



**Statement of Brett Tolman, former U.S. Attorney and
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**U.S. House Judiciary Committee
Subcommittee on Crime and Federal Government Surveillance
“Criminalizing America: The Growth of Federal Offenses and Regulatory Overreach”**

May 7, 2025

Chairman Biggs, Ranking Member McBath, and distinguished members of the Subcommittee: thank you for inviting me to participate in today’s hearing on overcriminalization.

My name is Brett Tolman, and I am 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. I am also a former United States Attorney for the District of Utah, appointed by George W. Bush in 2006 and a former chief counsel for crime and terrorism for the U.S. Senate Judiciary Committee.

Overcriminalization occurs when the government creates too many laws. A nation based on the rule of law should not be ruled solely by laws. Overcriminalization inverts this and fuels systemic abuse and degradation of the rule of law.

The total number of federal laws is largely unknown but is estimated to be over 300,000.¹ And it keeps growing. As of 2018, the U.S. Code encompassed 54 volumes and approximately 60,000 pages.² Over the last decade, Congress has adopted around 300 new laws each session.³

Federal agencies have been busy, too. When the Federal Register began in 1936, it was 16 pages long. It now adds more than 70,000 new pages each year.⁴ The 2024 *Federal Register* closed out at 106,109 pages, the highest count ever.⁵ Given this breadth, it should come as no surprise that the average American commits, on average, three felonies a day.⁶

How has this become the standard of our criminal justice system?

Overcriminalization goes against the basic tenets of living in the freest nation in the world: consistency and fair notice in the application of the law. As we punish and incarcerate Americans who may have made a mistake where they did not victimize, many will come out of the system a better criminal and likely commit more crimes.

¹ https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes/#_ftnref17.

² <https://www.gpo.gov/how-to-work-with-us/agency/congressionally-mandated-reports>.

³ <https://www.govtrack.us/congress/bills/statistics>.

⁴ https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-08/cfr_pages_by_calendar_year.pdf.

⁵ <https://cei.org/publication/10kc-2025-numbers-of-rules/>.

⁶ <https://www.wsj.com/articles/SB10001424052748704471504574438900830760842>.

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Imposing a criminal penalty should be the heaviest artillery at our society's disposal. Incarceration was once largely reserved for addressing obvious morally culpable behavior. Today, we punish inconsistently and incarcerate indiscriminately with no impact on public safety.

Take, for example, the recent case against Charles and Heather Maude. Under the Biden DOJ, criminal charges were brought against the Maudes, a South Dakota family who has a small cattle and hog operation. This family endured a senseless politically motivated prosecution waged by the Biden Administration over 25 acres of federal land.

The Maudes were not criminals. They fenced in land that had been part of their ranch for over 100 years. But, empowered by pointless laws and unfettered discretion, the minor land dispute devolved into an overzealous criminal prosecution. No criminal penalty should have even existed for a land dispute. And the Maudes should never have been charged.

Fortunately, under the Trump Administration, overcriminalization and senseless prosecutions will not stand. Thanks to Attorney General Pam Bondi and Agriculture Secretary Brooke Rollins, the criminal charges against Charles and Heather Maude were dismissed last week.⁷

Overcriminalization is an existential threat to our criminal justice system and the rule of law. Rogue prosecutors ignore certain crimes and pick and choose who are criminals. Politically biased judges find creative and questionable ways to legitimize an outcome. And the media creates controversy, ignoring the routine banality of government work and instead scours for government gossip.

Disregard for the rule of law and increased overcriminalization has led to the overincarceration of non-violent Americans; the abuse of prosecutorial discretion; the reckless power of the administrative state; and lawfare facilitated by political judges.

Overcriminalization & Overincarceration

The United States is a world leader in incarceration because of overcriminalization. Too many individuals are ensnared by the criminal justice system and subjected to overly harsh sentences, even though such imprisonment does not necessarily enhance public safety. Indeed, almost half of federal inmates are nonviolent drug offenders.⁸

Our federal prisons have been operating for years at over 100% capacity.⁹ And those who emerge from prison then face a different kind of overcriminalization in the form of collateral

⁷ <https://www.usda.gov/about-usda/news/press-releases/2025/04/28/trump-administration-announces-us-government-has-dropped-criminal-charges-against-small>.

⁸ https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

⁹ <https://www.forbes.com/sites/walterpavlo/2022/02/07/statistics-show-federal-bureau-of-prisons-unable-to-implement-key-policies-during-crisis/>; *see also* <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/#:~:text=Before%20the%20pandemic%2C%20nine%20state,into%20prisons%20across%20the%20country>.



consequences: loss of access to jobs, housing, voting rights, second amendment rights, licenses, and public benefits.

To add fuel to the fire, hundreds of thousands of Americans remain on some kind of community supervision for years after their release. For the low-level offenders, supervision is often arbitrary and an unnecessary burden to parole officers who could better spend their time restricting former violent offenders with an eye on public safety.

Nationwide, it is estimated that 1 out of every 47 adults is under some form of correctional supervision.¹⁰ And some estimates report that the federal supervised release system alone is a \$500 million drain on the taxpayer every year.¹¹ The tradeoff of such an investment is that supervised release will keep our communities safe. But with a recidivism rate hovering around 50%, it is willful ignorance to assert that the current supervised release system is working. And it is not serving taxpayers well.

Lawmakers on both sides of the aisle recognize the urgency to streamline the federal supervision system. The *Safer Supervision Act*, led by Representative Wesley Hunt in the House with bipartisan support in the House and Senate, ensures that supervision is more effective, fair, and tailored to individual needs.¹² Current supervision policies fuel overcriminalization, empowering judges to apply a one-size-fits-all approach. This often keeps people under supervision for too long or fails to provide the right level of support.¹³ That is why the *Safer Supervision Act* is a great tool to address overcriminalization.

Overcriminalization & the Abuse of Prosecutorial Discretion

The breadth of criminal penalties alone is problematic. But in the heightened political era we live in, prosecutorial discretion is the tip of the spear.

Prosecutors – state and federal alike – are granted the awesome power of discretion. They choose who to charge, what to charge, and what sentence to recommend. This discretion is a powerful tool that is often wielded responsibly. However, as we have witnessed in the last few years, too many prosecutors are abusing their discretion in targeted and politicized ways.

On one hand, prosecutors must have tools available to convict criminals. I was the U.S. Attorney for Utah, prosecuting violent criminals including the kidnapper of Elizabeth Smart. I know firsthand that having the right tools at your disposal can lead to appropriately tough sentences. But on the other hand, those tools must be limited by constitutional principles and thoughtful restraints.

¹⁰ This includes the estimated one million Americans behind bars and those on federal probation or parole.

¹¹ https://www.realclearpolicy.com/articles/2024/03/27/congress_must_pass_the_safer_supervision_act_1021209.html.

¹² H.R. 5005 (<https://www.congress.gov/bill/118th-congress/house-bill/5005/text>); S. 2681 (<https://www.congress.gov/bill/118th-congress/senate-bill/2681>).

¹³ See, generally, <https://rightoncrime.com/the-safer-supervision-act/>.

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One such restraint on unbridled prosecutorial discretion is requiring the government to prove criminal intent. Put in simple mathematical terms, mens rea + actus reus = crime. If a person has the intent to commit the crime (mens rea) and performs the act to follow through on that intent (actus reus), a judge or jury can have the reasonable belief that the crime has been committed. This formula is the backbone of our criminal justice system.

Tragically, the mens rea element has increasingly been abandoned, written in an unclear way, or underutilized. The flaw with eliminating or diminishing state of mind requirements is that Americans can be convicted and even imprisoned based solely on what they do, not whether they mean to do it.

The degradation of a critical element in criminal law will break down legitimacy in prosecutions, convictions, and even convict the innocent. To restore normalcy and preserve the criminal justice system, reforms should be made to improve the consistent use of the mens rea element in federal criminal law. That's why I applaud Chairman Biggs for leading this effort with his introduction of the *Mens Rea Reform Act*, which would insert a default mens rea element where it is currently lacking.¹⁴ Mens rea improvements are frankly one of the most important reforms to overcome overcriminalization.

Overcriminalization & the Administrative State

Bureaucracy – the administrative state – is also a massive contributor to our overcriminalization crisis. As I mentioned, nobody knows how many regulatory crimes are on the books. No one agency keeps track. By modest estimates, however, administrative offenses still outnumber criminal laws passed by Congress 75-to-1.

To put a finer point on it, consider the following: in 2015, Congress adopted approximately 100 new laws. The same year, federal agencies collectively issued 3,242 final rules and published another 2,285 proposed rules.¹⁵ That's more than 5,000 in just one year.

Faceless, unelected, and unaccountable bureaucrats wield their power to the extreme. In fact, 71% of the nearly 3,000 rules issued by the Department of Health and Human Services between 2001 and 2017 were issued by lower-level officials rather than the Senate-confirmed leaders. At the Food and Drug Administration, the number was 98%.¹⁶ Thousands of activities have been deemed illegal by those who never have to justify their decisions to the voter. And when coupled with the absence of the mens rea requirement, it is plain to see how overcriminalization is particularly oppressive from regulatory offenses.

The incredible volume of regulatory crimes and unaccountability means that Americans can be ensnared and easily targeted. Do you think this can't happen to you? It has been reported that

¹⁴ H.R. 59 (<https://www.congress.gov/bill/119th-congress/house-bill/59/text>).

¹⁵ <https://regulatorystudies.columbian.gwu.edu/reg-stats>; see also <https://sgp.fas.org/crs/misc/R43056.pdf>.

¹⁶ <https://pd.pacificlegal.org/HHSReport>.

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Americans today are “ten times more likely” to wind up in a case before a federal agency than a court.¹⁷

Agencies must be reined in. DOGE put a spotlight on this problem. But Congress must act in kind and hold lawmakers and federal agencies accountable.

That brings us to one of the most commonsense pieces of legislation – Representative Chip Roy’s *Count the Crimes to Cut Act*.¹⁸ This bill would require the Attorney General and heads of every federal agency to produce a report of all the federal criminal statutes and regulations that have criminal penalties. For each federal criminal offense, the report would outline the elements, the penalties, the number of prosecutions brought by the DOJ in the last 15 years, and the mens rea element.

The *Count the Crimes to Cut Act* tackles the overcriminalization problem head-on by finally requiring a fulsome audit and evaluation of federal statutory and regulatory laws, something the Congressional Research Service, Department of Justice, and American Bar Association have all tried and failed to do.¹⁹ The *Count the Crimes to Cut Act* deserves bipartisan support and is a must-pass bill to address overcriminalization.

Overcriminalization & Judges

Lastly, the federal bench is a developing area where overcriminalization runs rampant.

In recent years, lower courts have abused judicial powers to exert themselves into policymaking, rather than deciding “cases and controversies” as the Constitution tasks them to do.²⁰ Federal district courts’ abuse of nationwide rulings veers outside of their constitutional lane, defies nearly two centuries of precedent, politicizes the courts and incentivizes “forum shopping” to find a sympathetic judge. This practice undermines public confidence in the federal judiciary.

This problem is exacerbated when there are hundreds of thousands of criminal laws on hand. A biased judge who prioritizes policymaking over decision-making may be enticed and even emboldened by the vastness of the criminal code to render decisions that are inconsistent with the case.

Just in the last few weeks, federal district court judges across the country have ruled that President Trump may not undergo certain actions, including deportation actions, requiring voters to prove they are citizens, and defunding sanctuary cities that violate federal law.²¹ As some have argued,

¹⁷ <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Testimony-Turley-2016-04-20.pdf>.

¹⁸ H.R. 8672 (<https://www.congress.gov/bills/118/congress/house-bills/8672/text>).

¹⁹ See, generally, <https://www.congress.gov/118/meeting/house/117202/witnesses/HHRG-118-JU08-Wstate-TolmanB-20240430.pdf>.

²⁰ Article III, Section 2, Clause 1.

²¹ <https://x.com/ScottJenningsKY/status/1915749864614375627>



the politically fueled litigation and forum shopping is to fulfill one outcome: stop Trump in his tracks and run out the clock on his Presidency.

This is the most recent slew of actions that are grabbing the headlines. But a similar argument could be made – and indeed *has* been made – by Democrats. It was not long ago that cries to expand the size of the Supreme Court of the United States were commonplace due to the perceived political bias of some justices.²²

This is an issue for both sides of the political aisle and should be addressed.

Article III judges are not the only ones at issue here. In fact, administrative law judges have more discretion and power to abuse the system – again fueled by overcriminalization. As I mentioned, it is increasingly commonplace that a person can be heralded into an administrative court. And odds are, if that happens, you will likely lose. Take for example the unusually strong track record at the Securities and Exchange Commission (SEC). From October 2010 – March 2015, the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases brought to a federal court.²³

This hearing is not focused on judicial reform. But I raise this issue before the subcommittee today to show how overcriminalization is part of the conversation when thinking about how to restore and promote the rule of law on the bench.

Conclusion

It is a commonplace and disturbing maxim, most popularly stated by Stalin’s secret police chief: “Show me the man and I’ll show you the crime.”²⁴ But this troubling omen has been and can continue to be a reality unless and until overcriminalization issues are solved.

I mentioned several policy solutions throughout my testimony and urge this Committee to lead the effort and take them head on. Failing to do so may untether our great nation from its principles of equal justice under the law.

Justice Neil Gorsuch argued in his recent book that overcriminalization will slowly tear down the institutions created by the Bill of Rights. He wrote:

Instead of governing ourselves through our elected representatives, our laws will be made by officials who do not answer to us. Instead of having independent judges to decide our disputes, we will have ones who are forced to account to others. Instead of jealously

²² See, e.g., <https://www.forbes.com/sites/saradorn/2023/07/05/democrats-push-for-court-packing-after-controversial-supreme-court-rulings-why-the-proposal-is-likely-doomed/>, <https://www.politico.com/news/magazine/2024/07/29/biden-supreme-court-reform-00171667>, <https://www.rpc.senate.gov/policy-papers/the-democrats-plan-to-pack-the-supreme-court>, and <https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132>.

²³ <https://texaslawreview.org/wp-content/uploads/2016/10/Mark-94-SeeAlso.pdf>.

²⁴ See, e.g., <https://oxfordeagle.com/2018/05/09/show-me-the-man-and-ill-show-you-the-crime/>.

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guarding our rights to think, speak, pray, and pursue happiness, we will allow our liberties to become more and more circumscribed, all in the name of better protecting our own well-being. Instead of a rule *of* law designed to ensure fair notice, equal treatment, and room for individual flourishing, we will have rule *by* laws that can be applied and altered in ways that few can anticipate, that often favor the connected and moneyed, and that come to cover nearly every facet of our lives.²⁵

I take Justice Gorsuch's cautionary wisdom to heart, and I hope that members of this subcommittee and Congress will, too.

Thank you again for your time and I look forward to your questions.

²⁵ Gorsuch, Neil and Nitze, Janie, [Over Ruled: The Human Toll of Too Much Law](#).