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# A Bird in the Hand: Shotguns, Deadly Oil Pits, Cute Kittens, and the Migratory Bird Treaty Act

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## A BIRD IN THE HAND: SHOTGUNS, DEADLY OIL PITS, CUTE KITTENS, AND THE MIGRATORY BIRD TREATY ACT

*Samuel J. Panarella* \*

The defining characteristic shared by all migratory birds is found in the category name—migration.<sup>1</sup> More than half of the 650 species of North American breeding birds migrate.<sup>2</sup> Similar to migrations undertaken by other animals—including humans—bird migrations are often fraught with peril, and depending on the species of migratory bird can be hundreds or even thousands of miles long and take weeks or months to complete.<sup>3</sup> Fortunately, most migrating birds make the journey safely. Those lucky ducks (and other birds) are not the subject of this Article. Rather, the focus here will be on the unfortunate birds that never arrive at their intended migratory destination, as well as those killed between migrations. Specifically, this Article will explore the question of what, if any, legal consequences should attach under the Migratory Bird Treaty Act (the “MBTA” or the “Act”)<sup>4</sup> when a bird protected under the Act is killed, intentionally or unintentionally, by anthropogenic activities.

More than just an interesting historical artifact, the original motivation behind the passage of the MBTA—to protect migratory birds from anthropogenic harm—is relevant today. Courts struggle to define what limits, if any, should be placed on its application to activities that, unlike hunting and poaching, are in no part motivated by intent to kill or injure

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<sup>1</sup> Animal migration is defined as “mov[ing] from one area to another at different times of the year.” *Migrate*, MERRIAM-WEBSTER DICTIONARY (2016), <http://www.merriam-webster.com/dictionary/migrate>.

<sup>2</sup> See *The Basics Of Bird Migration: How, Why, And Where*, THE CORNELL LAB OF ORNITHOLOGY (Jan. 1, 2007), <https://www.allaboutbirds.org/the-basics-how-why-and-where-of-bird-migration/>.

<sup>3</sup> The dangers attendant in migrations are particularly and heartbreakingly relevant at the time of this writing as many thousands of refugees from the Syrian civil war have died trying to flee to safer places. See, e.g., Jim Yardley & Gaia Pianigiani, *Three Days, 700 Deaths on Mediterranean as Migrant Crisis Flares*, N.Y. TIMES, May 29, 2016, <http://www.nytimes.com/2016/05/30/world/europe/migrants-deaths-mediterranean-libya-italy.html> (recounting how at least 700 refugees trying to reach Europe from Syria and parts of Africa drowned in three separate shipwrecks over three days).

<sup>4</sup> Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–12 (2012)). The MBTA is the oldest U.S. federal law protecting birds. See *Migratory Bird Treaty Act of 1918*, DIGEST OF FEDERAL RESOURCE LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERVICE, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/laws/lawsdigest/migtrea.html> (last visited Mar. 22, 2017).

migratory birds but nevertheless do. The MBTA is administered by the U.S. Department of Interior (“Department of Interior”) through the U.S. Fish and Wildlife Service (the “Service”).<sup>5</sup> The Act’s encompassing “take” language and facial strict liability standard appear to reflect a strong congressional intent to offer protection to listed birds from multifarious causes and actors, without special regard to the societal or commercial utility of the underlying activity. Add to that Congress’s refusal over the last one hundred years to alter the Act’s broad misdemeanor strict liability reach, even as it limited felony liability by requiring scienter, and an otherwise sober-minded person could be forgiven for concluding that the most legally prudent course of action is to never leave home lest she accidentally injure a bird in her travels and face criminal sanctions under the MBTA. Fortunately, common sense, compelling legislative history, case law, and a history of the judicious exercise of prosecutorial discretion all argue against this extreme reaction to the Act. But it would be equal folly to assume that as long as one does not engage in the hunting or poaching of birds there is nothing to fear from the MBTA. Put another way, it is equally incorrect to say that the MBTA only applies to hunting and poaching activities as it is to say the Act applies to every anthropogenic harm that could befall a bird. The former is too limited a view and misses the more generalized conservational intent behind the Act. The latter is so broad that, if applied, it would criminalize many otherwise lawful and societally and economically-necessary commercial uses of the land, such as farming and construction, as well as many nonindustrial but no less valued activities, such as driving a car or sharing one’s house and yard with a pet cat—a result Congress simply could not have intended when it passed the Act.

Where then is the Goldilocks-ian middle of MBTA liability that does not criminalize every activity that might result in harm to a bird, but also imposes legal consequences for anthropogenic harms to bird species of the kind that motivated Congress to pass the Act? This question has bedeviled federal courts in the United States and is the subject of a longstanding and intense dispute between bird advocacy groups and businesses whose industrial activities regularly, albeit incidentally, kill migratory birds. And, this question recently made headlines across the country again when the Fifth Circuit Court of Appeals, in its decision in *United States v. Citgo Petroleum Corp.*,<sup>6</sup> reversed Citgo’s MBTA criminal misdemeanor conviction for migratory bird deaths caused by birds landing in oil and wastewater pits at a refinery the company operates in Texas. The district court found that Citgo’s oil field operations were a

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<sup>5</sup> 16 U.S.C. § 701.

<sup>6</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015) (“*Citgo Petroleum*”).

proximate cause of the bird deaths because these deaths were a reasonably foreseeable consequence of Citgo using open-air oil and wastewater pits, and, therefore, that Citgo was criminally liable for a “take” under the MBTA.<sup>7</sup> In reversing the district court, the Fifth Circuit held that criminal liability for a taking under the MBTA is limited to situations where the alleged violator took actions directed at migratory birds, which Citgo, simply by operating the pits in furtherance of its refining operations, had not done.<sup>8</sup>

The Fifth Circuit’s *Citgo Petroleum* opinion widened an existing split among United States federal circuit courts on the question of whether criminal liability under the MBTA should extend beyond affirmative acts directed against migratory birds (e.g., hunting and poaching) to reach acts that are not directed at birds but nevertheless result in the death of a protected bird.<sup>9</sup> It is well established under the law that activities in the former category violate the MBTA and subject the actor to criminal liability under the Act.<sup>10</sup> The question that remains unresolved is whether incidental bird deaths caused by the remarkably wide range of activities making up the latter category (from industrial activities such as utilizing open-air oil and wastewater pits in oil and gas operations and operating electricity production facilities to typically nonindustrial activities such as driving a car, letting a housecat roam freely outside, and living in a dwelling with windows) should result in criminal liability under the Act.

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<sup>7</sup> *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015). The same year a federal district court in North Dakota, faced with strikingly similar facts, came to the opposite conclusion, holding that no criminal liability should attach under the MBTA for bird deaths caused by landing in defendant oil and gas producer’s wastewater reserve pits, because the defendant’s use of the reserve pits was not intended to kill birds. *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1212–13 (D.N.D. 2012) (“[T]he use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act.”).

<sup>8</sup> *Citgo Petroleum*, 801 F.3d at 494.

<sup>9</sup> See 16 U.S.C. § 707 (2012). Section 707(a), the misdemeanor penalty provision of the MBTA, provides for punishment of up to a \$15,000 fine and/or up to six months in prison for any violation of the Act. The MBTA’s felony penalty provision, § 707(b), concerns knowingly taking a listed migratory bird for the purpose of selling it. Because this Article does not address collecting and selling migratory birds, § 707(a)’s misdemeanor liability will be the focus of this article’s liability discussion.

<sup>10</sup> See, e.g., *United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002) (hunter who exceeded his daily bag limit of ducks violated the MBTA); *Rice Farmer Convicted and Fined for Poisoning Birds*, DEP’T OF JUSTICE, U.S. ATTORNEY’S OFFICE, S. DIST. OF TEX. (Jan. 8, 2016), <https://www.justice.gov/usao-sdtx/pr/rice-farmer-convicted-and-fined-poisoning-birds> (rice farmer pleads guilty to MBTA criminal violation for intentionally poisoning 69 protected birds to keep them from eating his crop); *Parma Farmer Convicted of Conspiracy to Bait Ducks and Placing Bait for Ducks*, DEP’T OF JUSTICE, U.S. ATTORNEY’S OFFICE, DIST. OF IDAHO (May 17, 2016), <https://www.justice.gov/usao-id/pr/parma-farmer-convicted-conspiracy-bait-ducks-and-placing-bait-ducks> (farmer convicted under MBTA for baiting farm to allow hunters to shoot migratory birds attracted by bait).

This article traces the often byzantine reasoning underlying this circuit split and offers a practical solution to resolve it by using a category-based approach to criminal liability under the MBTA.

This Article is presented in three parts. Part I describes the modern application (and misapplication) of the MBTA and briefly sets out the history of the Act, including the widespread, indiscriminate killing of migratory birds for food and fashion in the 19th century that first spurred Congress to act. Building off this history and the clear Congressional intent behind the MBTA to criminalize industrial activities directed at killing birds, Part II sorts human-caused bird killing activities into three categories and proposes the appropriate MBTA liability treatment for each category based both on the original purpose of the Act and on our modern understanding of the desirability of balancing critical animal species preservation against necessary industrial activity. This Article concludes in Part III with a summary of the proposed approaches to the current MBTA liability quagmire.

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When you have shot one bird flying you have shot all birds flying. They are all different and they fly in different ways but the sensation is the same and the last one is as good as the first.<sup>11</sup>

## I. THE MIGRATORY BIRD TREATY ACT

### *A. A Law out of Time?*

The Endangered Species Act of 1973 (“ESA”),<sup>12</sup> the United States’ best known, oft-copied, and most heavily litigated animal-protection law, has entered a comfortable, albeit still controversial, middle age. The ESA’s animating purpose (“to protect and recover threatened and endangered species and the ecosystems upon which they depend”)<sup>13</sup> and strictures, while certainly not universally admired by all, are nevertheless relatively well understood by its regulated community. Principal among these strictures is that the incidental taking<sup>14</sup> of an ESA listed species without an Incidental Take Permit violates the ESA and subjects the “takee” to potential civil and criminal liability.<sup>15</sup> Compare the MBTA, a far older animal protection law, that even in its dotage at one hundred years old, remains subject to significant controversy about when and to what actions it should apply. At first blush, a plain reading of the MBTA and its implementing regulations appear to provide the same clarity offered by ESA’s take provision—the taking of a listed migratory bird for any reason and regardless of intention results in potential criminal liability.<sup>16</sup> And for intended takes, such as a hunter intentionally shooting a protected migratory bird out of season, the application of the statute is as straightforward as its wording.<sup>17</sup> It is where the take of a protected bird

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<sup>11</sup> ERNEST HEMINGWAY, *THE SNOWS OF KILIMANJARO AND OTHER STORIES* 63 (1961).

<sup>12</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 7 U.S.C. § 136 (2000) and 16 U.S.C. §§ 1531–44 (2000)).

<sup>13</sup> 16 U.S.C. § 1531(b) (2012).

<sup>14</sup> Similar to the take definition under the MBTA, a “take” occurs under the ESA when a listed species is harassed, harmed, pursued, hunted, shot, killed, wounded, trapped, captured or collected, or by any attempt to engage in such conduct. 16 U.S.C. § 1532(19).

<sup>15</sup> 16 U.S.C. § 1539(a). Unlike the ESA, the MBTA does not in most circumstances allow a party with foreknowledge that its activities may incidentally result in the take of a covered species to apply for an Incidental Take Permit to obviate liability for the incidental take under the Act. The Service may issue take permits under the MBTA for certain intentional activities that result in the death of a protected bird, such as scientific collecting, educational purposes, taxidermy and falconry. See U.S. FISH & WILDLIFE SERV., 724 FW 1, *AUTHORITIES, OBJECTIVES, AND RESPONSIBILITIES FOR MIGRATORY BIRD PERMITS* (2003).

<sup>16</sup> 16 U.S.C. § 707(a).

<sup>17</sup> See, e.g., *Hunting Guides Sentenced for Violating Migratory Bird Act in Reno County*, DEP’T OF JUSTICE, U.S. ATTORNEY’S OFFICE, DIST. OF KAN. (Jan. 28, 2015), <https://www.justice.gov/usao-ks/pr/hunting-guides-sentenced-violating-migratory-bird-act-reno-county> (announcing the sentencing of two Kansas hunting guides for violating the MBTA by exceeding the daily bag limits of Canada geese and mourning doves).

was not intended, but rather the incidental result of an otherwise lawful activity that the formerly clear waters become muddy, verging on opaque.

Despite being one of the oldest U.S. laws protecting wildlife, the MBTA remains relatively obscure. Outside of a small community of bird advocacy groups, hunters, owners of industrial operations that threaten migratory birds—and, yes, some lawyers and law professors—the Act’s primary prohibition against the intended killing of migratory birds has little purchase on the popular imagination. In fact, beyond this small community, to the extent the MBTA is known at all, it is for criminalizing acts that almost certainly were not the intended target by the Act’s original drafters. To wit, if you ask random people on the street what they know about the MBTA, eventually you would likely find someone who is aware of the law, and that person’s response would likely be something along the lines of, “Isn’t that the law that makes it a federal crime for your cat to kill a bird?” If you asked this same hypothetical well-informed person what she knows about the ESA, a federal law with a strong foothold in the popular imagination, she would likely tell you that it is the federal law that makes it a crime to harm or kill endangered species without a permit. Both of these responses are factually correct (if incomplete), but only the Endangered Species Act response describes a prohibition that was fundamental to the original purpose of the Act when it was passed, and remains foundational today. The MBTA response, on the other hand, describes a technical violation that even the original drafters of the Act would likely have disagreed with and that has little to no relevance to how the MBTA is enforced on the ground today.

The Endangered Species Act became law in 1973 as part of a tidal wave of federal environmental and animal welfare legislation passed in response to the burgeoning environmental movement of the early 1970s.<sup>18</sup> Much has changed in the country in the intervening forty years since its passage and the ESA has been amended several times in response, which has kept it a thoroughly modern law.<sup>19</sup> Compare the MBTA, which came into existence at a time in America when our current conceptions about the need to balance peoples’ desires for the nutritional bounty and sartorial possibilities available from harvesting wild animals with the

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<sup>18</sup> Other major environmental legislation passed by Congress during this period includes the National Environmental Policy Act in 1970 (42 U.S.C. §§ 4321–370h), the Federal Water Pollution Control Act (the “Clean Water Act”) in 1972 (33 U.S.C. §§ 1251–387), and the Resource Conservation and Recovery Act in 1976 (42 U.S.C. § 6901–992k).

<sup>19</sup> For example, the 1982 amendments to the Endangered Species Act authorized the Service to issue permits for the “incidental take” of listed species from otherwise legal activities and introduced the requirement that applicants for incidental take permits prepare Habitat Conservation Plans that minimize and mitigate harm to the impacted species during the proposed project. 16 U.S.C. § 1539(a)(2).

value (both psychic and tangible) of preserving these animals at sustainable populations were just beginning to take shape. Indeed many of the primary threats to birds in the 21st century were unknown in 1918 when the Act came into being. For instance, today communication towers are responsible for several million bird deaths every year and many thousands of birds die annually from colliding with commercial wind turbines, but neither of these man-made structures existed in 1918.<sup>20</sup> Like the ESA, the MBTA has been amended several times over its lifetime, but unlike the amendments to the ESA, these amendments have done little to clarify the MBTA's reach or applicability in the modern world, making it "a law out of time."

### *B. Impetus for the Act*

At the close of the 19th century, America was an industrialized country whose citizens seemed determined to bring under their dominion every square inch of the nation's remaining wild lands, and to put into their stomachs or onto their bodies the wild animals that lived on those lands. The United States was settled from coast-to-coast, with a transcontinental railroad that made it possible to traverse the country at speeds unimaginable only a few decades earlier, and held an exalted status as the world's manufacturing powerhouse.<sup>21</sup> Oil wells were being sunk at a furious pace in newly-discovered oil fields in several states, and John D. Rockefeller's now-infamous monopolistic monolith, Standard Oil, controlled 90 percent of the oil refined in the United States.<sup>22</sup> The United States entered the new millennium with a booming economy, a conviction bordering on arrogance in its own exceptionalism, and a future that appeared unimaginably bright.

Of course, there was another, much darker, side to this triumphant narrative. The U.S. Calvary's massacre of hundreds of members of the

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<sup>20</sup> See Andrew W. Minikowski, *A Vision or a Waking Dream: Revising the Migratory Bird Act to Empower Citizens and Address Modern Threats to Avian Populations*, 16 VT. J. ENVTL. L. 152, 156–57 (2014) ("The modern threats facing migratory bird species could not have possibly been contemplated by Congress when MBTA was passed in 1918, due to the extreme advances in technological and industrial development that have since occurred. The statute needs to be reexamined in the context of these modern threats in order to prevent it from becoming a mere nullity or legislative antique.").

<sup>21</sup> See GARY M. WALTON & HUGH ROCKOFF, *HISTORY OF THE AMERICAN ECONOMY* 299 (11th ed. 2010) ("American gains in manufacturing output were . . . phenomenal relative to the rest of the world. In the mid-1890s, the United States became the leading industrial power, and by 1910, its factories poured forth goods of nearly twice the value of those of its nearest rival, Germany. In 1913, the United States accounted for more than one-third of the world's industrial production.").

<sup>22</sup> See *Rockefeller and the Standard Oil Monopoly*, CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html> (last visited Mar. 22, 2017).



Lakota Sioux tribe on the banks of Wounded Knee Creek in South Dakota effectively ended the co-called Indian Wars that had raged across the country for the better part of the 18th and 19th centuries.<sup>23</sup> By 1900, the Native American tribes that had survived the disease and brutalities visited on them during these battles had been shunted off to live on newly-created reservations, most of which were located in some of the country's most inhospitable and least fecund lands.<sup>24</sup>

Many of the animals that the Indian tribes had once relied on for their survival fared no better. By the turn of the century, the American bison was on the brink of extinction.<sup>25</sup> This is remarkable considering that in 1860, only four decades earlier, the bison's overwhelming presence on America's Great Plains caused one observer to note: "What strikes the stranger with most amazement is their immense numbers. I know a million is a great many, but I am confident we saw that number yesterday. Certainly, all we saw could not have stood on ten square miles of ground. Often, the country for miles on either hand seemed quite black with them."<sup>26</sup> By the 1870s, commercial bison hunters were slaughtering the animals at a remarkable rate, sending hundreds of thousands of bison hides to the markets in the eastern United States each year.<sup>27</sup> During the 1872–1873 commercial hunting season alone, over 1.5 million bison hides were sent to market.<sup>28</sup> The killing wasn't limited to the commercial hunters. Passengers on the new transcontinental railroads were encouraged to shoot bison from the windows of their coaches, leaving the

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<sup>23</sup> See ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* 300 (2002) (asserting that the massacre at Wounded Knee "rang down the curtain" on the Indian Wars).

<sup>24</sup> *Id.* at 290.

<sup>25</sup> Shepard Krech III, *Buffalo Tales: The Near-Extinction of the American Bison*, NAT'L HUMANITIES CTR., <http://nationalhumanitiescenter.org/tserve/nattrans/ntecoindian/essays/buffaloc.htm> (last visited Mar. 22, 2017). Indeed, the destruction of the buffalo and the subjugation of Native Americans were seen as complimentary efforts by some at the time. James Throckmorton, a former governor of Texas and U.S. Congressman, held this view. In 1876, he said, "it would be a great step forward in the civilization of the Indians and the preservation of peace on the border if there was not a buffalo in existence." DANIEL BRISTER, *IN THE PRESENCE OF BUFFALO: WORKING TO STOP THE YELLOWSTONE SLAUGHTER* (2013). A military general at the time is reported to have said that buffalo hunters "did more to defeat the Indian nations in a few years than soldiers did in 50." See MARTIN J. SMITH, *THE WILD DUCK CHASE: INSIDE THE STRANGE AND WONDERFUL WORLD OF THE FEDERAL DUCK STAMP CONTEST* (2013).

<sup>26</sup> HORACE GREELEY, *AN OVERLAND JOURNEY, FROM NEW YORK TO SAN FRANCISCO IN THE SUMMER OF 1859* (1860). At the height of their population, it is estimated that there were as many as 75 million buffalo living on America's prairies. *American buffalo (bison, bison)*, U.S. FISH & WILDLIFE SERV., [https://www.fws.gov/species/species\\_accounts/bio\\_buff.html](https://www.fws.gov/species/species_accounts/bio_buff.html) (last visited Mar. 22, 2017).

<sup>27</sup> Robert C. Kennedy, *The Last Buffalo*, N.Y. TIMES, June 6, 2001, <https://www.nytimes.com/learning/general/onthisday/harp/0606.html>.

<sup>28</sup> *Nature: American Buffalo: Spirit of a Nation* (PBS television broadcast Nov. 10, 1998).

carcasses to rot alongside tracks from Nebraska to Utah.<sup>29</sup> A contemporary account of a hunt by rail in Harpers Weekly magazine gives a sense of the scale of depredation:

Nearly every railroad train which leaves or arrives at Fort Hays on the Kansas Pacific Railroad has its race with these herds of buffalo; and a most interesting and exciting scene is the result. The train is “slowed” to a rate of speed about equal to that of the herd; the passengers get out fire-arms which are provided for the defense of the train against the Indians, and open from the windows and platforms of the cars a fire that resembles a brisk skirmish. Frequently a young bull will turn at bay for a moment. His exhibition of courage is generally his death-warrant, for the whole fire of the train is turned upon him, either killing him or some member of the herd in his immediate vicinity.<sup>30</sup>

There was even a celebrity culture built around killing bison. Commercial bison hunter Buffalo Bill Cody derived his fame in no small part from the widely shared, and possibly apocryphal, tale that he once killed 4,000 bison over the course of just two hunting seasons.<sup>31</sup> Even future President Theodore Roosevelt, who later became an early and passionate advocate for conserving America’s wild lands, participated in the massacre. As a young man in 1883, Roosevelt spent a season in the Dakota Territory hunting bison for sport.<sup>32</sup> By 1900, the American bison was on the brink of extinction, victim both to America’s relentless push westward and to Americans’ desire for belts, coats, and other wearables made of bison.<sup>33</sup>

At the same time the bison on America’s vast plains was being decimated by commercial hunters, another far smaller animal that

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<sup>29</sup> Gilbert King, *Where the Buffalo No Longer Roamed*, SMITHSONIAN.COM (July 17, 2012), <http://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904/> (“The railroads began to advertise excursions for ‘hunting by rail,’ where trains encountered massive herds alongside or crossing the tracks. Hundreds of men aboard the trains climbed to the roofs and took aim, or fired from their windows, leaving countless 1,500-pound animals where they died.”).

<sup>30</sup> *Buffalo Hunting: Shooting Buffalo From the Trains of the Kansas Pacific Railroad*, HARPER’S WEEKLY (Dec. 14, 1867).

<sup>31</sup> JOSEPH R. CONLIN, *THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY* 509 (2010).

<sup>32</sup> SARAH WATTS, *ROUGH RIDER IN THE WHITE HOUSE: THEODORE ROOSEVELT AND THE POLITICS OF DESIRE* 175 (2006). Interestingly, near the end of his life, former President Roosevelt wrote eloquently about the value of preserving wild birds: “[Birds] should be saved because of reasons unconnected with any return in dollars and cents . . . . [T]o lose the chance to see frigate-birds soaring in circles above the storm, or a file of pelicans winging their way homeward across the crimson afterglow of the sunset, or a myriad terns flashing in the bright light of the midday as they hover in a shifting maze above the beach-why, the loss is like the loss of a gallery of masterpieces of the artists of old time.” THEODORE ROOSEVELT, *A BOOK-LOVER’S HOLIDAY IN THE OPEN* 316–17 (1916).

<sup>33</sup> *American buffalo (bison, bison)*, *supra* note 26 (“Less than 300 wild [buffalo] remained in the U.S. and Canada by the turn of the century out of the millions that once lived there.”).

traveled at sixty miles an hour in mind-bendingly huge numbers above those open expanses was suffering the same kind of depredation by commercial hunters. The passenger pigeon,<sup>34</sup> which darkened the skies over the United States in flocks that could number in the tens of millions of birds in the 17th and 18th centuries, was on the brink of extinction at the beginning of the 20th century.<sup>35</sup> Most Americans alive today have at least a passing familiarity with the extinction story of the passenger pigeon. But to truly understand the scale, scope, and speed of the decimation of the passenger pigeon, which by some estimates was once the most abundant bird species on Earth,<sup>36</sup> one must first grasp the ubiquity of the passenger pigeon in 19th century America.<sup>37</sup> In his article, *Why the Passenger Pigeon Went Extinct*, Barry Yeoman provides several first-person accounts from those alive at that time attesting to the awe-inspiring experience of being in the presence of these enormous flocks on the wing, including a Potawatomi tribal leader comparing the sound made by an advancing flock to “an army of horses laden with sleigh bells;” a resident of Columbus, Ohio describing an approaching flock as a growing cloud that blotted out the sun as it advanced toward the city; and the following account in the Fond du Lac, Wisconsin paper, *the Commonwealth*, of a group hunters witnessing adult male passenger pigeons leaving their nesting site one morning in 1871: “Imagine a thousand threshing machines running under full headway, accompanied by as many steamboats groaning off steam, with an equal quota of R.R. trains passing through covered bridges—imagine these massed into a single flock, and you possibly have a faint conception of the terrific roar.”<sup>38</sup>

And, yet, like the bison, at the turn of the 20th century, the passenger pigeon was a species on the precipice of extinction. What caused this incredible decline? In short, people did. People who viewed the passenger pigeon as a biblically-sized plague that, like the locusts in the Old

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<sup>34</sup> The passenger pigeon’s scientific name is *Ectopistes* (“moving about or wandering”) *migratorius* (“migrating”). *The Passenger Pigeon*, ENCYCLOPEDIA SMITHSONIAN, [http://www.si.edu/Encyclopedia\\_SI/nmnh/passpig.htm](http://www.si.edu/Encyclopedia_SI/nmnh/passpig.htm) (last visited Mar. 22, 2017) (“The scientific name carries the connotation of a bird that not only migrates in the spring and fall, but one that also moves about from season to season to select the most favorable environment for nesting and feeding.”).

<sup>35</sup> See Barry Yeoman, *Why the Passenger Pigeon Went Extinct*, AUDUBON MAGAZINE, June 2014, <http://www.audubon.org/magazine/may-june-2014/why-passenger-pigeon-went-extinct>.

<sup>36</sup> *The Passenger Pigeon*, *supra* note 34 (“It is believed that this species once constituted 25 to 40 percent of the total bird population of the United States.”).

<sup>37</sup> There were an estimated 3–5 billion passenger pigeons in America when Europeans first arrived. *Id.*

<sup>38</sup> Yeoman, *supra* note 35.

Testament,<sup>39</sup> meant to lay waste to their crops and their livelihoods. People who were living at a subsistence level and were desperate for the jolt of protein a cooked passenger pigeon could inject into their meager diets. And, most significantly, people who longed for the adornment a passenger pigeon feather could add to their fancy headwear. Regular people hunted passenger pigeons either to add protein to their diets or to keep the enormous flocks from feasting on their crops,<sup>40</sup> but the primary cause of this dramatic population plunge was the practice known as “millinery murder.”<sup>41</sup> During the latter half of the 19th century commercial (or market) hunters killed migratory birds, including passenger pigeons, in enormous numbers to harvest their feathers for use in fashionable women’s hats.<sup>42</sup> As but one example, it is estimated that during one nine-month period in the late 19th century, nearly 130,000 snowy egrets (prized for their pure white feathers) were killed by commercial hunters in the United States for the London, England millinery market alone.<sup>43</sup>

The industrial onslaught against passenger pigeons was comprehensive, its impact devastating. In less than half a century the passenger pigeon population went from inspiring comparisons with biblical hordes to extinction. The last passenger pigeon left on the planet, a lonely spinster named Martha, died without ever having laid a fertile egg in the Cincinnati Zoo in 1914, four years before the passage of the MBTA.<sup>44</sup> In addition to the passenger pigeon, the list of birds killed and trapped in numbers large enough to drive their species to extinction during this period includes the only species of parakeet native to the

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<sup>39</sup> *Exodus* 10:12 (“And the Lord said to Moses, “Stretch out your hand over Egypt so that locusts swarm over the land and devour everything growing in the fields, everything left by the hail.””).

<sup>40</sup> Yeoman, *supra* note 35 (noting that at the height of their abundance in North America, the flocks of passenger pigeons were so large that birds could be hunted by waving a pole in the air to knock down low-flying birds. Other “creative” techniques for bird slaughter enumerated in the article included torching their roosts, asphyxiating them with burning sulfur, attacking them with potatoes, and poisoning them with whiskey-soaked corn); see also Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL’Y REV. 1, n.12 (2014) (discussing a 1978 massacre by commercial hunters of “hundreds of thousands, indeed millions” of passenger pigeons nesting at Petoskey, Michigan).

<sup>41</sup> William Souder, *How Two Women Ended the Deadly Feather Trade*, SMITHSONIAN MAGAZINE, Mar. 2013, <http://www.smithsonianmag.com/science-nature/how-two-women-ended-the-deadly-feather-trade-23187277/> (“The plume trade was sordid business. Hunters killed and skinned the mature birds, leaving orphaned hatchlings to starve or be eaten by crows.”).

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

<sup>43</sup> *Id.* (quoting William Hornaday, director of New York Zoological Society, describing London at this time as “the Mecca of the feather killers of the world.”).

<sup>44</sup> Yeoman, *supra* note 35. The last known passenger pigeon to be killed in the wild was shot in Pike County, Ohio in 1900. The bird was stuffed and mounted by the sheriff’s wife, who used buttons instead of glass eyes, which led to its nickname of “Buttons.” *Id.*

eastern United States, the Carolina Parakeet,<sup>45</sup> whose brightly colored feathers were prized for the adornment they gave to women's hats, and Heath Hens, a related species to the prairie chicken, that were hunted to extinction for their delicious meat by American settlers in the late 19th century.<sup>46</sup>

This widespread slaughter and species decimation, even occurring during a time when the average American resembled in no way what people today would describe as a "conservationist" (let alone its more freighted adjectival cousin, "environmentalist"), finally began to draw the attention of progressive Americans<sup>47</sup> and some lawmakers. One such lawmaker was Republican Congressman John F. Lacey of Iowa, who proposed the bill in Congress that in 1900 became The Lacey Act,<sup>48</sup> a predecessor of the MBTA. In introducing his proposed bill, the country's first law specifically aimed at breaking the back of the market hunting industry by banning the interstate shipping of illegally-killed animals, Lacey said on the House floor:

The wild pigeon, formerly in this country in flocks of millions, has entirely disappeared from the face of the earth . . . . We have given an awful exhibition of slaughter and destruction, which may serve as a warning to all mankind. Let us now give an example of wise conservation of what remains of the gifts of nature.<sup>49</sup>

The Lacey Act is perhaps better known today for its contributions to our understanding of the limits on Congress's Commerce Clause power to regulate interstate commerce, but, as the United States' oldest federal wildlife protection law, it remains an important tool in regulating the hunting, trapping and poaching of animals and birds.

The legislative response to the widespread hunting and killing of migratory birds by market hunters continued in 1913 with Congress's

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<sup>45</sup> The Carolina Parakeet was declared extinct by the American ornithologists union in 1939. In a sad parallel to the extinction of the passenger pigeon, like Martha—the last captive passenger pigeon—the last known member of the species, Incas, also died in captivity at the Cincinnati Zoo in 1918, the same year the MBTA became law. Ironically, Incas died in the same aviary cage used to house the last passenger pigeon, Martha. See *The last Carolina Parakeet*, JOHN JAMES AUDUBON CENTER AT MILL GROVE, <http://johnjames.audubon.org/last-carolina-parakeet> (last visited Mar. 22, 2017).

<sup>46</sup> See REBECCA HEISMAN, *The Sad Story of Booming Ben, Last of the Heath Hens*, JSTOR DAILY (Mar. 2, 2016), <https://daily.jstor.org/last-heath-hen/>.

<sup>47</sup> Two such people were Boston socialites, Harriet Hemenway and Minna Hall, who in 1896 undertook a grassroots campaign in the parlors of Boston elites to convince their wealthy female friends to boycott feathered hats. Emboldened by the success of this campaign (900 women agreed to join the boycott), Hemenway and Hall started the Massachusetts Audubon Society, which would eventually grow into the National Audubon Society, America's leading bird conservation advocacy group. See Souder, *supra* note 41, at 1.

<sup>48</sup> 16 U.S.C. § 3371 (2012).

<sup>49</sup> 33 CONG. REC. 4,871–72 (Apr. 30, 1900).

passage of the Weeks-McLean Migratory Bird Act.<sup>50</sup> The Act was directly targeted at stopping millinery murder. It banned the spring shooting of migratory game and insectivorous birds, and brought them under the “custody and protection” of the federal government.<sup>51</sup> While the Weeks-McLean Migratory Bird Act had a short lifespan—it was ruled unconstitutional by two federal district courts just a year later on the grounds that Congress exceeded its authority under the Commerce Clause of the United States Constitution<sup>52</sup>—the growing legislative and popular sentiment against indiscriminate market hunting of migratory birds was clear. This sentiment would find its legislative outlet just three years later in the MBTA.

### *C. The Act and its Amendments*

The failure of the Weeks-McLean Migratory Bird Act to pass constitutional muster meant the federal government remained essentially powerless to control the very real and continuing threat to migratory birds from interstate commercial hunting, which continued unabated (and largely unregulated) in many states in the second decade of the 20th century. While Congress lacked a tool for enforcement, the legislative will to protect migratory birds from widespread slaughter that led to the passage of the Weeks-McLean Act remained strong. After all, as shown by the extinction of the passenger pigeon, the Carolina parakeet, and the Heath Hen, all species that were brought to extinction in far less than one century, there was good reason for Congress to be concerned about continued threats to migratory birds from anthropogenic activities at this time.

The problem Congress had to solve was how it could assume authority for regulating the largely intrastate bird-killing activities from the states without running afoul of constitutional limitations on its lawmaking powers. Fortunately for Congress (and for the birds it sought to protect), lawmakers in the United States were not alone in this concern for the continued survival of the remaining migratory bird species. Some of these migrating species crossed the border between the United States and Canada during their migrations, and the Canadian government also had

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<sup>50</sup> Weeks-McLean Act of 1913, ch. 145, 37 Stat. 828, 847–48 (repealed 1918). The Act was co-sponsored by Massachusetts Representative John Weeks and Connecticut Senator George McLean.

<sup>51</sup> *Id.*

<sup>52</sup> *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914) (holding that Congress lacked the power under the Commerce Clause to regulate the hunting of migratory birds within a state); *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915) (“[I]f the [Weeks-McLean Act] shall, on any ground, or for any reason, be upheld and enforced, it must surely follow [that] the many laws of the separate States of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and several States over the single subject matter in issue.”).

an interest in protecting them from industrial slaughter. This shared conservational concern offered a solution to the problem that Congress had been searching for—it would use its treaty-making powers,<sup>53</sup> not its lawmaking authority, to assert authority over activities directed at killing birds.<sup>54</sup>

On August 16, 1916, two years after the Weeks-McClearn Act was declared unconstitutional, the United States and Great Britain (acting on behalf of Canada, then part of the British Empire) signed a treaty for the protection for certain species of birds which migrate between the United States and Canada, in order to assure the preservation of species either harmless or beneficial to man.<sup>55</sup> The “Canada Treaty” was ratified by the United States on September 1, 1916 and by Great Britain on October 20, 1916.<sup>56</sup> It is clear from the legislative record of the Canada Treaty that the U.S. federal government was strongly motivated to act in an effort to gain control over the type of commercial over-hunting that led to the extinction of the passenger pigeon.<sup>57</sup> It is also the case that the specific restrictions on human activity within the Canada Treaty all involve time, place, and manner limitations on hunting and poaching of migratory birds.<sup>58</sup> It is important, however, to read these restrictions in light of the Canada Treaty’s broad conservation goal to preserve migrating bird species and to understand them within the context of the time they were written, when the most pressing threat to migrating birds was uncontrolled commercial hunting. In other words, while hunting and poaching activities feature prominently in the enumerated restrictions in the Canada Treaty, the broad conservation goal of species preservation undergirding the treaty suggests that the two countries intended their

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<sup>53</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>54</sup> See Alexander K Obrecht, *Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NAT. RES. J. 107, 113 (2014) (“Unable to protect migratory birds through its interstate commerce powers, Congress next turned to its treaty powers and succeeded in wresting some of the power to regulate wildlife away from the states.”).

<sup>55</sup> Convention between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., T.S. No. 628 (Aug. 16, 1916) [hereinafter Canada Treaty].

<sup>56</sup> *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/laws/lawsdigest/treaty.html#MIGBIRDCAN> (last visited Mar. 22, 2017).

<sup>57</sup> For an entertaining discussion of the legislative wrangling in the United States about the Canada Treaty, see KURKPATRICK DORSEY, *THE DAWN OF CONSERVATION DIPLOMACY: U.S.-CANADA WILDLIFE PROTECTION TREATIES IN THE PROGRESSIVE ERA* 211–13 (2009) (quoting an unnamed senator at the time telling James A. Reed, Senator from Missouri and emphatic opponent of the Canada Treaty, “We have got to protect these birds and we are going to do it *now*, so *sit down*, Jim!”) (emphasis in original); see also Kristina Roxan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HISTORICAL CTR., MICH. STATE UNIV. COLL. OF LAW (2014).

<sup>58</sup> See, e.g., Canada Treaty, *supra* note 55, Art. II (setting the locations and durations of “close hunting seasons” for certain migratory bird species).

agreement to reflect a more generalized desire to place reasonable limits on anthropogenic harm to migratory birds, whatever form it took.<sup>59</sup>

It happens that at the time of the treaty, the human activity primarily responsible for the dramatic depopulation of several bird species that migrated between the United States and Canada and that spurred the agreement was market hunting (an industrial directed activity). But it seems highly likely from the legislative history of the Canada Treaty that if another industrial cause was the primary driver of the depopulation, even one that was not directed at birds but which nevertheless caused them great harm (i.e., an industrial non-directed activity)—such as the rapid deforestation of the eastern U.S. hardwood forests, which were preferred habitat for several species of migratory birds, including the passenger pigeon<sup>60</sup>—the Canada Treaty’s specific restrictions would be different but the overarching goal of species preservation (“to assure the preservation of species either harmless or beneficial to man”) would be the same.

Put another way, the specific human activity causing the threat was somewhat beside the point. What mattered most to the proponents of the Canada Treaty was the deleterious *impact* on bird species from human activity, not the activity itself.<sup>61</sup> In a letter to President Woodrow Wilson encouraging him to sign the Canada Treaty, Secretary of State Robert Lansing, chief U.S. negotiator of the Treaty, listed commercial hunting as but one of several activities (along with increased agriculture and draining of swamps and meadows) that had “so altered conditions” in the United States in recent years that “few migratory game birds nest within

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<sup>59</sup> The Canada Treaty’s preamble attributes the danger of bird species extermination to “a lack of adequate protection.” Canada Treaty, *supra* note 55, Preamble.

<sup>60</sup> LOWELL DINGUS AND TIMOTHY ROWE, *MISTAKEN EXTINCTION: DINOSAUR EVOLUTION AND THE ORIGIN OF BIRDS* 286–91 (1997) (arguing that the destruction of the passenger pigeon’s habitat in the eastern United States was a larger contributor to the extinction of the species than was rampant and uncontrolled hunting by commercial hunters).

<sup>61</sup> This view also finds support in the 1995 amendments to the Canada Treaty between the United States and Canada (now acting on its own behalf), which, in addition to providing for the subsistence hunting of protected birds by Alaska Natives and Aboriginal people in Alaska and northern Canada, reaffirmed the countries’ broad conservation goals and replaced most of the original treaty’s provisions with specific restrictions on anthropogenic harms that extend well beyond hunting and poaching. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Can.-U.S., S. TREATY DOC. NO. 104-28, 1995 WL 877199 (Dec. 5, 1995). Specifically, the amendments provided that the U.S. and Canada would “take appropriate measures to preserve and enhance the environment of migratory birds[,] seek means to prevent damage to such birds and their environments, including damage resulting from pollution[, and] pursue cooperative agreements to conserve habitat essential to migratory bird populations.” For a thorough discussion of the 1995 amendments to the Canada Treaty see Alexander K. Obrecht, *supra* note 54, at 114–15; see also *Development of a Permit for Incidental Take of Migratory Birds*, HOLLAND & HART & INGAA FOUND., 9–10 (2010).



our limits” and made the Treaty necessary.<sup>62</sup> Lansing went on to describe the Canada Treaty as a “*conservation* measure of prime importance.”<sup>63</sup>

The United States implemented the Canada Treaty by passing the MBTA in 1918.<sup>64</sup> The MBTA was challenged almost immediately after its passage by the state of Missouri, which brought suit to prevent U.S. Game Warden, Ray P. Holland, from enforcing the Act against Missouri residents.<sup>65</sup> Missouri argued that the MBTA unconstitutionally interfered with Missouri’s reserved rights under the Tenth Amendment and violated the state’s sovereignty.<sup>66</sup> The case reached the U.S. Supreme Court in 1920.<sup>67</sup> In a 7-2 decision, the Court found no violation of the Tenth Amendment, and held that the MBTA was a necessary and proper means of effectuating the Canada Treaty under Article I, Section 8, of the Constitution.<sup>68</sup> The Court noted that the protection of migratory birds that reside in multiple states and countries requires national action in the form of an international treaty enforced with a congressional act, as it was done with the MBTA.<sup>69</sup> Writing for the majority, Justice Holmes, noted that “[b]ut for the treaty and the statute there soon might be no birds for any powers to deal with.”<sup>70</sup> At long last, the U.S. government had the law it wanted to thwart anthropogenic activities that had led to the decimation of the passenger pigeon and other migratory bird species. The question for the next one hundred years would be exactly to which of these activities (and actors) the new law should apply.

It is noteworthy that the new law did not simply mirror the Canada Treaty’s prioritization of impact over cause, but expanded it in several important respects, including, most significantly, in its broad definition of prohibited acts and in its use of a strict liability standard for violations.<sup>71</sup> The bird species selected for protection under the MBTA in 1918 included many non-game birds, offering further evidence that Congress at the time was concerned with protecting birds from harms that

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<sup>62</sup> H.R. REP. NO. 65-243, at 2. Later in that same letter, Secretary Lansing wrote that “millions of people in the United States are deeply interested in the conservation and increase of our bird life from an esthetic viewpoint, as well as on account of their practical utility.” *Id.* at 3.

<sup>63</sup> *Id.* at 3 (emphasis added).

<sup>64</sup> 16 U.S.C. §§ 703–11 (2012).

<sup>65</sup> *United States v. Samples*, 258 F. 479 (W.D. Mo. 1919).

<sup>66</sup> *Id.*

<sup>67</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>68</sup> *Id.* at 432–35.

<sup>69</sup> *Id.* at 435.

<sup>70</sup> *Id.*

<sup>71</sup> See Monica Carusello, *Can an Oil Pit Take a Bird?: Why the Migratory Bird Treaty Act Should Apply to Inadvertent Takings and Killings by Oil Pits*, 31 J. ENVTL. L. & LITIG. 87, 108 (“Congress was unmistakably primarily concerned with hunting [when it passed the MBTA]; however, the statutory language also makes clear that hunting was not its sole concern.”).

went beyond the damage wrought by hunters and poachers.<sup>72</sup> As one congressman at the time described it, “[t]he birds dealt with [in the MBTA] are of three classes—migratory game birds, migratory insectivorous birds, and migratory nongame birds.”<sup>73</sup> Further, as was the case in the Canada Treaty, the drafters of the MBTA explicitly recognized the value of preserving birds for their aesthetic value to humans as well as the irreplaceable benefit to farmers birds provided by eating insects that feed on crops.<sup>74</sup>

This expansion of the Canada Treaty through the MBTA was not an accident; it was entirely intended by the drafters of the Act.<sup>75</sup> The congressional opponents of the Act recognized this expansion and expressed their concerns about the MBTA’s potentially extensive reach. Among these opponents was Alabama congressman George Huddleston, who, referring to the provision in the Act that made it unlawful to take a bird except in accordance with rules promulgated by the Secretary of the Interior, said: “If the secretary . . . does not want you to do so, you will never kill another duck or any bird protected by this bill, whether it is a game bird or not . . . . [T]hat is all there is to that.”<sup>76</sup> The broad conservational spirit animating the Act can also be seen in the statement of Iowa Congressman Simeon D. Fess in 1918 in support of the bill: “I am in favor of protecting the birds. My admiration for our little friends of the air makes me unfriendly to the habit of killing off these winged visitors, whether game birds, migratory birds, or other species.”<sup>77</sup>

Unlike the Canada Treaty, the MBTA does not limit itself to placing time, place, and manner restrictions on migratory bird hunting activities to preserve bird populations. To the contrary, the Act defines its reach in

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<sup>72</sup> Among the bird species covered by the MBTA in 1918 were many species of song and insectivorous birds that were not hunted by humans.

<sup>73</sup> 56 CONG. REC. H7369 (June 4, 1918) (statement of Rep. Temple).

<sup>74</sup> See *id.* at H7458 (1918) (statement of Rep. Smith: “If we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions.”); *id.* at H7360 (statement of Rep. Stedman pointing out that among the MBTA’s many purposes is protecting insectivorous migratory birds from harm).

<sup>75</sup> See *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1082 (D. Colo. 1999) (“[T]here is no clearly expressed legislative intent that the MBTA regulates only physical conduct associated with hunting or poaching.”).

<sup>76</sup> 56 CONG. REC. H7364 (1918) (statement of Rep. Huddleston).

<sup>77</sup> *Id.* at H7357. Other members of congress at the time expressed similar views about the scope of the Act, including Rep. Stedman (“[T]he purpose of this bill is to give effect to the convention . . . . Insectivorous migratory birds as well as migratory game birds are embraced in the terms of the treaty.” *Id.* at H7364.) and Rep. Huddleston (“[This bill] puts it within the power of the Secretary of Agriculture to forbid the killing of game birds as much as the killing of song or insectivorous birds. They are put on the same level.” *Id.* at H7369.).

almost the broadest possible terms, making it unlawful at any time, and by any means or in any manner, for a “person”<sup>78</sup> to:

pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.<sup>79</sup>

A “take” of a migratory bird is defined in the rules implementing the MBTA as pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting a protected bird, or any attempt to do so.<sup>80</sup>

It is apparent from the Act’s broad take language, its strict liability formulation that requires no *mens rea* (mental state) to establish misdemeanor liability, and from much of its legislative history that the proponents of the MBTA (both in Congress and in the executive branch) believed they were creating a law that would have application to human-caused harm to birds beyond just that caused by out-of-season hunting and poaching. Congress’s ambitious yet realistic approach to the Act’s conservation goal, which sought to balance the MBTA’s preservation ethic with the country’s industrial, commercial, and residential bird-killing reality, can also be seen in the fact that Section 703(a)’s broad definition of prohibited activities under the Act is prefaced with the caveat, “unless and except as permitted by regulations made as hereinafter provided in this subchapter.”<sup>81</sup> This opened the door to rulemakings by the Department of Interior to decriminalize certain activities that kill protected birds.<sup>82</sup> Further, Section 704(a) of the Act provides that the Secretary of the Interior is “authorized and directed, from time to time, . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment,

<sup>78</sup> 50 C.F.R. § 10.12 (2013). A “Person” is defined in 50 C.F.R. § 10.12 as “any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires.”

<sup>79</sup> 16 U.S.C. § 703(a).

<sup>80</sup> 50 C.F.R. § 10.12 (2016).

<sup>81</sup> 16 U.S.C. § 703(a).

<sup>82</sup> See also Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 605 (2012) (“Congress made a sweeping prohibition that would be unrealistic to enforce—a prohibition that could, at some point, touch nearly everyone’s activities—and then asked the Secretary to carve out an enforceable plan.”).

transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same.”<sup>83</sup> However, to date, outside of rules allowing for the issuance of permits for the intentional take of protected birds for certain, limited public, scientific, and educational purposes,<sup>84</sup> and for incidental takings of migratory birds by military readiness activities, the Department of the Interior has not altered through rulemaking the MBTA’s fundamental prohibition in Section 703(a) as it applies to industrial and nonindustrial activities that intentionally or unintentionally kill birds.

The MBTA has been amended three separate times to implement migratory bird protection treaties with other countries: first with Mexico in 1936 (“Mexico Treaty”),<sup>85</sup> then with Japan in 1972 (“Japan Treaty”),<sup>86</sup> and finally with the U.S.S.R. (present-day Russia) in 1976 (“Russia Treaty”).<sup>87</sup> While the four treaties implemented through the MBTA differ in certain respects, they share the same guiding conservation principle first enunciated in the Canada Treaty. In its preamble, the Mexico Treaty provides that the purpose of the treaty is the protection of migratory birds from extinction.<sup>88</sup> Similarly, the Japan Treaty describes its reason for existence as a desire by the two countries to “cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds.”<sup>89</sup> The Russia Treaty followed form with its statement that the United States and the U.S.S.R. entered into the treaty to “cooperate in implementing measures for the conservation of migratory birds and their environment.”<sup>90</sup> Like the Canada Treaty, however, each of these treaties expressly recognizes that the signatory countries must allow the taking of protected birds in certain situations so

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<sup>83</sup> 16 U.S.C. § 704(a).

<sup>84</sup> 50 C.F.R. § 21. Under the Service’s migratory bird permit program, regional offices issue permits for the intentional take of listed birds for the following listed purposes: falconry, raptor propagation, scientific collecting, rehabilitation, conservation education, migratory game bird propagation, salvage, depredation control, taxidermy, and waterfowl sale and disposal. *See Permits Overview*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/permits/overview/overview.html> (last visited Mar. 22, 2017). According to the Service, these permits “enable the public to engage in legitimate wildlife-related activities that would otherwise be prohibited by law . . . [and] ensure that such activities are carried out in a manner that safeguards wildlife.” *Id.*

<sup>85</sup> Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., 50 Stat. 1311 (Feb 7, 1936) [hereinafter Mexico Treaty].

<sup>86</sup> Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Japan-U.S., T.I.A.S. No. 7990 (Mar. 4, 1972) [hereinafter Japan Treaty].

<sup>87</sup> Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., T.I.A.S. No. 9073 (Nov. 19, 1976) [hereinafter Russia Treaty].

<sup>88</sup> Mexico Treaty, *supra* note 85, Preamble.

<sup>89</sup> Japan Treaty, *supra* note 86, Preamble.

<sup>90</sup> Russia Treaty, *supra* note 87, Preamble.

as not to unreasonably burden their citizens' uses of land for commercial and recreational activities. The Mexico Treaty permits the "rational utilization of migratory birds for the purpose of sport as well as for food, commerce and industry."<sup>91</sup> The Japan Treaty provides that the "taking of the migratory birds or their eggs shall be prohibited," but also allows for exceptions to this prohibition in accordance with Japan and American laws and regulations for "scientific, educational, propagative or other specific purposes not inconsistent with the objectives of [the Japan Treaty]."<sup>92</sup> The Russia Treaty contains essentially the same language as the Japan Treaty in this regard.<sup>93</sup>

Congress amended the MBTA in 1986 to require scienter for a felony conviction under Section 707(b), which concerns taking a migratory bird for the purpose of selling it.<sup>94</sup> This amendment came in response to a Sixth Circuit decision in *United States v. Wulff*, which held that the absence of a knowledge requirement for a felony criminal conviction under Section 707(b) violated the Constitution's due process requirements.<sup>95</sup> The amendment added the word "knowingly" to Section 707(b) to "cure the unintended infirmity" and "require proof that the defendant knew (1) that his actions constituted a taking, sale, barter, or offer to sell or barter, as the case may be and (2) that the item so taken, sold, or bartered was a bird or portion thereof."<sup>96</sup> It is significant that Congress expressly did not add a scienter requirement to misdemeanor MBTA violations under Section 707(a) when it amended Section 707(b), leaving Section 707(a)'s strict liability scheme intact.<sup>97</sup>

The last significant amendment to the MBTA occurred in 1998, when Congress added an intent requirement for "baited field offenses."<sup>98</sup> Prior

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<sup>91</sup> Mexico Treaty, *supra* note 85, Preamble.

<sup>92</sup> Japan Treaty, *supra* note 86, at Art. III.I.

<sup>93</sup> Russia Treaty, *supra* note 87, at Art. II.I (providing that "[e]xceptions to these prohibitions must be made on the basis of laws, decrees or regulations [for] scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention[.]").

<sup>94</sup> 16 U.S.C. § 707(b).

<sup>95</sup> *United States v. Wulff*, 758 F.2d 1121 (1986) ("[T]o be convicted of a felony under the MBTA, a crime unknown to the common law which carries a substantial penalty, Congress must require the prosecution to prove the defendant acted with some degree of scienter. Otherwise, a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation. This, in our opinion, the Constitution does not allow."); S. REP. NO. 99-445, at 16 (1986) ("The effect of [the Wulff decision] is that the felony provisions are meaningless within the 6th Circuit and uncertainty now exists throughout the rest of the country.").

<sup>96</sup> S. REP. NO. 99-445, at 16 (1986).

<sup>97</sup> *Id.* ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.")

<sup>98</sup> Act of Nov. 10, 1986, Pub. L. No. 99-645, 100 Stat. 3582, 3590; Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, 112 Stat. 2956.

to this amendment, a hunter could be convicted of a misdemeanor violation under the MBTA for taking a bird over a baited field even if the hunter had no knowledge that the field was baited.<sup>99</sup> The amendment added a *mens rea* requirement that the government to secure a conviction show the hunter “knew or should have known” he was hunting with bait or over a baited field.<sup>100</sup> Again, as with the 1986 amendment to Section 707(b), Congress took pains to clarify that this amendment did not alter Section 707(a)’s general strict liability standard for non-baited field misdemeanor violations: “The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA [for misdemeanor offenses].”<sup>101</sup>

Lest the reader of this Article obtain the false impression that the story of the MBTA is one of unremitting controversy and disappointment, it is worth noting that enforcement of the Act is credited with the survival and recovery of many previously imperiled bird species. Among these species are the snowy egret, whose luminously white feathers were so popular for use in women’s hats in the 19th century that for a time they were worth more per ounce than gold,<sup>102</sup> and the majestically colored wood duck, which was hunted to near extinction at the turn of the 20th century.<sup>103</sup> Despite this laudable record of species preservation, however, significant controversy about the appropriate reach of the MBTA continues as it enters its second century. The remainder of this article will examine this controversy and suggest a category-based approach to resolve it.

## II. THE CATEGORIES

The list of anthropogenic causes of bird deaths is long and varied, and includes a spectrum of human behaviors ranging from deliberate actions directed at killing birds to passive acts that are in no way intended to harm birds but nevertheless do, and everything in between. It is quickly apparent from a survey of the cases, law review articles, treatises, and other commentary written about the MBTA that there is precious little

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<sup>99</sup> See, e.g., *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1985) (upholding criminal MBTA conviction for hunting over baited field even though evidence showed hunter did not know field was baited).

<sup>100</sup> 50 C.F.R. § 20.21(i) (2016).

<sup>101</sup> See S. REP. NO. 105-366, at 2 (1998).

<sup>102</sup> See Dave Taft, *Snowy Egrets, Once Fashion Victims, Always Elegant Predators*, N.Y. TIMES, Aug. 5, 2016, <http://www.nytimes.com/2016/08/07/nyregion/snowy-egrets-once-fashion-victims-always-elegant-predators.html> (“From near extinction, the snowy egret is once again a fixture along any number of coastal waterways and quiet freshwater ponds and creeks — a common bird along New York City’s summer shorelines.”).

<sup>103</sup> GUY BALDASSARRE, DUCKS, GEESE, AND SWANS OF NORTH AMERICA 280–81 (1942).

about the Act or its application that is generally agreed upon, except this: the drafters of the MBTA did not intend to criminalize every possible act that could result in the death of a protected bird. Nearly all commentators agree on this point both as a matter of common sense and from a close reading of the statute, which, after all, is quite broadly written. The disagreement comes in defining what acts should be included within the purview of the Act and which should be left out.

This Article proposes a middle-ground approach to these two extremes based on a category-based approach to criminal misdemeanor liability under the MBTA: (i) misdemeanor strict liability should apply to the injuring or killing of a protected bird associated with Industrial and Nonindustrial Directed Activities (the “Shotgun”), unless such injury or death is permitted by applicable hunting and poaching regulations; (ii) misdemeanor strict liability should apply to the injuring or killing of a protected bird associated with Industrial Non-Directed Activities (the “Deadly Oil Pit”), unless such injury or death is permitted by an Incidental Take Permit previously obtained by the industrial actor pursuant to the MBTA incidental take permit system proposed in this Article; and (iii) any injury or death of a protected bird associated with Nonindustrial Non-Directed Activities (the “Cute Kitten”) should be expressly excluded from misdemeanor liability under the MBTA rather than continuing to rely on prosecutorial discretion to avoid absurd prosecutions.

#### *A. Industrial and Nonindustrial Directed Activities*

The MBTA does not prohibit all hunting of migratory birds. In fact, as discussed above, the Act specifically authorizes the Secretary of the Interior to adopt regulations permitting the hunting of migratory birds that are compatible with the terms of the Canada, Mexico, Japan, and Russia Treaties.<sup>104</sup> Each year, the Department of Interior, acting through the Service, publishes framework hunting regulations in the Federal Register with the goal of keeping game bird harvest levels “compatible with a population’s ability to maintain itself.”<sup>105</sup> Among other things, the framework regulations set the outside dates for opening and closing of hunting seasons, daily bag limits, and shooting hours.<sup>106</sup> The earliest

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<sup>104</sup> 16 U.S.C. § 704(a) (2012).

<sup>105</sup> See *Migratory Bird Hunting Regulations*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/regulations/migratory-bird-hunting-regulations.php> (last visited Mar. 22, 2017). The MBTA designates 170 of its over 1,000 protected bird species as “game birds.” *FAQs/Commonly Asked Questions*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/faqs.php> (last visited Mar. 22, 2017).

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

beginning date and latest end date for a state's hunting season are set by the MBTA.<sup>107</sup> It is only where a hunter kills a protected bird out of season, exceeds his or her daily bag limit, or otherwise violates the terms of the hunting license that a MBTA violation may obtain. These violations typically occur in one of two scenarios, a commercial hunt run by a hunting guide or, more commonly, a noncommercial hunt by a recreational shooter.

*1. The Activity ("The Shotgun")*

*a. Industrial Directed Activities*

A video opens with five Canada geese gliding gracefully in the dawn light toward what appear to be a gaggle feeding in a wheat field. With the volume off, it would be easy to mistake this video for a high-production-value British Broadcasting Company ("BBC") nature show. With the volume on, however, the viewer quickly understands that this is not a BBC production. In place of the dulcet narration of Sir David Attenborough is a soundtrack of pulsating heavy metal music incongruously accompanying the birds on their arcing path to the ground. When the geese are only a few feet off the ground and have set their wings to land, three large men dressed head-to-toe in camouflage jump to their feet from the coffin blinds they had been lying in, shotguns raised. One of the men yells, "Kill 'em, boys" and all three begin to shoot into the geese, which have realized too late the trap they have fallen into and are desperately flapping their wings to gain elevation and escape. The video slows to half speed to allow the viewer to see the shotgun pellets impact the birds, sending them spinning one-by-one to the ground where they lay crumpled next to the plastic goose decoys they mistook for real birds. Standing over the dead geese, the same man who had given the kill order screams with obvious glee, "You're not as tough as you think you are, Mr. Honker."<sup>108</sup>

The man in the video is Jeffrey Foiles, an Illinois-based hunting guide, and the footage described is part of his *Fallin' Skies* series of DVDs, which have been described as "avian-death porn" for their gleeful tone and graphic depictions of birds being shot by Mr. Foiles and his clients.<sup>109</sup>

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<sup>107</sup> 50 C.F.R. § 20.100 (2016).

<sup>108</sup> OutdoorSporting, *Fallin' Skies 4 Duck Hunting Video*, YOUTUBE (uploaded Jan. 18, 2010), <https://www.youtube.com/watch?v=67G8iPGjb9w>.

<sup>109</sup> See Nicholas Phillips, *Jeff Foiles was a rock star in the world of waterfowl hunting—until the feds drew a target on his back*, RIVERFRONT TIMES, October 27, 2011, <http://www.riverfronttimes.com/stlouis/jeff-foiles-was-a-rock-star-in-the-world-of-waterfowl-hunting-until-the-feds-drew-a-target-on-his-back/Content?oid=2496416> (describing *Fallin' Skies*



Like the market hunters in the late 19th century, Foiles, through his guiding business, The Fallin' Skies Strait Meat Duck Club LLC, made his living by hunting birds. In Foiles' case, his income came not from sending bird feathers to market but from clients who paid him to take them on guided bird hunts. And like many of those market hunters, he did so with little apparent regard for species preservation. Unlike those market hunters, however, Foiles conducted his hunts in an America with well-developed federal and state laws regulating the time, place, and manner of bird hunting.

On December 9, 2010, Foiles was indicted by a federal grand jury in Illinois on twenty-three felony counts, including violations of the Lacey Act and the MBTA.<sup>110</sup> The indictment followed an investigation into Foiles' guiding activities by the Service.<sup>111</sup> Among other things, the indictment alleged that from 2003 to 2007, Foiles knowingly transported and sold ducks and geese that had been hunted and killed by his clients in excess of their daily individual bag limits in violation of the MBTA, falsified hunting records at his club to conceal these violations, and filmed the illegal hunts for his *Fallin' Skies* commercial hunting videos.<sup>112</sup> In June 2011, Foiles pleaded guilty to one Lacey Act misdemeanor violation for the unlawful sale of wildlife and one MBTA misdemeanor violation for unlawfully taking migratory game birds, and the Fallin' Skies Strait Meat Duck Club LLC pleaded guilty to one Lacey Act felony violation for the unlawful sale of wildlife in violation of the Act and one felony count for making false writings in a matter within the jurisdiction of the Service.<sup>113</sup> On September 21, 2011, Foiles was sentenced to thirteen months in prison and fined \$100,000 for these violations of the MBTA and the Lacey Act.<sup>114</sup>

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5 as a "three hour murder-fest" and Jeffrey Foiles as "a brash, hard-driving, all-American badass bird assassin.").

<sup>110</sup> *Professional Duck Hunter Charged with Guiding Illegal Waterfowl Hunts in Central Illinois*, DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE, OFFICE OF PUB. AFFAIRS (Dec. 9, 2010), <https://www.justice.gov/opa/pr/professional-duck-hunter-charged-guiding-illegal-waterfowl-hunts-central-illinois>.

<sup>111</sup> *Id.*

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

<sup>113</sup> *Illinois Man Pleads Guilty to Federal Duck Hunting Violations*, DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE, OFFICE OF PUB. AFFAIRS (June 23, 2011), <https://www.justice.gov/opa/pr/illinois-man-pleads-guilty-federal-duck-hunting-violations>.

<sup>114</sup> *Professional Illinois Duck Hunter Jeff Foiles Sentenced to More Than One Year in Jail and Fines for Illegal Hunting and Guiding Activities*, DEP'T OF JUSTICE, U.S. ATTORNEY'S OFFICE, OFFICE OF PUB. AFFAIRS (Sept. 21, 2011), <https://www.justice.gov/opa/pr/professional-illinois-duck-hunter-jeff-foiles-sentenced-more-one-year-jail-and-fines-illegal>. In a separate matter in Canada related to his guiding and hunting activities in that country, Foiles pleaded guilty to four violations of Canada's Migratory Birds Convention Act and one violation of Canada's Criminal Code for torturing ducks and geese, causing them unnecessary pain and suffering. *United States Poacher Fined for Violations of Canada Laws While Hunting Waterfowl*, ENV'T & CLIMATE

*b. Nonindustrial Directed Activities*

Around the time that Jeffrey Foiles was starting his commercial bird hunting guiding business, another bird hunter ran afoul of the MBTA. Unlike Foiles, David Morgan hunted for pleasure rather than pecuniary gain. Morgan's MBTA troubles stemmed from a duck hunting trip he and six friends took to Sawdust Pond in Plaquemines Parish, Louisiana in 2001. Morgan was hunting in his canoe when a Louisiana Department of Wildlife and Fisheries agent pulled alongside him. The agent found eight dead ducks in Morgan's canoe, which were two more than he was allowed to take in a single day under the terms of his duck hunting license. Morgan told the agent that only two of the ducks were his and that his dog had retrieved the other six that were shot by other hunters. Morgan was nevertheless charged with a misdemeanor violation of the MBTA for taking a listed bird beyond daily possession limits. At trial, the district court found Morgan guilty of a misdemeanor under Section 707(a) and sentenced him to three years probation and fined him \$1,000. On appeal, the U.S. Fifth Circuit Court of Appeals rejected Morgan's argument that his misdemeanor conviction should be overturned because he did not intend to violate the MBTA.<sup>115</sup> The Court noted that there was no dispute that Morgan was found in possession of a number of ducks exceeding his daily bag limit, and held that "possessing migratory game birds exceeding the daily bag limit in violation of the MBTA and its attendant regulations is a strict liability offense."<sup>116</sup>

*2. The Current State of the Law*

The applicability of the MBTA to industrial and nonindustrial activities directed at killing birds, such as those undertaken by hunters Jeffrey Foiles and David Morgan has never been seriously questioned by the courts. In case after case, the courts have found that these "shotgun" activities are precisely the kind of intentional acts that Congress intended to criminalize when it passed the MBTA.<sup>117</sup> Moreover, over the MBTA's one hundred years of its existence, Congress has steadfastly maintained

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CHANGE CANADA (Oct. 19, 2011), <https://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=BBFFF6A3-1>. Foiles was fined \$14,500 USD for these violations by an Edmonton provincial court and banned from hunting in Canada for three years. *Id.*

<sup>115</sup> *United States v. Morgan*, 311 F.3d 611, 616 (5th Cir. 2002).

<sup>116</sup> *Id.*

<sup>117</sup> *See, e.g.*, *United States v. Olson*, 41 F. Supp. 433, 434 (W.D. Ky. 1941) (finding hunter guilty of misdemeanor MBTA conviction for shooting a duck from a powerboat); *United States v. Tucker*, 934 F. Supp. 1249, 1251 (D. Colo. 1996) (hunter who shot migratory bird with illegally modified shotgun guilty of violating MBTA); *United States v. Abbate*, 439 F. Supp. 2d 625, 629 (E.D. La. 2006) (hunter who shot two wood ducks after legal hunting hours guilty of violating MBTA).

the MBTA's strict liability standard for misdemeanor violations of the Act. In addition to out-of-season hunting and poaching violations, courts have consistently held that the MBTA applies to other directed activities, both commercial and noncommercial, that take protected birds, such as poisoning them.<sup>118</sup>

### 3. *The Proposed Approach*

The legislative consistency and judicial clarity around the application of the MBTA to directed industrial and nonindustrial activities is a welcome oasis of certainty in the morass of confusion that surrounds the enforcement of the MBTA in other contexts. There is little genuine controversy that these directed activities are comfortably within the purview of the Act, as it was conceived by its drafters, maintained by Congress, interpreted by the courts, and enforced by the Service. Therefore, the proposed approach for this category is quite simple: don't fix what isn't broken and maintain the status quo. It gets harder from here.

#### *B. Industrial and Nonindustrial Non-Directed Activities*

Under a plain reading of the MBTA, any act that results in the non-permitted death of a protected bird, regardless of the intent behind it, violates the Act and triggers criminal liability for the bird hunter, the oil and gas producer, or the housecat owner, as the case may be. Conversely, under a more restrictive reading of the MBTA, such as that employed by the Fifth Circuit in the *Citgo Petroleum* case, only those acts that are directed at killing birds trigger MBTA liability.<sup>119</sup> Under this reading the hunter who shoots one bird out-of-season or in excess of his daily bag limit should face prosecution under the Act, while the oil and gas producer whose oil and gas wastewater pit kills fifty birds or the housecat owner whose cat kills seventy-five birds should not. The former interpretation of the Act generally comports with the legislative intent behind the MBTA to protect certain bird species from anthropogenic harm, but is over inclusive in assigning liability to acts that the MBTA's drafters would surely have seen as beyond the reasonable scope of the Act. The latter reading is fundamentally contrary to the conservational spirit behind the Act and fails to reach human causes of bird deaths that, while not directed at killing birds, nevertheless closely resemble the types of activities that spurred passage of the MBTA.

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<sup>118</sup> See, e.g., *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990) (upholding MBTA misdemeanor conviction of defendant who deliberately poisoned two protected birds).

<sup>119</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 493–94 (5th Cir. 2015).

### *1. Industrial Non-Directed Activities*

#### *a. The Activity (the “Deadly Oil Pit”)*

The operation of open-air oil and wastewater pits by oil and gas exploration and development companies is used to represent the industrial non-directed activity category because it is a lawful industrial activity responsible for a significant number of incidental bird deaths, which is undertaken in a regulated environment by corporate actors that profit financially from the activity, and who reasonably can be expected to know that their activity kills birds and accompanying legal implications of those deaths. This description and the proposed MBTA approach applies equally well to the electricity industry (including both the transmission and production segments), which is the other primary industrial activity responsible for incidental takes of protected birds.<sup>120</sup>

When migrating, a bird must at times come to earth to rest and recover. Similar to the succor provided to tired long-distance motorists by the fuel, food, and available (if unpleasant) bathrooms found in rest stops and gas stations along America’s highways and interstates, landing spots for migratory birds, commonly called stopover sites, provide an essential opportunity for the migrating bird to eat, drink, and recover before continuing its journey.<sup>121</sup> In the vast majority of cases, the stopover sites selected by migrating birds are the safe and nourishing harbors they appear to be from the air. But sometimes looks can be deceiving—and deadly. Hundreds of thousands of migrating birds die each year from selecting a seemingly benign body of water as a stopover site on their journey that turns out to be an open-air oil and wastewater pit.<sup>122</sup> These poisonous traps bring a bird’s migratory journey to a premature and tragic end. They also create potential civil and criminal liability for the pits’ owners under the MBTA.

With many millions of individual birds enjoying protection under the Act, the odds are fairly good that the next time you see a bird flying high

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<sup>120</sup> An estimated 25 million migratory birds are killed annually from colliding with electrical facilities, and another 5.4 million die each year from electrocutions. See *Threats to Birds: Migratory Bird Mortality – Questions and Answers*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> (last visited Mar. 22, 2017).

<sup>121</sup> An indication of the critical importance of these stopover sites for bird recovery can be seen in the fact that migrating birds typically spend more time at these stopover sites than in the air during migration. See Jennie Miller, *How Do Tired Birds Choose Where To Stop During Migration?*, CORNELL LAB OF ORNITHOLOGY (Jan. 7, 2015), <https://www.allaboutbirds.org/how-do-tired-birds-choose-where-to-stop-during-migration/>.

<sup>122</sup> The Service estimates that exposure to open-air oil and wastewater pits causes an estimated 500,000 to 1 million bird deaths annually. See U.S. FISH & WILDLIFE SERV., *THE INEFFECTIVENESS OF FLAGGING TO DETER MIGRATORY BIRDS FROM OILFIELD PRODUCTION SKIM PITS AND RESERVE PITS* (2011).

overheard, rushing to points unknown, that bird belongs to an MBTA-covered species. At present, there are over 1,000 species of birds protected under the MBTA, including several species of ducks, over thirty species of sparrows, and both the bald and the golden eagle.<sup>123</sup> In total, the Act provides protection to almost all native bird species currently existing in the United States, including, somewhat strangely given the Act's name and original purpose, some species that do not migrate at all.<sup>124</sup> If a bird has the misfortune of choosing an open-air oil and wastewater pit as a stopover site during its journey over the United States and dies because of it, the odds would seem certain that a violation has occurred under Section 707(a) of the MBTA, which does not require that the party intended to take a migratory bird for liability to attach.<sup>125</sup> Under the plain language of the Act, violators can be prosecuted on a strict liability basis without regard to the intent behind their actions (even if otherwise lawful) that resulted in the taking or killing of a protected migratory bird.<sup>126</sup> It would seem to follow from this that the owner of the pit, likely a company involved in oil and gas development,<sup>127</sup> in which a protected bird dies should prepare for an enforcement action under the MBTA, even though the owner's intended purpose for creating and operating the pit was not to kill protected birds.<sup>128</sup> While such an

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<sup>123</sup> Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (Nov. 1, 2013) (codified at 50 C.F.R. § 10.13(c)(1) (2015)). The MBTA protects only species of migratory birds that are "native" to the United States. "Native" is defined under the Act to mean bird species that occur in the United States or its territories "as the result of natural biological or ecological processes." Migratory bird species that were introduced to the United States by humans, either intentionally or unintentionally, are not protected under the Act, unless the introduction is the reintroduction of a migratory bird species that (i) was once native to the United States or its territories and extant in 1918 when the Act was passed, (ii) was completely killed off after 1918 throughout its range in the United States and its territories, and (iii) is being reintroduced by the Federal government. 16 U.S.C. § 703 (2012).

<sup>124</sup> See Sabrina Imbler, *A Hundred-Year Legacy: The Modern Role of the Migratory Bird Treaty*, AUDUBON (Aug. 16, 2016), <http://www.audubon.org/news/a-hundred-year-legacy-modern-role-migratory-bird-treaty>.

<sup>125</sup> When enacted in 1918, the MBTA provided one strict liability crime for violating the Act, but a Congressional amendment to the "Violations and Penalties" section of the Act in 1960 separated § 707 into misdemeanor crimes for violating any provision of the Act (§ 707(a)) and felony crimes for sale or take with intent to sell (§ 707(b)), both with strict liability still the standard. See Pub. L. No. 86-732, 74 Stat. 866 (1960). In 1986, Congress for the first time loosened the strict liability standard under the Act when it amended § 707(b) to require that an entity "knowingly" take a migratory bird to be held liable under this section. See Pub. L. No. 99-645 (1986), 100 Stat. 3582. Crucially, however, the 1986 amendment to the Act did not add a *mens rea* requirement to § 707(a)'s misdemeanor violation, leaving it a strict liability standard.

<sup>126</sup> 16 U.S.C. § 707(a).

<sup>127</sup> The plain language of the MBTA extends liability to incidental killings of protected birds by corporate actors. See *id.*

<sup>128</sup> Oil and gas producers are by no means alone in this predicament. Other potential liability targets under a strict reading of the MBTA include building owners, automobile operators, and pet owners, each of which, as a category, is responsible for millions of unintentional takes of migratory birds each year. See Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the*

enforcement action under the MBTA may indeed come, whether the pit owner is ultimately found liable under the MBTA for a bird's death will depend upon where in the U.S. the offending oil and wastewater pit is located.

Oil and wastewater pits, like uninteresting people at a cocktail party, have the quality of being at once ubiquitous and rarely noted. The open-air variety of oil and wastewater pits (hereinafter "open-air pits") poses a significant risk of injury or death to migratory birds that make the mistake of using them as a stopover site. These open-air pits are used by oil and gas producers throughout the exploration and production process and serve several different purposes, including storing drilling fluid and separating oil from produced water.<sup>129</sup> In all cases, the open-air pits contain a toxic blend of organic and inorganic compounds that often prove fatal to a bird that ingests them while preening its contaminated feathers.<sup>130</sup> Birds also die from drowning in the open-air pits when the oil in their feathers makes it impossible to stay afloat and from cold stress when the natural insulation provided by their feathers is lost from exposure to oil.<sup>131</sup> The damage done to migrating birds by a single open-air pit can be significant. In one study of bird mortality from open-air pits in Wyoming, researchers noted eighty-one bird deaths from one open-air pit over the course of one month.<sup>132</sup>

There is no exact count of the number of open-air pits currently existing in the United States, but credible estimates put the number at somewhere in the range of 400,000 to 600,000.<sup>133</sup> If the owners of these

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*Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1171 (2008) (noting that the leading contributors to U.S. bird fatalities include collisions with buildings and automobiles and predation by domestic and feral cats); *See also* COMM. ON ENVTL. IMPACTS OF WIND-ENERGY PROJECTS, NAT'L RES. COUNCIL, *Environmental Impacts of Wind-Energy Projects* 71–72 (2007) (noting that millions of migratory birds die each year from colliding with buildings, cars, and airplanes).

<sup>129</sup> The Service describes these open-air pits as "an earthen pit excavated adjacent to a drilling rig . . . commonly used for the disposal of drilling muds and fluids in natural gas or oil fields." *Reserve Pits: Mortality Risks to Birds*, U.S. FISH & WILDLIFE SERV. (Sept. 2009), <https://www.fws.gov/mountain-prairie/contaminants/documents/ReservePitsBirdMortality.pdf>.

<sup>130</sup> *See* PEDRO RAMIREZ, JR., U.S. FISH & WILDLIFE SERV., *WILDLIFE MORTALITY RISK IN OIL FIELD WASTE PITS* (2000).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g.*, Pepper W. Trail, *Avian Mortality at Oil Pits in the United States: A Review of the Problem and Efforts for Its Solution*, 543 ENVTL. MGMT. 543 (Nov. 2006) (estimating there were approximately 500,000 open-air pits in the United States in 2006). The number of pits has increased rapidly in the last decade with the development of the Bakken formation in North Dakota and Montana. The ancient Bakken formation, which is estimated to contain between 10 to 500 billion barrels of oil, was undevelopable until the late 2000s when oil and gas companies began using horizontal drilling and fracking techniques to reach the deposits. *See* Krisztina Nadasdy, *North Dakota: Flipping the Bird at the Migratory Bird Treaty Act Since 2012*, 40 B.C. ENVTL. AFF. L.

open-air pits are not utilizing effective mitigation techniques to protect migratory birds from harm, it stands to reason that several takes of migratory birds in violation of the MBTA from exposure to these open-air pits will have occurred in the time it takes to read this Article.

In his recent note in the *George Washington Journal of Energy & Environmental Law*, Benjamin Pachito points out that there are three mitigation techniques that are endorsed by the Service for use by oil and gas producers to protect birds from injury and death caused by open-air pits.<sup>134</sup> They are (1) using a closed containment system rather than an open-air pit, (2) eliminating open-air pits entirely or, alternatively, keeping oil out of the open-air pits, and (3) using a netting system to cover the open-air pit.<sup>135</sup> However, as Pachito notes, most oil and gas producers opt for the cheaper and far less effective “mitigation” measures in their open-air pits of flagging, strobe lighting, and installing noisemakers and metal reflectors.<sup>136</sup> There is considerable doubt about whether these measures in fact offer much mitigation at all. To wit, one large study of bird mortality from open-air pits found that these lesser mitigation measures have no impact on reducing bird deaths, effectively making them non-mitigating mitigation measures.<sup>137</sup>

Given the clear evidence that migrating birds are being killed and injured by exposure to open-air pits, that these injuries and deaths, while unintentional, are (at least in portions of the United States) violations of the MBTA and its strict liability regime, that the most commonly-used mitigation measures at the open-air pits (e.g., flagging, lighting, noise, and reflectors) are entirely ineffective at keeping migrating birds from using these open-air pits, and that the Service has offered clear instructions regarding effective mitigation techniques at open-air pits, a person could reasonably ask why the solution to this problem isn’t staring us in the face. Namely, requiring oil and gas producers to utilize these proven mitigation techniques. After all, if existing open-air pits were covered in netting, converted to closed containment systems, or

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REV. 69 (2013). At the end of 2015, there were 10,372 oil-producing wells in the Bakken, up from only 446 oil-producing wells at the beginning of 2008, when the current production boom in the Bakken began. *N.D. Monthly Bakken Oil Production Statistics*, N.D. DEP’T OF MIN. RES., <https://www.dmr.nd.gov/oilgas/stats/historicalbakkenoilstats.pdf> (last visited Mar. 22, 2017).

<sup>134</sup> Benjamin Pachito, *Resolving the Migratory Bird Treaty Act Circuit Split: Support for a Strict Liability Standard and Proposal for an Incidental Take Permit*, 6 *GEO. WASH. J. ENERGY & ENVTL. L.* 56, 58 (2016).

<sup>135</sup> *Id.* at 58; see also RAMIREZ, *supra* note 130, at 2.

<sup>136</sup> *Id.*; see also U.S. FISH & WILDLIFE SERV., *supra* note 122, at 1 (noting that mitigation techniques such as flagging, strobe lights, metal reflectors and noisemakers are ineffective at preventing bird mortalities in oil pits).

<sup>137</sup> Trail, *supra* note 133, at 543.

eliminated entirely, migrating birds would no longer be tempted to use them as stopover sites.

Unfortunately for migrating birds, this solution, while eminently reasonable in the abstract, is all but unworkable on the ground in the fragmented regulatory framework governing open-air pits. As Pachito points out, existing state (for open-air pits on private lands) and Bureau of Land Management (“BLM”) regulations (for open-air pits on federal lands) generally do not compel oil and gas producers to use proven mitigation techniques to protect migratory birds.<sup>138</sup> Rather, these state and federal regulations generally recommend rather than require use of proven mitigation techniques, or are entirely silent on the question.<sup>139</sup> This results in infrequent use of closed containment and other proven measures to mitigate bird deaths at open-air pits as the vast majority of oil and gas producers make the rational economic decision not to install the more expensive equipment in the absence of regulations requiring it.<sup>140</sup>

*b. The Current State of the Law*

The Service has consistently taken the position that a “take” under the MBTA includes any unpermitted anthropogenic bird death, regardless of whether the act causing the death was directed at birds or intended by the actor to result in the take.<sup>141</sup> In May 2015, the Service published a notice of intent to prepare a programmatic environmental impact statement under the National Environmental Policy Act to evaluate the potential environmental impacts of a proposed rule for the issuance of incidental take permits under the MBTA (“Incidental Take Notice” or “Notice”).<sup>142</sup> The Service referred to its “longstanding position that the MBTA applies to take that occurs incidental to, and which is not the purpose of, an otherwise lawful activity” in the Incidental Take Notice.<sup>143</sup> Later in the Notice, however, the Service explicates its longstanding, self-imposed practice of limiting misdemeanor enforcement actions under the MBTA to a subset of violations and actors:

We note that should we develop a permit system authorizing and limiting incidental take, we would not expect every person or business

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<sup>138</sup> Pachito, *supra* note 134, at 58–59.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., *Permits*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/migratorybirds/mbpermits/ActSummaries.html> (last visited Mar. 22, 2017) (The MBTA provides that it is unlawful to pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, nest, or egg or any such bird, unless authorized under a permit issued by the Secretary of the Interior.).

<sup>142</sup> 80 Fed. Reg. 30,032 (May 26, 2015).

<sup>143</sup> *Id.* at 30,034.



that may incidentally take migratory birds to obtain a permit, nor would we intend to expand our judicious use of our enforcement authority under the MBTA. The Service focuses its enforcement efforts under the MBTA on industries or activities that chronically kill birds and has historically pursued criminal prosecution under the Act only after notifying an industry of its concerns regarding avian mortality, working with the industry to find solutions, and proactively educating industry about ways to avoid or minimize take of migratory birds. Similarly, our permit program, if implemented, will focus on industries and activities that involve significant avian mortality and for which reasonable and effective measures to avoid or minimize take exist.<sup>144</sup>

The Service's explicit recognition in the Notice of its long-standing "judicious" practice of limiting misdemeanor MBTA enforcement for incidental takes to industrial actors responsible for large numbers of bird deaths who have been forewarned by the Service of their violations and have the ability to mitigate these takes did not satisfy some of the parties who submitted comments on the proposed rule.<sup>145</sup> Several public comments received by the Service on the proposed rule questioned the Service's legal authority under the MBTA to make such a rule, arguing that the premise upon which the proposed incidental take permit rule is based—that the MBTA criminalizes incidental takes of migratory birds—is faulty because the MBTA's take prohibition extends only to acts directed at birds.<sup>146</sup> Therefore, according to this reasoning, the Service is proposing to create a permitting regime for a class of activities and industries over which it has no legal authority under the MBTA.

Some comments opposing the proposed action took pains to draw a distinction between the Service's authority under the Endangered Species Act to issue incidental take permits for non-directed takes of listed species incident to lawful industrial activities and its authority to do so under the MBTA. An incidental take of a listed species under the ESA is

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<sup>144</sup> *Id.*

<sup>145</sup> The Service received 147 public comments on the proposed rule during the notice and comment period, which closed July 27, 2015. These comments can be found online at Migratory Bird Permits: Environmental Impact Statement, 80 Fed. Reg. 30,032 (proposed May 26, 2015) (to be codified at 50 C.F.R. pt. 21) (comments entered to Docket No. FWS-HQ-MB-2014-0067-0001), <http://www.regulations.gov/document?D=FWS-HQ-MB-2014-0067-0001>.

<sup>146</sup> *See, e.g.*, National Mining Association, Comment Letter on Proposed Rule, Migratory Bird Permits: Environmental Impact Statement, Docket No. FWS-HQ-MB-2014-0067-0001 (July 27, 2015) ([T]he [Service] should not pursue a rulemaking which improperly assumes that the MBTA covers incidental take and therefor authorizes the [Service] to regulate it . . ."); Wyoming Mining Association, Comment Letter on Proposed Rule, Migratory Bird Permits: Environmental Impact Statement, Docket No. FWS-HQ-MB-2014-0067-0001 (July 29, 2015) ("The Service has neither the authority nor the manpower or budget to develop and implement a permitting program for incidental take under MBTA.").

a take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>147</sup> The comments point out that the 1982 amendments to the ESA that created the concept of an incidental take of a listed species were based in part on the fact that an ESA “take” includes activities that “harm” or “harass” wildlife.<sup>148</sup> They argue that the use of the word harm, which is defined in the ESA regulations as any act that actually kills or injures wildlife, including habitat modification,<sup>149</sup> and harass, which means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife,”<sup>150</sup> expanded the prohibited conduct under the ESA beyond intentional acts directed at wildlife to include non-directed acts that incidentally harm wildlife. The comments contrast the ESA with the MBTA, which does not include harm or harassment in its take definition and, outside of a limited exception for military activities, has not been amended by Congress to expressly include incidental conduct within its purview in its more than one hundred year history.<sup>151</sup> Rather, they argue, the Service’s definition of an MBTA “take” in 50 C.F.R. 10.12, as well as the operative language of the MBTA in Section 703(a), only prohibit conduct that is actively directed at birds (“pursuing,” “hunting,” or “capturing”) and does not include incidental takes of birds.<sup>152</sup> In the words of one commenter, “[t]his difference between the ESA and the MBTA is conclusive that Congress knows how to prohibit incidental conduct when it chooses, but simply chose not to do so in the MBTA, and reaffirmed that decision time and again in subsequent amendments.”<sup>153</sup> Many of these same arguments against the applicability of the MBTA to incidental takes of birds formed the basis of the Fifth Circuit’s decision in *Citgo Petroleum* less than two months later.

In *Citgo Petroleum*, the Fifth Circuit considered Citgo’s appeal of its convictions in the District Court for the Southern District of Texas for three misdemeanor violations of the MBTA for “taking and killing” migratory birds.<sup>154</sup> The district court fined Citgo \$15,000 for each MBTA violation.<sup>155</sup> The MBTA convictions stemmed from the discovery of ten migratory bird carcasses in two open-top oil tanks at a refinery owned by

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<sup>147</sup> 16 U.S.C. § 1539(a) (2012).

<sup>148</sup> *Id.* § 1532(19).

<sup>149</sup> 50 C.F.R. § 17.3 (2016).

<sup>150</sup> *Id.*

<sup>151</sup> National Mining Association, *supra* note 146.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015).

<sup>155</sup> *Id.*

Citgo. The evidence presented at trial showed that the birds died from landing in these tanks and drowning in the oil contained therein.<sup>156</sup> Because the birds belonged to a species protected by the MBTA, the government brought criminal misdemeanor charges against Citgo for unlawfully taking and aiding and abetting the taking of migratory birds under Section 707(a).<sup>157</sup> At trial, Citgo did not dispute that the birds died as a result of landing in its oil tanks, but contended that these deaths were not “takings” within the meaning of the MBTA because they resulted from the company’s lawful industrial operations that were in no way directed at killing or injuring birds.<sup>158</sup> According to Citgo, the MBTA does not criminalize industrial activities “in which migratory birds are unintentionally killed as a result of activity completely unrelated to hunting, trapping, or poaching.”<sup>159</sup> To find otherwise, it argued, would extend the reach of the MBTA to non-directed industrial activities that the Act’s drafters never intended to criminalize and would “yield absurd results.”<sup>160</sup> For its part, the Government asserted that because the MBTA criminalizes the taking or killing of a migratory bird “at any time, by any means or in any manner,” it applies to directed activities such as hunting and poaching *and* to industrial non-directed activities by corporations that incidentally result in the taking and killing of migratory birds.<sup>161</sup>

In considering the parties’ arguments, the district court surveyed cases from federal courts across the country, acknowledging that there was a significant split among the circuits on the question of whether misdemeanor liability for takes of migratory birds under the MBTA is limited to bird deaths resulting from activities that are directed at birds, such as hunting and poaching, or extends to non-directed activities, such as oil and gas production, that indirectly and unintentionally cause the death of protected birds.<sup>162</sup> Among the cases standing for the former proposition discussed by the court were the Ninth Circuit’s decision in *Seattle Audubon Society v. Evans*,<sup>163</sup> the Eighth Circuit’s decision in *Newton County Wildlife Association v. United States Forest Service*,<sup>164</sup> and *United States v. Brigham Oil & Gas L.P.*,<sup>165</sup> a federal district court opinion out of the Eighth Circuit.

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<sup>156</sup> *Id.* at 842.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 845.

<sup>161</sup> *Id.* at 842.

<sup>162</sup> *Id.* at 843.

<sup>163</sup> 952 F.2d 297 (9th Cir. 1991).

<sup>164</sup> 113 F.3d 110 (8th Cir. 1997).

<sup>165</sup> 840 F. Supp. 2d 1202 (D.N.D. 2012).

The plaintiffs in *Seattle Audubon* appealed the district court's denial of their request to enjoin timber sales in the Pacific Northwest that they alleged would result in the taking and killing of northern spotted owls in violation of the MBTA by destroying their habitat.<sup>166</sup> The court affirmed the district court's holding that a take under the MBTA must involve "physical conduct of the sort engaged in by hunters and poachers" that is directed at birds.<sup>167</sup> Because the habitat modification from logging that plaintiff's sought to enjoin was not directed at birds, and any bird deaths resulting from that modification would be incidental to the main purpose of the activity, the court held that these deaths cannot constitute a take under the MBTA or its regulations.<sup>168</sup>

As further evidence that a take under the MBTA does not include bird deaths from non-directed conduct such as habitat modification, the court noted that the ESA's "take" definition includes the verb "harm," which includes habitat modification or degradation, while the MBTA's definition of take does not.<sup>169</sup> The court found this difference in prohibitions between the acts to be "distinct and purposeful," particularly in light of the fact that Congress amended the MBTA in 1986, just a few years after the ESA amendments adding incidental take, and did not add harm to its take prohibition in those amendments.<sup>170</sup>

A timber sale and its potential to result in the "take" of a protected bird was again at issue in *Newton County*, decided six years after *Seattle Audubon*. In *Newton County*, a coalition of environmental groups brought suit against the U.S. Forest Service seeking an injunction to stop proposed timber sales that they alleged, and the Forest Service conceded, would result in migratory bird deaths from logging activity.<sup>171</sup> Plaintiffs contended that these bird deaths would violate the MBTA's "absolute prohibition" against killing protected birds, regardless of the intent behind the activity that caused the deaths.<sup>172</sup> Citing with approval *Seattle Audubon*, the Eighth Circuit refused to grant an injunction, holding that Section 703(a)'s plain language only prohibits conduct directed at birds and that it would "stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such

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<sup>166</sup> *Seattle Audubon Soc'y*, 952 F.2d at 302.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 302 ("The statute and regulations promulgated under it make no mention of habitat modification or destruction.").

<sup>169</sup> *Id.* ("Habitat destruction causes "harm" to the owls under the ESA but does not "take" them within the meaning of the MBTA.").

<sup>170</sup> *Id.*

<sup>171</sup> *Newton Cty. Wildlife Assoc. v. U.S. Forest Serv.*, 113 F.3d at 115.

<sup>172</sup> *Id.*

as timber harvesting, that indirectly results in the death of migratory birds.”<sup>173</sup>

*Brigham Oil*, decided just nine months before the district court’s decision was handed down in *Citgo*, relied on the holding in *Newton County* to find that the defendant oil and gas company did not violate the MBTA when two mallard ducks were killed when they landed in one of the company’s open-air oil reserve pits.<sup>174</sup> The government charged Brigham under Section 707(a) with two misdemeanor criminal violations for taking migratory birds.<sup>175</sup> The court began its analysis by noting that the MBTA does not define what it means by the word “take” in Section 703(a), meaning the court must construe the term according to its ordinary meaning.<sup>176</sup> It found this ordinary meaning in the dictionary and in the MBTA’s implementing regulations, both of which, according to the court, limit a take to an affirmative act directed at birds and not “accidental activity or the unintended results of other conduct.”<sup>177</sup> Therefore, because it found that Brigham’s operation of its open-air oil reserve pits was not an activity directed at birds, the fact that two birds were killed as an unintended consequence of Brigham’s lawful operation those pits did not constitute a taking under the MBTA.<sup>178</sup> Echoing the *Newton County* court, the *Bingham Oil* court found it “highly unlikely” Congress intended to criminalize lawful industrial activity that indirectly kills birds under the MBTA.<sup>179</sup>

In addition to considering these “limited reach” cases finding that misdemeanor liability under the MBTA extended only to activities directed at birds, the *Citgo Petroleum* district court also took note of a line of “expansive scope” cases from other jurisdictions that extended MBTA misdemeanor liability to activities that indirectly took birds.<sup>180</sup> The “expansive scope” cases reviewed by the district court include the Second Circuit’s decision in *United States v. FMC Corporation*,<sup>181</sup> a case from a Colorado federal district court, *United States v. Moon Lake*

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<sup>173</sup> *Id.* (“[W]e agree with the Ninth Circuit that the ambiguous terms “take” and “kill” in 16 U.S.C. § 703 mean “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.”).

<sup>174</sup> *Brigham Oil*, 840 F. Supp. 2d at 1214.

<sup>175</sup> *Id.* at 1203.

<sup>176</sup> *Id.* at 1208.

<sup>177</sup> *Id.* at 1209.

<sup>178</sup> *Id.* at 1211.

<sup>179</sup> *Id.* at 1213.

<sup>180</sup> *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 843–44 (S.D. Tex. 2012).

<sup>181</sup> *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

*Electric Association, Inc.*,<sup>182</sup> and *United States v. Apollo Energies, Inc.*<sup>183</sup> from the Tenth Circuit.

The activity at issue in *FMC* was FMC's manufacture of pesticides at its plant in Middleport, New York.<sup>184</sup> The manufacturing process created large amounts of wastewater that FMC stored in a ten acre pond near to the plant.<sup>185</sup> Unbeknownst to FMC and despite its efforts to remove it from the plant's effluent, a toxic chemical from its manufacturing process was seeping into the wastewater and contaminating the pond.<sup>186</sup> Over the course of several months in 1975, the pond attracted birds that attempted to use it as a stopover site during migration.<sup>187</sup> Almost 100 birds died from being exposed to the chemicals in the water.<sup>188</sup> Based on these deaths, the department of justice brought a 36-count indictment against FMC for taking migratory birds in violation of Section 703 of the MBTA.<sup>189</sup> In its defense, FMC argued that because it had no intention to kill the birds and took no action directed at the birds in its industrial activities, it did not "take" the birds within the meaning of the MBTA.<sup>190</sup> After a jury trial, FMC was found guilty on eighteen of the thirty-six misdemeanor counts.<sup>191</sup>

On FMC's appeal of its convictions, the Second Circuit framed the legal issue before it as whether a conviction for a taking under the MBTA requires that the activity that resulted in the taking was intentional.<sup>192</sup> Or, to put it another way, must the government prove intent to sustain a criminal conviction under the MBTA? In considering this question, the court expressed concern about endorsing a construction of the MBTA that "would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly."<sup>193</sup> The court opined that such an expansive reading of the criminal reach of the MBTA would "offend reason and common sense."<sup>194</sup> In this case, however, the court found a sufficient distinction between these everyday activities that incidentally kills birds (e.g., driving a car or flying a plane), which it said

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<sup>182</sup> *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999).

<sup>183</sup> *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

<sup>184</sup> *FMC Corp.*, 572 F.2d at 904.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 905.

<sup>188</sup> *Id.* at 903.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 906.

<sup>191</sup> *Id.* at 903.

<sup>192</sup> *Id.* at 904.

<sup>193</sup> *Id.* at 905.

<sup>194</sup> *Id.*

should not trigger MBTA liability, and FMC's "extrahazardous" activity of manufacturing toxic pesticides and failing to keep them from entering its wastewater pond to justify imposing strict liability on FMC under the MBTA.<sup>195</sup> In other words, because FMC "engaged in an activity involving the manufacture of a highly toxic chemical; and . . . failed to prevent this chemical from escaping into the pond and killing birds" the fact that it did not intend to kill birds in its industrial activities was irrelevant to the question of strict liability under the MBTA.<sup>196</sup>

More than twenty years after the Second Circuit's decision in *FMC*, a federal district court in Colorado again took up the issue of criminal liability under the MBTA for the incidental take of protected birds from industrial non-directed activities in *Moon Lake*.<sup>197</sup> Defendant Moon Lake Electric, an electrical distribution cooperative, supplied electricity to a Colorado oil field using power lines strung across over 3000 poles.<sup>198</sup> Because the area near the oil field was mostly treeless, several species of MBTA-protected birds used Moon Lake's power poles for perching, roosting, and hunting.<sup>199</sup> Over the course of a little more than two years, thirty-eight of these birds were electrocuted to death while using Moon Lake's poles in this manner.<sup>200</sup> In its action against Moon Lake for "taking and killing" misdemeanor violations of the MBTA, the government alleged that these deaths could have been avoided if Moon Lake had installed inexpensive safety equipment on the poles.<sup>201</sup>

Moon Lake contended that these electrocutions did not violate the MBTA because they did not arise from the kind of an intentionally harmful conduct directed at birds, such as that "normally exhibited by hunters and poachers," that Congress intended to criminalize under the MBTA.<sup>202</sup> Because its conduct was unintentional and it undertook no action directed at birds, Moon Lake argued that it lacked both the *mens rea* (mental state) and *actus reus* (physical act) required for conviction under the MBTA.<sup>203</sup>

In rejecting Moon Lake's lack of *mens rea* defense, the court pointed to the plain language of Sections 703 and 707(a) of the MBTA.<sup>204</sup> According to the court, the plain wording of both sections make clear that

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 908.

<sup>197</sup> *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1072.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1073-74.

a misdemeanor violation of the Act is a strict liability crime and, therefore, does not require proof of intent to take a bird to sustain a conviction.<sup>205</sup> To further support this view, the court pointed to Congress's statement in its amendment adding a *mens rea* requirement for felonies under Section 707(b) of the Act that "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a)."<sup>206</sup> Therefore, the court held that Moon Lake's intent to take the birds, or lack thereof, was "irrelevant to its prosecution under § 707(a)."<sup>207</sup>

The court next took up Moon Lake's argument that it lacked the requisite *actus reus* to support a misdemeanor conviction under Section 707(a), because it took no action directed at taking the birds. The court noted that while some of the types of prohibited conduct enumerated in the statute and its implementing regulations (hunting, capturing, shooting, and trapping) could be construed as applying solely to hunters and poachers, the inclusion of the word "killing" shows that "Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers."<sup>208</sup> The court was also not persuaded by Moon Lake's reliance on *Seattle Audubon* and *Newton County* as support for its contention that the MBTA's reach is limited to takings associated with hunting and poaching.<sup>209</sup> The court found both cases inapposite to the conduct at issue because they dealt with plaintiffs seeking injunctions to stop timber sales that could lead to habitat modification or destruction that might result in the taking of migratory birds.<sup>210</sup> Comparing the somewhat tortured causal chain presented in those cases to the more proximate link between Moon Lake's activity in this case and the killing of birds, the district court held that the government had met its burden of proving proximate cause beyond a reasonable doubt under Section 707(a) because the evidence showed that Moon Lake was aware of the danger to birds posed by its activities prior to the killings at issue in the case and failed to take the relatively inexpensive measures required to ameliorate it.<sup>211</sup> In explaining what it meant by proximate cause in this context, the court cited the definition provided in Black's Law Dictionary: "that which, in a natural and continuous sequence, unbroken by any efficient

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<sup>205</sup> *Id.* ("Simply stated, then, it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.").

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1074.

<sup>208</sup> *Id.* ("If Congress intended to proscribe only capture, injury, and deaths that occur as a result of conduct associated with hunting or poaching, Congress could have said so.").

<sup>209</sup> *Id.* at 1075.

<sup>210</sup> *Id.* at 1076–77.

<sup>211</sup> *Id.* at 1085.



intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.”<sup>212</sup>

The *Moon Lake* court was the first federal court to suggest that misdemeanor liability under Section 707(a)—which the court itself characterized as a strict liability crime that applied to activities beyond hunting and poaching—was nevertheless limited to situations where the alleged violator reasonably anticipated or foresaw the bird deaths as a natural consequence of its act.<sup>213</sup> Given its expansive view of the scope of the Act, the court believed this proximate cause limitation was necessary to avoid “absurd results” under the MBTA in the form of criminal prosecutions for bird deaths caused by everyday activities.<sup>214</sup>

Because the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability under § 707(a), even if such activities would cause the death of protected birds.<sup>215</sup>

The court opined that this proximate cause limitation was preferable to relying on prosecutorial discretion to “ensure [the MBTA] does not ensnare those beyond its proper confines.”<sup>216</sup>

The Tenth Circuit endorsed the *Moon Lake* court’s expansive scope limited by proximate cause view of MBTA misdemeanor liability for incidental takes in *Apollo Energies*,<sup>217</sup> decided more than a decade later. The defendants in *Apollo Energies*, Apollo Energies, Inc. (“Apollo”) and Dale Walker (doing business as Red Cedar Oil) (“Walker”), were commercial oil field operators in Kansas that used a device at their well sites called a “heater-treater” to separate water and other contaminants from the produced oil.<sup>218</sup> The heater-treaters at issue were metal cylinders twenty feet high and more than three feet wide, with vertical exhaust pipes and movable louvres at the base. Birds were drawn to the heater-treaters as nest sites, but became stuck when they entered through the exhaust pipe or louvres.<sup>219</sup> Working off an anonymous tip, in December 2005, the Service inspected hundreds of heater-treaters in the area and discovered the carcasses of over 300 birds trapped inside, including ten

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<sup>212</sup> *Id.*; BLACK’S LAW DICTIONARY 1225 (6th ed.1990).

<sup>213</sup> 45 F. Supp. 2d at 1085.

<sup>214</sup> *Id.* at 1084.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (“While prosecutors necessarily enjoy much discretion, proper construction of a criminal statute cannot depend upon the good will of those who must enforce it.”).

<sup>217</sup> *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

protected birds.<sup>220</sup> None of these protected bird carcasses were found in heater-treaters belonging to Walker or Apollo.<sup>221</sup>

Rather than immediately recommending that the offending oil field operators be charged with violating the MBTA, the Service decided to give all operators in the area a grace period of one year and undertook a campaign to educate the companies about the heater-treater problem.<sup>222</sup> The Service's education campaign included sending letters describing the problem to oil companies in the area, including Apollo.<sup>223</sup> The evidence at trial showed that Walker did not receive a letter at this time.<sup>224</sup> In April 2007, after the grace period ended, the Service again inspected the heater-treaters. A carcass of a Northern Flicker, an MBTA-protected species, was found inside one of Apollo's heater-treaters, and four carcasses of protected birds were discovered in Walker's heater-treaters.<sup>225</sup> At this point the Service sent Walker the educational letter.<sup>226</sup> Another carcass was found in one of Walker's heater-treaters when the service performed a subsequent search in 2008.<sup>227</sup> At trial, Apollo was convicted of one misdemeanor violation of the MBTA for the carcass discovered in 2007 and Walker was convicted of two misdemeanor violations, one for the carcasses discovered in 2007 before it received the warning letter and one for carcass discovered in 2008 after the letter was received.<sup>228</sup> Citing *Moon Lake*, the lower court based its decision on its finding that defendants' failures to bird-proof their heater-treaters proximately caused the bird deaths they were accused of, because these deaths were a reasonably anticipated or foreseeable consequence of these failures to act.<sup>229</sup>

In their appeal to the Tenth Circuit, defendants argued that the convictions should be overturned because they had no intent to take the protected birds and, even if the court finds that violations of Section 703 are strict liability crimes, the application of the Act was unconstitutional as to their conduct because they were deprived of due process.<sup>230</sup> This due process argument rested on defendants' contention that because the MBTA criminalizes acts that are "several steps removed from bird deaths

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 683.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 689–90.

<sup>230</sup> *Id.* at 682.

or takings,” a reasonable actor has no notice that its otherwise legal and non-bird directed acts could give rise to criminal liability.<sup>231</sup>

The court made quick work of defendants’ *mens rea* argument, relying on its earlier decision in *United States v. Corrow*<sup>232</sup> to hold that misdemeanor violations of the MBTA are strict liability crimes and, therefore the fact that defendants did not intend to take the birds was irrelevant.<sup>233</sup> However, echoing the *Moon Lake* decision, the court went on to hold that strict liability under the MBTA satisfies due process only if the accused proximately caused harm to protected birds.<sup>234</sup> In other words, when the defendant’s predicate acts that led to the alleged violation of the Act are “commonly and ordinarily not criminal” (e.g., lawful industrial operations that are not directed at harming birds), proximate causation necessary for a criminal conviction under Section 703(a) requires that defendant was on notice that these predicate acts could result in a violation of the Act.<sup>235</sup> Based on this reasoning, the court upheld Apollo’s single conviction and Walker’s conviction for the 2008 violation, because both occurred after the respective parties received warning letters from the Service notifying them that their operations could result in the death of protected birds, and reversed Walker’s conviction for the 2007 violation that occurred before he received the letter.<sup>236</sup>

After reviewing both the “limited reach” and “expansive scope” cases discussed above and acknowledging that the issue of MBTA misdemeanor liability for indirect harm to protected birds by lawful industrial operations was an issue of first impression in the Fifth Circuit, the *Citgo Petroleum* district court opted to follow the *Moon Lake* and *Apollo Energies* strict liability tempered by proximate cause approach to this issue:

The Court further adopts the Tenth Circuit’s opinion that “a strict liability interpretation of the MBTA for the conduct charged here satisfies due process only if defendants proximately caused the harm to protected birds.” Thus, the Court must determine whether it was reasonably foreseeable that CITGO’s operation of open-air tanks would result in bird deaths.<sup>237</sup>

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<sup>231</sup> *Id.* at 689.

<sup>232</sup> *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997).

<sup>233</sup> *Apollo Energies*, 611 F.3d at 685.

<sup>234</sup> *Id.* at 682.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 691.

<sup>237</sup> *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015).

In determining that Citgo violated the Act by proximately causing the taking of protected birds, the court placed great emphasis on Citgo's failure to install roofs on its oil reserve tanks even after it was aware of the danger these tanks posed to birds.<sup>238</sup> There was ample evidence introduced at trial showing that Citgo had known for at least a decade prior to the bird deaths at issue in the trial that protected birds were dying at its open-air tanks.<sup>239</sup> Based on this evidence, the court held that it was reasonably foreseeable to Citgo that its operations could result in the deaths of protected birds, that Citgo had done nothing to mitigate this risk, and that these operations had in fact proximately caused the taking of migratory birds in violation of Section 703 of the MBTA.<sup>240</sup>

Citgo's appeal of its MBTA conviction reached the Fifth Circuit Court of Appeals in 2015. Reviewing Citgo's MBTA conviction *de novo*, the appellate court began its opinion by applauding the district courts for its thorough review of the case law on MBTA misdemeanor liability in reaching its holding that an illegal "taking" under the MBTA is a strict liability crime that applies both to activities directed at birds, such as hunting and poaching, and non-directed industrial activities that proximately cause the death of a protected bird.<sup>241</sup> Its appreciation for the lower court's diligence notwithstanding, however, the Fifth Circuit wasted little time in rejecting the lower court's expanded scope holding (and the rationale behind it borrowed from the Tenth Circuit's *Apollo Energies* decision), opting instead to follow the limited reach decisions in *Newton County* and *Seattle Audubon* to reverse Citgo's MBTA convictions:

[W]e agree with the Eighth and Ninth circuits that a "taking" is limited to deliberate acts done directly and intentionally to migratory birds. Our conclusion is based on the [MBTA's] text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary legal act.<sup>242</sup>

The court emphasized that because Citgo was accused of "taking" protected birds, not of "killing" them, it would confine its analysis to determining what is meant by this term in Section 703(a) and the implementing regulations.<sup>243</sup> The court agreed with the government that a Section 703(a) taking is a strict liability crime that does not require

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<sup>238</sup> *Id.* at 848.

<sup>239</sup> *Id.* ("The evidence presented at trial established that a number of individuals saw oil-covered birds—both dead and alive—inside Tanks 116 and 117 as early as 1997.").

<sup>240</sup> *Id.*

<sup>241</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 488 (5th Cir. 2015).

<sup>242</sup> *Id.* at 488–89.

<sup>243</sup> *Id.* at 489.

proof that defendant intended to cause injury to a protected bird to support a misdemeanor conviction.<sup>244</sup> But it disagreed that the absence of a *mens rea* requirement for takings means that even acts that indirectly or accidentally kill birds are “takes” under the Act.<sup>245</sup> According to the Fifth Circuit, while the strict liability nature takings under Act means the government need not prove the defendant had criminal intent in taking a protected bird, it does not relieve it of the obligation to prove that defendant undertook an affirmative act to cause migratory bird deaths.<sup>246</sup> The court found compelling support for an *actus reus* requirement that limits the reach of the MBTA’s taking prohibition to activities intentionally directed at migratory birds in its view that the common law definition of the word “take” at the time the Act was passed assumed an affirmative act of reducing an animal to human control, which, according to the court, cannot be done accidentally or by omission.<sup>247</sup> Echoing the Ninth Circuit in *Seattle Audubon*, the court bolstered this restrictive interpretation by comparing the MBTA’s definition of “take,” which does not include the concepts of harm or harassment, with the Endangered Species Act’s expansive definition of the concept, which does.<sup>248</sup>

In the Fifth Circuit’s view, the fact that Congress modified the common law definition of “take” in the ESA to include indirect injury to animals by “harming” or “harassing” them, but has not similarly expanded the MBTA’s take prohibition to cover non-intentional acts, supports its reading that an MBTA “take” retains its common law meaning and applies only to act directed at protected birds.<sup>249</sup> The court further found that Section 703(a)’s criminalizing of pursuing, hunting, taking, capturing or killing a protected bird “at any time, by any means, in any manner” does not expand its scope to cover non-directed activities, but merely modifies the mode of the prohibited “deliberately conducted activity.”<sup>250</sup> Therefore, the court held, while it is undisputed that MBTA protected birds died from landing in Citgo’s uncovered oil tanks, Citgo did not “take” the birds in violation of the MBTA because its operation of these tanks was not intentionally directed at migratory birds.<sup>251</sup>

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<sup>244</sup> *Id.* at 492.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 489 (citing *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J. dissenting)).

<sup>248</sup> *Id.* at 490.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (“For instance, the manner and means of hunting may differ from bowhunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity.”).

<sup>251</sup> *Id.* at 494.

The Fifth Circuit's decision in *Citgo Petroleum*, the latest judicial word on the applicability of the MBTA to bird deaths arising out of industrial non-directed activities, hardened the existing circuit split on this question. Thus, while it provided assurance to industrial operators that they have nothing to fear from the MBTA if their facilities located within the boundaries of the Fifth Circuit kill protected birds, this certainty is necessarily limited to these judicial boundaries. A solution with national application that will resolve the MBTA liability uncertainty plaguing companies with industrial operations in locations across the country remains elusive.

## *2. Nonindustrial Non-Directed Activities*

### *a. The Activity (the "Cute Kitten")*

In May 2014 Ernesto Pulido, a local landscaper, was hired by the U.S. Postal Service to trim several ficus trees outside a post office in Oakland, California, because birds nesting in the trees had been defecating on mail trucks parked underneath them.<sup>252</sup> As a result of Mr. Pulido's trimming work, five baby black-crowned night herons were dislodged from their nests and injured when they impacted the ground.<sup>253</sup> The public outcry in Oakland was immediate and intense. Mr. Pulido was forced to move to another residence in the city because of threats he received from enraged bird lovers.<sup>254</sup> Fortunately none of the baby birds were grievously injured and all eventually made a full recovery under the care of the International Bird Rescue Center in Solano County, California.<sup>255</sup>

Facing public pressure, the Service opened an investigation into the incident as a possible violation of the MBTA. At the close of the investigation the Service recommended that Pulido be charged with a misdemeanor violation under Section 707(a) of the MBTA and face a civil penalty of \$1,500.<sup>256</sup> This recommendation triggered another outcry; this time directed not at Mr. Pulido but at what California Congressman Darrell Issa called "bureaucratic bullying" by the Service in a letter he wrote to the Service in his capacity as Chairman of the House of

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<sup>252</sup> Carol Pogash, *Birds Leave Nest Involuntarily, and Oakland Fumes*, N.Y. TIMES, June 2, 2014, <http://www.nytimes.com/2014/06/03/us/after-fall-ruffled-feathers-for-5-birds-and-oakland.html>.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

Representative's Committee on Oversight and Government Reform decrying the recommendation to charge Pulido.<sup>257</sup>

Shortly after receiving Congressman Issa's letter, the Service and the U.S. Attorney's office jointly announced that they had decided not to pursue MBTA charges against Pulido for the incident.<sup>258</sup> Congressman Issa immediately lauded the decision not to prosecute in a press release:

I'm glad to hear that in the case of Mr. Pulido, the bureaucratic bullies have backed down. The decision to press charges in the first place seems to have been based more on public outcry from outside groups and less on common sense. Mr. Pulido made a mistake, but took responsibility and made substantial efforts to make amends. The Committee still has unanswered questions about this entire head-scratching incident and looks forward to hearing directly from the U.S. Fish and Wildlife Service, which must still comply with the Committee's document request.<sup>259</sup>

*b. The Current State of the Law*

The threatened but ultimately abandoned MBTA prosecution of Ernest Pulido surprised many observers, but perhaps not for the reason one might imagine. The surprising thing about the episode was not that the Service ultimately backed down, but that it recommended prosecution in the first place. The Service attributes an astonishing 2.4 billion migratory bird deaths each year to the predations of housecats.<sup>260</sup> While less lethal than cats in terms of absolute numbers, collisions with airplanes and automobiles kill hundreds of millions of migratory birds each year.<sup>261</sup> While these nonindustrial non-directed causes of migratory bird mortality are orders of magnitude more damaging to migratory birds than industrial and nonindustrial directed activities and industrial non-directed activities, which combined account for a comparatively paltry 50 million bird deaths annually,<sup>262</sup> they never result in MBTA prosecutions. This lack of

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<sup>257</sup> Letter to Honorable Daniel M. Ashe, Director, U.S. FISH & WILDLIFE SERV. (May 28, 2014), <http://oversight.house.gov/wp-content/uploads/2014/05/2014-05-28-DEI-to-Ashe-FWS-MBTA-Prosecution.pdf>.

<sup>258</sup> Veronica Rocha, *No charges for Oakland tree trimmer accused of injuring heron chicks*, L.A. TIMES, June 6, 2014, <http://www.latimes.com/local/lanow/la-me-ln-no-federal-charges-oakland-trimmer-herons-20140606-story.html>.

<sup>259</sup> Press Release, Congressman Daniel Issa, Issa Statement on Agency Dropping Charges Against Calif. Tree-Trimmer (June 4, 2016), <http://issa.house.gov/press-releases/2014/06/issa-statement-on-agency-dropping-charges-against-calif-tree-trimmer/>.

<sup>260</sup> See *Threats to Birds: Migratory Bird Mortality – Questions and Answers*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> (last visited Mar. 22, 2017).

<sup>261</sup> *Id.* (estimating 200 million annual migratory bird deaths from colliding with automobiles).

<sup>262</sup> *Id.*

enforcement cannot be attributed to a carve-out in the Act for bird deaths from these everyday activities; the statute and its implementing regulations offer no such safe harbor. Rather, the Service and Department of Justice exercise their prosecutorial discretion in refraining from prosecuting individuals for non-directed takings of protected birds.<sup>263</sup> This exercise of discretion is longstanding and uniform throughout the country. The author could not find a single example in the long history of the MBTA of an individual being prosecuted for killing a protected bird while engaged in a nonindustrial non-directed activity, such as driving a car or owning a predatory housecat.

### *3. The Proposed Approach*

It would be putting it kindly to say that courts have struggled to articulate a consistent and statutorily defensible rationale for imposing (or not imposing) misdemeanor MBTA liability on activities outside of hunting and poaching that kill protected birds. That this foundational question about the Act's scope remains in doubt even as it enters its second century of existence is equal parts astonishing and frustrating. While it is tempting (and perhaps accurate) to place the lion's share of the blame for this ongoing uncertainty on Congress and the Department of Interior, which have mostly failed for a century to add "flesh" to the skeletal outline of MBTA in the form of clarifying legislation or regulations,<sup>264</sup> the Supreme Court bears its share of responsibility for allowing a decades-long circuit split to fester unresolved. The unhappy result of this legislative, administrative, and judicial inaction is felt most keenly by the industries whose activities incidentally kill birds. For them, the question of whether they have violated the Act when a protected bird dies from their industrial operations is anything but straightforward; depending as it does both on the law applicable to the part of the country where those operations are located and on the Service's unpredictable and uneven enforcement of the Act.

The current confused status of the law around misdemeanor violations of the MBTA for industrial non-directed activities is untenable. On the one hand, in large parts of the country the Act's reach has been so circumscribed by judicial interpretation that it effectively has no role to

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<sup>263</sup> See Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,002, 30,032 (May 26, 2015) (noting the Service's "judicious use" of its MBTA enforcement authority).

<sup>264</sup> See Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 370 (1999) (describing the MBTA as "a skeleton upon which the implementing regulations necessarily place the flesh.").



play in regulating industrial causes of bird mortality outside of hunting and poaching.<sup>265</sup> This attenuation of the MBTA's scope contravenes a plain reading of its language and implementing regulations, compelling legislative history showing that the law's drafters meant to protect birds from multifarious harms, and the broad conservational spirit animating the several treaties it implements. On the other hand, even those few circuits that have taken a more expansive view of the Act's reach into industrial non-directed activities have inappropriately cabined their holdings with a proximate cause requirement that makes no sense with the Act's clear strict liability language<sup>266</sup> or added a nonsensical, tort-based restriction limiting the Act's reach to only "extrahazardous" industrial activities; a limitation that finds no support in the Act or the treaties it implements.<sup>267</sup> And, finally, there are the several circuits that have yet to rule on this question at all, creating more regulatory and legal uncertainty for industrial operators whose activities incidentally take protected birds.

This uncertainty is felt most acutely by companies with industrial facilities in different parts of the country. For these businesses, whether or not they risk criminal liability under the MBTA should a protected bird be killed as an incidental consequence of operating these facilities depends almost entirely on where in the country the facilities are located. For example, consider the situation of an oil company that has drilling operations with open-air oil and wastewater pits in multiple locations across the country. After *Citgo*, the company can rest easy that any birds that die when they land in its pits located in Texas, Louisiana, and Mississippi (the states making up the Fifth Circuit) will not trigger MBTA liability. But the same company also knows, based on the Tenth Circuit's *Apollo Energies* decision, that it faces potential MBTA liability if the same thing happens in any pits it operates in Oklahoma, Utah, New Mexico, Colorado, Kansas or Wyoming, provided those operations are found to have proximately caused the bird deaths. The same would be true for a bird take by open-air pits in New York, Vermont, and Connecticut, without the proximate cause limitation, but only if these operations are "extrahazardous" within the meaning of the Second Circuit's holding in *FMC*. If the company has any pits in states within the Eighth or Ninth Circuits, including states such as Alaska, Montana, and South Dakota with significant natural resource extraction activities, it

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<sup>265</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton Cty. Wildlife Assoc. v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

<sup>266</sup> *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

<sup>267</sup> *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

may take some solace in the *Newton County* and *Seattle Audubon* decisions that share the Fifth Circuit's restrictive view that an MBTA "take" only applies to conduct directed at a bird. But the company would also understand that those cases dealt with timber sales that might result in birds dying, not bird deaths caused by industrial operations, and therefore may not insulate it from MBTA liability. And, to confuse matters even more, any bird deaths caused by pits operated in North Dakota, located within the Eighth Circuit, may be treated as they would be in the Fifth Circuit, based on the district court's holding in *Bingham Oil* that the MBTA does not apply to incidental takes by industrial operations. And, finally, if any birds are killed by industrial operations in any of the twenty-two states outside the boundaries of Second, Fifth, Eighth, Ninth, and Tenth Circuits, the company can only guess as to its potential MBTA liability. It is, in short, a confusing and comprehensive mess that is antithetical to the nation-wide regulatory and legal certainty that federal laws are supposed to supply. This situation can also inadvertently and inappropriately put a regulatory thumb on the scale that favors one state over another when large industrial operators are considering locations for new industrial facilities.

Resolving the uncertainty caused by the circuit split about misdemeanor liability for bird kills from industrial non-directed activities and the continuing question about the applicability of the MBTA to nonindustrial non-directed activities will require action either by the Supreme Court or by the Service and Congress. For the reasons discussed below, the latter option is preferred.

*a. Judicial Resolution*

While it is possible that the Supreme Court will someday break its century-long silence on the scope of misdemeanor liability under the MBTA by granting certiorari to hear a case on point, there are no present indications that the Court intends to do so, nor would any such resolution arise from the Court taking up the Fifth Circuit's *Citgo Petroleum* decision.<sup>268</sup> Shortly after the Fifth Circuit issued its opinion in *Citgo Petroleum* the court granted the United States an extension of time to file a petition for rehearing, giving the government until October 16, 2015 to file.<sup>269</sup> However, no petition was submitted to the court by this date and

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<sup>268</sup> See Robbins, *supra* note 82, at 598 (pointing out that the U.S. Supreme Court has never dealt with the reach of MBTA liability, which has left it to the federal district and appellate courts to wrestle with the issue without guidance).

<sup>269</sup> Order Granting Extension of Time to File, *United States v. Citgo Petroleum Corp.*, No. 14-40128 (5th Cir. Sept. 11, 2015).

the mandate was issued on October 19, 2015.<sup>270</sup> The United States did not petition the Supreme Court for a writ for certiorari following the issuance of the mandate, effectively ending the case.

Even if the Supreme Court were to agree to consider such a case, however, it is likely that its resolution of this question would be as unsatisfactory as that offered by several circuit court opinions discussed in this article. Like them, the Supreme Court would have to contend with applying the skeletal language of the MBTA to contemporary industrial activities that bear little resemblance to those in existence in the early 20th Century when the MBTA became law. And, like the circuit courts before it, the Court would have to do so in the absence of regulations that could provide useful guidance from the Service as to what it views as the appropriate role of the MBTA in regulating incidental takes of protected birds by industrial and nonindustrial activities.

The most likely result of this hypothetical case would either be the Supreme Court adopting a Fifth Circuit-style limited reach approach that, outside of unpermitted takes by hunters and poachers, exempts all anthropogenic causes of bird mortality from criminal liability under the MBTA, including industrial non-directed takes; or adopting the Second and Tenth Circuit's more expansive view of MBTA misdemeanor liability for industrial actors that nevertheless relies on artificial limitations of proximate cause or extra hazardous behavior to avoid the "absurd result" of criminalizing bird deaths resulting from everyday activities under the Act. Neither one of these likely results would be desirable. What's more, in either scenario, the applicability of the MBTA to bird deaths from nonindustrial every day activities, such as driving a car, would not be directly at issue in the case and would therefore be unlikely to receive the consideration and clarification it merits. A better and more satisfying approach to resolving this uncertainty would come from Congress and the Service.

#### *b. Legislative and Administrative Resolution*

First, it is necessary to acknowledge that this article is being written in a time of congressional gridlock.<sup>271</sup> The phrase "do nothing Congress," first coined by President Truman in 1948 in reaction to the 80th

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<sup>270</sup> See Judgment Issued as the Mandate, *United States v. Citgo Petroleum Corp.*, No. 14-40128 (5th Cir. Oct. 19, 2015).

<sup>271</sup> See Aaron Blake, *Gridlock in Congress? It's probably even worse than you think*, WASH. POST, May 29, 2014, <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/gridlock-in-congress-its-probably-even-worse-than-you-think/> (noting that the number of bills passed by Congress has dropped by more than half over the last several decades, and that "[f]ully 75 percent of salient issues today are in gridlock.").

Congress's extreme legislative lethargy, has been revived in recent years as an apt descriptor for the 114th Congress and its inability or unwillingness to pass legislation.<sup>272</sup> Be that as it may, however, the best approach to clarify the scope of misdemeanor liability under the MBTA involves legislative amendments to the MBTA, coupled with an administrative rulemaking. So, with the hopeful observation that even the worst rush hour traffic jams eventually clear, this article proposes a set of legislative and administrative fixes to the MBTA liability quagmire.

Some courts and commentators have argued against criminalizing incidental takes of migratory birds by industrial activities by pointing to the fact that a primary motivation for the creation of the Canada Treaty and the passage of the MBTA implementing it was the decimation of bird species such as the passenger pigeon by hunters and poachers.<sup>273</sup> These commentators reason that the Act's original focus on the directed activities of hunting and poaching should be treated as a jurisdictional limitation on the scope of the MBTA, even one hundred years after the law was passed when the threats to birds include industrial activities that the law's drafters could not have imagined. There are several problems with this argument. First, it conveniently ignores the unfriendly fact that the extinction of the passenger pigeon and other migratory birds was primarily caused not by weekend hunters taking more than their fair share of game, but by professional hunters acting in response to the demands of a market that paid them handsomely for supplying that demand. In other words, a market hunting industry that existed to supply the millinery industry's need for bird feathers to adorn women's hats. That this commercially-driven, industrial-grade slaughter of birds, not the predations of weekend hunters, was behind the passage of the MBTA undermines the "originalist" argument to limit its present-day application to nonindustrial actors such as hunters and poachers, and supports a more expansive view of potential liability under the law that nevertheless avoids criminalizing bird deaths from everyday activities.

A second, related problem with this argument is that it relies on the fact that hunters kill birds by deliberately and intentionally firing projectiles at them to conclude that misdemeanor liability under the MBTA should attach only to the small number of human endeavors

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<sup>272</sup> STEVE NEAL, MIRACLE OF '48: HARRY TRUMAN'S MAJOR CAMPAIGN SPEECHES AND WHISTLE-STOPS 122 (2003).

<sup>273</sup> See, e.g., *Seattle Audubon Soc'y v. Evans*, 952 F.2d at 302 (limiting an MBTA "take" to "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."); Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 833 (1998) ("That the MBTA prohibits pursuing, hunting, capturing, and the like strongly suggests that Congress intended to restrict only activity directed at migratory birds.").

where the killing of protected birds is the intended result of the activity. In other words, so this thinking goes, as long as killing birds is not the intended outcome of an activity, the actor should not face liability under the MBTA for any bird deaths, no matter how numerous, resulting from it. This argument rests on a misapprehension about what Congress was trying to accomplish in the MBTA. The MBTA was not intended to simply be a piece of anti-hunting legislation. To the contrary, it expressly allows the continued hunting of birds within reasonable time, place, and manner limitations. Rather, the legislative history of the Act clearly shows that the drafters' focus was on protecting migratory birds from current and future threats to their survival so that they could continue to provide aesthetic, nutritional, recreational, and agricultural benefits to people into the future.

This broad conservational goal explains why the MBTA does not require *mens rea* for a criminal conviction for taking or killing a bird. Whether or not a person or company intended to kill a protected bird by their activity is not the point. The point is that a protected bird has been killed, which necessarily negatively impacts, even if remotely, its species' continued survival. Similarly, it explains why the instrument of the bird's death, be it shotgun or uncovered oil and wastewater pit, is of no import under the Act. Both of these manmade objects (and many others) are lethal to migratory birds and, therefore, both must be included within the ambit of the broad protections afforded to certain species of migratory birds by the MBTA if it is to serve its intended conservational purpose. But it is equally the case that there are significant societal benefits, be they purely recreational, purely economic, or some mixture of the two, that come from both; benefits few would argue should be entirely disregarded simply because they result in bird deaths. An appropriate balance must be struck that allows these activities to continue subject to reasonable regulations to ensure they do not threaten the survival of entire species of migratory birds. Most observers would agree that just such a balance exists under the MBTA for industrial and nonindustrial directed activities. While, as discussed elsewhere in this article, a plain reading of Section 703(a) appears to criminalize any activity, including hunting, that causes the death of a protected bird, regardless of intent, other provisions in the Act, the Service's implementing regulations, and complementary state laws and regulations allow hunters to take protected birds within prescribed time, place, and manner limitations. The result is a workable and easily understood regulatory framework that allows this important activity to continue while protecting fragile bird populations from overharvesting.

Unfortunately, and this is the root of the problem that has led to the circuit split, while the MBTA also plainly criminalizes bird deaths from industrial non-directed activities in Section 703(a),<sup>274</sup> neither it nor the statute's implementing regulations balance this facial blanket prohibition with rules that exempt companies from liability under the Act for certain preauthorized incidental takes of birds from their industrial activities. That this balance was not struck in the original incarnation of the MBTA is not particularly surprising. Most of today's biggest industrial threats to birds (wind turbines, cell towers, open-air oil and gas wastewater pits) either did not exist in 1918 or, if they did, their deleterious impact on birds was not well understood. The only industry that had Congress's attention at that time was the market hunting industry, and it provided a balanced approach for containing its impact on migratory birds, as discussed above. What is surprising is that Congress has not amended the MBTA in the last 100 years to address this obvious deficiency, and that it took the Service until 2015 to begin to officially explore the possibility of creating an incidental take permitting scheme for industrial activities under the MBTA.<sup>275</sup> This nearly century-long legislative and administrative silence on this critical question about the scope of the MBTA has persisted even as industrial development boomed in America and hundreds of millions of migratory birds were electrocuted, drowned, and smashed as a result. It is little wonder then that the court system, which does not have the option of staying silent when the rare MBTA case for an incidental take comes before it, has struggled to fill this legal and regulatory vacuum. The resulting uneven, confusing, and contradictory body of case law on MBTA incidental takes has led many industries to view the MBTA as a sword of Damocles hovering over their otherwise lawful commercial activities.<sup>276</sup> Similarly, noncommercial actors—automobile drivers, cat owners, house dwellers—are not expressly absolved of potential liability under the MBTA for incidental bird kills caused by their actions, even though it is clear that these everyday activities are not now and have never been the intended targets of the Act, and must instead rely on the discretion of government lawyers not to bring charges against them. The time has come for Congress to step

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<sup>274</sup> 16 U.S.C. § 703(a) (2012) (“[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . [.]”).

<sup>275</sup> Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015).

<sup>276</sup> See John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71, 78 (2007) (noting that the wind energy industry has suffered from not knowing whether the MBTA would be enforced against wind projects that kill birds).

in to resolve these uncertainties. To that end, Congress should take the following actions:

(1) Amend Section 703(a) of the MBTA to clarify that bird deaths from industrial non-directed activities are strict liability misdemeanor crimes under the Act. Resolving the longstanding uncertainty about whether MBTA misdemeanor liability should attach to incidental takes of protected birds by industrial activities can be accomplished by adding the following italicized language to Section 703(a):

(a) Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, *including, without limitation, constructing, operating, or deconstructing industrial facilities as part of a commercial enterprise,* to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . [.]

Amending Section 703(a) to specifically include industrial non-directed activities is consistent both with the MBTA's overarching purpose to protect selected species of migratory birds from the deleterious impacts of human activities that threaten their survival, without regard to the intent behind those activities, and with the law's creation in response to the industrial slaughter of birds by commercial hunters. Modern industrial threats to the survival of migratory birds extend well beyond hunting and poaching. Thus, in order to remain relevant in the 21st Century, the law should be amended to explicitly include these modern industrial activities within its ambit.

Making this addition to Section 703 does not require any amendment to the current regulatory definition of "take" as pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting a migratory bird.<sup>277</sup> The specific injuries that industrial facilities cause to migratory birds, and which the MBTA was created to address, are adequately captured by the verbs "kill" and "wound" in the take definition. In other words, with the suggested amendment to Section 703, if a migratory bird is killed or wounded by, for example, landing in an oil company's uncovered oil and wastewater pit and the company is indicted by the Service for taking the bird, the only question at trial should be one of proof that the alleged taking occurred, not whether the MBTA applies to incidental takes by industrial non-directed activities.

(2) Authorize the Department of Interior to develop an MBTA incidental take permit system for incidental takes of migratory birds by

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<sup>277</sup> 50 C.F.R. § 10.12 (2016).

industrial non-directed activities. The suggested revision to Section 703(a) resolves the vexing question of whether the MBTA applies to incidental takes by industrial activities, but it does not provide the safe harbor for incidental takes by industry that is currently available to hunters and other direct actors under the MBTA and its implementing regulations. The rules allowing hunters to take birds without liability as long as they do so in accordance with bag limits, open and close seasons, and other similar restrictions are compatible with the terms of the Canada, Mexico, Japan, and Russia Treaties and the terms of the MBTA, which authorizes the Secretary of the Interior to promulgate regulations allowing for the take of migratory birds so long as they are compatible with the conservation purposes of the treaties.<sup>278</sup> The Secretary, recognizing both the significant recreational value provided by bird hunting and its potential to wreak havoc on bird populations if left unchecked, struck a workable balance between the two with its time, place, and manner hunting regulations.

A similar scheme is required for bird takes from industrial non-directed activities; one that balances the economic necessity for continued industrial development, even when that development incidentally takes protected birds, with reasonable regulation of those takes to ensure they are compatible with the conservation purposes of the MBTA and the treaties it implements. The Service took an initial step toward developing just such a scheme in May 2015 by publishing the Incidental Take Notice.<sup>279</sup> Although the public comment period for the Incidental Take Notice closed on July 27, 2015, to date the Service has not taken further public action on the proposed rule. While the reasons behind this delay undoubtedly include both the considerable resource challenges involved in developing a programmatic environmental impact statement and the deliberate pace at which most federal rulemaking processes occurs, one also imagines that the current circuit split on the applicability of the MBTA to incidental takes of migratory birds has played a significant role in the Service's apparent hesitancy in moving forward with the proposed rulemaking. As several public comments on the Incidental Take Notice pointed out,<sup>280</sup> the Service may not have the legal authority to promulgate a nationwide incidental take permitting scheme for industrial non-directed activities that take birds in light of Fifth Circuit's holding in *Citgo Petroleum* that the MBTA does not apply to incidental takes by industrial actors,<sup>281</sup> and the Eighth and Ninth Circuit's holdings in *Newton*

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<sup>278</sup> 16 U.S.C. § 704(a).

<sup>279</sup> 80 Fed. Reg. 30,032.

<sup>280</sup> See *Permits*, *supra* note 141.

<sup>281</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).



*County* and *Seattle Audubon*,<sup>282</sup> respectively, that criminal liability under the MBTA must be premised on activities directed at birds. The Service likely has little interest in creating an incidental take permit rule that cannot be implemented in nearly a third of the country. The proposed congressional amendment to Section 703(a) clarifying that takes of protected birds by industrial non-directed activities are covered by the MBTA would resolve this issue by providing clear statutory authority, and an express authorization from Congress to develop incidental take permit program would provide the needed lubricant to kick start the stalled process.

There is relatively recent precedent for the Service developing rules exempting from MBTA liability certain incidental takes of birds at the behest of Congress, albeit for a more limited purpose. In 2002, a federal district court held that military live-fire training exercises by the U.S. Navy on the island of Farallon de Medinilla in the Pacific Ocean that unintentionally resulted in the death of protected birds was a violation of the MBTA.<sup>283</sup> In a subsequent ruling, the same court granted plaintiff's request for a preliminary injunction prohibiting such exercises on the island that killed migratory birds.<sup>284</sup> Congress's response to this decision was swift and decisive. Less than a year after the injunction was granted, Congress included a provision in the 2003 National Defense Authorization Act ("Authorization Act") suspending the application of the MBTA to incidental takes of migratory birds by military activities for a period of one year to give the Secretary of the Interior sufficient time to prescribe regulations using its authority under Section 704(a) of the MBTA to exempt the military from MBTA liability for incidental takes of protected birds by authorized military readiness activities.<sup>285</sup>

The Service finalized its rule exempting from MBTA liability incidental takes of protected birds by military readiness activities on March 30, 2007.<sup>286</sup> In preparing the final rule, the Service considered whether allowing for the incidental take of migratory birds by military readiness activities would conflict with the United States' substantive obligations to conserve migratory birds under any of the treaties implemented through the MBTA. The Service began its analysis by

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<sup>282</sup> *Newton Cty. Wildlife Assoc. v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

<sup>283</sup> *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174 (D.D.C. 2002).

<sup>284</sup> *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 122 (D.D.C. 2002).

<sup>285</sup> *Bob Stump National Defense Authorization Act for 2003*, Pub. L. No. 107-314, Section 315 (Dec. 2, 2002).

<sup>286</sup> *Take of Migratory Birds by the Armed Forces*, 72 Fed. Reg. 8,931 (Feb. 28, 2007), codified at 50 C.F.R. §§ 21.3, 21.15 (2016) ("[T]he Armed Forces may take migratory birds incidental to military readiness activities.").

noting that Congress made a clear determination of compatibility in the Authorization Act by requiring it to promulgate the incidental take regulations.<sup>287</sup> It then went on to note that none of the treaties places an absolute prohibition on the taking or killing of migratory birds, but rather allow the signatory countries to authorize takings of migratory birds that are not inconsistent with the conservational objectives of the treaties.<sup>288</sup> The Service found that the final rule allowing incidental takes of protected birds by military activities is consistent with the objectives of the treaties because it is for a special purpose consistent with the purpose of the treaties, it is limited to a defined category of activities that can result in incidental takes of migratory birds, and it expressly requires the regulated entity to develop and implement appropriate mitigation measures to minimize any significant adverse impacts on migratory birds from the activity.<sup>289</sup> Further, the Service noted that the rule contains a “safeguard” to ensure compliance with the treaties by specifying that it retains authority to suspend or withdraw an incidental take authorization if it believes that the specific activity at issue is incompatible with the objectives of the treaties or does not receive adequate information from the military to assure compliance.<sup>290</sup>

The development of the rule allowing for incidental takes of MBTA-protected birds by military activities based on an express congressional authorization provides a useful template for the proposed incidental take permit program for industrial non-directed activities.<sup>291</sup> A clear legislative mandate to develop the incidental take permitting program, coupled with the suggested amendment to Section 703(a) clarifying that incidental takes of migratory birds from industrial non-directed activities are within the scope of the MBTA, is necessary to resolve the uncertainty about the legality and scope of such a program created by the current circuit split and to provide the Service with the impetus (and legislative “air cover”) it needs to move forward with the process it started when it published the Incidental Take Notice.

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<sup>287</sup> *Id.* at 8,933. *See also* HOLLAND & HART & INGAA FOUND., *supra* note 61, at 25 (noting that Congress specifically found the incidental take authorization to be compatible with the conservation purposes of the treaties, quoting the conferees statement in the Authorization Act’s conference notes that they “believe this provision to be entirely consistent with the underlying terms of all treaty obligations of the United States.”).

<sup>288</sup> 72 Fed. Reg. at 8,946.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* (“This rule will continue to ensure conservation of migratory birds as the authorization it provides is dependent upon the Armed Forces conferring and cooperating with the Service to develop and implement conservation measures to minimize or mitigate significant adverse effects to migratory birds.”).

<sup>291</sup> *See* Obrecht, *supra* note 54, at 137–38 (suggesting that the incidental take rule for military activities could be used as a model for a broader incidental take permitting program).

(3) Amend the MBTA to clarify that bird deaths from nonindustrial non-directed activities are excluded from coverage under the Act. The unsettled law around the MBTA also impacts nonindustrial actors who incidentally kill birds by, for example, hitting them with their cars, and must rely on the exercise of discretion by federal prosecutors lest their trip to the grocery store result in criminal prosecution. While certainly less fraught than the uneven application of MBTA liability for industrial non-directed activities, it is ultimately no more satisfying, relying as it does on case-by-case exercises of prosecutorial discretion rather than on an articulated rationale for excluding these nonindustrial non-directed activities from the MBTA's strictures. At root, this difficulty stems from the failure of the MBTA's drafters to expressly exclude these types of activities from the Act's reach, despite the fact that it was apparent at the time that neither they nor the drafters of the Canada Treaty intended to criminalize them. This "original sin" has been compounded over the last century by the legislative failure to amend the MBTA to clarify that nonindustrial non-directed activities are not within the purview of the Act.

One could fairly ask whether this is a case of a solution in search of a problem given that there is no recorded instance of the Service or Department of Justice prosecuting a noncommercial actor under the MBTA for unintentionally taking a protected bird while driving a car, owning a cat, living in a glassed house, or engaging in any other "everyday" activity. This century-long practice of declining to bring charges in these situations has effectively hardened the discretionary exercise of prosecutors into something resembling a *de facto* categorical exclusion for bird deaths incidentally resulting from nonindustrial non-directed activities. Some courts have argued that this pattern and practice of declining to prosecute nonindustrial actors for incidentally taking migratory birds in the course of their everyday, noncommercial activities can be relied on to effectively ameliorate the "absurd results" that would flow from a literal reading of Section 703(a), which does not explicitly exclude incidental takes by nonindustrial non-directed activities from liability under the MBTA.<sup>292</sup> However, as one commentator recently pointed out, this reliance on prosecutorial discretion to save an overly broad law actually preserves the possibility, however small it may be, of just such an absurd result occurring should a prosecutor decide to break with tradition for political or other non-substantive reasons.<sup>293</sup> It also

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<sup>292</sup> See, e.g., *United States v. FMC Corp.*, 572 F.2d at 905 (stating that the decision whether to prosecute a taking caused by a nonindustrial non-directed take of a bird is best left to "the sound discretion of prosecutors and the courts.>").

<sup>293</sup> See Caruselo, *supra* note 71, at 115.

creates the possibility for inconsistent results and the appearance of favoritism should enforcement actions be brought against one category of violators but not another, with no comprehensible rationale for the differing treatment.<sup>294</sup> Further, and perhaps most practically, the Service and the Department of Justice simply do not have anything close to the resources it would require to bring prosecutions for even a percentage of the hundreds of millions of takes of protected birds caused by nonindustrial non-directed activities each year. Given this, any attempted enforcement in this realm would necessarily be extremely selective, likely piecemeal, and possibly improperly subjective. It is hard to conceive of a legally defensible rationale for prosecuting one driver whose car hits and kills a protected bird but not another.<sup>295</sup>

Finally, by continuing to rely on prosecutorial discretion and failing to amend the MBTA to clarify that it does not apply to nonindustrial non-directed activities that kill birds, Congress has preserved a convenient stalking horse for courts that would limit the Act's application to only directed activities undertaken by hunters and poachers. These courts, in a neat bit of rhetorical sleight of hand, use the fact that most everyone would agree that a person who unintentionally steps on a baby bird on their way to work should not be criminally prosecuted under the MBTA as evidence that the Act must only apply to acts directed at intentionally killing birds. The Fifth Circuit employed this tactic in its *Citgo* decision:

If the MBTA prohibits all acts or omissions that “directly” kill birds, where bird deaths are “foreseeable,” then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA. This scope of strict criminal liability would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion) for harsh penalties: up to a \$15,000 fine or six months' imprisonment (or both) can be imposed for each count of bird “taking” or “killing.” Equally consequential and even more far-reaching would be the societal impact if the government began exercising its muscle to prevent “takings” and “killings” by regulating every activity that proximately causes bird deaths. The absurd results that the government's interpretation would cause further bolsters our confidence

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<sup>294</sup> See Ogden, *supra* note 40, at 38 ([A]n enforcement policy that relies on prosecutorial discretion without clear guidelines for its application . . . undermine[s] the credibility of both the policy and the enforcement agency.”).

<sup>295</sup> *Id.* at 40 (expressing concern that exercise of prosecutorial discretion may result in the “under-enforcement” or “over-enforcement” of the MBTA).

that Congress intended to incorporate the common-law definition of 'take' in the MBTA.<sup>296</sup>

Congress should abolish this stalking horse and eliminate the possibility for absurd prosecutions of cat owners, car drivers, and building dwellers under the MBTA by amending the MBTA to clarify once and for all that incidental takes of protected birds from nonindustrial non-directed activities do not give rise to criminal or civil liability under the MBTA. There is an argument to be made that doing so would violate the terms of the treaties implemented through the MBTA, which do not explicitly exclude incidental takes from everyday noncommercial activities from their lists of prohibited conduct. But both common sense and the fact that, as in the United States, there are no recorded instances of criminal prosecutions in Canada, Mexico, Japan, or Russia for takes of this kind strongly suggest that all signatory countries view the incidental taking of migratory birds by nonindustrial non-directed activities as outside the reach of the treaties.

### III. CONCLUSION

All laws begin as creatures of their time, inexorably bound up in and informed by the prevailing societal, economic, and political views and priorities of their day. At the turn of the 20th century, many Americans were just beginning to recognize that the widely celebrated economic gains made possible by the United States' rapid industrial expansion came with theretofore unacknowledged ecological losses, including the disappearance of a bird, the passenger pigeon, which less than twenty years earlier was defined by its ubiquity. The Migratory Bird Treaty Act stands as an early example of a still maturing country's attempt to find an acceptable balance between the economic necessity of utilizing the country's bountiful natural resources to drive industrial growth, and the moral imperative to protect those resources from total destruction. Finding this balance is no less important today than it was in 1918, and the MBTA still has an important role to play in preserving healthy and diverse populations of migratory birds for this and future generations without placing unnecessarily harsh restrictions on otherwise lawful commercial and noncommercial activities. To do so most effectively, however, the law must be amended to reflect the industrial, recreational, and social realities of the 21st century. Without these changes, the Migratory Bird Treaty Act will continue to be a law out of time.

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<sup>296</sup> *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).