Exposed: Overcriminalization at the Department of the Interior

In the spirit of Executive Order 14294—"Fighting Overcriminalization in Federal Regulations"— and the recent Loper Bright Supreme Court decision, Department of the Interior (DOI) regulations were reviewed with a three-phased process. First, each regulation under DOI's jurisdiction was reviewed to determine whether there are criminal penalties associated. Second, the authorizing statute was reviewed to determine whether Congress actually delegated to DOI the authority to pass the criminal regulation in question. Third, it was determined whether the regulation had a *mens rea* (aka culpable mental state) or if it is a strict-liability crime.

While many of the criminal regulations passed each test, some did not. And, one criminal regulation caused an entirely separate problem: it does not require a beyond-a-reasonable-doubt standard.

Additionally, no policy judgments are made herein. Council to Modernize Governance (CMG) does not support or oppose the listed regulations or their respective policy merits. Rather, CMG merely represents regulations that it believes may be unauthorized and/or are implicated by Executive Order 14294.

The types of problematic regulations are as follows:

I. Regulations Lacking Legal Authorization

1. Authorizing Statute did not Delegate Agency Authority at all.

For this category, the statute that the agency purports to authorize the regulation does not provide authorizing language at all. This means that either no delegation language (e.g., "Secretary shall develop regulations….") existed within any of the cited statutes or that the subject of the authorizing statute was inconsistent with the regulations.

2. Authorizing Statute did not Delegate Agency Authority *and* Regulation Lacks a *Mens Rea.*

Just like category one, this category means that the regulation lacks authorization in the underlying statues. But, additionally, the regulation does not have a *mens rea*.

3. Regulations Relying on Implied Delegated Authority.

This category identifies criminal regulations citing 43 U.S.C. § 1733(a) as an authorizing statute. 43 U.S.C. § 1733(a) permits the Secretary to issue regulations, under threat of imprisonment, that the Secretary deems "necessary" for the management of public lands. Congress gave no examples or explicit guidance on what acts qualify for imprisonment. Currently, the constitutionality of this statute's sweep is pending before the Supreme Court in Pheasant v. United States, 25-6911 (2026). Because the (tenuous) authority of DOI to promulgate criminal penalties under 43 U.S.C. § 1733(a) is built on implicit, not explicit, power, the rules promulgated under this statute may be worth review.

It should be noted that, while § 1733(a) states "knowingly," many of the regulations themselves read as strict liability. Thus, even if they are not addressed on delegation grounds, they could also be addressed due to their lack of *mens rea*.

4. Authorizing Statute Repealed.

Here, the threshold issue of whether there is delegation is not met at all because the statute that the regulation identifies as authorizing has been repealed. These regulations should be removed without further evaluation of *mens rea* or whether the statute gave authority at the time of rulemaking.

II. Strict Liability Criminal Regulations

5. Regulation Creates Strict Liability Offense without statutory Delegation.

These regulations do not have a culpable mental state. While the purpose of the regulations may or may not be good policy, their effect—as written—means that someone may unknowingly violate criminal laws. Something this significant should have express delegation by Congress. Yet, these regulations do not.

No person visiting our public lands should find himself in prison for, as an example, accidentally forgetting some trash at a campsite or mistakenly driving on a road that is closed to the public. Yet, both of these activities are regulatory crimes—lacking a *mens rea*—that could turn harmless acts into potential criminal prosecutions under the DOI regulations, as written.

6. Part of Regulation Creates Strict Liability Offense without statutory Delegation.

Similar to the first category, these regulations contain crimes that do not have a *mens rea*. However, for this category, multiple crimes are within one regulation and, at least some of the crimes are missing a *mens rea*, while others retain a *mens rea*.

III. Regulations with Constitutional Invalidity

7. Criminal Regulation tied to Civil Judgment.

There is one regulation, 43 C.F.R. §3163.3, which shifts a civil judgment into a criminal penalty. The trigger for criminality is not the underlying conduct, but a civil "conviction." This indicates that facts tried under a civil burden of proof then shifts to criminal punishment, without the criminal burden of beyond a reasonable doubt. Beyond a reasonable doubt is required for criminal due process. In re Winship, 397 U.S. 358 (1970). While arguably outside the scope of this study, this regulation appears illegal and consistent with the desire to address agency overcriminalization.

APPENDIX

1. Authorizing Statute did not Delegate Agency Authority at all.

- 25 C.F.R. § 11.1212—This regulation is an enforcement provision for child-protection and domestic-violence protocols on Indian reservations. One has to zoom out quite a bit to find the authorizing statutes. It is a part of "Part 11" which covers all "Courts of Indian Offenses." The listed authorizing statutes give the President and agency/department heads the authority to issue regulations broadly, but none of the listed statutes addresses domestic violence or child abuse.

2. Authorizing Statute did not Delegate Agency Authority and Regulation Lacks a *Mens Rea*.

- 25 C.F.R. §§ 11.400–53[1]—These regulations create criminal law for "Courts of Indian Offenses." Crimes include assault, trespassing, fraud, perjury, etc. The authorizing statutes include 5 U.S.C. § 301 (gives the head of each agency the authority to prescribe regulations), 25 U.S.C. § 2 (authorizes Commissioner of Indian Affairs authority to manage Indian relations), 25 U.S.C. § 9 (President may prescribe regulations over Indian Affairs), 25 U.S.C. § 13 (prescribes specific instances where the Bureau of Indian Affairs may direct, supervise, and expend moneys toward certain programs which do not include criminal violations), and 25 U.S.C. § 200 (requires an agency to report the arrest of "an Indian"). None of these statutes directs the agency to create separate criminal laws for reservations.

3. Regulations Relying on Implied Delegated Authority.

- 43 C.F.R. § 3809.700—This regulation describes criminal penalties for violations of mining-use regulations.
- 43 C.F.R § 5462.2—This regulation covers trees on BLM land. Things like, cutting, removing, stamping, tagging, etc. "may be prosecuted criminally."
- 43 C.F.R. § 5462.3—This regulation describes criminal penalties for violations under § 5462.2 (above).
- 43 C.F.R § 5511.4—This regulation criminalizes obtaining a timber free use permit through falsifying facts, violating the permit terms, exporting the timber outside the state, or transferring the right to another.
- 43 C.F.R §§ 6302.20, .30—These regulations define and criminalize "prohibited acts," including operating for a commercial purpose, temporary or permanent roads or landing strips, use of motorized equipment or vehicles, land aircraft, build or install structures, cut trees, "enter or use wilderness areas without authorization," engage in "competitive use," and the catch-all "violate any BLM regulation."
- 43 C.F.R. § 8224.2—This regulation describes the criminal penalties for violations of § 8224.1 regarding the collection of fossils and activities in the Fossil Forest.
- 43 C.F.R §§ 8340.0–.7—These regulations criminalize use of off-road vehicles under certain conditions.

[1] It should be noted that statutory rape does not have a *mens rea*, but since that is standard in criminal law, this report will not treat it as if a *mens rea* is missing.

- 43 C.F.R. § 8364.1—This regulation describes the criminal penalties for one who violates a temporary closure or restriction order of any "designated public lands, including roads, trails, and waterways."
- 43 C.F.R § 8351.1-1—This regulation criminalizes operating a motor vehicle along a scenic trail.
- 43 C.F.R §§ 8360.0–.7—These regulations criminalize visitor behavior, including visitors picking up after themselves at camp sites, length of stay, speed limits, noise control, defacing a structure, etc.
- 43 C.F.R. § 9262.1—This regulation describes the criminal penalties for "unauthorized use, occupancy, or development of public lands."
- 43 C.F.R. § 9265.4—This regulation covers trees on BLM land. Things like, cutting, removing, stamping, tagging, etc. "may be prosecuted criminally."
- 43 C.F.R. § 9265.5—This regulation criminalizes obtaining a timber free use permit through falsifying facts, violating the permit terms, exporting the timber outside the state, or transferring the right to another.
- 43 C.F.R. § 9265.6—This regulation describes criminal penalties for violations under § 5462.2 (above).
- 43 C.F.R. § 9266.4—This regulation describes criminal penalties for damages or injuries to viable coral communities located in the Outer Continental Shelf.
- 43 C.F.R. § 2920.1–2—This regulation describes criminal penalties for "[a]ny use, occupancy, or development of the public lands" that is not "casual use as defined in § 2920.0–5(k)."
- 43 C.F.R. § 4140.1—This regulation has to do with grazing on public lands. It criminalizes things such as allowing livestock to graze or be driven across public lands or to install, modify, burn, etc. the lands.
- 43 C.F.R. § 4170.2–2—This regulation describes criminal penalties for violations under § 4140.1(b).
- 43 C.F.R. § 9269.3–4—This regulation describes criminal penalties for violations of Part 4300 regarding Alaska grazing administration and reindeer.
- 43 C.F.R. § 9212.1—This regulation describes causing fires, slashing or burning trees, or impeding fire orders on public lands as criminal acts.
- 43 C.F.R. § 9212.4—This regulation describes the criminal penalties for violations of § 9212.1.
- 43 C.F.R. § 9264.1—This regulation describes the criminal penalties for listed grazing activities such as allowing livestock to drive across land, litter, and affecting vegetation.

4. Authorizing Statute Repealed.

- 25 C.F.R. § 140.5—This regulation prohibits agency employees from contracting or trading with "Indians." The authorizing statute, 18 U.S.C. § 437, has been repealed.

5. Regulation Creates Strict Liability Offense without statutory Delegation.

- 43 C.F.R § 9239.1-2—This regulation piggybacks off of 43 C.F.R. §§ 5462.2 and 5511.4 (below) and criminalizes the same behavior in a different context.
- 50 C.F.R. § 80.100—This regulation criminalizes improper use of symbols of the wildlife and fishery programs.

- 50 C.F.R. § 86.76—This regulation criminalizes improper use of the Sport Fish Restoration Logo.

6. Part of Regulation Creates Strict Liability Offense without statutory Delegation.

- 25 C.F.R. § 273.182—This regulation makes it a crime for "any contractor or subcontractor under this part [who] embezzles, willfully misapplies, steals, or obtains by fraud any of the funds or property…." All violative actions except "misapplies" are missing a *mens rea*.
- 43 C.F.R. § 2932.57—This regulation, in the context of permitting, criminalizes failing to post a copy of a permit during active use, failing to show the permit to a BLM employee, obstructing pedestrians or visitors while engaging in permitted activities, and refusing to leave or disperse. The enabling statute explicitly states that the criminal elements are to be for "knowing" or "willful" violations, yet most of the regulation lacks a *mens rea*.
- 43 C.F.R § 4770.1—This regulates wild horses. Some acts do have a *mens rea*, but others do not. Acts without a *mens rea* include removing a wild horse from public lands, destroying one, selling one, "commercially exploiting" one, treating one inhumanely, etc. This regulation is made criminal by 43 C.F.R. § 4770.5.

7. Criminal Regulation tied to Civil Judgment.

- 43 C.F.R. § 3163.3—This regulation has to do with Federal Oil and Gas Royalty Management Act compliance. Here, if it is found that a "person who commits an act for which a civil penalty is provided in §3163.2(f)," he shall, "upon conviction, be punished by a fine of not more than $50,000, or by imprisonment for not more than 2 years, or both."