



# THE BUCKEYE INSTITUTE

## **Public Comments on Regulations Governing Take of Migratory Birds**

Submitted to The United States Fish and Wildlife Service

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The United States Fish and Wildlife Service's (FWS) proposed regulations clarifying that the Migratory Bird Treaty Act's (MBTA) criminal conduct and penalty provisions apply only to those intentionally harming migratory birds will help rein in overcriminalization. The Buckeye Institute supports FWS's efforts to adhere to the plain meaning of its enabling legislation and ensure that our criminal laws reflect the fundamental need for *mens rea* requirements.

The plain meaning of the MBTA makes it clear that only intentional efforts to harm migratory birds qualify for the Act's criminal penalties. The relevant statutory language makes it "unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird."<sup>1</sup> And FWS's regulations define a "take" under the Act as applying to the following activities to "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."<sup>2</sup> Despite the MBTA's text, in the final weeks of the Obama administration, FWS issued a legal opinion recognizing the category of an "incidental take," defining it as a "take of migratory birds that directly and foreseeably results from, but is not the purpose of, an activity."<sup>3</sup>

As the recent FWS Opinion M-37050 that this proposed regulation would codify notes, applying the MBTA "to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions, threatening up to six months in jail and a \$15,000 penalty for each and every bird injured or killed."<sup>4</sup> Opinion M-37050 also points out that courts find MBTA misdemeanor violations are strict liability offenses.<sup>5</sup>

*Mens rea* requirements ensure that we only impose criminal sanctions on individuals who break the law on purpose. Such requirements are fundamental to our scheme of criminal law. As former Supreme Court Justice Oliver Wendell Holmes, Jr. memorably put it, "even a dog distinguishes between being stumbled over and being kicked."<sup>6</sup> The FWS's proposed rule would simply ensure that individuals and industry would not face up to six months in jail and up to \$15,000 in fines merely because they stumbled over the dog by engaging in otherwise lawful conduct that FWS sought to criminalize by administrative fiat.

Unfortunately, Congress and regulators often codify legislation and regulation devoid of a *mens rea* requirement. A joint study by the Heritage Foundation and the National Association of Criminal Defense Lawyers found that 64 percent of all offenses enacted into law during the 109<sup>th</sup> Congress contained inadequate *mens rea* requirements.<sup>7</sup> This problem is exacerbated when agencies promulgate rules without sufficient *mens rea* requirements. Nearly two decades ago,

<sup>1</sup> 16 U.S.C. § 703 (2017).

<sup>2</sup> 50 C.F.R. § 10.12.

<sup>3</sup> U.S. Fish and Wildlife Service Manual, party 720, ch. 3, *Incidental Take Prohibited Under the Migratory Bird Treaty Act*, January 11, 2017.

<sup>4</sup> The Migratory Bird Treaty Act Does Not Prohibit Incidental Take, U.S. Department of the Interior, Office of the Solicitor Opinion M-37050, December 2, 2017.

<sup>5</sup> *Ibid.*

<sup>6</sup> Oliver Wendell Holmes Jr., *The Common Law*, 1881.

<sup>7</sup> Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, the Heritage Foundation and the National Association of Criminal Defense Lawyers, May 5, 2010.

Columbia law professor John Coffee estimated that up to 300,000 federal regulations can be punished criminally.<sup>8</sup> Given the multiplicity of offenses, the failure to provide adequate *mens rea* requirements in such regulations creates traps for the unwary.

The Buckeye Institute has long championed *mens rea* reform efforts. In 2014, The Buckeye Institute led the way for *mens rea* reform in Ohio. The reform shifted the default rule for *mens rea* requirements away from one that assumed no *mens rea* if the legislature assigned a *mens rea* requirement as to one element of the offense but was silent as to all other elements. In that instance, the silence was treated as requiring no culpable mental state for the silent elements.<sup>9</sup> Ohio's 2014 reform clarified that the default *mens rea* term applies to any element to which the *mens rea* may fairly be applied.<sup>10</sup> As The Buckeye Institute's president and chief executive officer Robert Alt testified in 2014, the reform keeps "omissions that may be caused by drafting errors or inadvertence from being interpreted as stripping away traditional legal protections for the accused."<sup>11</sup>

Though some have argued that the proposed rule is unnecessarily pro-industry, FWS data indicates these concerns are misplaced.<sup>12</sup> The FWS data show that cats are the single greatest threat to the safety of MBTA protected migratory birds, killing a median estimated 2.4 billion migratory birds in North America annually.<sup>13</sup> While cat-related deaths make up around two-thirds of all estimated deaths, FWS estimates industry-related deaths make up around 700 million or about 20 percent of all trackable deaths.<sup>14</sup> Further, migratory birds colliding with glass makes up an estimated average of 599 million of those industry-related deaths.<sup>15</sup>

Prosecuting "incidental takings" of migratory birds threatens businesses across industries with criminal penalties for otherwise lawful conduct. These penalties would apply even to renewable energy sources like wind turbines. Though they make up a small proportion of migratory bird deaths nationally—an estimated 140,000 to 328,000 birds annually in North America—<sup>16</sup> one *Audubon* magazine article described wind turbines as "the most threatening form of green energy" to birds.<sup>17</sup> And the federal government has chosen to prosecute wind energy-related deaths in the

<sup>8</sup> John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991).

<sup>9</sup> Robert Alt, **Interested Party Testimony on Senate Bill 361 Before the Criminal Justice Committee Ohio Senate**, The Buckeye Institute, December 2, 2014.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> As the chief executive officer of the National Wildlife Federation said: "The rule sends an irresponsible—and legally incorrect—signal to industry that common-sense measures to protect birds . . . are no longer needed." Merrit Kennedy, **"White House Moves to Formally Decriminalize Accidentally Killing Birds,"** National Public Radio, January 30, 2020.

<sup>13</sup> U.S. Fish and Wildlife Service, **Threats to Birds: Migratory Birds Mortality – Questions and Answers**, September 14, 2018.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Emma Bryce, **"Will Wind Turbines Ever Be Safe For Birds?"** *Audubon*, March 16, 2016.

past. As National Public Radio reported, in 2013, Duke Energy Renewables pleaded guilty after 14 golden eagles and 149 other migratory birds were killed by wind turbines in Wyoming.<sup>18</sup>

## Conclusion

The proposed regulations would restore the plain meaning of the MBTA and ensure only truly criminal actors—those intentionally harming migratory birds—could be prosecuted under the act. Ensuring that those violating the law have the requisite mental state to engage in blameworthy conduct is central to our criminal justice system. And ensuring that administrative agencies do not go beyond their scope of authority by amending statutes to give the government power to impose criminal penalties on more individuals is important for slowing the momentum of overcriminalization.

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<sup>18</sup> Eyder Peralta, “**Duke Energy Pleads Guilty Over Eagle Deaths at Wind Farms**,” National Public Radio, November 23, 2013.



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