



**Statement of Brett Tolman, former U.S. Attorney and
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**House Judiciary Committee
Subcommittee on Crime and Federal Government Surveillance
“Overreach: An Examination of Federal Statutory and Regulatory Crimes”
April 30, 2024**

Chairman Biggs, Ranking Member Jackson Lee, and distinguished members of the committee: Thank you for inviting me to testify today on the topic of overcriminalization and the overreach of federal statutory and regulatory crimes.

I am a former United States Attorney for the District of Utah, appointed by George Bush in 2006, and a former chief counsel for crime and terrorism for the U.S. Senate Judiciary Committee. Today, I serve as the Executive Director of Right On Crime, a national criminal justice campaign of the Texas Public Policy Foundation, where we focus on conservative, data-driven solutions to reduce crime, restore victims, reform offenders, and lower taxpayer costs.

As U.S. Attorney, I remember a plaque in the halls of justice that read, “The hallmark of fairness in the administration of justice is consistency.”

And yet, we have bestowed an inordinate amount of power and discretion unto prosecutors and administrative agencies to where the hallmark of consistency can be easily lost. This is particularly troubling and true when there are too many federal criminal laws to keep track of, let alone understand.

James Madison warned of this issue in Federalist Paper 62, writing that “it will be of little avail to the people... if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”

Madison was onto something, because we currently have no idea how many crimes are on the books.

The Congressional Research Service, the Justice Department, and the American Bar Association have all tried and failed to count the federal criminal laws. But we believe there may be around 4,000 existing federal criminal laws. But even this massive number is dwarfed by incredibly high estimates that Americans are subjected to about 300,000 federal regulatory offenses.

But nobody really knows.

What we *do* know is that overcriminalization offends both sides of the aisle and is antithetical to our nation’s founding principles.

This overcriminalization issue is a problem for many reasons.

First, criminal laws now cover so many facets of our everyday lives that the government can target citizens with impunity. In fact, one lawyer estimated that the average American commits three felonies a day without even knowing it.¹

And these laws are random and seemingly absurd. Take for instance, the story of three-time Indy 500 winner, Bobby Unser. In 1997, he was convicted of a federal crime that carried up to a \$5,000 fine and six-month prison sentence. He and a friend were riding a snowmobile and got caught in a blizzard in the woods. They abandoned their snowmobiles to seek shelter. They were trapped for two days and two nights, coming close to dying from hypothermia. Little did Unser know, abandoning a snowmobile in a federal wilderness area was a crime. Despite this, the federal government was incensed enough to pursue charges and secure a conviction.

Unser's story is one of many egregious examples of the seemingly benign choices Americans make that can unknowingly lead to criminal sanctions.² So as a basic tenant of living in the freest nation in the world, overcriminalization is troubling.

Second, the volume of crimes is exacerbated by the frequency that they ensnare people. This is due in part to the removal or lack of mens rea elements in many statutory and regulatory criminal offenses. To commit a crime, you have to do it and mean to do it (or at least know that it could happen).

This isn't a new idea. In fact, Supreme Court Justice Robert Jackson—a former U.S. Attorney General and special prosecutor during the Nuremberg trials—wrote in 1952 in *Morissette v. United States*, 342 U.S. 246, 250 (1952):

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

And more recently, in *Rogers v. Tennessee*, the Supreme Court similarly opined that “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning [] bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.” 532 U.S. 451, 459 (2001).

But often, mental state requirements have been largely abandoned. This means that if Congress or an administrative body creates a criminal law without a mens rea element, courts are going to interpret it inconsistently or as a strict liability offense, meaning that just the act itself will be enough to prosecute. Absent a few exceptions, like statutory rape, our nation is categorically

¹ <https://www.wsj.com/articles/SB10001424052748704471504574438900830760842>

² Take, for instance, how it is illegal to do the following:

- Write a check for less than \$1 (18 U.S.C. § 336).
- Roll something down a hillside or a mountainside on federal land (36 C.F.R. § 2.1(a)(3)).
- Allow a pet to make an “unreasonable noise” while on federal land (36 C.F.R. § 2.15 (a)(4)).
- Poll a service worker before an election (18 U.S.C. § 596).
- Sell malt-liquor labeled “pre-war strength.” (27 U.S.C. §§ 205, 207 (2014); 27 C.F.R. § 7.29(f)).

opposed to strict criminal liability. And for good reason. An American shouldn't be guilty of an offense without the government having to prove that he meant to commit that offense.

Third, the bloated administrative state contributes greatly to overcriminalization. As I mentioned, nobody knows how many regulatory crimes there are. By our modest estimates, however, administrative offenses still outnumber criminal laws passed by Congress 75-to-1. Faceless, unelected, and unaccountable bureaucrats have wielded their power to its extremes. Thousands of activities are illegal by those who don't have to justify their decisions to the voter. And the absence of the mens rea requirement is particularly acute with regulatory offenses.

And lastly, overcriminalization is seen through the federal government's encroachment of state prosecution powers. States are the best equipped to deal with most criminal prosecutions. Yes, federal criminal statutes are important, as I know from firsthand experience as U.S. Attorney. But what I mean is that Congress has overstepped into the traditionally state-held space, sometimes unnecessarily replicating state offenses. We ought to largely return criminal prosecution to the states.

These above four points highlight how overcriminalization is problematic in *normal* times. But we are living in a unique time, with political pressures taking precedence over the rule of law and where the Justice Department has the potential to use its power and discretion as a political weapon.

I have worked in the criminal justice system for 25 years and cannot believe how the current DOJ is choosing to throw away the rule of law to attack political enemies. When I was U.S. Attorney, I was happy to prosecute Republicans and Democrats alike, so far as the facts and law supported the charges. But times have changed. Federal prosecutors from the smallest districts to Main Justice benefit from a lack of transparency and massive discretion to target whoever they choose.

Recently, even state prosecutors have jumped on the bandwagon, wielding their discretion as a political sword. The most chilling and relevant example is ongoing with the targeted prosecution of President Trump by D.A. Alvin Bragg. This case didn't have enough evidence to support a legitimate federal prosecution, but woke state prosecutors, seeking to gain some political points, have chosen to target political enemy #1.

Even for Democrats, this should be concerning. Because if it's Donald J. Trump today, it could be you tomorrow.

This is a troubling reality, but one that has been historically warned against. In fact, Justice Scalia, in a 1988 dissent in *Morrison v. Olson*, wrote that “[n]othing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naïve, ineffective, but, in all probability, ‘crooks.’” 487 U.S. 654, 713 (1988).

Prosecutions, even politically inspired ones, are protected under a veil of legitimacy because “[n]othing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution.” *Id.* Grand jury indictments and the mere presence of an investigation make it seem that a criminal charge is not only warranted but will surely lead to a conviction. Congress must pierce this veil. Failing to do so will lead to an illegitimate and

dangerous criminal justice system where “the most dangerous power of the prosecutor” will be unleashed: “he will pick people that he thinks he should get, rather than cases that need to be prosecuted.” *Id.* at 728 (internal quotation and citation omitted).

This issue is exacerbated by the vast number of federal criminal penalties that every American is subjected to. Even the most conscientious and law-abiding members of the public will struggle to not violate at least one law, if only unintentionally. Again, as highlighted by Justice Scalia:

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. *Id.*

So if a prosecutor picks a person who he dislikes, sees a political enemy, or desires to undermine, abuse of power thrives. *See, e.g., id.* at 729 (“If federal prosecutors ‘pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted,’ if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office.”).

As shown, the weaponization of criminal investigations and prosecutions is buttressed by our overcriminalization problem. Both run afoul of a free society and represent moral threats to our nation’s values.

So how do we solve this problem?

Today’s hearing is a step in the right direction. Congress has historically and must continue to play a vital role in reigning in overcriminalization.

So, I first urge each member of this Committee to think about the absurdity of those three felonies a day and practice more restraint in creating more criminal laws. Emotionally driven and reactive legislation creates bad policy. This is because very few criminals, in the commission of a crime, are giving second thought to a list of possible charges or the length of a sentence. They’re worried about one thing: getting caught. Research backs this up.³ So, while creating laws that increase penalties, such as mandatory minimums, may *feel* like it’s helping address public safety, I assure you it’s not. Rather, it’s adding fuel to the overcriminalization fire.

Also, it’s past due for Congress to seriously consider mens rea reform. About 20 years ago, as Chief Counsel on the Senate Judiciary Committee, my former boss, Senator Orrin Hatch, was a strong advocate for mens rea reform. Representative Bob Goodlatte has also been an advocate in this space. Legislative proposals over time, however, have withered on the vine. This committee

³ <https://www.ojp.gov/pdffiles1/nij/247350.pdf>

can revive this issue. It should do so by making sure that each criminal offense penned by Congress has a mental state included, and that all regulations and statutes would have a default mens rea provision applied in the absence thereof.

The executive branch also plays a role in correcting course. President Trump issued an Executive Order in the waning days of his administration entitled “Protecting Americans from Overcriminalization through Regulatory Reform.” It required agencies that issue regulations with criminal penalties to “be explicit about what conduct is subject to criminal penalties and the ‘mens rea’ standard applicable to those offenses.” The order, taking heed of Madison’s Federalist Papers, ordered agencies to make all regulatory criminal laws “clearly written so that all Americans can understand what is prohibited and act accordingly.” Unfortunately, with a stroke of his pen, President Biden undid this criminal justice reform. This is despite then-Senator Joe Biden saying, as head of the Senate Judiciary Committee, that he worried that we have assumed a tendency to federalize, “[e]verything that walks, talks, and moves.”⁴ To that end, members of this committee should press President Biden about his hypocrisy and urge him to reinstate Trump’s anti-overcriminalization executive order.

All three branches should do what they can to reign in the administrative state. Agencies must stop creating new criminal offenses as a method of regulating business activities. As a practical matter, regulation is better handled through fines and market forces, not a criminal penalty. And more so, the power to create crimes should be put in the hands of the people’s representatives, where it has always belonged. For that reason, Congress should conduct thoughtful and direct oversight of regulatory offenses, urging those laws to include a mens rea element across the board. Congress can also reign in the ability of federal agencies to promulgate regulations that include criminal elements without the involvement of Congress. And the legislative branch should lead by example because the overpowerful administrative state is not likely to change course on its own.

This hearing is an important step to educate other members of Congress and the American people about the absurdity and dangers of overcriminalization. It threatens our nation’s public safety, individual liberties, and the fair administration of justice. Consistent application of the law is a hallmark of the administration of justice. And addressing the overcriminalization problem is a critical step to achieving this laudable goal. I appreciate your time and look forward to your questions.

⁴ <https://rightoncrime.com/judge-neil-gorsuch-on-overcriminalization/>