

LEGAL MEMORANDUM

No. 242 | MARCH 1, 2019

Overcriminalization in the 115th Congress

John-Michael Seibler and Jonathan M. Zalewski

Abstract

This Legal Memo discusses several laws introduced in the 115th Congress that illustrate the problems of Congress's overuse and misuse of substantive criminal laws—a troubling trend generally referred to as “overcriminalization.” All three branches of the federal government have identified overcriminalization as a serious issue that demands attention. Fortunately, since the House Judiciary Committee authorized a task force to explore the problem of overcriminalization in 2013, the pace of enactment of superfluous or otherwise unnecessary criminal laws has slowed. Unfortunately, the 115th Congress failed to address the problems of overcriminalization. This should be a priority for the 116th Congress. Among other potential reforms, Congress should consider mandating an inventory of all federal criminal laws and regulations, setting a default mens rea standard, and repealing criminal laws that are redundant, overreaching, or otherwise problematic.

In the final days of the 115th Congress, lawmakers took a significant first step toward meaningful criminal justice reform by passing the First Step Act. This new law provides federal corrections and sentencing reforms based on successful conservative state policies that have proven to help lower recidivism and reduce crime.¹ There remains, however, a broad consensus that Congress has more work to do on criminal justice reform. One problem in need of correction is Congress's continued overuse and misuse of substantive criminal law, a troubling trend known as “overcriminalization.”

When the first Congress enacted America's first federal criminal code,² it contained 23 traditional common-law crimes, including murder, manslaughter, larceny, perjury, and bribery.³ All of those crimes

KEY POINTS

- It is a positive sign that the 115th Congress slowed the pace of enactment of criminal laws, enacted criminal laws related to genuine national interests that address significant problems, and enacted only one law with overcriminalization concerns.
- The 115th Congress, however, did introduce a significant number of bills that, had they been enacted, would have duplicated federal and state laws, expanded federal police power, and drained more federal resources from legitimate national interests.
- The resources devoted to each of those problematic bills would have been far better spent on confirmations, policy debates, and other important functions of Congress.
- Still, several bills that were introduced in the 115th Congress—including legislation to clean up the federal code and add a default mens rea requirement to future federal laws—show that some leaders in Congress take America's overcriminalization problem seriously.

This paper, in its entirety, can be found at <http://report.heritage.org/lm242>

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214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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were, and still are, universally understood to be inherently morally wrongful acts.⁴ Since then, however, Congress has enacted more than 4,500 criminal laws—more than half of them since 1970. Experts estimate that federal agencies have promulgated another 300,000 or more regulatory crimes.⁵

This trend is particularly troublesome because the substance of many of these modern offenses is markedly different from that of the Founders' original list of crimes. Many offenses on the books today do not relate to conduct that the average person would identify as inherently morally blameworthy.⁶ Instead, many so-called public welfare offenses concern technical issues and are written in a blend of legal and scientific jargon.⁷

Those circumstances mark a dangerous departure from the constitutional requirement that Congress must enact criminal laws using language that people of average intelligence—not just highly trained experts—can readily understand.⁸ It is true that “ignorance of the law is no excuse.”⁹ But too often, it is a reality.¹⁰

This problem is exacerbated by the lack of a strong *mens rea* (Latin for “guilty mind”) requirement in many modern federal criminal laws and regulations. Traditional tenets of criminal law provide that only individuals who intentionally committed a crime should be criminally punished because “intentional wrongdoing is more morally culpable than accidental wrongdoing.”¹¹ Today, however, we have many strict-liability crimes that require no proof that a defendant acted with a guilty mind.¹² And even when *mens rea* requirements do appear in federal criminal offenses, they are often so weak that they fail to “protect defendants from punishment for ‘making honest mistakes.’”¹³

For example, many criminal statutes require a defendant to have merely acted “knowingly”—that is, to have been conscious when he acted—which is not an exceptionally difficult standard for the government to prove.¹⁴ Worse, other criminal statutes borrow standards from the realm of civil liability—cases involving car crashes, industrial mishaps, and other accidents—such as negligence and recklessness.¹⁵ In such cases, everyday citizens can be held liable for violating criminal laws regardless of whether they knew that their action was wrongful.

Finally, Congress often considers legislation purporting to address matters traditionally believed to belong under the purview of the states. This specific

trend, called overfederalization, expands the power of the federal government at the expense of the states. Congress's intervention into local criminal matters, like arson, assault, and animal cruelty, needlessly drains scarce federal resources from national interests such as illegal immigration, foreign cyberattacks, international human and drug trafficking, and financial crimes.¹⁶ In turn, federal criminal cases that belong in state court needlessly tax the federal judiciary's resources.¹⁷

Ultimately, even earnestly law-abiding citizens can and, in rare and unfortunate cases, do unwittingly find themselves in serious trouble with the federal government for relatively minor mistakes and misdeeds.¹⁸ Fortunately, some policymakers are aware of the problem. Conservative leaders on Capitol Hill, including former House Judiciary Committee Chairman Bob Goodlatte (R-VA)¹⁹ and former Senate Finance Committee Chairman Orrin Hatch (R-UT),²⁰ both of whom retired after the 115th Congress, had long strived to address overcriminalization. Several U.S. Supreme Court Justices have expressed concern about the problem.²¹ And former Attorney General Jeff Sessions conveyed awareness of the issue during his confirmation hearing.²²

Unfortunately, awareness has not translated into action. The 115th Congress, like its predecessors, failed to reverse the course of overcriminalization. Although there were certainly some positive legislative developments in the House and Senate, overcriminalization remains a major problem in need of a remedy—and should be a priority for the 116th Congress.

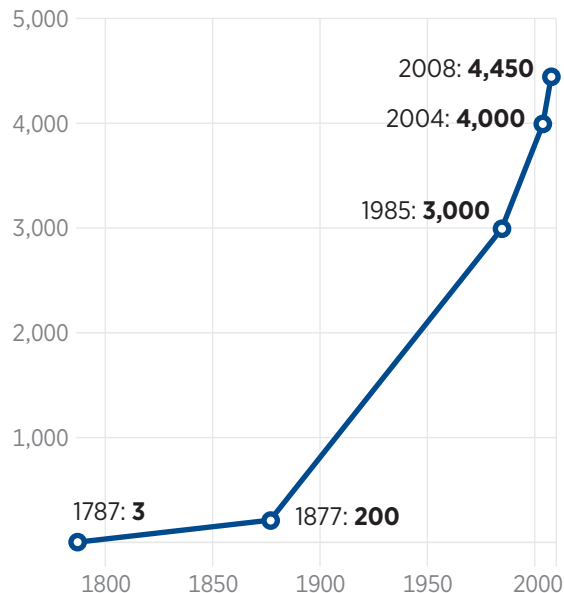
The 115th Congress and Overcriminalization

Slowing the Pace of Overcriminalization. From 2000 to 2007, Congress enacted 450 additional federal criminal laws, a pace of approximately *one new crime per week*.²³ In recent years, however, Congress has slowed the pace of overcriminalization, enacting fewer criminal laws than it has in the past.²⁴ Members of the 109th Congress (2005–2007) introduced 203 bills that would have provided for 446 nonviolent criminal offenses, and 36 of those bills became law.²⁵ The 113th Congress established an Overcriminalization Task Force to study the problem of overcriminalization and, while no proactive legislation was ultimately enacted, the task force held important hearings on the subject; Heritage scholars noted after the first session of the 113th Congress that the pace of

CHART 1

Explosive Growth of Federal Criminal Law

NUMBER OF FEDERAL CRIMES (SELECT YEARS)



SOURCES: Crimes Act of 1790, 1 Stat. 112; American Bar Association, “The Federalization of Criminal Law,” 1998; John S. Baker, Jr., “Revisiting the Explosive Growth of Federal Crimes,” Heritage Foundation *Legal Memorandum* No. 26, June 16, 2008, <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes>.

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overcriminalization had slowed substantially.²⁶ That trend continued in the 115th Congress (2017–2019) during which Members introduced approximately 154 bills that carried criminal penalties, and enacted six of them.²⁷

While tapping the brakes on the overall pace of overcriminalization, the 115th Congress still wasted precious time and resources drafting and considering legislation with one or more problems associated with overcriminalization—be it overfederalization, duplication of existing offenses, a lack of adequate *mens rea* requirements, or other concerns. Congress also missed the opportunity to enact meaningful overcriminalization reforms.

What follows are a few examples that illustrate the ongoing problem.

Examples of Overcriminalization

Eliminating Kickbacks in Recovery Act of 2018.²⁸ Senators Marco Rubio (R–FL) and Amy Klobucher (D–MN) introduced the Eliminating Kickbacks in Recovery Act of 2018, which never received a stand-alone vote in the Senate. It was nevertheless enacted into law as part of the Support for Patients and Communities Act, which provided federal funding and assistance to combat the country’s opioid epidemic.²⁹ “The [law]...makes it a federal crime for sober homes—residential facilities that treat people suffering from drug dependence—to provide certain monetary kickbacks (or non-monetary benefits) to individuals or organizations who refer patients to those facilities for treatment.”³⁰ Often, sober homes use fraudulent private or public health care reimbursements to fund illegal kickback schemes for the purpose of recruiting more patients.³¹

The law’s proponents claimed that a new law was necessary to combat private health care fraud in the addiction treatment industry, but that simply is not the case.³² Private health insurance fraud, including kickback schemes, was already a crime under federal law as well as under many state laws, and the Department of Justice actively enforces the federal health care fraud statutes. In fact, the Department carried out the largest health care fraud takedown in its history almost exactly one year *before* the bill was introduced.³³ Still, the law passed—adding one more unnecessary federal criminal law to the books.

The Unmasking Antifa Act.³⁴ Representative Daniel Donovan (R–NY) introduced The Unmasking Antifa Act which, if enacted, would have enhanced criminal penalties for individuals who threaten or assault another individual while wearing a disguise or a mask.³⁵ Representative Donovan’s bill was aimed at curbing violent acts by the left-wing, anti-fascist organization Antifa, a riotous group of protestors notorious for covering their faces with bandanas and masks.³⁶

Antifa’s criminal conduct primarily occurs, however, at the state and local levels, where assaulting, harassing, or threatening another individual is already a crime. And at least 18 states already have “anti-masking” laws, which were enacted between 1920 and 1950 because of the Ku Klux Klan, to criminalize the act of wearing a mask to intimidate others.³⁷ While violent individuals and organizations must be held accountable for criminal acts, the Unmasking Antifa Act was and is not necessary for that to happen.

The states are more than able—and willing—to police this type of crime without federal intervention.³⁸ The bill died in committee.

The Securing Airspace for Emergency Responders Act. In light of severe fires in Western states and several incidents of drones interfering in wildfire operations, Senators Cory Gardner (R-CO) and Michael Bennet (D-CO)—along with Representative Scott Tipton (R-CO) in the House³⁹—introduced the Securing Airspace For Emergency Responders Act. Their goal was to make interference with fire-fighting operations over wildfires a federal felony.⁴⁰ Laws are already on the books, however, in Colorado⁴¹ and other fire-ravaged states⁴² and at the federal level to punish that wrongdoing.⁴³

Congress could have held a more meaningful debate on how best to provide state and local first responders with the tools and the legal authority they need to mitigate threats posed by hostile or reckless drones. Instead, Members put forth a redundant bill. That missed opportunity only further delays more effective solutions, such as taking steps toward developing the capability to identify, investigate, and prosecute wrongdoers who use drones to commit the relevant crimes.⁴⁴ The bill did not pass.

The Protect and Serve Act. In 2018, both chambers of Congress observed Police Week—an important annual opportunity to honor our brave law enforcement professionals who paid the ultimate price while in the line of duty—by introducing the Protect and Serve Act. Both the House and Senate version would have, if enacted, provided fines and up to 10 years’ imprisonment for knowingly causing serious bodily injury to a police officer.⁴⁵ The bill’s basis in the U.S. Constitution was dubious at best, and it would have blatantly and needlessly duplicated laws in all 50 states. Yet the House voted 382–35 in favor of its passage.

Fortunately, the bill failed in the Senate—not because police officers are undeserving of protection, but because there is no state or locality that would refuse to vigorously pursue and prosecute those who commit the crimes contemplated in the Act. In fact, a recent trend among the states has been to raise their own criminal penalties for attacking police officers.⁴⁶ It would not only be a waste of federal resources, but it would deprive any residents in the affected locality of its opportunity to see justice done and carried out in a competent manner by their own local officials.

The “Flamethrowers? Really? Act.” For the second Congress in a row, Representative Eliot Engel (D-NY) introduced the “Flamethrowers? Really? Act,” which he modeled after a Saturday Night Live comedy sketch.⁴⁷ The bill would have made it a federal crime to transfer or possess a flamethrower, punishable by fines and up to 10 years behind bars. There are at least three reasons why that would be a major disservice to the public.

First, there are lawful commercial uses for flamethrowers—in roofing, agriculture, forestry, and clearing massive snowfalls, to name a few—that the bill would criminalize. Second, there are abundant state and federal laws that prohibit any criminal use for a flamethrower, including arson, assault, murder, and manslaughter, as well as specific flamethrower regulations in states that have a genuine need for them.⁴⁸ Third, there is a dearth of flamethrower-related criminal cases and no reports of flamethrower-related deaths in Engel’s home state of New York during the 115th Congress. Yet dozens of people die each year due to popping champagne corks, falling vending machines, and being stung by bees.⁴⁹ Sadly, a “Bees? Really? Act” would have been a more legitimate, albeit still laughable, object of Congress’s attention. The bill did not pass.

Pet and Women Safety Act of 2017.⁵⁰ Representative Katherine Clark (D-MA) introduced the Pet and Women Safety Act of 2017 designed “to protect domestic violence victims ‘from trauma caused by acts of violence or threats of violence against pets.’”⁵¹ The bill had a laudable aim. But one provision would have unnecessarily created a federal crime of harassment or intimidation of a pet that causes “substantial emotional distress” to the owner.⁵² As you might expect, animal abuse is already a crime in virtually every state.

And “while no one condones violence against any pet, common sense and principles of federalism in law enforcement suggest that the clear and compelling federal interests to pursue gangs, cartels, and the like do not as clearly apply to hunting down animal abusers.”⁵³ The bill is one more example of Congress’s costly efforts to exert federal authority where it simply does not belong. Fortunately, this bill also failed to pass.

Positive Legislative Developments.

The 115th Congress failed to take affirmative steps to address overcriminalization, but it was not for want of trying by some individual Senators and

Representatives. Three particular efforts were aimed at addressing some of the problems created by overcriminalization. First, Congressman Steve Chabot (R-OH) introduced the Clean Up the Code Act of 2018, which would have repealed nine obsolete federal criminal laws.⁵⁴ The bill passed the House, but the Senate never acted upon it. Nevertheless, a message was sent to the 116th Congress that a more focused effort on ridding the federal criminal code of obsolete and redundant bills is much needed.⁵⁵

Second, former Senator Orrin Hatch (R-UT) introduced the Mens Rea Reform Act of 2018, which would take a modest and sensible approach to reforming the federal criminal code.⁵⁶ While it did not pass, the bill would have required that all federal crimes enacted after the bill became law include a default *mens rea* requirement unless Congress specified another state of mind for the offense.⁵⁷ This bill would have made significant progress towards restoring the American justice system to one that punishes only those with a guilty mind, not those who have committed an innocent mistake.

Third, Senator Chuck Grassley (R-IA) introduced the Sentencing Reform and Corrections Act of 2017.⁵⁸ In an effort to address the overcriminalization problem, the bill included a provision that ordered the Attorney General to take an inventory of, among other things, the number of federal criminal offenses in existence, both statutory and regulatory; to report the inventory to Congress; and to make the list freely accessible to the public.⁵⁹ This report would mark a tremendous step toward providing the public fair notice of the criminal law to which it is entitled,⁶⁰ identifying any obsolete, redundant, or otherwise unnecessary criminal offenses that Congress should repeal; and any other issues in the substantive criminal law. While the bill never received a vote, some other portions of the bill related to sentencing reform were included in the enacted bipartisan criminal justice reform bill, the First Step Act, the historic piece of legislation aimed at rehabilitating federal inmates and reducing recidivism and crime rates.⁶¹

There is some hope that the next Congress will take up these and other important reforms. Senator Mike Lee (R-UT) has long championed criminal justice reform, as have several of his colleagues returning to the 116th Congress. The House will also retain several champions of criminal justice reform,

including Doug Collins (R-GA). In the final days of the 115th Congress, Senator Tom Cotton (R-AR) expressed support for several criminal justice reform measures that should be prioritized in the 116th Congress.⁶² First, Cotton wrote, “we need to clean out the federal criminal code,” because “many of” the unknown number of “federal crimes would be funny, if they were not so dangerous to our liberty.”⁶³ Second, Cotton called on Congress to enact *mens rea* reform to ensure that Americans are not “at risk of arbitrary prosecution for trivial conduct,” but “that, at a minimum, a defendant should have known his conduct was wrong before facing criminal charges.”⁶⁴

There is much more that the 116th Congress should do, including enacting legislation to ensure that the federal government identifies all of the criminal laws and regulations that are on the books today, and to provide those to the public, free of charge, on a government website.⁶⁵

Conclusion

It is a positive sign that the 115th Congress slowed the pace of enactment of criminal laws, enacted criminal laws related to genuine national interests that address significant problems, and enacted only one law with overcriminalization concerns. The 115th Congress, however, did introduce a significant number of bills that, had they been enacted, would have duplicated federal and state laws, expanded federal police power, and drained more federal resources from legitimate national interests. The resources devoted to each of those problematic bills would have been far better spent on confirmations, policy debates, and other important functions of Congress.

Still, several bills that were introduced in the 115th Congress—including legislation to clean up the federal code and add a default *mens rea* requirement to future federal laws—show that some leaders in Congress take America’s overcriminalization problem seriously. That unfinished work should be a priority for the 116th Congress.

—*John-Michael Seibler is a former Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation. Jonathan M. Zalewski is Visiting Legal Fellow and Koch Associate in the Meese Center.*

Endnotes

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3. FED. JUDICIAL CTR., *supra* note 2, <https://www.fjc.gov/history/timeline/crimes-act-0>.
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5. AM. BAR ASSOC. CRIM. JUST. SEC. TASK FORCE ON THE FEDERALIZATION OF CRIM. L., THE FEDERALIZATION OF CRIMINAL LAW, 9 (1998), available at [hereinafter TASK FORCE REPORT]; Overcriminalization, *Solutions 2018: The Policy Briefing Book*, HERITAGE FOUNDATION, <https://solutions.heritage.org/protecting-the-rule-of-law/over-criminalization/>; see Steven Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 538 (“According to a 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970.”).
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16. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL’Y 715, 721 (2013); Edwin Meese III, *The Dangerous Federalization of Crime*, HOOVER DIGEST (July 1999), <https://www.hoover.org/research/dangerous-federalization-crime>; Brian W. Walsh, *Doing Violence to the Law: The Over-Federalization of Crime*, HERITAGE FOUNDATION (June 9, 2011), <https://www.heritage.org/crime-and-justice/commentary/doing-violence-the-law-the-over-federalization-crime>; John-Michael Seibler & Elizabeth Slattery, *This Bill Would Drag the Federal Government Into Disputes Over Pets*, DAILY SIGNAL (Feb. 24, 2017), <https://www.dailysignal.com/2017/02/24/this-bill-would-drag-the-federal-government-into-disputes-over-pets/>.
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22. "So many [crimes] like larceny and murder...have traditionally been totally the responsibility of the states," said then-Senator Jeff Sessions, adding "Now we have forgotten that distinction, that limitation on federal power." John-Michael Seibler, *Trump's Opportunity to Work With Congress to Scrap Unneeded Criminal Laws, Rules*, DAILY SIGNAL (Mar. 01, 2017), <https://dailysign.al/2R8Gunx>.
23. *Id.*
24. See Bernick et al., *supra* note 13.
25. *Id.* at 3.
26. In August 2014, Heritage scholars reported that Members of the 113th Congress (2013–2015) had introduced 115 bills that carried criminal penalties and enacted three of them. *Id.*
27. We arrived at these figures by searching on *Congressional Quarterly* (CQ) for all bills introduced during the 115th Congress that contained the terms "'criminal penalty' or 'criminal penalties,'" then searching within those results for "'prison' or 'fine'"; reading the 182 bills that those search terms generated; and identifying the bills that provided new criminal penalties or expanded existing penalties to reach additional conduct. We referenced both CQ and Congress.gov to check the final action for each bill. While we experimented with various search terms to isolate only those that provided for new criminal penalties, there is, of course, a possibility that our search omitted some bills. Thus, these figures are meant to convey approximations and not exact figures. The enacted laws include: The Abolish Human Trafficking Act of 2017, S. 1311, 115th Cong. (enacted Dec. 21, 2018), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1311>; The Amy, Vicky, and Andy Child Pornography Victim Assistance Act, S. 2152, 115th Cong. (enacted Dec. 7, 2018), available at <https://www.congress.gov/bill/115th-congress/senate-bill/2152>; The Frank LoBiondo Coast Guard Authorization Act of 2018, S.140, 115th Cong. (enacted Dec. 4, 2018), available at [https://www.congress.gov/bill/115th-congress/senate-bill/140?q=%7B%22search%22:\[%22S.+140%22\]%7D&r=7](https://www.congress.gov/bill/115th-congress/senate-bill/140?q=%7B%22search%22:[%22S.+140%22]%7D&r=7); SUPPORT for Patients and Communities Act, H.R. 6, 115th Cong. (enacted Oct. 24, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/6>; The Protecting Religiously Affiliated Institutions Act, S. 994, 115th Cong. (enacted Sept. 28, 2018), available at <https://www.congress.gov/bill/115th-congress/senate-bill/994>; and The Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (enacted Apr. 11, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1865>.
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32. *Id.*
33. *Id.*
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36. Matthew Vadum, *Origins of Antifa*, CAP. RES. CTR. (Apr. 16, 2018), <https://capitalresearch.org/article/origins-of-antifa/>.
37. Rosenthal, *supra* note 36.
38. See e.g., Larry Gillheeny, *Antifa Protest Attendee Arrested for Striking Veteran with Bike Lock*, OCEAN STATE CURRENT (Aug. 8, 2018) (reporting that the Providence police arrested an Antifa protestor for striking an Army veteran with a bike lock during a protest at the Rhode Island State House), <https://bit.ly/2RLUy7u>.
39. H.R. 6235, 115th Cong. (2018).

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