC Can Successfully Police Broadband-Related Internet Abuses," Heritage Foundation *Legal Backgrounder* No. 154, May 20, 2013.
- James L. Gattuso and Michael Sargent, "Eight Myths About FCC Regulation of the Internet," Heritage Foundation *Backgrounder* No. 2982, December 17, 2014.
- Maureen K. Ohlhausen, "Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously," *Colorado Technology Law Journal*, Vol. 15 (2016), p. 119.

Federal Deposit Insurance Corporation

Eliminate the Need for the Federal Deposit Insurance Corporation

RECOMMENDATION

The private market, not a government-backed insurance system, should control deposit insurance. If customers truly value deposit insurance, private financial companies will provide it.

The Trump Administration should work with Congress to develop the best transition plan to a private system. Important intermediate steps include: (1) reducing the Federal Deposit Insurance Corporation (FDIC) coverage limit; (2) applying FDIC coverage on a per account holder basis; and (3) applying FDIC coverage only to retail accounts.

At the very least, the FDIC limit should be reduced to the pre-Dodd–Frank limit of $100,000. Even reverting to the pre-1980 limit of $40,000 would more than adequately cover the vast majority of U.S. households. Other important reforms include eliminating the FDIC's systemic-risk exception, and prohibiting the FDIC from providing any type of loan guarantees. Finally, once FDIC coverage is significantly reduced, the role of the FDIC in bank resolution can also be reduced. Again, at a minimum, the FDIC's role in the resolution of non-bank financial institutions should return to the role it had prior to the Dodd–Frank Act.

RATIONALE

The FDIC provides federally backed deposit insurance for bank accounts of up to $250,000. The FDIC also serves as banking regulator for all non-Federal Reserve member state-chartered banks, and is responsible for resolving insolvent commercial banks. In addition to its main deposit insurance program, the FDIC has emergency authority to guarantee other types of bank accounts and even loans. The FDIC provided hundreds of billions in loan guarantees in the wake of the 2008 crisis—mainly by invoking its systemic-risk exception in Section 13(G) of the Federal Deposit Insurance Act.

Government provision of financial guarantees harms competitiveness and stability in financial markets. It reduces people's incentive to monitor both personal and institutional financial risks. Shifting to a private system would bring much-needed market discipline to the financial sector. If customers truly value deposit insurance, private financial companies will provide it.

The fear that a bank failure could freeze a large amount of customer deposits, resulting in economic disruption, has been a main contributing factor to the existing FDIC bank-resolution process. Many options from around the world could replace the FDIC process and bring much-needed market discipline to the banking industry. Banks, just as other failed companies, should be allowed to go through the bankruptcy process. Imposing more market discipline in the banking sector requires major changes to the FDIC bank-resolution process, the FDIC deposit-insurance scheme, and the FDIC's authority to grant emergency guarantees.

ADDITIONAL READING

- David R. Burton and Norbert J. Michel, "Financial Institutions: Necessary for Prosperity," Heritage Foundation *Backgrounder* No. 3108, April 14, 2016.
- Mark Calabria, "Deposit Insurance, Bank Resolution, and Market Discipline," in Norbert J. Michel, ed., *Prosperity Unleashed: Smarter Financial Regulation* (Washington, DC: The Heritage Foundation, 2017).

Federal Housing Finance Agency

Eliminate the Federal Housing Finance Agency

RECOMMENDATION

Congress should eliminate the Federal Housing Finance Agency (FHFA) upon the dissolution of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).

Until Congress eliminates it, the FHFA should maintain a limited role as regulator of the Federal Home Loan Banks (FHLBs) and the FHLB Office of Finance, as well as conservator and regulator of Fannie Mae and Freddie Mac.

Specifically, the FHFA should cease any policies that expand the scope of the institutions under its purview. These reforms should include the following changes to the operations of Fannie Mae and Freddie Mac during conservatorship:

- Decrease, annually, the loan limits for conforming mortgages that Fannie Mae and Freddie Mac are eligible to acquire;
- Increase the guarantee fees charged by both Fannie Mae and Freddie Mac in their respective mortgage-backed securities portfolios;
- Maintain the covenant of the third amendment to the preferred stock purchase agreements (PSPAs) that deplete the capital reserves for both Fannie Mae and Freddie Mac by January 1, 2018;
- Cease the implementation of the Common Securitization Platform currently under development by Fannie Mae and Freddie Mac;
- Close the Housing Trust Fund and the Capital Magnet Fund that use revenue from both institutions as finance mechanism; and
- Cease the implementation of the Duty to Serve Underserved Markets regulatory regime, which the FHFA submitted as a final rule to the *Federal Register* in December of 2016.

RATIONALE

In 2008, Congress established the FHFA as the federal agency authorized to regulate the government-sponsored enterprises (GSEs) dealing with housing; specifically, charged with regulating the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the FHLBs, and the Federal Home loan Bank Office of Finance. Congress created the FHFA as part of the Housing and Economic Recovery Act (HERA) of 2008, replacing the Office of Federal Housing Enterprise Oversight (OFHEO) as regulator of Fannie Mae and Freddie Mac, and the Federal Housing Finance Board as regulator of the FHLBs and the FHLB Office of Finance.[1] In addition to providing the FHFA with regulatory authority over these GSEs, HERA provided the statutory authority for the FHFA to decide whether to place the financially insolvent Fannie Mae and Freddie Mac into a federal conservatorship, or to structure a liquidation of the GSEs under a federal receivership.

Acting on its statutory authority, the FHFA decided after the 2008 passage of HERA to place both Fannie Mae and Freddie Mac into a federal conservatorship, and the two GSEs have remained under this oversight status. Also in 2008, the FHFA coordinated with the U.S. Department of the Treasury a PSPA structure with Fannie Mae and Freddie Mac.[2] The PSPAs have since been amended three separate times, and under the terms of the third amendment, the Treasury retains exclusive rights to dividend payments as the senior preferred shareholder of both Fannie Mae and Freddie Mac. The PSPAs included a forcing mechanism of sorts to structural reform of both Fannie Mae and Freddie Mac in that the capital reserve accounts for both GSEs must net to zero by January 1, 2018. Fannie Mae and Freddie Mac still retain a separate line of credit with the Treasury to cover instances of financial loss, though this covenant of the PSPA will effectively deplete their ability to retain any earnings year to year after January 1, 2018.

HERA carried over statutory authority and created expanded duties for the FHFA as the regulator of Fannie Mae and Freddie Mac. Carryover authority for the FHFA includes, for example, the oversight of housing goals required of both GSEs; HERA also outlined expanded duties for the FHFA, including broader oversight of the management and governance of the GSEs, as well as an expansion of the mandatory obligation of the GSEs to provide affordable housing credit to underserved markets.[3] Beyond these statutory powers outlined of the agency in HERA, the FHFA has also decided to design not only a strategic direction for itself as a regulatory agency, but also to build out parameters for the securitization market.[4] Specifically, the FHFA concretely established in its strategic plan the creation of a common securitization platform (CSP), an undertaking that will, if fully enacted, provide the structure for the dissemination of a standard, uniform mortgage-backed security. The development of the CSP is a critical element of the FHFA's vision for the U.S. mortgage securitization market. The FHFA should cease, however, the development of this securitization platform; the federal government should neither fund nor direct the development of any particular product in the secondary mortgage market.[5]

Federal reforms of all three GSEs are crucial for the creation of a stable and resilient housing-finance system. The GSEs' institutional design is fundamentally flawed, and the public-private nature of their charters has created enormous, and highly unfortunate, opportunities for federal politicians to advance nebulous housing policies. Moreover, the GSE institutional model has effectively cost taxpayers during normal housing markets, in addition to the substantial costs during episodes of financial failure. Certainly prior to the 2008 FHFA conservatorship and Treasury bailout, the GSEs benefited from funding advantages not conferred to other financial institutions, allowing them to borrow at below market-interest rates to cover their business operations.

Other privileges bestowed on the GSEs, providing financial benefits (costing taxpayers) across market cycles, include exemptions from regulatory and compliance filings, as well as various tax exemptions. Ideally, Congress will enact legislation that shuts down Fannie Mae and Freddie Mac, and enact reforms that eliminate all federal subsidies and mandates that govern the 11 FHLBs, the Office of Finance that issues debt to the FHLBs, and all financial member institutions.[6]

After reforming the housing-finance GSEs, Congress should eliminate the FHFA. The FHFA would have no continuing role as a federal property manager (conservator) once Congress dissolves Fannie Mae and Freddie Mac, in addition to transferring any ongoing regulatory functions of the reformed (private, non-GSE) FHLB system to a separate federal department or agency.

ADDITIONAL READING

- John L. Ligon, "A Pathway to Shutting Down the Federal Housing Finance Enterprises," Heritage Foundation *Backgrounder* No. 3171, December 21, 2016.
- Norbert J. Michel and John L. Ligon, "Five Guiding Principles for Housing-Finance Policy: A Free-Market Vision," Heritage Foundation *Issue Brief* No. 4259, August 11, 2014.

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2. Federal Housing Finance Agency, "Senior Preferred Stock Purchase Agreements," https://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx (accessed May 11, 2017).
3. John L. Ligon, "Mortgage Principal Forgiveness Is a Bad Idea," Heritage Foundation *Issue Brief* No. 4598, August 1, 2016, http://www.heritage.org/housing/report/mortgage-principal-forgiveness-policy-bad-idea; Norbert J. Michel, John L. Ligon, and Filip Jolevski, "GSE Reform: FHFA Should Not Pursue Principal Reduction Alternatives," Heritage Foundation *Issue Brief* No. 4108, December 17, 2013, http://www.heritage.org/housing/report/gse-reform-fhfa-should-not-pursue-mortgage-principal-reduction-alternatives; and Norbert J. Michel and John L. Ligon, "GSE Reform: Trust Funds or Slush Funds?" Heritage Foundation *Issue Brief* No. 4080, November 7, 2013, http://www.heritage.org/housing/report/gse-reform-trust-funds-or-slush-funds.
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5. John L. Ligon and Norbert J. Michel, "Why Is Federal Housing Policy Fixated on 30-Year Fixed-Rate Mortgages?" Heritage *Backgrounder* No. 2917, June 18, 2014, http://www.heritage.org/housing/report/why-federal-housing-policy-fixated-30-year-fixed-rate-mortgages, and Norbert J. Michel and John L. Ligon, "Five Guiding Principles for Housing-Finance Policy: A Free-Market Vision," Heritage Foundation *Issue Brief* No. 4259, August 11, 2014, pp. 2 and 3, http://www.heritage.org/housing/report/five-guiding-principles-housing-finance-policy-free-market-vision.
6. Michel and Ligon, "Five Guiding Principles for Housing-Finance Policy," pp. 1–3.

National Foundation on the Arts and the Humanities

Eliminate the National Foundation on the Arts and the Humanities

RECOMMENDATION

Congress should eliminate the National Foundation on the Arts and Humanities, including all of its sub-agencies.

RATIONALE

The National Foundation on the Arts and the Humanities consists of the National Endowment for the Arts, the National Endowment for the Humanities, the Federal Council on the Arts and the Humanities, and the Institute of Museum and Library Services. The foundation was created as an independent agency by the National Foundation on the Arts and the Humanities Act of 1965.[1] Congress should eliminate the foundation and all its parts to reflect that federal funding and involvement in the arts, culture, and humanities is outside the proper scope of the federal government. Such activities and support are reserved for civil society and state and local government.

Federal funding for the arts and humanities is neither necessary nor prudent. According to USA Giving's latest report, charitable giving to the arts, culture, and humanities reached $17.07 billion in 2015.[2] In comparison, federal funding in the hundreds of millions is a mere rounding error.

Private individuals and organizations are donating to the arts and humanities at their own discretion. Advocating the elimination of federal funding should not be conflated with lack of support for the arts, culture, and humanities. There is no compelling public policy reason for the federal government to use its coercive power of taxation to compel taxpayers to support cultural organizations and activities. Such powers should be properly limited to constitutional federal causes while the arts, culture, and humanities should be allowed to flourish without federal support or interference.

ADDITIONAL READING

- Laurence Jarvik, "Ten Good Reasons to Eliminate Funding for the National Endowment for the Arts," Heritage Foundation *Backgrounder* No. 1110, April 29, 1997.

ENDNOTES

1. 20 U.S. Code § 951 (2010), https://www.arts.gov/sites/default/files/Legislation.pdf (accessed May 8, 2017).
2. Jean O'Brien, "Charitable Donations Hit Record for Second Year in a Row, at Estimated $373.25 Billion," Giving USA, June 13, 2016, https://givingusa.org/giving-usa-2016/ (accessed May 8, 2017).

Office of Management and Budget

Institute Evidence-Based Policymaking within the Office of Management and Budget

RECOMMENDATION

President Trump and Office of Management and Budget (OMB) Director Mick Mulvaney should formally institute evidence-based policymaking within the OMB. First, the Administration should reorganize existing offices within the OMB into the Division of Evidence-Based Policy to improve the use of evidence in policymaking. Second, the Administration should re-establish a modified and improved Program Assessment Rating Tool (PART) along with a fiscally disciplined evidence-based spring review within the OMB.

RATIONALE

The current use of evidence in policymaking in the OMB is disjointed, with relevant offices often working at cross-purposes with each other. In order to fully integrate and coordinate the use of evidence within the OMB, the Administration should create the Division of Evidence-Based Policy. This division would be composed of renamed offices that currently exist. The units of the division would be:

- Economic Analysis (formerly the Economic Policy Division);
- Information Policy (formerly the Statistical and Science Policy Branch within the Office of Information and Regulatory Affairs); and
- Performance Management and Evaluation (formerly the Evidence Team within the Economic Policy Division and the Performance Team within Performance and Personnel Management)

The new division would be situated under the Deputy Director and headed by the Associate Director for Evidence-Based Policy with a Deputy Associate Director serving as the career senior position. This organizational improvement should fix the fragmentation that is hindering the OMB's capacity to drive improvements in how the federal government uses and builds evidence, harnesses high-quality data for performance measurement and evaluation, and identifies which performance data that is now collected could be eliminated because it is burdensome, not reliable, or not useful.

Next, the Administration should re-establish a modified and improved PART along with a fiscally disciplined evidence-based spring review within the OMB. PART was an attempt by the Bush Administration to assess every federal program's purpose, management, and results to determine its overall effectiveness. The extremely ambitious PART was a first-of-its-kind attempt to link federal budgetary decisions to performance. Unfortunately, President Obama terminated PART. A revitalized spring review would require federal agencies to present the OMB with credible evidence on their performance. Budget requests from agencies should be based on their performance, not just desired levels of funding.

As an opening maneuver in the budget process, the President can encourage Congress to be more fiscally disciplined by incorporating rigorous evidence into budget recommendations. Instituting an improved PART and an evidence-based spring review would help the Administration focus Congress on eliminating wasteful and ineffective programs, and on making remaining federal programs operate as efficiently as possible to save money for taxpayers. PART required all programs to be reviewed over five-year intervals, therefore, placing pressure on agencies to continually collect performance information throughout their programs' existence.

When practiced correctly, evidence-based policymaking is a tool that would allow policymakers, especially at the OMB, to base funding decisions on scientifically rigorous impact evaluations of programs. Given scarce federal resources, federal policymakers should fund only those programs that have been proven to work, and defund programs that do not work. In addition to assessments of effectiveness, the constitutionality of programs should heavily influence decision making in the budget process.

Leadership is crucial to setting an evidence-based agenda. First, the President needs to send a clear message to the OMB and the entire federal bureaucracy that the West Wing believes evidence-based policymaking should influence budget decisions. Second, Director Mulvaney needs to develop clear expectations that program associate directors and program examiners are to concentrate on rigorous evidence for justifying agency budgets.

ADDITIONAL READING

- David B. Muhlhausen, *Do Federal Social Programs Work?* (Santa Barbara, CA: Praeger, 2013).
- David B. Muhlhausen, "Evaluating Federal Social Programs: Finding Out What Works and What Does Not," testimony before the Subcommittee on Human Resources, Committee on Ways and Means, U.S. House of Representatives, July 17, 2013.
- David B. Muhlhausen, "Evidence-Based Fiscal Discipline: The Case for PART 2.0," Heritage Foundation *Backgrounder* No. 33158, September 27, 2016.
- David B. Muhlhausen, "Evidence-Based Policymaking: A Primer," Heritage Foundation *Backgrounder* No. 3063, October 15, 2015.

Office of Personnel Management

Eliminate Funding for the Office of Personnel Management's Multi-State Plan Program

RECOMMENDATION

Congress, working with the President, should eliminate funding for the Office of Personnel Management's (OPM's) Multi-State Plan (MSP) program established under the Affordable Care Act of 2010.

RATIONALE

Under Section 1334 of the Affordable Care Act, Congress created the MSP program to be administered by the OPM. The OPM was to contract with at least two insurance companies; at least one plan was to be a nonprofit insurer. The MSP plan was authorized to compete with private health plans in the health insurance exchanges throughout the United States. The Obama Administration and its congressional allies created the MSP as a substitute for the "robust public option" that was discarded by House and Senate Democratic leaders in the final stages of the 2010 congressional debate on the Affordable Care Act. The Administration and its congressional allies argued that the MSP program was necessary to enhance competition in the health insurance exchanges.[1] In fact, the MSPs have had a relatively poor showing, with unimpressive enrollment. In 2014, the OPM contracted with only one insurer; and in 2015, the OPM added the so-called co-op plans—another set of government-financed health plans—to the MSP program. Those plans have generally proven to be financially unstable, and most co-ops have left the markets.

In fact, there is no need for the government to sponsor special health plans to compete against other private plans in the individual markets. Competition in the exchanges and the individual markets has declined, and the MSP program has not measurably improved the situation. The MSP was supposed to have at least two plans in each state by 2017, but instead of increasing, the number of states with one or more MSP has declined. Currently, only 22 states have MSPs.[2] Meanwhile, OPM staff have major responsibilities for administering the Federal Employees Health Benefits Program (FEHBP), one of the government's most successful programs; and the elimination of the MSP program would enable them to concentrate their time, energy, and effort on FEHBP administration.[3]

ADDITIONAL READING

- Robert E. Moffit and Neal R. Meredith, "Multistate Health Plans: Agents for Competition or Consolidation?" Mercatus Center *Working Paper*, January 2015.

Eliminate Special Congressional Subsidies for Health Insurance

RECOMMENDATION

The President should order the OPM to stop funding congressionally unauthorized subsidies for the health insurance of Members of Congress and their staffs in the Affordable Care Act's health insurance exchange.

RATIONALE

The OPM is the central personnel management agency of the federal government. The OPM enforces all civil service laws, rules and regulations. It also administers federal pay and benefits and health and retirement programs. In that capacity, it administers the FEHBP, a system of competing private health plans available to federal workers and retirees and their families. The FEHBP is the largest group health insurance program in the world.

During the debate on the 2010 ACA, Congress created Section 1312 (d)(3)(D), which required that Members of Congress and their staff obtain their health coverage through the ACA's new health insurance exchange program instead of through the FEHBP.

When Members of Congress realized that, in enacting the ACA, they had voted themselves and their staffs out of their own health coverage, many urgently tried to find a way out of their predicament, preferably in the form of an administrative solution. That option would avoid the public embarrassment of a recorded vote on the floor of the House or the Senate.[4]

President Obama provided that administrative relief in 2013: He ordered the OPM to provide special taxpayer subsidies for Congress and staff to offset their higher insurance costs in the law's new health insurance exchange. On August 7, 2013, the OPM ruled that Members of Congress and staff—despite their exit from the FEHBP—would henceforth receive FEHBP subsidies for coverage outside the FEHBP in the exchanges. This was purely an administrative action outside the constraints of the Constitution or the laws. In other words, the Obama Administration took this regulatory action without statutory authority under either the ACA or Title 5 of the U.S. Code, the law that governs the FEHBP.[5]

It is impossible to recover the same coverage and health plans that prevailed in the past. In repealing and replacing the ACA, while promoting personal choice of health plans and benefits, Members of Congress, to the extent practicable, should allow Americans to try to get the kind of coverage they liked before the enactment of Obamacare. That would include the FEHBP plans that they and their staffs had before they mistakenly voted themselves out of their own program.

ADDITIONAL READING

- Robert E. Moffit, Edmund F. Haislmaier, and Joseph R. Morris, "Congress in the Obamacare Trap: No Easy Way Out," Heritage Foundation *Backgrounder* No 2831, August 2, 2013.

ENDNOTES

1. For a discussion of the MSP program, see Robert E. Moffit and Neal Meredith, "Multistate Health Plans: Agents for Competition or Consolidation?" Mercatus Center *Working Paper*, January 2015, https://www.mercatus.org/system/files/Moffit-Multistate-Health-Plans.pdf.
2. Office of Personnel Management, "Multi-State Plan Program and the Health Insurance Marketplace," https://www.opm.gov/healthcare-insurance/multi-state-plan-program/consumer/ (accessed May 26, 2017).
3. Concern over the allocation of OPM mission and staff responsibilities has been recurrent. See, for example, Hon. Linda Springer et al., "The Office of Personnel Management: A Power Player in America's Insurance Markets?" Heritage Foundation *Lecture* No. 1145, February 19, 2010, http://www.heritage.org/health-care-reform/report/the-office-personnel-management-power-player-americas-health-insurance.
4. For a detailed discussion of the legislative history behind the controversy, see Robert E. Moffit, Edmund Haislmaier, and Joseph R. Morris, "Congress in the Obamacare Trap: No Easy Way Out," Heritage Foundation *Backgrounder* No. 2831, August 2, 2013, http://www.heritage.org/health-care-reform/report/congress-the-obamacare-trap-no-easy-escape.
5. For a blow-by-blow description of the progression of events, see Robert E. Moffit, " How Congress Mysteriously Became a Small Business to Qualify for Obamacare Subsidies," The Daily Signal, May 11, 2016, http://dailysignal.com/2016/05/11/how-congress-mysteriously-became-a-small-business-to-qualify-for-obamacare-subsides/.

Securities and Exchange Commission

Reduce the Number of Securities and Exchange Commission Managers Who Report Directly to the Chairman

RECOMMENDATION

The number of Securities and Exchange Commission (SEC) managers directly reporting to the Chairman should be reduced.

RATIONALE

Under Reorganization Plan No. 10 of 1950, the Chairman has executive authority over the SEC staff and, in general, the structure of the SEC. Currently, 23 managers report directly to the Chairman (counting the newly created Advocate for Small Business Capital Formation). This is two to three times the number typically considered optimal (six to 10), and more than the vast majority of government agencies or private enterprises have.

The SEC should be restructured to reduce the number of direct reports to the Chairman. Specifically, the following offices should be merged with other offices and their managers made to report to an SEC official other than the Chairman:

1. Division of Investment Management;
2. Office of Compliance Inspections and Examinations;
3. Office of the Secretary;
4. Office of Administrative Law Judges;
5. Office of the Ethics Counsel;
6. Office of International Affairs;
7. Office of the Chief Accountant;
8. Office of Credit Ratings;
9. Office of Municipal Securities;
10. Office of Public Affairs;
11. Office of Equal Employment Opportunity;
12. Office of Minority and Women Inclusion; and
13. The Office of Investor Education and Advocacy

Some of these changes can be undertaken by the Chairman because of the authority granted by Reorganization Plan No. 10 of 1950. Others will require statutory changes.

Merge the Division of Investment Management with the Division of Trading and Markets. Both divisions regulate financial services providers, and regulated firms are often subject to regulation by both divisions. The Division of Trading and Markets regulates broker-dealers, stock exchanges, self-regulatory organizations, and other financial-market participants. The Division of Investment Management regulates investment companies, variable insurance products, and registered investment advisers.

Merge the Office of the Ethics Counsel, the Office of Administrative Law Judges, the Office of the Secretary, and the Office of International Affairs with the Office of the General Counsel. Alternatively, all or some functions of the Office of International Affairs could be moved to the Division of Corporate Finance.

Legal functions, such as providing ethics advice and enforcement, conducting administrative hearings, and providing legal advice to the Commission regarding Commission procedures, administrative law, and international comparative law and coordination should be unified under one chief legal officer, the General Counsel.

Merge the Office of the Chief Accountant, the Office of Credit Ratings, and the Office of Municipal Securities into the Division of Corporate Finance. The primary duty of Office of the Chief Accountant involves financial-accounting disclosures. That, combined with non-financial-accounting disclosure is also the core function of the Division of Corporate Finance. The Office of the Chief Accountant should become an office within the Division of Corporate Finance and their functions integrated. The Office of Credit Ratings also plays a key function in the disclosure process, particularly with respect to debt securities and in ensuring the integrity of the rating process by rating organizations. It should become an office within the Division of Corporate Finance.

Merge the Office of Compliance Inspections and Examinations with the Division of Trading and Markets. The Division of Trading and Markets provides oversight of financial services providers. The Office of Compliance Inspections and Examinations is an integral part of that oversight. The division and

office should be part of an integrated compliance program within one office.

Merge the Office of Public Affairs with the Office of Legislative and Intergovernmental Affairs. The Office of Public Affairs and the Office of Legislative and Intergovernmental Affairs discharge allied functions. They should be integrated as a single office. There is no need to have two separate directors reporting separately to the Chairman.

Merge the Office of Equal Employment Opportunity with the Office of Minority and Women Inclusion, and Have the New Office Report to the Chief Operating Officer. These two offices perform similar and materially overlapping functions. They should be merged. There is no need to have two separate directors reporting separately to the Chairman. In addition, the new office should report to the Chief Operating Officer.

Merge the Office of Investor Education and Advocacy with the Office of the Investor Advocate. The Office of Investor Education and Advocacy and the Office of the Investor Advocate perform similar and materially overlapping functions. There is no need to have two separate directors reporting separately to the Chairman.

Improve Data on Securities Markets for Policymakers

RECOMMENDATION

The SEC should substantially improve the collection and publication of data with respect to securities markets, securities offerings, securities market participants, and securities law enforcement.

RATIONALE

Data available to the SEC and congressional policymakers with respect to securities markets, securities offerings, securities market participants, and securities law enforcement is seriously deficient. The Division of Economic and Risk Analysis (DERA) should substantially improve the collection and regular publication of data on securities offerings, securities markets, and securities law enforcement and publish an annual data book of time series data on these matters.

DERA should consult with the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) and the Interagency Council on Statistical Policy, and secure advice from key statistic agencies, such as the Census Bureau and the Bureau of Economic Analysis. DERA should conduct surveys and collect information internally available and publish on a regular basis time series data in compliance with OMB's Standards and Guidelines for Statistical Surveys and the Paperwork Reduction Act.

Specifically, DERA should publish annual data on:

1. The number of offerings and offering amounts by type (including type of issuer, type of security, and exemption used);
2. Ongoing and offering compliance costs by size and type of firm and by exemption used or registered status (such as emerging growth company, smaller reporting company, and fully reporting company);
3. Enforcement, including the type and number of violations, the type and number of violators (such as private issuer, Regulation A issuer, crowdfunding issuer, reporting company, investment company, registered investor advisor, broker-dealer, and registered representative);
4. Basic market statistics, such as market capitalization by type of issuer; the number of reporting companies, Regulation A issuers, and the like; trading volumes by exchange or ATS; and
5. Market participants, including the number (and, if relevant, size) of broker-dealers, registered representatives, exchanges, alternative trading systems, investment companies, registered investment advisors, and other information.

Create a Complex Case Unit in the Enforcement Division

RECOMMENDATION

Create a Complex Case Unit with the Enforcement Division to handle cases involving large, complex, and well-financed investment banks, banks, investment companies, and similar market participants.

RATIONALE

Many large institutions have committed multibillion-dollar frauds. Shareholders of these firms have paid billions of dollars in settlements and fines. Yet almost no individual managers have been barred from the industry, had civil money penalties imposed, or been subject to criminal prosecution. The prevention of fraud is a central objective of the securities laws, yet the individuals who commit fraud in large institutions have been able to do so largely free of any individual consequences. This policy encourages fraud because those that profit from fraud in large institutions know that they are highly unlikely to personally bear any adverse legal consequences.

Enforcement officials, when criticized about the lack of pursuit of individual malefactors, usually cite the difficulty of determining which individuals actually perpetrated the fraud in the context of a large organization. They are also reluctant to devote the time and resources necessary to successfully pursue individual malefactors given the large resources available to defend culpable management of these large firms from individual legal responsibility for fraud. Enforcement officials are usually satisfied with headlines announcing the imposition of large fines on the corporation—even though these fines are borne by innocent shareholders rather than the individuals who committed the fraudulent acts. Officials may also be reluctant to pursue individuals for fear of damaging their future employment prospects at large firms or at the large law and accounting firms that perform services for large firms.

In the interest of justice and investor protection, there is a need to adequately pursue individual managers who commit fraud while employed by large firms. The creation of a Complex Case Unit within the Enforcement Division with the institutional expertise and mission of addressing large corporate fraud is warranted.

Allow Respondents to Choose the SEC's Administrative Law Court or an Article III Court

RECOMMENDATION

Allow respondents to elect between the SEC's administrative law courts and proceeding in an Article III court.

RATIONALE

Serious questions have been raised about the objectivity of SEC administrative law judges. Evidence strongly implies that the SEC's win rate is substantially higher in its administrative law courts than in ordinary federal courts. Similarly, serious questions have been raised about whether procedural due process is adequately provided in the SEC's in-house administrative law courts.

By allowing respondents to elect whether the adjudication occurs in the SEC's administrative law court or in an ordinary Article III federal court, respondents who are concerned about the fairness of the SEC proceedings can choose to proceed in a federal district court.

Study Regional Office Consolidation

RECOMMENDATION

The SEC, the Government Accountability Office (GAO), or both should study whether regional office consolidation is warranted.

RATIONALE

The SEC has 11 regional offices: in Atlanta, Boston, Chicago, Denver, Fort Worth, Los Angeles, Miami, New York, Philadelphia, Salt Lake, and San Francisco. Consolidation of those offices may save significant resources and streamline administration without endangering enforcement or inconveniencing the public. Whether this is the case is not clear. The issue should be studied.

Study Delegation to Staff and Consider Sunsetting Delegations

RECOMMENDATION

The SEC, the GAO, or both should study whether SEC delegation of authority to staff should be narrowed, and whether sunsetting of delegations should be standard practice to ensure review of various delegations' practical effects and efficacy.

RATIONALE

Concerns have been raised that too much authority has been delegated to staff and, specifically, whether SEC approval should be required to issue formal orders of investigation. The scope and duration of SEC delegation to SEC staff should be studied comprehensively.

Require SEC Approval for Market-Data Fee Increases

RECOMMENDATION

Require SEC approval of market-data fee increases.

RATIONALE

Exchanges charge broker-dealers for obtaining exchange data about exchange transactions and offers to buy and sell securities. Broker-dealers are required to purchase this data to comply with SEC best-execution requirements. Exchanges have been de-mutualized and are now independent for-profit companies rather than broker-dealer-controlled entities. There is concern that exchanges are able to charge unwarranted fees, and that broker-dealers are mandated nevertheless to purchase the data no matter the cost, due to the best-execution rules. Given the effective mandate to purchase the data, the SEC's approval of fee increases should be required, rather than the fee increases taking effect automatically. SEC approval should generally be based on whether there is an objective reason for the fees to increase, such as an increase in exchange costs.

Social Security Administration

Eliminate the Vocational Grids from the Disability Insurance Determination Process

RECOMMENDATION

The Secretary of Health and Human Services (HHS) should eliminate the non-medical vocational grids, as well as a person's ability to *adjust* to work, from Social Security Disability Insurance (SSDI) determinations.

Using his authority to determine what constitutes "disability" and to promulgate regulations, the Secretary should eliminate the non-medical grid factors from the disability determination process, and instead base determinations exclusively on physical and mental conditions that prevent workers from performing any job in the national economy (which is the Social Security Administration's definition of disability).[1] Moreover, because being *capable of adjusting to a job* is a precondition of *being able to perform that job*, the Secretary should eliminate consideration of the ability to adjust to work in the determination process.

RATIONALE

SSDI benefits are supposed to be for people who have physical or mental conditions that prevent them from working. Nevertheless, 40 percent of all SSDI benefit awards rely on non-medical vocational grids in the disability determination process.[2]

Under regulatory authority to consider the relevant disability factors,[3] the Secretary of HHS promulgated medical-vocational guidelines in 1978 that establish disability status on the basis of non-medical vocational (so-called "grid") factors including age, eligibility, and work experience.[4] Consequently, individuals can qualify for SSDI benefits based on factors that may have no role whatsoever in their disability claims. For example, individuals who are limited to sedentary work can be determined disabled if they are ages 45 or older and say they cannot speak English, or if they are 50 or older and lack transferable skills.

While age and disability are correlated, age itself does not cause disability any more than do grey hairs or extra pounds. Education and work experience, or lack thereof, cannot cause disability. Qualification for SSDI benefits based on a lack of education or skills discourages individuals from gaining education, skills, and literacy that would improve their job prospects and overall well-being.

The HHS Secretary should eliminate the broad-sweeping and discriminatory vocational standards from the disability determination process and base disability determinations exclusively on physical and mental factors that directly affect work capabilities.

ADDITIONAL READING

- Rachel Greszler, "Comments to SSA on Grid 2015," submission for comments on the Social Security Administration (SSA) Proposed Rule: Vocational Factors of Age, Education and Work Experience in the Adult Disability Determination Process, November 9, 2015.

Establish a Needs-Based Period for Disability Benefits

RECOMMENDATION

Congress should revise disability classifications and establish a needs-based period of disability benefit for newly eligible SSDI beneficiaries who qualify with conditions that are expected to improve.

RATIONALE

The current SSDI program sets no clear expectation that individuals with marginal and temporary disabilities should return to work with improvement and given applicable accommodations. The program makes no provisions for individual conditions and fails to acknowledge potential future work capacity.

The continuing disability review (CDR) process, responsible for reviewing whether disability insurance beneficiaries continue to be eligible, suffers from several flaws which undermine its effectiveness. One example is the medical review improvement standard. The Social Security Administration (SSA) must first find "substantial evidence of improvement in the individual's impairment(s) enabling [the individual] to engage in substantial employment." For individuals who initially qualified with marginal conditions or conditions that were insufficiently documented or inadequately supported by the evidence on file, demonstrating such substantial improvement can be an impossible task. The purpose of this standard is to make it more difficult for the SSA to terminate benefits than to continue them.

Congress should revise current disability classifications and period of disability to establish a needs-based period of disability benefit that aligns individual needs and abilities with benefit provisions to help reintegrate individuals with disabilities into labor markets upon the improvement of their condition and in considering applicable accommodations. Such a benefit would be time-limited based on the disability classification granted. Individuals could requalify prior to benefit cessation via an expedited determination process. Individuals whose conditions worsened after exiting the program could reapply using the current expedited reinstatement process that exists under the Ticket to Work and Work Incentives Improvement Act of 1999.

ADDITIONAL READING

- Romina Boccia, "A Pathway to Work for Social Security Disability Beneficiaries," Heritage Foundation *Commentary*, March 27, 2017.
- Jason Fichtner and Jason Seligman, "Beyond All or Nothing: Reforming Social Security Disability Insurance to Encourage Work and Wealth," in Jim McCrery and Early Pomery, eds., *SSDI Solutions: Ideas to Strengthen the Social Security Disability Insurance Program* (Infinity Publishing, 2016).

Strengthen and Enforce the Five-Day Rule to Close the Evidentiary Record for SSDI

RECOMMENDATION

The Commissioner of Social Security should chiefly communicate agency commitment to the five-day rule for closing the evidentiary record for the Social Security adjudication process, including through consistent messaging and enforcement of the rule among Administrative Law Judges (ALJs) and the Appeals Councils nationwide. Furthermore, the current regulation should be strengthened to allow evidence to be submitted within five days of the hearing *only* if Social Security's action demonstrably misled the applicant or severe, unexpected, and unavoidable circumstances beyond the applicant's control prevented timely submission. No more evidence shall be submitted after the hearing begins.

RATIONALE

The Commissioner of Social Security has broad discretion to issue regulations establishing the processes by which evidence is submitted and hearings are conducted. A key component of a well-functioning SSDI hearing process is the timely and complete submission of evidence that is to be considered by the ALJ in deciding the claimant's case. Evidence that is submitted late, especially if such evidence is voluminous, as is often the case, makes it impossible for the ALJ to fully consider it for the hearing. Allowing evidence to be submitted too close to, during, and even after the hearing, can unnecessarily delay hearing decisions, further contributing to unfair and inconsistent decision making and case backlogs.

Section 405.331 of the Code of Federal Regulations specifies that any written evidence must be submitted no later than five business days before the date of the scheduled hearing. Yet this rule is not enforced consistently. Moreover, current regulation is too loose, allowing applicants with a physical, mental, educational, or linguistic limitation(s) to submit evidence within five days of the hearing. Arguably, all eligible Social Security applicants have some physical, mental, educational, or linguistic limitation(s), rendering the current rule virtually unenforceable.

Furthermore, the Commissioner should *close* the record at the very latest at the moment at which the hearing begins. No more evidence should be accepted that is submitted during or after the hearing.

ADDITIONAL READING

- Office of the Chairman of the Administrative Conference of the United States, "SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Program," December 23, 2013.
- Romina Boccia, "What Is Social Security Disability Insurance? An SSDI Primer," Heritage Foundation *Backgrounder* No. 2994, February 19, 2015.

Test an Optional Private Disability Insurance Component within the SSDI Program

RECOMMENDATION

The Social Security Administration should implement a demonstration project to test the viability of providing an optional, private disability insurance component within the current SSDI program.

RATIONALE

Aside from inefficiencies in the Social Security Administration's operations, SSDI's problems and unchecked growth boil down to two factors: Too many people get on the rolls and too few ever leave them. The private sector offers solutions to both of those problems. Private disability insurance (DI) does a significantly better job than SSDI of weeding out truly disabled individuals from those who have non-disabling conditions and would simply like to retire early. Private DI also helps about four times as many people return to work, it provides a more efficient and timely determination process (taking no more than 45 days for a determination, compared to more than a year for most SSDI applicants), and it provides about 33 percent more in benefits for about half the cost of SSDI.[5]

The Heritage Foundation has a proposal that would provide private companies and self-employed individuals with the option of receiving a reduction in their portion of the SSDI payroll tax in exchange for providing their employees (or purchasing, if self-employed) qualified, private long-term private DI that would cover at least the first three years of disability benefits.[6]

The SSA should use its authority under Section 234[7] to implement a demonstration program that would test the viability—including the budgetary impact for the SSDI system and the economic and physical well-being of potential SSDI beneficiaries—of an optional, private DI component by allowing a limited number of companies and workers to participate in an optional private DI system for their first three years of benefits.[8] If mutually beneficial to SSDI's finances and to individuals' well-being, Congress should make optional private DI available to all companies and workers.

ADDITIONAL READING

- Rachel Greszler, "Private Disability Insurance Option Could Help Save SSDI and Improve Individual Well-Being," Heritage Foundation *Backgrounder* No. 3037, July 20, 2015.

Eliminate the SSA as Middleman in Disability Insurance Representatives' Payments

RECOMMENDATION

Congress should eliminate the SSA's role in the payment of SSDI representatives, and replace the current mandatory criteria and fee structure for SSDI representatives with an optional certification for SSDI representatives who choose to follow the SSA's requirements.

RATIONALE

Currently, more than 90 percent of SSDI claimants are represented at hearings before ALJs.[9] Instead of contracting with representatives and paying them after the case is settled, the SSA withholds money from the claimants' benefits and pays SSDI representatives directly. By acting as representatives' bill collectors, the SSA's direct payment raises representatives' payments, which increases their supply and can lead some representatives to seek out and encourage potential SSDI beneficiaries to apply for benefits.

Direct payment also diminishes disability applicants' control over representatives' services and fees because representatives bill the SSA directly, and the SSA takes the money out of the claimants' benefit checks. Consequently, many SSDI representatives receive significant payments without providing much value to claimants. A 2014 report by the Office of the Inspector General (OIG) examined representation of SSDI claimants at the initial Disability Determination Service (DDS) level. Of the cases the OIG examined, only 37 percent of representatives assisted their clients throughout the claim process, 41 percent assisted only with filing the claim, and 22 percent appeared to have not assisted their clients at all.[10]

Direct payment for SSDI representatives also establishes a dangerous precedent for the government stepping in as bill collector if it determines there is a need to increase access to certain services. This precedent could be used to require all tax preparers to follow government standards and fee schedules, and to have the government take money out of individuals' tax returns to directly pay their tax preparers.

SSDI representatives provide services to individuals—not to the federal government—and it is an individual's right and responsibility to pay for the services that he contracts to receive. Claimants should be free to choose the types of services they want to purchase and should be in control of their own money so that they can ensure that they obtain what they contract to receive. If the SSA wants to establish a certain standard of services and schedule of allowable fees, it can provide SSDI representatives the option of receiving an SSA certification if they choose to abide by those standards.

ADDITIONAL READING

- Rachel Greszler, "Time to Cut out the SSA as Middleman in SSDI Representation," Heritage Foundation *Issue Brief* No. 4489, November 24, 2015.

Improve the SSDI Program's Continuing Disability Review Process

RECOMMENDATION

The SSA should enact a meaningful and timely continuing disability review (CDR) process that requires more than returning a check-the-box postcard to the SSA.

RATIONALE

Virtually all individuals who receive SSDI benefits are required to undergo a CDR process every three or seven years, depending on their disability. However, most of those (73 percent) CDRs involve nothing more than sending current SSDI beneficiaries a postcard in the mail that asks them to check a box if they are still disabled.[11] While 19 percent of full medical CDRs result in a cessation of benefits, only 5 percent of mailed CDRs result in cessation of benefits (and much of that appears to come from mailed CDRs that are followed up by full in-person medical CDRs).[12] As a whole, only about 0.5 percent of all SSDI beneficiaries return to work in any given year.[13]

Despite its statutory requirement to perform CDRs at least every three years except for individuals with permanent disabilities, the SSA has a backlog of more than 1 million CDRs, meaning many beneficiaries escape the CDRs or receive only a mailed CDR. This creates the impression—and, predominantly, the reality—that a positive SSDI determination equates to disability benefits for life.

While the SSA is required by law to prioritize certain CDRs, such as those for low-birth-weight children upon their first birthday, and it is supposed to conduct them for all non-permanent disabilities within three years, the SSA has wide discretion in how it prioritizes the CDRs it is able to conduct given limited resources. A 2016 GAO report found that the SSA could realize significant savings by prioritizing CDRs more efficiently.[14]

The SSA Commissioner should work with the Deputy Commissioner of Operations and the Deputy Commissioner of Budget, Finance, Quality, and Management to optimize the prioritization of CDRs and should establish a timeline and adequate resources to eliminate the current CDR backlog and ensure that all SSDI beneficiaries with non-permanent disability determinations receive a CDR within the statutorily required three-year period. Furthermore, the SSA should add a medical verification component to the mailed CDR process. This could be as simple as having the beneficiaries' medical providers confirm or deny continued disability status through a check-the-box online portal. If the provider indicates that the individual is no longer disabled (at least not to the same extent), this should trigger a prompt and full CDR.

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U.S. Trade and Development Agency

Eliminate the U.S. Trade and Development Agency

RECOMMENDATION

Congress should eliminate the U.S. Trade and Development Agency (USTDA).

RATIONALE

The USTDA is intended to help companies create U.S. jobs through the export of U.S. goods and services for priority development projects in emerging economies. The USTDA links U.S. businesses to export opportunities by funding project planning activities, pilot projects, and reverse trade missions while creating sustainable infrastructure and economic growth in partner countries.[1]

These activities more properly belong to the private sector. The best way to promote trade and development is to reduce trade barriers. Another way is to reduce the federal budget deficit and thereby federal borrowing from abroad, freeing more foreign dollars to be spent on U.S. exports instead of federal treasury bonds. A dollar borrowed from abroad by the government is a dollar not available to buy U.S. exports or invest in the private sector of the U.S. economy.

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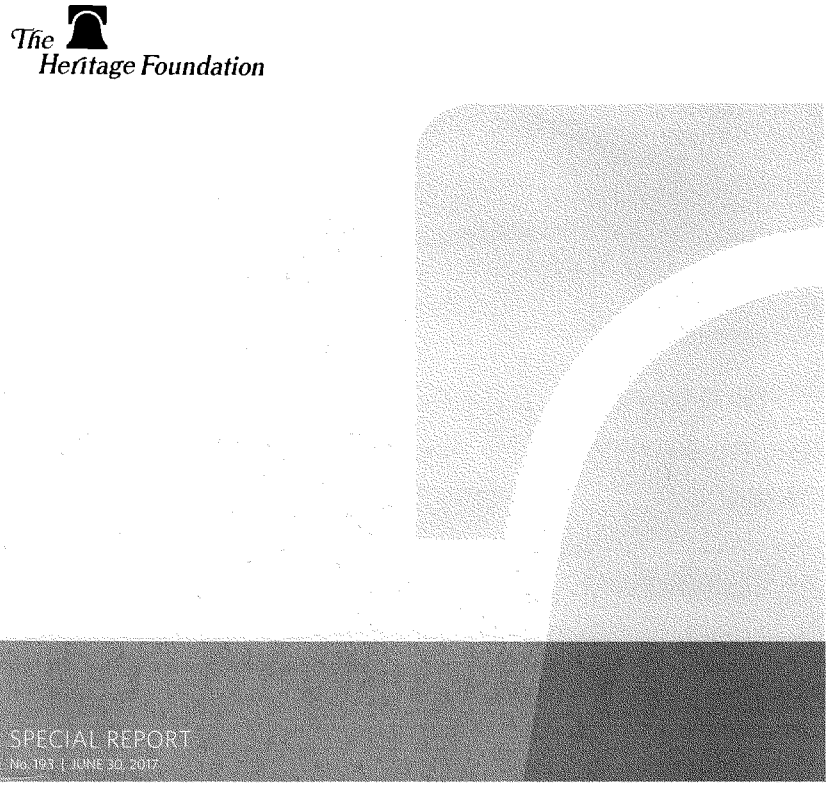

Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

Edited by David B. Muhlhausen, PhD

The Heritage Foundation

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About the Authors

David B. Muhlhausen, PhD, *is Research Fellow in Empirical Policy Analysis in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, at The Heritage Foundation.*

Romina Boccia *is Deputy Director of the Roe Institute and Grover M. Hermann Research Fellow.*

Justin Bogie *is Senior Policy Analyst in Fiscal Affairs in the Roe Institute.*

James L. Gattuso *is Senior Research Fellow for Regulatory Policy, in the Center for Free Markets and Regulatory Reform, of the Institute for Economic Freedom.*

Rachel Greszler *is Research Fellow in Entitlement Economics in the Roe Institute.*

Diane Katz *is Senior Research Fellow in Regulatory Policy at the Center for Free Markets and Regulatory Reform.*

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.*

Nicolas D. Loris *is Herbert and Joyce Morgan Fellow in Energy and Environmental Policy in the Center for Free Markets and Regulatory Reform.*

Norbert J. Michel, PhD, *is Senior Research Fellow in Financial Regulations in the Roe Institute.*

Robert E. Moffit, PhD, *is Senior Fellow for Health Policy Studies in the Institute for Family, Community, and Opportunity.*

Michael Sargent *is Policy Analyst in the Roe Institute.*

John-Michael Seibler *is a Legal Fellow in the Meese Center.*

Katie Tubb *is Policy Analyst for Energy and Environmental Issues in the Roe Institute.*

John W. York *is Research Assistant, at the Center for Principles and Politics, in the B. Kenneth Simon Center for Principles and Politics, of the Institute for Constitutional Government.*

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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

David B. Muhlhausen, PhD

Introduction

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

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

- Whether the functions of an agency are appropriate for the federal government or would be better left to state and local governments or to the private sector;
- Whether the functions of an agency are redundant with the functions of other agencies;
- Whether administrative fuctions for operating an agency are redundant with those of other agencies;
- Whether the costs of an agency are justified by the public benefits it provides; and
- What it would cost to shut down or merge agencies.[3]

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

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

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

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

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Chapter 1: The Problem with a Bloated, Ineffective Government

Rachel Greszler and David B. Muhlhausen, PhD

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

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

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

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

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

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

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

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

Scale of Government Employment

The federal government directly employs about 4.1 million workers, including about 1.4 million uniformed military members.[8] Although direct civilian employment has not changed substantially over the past decades, the federal government's de facto employment has grown substantially. Millions of workers rely either in part or entirely on federal contracts for their paychecks. Between just 2000 and 2012, federal spending on contracts increased by 87 percent, to $518 billion in 2012.[9] Moreover, the federal government provides roughly $550 billion in aid to state and local governments. These funds indirectly pay all or some of the salaries of many state and local

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

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

Provider of Everything But the Kitchen Sink

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

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

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

An estimated 12.5 million[12] households receive 'free" cell phone services through the Lifeline program, while all *other* cell phone users pay about $2.50 per month to cover Lifeline and other federal communications programs.[13] What is "free" to one person cannot be free to every person.

Spread across roughly 125 million households across the U.S.—and in comparison to the federal government's $4.0 trillion in total spending—many of the government's spending line items can be reduced to marginal, "free" services. Whereas individuals or companies would have to invest millions to undertake certain projects, special interests can petition the government to socialize—or marginalize—those costs into spare change for average Americans.

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

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

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

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

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

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

Take the example of the Lifeline program mentioned above which provides "free" cell phones and cellular service to as many as one-third of all U.S. households. A report by the non-partisan Government Accountability Office[15] said that the Lifeline program is an inefficient and costly program, and an economic study found that every dollar of actual Lifeline support results in 65 cents of administrative costs.[16] In other words, $1 taken from John provides Sue with only 35 cents in benefits. That's 65 cents in deadweight loss.

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

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

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

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

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

Diminished Federalism

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

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

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

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

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

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

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

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

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

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

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Summary

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

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

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Chapter 2: Pathways to Reform

John W. York and David B. Muhlhausen, PhD

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

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

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

An Abbreviated History of Executive Reorganization

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

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

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

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

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

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

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

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

Lessons from the Past

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

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

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

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

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

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

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

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

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

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

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

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

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

Principles of Reform

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

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

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

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

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

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

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

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

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

Preventing Creation of New Agencies. Creating new agencies, as both Presidents Bush and Obama did, may be easier than cutting obsolete or obstinate ones, but this does nothing to "drain the swamp" as President Trump memorably pledged to do. At best, a new agency can build a bridge across the most festering sections of the quagmire. More often, new agencies end up reflecting the same perverse incentives and ideological biases that infest the rest of the administrative state.

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

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

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

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

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

Pathways to Reform

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

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

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

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

Conclusion

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

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

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

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22. The leftward tilt of the federal civil service is well known, persistent, and highly consequential for policy implementation. The past two Administrations provide several clear-cut examples of how the leftward tilt of the career civil service benefits the Democratic Party. Lois Lerner, an IRS careerist purportedly working on her own initiative, subjected the nonprofit applications of Tea Party groups to a level of scrutiny orders of magnitude higher than any other group. Career civil servants in the Trump Administration are actively sabotaging his presidency.
23. Moe, *Administrative Renewal*, p. 43.
24. Anthony Downs, *Inside Bureaucracy* (Boston: Little, Brown, 1967).
25. Moe, *Administrative Renewal*, p. 137.
26. Ibid., p. 44.
27. Ibid.
28. David B. Muhlhausen, *Do Federal Social Programs Work?* (Santa Barbara, CA: Praeger, 2013).
29. U.S. Department of Health and Human Services, Administration for Children and Families, Office of Planning, Research, and Evaluation, *Head Start Impact Study: First Year Findings*, June 2005; U.S. Department of Health and Human Services, Administration for Children and Families, Office of Planning, Research, and Evaluation, *Head Start Impact Study: Final Report*, January 2010; and Mike Puma et al., "Third Grade Follow-Up to the Head Start Impact Study: Final Report," *OPRE Report* 2012-45, October 2012. For a review of the Head Start Impact Study findings, see Muhlhausen, *Do Federal Social Programs Work?* pp. 104-125.
30. Muhlhausen, *Do Federal Social Programs Work?* pp. 212-303, and David B. Muhlhausen, "Federal Job-Training Fails Again," Heritage Foundation *Backgrounder* No. 3198, March 10, 2017, http://www.heritage.org/jobs-and-labor/report/federal-job-training-fails-again.
31. Nicola Ulibarria, Bruce E. Cain, and Newsha K. Ajami, "A Framework for Building Efficient Environmental Permitting Processes," *Sustainability*, Vol. 9, No. 2 (2017), p. 180, and Nicola Ulibarri, "Streamlining Permitting Processes for Multi-Benefit Water Projects," Association for Public Policy Analysis and Management, Fall Conference: The Role of Research in Making Government More Effective, 2016.
32. S.1607, Independent Agency Regulatory Analysis Act of 2015.
33. Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: W.W. Norton & Company, 1969), and John D. Huber and Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002).

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Chapter 3: The President's Reorganization Authority

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 1932, Congress first enacted law delegating to the President broad authority to reorganize the executive branch according to specific guidelines.[35] Since then, nine Presidents have sought and secured similar authority from Congress.[36] The last to exercise that authority was Jimmy Carter; the last to receive it was Ronald Reagan. The most recent Reorganization Act expired in December 1984.[37] Since then, Presidents George W. Bush and Barack Obama sought reorganization power from Congress,[38] which introduced but did not enact legislation that would have granted them reorganization authority.[39]

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

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

Conclusion

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

Appendix

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

5 U.S.C. § 903—Reorganization plans:

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

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

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

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

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

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

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

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

(b) The President shall have a reorganization plan delivered to both Houses on the same day and to each House while it is in session, except that no more than three plans may be pending before the Congress at one time. In his message transmitting a reorganization plan, the President shall specify with respect to each abolition of a function included in the plan the statutory authority for the exercise of the function. The message shall also estimate any reduction or increase in expenditures (itemized so far as practicable), and describe any improvements in management, delivery of Federal services, execution of the laws, and increases in efficiency of Government operations, which it is expected will be realized as a result of the reorganizations included in the plan. In addition, the President's message shall include an implementation section which shall (1) describe in detail (A) the actions necessary or planned to complete the reorganization, (B) the anticipated nature and substance of any orders, directives, and other administrative and operational actions which are expected to be required for completing or implementing the reorganization, and (C) any preliminary actions which have been taken in the implementation process, and (2) contain a projected timetable for completion of the implementation process. The President shall also submit such further background or other information as the Congress may require for its consideration of the plan.

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

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

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

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

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

5 U.S.C. § 909—Terms of resolution:

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

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

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

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

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

If the committee to which is referred a resolution introduced pursuant to subsection (a) of section 910 (or, in the absence of such a resolution, the first resolution introduced with respect to the same reorganization plan) has not reported such resolution or identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to be discharged from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

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

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

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

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

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

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

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

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

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

Endnotes

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

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

45. *See generally* CRS 2012, *supra* note 36. The 1977 Act offered broad authority to consolidate inter- and intra-agency functions as well as "the abolition of all or a part of the functions of an agency, except" for any "enforcement function or statutory program." 5 U.S.C. § 903. It also prohibited the President from certain actions such as creating, abolishing, or completely consolidating any executive departments. *See* 5 U.S.C. § 905 (1977); CRS 2001, *supra* note 25, at 6.

46. For instance, in 1993, President Bill Clinton "simply announced" the creation of a National Performance Review with "no statutory authority," staff, funding, or "work plan." CRS 2002, *supra* note 36, at 91. Vice President Al Gore shaped it into an interagency task force to make the executive branch leaner and more entrepreneurial. It eventually claimed to have ended "the era of big government," "reduced the size of the federal civilian workforce by 426,200 positions," and delivered "savings of more than $136 billion...by eliminating what wasn't needed." *Id.* at 96.

47. *See generally* Mansfield, *supra* note 20; John W. Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQ. L. REV. 89, 91 (1949); HARRY S. TRUMAN LIBRARY INST., *Truman and the Hoover Commission*, 19 WHISTLE STOP (1991), https://www.trumanlibrary.org/hoover/commission.htm.

48. *See* CRS 2001, *supra* note 25, at 8 (discussing H.R. 1314 and the Reorganization Act of 1984).

49. *See* GGD-81-57, REPORT OF THE U.S. GENERAL ACCOUNTING OFFICE TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, IMPLEMENTATION: THE MISSING LINK IN PLANNING REORGANIZATIONS (Mar. 20, 1981), http://www.gao.gov/assets/140/132455.pdf (advising that implementation plans will help to avoid past staffing, funding, office space, accounting systems, and other problems that distracted officials from their missions).

50. 1 Op. O.L.C. 248, 251.

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Chapter 4: Congressional Action Needed for Reform

John W. York and David B. Muhlhausen, PhD

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

Obstacles to Reform in Congress

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

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

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

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

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

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

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

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

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

Congress-led Reorganization

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

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

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

The federal bureaucracy is overwhelming in both size and scope. A thoroughgoing reorganization of the executive will require a detailed knowledge of the administrative state that only career civil servants and some very experienced senior political appointees are likely to have. In other words, no matter who is nominally in charge of reorganization, the expertise of the executive branch will be indispensable.

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

Reauthorization of Executive Branch Reorganization as It Existed Prior to 1984

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

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

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

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

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

However, reauthorizing statutory language regarding executive reorganization plans without substantive amendment will not allow the President to propose a plan that has the scope and depth he seems eager to pursue. As discussed, by 1983 the President could not propose a plan to create a new department or agency, consolidate two departments, or even rename a department. Nonetheless, within these limitations, much can be done. Below the department level, the President would have somewhat wider discretion. He could, for instance, call on Congress to abolish most agencies (though independent regulatory agencies are protected by 5 U.S. Code § 905 (a)(1)), consolidate or coordinate all or part of an agency, or transfer regulatory authority from one agency to another.[4] However, the latest authorization of presidential reorganization authority expressly forbids the President from proposing a plan that continues an agency or a function thereof beyond the period authorized by law, authorizing an agency to exercise a function that is not expressly authorized by law, or creating a new agency.[5] According to current statutory language, the President is also forbidden from submitting a plan "dealing with more than one logically consistent matter,"[6] and no more than three plans may be pending before Congress at one time.[7] Therefore, a comprehensive plan of the sort President Trump seems to favor would likely require submitting not one, but many, reorganization plans staggered across a significant length of time.

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

Enhancing Presidential Executive Reorganization Authority

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

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

Why BRAC Succeeded

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

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

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

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

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

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

While Senator Lieberman's bill generally expanded the President's latitude, it did propose one important new restriction. Under the RCGA, presidential reorganization plans submitted to Congress must be deemed "efficiency enhancing"—they must either decrease the number of agencies or lead cost savings by other means—by the Director of the Office of Management and Budget. This clause would rule out the possibility that Presidents would use their new authority to build up the administrative state, an outcome contrary to the purpose of the legislation.

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

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

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

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

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

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

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

Another improvement would allow the President to submit amendments to his submission to Congress to address unforeseen objections and include suggestions offered by Congress within a specified time frame. Such a power would allow the President to more ably foster consensus while taking advantage of congressional expertise. President Jimmy Carter requested such an instrument that was enacted as part of the Reorganization Act of 1977.[9]

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

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

Giving Reorganization Authority to a Committee or Commission

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

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

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

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

Congress has relied on commissions of outside experts to craft recommendations on contentious or technical issues in the past, and reorganizing the federal bureaucracy certainly meets these criteria.[11] One of the most successful expert commissions in recent memory was the Base Realignment and Closure (BRAC) Commission, which successfully broke the political deadlock that kept obsolete military bases open. Given the parallels between eliminating superfluous military bases and reducing superfluous federal agencies and bureaus, Congress should use BRAC as a model for an executive reorganization commission. Like BRAC, an executive reorganization commission could overcome reluctance among Members of Congress to cut government waste that benefits them.

Incentivizing Adoption of a Commission or Committee's Proposals

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

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

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

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

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

Conclusion

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

Worse still, President Trump will not be able to rely on unanimous support from his own party. A comprehensive executive reorganization plan that streamlines the federal bureaucracy by eliminating redundant agencies and consolidating like functions will make enemies of every Member of Congress whose committee stands to lose power and oversight. Senators and Representatives who agree that the bloated federal bureaucracy should be cut to size in theory may not be willing to sacrifice any of the bureaus or agencies under their jurisdiction. Fearing that they might be on the chopping block, Members of Congress may short circuit the reorganization process before it even begins.

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

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

Endnotes

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

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Chapter 5: Budget Process Reform

Justin Bogie and Romina Boccia

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

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

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

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

Reauthorize the President's Reorganization Authority. Congress should grant the President wide latitude in reshaping and streamlining the nation's ever-expanding bureaucracy. Historically, this has not been a partisan or divisive issue and Congress has granted wide reorganization authority to both Republican and Democratic Presidents. In fact, the campaign promises of reorganization heard over the course of Donald Trump's 2016 campaign mirrored closely those of Jimmy Carter 40 years earlier. At that time, Carter described the federal government as "a horrible bureaucratic mess," and pledged that he would "have a complete reorganization of the Executive Branch of government [and] make it efficient, economical, purposeful, simple, and manageable."[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to cut funding for authorized programs to provide an appropriation.

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

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

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

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Chapter 6: Federal Regulatory Power

James Gattuso and Diane Katz

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

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

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

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

But it is not enough to simply reshuffle the rulemaking process. The nation must address the extent to which federal agencies contravene the U.S. Constitution on a daily basis by autonomously issuing edicts, monitoring compliance, and punishing transgressors. Unless constrained, the administrative state will extinguish America's entrepreneurial spirit and the freedoms on which this nation was founded.

Costs

Regulation acts as a stealth tax on Americans and the U.S. economy. The weight of this tax is crushing, with independent estimates of total regulatory costs exceeding $2 trillion annually—more than is collected in income taxes each year. As the number of regulations has grown, so, too, has spending on government bureaucracy. Based on fiscal year (FY) 2017 budget figures, administering red tape will cost taxpayers nearly $70 billion—an increase of 97 percent since 2000.[5]

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

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

Benefits (Justifications)

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

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

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

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

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

Reforms

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

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

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

President Trump's first actions included a regulatory freeze in the form of a memorandum to executive departments[11] directing agency heads to:

1. Refrain from sending regulations[12] to the Office of the Federal Register until a department or agency head designated by the President reviews and approves it. (Publication in the *Federal Register* is required to finalize a rule.)

2. Withdraw regulations that had been sent to the Office of the Federal Register but have not yet been published.

3. Postpone, for 60 days, regulations that have been published in the *Federal Register* but have not yet taken effect, for the purpose of reviewing questions of fact, law, and policy (as permitted by law).

Also in his first month, the President issued an executive order[13] that directs agencies to identify for elimination at least two prior regulations for every one new regulation issued, and to manage and control regulatory costs through a budgeting process. For the current fiscal year, the total incremental cost of all new regulations, including repealed regulations, shall be no greater than zero (unless otherwise required by law).

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

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

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

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

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

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

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

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

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

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

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

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

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

- **Create a congressional regulatory analysis capability.** In order to exercise regulatory oversight, especially if the REINS Act is adopted, Congress needs to be able to analyze various regulatory policies objectively. Congress currently depends on OIRA, or the regulatory agencies themselves, for analyses, and needs an independent source of expertise. This could be accomplished through an existing congressional institution, such as the Congressional Budget Office or the Government Accountability Office, or through a new unit established by Congress. This new capability need not require a net increase in staff or budget, but could easily be paid for through reductions in existing regulatory agency expenses.

- **Set sunset dates for all major regulations.** Rules should expire automatically if not explicitly reaffirmed by the relevant agency through the formal rulemaking process. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some regulations. Congress should make them the rule, not the exception.

- **Codify regulatory impact analysis requirements.** All executive branch agencies are currently required to conduct a regulatory impact analysis (including cost-benefit calculations) when imposing any major regulation. Codifying these requirements would ensure that they cannot be rolled back without congressional action, and provides the basis for judicial review of agency compliance.

- **Subject "independent" agencies to executive branch regulatory review.** Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies, such as the FCC, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau, are not subject to review by OIRA or even required to undergo a cost-benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as executive branch agencies. Such a requirement has broad support, even from President Barack Obama's former OIRA chief, Cass Sunstein.[18]

- **Codify stricter information-quality standards for rulemaking.** Federal agencies too often mask politically driven regulations as scientifically based imperatives. In such cases, agencies fail to properly perform scientific and economic analyses or selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda. Congress should impose specific strict information-quality standards for rulemaking, and conduct oversight to ensure that federal agencies meet these standards. Congress should also make compliance with such standards subject to judicial review, and explicitly state that noncompliance will cause regulation to be deemed "arbitrary and capricious."

- **Reform "sue and settle" practices.** Regulators often work in concert with advocacy groups to produce settlements to lawsuits that result in greater regulation. Such collaboration has become a common way for agencies to impose rules that otherwise would not have made it through the regulatory review process. To prevent such "faux" settlements, agencies should be required to subject proposed settlements to public notice and comment. The Sunshine for Regulatory Decrees and Settlements Act (H.R. 712) would do just that.

- **Increase professional staff levels within OIRA.** OIRA is one of the only government entities in Washington that is charged with limiting, rather than producing, red tape. More resources should be focused on OIRA's regulatory review function. This should be done at no additional cost to taxpayers: The necessary funding should come from cuts in the budgets of regulatory agencies.

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Chapter 7: Restructuring Federal Financial Regulators

Norbert J. Michel, PhD

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

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

Consolidation vs. Competition

After the 2008 crisis, Congress considered creating a single consolidated financial regulator.[2] However, the ultimate product of that debate—the Dodd–Frank Wall Street Reform and Consumer Protection Act[3]—did not create such a super regulator. Instead, Dodd–Frank increased the scope of the Federal Reserve's authority by including an explicit systemic-risk mandate. It also gave the Fed supervisory authority over new entities, such as savings-and-loan holding companies, securities holding companies, and systemically important financial institutions (SIFIs).[4]

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

There are many arguments for and against regulatory consolidation. Critics of consolidation believe that a structure based on multiple regulatory agencies is good because it allows regulators to specialize in particular types of institutions,[5] it allows regulatory experimentation and competition,[6] and it helps highlight one regulator's mistakes. Also, if a regulator does make an error, only the subset of entities it regulates will be directly affected. Finally, maintaining distinct capital markets and banking regulators creates speed bumps to banking regulators' efforts to apply bank-like regulation more broadly.[7]

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

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

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

- The NCUA supervises only federally chartered credit unions, but it is the deposit insurer for both federal credit unions and most state-chartered credit unions. Its role as deposit insurer creates overlap with state credit union regulators.

- The Federal Reserve has consolidated supervision authority over most holding companies that own or control a bank or thrift and their subsidiaries. This authority creates overlap because the Fed's role is in addition to the oversight provided by the banks' primary federal regulator.

- State banking regulators share oversight of the safety and soundness of state-chartered banks with the FDIC and the Federal Reserve.

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

- Differences in examination scope, frequency, documentation, guidance, and rules among the FDIC, OCC, and the Fed;

- Inconsistent methods for assessing loan loss reserves;

- Inconsistent guidance and terminology for Bank Secrecy Act examinations *and* compliance;

- Inconsistencies with oversight and compliance of federal consumer financial protection laws (such as fair lending laws);

- The Fed and other primary regulators have not, though they have tried, successfully coordinated their supervision and examination responsibilities.

- Duplication in the examinations of financial holding companies, despite the OCC's and the Fed's efforts to coordinate;

- Conflicting guidance from the Fed and the OCC; and

- Requirements by prudential regulators of regulated entities to report the same data in different formats.

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

Removing the Federal Reserve's Regulatory and Supervisory Powers

As the United States central bank, the Federal Reserve's primary role is, and should remain, monetary policy. The Federal Reserve Act directs the central bank to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices and moderate long-term interest rates."[14] The Federal Reserve has struggled to fulfill these macroeconomic responsibilities, and its supplementary regulatory and supervisory responsibilities—particularly as they have expanded since the financial crisis[15]—are simply unnecessary for conducting monetary policy.

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

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

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

Merging the SEC and the CFTC

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

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

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

Conclusion

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

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

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

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

Endnotes

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3. Public Law 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S. Code).
4. For a discussion of this expansion, see Hester Peirce and Robert Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd-Frank," Mercatus Center at George Mason University, November 13, 2013, http://mercatus.org/publication/federal-reserves-expanding-regulatory-authority-initiated-dodd-frank (accessed October 8, 2016).
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12. States also have their own banking regulatory agencies, and banks are subject to various rules and regulations promulgated by the Consumer Financial Protection Bureau (CFPB), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Federal Housing Administration (FHA), the Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD).
13. U.S. Government Accountability Office, "Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness," GAO-16-175, February 2016, http://www.gao.gov/assets/680/675400.pdf (accessed April 4, 2017).
14. Federal Reserve Act § 2A, 12 U.S. Code 225a.
15. Peirce and Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd-Frank." Also see Patrick McLaughlin, Chad Reese, and Oliver Sherouse, "Dodd-Frank and the Federal Reserve's Regulations," Mercatus Center at George Mason University, February 4, 2016, http://mercatus.org/publication/dodd-frank-and-federal-reserve-s-regulations (accessed October 8, 2016).
16. Dodd-Frank § 1108(a).
17. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 28, which explains that "[a]ll forms of consolidated supervision by the Federal Reserve create overlap with authority of the primary regulators of the holding company's regulated subsidiaries."
18. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 36, which noted that "the Federal Reserve's data requests can be very similar to the OCC's requests and that often the two requests will ask for the same data but in different formats." See also memorandum from the Office of the Inspector General to the Board of Governors of the Federal Reserve System, "2015 List of Major Management Challenges for the Board," September 30, 2015, https://oig.federalreserve.gov/reports/board-management-challenges-sep2015.pdf (accessed October 8, 2016). Among the items in the list was "maintaining effective relationships with other regulators." The Inspector General noted: "While the Board has taken steps to improve interagency collaboration and cooperation...continued coordination with other federal supervisory agencies, such as the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, is crucial to implementing the financial stability regulatory and supervisory framework." Ibid., p. 6.
19. The FFIEC is "a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by" the Board of Governors, the FDIC, the NCUA, the OCC, and the CFPB.
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22. Historically, the CFTC applied a principles-based approach to regulation, whereas the SEC's approach was more rule-based. The two agencies' approach is now very similar, particularly since Congress passed the 2010 Dodd-Frank Act.
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Chapter 8: Human Resources

Rachel Greszler, John W. York, and Robert E. Moffit, PhD

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

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

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

Bringing Federal Compensation in Line with Private-Sector Compensation

The federal government significantly overcompensates federal employees. According to a 2017 report by the Congressional Budget Office, federal government employees receive 17 percent more, on average, than their private-sector counterparts. This costs taxpayers $31 billion per year in added compensation costs. Reports by The Heritage Foundation[2] and American Enterprise Institute[3] find significantly greater overall compensation premiums of 30 percent to 40 percent, and 61 percent, respectively. Those reports suggest that federal compensation premium costs two or three times as much—an amount between $50 billion and $81 billion per year.

One component of this overcompensation is higher salaries. A 2011 Heritage Foundation analysis of the gap between federal and private-sector compensation found that much of the unexplained wage premium in the federal government comes from federal employees advancing up the pay scale more quickly than private-sector workers.[4] Congress should remove the automatic nature of within-grade-increases (WIGIs) and allow federal managers to determine (within reasonable guidelines) the rate at which particular employees advance up the GS grades and steps.

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

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

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

Performance Rating System Should Reward and Discipline Employees Accordingly

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

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

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

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

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

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

Improving and Expanding Pay-for-Performance Compensation Programs

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

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

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

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

bonuses are awarded far too routinely to make them an adequate inducement. In fiscal year 2015, for instance, 71.2 percent of SES managers received a performance bonus.[13] According to an OPM report, 45 percent of employees below the senior levels received bonuses averaging close to $1,000.[14] To limit awards to truly excellent service, the OMB can provide a similar recommended distribution schedule for bonuses, and require managers who deviate from those schedules to provide sufficient evidence for doing so.

Make It Less Burdensome to Dismiss Chronic Low Performers

While high-performing civil servants are not rewarded sufficiently for their good work, underperforming employees rarely face serious consequences. While the risk of getting fired in the private sector is 1 in 77, the odds of being removed from public-sector employment are 1 in 500.[15] Holding on to inadequate employees not only leads to wasted taxpayer dollars and poorly administered government programs, it also poisons the workplace climate as other employees learn that misconduct is tolerated and high performers are called on to pick up the slack.

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

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

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

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

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

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

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

Seeking Opportunities to Expand Automation

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

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

Consider a Contractor Cloud

The fact that the size of the *official* federal workforce has not changed significantly over the past decades hides the true size of the federal workforce. In addition to employing about 2 million civilians, the federal government provides contracts that support far more than 2 million jobs.[22] Between just 2000 and 2012, federal spending on contracts increased by 87 percent to $518 billion in 2012.[23]

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

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

Conclusion

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

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Chapter 9: Reducing the Federal Government's Footprint

Nicolas D. Loris, Michael Sargent, Katie Tubb, and Rachel Greszler

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

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

Energy and Environment

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

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

PMAs sell deeply subsidized power to municipal utilities and cooperatives in the Southeast and West; they do not pay taxes and enjoy low-interest loans subsidized by taxpayers. Originally intended to recover the costs of federal waterway construction projects and to provide subsidized power to poor communities, the PMAs now supply such areas as Los Angeles, Vail, and Las Vegas. Generating and distributing commercial electricity should not be a centralized, government-managed activity; neither should taxpayers be forced to subsidize the electricity bills of a select group of Americans. Both the Reagan and Clinton Administrations proposed PMA privatization, and the Alaska Power Administration was successfully divested in 1996.[4] The four PMAs that remain today should also be sold under competitive bidding.

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

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

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

The Strategic Petroleum Reserve (SPR), the Northeast Home Heating Oil Reserve, and the Gasoline Supply Reserves. As part of the U.S. commitment to the International Energy Agency, the federal government created the SPR through the Energy Policy and Conservation Act (EPCA) in 1975.[8] Congress initially authorized the SPR to store up to one billion barrels of petroleum products, and mandated a minimum of 150 million barrels of petroleum products. The SPR, which opened in 1977, has the capacity for 727 million barrels of crude oil, and currently holds 685 million barrels.[9] The Northeast Home Heating Oil Reserve and the Gasoline Supply Reserves were established by EPCA and are held by the Department of Energy. They contain 1 million gallons of diesel and 1 million gallons of refined gasoline to prevent supply disruptions for homes and businesses in the Northeast heated by oil, to be used at the President's discretion.

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

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

Commercial Nuclear Waste Management. Management of nuclear waste from commercial nuclear power reactors is a business activity, not an inherent government function.[10] Yet the Nuclear Waste Policy Act, as amended, established a system where the Department of Energy is legally responsible for collecting and storing waste from commercial nuclear reactors. Decades of dysfunction demonstrate the federal government's inability to manage nuclear waste rationally, economically, or at all. Should the Nuclear Regulatory Commission (NRC) grant a license to build a repository at Yucca Mountain as proposed, this would not solve the nuclear-waste-management challenge. It merely provides a short-sighted solution rather than an innovative, multi-dimensional market with an array of management opportunities for the future nuclear industry.

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

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

Income Security and Retirement

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

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

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

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

Moreover, when a multiemployer pension plan becomes insolvent and the PBGC has to step in to pay insured benefits, the trustees who oversaw the plan's demise do not lose their jobs. Instead, the PBGC pays them to *continue* overseeing the plan. Consequently, the PBGC's multiemployer program faces an estimated deficit of $58 billion to $101 billion, and that only includes the liabilities of plans that become insolvent between 2017 and 2026.[17] The only way to make the PBGC solvent (and therefore ensure that pensioners receive their insured benefits and that taxpayers do not have to pick up the tab) is to make the PBGC function like a private insurance company. That is not possible if it has to petition Congress to make a change.

Therefore, Congress should establish a path to divest the PBGC's role to the private sector. After addressing its existing deficits, Congress should end the PBGC. In its place, Congress should establish minimum required insurance that private pensions must purchase, similar to how state governments require certain levels of car insurance. Private insurers would do a better job of appropriately pricing insurance and would incentivize plans to maintain higher funding levels. Moreover, taxpayers would be less likely to have to pick up the tab for underfunded pensions.

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

The SSA should implement a demonstration project to test the viability of providing an optional, private disability insurance component within the current SSDI program. The SSA should use its authority under Section 234 of the Social Security Act[19] to implement a demonstration program that would test the viability—including the budgetary impact for the SSDI system and the economic and physical well-being of potential SSDI beneficiaries—of an optional, private DI component by allowing a limited number of companies and workers to participate in an optional private DI system for their first three years of benefits.[20] If mutually beneficial to the SSDI program's finances and to individuals' well-being, Congress should make private DI an option for all companies and workers.

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

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

Transportation Infrastructure

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

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

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

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

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

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

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

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

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

Federal Property

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

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

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

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

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

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

- The Stewart B. McKinney Homeless Assistance Act of 1987, which requires agencies to offer properties to organizations alleviating homelessness;[37] and

- Budget scoring rules that act as disincentives to agencies to incur short-term expenses to sell or demolish surplus properties, but lead to greater long-term costs of maintaining suboptimal properties.[38]

In order to expedite the process of offloading surplus real property, the Administration should improve data collection and reporting to adequately quantify the nature of the federal government's properties that are vacant or underutilized, as required by the Federal Assets Sale and Transfer Act of 2016.[39] The Administration and Congress should then further expedite or waive the procedural hurdles facing the federal government from offloading the properties to private ownership. Undertaking a BRAC-like process to dispose of a large number of surplus property is another approach.[40] Facilitating easier disposal of federal real properties would shrink the footprint of the federal government, save long-term budget resources, and allow the free market to make better use of underutilized federal properties.

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

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Chapter 10: Deputizing Federal Law Enforcement Personnel Under State Law

Paul J. Larkin, Jr.

The Legislative Response to Unsettling Crimes

The criminal law has always sought to prevent wrongdoing and redress grievances.[1] Both the federal and state governments have that responsibility, with the states doing the lion's share of the work.[2] The reason is that states have a general "police power"—that is, the inherent authority to legislate on any subject to protect the health, safety, and well-being of the public[3] unless the Constitution gives a particular subject matter exclusively to the federal government.[4] This police power enables any state to make it a crime to murder, rape, rob, or swindle anyone within its territory.[5]

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

But no more. It is not uncommon today to see Congress enact a new federal criminal law in response to a surge of media attention to a problem or a noteworthy event. In 1992, the problem was "carjacking," and the event was a carjacking in the Washington, D.C., region of a mother's car with her child still in it. To signal its disapproval, Congress gave us a federal carjacking statute,[9] even though kidnapping and the interstate transportation of a stolen vehicle were already federal offenses[10] and kidnapping and theft were crimes in all 50 states.[11] Ten years later, large-scale corporate fraud prompted Congress to enact the Sarbanes-Oxley Act of 2002,[12] even though there already were dozens of federal fraud statutes on the books[13] and both fraud or larceny have been crimes in one form or another since the common law.[14]

Today, the problem is the rise in assaults against police officers, and the events were the murders of officers in San Antonio, Texas, and Baton Rouge, Louisiana, as well as the ambush murders of several officers in Dallas. Together, those incidents have led some Members of Congress to introduce legislation that would make it a federal crime to kill a state or local police officer if his department receives federal funds,[15] even though every state criminal code already outlaws murder.[16] It would not be unreasonable for anyone to conclude that Congress no longer feels itself bound by the principle that there is a limit as to how far it should extend federal criminal jurisdiction in the service of a healthy system of federalism.

Although the reflexive desire to address the murder of state and local police officers through new federal legislation is misguided, the sentiment behind such legislation can be noble. Police officers are "the foot soldiers of an ordered society,"[17] and there is reason to believe that they have recently been under assault. Preliminary data for 2016 recently published by the Federal Bureau of Investigation (FBI) indicate that 66 police officers were feloniously killed in the line of duty, 17 of them by ambush, for a 61 percent increase over the 41 killed in 2015.[18] Also troubling is the trajectory of those numbers. Over the past decade, the number of officers killed in the line of duty peaked at 72 in 2011 and then declined to 27 in 2013 before the recent uptick beginning in 2014, which saw an increase to 51.[19] We are not in the same position today that we found ourselves in during the 1960s, when the Black Liberation Army targeted members of the New York City Police Department for assassination,[20] but the current trend is one that any responsible party wants to see reversed.

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

that the police have abused their authority in some well-publicized cases[22] (and others unknown), but the Michael Brown incident was not one of them.[23] Moreover, it is in the nature of things that calls by extremists for the on-sight murder of white police officers[24] will have an effect on at least some portion of the target audience.[25] When anything can be said—however incendiary, however inciting, however dangerous—there is a real risk that whatever is said will be done. The result is that to some elected officials, the only effective response is new legislation making the strong statement that "This conduct stops *here and now!*"

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

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

The Ubiquity of Law Enforcement Task Forces

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

Federal and State Collaboration via Task Forces

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

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

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

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

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

Disaster Fraud Task Force. The Disaster Fraud Task Force (DFTF) was created on September 8, 2008, to combat various instances of fraud in relation to Hurricane Katrina and other natural disasters,[38] such as the submission of benefit claims on behalf of people who did not exist.[39] In 2006, the Government Accountability Office "estimated that perhaps as much as 21 percent of the $6.3 billion given directly to victims might have been improperly distributed."[40] By working together with local law enforcement, as well as the Federal Trade Commission and the Securities and Exchange Commission (among others), the DFTF is able to combat a wide array of thefts and frauds from both Katrina and subsequent natural disasters.[41]

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

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

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

ICE: Customs Cross-Designation. The office of Homeland Security Investigations (HSI) under ICE is authorized to "cross-designate other federal, state and local law enforcement officers to investigate and enforce customs laws."[51] Those cross-designated officers[52] can conduct customs searches,

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

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

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

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

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

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

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

The Attorney General, the nation's senior federal law enforcement officer,[61] has the authority under Title 28 of the U.S. Code to manage the conduct of all federal investigations and litigation.[62] The Intergovernmental Personnel Act[63] empowers the Attorney General to assign federal personnel to states or localities "for work that [he or she determines] would be of mutual concern to [both parties]."[64] If so, the Attorney General should be free to enter into an MOU with a senior state official—perhaps the governor or the state attorney general—granting federal investigators and prosecutors the same authority enjoyed by their state counterparts. Where federal and state law enforcement personnel are working on a case or problem of interest to both, cross-designation would be a sensible decision.[65] Federal law expressly allows the Attorney General to appoint state or local prosecutors as Special Assistant U.S. Attorneys (SAUSAs), and those SAUSAs may prosecute cases in federal court.[66] The proposal outlined in this paper is to regularize the same process, just in reverse.

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

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

The Role for Congress

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

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

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

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

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

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

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

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

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

Those conclusions are sensible ones. Congress is limited to the authority granted by the Constitution, and federal law enforcement officers—e.g., federal agents and Justice Department lawyers—are limited to the authority that Congress assigns them.[76] The Constitution does not grant Congress the power to create state law, so federal law enforcement officers cannot claim to possess an inherent federal right to exercise state law enforcement authority. For example, because Congress cannot make simple common-law crimes—such as murder, rape, robbery, and burglary—federal offenses (unless the victims are federal officials or the crime occurs on federal property),[77] it cannot authorize federal agents to investigate such violations of state law.

In a few instances, Congress has authorized the Attorney General to provide federal law enforcement assistance to states or localities. The Emergency Law Enforcement Assistance Act authorizes the Attorney General to use federal law enforcement personnel during a state or local "law enforcement emergency."[78] The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988[79] would empower the President to use federal law enforcement officers to help a state protect the public during a disaster or emergency.[80] The Protection of Children from Sexual Predators Act of 1998[81] authorizes the Attorney General and FBI director, upon request by a senior state or local law enforcement officer, to assist in the investigation of "serial killings."[82]

Those, however, are baby steps. Congress took a giant step toward granting federal agents plenary authority to act under state law in the Anti-Drug Abuse Act of 1988.[83] The act added a new Section 564 to Title 28, which provides that U.S. Marshals and Deputy U.S. Marshals may exercise "the same powers which a sheriff of the State may exercise in executing" state law when a marshal or deputy is engaged "in executing the laws of the United States."[84] That provision does not completely turn federal agents into police officers—a federal agent must be in the process of executing federal law to be deemed a state sheriff—but it does signal that Congress does not object to that proposition in appropriate circumstances.

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

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

Practical Implementation of This Proposal

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

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

Conclusion

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

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

Endnotes

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

22. *See, e.g.*, Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES, Aug. 9, 2007, https://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/comment-page-1/; John Marzulli, *The Abner Louima Case: 10 Years Later*, DAILY NEWS, Aug. 10, 2007, http://www.nydailynews.com/news/crime/abner-louima-case-10-years-article-1.237985; Editorial, *An End to the Louima Case*, N.Y. TIMES, Sept. 24, 2002, http://www.nytimes.com/2002/09/24/opinion/an-end-to-the-louima-case.html?rref=collection%2Ftimestopic%2FLouima%2C%20Abner&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=14&pgtype=collection.

23. *See, e.g.*, DEP'T OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI, POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf; Jack Healy et al., *Ferguson Report Puts "Hands Up" to Reality Test*, N.Y. TIMES, Mar. 5, 2015, https://www.nytimes.com/2015/03/06/us/in-ferguson-both-sides-see-vindication-in-justice-department-reports.html?_r=0; Sari Horwitz, *Justice Department Clears Ferguson Police Officer in Civil Rights Probe*, WASH. POST, Mar. 4, 2015, https://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239_story.html?tid=a_inl&utm_term=.d48facbf699a.

24. *See* John G. Malcolm, Book Review of MACDONALD, WAR ON COPS, 17 FED'T SOC. REV. Issue 3, 68, 68-69 (2016) ("The public should be, but too often is not, horrified by spectacles such as Black Lives Matter (BLM) activists in St. Paul, Minnesota marching in the streets yelling, 'Pigs in a blanket, fry 'em like bacon'; or BLM protestors in New York City chanting, 'What do we want? Dead Cops! When do we want it? Now!'; or a message posted by the African American Defense League urging its followers to 'hold a barbeque' and 'sprinkle Pigs Blood!'; or the Facebook posting by a man in Detroit following the slaying of five Dallas police officers which read, 'All lives can't matter until black lives matter. Kill all white cops.' One would think that, in any civilized society, such sentiments would be universally condemned as barbaric. Instead, such deplorable rhetoric is met with sympathy and tolerance by some on the Left. One can acknowledge, as former Speaker of the House Newt Gingrich did recently, that '[i]f you are a normal white American, the truth is you don't understand being black in America and you instinctively under-estimate the level of discrimination and the level of additional risk.' But one should also acknowledge, as Gingrich did, that, from the perspective of the police, '[e]very time you walk up to a car you could be killed. Every time you go into a building where there's a robbery you can be killed.' The hateful rhetoric quoted above only serves to incite violence, and, to put it mildly, generates more heat than light.") (footnotes omitted).

25. *See* Ingraham, *Fatal Shootings*, *supra* note 18 ("There have been two high-profile instances this year in which multiple police officers were targeted and killed by black male suspects with a history of antipathy toward law enforcement. In Dallas in July, Micah Johnson shot and killed five police officers and wounded nine others, telling authorities he 'wanted to kill white people, especially white officers.' [¶] Later that month in Baton Rouge, Gavin Long killed three police officers and wounded three others after leaving behind a long trail on social media arguing that violence was the solution to the oppression of black Americans.").

26. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 735-37 (2013).

27. The Heritage Foundation has previously urged the federal government to pursue such undertakings. *See* Paul J. Larkin, Jr. & Daniel J. Dew, *Making Crime Fighting a Team Effort: Cross-Designating Federal Law Enforcement Officers as State Officers*, HERITAGE FOUND. LEGAL MEMORANDUM No. 100 (Aug. 14, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm100.pdf.

28. *See* OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS MANUAL, 9-2186, https://www.justice.gov/usam/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures (last visited June 26, 2017).

29. *See* OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS MANUAL, 9-669, https://www.justice.gov/usam/criminal-resource-manual-669-prosecution-military-personnel (last visited June 26, 2017).

30. U.S. DEPARTMENT OF JUSTICE, PRIVACY IMPACT ASSESSMENT FOR THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE FUSION CENTER AND INTERNATIONAL ORGANIZED CRIME INTELLIGENCE AND OPERATIONS CENTER SYSTEM 2 (June 1, 2009), available at http://www.justice.gov/opcl/crime-taskforce.pdf (last visited Mar. 25, 2013).

31. *See* U.S. Department of Justice, Organized Crime Drug Enforcement Task Forces, available at http://www.justice.gov/criminal/taskforces/ocdetf.html (last visited Mar. 25, 2013).

32. *See* U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL INFRASTRUCTURE PROTECTION PLAN: PARTNERING TO ENHANCE PROTECTION AND RESILIENCY (2009), available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (last visited Mar. 22, 2013).

33. *Id.* at iii. DHS has the responsibility to support "the formation and development of regional partnerships, including promoting new partnerships," and to enable "information sharing." *Id.* at 17.

34. *Id.* at 22.

35. *See* Federal Bureau of Investigation, Violent Gang Task Forces, https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces (last visited May 24, 2017).

36. *Id.*

37. Grant D. Ashley, Ass't Director, Criminal Investigative Division, FBI, *Testimony Before the Senate Judiciary Committee*, Federal Bureau of Investigation (Sept. 17, 2003), https://archives.fbi.gov/archives/news/testimony/the-safe-streets-violent-crimes-initiative.

38. *See* U.S. Dep't of Justice, Disaster Fraud Task Force, https://www.justice.gov/criminal-disasters (last visited May 24, 2017).

39. Eric Lipton, *"Breathtaking" Waste and Fraud in Hurricane Aid*, N.Y. TIMES, June 27, 2006, http://www.nytimes.com/2006/06/27/washington/27katrina.html.

40. *Id.*

41. *See* U.S. Dep't of Justice, Disaster Fraud Task Force, https://www.justice.gov/criminal-disasters (last visited May 24, 2017).

42. 108 Pub. L. No. 458, 118 Stat. 3868 (2004).

43. Michael C. Mines, Deputy Ass't Director, Directorate of Intelligence, Federal Bureau of Investigation, *Statement Before the House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment*, Federal Bureau of Investigation (Sept. 27, 2007), https://archives.fbi.gov/archives/news/testimony/the-fbi-and-fusion-centers (last visited June 5, 2017).

44. Mary Beth Sheridan and Spencer S. Hsu, *Localities Operate Intelligence Centers to Pool Terror Data*, WASH. POST, Dec. 31, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html (last visited June 5, 2017).

45. *Id.*

46. Jerry Markon, *11 in San Francisco Charged with Trafficking in Knockoffs Worth Millions*, WASH. POST, Aug. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/03/AR2010080304739.html (last visited June 5, 2017).

47. *Id.*

48. *See* U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, National Explosives Task Force, https://www.atf.gov/explosives/national-explosives-task-force (last visited June 5, 2017).

49. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, HOMELAND SECURITY/LAW ENFORCEMENT: EXPLOSIVES INVESTIGATIONS (Mar. 6, 2013), http://www.gao.gov/duplication/action_tracker/Explosives_Investigations/action1 (last visited June 5, 2017).

50. *Id.*

51. *See* Dep't of Homeland Security, Customs Cross-Designation, http://www.ice.gov/customs-cross-designation (last visited June 5, 2017).

52. *See* 19 U.S.C. § 1401(i) (2012).

53. Customs Cross-Designation, *supra* note 51.

54. *See* Specialized Task Forces, Orange County Sheriff's Department, http://www.ocsd.org/gov/sheriff/divisions/fieldops/investigations/sib/stf/default.asp (last visited May 24, 2017).

55. *See* U.S. Dep't of Justice, U.S. Attorney's Office, Western District of Pennsylvania Task Forces, https://www.justice.gov/usao-wdpa/task-forces#child (last visited May 25, 2017).

56. *See* Internet Crimes Against Children Task Force, https://www.icactaskforce.org/ (last visited June 5, 2017).

57. *Alabama, Georgia Task Forces Honored for Child Porn Investigation*, GADSEN TIMES, May 24, 2017, http://www.gadsdentimes.com/news/20170524/alabama-georgia-task-forces-honored-for-child-porn-investigation (last visited June 5, 2017).

58. *See* Northern Virginia Regional Gang Task Force Resource Website, http://www.preventgangsnova.org/index.html (last visited June 5, 2017).

59. Jerry Markon, *Va. Task Force, Agencies Unite to Take on Gangs*, WASH. POST, June 6, 2004, http://www.washingtonpost.com/wp-dyn/articles/A8540-2004Jun2.html (last visited June 5, 2017).

60. *Id.*

61. The President appoints the Attorney General, U.S. Attorneys, the Director of the FBI, and other senior federal law enforcement officials. Those officials, in turn, appoint subordinate federal officers. *See, e.g.*, 28 U.S.C. §§ 503, 532–533, 541–542 (2006).

62. *See* 28 U.S.C. §§ 503, 506, 509–519 (2006).

63. 5 U.S.C. §§ 3372–73 (2012).

64. *Id.* § 3372(a)(1) (2006); *see also id.* § 3373.

65. The Attorney General has assigned Justice Department lawyers to act as local prosecutors. *See* PETER F. NERONHA, UNITED STATES ATTORNEY, U.S. DEP'T OF JUSTICE, *State, Federal Prosecutors Cross-Designated to Prosecute Drugs, Firearms and Neighborhood Crimes*, NEWS RELEASE (Mar. 9, 2010) ("U.S. Attorney Peter F. Neronha and R.I. Attorney General Patrick C. Lynch today jointly announced the cross-designation of several senior prosecutors to bolster the prosecution of neighborhood crimes, particularly crimes involving drugs and firearms. * * * Cross-designation permits prosecutors to cross-over and prosecute cases in either a state or federal court. Targeted cases are jointly reviewed to determine appropriate charges, appropriate jurisdiction and in which court appropriate penalties are likely to be realized. Senior prosecutors experienced in firearms, drugs, organized crime and neighborhood prosecution have been cross-designated.").

66. *See* 28 U.S.C. § 543 (2012); Victoria L. Killion, Comment, *No Points for the Assist: A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789 (2009).

67. *See, e.g.*, Jones v. United States, 529 U.S. 848 (2000) (the arson of an owner-occupied dwelling not used for commercial purposes does not involve property used in interstate commerce or in an activity affecting interstate commerce and therefore cannot be prosecuted under 18 U.S.C. § 844(i) (2006)).

68. *See, e.g.*, Morrison v. United States, 529 U.S. 598 (2000) (holding unconstitutional, as beyond Congress's Commerce Clause power, a statute making rape a federal offense); United States v. Lopez, 514 U.S. 549 (1995) (same, a federal statute making it a crime to possess a firearm in the vicinity of a school).

69. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (ruling that under its Article I Spending Clause power, Congress can condition the receipt of a portion of federal highway funds on the adoption of a speed limit identified by federal law).

70. U.S. CONST. art. I, § 6, cl. 2.

71. Of course, a person could resign from Congress or the Executive branch to accept or stand for election to a position in the other branch, as members of both parties have done.

72. In the 19th century, the Supreme Court noted that problem in the context of the opposite problem—namely, the federal government's attempt to impose a burden on state officers. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 674–78 (1978) (discussing 19th century cases). The problem is the same here, just in the opposite direction.

73. *See* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments* 4–5 (Mar. 5, 2012) (concluding that federal law enforcement officers have only the arrest power granted them by federal law; also citing earlier OLC opinions to that effect) (hereafter OLC STAFFORD ACT MEMO).

74. *See* U.S. CONST. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); 31 U.S.C. § 1301(a) (2012) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

75. OLC STAFFORD ACT MEMO 8 (internal quotations omitted).

76. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act...unless and until Congress confers power upon it").

77. *See supra* notes 6–7.

78. 42 U.S.C. § 10501 (2012) provides as follows: "(a) State as applicant ¶ In the event that a law enforcement emergency exists throughout a State or a part of a State, a State (on behalf of itself or another appropriate unit of government) may submit an application under this section for Federal law enforcement assistance. ¶ (b) Execution of application; period for action of Attorney General on application ¶ An application for assistance under this section shall be submitted in writing by the chief executive officer of a State to the Attorney General, in a form prescribed by rules issued by the Attorney General. The Attorney General shall, after consultation with the Assistant Attorney General for the Office of Justice Programs and appropriate members of the Federal law enforcement community, approve or disapprove such application not later than 10 days after receiving such application. ¶ (c) Criteria ¶ Federal law enforcement assistance may be provided if such assistance is necessary to provide an adequate response to a law enforcement emergency. In determining whether to approve or disapprove an application for assistance under this section, the Attorney General shall consider—(1) the nature and extent of such emergency throughout a State or in any part of a State, (2) the situation or extraordinary circumstances which produced such emergency, (3) the availability of State and local criminal justice resources to resolve the problem, (4) the cost associated with the increased Federal presence, (5) the need to avoid unnecessary Federal involvement and intervention in matters primarily of State and local concern, and (6) any assistance which the State or other appropriate unit of government has received, or could receive, under any provision of title I of the Omnibus Crime Control and Safe Streets Act of 1968 [42 U.S.C. § 3701 et seq.].

79. Pub. L. No. 100-707, 102 Stat. 4689 (1988).

80. *See* 42 U.S.C. § 5192(a) (2012) ("In any emergency, the President may—(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations[.]"); *id.* § 5201 ("The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency or agencies as he may designate."); *id.* at § 5195 ("The purpose of this subchapter is to provide a system of emergency preparedness for the protection of life and property in the United States from hazards and to vest responsibility for emergency preparedness jointly in the Federal Government and the States and their political subdivisions. The Congress recognizes that the organizational structure established jointly by the Federal Government and the States and their political subdivisions for emergency preparedness purposes can be effectively utilized to provide relief and assistance to people in areas of the United States struck by a hazard. The Federal Government shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance, as authorized in this subchapter so that a comprehensive emergency preparedness system exists for all hazards.").

81. Pub. L. No. 105-314, 111 Stat. 1294 (1998) (codified at 28 U.S.C. § 540B (2012)).

82. See 28 U.S.C. 540B (2012) ("(a) In general.—The Attorney General and the Director of the Federal Bureau of Investigation may investigate serial killings in violation of the laws of a State or political subdivision, if such investigation is requested by the head of a law enforcement agency with investigative or prosecutorial jurisdiction over the offense. ¶ (b) Definitions.—In this section: ¶ (1) Killing.—The term 'killing' means conduct that would constitute an offense under section 1111 of Title 18, if Federal jurisdiction existed. ¶ (2) Serial killings.—The term 'serial killings' means a series of three or more killings, not less than one of which was committed within the United States, having common characteristics such as to suggest the reasonable possibility that the crimes were committed by the same actor or actors. ¶ (3) State.—The term 'State' means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.").

83. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at various sections of 42 U.S.C. (2012)).

84. *See* 28 U.S.C. § 564 (2012) ("United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.").

85. 274 U.S. 501 (1927).

86. *Id.* at 744 n.32 ("The power of the ordinary peace officers to arrest and to seize does not seem to have been conferred originally by statute. As to the sheriff, statutes dealt with the method of appointment, tenure of office, and qualifications, but not with the extent of his powers.... Similarly as to constables and watchmen.... These powers, including of course the power to arrest, are in this country thought to inhere in these offices, except in so far as they may be limited by statute.") (Brandeis & Holmes, JJ., concurring) (citations omitted).

87. 1 WILLIAM BLACKSTONE, COMMENTARIES *328, 332; McMillian v. Monroe County, 520 U.S. 781, 793 (1997).

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Chapter 11: Reorganizing the Federal Clemency Process

Paul J. Larkin, Jr.

Western civilization has always encouraged anyone in a position of authority to "temper... Justice with Mercie."[1] "The extraordinary power to grant clemency," which is an integral part of this tradition, "allows a chief executive to play God on this side of the River Styx by forgiving an offender's sins or remitting his punishment."[2] Clemency was a settled feature of English common law[3] and a feature of criminal justice during the early days of our nation.[4] The Framers saw a host of benefits in being able to extend offenders "forgiveness, release, [and] remission"[5] from a conviction or punishment,[6] and they vested that prerogative in the President by Article II of the Constitution.[7]

Criticisms of the Federal Clemency Process

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

The second fault is that Presidents have used their clemency power in dishonorable ways, such as repaying old political debts or making new political allies.[11] Bill Clinton is Exhibit A (and B). He offered conditional commutations to the members of a Puerto Rican terrorist group, very possibly to enlist the support of the Puerto Rican community for Hillary Clinton's New York Senate race and Vice President Al Gore's presidential campaign. He also granted pardons and commutations during his last 24 hours in office to cronies, people with White House connections, or individuals who had contributed to his party or presidential library.[12] Such a tawdry practice dishonors a noble, revered criminal justice instrument.

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

The President relies on the Justice Department to filter out ineligible applicants[15] and to recommend from the remainder which ones should receive clemency in some form or other, whether a pardon, commutation of sentence, rescission of a fine or forfeiture, general amnesty, or merely a stay in the execution of sentence.[16] The problem with that arrangement, however, is that the Justice Department suffers from an actual or apparent conflict of interest.

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

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

Potential Remedies

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

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

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

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

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

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

Conclusion

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

Endnotes

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

14. See, e.g., Alschuler, *supra* note 11, at 1164; Barkow & Osler, *supra* note 8, at 13-15, 18-19; Larkin, *Revitalizing Clemency*, *supra* note 4, at 903-06; Kobil, *supra* note 8, at 622; Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89 (2015); Rosenzweig, *supra* note 8, at 609-10; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 446-47 (2016); Editorial, *It's Time to Overhaul Clemency*, N.Y. TIMES (Aug. 18, 2014) ("Even if the [Obama Clemency Project 2014] succeeds, it is a one-time fix that fails to address the core reasons behind the decades-long abandonment of the presidential power of mercy. A better solution would be a complete overhaul of the clemency process. First and foremost, this means taking it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications. Instead, give it to an independent commission that makes informed recommendations directly to the president."), http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0 [https://perma.cc/7ZTM-A7NW].

15. For example, the President can grant clemency only to parties who have been convicted of "Offences against the United States," U.S. CONST. art. II, § 2, cl. 1, so offenders convicted of state-law crimes are ineligible for federal relief.

16. See, e.g., Larkin, *Revitalizing Clemency*, *supra* note 4, at 846-47 (discussing the different forms of federal clemency). Clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. See 28 C.F.R. §§ 0.35, 1.1 to 1.11 (2011); *Office of the Pardon Attorney*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/pardon/. For an excellent historical discussion of how the federal clemency process has worked, see Love, *supra* note 8, at 1175-1204.

17. Clemency petitions were initially considered by the Department of State, but the responsibility was transferred to the Justice Department after it was created in the 19th century. The Office of the Pardon Attorney came into being to assist the Attorney General in managing the clemency process for the President. That process worked well until Attorney General Griffin Bell transferred management to the Deputy Attorney General, who is responsible for overseeing all criminal prosecutions brought by the department and the U.S. Attorney's Offices. Combining the two responsibilities in one department official creates an actual or apparent conflict of interest, since few officials in that position, critics argue, would be willing to recommend that the President exonerate or grant leniency to someone whom a colleague has sent to prison. Concern with this conflict of interest has existed for some time. See William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 549, 557 (1911) (criticizing the notion that "it is frequently considered advisable to consult the prosecuting attorney" due to the "common belief" that he is "disinterested"; "this is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion [on clemency] should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility.").

18. See, e.g., Rosenzweig, *supra* note 8, at 609-10 ("[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.").

19. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 290 (2013) ("Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House.") (footnote omitted).

20. See, e.g., Barkow & Osler, *supra* note 8, at 1.

21. See Larkin, *The Vice President and Clemency*, *supra* note 2, at 249-53.

22. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (the President can appoint "Officers" of the United States "by and with the Advice and Consent of the Senate"); 47 U.S.C. § 154(b)(5) (2012) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."); 52 U.S.C. § 30106(a)(1) (2012) ("There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party."); Buckley v. Valeo, 424 U.S. 1, 113 (1976) (noting that, under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (held unconstitutional in part by *Buckley*), the President pro tempore of the Senate appointed two members of the Federal Election Commission "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate."). In that regard, if a clemency commission did not exercise governmental power, the Appointments Clause might not legally bar the Senate and House of Representatives from demanding authority to appoint some of its members. Nothing, however, prevents Congress from making such a demand as a matter of politics.

23. The U.S. Sentencing Commission occupies a different position. It is a collegial body, but its sentencing guidelines must comply with the punishments defined by the federal criminal code. Larkin, *Revitalizing Clemency*, *supra* note 4, at 252. A clemency commission would not have to operate within those guardrails because there are and can be no statutory restrictions on who may receive clemency. See *supra* note 7.

24. See Larkin, *The Vice President and Clemency*, *supra* note 2, at 241-48; Larkin, *Revitalizing Clemency*, *supra* note 4, at 900-03.

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

Paul J. Larkin, Jr.

Introduction

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

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

Use of the Criminal Law as a Regulatory Tool

Beginning in the mid-19th century, legislatures concluded that industrialization and urbanization had generated widespread harms that no tort system could adequately recompense. That belief led legislators to use the criminal law to enforce regulatory programs by creating what came to be known as "regulatory offenses" or "public welfare offenses." Initially, the category of those crimes was small, limited to building code offenses, traffic violations, and sundry other comparable low-level infractions.[7] But the list of strict liability offenses grew over time. Today, the corpus of regulatory offenses is considerably larger than anyone initially envisioned.[8]

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

Early in the 20th century, the question arose whether only Congress has the authority to define the elements of a federal offense. The Supreme Court of the United 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 offenses. Here, too, the relevant offenses may use abstruse concepts that an attorney can learn only with the specialized training and experience that comes with practicing law in a specific regulatory field. Only the general counsel's office at a particular agency may have attorneys who are sufficiently versed in the relevant statutes and regulations to be able to help federal investigators identify what must be proved to establish an offense. For that reason, too, it therefore makes sense to combine investigators with the lawyers who will advise them about the laws' meaning.

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

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

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

The Minuses of Establishing Criminal Investigative Programs at Federal Regulatory Agencies

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

First, the public likely believes that crimes of violence (e.g., robbery) or deceit (e.g., fraud) are more serious and should be given greater attention than regulatory offenses. Members of Congress may agree with that attitude but nonetheless create regulatory crimes for other reasons. For example, adding criminal statutes to an otherwise civil regulatory scheme allows Congress to cash in on the leverage that a criminal investigation enjoys with the public and the media.[19] Federal agents (think Jack Taggart in *Fire Down Below*[20]) will receive considerable respect from the public and the press; civil inspectors (think Walter Peck in *Ghostbusters*[21]) won't. That is particularly true when agents wear "raid jackets" emblazoned with the agency logo and the word "POLICE." To take advantage of the nimbus that law enforcement officers radiate, Congress may create a misdemeanor or minor 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 a long distance from the site of the crime. Travelling back and forth not only takes a considerable period of time, but also eats up a sizeable portion of a field office's budget. Crimes can go uninvestigated simply because of the difficult logistics involved. That does not benefit either the public or the EPA agents.

Of course, the statutory designation of 200 agents does not take into account several factors. It does not account for the need to have some agents work in management capacities, both in the field offices and in Washington, D.C. It does not account for the need to have some agents work in an internal affairs or professional responsibility office. It does not consider the need for some agents to be assigned to the Federal Law Enforcement Training Center (FLETC) in 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—less than four per state.

But there is more.

Federal law enforcement agencies also have a considerable number of nonagent employees working in a variety of investigation-related activities, such as scientists, technicians, and office support personnel. The Pollution Prosecution Act of 1990 did not authorize the EPA to hire personnel to fill those slots. To some extent, EPA special agents can draw on evidence-collection and analytical experts at one of the agency's regional laboratories or elsewhere within the EPA.[47] Unlike the forensic service components of the 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 alkalinic. The working conditions are ones in which you will need to get your hands dirty but also will need to be particularly careful how and with what. In addition, employees working in those businesses make less than hedge fund managers earn. Now ask yourself two questions:

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

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

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

Regulatory agencies, by contrast, do not have the same law enforcement culture or mission, let alone the corresponding esprit de corps, that is embedded in the DNA of traditional law enforcement agencies like the FBI and Marshals Service. Most agency personnel work in offices. Their principal interactions are with colleagues, members of industry and their lawyers, Members of Congress and their staffs, political superiors within the agency, and officials at OMB or the White House Office of Information and Regulatory Affairs. They are accustomed to seeing outsiders respect their authority, even when the outsiders disagree with them. They are strangers to being placed in situations in which words or numbers will not suffice to deal with a problem or in which outsiders refuse to defer to their position. Their culture—whether environmental, regulatory, scientific, or social worker—does not include people who place their hands on others. In fact, it would be seen as a sign of intellectual weakness and professional failure.

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

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

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

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

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

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

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

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

While transferring such duties to the FBI is certainly a viable option, an alternative that may make more sense is to transfer those agents to the U.S. Marshals Service. With an organizational bloodline that begins with the Judiciary Act of 1789,[64] U.S. marshals and their deputies have exceptionally broad law enforcement authority—the same authority as FBI 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.

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 Enforeement

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're 50 percent red.
- Labeling noodle soup as "chicken noodle soup" if it has less than 2 percent chicken.
- Riding your bicycle in a national park while holding a glass of wine.
- Failing, if a winemaker, to report any "extraordinary or unusual loss" of wine.

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

31. *See* THE HERITAGE FOUND., USA vs. YOU 4 (2013); Joe Luppino-Esposito & Raija Churchill, *Overcriminalization Victimizes Animal-Loving 11-Year-Old and Her Mother*, THE HERITAGE FOUND., THE DAILY SIGNAL (Aug. 05, 2011), http://dailysignal.com/2011/08/05/overcriminalization-victimizes-animal-loving-11-year-old-and-her-mother.

32. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *as amended on denial of rehearing*, 2003 WL 21233539 (May 29, 2003); ONE NATION UNDER ARREST 3-11 (2d ed. Paul Rosenzweig ed., 2013); USA vs. YOU, *supra* note 31, at 20; Meese & Larkin, *supra* note 30, at 777-82.

33. *See* Joe Luppino-Esposito, *A Bird-Brained Use of the Migratory Bird Treaty Act*, THE HERITAGE FOUND., THE DAILY SIGNAL (Feb. 6, 2012), http://dailysignal.com/2012/02/06/a-bird-brained-use-of-the-migratory-bird-treaty-act/.

34. USA vs. YOU, *supra* note 31, at 15.

35. 16 U.S.C. § 470aa-470mm (2012).

36. 16 U.S.C. § 470ee(a).

37. *See* USA vs. YOU, *supra* note 31, at 11.

38. *See* Paul J. Larkin, Jr. et al., *Time to Prune the Tree, Part 3: The Need to Reassess the Federal False Statements Laws*, HERITAGE FOUNDATION LEGAL

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

39. *Id.* There is an additional point worth noting: It might often be the case that regulatory infractions should be subject only to administrative or civil sanctions, not penal ones. That is true for several reasons. *First*, the criminal law should reflect the moral code that everyone knows by heart. Turning regulatory infractions into strict liability crimes because criminal enforcement is more efficient than civil enforcement may be fiscally responsible, but it does not reflect society's serious, sober, and moral decision that incarceration is an appropriate sanction. If the latter is what we are concerned with, then the ubiquitous presence of strict liability crimes authorizing incarceration does not represent that type of judgment by a mature society, a judgment that finds regulatory infractions to be as serious as traditional blue- or white-collar crimes. *Second*, regulatory crimes can spur companies to seek their own industry-specific law for anticompetitive purposes, to garner economic rents—supernormal profits obtained because of government regulation. For example, a business threatened by a particular imported commodity may persuade the government to impose strict regulations on importing that item, backed with criminal sanctions, to restrict competition. Antitrust experts have long believed that businesses will use the regulatory process as a form of economic predation, especially if a company can persuade the government to bear the investigative and prosecutive costs by bringing a criminal prosecution against a rival. *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 375, 381–92 (4th ed. 2005) (collecting authorities); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); *see generally* Larkin, *Overcriminalization*, *supra* note 14, at 744–45. The point is not that there is something illegitimate about using law enforcement officers to enforce civil laws. The federal, state, and local governments may empower their officers to enforce the full range of provisions in the criminal and civil codes for whatever reasons those governments see fit. Whether the police can *arrest* someone for a purely civil infraction raises a different question. *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that the Fourth Amendment does not forbid the warrantless arrest of a person suspected of committing a crime for which incarceration is not an authorized penalty). The point is that calling a civil or administrative infraction a crime should make us wary of what elected officials are doing. Tacking a term of confinement onto an administrative misstep or breach of contract is not a response signifying the same type of moral disapproval that people naturally feel at the sight of dangerous, harmful, or repulsive conduct. There should be more than the desire merely to enhance the U.S. Treasury as the justification for exposing people to criminal liability. Authorizing and imposing incarceration on a particular individual is a moral judgment about his actions and character. Imprisonment represents an extreme form of societal condemnation, one that should be seen as necessary only when an offender is deemed not fit to live free for a certain period. No court or legislature should make that judgment just to save or make a few bucks here and there.

40. For a discussion of the development of federal environmental criminal law, see, *e.g.*, Richard J. Lazarus, *supra* note 19; Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867 (1994). The author of this Legal Memorandum was a Special Agent in the EPA criminal investigation program from 1998 to 2004 and draws on his experiences there as a basis for the recommendations contained herein.

41. For a discussion of the development of federal environmental regulation, see, *e.g.*, RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).

42. There has been no shortage of criticisms of strict liability offenses. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968) ("Strict liability is odious[.]"); *see generally* Larkin, *Strict Liability*, *supra* note 7, at 1079 n.46 (2014) (collecting authorities). Common-law courts and scholars since William Blackstone have consistently and stridently disparaged liability without culpability, by which they have meant without proof of a wicked state of mind. At one time, even the Supreme Court wrote that it would shock a universal "sense of justice" for a court to impose criminal punishment without proof of a wicked intent. *See* Felton v. United States, 96 U.S. 699, 703 (1877) ("But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."). As argued elsewhere: "Critics maintain that holding someone liable who did not flout the law cannot be justified on retributive, deterrent, incapacitative, or rehabilitative grounds. By dispensing with any proof that someone acted with an 'evil' intent, strict liability ensnares otherwise law-abiding, morally blameless parties and subjects them to conviction, public obloquy, and punishment—that is, it brands as a 'criminal' someone whom the community would not label as blameworthy. By imposing liability for conduct that no reasonable person would have thought to be a crime, strict liability also denies an average person notice of what the law requires. The result is to violate a principal universally thought to be a necessary predicate before someone can be convicted of a crime and to rob people of the belief, necessary for the law to earn respect, that they can avoid criminal punishment if they choose to comply with the law. By making into criminals people who had no knowledge that their conduct was unlawful, strict liability violates the utilitarian justification for punishment, since a person who does not know that he is committing a crime will not change his behavior. Lastly, strict criminal liability flips on its head the criminal law tenet that '[i]t is better that ten guilty persons escape than that one innocent suffer.' Strict liability accomplishes that result because it sacrifices a morally blameless party for the sake of protecting society. In sum, by punishing someone for unwittingly breaking the law, strict criminal liability statutes mistakenly use a legal doctrine fit only for the civil tort purpose of providing compensation as a mechanism for imposing criminal punishment. By so doing, they unjustifiably impose an unnecessary evil. Strict liability for a criminal offense is, in a phrase, fundamentally unjust." Larkin, *Strict Liability*, *supra* note 7, at 1079–81 (footnotes omitted).

43. *See, e.g.*, Meese & Larkin, *supra* note 30, at 734–36, 744–46. The concern with strict liability exists not only when a criminal statute dispenses altogether with proof of any mental element, but also when a statute does not require proof of mens rea in connection with a fact relevant to a defendant's culpability. Mistakenly taking someone else's umbrella does not constitute theft. *See, e.g.*, HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 122 (1968). Eliminating proof of that fact abandons the precept that the criminal law should punish only culpable behavior.

44. That prospect is terrifying enough for people who believe that the criminal law must give the average person adequate notice of what is and is not a crime without the need to resort to legal advice to stay out of jail, but there is more. Regulations do not exhaust the number and type of administrative dictates that can define criminal liability. Agencies often construe their regulations in the course of applying them, and the interpretations that agencies give to their own rules receive a great degree of deference from the courts. The Supreme Court has explained that an agency's reading of its own regulations should be deemed "controlling" on the courts unless that interpretation is unconstitutional or irreconcilable with the text of the regulation. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 457 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417–18 (1945). If an agency's interpretations of its regulations were to be applied in a criminal prosecution, the result would be the development of a body of private agency "case law" that a person must know to be aware of the full extent of his potential criminal liability. In an opinion accompanying the denial of certiorari, Justices Antonin Scalia and Clarence Thomas wrote that the courts should never give deference to the government's interpretation of an ambiguous criminal law because the "rule of lenity" demands the exact opposite result. *See, e.g.*, Whitman v. United States, 135 S. Ct. 352, 353 (2014) (statement by Scalia & Thomas, JJ., respecting the denial of certiorari; concluding that courts should never give deference to the government's interpretation of an ambiguous criminal law because the "rule of lenity" demands the exact opposite result).

45. The Pollution Prosecution Act of 1990, Tit. II of the Act of Nov. 16, 1990, §§ 201–05, 101 Pub. L. No. 593, 104 Stat. 2954 (1990).

46. *Id.* § 202(a)(5).

47. U.S. Environmental Protection Agency, "Environmental Management Systems at Regional Laboratories," https://www.epa.gov/ems/environmental-management-systems-regional-laboratories (last accessed June 28, 2017).

48. *See* FBI, LABORATORY SERVICES, https://www.fbi.gov/services/laboratory (last accessed May 1, 2017).

49. *See* U.S. SECRET SERVICE, THE INVESTIGATIVE MISSION, FORENSIC SERVICES, https://www.secretservice.gov/investigation/ (last accessed May 1, 2017).

50. "Every organization has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all." JAMES Q. WILSON, BUREAUCRACY 91 (1989).

51. I use the term "social worker" not to malign EPA employees with that mindset, but to describe a culture that, in the vernacular, might be referred to as a "do-gooder" enterprise. In my experience, EPA personnel see the agency's mission as protecting the environmental integrity of the nation and planet, goals that should be pursued above all others that the agency has been tasked with achieving and that are more important than most of the nation's other goals.

52. WILSON, *supra* note 50, at 99; *see also id.* at 95 ("When an organization has a culture that is widely shared and warmly endorsed by operators and managers alike, we say that the agency has a sense of *mission*. A sense of mission confers a feeling or special worth on the members, provides a basis for recruiting and socializing new members, and enables the administration to economize on the use of other incentives.") (emphasis in original; footnote omitted).

53. Also keep in mind that the special agents at the EPA criminal division have the authority to initiate criminal investigations of EPA employees who violate the environmental laws. So far, they have not done so. *See* Paul J. Larkin, Jr., & John-Michael Seibler, *Agencies Not Coming Clean About the EPA's Responsibility for Poisoning the Animas River*, HERITAGE FOUND. LEGAL MEMORANDUM No. 170 (Dec. 8, 2015), file:///C:/Users/Larkinp/AppData/Local/Temp/LM-170.pdf; Paul J. Larkin, Jr. & John-Michael Seibler, *"Sauce for the Goose Should Be Souce 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 Focing 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).

PARTNERSHIP FOR PUBLIC SERVICE

Statement of Max Stier
President and CEO
Partnership for Public Service

Written statement prepared for

The Senate Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

Hearing entitled,

"Examining OMB's Memorandum on the Federal Workforce, Part II: Expert Views on OMB's Ongoing Government-wide Reorganization"

September 13, 2017

Chairman Lankford, Ranking Member Heitkamp, members of the Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, thank you for the opportunity to submit a written statement for the record to inform the Subcommittee's oversight of ongoing government-wide reorganization efforts and the role of the Office of Management and Budget (OMB). Your interest in how government is resourced, shaped and organized contributes to better oversight and a deeper understanding of the opportunities and challenges associated with the executive branch's ongoing government-wide reform efforts.

If government doesn't work, it has real consequences. As noted in the Partnership's 2017 report with Booz Allen Hamilton, *Mission Possible: How Chief Operating Officers Can Make Government More Effective*, "significant changes are needed in the management and operation of the federal government for it to become the best version of itself and serve the needs of the American people more effectively."[1]

The current administration has made a positive start. It launched an early and ambitious reform agenda to reorganize departments and agencies, demonstrating its commitment to address deep and longstanding challenges that impact government's ability to serve its citizens efficiently and effectively.[2] It laid out a management framework in its first 100 days, committing to work with congressional committees that have jurisdiction over government organization "to ensure the needed reforms actually happen."[3] It worked with Congress to introduce legislation designed to modernize federal IT infrastructure and help agencies fulfill mission-critical priorities. It established the White House Office of American Innovation to bring new ideas from the private sector to bear, solving intractable government problems, and convened the American Technology Council to discuss IT modernization and identify cross-sector solutions to government technology challenges.

The successful implementation of this or any reform agenda, however, will require sustained leadership and commitment of the executive and legislative branches of government over the long term. Reorganizing and reforming the federal enterprise will require good information to drive decisions, creative thinkers who emphasize results, a regular flow of information between the executive and legislative branches, and sustained attention for years, not months, to get it right. This Subcommittee should continue to monitor the development and implementation of agency reorganization plans and hold agency leaders accountable for making good decisions that will improve transparency and services to the American people.

For OMB, a successful government reform plan starts at home

The Partnership's 2016 report *From Decisions to Results: Building a More Effective Government through a Transformed Office of Management and Budget*[4] (OMB Report), acknowledged that OMB is central to the effective functioning of government. OMB is a small agency with fewer than 500 employees and a budget of less than $100 million, but its responsibilities are massive.[5] Despite its modest size, OMB is the one executive branch agency with an enterprise-wide perspective, overall responsibility for the federal budget, convening power, policy and management levers, institutional expertise on how government works and knowledge about where talent lies. As it stands today, OMB is operating with fewer resources in both absolute and relative terms than it has had historically and is often assigned new responsibilities without increases in staff or funding, stretching its capacity to deliver.[6] When OMB succeeds, that success often ripples across the entire government. When it struggles, the negative consequences can be significant.

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[1] Partnership for Public Service and Booz Allen Hamilton, *Mission Possible: How Chief Operating Officers Can Make Government More Effective*, June, 2017. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1875

[2] Office of Management and Budget, *Memorandum for Heads of Executive Departments and Agencies: Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce (Memorandum 17-22)*, April 12, 2017. Washington, D.C.

[3] Office of Management and Budget, *America First: A Budget Blueprint to Make America Great Again*, March 16, 2017. Washington, D.C.

[4] Partnership for Public Service and Laura and John Arnold Foundation, *From Decisions to Results: Building a More Effective Government through a Transformed Office of Management and Budget*, September, 2016. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1349

[5] Ibid., 3

[6] Ibid.

OMB's success in coordinating and driving government reform may be inhibited by its own organizational structure and processes. Fragmentation among its components—especially budget, management, regulation, information, procurement and technology—limits its ability to coordinate government-wide activities. In its 2017 report, *The Promise of Evidence-Based Policy Making,*[7] the Commission for Evidence Based Policy (CEP) acknowledged that OMB has a central and critical coordinating role for enterprise-wide processes, yet its current structure does not put it in a strong position to coordinate the federal government's evidence-building capacity: "As the demand for evidence to support the policymaking process continues to grow, the operational silos within OMB will likely only become more constraining for the timely production of evidence across government."[8]

Historically, OMB's mission has been to make sure agencies' agendas and the annual budget request to Congress promote the president's priorities. It scrutinizes agency proposals and operations and challenges those that do not fit with the administration's priorities or budget realities. However, that too often has made OMB into what some perceive as a hurdle instead of an arm of the White House that drives the government toward success. In a December 2016 interview published in Politico, the outgoing U.S. Secretary of Agriculture was quoted as saying, "Early in the administration I would get quite a rise out of people when I would say to them, 'I never thought I would meet God on Earth, but OMB is about as close to that as possible.' I never realized there was a department that had that much clout with not much statutory authority, and very few people. But they do."[9] Incoming political appointees need to understand the role of OMB, and how to work with OMB collaboratively to deliver on mission priorities and improve agency performance and efficiency.

OMB can strengthen its ability to lead reorganization and reform efforts across government

The Partnership's 2016 report *From Decisions to Results: Building a More Effective Government through a Transformed Office of Management and Budget*[10] highlighted several opportunities to maximize OMB's impact. We encourage the Subcommittee to focus on these areas of OMB as you continue to oversee progress on executive branch reorganization efforts and OMB's leadership role.

OMB must drive implementation. As the primary force for ensuring that federal agencies effectively implement the administration's priorities, OMB must hold agencies accountable for effective policy and program implementation, including the proposals contained in agency reform plans. OMB should build on its efforts to use performance metrics to demonstrate whether results have been achieved and goals are being met. OMB is often at its most effective when it uses its expertise and its role at the center of government to convene stakeholders, ensure political leaders and the career staff are working together,[11] learn from their operating experience, devise new problem-solving strategies and build cross-agency collaborations to carry them out. The president's recent nomination of OMB's deputy director for management will strengthen OMB's leadership capacity to do these things.

OMB must lead collaboration across agencies. The most complex challenges facing our country span across the government enterprise and require effective coordination across federal agencies. OMB is uniquely placed to drive cross-agency collaboration on government reform and reorganization efforts through forums such as the President's Management Council (PMC) and cross-functional "CXO" councils. The PMC is valued for providing departments' chief operating officers with the opportunity to connect with each other on

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[7] The Commission for Evidence Based Policy, *The Promise of Evidence-Based Policy Making*, September 8, 2017. Retrieved from https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf

[8] Ibid., 96

[9] Ian Kullgren, "Vilsack discusses 'God on Earth'," *Politico,* December 8, 2016. Retrieved from http://www.politico.com/tipsheets/morning-agriculture/2016/12/vilsack-discusses-god-on-earth-217775

[10] Partnership for Public Service and Laura and John Arnold Foundation, *From Decisions to Results: Building a More Effective Government through a Transformed Office of Management and Budget*, September, 2016. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1349

[11] Partnership for Public Service and Deloitte, *Moving the Needle on Employee Engagement during Presidential Transitions*, August, 2017. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1221

items of strategic importance.[12] Having members from OMB's senior leadership team and the White House involved and invested in PMC's success would further increase its effectiveness. Led by OMB, these central forums will continue to be important for cross-agency collaboration and coordination of government reorganization efforts.

OMB must promote innovation. Making government work better requires innovative approaches, yet OMB has been viewed in the past by many federal leaders as an impediment rather than a champion for innovation. In considering ideas submitted by agencies and the general public on how to reorganize the federal government, OMB should focus on how it can improve the climate for sensible risk-taking, incubate innovation and bring in new talent and innovative thinking from outside of government to implement the administration's reform agenda.

OMB must bring better information to government. Government needs reliable information to make well-informed decisions, yet many decisions are not based on strong data or evidence. In his FY 2019 budget guidance to heads of departments and agencies, OMB director Mick Mulvaney reinforced the administration's commitment to "building evidence and better integrating evidence into policy, planning, budget, operational, and management decision-making."[13] In the CEP's 2017 report, the Commission recommended that Congress and the president direct OMB to "coordinate the federal government's evidence-building activities across departments, including through any reorganization or consolidation within OMB that may be necessary and by bolstering the visibility and role of interagency councils."[14] OMB should continue to lead efforts to use and produce better evidence across government and help agencies build their capacity to inform decisions about what works and what doesn't.

OMB must strengthen and better coordinate internally. OMB's own staffing patterns and organizational structure, like the disproportionate emphasis on the "budget side" over the "management side," can contribute to fragmentation across government more generally. As the reorganization efforts are being led from the management side, it is critical that OMB as a whole organization is able to coordinate its efforts. OMB should be responding to its own guidance and finalizing its reform proposal, including plans to reduce duplication, increase efficiency and maximize employee performance at OMB.

Congress must also play its part to implement reform

Oversight of the executive branch is a primary duty of Congress – inquiring into how policy is implemented, how programs are administered, how agencies are managed and how money is spent. Congress can play a critical role in overseeing progress and asking the tough questions to understand how the federal government can be more effective, efficient and accountable. The scope of the reorganization plans reportedly under consideration by the administration will demand strong congressional oversight.

Efforts to make government more efficient, effective and accountable are not new. Both the legislative and executive branches have initiated improvements in financial management, human capital, acquisition, information technology, data, performance improvement, cost savings, customer service and government-wide approaches to solving problems - factors that are critical to a well-functioning government.[15] And we know that reform is most successful when the legislative and executive branches work together. In March 2012, the Senate Homeland Security and Governmental Affairs Committee hearing on the previous administration's plans to reorganize government and reduce duplication acknowledged that solving the challenges facing government would require concerted action by Congress working with the executive

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[12] Partnership for Public Service and Laura and John Arnold Foundation, *From Decisions to Results: Building a More Effective Government through a Transformed Office of Management and Budget*, September, 2016, 11. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1349

[13] Office of Management and Budget, *Memorandum for the Heads of Departments and Agencies: Fiscal Year (FY) 2019 Budget Guidance (Memorandum 17-28)*, July 7, 2017. Washington, D.C.

[14] The Commission for Evidence Based Policy, *The Promise of Evidence-Based Policy Making*, September 8, 2017, 96. Retrieved from https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf.

[15] Partnership for Public Service and IBM Center for the Business of Government, *Making Government Work for the American People: A Management Roadmap for the New Administration*, September, 2016. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1291

branch.[16] That need for cooperation is still true today, and we applaud the Subcommittee for its ongoing interest in government reorganization and reform.

We also note that successfully reforming government requires capable leaders, and the Senate plays an important role given its constitutional responsibility to advise and consent on senior-level presidential appointments. As of September 11, only 117 of 599 key positions requiring Senate confirmation have been filled with a Senate-confirmed appointee.[17] Of the 15 Cabinet deputy secretary positions, only 8 have been filled, and many other top leadership positions, including those key to reorganization efforts, remain vacant.[18] We urge the administration and the Senate to work together to fill government's top management positions with qualified appointees as quickly as possible.

Recommendations

The Partnership would like to offer the following recommendations to the Subcommittee about ongoing efforts to reorganize the federal government.

1. Congress should continue its oversight of agency reform and reorganization plans. All congressional committees overseeing federal departments and agencies, including the Senate Homeland Security and Governmental Affairs Committee, should engage in active and regular oversight of government reorganization efforts. This Subcommittee is certainly the leader in this respect and we encourage you to continue your active oversight, particularly of agency and government–wide crosscutting reform plans.

2. Congress should increase collaboration across committees to address overlap, duplication and cross-agency challenges. To accomplish these goals, Congress should make greater use of joint hearings between oversight, authorizing and appropriations committees to improve coordination and promote better understanding of cross-cutting management challenges. Congress' committee structure can make it difficult to address enterprise-wide issues, but joint hearings can raise the profile of these issues so they receive appropriate attention from all congressional stakeholders. These types of convenings will become much more important as the administration begins to release the details of agency reorganization plans.

3. The Subcommittee should develop and execute an OMB oversight hearing plan and request OMB's agency reform plan. OMB is one of the most critical agencies to the effective functioning of government, yet it has been subject to minimal oversight by Congress. As agencies submit their budget submissions and reform plans to OMB, the focus will shift to OMB's development of the president's FY 2019 budget and government–wide reform plan. An OMB-focused congressional oversight plan should therefore examine the resourcing, structure, relationship and capacity of OMB to implement the reform priorities of the administration. This Subcommittee should also request from OMB its own agency reform plan so it can conduct appropriate oversight.

4. Congress should seek more information from agencies, including OMB, about how data and evidence has been used to inform big, bold reform ideas proposed in agency and government–wide reform plans. Congress should seek better information to understand agency and government-wide programmatic and operational challenges. Members of Congress and staff should proactively seek opportunities to visit agency headquarters or field offices to meet with agency leaders and staff in order to learn more about management and program challenges and how they are being addressed. Greater use of congressional delegations could also be made for this purpose. Congress should also invest in congressional staff education and training about how to interpret and analyze data, especially as it seeks to review agency reorganization and reform plans.

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[16] *Retooling Government for the 21st Century: The President's Reorganization Plan and Reducing Duplication: Hearings on S.Hrg. 112-537, before the U.S. Senate Committee on Homeland Security and Governmental Affairs,* 112th Cong. 2 (2012). Available at https://www.gpo.gov/fdsys/pkg/CHRG-112shrg73680/pdf/CHRG-112shrg73680.pdf

[17] The Washington Post, "Appointment Tracker." http://wapo.st/appointee-tracker

[18] Ibid.

5. Agencies should enhance their engagement with Congress on agency reform and reorganization plans. The executive branch must also play its part. OMB and agency leaders should communicate regularly and candidly with Members of Congress about the status of agency and government wide reform plans so they are aware of implementation issues and challenges, and can take appropriate steps to address them. They should be willing to appear before congressional committees when invited, and speak openly about what is working well, what issues require additional work, and what they need from Congress in order to be successful.

6. Civil service reforms should be pursued complementary to agency reforms. Federal employees are highly committed to the work and missions of their agencies but in many cases operate within a structure that limits their ability to be successful. Doing things better and smarter in government depends on having great people, yet our broken civil service system hinders government's efforts to hire, retain and manage its talent. The fractured nature of the federal government's personnel system creates have and have-not agencies in terms of flexibility to pay, reward and manage talent, and forces agencies to compete not just with the private sector but with other agencies as well. While civil service reform is complex, the administration's mandate to address longstanding intractable challenges means that now is the best time to reform the civil service. This Subcommittee should quickly advance legislation authorizing short-term workforce reforms, such as giving agencies more flexibility to use Voluntary Separation Incentive Payment/Voluntary Early Retirement Authority and creating a public-private talent exchange. These would allow agencies to more effectively implement reorganization plans so they are positioned to take advantage of these flexibilities when they are needed.

Conclusion

Chairman Lankford, Ranking Member Heitkamp and Members of the Subcommittee, thank you again for the opportunity to share the Partnership's views on the challenges and opportunities OMB, other federal departments and agencies, and Congress face in implementing significant reforms to the organization and operation of the federal government. We look forward to being of assistance to this Subcommittee and to Congress as you continue your oversight of these significant reforms.

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