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Take Two: The Fifth Circuit's Interpretation of the Migratory Bird Treaty Act in *United States v. CITGO*

INTRODUCTION

Imagine yourself working on an oil rig, watching pelicans and ducks fly into uncovered oil tanks and eventually die from drowning, exhaustion, or the effects of ingested oil. You have informed your supervisor of the problem and have suggested that the company cover the tanks; however, the tanks remain uncovered and these magnificent birds continue to die. Further, after discussing the situation with your supervisor to no avail, you are now forced to clean these tanks. In doing so, you find bird bones and debris clog your vacuum equipment.

Unfortunately, the fact pattern described above is not a hypothetical. Rather, it is the unfortunate set of facts in *United States v. CITGO*¹—a case where the Fifth Circuit Court of Appeals reversed CITGO Petroleum Corporation's (CITGO) conviction for violating the Migratory Bird Treaty Act of 1918 (MBTA).² Although the MBTA makes it illegal "at any time, by any means or in any manner,"³ to kill protected birds, U.S. courts have allowed this sort of irresponsible activity from corporate actors such as CITGO.⁴

The MBTA has been the topic of a federal circuit split since the 1970s. Two circuits have held that the MBTA applies to accidental killings by corporate actors.⁵ In contrast, three circuits, the most recent being the Fifth Circuit, have held that the MBTA is limited to deliberate acts committed against migratory birds, such as hunting and poaching.⁶

The importance and scope of the MBTA and *CITGO* cannot be understated. The MBTA affects a number of industries, mainly energy, which are vital to Fifth Circuit states. In fact, there are nearly fifty oil refineries between Texas, Louisiana, and Mississippi.⁷ Moreover, Texas leads the country in the wind energy industry, with over 10,000 wind

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1. 801 F.3d 477, 494 (5th Cir. 2015).

2. 16 U.S.C. § 703 *et. seq.* (2012).

3. 16 U.S.C. § 703(a) (2012).

4. *See generally CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

5. *See e.g.*, *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

6. *See e.g.*, *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

7. *Number and Capacity of Petroleum Refineries*, U.S. ENERGY INFO. ADMIN. (June 19, 2015), http://www.eia.gov/dnav/pet/pet_pnp_cap1_dcu_nus_a.htm [<https://perma.cc/FTF9-ZRMP>].

turbines installed.⁸ Both of these energy industries pose threats to migratory birds and have been subject to convictions under the MBTA.⁹

The Fifth Circuit's holding in *CITGO* is incorrect. It misconstrues the text of the MBTA and is inconsistent with the holdings of other circuits which found the MBTA applicable to accidental killings and takings by commercial actors. Further, the MBTA should be interpreted to apply to accidental killings and takings by corporate actors.

This case note will first discuss the background of the MBTA. Next, it will analyze how accidental killings of protected birds have been adjudicated under the MBTA in federal courts and will explain why the Fifth Circuit's ruling in *CITGO* is flawed. Then, it will discuss why the MBTA should be interpreted to apply to accidental killings of birds by corporate actors, and will explore administrative and judicial means of accomplishing this goal.

I. BACKGROUND: WHAT IS THE MIGRATORY BIRD TREATY ACT?

The MBTA arose from a treaty between the United States and Great Britain, acting on behalf of Canada.¹⁰ This treaty aimed to create a "uniform system of protection" for migratory birds that navigate between the United States and Canada.¹¹ The MBTA was amended to implement subsequent treaties among the United States, Mexico, Japan, and the former Soviet Union (now Russia).¹²

The MBTA states that "it 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, possess . . ." any migratory bird.¹³ The MBTA conveys a strict liability standard for misdemeanor violations, which include the accidental killing and taking of protected birds.¹⁴

8. *U.S. Wind Energy State Facts*, AM. WIND ENERGY ASSOC., <http://www.awea.org/resources/statefactsheets.aspx?itemnumber=890> [<https://perma.cc/GJ5Q-4CNB>] (2016).

9. *See infra* Section II: The Circuit Split; *See also* *United States v. Duke Energy Renewables, Inc.*, No. 2:13-cr-00268, 2013 BL (D. Wyo., Nov. 22, 2013).

10. *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

11. *Id.*

12. 16 U.S.C. § 703(a).

13. 16 U.S.C. § 703.

14. *Id.* In contrast, felony MBTA convictions require the government to prove a defendant knowingly acted in violation of the MBTA. 16 U.S.C. § 707(b) (2016); *See e.g.*, *United States v. Pitrone*, 115 F.3d 1, 5 (1st Cir. 1997). Since most of the controversy over MBTA convictions arise from accidental and unintentional killings, the scope of this article only addresses convictions of misdemeanor violations of the MBTA.

The MBTA, like similar environmental protection laws, acts as a foundation upon which implementing regulations build upon.¹⁵ For example, *take* is not defined in the MBTA. However, regulations implementing the MBTA define *take* to mean “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect” a migratory bird.¹⁶

The MBTA grants the Secretary of the Interior power to enforce the MBTA.¹⁷ In turn, the Secretary of Interior delegates enforcement to the Fish and Wildlife Service (FWS).¹⁸ Consequently, FWS has much discretion in who it charges with MBTA violations. Traditionally, the MBTA was intended to combat market hunters’ excessive exploitation of game and non-game birds during the late nineteenth and early twentieth centuries.¹⁹ The MBTA has been successful in reducing over-exploitation driven by activities such as hunting and poaching.²⁰ For instance, most waterfowl populations are either stable or increasing as a direct result of the MBTA.²¹

Today, migratory birds face a number of different threats beyond simply excessive hunting.²² A 2002 FWS study identified the leading causes of bird mortality²³ in the United States to be: building window strikes (estimated 97 to 976 million bird deaths per year); communications towers (4 to 5 million deaths per year); high tension transmission and power lines (up to 174 million deaths per year); impacts with vehicles (60 million deaths or more per year); and pesticide poisoning (at least 72 million deaths per year).²⁴ Newer studies estimate that wind farms kill as

15. 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).

16. 50 C.F.R. § 10.12 (2016).

17. 16 U.S.C. § 706 (2012).

18. 50 C.F.R. § 10.1 (2016).

19. See Andrew G. Ogden, *Dying for A Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL’Y REV. 1, 5 (2013).

20. See Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RES. J. 47, 48 (2000).

21. See U.S. FISH & WILDLIFE SERV., OFFICE OF MIGRATORY BIRD MGMT., WATERFOWL POPULATION STATUS (2015) (noting the FWS estimated there were approximately 49.5 million breeding ducks in the traditional survey area, which is 43% above the 1955–2014 long-term average).

22. David Sibley, *Causes of Bird Mortality*, SIBLEY GUIDES (Jan. 15, 2010), <http://www.sibleyguides.com/conservation/causes-of-bird-mortality> [<https://perma.cc/2CMY-D2WY>] (last updated July 18, 2016).

23. Behind habitat loss and degradation.

24. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1363&context=usfwpubs> [<https://perma.cc/83D6-AFPG>].

many as 368,000 birds annually,²⁵ and oil field production “skim pits”²⁶ and wastewater disposal facilities kill between 500,000 to 1 million birds annually.²⁷

When the MBTA was adopted in 1918, the government could not anticipate the impact modern technology would have on the migratory bird population. In the early 1970s, the federal government began prosecuting companies for incidental takings other than the traditional MBTA violations of hunting and poaching.²⁸ The federal government continues to prosecute companies for takings of migratory birds; however, federal courts are split on: (1) whether the MBTA applies to accidental takings, and (2) if the MBTA applies, the scope of prohibited activity. The underlying issue driving the circuit split is whether the MBTA applies to commercial actors who accidentally or indirectly kill or take birds.

II. THE CIRCUIT SPLIT: “NOW, LET’S SAY YOU AND I GO TOE-TO-TOE ON BIRD LAW AND SEE WHO COMES OUT THE VICTOR?”²⁹

Before the Fifth Circuit handed down the *CITGO* decision in September 2015, federal appellate courts were evenly split in their application of the MBTA. While the Second and Tenth Circuits held that

25. Trevor Hughes, *Officials Crack Down on Wind Farms that Kill Birds, Bats*, USATODAY (Jan. 29, 2015), <http://www.usatoday.com/story/news/nation/2015/01/29/bird-deaths-wind-turbines/21358155/> [<https://perma.cc/Q36W-TE24>].

26. A skim pit is a pit dug in the ground used to separate oil from produced water using gravity-separation. Migratory birds are attracted to oil field production skim pits by mistaking them for natural bodies of water. U.S. FISH & WILDLIFE SERV., CONTAMINANT ISSUES-OIL FIELD WASTE PITS, <http://www.fws.gov/mountain-prairie/contaminants/contaminants1e.html> [<https://perma.cc/4ZLS-ZBUL>] (last visited Aug. 28, 2016).

27. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY IN OILFIELD WASTEWATER DISPOSAL FACILITIES (May 2009), <http://www.fws.gov/mountain-prairie/contaminants/documents/COWDFBirdMortality.pdf> [<https://perma.cc/3SLC-BB4F>].

28. See George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 183–85 (1979). 16 U.S.C. § 703 makes it illegal to do the following to any migratory bird: 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

29. *It’s Always Sunny in Philadelphia: The Gang Exploits the Mortgage Crisis* (FX Network broadcast Sept. 17, 2009).

the MBTA applies to accidental takings by commercial actors,³⁰ the Eighth and Ninth Circuits held that the MBTA does not apply.³¹

A. *The Second and Tenth Circuits*

The Second Circuit was first to address the applicability of the MBTA to accidental takings in the 1978 case *United States v. FMC Corp.*³² In *FMC Corp.*, the Second Circuit upheld a conviction for killing migratory birds. The defendant was engaged in the “extrahazardous” activity of manufacturing pesticides and failed to prevent the dangerous chemicals from accruing in a wastewater storage pond.³³ As a result, migratory birds landed in the storage ponds and died of pesticide poisoning.³⁴ Ultimately, the court found it appropriate to uphold strict liability for killings under the MBTA, even though the defendant was unaware of the harm caused, because the defendant was engaged in an “extrahazardous” activity.³⁵

In 2010, the Tenth Circuit similarly upheld misdemeanor convictions for the death of migratory birds caught in oil production equipment.³⁶ In *United States v. Apollo Energies*,³⁷ the court held that a misdemeanor violation of the MBTA is a strict liability crime since the “take” provision of the Act does not contain a knowledge requirement.³⁸ Furthermore, the court held that the MBTA is not unconstitutionally vague.³⁹ The court explained that although the MBTA criminalizes a wide range of conduct, the law explicitly makes it illegal to “pursue, hunt, take, capture, [and] kill . . .” protected migratory birds.⁴⁰ Since the defendants had fair notice of what constituted a MBTA violation, the court held the statute was not unconstitutionally vague.⁴¹

Apollo involved the prosecution of two defendants. FWS put the first defendant, Apollo Energies, on notice that their equipment could trap and kill migratory birds.⁴² The Tenth Circuit upheld MBTA convictions only for conduct that occurred after the FWS provided notice that the activity could be a proximate cause of bird injuries.⁴³ In doing so, the Tenth Circuit

30. *See supra* note 5.

31. *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 112 (8th Cir. 1997); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

32. 572 F.2d 902 (2d Cir. 1978).

33. *Id.* at 907.

34. *Id.* at 904–05.

35. *Id.* at 907.

36. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010).

37. 611 F.3d 679 (10th Cir. 2010).

38. *Id.* at 686.

39. *Id.* at 688–89.

40. *Id.*

41. *Id.*

42. *Id.* at 691.

43. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 691 (10th Cir. 2010).

reasoned that criminalizing acts that were not reasonably foreseen to effect birds would stretch the MBTA to its “constitutional breaking point.”⁴⁴ The court clarified that the “foreseeability” required is the foreseeability that one’s equipment could harm migratory birds.⁴⁵ Because Apollo Energies had received notice of its equipment killing birds for nearly eighteen months before the bird death resulting in its conviction occurred; it knew its equipment could (and did) proximately cause bird deaths.⁴⁶ The second defendant, Walker, was not made aware that its equipment could injure birds, and no reasonable person would conclude the equipment would lead to the deaths of migratory birds. Therefore, Walker’s conviction was reversed.⁴⁷

B. The Eighth and Ninth Circuits

In *Seattle Audubon Society v. Evans*,⁴⁸ the Ninth Circuit considered whether timber sales that would destroy a suitable habitat for the northern spotted owl amounted to a taking under section 703 of the MBTA.⁴⁹ In declining to extend the MBTA to an activity that would “indirectly” lead to bird deaths, the court stated “[h]abitat destruction causes ‘harm’ to the owls under the Endangered Species Act (ESA) but does not ‘take’ them within the meaning of the MBTA.”⁵⁰ The Ninth Circuit distinguished between the ESA and the MBTA’s definition of *take*, noting the ESA’s definition of *take* included the word *harm*, which was further defined to include “significant habitat modification or degradation where it actually kills or injures wildlife.”⁵¹ Furthermore, the only cases that had found liability under the MBTA reached as far as “direct, though unintended,” bird killings from pesticide poisoning.⁵²

In *Newton Country Wildlife Associations v. U.S. Forest Service*,⁵³ the Eighth Circuit also found that timber sales did not violate the MBTA.⁵⁴ In *Newton*, the Newton County Wildlife Association (NCWA) sued the United States Forest Service (USFS), alleging MBTA violations in four

44. *Id.* at 690.

45. *Id.* at 690 n.5 (quoting “We emphasize that ‘foreseeability’ in the proximate cause sense is not foreseeability of a legal rule . . . Due process constrains the criminalization of predicate acts that do not foreseeably result in a danger that is criminal—here, the taking of protected birds.”).

46. *Id.* at 691.

47. *Id.*

48. 952 F.2d 297 (9th Cir. 1991).

49. *Id.* at 302.

50. *Id.* at 303.

51. *Id.* (citing 50 C.F.R. § 17.3 (2012)) (internal citations omitted).

52. *Id.* (referring to *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978)).

53. 113 F.3d 110 (8th Cir. 1997).

54. *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 116 (8th Cir. 1997).

timber sales.⁵⁵ Particularly, the NCWA argued that the logging necessary for the timber sales would “disrupt nesting migratory birds, killing some,” thus violating section 703 of the MBTA.⁵⁶ The Eighth Circuit disagreed with NCWA, reasoning that “it would stretch [the MBTA] far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.”⁵⁷ Citing *Seattle Audubon Society v. Evans*, the Eighth Circuit held that the ambiguous terms *take* and *kill* in 16 U.S.C. section 703 refer to the “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.”⁵⁸

C. *The Case Note Focus: United States v. CITGO Petroleum Corp*

A surprise inspection in March 2002 revealed that two of CITGO’s oil-water separator tanks were left uncovered.⁵⁹ In 2007, a grand jury indicted CITGO for misdemeanor violations of the MBTA, 16 U.S.C. section 703.⁶⁰ The government accused CITGO of “taking” a number of migratory birds, including “five White Pelicans, twenty “regular old” Ducks, two Northern Shoveler Ducks, four Double Crested Cormorants, one Lesser Scaup Duck, one Black-Bellied Whistling Tree Duck, one Blue-Winged Teal Duck, and one Fulvous Whistling Tree Duck.”⁶¹

At trial, the district court found CITGO guilty of three out of five counts for “taking” migratory birds.⁶² Agreeing with the Tenth Circuit’s reasoning in *Apollo Energies*, the district court found it obvious that “unprotected oil field equipment can take or kill migratory birds.”⁶³ The district court ruled that the MBTA requires the defendant to proximately

55. *Id.* at 112.

56. *Id.* at 115.

57. *Id.*

58. *Id.*

59. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 480 (5th Cir. 2015).

60. *Id.* at 488. CITGO was also convicted for violating the Clean Air Act based on the said tanks being left open. The trial court found CITGO guilty of these charges. *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 842 (S.D. Tex. 2012). On appeal, the Fifth Circuit ruled CITGO not guilty of violating the Clean Air Act because CITGO’s open-air equalization tanks were not oil-water separators under Clean Air Act regulation and, therefore, did not require the tanks to be covered. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

61. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 480 n.4 (5th Cir. 2015).

62. *United States v. CITGO Petroleum Corp.*, 893 F. Supp.2d 841, 848 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015).

63. *Id.* at 847 (quoting *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010)).

cause the bird deaths to satisfy due process.⁶⁴ In order to determine proximate cause, the court had to determine whether it was reasonably foreseeable that CITGO's operation of open-air oil tanks would result in bird deaths.⁶⁵ In finding proximate cause existed, the district court held:

[N]ot only was it reasonably foreseeable that protected migratory birds might become trapped in the layers of oil on top of Tanks 116 and 117, CITGO was aware that this was happening for years and did nothing to stop it. CITGO's unlawful, open-air oil tanks proximately caused the deaths of migratory birds in violation of the MBTA.⁶⁶

The Fifth Circuit Court of Appeals overturned all of CITGO's convictions in September 2015, structuring its holding in four parts.⁶⁷

First, the Fifth Circuit held that the MBTA's text and the common law origin of the word *take* limited prosecution of a "taking" to affirmative actions that "reduce those animals, by killing or capturing, to human control."⁶⁸ The Fifth Circuit began its analysis by ruling that courts assume that Congress intends to use the common law definition of statutory terms, unless there are "contrary indications."⁶⁹ The common law definition of *take*, as applied to wildlife, means to "reduce those animals, by killing or capturing, to human control."⁷⁰ Further, one does not reduce an animal to human control "accidentally or by omission; he does so affirmatively."⁷¹

The government argued that the common law definition of *take* was not so limited in 1918.⁷² In doing so, the government listed every possible definition of the term *take* in the 1920 edition of Webster's dictionary. The Fifth Circuit responded that simply because "take" may have alternative meanings is not determinative; when the MBTA was originally passed, the term "take" was a commonly understood term of art in the common law when applied to wildlife.⁷³ The Fifth Circuit further justified limiting *take* to affirmative acts by comparing the MBTA's definition to related statute's definitions.⁷⁴ The ESA and the Marine Mammal Protection Act

64. *Id.*

65. *Id.*

66. *Id.* at 848.

67. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489–94 (5th Cir. 2015).

68. *Id.* at 489 (quoting *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

69. *Id.* (quoting *United States v. Shabani*, 513 U.S. 10, 13 (1995)).

70. *Id.* at 489 (quoting *Babbitt*, 515 U.S. at 717).

71. *Id.*

72. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

73. *Id.* (internal citations omitted).

74. *Id.* at 490.

(MMPA) both define *take* to include the acts of harassing or harming.⁷⁵ *Harass* and *harm* are interpreted by the ESA and the MMPA to include negligent acts that indirectly disturb animals, which is contrary to the common law definition of *take*.⁷⁶ Since the MBTA does not contain terms like *harm*, or *harass*, or language signaling Congress's intent to modify the common law definition of *take*, the Fifth Circuit assumed *take* in the MBTA should be read by its common law meaning.⁷⁷

The government also argued that Congress expanded the definition of *take* by negative implication. The argument goes as follows: in response to a 2002 conviction of the U.S. military for accidentally killing birds during training exercises, Congress authorized the accidental taking of migratory birds for "military readiness activity."⁷⁸ Since Congress only permitted military training activity, and not "operation of industrial facilities," to take migratory birds, the government argued that Congress implicitly expanded *take* beyond its common-law meaning to cover activities unrelated to hunting and trapping.⁷⁹ The Fifth Circuit found the argument to be illogical because Congress was addressing a narrow military exception, not all military activities.⁸⁰ Therefore, Congress had no reason to address the full scope of the MBTA.⁸¹

Secondly, the Fifth Circuit refused to adopt the "broad readings" of the MBTA adopted by the Second and Tenth circuits.⁸² These circuits hold that because the MBTA imposes strict liability, "it must forbid acts that accidentally or indirectly kill birds."⁸³ The Fifth Circuit cited *U.S. v. FMC Corp.*⁸⁴ and *United States v. Apollo Energies*,⁸⁵ finding those cases' interpretations of the MBTA to be "broad" and "counter-textual;" therefore, it refused to adopt their holdings.⁸⁶ The court further reasoned that neither of the decisions explored the meaning of *take*. Moreover, the Fifth Circuit ruled that strict liability crimes, such as MBTA violations,

75. *Id.*

76. *Id.*

77. *Id.*

78. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

79. *Id.* at 490–491. Congress specifically stipulated that incidental takes caused by the "operation of industrial activities" should not be exempted from MBTA liability. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315(f)(2)(B), 116 Stat. 2458, 2509-10 (2002).

80. *CITGO Petroleum Corp.*, 801 F.3d at 491.

81. *Id.*

82. *Id.* at 493.

83. *Id.* at 491.

84. 572 F.2d 902 (2d Cir. 1978).

85. 611 F.3d 679, 686 (10th Cir. 2010).

86. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 492 (5th Cir. 2015). *See supra* Section Section II: The Circuit Split, Part 1 for a detailed discussion of *FMC Corp.* and *Apollo Energies*.

require a defendant commit the illegal act voluntarily.⁸⁷ Additionally, the Fifth Circuit solidified its stance on the MBTA's scope by ending its argument with: "[w]e agree with the Eighth and Ninth Circuits, which, recognizing this distinction, have placed decisive weight on the meaning of 'take.'"⁸⁸

Next, the Fifth Circuit stated the district court incorrectly distinguished the present case from similar oil field cases where MBTA convictions were dropped⁸⁹ because the conduct charged in CITGO's MBTA conviction also violated the Clean Air Act and Texas law.⁹⁰ The court pointed out two flaws in the district court's distinction. First, the Fifth Circuit stated that the MBTA's text provides no basis for criminalizing migratory bird deaths only because they resulted from violations of other state or federal laws.⁹¹ Second, even if the MBTA did provide such a basis, the Fifth Circuit reversed all of CITGO's other charges, and thus, the MBTA convictions must be overturned.⁹²

Finally, the Fifth Circuit held that extending the scope of the MBTA to all acts or omissions that directly kill birds would enable the government to "prosecute at will and even capriciously."⁹³ In support, the court discusses the amount of birds killed each year by windows, communication towers, cars, and even cats. It then speculated that the government could prosecute the owner of any of these if it began "exercising its muscle to prevent 'takings' and 'killings' by regulating every activity that proximately causes bird deaths."⁹⁴

III. ANALYSIS OF *CITGO*: WHERE WAS THE FIFTH CIRCUIT WRONG?

Prior to *CITGO*, the trend among courts was to expand the scope of the MBTA to include accidental takings by corporate actors, so long as the activity was both the actual and proximate cause of the taking.⁹⁵ In siding with the Eighth and Ninth Circuits, the Fifth Circuit *opposed* this trend and chose

87. *CITGO Petroleum Corp.*, 801 F.3d at 492.

88. *Id.* at 493. See *supra* Section II: The Circuit Split, Part 2 for a detailed discussion on the Eighth and Ninth Circuit's application of the MBTA.

89. See *e.g.*, *United States v. Chevron USA, Inc.*, No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp.2d 1202 (D.N.D. Jan. 17, 2012); *United States v. ConocoPhillips Co.*, Nos. 4:11-po-002 through 4:11-po-008, 2011 WL 4709887 (D.N.D. Aug. 10, 2011).

90. *CITGO Petroleum Corp.*, 801 F.3d at 493.

91. *Id.*

92. *Id.*

93. *Id.* at 494.

94. *Id.*

95. See Ogden, *supra* note 19, at 27.

to limit the MBTA's misdemeanor liability to affirmative actions by human beings.⁹⁶ The following analysis examines each of *CITGO*'s four holdings.⁹⁷

A. "Contrary Indications" of the Common Law Meaning of "Take"

The Fifth Circuit stated, "[a]bsent contrary indications,' courts presume that 'Congress intends to adopt the common law definition of statutory terms.'"⁹⁸ The Fifth Circuit found no contrary indications and interpreted *take* by its common law meaning—to "reduce those animals, by killing or capturing, to human control."⁹⁹ However, this interpretation is incorrect as there are at least "contrary indications" implying that Congress meant to expand the term *take* to something more than affirmative actions by people, such as hunting, shooting and capturing migratory birds. The language of the MBTA makes it a crime to "pursue, hunt, take, *capture*, *kill*, attempt to take, capture, or kill . . ." any migratory bird.¹⁰⁰ The Supreme Court is reluctant to treat statutory terms as superfluous.¹⁰¹ If Congress truly intended *take* to mean "to reduce those animals, by killing or capturing, to human control," then it would have not also made it illegal to *capture* and/or *kill* migratory birds.¹⁰² Thus, Congress would have only made it illegal to *take* or attempt to *take* migratory birds, since *take*, in the opinion of the Fifth Circuit, would encompass killing or capturing.

Further, *take* logically means more than its common law meaning because the origins of the MBTA were concerned with more than "curbing overhunting." The treaty that created the MBTA aimed to create a "uniform system of protection" for all of the listed migratory birds, not just those hunted.¹⁰³ Thus, the treaty covers not only "Game Birds," but also "Nongame Birds," and "Insectivorous Birds" which are not typically hunted.¹⁰⁴ Since the treaty covers more than Game Birds, it is reasonable to believe that the MBTA is not solely concerned with affirmative human

96. See e.g., *CITGO Petroleum Corp.*, 801 F.3d at 494.

97. This article only examines *CITGO*'s MBTA holding. This article does not explore *CITGO*'s analysis on the Clean Air Act convictions.

98. *CITGO Petroleum Corp.*, 801 F.3d at 489 (quoting *United States v. Shabani*, 513 U.S. 10, 13 (1995)).

99. *Id.*

100. 16 U.S.C. § 703 (emphasis added).

101. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, n.11 (1988).

102. *Babbitt*, 515 U.S. at 697–98, 701–02 (construing "harm" in a manner that did not "duplicate the meaning of other words" due to a "reluctance to treat statutory terms as surplusage").

103. *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

104. *Id.*

actions—killing or capturing—that reduce birds to human control. Rather, a more logical interpretation of *take* would include actions beyond the affirmative human action of hunting. While the government raised this argument in its brief, the court chose not address it.¹⁰⁵ Instead, the court stuck to its presumption, and based on the cases it cited and the common law definition of *take*, found *take* in context of the MBTA to mean to “reduce those animals, by killing or capturing, to human control,” and nothing more.¹⁰⁶

The Fifth Circuit cites two Supreme Court cases, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹⁰⁷ and *Geer v. Connecticut*¹⁰⁸ to formulate its common law definition of *take*.¹⁰⁹ The Fifth Circuit cited the dissenting opinion in *Babbitt*, which discussed the ESA’s definition of *take*,¹¹⁰ and applied this definition to the MBTA.¹¹¹ There are a number of problems with this analysis. First, the Fifth Circuit relied on a dissenting opinion, which neither creates binding precedent nor becomes a part of case law, to formulate its definition of *take*.¹¹² Second, the ESA’s definition of *take* is explicitly defined in the act,¹¹³ which deemed the dissent’s definition for *take* irrelevant. The Supreme Court made the following clear: “Congress explicitly defined the operative term “take” in the ESA, no matter how much the dissent wishes otherwise . . . thereby obviating the need for us to probe its meaning”¹¹⁴ Therefore, the Fifth Circuit’s contention that the dissent’s discussion of *take* was not criticized in *Sweet Home* is contradictory to *Sweet Home*’s text.

The other case cited by the Fifth Circuit, *Geer v. Connecticut*,¹¹⁵ was also improper for defining the term *take* in the MBTA. *Geer* was decided in 1896—twenty-two years before the MBTA was enacted. In fact, *Geer* was decided before any federal laws protecting migratory birds were enacted in

105. Answering Brief of Plaintiff–Appellee at 59–60, *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015) (No. 14-40128).

106. *CITGO Petroleum Corp.*, 801 F.3d at 493.

107. 515 U.S. 687 (1995).

108. 161 U.S. 519 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

109. *CITGO Petroleum Corp.*, 801 F.3d at 489.

110. The dissent defines *take* as: “when applied to wild animals, [take] means to reduce those animals, by killing or capturing, to human control.” See *Babbitt*, 515 U.S. at 717.

111. *CITGO Petroleum Corp.*, 801 F.3d at 489.

112. *Id.* (referring to Justice Scalia’s dissenting opinion in *Babbitt*, 515 U.S. at 717).

113. 16 U.S.C. § 1532(19) (2012).

114. *Babbitt*, 515 U.S. at 697 n.10.

115. *Greer v. Connecticut*, 161 U.S. 519 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

the United States. The first law of this sort, the Lacey Act,¹¹⁶ was enacted in 1900—four years after *Geer* was decided. Moreover, *Geer* questioned the constitutionality of a Connecticut state law that made it unlawful to *kill*—not *take*—and transport wild fowl over state lines.¹¹⁷ *Geer* did not interpret a law that made it illegal to *take* migratory birds, and there were no federal laws enacted at the time of *Geer* that made it illegal to *take* migratory birds. Accordingly, the Fifth Circuit improperly cited *Geer* to justify *take* as a well-understood term of art when the MBTA was enacted.

B. Reliance on Factually Distinguishable Jurisprudence

The Fifth Circuit refused to “adopt the broad, counter-textual reading of the MBTA” by the Second and Tenth Circuits because an act to take cannot be done unknowingly or involuntarily.¹¹⁸ Instead, *CITGO* adopted the Eighth and Ninth Circuit’s understanding of the MBTA, requiring defendants to take an affirmative action to cause migratory bird deaths.¹¹⁹

The main problem with *CITGO* relying on *Seattle Audubon Society*¹²⁰ (Ninth Circuit) and *Newton County Wildlife*¹²¹ (Eighth Circuit) is the clear factual distinction between these cases. The actions at issue in *Newton County Wildlife* and *Seattle Audubon Society* involved logging sales “that modified bird habitat in some way.”¹²² The facts of *CITGO* are instead analogous to *Apollo*, as they both involve killing of migratory birds by oil production equipment and notice to the defendant that their equipment could cause bird deaths.¹²³

The *Apollo* court noted the distinction between its own facts and the facts of *Newton County Wildlife* and *Seattle Audubon Society*, and held the distinction to be influential: “[W]hile the MBTA’s scope, like any statute, can test the far reaches in application, we do not have that case before us. The question here is whether unprotected oil field equipment can take or kill migratory birds. It is obvious the oil equipment can.”¹²⁴ Just as the *Apollo* court found the distinguishable facts of the *Seattle Audubon Society* and *Newton County Wildlife* dispositive, so should have the Fifth Circuit

116. 16 U.S.C. §§ 3371–3378 (2012).

117. *Geer*, 161 U.S. at 521–22.

118. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 492–93 (5th Cir. 2015).

119. *Id.* at 493.

120. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

121. *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

122. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010).

123. *Id.* at 689–91; *United States v. CITGO Petroleum Corp.*, 893 F. Supp.2d 841, 848 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015).

124. *Apollo Energies, Inc.*, 611 F.3d at 686.

in *CITGO*. Instead, the *CITGO* court improperly rejected the persuasive value of a conviction in the Tenth Circuit of an oil company whose equipment led to the death of migratory birds.¹²⁵

C. Improper Dependence on Clean Air Act Violations for a MBTA Conviction

When the district court found *CITGO* in violation of the MBTA, it noted that *CITGO* had also violated the Clean Air Act.¹²⁶ The Fifth Circuit found the district court decision flawed because the MBTA provides no basis for criminalizing migratory bird killings that result from violations of other laws. Further, the court held that, even if there was such a basis, *CITGO* did not violate the Clean Air Act because its violation of the act was also overturned on appeal.¹²⁷

The Fifth Circuit wrongfully assumed the district court upheld the MBTA convictions solely because *CITGO* had also violated other laws.¹²⁸ The district court held that *CITGO*'s uncovered tanks were in violation of the Clean Air Act, and that the resulting bird deaths violated the MBTA.¹²⁹ Although the Fifth Circuit overturned *CITGO*'s Clean Air Act violations, the MBTA violations should not have been overturned. The district court's MBTA violations were not a direct result of *CITGO*'s Clean Air Act violations, but rather resulted because it was "reasonably foreseeable" *CITGO*'s open oil tanks would result in bird deaths.¹³⁰ Not only was it reasonably foreseeable that birds could die as a result of the open tanks, but evidence presented at trial established *CITGO* supervisors knew the problem was happening. A *CITGO* employee testified:

125. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 493 (5th Cir. 2015).

126. *CITGO Petroleum Corp.*, 893 F. Supp.2d at 847.

127. *CITGO Petroleum Corp.*, 801 F.3d at 493.

128. *Id.*

129. *United States v. CITGO Petroleum Corp.*, 893 F. Supp.2d 841, 847–48 (S.D. Tex. 2012), *rev'd*, 801 F.3d 477 (5th Cir. 2015).

130. *Id.* at 847.

He told his supervisor about dead ducks in Tanks 116 and 117 and suggested that CITGO put roofs on the tanks. A number of individuals who worked for a company that CITGO used to clean the tanks also testified that their vacuum filters often got clogged with bird bones and debris when they cleaned Tanks 116 and 117. . . . A Process Engineering Group Leader at CITGO testified that he learned that CITGO had an issue with birds getting into Tanks 116 and 117 from operators who came to him and said they didn't think they should have birds in the tanks. He also saw three dead pelicans at one time. He further testified that he remembered having discussions with CITGO's Environmental Manager about putting roofs on the tanks in order to comply with the Clean Air Act and thought that would also help keep birds out of the tanks.¹³¹

The district court held that “the migratory birds at the CITGO refinery were killed *as a direct result of being exposed to waste oil in uncovered tanks*—tanks that under the Clean Air Act were required to be covered.”¹³² CITGO's MBTA violation was not contingent on whether their activities violated the separate laws, but whether it was “reasonably foreseeable” that CITGO's unprotected oil field equipment could take or kill migratory birds.¹³³ The district court found this to be obvious.¹³⁴ Therefore, it is immaterial that the MBTA does not call for prosecution of an activity that kills birds and violates separate laws. If it was reasonably foreseeable that a certain activity would kill protected birds, these deaths should have been prosecuted under the MBTA.

D. Unsupported Fear of Absurd MBTA Convictions

The Fifth Circuit believes Congress must have wanted the traditional common law definition of *take* in order to deter absurd convictions;¹³⁵ however, the Fifth Circuit cites no case law in support of its argument. Rather, the court cites the toddler book “My Nest is Best,” and hypothesizes the government prosecuting owners of everything from communication towers to church steeples and even cats in order to exercise its muscle.¹³⁶ Fear of the government overstepping its boundaries is a

131. *Id.* at 848 (internal citations omitted).

132. *Id.* at 847 (emphasis added).

133. *Id.* (quoting *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010)).

134. *United States v. CITGO Petroleum Corp.*, 893 F. Supp.2d 841, 846 (S.D. Tex. 2012), *rev'd*, 801 F.3d 477 (5th Cir. 2015).

135. *CITGO Petroleum Corp.*, 801 F.3d at 494.

136. *Id.* at 494, n.16.

growing trend as of late.¹³⁷ However, it is difficult to imagine the government “capriciously” prosecuting car, cat, and church steeple owners for activities that kill protected birds.¹³⁸ Prosecutorial discretion is not unlimited, and prosecutors may not engage in “selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process rights.”¹³⁹ Prosecutorial discretion can and should be relied on to prevent absurd convictions. To date, prosecutors have resisted convicting purely technical violations of the MBTA, such as migratory birds being killed by cars, planes, house windows, and cats.¹⁴⁰

While prosecutorial discretion is sufficient to prevent absurd convictions, steps must be taken to limit relying on such a method. Giving prosecutors free rein to convict under a broad law like the MBTA creates concerns of inconsistent MBTA convictions.¹⁴¹ Theoretically, prosecutorial discretion could shift as administrations and their objectives change.¹⁴² For example, in 2012, Republican Senators David Vitter (R-La.) and Lamar Alexander (R-Tenn.) wrote a letter to Attorney General Eric Holder, arguing MBTA prosecutions under the Obama administration have discriminately targeted oil and gas production companies, while wind farms have been given leniency.¹⁴³ Further, scholars suggest a lack of uniformity in MBTA prosecutions could impede businesses from developing in some areas of the country.¹⁴⁴

137. See, e.g., William J. Olsen, *Warning: Obama Might Have Just Figured Out How To Take Your Guns Away*, W. JOURNALISM (Apr. 22, 2014), <http://www.westernjournalism.com/atf-regulations-designed-disqualify-many-gun-ownership/> [<https://perma.cc/U9MT-C84H>].

138. *CITGO Petroleum Corp.*, 801 F.3d at 493 (“This scope of strict criminal liability would enable the government to prosecute at will and even capriciously . . .”).

139. *Article: II. Preliminary Proceedings*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 247 (2014) (internal citations omitted).

140. See Marc R. Greenberg, *Captain “Sully” Sullenberger, Charles Dickens, and the Migratory Bird Treaty Act*, CRIMINAL JUSTICE (A.B.A.), Spring 2010, at 12. (noting that after US Airways Flight 1549 landed in the Hudson River, the DOJ found it prudent not to charge the captain with violating the MBTA, even though his plane’s engines had ingested a flock of Canada geese, a species protected under the law).

141. See, e.g., Ashley R. Fiest, *Defining the Wingspan of the Migratory Bird Treaty Act*, 47 AKRON L. REV. 587, 606 (2014).

142. Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 83435 (1998).

143. U.S. Senate Committee on Environment & Public Works, Vitter, Alexander Demand a Clear Migratory Bird Policy from Justice Department (Jan. 30, 2013), <http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=8C84134D-A36C-2155-A554-DC81EADED88A> [<https://perma.cc/T7YD-D5N9>]. It should be noted that Duke Energy, a Wyoming wind farm, was charged with violating the MBTA in 2013, stemming from the deaths of 14 Golden Eagles and 149 other protected birds. See *United States v. Duke Energy Renewables, Inc.*, No. 2:13-cr-00268, 2013 BL (D. Wyo., Nov. 22, 2013).

144. Fiest, *supra* note 142, at 608.

Relying on prosecutorial discretion can create a “blank check,” allowing courts to avoid establishing a concrete rule on how the MBTA should be applied.¹⁴⁵ A lack of certainty as to the MBTA’s scope has led federal courts to the current circuit split on the MBTA’s application. Thus, federal courts and the prosecutors need guidance on what is a violation of the MBTA.

IV. PROPOSED SOLUTIONS

Having concluded that courts should not rely solely on prosecutorial discretion in determining what constitutes MBTA violations, the following section explores administrative and judicial solutions to provide courts and prosecutors guidance. When exploring regulatory solutions, it is appropriate to consult a recent FWS notice of intent to authorize incidental takings of migratory birds. Additionally, this article also explores the FWS’s constitutional authority to interpret the MBTA to apply to accidental killings by commercial actors.

A. Administrative Solution: Incidental Take Permits

The FWS—the agency charged with enforcing the MBTA—has the authority to issue permits to natural and juridical persons for accidentally taking birds. This authority covers any activity that would normally violate the MBTA.¹⁴⁶ There are a variety of authorized permits, including those for bird banding and marking, scientific collection, taxidermy, and falconry.¹⁴⁷ The FWS has also issued incidental take permits to the Armed Forces for activities that may accidentally kill birds during military training.¹⁴⁸ Moreover, there exist “special purpose permits” that cover activities “outside the scope of the standard form permits” for the MBTA.¹⁴⁹ An applicant for a “special purpose permit” must make a “sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”¹⁵⁰

145. Fiest, *supra* note 141, at 606–07 (quoting Norman L. Reimer, *When It Comes to Overcriminalization, Prosecutorial Discretion Is for the Birds*, THE CHAMPION, Oct. 2012, at 9).

146. 50 C.F.R. §§ 21.1–22.61 (2014).

147. 50 C.F.R. §§ 21.21–22.31. Falconry is the “sport of hunting with falcons or other birds of prey; the keeping and training of such birds. NEW OXFORD AMERICAN DICTIONARY 623 (3d ed. 2010). End quotes are missing here. Don’t assume, let the EIC tell you where it goes.

148. 50 C.F.R. § 21.15.

149. 50 C.F.R. § 21.27.

150. *Id.*

Many scholars have suggested that the FWS should *force* corporations that put birds at risk to apply for these incidental take permits.¹⁵¹ In exchange for a permit to kill protected birds, the corporations would have to mitigate certain risks that they create for protected birds.¹⁵² Coincidentally, in May 2015, the FWS released a notice of intent to evaluate potential environmental impacts of authorizing accidental deaths of migratory birds under the MBTA.¹⁵³

1. Fish and Wildlife Service's Proposal to Authorize Incidental Takings

In the FWS's notice of intent to evaluate the impact of authorizing takings, the agency proposed four specific regulatory approaches to authorize takings. Three of the prospective approaches would be mandatory requirements, while the fourth would be voluntary.

The first approach, "General Conditional Authorization for Incidental Take Associated With Particular Sectors," would establish a general authorization to take birds for certain industries and hazards that have historically harmed birds, in exchange for adherence to certain procedures that have been developed to address practices or structures that effect birds.¹⁵⁴ The second approach, "Individual Permits,"¹⁵⁵ seeks to establish the authority to issue take permits for activities not covered under the first approach.¹⁵⁶ The third approach, "Memoranda of Understanding With Federal Agencies," would establish a procedure for authorizing incidental take permits to federal agencies in exchange for a memorandum of understanding (MOU) to the FWS. The last approach, "Development of Voluntary Guidance for Industry Sectors," would involve the FWS working with interested industry sectors to develop ways their operations and facilities could mitigate migratory bird risks.¹⁵⁷ This approach does not seek to give incidental take permits, "but would, as a matter of law-enforcement discretion, consider the extent to which a company or

151. See, e.g., Ogden, *supra* note 19, at 53; Robyn Rose, *A Special Purpose: The Migratory Bird Treaty Act and Wind Energy*, 55 NAT. RESOURCES J. 205, 225 (2014).

152. *Id.*

153. Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30032 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21) [hereinafter Migratory Bird Impact Statement].

154. *Id.*

155. *Id.*

156. *Id.* Unlike the first approach which would issue permits to take birds for certain industries, this approach only seeks the authority to do so.

157. *Id.*

individual had complied with that guidance as a substantial factor in assessing any potential enforcement action for violation of the Act.”¹⁵⁸

There are benefits to the implementation of each of the FWS’s mandatory incidental take permit application approaches. Nevertheless, if the FWS were to implement one of the authorized take proposals, it should be the first approach, “General Conditional Authorization for Incidental Take Associated With Particular Sectors.” The FWS’s first approach best suits the purpose of the MBTA—the protection of migratory birds—while providing fair notice of what is expected of corporate actors. The FWS provides a list of specific industries and hazards that they are concerned with, including: oil, gas, and wastewater pits; oil production gas burning pipes; communication towers; and power lines.¹⁵⁹ However, noticeably absent from this list is wind energy.¹⁶⁰ It is crucial that the FWS includes wind energy as an industry required to apply for incidental take permits.

Wind farms, which have been described as “bird blender[s],”¹⁶¹ pose a great threat to migratory birds. As previously discussed, studies predict that wind farms kill as many as 368,000 birds annually.¹⁶² For example, in *United States v. Duke Energy Renewables, Inc.*,¹⁶³ the owner of two Wyoming wind energy projects was convicted of violating the MBTA, stemming from the deaths of fourteen Golden Eagles and 149 other protected birds.¹⁶⁴ Currently, wind farms are not governed by a mandatory regulation scheme that requires them to actively mitigate bird deaths.¹⁶⁵ In 2012, the FWS published the Land-Based Wind Energy Guidelines to address the increasing problem of bird deaths.¹⁶⁶ However, the Wind

158. *Id.*

159. Migratory Bird Impact Statement, *supra* note 153.

160. *Id.* The FWS’s notice of intent states “We may seek to develop additional general authorizations in this rulemaking for hazards to birds associated with other industry sectors. We are considering, for example, whether a general conditional authorization can be developed for hazards to birds related to wind energy generation[.]”

161. Mike Barnard, *Want to Save 70 Million Birds a Year? Build More Wind Farms*, RENEWECONOMY (Aug. 10, 2012), <http://reneweconomy.com.au/2012/want-to-save-70-million-birds-a-year-build-more-wind-farms-18274> [<https://perma.cc/6F2D-WMZA>].

162. Hughes, *supra* note 25.

163. No. 2:13-cr-00268, 2013 BL (D. Wyo., Nov. 22, 2013).

164. *United States v. Duke Energy Renewables, Inc.*, No. 2:13-cr-00268, 2013 BL (D. Wyo., Nov. 22, 2013).

165. U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE LAND-BASED WIND ENERGY GUIDELINES (2012), http://www.fws.gov/windenergy/docs/weg_final.pdf [<https://perma.cc/WP2U-4DEB>] [hereinafter WIND ENERGY GUIDELINES].

166. *Id.*

Energy Guidelines are purely voluntary and non-binding.¹⁶⁷ Since voluntary guidelines for these bird blenders would be unenforceable, they are simply unacceptable; therefore, the FWS must include the wind energy industry in its regulations.

The second approach proposed by the FWS—“individual permits”—would establish legal authority and standards which authorize takes for activities not historically thought to put migratory birds at risk. The consideration for take permits would go to projects that require project-specific considerations, and projects with little information regarding their adverse effects on migratory birds.¹⁶⁸ The FWS would conduct site-specific reviews to determine whether a permit should be issued for each applicant.¹⁶⁹ The FWS would not be bound to issue permits to all persons who apply, but would simply have the legal authority to do so if certain standards established by FWS were met.¹⁷⁰

While the activities covered by the second approach should be entitled to the same protections as the usual suspects,¹⁷¹ the FWS’s statement “we do not intend to issue any actual individual permits as part of this action” is concerning. The FWS must make the requirements for obtaining an incidental take permit clear in order to avoid prejudicial allocation of permits. Moreover, the FWS should not expect every person or business that may incidentally take migratory birds to apply for a permit.¹⁷²

The third approach—“Memoranda of Understanding With Federal Agencies”—would establish a procedure to authorize incidental takes for federal agencies that submit a MOU with the FWS.¹⁷³ The federal agency’s MOU would “consider the impacts to migratory birds in their actions and to mitigate that take appropriately.”¹⁷⁴ In 2001, President Clinton issued an executive order requiring federal agencies likely to have a measurable negative effect on migratory bird populations to enter into a MOU “that

167. *Id.* (“These voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development.”).

168. *Id.*; Migratory Bird Impact Statement, *supra* note 153.

169. Migratory Bird Impact Statement, *supra* note 153.

170. *Id.* (“Our intention would be only to establish the authority and standards for issuance of individual permits in this rulemaking; we do not intend to issue any actual individual permits as part of this action.”).

171. Oil and gas industries, communication towers, electric transmission and distribution lines, and so on.

172. The FWS mirrors this statement in its introductory statement. “[W]e would not expect every person or business 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.” Migratory Bird Impact Statement, *supra* note 153.

173. *Id.*

174. *Id.*

shall promote the conservation of migratory bird populations” with the FWS.¹⁷⁵ The third approach would give the FWS the authority to exchange incidental take permits for MOUs—something not done under President Clinton’s 2001 executive order.¹⁷⁶ The third approach raises the same concerns as the second approach in that neither approach sets forth a definite method to obtain an incidental take permit. Both approaches only give the FWS the authority to authorize incidental take permits. Allowing the FWS too much discretion in allocating incidental take permits would certainly lead to parties claiming that they were discriminated against when denied an incidental take permit.

The last approach by the FWS—“Development of Voluntary Guidance for Industry Sectors”—should not be favored over an approach making application for incidental take permits mandatory. A voluntary approach would not solve the ambiguity of whether the MBTA applies to incidental takes by commercial actors. Furthermore, offering prosecutorial discretion instead of an incidental take permit would only prevent absurd MBTA prosecutions. Prosecutorial discretion would not resolve the ambiguity in the MBTA’s application in federal courts.

Currently, the FWS has not implemented any of the proposed approaches to authorized bird takes. Should the FWS choose to force certain corporations to apply for incidental take permits, as many scholars have suggested, it is sensible that the FWS would do so through one of the proposed approaches in its notice of intent to evaluate the impacts of authorized takes.

Forcing corporations to apply for incidental take permits would allow corporations to accidentally kill migratory birds while still complying with the MBTA.¹⁷⁷ Moreover, the FWS would make it known that the MBTA applies to accidental, direct killings by corporate actors, solving the conflict facing corporations and courts alike.

If the FWS authorizes incidental take permits to corporate actors who mitigate bird deaths, it stands to reason that the FWS intends to prosecute corporate actors who do not choose to mitigate risks to protected birds. Should the FWS require corporate actors to apply for incidental take permits, the FWS would implicitly interpret the MBTA to apply to incidental takes. Parties who believe *take* and *kill* apply only to conduct directed against wildlife (hunting, poaching, and so on) may argue FWS

175. Exec. Order No. 13186 §§ 2(c) & 3(a), 66 Fed. Reg. 3853 (Jan. 10, 2001). The Executive Order also clarified that the MBTA applies to intentional and unintentional taking, and defined “unintentional take” as that which “results from, but is not the purpose of, the activity in question.”

176. Migratory Bird Impact Statement, *supra* note 153.

177. See Robyn Rose, *A Special Purpose: The Migratory Bird Treaty Act and Wind Energy*, 55 NAT. RESOURCES J. 205, 225 (2014).

does not have the legal authority to expand the MBTA's scope to include activities that incidentally kill migratory birds, since this is a job normally left to the legislature. Therefore, an analysis of the FWS's authority to interpret the MBTA is appropriate.

2. *The FWS's Authority to Interpret the MBTA: Chevron Deference vs. Rule of Lenity*

Chevron deference is the administrative law principal requiring courts to defer to interpretations of statutes made by the government agencies charged with enforcing them, as long as the interpretation is reasonable.¹⁷⁸ In order for an agency interpretation to obtain *Chevron* deference, a court must determine two things. First, the court must determine Congress has not "directly spoken to the precise question at issue."¹⁷⁹ If Congress has directly spoken to the issue, its intent is clear and must be followed.¹⁸⁰ Second, if the statute is silent or ambiguous regarding a specific issue, the court must determine whether the agency's interpretation is based on a permissible construction of the statute.¹⁸¹

Congress has not spoken to the precise question of whether the MBTA applies to incidental takes. As evidenced by the circuit split,¹⁸² the MBTA is ambiguous as to whether it applies to incidental takes by commercial actors. Therefore, the first prong of the *Chevron* deference test would be satisfied. Next, a court must decide whether the FWS's answer to the incidental take issue is "based on a permissible construction of the statute."¹⁸³ Should the FWS pass one of its proposals requiring corporations to apply for incidental take permits, the FWS would be interpreting the MBTA to apply to incidental takings. This interpretation would not be impermissible or unreasonable. In fact, two federal circuit courts of appeals and numerous district court judges have already held the MBTA applies to incidental takes.¹⁸⁴ Therefore, should the FWS require certain corporations to apply for incidental take permits, courts would likely find this permissible under *Chevron* deference.

The FWS seeks to implement incidental take permits in order to reinforce its position "that the MBTA applies to take that occurs incidental

178. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

179. *Id.* at 842.

180. *Id.*

181. *Id.* at 843.

182. *See supra* Section II: The Circuit Split.

183. *Chevron, U.S.A., Inc.*, 467 U.S. at 843–44.

184. *See supra* Section II: The Circuit Split, Part 1: The Second and Tenth Circuit. *See also* *United States v. Moon Lake* 45 F. Supp.2d, 1070, 1074 (D. Colo. 1999) (Congress intended to "prohibit conduct beyond that normally exhibited by hunters and poachers.").

to, and which is not the purpose of, an otherwise lawful activity”¹⁸⁵ Normally when an administrative agency reasonably interprets an ambiguous law, such interpretation is entitled to *Chevron* deference by the court.¹⁸⁶ However, the MBTA is a criminal statute, and criminal statutes are subject to the rule of lenity.¹⁸⁷ The relationship between the rule of lenity and *Chevron* deference has been the subject of recent debate.¹⁸⁸

As the U.S. Supreme Court explained, “[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them.”¹⁸⁹ The policy behind the rule of lenity is that the legislature, not executive officers, defines crimes.¹⁹⁰ Moreover, the rule of lenity “promotes fair notice of prohibited conduct and reduces the likelihood that unintentionally criminal conduct will be penalized.”¹⁹¹ However, the rule applies only if there remains uncertainty in a statute after review of its text, structure, history, and purpose.¹⁹²

Multiple courts have invoked the rule of lenity when ruling on the application of the MBTA.¹⁹³ Most courts cite the rule of lenity to support the MBTA being interpreted narrowly; therefore, it does not apply to accidental takes by corporations.¹⁹⁴ Should the FWS choose to interpret the MBTA, courts would face the issue of whether the FWS’s interpretation of the MBTA is entitled to *Chevron* deference, or whether the rule of lenity prevails.

This issue is largely unsettled. Supporters of a FWS interpretation receiving *Chevron* deference would cite *Babbitt*,¹⁹⁵ where the Supreme Court provides, “[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative

185. Migratory Bird Impact Statement, *supra* note 153 (“We seek to provide legal clarity to Federal and State agencies, industry, and the public regarding compliance with the MBTA.”).

186. *Chevron, U.S.A., Inc.*, 467 U.S. at 842–43.

187. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013).

188. *See, e.g.*, Jason W. McElroy, *Lenity And Deference On A Collision Course*, Law 360 (Feb. 26, 2015), <http://www.law360.com/articles/625152/lenity-and-deference-on-a-collision-course> [<https://perma.cc/F5KN-TMEL>].

189. *United States v. Santos*, 553 U.S. 507, 514 (2008).

190. *Whitman v. United States*, 135 S. Ct. 352, 353 (2014).

191. *United States v. Hartec Enters., Inc.*, 967 F.2d 130, 133 (5th Cir. 1992) (citing *United States v. Kozminski*, 487 U.S. 931, 952 (1988)).

192. *Barber v. Thomas*, 560 U.S. 474, 474 (2010).

193. *See United States v. Chevron USA, Inc.*, No. 09–CR–0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp.2d 1202, 1211 (D.N.D. 2012); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 529 (E.D. Cal. 1978).

194. *United States v. Chevron USA, Inc.*, No. 09–CR–0132, 2009 WL 3645170, at *3 (W.D. La. Oct. 30, 2009); *Brigham Oil & Gas*, 840 F. Supp. 2d at 1212.

195. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995).

regulations whenever the governing statute authorizes criminal enforcement.”¹⁹⁶ Those opposing a FWS interpretation would attempt to disprove *Babbitt* by citing *Whitman v. United States*.¹⁹⁷ In the Supreme Court’s denial of certiorari, the Court held the *Babbitt* court’s statement regarding the rule of lenity “contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings.”¹⁹⁸ Opponents of the FWS interpretation would also cite the concurrence in *Carter v. Welles-Bowen Realty, Inc.*,¹⁹⁹ where Judge Sutton explored the balance between the rule of lenity and *Chevron* deference.²⁰⁰ The *Carter* court found it unlikely that the *Babbitt* footnote intended to overrule previous laws regarding the rule of lenity.²⁰¹

The proponents of FWS regulations interpreting the MBTA may finally argue that the nondelegation doctrine occasionally allows Congress to transfer some responsibility for defining crimes to an administrative agency.²⁰² For Congress to do so, it must speak distinctly.²⁰³ Judge Sutton referred to this as the “clear-statement rule.”²⁰⁴ The text of the MBTA specifically authorizes the Secretary of the Interior “to issue such regulations as may be necessary to implement the provisions of the [MBTA] convention.”²⁰⁵ Additionally, the MBTA specifically authorizes and directs the Secretary of the Interior:

[T]o 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, . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.²⁰⁶

196. *Id.* at 704 n.18.

197. 135 S. Ct. 352 (2014).

198. *Id.* at 353–54.

199. 736 F.3d 722 (6th Cir. 2013) (Sutton, concurring).

200. *Id.* at 729–35.

201. *Id.* at 735.

202. *United States v. Grimaud*, 220 U.S. 506 (1911) (held that Congress could make it a crime to violate regulations issued by the Secretary of Agriculture); *Touby v. United States*, 500 U.S. 160 (1991) (holding that Congress could delegate power to the Attorney General for temporary scheduling of controlled substances); *United States v. O’Hagan*, 521 U.S. 642 (1997) (holding the Securities and Exchange Commission could, through legislation, authorize rules combating securities fraud and criminalizing violations of these rules).

203. *Carter*, 736 F.3d at 733 (quoting *United States v. Grimaud*, 220 U.S. 506, 519; *United States v. Eaton*, 144 U.S. 677, 688 (1892)).

204. *Id.*

205. 16 U.S.C. § 712(2) (2012).

206. *Id.* § 704(a) (2012) (emphasis added).

Congress made it clear that the administering agency of the MBTA—the Secretary of the Interior, which in turn delegates power to the FWS—is distinctly given the power to implement regulations it deems fit to enforce the MBTA.

The courts have not squarely settled the issue of *Chevron* deference versus the rule of lenity. The most persuasive authority on the issue comes from a Supreme Court denial of certiorari²⁰⁷ and an appellate court’s concurring opinion.²⁰⁸ In regards to the present issue, the face of the MBTA seems to “distinctly” give FWS the authority to define criminal conduct.²⁰⁹ Therefore, a reasonable interpretation of the MBTA by the FWS should be entitled to *Chevron* deference.

If the FWS adopts incidental take regulations under the MBTA, those regulations would be vulnerable to challenge in the Fifth, Eighth, and Ninth Circuits (and other courts that reason that the MBTA does not apply to accidental killings by commercial actors). The Supreme Court could save courts and scholars the grief of determining what deference should be given to a FWS interpretation of the MBTA by granting *CITGO* certiorari and determining if the law applies to accidental takes by corporate actors.

B. Judicial Solution

The current federal circuit split indicates that the interpretation of the MBTA is ripe for Supreme Court or *en banc* review. Before the Fifth Circuit overturned the district court’s decision in *CITGO*,²¹⁰ several courts and scholars felt that the MBTA applied to accidental killings or takings, subject to limitations of actual and proximate cause.²¹¹ However, the recent *CITGO* decision *opposed* this trend.²¹²

It is unclear at this time whether the government will file a writ of certiorari. Should the Supreme Court choose to hear *CITGO*, or any other case regarding the application of the MBTA, the Court should follow the holding of the Tenth Circuit in *Apollo Energies*.²¹³ Such a ruling would hold corporate actors responsible for bird deaths as long as the actor proximately caused the death. Moreover, it must be foreseeable that a defendant’s actions could cause bird deaths, and thereby, are subject to MBTA convictions. In order to provide fair notice of what sort of activities

207. *Whitman v. United States*, 135 S. Ct. 352 (2014).

208. *See e.g., Carter*, 736 F.3d 722.

209. 16 U.S.C. §§ 712(2), 704(a).

210. *United States v. CITGO Petroleum Corp.*, 893 F. Supp.2d 841 (S.D. Tex. 2012), *rev’d*, 801 F.3d 477 (5th Cir. 2015).

211. *See Ogden, supra* note 19, at 48.

212. *CITGO Petroleum Corp.*, 801 F.3d at 494.

213. *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

are subject to MBTA convictions, the FWS should create regulations requiring certain industries that put birds at risk to apply for incidental take permits.

V. CONCLUSION

The MBTA is an important law that affects many industries vital to Fifth Circuit states. When faced with two competing views of the MBTA's application, the Fifth Circuit took the wrong path. The MBTA must be interpreted to apply to incidental killings and takings of protected birds, subject to proximate cause limitations. Moreover, the FWS must implement mandatory regulations requiring corporations who put birds at risk to apply for incidental take permits. Doing so would not only inform the court and corporations of what is permissible under the MBTA, but it would also mitigate many inevitable bird deaths.

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