

ARTICLES

Essay: A New Law Enforcement Agenda for a New Attorney General

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ABSTRACT

President Donald Trump's decision to dismiss U.S. Attorney General Jeff Sessions generated considerable legal and political controversy. The foci of debate have been whether the President could lawfully appoint Sessions's chief of staff, Matthew Whitaker, as Acting Attorney General and whether Whitaker was likely to dismiss Special Counsel Robert Mueller, the attorney appointed to investigate Russia's involvement in the 2016 presidential election. Lost in the wrangling over those matters is the issue whether the next attorney general should re-examine the direction of federal law enforcement. No attorney general has undertaken a comprehensive review of that enterprise for the last fifty years, and members of Congress, scholars, and practitioners have disagreed over the proper course. It is important for the next attorney general to consider taking up that issue even if all he does is start the conversation. The purpose of this essay is to facilitate that discussion by identifying three issues that the new attorney general should ask the Justice Department, the bench, the bar, the academy, and the public to ponder: (1) On what crimes should federal law enforcement focus? (2) Which federal law enforcement agency should be responsible for each category of those offenses? (3) How should we measure a federal law enforcement agency's success?

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INTRODUCTION

President Donald Trump's decision to replace U.S. Attorney General Jeff Sessions created quite a political hullabaloo.¹ One reason was that it raised the issue of whether the person he chose as Acting Attorney General, Matthew Whitaker, Sessions' former chief of staff, could constitutionally assume that office.² Another controversy involved the question whether Whitaker would terminate or restrict the pending investigation headed by Special Counsel (and former FBI Director) Robert Mueller into Russia's involvement in the 2016 presidential election.³ The hubbub over that prospect brought to mind the "Saturday Night Massacre" during the days of the Watergate imbroglio.⁴ Trump's selection of former Attorney General William P. Barr as Sessions's permanent replacement has quieted the wrangling over the first issue, but not the second.⁵

Obscured by the heat and smoke generated by those questions is an important policy issue: Should the next attorney general carry forward the same law enforcement priorities that Session pursued: violent crimes, immigration offenses, and drug trafficking? The answer to that policy issue is likely to have

1. See, e.g., Vivian Salama et al., *Attorney General Jeff Sessions Pushed Out of Trump White House*, WALL ST. J. (Nov. 7, 2018, 8:10 PM), https://www.wsj.com/articles/attorney-general-jeff-sessions-resigns-from-trump-white-house-1541619893?mod=article_inline [<https://perma.cc/DL54-JFUF>].

2. The debate involved the issue of whether the president could appoint Whitaker consistently with the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d (2018), and the Appointments Clause of the Constitution, art. II, § 2, cl. 2. See, e.g., Memorandum from Stephen A. Engel, Assistant Attorney General to Emmet T. Flood, Counsel to the President (Nov. 14, 2018), <https://www.justice.gov/olc/page/file/1110881/download> [<https://perma.cc/J84H-DXJL>]; Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. REG.: NOTICE & COMMENT (Nov. 26, 2018), <http://yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry/> [<https://perma.cc/S7SD-95Y8>].

3. President Trump has been (to put it mildly) quite critical of that entire matter. See, e.g., Vivian Salama, *Trump Castigates Mueller Investigation as 'Disgrace to the Nation,'* WALL ST. J. (Nov. 15, 2018, 10:48 AM), <https://www.wsj.com/articles/trump-castigates-mueller-investigation-as-disgrace-to-nation-says-probe-is-total-mess-1542292248?mod=searchresults&page=1&pos=6> [<https://perma.cc/ZSJ5-SY7T>].

4. For an insider's account of that event, see ROBERT H. BORK, *SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL* (2013).

5. See Editorial, *Whose Attorney General Will William Barr Be?*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/opinion/william-barr-attorney-general-trump.html> [<https://perma.cc/F975-KPUN>]. For insight into Barr's views on some initial priorities, see Hearing on the Nomination of the Honorable William Pelham Barr to be Attorney General of the United States Before the S. Comm. on the Judiciary, 116th Cong. (2019) (statement of William P. Barr), <https://www.judiciary.senate.gov/imo/media/doc/Barr%20Testimony.pdf> [<https://perma.cc/F7Z5-6JXR>].

far more long-term importance than the resolution of the other matters that have recently been the subject of political quarreling in the nation's capital.

Legally speaking, the attorney general has two principal duties. As head of the Department of Justice,⁶ he or she must supervise the work of the lawyers, agents, and allied personnel in the department's divisions and agencies.⁷ As the federal government's chief legal officer, he also must counsel the President and other cabinet officials on all legal issues.⁸ But his power does not end there. Not for nothing is the attorney general known as the nation's "chief law enforcement officer."⁹ An informal, but quite important, feature of his position is his ability, by example and moral suasion, to chart law enforcement policy for the nation. In those roles, he must decide how to allocate his limited resources to "insure domestic Tranquility."¹⁰ As one can imagine, that is no mean feat.

Most of the literature on the federal and state criminal justice systems depicts them as dystopias.¹¹ Critics allege that the systems are unduly punitive, discriminatory, and ineffective. They claim that the government incarcerates far too many people, and the offenders it imprisons are primarily poor, non-violent, and people of color, rather than white, wealthy, and white-collar. In areas such as drug enforcement, they contend that the entire effort has been a failure since there are more drugs, of higher purity, being sold at lower prices today than was true when President Richard Nixon declared "war" on drugs in the 1970s. Adherence to the rule of law and avoidance of conscious and unconscious racism, critics maintain, demand that we fully re-examine our criminal justice systems to eliminate their

6. 28 U.S.C. §§ 501, 503 (2018).

7. See, e.g., 28 U.S.C. §§ 506–507A (2018) (authorizing the President to appoint a deputy attorney general, associate attorney general, solicitor general, and 13 assistant attorneys general); *id.* § 510 (authorizing the attorney general to delegate or reassign his authority to other department officers, employees, or agencies); *id.* §§ 517–19 (the Attorney General can conduct, direct, or supervise all litigation in which the United States has an interest); *id.* § 531 (the Federal Bureau of Investigation); *id.* § 561 (the U.S. Marshals Service); *id.* § 581 (U.S. Trustees); *id.* § 599A (Bureau of Alcohol, Tobacco, Firearms, and Explosives); 18 U.S.C. § 4041 (Bureau of Prisons); Reorganization Plan No. 2 of 1973, 87 Stat. 1091 (codified as amended at 5 U.S.C. app. 1 (2018)) (Drug Enforcement Administration); see generally U.S. DEP'T OF JUSTICE, ORGANIZATIONAL CHART (Feb. 5, 2018), <https://www.justice.gov/agencies/chart> [<https://perma.cc/7NLD-TJQ3>].

8. See 28 U.S.C. §§ 511–13 (2018).

9. Neal K. Katyal & George Conway III, Opinion, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> [<https://perma.cc/5Z4B-GTBQ>].

10. U.S. CONST. pmbl.

11. The number of books and articles are as numerous as the grains of sand on the beach. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARIE GOTTSCHALK, CAUGHT: THE PRISON SYSTEM AND THE LOCKDOWN OF AMERICAN POLITICS (2016); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013).

unlawful, immoral, and ineffective policies and practices.¹²

Some critics are wrong on the merits of their arguments,¹³ and some are more interested in scoring political points with potential electoral constituencies than in engaging in reasoned policy debate.¹⁴ But critics are right about the need for reform. There is a consensus that our criminal justice systems need a thorough re-examination,¹⁵ and there has been no comprehensive review since former Attorney General Nicholas Katzenbach chaired President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice fifty years ago.¹⁶ It is time to undertake that evaluation again.

A new attorney general will have the opportunity to do so and, if need be, to chart a different course. The bench, the bar, the academy, and the public should assist him by identifying questions that he should ask and, even more helpfully, offering suggested answers. It is the goal of this essay to start that process.

In my opinion, the new attorney general must ask and answer three critical questions: (1) Which crimes should be the focus of federal law enforcement efforts, with the remainder being generally left to the states? (2) Which specific federal law enforcement agency should investigate each category of those crimes? (3) How should we measure a federal law enforcement agency's success? My preliminary answers to those questions are these: First, federal law enforcement should focus on crimes that only the national government can successfully handle: foreign and domestic terrorism; political and economic espionage; cyber-crimes; international and interstate crimes, including complex white-collar fraud; political corruption; civil rights crimes; large-scale organized criminal enterprises; environmental crimes; and crimes against foreign government officials. Second, Congress should re-evaluate and reorganize the federal law enforcement

12. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

13. See, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (demonstrating that most state prisoners are in custody for having committed violent crimes, not minor, nonviolent drug offenses); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL'Y 241 (2014) (arguing that the federal sentencing laws governing crack cocaine distribution are not racially discriminatory).

14. See Bill Barrow & Chevel Johnson, *Warren at Black University: Criminal Justice System 'Racist'*, U.S. NEWS & WORLD REPORT (Aug. 3, 2018 9:54 PM), <https://www.usnews.com/news/politics/articles/2018-08-03/warren-at-black-college-criminal-justice-system-racist> (“Speaking Friday at a historically black university, potential presidential candidate Elizabeth Warren delivered what she called ‘the harsh truth about our criminal justice system: It’s racist . . . I mean front to back.’”).

15. See, e.g., Zach Dillon, *Foreword*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2012) (“Overcriminalization is one of those rare topics where both the political right and political left come together. 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.”); Editorial, *A Real Chance at Criminal Justice Reform*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/criminal-justice-reform.html> [<https://perma.cc/5X6Z-UX8H>] (discussing the “bipartisan” First Step Act, which would revise the federal sentencing and early release laws).

16. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

infrastructure, assigning primary (if not exclusive) responsibility over each area to one agency so that each agency can efficiently meet its obligations. Third, government and law enforcement agencies at every level should discuss how to measure success, not in terms of outputs such as arrests, convictions, and the like, but in terms of outcomes, such as a lower crime rate and a greater feeling of personal security by the public. The next attorney general likely will not be able to do more than start the discussion about what questions must be answered and what the best answer is to each question. The debate has to start at some point, however, and 2019 is an excellent time.

I. ON WHAT CRIMES SHOULD FEDERAL LAW ENFORCEMENT FOCUS?

We cannot tell whether the federal criminal justice system is operating properly unless we know on what crimes it should focus. Ordinarily, the federal criminal code might be the best place to discover that core. The theory would be that, because all federal crimes are statutory,¹⁷ Congress would have limited the government's investigative and prosecutorial resources to only those matters of peculiar federal interest.

That was true in 1790,¹⁸ but not today. Spread across the 51 volumes and 27,000 pages of the U.S. Code are thousands of federal offenses, with the Code of Federal Regulations adding hundreds of thousands of pertinent regulations.¹⁹ The reason for that explosion is that, as public choice theory teaches us, Congress passed criminal laws to satisfy different specific interest groups, rather than to serve the public as a whole.²⁰ Politics, not policy, has largely driven that train for the last half century. Want proof? It is a federal crime to assault the President²¹ and to harass the Western Prairie Dog.²² It is a federal crime to counterfeit United States currency²³ and to misuse Smokey the Bear's image.²⁴ It is a federal crime to transport heroin in interstate commerce²⁵ and to transport across state lines dentures not provided by a licensed dentist.²⁶ I could go on, but that would be just gilding the lily. The federal penal code is not much help deciding in what the federal government deems important.

17. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (ruling that there are no federal common law crimes).

18. See Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790) (making it a crime to interfere with functions of the new government through offenses, such as treason, misprision of treason, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities, as well as murder, robbery, larceny, and receipt of stolen property on federal property or the high seas); Larkin, *supra* note 11, at 726.

19. Larkin, *supra* note 11, at 726–29.

20. *Id.* at 722–65.

21. 18 U.S.C. §§ 111 & 1114 (2018).

22. 16 U.S.C. §§ 1532(9), 1538(a), 1538(g), 1540(b) (2018); 50 C.F.R. § 17.40(g) (2018).

23. 18 U.S.C. ch. 25 (2018).

24. 18 U.S.C. § 711 (2018).

25. 21 U.S.C. §§ 801 & 841(a)(1) (2018).

26. 18 U.S.C. § 1821 (2018).

An inquiry guided by structural or federalist concerns is more useful. The Framers created the federal government to address problems, such as the regulation of interstate and foreign commerce, that the states had proved incapable of handling under the Articles of Confederation without favoring themselves at the expense of their neighbors.²⁷ The remedy was to assign certain powers to the national government for it to exercise on behalf of the nation as a whole. For example, only the federal government may regulate the immigration and naturalization process, coin money, enter into foreign alliances, recognize foreign governments, or govern the District of Columbia.²⁸ It therefore makes sense for the federal government to investigate and prosecute crimes that threaten exclusive federal interests or that have an international or interstate element. For example, the nation needs to take responsibility over crimes committed by agents of foreign nations (or by private parties with the host government's blessing), such as terrorism, espionage, and (many) cybercrimes.²⁹ Accordingly, federal law enforcement agencies should be tasked with investigating those offenses.

There are also offenses—political corruption, environmental crimes, and civil rights violations, to name a few—that federal law enforcement officers are far better suited to investigate than their state and local counterparts. The federal government has traditionally investigated governors, mayors, and state legislators for bribery, large in-state employers for despoiling the air, water, or land, and local sheriffs for abusing prisoners in their jails. Why? Federal agents do not risk losing their jobs by investigating those offenders; state and local police officers do. It would be a serious mistake for the new attorney general to leave the handling of those matters to law enforcement officers crippled by a conflict of interest. Federal law enforcement needs to remain vigilant in those fields.

By contrast, states traditionally can successfully handle the common law crimes—murder, assault, robbery, theft, burglary, and the like—as well as the modern-day additions to that list—small-scale fraud or embezzlement, drug possession, and so forth. Ordinarily, there is no reason to assume that a local police department cannot investigate such a crime without federal assistance. Leaving

27. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 21 (1888); THE FEDERALIST NO. 7, at 60–61 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

28. See, e.g., U.S. CONST. art. I, § 8, cls. 4, 5, 10 & 17 (the Immigration and Naturalization, Coin Money, Law of Nations, and Seat of Government Clauses); *id.* § 10, cls. 1–3 (imposing limits on a state ability to affect foreign relations); *id.* art. II, § 2, cl. 1, and § 3 (Commander-in-Chief and Reception Clauses); *Arizona v. United States*, 567 U.S. 387 (2012) (ruling that the federal government has exclusive authority over immigration and naturalization).

29. See, e.g., 18 U.S.C. ch. 37 (2018); *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010); THE COMM'N ON THE THEFT OF AM. INTELLECTUAL PROP., THE IP COMM'N REPORT 2 (2013) (“China is the world largest source of IP theft.”); Dennis C. Blair & Keith Alexander, Opinion, *China's Intellectual Property Theft Must Stop*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/opinion/china-us-intellectual-property-trump.html> [<https://perma.cc/6RYW-USPV>] (“All together, intellectual-property theft costs America up to \$600 billion a year, the greatest transfer of wealth in history. China accounts for most of that loss.”).

those cases to the states frees federal agents to investigate the crimes that only the United States can or should handle.

A particularly good example is the possession of a firearm by a felon, known in the lingo as a “FIP.” Like inchoate crimes such as attempts, felon-in-possession offenses attempt to prevent harm from occurring by allowing law enforcement to intervene before a crime or physical harm (such as armed robbery) occurs. Those crimes have no special federal interest, and there is nothing particularly sophisticated about their commission or proof. Have a police officer testify that he arrested the defendant in possession of a firearm. Then, have the officer identify the firearm, offer it into evidence, and produce the government document proving that the defendant has a felony record. Q.E.D. FIP cases keep dangerous offenders off the streets (and make for “cheap stats”—i.e., easy convictions), but the states can handle those crimes with ease. The same is true for bank robberies. Even when a bank does not have the now ubiquitous interior cameras and the offender does not leave incriminating evidence (e.g., DNA) behind, state and local law enforcement can solve those crimes without too much difficulty.

To be sure, states may regulate some aspects of an activity, such as the intrastate elements of interstate commerce,³⁰ which falls primarily within the federal government’s bailiwick.³¹ States naturally have jurisdiction to investigate the murders, thefts, kidnapping, and fraud that anyone commits within their borders whether as part of a global jihad against the United States or an interstate organized criminal enterprise like MS-13. States can and should investigate public corruption and environmental offenses to keep their own houses in order. And a state’s interest in protecting the lives, property, and safety of its citizens is unquestioned and weighty. Nevertheless, there are legal and practical impediments to state investigation of interstate crimes, even more so regarding international ones.³² The Federal Bureau of Investigation (FBI), for example, is far better situated to conduct cross-border investigations, whether they are ones in which a foreign government’s assistance is necessary or ones in which foreign citizens or officials might be involved in criminal activity.³³ To further such investigations, the FBI has more than eighty overseas offices to help in global

30. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (licensing).

31. *See* U.S. CONST. art. I, § 8, cl. 3 (the Commerce Clause).

32. States lack authority to regulate conduct occurring beyond their borders absent proof of an in-state effect. *See, e.g.*, *Strassheim v. Daily*, 221 U.S. 280, 284–85 (1911); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other States.”); WAYNE R. LAFAVE, *CRIMINAL LAW* § 4.4, at 223–24 (5th ed. 2010). State law enforcement officers have only whatever power the state grants them, *see, e.g.*, VA. CODE ANN. §§ 15.2-1603 (deputy sheriffs may exercise the authority of a sheriff), 15.2-1609 (defining the authority of a sheriff), 52-8 (2018) (granting state police officers the same law enforcement authority as a sheriff), unlike federal agents, who exercise authority nationwide, *see, e.g.*, 18 U.S.C. § 3052 (2018).

33. *See, e.g.*, Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html> [<https://perma.cc/JFC4-6M5W>].

investigations.³⁴ Local sheriff's departments do not. In those instances, state and local authorities can remain involved by collaborating with federal law enforcement officials in one of many ongoing task forces or joint operations.³⁵

Does this mean that federal agents should never pursue violent or street crimes? Of course not. There will be instances in which the federal government should investigate members of criminal enterprises for murder committed in violation of the federal racketeering or drug laws.³⁶ On other occasions, one or more offenders will commit a series of violent crimes in adjacent states—the early 21st century Washington, D.C.-area sniper cases is a good example³⁷—and federal agencies can and should assist local law enforcement apprehend anyone involved. The crime rate in a particular locale—Chicago, for instance³⁸—might be so high that a “law enforcement emergency” requires federal agencies to participate.³⁹ A natural catastrophe—such as Hurricane Katrina⁴⁰—could overwhelm the ability of local authorities to police a community.⁴¹ A host of other factors might justify federal support of a “street crime” investigation.⁴² The result is this: While the number of federal investigations of ordinary crimes should drop off, it will not and should not reach zero.

34. See FBI, OVERSEAS OFFICES, <https://www.fbi.gov/contact-us/legal-attache-offices> [https://perma.cc/66VL-J5KS] (last visited Apr. 4, 2019).

35. See, e.g., FBI, VIOLENT GANG TASK FORCES, <https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces> [https://perma.cc/XSR9-W3P5] (last visited Apr. 4, 2019); U.S. DEP'T OF JUSTICE, ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES, <http://www.justice.gov/criminal/taskforces/ocdetf.html> [https://perma.cc/347M-ZMSD] (last visited Apr. 4, 2019); see also Paul J. Larkin, Jr., *Deputizing Federal Law Enforcement Personnel Under State Law*, THE HERITAGE FOUND., (Apr. 4, 2019), https://www.heritage.org/sites/default/files/2017-07/LM-209_1.pdf [https://perma.cc/6M9N-LAKQ].

36. See, e.g., the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2018)); the Continuing Criminal Enterprise Act, Pub. L. No. 91-513, tit. II, § 408, 84 Stat. 1265 (1970) (codified at 21 U.S.C. § 848 (2018)); *United States v. Edmund*, 52 F.3d 1080 (D.C. Cir. 1995).

37. See *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018); *Muhammad v. Kelly*, 575 F.3d 359 (4th Cir. 2009).

38. See, e.g., Matt Ford, *What's Causing Chicago's Homicide Spike?*, ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/01/chicago-homicide-spike-2016/514331/> [https://perma.cc/562Y-FG8S].

39. The Emergency Law Enforcement Assistance Act, 34 U.S.C. § 10501 (2012), authorizes the Attorney General to use federal law enforcement personnel during a state or local “law enforcement emergency.”

40. See, e.g., Joseph B. Treaster, *Law Officers, Overwhelmed, Are Quitting the Force*, N.Y. TIMES (Sept. 4, 2005), <https://www.nytimes.com/2005/09/04/us/nationalspecial/law-officers-overwhelmed-are-quitting-the-force.html> [https://perma.cc/57DL-AW5X].

41. Act of Nov. 23, 1988, Pub. L. No. 100-707, § 502, 102 Stat. 4689, 4706–07 (codified at 42 U.S.C. § 5192(a) (2018)), empowers the President to use federal law enforcement officers to help a state protect the public during a disaster or emergency.

42. The Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, tit. VII, § 701(a), 112 Stat. 2974, 2986–87 (1998) (codified at 28 U.S.C. § 540B (2012)), 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.”

II. WHICH FEDERAL LAW ENFORCEMENT AGENCY SHOULD BE RESPONSIBLE FOR EACH CATEGORY OF FEDERAL OFFENSES?

State and local law enforcement agencies conduct the vast majority of criminal investigations, and most people are accustomed to seeing municipal police officers or members of a rural sheriff's department. The infrastructure that many people envision is therefore quite simple. By contrast, the federal government contains "a dizzying array" of federal investigative agencies, some with limited, specialized investigative authority.⁴³ More than thirty federal agencies are authorized to investigate crimes, execute search warrants, serve subpoenas, make arrests, and carry firearms—the functions traditionally associated with being a law enforcement officer.⁴⁴ Some agencies—the FBI, the Drug Enforcement Administration (DEA), the U.S. Secret Service, and the U.S. Marshal's Service⁴⁵—are well known to the public (principally through television and movies⁴⁶). A few—such as the criminal investigative programs at the National Park Service and the U.S. Forest Service—are fairly well known, especially by people who live in states like Utah, given the large number of federal parks and forestlands west of the Mississippi.⁴⁷ Similar programs at other federal agencies—such as the Environmental Protection Agency (EPA) Office of Criminal Enforcement, Forensics, and Training—are largely unknown.⁴⁸

How did this proliferation come about? The First Congress created the first two federal law enforcement agencies—the U.S. Marshals and Customs Officers—late in the eighteenth century. The former were the equivalent of the common law sheriffs.⁴⁹ The latter were responsible for enforcing the customs laws, a critical function in a day when there was no income tax and customs duties (along

43. 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.

44. See, e.g., 18 U.S.C. § 3052 (2018) (FBI agents); 18 U.S.C. § 3053 (U.S. Marshals and deputy marshals); 28 U.S.C. §§ 564, 566(c)–(d) (2018) (same); 18 U.S.C. § 3056 (2018) (U.S. Secret Service agents); see generally GOV'T ACCOUNTABILITY OFFICE, FEDERAL LAW ENFORCEMENT: SURVEY OF FEDERAL CIVILIAN LAW ENFORCEMENT FUNCTIONS AND AUTHORITIES (2006), <http://www.gao.gov/new.items/d07121.pdf> [<https://perma.cc/KP4E-QGU9>].

45. See, e.g., 6 U.S.C. § 381 (2018) (Secret Service); 18 U.S.C. § 3056 (2018) (same); 28 U.S.C. § 531 (2018) (FBI); *id.* § 561 (U.S. Marshals Service).

46. See, e.g., IN THE LINE OF FIRE (Columbia Pictures 1993) (U.S. Secret Service); JUSTIFIED (FX 2010–2015) (U.S. Marshal's Service).

47. See 16 U.S.C. 559c (2018) (identifying law enforcement authority of U.S. Forest Service officers); 18 U.S.C. 3061 (2018) (identifying powers of Postal Inspection Service officers); 54 U.S.C. § 102701(a) (2018) (empowering the Secretary of the Interior to designate law enforcement officers).

48. See 18 U.S.C. § 3063 (2018) (identifying authority of EPA law enforcement officers); *Criminal Enforcement*, ENV'T'L PROT. AGENCY (last visited Dec. 30, 2018), <https://www.epa.gov/enforcement/criminal-enforcement> [<https://perma.cc/7CHQ-C98F>].

49. See Judiciary Act of 1789, ch. 20, §§ 27–28, 1 Stat. 73 (1789) (creating a U.S. Marshall for each district and authorizing the hiring of deputies); Act of Mar. 3, 1825, ch. 65, § 15, 4 Stat. 115, 118, and Act of Mar. 3, 1835, ch. 40, § 5, 4 Stat. 775, 777 (both authorizing U.S. Marshals to contract with state authorities to take custody of federal prisoners); *Randolph v. Donaldson*, 13 U.S. (9 Cranch) 77, 84 (1815) (discussing Virginia statute); *McMillan v. Monroe County*, 520 U.S. 781 (1997) (describing the authority of state sheriffs).

with the sale of public lands) funded the new national government.⁵⁰ It made sense for Congress to establish those bureaus. Unfortunately, we now have too much of a good thing.

The current assortment of federal law enforcement agencies, and the assignment of their respective investigative responsibilities, has come about in a largely random manner. The FBI, for instance, began as the Bureau of Investigation, which lacked traditional law enforcement authority. Attorney General Charles Bonaparte created a cadre of investigators at the Justice Department because he tired of asking the Secret Service to borrow its agents.⁵¹ Yet, perhaps due to empire building by the FBI's first Director, J. Edgar Hoover, and a long series of compliant Congresses, today's FBI has the broadest range of investigative responsibilities among federal agencies, including robbery of federal banking institutions, racketeering, counterterrorism, counterespionage, and complex white-collar crime.⁵² The FBI does a little of everything. It has essentially become the Wal-Mart of federal law enforcement.

The FBI, however, does not handle counterfeiting; the Secret Service does. Congress created the Secret Service after the Civil War to investigate rampant counterfeiting throughout the South.⁵³ The service is better known now for its responsibility to protect the president, vice president, and their families, duties that the Service assumed only after the 1901 assassination of President William McKinley.⁵⁴ The Service also protects visiting heads of state, but not lower echelon foreign officials or dignitaries. The Diplomatic Security Service (DSS), a component of the Department of State, has that responsibility, as well as the job of protecting American diplomats traveling abroad.⁵⁵

Consider a few other agencies as well. Agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives—think Eliot Ness and Kevin Costner's *The Untouchables*—were the original “Prohibition Agents” or “Revenuers.”⁵⁶ Initially situated in the Treasury Department (before the 1960s, Congress's Tax

50. See Act of July 31, 1789, ch. 5, § 1, 1 Stat. 627, 627–35 (authorizing the appointment of a tariff collector in each customs district); *Maul v. United States*, 274 U.S. 501, 504–06 (1927) (describing the early history of the U.S. Customs Service, now known as the Bureau of Customs and Border Protection).

51. *A Brief History, 1908–1923*, FBI, <https://www.fbi.gov/history/brief-history> [<https://perma.cc/2STR-77C4>] (last visited Apr. 4, 2019).

52. See, e.g., 18 U.S.C. §§ 351(g), 3052, 3107 (2018); 28 U.S.C. §§ 533, 540, 540A, 540B (2018); 50 U.S.C. §§ 402–04, 1801–12 (2018).

53. *USSS History*, U.S. SECRET SERVICE, <https://www.secretservice.gov/about/history/events/> [<https://perma.cc/9PCB-5E5A>] (last visited Apr. 4, 2019); see also, e.g., 18 U.S.C. § 3056 (2018).

54. *Id.*

55. See 22 U.S.C. ch. 58 (2018); *Diplomatic Security Service*, U.S. DEP'T OF STATE, <https://www.state.gov/m/ds/> [<https://perma.cc/W3FN-BSC5>] (last visited Apr. 4, 2019).

56. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 439 (1932) (“prohibition agent”); *Capone v. United States*, 51 F.2d 609 (7th Cir. 1933); *Eliot Ness*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/our-history/eliot-ness> [<https://perma.cc/T364-KTPH>] (last visited Apr. 4, 2019).

and Spending Clause authority exceeded its Commerce Clause authority⁵⁷), ATF is now a component of the Justice Department, where it investigates violent crimes and explosives offenses.⁵⁸ The DEA has the lead responsibility for investigating the federal controlled substances laws. The DEA also began in the Treasury Department (the Harrison Narcotics Tax Act of 1914⁵⁹ gave the Treasury Department jurisdiction over heroin trafficking), but the DEA now resides in the Justice Department too.⁶⁰ Moreover, over the last eighty years Congress has created numerous federal regulatory agencies and assigned some of them—the EPA for example—criminal law enforcement responsibilities.⁶¹ Then, there are numerous Offices of Inspector Generals in the myriad federal agencies.⁶² They are responsible for uncovering “waste, fraud, and abuse” in the executive branch,⁶³ and special agents in those offices have traditional law enforcement authority.⁶⁴ Finally, there are the geographically defined agencies, such as the U.S. Capitol Police, the U.S. Supreme Court Police, and the U.S. Park Police.⁶⁵ Yet, despite the multiplication of federal law enforcement agencies and their overlapping responsibilities, there has been no recent systematic congressional or presidential analysis of the comparative advantages and disadvantages of the current dispersal of federal law enforcement authority.

Such a reorganization could eliminate inefficiencies. Congress could, for example, separate counterespionage and counterterrorism responsibilities from

57. *Compare, e.g., Helvering v. Davis*, 301 U.S. 619 (1937) (ruling that a statute that generates revenue is a lawful tax for purposes of the Taxing and Spending Clause, U.S. CONST. art. I, § 8, cl. 1), with, *e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (ruling that mining is not “commerce” for purposes of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

58. *See About the Bureau of Alcohol, Tobacco, Firearms and Explosives*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov> [<https://perma.cc/8PPE-79HN>] (last visited Apr. 4, 2019).

59. Ch. 1, 38 Stat. 785 (1914).

60. DRUG ENF’T ADMIN, HISTORY: THE EARLY YEARS (2012), <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf> [<https://perma.cc/V3RK-DECR>] (last visited Apr. 4, 2019). The FBI also becomes involved in cases involving the Sicilian or Russian Mafia. *See, e.g., United States v. Salerno*, 505 U.S. 317 (1992); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993); *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989) (the “Pizza Connection” case).

61. *See, e.g., Judson W. Starr, Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900 (1991). In my opinion, that is a problematic location. *See Paul J. Larkin, Jr., Reorganizing the Federal Administrative State: The Disutility of Criminal Investigative Programs at Federal Regulatory Agencies*, THE HERITAGE FOUND., Legal Memorandum No. 208 (July 12, 2017), <http://www.heritage.org/sites/default/files/2017-07/LM-208.pdf> [<https://perma.cc/5L29-2VWX>].

62. *See Inspector General Act of 1978*, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. App. 3 (2018)).

63. Inspectors General are referring an increasing number of cases for prosecution to the Justice Department. *See JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE* 17–18 (4th ed. 2015).

64. *See the Homeland Security Act of 2002*, Pub. L. No. 107-296, § 812, 116 Stat. 2135 (2002) (codified at 5 U.S.C. App. 3, § 6 (2018)).

65. *See 2 U.S.C. ch. 29* (2018) (U.S. Capitol Police); 40 U.S.C. § 6120 (2018) (U.S. Supreme Court Police); 54 U.S.C. § 102701 (2018) (Dep’t of Interior law enforcement officers).

the FBI and place them in a new agency similar to the British model, as former Judge Richard Posner has recommended.⁶⁶ Congress could task the FBI with jurisdiction over *all* white-collar crimes, including counterfeiting and criminal violations of regulatory laws. Congress could merge the Secret Service and DSS into one unified protective services agency. The ATF could receive responsibility for all violent crimes, including bank robberies, within federal jurisdiction. Investigations of the controlled substances laws could be the responsibility of one agency consisting of the DEA and the relevant components of the Department of Homeland Security and the FBI. The Marshal's Service could provide physical security for all federal buildings other than ones exclusively housing another federal law enforcement agency.⁶⁷ That is merely a short list of potential options. They or others might improve the efficiency of federal law enforcement.

To be sure, this issue is not as important as others discussed here. The proper alignment of today's federal law enforcement infrastructure raises smaller-scale issues of efficiency than the ones discussed in Part I. The proper allocation of agency-specific law enforcement jurisdiction is also less important than Part III's question of how to determine whether our efforts have been successful. Yet it would not be reasonable to answer the questions posed by Parts I and III without also considering those posed by this part. It would make little sense for the new attorney general to analyze the issues of which crimes the federal government should investigate and how well it is performing without also asking whether each agency's jurisdiction reflects a judgment that it is the best agency to investigate certain types of crimes.

III. HOW SHOULD WE MEASURE A FEDERAL LAW ENFORCEMENT AGENCY'S SUCCESS?

The final question is the most important and most difficult of the three. Important because knowing which deck chairs to choose (Question 1) and how to arrange them (Question 2) matters little if you are on the RMS Titanic (Question 3). Difficult because of the perplexity of measuring the success of an enterprise that does not have a quantifiable bottom line. The government is not a for-profit enterprise, so it cannot measure success by determining whether its revenues exceed its liabilities. Historically, the Justice Department used the same "body count" performance methodology that we used (unsuccessfully) in the Vietnam

66. The reason for the separation is that the FBI's law enforcement investigation and intelligence-gathering and evaluation functions represent very different cultures that do not always blend well. See Richard A. Posner, *The Reorganized U.S. Intelligence System after One Year*, AM. ENTERPRISE INST. 5 (Apr. 11, 2006), http://www.aei.org/wp-content/uploads/2011/10/20060411_SENSOg.pdf [https://perma.cc/R2AE-VF9F].

67. Currently, the Federal Protective Service, a component of the U.S. Department of Homeland Security, has that responsibility. *The Federal Protective Service*, U.S. DEP'T OF HOMELAND SECURITY, THE FEDERAL PROTECTIVE SERVICE (June 29, 2016), <https://www.dhs.gov/fps-operations> [https://perma.cc/523K-QZ93].

War.⁶⁸ The measure of effectiveness was based on the number of investigations opened, arrests made, charges brought, cases resulting in convictions, amount of incarceration sentences imposed, and sum of the fines and forfeitures obtained. That approach, however, measures outputs, not outcomes. It does not ask whether those numbers reflect an improvement in the deterrent, incapacitative, educative, and rehabilitative purposes of the criminal law. That approach also encourages the government to pursue trivial cases or ones involving technical violations of the law, particularly regulations, where no true wrongdoing was involved and no one acted with the “evil intent” underlying common law crimes.⁶⁹ The result is to create injustices that weaken public respect for the law and disserve its purposes.⁷⁰

In 1993, Congress tried to address that problem by enacting the Government Performance and Results Act (GPRA).⁷¹ GPRA’s mission was to force government agencies to design performance goals and metrics that would represent outcomes and thereafter to calculate those outcomes by engaging in rigorous self-examination to determine whether they had achieved their goals.⁷² One problem, however, is that not every federal agency has a mission that can be easily measured. The Department of the Interior (DOI) can count the number of mining permits issued during a particular year; it can obtain from mining companies the amount of oil or natural gas they extracted; and it can task economists with calculating the effect of that new supply on the price of fuel. By contrast, we cannot truly know how effective the Justice Department has been at enforcing federal criminal law without knowing the answers to two very difficult questions: (1) Has it reduced the number of crimes committed?; and (2) Has it generated an increase in the feelings of personal and financial security held by a majority of the public, as well as the majority’s commitment to the rule of law? The first answer is (to quote Donald Rumsfeld) a “known unknown.” We will never know the number of crimes not committed or the reasons why. As for the second answer: Public attitudes about the effectiveness of law enforcement can be as much the product of political salesmanship, whether positive or negative, as of the actions themselves. Filtering out “spin” is a near impossible task. Plus, given the overlap

68. See Larkin, *supra* note 11, at 752 & n.169.

69. See Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 349–51 (2018).

70. See Larkin, *supra* note 11, at 750 (“When we know that everyone could be found guilty of something because there is no activity that the criminal law does not reach, we may look at a defendant as being unlucky, not immoral. There, but for the grace of God, go I. Extending criminal law to the point where nearly everyone at some time has done something for which he could be sent to prison erodes the law’s ability to signal that certain conduct and certain people are out of bounds. The law can no longer distinguish ‘us’ from ‘them.’ Instead, to quote Walt Kelly, ‘we have met the enemy, and he is us.’”).

71. Pub. L. No. 103-62, 107 Stat. 285 (1993) (as amended by the GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2010)) (codified in scattered sections of 5 U.S.C. and 31 U.S.C.).

72. See OFFICE OF THE ATTORNEY GENERAL, U.S. DEP’T OF JUSTICE, FY 2017 ANNUAL PERFORMANCE REPORT AND FY 2019 ANNUAL PERFORMANCE PLAN (2018), <https://www.justice.gov/doj/page/file/1033761/download> [<https://perma.cc/V9LB-9PAF>].

between federal and state enforcement over some offenses, such as the drug laws, specifying what effect the federal government *alone* had on drug use would be quite an undertaking.

It is far easier for state and local law enforcement agencies, like the New York City Police Department, to measure the effectiveness of its operations. Aside from having a dramatically smaller geographic area to evaluate, police departments have a number of metrics that can offer evidence of successful crime interdiction. For example, is the local population increasing or decreasing in size? Is the average income in a community going up or down? Have more local businesses opened or closed during the relevant time? Are there more or fewer people on the street, especially at night, a factor that can offer insight into how secure people feel? Do new businesses quickly or slowly occupy empty buildings? Are empty buildings regularly vandalized or covered with graffiti? Are there empty lots that have been in that condition for some time? And so on. Those “quality of life” factors are the type of evidence that the “Broken Windows Theory” of policing found illuminating.⁷³

That is not all. It is far more difficult for the federal government to know what data to look for in New York City and Salt Lake City, let alone the thousands of large and small cities betwixt them, to determine whether federal public corruption, anti-fraud, civil rights, and environmental efforts have made a difference. How can we tell whether the prosecution of cybercrimes prevented assaults by would-be domestic hackers—to say nothing of foreign ones—rather than the adoption of better security practices by private parties (like not using “Password” as a password)? Besides, are fewer infiltrations an improvement if the ones that still occur impose a far greater cost on the nation? Would interdicting an additional 25 percent of the fentanyl manufactured in China and smuggled into the United States truly be an improvement if the result were to encourage enterprising high school chemistry teachers in New Mexico to open domestic fentanyl production facilities? Finding answers to those questions, or admitting that there are and can be none, would help the public decide what to do in future elections.

To be sure, as difficult as answering those questions will be, it likely will be even more difficult to implement any answers that require a change to the status quo. Law enforcement agencies clearly have a culture that, in part, is based on their mission. Shifting investigative responsibilities or merging different law enforcement agencies upsets the longstanding self-image that agency culture

73. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/> [<https://perma.cc/7EXY-ZEMD>]. Crimes that states handle are largely the type of common law crimes that have immediate, obvious victims and that generate intense interpersonal conflict. See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 328 (2016). By contrast, the federal government enforces a wealth of statutes, such as the export control laws, see, e.g., 22 U.S.C. § 2778 (2018), whose violation does not generate immediately identifiable victims or effects.

affords its members.⁷⁴ Accordingly, just as it is difficult to shift the course of a river mid-stream, it is difficult to change a settled agency culture.⁷⁵ Moreover, any reorganization might have a short-term effect of rendering agencies less effective as they try to accommodate their new responsibilities. That would reduce their crime-fighting outputs, as well as create political headaches for the attorney general as the media and Congress inveigh against his decision to violate the “If it ain’t broke, don’t fix it” rule. States will push back against any reduction in the number of violent crimes the federal government pursues, because that would force the states to investigate and prosecute those cases themselves, as well as—most importantly—to pay for the imprisonment of convicted offenders. Finally, reorganizing law enforcement responsibilities would have an indirect effect on Capitol Hill because it would affect the jurisdiction of different committees to conduct oversight of—and to ask favors from—different agencies.

Those factors could scare off the next attorney general from taking even the first step down the path of reform. There also could be domestic or foreign events that push aside any consideration of the reforms mentioned here. We did not anticipate on September 10, 2001, the new challenges our law enforcement agencies would face on the morrow, nor did we foresee many of the financial frauds that rocked the market over the last three decades.⁷⁶ But we should not fear making a reasonable decision because it might not turn out as we hoped or because unforeseen events force us to cancel our plans. If asking the three questions posed here is reasonable, finding answers to them is too.

CONCLUSION

The current federal law enforcement apparatus has done the nation a service by pursuing foreign and domestic threats to domestic tranquility. That is true even if those agencies investigate crimes better left to the states and localities, and even if the wrong federal agency has been tasked with conducting those investigations. Agencies such as the FBI and Secret Service are justly respected worldwide for their investigative and personal security prowess. Nevertheless, the public needs more than what available information reveals to know whether they can do a better job. To gather that information, we need to identify the relevant factors. To start that job, we need to ask what we think is relevant. The next attorney general needs to lead that inquiry.

74. “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); *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)).

75. *Id.* at 96.

76. See ELLEN S. PODGOR ET AL., *WHITE COLLAR CRIMES* 10 (2d ed. 2010).

Deciding how to dedicate the federal government's law enforcement resources, deciding which agency should investigate each category of federal crimes, and deciding whether they have done their jobs well—those three questions are critical ones for the next attorney general. He might not be able to answer them, and any answers that the new attorney general does have may not be correct forever. Nonetheless, Attorney General Barr must start the necessary inquiry. The new attorney general, of course, will find numerous other criminal justice issues on his plate, but the American criminal justice system would be well-served if the nation's next chief law enforcement officer recognizes the importance of the questions discussed here and asks the nation for its help in answering them.