

# ARTICLES

## THE ENDANGERED SPECIES ACT v. THE UNITED STATES DEPARTMENT OF JUSTICE: HOW THE DEPARTMENT OF JUSTICE DERAILED CRIMINAL PROSECUTIONS UNDER THE ENDANGERED SPECIES ACT

By  
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*Historically, in prosecutions under the Endangered Species Act (ESA), to prove the element “knowingly” the government only had to prove that a defendant intentionally killed an animal that turned out to be endangered or threatened, not that the defendant knew the identity of the species or the endangered or threatened status of the animal when it was killed. Jury instructions to this effect were repeatedly upheld. Then, in a brief filed with the U.S. Supreme Court for *McKittrick v. U.S.*, the federal government, unprompted, unnecessarily, and without explanation, said that it would not use this jury instruction in the future because the instruction did not properly explain “knowingly.” The U.S. Department of Justice subsequently issued a directive to its attorneys to that same effect. Now, there is a self-imposed rule in ESA prosecutions requiring prosecutors to prove that a defendant knew the animal was endangered or threatened at the time it was “taken” or killed. This Article discusses ways in which this change conflicts with the established law and its impact on ESA prosecutions.*

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## I. INTRODUCTION

The story you are about to read is true. The names have not been changed because none of the living players are innocent. It is the story of a wolf named Number Ten and a poacher named Chad McKittrick and how their fateful encounter in 1995 led to a unilateral U.S. Department of Justice directive that runs counter to established case law and historic standards for *mens rea*. The directive, which was adopted without explanation, ignores the unequivocal intent of Congress that violations of the Endangered Species Act<sup>1</sup> (ESA) amount to general intent crimes, ignores the fact that Congress purposely amended the language in the ESA’s criminal provisions to make that fact clear, and ignores the interpretations of several district courts and circuit courts of appeal. As a result, criminal investigations and prosecutions of ESA violations are artificially hampered in ways lawmakers, the courts, and the American public never envisioned.

### A. *The Stage Is Set*

In 1995, Yellowstone National Park was ground zero for a bold and controversial experiment in ecological reconstructive surgery. The U.S. Fish and Wildlife Service (FWS), in cooperation with the U.S. Park Service, initiated the reintroduction of the gray wolf to Yellow-

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<sup>1</sup> *Endangered Species Act of 1973*, 16 U.S.C. §§ 1531–1544 (2006).

stone.<sup>2</sup> It goes without saying that the reintroduction plan was controversial.<sup>3</sup>

Historically a top predator in the western U.S., the gray wolf was extirpated from much of its historic habitat in the lower forty-eight states by the 1930s.<sup>4</sup> On one side of the equation, environmentalists and biologists were gravely concerned about the lopsided predator-to-prey ratios in Yellowstone and the negative impact it was having on the ecosystem.<sup>5</sup> Biologists were advocating for the return of the apex predator in order to keep down populations of lesser predators such as coyotes and also as a way to promote healthy ungulate populations.<sup>6</sup> Wolves predominately prey on weak, old, and sick hooved animals such as elk and deer, which in turn promotes healthier herd populations.<sup>7</sup> Additionally, the reduction in the numbers of these animals also allows for natural vegetation that is over-consumed and trampled by ungulates to rebound.<sup>8</sup> As good habitat and forage return, so does a vast array of birds and small animals.<sup>9</sup> This symbiotic relationship is the basis for a healthy and productive ecosystem<sup>10</sup>?exactly what people hope to get a glimpse of when they visit our western landscapes.

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<sup>2</sup> FWS, *Northern Rocky Mountain Wolf Recovery Plan* v (1987) (available at <http://www.fws.gov/mountain-prairie/species/mammals/wolf/NorthernRockyMountainWolfRecoveryPlan.pdf> (accessed Apr. 2, 2011)). The Northern Rocky Mountain Wolf Recovery Plan was approved by the FWS and the Northern Rocky Mountain Wolf Recovery Team, which included individuals from the FWS, the National Park Service, the Bureau of Land Management, the Idaho Department of Fish and Game, the U.S. Forest Service, the University of Montana, the National Audubon Society, and a local stockman. *Id.* at Acknowledgements. The Recovery Plan's main objective was to remove the Northern Rocky Mountain Wolf from the endangered and threatened species lists by securing and maintaining a minimum of ten breeding pairs for a minimum of three successive years. *Id.* at v; see also *Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Central Idaho and Southwestern Montana*, 59 Fed. Reg. 60266, 60268–69 (Nov. 22, 1994) (to be codified at 50 C.F.R. pt. 17) (discussing the recovery plan and consultation by FWS with the National Park Service and Forest Service).

<sup>3</sup> FWS, *supra* n. 2, at 112 (the original Northern Rocky Mountain Wolf Recovery Plan was approved in 1980. However, based on new information made available to the FWS, a revised draft was distributed to “technical ‘experts’ and involved agencies and individuals” for review and incorporation into the adopted plan “[b]ecause of the controversial nature of the program and the many possible or perceived impacts and concerns associated with it. . .”).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> Defenders of Wildlife, *Why Restore Wolves in North America*, [http://www.defenders.org/programs\\_and\\_policy/wildlife\\_conservation/imperiled\\_species/wolves/wolf\\_facts/why\\_restore\\_wolves.php](http://www.defenders.org/programs_and_policy/wildlife_conservation/imperiled_species/wolves/wolf_facts/why_restore_wolves.php) (accessed Apr. 2, 2011).

<sup>6</sup> *Id.*

<sup>7</sup> Ludwig N. Carbyn, *Wolf Predation on Elk in Riding Mountain National Park, Manitoba*, 47 J. Wildlife Mgt. 963, 973–74 (1983).

<sup>8</sup> *Crying Wolf: The Unlawful Delisting of Northern Rocky Mountain Gray Wolves from Endangered Species Act Protections*, 50 B.C. L. Rev. 1195, 1198–99 (2009) [hereinafter *Crying Wolf*].

<sup>9</sup> *Id.* at 1198–99; Carbyn, *supra* n. 7, at 974.

<sup>10</sup> *Crying Wolf*, *supra* n. 8, at 1198–99.

On the other side of the equation, ranchers and hunters were outraged that the government would even consider bringing back an animal they feared would systematically chew its way through domestic cattle and sheep populations and reduce the area's prized big game trophy animals.<sup>11</sup> In Montana, between 1987 and 2006, confirmed domestic stock losses from gray wolf predation totaled 230 cattle and 436 sheep.<sup>12</sup> Predation on domestic livestock and the potential for conflicts between ranchers and wolves was addressed by including various reimbursement programs to compensate ranchers for confirmed losses due to wolves.<sup>13</sup> Regulations were also established to allow for lethally removing wolves that were preying on stock.<sup>14</sup> During the same time period, 254 wolves were killed in response to their predation on sheep or cattle.<sup>15</sup>

As the first wolves were released in 1995, conflicts flared between these two polarized interests with the wolves ending up in the middle. In an effort to protect the newly released wolves, they were listed as threatened under the ESA.<sup>16</sup> Pursuant to the ESA, it is a crime to "take"<sup>17</sup> any endangered or threatened species.<sup>18</sup> This protection was

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<sup>11</sup> See *Home Again*, 334 *The Economist* 23, 23 (Jan. 7, 1995) (describing the fears of ranchers with regard to reintroduction of wolves); Ed Dentry, *Hunters Disagree on Wolves*, *Rocky Mt. News* (Denver, Colo.) 26B (Jan. 29, 1995) (recounting the concerns of hunters regarding wolf reintroduction).

<sup>12</sup> Carolyn A. Sime et al., *Gray Wolves and Livestock in Montana: A Recent History of Damage Management in Proceedings of the Twelfth Wildlife Damage Management Conference* 16, 24 (Dale L. Nolte et al., eds., 2007).

<sup>13</sup> See 59 Fed. Reg. 60252, 60257 (Nov. 22, 1994) (stating that although there is no federal compensation program, compensation from private funding is encouraged); see e.g. Mont. Dept. of Livestock, *Livestock Loss Reduction & Mitigation*, <http://liv.mt.gov/liv/LM/index.asp> (accessed Apr. 2, 2011) (describing one example of non-federal compensation programs for ranchers).

<sup>14</sup> Sime et al., *supra* n. 12, at 21; see also 59 Fed. Reg. at 60271 (allowing lethal removal of wolves as a last resort and in the event of domestic animal depreations).

<sup>15</sup> Sime et al., *supra* n. 12, at 24.

<sup>16</sup> 50 C.F.R. § 17.11 (1996). Note that some of the wolves in the area around but outside Yellowstone were listed as "experimental." 50 C.F.R. § 17.84(i)(7)(ii) (1996). The Code of Federal Regulations codified protections for both the threatened and experimental populations but allowed for some take of the experimental population provided certain conditions were met. 50 C.F.R. § 17.84(i)(3).

<sup>17</sup> 16 U.S.C. § 1532 (1994). "Take" is defined by the ESA as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* at § 1532(19). The term "harm" "includes indirect as well as direct injuries." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697-98 (1995); see also *Palila v. Haw. Dept. of Land & Nat. Resources*, 649 F. Supp. 1070, 1075, 1077 (D. Haw. 1986) (defining "harm" to include "an adverse impact on the protected species" including "habitat modification that prevents a population from recovering," and holding that a species does not need to actually be killed to trigger criminal or civil proceedings).

<sup>18</sup> The prohibitions section of the ESA prohibits the violation of any regulation pertaining to any threatened species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(G) (1994). The federal regulations prohibited the taking of gray wolves in areas where they were listed as threatened. 50 C.F.R. §§ 17.21, 17.31 (1996). Taking of populations listed as

afforded to the wolves regardless of whether they were inside or outside the boundaries of Yellowstone National Park.<sup>19</sup>

*B. The Endangered Species Act: A Brief Primer*

The ESA is a comprehensive<sup>20</sup> regulatory statute designed to protect species that are threatened or endangered—“threatened” meaning they are at risk of becoming endangered and “endangered” meaning they are at risk of becoming extinct—by restricting the taking of members of such species.<sup>21</sup> A person who “knowingly” violates the ESA is subject to criminal liability.<sup>22</sup> The ESA provides that anyone convicted of knowingly taking a threatened species can be sentenced to up to six months in jail and fined up to \$25,000.<sup>23</sup> There are no felony provisions for violations of the ESA, even if the animal taken is listed as endangered.<sup>24</sup>

The FWS has the primary responsibility for investigating violations of the ESA, a mission that falls to the FWS’s special agents.<sup>25</sup> Like their counterparts in the Federal Bureau of Investigation (FBI), the Secret Service, and other federal law enforcement agencies, special agents of the FWS are highly educated and highly trained plainclothes investigators with nationwide jurisdiction who have the authority to carry firearms and make arrests.<sup>26</sup> However, unlike their counterparts

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“experimental” was also prohibited except for limited purposes as permitted by FWS employees on a case-by-case basis. 50 C.F.R. §§ 17.82, 17.84(i) (1996).

<sup>19</sup> 50 C.F.R. § 17.84(i)(7)(ii) (1996).

<sup>20</sup> *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 180, 184 (1978) (describing the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. . . . The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”).

<sup>21</sup> 16 U.S.C. §§ 1532(6), 1532(19), 1532(20).

<sup>22</sup> 16 U.S.C. § 1540(b).

<sup>23</sup> The criminal penalties section of the ESA (16 USC § 1540(b)(1)) provides for up to one year in jail and a \$50,000 fine for violations involving an animal listed as endangered. The maximum fine, however, is actually set by 18 U.S.C. §§ 3559, 3571, which provide for up to a \$100,000 fine for any individual convicted of a Class A misdemeanor that does not result in death. The criminal penalties for knowing violations involving an animal listed as threatened (“any other regulation”) are a maximum of six months in jail and a \$25,000 fine. The provisions in 18 U.S.C. §§ 3559 and 3571 do not change the maximum fine for a Class B misdemeanor ESA offense.

<sup>24</sup> See 16 U.S.C. § 1540(b)(1) (setting out criminal violations of the ESA); 18 U.S.C. §§ 3559, 3571 (providing guidelines for sentencing and fines; the designations of misdemeanor encompass the punishments of the ESA criminal violations).

<sup>25</sup> 16 U.S.C. § 1540(e); 50 C.F.R. §402.01(b) (2009); 35 Am. Jur. 2d *Fish, Game, and Wildlife Conservation* § 64 (2010).

<sup>26</sup> FWS Div. of Human Capital, *What We Do: Law Enforcement Positions*, [http://www.fws.gov/jobs/wwd\\_law.html](http://www.fws.gov/jobs/wwd_law.html) (updated Aug. 28, 2008) (accessed Apr. 2, 2011); Off. of L. Enforcement, Sec. & Emerg. Mgt., *Law Enforcement Career Opportunities: Fish and Wildlife Service Office of Law Enforcement* (updated Sept. 3, 2008) (accessed Apr. 2, 2011).

in the FBI, an agency with almost 14,000 agents nationwide, FWS special agents number fewer than 300.<sup>27</sup>

## II. MCKITTRICK MEETS WOLF NUMBER TEN

With this background in mind, our story begins near Red Lodge, Montana, a small western town with a population of fewer than 4,000 people.<sup>28</sup> It sits roughly midway between Billings, Montana, and the northeast corner of Yellowstone National Park. Beginning in 1995, this geographic area was once again Wolf Country.<sup>29</sup> On a chilly day in late April 1995, Red Lodge resident Chad McKittrick and one of his buddies took off in McKittrick's rickety pickup truck to explore the backcountry between Red Lodge and the northeast boundary of Yellowstone National Park. McKittrick had his rifle stored snugly in the cab's standard equipment for any self-respecting pickup driver in Montana.

Wolf Number Ten was well known to wolf biologists. He was one of the first wolves to be part of the reintroduction program.<sup>30</sup> Originally captured in Canada, he was fitted with a thick leather radio collar to help biologists track his movements.<sup>31</sup> He weighed in at over 120 pounds,<sup>32</sup> much larger than his cousin the coyote. In comparison, coyotes, a small and common denizen of the area, only weigh an average of 35 pounds.<sup>33</sup> Number Ten was released inside Yellowstone National Park in January, and, by April, he and his lifelong mate were already expecting their first litter of puppies.<sup>34</sup> Number Ten and his pups were the future of wild wolves and an improved Yellowstone ecosystem. But in late April 1995, Number Ten wandered outside the park's northeast boundary in the direction of Red Lodge, Montana,<sup>35</sup>

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<sup>27</sup> FBI, *Frequently Asked Questions*, <http://www.fbi.gov/about-us/faqs> (accessed Apr. 2, 2011); FWS Off. of L. Enforcement, *Service Law Enforcement*, [http://www.fws.gov/le/AboutLE/about\\_le.htm](http://www.fws.gov/le/AboutLE/about_le.htm) (updated Mar. 25, 2005) (accessed Apr. 2, 2011).

<sup>28</sup> U.S. Census Bureau, *Montana: 2000, Population and Housing Unit Counts, 2000 Census of Population and Housing* 15 (Sept. 2003) (available at <http://www.census.gov/prod/cen2000/phc-3-28.pdf> (accessed Apr. 2, 2011)).

<sup>29</sup> FWS, *supra* n. 2, at iv (the Northern Rocky Mountain Wolf Recovery Plan included a process to secure and maintain several breeding pairs of wolves); The Economist, *supra* n. 11.

<sup>30</sup> Michael K. Phillips & Douglas W. Smith, *Yellowstone Wolf Project: Biennial Report 1995 and 1996* 6 (Nat'l. Park Serv., Yellowstone Ctr. for Resources 1997) (available at <http://www.yellowstone.co/pdfs/wolves/wolves95-96.pdf> (accessed Apr. 2, 2011)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The average size of an adult gray wolf is 80–120 pounds. Wolves are 5–6 feet in length from the tip of the nose to the tail and stand 26–32 inches tall at the shoulder. In comparison, coyotes weigh only 30–40 pounds and are no longer than 3–4 feet in length. Defenders of Wildlife, *Foxes, Coyotes, and Wolves - How to Tell the Difference*, [http://www.defenders.org/programs\\_and\\_policy/wildlife\\_conservation/solutions/coexisting\\_with\\_carnivores/in\\_your\\_neighborhood/encountering\\_wildlife/identifying\\_animals/identifying\\_foxes\\_coyotes\\_and\\_wolves.php](http://www.defenders.org/programs_and_policy/wildlife_conservation/solutions/coexisting_with_carnivores/in_your_neighborhood/encountering_wildlife/identifying_animals/identifying_foxes_coyotes_and_wolves.php) (accessed Apr. 2, 2011).

<sup>34</sup> Phillips & Smith, *supra* n. 30, at 6, 11.

<sup>35</sup> *Id.* at 15.

an action that would have lethal consequences for him and puzzling consequences for the law.

When McKittrick saw the animal, he knew it was a wolf. Anyone who has seen a gray wolf knows instinctively that they are looking at neither a dog nor a coyote. It would come out later in trial that McKittrick admitted to his buddy that they were looking at a wolf.<sup>36</sup> Before Number Ten could identify the threat on the next hill, a high velocity rifle round had shattered his internal organs and snuffed out his short life and future in Yellowstone.

Special Agent Tim Eicher of the U.S. Fish and Wildlife Service was assigned to investigate the killing of Number Ten.<sup>37</sup> Through tenacious investigation he quickly identified and apprehended Chad McKittrick who was subsequently charged with illegally taking an animal listed as threatened pursuant to the Endangered Species Act (ESA).<sup>38</sup> McKittrick denied the charges and requested a jury trial.<sup>39</sup>

At McKittrick's trial, the U.S. District Court for the District of Montana approved a jury instruction requiring that the government prove only that McKittrick intentionally shot an animal and that the animal turned out to be threatened.<sup>40</sup> Although evidence was presented at trial that McKittrick knew or believed he was shooting at a wolf when he took the shot,<sup>41</sup> the government was not required to prove that McKittrick knew he was shooting a gray wolf when he knowingly shot an animal.<sup>42</sup> A federal jury of McKittrick's Montana peers promptly convicted him.<sup>43</sup>

McKittrick appealed his conviction to the Ninth Circuit Court of Appeals. In short, he lost.<sup>44</sup> Although he appealed on a number of issues, the only issue of importance to this Article was the question of "knowingly" and the related jury instruction. McKittrick argued to the Ninth Circuit that the government should have been required to prove that he knew that he was shooting a wolf rather than simply knowing that he was shooting an animal.<sup>45</sup> The Ninth Circuit matter-of-factly dismissed this argument, citing other U.S. appellate circuits and, most interestingly, the Congressional Record.<sup>46</sup>

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<sup>36</sup> At trial, McKittrick asserted that he thought he was shooting a dog, but a friend's testimony contradicted that assertion. *U.S. v. McKittrick*, 142 F.3d 1170, 1178 (9th Cir. 1998); see also *infra* n. 120 (further discussing McKittrick's testimony).

<sup>37</sup> Ted Williams, *Defense of the Realm: The Thin Green Line Protecting Endangered Species*, 81 *Sierra* 34, 39 (1996).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *McKittrick*, 142 F.3d at 1177.

<sup>41</sup> *Id.* at 1177-78.

<sup>42</sup> *Id.* at 1177.

<sup>43</sup> *Id.* at 1173.

<sup>44</sup> *Id.* at 1178.

<sup>45</sup> *Id.* at 1176.

<sup>46</sup> *McKittrick*, 142 F.3d at 1177.

### III. KNOWING WHAT “KNOWINGLY” MEANS

Because McKittrick exercised his right to a jury trial, the jury had to be given proper instructions, including definitions of key words.<sup>47</sup> Jury instructions are a matter of law which must come from the court.<sup>48</sup> Usually a court will be able to craft an instruction that includes the statutory definitions directly from the language in the statute.<sup>49</sup> However, the Endangered Species Act (ESA) does not define “knowingly,” so looking to the statute fails to provide guidance.<sup>50</sup>

This is not an unusual circumstance; courts have reviewed the Congressional Record created while crafting statutory language in order to determine exactly what Congress had in mind when they passed the law.<sup>51</sup> The 1978 Amendments to the ESA include a clear discussion of what Congress meant with the use of the word “knowingly” in the criminal provisions.<sup>52</sup>

#### A. Congressional Record and U.S. Supreme Court Precedent

When the ESA was initially enacted, the penalties and enforcement provisions established that a person who “knowingly” violates a provision of the Act can be fined, and any person who “willfully” commits an act which violates the statute can be fined or imprisoned up to one year, or both.<sup>53</sup> The ESA Amendments of 1978 deleted all instances of the words “willfully commits an act” in the criminal enforcement provision and replaced them with “knowingly violates any provisions of the Act”<sup>54</sup> because Congress did “not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act.”<sup>55</sup> The Amendments effectively reduced the *mens rea* to require only that a defendant consciously and with awareness

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<sup>47</sup> See *e.g. id.* at 1176–77 (discussing the need of jury instructions to accurately state elements of the crime).

<sup>48</sup> *Staples v. U.S.*, 511 U.S. 600, 612 n. 6 (1994) (“[t]he *mens rea* requirement under a criminal statute is a question of law, to be determined by the court. . . . It is for courts, through interpretation of the statute, to define the *mens rea* required for a conviction.”).

<sup>49</sup> See *e.g. McKittrick*, 142 F.3d at 1177 (explaining two terms defined in jury instructions: one is not defined in the statute so the legislative history is used to explain the meaning of the statutory language and another where the exact language of the statute was used in the instruction).

<sup>50</sup> See 16 U.S.C. § 1532 (providing definitions for the chapter).

<sup>51</sup> *Babbitt*, 515 U.S. at 696 n. 9 (citing H. R. Conf. Rpt. No. 95-1804 at 26 (1978) to note that “Congress added ‘knowingly’ in place of ‘willfully’ in 1978 to make ‘criminal violations of the act a general rather than a specific intent crime.’”); see also *U.S. v. Wilson*, 133 F.3d 251, 263 (1997) (stating that “interpreting the phrase ‘knowingly violate’ to mean violation with knowledge of an act’s illegality would require us to ignore the distinction between a knowing and a willful violation, a distinction that Congress recognized in amending the law”).

<sup>52</sup> *Babbitt*, 515 U.S. at 696 n. 9 (citing H. R. Conf. Rpt. No. 95-1804 at 26).

<sup>53</sup> 16 U.S.C. § 1565.

<sup>54</sup> Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 6, 92 Stat. 3751, 3761 (1978).

<sup>55</sup> H.R. Rpt. 95-1625 at 26 (Sept. 25, 1978).

harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected a threatened or endangered species, or attempted to engage in any such conduct. After the Amendments were passed, the *mens rea* needed to prove criminal culpability under the ESA was clear.

Indeed, reviewing statutory language and legislative records for guidance on the level of intent envisioned by Congress on a particular issue is nothing new. As early as 1975, the U.S. Supreme Court tackled the definition of “knowing” in *U.S. v. Feola*.<sup>56</sup> In *Feola*, a case where the judicial analysis is strikingly analogous to *McKittrick*, the Court looked directly to the statute for guidance on the requisite level of “intent” needed to convict violators of 18 U.S.C. § 111, “assaulting, resisting, or impeding certain officers or employees.”<sup>57</sup> The question before the Court was whether the government needed to prove that the defendant actually knew that his victim was a federal officer at the time of the assault in order to be guilty of violating the law. The Court held, after looking to the legislative history of §111, that Congress intended to require only “an intent to assault, not an intent to assault a federal officer.”<sup>58</sup> The *Feola* Court said that in such a case, the offender takes his victim as he finds him.<sup>59</sup> Thus, the legislation—as explained in its own legislative history contained in the Congressional Record—determines the requisite mental state required for conviction under that particular law.

This reasoning was reiterated in the U.S. Supreme Court’s review of *Babbitt v. Sweet Home Communities for a Greater Oregon*.<sup>60</sup> The main issue the Court reviewed in *Babbitt* was “whether the Secretary [of Interior] exceeded his authority under the Act” by including “significant habitat modification or degradation where it actually kills or injures wildlife” as part of the “harm” prohibited in the ESA.<sup>61</sup> In a 6–3 decision, the Court held that the regulation was reasonable, citing the legislative history as support for its conclusion.<sup>62</sup> The Court did not specifically address the scienter requirement in the criminal provisions of the Act, but a footnote in the majority opinion does.<sup>63</sup>

Very early in the Court’s opinion, in a lengthy footnote, Justice Stevens, delivering the opinion of the Court, cited the Congressional

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<sup>56</sup> *U.S. v. Feola*, 420 U.S. 671 (1975).

<sup>57</sup> *Id.* at 672–73, 673 n. 1.

<sup>58</sup> *Id.* at 684.

<sup>59</sup> *Id.* at 685.

<sup>60</sup> *Babbitt*, 515 U.S. at 692 (stating that respondents were small landowners, logging companies, and families dependent on forest products who challenged the “harm” definition, “particularly the inclusion of habitat modification and degradation in the definition. . . . Their complaint alleged that application of the ‘harm’ regulation to red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them economically”).

<sup>61</sup> *Id.* at 690.

<sup>62</sup> *Id.* at 698 (citing *TVA*, 437 U.S. at 179–80, which analyzes legislative history to ascertain the purpose of the ESA).

<sup>63</sup> *Id.* at 696 n. 9.

Record.<sup>64</sup> “Congress added ‘knowingly’ in place of ‘willfully’ in 1978 to make ‘criminal violations of the [A]ct a general rather than a specific intent crime.’”<sup>65</sup> Justice Stevens reinforced this reasoning by stating, “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”<sup>66</sup> Reducing the *mens rea* requirement for criminal prosecutions is certainly a real and substantial effect.

The footnote discussion supports the notion that the “knowing” requirement in the ESA criminal provisions amounts to general intent crimes. Thus, defendants charged with violating the ESA are not required to have a higher standard of knowledge, which would include knowing the species and its protected status.

### B. Legislative History in Pattern Jury Instructions

The proper interpretation of the “knowing” requirement has been specifically addressed by the Congressional Record: The 1978 Amendments to the ESA deleted all instances of the word “willfully commits an act” and replaced them with “knowingly violates any provisions of the Act” because Congress did “not intend to make knowledge of the law an element of either civil penalties or criminal violations of the [A]ct.”<sup>67</sup> Furthermore, the reasoning provided by the Supreme Court in both *Feola* and *Babbitt* references and supports the general intent status of the “knowing” language.<sup>68</sup> Even without an analysis of *Feola* or *Babbitt*, trial courts are guided by pattern jury instructions that establish the proper definition of “knowingly” for their jurisdiction.<sup>69</sup>

The First Circuit’s pattern jury instructions define the word “knowingly” as meaning that the “act was done voluntarily and inten-

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (citing H.R. Conf. Rpt. 95-1804 at 26 (Oct. 15, 1978) (reprinted in 1978 U.S.C.C.A.N. 9453, 9476); see also *U.S. v. Wilson*, 133 F.3d 251, 263 (4th Cir. 1997) (stating that “interpreting the phrase ‘knowingly violate’ to mean violation with knowledge of an act’s illegality would require us to ignore the distinction between a knowing and a willful violation, a distinction that Congress recognized in amending the law”).

<sup>66</sup> *Babbitt*, 515 U.S. at 701 (citing *Stone v. INS*, 514 U.S. 386, 397 (1995)).

<sup>67</sup> H.R. Conf. Rpt. 95-1804 at 26; see also *Babbitt*, 515 U.S. at 696 n. 9 (citing H.R. Conf. Rpt. 95-1804 at 26 to note that “Congress added ‘knowingly’ in place of ‘willfully’ in 1978 to make ‘criminal violations of the act a general rather than a specific intent crime.’”); *Wilson*, 133 F.3d at 263 (stating that “interpreting the phrase ‘knowingly violate’ to mean violation with knowledge of an act’s illegality would require us to ignore the distinction between a knowing and a willful violation, a distinction that Congress recognized in amending the law”).

<sup>68</sup> See *Feola*, 420 U.S. at 684 (limiting the required intent for assault of a federal officer); *Babbitt*, 515 U.S. at 696 n. 9 (acknowledging Congressional limitation of required intent for violations of ESA).

<sup>69</sup> See e.g. 3d Cir. Model Crim. Jury Instr. Ch. 5, 5.02 (2004) (available at <http://www.ca3.uscourts.gov/modeljuryinstructions.htm> (updated Jan. 2010) (accessed Apr. 2, 2011)).

tionally and not because of mistake or accident.”<sup>70</sup> In the commentary section of the pattern jury instructions, a discussion of *U.S. v. Tracy* addresses the fact that there is a split of authority over how to define the term “knowingly”:

The Fifth and Eleventh circuits . . . emphasiz[e] the voluntary and intentional nature of the act. The Sixth, Seventh and Ninth circuits, on the other hand, embrace an instruction to the effect that “‘knowingly’ . . . means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident.”<sup>71</sup>

Judge Hornby’s commentary in *Updated Revisions to the Pattern Criminal Jury Instructions for the District Courts of the First Circuit* expresses concern over instructions that include awareness of the “nature of . . . conduct.”<sup>72</sup> The concern is that juries could be confused and be led to believe that the government must prove that a defendant knew that his acts were unlawful when this is not the appropriate standard.<sup>73</sup>

The Third Circuit’s pattern jury instruction for “knowingly” requires that

the government prove that [defendant] acted ‘knowingly’ [with knowledge] with respect to an . . . element[ ] of the offense[ ]. This means that the government must prove beyond a reasonable doubt that [defendant] was conscious and aware of the nature of [his/her] actions and of the surrounding facts and circumstances, as specified in the definitions of the offense(s) charged.<sup>74</sup>

In distinguishing between “willfully” and “knowingly,” the commentary explains that “the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.”<sup>75</sup> The term “willfully” requires a defendant to have “acted with knowledge that his conduct was unlawful.”<sup>76</sup>

The Sixth Circuit District Judges Association Committee on Pattern Criminal Jury Instructions does not recommend a standard jury instruction on “knowingly.” Instead, the Committee Commentary states that

[t]he Committee recommends that the district court give no general instruction defining the term “knowingly” and that instead, the district court define the mental state required for the particular crime charged as part of the court’s instructions defining the elements of the offense . . . . The mean-

<sup>70</sup> D. Brock Hornby, *2010 Revisions to Pattern Criminal Jury Instructions for the District Courts of the First Circuit* 2.15 (2010) (available at <http://www.med.uscourts.gov/practices/crimjuryinstrs.htm> (updated Dec. 23, 2010) (accessed Apr. 2, 2011)).

<sup>71</sup> *Id.*; see also *U.S. v. Tracy*, 36 F.3d 187, 194–95 (1st Cir. 1994), cert. denied, 115 S.Ct. 1717 (1995) (describing the definitions of “knowing” in various circuits).

<sup>72</sup> Hornby, *supra* n. 70, at 2.15.

<sup>73</sup> *Id.*

<sup>74</sup> 3d Cir. Model Crim. Jury Instr. Ch. 5, 5.02.

<sup>75</sup> *Id.* (citing *Bryan v. U.S.*, 524 U.S. 184, 193 (1998)).

<sup>76</sup> *Id.*

ing of the term “knowingly” varies depending on the particular statute in which it appears.<sup>77</sup>

The Committee Commentary provides two examples. The Committee cites *Liparota v. U.S.* and a contrasting example in *U.S. v. Elshenawy*. In *Liparota*, the U.S. Supreme Court held that in order “to convict a defendant of food stamp fraud, the government must prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations.”<sup>78</sup> The contrasting example details the Sixth Circuit’s holding that “to convict a defendant of possessing contraband cigarettes, the government need only prove that the defendant knew the physical nature of what he possessed. The government need not prove that the defendant also knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid.”<sup>79</sup> The points being stressed by the Committee are that there is no standard instruction appropriate for “knowingly” and that trial courts must analyze the statutory language and legislative history of the statutes at issue when preparing jury instructions on the “knowingly” element.<sup>80</sup>

#### IV. CASE LAW AND THE “KNOWINGLY” REQUIREMENT IN PRACTICE

Existing decisions under the Endangered Species Act (ESA) do not define “knowingly” to include knowledge of an animal’s species or its protected status. Courts ascribing to this reasoning include the Southern District of Florida, the U.S. District Court of Montana, and the U.S. Courts of Appeals for the Fifth and Ninth Circuits.

##### A. Pre-McKittrick Case Law

One of the first cases to address the “knowingly” requirement of the ESA’s criminal provisions<sup>81</sup> was *U.S. v. Billie*.<sup>82</sup> In the Southern District of Florida, a federal district judge approved a jury instruction requiring that the government prove only that a defendant knew he was shooting an animal and that it turned out to be an endangered Florida panther.<sup>83</sup> Defendant James Billie’s motion to dismiss on the grounds that, in order to convict, the government must prove beyond a reasonable doubt that he knew he was shooting an endangered Florida panther was rejected by the Court.<sup>84</sup> The Court rejected Billie’s argument because, “[i]n the court’s view, the construction advanced by defendant would eviscerate the [ESA’s] purpose because it would be

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<sup>77</sup> 6th Cir. Dist. JJ. Assn. Comm. Pattern Jury Instr. Crim. 2.06 (2009).

<sup>78</sup> *Id.* (discussing *Liparota v. U.S.*, 471 U.S. 419, 433–34 (1985)).

<sup>79</sup> *Id.* (discussing *U.S. v. Elshenawy*, 801 F.2d 856, 857–59 (6th Cir. 1986)).

<sup>80</sup> *Id.*

<sup>81</sup> 16 U.S.C. § 1540(b)(1).

<sup>82</sup> *U.S. v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>83</sup> *Id.* at 1492.

<sup>84</sup> *Id.* at 1492–93.

nearly impossible to prove that the average hunter recognized the particular subspecies protected under the Act.”<sup>85</sup> The Court reasoned that the general meaning of the word “knowingly” is “that the act was done voluntarily and intentionally and not because of mistake or accident.”<sup>86</sup> Moreover, “[s]uch a definition comports with the general rule that criminal penalties attached to regulatory statutes intended to protect public health, safety, or welfare should be construed to effectuate the regulatory purpose.”<sup>87</sup>

In another case, the U.S. District Court of Montana echoed the *Billie* Court’s reasoning when it rejected the defendant’s request to provide evidence that he believed he was shooting an elk at the time he shot a grizzly bear in *U.S. v. St. Onge*.<sup>88</sup> The Court held that “[t]he critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting.”<sup>89</sup>

The Fifth Circuit Court of Appeals expanded upon the *Billie* and *St. Onge* Courts’ analyses by citing to the 1978 Amendments to the ESA as well as the legislative history in support of Congress’ intent to make violations of the ESA’s provisions general intent crimes in *U.S. v. Nguyen*.<sup>90</sup> The Court rejected defendant Oahn Vu Nguyen’s argument that the trial court judge had committed reversible error when he instructed the jury they could convict Nguyen for possession of a threatened sea turtle even if he did not know that the turtle was a threatened species.<sup>91</sup> The Court held that “[t]he government was not required to prove that Nguyen knew that this turtle is a threatened species . . . .”<sup>92</sup>

In 1989, Nguyen was operating a commercial fishing boat off the coast of Texas.<sup>93</sup> When the boat was boarded by the U.S. Coast Guard for a safety inspection, a Coast Guard officer found freshly butchered parts of a loggerhead sea turtle, a species listed as threatened under the ESA.<sup>94</sup> Nguyen was charged with illegal possession of a threatened species and attempting to import a threatened species.<sup>95</sup> At trial, the District Court’s jury instructions on both counts did not require that the government prove that Nguyen knew that the turtle was a loggerhead sea turtle or that it was a threatened species.<sup>96</sup> Nguyen appealed, arguing that the government should have been required to prove “some sort of mental fault on his part.”<sup>97</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1492.

<sup>87</sup> *Id.*

<sup>88</sup> *U.S. v. St. Onge*, 676 F. Supp. 1044 (5th Cir. 1988).

<sup>89</sup> *Id.* at 1045.

<sup>90</sup> *U.S. v. Nguyen*, 916 F.2d 1016, 1017 (5th Cir. 1990).

<sup>91</sup> *Id.* at 1020.

<sup>92</sup> *Id.* at 1018.

<sup>93</sup> *Id.* at 1017.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1017–18.

<sup>96</sup> *Nguyen*, 916 F.2d at 1017–18.

<sup>97</sup> *Id.* at 1019.

In reaching its decision, the *Nguyen* court analyzed the legislative history and congressional record related to the ESA and concluded that Congress expressly intended to modify the required *mens rea* in ESA cases.<sup>98</sup> The Fifth Circuit noted that the previous version of the ESA “required the government to prove that a defendant had ‘willfully commit[ted] an act which’ violated promulgated regulations,” but in 1978, Congress amended the ESA by substituting “knowingly” for “willfully.”<sup>99</sup> The Fifth Circuit went on to note that, “[t]he [congressional] committee explicitly stated that it did ‘not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act.’”<sup>100</sup>

In his appeal, Nguyen cited *U.S. v. Anderson* in support of his contention that the government must prove he knew the endangered status of the turtle in order to be convicted.<sup>101</sup> In *Anderson*, the defendant had been convicted of possessing an illegally modified firearm, a violation of the National Firearms Act (NFA).<sup>102</sup> On appeal, the conviction was reversed because the jury instruction at issue did not require the government to prove that Anderson knew that the guns had been modified but only that they were guns.<sup>103</sup> In the *Nguyen* decision, the Fifth Circuit distinguished the *Anderson* case by analyzing the underlying statutes. The Court noted that the NFA was silent with regard to *mens rea* and, accordingly, there was no clear legislative intent to make a violation anything but a specific intent crime.<sup>104</sup>

The analysis of the Fifth Circuit in *Nguyen* was wholly consistent with a U.S. Supreme Court decision issued four years later in *Staples v. U.S.* Defendant Staples was convicted of illegally possessing a machine gun.<sup>105</sup> During the trial, Staples asserted that he believed his rifle was a semi-automatic and did not know that it had been converted to fully automatic.<sup>106</sup> The trial court approved a jury instruction that did not require the government to prove that Staples knew that the gun was a fully automatic rifle, but instead only required proof that it was, in fact, a fully automatic weapon.<sup>107</sup> The Supreme Court reversed the conviction and concluded that the government was required to prove that Staples knew that the weapon was a fully automatic machine gun.<sup>108</sup> In explaining its decision, the Court noted that the statute was silent regarding whether *mens rea* was required.<sup>109</sup> The Court explained that

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<sup>98</sup> *Id.* at 1017–19.

<sup>99</sup> *Id.* at 1018.

<sup>100</sup> *Id.* at 1019 (citing H.R. Rpt. 95-1625 at 26 (Sept. 25, 1978)).

<sup>101</sup> *Id.* at 1019.

<sup>102</sup> *U.S. v. Anderson*, 885 F.2d 1248, 1249 (5th Cir. 1989) (en banc).

<sup>103</sup> *Id.* at 1254.

<sup>104</sup> *Nguyen*, 916 F.2d at 1019–20.

<sup>105</sup> *Staples*, 511 U.S. 600.

<sup>106</sup> *Id.* at 603.

<sup>107</sup> *Id.* at 604.

<sup>108</sup> *Id.* at 619–20.

<sup>109</sup> *Id.* at 605.

[w]hether or not [the law] requires proof that defendant knew of the characteristics of his weapon that made it a “firearm” under the Act is a question of statutory construction. As we observed in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), “[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” *Id.* at 424, 105 S.Ct. at 2087 (citing *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812)). Thus, we have long recognized that determining the mental state required for commission of a federal crime requires “construction of the statute and . . . inference of the intent of Congress.” *United States v. Balint*, 258 U.S. 250, 253, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922).<sup>110</sup>

The Court went on to state that “some indication of congressional intent, express or implied, is required to dispense with *mens rea* . . . .”<sup>111</sup> Silence on the element of knowledge required for a conviction “does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal.”<sup>112</sup> The Court in *Staples* allowed for alternative *mens rea* requirements provided there is some other indication of congressional intent, express or implied.<sup>113</sup>

These cases,<sup>114</sup> the Congressional Record,<sup>115</sup> and related U.S. Supreme Court precedents<sup>116</sup> make it clear that, in cases involving violations of the ESA’s criminal provisions, the government is not required to prove that defendants know that the creatures they are harming are endangered or threatened in order to secure convictions for unlawful takings of such species.

### B. *U.S. v. McKittrick*

One of the issues that Chad McKittrick raised in his appeal to the Ninth Circuit Court of Appeals was that his taking of a threatened gray wolf was not “knowing” because he did not realize that he was shooting a threatened gray wolf.<sup>117</sup> This is the same argument that the defendants in the *Nguyen*, *St. Onge*, and *Billie* cases asserted unsuccessfully.<sup>118</sup> In affirming the District Court of Montana’s ruling, the

<sup>110</sup> *Id.* at 604–05.

<sup>111</sup> *Staples*, 511 U.S. at 606.

<sup>112</sup> *Id.* at 605.

<sup>113</sup> *Id.* at 606 (citing *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) & *Morissette v. U.S.*, 342 U.S. 246, 263 (1952)).

<sup>114</sup> *Nguyen*, 916 F.2d 1016; *St. Onge*, 676 F. Supp. 1044; *Billie*, 667 F. Supp. 1485.

<sup>115</sup> H.R. Conf. Rpt. 95-1804 at 26

<sup>116</sup> *Babbitt*, 515 U.S. at 696 n. 9; *Feola*, 420 U.S. at 684.

<sup>117</sup> *McKittrick*, 142 F.3d at 1173.

<sup>118</sup> See *Nguyen*, 916 F.2d at 1017 (holding that the government was not required to prove that the defendant knew that the turtle he illegally possessed and transported was a threatened species); *St. Onge*, 676 F. Supp. at 1044–45 (rejecting defendant’s request to provide evidence that he believed he was shooting an elk at the time he shot a grizzly bear); *Billie*, 667 F. Supp. at 1492 (approving a jury instruction that a defendant

Ninth Circuit cited the Eleventh and Fifth Circuit Court decisions and also the Congressional Record.<sup>119</sup> The Court held that McKittrick only needed to know “he was shooting an animal, and that the animal turned out to be a protected gray wolf.”<sup>120</sup>

The Montana District Court’s jury instruction in McKittrick’s trial was upheld and it was clear, in the year 1998, that the Ninth Circuit’s understanding of “knowingly” in an ESA case was that the government must only prove that a defendant knew he was shooting an animal but need not prove that the defendant knew he was shooting an endangered or threatened animal.<sup>121</sup> This conclusion was consistent with other federal appellate circuit decisions as well as longstanding opinions of the U.S. Supreme Court.<sup>122</sup>

Unhappy with the Ninth Circuit’s decision, McKittrick took his arguments to the U.S. Supreme Court, and the Office of the U.S. Solicitor General became involved. The Government’s brief to the Supreme Court and a subsequent U.S. Department of Justice directive soon turned enforcement of the ESA on its head.

#### V. THE U.S. SOLICITOR GENERAL TAKES A DETOUR

At the conclusion of McKittrick’s appeal to the Ninth Circuit, the law on the issue of “knowingly” in an Endangered Species Act (ESA) prosecution, and the burden of proof required at trial, was consistent throughout a number of federal circuits, and Congressional intent was apparently well stated in the Congressional Record associated with the 1978 amendments to the ESA. Further, the U.S. Supreme Court appeared to be in agreement that the standard of *mens rea* required in given cases is dependent upon an analysis of Congressional intent and legislative history. Nonetheless, feeling aggrieved, McKittrick’s appeal to the U.S. Supreme Court included the issue of the jury instruction on the definition and understanding of “knowingly.” The Court ultimately denied certiorari,<sup>123</sup> but it is here that things took an unexpected turn.

Briefs were filed with the U.S. Supreme Court by both McKittrick’s counsel and the U.S. Solicitor’s Office. The appellate counsel representing the government’s interests were Seth Waxman, the U.S. Solicitor General at the time, an assistant U.S. Attorney General by the name of Lois Schiffer, and a third attorney named James Kil-

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need only know that he was shooting an animal and that it turned out to be an endangered Florida panther).

<sup>119</sup> *McKittrick*, 142 F.3d at 1177.

<sup>120</sup> *Id.* at 1177–78 (explaining that “McKittrick did maintain at trial, in the face of contradictory testimony from a friend who accompanied him, that he thought the animal was a wild dog when he shot it. Because the court followed *St. Onge* in formulating the jury instructions, however, the jury did not have to decide whether to believe McKittrick.”).

<sup>121</sup> *Id.* at 1177.

<sup>122</sup> *Id.*; see also *Nguyen*, 916 F.2d at 1017–18 (affirming that a possession conviction did not require the defendant to know an animal’s ESA-protected status).

<sup>123</sup> *McKittrick v. U.S.*, 525 U.S. 1072 (1999).

bourne.<sup>124</sup> Deep in the Government's brief was a strange and unexplained concession. In just a few words, the U.S. Solicitor General's Office conceded the issue on whether the government had to prove actual knowledge of species identity. According to the brief, "This claim does not warrant this Court's review . . . [and] the Department of Justice does not intend in the future to request the use of this instruction, because it does not adequately explicate the meaning of the term 'knowingly' . . ."<sup>125</sup> Certiorari was denied, and, shortly thereafter, the Department of Justice (DOJ) directed federal prosecutors not to seek the jury instruction at issue in *McKittrick*.<sup>126</sup> No reasons were given.

In its brief, the Government claimed that the jury instruction at issue in *McKittrick* failed to "explicate" the meaning of knowingly.<sup>127</sup> Explicate means "[t]o make clear the meaning of; explain."<sup>128</sup> It is difficult to address the Government's statement about the instruction's failure to explicate the meaning of "knowingly" because no additional explanation was offered by the Government.

Also in its brief to the Court, the Government unconvincingly attempted to distinguish *McKittrick* from *Nguyen* by asserting in a footnote that slight factual differences in each case resulted in *Nguyen* not "squarely address[ing] the question."<sup>129</sup> Strangely, in both cases, the question was precisely whether the defendant knew he was either killing or possessing an animal, not whether he knew the precise species or the legal status of the animal. The factual differences are so slight that it is difficult to understand how the Government so summarily dismissed *Nguyen* in a mere footnote.

To support its contention that the Court did not need to review the question of "knowingly," the Government told the Court that "[t]here is no split in the circuits, nor is there any indication that the issue has arisen frequently."<sup>130</sup> Given that accurate statement in the Government's brief, shouldn't the Government's position have been exactly the opposite—that the currently accepted view, to which there is no split in the circuits, should be upheld and accepted? Instead, the Government conceded a point it did not need to concede and announced that it was effectively giving up by no longer utilizing an important jury instruction. Again, no reasons were given.

In researching this article, the authors attempted to contact former Assistant U.S. Attorney General Lois Schiffer as well as attorney James Kilbourne to inquire about the reasons for the abandonment of

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<sup>124</sup> Br. for U.S. in Opposition, *McKittrick v. U.S.* (No. 98-5406, 525 US 1072 (1999)).

<sup>125</sup> *Id.* at 15–16.

<sup>126</sup> Memo. from Donna A. Bucella, Dir., Exec. Off. for U.S. Attys., to All U.S. Attys., First Asst. U.S. Attys., All Crim. Chiefs, All Civ. Chiefs, *Knowing Instruction in Endangered Species Cases* (Feb. 12, 1999) (on file with *Animal Law*).

<sup>127</sup> Br. for U.S. in Opposition, *supra* n. 124, at 15–16.

<sup>128</sup> *The American Heritage Dictionary of the English Language* 645 (3d ed., Houghton Mifflin Co. 1992).

<sup>129</sup> Br. for U.S. in Opposition, *supra* n. 124, at 15 n. 8.

<sup>130</sup> *Id.* at 15.

this issue during the *McKittrick* appeal. Ms. Schiffer initially returned e-mails until she learned the topic of our article, at which point she stopped communicating. Although Mr. Kilbourne returned a phone call, the authors have been unable to connect with him again for a substantive interview.

A. *Where the Law Meets the Boots on the Ground—A Real Case Post-McKittrick*

In February 2003, the Torrance, California office of the U.S. Fish and Wildlife Service (FWS) Office of Law Enforcement was notified that a California Condor had been found dead in Tejon Ranch, located just an hour north of Los Angeles. The California Condor is listed as an endangered species.<sup>131</sup> At the time, one of the authors of this Article, then Special Agent Marie Palladini, supervised the group of agents who investigated the case. The following reflects her firsthand knowledge of the series of events that tied the special agents' hands—and, more specifically, the prosecutor's hands—during the investigation and prosecution of this case.

Similar to the wolves at issue in *McKittrick*, the California condor population was effectively extirpated from its range through conflicts with humans, loss of habitat, poisoning from the pesticide DDT (dichlorodiphenyltrichloroethane) and lead found in bullets that the birds ingest when they consume carcasses left behind by hunters. By the 1970s, fewer than thirty-five individual birds remained in the wild.<sup>132</sup> In 1975, the California Condor Recovery Program was established, with the FWS as the lead agency.<sup>133</sup> The remaining wild condors were captured and incorporated into a massive captive breeding and reintroduction program.<sup>134</sup> Needless to say, each individual bird in the program represented an almost irreplaceable piece in the recovery puzzle.

The dead condor, known as Adult Condor Number Eight, was being tracked by both satellite and radio transmitters.<sup>135</sup> In February 2003, FWS biologists noted that the position of the condor had remained stationary for three days, causing a mortality switch to be activated. (Radio transmitters attached to animals are routinely

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<sup>131</sup> FWS, *Species Profile: Environmental Conservation Online System: California Condor (*Gymnogyps californianus*)*, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=B002> (accessed Apr. 2, 2011); For more information on this case and the condor recovery project, see Joanna Behrens & John Brooks, *Wind in Their Wings: The Condor Recovery Program*, 25 *Endangered Species Bulletin* 8 (May/June 2000) (available at <http://www.fws.gov/endangered/bulletin/2000/05-06/08-09.pdf> (accessed Apr. 2, 2011)) (providing additional information about the condor recovery program).

<sup>132</sup> San Diego Zoo, *Birds: California Condor, Humans and Condors*, <http://www.sandiegozoo.org/animalbytes/t-condor.html> (accessed Apr. 2, 2011).

<sup>133</sup> Behrens & Brooks, *supra* n. 131, at 8.

<sup>134</sup> *Id.*

<sup>135</sup> Suzanne Herel, *Regal Condor Killed in the Wild*, S.F. Chron. A3 (Feb. 21, 2003) (available at [http://articles.sfgate.com/2003-02-21/news/17478250\\_1\\_california-condor-ac-8-adult-condor](http://articles.sfgate.com/2003-02-21/news/17478250_1_california-condor-ac-8-adult-condor) (accessed Apr. 2, 2011)).

programmed to send a “mortality signal” whenever the unit is stationary for an unusually long period of time.) This led the biologists on a search for Number Eight. The bird’s body was found lodged in branches, in the top of a 30-foot oak tree, with a hole the size of a silver dollar in its breast cavity. The biologists quickly notified FWS special agents in Agent Palladini’s unit.

Following a crime scene investigation, the bird’s carcass was sent to the FWS’s National Forensic Laboratory, where a necropsy was performed.<sup>136</sup> The results confirmed that the bird had been shot with a high-powered rifle at fairly close range and most likely was in a sitting position with wings folded when it was shot.

FWS Special Agent Brett Dickerson led the investigation and doggedly pursued every lead by tracking down each hunter who was in the area during the dates in question. Interviews soon pointed to two suspects, the father and son hunting team of Rick and Britton Lewis. During simultaneous but separate interviews, the younger Lewis denied any involvement in killing any bird, while his father recounted a story of how he and his son were driving in Tejon Ranch when they saw a “buzzard” at the very top of a tree.<sup>137</sup> The father reported that, after stopping their truck, the younger Lewis picked up his 7mm rifle, got out of the truck, and shot the bird. In response to this act, Lewis senior told his son that he thought he just shot a (expletive) condor! With conflicting stories in hand, the agents confronted the younger Lewis and he confessed to shooting the “buzzard.”

#### B. A DOJ Memo Imposes Legally Incorrect Burden on the Government

The case was referred to the U.S. Attorney’s Office for the Eastern District of California. Under the law, as stated by the language in the ESA and appellate court decisions, charges were appropriate under the ESA’s prohibitions.<sup>138</sup> However, the DOJ directive entitled “Federal Prosecutors May Not Use Knowledge Instruction Upheld in *United States v. McKittrick*” was quite clear.<sup>139</sup> The government would have to prove that Lewis knew he was shooting a California Condor at

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<sup>136</sup> FWS, *Poacher Shoots One of the Last Original California Condors* (Feb. 20, 2003) (available at <http://www.fws.gov/news/newsreleases/>; search “senseless shooting”, select Poacher Shoots One of the Last Original California Condors (accessed Apr. 2, 2011)).

<sup>137</sup> The differences between a condor and a buzzard are similar to the differences between a wolf and a coyote. The California Condor is 3.5–4.6 feet tall, has a wingspan of 8.2–9.7 feet and weighs 17–29 pounds. See San Diego Zoo, *supra* n. 132 (stating the height, wingspan, and weight of California Condors). Buzzards can be any number of large birds of prey, but in the West buzzards are the colloquial name for turkey vultures. San Diego Zoo, *Birds: Vulture*, <http://www.sandiegozoo.org/animalbytes/t-vulture.html> (accessed Apr. 2, 2011) (stating the height, weight, and wingspan of vultures). It is assumed that the Lewis’ were referring to a turkey vulture which is on average only 2 feet in height with a wingspan of 5.6 feet and a weight of 5 pounds or less. See *id.*

<sup>138</sup> 16 U.S.C. § 1538 (2006).

<sup>139</sup> Memo, *supra* n. 126.

the time he committed the crime—something Lewis would not admit during interviews.

Although Lewis did not go unpunished, he escaped the harsher penalties Congress intended for ESA violations. The California Condor has dual protection as it is included on a list of birds protected by the Migratory Bird Treaty Act (MBTA) in addition to being protected under the ESA.<sup>140</sup> Violation of the MBTA is a strict liability offense. An information was filed against Lewis charging that “. . . Lewis did unlawfully shoot, kill, and take a migratory bird protected by the Migratory Bird Treaty Act . . . 16, United States Code, Sections 703 and 707(a).”<sup>141</sup> Lewis pleaded guilty and was convicted. Unlike the Class A misdemeanor status of ESA violations involving species listed as endangered, which carries a maximum penalty of one year in jail and a \$100,000 fine,<sup>142</sup> the maximum penalty for Lewis’ MBTA violation was a Class B misdemeanor punishable by up to six months in jail and a \$15,000 fine.<sup>143</sup>

## VI. WHERE ARE WE NOW?

While U.S. Fish and Wildlife (FWS) special agents and U.S. Department of Justice (DOJ) prosecutors are hobbled by the DOJ directive, federal appellate case law in the Fifth, Ninth, and Eleventh Circuits, as well as the highest court in the land, have addressed the “take” issue on point and support an application of a general intent standard. The real irony is that Congress, presumably unaware of the DOJ directive to its prosecutors, is also seemingly unaware that the Endangered Species Act criminal provisions are being applied contrary to its specific intentions—lacking, as Justice Stevens put it in *Babbitt v. Sweet Home*, “real and substantial effect.”<sup>144</sup> Further, anyone who is conducting diligent legal research on this issue and is unaware of the DOJ directive will conclude that the law on the issue of knowingly killing endangered or threatened species is much different than the manner in which it is actually being applied. This leaves us in a situation where the executive branch of our government, through the DOJ, is both creating *and* interpreting law; roles that are reserved to the legislative and judicial branches.

Interestingly, the *McKittrick* phenomenon appears to be nothing new. Perhaps former U.S. Court of Appeals Justice Learned Hand put

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<sup>140</sup> 16 U.S.C. § 703 (2006).

<sup>141</sup> Info., *U.S. v. Britton Cole Lewis* (E.D. Cal. Apr. 29, 2003) (No. 03–2173).

<sup>142</sup> The penalties section of the ESA (16 U.S.C. § 1540(b)(1)) provides for up to one year in jail and a \$50,000 fine. The maximum fine, however, is actually set by 18 U.S.C. §§ 3559, 3571, which provide for up to a \$100,000 fine for any individual convicted of a Class A misdemeanor.

<sup>143</sup> The penalties section of the MBTA (16 USC § 707 (2006)) provides for up to six months in jail and a \$15,000 fine. The maximum fine, however, is actually set by 18 U.S.C. §§ 3559, 3571 (2006), which provide for up to a \$5,000 fine for any individual convicted of a Class B misdemeanor that does not result in death.

<sup>144</sup> *Babbitt*, 515 U.S. at 701 (quoting *Stone*, 514 U.S. at 397).

it best when he said, “It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General.”<sup>145</sup> Although Justice Hand gave no specific example, it is clear that this is not the first time that the U.S. Solicitor General’s Office and the DOJ have ignored appellate court decisions.

## VII. WHERE DO WE GO FROM HERE?

Ultimately, the criminal provisions of the Endangered Species Act (ESA) will not be applied as Congress intended until the U.S. Department of Justice (DOJ) directive prohibiting the use of the jury instruction upheld in *U.S. v. McKittrick* is rescinded. The directive has been in place for a decade and has allowed an unknown number of criminal acts to go unpunished. It has hampered the ability of law enforcement to contribute to the protection and recovery of threatened and endangered species. Who can order the DOJ to rescind the directive? The courts, it seems, are helpless at this point because the issue will certainly not be raised on appeal by the defendants who benefit from the directive. Certainly, the U.S. Attorney General could rescind the directive, as could someone higher in the Executive Branch. Perhaps additional Congressional inquiry or action is necessary to reaffirm Congress’s intention with regard to criminal culpability in ESA cases. In the final analysis, it may fall to the public to assert its will with lawmakers to ensure that the ESA is applied as intended for the benefit of the American people.

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<sup>145</sup> This quote is taken from Hon. Archibald Cox, *The Government in the Supreme Court*, 44 Chi. B. Rec. 221, 224–25 (1962) (discussing the role of the U.S. Solicitor General’s Office in the Supreme Court). Justice Hand served on the Second Circuit from 1924 to 1961. James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L. Rev. 387, 387 (1994–1995).