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NCLA Slams Interior's Proposed New Rule Creating Criminal Liability for Incidental Bird Deaths

Regulations Governing Take of Migratory Birds; Proposed Rule

Washington, DC (June 8, 2021) – Any activity resulting in the incidental death of migratory birds would be considered a crime under a proposed rule by the U.S. Fish and Wildlife Service (FWS). FWS's *Regulations Governing Take of Migratory Birds* repeals a Trump Administration final rule which correctly defines the scope of the Migratory Bird Treaty Act (MBTA), as Congress did, to exclude criminal liability for the incidental death of migratory birds. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed comments objecting to the proposed rule, which greatly expands the interpretation of the MBTA so as to grant the Department of Justice the discretion to prosecute all actions that have the mere effect of killing migratory birds. According to FWS's new position, any activity that unintentionally causes the death of a migratory bird—such as running into a bird while driving or a windmill blade striking a bird—is a crime. Individuals must rely on the grace of the federal government to avoid being prosecuted.

The MBTA, first passed in 1918, was created to ensure the sustainability of populations of migratory bird species. It protects more than 1,000 bird species in the U.S. The MBTA focuses exclusively on actions that kill or directly harm protected migratory birds. The statute declares that 22 specifically listed activities regarding migratory birds are flatly unlawful. The words in the listed activities share a common theme: all of them prohibit activity intentionally directed at migratory birds. Not included anywhere in the MBTA's list of prohibited activities is the phrase "incidental take."

Since 1973—uncoincidentally, the year the Endangered Species Act was enacted—FWS has sought to expand its jurisdiction by sometimes enforcing the MBTA against those who did not act to harm a migratory bird, but whose conduct led indirectly to the harming of migratory birds. For decades, the MBTA's scope of liability has been a controversial issue and has split both the courts and Departments of Interior across different administrations. NCLA believes FWS lacks the authority to issue regulations related to "incidental takes" and disagrees with FWS's view that the MBTA can be interpreted as prohibiting acts not directed at birds that result in incidental and indirect harm to them.

FWS should refrain from repealing the final rule and instead continue its current practice of not prosecuting incidental takes. The meaning of the MBTA should be finally fixed judicially via the adversary process—by the Supreme Court if necessary. The statute's meaning should not ping-pong depending on who occupies the White House or the Department of Interior.

NCLA released the following statements:

"A major source of the continuing confusion over the meaning of the MBTA is the *Chevron* doctrine, under which courts often defer to a federal agency's interpretation of a federal statute. It is high time for courts to jettison the constitutionally problematic *Chevron* doctrine and construe the MBTA in accordance with the plain meaning of its text."

— **Rich Samp, Senior Litigation Counsel, NCLA**

"The U.S. Fish and Wildlife Service could go to Congress at any time to ask for an amendment to the Migratory Bird Treaty Act allowing the Justice Department to prosecute so-called incidental takes of birds. Instead, it seeks to shortcut the ordinary lawmaking process. The fact that this unconstitutional shortcut was first tried in the Nixon era doesn't excuse the constitutional violation. FWS should leave the business of defining new crimes to Congress, where that power belongs."
— **Sheng Li, Litigation Counsel, NCLA**

For more information about this issue visit here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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