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# Un-Pheasant Consequences: The Migratory Bird Treaty Act Circuit Split, the Trump Administration, and a Sensible Interpretation of 16 U.S.C. § 703

## PREPARING FOR TAKEOFF

In Alaska's Prince William Sound, the oil tanker Exxon Valdez traveled toward California filled with crude oil.<sup>1</sup> Undoubtedly, transporting crude oil is not intended to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale" migratory birds, or their nests.<sup>2</sup> In the early hours of March 24, 1989, disaster struck the Exxon Valdez as the single hulled tanker ran aground on Bligh Reef at approximately 12:04 a.m., tearing a hole in the hull and releasing more than 11 million gallons of crude oil into the Prince William Sound.<sup>3</sup> The resulting spill was the largest oil spill in world history until the Deepwater Horizon/BP Oil Spill in 2010, and affected over a thousand miles of Alaskan coastline.<sup>4</sup> Additionally, the spill killed an estimated 250,000 birds, many of which were protected by the Migratory Bird Treaty Act (MBTA).<sup>5</sup> Exxon pled guilty to violations of the MBTA and the United States District Court for the District of Alaska fined Exxon \$150 million, the largest fine ever levied for an environmental crime.<sup>6</sup> April of 2010 saw another historic oil spill, this time in the Gulf of Mexico, which led to over 130 million gallons of oil polluting the Gulf.<sup>7</sup> The explosion of the Deepwater Horizon led to the largest oil spill in history; and, once again, the underlying activity, drilling and negligently capping oil wells, was definitely not intended to kill birds. Despite the intention behind these underlying activities, both of these disasters were devastating to local bird populations.

Under the plain language of the MBTA, a person that "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to

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1. *Exxon Valdez Spill Profile*, U.S. ENVTL. PROT. AGENCY, <https://perma.cc/C99D-8KYQ> (last visited Sept. 26, 2018).

2. 16 U.S.C. § 703 (2017).

3. *Exxon Valdez Spill Profile*, U.S. ENVTL. PROT. AGENCY, *supra* note 1.

4. *Id.*

5. *Questions and Answers about the Spill*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, <https://perma.cc/HW2S-VFVC> (last visited Sept. 26, 2018).

6. *Settlement*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, <https://perma.cc/HW2S-VFVC> (last visited Sept. 26, 2018). Note: \$125 Million was forgiven due to Exxon's cooperation in clean-up efforts.

7. Richard Pallardy, *Deepwater Horizon Oil Spill of 2010*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/24DF-G362> (last visited Sept. 28, 2018).

take, capture, or kill” birds as listed by the United States Fish and Wildlife Service (FWS) is subject to strict misdemeanor criminal liability.<sup>8</sup> However, under the latest guidance from United States Department of the Interior,<sup>9</sup> along with FWS,<sup>10</sup> neither of these disasters would be considered violations of the MBTA, even though they account for nearly ninety-seven percent of all fines levied under the MBTA.<sup>11</sup> The Trump administration’s guidance memorandum is but one of many interpretations of the MBTA’s strict liability provision and muddies the water further, rather than drastically changing the state of the law.

The interpretation and enforcement of the MBTA has long been confusing, as demonstrated by Randy “The Big Unit” Johnson, a 2015 inductee into the Major League Baseball Hall of Fame.<sup>12</sup> During a spring training game on March 24, 2001, The Big Unit committed one of the most infamous potential violations of the MBTA when a pitch he attempted to deliver to the plate inadvertently hit a mourning dove.<sup>13</sup> Unfortunately for the dove, the fastball hit it mid-flight as it passed between Johnson and home plate. The resulting collision led to an explosion of feathers, a dead dove, and a possible violation of the MBTA.<sup>14</sup> The mourning dove is one of the species protected under the MBTA.<sup>15</sup> As is usually the case, enforcement of the MBTA is more nuanced than the plain language of § 703 suggests. This is especially true given the curve the Trump administration threw with its latest MBTA interpretation and enforcement guidance aimed at resolving a circuit split festering in the federal appeals courts.

Federal appellate courts are split over the applicability of the MBTA’s strict liability standard for misdemeanor offenses to non-hunting

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8. 16 U.S.C. § 703 (2018).

9. *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*, U.S. DEPT. OF THE INTERIOR, OFFICE OF THE SOLICITOR, M-37050, <https://perma.cc/X649-P3DX> (last visited Sept. 28, 2018).

10. *Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act*, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, (2018), <https://perma.cc/ML68-L9EP>.

11. *Id.*; Darryl Fears & Dino Grandoni, *The Trump Administration has Officially Clipped the Wings of the Migratory Bird Treaty Act*, WASHINGTON POST (Apr. 13, 2018), <https://perma.cc/Z9U2-DXED>.

12. *Randy Johnson*, NAT’L BASEBALL HALL OF FAME, <https://perma.cc/U2XS-F8F2> (last visited Nov. 11, 2017).

13. Douglas Main, *Bird Experts Reflect on Randy Johnson Hitting a Bird With a Pitch*, NEWSWEEK (Mar. 24, 2016), <https://perma.cc/AJ7R-TK5Y>.

14. 16 U.S.C. § 703 (2018).

15. 50 C.F.R. § 10.13 (2017).

activities,<sup>16</sup> including: industrial activities, such as operating open-air reserve pits,<sup>17</sup> wind turbines, or power lines, and non-industrial, everyday activities like owning a cat, having a picture window,<sup>18</sup> or throwing a fastball. There is ambiguity regarding the amount of protection that the MBTA provides to the listed migratory birds because of the differing interpretations of its strict liability provision. The applicability of strict misdemeanor criminal liability under the MBTA differs depending on the United States circuit court of appeals in a given state. Within the geographical boundaries of the Fifth, Eighth, or Ninth Circuits, the MBTA does not cover industrial and everyday non-hunting activities and there is no liability for protected-bird deaths caused by things other than hunting.<sup>19</sup> Conversely, within the boundaries of the Second and Tenth Circuits, strict liability applies if the activity is “ultrahazardous”<sup>20</sup> or is a “proximate cause”<sup>21</sup> of bird deaths. As if the confusion caused by the circuit split was not enough, the Trump administration’s latest MBTA interpretation stated that MBTA violations do not occur “when the underlying purpose of that

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16. Currently, the Fifth, Eighth, and Ninth Circuits do not recognize misdemeanor strict liability for non-hunting activities, and the Second and Tenth Circuits recognize strict liability, though the analyses employed by each make it seem more like criminal negligence. This will be discussed in greater detail in Part II.

17. The FWS defines a reserve pit as “an earthen pit excavated adjacent to a drilling rig and is 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 AND WILDLIFE SERV. (Sept. 2009), <https://perma.cc/844Q-PAZR>.

18. A picture window is an outsize usually single-paned window designed to frame an exterior view. *Picture Window*, MERRIAM WEBSTER’S DICTIONARY. Picture windows are used in many high-rise office buildings to provide views of the surrounding areas. Many bird deaths are caused by collisions with these windows because the birds cannot distinguish between open space and the large transparent windows.

19. See, *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); See also *Newton County Wildlife Ass’n v. U.S. Dep’t of Agriculture*, 113 F.3d 110 (8th Cir. 1997); See also *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

20. Activities the actor knows are dangerous before and while conducting the activities, e.g. blasting, filth in cesspools, and crop dusting. See *United States v. FMC Corp.*, 572 F.2d 902, 907 (2nd Cir. 1978).

21. *Proximate Cause*, BLACK’S LAW DICTIONARY 1225 (6th ed.1990) that which, in a natural and continuous sequence, unbroken by any efficient 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. See also *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010).

activity is not to take birds.”<sup>22</sup> Stated another way, according to the latest statements from the Department of the Interior and the FWS, a person cannot violate the MBTA unless the activity they are engaged in is intended to kill birds.<sup>23</sup>

This Comment outlines a solution to the ambiguity in the MBTA that furthers Congress’s conservationist goals in enacting this statute and clarifies the potential criminal liability for protected bird “tak[ings]”<sup>24</sup> by industrial actors. Part I is a case study of the oil and gas industry, communication towers and electrical power transmission lines, and wind turbines; the impact of these industries on migratory birds; and the potential liability under the current construction of the MBTA. Part II outlines the differing interpretations of the strict liability provision of the MBTA, including the latest guidance from the Department of the Interior;<sup>25</sup> discusses the approaches taken by each circuit; and discusses the major cases from each circuit interpreting § 703.<sup>26</sup> Part III discusses the ways in which Congress can revise the MBTA to clarify the ambiguity under § 703 and hold industrial actors more accountable.<sup>27</sup> Part IV demonstrates that by simply amending § 703 from the current strict liability standard to a criminal negligence standard, Congress can further its goal of conservation while avoiding the potentially absurd results the Trump administration’s interpretation or a strict reading of § 703’s current form create.

## I. GETTING THE DUCKS IN A ROW: BACKGROUND

Congress originally enacted the Migratory Bird Treaty Act in 1918 to enforce a treaty between Great Britain and the United States, known as the

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22. *Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act*, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., *supra* note 10.

23. *Exxon Valdez Spill Profile*, U.S. ENVTL. PROT. AGENCY, *supra* note 1.

24. 16 U.S.C. § 703 (2017).

25. *Id.*

26. *See generally FMC Corp.*, 572 F.2d 902; *CITGO*, 801 F.3d 477; *Newton County Wildlife Ass’n*, 113 F.3d 110; *Apollo Energies, Inc.*, 611 F.3d 679; *Seattle Audubon Soc’y*, 952 F.2d 297.

27. In addition to the mitigation methods discussed below, a regulatory scheme similar to the federal duck stamp program could be instituted for industrial takes of migratory birds, and the money collected under this scheme used for conservation aimed at the three major causes of migratory bird deaths habitat loss, feral/stray cats, and collisions with power lines and communications towers in order to achieve Congress’s conservationist goals. Another possible solution is adding citizen suit provision similar to that of the Endangered Species Act, though both of these are outside the scope of this Comment.

Canada Treaty.<sup>28</sup> The MBTA aimed at conserving migratory bird populations, which had dwindled in the late nineteenth and early twentieth centuries.<sup>29</sup> Since enacting the MBTA to enforce the Canada Treaty, Congress modified it to add three additional countries: Mexico in 1936,<sup>30</sup> Japan in 1972,<sup>31</sup> and the Union of Soviet Socialist Republics (USSR) in 1976.<sup>32</sup> Bearing in mind that the USSR no longer exists,<sup>33</sup> it is reasonable to suspect that the MBTA needs a bit of updating. To do proper justice to the MBTA, and to the migratory birds themselves, any update Congress makes should be in accordance with the original intent for enacting this legislation.

*A. An Egg in the Nest: Legislative History of the Migratory Bird Treaty Act*

Congress enacted the MBTA in an effort to conserve dwindling populations of migratory birds affected by overhunting, due in part to the demands of the millinery, or hat making, industry.<sup>34</sup> As hunters tried to meet the demand for feathers during the nineteenth and early twentieth centuries, at least three species of birds<sup>35</sup> went extinct, and several others became threatened.<sup>36</sup> In response, Congress passed two statutes attempting to address the issue of declining migratory bird populations: one law did not fully address the problem, and the federal court system declared the other law unconstitutional.<sup>37</sup>

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28. Great Britain negotiated this treaty, known as the Canada Treaty, on behalf of Canada, which was a British Territory at the time. See Samuel J. Panarella, *A Bird in the Hand: Shotguns, Deadly Oil Pits, Cute Kittens, and the Migratory Bird Treaty Act*, 35 VA. ENVTL. L.J. 153, 166 (2017).

29. *Id.* at 162-163.

30. *Convention between the United States of America and Mexico for the protection of migratory birds and game mammals*, Feb. 7, 1936, FOREIGN TREATIES AND INTERNATIONAL AGREEMENTS – MEXICO, 50 Stat. 1311.

31. Protection of Birds and Their Environment, Mar. 4, 1972, T.I.A.S. No. 7990.

32. Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, T.I.A.S. No. 9073.

33. *The Collapse of the Soviet Union*, U.S. DEPT. OF STATE, OFFICE OF THE HISTORIAN, <https://perma.cc/3MCJ-PVVL> (last visited Jan. 21, 2018).

34. Panarella, *supra* note 28, at 163-164.

35. The Passenger Pigeon, Carolina Parakeet, and Heath Hen went extinct due to overhunting. See Panarella, *supra* note 28 at 163-164.

36. *Id.*

37. *Id.*

Congress first attempted to solve the problem of overhunting by enacting the Lacy Act.<sup>38</sup> It was one of the first pieces of legislation drafted to stop the widespread slaughter of animals, including migratory birds, by hunters trying to meet industrial demands.<sup>39</sup> In advocating for his bill before the House of Representatives, John F. Lacy, a U.S. Congressman from Iowa, stated, “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>40</sup> Though it made some progress, the Lacy Act did not completely resolve all of the issues related to the millinery industry that Congress wanted to remedy, which led to the passage of the Weeks-McLean Migratory Bird Act, or Weeks-McLean.<sup>41</sup> Congress passed Weeks-McLean<sup>42</sup> in 1913 as a direct response to the widespread killing of migratory birds for the millinery industry.<sup>43</sup> Weeks-McLean brought all migratory and insectivorous, or insect eating, birds under the “custody and protection” of the federal government and outlawed hunting these birds during the spring.<sup>44</sup> The federal courts quickly declared Weeks-McLean an unconstitutional attempt to regulate bird hunting within the states.<sup>45</sup> The United States District Court for the Eastern District of Arkansas found that Congress’s commerce power did not extend to regulating purely intrastate hunting.<sup>46</sup>

While the federal government and the states battled over the Weeks-McLean Act, the United States signed the Canada Treaty and enacted the MBTA. The MBTA was one of the earliest pieces of environmental legislation that the United States Congress passed and, perhaps unsurprisingly, was controversial from the beginning. A group of states challenged the constitutionality of the MBTA on Tenth Amendment grounds, and the State of Missouri attempted to enjoin a U.S. Game Warden from enforcing the MBTA against its citizens.<sup>47</sup> When the issue of the MBTA’s constitutionality reached the United States Supreme Court, it ruled that, though Congress could not enact the MBTA under its commerce power, Congress could enact the law under its treaty power

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38. 16 U.S.C. § 3371 (2017).

39. Panarella, *supra* note 28, at 163-164.

40. 33 Cong. Rec. 4,871-72 (1900).

41. Panarella, *supra* note 28, at 164-165.

42. Weeks-McLean Act of 1913, ch. 145, 37 Stat. 828, 847-48 (*repealed* 1918).

43. Panarella, *supra* note 28, at 164-165.

44. *Id.* at 165.

45. *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

46. *Id.*

47. *United States v. Samples*, 258 F. 479 (W.D. Mo. 1919).

because of the Canada Treaty.<sup>48</sup> As the current circuit split demonstrates, this would not be the end of controversies stemming from the MBTA. Currently, the circuits are split over the applicability of misdemeanor strict criminal liability to non-hunting activities,<sup>49</sup> and under the Trump administration's current interpretation, enforcement of the MBTA is grounded.

*B. An Old Bird: The Migratory Bird Treaty Act Today*

The Migratory Bird Treaty Act (MBTA) is still protecting migratory birds across the United States 100 years after its enactment. The MBTA currently protects 1,027 bird species, including most bird species found in the United States, from the iconic bald eagle or whooping crane, to the common plain pigeon.<sup>50</sup> Human activities, which include not only hunting but also ordinary activities such as owning a cat, having a picture window, operating power lines, using pesticides, and a host of other activities unrelated to hunting, kill billions of these protected birds every year.<sup>51</sup>

The MBTA grants wide authority to the Secretary of the Interior to regulate hunting, which is then delegated to the U.S. Fish and Wildlife Service.<sup>52</sup> Under this authority, FWS establishes hunting seasons, determines which birds can be hunted and the number of these birds that each hunter may kill per day, and sells permits that allow hunters to “take” a certain number of migratory game birds,<sup>53</sup> known as the federal duck stamp program.<sup>54</sup> FWS uses the proceeds of the federal duck stamp for funding conservation efforts aimed at maintaining migratory bird species for future generations, in accordance with Congress's original vision of the MBTA.<sup>55</sup> Despite these regulations being in place for hunting, there is

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48. *Missouri v. Holland*, 252 U.S. 416 (1920).

49. *Panarella*, *supra* note 28, at 155.

50. 50 C.F.R. § 10.13 (2017); *See also* U.S. FISH AND WILDLIFE SERV., *Migratory Bird Program: Conserving America's Birds*, <https://perma.cc/N7K9-E5LZ> (last visited Nov. 13, 2018).

51. *Id.*

52. 16 U.S.C. § 704 (2018).

53. The FWS works with the state departments of wildlife and fisheries to develop these regulations, and the numbers vary from state to state based on a variety of state specific factors. Currently, the daily limit in Louisiana is six ducks per person per day. Additionally, there are further regulations for various species of duck, geese, and other migratory birds. LA. DEPT. OF WILDLIFE AND FISHERIES, <https://perma.cc/2CXM-A8R6> (last visited Nov. 13, 2018).

54. 16 U.S.C. § 704 (2018).

55. *Migratory Bird Program: Conserving America's Birds, Partner*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/6E5B-FXBX> (last visited Nov. 13, 2017).

no mechanism, as of yet, to allow industrial actors to “take” protected migratory birds without subjecting themselves to potential criminal liability.<sup>56</sup>

Common sense suggests that, short of criminal negligence,<sup>57</sup> non-hunting activities, such as driving cars or owning cats, that kill birds protected under the MBTA are not, or at least should not be, criminalized. A plain reading of 16 U.S.C. § 703, shows that, like many things in the law, the answer is not that simple. This is because the statute lacks a mental state, or *mens rea*, for criminal violations of § 703. Courts have interpreted the lack of a *mens rea* element to impose strict liability under the MBTA.<sup>58</sup> This means that, regardless of the actor’s intent, or lack thereof, in theory, the actor can be held criminally liable for killing or taking a MBTA protected bird through any of the above listed acts. However, there is some dispute amongst the circuits about how this standard applies to non-hunting activities, including activities by the oil and gas industry, communication towers and electrical transmission lines, and wind farms, which Congress and the U.S. Supreme Court have not yet resolved. The Trump administration has attempted to clarify the interpretation of § 703 through its latest interpretive memo and enforcement guidance, though it has only succeeded in frustrating congressional intent and clipping the MBTA’s metaphorical wings.

Under the Trump administration’s interpretation, any activity that is not intended to “take” birds does not violate the MBTA.<sup>59</sup> At first glance, this interpretation appears to solve an issue with the MBTA that has existed since the circuit split began; however, upon closer inspection, this interpretation is completely out of line with Congress’s conservation goals detailed above. In fact, the vast majority of activities that cause the harm to protected birds are not intended “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill” migratory birds and, thus, would not be violations of the MBTA under the Trump administration’s interpretation of § 703.

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56. The federal duck stamp program only covers hunting, and there is not a corresponding regulatory scheme for non-hunting human activities. 16 U.S.C. § 704 (2017).

57. Gross negligence so extreme that it is punishable as a crime. For example, involuntary manslaughter or other negligent homicide can be based on criminal negligence, as when an extremely careless automobile driver kills someone. Also termed *culpable negligence*; *gross negligence*. *Criminal negligence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

58. *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997).

59. *Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act*, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., *supra* note 10.

Though the market demand for bird feathers and parts has diminished, migratory bird populations are still declining.<sup>60</sup> Today, the biggest threats facing birds protected under the MBTA are human activities.<sup>61</sup> Hunting accounts for a number of migratory bird deaths; but hunting is heavily regulated by the FWS and similar state departments<sup>62</sup> and therefore will not be discussed for purposes of this Comment.<sup>63</sup> Non-hunting activities, both industrial and non-industrial, account for the majority of migratory bird deaths in the United States.

Bird deaths caused by industrial activities, such as those by oil and gas, electrical, agricultural, wind farming, and other related industries far outstrip the number of deaths caused by hunting,<sup>64</sup> yet under the current construction of the MBTA, there is little regulation of these “industrial tak[ings]”<sup>65</sup> or enforcement of criminal liability against industrial actors that “take” birds.<sup>66</sup> Non-industrial human activities, such as buildings with plate glass windows, driving, and owning cats, coupled with habitat loss, pose the greatest threats to migratory birds today.<sup>67</sup> Collisions with buildings and vehicles kill around 500 million birds protected under the MBTA per year,<sup>68</sup> and cats kill somewhere between 1.4 and 3.7 billion birds per year.<sup>69</sup> Despite all of these things, habitat loss poses the biggest threat to migratory bird survival, though there are no reliable estimates of the full extent of the effects of habitat loss on bird populations.<sup>70</sup>

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60. *Threats to Birds*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/9BV4-R29Q> (last visited Nov. 13, 2017).

61. *Id.*

62. *See*, Weeks-McLean Act of 1913, ch. 145, 37 Stat. 828, 847-48 (*repealed* 1918). *See also* Panarella, *supra* note 28, at 166.

63. Migratory birds also face threats from poaching, or illegal hunting, but estimates of the number of protected bird deaths due to poaching are difficult to come by and often unreliable. Therefore, they will also not be discussed for purposes of this Comment. *See* U.S. FISH AND WILDLIFE SERV., *supra* note 60.

64. *Id.*; *see also* *Causes of Bird Mortality*, SIBLEY GUIDES, <https://perma.cc/Q9XQ-VX9D> (last visited Oct. 14, 2017).

65. The federal duck stamp program only covers hunting, and there is not a corresponding regulatory scheme for non-hunting human activities. 16 U.S.C. § 704 (2017).

66. Currently the only enforcement mechanism is through the FWS and the U.S. Justice Department, and due to limited resources in both departments, many protected bird takes are either not discovered or not prosecuted. 16 U.S.C. §§ 706-707 (2017).

67. UNITED STATES FISH AND WILDLIFE SERV., *supra* note 60.

68. *Id.*

69. *Id.*

70. *Id.*

Regardless of the resolution to the MBTA circuit split, these threats, coupled with reduced enforcement under the Trump administration's interpretive memo, will require serious conservation efforts if we are to preserve these bird populations for posterity, as Congress intended in enacting the MBTA. Sensible enforcement of the MBTA, which will reduce preventable bird deaths, should be an integral part of migratory bird conservation efforts going forward.<sup>71</sup>

## II. THE "SHOCKING" EFFECTS OF INDUSTRIAL ACTIVITY ON MIGRATORY BIRDS

While there are a number of industries and industrial actions that result in the deaths of migratory birds,<sup>72</sup> this Comment focuses on three industries responsible for most bird deaths caused by industrial activities: oil and gas, electrical power transmission lines and communication towers, and wind farming. Combined, these industries account for approximately thirty-eight million protected bird deaths every year,<sup>73</sup> which is more than twice the number killed by regulated hunting.<sup>74</sup> Yet, under the Trump administration's interpretation of § 703, nearly none of these protected bird deaths are considered violations of the MBTA because the underlying activities that led to those deaths were not intended to kill birds.<sup>75</sup>

### A. Oil and Gas Industry: A Sticky Place for a Weary Traveler

Industrial actors in the oil and gas industry are responsible for the deaths of approximately 750,000 birds protected under the MBTA every year through the operation of open-air reserve pits alone.<sup>76</sup> This estimate

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71. See e.g. Amanda Rodewald, *The Trump Administration's New Migratory Bird Policy Undermines a Century of Conservation*, THE CONVERSATION, (August 15, 2018), <https://perma.cc/GN5H-V673> (last visited Sep. 10, 2018). By working with the FWS the oil and gas industry began installing nets over reserve pits, which reduced the number of birds killed in reserve pits by one to one and a half million.

72. *Id.*

73. *Id.*

74. *Causes of Bird Mortality*, SIBLEY GUIDES, <https://perma.cc/67JQ-LDTA> (last visited Nov. 13, 2017).

75. UNITED STATES DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., *supra* note 10.

76. U.S. FISH AND WILDLIFE SERV., *supra* note 60.

does not include birds that are killed from poisoning, entanglement, or entrapment<sup>77</sup> caused by oil and gas facilities across the United States.<sup>78</sup>

For many migratory bird species, a migration can be compared to a cross-country road trip; it requires a lot of time, energy, and frequent stops along the way.<sup>79</sup> Unfortunately for the birds, the FWS does not currently intend to build safe, lighted rest areas for migrating birds.<sup>80</sup> Migrating birds, therefore, must settle for ponds, lakes, and other waterbodies they find along their migration path. Reserve pits, pits filled with wastewater and oil by-products from drilling, pose a large threat to migratory birds, especially in areas with few water resources, because from the air they look like an inviting pit stop along the migratory route instead of the death pit they can become.<sup>81</sup> After landing in these pits, birds can become trapped and drown, poisoned by ingesting chemicals during preening or eating, or can freeze because of chemicals that damage the insulating qualities of feathers.<sup>82</sup>

Open-air reserve pits are common practice nationwide,<sup>83</sup> and because of differing interpretations of § 703, a company that operates reserve pits in multiple states may be subject to different interpretations of the strict criminal liability provisions of the MBTA. If the company has a reserve pit in New York, it is subject to liability for each protected bird that dies in its pits,<sup>84</sup> but, if the same company operated the same pit in Louisiana, there would be no criminal liability due to the Fifth Circuit's ruling in *United States v. CITGO Petroleum Corporation*.<sup>85</sup> This inconsistency in interpretation could have a chilling effect on industrial actors expanding their operations across the country. The same need for clarity and resolution of the circuit split also applies for operating power lines and communication towers, as well as wind farming. While the Trump administration's interpretation should provide consistency for the time

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77. *Id.*

78. For the purposes of this Comment, estimates of deaths caused by these other oil and gas activities are not reliable, so the focus will be upon the reserve pits.

79. *The Basics Of Bird Migration: How, Why, And Where*, ALL ABOUT BIRDS, <https://perma.cc/R6TF-RVVA> (last visited Jan. 21, 2018).

80. See Pedro Ramirez, Jr., *Wildlife Mortality Risk in Oil Field Waste Pits*, U.S. FISH AND WILDLIFE SERV.: REGION 6 CONTAMINANTS INFORMATION BULLETIN (December 2000).

81. *Id.*

82. *Id.*

83. *Id.* See also *Mortality Risks to Birds*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/R8SH-EXQX> (last visited Sept. 2009).

84. See e.g., *FMC Corp.*, 572 F.2d 902.

85. *CITGO*, 801 F.3d 477.

being, it would be foolhardy to rely on this interpretation long-term. Without a legislative or judicial resolution, another administration is free to determine that the MBTA should be interpreted in a completely different way, as the Trump administration did when confronted with the Obama administration's interpretation and enforcement policies.

As long as the split exists, there will be issues for multistate industrial actors that cause bird deaths. For example, Cactus Drilling Company has facilities in both Texas, which is in the Fifth Circuit, and Oklahoma, which is located in the Tenth Circuit.<sup>86</sup> Some of its facilities are located within 100 miles of each other across state lines,<sup>87</sup> but as it relates to liability under the MBTA, they might as well be a million miles away from one another. For the sake of the Cactus Drillings of the world and the millions of birds that benefit from the MBTA's protections, there must be a permanent, uniform interpretation of §703, which can only come from judicial or legislative action.

### *B. Electrical Power Transmission Lines and Communication Towers: The Shocking Truth*

Although this infrastructure is important for modern society, collisions with electrical power transmission lines and communication towers kill approximately 31.5 million birds each year and another 5.4 million birds die from electrocution.<sup>88</sup> Power lines are often at the flight level of birds and are difficult obstructions for birds to see, which causes many collisions and bird deaths.<sup>89</sup> This problem is even more acute in areas frequently traveled by birds.<sup>90</sup> Additionally, areas with low visibility due to darkness or poor weather conditions also create greater hazards.<sup>91</sup>

There are approximately 160,000 registered communication towers in the United States; while it is not entirely clear why birds often collide with communication towers, there are a few factors that make bird collisions more likely.<sup>92</sup> These factors include: steady burning lights; the use of guy wires for support; towers taller than 350 feet; towers located in areas with

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86. *Rig Locator*, CACTUS DRILLING COMPANY, <https://perma.cc/NTT9-YQE7> (last visited Nov. 13, 2017).

87. *Id.*

88. U.S. FISH AND WILDLIFE SERV., *supra* note 60.

89. *Electric Utility Lines*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/LMH7-UUN8> (last visited Nov. 13, 2017).

90. *Id.*

91. *Id.*

92. *Communication Towers*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/JR44-SVUD> (last visited Nov. 13, 2017).

frequent inclement weather patterns; towers placed in areas with a higher density of migrant birds using the airspace; and towers located along ridgelines, effectively reducing the free airspace above the tower.<sup>93</sup> The electric utility and communication industries are vital to modern American society, but are in need more regulation for the protection of migratory birds.

### *C. Wind Farming: The Environmentally Friendly Energy Source?*

Even the environmentally friendly energy industry of wind farming is not immune from potential liability under the MBTA. Current estimates state that wind farming kills approximately 234,000 birds per year nationwide.<sup>94</sup> The number of wind farms is increasing across the United States due to a growing desire for sustainable, clean energy production. As the number of wind farms increases, so too will the number of birds killed by collisions with turbines. The risk of bird collisions with wind turbines is the result of three factors: turbine location, turbine design, and the way in which birds fly across the landscape.<sup>95</sup>

The siting of wind turbines has the greatest impact on bird collisions for two main reasons.<sup>96</sup> First, if a turbine is located in an area with a large bird population, more collisions are likely to occur.<sup>97</sup> Second, a wind farm located in the migratory path of a bird species is more likely to have bird collisions than an area outside of these paths, much like automobile accidents are more likely to occur along an interstate than on a farm.<sup>98</sup> Current data shows that collisions are most frequent at windfarms located in California, estimated on average at 7.85 birds per turbine per year, which is higher than in the rest of the West (4.72 birds per turbine per year), the East (6.86 birds per turbines per year), and the Great Plains (2.92 birds per turbine per year).<sup>99</sup> While the numbers for individual turbines seem insignificant, wind turbines kill more than 200,000 birds per year because there are more than 57,000 wind turbines in the United States.<sup>100</sup>

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93. *Id.*

94. U.S. FISH AND WILDLIFE SERV., *supra* note 60.

95. *Wind Turbines*, U.S. FISH AND WILDLIFE SERV., <https://perma.cc/PV9K-34BA> (last visited Nov. 13, 2017).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Christopher Ingraham, *Every One of America's 57,636 Wind Turbines Mapped*, WASHINGTON POST, <https://perma.cc/ZR3Y-SJJW> (last visited January 2, 2019).

Keeping this data in mind when determining locations for new wind farms, companies can continue to expand wind power while mitigating the damage to migratory bird populations.

The design of the turbines also plays a role in the risk of bird collisions. Essentially, the taller the tower, the more bird deaths the turbine is likely to cause.<sup>101</sup> Birds often collide with turbines because, while soaring, they are unable to maneuver effectively and may be unable to avoid the turbine's rotor swept zone.<sup>102</sup> Also, birds that move during the day fly at lower heights and may be at higher risk of flying into the rotor swept zone because of these lower heights.<sup>103</sup> Design measures, such as eliminating the towers and sweeping blades seen in traditional wind turbines, can be taken to reduce the number of bird collisions with turbines.<sup>104</sup> New turbine designs, such as those being developed by Sheerwind<sup>105</sup> and the Tunisian company Saphon Energy,<sup>106</sup> attempt to make wind energy more efficient along with reducing the risks of bird mortality that exist with traditional turbines.

Finally, some species of birds have lower flight heights and can congregate near summits and steep slopes or large open areas where windfarms are typically located, increasing the risk of collision.<sup>107</sup> However, using the bird safe turbine designs can mitigate, if not eliminate, this risk as well. Sheerwind's Invelox technology captures wind by funneling it through tubes that squeeze the wind and increase its speed, similar to putting your thumb over the spout of a water hose.<sup>108</sup> This means that the turbines can capture wind even in areas where airflow is minimal, eliminating the need to put turbines in migration paths or traditional wind farming areas.<sup>109</sup> Additionally, these alternative designs create wind energy more efficiently, with some producing two and a half to three times as much energy as a traditional turbine.<sup>110</sup> This increased efficiency indicates that these alternative designs are the future of wind energy,

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101. U.S. FISH AND WILDLIFE SERV., *supra* note 95.

102. The rotor swept zone is the area through which the rotors of the turbine pass during the turbine's rotation.

103. U.S. FISH AND WILDLIFE SERV., *supra* note 95.

104. *Id.*

105. *Can Wind Energy Be Bird Safe?*, AMERICAN BIRD CONSERVANCY, <https://perma.cc/7U7S-6SG5> (last visited Jan. 21, 2018).

106. *Bird-friendly Bladeless Wind Turbine Mimics Nature*, VOA NEWS, <https://perma.cc/4DSJ-Z2P3> (last visited Jan. 21, 2018).

107. U.S. FISH AND WILDLIFE SERV., *supra* note 95.

108. AMERICAN BIRD CONSERVANCY, *supra* note 105.

109. *Id.*

110. *Id.*

regardless of its positive effects on birds. Due to this increased efficiency and coupled with the protection provided to migratory birds by reducing the number of traditional turbines, the wind industry would be negligent to not further develop and invest in bird-friendly wind turbines going forward.

### III. TAKING THESE BROKEN WINGS: THE CIRCUIT COURTS' INTERPRETATIONS OF 16 U.S.C. §703

A circuit split currently exists between the Second and Tenth Circuits and the Fifth, Eighth and Ninth Circuits, over the applicability of misdemeanor strict liability for non-hunting activities. The roots of this split can be traced back to 1978 when the Second Circuit decided *United States v. FMC Corporation* in favor of applying strict liability.<sup>111</sup> Though the Second Circuit decided *FMC* in 1978, no other circuit ruled on the issue until 1991 when the Ninth Circuit decided against applying strict liability in *Seattle Audubon Society v. Evans*.<sup>112</sup> Although a circuit split in need of resolution existed at this point, in the intervening twenty-six years, neither Congress nor the U.S. Supreme Court resolved the split. Even since the Fifth,<sup>113</sup> Eighth,<sup>114</sup> and Tenth<sup>115</sup> Circuits have entered the ring, neither the Judicial nor Legislative Branch has worked to permanently resolve the inherent ambiguity of the MBTA in the courts of appeal. Now is the time for Congress to step in and amend the MBTA because until they do, multistate industrial actors are in an unsustainable limbo, even in light of the Trump administration's current interpretation of §703.

The ambiguity centers around 16 U.S.C. § 703, which has been interpreted to impose strict liability for misdemeanor violations of the MBTA.<sup>116</sup> It is well understood that, in cases involving hunting, strict liability applies for misdemeanor violations of the MBTA, excluding baited field offenses,<sup>117</sup> which require knowledge.<sup>118</sup>

A plain reading of 16 U.S.C. § 703 suggests that strict liability should apply to any activity that results in the death or capture of a protected bird

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111. *United States v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978).

112. *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991).

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

114. *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110 (8th Cir. 1997).

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

116. *United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997).

117. This includes hunting over a field that has been baited, typically with grains such as corn, to attract a greater number of migratory birds.

118. *United States v. Morgan*, 311 F.3d 611, 614 (5th Cir. 2002).

regardless of the violator's mental state. In practice, this interpretation would lead to absurd results, such as prosecutions for the deaths of birds that fly into windows, are struck by vehicles, or are killed by cats, if it were not for prosecutorial discretion<sup>119</sup> and the lack of resources in the FWS and U.S. Department of Justice. The language of the statute seems to suggest that Congress intended for some activities aside from hunting to be considered violations of the MBTA, since the statute contains the phrase, "by any means or in any manner."<sup>120</sup> Though § 703 says "in any manner," three circuits have determined that strict liability applies only to hunting activities,<sup>121</sup> and two circuits have attached analyses that look similar to criminal negligence,<sup>122</sup> creating more than a little confusion around the MBTA's strict liability provision.

*A. Leaving the Nest for the First Time: The Second Circuit Begins the Split by Deciding United States vs. FMC Corporation.*

The Second Circuit was the first to rule on the applicability of strict liability to misdemeanor violations of the Migratory Bird Treaty Act (MBTA) in *FMC*, which involved a reserve pit at a chemical production plant.<sup>123</sup> FMC Corp. was convicted of violating the MBTA because its pesticides contaminated a reserve pit, leading to the deaths of 92 migratory birds.<sup>124</sup> The Second Circuit stated that it must "attemp[t] to balance public policy in support of the protection of migratory birds with a reluctance to charge anyone with a crime which he does not know he is committing."<sup>125</sup> After a balancing of these factors, the court held that "engag[ing] in an activity involving the manufacture of a highly toxic chemical" was sufficient to satisfy the *actus reus* element of the crime. In reaching this decision, one factor the Second Circuit relied upon heavily was that "FMC was manufacturing a powerful pesticide,"<sup>126</sup> and despite taking some remedial measures, cooperating with governmental authorities, and assuming FMC did not know its chemical was killing the birds, "the fact

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

120. 16 U.S.C. § 703 (2017).

121. *Seattle Audubon Society*, 952 F.2d 297 (9th Cir. 1991); *CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton County*, 113 F.3d 110 (8th Cir. 1997).

122. *FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978); *Apollo Energies, Inc.*, 611 F.3d 679. (10th Cir. 2010).

123. *FMC Corp.*, 572 F.2d at 904.

124. *Id.* at 903.

125. *Id.* at 905.

126. *Id.* at 906.

remain[ed] that it was FMC's product which killed the birds."<sup>127</sup> The Second Circuit found that the balancing test came out in favor of imposing strict liability to FMC's violations of § 703.

After determining that violations of § 703 are strict liability crimes, the Second Circuit addressed the *actus reus* component, seeming to eliminate the concerns the Fifth Circuit raised nearly forty years later.<sup>128</sup> The Second Circuit stated that FMC's conduct satisfied the *actus reus* component because it "engaged in the manufacture of a pesticide known to be highly toxic [and] failed to act to prevent this dangerous chemical from reaching the pond"<sup>129</sup> The Second Circuit went on to compare the strict liability provided for under § 703 to tort notions of strict liability, discussing tort cases in which courts applied strict liability to situations arising from ultrahazardous activities, such as blasting, filth in cesspools, and crop dusting.<sup>130</sup>

After comparing § 703 with the principles of strict liability in tort, the court concluded that, as is the case with tort liability, the actions of FMC caused harm to others and the company should bear the burden of that harm.<sup>131</sup> By importing tort notions of strict liability, the Second Circuit addressed the major concerns over the absurd consequences that can result from an overbroad, or even plain, reading of § 703. The ultrahazardous activity analysis eliminates liability for many everyday activities that kill protected birds, while protecting birds from actors that knew, or reasonably should have known, that their actions posed a threat to migratory birds. Though the Second Circuit's analysis of "strict liability" under the MBTA leads to something closer to criminal negligence, this seems to be the only way to adequately "balance public policy with a reluctance to charge anyone with a crime which he does not know he is committing."<sup>132</sup> It would be thirteen years before this issue came up for review in another U.S. circuit court of appeals.

*B. Toucan Play at This Game: The Ninth Circuit Decides Seattle Audubon Society v. Evans and the Circuit Split Begins in Earnest*

In 1991, the Ninth Circuit decided *Seattle Audubon*,<sup>133</sup> which went the opposite way on strict liability for non-hunting activities under the MBTA,

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127. *Id.*

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

129. *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

130. *Id.*

131. *Id.*

132. *Id.* at 905.

133. *Seattle Audubon Soc'y*, 952 F.2d 297.

leading to a circuit split. This case arose from a suit by two environmental groups, the Portland Audubon Society and the Seattle Audubon Society, against the U.S. Forest Service (Forest Service) over the sale of timber in national forests. Portions of the national forests in question were habitats of the northern spotted owl, which is protected under the MBTA, but not under the Endangered Species Act, (ESA).<sup>134</sup>

The Audubon Societies contended that the MBTA prevented the Forest Service from selling and logging timber in areas that could provide habitats for the northern spotted owl.<sup>135</sup> They argued that “timber sales which destroy owl habitat are tantamount to a proscribed “taking” under the [MBTA].”<sup>136</sup> The Ninth Circuit compared the definitions of “take” under the MBTA and ESA and found that when Congress amended the MBTA after the enactment of the ESA, it did not add the word “harm” which is included in the definition of “take” under the ESA. The Ninth Circuit agreed with the Seattle district court, that “the differences in the proscribed conduct under ESA and the MBTA are ‘distinct and purposeful.’”<sup>137</sup> The Ninth Circuit concluded that “[h]abitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA.” Therefore, the defendants had not committed a “taking” under the MBTA.

The Ninth Circuit’s analysis does not directly confront whether there can ever be strict liability for non-hunting violations of the MBTA but holds that strict liability does not apply in this case. A complicating factor in determining if there is any room for strict liability under the MBTA in the Ninth Circuit is that the Audubon Societies brought this case under a citizen suit provision of another environmental statute and it is not an appeal from a criminal prosecution under the MBTA.<sup>138</sup> It is not clear whether the Ninth Circuit would apply strict liability in a criminal

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134. *Id.* at 298. 16 U.S.C. §§ 1361-1423 (2017).

135. *Seattle Audubon Soc’y*, 952 F.2d at 302.

136. *Id.* at 302.

137. *Id.* at 303.

138. There is still some debate as to whether there is a MBTA citizen suit possible under the Administrative Procedure Act, *see* *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). (Congress adding a citizen suit provision similar to that of the ESA, 16 U.S.C. § 1540(g), is a possibility that would help to increase MBTA enforcement and protect migratory birds, while this should be done to conserve migratory bird populations, this issue is outside the scope of this Comment).

prosecution, which is possible,<sup>139</sup> but for now, strict liability does not apply to non-hunting activities.

*C. Hoo Cares About a Few Birds: The Eighth Circuit's Decision in Newton County Wildlife Association v. U.S. Department of Agriculture*

The Eighth Circuit entered the fray in 1997 by deciding *Newton County Wildlife Association v. U.S. Department of Agriculture*,<sup>140</sup> which also involved environmental groups seeking to enjoin the Forest Service from selling timber in national forests.<sup>141</sup> The Eighth Circuit noted that the MBTA's "plain language prohibits conduct directed at migratory birds—'pursue, hunt, take, capture, kill, possess,' and so forth."<sup>142</sup> The Eighth Circuit found that, "[s]trict liability may be appropriate when dealing with hunters and poachers," but deciding that the statute imposes "an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds" expanded the statute to absurdity.<sup>143</sup>

The Eighth Circuit agreed with the Ninth Circuit's holding in *Seattle Audubon* 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>144</sup> Once again, this case involved a citizen suit seeking an injunction against the actions of a federal agency, and the Eighth Circuit held that the "MBTA does not appear to apply to the actions of federal government agencies,"<sup>145</sup> going a step further than the Ninth

Circuit in *Seattle Audubon*.<sup>146</sup> Note that the Eighth Circuit did not definitively rule out applying strict liability in criminal cases brought by the Justice Department against individuals, so it is still possible that in a criminal case, the Eighth Circuit could find that strict liability applies to misdemeanor offenses. This possibility further demonstrates the need for a permanent solution to the MBTA's interpretation, since uncertainty exists even in Circuits that have ruled upon § 703's applicability to non-hunting activities.

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139. The court seems to suggest that if this case involved toxic chemicals, the result may be different, but this is merely speculation. See *Seattle Audubon Soc'y*, 952 F.2d at 303.

140. *Newton Cty. Wildlife Ass'n*, 113 F.3d 110.

141. *Id.* at 112.

142. *Id.* at 115.

143. *Id.*

144. *Id.* (internal citation omitted).

145. *Id.*

146. *Seattle Audubon Soc'y*, 952 F.2d 297.

*D. They are Going to Egret Not Covering Those Exhaust Pipes: The Tenth Circuit's Decision in United States v. Apollo Energies, Inc.*

After *Newton County*, the next court of appeals to rule on the issue was the Tenth Circuit in 2010, which applied strict liability to non-hunting activities in *United States v. Apollo Energies, Incorporated*.<sup>147</sup> This case arose from a criminal conviction for MBTA violations stemming from dead birds found in the defendant oil companies' drilling equipment.<sup>148</sup> The Tenth Circuit held that strict liability applied for non-hunting violations of the MBTA, but "a strict liability interpretation of the MBTA . . . satisfies due process only if defendants proximately caused the harm to protected birds."<sup>149</sup> By requiring the activity to proximately cause the harm, the Tenth Circuit imported another negligence standard to control the scope of strict liability under the MBTA. This was done to prevent absurd, and—in the Tenth Circuit's opinion—unconstitutional, applications of § 703.<sup>150</sup> The addition of another negligence standard into the strict liability analysis bolsters § 703's constitutionality by addressing the due process issues left unaddressed by the Second Circuit in *FMC*.<sup>151</sup> Ultimately, the Tenth Circuit followed the holding in *United States v. Corrow*, which states, "misdemeanor violations under § 703 are strict liability crimes."<sup>152</sup>

The defendants in *Apollo* contended that the statute was unconstitutionally vague.<sup>153</sup> In addressing this issue, the Tenth Circuit found that the MBTA "criminalize[d] a range of conduct that [would] lead to the death or captivity of protected migratory birds, including to 'pursue, hunt, take, capture, [and] kill ' The actions criminalized by the MBTA may be legion, but they are not vague."<sup>154</sup> Therefore, even though many actions lead to liability under § 703, the statute is not unconstitutionally vague according to the Tenth Circuit.

Additionally, the defendants argued that the statute did not provide fair notice. The Tenth Circuit stated that, for the MBTA to be constitutional, it must require that the defendant proximately cause a

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147. *Apollo Energies, Inc.*, 611 F.3d 679.

148. *Id.* at 682.

149. *Id.*

150. "Due process requires criminal defendants have adequate notice that their conduct is a violation of the [MBTA]." *Id.*

151. *See United States v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978).

152. *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997).

153. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 683 (10th Cir. 2010).

154. *Id.* at 688-689 (internal citations omitted).

violation of the statute.<sup>155</sup> The court then found that the defendants in this case proximately caused the deaths of the migratory birds because:

[Apollo] had notice of the heater-treater problem for nearly a year-and-a-half . . . [and] admitted at trial that it failed to cover some of the heater-treaters' exhaust pipes as Fish and Wildlife had suggested after the December 2005 inspection. In effect, Apollo knew its equipment was a bird trap that could kill.<sup>156</sup>

This holding is most similar to the criminal negligence standard that Congress should amend the MBTA to apply instead of strict liability and gives guidance to courts interpreting the new provision.<sup>157</sup>

*E. The Fifth Circuit: United States v. CITGO Petroleum Corporation*

The most recent decision on MBTA misdemeanor strict liability came from the Fifth Circuit in *CITGO*.<sup>158</sup> As of this Comment's publication, the Fifth Circuit is the only circuit to directly confront the issue of Migratory Bird Treaty Act strict liability in criminal prosecutions for non-hunting activities and determine that it does not apply.<sup>159</sup> *CITGO* was convicted of three violations of the MBTA due to migratory bird deaths caused by reserve pits operated in Corpus Christie, Texas.<sup>160</sup> The Fifth Circuit held that "a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds."<sup>161</sup> This is the analysis that most closely aligns with that of the Trump administration's interpretive memo and enforcement guidance.<sup>162</sup>

In support of its conclusion, the Fifth Circuit compared the MBTA with the ESA<sup>163</sup> and the Marine Mammal Protection Act ("MMPA").<sup>164</sup> Particularly, the court focused on the definition of "take" in each statute.

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155. *Id.* at 690.

156. *Id.* at 691.

157. *See* Part IV of this Comment for further discussion.

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

159. *Id.* *See also* *FMC Corp.*, 572 F.2d 902; *Newton County Wildlife Ass'n*, 113 F.3d 110; *Apollo Energies, Inc.*, 611 F.3d 679; *Seattle Audubon Soc'y*, 952 F.2d 297.

160. *Id.* at 481.

161. *Id.* at 488-489.

162. UNITED STATES DEPT. OF THE INTERIOR, OFFICE OF THE SOLICITOR, *supra* note 9. *See also* U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., *supra* note 10.

163. 16 U.S.C §§ 1361-1423 (2017).

164. 16 U.S.C §§ 1531-1544 (2017).

Both the ESA and MMPA definitions include the words “harm” or “harass,”<sup>165</sup> and the Fifth Circuit determined that “[w]ithout these words, ‘take’<sup>166</sup> assumes its common law definition.”<sup>167</sup> The court concluded that “the MBTA’s ban on ‘takings’ only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.”<sup>168</sup> The court also cited concerns about criminalizing everyday activities mentioned earlier in this Comment.<sup>169</sup>

The Fifth Circuit’s analysis in *CITGO* is flawed because it focused its analysis of the MBTA’s scope solely on the word “take” while ignoring the fact that two words later, “kill” appears. The court accused the circuits that applied strict liability to non-hunting activities of “confus[ing] the *mens rea* and the *actus reus*”<sup>170</sup> requirements<sup>171</sup> and stating that “a defendant must still commit the act to be liable.”<sup>172</sup> This argument only makes sense when you ignore some of the words in § 703, particularly “kill,”<sup>173</sup> because many of the other prohibited actions listed in the statute qualify as actions that would constitute an *actus reus*.<sup>174</sup> Additionally, since *actus reus* can include omissions, and failing to cover the reserve pits was an omission that killed the birds in question, there is no problem with *actus reus*. Yet the fact remains that within the geographical boundaries of the Fifth Circuit, and under the Trump administration’s current interpretation, § 703 only applies to intentional acts directly killing migratory birds or intended to kill birds.<sup>175</sup>

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165. See 16 U.S.C. § 1532(19); see also 16 U.S.C. § 1372(a).

166. At common law, take is defined as “to reduce those animals, by killing or capturing, to human control.” *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

167. *CITGO*, 801 F.3d 477, at 491.

168. *Id.*, at 494.

169. *Id.*; see also Part II *supra*.

170. The voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the physical components of a crime. *Actus Reus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

171. *CITGO*, 801 F.3d at 492.

172. *Id.*

173. Perhaps the Fifth Circuit’s analysis of strict liability under § 703 would have been different had the charges against *CITGO* included the word kill along with take, but this seems to be a trivial textual distinction considering that the proscribed actions of “take” and “kill” are separated by one word in the legislation and committing any of the proscribed acts is unlawful.

174. 16 U.S.C. § 703 (a) (2018).

175. *CITGO*, 801 F.3d 477, at 494.

#### IV. LEARNING TO FLY AGAIN: CONGRESSIONAL RESOLUTION OF THE STRICT LIABILITY CONUNDRUM<sup>176</sup>

In order to resolve this the ambiguity of § 703 and counteract what the Trump administration has done, Congress should revise the MBTA. As previously mentioned, in the nearly 100 years since the MBTA was originally enacted, it has been revised only a handful of times.<sup>177</sup>

Understandably, some provisions of the MBTA are out of touch with the modern world, particularly 16 U.S.C. § 703. Due to advances in technology and modern society, there are many more societally beneficial activities unrelated to hunting that kill migratory birds than in 1918. Things such as high-rise buildings, electrical transmission lines, and communications towers are exponentially more prevalent than they were in 1918. The risks these threats pose to migratory birds, *i.e.* high casualty rates, are the types of human activities Congress intended to criminalize in its effort to protect bird populations. Unfortunately, whether these activities are criminal remains ambiguous due to Congress's lack of action in revising the MBTA.

Congress should amend 16 U.S.C. § 703 to institute a criminal negligence standard similar to that of the Second and Tenth Circuits to strike a sensible balance between conservation and economic concerns.

This middle-ground approach furthers Congress's original intent to conserve migratory bird populations and avoids the absurd consequences of over-enforcement. Congress could state that there is no criminal liability under the MBTA for non-hunting activities, similar to the approach taken by the Fifth Circuit, and the Trump administration,<sup>178</sup> or amend the MBTA to clearly state that strict liability applies to non-hunting activities that kill protected birds, but these are much less desirable outcomes than instituting a criminal negligence standard.

Out of the three options mentioned above, the least desirable option is for Congress to follow the interpretations of the Trump administration and

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176. The circuit split could also be resolved by the United States Supreme Court, but this option is rather unlikely because these cases are rarely prosecuted, much less appealed to the Circuit Courts of Appeal. Writs were not even applied for in the most recent case, *CITGO*, and it is uncertain how long it will be before a writ application would be made or granted on this issue. Additionally, the Supreme Court does not have the power to institute a regulatory scheme, or expand the enforcement of the MBTA. Therefore, this option falls outside of the scope of this Comment.

177. 16 U.S.C. § 703(a) (2017), *see also* 16 U.S.C. § 704 (2017), which was amended to include the knowledge requirement for baited fields in 1998.

178. *CITGO*, 801 F.3d 477; *see also* U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., *supra* note 10.

the Fifth, Eighth, and Ninth Circuits, because it exacerbates the inequities that currently exist and frustrates Congress's intent in enacting the MBTA. The inequity of the current interpretations of § 703 is apparent when considering the differences in the way hunting and non-hunting activities are treated in regard to MBTA criminal liability. A hunter that shoots a single migratory bird after legal shooting hours is held strictly liable under § 703<sup>179</sup> and subject to up to \$15,000 in fines, six months in prison, or both.<sup>180</sup> Conversely, an oil and gas company that kills any number of migratory birds through the use of open reserve pits,<sup>181</sup> faces no criminal consequences under the interpretation of the Trump administration, along with the Fifth, Eighth, or Ninth Circuit.

In this scenario, one bird death can be punished by up to \$15,000 in fines, while the deaths of potentially hundreds of birds go unpunished; and the only difference between the cases is the action that led to the birds' death. Congress cannot, or should not, sanction the continuation and expansion of these inequities and therefore should not apply § 703 to hunting exclusively. Merely enforcing the MBTA against actors that intended to kill protected birds frustrates Congress's conservation goals in enacting the MBTA because the vast majority of protected bird deaths are caused by activities other than hunting.<sup>182</sup> This option does not serve the purpose of conservation, nor does it lead to the equitable application of punishment. Therefore, the MBTA should not be amended in accordance with the interpretations of the Trump administration, Fifth, Eighth, or Ninth Circuit.

Imposing strict liability to all activities that result in bird deaths is also an unsuitable solution to the issue because it exacerbates the Fifth Circuit's concerns in *CITGO*, that "[t]his scope of strict criminal liability would enable the government to prosecute [violators] at will and even capriciously."<sup>183</sup> If Congress were to apply strict liability to every act or omission that resulted in bird deaths, the only thing protecting most Americans that own cats, drive cars, or have picture windows from prosecution and fines up to \$15,000, six months in jail, or both,<sup>184</sup> would be prosecutorial discretion and the lack of resources in the FWS and

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179. *United States v. Abbate*, 439 F. Supp. 2d 625, 627 n.8 (E.D. La. 2006).

180. 16 U.S.C. § 707(a) (2017).

181. Studies have shown that these pits can kill between seventeen and eighty-one birds per month, *see* Pedro Ramirez, Jr., U.S. FISH & WILDLIFE SERV., WILDLIFE MORTALITY RISK IN OIL FIELD WASTE PITS (2000).

182. U.S. FISH AND WILDLIFE SERV., *supra* note 60; *see also* SIBLEY GUIDES, *supra* note 64.

183. *CITGO*, 801 F.3d at 494.

184. 16 U.S.C. § 707(a) (2017).

Justice Department.<sup>185</sup> This situation would be untenable, and therefore, Congress should not amend the MBTA to apply strict liability to all non-hunting activities that kill protected birds.

The most sensible option for Congress to resolve the inherent ambiguity in the MBTA is to change § 703 from a strict liability standard to a criminal negligence standard because it strikes an appropriate balance between economic necessity and migratory bird conservation. This solution is similar to what is currently being done in the Second<sup>186</sup> and Tenth<sup>187</sup> Circuits and solves the problems associated with both of the previously discussed options. Applying a criminal negligence standard also eliminates the inequities associated with uneven enforcement, because it will hold industrial and other non-hunting actors to the same standard as hunters. It also prevents the overbreadth of the second solution by requiring a *mens rea* of knowledge or negligence, which will prevent liability for bird deaths caused by collisions with windows and cars, feral cats, or fastballs. Additionally, it furthers Congress's conservation goals by regulating and working with industries to transform industrial activities in ways that curtail protected bird deaths. As mentioned above, making this change would be straightforward and simple, with the revised 16 U.S.C. § 703(a) reading, "it shall be unlawful at any time, ~~by any means or in any manner~~ with knowledge or disregard for the consequences of the act, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale"<sup>188</sup>

By making this amendment to the MBTA, Congress can continue to further the MBTA's original intent of bird conservation and clarify potential criminal liability for multistate industrial actors. This amendment would further migratory bird conservation goals by deterring industrial actors from killing migratory birds since they will face criminal liability if their acts or omissions, that they knew or reasonably should have known, would result in bird deaths.<sup>189</sup> It would also clarify and simplify the

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185. Though relying on prosecutorial discretion and lack of resources does not always pan out, especially considering that the Immigration courts, which also have limited resources and rely upon the prosecutorial discretion of Immigration and Customs Enforcement, currently have a backlog of more than 632,000 cases. *See e.g. Immigration Court Backlog Tool*, SYRACUSE UNIVERSITY, <https://perma.cc/THX9-9T3M> (last visited Oct. 14, 2017).

186. *FMC Corp.*, 572 F.2d 902.

187. *Apollo Energies, Inc.*, 611 F.3d 679.

188. 16 U.S.C. § 703 (2017) (*emphasis added*).

189. As mentioned in note 27 *supra*, a regulatory scheme similar to the Federal Duck Stamp Program may be warranted here, though discussion of this issue is outside the scope of this Comment.

potential criminal liability of multistate industrial actors under the MBTA because they would only have to worry about a single standard nationwide. Ultimately, many of the problems associated with the MBTA could be alleviated with one simple amendment.

#### BEST LAID PLANS OF BIRDS AND MEN: CONCLUSION

Ultimately, the differing interpretations of 16 U.S.C § 703 hurt the economy, are incredibly inequitable for hunters, and hurt migratory bird populations. The current scope of the protection granted by the MBTA to protect the existence of migratory birds remains ambiguous. Until Congress amends § 703, the interpretation of the provision designed to protect and conserve migratory bird populations is left up to an administration and agency that have effectively clipped the MBTA's wings and drastically reduced the protections afforded to migratory birds. Congress can begin nursing the MBTA back to health and teaching it to fly again by amending § 703 as outlined above.

The ambiguity of § 703 is problematic because it creates a chilling effect on multistate industrial actors due to the vastly different, and incredibly confusing, differences in the application of strict liability under the MBTA in different parts of the country. Currently, industrial actors looking to expand to new geographic areas have to worry if the same practices that they currently have in place will result in criminal liability in a new location. This kind of confusion and differing treatment leads to an environment in which businesses are hesitant to expand to new areas, stifling growth and hurting the economy. While the Trump administration's current interpretation of § 703 reduces this concern, this interpretation could be altered by a future administration in a way that creates greater chilling effects. Furthermore, the administrative interpretations are only binding upon the agency, meaning that the Justice Department could pursue criminal charges, despite the Department of the Interior's interpretation of § 703. Until Congress definitively acts to amend § 703, the possible criminal liability for industrial actors will be left up to interpretation, which are subject change from administration to administration, and is ultimately not binding upon the courts.

The current state of the law is inequitable to the millions of hunters across the United States because they face regulation and penalties, at a much higher level, though they account for a fraction of the total protected bird deaths caused by non-hunting activities each year. Industrial actors should be held accountable at least on a similar level with hunters, especially considering that their actions result in many more bird deaths. Hunters nationwide are held strictly liable for killing one bird over their

daily limit, yet in some parts of the country, and under the Trump administration's interpretation, industrial actors can kill hundreds of protected birds and face no consequences. This differential enforcement of the MBTA is incredibly inequitable and, quite frankly, absurd in light of Congress's original intentions for enacting the MBTA.

The differing interpretations of § 703 frustrate Congress's original intent behind enacting the MBTA since, under the Trump administration's interpretation, industrial actors are not deterred from killing migratory birds, and bird populations suffer. Congress enacted the MBTA to preserve migratory bird populations for generations to come, but without a consistent approach to preventing migratory bird deaths, trying to reach this goal is like flying against the wind. The MBTA should be amended to further Congress's original intent in the modern world.

If history has anything to tell us, the question is not if there will be another Exxon Valdez or Deepwater Horizon, but when the next major environmental disaster will occur. In order to clarify the criminal liability for the next disaster, help migratory bird populations to recover, and gather the funding necessary to mitigate future environmental disasters, the MBTA needs to be amended to a clearer, criminal negligence standard. By amending 16 U.S.C. § 703(a) to a criminal negligence standard, Congress can solve all of the problems listed above and ensure that migratory birds are protected for the enjoyment of posterity. Since this issue leads to the problems mentioned above, and is so easily remedied, Congress not only has the ability but the responsibility to clarify § 703 quickly and sensibly.

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