FROM FRIEND TO FOE: THE COMPLEX AND EVOLVING RELATIONSHIP OF THE FEDERAL GOVERNMENT AND THE MIGRATORY BIRDS IT IS BOUND TO PROTECT

BY

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The year 2018 marked the 100th anniversary of the signing of the Migratory Bird Treaty Act (MBTA or the Act), which has protected hundreds of bird species from death and even extinction over the past century. Unfortunately, the Trump Administration appears dedicated to eviscerating the Act's effectiveness in honor of this auspicious occasion. In December 2017, the United States Department of Interior (DOI) reversed approximately fifty years of federal government policy by excluding "incidental takes" from coverage under the Act. "Incidental takes," unlike direct takes such as hunting or poaching, consist of bird deaths caused unintentionally, and constitute the vast majority of bird deaths in the present day.

This Article presents an analysis of the DOI's new policy on incidental takes under the Act. It begins by providing a retrospective of the MBTA from its origins at the beginning of the twentieth century to its evolution through the modern day. It looks first to the history of the Act and the international Migratory Bird Treaties, then considers major amendments to the Act. It presents some of the greatest current threats to birds, which generally constitute incidental takes, including deaths caused by habitat loss, pesticide use, and climate change. It then examines the legal parameters of incidental take, including incidental takes caused by the government itself, as well as the complex issue of whether federal government incidental takes are covered by the Act. It considers the DOI's new opinion, evaluating its significance as well as environmental groups' lawsuit filed in May challenging this new opinion.

This Article argues that the current political threats to the MBTA, and the DOI's new legal opinion in particular, have transformed the federal government from being one of birds' greatest friends to their foe. It concludes that the DOI's current position must be corrected to cover incidental take under the MBTA. Moreover, the DOI should

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strengthen its stance on incidental take by clarifying that the federal government itself may be found liable for incidental takes. It is only through so doing that the MBTA can continue to be an effective statute over the next 100 years and combat the greatest global environmental threat of our time: climate change.

I. INTRODUCTION

One hundred years ago President Woodrow Wilson signed the Migratory Bird Treaty Act[1] (MBTA or Act) to combat the dramatic loss of migratory birds in the United States.[2] In the century since, the MBTA has proved an effective tool at protecting migratory birds, which constitute the vast majority of birds in the United States.[3] However, in that time new threats to birds have also arisen, including increased habitat loss, new pesticides and rodenticides, climate change, and the federal government itself.[4] These threats largely take the form of "incidental take," or bird deaths caused unintentionally, unlike illegal hunting or poaching.[5]

The United States Department of Interior (DOI), which is responsible for implementing the MBTA, has often found itself at odds with industry and other branches of government over enforcement of the MBTA, and specifically over incidental takes or unintentional bird deaths.[6] Over the years DOI has come up with various approaches to try to ensure the continued effectiveness of the Act to meet these changing challenges, with varying effectiveness.[7] However, the Trump Administration has recently reversed course, with DOI declaring it will no longer enforce the law when it comes to unintentional bird deaths.[8] This marks the beginning of a new era in the complex relationship between the federal government and migratory birds and their advocates, in which DOI will no longer protect birds from some of the greatest threats they face, from private actors and the federal

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1 Ch. 128 § 2, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703–712 (2012)); Craig D. Sjostrom, Comment, *Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371, 373 (1989).

2 Sjostrom, *supra* note 1, at 372–73; *The Migratory Bird Treaty Act, Explained*, NAT'L AUDUBON SOC'Y (Jan. 26, 2018), https://perma.cc/Y8SZ-LRR9 (stating the MBTA was signed "in response to the extinction or near-extinction of a number of bird species").

3 Jhaneel Lockhart, *9 Awesome Facts About Bird Migration*, NAT'L AUDUBON SOC'Y (Oct. 11, 2012), https://perma.cc/B4FG-6DGS (stating that "[i]n North America, most bird species migrate to some extent").

4 *See* Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RES. J. 47, 48–49, 59 (2000); Andrew W. Minikowski, *A Vision or a Waking Dream: Revising the Migratory Bird Treaty Act to Empower Citizens and Address Modern Threats to Avian Populations*, 16 VT. J. ENVTL. L. 152, 152–53 (2014).

5 *See Migratory Bird Treaty Act*, ENVTL. L. HARV., https://perma.cc/6QLL-XXLD (last visited Feb. 16, 2019).

6 *See, e.g.*, Martha G. Vazquez, Note, *Clipping the Wings of Industry: Uncertainty in Interpretation and Enforcement of the Migratory Bird Treaty Act*, 74 WASH. & LEE L. REV. ONLINE 281, 295–98 (2018).

7 *See* Vicky J. Meretsky et al., *Migration and Conservation: Frameworks, Gaps, and Synergies in Science, Law, and Management*, 41 ENVTL. L. 447, 473–74 (presenting the main legal approaches used by existing conservation laws to protect migratory species: "1) providing funding and assistance for conservation projects and fostering coordination and information generation and exchange; 2) providing incentives for state-level conservation planning; 3) acquiring and designating habitat for the benefit of species' individuals; 4) controlling the 'take' of species individuals through prohibitions and harvest restrictions; and 5) establishing standards and management practices to avoid harm to species' individuals and populations").

8 *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*, U.S. DEP'T INTERIOR (Dec. 22, 2017), https://perma.cc/BA5S-SJVJ.

government alike. The federal government was once one of birds' greatest friends; it is now one of their greatest foes.

Part II of this Article provides a retrospective of the MBTA from its origins at the beginning of the twentieth century to its evolution through the modern day. Part III considers some of the greatest current threats to birds, most of which involve incidental take. Part IV presents the statute's structure, content, and implementation, and then examines incidental take in more detail, particularly the interesting and complex issue of whether federal government incidental takes are covered by the Act. This Article analyzes the Department of Interior's new approach to incidental take in Part V. Finally, it concludes with recommendations to ensure that the MBTA survives and becomes even more effective over the next century.

II. HISTORY OF THE MIGRATORY BIRD TREATIES AND ACT

By the end of the nineteenth century, it had become clear to Congress that wildlife did not exist in infinite supply and that human consumption of natural resources would have to be managed.[9] The federal government at this time went to great measures to try to protect migratory birds. In 1900, Congress enacted the Lacey Act,[10] a criminal statute, which is today generally considered the first piece of federal legislation to protect wildlife, including birds.[11] Iowa congressman John Lacey introduced the Act primarily to combat illegal poachers, who often evaded state-level prosecution by hunting and selling in different jurisdictions.[12] The Lacey Act also addressed the fact that states found themselves competing for resources, with each tempted "to secure its full share of edible game birds during the spring and fall migrations[,]" which "rendered harmonious and effective State supervision impossible."[13] Relying on the interstate commerce power, the Lacey Act constituted a comprehensive federal version of what states were trying to accomplish—preventing illegal poachers from evading state-level prosecution.

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9 *See* Erin C. Perkins, *Migratory Birds and Multiple-Use Management: Using the Migratory Bird Treaty Act to Rejuvenate America's National Environmental Policy*, 92 NW. U. L. REV. 817, 824 (1998); *see also* Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 6 n.15 (1996) ("At the end of the nineteenth century birds were killed in large numbers for food, sport and millinery purposes. By the turn of the century, several species had become extinct and many were threatened with extinction. In response to the mass destruction, a bird protection movement was formed in the latter half of the nineteenth century, its leadership drawn from the new science of ornithology. One of the movement's primary goals was to create laws to regulate the taking of bird life. The most important statutory result of those efforts is the MBTA." (internal citations omitted)).

10 16 U.S.C. § 667(e) (1952) (repealed 1981; the Act's provisions are now generally covered by chapter 53 of title 16).

11 *U.S. Conservation Laws*, *Lacey Act*, U.S. FISH & WILDLIFE SERV., https://perma.cc/U5Z3-9RQJ (last visited Feb. 16, 2019).

12 *See* H.R. Rep. No. 56-474, at 1–2 (1900); *see also* 33 CONG. REC. 4,871 (Apr. 30, 1900).

13 Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, SUP. CT. REV., Vol. 1975, at 77, 78 (citing S. Rep. No. 675, 62d Cong., 2d Sess., 1 (1912)).

Federal government support for the protection of migratory birds continued to build, with a bill proposed specifically to protect migratory birds in 1904 and in each of the next nine Congressional sessions.[14] In 1913, such a bill finally became law when Congress passed the Weeks-McLean Act[15] as an amendment to the Department of Agriculture Appropriation Act.[16] However, the Weeks-McLean Act was quickly and successfully challenged in two federal district courts as an unconstitutional exercise of State police power,[17] and the United States Supreme Court granted certiorari to consider the two decisions collectively.[18] Previous Supreme Court cases had treated migratory birds as *ferae nature*, and thus subject matter appropriate for state, rather than federal, regulation.[19] However, before the cases were heard, Secretary of State Robert Lansing invoked the Treaty power and entered into the 1916 "Convention Between the United States of America and the United Kingdom of Great Britain and Ireland for the Protection of Migratory Birds in the United States and Canada."[20]

A. History of the Original Treaty with the UK/Canada

The first mention on record of the possibility of using a treaty to achieve what Congress was struggling to constitutionally regulate otherwise was a statement by Senator Elihu Root in January 1913, suggesting that a treaty for the protection of migratory birds might give "the Government of the United States . . . constitutional authority to deal with this subject."[21] Upon receiving a report from the Senate Foreign Relations Committee supporting the concept,[22] the Senate passed a resolution requesting the President to enter into a treaty for that purpose just six months later.[23] Senator Root and Secretary Lansing are thus jointly credited for identifying the treaty power as a constitutional means of achieving the protective ends that Congress sought under the Weeks-McLean and Lacey Acts.[24] Secretary

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14 *Id.*

15 Act of March 4, 1913, ch. 145, 37 Stat. 847 (1913).

16 Lofgren, *supra* note 13.

17 *See* United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288, 296 (D. Kan. 1915).

18 Erin C. Perkins, *Migratory Birds and Multiple-Use Management: Using the Migratory Bird Treaty Act to Rejuvenate America's National Environmental Policy*, 92 NW. U. L. REV. 817, 824–25 (1998).

19 G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 64–65 (1999) (citing Geer v. Connecticut, 161 U.S. 519 (1896)).

20 Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 [hereinafter Migratory Bird Convention]; *see* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 169 (1979) (providing historical context for the U.S.'s entrance into the Convention).

21 51 Cong. Rec. 8349 (1914).

22 Arthur H. Dean, *Amending the Treaty Power*, 6 STAN. L. REV. 589, 596 (1954)

23 White, *supra* note 19, at 66 (citing 50 Cong. Rec. 2337, 2339– 2340 (1913)).

24 *See, e.g.*, George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 169 (1979) ("[S]ecretary of State

Lansing expressed his reasons for entering into the treaty in a letter to President Woodrow Wilson:

> Not very many years ago vast numbers of waterfowl and shorebirds nested within the limits of the United States . . . but the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory birds nest within our limits.[25]

Congress, the Secretary of State, and President Wilson worked in concert to ensure the federal government could do its part to protect migratory birds. President Wilson initiated the Convention with Great Britain, which was acting for Canada prior to the country's self-governance.[26] The resulting treaty required both parties to "take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention,"[27] but it did not impose any penalties for violating its terms.[28] The treaty consisted of nine articles: Article I establishes class of migratory birds, including game, non-game, and insectivorous; Article II declares closed seasons for certain migratory birds; Article III declares continuous closed seasons for certain species for the ten years following the treaty's going into effect; Article IV gives special protection to the wood duck and the eider duck; Article V prohibits taking the nests or eggs of migratory birds except for approved scientific or propagating purposes; Article VI prohibits shipping migratory birds, their nests or their eggs between states or provinces during closed seasons, except for approved purposes; Article VII allows the treaty parties to kill protected birds that become injurious to agriculture or other important interests; Article VIII affirms the parties' commitment to enacting legislation to execute the treaty domestically; and Article IX declared the treaty's effectiveness for fifteen years after ratification, with yearly renewal occurring automatically in the absence of objection from either party.[29] The treaty's silence regarding penalties suggested the parties would establish

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Lansing (with Senator Elihu Root) found a constitutional solution; in 1916 he invoked the Treaty power by negotiating a treaty with Great Britain on behalf of Canada for the protection of birds migrating between the countries.").

25 Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1160 (2010) (citing United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1080–81 (D. Colo. 1999) (citations omitted)).

26 David G. Lombardi, *The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot for Hunting Migratory Waterfowl*, 22 AKRON L. REV. 343, 346 (1989).

27 Migratory Bird Convention, *supra* note 20, at art. VIII.

28 William E. Sulzer, *United States v. Boynton: A Bona Fide Reason for Applying a Subjective Standard to the Exceptions of the Anti-Baiting Regulation*, 14 PACE ENVTL. L. REV. 767, 774 (1997) (citing Bob Neufeld, *The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D. L. REV. 307, 310 (1974)).

29 *See generally* Migratory Bird Convention, *supra* note 20.

penalties by enacting domestic legislation, as the United States did in the MBTA.[30]

B. Subsequent Migratory Bird Treaties

Over the next approximately sixty years, the U.S. federal government continued to work towards strengthening bird protections. Its efforts included entering into another three international treaties aimed at protecting migratory birds, which vary in scope and in permissible takings, and all of which are currently implemented through the MBTA.[31] In 1936, the United States entered into the Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals.[32] Subsequently the United States entered the Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, which took effect in 1974.[33] Finally, in 1976, the United States entered the Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment.[34] It is evident from the text of the treaties themselves that their signatories' understanding of the importance of bird protection has grown throughout the twentieth century.[35]

C. Passage of the Migratory Bird Treaty Act

The Migratory Bird Treaty gained the force of law in the United States two years later, when President Woodrow Wilson signed the Migratory Bird Treaty Act in 1918.[36] Congressional statements made during the consideration and passage of the Act illustrate the varied opinions that it generated and the suspicions that proponents and opponents of the bill held regarding each other. Critics of the bill claimed that the legislation sought to profit shotgun manufacturers by controlling the market and forcing huntsmen to purchase clay pigeons and alternative products when hunting

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30 Lombardi, *supra* note 26, at 346–47 ("This apparent loophole in the Treaty was later rectified when Congress enacted the Migratory Bird Treaty Act (MBTA). . . . Probably the most significant differences between the Treaty and the MBTA, are the criminal penalties and procedures for arrest in the MBTA.").

31 *See Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERV., https://perma.cc/NGJ4-FNFG (last updated Aug. 8, 2017) (cataloging the expansion of the MBTA to include more parties).

32 U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311.

33 Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Sept. 19, 1974, 25 U.S.T. 3329.

34 Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

35 *See* Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 10 (1996) (contrasting the calls for bird refuges in the earlier treaties with Great Britain and Mexico with the recognition of habitat protection in the later treaties with Japan and Russia).

36 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

was not allowed; that the United States Department of Agriculture (USDA or Department of Agriculture) was not competent to regulate hunting, as most of its members had never even engaged in the sport; and that regulating hunting was a right and privilege of the states, inappropriate for the federal government to assume.[37]

Relatedly, some expressed concern that the law would allow USDA and Forestry Service officers to "recklessly invade the premises of every settler and every farmer and every ranchman whom he may suspect to be in violation of the law."[38] Critics accused the Act of affording too much authority to the government by placing "it within the power of the Secretary of Agriculture to forbid the killing of game birds as much as the killing of song or insectivorous birds. They are put on the same level."[39] Finally, there were protests that the Act was a clear example of Congress unconstitutionally extending its powers by treaty, following negative judicial treatment of its earlier attempts to regulate bird hunting.[40]

In response, proponents of the bill cited reasons for the bill's necessity and constitutionality.[41] Supporters also rejected critics' concerns that the general public would be harassed and prosecuted for normal hunting activities by stating that the Act would target "professional pothunters" rather than casual sportsmen.[42] A "pothunter" as used at the time was a hunter who disregarded rules of sportsmanship and hunted unreservedly.[43] Furthermore, some contemporary sources suggest that the hunting and farming communities in fact supported the Act as a practical means of

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37 *See* 55 CONG. REC. 5546 (1917) (statements of Sen. Reed); *see also* 56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston) ("The real purpose of this bill . . . is not to protect the birds, [but] to fix it . . . so that the common people of the country can not get their fair share of the game and so that only those who are able to afford game preserves and fancy equipment."); 56 CONG. REC. 7366 (June 4, 1918) (statement of Rep. Bland to the same effect).

38 55 CONG. REC. 4401 (1917) (statement of Sen. Borah).

39 56 CONG. REC. 7364 (1918) (statement of Sen. Reed).

40 *See, e.g.*, 55 CONG. REC. 5545 (1917) (statement of Sen. Reed) (claiming that the bill's proponents were "obsessed with the idea that Congress can do by treaty an act in violation of the Constitution of the United States, which it cannot do by statute").

41 Sen. McLean, one of the sponsors of the aforementioned Weeks-McLean Act, stated simply that Act was a food conservation measure, to which Sen. Hitchcock responded that it was "more than a food conservation bill"—it was an essential act for meeting the United States' obligation to implement the treaty entered into with the United Kingdom. 55 CONG. REC. 4400 (1917). Rep. Fess echoed both the latter points: he expressed dismay that the United States had initiated the treaty with Canada, yet had neglected to implement the treaty with an Act even after Canada had done so, and he stated his belief that "conservation of bird life is real conservation of food." 56 CONG. REC. 7357 (1918). Matters of managing the nation's food supply and hunting market were indeed constitutional subjects of federal legislative powers, Rep. Fess concluded. *Id.*; *see also* H.R. REP. NO. 65-243, at 2 (1918) ("By preventing the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage them to the extent of many millions of dollars, [the MBTA] will thus contribute immensely to enlarging and making more secure the crops[.]").

42 *See* 55 CONG. REC. 4402 (1917) (statement of Sen. Smith); *see also id.* at 4816 (statement of Sen. Smith) ("Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.").

43 Hye-Jong Linda Lee, *The Pragmatic Migratory Bird Treaty Act: Protecting "Property"*, 31 B.C. ENVTL. AFF. L. REV. 649, 652 n.22 (2004).

preserving their sport and livelihood, respectively.[44] Proponents also cited the threats posed by rapidly expanding urbanization and the need to protect wildlife from its effects.[45]

Despite these disagreements, the Act that passed went even further than the 1916 Convention in its scope of protection, and the heart of the statute is the text making it illegal to "hunt, take, capture, kill . . . or possess" a protected bird, rather than merely prohibiting hunting protected species out of season as was initially envisioned.[46] The Act was not immune from legal challenges, and two years after its passage, the MBTA was challenged on the same grounds as the Weeks-McLean Act in the landmark Supreme Court case of *Missouri v. Holland*.[47] Justice Holmes addressed the general question of "whether the treaty and statute are void as an interference with the rights reserved to the States[,]" which he "narrowed to an inquiry into the ground upon which the present supposed exception is placed."[48] Justice Holmes noted that treaties, along with the Constitution and federal laws, are the supreme law of the land. He wrote that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution[,]" and that therefore, "[t]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment[,]" which he concluded it is not, observing that the Court saw "nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."[49] The Court noted that the Act involved "a national interest of very nearly the first magnitude[,]" which "can be protected only by national action in concert with that of another power[,]" and that "[b]ut for the treaty and the statute there soon might be no birds for any powers to deal with."[50] As the Court found no constitutional prohibition on the Government's ability to address the latter threat, the Court upheld the Act as constitutional.[51] Lower courts

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44 *See id.* at 652 ("[M]uch of wildlife protection was advocated by sportsmen, who announced the need for conservation through a variety of hunting journals like *American Sportsman, Forest and Stream, Field and Stream*, and *American Angler*."); *see also* 56 CONG. REC. 7360 (1918) (statement of Rep. Anthony) ("[T]he farmers are in favor of protection of the birds and the wild fowl, and . . . the people who are against this bill are the market shooters.").

45 *See* 56 CONG. REC. 7362 (1918) (statement of Rep. Stedman) ("Civilization, ever advancing along the world's pathway, pleads for humanity, for the birds, so helpless and yet so useful."); *see also id.* at 7363 (statement of Rep. Cooper) (lamenting the extermination of the last wild pigeon in North America and urging passage of the bill to "prevent the extermination of other birds equally valuable for purposes of food and now fast disappearing").

46 Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 14–15 (1996) (citing both the Convention and Act, as well as *Andrus v. Allard*, 444 U.S. 51, 62 n.18 (1979) ("[I]nasmuch as the Conventions represent binding international commitments, they establish *minimum* protections for wildlife; Congress could and did go further in developing domestic conservation measures.")).

47 252 U.S. 416 (1920).

48 *Id.* at 432.

49 *Id.* at 433–35.

50 *Id.* at 435.

51 *Id.*

had already reached similar conclusions when considering constitutional challenges to the MBTA, and the Supreme Court's decision affirmed them.[52]

D. Significant Amendments to the Act

The federal government continued to demonstrate its commitment to protecting migratory birds through numerous amendments to the Act over the past century.[53] In 1960, the Act was amended under the "Violations and Penalties" § 707 to allow for both misdemeanor and felony convictions, with strict liability applying to both classes of crime.[54] In 1978, the Act was amended under the Fish and Wildlife Improvement Act[55] by the addition of § 712, which allowed the Secretary of the Interior to issue regulations "as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs."[56]

In 1986, the MBTA was again amended under the Emergency Wetlands Resources Act[57] to require that felony violations be committed "knowingly."[58] The reason for the amendment is laid out in the senate report from the Committee on Environment and Public Works, explaining the need for the Act's felony penalties to require knowledge in order to comply with constitutional due process requirements.[59] The report continued to note that "[i]t is not intended that proof be required that the defendant knew the taking, sale, barter or offer was a violation of the subchapter," and that "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. 707(a)."[60]

In 1998, Congress passed the Migratory Bird Treaty Reform Act[61] (Reform Act) "to clarify restrictions under the Migratory Bird Treaty Act on baiting and to facilitate acquisition of migratory bird habitat, and for other purposes."[62] The Reform Act added a subsection to § 704 of the MBTA that eliminated strict liability for baiting, making it unlawful only if "the person

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52 Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 67 (2014) (citing, *inter alia*, United States v. Selkirk, 258 F. 775, 776 (S.D. Tex. 1919); United States v. Samples, 258 F. 479, 485 (W.D. Mo. 1919); United States v. Thompson, 258 F. 257, 268 (E.D. Ark. 1919)).

53 *See* Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HIST. CTR. (2014), https://perma.cc/WW33-WPF2 (explaining the various amendments); *see also Migratory Bird Treaty Act: Birds Protected*, U.S. FISH & WILDLIFE SERV., https://perma.cc/JXD8-ZKLM (last updated Sept. 26, 2018).

54 Migratory Bird Treaty Act, sec. 6, Pub. L. No. 86-732, 74 Stat. 866 (1960).

55 Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3112 (1978).

56 *Id.*

57 Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582 (1986).

58 *See id.* ("Section 6(b) of the Act of July 3, 1918 (16 U.S.C. 707(b)) is amended by deleting 'shall' the first place it appears therein and by inserting in lieu thereof 'shall knowingly'.").

59 *See* S. REP. NO. 99-445, at 16 (1985).

60 *Id.*

61 Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, 112 Stat. 2956 (1998).

62 *Id.*

knows or reasonably should know that the area is a baited area;"[63] or the person committed the baiting "for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird."[64]

In 2004, another Migratory Bird Treaty Reform Act[65] was passed, which added a subsection to § 703 titled "Limitation on Application to Introduced Species."[66] The amendment limits the Act's application to migratory birds native to the United States or its territories,[67] and defines "native" as those species present "as a result of natural biological or ecological processes."[68]

III. CURRENT THREATS TO MIGRATORY BIRDS

As the Act has evolved, so too have the threats facing migratory birds, becoming more diffuse over the past 100 years.[69] Today the plight of birds in general is serious, and the plight of migratory birds is even more so.[70] Their rates of decline exceed those of static bird species due to their dependence on environmental and climatic conditions along their globe-crossing.[71] Migratory birds' reliance upon conditions at stopover points can land birds in what researchers call "multiple jeopardy" when those conditions no longer meet the birds' needs.[72] The chain of decline along migratory routes compounds the already substantial threats posed by climate change and habitat loss.[73] The worse conditions become at each stopover, the more stops the birds must make, and the greater risks they accordingly face.[74] Therefore, it is not surprising that rates of mortality are far higher for migratory birds during times of migration than during times of stasis, and it is often hard to isolate the impacts of one factor from another.[75] As further affirmed by BirdLife International,

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63 *See* 16 U.S.C. § 704(b)(1) (1998).

64 *Id.* § 704(b)(2).

65 Migratory Bird Treaty Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004).

66 *Id.*

67 *See* 16 U.S.C. § 703(b)(1) (2004).

68 *Id.* § 703(b)(2)(A).

69 *See* Jackson Landers & Rachel Gross, *100 Years Later, the First International Treaty to Protect Birds Has Grown Wings*, SMITHSONIAN (Aug. 18, 2016), https://perma.cc/23T5-RREV (statement of Smithsonian Migratory Bird Center director Pete Marra: "Back then, with declines in over 40 species, we knew the causes: overhunting of ducks, culling of egrets and herons for fashion and food. Now, we don't know what the cause is").

70 Molly Hardesty-Moore et al., *Migration in the Anthropocene: How Collective Navigation, Environmental System and Taxonomy Shape the Vulnerability of Migratory Species*, 373 PHIL. TRANS. ROYAL SOC'Y B., no. 1746, 2018, at 1, 1–2.

71 *Id.* at 2.

72 *See* James J. Gilroy et al., *Migratory Diversity Predicts Population Declines in Birds*, 19 ECOLOGY LETTERS 308, 308 (2016).

73 *See* Christine Howard et al., *Flight Range, Fuel Load and the Impact of Climate Change on the Journeys of Migrant Birds*, 285 PROC. ROYAL. SOC'Y B., no. 1873, 2018, at 1, 8.

74 *Id.* at 1.

75 *See* Raymond H. G. Klaassen et al., *When and Where Does Mortality Occur in Migratory Birds? Direct Evidence from Long-term Satellite Tracking of Raptors*, 83 J. ANIMAL ECOLOGY 176, 177 (2013).

> Most species are impacted by multiple threats and many threats are interrelated. For example, land clearance for agriculture is often preceded by deforestation or wetland drainage. Similarly, many threats act to compound and intensify the impacts associated with other threats. For instance, in some places climate change is exacerbating the threat posed by avian malaria by extending the area of suitable habitat for malaria-transmitting mosquitoes.[76]

While habitat destruction and climate change are widely considered the greatest threats to biodiversity in general,[77] migratory birds face additional threats from energy development in both fossil fuel-based and renewable sectors, from agriculture in the form of pesticide exposure, from hunting and trafficking for sport, from incidental capturing through fishing, and from starvation due to human harvesting of the birds' food sources.[78] Each of these threats could conceivably constitute a "taking" under the MBTA.[79] BirdLife International has evaluated the greatest threats facing birds worldwide and has determined the percentage of threatened birds they impact as follows: agricultural expansion and intensification impacts 1,091 species (74%); logging impacts 734 species (50%); invasive alien species impact 578 bird species (39%); hunting and trapping impact 517 (35%); and climate change, which impacts 33% of species, but will certainly impact greater numbers as its effects intensify.[80]

A. Habitat Destruction

According to Ken Rosenberg of the Cornell Lab of Ornithology, "the top three threats to birds overall are habitat loss, habitat loss, and habitat loss."[81] Habitat is being lost at a rapid rate due to a variety of anthropogenic forces, including agriculture and urban sprawl.[82] Migratory birds are keenly sensitive to the effects of habitat destruction, as destruction of a small portion of their habitat can have a "bottleneck" effect on the overall population due to migratory connectivity.[83] Deforestation and logging significantly threaten bird habitats in regions with some of the largest intact tracts of tropical forest that are experiencing great rates of urbanization and road expansion, such as forested portions of South America, South and Southeast Asia, and

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76 BIRDLIFE INT'L, THE STATE OF THE WORLD'S BIRDS 30 (Tris Allinson et al. eds., 2018), https://perma.cc/S3GP-R66X.

77 *See* Chelsea Harvey, *Climate Change is Becoming a Top Threat to Biodiversity*, SCI. AM. (Mar. 28, 2018), https://perma.cc/8GTU-A83F.

78 *See Migratory Bird Mortality—Questions and Answers*, U.S. FISH & WILDLIFE SERV., https://perma.cc/R8ME-EJYV (last updated Sept. 14, 2018).

79 *See* Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

80 BIRDLIFE INT'L, *supra* note 76, at 30.

81 Mel White, *North American Birds Declining as Threats Mount*, NAT. GEO. (June 21, 2013), https://perma.cc/QM8H-74VN.

82 *Id.*

83 Takuya Iwamura et al., *Migratory Connectivity Magnifies the Consequences of Habitat Loss From Sea-level Rise for Shorebird Populations*, 280 PROC. ROYAL SOC'Y B., No. 1761, 2013, at 1, 5.

sub-Saharan Africa.[84] These expanding networks of roads pose multiple threats, including habitat fragmentation and modification, pollution, and increased exposure to loggers and poachers who can now more easily access the habitat.[85]

B. Declining Water Quality and Degraded Wetlands

Wetlands are widely understood to be extremely valuable bird habitats used for feeding, breeding, nesting, and resting.[86] Migratory birds often utilize wetlands as stopovers during transit, depending on them for food and shelter to complete their journeys.[87] Wetlands are also an issue of global concern, as they are both the most productive and the most degraded ecosystems in the world.[88] Marshland and wetland habitats are susceptible to destruction through a number of human practices, including alteration for flood control, diversion of waterways for industrial uses, timber harvesting in forested wetland regions, and livestock grazing and manure runoff in riparian regions.[89]

C. Agricultural Practices

Agricultural intensification is a growing threat to migratory bird species worldwide, and most bird species that rely upon agricultural landscapes in Europe and North America during migration are declining.[90] Likewise, in the grassland regions of South America, "[l]arge-scale agriculture and overgrazing by cattle are arguably the greatest threats" facing migratory birds.[91] Widespread planting of feed crops, extensive burning, exposure to agrochemicals, and persecution of migratory birds are some of the most harmful agricultural practices.[92] Given the latter slew of harms, many

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84 BIRDLIFE INT'L, *supra* note 76, at 34.

85 *Id.* at 41.

86 Robert E. Stewart, Jr., *Wetlands as Bird Habitat*, *Water Supply Paper 2425*, *in* NATIONAL WATER SUMMARY ON WETLAND RESOURCES 49, 49 (Judy D. Fretwell et al. eds., 1996), https://perma.cc/2GED-NLUZ.

87 *Id.* at 51, 54.

88 R. Michael Erwin et al., *Managing Wetlands for Waterbirds: How Managers Can Make a Difference in Improving Habitat to Support a North American Bird Conservation Plan*, *in* U.S. DEP'T OF AGRIC., STRATEGIES FOR BIRD CONSERVATION: THE PARTNERS IN FLIGHT PLANNING PROCESS 82 (2000).

89 *Id.* at 84–85; *see also* BIRDLIFE INT'L, REVIEW REPORT AND GUIDANCE: AGRICULTURE AND THE CONSERVATION OF MIGRATORY SOARING BIRDS IN THE RIFT VALLEY/RED SEA FLYWAY, MIGRATORY SOARING BIRDS PROJECT 10 (2014) (noting the decline in marsh vegetation and fish foraging bases in California and Nevada due to irrigation and issuing recommendations to avoid similar impacts on migratory soaring birds in the Rift Valley/Red Sea Flyway).

90 U.N. Convention on Migratory Species, *Review of the Ecological Effects of Poisoning on Migratory Birds*, at 4, UNEP/CMS/COP11/Inf.34 (Aug. 29, 2014) [hereinafter *Review of the Ecological Effects*].

91 Alex E. Jahn et al., *Movement Ecology Research to Advance Conservation of South America's Grassland Migratory Birds*, 15 PERSP. ECOLOGY & CONSERVATION 209, 210 (2017).

92 *Id.* at 210–11.

researchers have linked the demise of farmland bird species to agricultural intensification writ large, rather than to specific agricultural practices.[93] However, researchers have found that the use of lethal insecticides is actually more highly correlated to the decline of farmland species in North America than is the more common explanation of "habitat loss through agricultural intensification."[94] Therefore, it is important to consider both the direct and indirect effects of insecticides and herbicides on bird species when addressing agricultural practices.

The threat of agricultural poisoning to migratory birds has been recognized by the United Nations Environment Programme as well, through its work under the Convention on the Conservation of Migratory Species of Wild Animals (CMS).[95] In 2014, the CMS Preventing Poisoning Working Group published a Review of Ecological Effects of Poisoning, followed in 2015 by the publication of Guidelines to Prevent the Risk of Poisoning to Migratory Birds.[96] The 2014 review noted both the direct and indirect impacts of agricultural pesticides—namely organophosphates carbamates, neonicotinoids, and anticoagulant rodenticides—and identified factors contributing to exposure and mortality of migratory birds, including cultivation practices, pest types, crop types, pesticide form, and migratory bird ecology.[97] The 2015 guidelines built upon the findings by issuing both legislative and non-legislative recommendations for reducing the risk to birds of agricultural poisons, including, inter alia, insecticides and rodenticides.[98]

One class of pesticides known as neonicotinoids are of growing concern, given their status as the fastest-growing class of pesticides used globally and their wide range of direct and indirect impacts on non-target species.[99] Exposure to neonicotinoids can impair birds' migratory orientation and cause a loss of body mass and fat storage.[100] Accumulation of these toxins at multiple levels in the food chain expands and extends the degree to which birds are exposed.[101] While the acute toxicity of neonicotinoids is less than that of the organophosphate pesticides they replaced, their

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93 Pierre Mineau & Melanie Whiteside, *Pesticide Acute Toxicity Is a Better Correlate of U.S. Grassland Bird Declines than Agricultural Intensification*, PLOSONE, Feb. 20, 2013, at 5.

94 *Id.* at 7.

95 Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The "Bonn Convention")*, 29 NAT. RESOURCES J. 979, 979–80 (1989).

96 *Review of the Ecological Effects*, *supra* note 90, at 3; U.N. Convention of Migratory Species, *Annex 2: Guidelines to Prevent the Risk of Poisoning to Migratory Birds*, UNEP/CMS/COP11/Doc.23.1.2 (2015) [hereinafter *Annex 2: Guidelines to Prevent the Risk of Poisoning*].

97 *Review of the Ecological Effects*, *supra* note 90, at 5.

98 *Annex 2: Guidelines to Prevent the Risk of Poisoning*, *supra* note 96, at 10–14.

99 *See* David Gibbons et al., *A Review of the Direct and Indirect Effects of Neonicotinoids and Fipronil on Vertebrate Wildlife*, 22 ENVTL. SCI. & POLLUTION RES. 103, 115 (2015).

100 *See* Margaret L. Eng et al., *Imidacloprid and Chlorpyrifos Insecticides Impair Migratory Ability in a Seed-Eating Songbird*, SCI. REP. 7, 15176 (2017), at 1, 1.

101 BIRDLIFE INT'L, *supra* note 76, at 32.

accumulation often causes their risk to be underestimated.[102] It is also difficult to directly establish the link between loss of food sources depleted by insecticides during times of stasis and bird mortality, leading to underestimation of the threat the toxins pose.[103]

D. Climate Change

Migratory birds depend heavily on climatic conditions both to time their migration and to ensure their ability to sustain themselves throughout with sufficient resources, which renders them especially vulnerable to variations in temperature and corresponding food availability.[104] Climatic changes can delay migration, causing birds to arrive later at stopover and destination sites.[105] Late arrivals negatively impact breeding conditions and success by restricting options for nesting sites, mates, and food sources that birds face.[106]

Climate change can also impact the availability of birds' food sources by creating conditions in which native flora and fauna struggle and invasive species thrive.[107] Insectivores may be particularly impacted, as the trophic interactions between plants and insects may be disrupted, and insect reproduction rates may change accordingly.[108] Relatedly, anthropogenic overharvesting of migratory birds' food sources increases the amount of time they must spend at stopover sites along their routes to consume sufficient nutrition.[109] This further increases rates of mortality by making it more likely the birds will continue on with insufficient resources, as well as by extending their exposure to predators.[110]

Researchers have identified the risk that climate change poses to arctic birds as particularly great due to the contracting and shifting locations of suitable breeding conditions.[111] To respond to these shifts, birds must alter their migratory routes and fly longer to reach suitable conditions, which

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102 *See* PIERRE MINEAU & CYNTHIA PALMER, AMERICAN BIRD CONSERVANCY, THE IMPACT OF THE NATION'S MOST WIDELY USED INSECTICIDES ON BIRDS 6 (2013), https://perma.cc/9J56-WC7G.

103 *Id.* at 7.

104 JANICE WORMWORTH & CAGAN H. SEKERCIOGLU, WINGED SENTINELS: BIRDS & CLIMATE 61–62 (2011).

105 *Id.*

106 Cristina Perez et al., *Low Level Exposure to Crude Oil Impacts Avian Flight Performance: The Deepwater Horizon Oil Spill Effect on Migratory Birds*, ECOTOXICOLOGY & ENVTL. SAFETY, Dec. 2017, at 98, 102.

107 Frank A. Sorte et al., *Seasonal Associations with Novel Climates for North American Migratory Bird Populations*, 21 ECOLOGY LETTERS 845, 852 (2018).

108 *Id.*

109 *See, e.g.*, Lawrence J. Niles et al., *Effects of Horseshoe Crab Harvest in Delaware Bay on Red Knots: Are Harvest Restrictions Working?*, 59 BIOSCIENCE 153, 159 (2009) (discussing how a decline in horseshoe crabs and their eggs in the Delaware Bay has impacted migrant red knots and other shorebirds in the Delaware Bay).

110 Perez et al., *supra* note 106, at 103.

111 Hannah Wauchope et al., *Rapid Climate-Driven Loss of Breeding Habitat for Arctic Migratory Birds*, 23 GLOBAL CHANGE BIOLOGY 1085, 1091 (2016).

causes increased risks to birds.[112] Lowering emissions is therefore a priority for mitigating these harms.[113] Additionally, sea level rise is a consequence of climate change that imperils the habitat of many migratory shorebirds and results in the aforementioned bottleneck effect.[114]

E. Energy Development

1. Oil Production

Exposure to crude oil significantly harms migratory birds, with the oil's impact on feathers being most impactful.[115] Saturation with oil directly causes mortality by disrupting flight aerodynamics and removing critical water repellency, exposing birds to greater risks during migration and requiring greater resources to reach their destinations.[116] Open pits of oil and water created during oil production pose deadly threats to birds, who mistake the oily sheen for wetlands.[117] Even a light sheen can kill birds by entrapping and drowning them, by contaminating the surface-dwelling insects on which they feed, and/or by killing the embryos of birds exposed to oil who then transfer the residue to their nest eggs.[118]

2. Wind Farms and Turbines

Wind development poses multiple threats to birds, both directly and indirectly fatal.[119] Turbine collisions constitute the obvious directly fatal threat to birds, while indirect threats include avoidance behavior and habitat fragmentation.[120] According to the United States Fish and Wildlife Service (FWS), between 140,000 and 500,000 birds are killed from collisions with wind turbines every year.[121] Considering the Department of Energy's mandate to increase wind energy capacity to six times above current levels, such deaths could reach 1.4 million birds per year.[122] The growing threat of wind turbines has been recognized by the American Bird Conservancy, the Audubon Society, and other notable bird activists, who are calling for tighter regulations on wind energy and increased investment in less lethal forms of

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112 *Id.* at 1092.

113 *Id.*

114 Takuya Iwamura et. al., *Migratory Connectivity Magnifies the Consequences of Habitat Loss from Sea-Level Rise for Shorebird Populations*, PROC. ROYAL SOC'Y B, May 2013, at 1, 6.

115 Perez et al., *supra* note 106, at 101.

116 *Id.* at 98.

117 *Minimizing Risk to Migratory Birds in Oil and Gas Facilities*, U.S. FISH & WILDLIFE SERV., https://perma.cc/MY7X-V6RU (last visited Feb. 16, 2019).

118 *Id.*

119 *See* Amy Pocewicz et al., *Modeling the Distribution of Migratory Bird Stopovers to Inform Landscape-Scale Siting of Wind Development*, PLOSONE, Oct. 2, 2013, at 1, 1.

120 *Id.*

121 *Wind Turbines*, U.S. FISH & WILDLIFE SERV., https://perma.cc/SCW3-R5GT (last updated Apr. 18, 2018).

122 *Id.*

renewable energy.[123] It is possible that strategic siting of wind turbines to avoid intersection with migration routes could substantially reduce their impact on migratory birds, and the Department of Energy's goals for wind energy development could still be met if biologically sensitive areas were avoided.[124] The possibility of avoiding bird death through preliminary studies and development plans should strengthen the argument for prosecution of "incidental" takes by wind energy companies.

F. Invasive Alien Species

Invasive alien species alter migratory bird habitats and impair their mobility and competitiveness.[125] Predators introduced as foreign invasive species significantly impact the survival of migratory birds, often by targeting chicks and eggs.[126] One example in North America is the decline of the Wood Thrush due to invasion of their habitat by the brown-headed cowbird, which lays its own eggs in Wood Thrush nests and outcompetes the latter's own young.[127] Invasive plant species can also harm migratory birds by providing less nutrition than native plant species and thus impairing birds' energy reserves and ability to complete their journeys.[128] After consuming the plants, birds spread them along the migratory route and facilitate propagation.[129] Plants may do further damage by consuming large amounts of water and drying up delicate riparian regions.[130]

G. Overexploitation of Birds Through Hunting and Trafficking

Overexploitation of birds through hunting and trafficking continues to pose additional threats. Trafficking in protected birds is a vibrant trade.[131] In Southeast Asia, for example, songbird-keeping is a culturally entrenched practice that results in illegal trafficking of hundreds of thousands of birds a year, and the trade is considered a primary threat to native species there.[132] However, while researchers have acknowledged hunting as a source of

123 *See* Michael Shellenberger, *If Renewables Are So Great for the Environment, Why Do They Keep Destroying It?*, FORBES (May 17, 2018), https://perma.cc/3FR8-QS5U; *see also* Michael Casey, *30,000 Wind Turbines Located in Critical Bird Habitats*, CBS NEWS (May 20, 2015), https://perma.cc/7QGS-J3PY.

124 Pocewicz et al., *supra* note 119, at 15–16.

125 *Invasive Species*, MIGRATORY CONNECTIVITY PROJECT, https://perma.cc/E2MK-L9WZ (last visited Feb. 16, 2019).

126 BIRDLIFE INT'L, *supra* note 76, at 36.

127 *Wood Thrush*, NAT'L AUDUBON SOC'Y, https://perma.cc/9MQF-D8UD (last visited Feb. 16, 2019).

128 *Invasive Species*, *supra* note 125.

129 *Id.*

130 *Id.*

131 BIRDLIFE INT'L, *supra* note 76, at 38.

132 *Id.*

mortality for migratory bird populations, most maintain that habitat loss and climate change are more significant threats.[133]

H. Political Threats

The greatest albatross around the neck of bird advocates may prove to be the Trump Administration. The Migratory Bird Treaty Act prohibits taking (harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct) migratory birds protected under the Act, which currently number a little over 1,000.[134] In January of 2017, the Interior Solicitor under the Obama Administration issued Opinion M-37041, which stated that incidental taking of migratory birds was prohibited and thus could be prosecuted.[135] The memo codified the federal government's longstanding approach and resolved judicial confusion regarding the limits of "taking." However, it was reversed in December of the same year by the Trump Administration's solicitor under M-37050, which permanently withdrew M-37041.[136]

Under the Trump Administration's new interpretation, only affirmative acts, such as shooting a protected bird or stealing its eggs, could be prosecuted.[137] However, oil spills, wind turbines, cell towers, and other anthropogenic activities that kill millions of birds a year, and many more than are killed through intentional takes, could not be prosecuted.[138] As incidental takes far outnumber intentional takes, sanctioning them effectively cripples the MBTA by preventing the government from prosecuting its most frequent violations, and most of the greatest current threats birds face mentioned above.[139] In this way, the federal government has shifted from a friend of migratory birds to their foe. A coalition of prominent environmental and conservation organizations—the Natural Resources Defense Council, the National Wildlife Federation, the National Audubon Society, Defenders of Wildlife, Center for Biological Diversity and American Bird Conservancy—have filed a complaint in United States District Court for the Southern District of New York asking that the court deem the reinterpretation unlawful and reinstate the prohibition on

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133 Benjamin Barca et al., *Environmentalism in the Crosshairs: Perspectives on Migratory Bird Hunting and Poaching Conflicts in Italy*, 6 GLOBAL ECOLOGY & CONSERVATION 189, 189 (2016).

134 *The Migratory Bird Treaty Act, Explained*, NAT'L AUDUBON SOC'Y (Jan. 26, 2018), https://perma.cc/4HVZ-S55R [hereinafter Migratory Bird Treaty Act, Explained].

135 Memorandum M-37041: Incidental Take Prohibited Under the Migratory Bird Treaty Act, from the Solicitor, U.S. Dep't of the Interior, to Dir. of the Fish and Wildlife Serv. 2 (Jan. 10, 2017).

136 Memorandum M-37050: The Migratory Bird Treaty Act Does Not Prohibit Incidental Take, from Principle Deputy Solicitor, U.S. Dep't of the Interior 1–2 (Dec. 22, 2017).

137 *The Migratory Bird Treaty Act, Explained*, *supra* note 134.

138 *Id.*

139 Richard Lazarus, *Will 2018 Be the Year of the Bird? If So, Not Necessarily a Good One*, ENVTL. L. INST., Mar./Apr. 2018, at 13, 13.

incidental taking.[140] This will be discussed in more detail below, but it is worth first discussing the details of the statute's structure, content, and implementation.

IV. THE STATUTE'S STRUCTURE, CONTENT, AND IMPLEMENTATION

The statute, which is implemented by the Fish and Wildlife Service in DOI, prohibits "takings" of migratory birds without a permit from FWS. Prohibited acts include "by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take capture or kill" any migratory bird without a permit issued by FWS.[141] FWS has generally taken a broad approach to its interpretations of the Act's coverage, such as stating in a handbook that "[t]he MBTA applies to activities conducted within the United States (including import to and export from), by any person, business, organization, institution, and any local, State or Federal agency."[142]

FWS has set up a permitting program for certain intentional takes of migratory birds, but has created no such procedure for unintentional takes (*e.g.*, takes incidental to other actions). Through the Department of Justice, FWS has brought numerous enforcement actions for these incidental takes such as large bird kills caused by "avoidable environmental disasters like the *Exxon Valdez* and *Deepwater Horizon* oil spills," as well as "operation of oil pits, waste treatment lagoons, power lines, communication towers, and wind turbines."[143]

MBTA cases generally involve criminal prosecutions of private actors. However, it is not just private actors that cause bird deaths through incidental takes; the government engages in incidental take as well. Unlike many other environmental statutes, the MBTA does not include any provision for civil penalty or injunctive relief or a private right of action. Therefore, stakeholders who wish to challenge federal government, rather than private, actions as violations of the MBTA typically do so under the Administrative Procedure Act[144] (APA) alleging that the agency action violates the APA prohibition against actions that are arbitrary, capricious, or not in accordance with law.[145] This tool has been underutilized, though, as DOI has not been clear as it could be regarding whether the MBTA applies to government agency actions, and courts have been inconsistent when addressing this issue as well, making such cases risky from a potential litigant's perspective. This is unfortunate as citizen suits have significantly increased enforcement of other environmental statutes. For example, as

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140 Press Release, Am. Bird Conservancy, Lawsuits Seek to Restore Protections for Migratory Birds (May 24, 2018), https://perma.cc/QB6Q-S5Y4.

141 Migratory Bird Treaty Act, 16 U.S.C. § 703 (2012).

142 U.S. FISH & WILDLIFE SERV., FISH AND WILDLIFE SERVICE MANUAL, MIGRATORY BIRD PERMITS, FWM 428, 724 FW 2, 2.2 (2003) https://perma.cc/5N6W-FXXN.

143 Complaint at 3, Audubon v. Dept. of the Interior, No. 1:18-cv-04601 (S.D.N.Y. May 4, 2018).

144 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 334, 4301, 5335, 5372, 7521 (2012).

145 5 U.S.C. § 706; *see, e.g.*, Sierra Club v. Martin, 933 F. Supp. 1559 (N.D. Ga 1996).

early as 1993, just about twenty years after passage of the Clean Water Act (CWA),[146] nearly half of all CWA judicial enforcement actions consisted of citizen suits, nearly equaling "all CWA judicial enforcement efforts brought throughout the nation by all the states and the federal government combined."[147] Whether the MBTA applies to government activities and to incidental takes specifically, raises a number of complex, thought-provoking issues that courts have wrestled with in various ways. For plaintiffs hoping to use the MBTA to hold the federal government accountable for unintentional bird deaths resulting from its actions, it is crucial to understand the development of this area of caselaw.

A. MBTA Applicability to Federal Agencies

Federal agency action results in incidental take in a number of ways, from permitting certain land use changes to occur, to approving the use of certain pesticides, to refusing to adequately address climate change. Despite this, and as has been examined in some existing literature,[148] there is a split

146 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

147 Jessica Scott, *Cleaning up the Dragon's Fountain: Lessons from the First Public Interest Lawsuit Brought by a Grassroots NGO in China*, 45 GEO. WASH. INT'L L. REV. 727, 738 n.92 (2013) (citing David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1620 (1995)).

148 *See* Rachael Abramson, *The Migratory Bird Treaty Act's Limited Wingspan and Alternatives to the Statute: Protecting the Ecosystem Without Crippling Communication Tower Development*, 12 FORDHAM ENVTL. L.J. 253, 255, 257–58, 268–71 (2000) (discussing whether the government has committed a "taking" via FCC regulations that allow tower construction that kill birds and, if so, whether such takings are permitted and noting that because only the FWS has standing to bring suit under the MBTA, environmental groups have sought standing via the APA); Heather Eisenlord, *Environmental Law: A Proper Refusal of Deference: An Analysis of Humane Society v. Glickman in Light of the Supreme Court's Most Recent Standard for Judicial Review of Agency Statutory Interpretation*, 70 GEO. WASH. L. REV. 378, 391, 393, 398 (2002) (describing a circuit split over whether MBTA can be applied to federal officers and arguing that "[w]hen viewed in light of its purpose in implementing the United States' treaty obligations, with reference to the several decades in which it was interpreted to restrict agency action, the MBTA strongly suggests that it intends to bind federal officers"); Erin R. Flanagan, *It's the "Supreme Law of the Land:" Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by SWANCC*, 22 PACE ENVTL. L. REV. 175, 194–96, 200 (2005) (investigating how the MBTA can be used to protect migratory birds habitats located in isolated wetlands after *SWANCC* in light of the split on the issue of allowing private citizens to sue federal agencies under the APA for MBTA violations); Jamie Futral, *Protect Our Cmtys. Found. v. Jewell: The Ninth Circuit Draws a Line in the Sand While Objectively Deciding a Case That Presents Two Different Environmental Objectives*, 30 TUL. ENVTL. L.J. 153, 154, 157 (2016) (noting the circuit split on whether the MBTA applies to federal agencies); Helen M. Kim, *Chopping Down the Birds: Logging and the Migratory Bird Treaty Act*, 31 ENVTL. L. 125, 129–30, 142–43 (2001) (noting that a major procedural issue has protected loggers and USFS from guilt, namely, whether the Forest Service, as a federal agency, is within the jurisdiction of the MBTA and whether the MBTA is, therefore, a law that binds agencies); Julie Lurman, *Agencies in Limbo: Migratory Birds and Incidental Take by Federal Agencies*, 23 J. LAND USE & ENVTL. L. 39, 46 (2007) (suggesting FWS develop incidental take regulations aimed at federal action); Meretsky, *supra* note 7, at 488 n.20 (noting that private citizens have a limited role in MBTA enforcement as, unlike the ESA, the MBTA does not authorize a private right of action to sue private entities

in the circuit courts on the issue of whether the MBTA is enforceable against federal agencies under the APA. It is unlikely that the MBTA's criminal liability provisions would be used against a government official.[149] The United States Court of Appeals for the Eleventh Circuit[150] and the United States Court of Appeals for the Eighth Circuit[151] have confronted the issue and held that the MBTA does not apply to the federal government. In more recent cases, however, the United States Court of Appeals for the D.C. Circuit[152] and United States Court of Appeals for the Ninth Circuit[153] have

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for violating the MBTA, although parties may sue a federal agency for MBTA violations); Krisztina Nadasdy, *Killing Two Birds with One Stone: How an Incidental Take Permit Program Under the MBTA Can Help Companies and Migratory Birds*, 41 B.C. ENVTL. AFF. L. REV. 167, 182–83, 198 (2014) (exploring the current state of the law regarding incidental takes and claims that an incidental take permit program would reduce migratory bird deaths and provide commercial entities with a means to assure their compliance with the MBTA and noting that incidental take permits would constitute a federal agency action, thereby allowing citizens to challenge the FWS's issuance of permits as arbitrary and capricious under the APA); Colonel E.G. Willard et al., *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65, 76–78 (2004) (describing the occurrence and consequences of unintentional takes in context of Air Force operations and noting lack of FWS regulations to grant permits for unintentional takes and resulting difficulty for Air Force of avoiding unlawful incidental takes).

149 The only court that appears to have acknowledged this issue, the United States Court of Appeals for the D.C. Circuit, which found that the federal government was liable under the APA for noncompliance with the MBTA, noted in passing that it was nevertheless "willing to assume that the criminal enforcement provision could not be used against federal agencies." Humane Soc'y v. Glickman (*Glickman II*), 217 F.3d 882, 886 (D.C. Cir. 2000). Additionally, a former Assistant Attorney General at the Department of Justice's Land and Natural Resources Division wrote a letter to the former Solicitor concluding that MBTA's "strict criminal liability provisions were not intended to apply to federal officials and employees provided that (1) the officials act within the authority granted by Congress and perform their job responsibilities with due care; and (2) they make a good-faith attempt to comply, to the extent practicable under the circumstances, with MBTA." Letter from F. Henry Habicht II, Assistant Att'y Gen., Dep't of Justice, Land and Nat. Res. Div., to Marian Blank Horn, Acting Solicitor, Dep't of the Interior (Oct. 7, 1985). DOJ relied in part on legislative history of the MBTA to reach this conclusion. While legislative history does not address this issue directly, both the Senate and House reports indicate that Congress envisioned the proposed bill "as a wildlife management act, designed to protect the public interest through prudent husbanding of avian resources" and as an act "that gave broad discretionary power to the federal government." *Id.* (internal citations omitted). Issues of prosecutorial discretion would necessarily arise in any government decision on whether to prosecute an agency official, and there is no case where the government has chosen to do this.

150 Stating:

> The MBTA, by its plain language, does not subject the federal government to its prohibitions. . . . Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so. For example, the term 'person' in the Endangered Species Act is defined to include 'any officer, employee, agent, department, or instrumentality of the Federal Government.'

Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir. 1997) (citing 16 U.S.C. § 1532(13) (1994)).

151 "MBTA does not appear to apply to the actions of federal government agencies." Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997).

152 Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 177–78 (D.D.C. 2002) *vacated on other grounds*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110

reached a different conclusion, holding that federal agencies can be liable under the APA for violations of the MBTA. Furthermore, the Supreme Court indicated in dicta that federal agencies are bound by the MBTA, though the opinion did not actually directly address the issue.[154] Additionally, FWS issued a Director's Order, which has now been superseded by a chapter in one of its handbooks, in which it states that the MBTA applies to activities conducted by "any local, State or Federal agency."[155]

The courts that have found that the MBTA does not apply to federal agencies have focused largely on the language of the statute. *Sierra Club v. Martin* is one such case. There, plaintiffs challenged a timber sale by the Forest Service, arguing that the resultant habitat modification would lead to bird deaths.[156] The court found that federal agencies are not bound by the MBTA because the Act

> by its plain language, does not subject the federal government to its prohibitions. . . . Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so. For example, the term 'person' in the Endangered Species Act is defined to include "any officer, employee, agent, department, or instrumentality of the Federal Government."[157]

The *Martin* court thus found the MBTA inapplicable to federal agencies because Congress did not explicitly subject the federal government to its prohibitions.

In the D.C. Circuit cases on federal agency liability, on the other hand, courts have determined that the MBTA applies to federal agencies and that agency actions in violation of the MBTA can be enjoined as "not in accordance with law" within the meaning of Section 706(2)(A) of the APA.[158] These cases include *Ctr. for Biological Diversity v. Pirie* and the two *Humane Soc'y v. Glickman* cases (*Glickman I* and *Glickman II*).

In *Glickman I & II*, organizations and individuals sought to enjoin the government from implementing a management plan for Canada Geese that provided for Department of Agriculture personnel to kill (and thus "take") birds covered by the MBTA without seeking a FWS permit. The United States District Court for the District of the District of Columbia and the D.C. Circuit, like the court in *Martin*, relied on the statute's language, but reached the opposite outcome; they concluded that the Act does apply to federal

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(D.C. Cir. Jan. 23, 2003); Humane Soc'y v. Glickman (*Glickman I*), No. 98-1510, 1999 U.S. Dist. LEXIS 19759, at *33–34 (D.D.C. July 6, 1999), *aff'd*, *Glickman II.*, 217 F.3d at 888.

153 City of Sausalito v. O'Neill, 386 F.3d 1186, 1204 (9th Cir. 2004). In this action against the National Park Service, the Court held that "anyone who is 'adversely affected or aggrieved' by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action." *Id.* (internal citations omitted).

154 Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439 (1992).

155 U.S. FISH & WILDLIFE SERV., *supra* note 142.

156 *Martin*, 110 F.3d 1551, 1553–54 (11th Cir. 1997).

157 *Id.* at 1555 (citing 16 U.S.C. § 1532(13)).

158 5 U.S.C. § 706(2)(A) (2012).

agencies, emphasizing that "[n]othing in § 703 [of the MBTA] turns on the identity of the perpetrator."[159] The district court looked to two scenarios in which courts have applied the canon that statutes employing the term "person" ordinarily are construed to exclude the sovereign, and concluded that neither exception existed with regard to the MBTA.[160] The first situation is when federal compliance with the act would "deprive the sovereign of a recognized or established prerogative title or interest."[161] The second situation is when a reading that would require federal compliance with the act would result in an obvious absurdity, such as "the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."[162] The court found that prohibiting federal officials from capturing and slaughtering migratory birds would neither deprive the sovereign of a recognized interest nor result in an absurdity.[163] Thus, the court held that the MBTA applies to the federal government.[164]

Pirie involved live-fire training exercises of the Navy, which all parties acknowledged resulted in bird deaths.[165] The district court in *Pirie* held that training exercises without a FWS permit were "not in accordance with law" within the meaning of the APA.[166] The court concluded that

> federal agencies can be subject to suit for violations of the MBTA pursuant to the APA's prohibition on unlawful action regardless of whether those violations are intentional or unintentional. . . . And because the APA provides a cause of action to challenge unlawful agency actions, whether or not one federal agency has violated a federal law is not an issue left to the prosecutorial discretion of another federal agency.[167]

Congress responded to *Pirie* with an amendment to the MBTA requiring the FWS to develop regulations permitting the United States Department of Defense to incidentally take migratory birds in the course of military readiness activities, so, in an unpublished opinion, the court of appeals vacated the case and remanded it for dismissal as moot.[168] Nonetheless, *Pirie*'s reasoning remains valid, especially given that Congress did not further amend the MBTA at that time to clarify that it does not apply to federal agencies.

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159 *Glickman II*, 217 F.3d 882, 885 (D.C. Cir. 2000).

160 *Glickman I*, 1999 U.S. Dist. LEXIS 19759, at *36–37.

161 *Id.* at *23 n.5 (internal citations omitted).

162 *Id.* at *22 (citing *Nardone v. U.S.*, 302 U.S. 379, 384 (1937)).

163 *Id.* at *23.

164 *Id.*

165 Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003).

166 *Id.* at 164.

167 *Id.* at 177.

168 Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003).

The district court also relied on the U.S. Supreme Court's opinion in *Robertson v. Seattle Audubon Soc'y*,[169] where, in dictum, the Supreme Court suggested that the MBTA applies to federal agencies when it stated that "agencies could satisfy their MBTA obligations in either of two ways: by managing their lands so as neither to 'kill' or 'take' any northern spotted owl within the meaning of § 2, or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5)."[170]

B. Standards for a "Take" Under the Act

Another complex question that comes up in the context of incidental take and federal agency action are the standards for what constitutes a "take" under the Act. The case law varies from circuit to circuit on the issues of intent, causation, and directness. It is worth noting that these issues sometimes overlap and that courts often confound them.

1. Intent

Regarding intent, the majority of courts have held that the MBTA is a strict liability statute with no scienter requirement. Some courts have, however, created limitations to this rule depending on the type of activity. For instance, the United States District Court for the Southern District of Indiana concluded that Congress could not have intended all forms of human activity that might result in the death of a migratory bird, such as logging or flying a plane, to be strictly liable activities.[171] Conversely, the United States District Courts for the District of Colorado and the District of Kansas have held that violations under MBTA are strict liability crimes, and the United States Court of Appeals for the Fourth Circuit[172] and the D.C. Circuit[173] have held that the MBTA covers both intentional and unintentional conduct.

Mahler v. U.S. Forest Service was one case where the court refused to accept that strict liability could apply to all forms of human conduct under the MBTA. It involved an action against the Forest Service seeking an injunction against salvage operations for diseased and dying trees.[174] Plaintiffs argued that this habitat modification would result in bird deaths.[175] The court refused to accept "that Congress intended for 'strict liability' to apply to all forms of human activity, such as cutting a tree, mowing a

169 503 U.S. 429 (1992)

170 *Id.* at 438.

171 Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1581 (S.D. Ind. 1996).

172 United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) (treating misdemeanor violations of the MBTA as strict liability crimes).

173 *See* Ctr. for Biological Diversity v. Pirie, 191 F.Supp. 2d 161, 174–75 (D.D.C. 2002) (holding that the "MBTA prohibits both intentional and unintentional killing"), *vacated on other grounds*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003).

174 *Mahler*, 927 F. Supp. at 1559.

175 *Id.* at 1581.

hayfield, or flying a plane."[176] Instead, the court opined that the prohibitions only applied to activity "intended to kill or capture birds."[177] The court stated that the statute's history does not indicate concern for migratory bird deaths that are incidental results of human activity unintended to take birds. Instead, its focus was on bird hunting and poaching.[178] The court thus relied in part on legislative history to support the theory that MBTA violations are confined to hunting- or poaching-related activities, even though the "argument for broad application of the MBTA admittedly draws substantial support from the statutory language and from case law brought by agencies."[179]

Some courts in the United States Court of Appeals for the Tenth Circuit, on the other hand, have held that misdemeanor violations under the MBTA are strict liability crimes. In *U.S. v. Corrow*,[180] the Tenth Circuit affirmed the conviction of a defendant who unlawfully possessed migratory bird feathers. The court there held that the MBTA contains no scienter requirement for misdemeanor offenses.[181] Furthermore, in *United States v. Moon Lake Elec. Ass'n*,[182] the United States District Court for the District of Colorado convicted an electricity cooperative for the deaths of birds from power lines. There the court pointed out that the *Mahler* court's concern about "absurd" results (such as prosecuting the behavior of mowing a field, cutting down a tree, or flying a plane) overlooks the proximate cause requirement, an "important and inherent limiting feature of the MBTA's misdemeanor provision" (which is examined in greater detail below).[183] Even if a court does not require intent to find liability, there would not be absurd results so long as a court did require proximate causation.

The *Moon Lake* court also pointed out that the theory requiring MBTA violations to be confined to hunting- or poaching-related activities is undermined by the fact that the regulations that list migratory birds covered by the MBTA, 50 C.F.R. § 10.13, lists "approximately 925 protected bird species, many of which are not game birds and have not been hunted, traditionally, by humans."[184] The court also cited legislative history, referring to the statement of Representative Green that "[n]ot anybody in my State or elsewhere hunts insectivorous birds" though the MBTA does protect them.[185] The court thus concluded that MBTA proscriptions apply to both intentional and unintentional conduct.[186] Because this case involved a criminal

176 *Id.* at 1580.
177 *Id.* at 1580.
178 *Id.*
179 *Id.* at 1576.
180 119 F.3d 796 (10th Cir. 1997).
181 *Id.* at 805.
182 45 F.Supp.2d 1070 (D. Colo. 1999).
183 *Id.* at 1085.
184 *Id.* at 1082.
185 *Id.* at 1082 (citing 56 CONG. REC. 7453 (June 6, 1918)).
186 *See Moon Lake*, 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999) (holding that such a violation of the MBTA is a "strict liability" crime, and therefore "whether Moon Lake intended to cause the deaths of 17 protected birds is irrelevant to its prosecution").

prosecution, it is not clear that it would be fully applicable in the federal agency civil action context. Nevertheless, the court considered the reasoning of *Seattle Audobon Society v. Evans (Seattle II)*,[187] which *was* a civil case against a federal agency, unpersuasive "[t]o the extent [it] may be read to say that the MBTA regulates only physical conduct normally associated with hunting or poaching."[188] Thus, in the Tenth Circuit, there is precedent to conclude that misdemeanor violations of MBTA are strict liability crimes not requiring intent.

The D.C. District Court also recognized that the MBTA covers both intentional and unintentional conduct.[189] Additionally, the *Pirie* court developed a definition of "intentional" that covers a wide range of activities.[190] The court found that the Navy's live-fire training activities did violate the MBTA even though the Navy described the bird deaths as being "unintentional."[191] The court first concluded that the killings were not in fact unintentional, as the defendants knowingly engaged in activities with the direct consequence of killing migratory birds, which is legally sufficient to establish intent.[192] The court then added that even if the conduct had been unintentional, "the MBTA prohibits both intentional and unintentional killing. Courts have consistently refused to read a scienter requirement into the MBTA."[193] There is, thus, support in the D.C. District Court for a court to find that the MBTA does cover unintentional conduct.

There are also several cases in which courts have found liability for actions involving abnormally dangerous activities (pesticide application or production) even where there is no obvious "intent" to take birds. In these cases, the courts' reasoning often relies on tort law either implicitly or explicitly to justify strict application of the MBTA to inherently dangerous activities. For instance, in *United States v. Corbin Farm Service*,[194] the United States charged various private parties for bird deaths resulting from application of pesticides to an alfalfa field. The defendant challenged the constitutionality of applying the MBTA to impose criminal penalties on those who do not intend to kill migratory birds.[195] The court supported its finding of liability by stating that "[w]hen dealing with pesticides, the public is put on notice that it should exercise care to prevent injury to the environment and to other persons; a requirement of reasonable care under the circumstances of this case does not offend the Constitution."[196] Similarly, in

187 952 F.2d 297 (9th Cir. 1991).

188 *Id.* at 1076.

189 Ctr. for Biological Diversity v. Pirie, 191 F.Supp. 2d 161, 177–78 (D.D.C. 2002), *vacated on other grounds*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003).

190 *Id.* at 175, 178.

191 *Id.*

192 *Id.* at 172–74 .

193 *Id.* at 74.

194 444 F. Supp 510 (E.D. Cal. 1978).

195 *Id.* at 515.

196 *Id.* at 536.

United States v. FMC Corp.,[197] the government prosecuted a pesticide manufacturer for unlawfully killing migratory birds by failing to act to prevent dangerous chemicals from reaching a pond that migratory birds used. The court analogized the situation "to the situations in the various tort notions of strict liability [for abnormally dangerous activities] which have insinuated themselves into American law since the English case of *Rylands v. Fletcher*."[198] When dealing with similar types of activities, the courts have thus focused on the ability of a perpetrator to foresee the danger and, therefore, to prevent it. In such situations, any further demonstration of intent is unnecessary.

2. Causation

Existing MBTA jurisprudence has only minimally addressed causation. In *Moon Lake*, the U.S. District Court for the District of Colorado focused on causation to demonstrate that the *Mahler* court's concern about "absurd" results was unfounded as it overlooked the proximate cause requirement.[199] The *Moon Lake* court called this requirement an "important and inherent limiting feature of the MBTA's misdemeanor provision. . . ."[200] The court further explained that

> to obtain a guilty verdict under § 707(a), the government must prove proximate causation, also known as "legal causation," beyond a reasonable doubt. . . . Because the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability under § 707(a), even if such activities would cause the death of protected birds.[201]

Thus, the *Moon Lake* court concluded that proper application of the law should not lead to absurd results. In *U.S. v. Apollo Energies, Inc.*,[202] the United States District Court for the District of Kansas agreed with *Moon Lake* that the government must prove "proximate causation" or "legal causation" beyond a reasonable doubt when prosecuting violators of the MBTA.[203]

Therefore, some courts have recognized a proximate causation element to MBTA liability and such an element might be relevant to establishing a violation of the MBTA in a civil case against a federal agency under the APA as well.

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197 572 F.2d 902, 907 (2nd Cir. 1978).

198 *Id.* at 907 (citing Rylands v. Fletcher, 3 Hurl. & C. 774 (1865), L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868)).

199 *Moon Lake*, 45 F. Supp. 2d 1070, 1084–85 (D. Colo. 1999).

200 *Id.* at 1085.

201 *Id.*

202 611 F.3d 679 (10th Cir. 2010).

203 *Id.* at 690.

3. Directness

Directness, or how direct the connection must be between the agency action and an actual take, is a similar concept to causation, but courts have treated it distinctly. Courts that have considered directness are divided on how relevant the issue is to MBTA liability. Some require physical conduct, such as hunting or poaching, that results directly in the take of migratory birds as a prerequisite for any violation. Others have held that proximate causation, not directness, is the relevant legal inquiry for determining liability under the MBTA.

Seattle II is a case with some significant discussion of the directness issue. In this case, the Seattle Audubon Society and the Portland Audubon Society asserted that U.S. Forest Service timber sales in Washington and Oregon that destroyed spotted owl habitat constituted a take under the MBTA.[204] The court analyzed the activity at issue and concluded that liability under the MBTA would not attach to conduct so indirectly related any potential take.[205] In particular, the court found that conduct directly resulting in the alleged take was necessary to establish an MBTA violation.[206] Notably, the court distinguished the concepts of "take" under the MBTA and the Endangered Species Act (ESA).[207] As the court observed, under the ESA, the prohibition against the take of certain listed endangered species includes a prohibition of conduct that would "harass" or "harm" the species.[208] Neither of these terms appears in the MBTA take provision. Courts have thus found that the more indirect effect of habitat modification resulting from logging, which is covered under the ESA, is not covered under the MBTA.

The Eighth Circuit adopted similar reasoning to the *Seattle I* court's in *Newton County Wildlife Association v. U.S. Forest Service*.[209] There, the plaintiff alleged that logging under Forest Service timber sales would disrupt nesting migratory birds and kill some of them.[210] The court recognized that strict liability under the MBTA might be an appropriate standard when dealing with conduct such as hunting or poaching, which would typically come up in the criminal context.[211] The court concluded, however, that "it would stretch this 1918 statute 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."[212] The court therefore agreed with *Seattle II* that "take" means hunting- or poaching-related physical conduct, but does not translate over to the civil context in a case against the Forest Service. It is worth noting, however, that the *Newton County Wildlife Association* court recognized its conclusions about the

204 *See Seattle II*, 952 F.2d 297, 302 (9th Cir. 1991).
205 *Id.* at 303; Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).
206 *See Seattle II*, 952 F.2d at 303.
207 *Id.*; Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).
208 *Seattle II*, 952 F.2d at 303 (citing 50 C.F.R. § 17.3 (1999)).
209 113 F.3d 110 (1997).
210 *Id.* at 115 n.10.
211 *Id.* at n.11.
212 *Id.* at 115 (emphasis omitted).

scope of the MBTA as being "necessarily tentative" because it lacked the Fish and Wildlife Service's views on the issue.[213]

Additionally, *Seattle II* and *Newton County Wildlife Association* do not represent the majority view. Few courts have even addressed the issue of directness, and one has explicitly rejected a direct/indirect analysis. A Tenth Circuit district court rejected such an approach in *Moon Lake.* There, the government prosecuted an electricity cooperative for causing the death of numerous birds by failing to install inexpensive equipment on power poles that would have prevented the birds' electrocution.[214] The court denied that conduct needed to be similar to that in which hunters and poachers typically engage, stating:

> To the extent *Seattle II* may be read to say that the MBTA regulates only physical conduct normally associated with hunting or poaching, its interpretation of the MBTA is unpersuasive. Foremost, the Ninth Circuit Court of Appeals' distinction between an "indirect" and "direct" taking is illogical. By focusing on whether the taking is "direct" or "indirect," the Court conflates the causation element with the *actus reas* element.[215]

The *Moon Lake* court thus recognized that "take" is broader than conduct typically exhibited by hunters and poachers and rejected the direct/indirect analysis as a whole.

Other courts (including another court in the Ninth Circuit) that have considered whether a take was direct have used what appears to be a broader definition of "direct" than the narrow hunting/poaching conduct definition developed in *Seattle II.* For example, courts in the Second and Ninth Circuits have found unintentional bird poisonings to be "direct" deaths.[216]

C. Types of Federal Agency Activities That Courts Have Recognized as Resulting in Liability for "Take"

Courts have found federal government agencies liable for intentional and unintentional direct takes, but never for more indirect, habitat-modification-related takes. Live-fire training exercises that resulted in bird takings and a bird population control program where government agents killed birds have both resulted in findings of federal agency liability.[217] On the

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213 *Id.*

214 *Moon Lake*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999).

215 *Id.* at 1076–77 (emphasis omitted).

216 United States v. FMC Corp., 572 F.2d 902, 904–05 (2d Cir. 1978) (killing of migratory birds by dumping wastewater); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (deaths of birds from misapplication of pesticides).

217 *See* Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003); *see also Glickman I*, Civ. Act. No. 98-1510, mem. op. (D.D.C. July 6, 1999), *aff'd Glickman II*, 217 F.3d 882 (D.D.C. 2000).

other hand, courts have consistently found, for a variety of reasons, that federal government agencies are not liable for timber sales leading to habitat modification that would result in bird deaths.[218]

D. Likelihood of Take

When considering federal agency action, which the APA and individual federal statutes generally require be proposed before it is taken, likelihood of take is an issue that arises. Regarding what the demonstration must be to establish a take in the federal conduct/APA context, there is extremely limited case law on this as almost all cases are in the criminal context and deal with situations where birds have already been killed.

While the great majority of cases deal with situations where birds have already been killed, the D.C. Circuit did hold in one instance that the government could be enjoined from taking an action that would directly result in bird deaths even though none had yet been killed.[219] In the *Glickman* cases, organizations and individuals sought to enjoin government officials from implementing a management plan for Canada Geese.[220] Even though the government had not yet killed any birds, the district court and court of appeals were still willing to enjoin government officials from taking Canada geese through their management plan, indicating that actual bird deaths are not required for a court to decide a case under the MBTA.

In *Pirie*, the D.C. District Court granted an injunction to stop U.S. military live-fire training exercises that unintentionally take birds.[221] The court provided some informative language on the issue of standing when it stated that a plaintiff-NGO "is not required to wait until [its constituents] are completely unable to view any members of the species of birds that defendant is illegally killing before being granted access to this Court."[222] There, however, the defendants did not dispute that they had already killed and would continue to kill migratory birds through their live-fire training exercises.[223] Nonetheless, this language indicates that there need not necessarily be an actual bird death, or several, to find a government agency liable.

A district court in the Tenth Circuit, on the other hand, has indicated that a claim that involved only possible injury or death to birds would be insufficient. In dictum, the *Moon Lake* court distinguished the facts there

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218 *See, e.g.*, Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir. 1997); Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) (*Seattle I*).

219 *Glickman II*, 217 F.3d at 888.

220 *Id.* at 884.

221 *Pirie*, 191 F. Supp. 2d at 173.

222 *Id.*

223 In fact, the defendants stated in their Combined Statement of Material Facts that their "live-fire training exercises occasionally kill migratory birds protected by the MBTA." *Id.* at 174. Additionally, FWS had concluded that "[t]here is no question that bombing of [the] island [would] result in the death of seabirds, migratory shorebirds, and possibly even the endangered Micronesian megapode." *Id.* at 166 (internal citations omitted).

from those in logging cases by pointing out that in *Seattle II* "the plaintiffs . . . perceived injury and death as imminent, no actual injury or death had occurred as a result of timber sales, which were only proposed at the time the plaintiffs requested injunctive relief."[224] The court contrasted such a situation to *Moon Lake*, where numerous birds had already died.[225] This discussion indicates that the Tenth Circuit may view actual bird deaths as critical to a successful MBTA claim, unlike the D.C. Circuit.

Were a court considering whether to grant a preliminary injunction, it would typically employ a balancing test of four factors. Plaintiffs must demonstrate that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest.[226] Demonstrating that injury is a possibility is not sufficient; instead a plaintiff must meet a higher standard and "demonstrate that irreparable injury is *likely* in the absence of an injunction," and a "preliminary injunction is an extraordinary remedy never awarded as of right."[227] Whether a plaintiff were able to show proximate causation and sufficient directness could strongly influence his or her ability to meet this "likelihood" standard.

V. THE DEPARTMENT OF INTERIOR'S NEW APPROACH TO INCIDENTAL TAKE

A. Interior's Historical Position

As the cases above demonstrate, the federal government has at times caused bird deaths that courts have found to violate the MBTA, though court findings have been inconsistent. However, FWS, the agency responsible for implementing the MBTA, has remained relatively consistent for the past fifty years in its position that it can hold those that cause incidental take to task.[228] In the past two decades, there were fourteen federal prosecutions for incidental takes.[229] The majority of these cases (nine) involved energy

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224 United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1076 (D. Colo. 1999).

225 *Id.* at 1071.

226 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (internal citations omitted).

227 *Id.* at 22, 24.

228 Until now this has not been a politicized issue; the Department of Justice, working with the Department of Interior under Republican Presidents from President Nixon to President Bush, has prosecuted incidental take. *See, e.g.*, United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (the indictment charged that FMC unlawfully killed migratory birds included in multiple international conventions in violation of Title 16, United States Code, § 703); United States v. Apollo Energies, Inc., No. 08-10111-01-JTM, 2009 WL 211580 (D. Kan. Jan. 28, 2009) (in which, Apollo's machinery was incidentally killing birds covered by the MBTA), *aff'd in part*, *rev'd in part and remanded*, 611 F.3d 679 (10th Cir. 2010); *see also* Lazarus, *supra* note 139, at 13.

229 *See Moon Lake*, 45 F. Supp. 2d 1070, 1088 (D. Colo. 1999) (finding that the defendant's failure to take protective measures to prevent birds protected by the MBTA from being electrocuted by its power lines fell within the scope of the Act); United States v. Morgan, 311 F.3d 611, 616 (5th Cir. 2002) (holding a hunter was properly found in violation of the strict liability bag limit regulations notwithstanding his claim that he had not intended to violate the limit, but came into possession of more than the permitted number of birds only because his dog had retrieved birds shot by other hunters); United States v. WCI Steel, Inc., No. 5:04 MJ

industry operations, with two involving other industries, two involving pesticides, and one even involving an eager and efficient hunting dog. The total number of cases is relatively low, and there are likely numerous cases where FWS could have enforced more than it has.[230] Despite this, environmental groups argue that only the threat of prosecution under the MBTA has motivated members of industry to take the actions they have taken to save thousands of birds every year.[231]

5053, 2006 WL 2334719, at *1, *4 (N.D. Ohio Aug. 10, 2006) (finding WCI Steel not guilty despite a $65,900 fine for the deaths of twenty-eight migratory birds in its runoff water system because of a lack of evidence regarding the cause of death); United States v. Cota, No. CR 08-00160, 2009 WL 1765647, at *1, *2–4 (N.D. Cal. June 22, 2009) (finding the manager of a container ship that collided with the San Francisco Bay Bridge and discharged over 50,000 gallons of heavy fuel oil into the San Francisco Bay guilty of violating the MBTA for negligently operating and navigating the vessel); United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615, at *7 (D. N.M. Feb. 25, 2009) (finding the defendant, the owner of an oil evaporation pit, not liable for the deaths of thirty-four MBTA-protected birds because Congress intended to prohibit only conduct directed towards birds, not to criminalize negligent acts or omissions that incidentally and proximately cause bird deaths); United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at *4–5 (W.D. La. Oct. 30, 2009) (ruling that Chevron had not been on notice of potential MBTA liability following discovery of thirty-five dead Brown Pelicans that had been entrapped and died in the space between the inner wall of a caisson and the outer wall of a wellhead, which resulted in the court refusing to enter a negotiated plea); United States v. Apollo Energies, Inc., 611 F.3d 679, 681–82 (10th Cir. 2010) (finding Apollo Energies liable for violating the MBTA when dead migratory birds were found lodged in part of their oil drilling equipment); United States v. ConocoPhillips Co., Nos. 4:11-po-002, 4:11-po-003, 4:11-po-004, 4:11-po-005, 4:11-po-006, 4:11-po-008, 2011 WL 4709887, at *3–4 (D. N.D. Aug. 10, 2011) (deferring judgment after dead birds were found in the defendant's oil pits until the record was further supplemented with evidence); United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1213–14 (D. N.D. 2012) (holding Brigham Oil not in violation of the MBTA after deceased birds were found near one of their reserve pits, because death or injury was not intentional); 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) (finding that CITGO's unlawful, open-air oil tanks proximately caused deaths of migratory birds); Statement of Facts at 5–6, United States v. Duke Energy Renewables Inc., No. 2:13-CR-00268 (D. Wyo. Nov. 7, 2013) (finding Duke Energy liable for failing to take prudent steps to construct windfarms in such way as to avert the threat of bird deaths caused by crashing into the turbine blades following the discovery of more than 150 protected birds); United States v. Gulf Coast Asphalt Co., LLC, No. 1:15-00154-001 (S.D. Ala. Jul. 29, 2015) (guilty pleading for discharge of oil caused by overfill of oil during a tank to tank transfer when employees pumped oil into the receiving tank under pressure, ultimately releasing oil into the Mobile River); United States v. Rickie D. Cloyd, No. 2:14-MJ-192 (E.D. Tenn. Apr. 24, 2015) (finding Cloyd guilty of using pesticide Furadan in an attempt to control pests, unintentionally poisoning a variety of animals, including several species of migratory birds); United States v. John Purviance, No. 5:17-CR-0003 (E.D. Tex. June 20, 2017) (finding Purviance guilty after he mixed a restricted-use pesticide with corn syrup and then spread the mixture along a tree line of a ranch in Bowie County with the intent to poison and kill feral hogs, but also killed blackbirds, cardinals, and at least one vulture, which are all migratory birds and protected by federal statute).

230 Sam Schipani, *Interior Ruffles Feathers Over Weakened Migratory Bird Treaty Act*, SIERRA CLUB (Apr. 24, 2018), https://perma.cc/P3CL-DXHB.

231 *Id.* After all, a key purpose of legal sanctions is to deter potential offenders from violating the law. Mark Cohen, *The Economics of Crime and Punishment: Implications for Sentencing of Economic Crimes and New Technology Offenses*, 9 GEO. MASON L. REV. 503, 512 (2000). Scholarship has suggested that the law can play a role in the development of new behavioral norms (such as covering oil pits to prevent unintentional bird deaths) even if such "crimes were

In addition to these prosecutions, FWS has worked with other members of the federal family to try to ensure they address incidental takes. FWS's work with the United States Environmental Protection Agency (EPA) provides an excellent example of this. In one instance, after years of tension between the two agencies over incidental takes of migratory birds from pesticides EPA registered (or approved) under the Federal Insecticide, Fungicide, and Rodenticide Act,[232] FWS worked with EPA to develop a Memorandum of Understanding (MOU) to promote protection of migratory birds regarding actions directly carried out by EPA's Office of Pesticide Programs (OPP), such as pesticide registration and re-evaluation decisions.[233] In this MOU, EPA's OPP was tasked, among other things, "to improve the quality and clarity of label language during the registration review process to inform users of potential risks [to migratory birds] associated with a [pesticide's] use," to develop internal trainings for management and staff on pesticide use and registrations and migratory birds, to work more closely with FWS in its decision-making, and to "[e]ncourage the development of less toxic alternatives. . . ."[234]

As another example, FWS has weighed in on state water quality standards that EPA must approve under the Clean Water Act. In the course of a state water quality standard revision process, Utah convened an expert science panel, which included EPA and FWS experts, to issue recommendations.[235] When a FWS panel member disagreed with the panel's ultimate recommendation, which the state did indeed adopt, FWS sent EPA a letter (dated May 18, 2009) expressing their position that, were EPA to approve Utah's proposed standard, it would be causing incidental take in violation of the MBTA, and suggested that the selenium criterion should be set at a lower level.[236]

FWS has been consistent for the past fifty years in its position that the MBTA covers incidental takes, and they have saved thousands of birds a

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seldom prosecuted." *See* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1256–57 (2000). The Department of Justice is aware of this, noting in a 2006 memorandum that provided guidance to the DOJ on when to prosecute environmental crimes that "criminal prosecution can force change in culture and behavior." *See* Krista McIntyre, *Current Trends in Enforcement of Environmental Crimes*, 50 ADVOC., June–July 2007, at 31. At the same time, there can be little doubt that citizen suits brought against the government for its role in incidental takes would have an even greater influence on behavior.

232 7 U.S.C. §§ 136, 136a, 136a–1, 136c to 136w, 136w–1 to 136w–8, 136x, 136y (2012).

233 U.S. ENVTL. PROT. AGENCY & U.S. FISH & WILDLIFE SERV., MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. ENVTL. PROT. AGENCY OFFICE OF PESTICIDE PROGRAMS AND THE DEP'T OF THE INTERIOR U.S. FISH AND WILDLIFE SERVICE REGARDING IMPLEMENTATION OF EXEC. ORDER 13186, "RESPONSIBILITIES OF FEDERAL AGENCIES TO PROTECT MIGRATORY BIRDS" 1 (Jan. 4, 2017), https://perma.cc/26YQ-2EWX.

234 *Id.* at 7–9.

235 Walter L. Baker, *The Process of Developing a Selenium Standard for Great Salt Lake*, DEP'T ENVTL. QUALITY UTAH (May 20, 2008), https://perma.cc/PP7N-PMZR (click on "Developing a Selenium Standard for GSL").

236 Judy Fahys, *Agencies at Odds on Great Salt Lake Bird Threat*, SALT LAKE TRIB. (May 28, 2009), https://perma.cc/F7VK-4BN6.

year by doing so.[237] In its last moments in office, the Obama Administration's DOI acted consistently with this approach as well, issuing a memorandum stating that "the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing."[238] Given the disagreement in the courts on this issue, this document constituted an important memorialization of DOI's longstanding position on the matter.[239] However, the Trump Administration quickly acted to muddy the waters.

B. Interior's New Approach

Upon taking office, the Trump Administration promptly suspended the opinion,[240] and in December of 2017, the DOI under Secretary Ryan Zinke issued a new opinion rejecting the former Administration's opinion entirely.[241] The new opinion stated that "[i]nterpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions."[242] The DOI acknowledged that its interpretation "is contrary to the prior practice of this Department,"[243] but concluded that "consistent with the text, history, and purpose of the MBTA, the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."[244] The opinion has been praised by industry members and current DOI officials, and criticized by conservation NGOs, members of Congress, and former DOI officials.[245]

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237 Schipani, *supra* note 230.

238 Memorandum 37041 from Hilary C. Tompkins, Acting Solic., to Dir., Fish & Wildlife Servs., on Incidental Take Prohibited Under the Migratory Bird Treaty Act 2 (Jan. 10, 2017).

239 DOI has been consistent for about fifty years in its position that the MBTA covers incidental take. Lazarus, *supra* note 139, at 13.

240 Memorandum from K. Jack Haugrud, Acting Secretary, to Acting Solic., on Temporary Suspension of Certain Solic. M-Opinions Pending Review (Feb. 6, 2017).

241 Memorandum 37050 from Daniel H. Jorjani, Principal Deputy Solic., to Secretary, Deputy Secretary, Assistant Sec'y for Land and Minerals Management, and Assistant Secretary for Fish and Wildlife Parks on The Migratory Bird Treaty Act Does Not Prohibit Incidental Take 1–2 (Dec. 22, 2017).

242 *Id.* at 1.

243 *Id.* at 2.

244 *Id.* at 2.

245 *See, e.g.*, Letter from Former Dep't of the Interior Officials, to Ryan Zinke, Sec'y of the Interior (Jan. 8, 2018), https://perma.cc/FAN4-GSH2; Letter From Conservation Orgs., to Congress, (Feb. 8, 2018), https://perma.cc/V6W4-QLQA; Letter from ten current U.S. Senators, to Ryan Zinke, Sec'y of the Interior (Apr. 4, 2018), https://perma.cc/42F8-39MD; Elizabeth Shogren, *Egged on by Industry Lobbyists, Interior Dept. Weakens Bird Protections*, REVEAL NEWS (Mar. 15, 2018), https://perma.cc/36UK-GCCB.

1. Supporter's Perspective

Showing that birds of a feather flock together, supporters of the new interpretation appear to primarily hail from energy industries and the current Administration (if one distinguishes the two camps). Industry groups including the National Ocean Industries Association and the American Petroleum Institute have praised the new approach for ensuring "that lawful activities are not held hostage to unnecessary threats of criminalization" and classified the prior interpretation of the MBTA as "riddled with flawed decisions that have created massive uncertainty."[246] Similarly, the DOI's deputy communications director, Russell Newell, celebrated the new interpretation as a "victory over the regulatory state" that would correct the hithertofore "tremendous uncertainty in how the act [was] applied."[247] Kathleen Sgamma, president of the Western Energy Alliance, called the new interpretation a return to the proper meaning and use of the MBTA.[248] Said Sgamma, "The MBTA was enacted by Congress as a criminal statute to stop the hunting and poaching of migratory birds . . . . It was not meant to address activities that do not directly kill birds."[249]

2. Critics' Perspective

Environmental, conservation and wildlife advocacy groups, on the other hand, are overwhelmingly concerned that this new approach removes any incentive for private industry actors to avoid killing birds in their routine commercial practices, and simply gives them the opportunity to further feather their nests. Because energy industries, which kill millions of birds a year, do not operate for the express purpose of killing birds, the vast numbers of deaths resulting from their operations will no longer be actionable. The American Bird Conservancy's Vice President of Policy, Steve Holmer, rejects the purported basis of the new legal interpretation, stating that the FWS's enforcement of the MBTA has been judicious and restrained throughout the Act's history.[250] Holmer cites the agency's practice of giving multiple warnings and dialoguing with offenders prior to enforcement and references "numerous cases where [the FWS] probably could have done more enforcement than they have."[251] The Sierra Club also emphasized the "[u]ncovered oil field waste pits, where confused birds land thinking the glossy surface is water and are poisoned or drowned in a slow, viscous death," and warned that only "[t]he risk of prosecution under the Migratory Bird Treaty Act incentivized the industry to implement the inexpensive, common-sense solution of putting nets over these pits, saving thousands of

246 *See* Juliet Eilperin, *Trump Administration Eases Rule against Killing Birds*, WASH. POST (Dec. 26, 2017), https://perma.cc/SW5Z-BEPJ.

247 *Id.*

248 Laura Zuckerman, *Accidentally Killing Birds Not a Crime, Trump Administration Says*, REUTERS, Dec. 22, 2017, https://perma.cc/E5K5-W46S.

249 *Id.*

250 Schipani, *supra* note 230, at 2.

251 *Id.*

birds every year from easily preventable deaths at each compliant facility."[252] The goal of prosecution has been to get industry to adopt best management practices that would reduce needless deaths, explained Holmer, and the DOI's new interpretation abandons that goal entirely.[253] The Sierra Club further warned that under the new interpretation, even catastrophic events like the 2010 Deepwater Horizon oil spill would no longer be actionable for their resulting bird deaths.

An editorial in the Chicago Tribune echoed this logic, calling the announcement "a sharp change in how [the FWS] interprets the law[,]" and illustrating the change with a seemingly absurd hypothetical: one company is liable under the MBTA for spraying pesticides and killing birds with the purpose of killing those birds, while another company is *not* liable for spraying the same pesticides and killing birds, if the purpose of the spraying was instead to kill insects.[254] The Tribune quotes Justice Oliver Wendell Holmes maxim that "a page of history is worth a volume of logic" as representative of the Act's historical common-sense interpretation, which has prevented it from impeding enterprise or criminalizing innocents.[255] As proof, the article contrasts the FWS's requirement that oil companies cover waste sites and prevent the birds' fatal attraction to them with the agency's abstention from prosecuting the unavoidable bird deaths caused by power lines, wind turbines, vehicles and skyscrapers.[256] Under the agency's new interpretation of the Act, argues the Tribune, companies will no longer face any repercussions for causing avoidable bird deaths, and logical result of lack of consequences is lack of concern for avoiding such deaths.[257]

Former FWS official Terry Grosz validates activists' concern based on his experience in the agency, stating that "[w]e needed the criminal statutes to take them on and force them into compliance .... Without that, the migratory birds are going to take a big hit."[258] Current FWS special agent Gary Mowad compared the DOI's new interpretation with removing speed limits and warned that small and marginal oil producers will be the first to start backsliding.[259] There are numerous examples of actions industries have taken to reduce bird deaths in order to avoid prosecution: 1) the Nixon administration negotiated with power companies to increase the distance between wires to reduce bird deaths from electrocution; 2) fishing boats now attach weights on long lines that previously drowned hundreds of thousands of seabirds that dived for the baited hooks; 3) communications towers now use blinking lights to reduce deaths of songbirds; and 4) wind

252 *Id.* at 3.

253 *Id.* at 3–5.

254 Editorial Board, *A New Threat to Migratory Birds*, CHICAGO TRIB. (May 6, 2018), https://perma.cc/EHQ5-RCM5.

255 *Id.*

256 *Id.*

257 *Id.*

258 Shogren, *supra* note 245.

259 *Id.*

companies now study birds' flight patterns to construct turbines in places less likely to kill them.[260]

Further affirming the importance of the MBTA to industry compliance under the previous interpretation, Vice President of Conservation for the Audubon Society Sarah Greenberger put it simply: "The reason the industry covers the tar pits is the Fish and Wildlife Service's use of the MBTA as a tool to get them to the table. Why would you spend money to implement those, why would your shareholders even allow it, if there's no reason?"[261] Rounding out the unanimity amongst NGOs, Senior Vice President for Conservation with Defenders of Wildlife Bob Dreher called the new guidelines "a license to kill," based on its interpretation of the Act as omitting industrial "takes" entirely.[262] According to Dreher, the result is not surprising: businesses will not take precautionary measures, because they do not have to.[263] Dreher stated, "They don't have to do anything in order to avoid the killing of migratory birds, even though they know that it will occur from what they're doing, and even though there may be reasonable and cost-effective things they could do to avoid killing birds."[264]

A related concern is the effect of the interpretation internationally, given the distinct interests in preventing migratory bird deaths held by the Treaties' four other signatories. The Sierra Club has noted the international impacts of the new interpretation, which are significant given the Act's inclusion of Mexico, Japan, and Russia.[265] Though those countries may maintain higher protection for migratory birds within their own borders than those secured in the United States, birds still face risk while passing through the states to other destinations.[266] Migratory birds are important to global trade, due to their role as seed dispersers, pest controllers, and food sources for larger animals, so increased migratory bird deaths could cause a ripple effect in global trade.[267]

3. Former and Current Government Officials' Opposition

Concern over the likely consequences of the new interpretation is shared by members of Congress and former DOI officials as well. In January of 2018, seventeen former top DOI officials who have served presidents from both parties since the 1970s signed a letter opposing the memorandum and

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260 *Id.*

261 Darryl Fears & Dino Grandoni, *The Trump Administration Has Officially Clipped the Wings of the Migratory Bird Treaty Act*, WASH. POST (Apr. 13, 2018), https://perma.cc/PK85-GH78.

262 Suzanne Potter, *Conservation Groups Fight for Federal Bird Protections as the Migratory Bird Treaty Act Turns 100*, CLEVELAND SCENE (Jul. 6, 2018), https://perma.cc/NDQ8-XQBY.

263 *Id.*

264 *Id.*

265 Schipani, *supra* note 230.

266 *Id.*

267 *Id.* ("For example, a lot of migratory birds spend the winters in shade coffee plantations, and research shows that pest control services by birds in these plantations improve coffee yields . . . .").

calling it a "new, contrived legal standard that creates a huge loophole in the MBTA."[268] The letter states that "[t]he MBTA can and has been successfully used to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm[,]" and claims that the new interpretation "needlessly undermines a history of great progress, undermines the effectiveness of the migratory bird treaties, and diminishes U.S. leadership."[269]

On April 4, 2018, ten senators wrote a joint letter to Secretary Zinke warning that "eliminating agency authority to address incidental takes under the MBTA risks reversing the significant progress the nation has made in recovering and maintaining bird populations, ties the hands of the Department's wildlife professionals, and undermines our international obligations."[270] As a result, the senators concluded, the opinion put at risk not only migratory birds, but also the multi-billion dollar economies that rely on them.[271] Two weeks later, over sixty members of the United States House of Representatives sent a letter urging Secretary Zinke to withdraw the opinion and to preserve the MBTA as a critical tool to helping species recover.[272]

4. Conservation NGOs Challenge Interior's Memorandum

In February of 2018, over 500 conservation organizations sent a joint letter to Congress asking them to oppose the new opinion, as well as any other measures that undermine the MBTA's ability to address incidental takes.[273]

Then, on May 24, 2018, the Audubon Society filed a complaint in *Audubon v. U.S. Department of the Interior* in the Southern District of New York, along with American Bird Conservancy, Center for Biological Diversity, and Defenders of Wildlife.[274] The coalition of conservation organizations asked the court to declare the memorandum arbitrary, capricious, an abuse of discretion, and unlawful, and requested that the court vacate the memorandum and require the DOI to implement its previous, long-standing policy.[275] The thrust of the plaintiffs' allegation is that the Memorandum and its implementing guidance "interpret the language of the MBTA in a manner that is contrary to the Department's prior interpretations of the MBTA and reverses Defendants' prior policy and interpretation of the protections offered to migratory birds by the plain

268 Letter from Former Dep't of the Interior Officials, *supra* note 245.

269 *Id.*

270 Letter from ten current U.S. Senators, *supra* note 245.

271 *Id.*

272 Letter from U.S. Representatives, to Ryan Zinke, Sec'y of the Interior 1 (Apr. 19, 2018), https://perma.cc/UB3L-KPRM.

273 Letter from Conservation Organizations, *supra* note 245.

274 Complaint, Nat'l Audubon Soc'y v. U.S. Dep't of the Interior, No. 1:18-cv-04601 (S.D.N.Y. filed May 24, 2018), https://perma.cc/MUX3-ZHFK.

275 *Id.* at ¶ 10.

language of the MBTA."[276] Furthermore, they allege the agency acted arbitrarily and capriciously by disregarding reasonable alternatives that focused on major foreseeable causes of incidental take without needlessly imperiling so many birds, in contravention of the Act's purpose.[277] Finally, they claim the agency arbitrarily and capriciously undermined "decades of successful work by the FWS to develop collaborative programs with industry and Plaintiff conservation organizations aimed at protecting migratory while allowing industrial activities to proceed."[278]

The complaint forecasts the same inevitable outcome as that predicted by the aforementioned critics of the administration's position:

> [I]ndustrial actors need no longer take any precautions to avoid incidentally killing or injuring migratory birds, even when it is inevitable that industrial activities will, in fact, harm migratory birds and have a far more deleterious effect on migratory birds than hunting and similar intentional actions specifically directed at migratory birds, and even when relatively modest and inexpensive measures could be employed to prevent or ameliorate such adverse impacts.[279]

The claim that the resulting harms to migratory birds will be "far more deleterious" than hunting and intentional actions is important to note. This comparison speaks to the great degree of harm to which this reversal of federal policy exposes birds. The complaint further explains the dire consequences of the memorandum by noting that "the Service can no longer refer for prosecution anyone for actions that incidentally kill or take migratory birds, no matter how egregious or reckless the conduct and how easy it might be to avoid the harmful consequences[,]" and similarly, that neither the DOI nor the FWS can continue utilizing the Act "to reach reasonable accommodations with industry to ameliorate adverse impacts on protected migratory bird populations which are a public resource."[280]

In addition to alleging that the memorandum itself was arbitrary and capricious, the plaintiffs also alleged that the issuance and implementation of the memorandum were arbitrary and capricious for their failure to comply with the APA's public notice and comment requirements.[281] The memorandum is subject to the APA because it constituted a "substantive change to existing law and policy with significant legal and practical consequences for affected parties with interests in migratory bird conservation as well as industries whose activities routinely kill or take migratory birds."[282] Plaintiffs' third and final count alleged that the DOI violated NEPA by failing to prepare an environmental impact statement,

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276 *Id.* at ¶ 77.
277 *Id.* at ¶ 79.
278 *Id.*
279 *Id.* at ¶ 7 (emphasis omitted).
280 *Id.* at ¶ 8.
281 *Id.* at ¶ 82.
282 *Id.*

conduct an environmental assessment, or invoke a categorical exclusion before issuing the memorandum.[283]

Beyond the arbitrary and capricious claims, the plaintiffs also allege injuries suffered by their members stemming from their interests in conserving bird species and habitats. In this vein, the plaintiffs claimed that the memorandum required the plaintiff organizations to "divert their limited resources and personnel in an attempt to fill the gap left by the federal government's abandonment of efforts to implement the MBTA so as to mitigate the impact of industrial activities on migratory birds."[284]

Plaintiffs have strong arguments, and there is reason to believe that they will succeed in their efforts to make sure the MBTA is not crippled by the current Administration.

VI. CONCLUSION

The MBTA had its 100th anniversary in 2018. The Migratory Bird Treaties and the Migratory Bird Treaty Act are powerful tools that the federal government has used to save the lives of thousands of birds a year for the past century. As one of the earliest environmental statutes, the MBTA has generally proven up to the task of addressing the evolving threats and new challenges to the survival of migratory birds. From hunting to agricultural practices and the energy sector, the federal government has used the MBTA to protect the invaluable resource of migratory birds.

However, that has changed with the Trump Administration. The federal government has reversed course, stating that it will no longer address the most significant threats to migratory birds: incidental takes. In so doing, it has transformed from a protector of migratory birds through its role signing the Migratory Bird Treaties, adopting the Migratory Bird Treaty Act, and responsibly implementing this statute, to a threat to migratory birds as it gives tacit approval to industry and government actions that will kill them. One hundred years after the MBTA came to be, the federal government has changed from a friend of migratory birds to one of their greatest foes.

Fortunately, conservation organizations are already challenging this dramatic about-face. To ensure that the MBTA continues to be an effective law over the next 100 years, the Trump Administration's policy reversal must be corrected and the federal government must prosecute incidental takes. Moreover, to ensure that citizens can play a greater role in enforcement of the MBTA as well, the DOI should strengthen its stance on incidental takes by clarifying that government agencies may also be found liable for incidental takes. Government agencies cause incidental takes of birds through permitting decisions, pesticide approvals, climate change policy (or lack thereof), and more. Citizen suits under the APA alleging that the federal government is not acting in accordance with the MBTA's unintentional take prohibition are an important tool because the federal government has not

283 *Id.* at ¶ 87.
284 *Id.* at ¶ 24.

litigated unintentional takes nearly as aggressively as it could. Citizen suits are critical in environmental litigation generally,[285] making up almost half of all environmental judicial enforcement.[286] Environmental groups have not engaged in such litigation with regards to the many government actions that contribute to incidental take of birds, however, as current uncertainty about MBTA coverage of government actions has made it risky to do so.

By making clear that government agency incidental takes are covered by the MBTA, DOI would make it easier for environmental groups to be more involved in decreasing government agency incidental takes and in so doing would help to protect birds from the most significant threats they currently face, from habitat loss to climate change. Such a policy would enable another of our greatest resources, our citizens, to sue the numerous government agencies that engage in activities that incidentally take birds. Such a policy would allow the MBTA to become an even more effective tool over the next century and ensure the survival of millions more birds.

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285 Scott, *supra* note 147, at 738.

286 *Id.* at 738 n.92.