The MBTA: Why the DoD Should Want an Incidental Take Permit Program

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A Thesis submitted to

The Faculty of
The George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws
May 16, 2021

Thesis directed by
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Acknowledgments

First and foremost, I would like to thank my wife for her constant love and support, especially over the past nine months. I could never articulate how much I appreciate your calming presence and endless patience. Thank you for listening to me talk incessantly about the Migratory Bird Treaty Act, the renewable energy industry, and our near-peer competitors. Next, I must thank my academic advisor, Ms. Lin Harmon-Walker, for making this thesis possible. Thank you for your constant encouragement and the many hours spent on Zoom working on my thesis. My GWU performance would have been significantly diminished if you hadn't been my advisor. To my Wildlife Law and Government Procurement professors, thank you for your insight and your time. Each of you played a critical role in making this thesis the product that it is. Additionally, I absolutely must thank my classmates and gym pals. You all kept me sane. And finally, I would like to thank my parents. Everything I am begins with you.

Disclaimer

Major Christian Gordon serves in the United States Air Force Judge Advocate General's Corps. This paper is submitted in partial satisfaction of the requirements for the degree of Master of Laws in Environmental Law and Government Procurement at The George Washington University Law School. The views expressed in this paper are solely those of the author. They do not reflect the official policy or position of the United States Air Force, Department of Defense, or United States Government.

Abstract

The MBTA: Why the DoD Should Want an Incidental Take Permit Program

Congress created the Migratory Bird Treaty Act (MBTA) of 1918 to stop hunters and poachers from killing migratory birds almost to extinction. However, now migratory birds face different, modern foes, industrial operators, such as the renewable energy industry. These industrial operators are not committing direct takes of migratory birds like hunters and poachers but indirect and unintentional takings of migratory birds. Courts are divided over whether or not the unintentional and incidental takes violate the MBTA. This split and confusion have led to uncertainty and fear of liability for industries, which has stifled innovation. It is time for Congress to amend the MBTA in a way that continues to protect migratory birds but also provides certainty to industries, so the MBTA does not throttle innovation. This thesis argues that a Congressionally-mandated Incidental Take Permit Program can grant industries the certainty they need regarding liability under the MBTA. That certainty will allow industries to innovate while allowing the Fish and Wildlife Services to use their tools to protect migratory birds from threats new and old.

The creation of an Incidental Take Permit Program under the MBTA should be a top priority for DoD. The Incidental Take Permit Program will lead to innovation from the renewable energy industry that will enhance mission readiness and national security, reduce the DoD's dependency on liquid fuel, combat climate change, and help the DoD compete with its near-peer adversaries. However, there must be a shift in how DoD's government procurement officials think and evaluate products before the DoD can take

advantage of the invaluable sustainable solutions from a Congressional mandated Incidental Take Permit Program.

For DoD to fully maximize the benefits of an Incidental Take Permit Program under the MBTA, the DoD must form an aggressive sustainable procurement regime. This thesis explains how the DoD and its procurement officials can do this.

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Introduction

It is no surprise that the nation's oldest wildlife law, the Migratory Bird Treaty Act of 1918 ("MBTA"),[1] is one that debatably continues to be the most confusing and contentious of all the federal statutes charged with protecting and regulating wildlife.[2] Under the MBTA, the Department of the Interior ("DOI"), through the U.S. Fish and Wildlife Service ("FWS"), administers a program that protects 1093 species of migratory birds that spend all or a portion of their lives in the United States.[3]

History of the MBTA. To protect birds migrating between the United States and Canada, Congress enacted the MBTA.[4] The MBTA implemented the 1916 treaty with Great Britain,[5] which acted on behalf of its then-province Canada.[6] Subsequently, Congress amended the MBTA to implement treaties between the United States and

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[1] 16 U.S.C. §§ 703–711 (2006).

[2] The Lacey Act of 1900, 16 U.S.C. §§ 3371–3378, is known as the nation's first wildlife conservation statute with a national reach. Robert S. Anderson, The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, 16 PUB. LAND L. REV. 27, 29 (1995). The MBTA replaced the Weeks-McLean Migratory Bird Act, enacted in 1913. It was the first federal law to regulate the shooting of migratory birds. A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, U.S. FISH & WILDLIFE SERV., available at https://www.fws.gov/birds/policies-and-regulations/laws-legislations/other-relevant-laws.php (last visited Mar 29, 2021). Two federal district courts found the Weeks-McLean Act unconstitutional. A third district court upheld the Weeks-McLean Act as constitutional, but an appeal before the Supreme Court was dismissed as moot following the ratification of the Migratory Bird Treaty of 1916 and the enactment of the MBTA in 1918. DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW CASES AND MATERIALS 459–60 (2010).

[3] See 50 C.F.R. § 10.13 (2013); Birds Protected by the Migratory Bird Treaty Act, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php (last visited Mar. 29, 2021).

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

[5] *Id.*

[6] Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Treaties List, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/laws/lawsdigest/treaty.html (last visited Mar. 29, 2021).

Mexico,[7] Japan,[8] and Russia.[9] The MBTA protects birds born in the United States or its territories that are part of a family group or species covered by one of the four migratory bird treaties.[10]

The MBTA idea originated in the late nineteenth and early twentieth centuries during a time of extreme exploitation of game and non-game birds in the United States.[11] The United States was quickly urbanizing, and the overall market for game and non-game birds was unregulated.[12] Additionally, new technology exacerbated the commercial exploitation of large populations of game birds. The railroads' expansion carried hunters farther west; refrigerated railcars allowed hunters to ship game birds to urban markets. The telegraph allowed news to spread quickly about the location of millions of adult birds and young nestlings.[13] Also contributing to the overexploitation of game and non-game birds was ladies' fashion in the gilded age, which popularized elegant hats, gowns, and

[7] Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311. Congress amended the MBTA on June 20, 1936 to implement the treaty. 16 U.S.C. § 703 (2006).

[8] 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, U.S.-Japan, Mar. 4, 1972, 25.3 U.S.T. 3329. Congress amended the MBTA on June 1, 1975 to implement the treaty. 16 U.S.C. § 703 (2006).

[9] Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.- U.S.S.R., Nov. 26, 1976, 29.4 U.S.T. 4674. Congress amended the MBTA on November 8, 1978 to implement the treaty. 16 U.S.C. § 703 (2006).

[10] 50 C.F.R. § 10.13 (2013).

[11] See George Cameron Coggins & Sebastian T. Patti, The Resurrection and Expansion of the Migratory Bird Treaty Act, 50 U. COLO. L. REV. 165, 167–69 (1979). See generally PETER MATTHIESSEN, WILDLIFE IN AMERICA 157–82 (1987); CARL SAFINA, THE VIEW FROM LAZY POINT—A NATURAL YEAR IN AN UNNATURAL WORLD 184–87 (2011).

[12] GOBLE & FREYFOGLE, supra note 2, at 769 (quoting an excerpt from GUY A. BALDASSARRE & ERIC G. BOLEN, WATERFOWL ECOLOGY AND MANAGEMENT 517–20 (1994)).

[13] *Id*. at 28. One such nesting in 1878 at Petoskey, Michigan, was estimated to cover 750 square miles and include 136,000,000 birds.

capes, decorated with ornate feathers of exotic bird species like the roseate spoonbill, great white heron, and snowy egret.[149]

The extreme exploitation of game and non-game birds led to the Audubon Society's founding in 1886[15] and compelled conservationists and ornithologists to advocate for enacting federal and state governments' protective measures.[16] "[T]he framers of the MBTA were determined to put an end to the commercial trade in birds and their feathers that, by the early years of the twentieth century, had wreaked havoc on the populations of many native bird species."[17] Once enacted, the MBTA "decreed that all migratory birds and their parts (including eggs, nests, and feathers) were fully protected from exploitation."[18]

The MBTA successfully protects migratory birds from the over-exploitation of activities like hunting and poaching.[19] The Snowy Egret provides a great example. Hunters once killed the Snowy Egret in large numbers for their plumage. Still, they rebounded due to the MBTA's protections from near extinction to an estimated current population of over 1.3 million in the United States.[20] However, many bird species in the

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[14] See DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 9–12 (2009).

[15] History of Audubon and Science Based Bird Conservation, https://www.audubon.org/about/history-audubon-and-waterbird-conservation (last visited Apr. 7, 2021).

[16] *Id.*

[17] A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/international/laws-treaties-agreements/ (last visited March 29, 2021).

[18] *Id.*

[19] See Conrad A. Fjetland, Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds, 40 NAT. RESOURCES J. 47, 48 (2000).

[20] Snowy Egret, NAT'L AUDUBON SOC'Y, http://birds.audubon.org/species/snoegr (follow "Conservation Status" tab) (last visited March 5, 2021).

United States now face a greater range of threats than those posed by the late nineteenth and early twentieth centuries' hunters and poachers.[21]

Modern Threats to Birds. Unlike the late nineteenth and early twentieth centuries, today, birds are far more likely to be killed by anthropogenic threats than hunters.[22] In 2017, the FWS Migratory Bird Mortality Fact Sheet identified the leading causes and estimated levels of mortality for the 10 to 20 billion birds that breed in the United States[23] (other than from habitat loss or degradation) to be collisions with building windows (estimated 365 to 988 million bird deaths per year), communications towers (6,600 million), high tension transmission and power lines (estimated 8 to 57 million), electrocutions (tens of thousands), impacts with vehicles (80 million or more), pesticide poisoning (72 million), and wind turbine rotors (estimated average of 234 thousand bird deaths per year).[24]

The Problem. Courts have successfully applied the MBTA to bird deaths caused by routine hunting and poaching activities.[25] However, in the 1970s, the FWS began prosecuting other actions that killed migratory birds, activities that were outside the MBTA's original scope.[26] Now, the FWS prosecutes industrial activities that cause bird

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[21] See Fjetland, supra note 19, at 48–49; Umair Irfan, Bats and Birds Face Serious Threats From Growth of Wind Energy, N.Y. TIMES, Aug. 8, 2011, http://www.nytimes.com/cwire/2011/08/08/08climatewire-bats-and-birds-face-serious-threats-from-gro-10511.html (last visited 29 Mar 21)..

[22] David Sibley, Causes of Bird Mortality, SIBLEY GUIDES (Jan. 15, 2016), http://www.sibleyguides.com/conservation/causes-of-bird-mortality (last visited Mar. 29, 20202110).

[23] Migratory Bird Mortality: Many Human-Caused Threats Afflict our Bird Populations, U.S. FISH & WILDLIFE SERV. (Jan. 2002) [hereinafter Migratory Bird Mortality], available at https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last visited 29 Mar 2021).

[24] *Id.*

[25] See infra notes 42-52 and accompanying text (discussing the original aim of the MBTA and how the language actually turned out).

[26] See infra notes 84-94 and accompanying text (describing the difficulty courts have had in interpreting the MBTA's scope in regard to incidental take caused by industrial activities).

deaths like wastewater ponds, oil and gas extraction, electricity transmission, logging, pesticide application, communication tower construction, and wind farms.[27] The FWS' prosecution of incidental industrial take created a split among U.S. Circuit Courts of Appeals.[28] One side is applying strict liability to unintentional bird deaths from industrial activities, limited by proximate cause.[29] The other side refuses to apply the MBTA to activities that fall outside the original scope of the MBTA—hunting, and poaching.[30] The resulting circuit split has led to confusion for the FWS, various industries, including the renewable energy industry, and lower courts.

The Solution. This thesis proposes that Congress end the confusion by amending the MBTA to authorize an incidental take program, permitting the FWS to approve limited unintentional killings of protected birds. This would clarify liability and project planning and strike a balance between Migratory Bird conservation and the inevitable killing of protected birds by industrial operations. It would allow the FWS to protect migratory birds while allowing the FWS to take judicial action against companies that fail to obtain a permit or violate the MBTA in some other way.

The Significance for DoD. An incidental take program will provide industry certainty regarding liability and project planning. That certainty will lead to innovation that can enhance the Department of Defense's (DoD) mission readiness and national security. Innovation in industry, especially the renewable energy industry, could also lead to the DoD's reduced dependency on liquid fuel and the creation of deployable energy

[27] See infra notes 95-104 and accompanying text (listing industrial activities that the FWS has prosecuted).
[28] See infra notes 90-109 and accompanying text (outlining the strict liability approach to the MBTA).
[29] See infra notes 110-120 and accompanying text (highlighting the narrow interpretation of MBTA take).
[30] See infra notes 121-137 and accompanying text (emphasizing the confusion created by the circuit split and the expansion of the MBTA).

sources, both of which are necessary as the DoD prepares for combat with near-peer adversaries. Finally, innovation in renewable energy industries, like the wind energy industry, can create sustainable procurement opportunities for the DoD, which will help DoD contribute to the fight against climate change. All of these are reasons the DoD should want an Incidental Take Permit Program.

How DoD can take advantage. However, before DoD can take advantage of the sustainable solutions resulting from the Incidental Take Permit Program, it needs to form an aggressive sustainable procurement regime. DoD and their procurement officials have to focus less on low prices and more on the life cycle cost analysis when purchasing. Focusing on a life cycle cost analysis will allow DoD's procurement officials to see their procurements' actual value and purchase sustainable solutions even at an initial price premium.

Outline of this Article. Part I discusses the issue with the MBTA. It provides the historical backdrop of the MBTA, details the underlying treaties, illustrates the Act's functional operation, and provides a review of the Act's varying judicial and executive interpretations. In Part II, the thesis considers options to solve the current MBTA confusion, including (1) congressional redefinition of the MBTA take, (2) congressional authorization of an incidental take permit program, and (3) FWS implementation of an incidental take permit program without explicit congressional authorization. This thesis concludes that a congressionally authorized incidental take permit program would best solve the current confusion surrounding the MBTA application and scope. In Part III, the thesis discusses the benefits an incidental take permit program can have for DoD, chiefly enhancing National Security. Finally, in Part IV, the thesis explains what DoD needs to

do to take advantage of the increase in sustainable solutions resulting from the Incident Take Permit Program.

Part I: The Problem – Confusion Surrounding the MBTA

I. History of the MBTA

In the early 19th century, the United States began to grow.[31] The country's growing population ventured west, in the name of "manifest destiny," and discovered many untapped natural resources.[32] The expansion led to a boom in commercial trade and the recreational hunting of animals.[33] The near-extinction of bison from overhunting caused many in the United States to become aware of species' vulnerability to commercial hunting.[34] However, overhunting was not exclusive to bison but impacted many species, including migratory birds.[35]

The demise of passenger pigeons exemplifies the impact commercial hunting had on bird populations.[36] According to ornithologists, the passenger pigeon once was Earth's most abundant species of bird.[37] Alexander Wilson, known as the father of American ornithology, estimated that between the late 18th century and early 19th century, the size

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[31] See Guillaume Vandenbroucke, The U.S. Westward Expansion, 49 INT'L ECON. REV. 81, 94, 104 fig.6 (2008).

[32] See Meredith Blaydes Lilley & Jeremy Firestone, Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward, 38 ENVTL. L. 1167, 1177-78 (2008).

[33] *Id*.

[34] *Id*.

[35] *Id.* at 10.

[36] JENNIFER PRICE, FLIGHT MAPS: ADVENTURES WITH NATURE IN MODERN AMERICA, 5 (Basic Books 1999) ("[T]he extinction [of the passenger pigeon] finally persuaded many Americans that the continent's wildlife was finite and that much of it had been destroyed.").

[37] EDWARD HOWE FORBUSH ET AL., A HISTORY OF THE GAME BIRDS, WILD-FOWL AND SHORE BIRDS OF MASSACHUSETTS AND ADJACENT STATES 416, 433 (Wright and Potter 1912) ("Once the most abundant species, in flights and on its nesting grounds, ever known in any country, ranging over the greater part of the continent of North America in innumerable hordes, the race seems to have disappeared within the past thirty year, leaving no trace.").

of one flock of passenger pigeons was roughly 240 miles long and a mile wide.[38] According to Wilson's estimates, a flock of passenger pigeons "contain[ed] two billion, two hundred and thirty million, two hundred and seventy-two thousand pigeons."[39] Another bird observer wrote: "They say that when a flock of passenger pigeons flew across the countryside, the sky grew dark. The air rumbled and turned cold. Bird dung fell like hail. Horses stopped and trembled in their tracks, and chickens went in to roost."[40] Notwithstanding the abundance of passenger pigeons, commercial hunting drove them to extinction in less than three decades.[41]

At the turn of the century, as the public began to voice their outrage against birds' commercial hunting, Congress noticed.[42] Congress' first attempt to curb the bird massacre was the Lacey Act of 1900.[43] Congress created the Lacey Act to prevent interstate and international transportation of birds killed and captured illegally, reduce domestic bird decline, and avoid introducing harmful foreign bird species.[44] However, the highly profitable black market and lack of enforcement mechanisms[45] made the Lacey Act ineffective in reducing migratory birds' illegal trade.[46]

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[38] *Id.* at 444.

[39] *Id.*

[40] PRICE, supra note 36, at 1–2.

[41] FORBUSH, supra note 37, at 460; PRICE, supra note 36, at 3–5.

[42] Lilley & Firestone, supra note 32, at 1178.

[43] Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2013)); see Lilley & Firestone, supra note 32, at 1178.

[44] Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2013)); Robert S. Anderson, The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking, 16 PUB. LAND. L. REV. 27, 29 (1995); see also Lilley & Firestone, supra note 32, at 1178.

[45] Lilley & Firestone, supra note 32, at 1178; A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, U.S. Fish & Wildlife Serv., https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php (last visited Mar. 29, 2021) [hereinafter Protecting Migratory Birds].

[46] Protecting Migratory Birds, supra note 45.

The Lacey Act's shortcomings led Congress to pass the Weeks-McLean Law in 1913.[47] It sought to protect birds that migrate over state lines by using federal resources.[48] Shortly after passing the law, dissatisfied hunters facing prosecution under the Weeks-McLean Law challenged the law's constitutionality.[49] The defendants argued that under the Tenth Amendment, the regulation of wildlife fell solely to the states because there is no express constitutional authorization for Congress to regulate it.[50] Both of the U.S. District Courts that heard the challenges held the Weeks-McLean Law unconstitutional, finding the Constitution did not grant authority to Congress to control wildlife.[51] The court based their holdings upon U.S. Supreme Court precedent finding that states possessed the sole power to regulate wildlife within their borders and struck down the Weeks-Mclean Act as unconstitutional.[52]

A. Treaties Underlying the MBTA

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[47] Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918).

[48] *Id*. The act provided:

> All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

[49] See, e.g., Unites States v. McCullagh, 221 F. 288, 290 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 156 (E.D. Ark. 1914).

[50] Lilley & Firestone, supra note 32, at 1179.

[51] McCullagh, 221 F. at 294 ("Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our county."); Shauver, 214 F. at 160 ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.").

[52] McCullagh, 221 F. at 293 ("The power of a state to control and regulate the taking of game cannot be questioned.") (citing Geer v. Connecticut, 161 U.S. 519 (1896)), overruled by Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)); Shauver, 214 F. at 158 (citing Geer v. Connecticut, 161 U.S. 519 (1896), overruled by Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)).

Congress failed to protect migratory birds using its interstate commerce powers, so Congress turned to its treaty powers.[53] In 1916, the United States entered into a treaty with Great Britain.[54] To implement that treaty, Congress enacted the Migratory Bird Treaty Act in 1918.[55] During the next 58 years, the United States entered into three more migratory bird treaties with Mexico in 1937, Japan in 1972, and Russia in 1976.[56] Each treaty differs regarding what and how the parties might allow for the take of migratory birds. Therefore, the FWS must comply with the provisions found in each of the four treaties when implementing an incidental take program to not exceed its statutory authority under the MBTA. Regardless of their differences, all of the treaties state: "[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill" any migratory bird unless permitted by the FWS.[57]

1. The Canada Treaty

The United States and Great Britain formed the first treaty in 1916 to protect birds migrating between Canada and the United States. [58] In 1995, Canada and the United States modified the original treaty to account for indigenous peoples' hunting rights and

[53] Larry Martin Corcoran & Elinor Colbourn, Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties, 77 DEN. U. L. REV. 359, 360–61 (1999) ("Secretary of State Robert Lansing and Senator Elihu Root conceived a constitutional solution to the need for federal protection of migratory birds by invoking the treaty power . . . ."); Protecting Migratory Birds, supra note 17 ("Following close on the heels of the Lacey Act and the Weeks-McLean Law, the framers of the Migratory Bird Treaty Act were determined to put an end to the commercial trade in birds and their feathers that, by the early years of the 20th century, had wreaked havoc on the populations of many native bird species.").

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

[55] Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2012)).

[56] See 16 U.S.C. § 703(a).

[57] 16 U.S.C. § 703(a)

[58] *See* 39 Stat. 1702 (1916).

improve the management and protection of migratory birds.[59] The 1995 Protocol states that the United States and Canada are committed "to the long term conservation of shared species of migratory birds...that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information."[60] Thus, the protocol acknowledges that some degree of take coincides with migratory bird conservation. Additionally, concerning take, the 1995 Protocol states: "Subject to laws, decrees or regulations . . . , the taking of migratory birds may be allowed at any time of the year for scientific, educational, propagative, or other specific purposes consistent with the conservation principles of this Convention."[61]

The 1995 Protocol outlines five conservation principles that serve as guidelines for permitted takes: (1) management of migratory birds internationally, (2) guaranteeing various sustainable uses, (3) protecting healthy bird populations for harvesting, (4) protecting necessary bird habitat, and (5) restoring diminished bird populations.[62] Thus, the 1995 Protocol allows the parties to regulate take per these five conservation principles, as long as the take does not further accelerate the decline of protected birds or destroy necessary habitat. Therefore, to comply with the Canada Treaty, any incidental take permit program must have no impact on bird populations and improve or conserve migratory birds' required habitats.

2. The Mexico Treaty

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[59] Protocol Amending the 1916 Convention for the Protection of Migratory Birds, U.S.-Can., Dec. 5, 1995, S. TREATY DOC. NO. 104-28, 1995 WL 877199, at 1 [hereinafter 1995 Protocol].

[60] 1995 Protocol at Preamble.

[61] *Id*. at Article II.3.

[62] *Id*. at Article II.

In 1937, the United States entered into a migratory bird treaty with Mexico.[63] The purpose of the treaty was "for the protection of migratory birds and game mammals."[64] Concerning migratory birds, the Mexico Treaty states that "it is right and proper to protect the said migratory birds...in order that the species may not be exterminated."[65] Additionally, "for this purpose it is necessary to employ adequate measures which will permit a rational utilization of migratory birds for the purpose of sport as well as for good and commerce and industry."[66] The Mexico Treaty only necessitates the parties to restrict takes by creating closed hunting seasons and take-free refugee zones, and prohibiting killing migratory insectivorous birds.[67] In contrast to the 1995 Protocol and other MBTA treaties, the Mexico Treaty allows for the most use of migratory birds. The Mexico Treaty permits the parties to control birds' take as they see fit, as long as they prevent the species' termination.

3. The Japan Treaty

In 1972, about 35 years after the Mexico Treaty, the United States and Japan signed a migratory bird treaty.[68] The Japan Treaty only allows the taking of migratory birds in specific circumstances.[69] Like 1995 Protocol, the Japan Treaty permits take "[f]or

[63] Convention between the United States of America and Mexico for the protection of migratory birds and game mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311.
[64] Mexico Treaty at Preamble.
[65] *Id*.
[66] *Id.*
[67] Mexico Treaty, supra note 68, at art. II(A)–(F), 1–2.
[68] 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, U.S.-Japan, Mar. 4, 1972, T.I.A.S. No. 7990.
[69] *Id*. at art. III (1), 1; see HOLLAND & HART, supra note 57, at 10.

scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention."[70]

4. The Russia Treaty

In 1976, the United States and Russia entered into the final migratory bird treaty underlying the MBTA.[71] Like the Japan Treaty, the Russia Treaty explicitly prohibits the taking of migratory birds, except "for scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention."[72]

B. Operative Language of the MBTA

The Secretary of the Interior has the power under the MBTA to issue regulations implementing the underly treaties[73] and protect nearly 1100 species of birds.[74] The MBTA permits misdemeanor and felony criminal penalties for the unauthorized take of protected birds.[75] The MBTA makes any person, association, or other business entity who commits a misdemeanor level offense liable for a fine of not more than $15,000 or imprisonment not to exceed six months.[76] Additionally, the misdemeanor penalties may

[70] Japan Treaty, supra note 72, at art. III(1)(a), 1.

[71] Convention: Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, T.I.A.S. No. 9073.

[72] *Id*. at art. II(1)(a), 1.

[73] See 16 U.S.C. § 712(2) (1978, current through 2021).

[74] 50 C.F.R. § 10.13 (1973) (listing protected species); U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002), available at https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last visited Mar. 29, 2021).

[75] 16 U.S.C. §§ 707(a)-(d) (1918).

[76] 16 U.S.C. §707(a).

apply without any showing of guilty intent.[77] The MBTA does not contain a mens rea element.

Consequently, the majority of U.S. Courts of Appeals construe the MBTA to be a strict liability statute.[78] However, a minority of courts have limited the MBTA's misdemeanor provisions to intentional actions directed at migratory birds.[79] The current circuit split creates confusion for the FWS, industries like the renewable energy industry, and district courts applying the MBTA.

II. The Varied Interpretations of the MBTA & Incidental Take

A. Judicial Interpretations

Before the 1970s, criminal prosecutions under the MBTA concentrated on illegal hunting, poaching, and possessing of protected migratory birds.[80] However, in the 1970s,

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[77] See, e.g., United States v. Apollo Energies, Inc., 611 F.3d 679, 685 (10th Cir. 2010) ("At least seven other circuits either had held that MBTA misdemeanors are strict liability crimes or noted the MBTA's lack of mens rea in passing.").

[78] See, e.g., Apollo, 611 F.3d at 685; United States v. Morgan, 311 F.3d 611, 616 (5th Cir. 2002) ("In light of the above case law, the express intent of Congress, and the nature of the violation, we hold that possessing migratory game birds exceeding the daily bag limit in violation of the MBTA and its attendant regulations is a strict liability offense."); United States v. Pitrone, 115 F.3d 1, 5 (1st Cir. 1997) ("For most of its existence, the MBTA contained
no scienter requirement whatever; its felony provision, like its misdemeanor provision . . . imposed strict liability."); United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) ("Since the inception of the Migratory Bird Treaty in the early part of this century, misdemeanor violations of the MBTA . . . have been interpreted by the majority of the courts as strict liability crimes."); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); United States v. FMC Corp., 572 F.2d 902, 907–08 (2d Cir. 1978).

[79] United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) ("This Court expressly finds that the use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act."); United States v. Ray Westall Operating, Inc., No. CR-05-1516-MV, 2009 WL 8691615, at 7 (D.N.M. 2009) ("The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths."); United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at 3 (W.D. La. 2009) ("These regulations were clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of
totally legal and permissible activities, as happened here.").

[80] Larry Martin Corcoran & Elinor Colbourn, Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties, 77 DENV. U. L. REV. 359, 385-86 (1999)

the FWS began to use the MBTA to prosecute not only hunters and illegal bird traffickers but takings incidental to activities other than hunting, poaching, or other violations specifically listed in Section 703 of the MBTA.[81]

Federal judges have wrestled with whether the MBTA applies to incidental takes and, if so, deciding the scope of prohibited activity.[82] Fearful of the potentially large and irrational amount of liable conduct that strict liability for MBTA violations could include, some courts began requiring proximate causation for MBTA prosecutions.[83] This has created circuit divisions regarding MBTA case law, which has resulted in uncertainty and confusion regarding liability among industrial companies, like the wind energy industry, telecommunication industry, and oil refinery industry.[84] The Second and Tenth Circuits have established that incidental taking is a violation of the MBTA. The Eighth and Ninth Circuits have found that incidental taking is not a violation of certain types of activities.[85]

1. Second and Tenth Circuits

The U.S. Court of Appeals for the Second Circuit addressed the MBTA's applicability to incidental takes in 1978.[86] In *United States v. FMC Corp.*, the second

[81] See George Cameron Coggins & Sebastian T. Patti, The Resurrection and Expansion of the Migratory Bird Treaty Act, 50 U. COLO. L. REV. 165, 183-185 (1979).

[82] See United States v. Pitrone, 115 F.3d 1, 6 (1st Cir. 1997).

[83] Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d at 1085 ("[T]o obtain a guilty verdict under § 707(a), the government must prove proximate causation."); see United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010).

[84] See generally Sandra A. Snodgrass, It's for the Birds—Recent Developments Under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, in FEDERAL REGULATION OF CULTURAL RESOURCES, WILDLIFE, AND WATERS OF THE UNITED STATES, Paper No. 10A, 10A-2 (Rocky Mt. Min. L. Fdn. 2012) ("But this reliance on the exercise of prosecutorial discretion provides little comfort or certainty to project developers who are trying to obtain financing and manage project risks."). Wind energy development and everything that goes with it-turbines, high-tension power transmission lines, buildings, roads, fences and other structures is possibly the largest invlyx of new infrastructure on a national scale since the construction of the interesatae highways system.

[85] Newton Cnty. Wildlife Ass'n v. United States Forest Serv., 113 F.3d 110, 111.

[86] See generally United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

circuit affirmed a conviction for killing migratory birds after an inspection of FMC Corporation's wastewater ponds revealed several separate instances of bird deaths due to toxic chemical exposure in the ponds.[87] FMC argued they should not be liable because they took no affirmative action to kill the birds and therefore had no intent to kill them.[88] However, the court found that FMC took an "affirmative act [when] it engaged in the manufacture of a pesticide known to be highly toxic"[89] and again when FMC "failed to act" despite their chemical reaching a pond where contact with protected birds was likely.[90] Finally, the court rejected FMC's argument that it lacked knowledge of the bird deaths by explaining "the statute does not include as an element of the offense 'willfully, knowingly, recklessly, or negligently.'"[91] *FMC Corp.* was the first significant circuit court decision upholding strict liability for incidental takings under the MBTA.[92]

In 2010, the Tenth Circuit in the *United States v. Apollo Energies, Inc.* addressed the MBTA's applicability to incidental takes.[93] In *Apollo Energies,* the Tenth Circuit affirmed two oil and gas producers' convictions for the deaths of migratory birds found in the exhaust pipes of their oil drilling equipment ("heater-treaters").[94] On appeal, the defendants argued that the MBTA was unconstitutional both facially and as applied to their case.[95] First, the defendants argued that the MBTA is unconstitutionally vague

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[87] *Id*. at 904–05.
[88] *Id.*
[89] *Id*. at 907.
[90] *Id.*
[91] *Id*. at 908.
[92] Kalyani Robbins, Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act, 42 ENVTL. L. 579, 598 (2012) ("While this case has been highly regarded and often cited—after all, until [2010] it was the only appellate case on the matter—it is also well over three decades old.").
[93] United States v. Apollo Energies, Inc., 611 F.3d 679, 684-86 (10th Cir. 2010).
[94] *Id*. at 682–83.
[95] *Apollo Energies, Inc. at 682.*

because it does not adequately notify what conduct violates the MBTA.[96] Next, the defendants argued the otherwise harmless behavior that may lead to a violation of the MBTA does not afford "fair notice" of what equates to criminal conduct.[97]

Regarding the vagueness argument, the court recognized that definitions of criminal offenses must have sufficient definiteness so that an ordinary person can understand what conduct is prohibited, then held: "The MBTA is not unconstitutionally vague. It criminalizes a range of behavior…that will lead to the death or captivity of protected migratory birds, including to 'pursue, hunt, take, capture, [and] kill….'''[98]

Concerning the defendant's "fair notice" argument, which claims that using a strict liability standard would criminalize otherwise legal acts such as driving a car, the court held that "the MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster."[99] The court then explained that to be convicted, the defendants need not know the MBTA's provisions but know that their activity could cause the bird's death.[100]

Based on these principles, the Tenth Circuit upheld Apollo Energies' convictions and one of the convictions of Red Cedar Oil.[101] The court relied on evidence showing the FWS gave the defendants notice that protected birds could enter and become trapped in the heater treaters' various openings.[102] Thus, it was reasonably foreseeable that

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[96] *Id*. at 683.

[97] *Id*. at 688.

[98] *Id*. at 688-689.

[99] Apollo Energies, Inc., 611 F.3d at 690 ("Proximate causation is not a concept susceptible of precise definition. . . . We have recently said that proximate causation 'normally eliminates the bizarre,' and have noted its 'functionally equivalent' alternative characterizations in terms of foreseeability and duty.").

[100] *Id.* at 691.

[101] *Id*. at 682, 689–91.

[102] *Id*.

uncovered heater-treaters could kill protected birds.[103] However, the Tenth Circuit vacated Red Cedar's second conviction because there was insufficient evidence showing they had knowledge that would lead a reasonable person to believe that the unscreened heater-treaters would lead to migratory bird deaths.[104]

There are two critical takeaways from the *Apollo* decision: first, the misdemeanor clauses of the MBTA are strict liability offenses, which apply to incidental takings; second, there needs to be proximate causation for a conviction under the MBTA.[105]

2. Eighth and Ninth Circuits

In the 1990s, the Eighth and Ninth Circuits heard cases involving incidental takes but found the MBTA does not have jurisdiction over incidental takings.[106] After analyzing the MBTA's language and legislative history, these courts do not believe that actors who commit incidental takings are liable under the MBTA.[107]

In *Seattle Audubon Society,* the plaintiffs challenged the issuance of timber permits for logging they believed would destroy the habits of northern spotted owls and eventually kill protected birds.[108] The court held that "take" in the MBTA and FWS regulations "describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in

[103] *Id*. at 691.

[104] *Id*.

[105] *Id*.; see Robbins, supra note 96, at 601 ("The Apollo Energies court took the expectation that parties be on notice of the potential for regulation of their activities and twisted it into a requirement that the government provide individualized written notice of each particular risk of harm in order to hold the parties responsible for that harm.").

[106] See generally Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997).

[107] Newton Cnty. Wildlife Ass'n, 113 F.3d at 115; Seattle Audubon Soc'y, 952 F.2d at 302–03.

[108] Seattle Audubon Soc'y, 952 F.2d at 298–99, 302.

1918."[109] Therefore, the Eighth Circuit declined to apply the MBTA to "habitat modification or destruction."[110]

The Eighth Circuit also declined to include indirect and unintentional migratory bird deaths in the definition of take.[111] In *Newton County Wildlife Ass'n v. U.S Forest Service*, plaintiffs alleged that timber sale would "disrupt nesting of migratory birds, killing some," in violation of the MBTA.[112] The court did not agree. First, it opined the MBTA only prohibited "conduct directed at migratory birds."[113] Next, the court refused to hold anyone outside of hunters and poachers liable under the MBTA.[114] The court held, "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."[115]

Under the holdings in *Newton County Wildlife Ass'n* and *Seattle Audubon Society,* there is no liability for a company whose actions indirectly and unintentionally kill protected birds.[116]

3. District Courts

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[109] *Id*. at 302. (citing 50 C.F.R. § 10.12).

[110] Seattle Audubon Soc'y, 952 F.2d at 302.

[111] Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997).

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] See, e.g., United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1213 (D.N.D. 2012) ("This Court believes that it is highly unlikely that Congress ever intended to impose criminal liability on the acts or omissions of persons involved in lawful commercial activity which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act.").

Despite the most recent ruling in *Apollo*, district courts have not followed its reasoning.[117] In *United States v. Brigham Oil and Gas, L.P.*, the District of North Dakota, in the Eighth Circuit,[118] granted a motion to dismiss from oil field operators charged under the MBTA for dead birds found in their wastewater reserve pits.[119] The court held the MBTA's take prohibition only encompasses intentional acts directed towards migratory birds.[120] The court opined that it was not Congress's intent to criminalize behavior "which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act."[121]

The court held that the MBTA prohibits direct bird-killing acts, not indirect acts that cause unintentional bird deaths.[122] The court wrote, "In the context of the Act, 'take' refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths."[123] The court relied on the dictionary's definition of take and found "the definition involves deliberate, not accidental, conduct. It refers to a purposeful attempt to possess wildlife through capture, not incidental or accidental taking through lawful commercial activity."[124] Next, the court bolstered its position by relying on the Eighth and Ninth

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[117] See, e.g., United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at 5 (W.D. La. Oct. 30, 2009) ("To the extent that the court's decision in Apollo is inconsistent with the reasoning in this case, the undersigned simply declines to adopt the reasoning and rationale of that decision." (emphasis added)); but see United States v. CITGO Petroleum Corp., 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012) ("After a thorough review of the relevant case law, the Court agrees with the Tenth Circuit's holding in Apollo Energies that it is obvious that 'unprotected oil field equipment can take or kill migratory birds.'" (quoting Apollo, 611 F.3d at 686)).

[118] United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202 (D.N.D. 2012).

[119] *Id*. at 1203.

[120] *Id*.

[121] *Id*. at 1213.

[122] *Id*. at 1208.

[123] *Id*. (emphasis added).

[124] *Id*. 1208–09.

Circuits' opinions in *Newton* and *Seattle Audubon Society*. The courts barred prosecution under the MBTA indirect activity that killed protected birds.[125]

Additionally, the court relied on *United States v. Ray Westall Operating*, a case from the District of New Mexico, Tenth Circuit,[126] where the district court found that the MBTA does not extend to bird deaths in an oil and gas wastewater pond.[127] The *Brigham* court stated, "reserve pits are not directed at birds or their habitat."[128]

The *Brigham* court concluded that if the MBTA were understood to include any conduct that proximately caused a bird death, the statute would inflict liability on ordinary everyday activities like cutting trees, tending crops, operating a car, having windows, or owning a cat.[129] The court quoted a 2002 FWS study on the causes of bird deaths, which found the leading cause of bird deaths was collisions with building windows.[130]

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[125] *Id*. ("Other courts have recognized that lawful commercial activity, such as logging, that is unrelated to hunting or poaching and not directed at birds does not constitute a crime under the federal Migratory Bird Treaty Act.").

[126] *Id*. at 1210–11 (citing United States v. Ray Westall Operating, Inc., No. CR-05-1516- MV, 2009 WL 8691615 (D.N.M. Feb. 25, 2009)).

[127] Ray Westall Operating, Inc., 2009 WL 8691615.

[128] Brigham Oil & Gas, 840 F. Supp. 2d at 1211.

[129] *Id*. at 121-13.

[130] *Id*.

There is no agreement among the courts on how to apply the MBTA.[131] Currently, there are varying judicial approaches at the circuit and district levels.[132] This has created confusion and uncertainty amongst potential incidental takers.[133] This negatively impacts the industry's ability to innovate and create, which hinders the DoD's ability to enhance mission readiness and national security. Moreover, exasperating this confusion are the changing interpretations of MBTA jurisdiction from the executive branch.

B. The Department of the Interior's Interpretation

On January 10, 2017, the U.S. Department of the Interior's outgoing solicitor issued an opinion stating that the MBTA prohibits incidental takes of migratory birds.[134] The opinion found that the "courts have generally agreed with the FWS' interpretation of the MBTA: the Act prohibits incidental take."[135] The opinion went on to mention that "recently a few courts have erroneously construed the prohibition of 'take' in the MBTA

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[131] See, e.g., United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010); Julie Lurman, Agencies in Limbo: Migratory Birds and Incidental Take by Federal Agencies, 23 J. LAND USE & ENVTL. L. 39, 60 (2007) ("Incidental taking by land clearance must not be allowed to continue unchecked and unmonitored."); Robbins, supra note 96, at 581 ("The strict liability offenses found in the Migratory Bird Treaty Act (MBTA) should be enforced with the purest form of strict liability. . . ."); see also THOMAS R. LUNDQUIST ET AL., THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW 2, 4 (2012), available at http://www.crowell.com/files/the-migratory-bird-treaty-act-an-overview-crowell-moring.pdf (last visited Mar. 30, 2021) ("Many commentators and companies are not comfortable with fuzzy potential MBTA liability and with reliance on uncertain prosecutorial discretion to avoid criminal liability for an otherwise-lawful land use.").

[132] Compare Apollo, 611 F.3d at 686, with United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1213 (D.N.D. 2012). See Scott W. Brunner, The Prosecutor's Vulture: Inconsistent MBTA Prosecution, its Clash with Wind Farms, and How to Fix It, SEATTLE J. ENVTL. L., 2013, at 27, ("A judicial carve-out is an ill-fit fix to the MBTA's inconsistent application because carve-outs have already been utilized by some courts, and MBTA application has simply been made less uniform as a result.").

[133] Lilley & Firestone, supra note 32 at 1209 ("[T]he exercise of prosecutorial discretion and lack of enforcement action by FWS and state agencies fails to provide wind farm operators with proper incentives to prevent or minimize wildlife impacts."); John Arnold McKinsey, Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of its Own, the Environmental Protection Movement, 28 ENERGY L.J. 71, 89 (2007) ("The uncertainty brought on by reliance on selective enforcement of the MBTA is perhaps the most difficult risk to precisely assess.").

[134] Dep't of Interior, Solicitor's Opinion M-37041, Jan. 10, 2017

[135] *Id*. at 1.

as limited to hunting and other forms of intentional taking of migratory birds."[136] Ultimately, the opinion found no need to find the willful or intentional taking of migratory birds to prove strict liability and demonstrate criminal violations of the Act.

However, on December 22, 2017, the Trump administration's solicitor for the Department of the Interior retracted the Obama solicitor's opinion and issued a new opinion concluding that the MBTA does not prohibit incidental takes.[137] The new opinion bases this finding on the "text, history, and purpose of the MBTA, as well as relevant case law."[138] The new opinion concludes that "interpreting the MBTA to apply to incidental or accidental actions" by various industry operators "hangs the sword of Damocles over a host of otherwise lawful and productive actions" and will inevitably hinder investment and operation of those industries.[139] Thus, the federal government's current legal opinion is that the MBTA's ban on the taking of migratory birds only pertains to direct and intentional actions that kill protected migratory birds.

Most recently, the Biden Administration said it would undo a rule finalized during the Trump administration that eliminated criminal penalties for incidental migratory bird deaths under the MBTA. [140] The Biden administration also plans to undo the former Solicitor General's underlying opinion that provided the legal basis for the Trump administration's rule.[141] A federal court already rejected that opinion.[142]

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[136] *Id*. at 1-2 (emphasis added).
[137] The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dep't of Interior, Solicitor's Opinion M-37050 Dec. 22, 2017).
[138] *Id*. at 1.
[139] *Id*.
[140] *Id.*
[141] *Id.*
[142] *Id*.

The federal government's shifts in opinion have only contributed to the courts' and potential incidental takers' confusion and uncertainty.[143] Again, this confusion and uncertainty hamper the industry's ability to innovate and create, which impedes the DoD's ability to enhance mission readiness and national security. However, Congress and the FWS can authorize and develop an incidental take permit program for potential incidental takers that would eliminate the confusion and uncertainty regarding liability and create a solution that can bring projects into compliance with the MBTA.

III. Summary

Congress created the MBTA to curb hunters and poachers from annihilating the abundant migratory bird species across the United States. When Congress created the MBTA, it is undisputed that it was concerned with hunting and poaching, but the statute contains no overt restriction on the type of conduct it covers. The broad language of the MBTA, and FWS's administration of the MBTA, now include industrial activities in the MBTA scope. This has created a significant circuit split with one group of circuits applying strict liability to industrial activities limited only by proximate cause and the other declining to apply the MBTA to indirect and unintentional take. The circuit split has created confusion for the FWS, industry, and lower courts, which has just been incensed by the executive branch's constantly changing position. Together, this confusion and uncertainty adversely impact the industry's ability to innovate and create, disrupting the DoD's ability to enhance mission readiness and national security. However, a solution exists to bring projects into compliance with the MBTA while still protecting migratory

[143] Lilley & Firestone, supra note 32, at 1209 ("[T]he exercise of prosecutorial discretion and lack of enforcement action by FWS and state agencies fails to provide wind farm operators with proper incentives to prevent or minimize wildlife impacts."); McKinsey, supra note 138, at 89 ("The uncertainty brought on by reliance on selective enforcement of the MBTA is perhaps the most difficult risk to precisely assess.").

birds. Congress and the FWS should authorize and develop an incidental take program for potential incidental takers.

Part II: The Solution – An Incidental Take Permit Program

Congress and the FWS should take steps to remove the confusion regarding liability under the MBTA. There are two ways Congress can reduce the confusion concerning the MBTA. First, Congress could amend the statute and modify the MBTA's take prohibition to either include or exclude incidental take. Second, Congress could create an incidental take permit program. If Congress is unwilling to act, the FWS may have the authority to implement an incidental take permit program without Congress' explicit authorization. Modifying the MBTA's take prohibition will have major political and administrative consequences. However, Congress can construct an incidental take permit program to alleviate the MBTA's confusion without sacrificing the conservation power of the MBTA.

I. Congressional Amendment to the MBTA

In a perfect world, with a unified political climate, using Congress to alleviate the MBTA's confusion for FWS and industrial operators would be the most efficient and legitimate route.[144] Congress has two workable options to improve the MBTA to permit incidental takes. First, Congress can modify the MBTA statutory text to apply only to intentional and direct takings.[145] Even though this would result in more certainty

[144] See Lilley & Firestone, supra note 32, at 1210 ("Congress should amend the MBTA to grant incidental-take permits and require FWS to adopt regulations specifying the criteria for issuing such permits and standards for compliance with them.").

[145] See Scott W. Brunner, The Prosecutor's Vulture: Inconsistent MBTA Prosecution, its Clash with Wind Farms, and How to Fix It, SEATTLE J. ENVTL. L., 2013, at 29-32, http://www.sjel.org/images/pdf/2013/brunner_prosecutors%20vulture.pdf,.

regarding industrial operators' liability, it would place migratory birds in greater danger from increased industrial development.[146]

Second, Congress can direct the FWS to form an incidental take permit program.[147] Through an incidental take permit program, the FWS could issue permits for a regulated number of bird deaths. An incidental take permit program would provide more protection to incidental takers but allow the FWS to regulate migratory bird deaths. Some possible disadvantages include delays to permit issuance due to an overstretched and understaffed FWS. Additionally, some project managers might find the permit program too costly and decide to risk possible MBTA prosecution.[148] After comparing each system, it's clear that creating an incidental take permit program is the best way to provide certainty to potential incidental takers and protect migratory birds.

A. Amending the Meaning of "Take"

Congress could eliminate the incidental takes debate in the courts by clarifying the meaning of the word "take."[149] However, if Congress developed a new definition of take that excludes liability for incidental bird killings, it would not only resolve the confusion in the courts, but it would eliminate the MBTA's protections against incidental activities that severely impact the protection of migratory bird species. One example of revised 16 USC 703(a) take provision could read:

> It shall be unlawful to take at any time, by any means or in any manner, except incidental harm or death to birds:

[146] See Brunner, supra note 150 at 25.

[147] Lilley & Firestone, supra note 32, at 1210.

[148] See *Id*. at 37; Julie Lurman, Agencies in Limbo: Migratory Birds and Incidental Take by Federal Agencies, 23 J. LAND USE & ENVTL. L. 39, 58 (2007).

[149] Brunner, supra note 150, at 29; see 16 U.S.C. § 703(a) (2011); 50 C.F.R. § 10.12 (2013).

> (1) Occurring from birds striking structures reasonably designed to minimize such collisions, or
> (2) Resulting from commercial or industrial operations unrelated to hunting, gaming, or poaching practices if the commercial or industrial operations are reasonably designed to minimize such harm or deaths to birds.[150]

Under this new definition, the MBTA would exclude industrial operators from liability for incidental deaths.[151] However, the term "reasonably" would cause additional confusion and ambiguity for the courts.[152] Different industries and environmental players would have different perspectives on what is reasonable regarding bird deaths.[153] This would lead environmental groups and the FWS to lobby strongly against such a modification to the definition. Furthermore, such a definition would remove many of the protections of the MBTA.

Despite these drawbacks, on January 7, 2021, the US Fish and Wildlife Service (FWS) published a final rule stating the scope of the prohibition of take under the MBTA applies "only to actions directed at migratory birds, their nests, or their eggs."[154] Additionally, the final rule states the prohibition of take under the MBTA does not prohibit incidental take.[155] The regulatory text outlined in the final rule, which is to be codified at 50 C.F.R. §10.14, states as follows:

> The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of

[150] Brunner, supra note 150, at 31.

[151] *Id*. ("This language would capture, for example, oil pits that are designed in a way that can reasonably prevent bird deaths.").

[152] See generally McKinsey, supra note 138, at 90 ("In essence then, the policy question is one of how much energy a bird is worth, and whether it is worth more renewable energy than non-renewable energy.").

[153] *Id*.

[154] 86 Fed. Reg. 1134 (January 7, 2021).

[155] *Id*.

> those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.,* incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.[156]

The FWS clarifies in the preamble to the final rule that the rule will resolve the inconsistency and uncertainty regarding MBTA enforcement which has resulted in what the FWS describes as a "convoluted patchwork of legal standards[,] all purporting to apply the same underlying law," and to establish "a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality."[157] The FWS then clarifies that the rule serves to further policy goals of promoting otherwise lawful economic activity, which, in FWS's view, "should not be functionally dependent upon the ad hoc exercise of enforcement discretion."[158] Under the new rule, the FWS states that businesses will have "better information for planning projects and achieving goals."[159]

Under this new rule, the MBTA would exclude all industrial operators from liability for incidental deaths to migratory birds because their actions are not directed towards migratory birds. The new rule accomplishes the goal of providing the certainty that industry desires and needs. However, it does it at a high cost. It removes many of the protections of the MBTA. Additionally, it has the potential to violate our treaty agreements and deteriorate our diplomatic relations with at least two of our treaty partners. As the FWS is relaxing the protection of migratory birds, Canada and Japan are instituting more protective policies.

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[156] *Id.*
[157] 86 Fed. Reg. at 1142
[158] *Id.*
[159] 86 Fed. Reg. at 1160.

Canada

Canadian law not only protects migratory birds against incidental takes, but it has issued Migratory Bird Sanctuary (MBS) regulations to implement its own Migratory Bird Convention Act (MBCA).[160] Human access to most MBSs is not restricted; however human activities, such as the extraction of natural resources essential to the energy and timber industries, are controlled under the new regulations.[161]

Japan

Japan has begun to develop wind energy as a major source of power. However, one of Japan's most significant wind energy development projects, located in the Aomori Prefecture, was stopped after developers carried out an environmental impact assessment that found that rare bird species would be taken because of the project.[162] Additionally, the Japanese public has, in several cases, opposed the construction of wind turbines in nature preserve areas precisely because their construction threatened migratory bird species.[163] Furthermore, Japan has also sought to reduce incidental bycatch of migratory birds in longline fishing operations using tori lines, typically composed of plastic tubes or polymer streamers hanging from fishing lines.[164] Tori lines frighten seabirds away from baited hooks, chummed waters, and other potentially dangerous situations.[165]

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[160] Migratory Bird Convention Act, S.C. 1994, c.22 (Can.).

[161] *Id.*

[162] See Rebecca L. Gibson, Cast Your Fate to theWind (Turbines): Strengthening Japanese Wind Energy Law and Policy, 9 Tex. J. of Oil, Gas & Energy L. 123, 146–47 n.178 (2014).

[163] Robert V. Percival & Garrett S. Kral, Global Trends in Protection of Migratory Birds, 33 NAT. Resources & ENV't 43, 47 (2018).

[164] *Id.*

[165] *Id.*

Finally, Japan's wildlife and game code, part of the country's national laws for the protection of migratory birds, defines "take" as capturing, killing, or injuring wildlife.[166] To expand Japan's definition of take to include incidental take, Japan's Ministry of the Environment has issued a formal memorandum stating that knowingly cutting down a tree that has migratory birds, nests, or eggs in it may constitute a taking of that species.[167]

Mexico and Russia

Mexico's migratory bird laws are not as developed as the laws in Canada and Japan. Commercial and industrial development in Mexico has narrowed the range of suitable migratory bird habitats, which has led to increased migratory bird mortality, with large numbers of birds having to breed and nest in subpar locations.[168]

Additionally, Russian enforcement of the treaty continues to be relaxed.[169] Russia protects less than half of their rare and endangered birds under the nation's current laws.[170] The Russian Ministry of Natural Resources and Environment does not acknowledge the significant gaps in environmental protection, which experts believe stem not only from the poaching and taking of migratory bird species but also from relaxed enforcement against those industries and individuals who knowingly do so.[171]

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[166] Chōjō no hogo oyobi shuryō no tekiseika ni kansuru hōritsu (Wildlife Protection and Proper Hunting Act) [hereinafter Wildlife Act], Act No. 88 of 2002, art. 2 (Japan).
[167] Mitsuhiko A. Takahashi, Migratory Bird Treaties' Issues and Potentials: Are They Valuable Tools or Just Curios in the Box, 42 Envtl. L. Rev. 609, 621 (2012).
[168] Percival and Kral, Global Trends in Protection of Migratory Birds, 33 NAT. Resources & ENV't 43, 47 (2018).
[169] See Joshua P. Newell & Laura A. Henry, The State of Environmental Protection in the Russian Federation: A Review of the Post-Soviet Era, 57 Eurasian Geography & Econ. 779–801 (Feb. 10, 2017).
[170] *Id.*
[171] *Id.* at 783.

The new FWS rule has the potential to do more harm than good. It will strip the MBTA and FWS of many of the tools necessary to protect migratory birds. It may violate our existing treaties and severe diplomatic relations with some of our treaty partners. Furthermore, this new FWS rule may benefit intentional wrongdoers. The new rule does not account for industrial operators who knowingly, though indirectly, harm migratory birds. For these reasons, this thesis recommends a different approach that brings certainty to industry while protecting migratory birds.

B. Mandating an Incidental Take Permit Program

Congress could amend the MBTA by mandating the FWS construct an incidental take permit program. A Congressionally mandated program will offer several advantages over a program the FWS creates using its authority. First, if Congress directs the program, it avoids the question, does FWS have the power to make an incidental take program without explicit congressional authorization under its authority under the MBTA.[172] Second, it will be faster because it would not go through the lengthy rulemaking process of the FWS. [173] Finally, it would remove uncertainty and possible litigation over the legitimacy of an incidental take program created by the FWS.[174] Although congressional action offers the fastest and smoothest route to authorizing incidental take, Congress has not taken steps to develop such a broad program in the MBTA's history.[175]

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[172] Pursuant to 16 U.S.C. § 704(a) (2011), the Secretary of the Interior has authority to permit take or killing of migratory birds so long as the take is not inconsistent with the treaties. But see HOLLAND & HART, supra note 57, at 1.

[173] McKinsey, supra note 138, at 91

[174] *Id*.

[175] See Brunner, supra note 150, at 28 ("However, since 1918, the MBTA has only been altered to reflect more bilateral treaties that the United States entered, or to update monetary fine amounts.").

However, Congress has created a more tailored incidental take permit program under the MBTA for military training exercises, which it can use as a template for a broader incidental take permit program.[176] The idea for a military incidental take permit came in 2002. In 2002, after the Navy conducted a live-fire exercise that killed several protected migratory birds, the U.S. District Court for the District of Columbia held the Navy violated the MBTA.[177] Congress disagreed with this restraint on military preparedness and responded by authorizing the FWS to create an incidental take permit program for military readiness activities.[178] In addition to authorizing incidental takes, the rule also requires the military to mitigate, minimize, and monitor migratory bird takes during training exercises.[179] Through this program, the FWS may issue permits and authorize incidental takes to the extent they believe the take follows the MBTA and its underlying treaties.

[176] See generally 16 U.S.C. § 703 (2011).

[177] Ctr. For Biological Diversity v. Pirie (Pirie I), 191 F. Supp. 2d 161, 163–64 (D.D.C. 2002), superseded by statute, 16 U.S.C. § 703 (2011), as recognized in Ctr. For Biological Diversity v. England, No.00cv03044, 2003 WL 179848, at 1 (D.C. Cir. Jan. 23, 2003).; Ctr. For Biological Diversity v.Pirie (Pirie II), 201 F. Supp. 2d 113, 123 (D.D.C. 2002); Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8933 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15 (2007)); see also HOLLAND & HART, supra note 57, at 24 ("The need for this permit program arose, in part, from a 2002 federal district court ruling that held that military training exercises of the Department of the Navy that resulted in incidental take of migratory birds without a permit violated the MBTA.").

[178] Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8933 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15).

[179] *Id*.

Congress could model a broader incidental take program based on the military's incidental take program. Congress[180] and the FWS[181] have already declared that the military training incidental take permit amendment satisfies the United States' treaty obligations under the MBTA. Therefore, the footing has already been laid for additional modifications to the MBTA for incidental takes. Moreover, Congress's conclusion that the MBTA permits the killing of protected birds during military exercises shows Congress also believes incidental takes will not breach the underlying treaties of the MBTA.[182]

II. FWS Development of an Incidental Take Permit

If Congress does not modify the MBTA, the FWS may create an incidental take permit program on its own. Despite it taking longer and overcoming many administrative hurdles, the FWS has the authority to implement a general, incidental take permit.

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[180] H.R. Rep. No. 107-772, at 624 (2002) (Conf. Rep.); see also HOLLAND & HART, supra note 57, at 25 (quoting H.R. Rep. No. 107-722, at 625 (2002) (Conf. Rep.)); News Release, U.S. Fish & Wildlife Serv., U.S. Fish and Wildlife Service Proposes Rule to Allow Defense Department To Take Migratory Birds (May 28, 2004), available at https://www.fws.gov/mountain-prairie/pressrel/2004/dc%20408.htm (last visited Mar. 31, 2021) ("The 2003 Defense Authorization Act conference report notes specifically that Congress found the authorization for incidental take to be consistent with the underlying treaty obligations of the United States.").

[181] Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8932 (Feb. 28, 2007) (codified at 50 C.F.R. § 21.15) ("In passing the Authorization Act, Congress itself determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties."), quoted in HOLLAND & HART, supra note 57, at 25.

[182] Compare CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 193 (2001), available at http:// www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf ("[A] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty in whole or in part."), with HOLLAND & HART, supra note 57, at 13 ("The Senate has made clear that the United States is to interpret the treaty in accordance with the common understanding of the treaty shared by the President and the Senate at the time the Senate gave its advice and consent."). See Brunner, supra note 150, at 38–39 ("The plain language of the MBTA provides, however, that everyday commercial and industrial operators subject themselves to prosecution."); *Id.* at 39 ("In effect, the legislative history suggests that the MBTA was designed to preserve migratory bird population in lieu of hunting practices, not everything under the sun.").

The Interstate Natural Gas Association of America (INGAA), an industry group, published a report petitioning the FWS to not wait for explicit authorization from Congress and create an incidental take program.[183] According to the INGAA study, the MBTA gives the Secretary of the Interior the authority, through FWS, to "determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow…taking…of any [protected] bird…, and to adopt suitable regulations permitting and governing the same."[184] Therefore, the MBTA, by itself, allows FWS to regulate the take of protected birds. Understanding this, the FWS has already created limited permits for direct and incidental take.[185] However, none of the existing permits extend to industrial operators' incidental takes, like those in the renewable energy industry.

Next, the INGAA study focuses on the second factor for a legitimate, FWS-created incidental take permit program: its compatibility with the MBTA's underlying treaties.[186] Those treaties require the conservation of migratory birds and their habitat. All of the treaties, except the Mexico treaty, allow the take of migratory birds for "other specific purposes" so long as they are consistent with preserving migratory birds.[187]

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[183] See generally Sandra A. Snodgrass, It's for the Birds—Recent Developments Under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, in FEDERAL REGULATION OF CULTURAL RESOURCES, WILDLIFE, AND WATERS OF THE UNITED STATES, Paper No. 10A, 10A-27 to -28 (Rocky Mt. Min. L. Fdn. 2012); see generally INGAA, http://www.ingaa.org/ (last visited February 1, 2021) ("Representing Interstate Natural Gas Pipeline Companies").

[184] 16 U.S.C. § 704(a) (2011).

[185] 50 C.F.R. pt. 21 (2013);

[186] *Id*. at 6; Snodgrass, supra note 176, at 10A-27.

[187] 1995 Protocol, supra note 61, at 4 ("[T]he taking of migratory birds may be allowed at any time of the year for scientific, educational, propagative, or other specific purposes consistent with the conservation principles of this Convention."); Russia Treaty, supra note 75, at art. II(1)(a) (allowing take for "scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention."); Japan Treaty, supra note 72, at art. III(1)(a) (permitting take for "scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention.").

However, these treaties restrict the other purposes of take to "scientific, educational, and propagative" goals.[188] An incidental take permit program for industrial activities does not fit neatly within the take exceptions for science, education, or species propagation. Consequently, a court could find the FWS does not have the authority to allow incidental industrial takes under these treaties.

Notwithstanding the litigation risks, the FWS could implement an incidental take program similar to Congress's military readiness exception. The FWS has already found that the program is compatible with the MBTA's underlying treaties.[189] According to the INGAA study, the military readiness permit program creates a broader incidental take program path.[190] However, the study does state, "whether the Service's regulations implementing the program for incidental take by the Armed Forces are consistent with Canada, Japan, Mexico, and Russia treaties were not tested in court and can no longer be challenged, but the Service believes them to be consistent."[191]

Even though the FWS can likely implement an incidental take program without explicit Congressional authorization, the best option remains a congressional mandate for an incidental take program for the following reasons. First, it would avoid any challenge that the agency acted outside its congressional granted authority. Second, it would prevent any challenge that it issued regulations undermining the underlying treaties' conservation principles. Third, it would avoid challenges that the agency interpreted the

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[188] 1995 Protocol, supra note 61, at 4; Russia Treaty, supra note 75, at art. II(1)(a); Japan Treaty, supra note 72, at art. III(1)(a).

[189] Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931-01, 8946 (Feb. 28, 2007) (to be codified at 50 C.F.R. pt. 21) ("Thus, the authorization in this rule . . . provides for compliance with the requirements of the treaties.").

[190] see INGAA, http://www.ingaa.org/ (last visited February 1, 2021) ("Representing Interstate Natural Gas Pipeline Companies"), at 27.

[191] *Id*.

phrase “other specific purpose” too broadly. For all these reasons, it is best for Congress to create an incidental take permit program.[192]

III. Part II Summary

If Congress does not intervene, the MBTA will continue to be stuck with varying interpretations from court to court, preventing migratory birds' effective and uniform conservation. Congress can eliminate the confusion by amending the MBTA and mandating the FWS create an Incidental Take Permit Program using the military readiness permit program as a template. A congressional mandate authorizing an incidental take permit program would provide the clarity the FWS, industry, and courts require.

Part III: Why DoD Should Care – National Security

The DoD should make the FWS’ creation of a Congressionally mandated Incidental Take Permit Program under the MBTA a top priority. The DoD will benefit tremendously from the creation of an Incidental Take Permit Program. The added certainty for industry, especially the renewable energy industry, from an Incidental Take Permit Program will lead to innovation in renewable energy projects. Fear of liability will no longer limit companies. Instead, the added certainty will free industries to build, research, and develop, all with the FWS' blessing. The resulting innovation will enhance mission readiness for the United States military, bolster national security, reduce the DoD’s dependency on liquid fuel, prepare the DoD for its evolving combat against our near-peer adversaries, and provide the DoD with sustainable solutions that will help the DoD combat climate change.

[192] *Id*. at 33.

I. Enhanced Mission Readiness and National Security

The innovation that will result from the renewable energy industry's certainty regarding liability under the MBTA will lead to enhanced mission readiness for the DoD and enhanced National security for our country. The DoD has been clear that the military's shift toward renewable energy is an operational imperative.[193] Improvements toward energy alternatives can increase warfighter efficiency, enhance energy security, and cut installation and operational energy costs.[194]

In 2011, the DoD published an Operational Energy Strategy.[195] The most recent version was published in 2016 and provides an overview of DoD's operational energy use.[196] The DoD defines Operational energy as "energy required for training, moving, and sustaining military forces and weapons platforms for military operations."[197] The strategy lays out three objectives to address the challenges facing operational energy needs to mission success. The goals are: Increase future warfighting capability by including energy throughout future force development. Identify and reduce logistics and operational risks from operational energy vulnerabilities. And enhance the mission effectiveness of the current forces through updated equipment and improvements in training, exercises, and operations.[198] The DoD can achieve all of these goals with the innovation and sustainable solutions bound to come from the renewable energy industry's certainty regarding liability under the MBTA.

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[193] Department of Defense, "2016 Operational Energy Strategy," 2015; 10 US Code 2926 (b).
[194] *Id.* at 3.
[195] Department of Defense, "2011 Operational Energy Strategy," 2010.
[196] Department of Defense, "2016 Operational Energy Strategy," 2015; 10 US Code 2926 (b).
[197] *Id.* at 3; 10 US Code 2924.
[198] *Id.* at 6.

II. Deployable and Operational Energy Sources

The innovation that will result from the industries' certainty regarding liability under the MBTA will also increase deployable and operational energy sources that will benefit all military service branches. In the 2016 National Defense Strategy and Operational Energy Strategy, the DoD recognized the need for new technologies to address their operational energy challenges.[199] The DoD is conducting research and procuring sustainable solutions that decrease their dependence on and the logistical limitations of liquid fuel to support military missions.[200] Creating an incidental take permit program, which would give the renewable energy industry certainty regarding liability and project planning, will increase research and available renewable energy technology for the DoD to procure and use in contingency operations abroad.

1. Marine Corps

The U.S. Marine Corps (USMC) operational energy efforts are coordinated through the Expeditionary Energy Office (E2O).[201] The 2018 U.S. Marine Corps Science and Technology (S&T) Strategic Plan includes a logistics goal of "Enhanced Self-Sufficiency for Portable Electric Energy."[202] This goal consists of developing tactically viable alternative energy solutions like solar, wind, hybrid, kinetic recovery, fuel cells, and biofuels for use at remote, austere locations by small units that can reduce the Marine combat load.[203] Innovation in the renewable energy field can help the USMC meet this

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[199] SANDIA Report, Market Opportunities for Deployable Wind Systems for Defense and Disaster Response, Feb 2020.
[200] *Id.* at 12.
[201] United States Marine Corps, "S&T Strategic Plan," 2018.
[202] *Id.*
[203] *Id.*

goal, which is more likely to happen if uncertainty and fear of unpredictable liability under the MBTA do not hamper their creativity.

2. Army

The Office of Assistant Secretary of the Army for Installations, Energy, and Environment leads the U.S. Army's operational energy efforts.[204] This office establishes the Army's global policy, provides strategic direction and supervises all infrastructure, installation and contingency bases, energy, and environmental programs.[205] The Army's goal is to find and invest in technology that can reduce or replace diesel fuel to support mission requirements at contingency bases where the logistics of delivering fuel risk lives and adds cost.[206] Again, it will take innovation in the renewable energy field to meet the Army's goals, which is more likely to happen if uncertainty and fear of liability under the MBTA do not obstruct the renewable energy industry from creating.

3. Air Force

The Air Force is the largest energy consumer in the DoD, primarily in fuel for aircraft.[207] The Deputy Assistant Secretary of the Air Force for Operational Energy, Office of the Assistance Secretary of the Air Force for Installations, Environment and Energy manage the Air Force's operational energy activities.[208] The Air Force operational energy goals center around finding sustainable solutions that use fuel more efficiently in aircraft.[209] It will take innovation in the renewable energy field to meet the

[204] SANDIA Report, supra note 196, at 12.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] Department of the Navy, "Strategy for Renewable Energy," 2012.
[209] *Id.*

Air Force's goal, which is more likely to happen if uncertainty and fear of unpredictable liability under the MBTA do not obstruct industry.

4. Navy

As the second-largest consumer of energy, the U.S. Navy is also responsible for transporting liquid fuel to other services at remote locations.[210] The Deputy Assistant Secretary of the Navy Energy and the Directory of Operational Energy manages the Navy's operational energy activities.[211] In 2012, the Navy launched an initiative to acquire 50% of its energy from renewable resources.[212] Additionally, the Navy wants to meet future-directed energy weapons requirements and close the gap between the growth in fuel demand and the ability to supply it to Naval and joint forces in a degraded environment.[213] Expanding Navy and Marine Corps Forces' operational reach is also a key objective. Like the other branches of service, it will take innovation in the renewable energy field to meet the Navy's renewable energy goals, which is more likely to happen if uncertainty and fear of unpredictable liability under the MBTA do not obstruct the renewable energy industry.

III. Reduced Fuel Dependency

The innovation that will result from industry's certainty regarding liability under the MBTA will lead to the DoD's reduced dependency on liquid fuel, a logistical and financial burden on the DoD. DoD uses over 100,000 generators for combat support and combat services.[214] Procurements for generators, including the replacing and upgrading

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[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] Id.
[214] SANDIA Report, supra note 196, at 16.

these systems, cost millions of dollars per year.[215] These generators consume millions of diesel fuel each year at a cost that ranges from $15 to $42 per gallon.[216]

The DoD's Operational Energy Strategy makes the DoD's reduction of liquid fuel dependency as a primary source of energy a primary goal.[217] The DoD relies heavily on liquid fuel and uses more liquid fuel than many small and medium-sized countries.[218] In 2008, the DoD supplied more than 68 million gallons of fuel each month to support U.S. forces abroad, with most of that fuel going to supply generators.[219] A 2008 Defense Science Board Task Force report noted that Army generators alone consume about 26 million gallons of fuel annually during peacetime and 357 million gallons annually during wartime.[220]

Aside from battlefield locations operating in austere environments with minimal amenities, the U.S. military also operates many long-term bases overseas. Many of these bases are not permanent installations but are not necessarily temporary either.[221] Many of them have been operating for over 20 years with amenities for base occupants like gyms, air conditioning, and restaurants.[222] While these bases can often resemble small towns,

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] O. Belcher, P. Bigger, B. Neimark and C. Kennelly, "Hidden carbon costs of the "everywhere war": Logistics, geopolitical ecology, and the carbon boot-print of the US military," *Trans Inst Br Geogr.*, pp. 1 - 16, 2019.

[219] United States Government Accountability Office, "DEFENSE MANAGEMENT DOD Needs to Increase Attention on Fuel Demand Management at Forward-Deployed Locations," 2009.

[220] Office of the Under Secretary of Defense,For Acquisition, Technology, and Logistics, "Report of the Defense Science Board Task Force on DoD Energy Strategy: More Fight - Less Fuel," DoD, 2008.

[221] SANDIA Report, supra note 196, at 16.

[222] *Id.*

they often lack permanent electrical infrastructure and rely heavily on diesel generators to access electric power.[223]

Such a high fuel demand produces an enormous logistics burden. General Paul Kern of the U.S. Army stated at the 2003 SAE World Congress that two-thirds of the Army's vehicles deliver fuel to the other third in the battlefield.[224] Transporting this fuel in a battlefield environment drives up cost and risk.[225] Transporting fuel via truck convoy creates casualty risks from enemy activity, weather, traffic accidents, and pilferage.[226] In June 2008 alone, a combination of these factors caused 44 trucks and 220,000 gallons of fuel.[227]

Additionally, the DoD is not immune to fluctuations in fuel prices. The DoD estimates that for every $10 increase in the price of a barrel of oil, the DoD's operating costs increase by approximately $1.3 billion per year.[228] Fully burdened fuel costs delivered vary, but some estimates reach as high as $400/gal for remote forward operating bases (FOB) where the DoD provides fuel by air.[229] Another report by the Defense Science Board Task Force in 2008 estimated the fully burdened cost of fuel from $15/gallon up to $42/gallon assuming no convoy protection requirements. The renewable energy innovation that will come from the certainty provided to industry through the Incidental Take Permit Program will help reduce the logistical and financial burdens

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[223] *Id.*

[224] J. Conover, H. Husted, J. MacBain and H. McKee, "Logistics and Capability Implications of a Bradley Fighting Vehicle with a Fuel Cell Auxiliary Power Unit," *SAE Technical Paper,* Vols. 2004-01-1586, 2004.

[225] Deloitte, "Energy security - America's best defense," Deloitte, 2009.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] N. Hodge, "U.S.'s Afghan Headache: $400-a-Gallon Gasoline: Military Air Drops Fuel Barrels to Avoid Dangerous Convoys," *Wall Street Journal,* 11 December 2011.

caused by the DoD's dependency on liquid fuel. Thus, saving DoD money and mitigating risk to servicemembers.

IV. Mitigate Risk in Near-Peer Conflict

The innovation that will result from industry's certainty regarding liability under the MBTA will also help the DoD in its near-peer conflicts. After nearly two decades of counterterrorism and counterinsurgency, the DoD's 2018 National Defense Strategy (NDS) has shifted its primary focus to near-peer conflict. [230] In the RAND study *The Emergence of Peer Competitors: a Framework for Analysis* they define near-peer adversaries as a "state or collection of challengers with the power and motivation to confront the United States on a global scale in a sustained way and to a sufficient level where the ultimate outcome of a conflict is in doubt even if the United States marshals its resources in an effective and timely manner."[231]

To mitigate risk in a near-peer conflict, the RAND Corporation proposed that the Air Force employ a dispersed airbase concept that involves conducting operations from many smaller airbases.[232] This strategy will allow the Air Force to operate in one location and rapidly move operations before adversaries target the base for attack. However, conducting operations from many bases is logistically complex and will expose our servicemembers to adversaries. deThere will also be an increase in fuel, munitions, food, and water resupply needed.

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[230] Mattis, J. Summary of the 2018 National Defense Strategy of the United States: Sharpening the American Military's Competitive Edge; United States Department of Defense: Washington, DC, USA, 2018.

[231] *See* https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1346/MR1346.ch2.pdf (last visited Apr. 7, 2021) at 7.

[232] Priebe, M.; Vick, A.J.; Heim, J.L.; Smith, M.L. Distributed Operations in a Contested Environment: Implications for USAF Force Presentation; RAND Corporation: Santa Monica, CA, USA, 2019.

The RAND report focused on the possibility of a conflict in the area surrounding the South China Sea. It identified that the DoD needs a mixture of different bases to achieve military objectives in a contested battlespace, for example, bases that have an indefinite duration, bases that last days to weeks, and bases established for less than a day.[233] Bases that have an indefinite duration have a larger footprint, operate on the edge of the contested battlespace, and have more permanent infrastructure, including grid-tied power and large-scale fuel storage.[234] Conversely, bases established for less than a day will have everything needed to conduct operations flown in on cargo aircraft and only used for short periods.

Bases that last days to weeks, also called "drop-in bases," which are similar to the forward operating bases concept used in Afghanistan and Iraq, will primarily use expeditionary equipment and fabric shelter facilities. The DoD does not connect these bases to local power sources. Therefore, liquid fuel generators produce all the electricity, which has a demand of approximately 2270 L per day.[235] Sustainable solutions would reduce the high logistics requirement for fuel and lower the base's reliance on fuel and resupply. The Incidental Take Permit Program's creation will help DoD with these sustainable solutions that can mitigate risk to our servicemembers because the certainty it will provide the renewable energy industry will create innovative technology.

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[233] Jay Pearson Torrey Wagner, Justin Delorit, and Steven Schuldt, Cost Analysis of Optimized Islanded Energy Systems in a Dispersed Air Base Conflict, 8 September 2020.

[234] *Id.*

[235] Lagoon, B. Net Zero Plus JCTD: Evaluation of Energy Saving Technologies for Expeditionary Shelters. US Army NATIC Soldier Research, Development & Engineering Center, 4 November 2009. Available online: http://www.dtic.mil/dtic/tr/fulltext/u2/a514485.pdf (accessed on March, 5 2021); US Marine Corps Systems Command, TM 12359A–OD, 1 January 2011. Available online: https://www.marcorsyscom.marines.mil/Portals/105/pdmeps/docs/MEP/B1016B1021.pdf (accessed on March 5, 2021).

V. Combat Climate Change

Finally, the innovation that will result from industry's certainty regarding liability under the MBTA will lead to increased sustainable procurement opportunities for the DoD. These sustainable procurement opportunities will allow DoD to participate in the fight against climate change, which the DoD views as a significant national security threat. In *All Hell Breaking Loose: The Pentagon's Perspective on Climate* Change, Michael T. Klare explains:

> [W]hile discussion of climate change has indeed largely disappeared from the Pentagon's public statements [under the current administration, its internal efforts to address the effects of global warming have not stopped. Instead, …many senior officers are convinced that climate change is real, is accelerating, and has direct and deleterious implications for American national security…[236]

In *All Hell Breaking Loose*, Klare also identifies a wide range of global warming-related risks, from water, food, or energy scarcity to massive drought flood, or fire-induced refugee mitigations[237] to a "whole new ocean" opened by melting of the polar ice caps, creating a new theater of military operations.[238]

Finally, Klare describes how climate change will lead to "All Hell Breaking Loose*"* when "the armed forces are called upon to overcome multiple emergencies [(e.g.,

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[236] Hope Jahren, *The Story of More: How We Got to Climate Change and Where to Go From Here* (New York: Vintage Books, 2020): 129.

[237] On that score, the United Nations "projects 200 million climate refugees by 2050" (Wal- lace-Wells, *see* note 4, at 7); *see also* Abraham Lustgartan, "Where Will Everyone Go?: The Great Climate Migration," *ProPublica* and *New York Times* Magazine (July 23, 2020), *available at* https://features.propublica.org/ climate-migration/model-how-climate-refugees-move-across-continents/ *and* https://www. nytimes.com/interactive/2020/07/23/magazine/ climate-migration.html ("[W]ithout preparation and planning, the sweeping scale of change could prove wildly destabilizing. The United Nations and others warn that in the worst case, the governments of the nations most affected by climate change could topple as whole regions devolve into war."); *and* Sonia Shah, "Climate Change Will Drive People Across Borders," *Foreign Affairs* (July 29, 2000), *available at* https:// www.foreignaffairs.com/thesiss/central-america-caribbean/2020-07-29/climate-change-will- drive-people-across-borders (despite the UN's projection that 200 million people could be displaced for climate-related reasons by 2050, "no legal framework exists to help such migrants relocate, let alone to protect them in their most vulnerable moments.").

[238] Klare, see note 218, at 125-130.

humanitarian disaster relief, support for beleaguered foreign state, and disruptions to the global supply (and food) chains)] while their bases are out of commission [due to flooding or fires or drought] and large numbers of their troops are engaged in domestic relief operations, leaving them ill-equipped to address any major threats at all." [239] The DoD needs to prepare for "All Hell Breaking Loose." The Incidental Take Permit Program's creation will help DoD combat climate change because the certainty it will provide the renewable energy industry will create and spur markets for innovative technologies. However, to take advantage of these sustainable solutions, the DoD will need to build a sustainable procurement regime.

VI. Part III Summary

The DoD should care about and provide support for creating an Incidental Take Permit Program under the MBTA. Forming an Incidental Take Permit Program will lead to industry's certainty regarding liability under the MBTA. That certainty will cause innovation in the renewable energy industry, and innovation in the renewable energy industry will benefit the DoD greatly. It will enhance mission readiness and our national security. It will supply us with deployable and operational energy sources that reduce our dependency on liquid fuel.

Additionally, it will help us fight against climate change and mitigate the risk associated with the logistical complexity of conflict with our near-peer competitors. However, for the DoD to take advantage of the benefits that will come as a result of the MBTA's Incidental Take Permit Program, they will need to create an aggressive sustainable procurement regime.

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[239] *Id.*

Part IV: How DoD Can Take Advantage – A Sustainable Procurement Regime

The DoD can take advantage of the sustainable innovation resulting from certainty in the renewable energy industry regarding migratory bird takes by developing an aggressive sustainable procurement regime. There are three things necessary to establish a sustainable procurement regime.[240] The DoD must overcome its love affair with low prices, understand and implement lifecycle costing, and consider externalities in the evaluation of products.[241]

I. Breaking up the Low Price Love Affair

First, the DoD needs to be okay paying a price premium. Since the 1990s, government procurement officials have been in love with the low price.[242] Conversely, as individual consumers, we are consistently willing to pay higher costs to achieve greater customer satisfaction and better quality. As consumers, we understand that when you spend more, you usually get goods and services that make life or work more accessible and more efficient, last longer, fail less, fit better, look or taste more desirable, and require less maintenance. However, historically government procurement officials have ignored these basic principles when procuring goods and services for the government.[243] Instead, they routinely choose to focus on the product's price and tend to go for the good or service with the lowest price despite the perceived drawbacks and shortcomings.[244]

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[240] Steven L. Schooner and Markus Speidel, Warming Up' to Sustainable Procurement, 60 Contract Management, Issue 10, 32 (October 2020).
[241] *Id*.
[242] *Id.* at 37.
[243] *Id.*
[244] *Id.*

Government procurement officials and Congress are obsessed with low purchase prices.[245] However, getting the lowest prices does not always correlate with getting the product that works the best, lasts the longest, or meets the agency's needs. The sustainable solutions that will enter the market due to the Incidental Take Permit Program will cost a price premium. Therefore, if the DoD and their government procurement officials take advantage of the impending sustainable solutions, it needs to shift its thought process and become comfortable paying an initial price premium to get what it needs.

II. Using Lifecycle Cost to Appreciate Value

Second, the DoD should focus on the lifecycle cost or the total cost of ownership instead of the purchase price when evaluating products. Life cycle analysis helps government procurement officials understand what value purchase will return or what monetary expense it is worth.[246] As mentioned above, sustainable solutions, like a hybrid automobile, will likely have a higher price premium or higher purchase price. However, using a lifecycle cost analysis, DoD's procurement officials can determine what they are getting with the product and factor it into the analysis to determine the product's actual value. Using the hybrid automobile as an example, they would consider the increased fuel efficiency when considering its worth. It will reduce operating costs over the automobile's life or the ownership of the vehicle. Procurement officials should also consider additional incentives, likes federal and state tax credits or reduced commuting time due to express lane privileges. All of these should offset the price premium and help

[245] *Id.*
[246] *Id.*

government officials evaluate a product's true worth. Considering sustainable procurement through lifecycle cost instead of price premiums is the best way for the DoD to take advantage of the sustainable solutions from the Incidental Take Permit Program because it will help DoD and their procurement officials justify spending higher prices on cutting edge sustainable solutions.

III. Considering Externalities to Uncover the Real Price

Finally, the DoD should add externalities to the life cycle cost analysis. This will allow DoD procurement officials to fully define the worth of the sustainable solution they are purchasing. [247] To do this, DoD procurement officials first must identify the positive or negative side effects or consequences associated with the sustainable solution. Next, they must evaluate the side effects, monetary value, or cost and apply that to the life cycle cost analysis. Lifecycle cost analysis and increased focus on externalities can bring transparency to actual and often hidden costs of unnaturally inexpensive solutions that we too frequently take for granted. For example, "estimates for the total global fossil fuel subsidies paid out each year run as high as $5 trillion,"[248] but that does not include the

[247] See Jason J. Czarnezki and Steven V. Garsse, "What Is Life-Cycle Costing?" in Cost & EU Public Procurement Law: Life-Cycle Costing for Sustainability (Marta Andhov et al., eds., 2019): 3, 8, 10, 14 ("LCC can include capture, measure, quantify, and monetize environmental, social, and health effects of products and services")_ Marta Andhov, Roberto Caranta, and Anja Wiesbrock, "The European Union Law of Life-Cycle Costing," ibid., at
20, 30 ("Since the introduction of the new provision [Article 68 of Public Sector Directive 2014/24/ EU] LCC have been seen as a tool with a great potential to significantly facilitate [sustainable public procurement] by encouraging contracting authorities to 'think outside the (price) box in the context of sustainable public procurement.'")_ and Jason J. Czarnezki, Green Public Procurement: Legal Instruments for Promoting Environmental Interests in the United States and European Union (2019): 132 (EU "Directive 2014/24 both provides a working definition of life-cycle costing and lays down award criteria through which contracting authorities (and entities) may take account of externalities in their purchasing decisions….").

[248] See, generally, David Wallace-Wells, The Uninhabitable Earth: Life After Warming (New York: Penguin Random House, 2019) at 70. See also Majority Staff of H. Select Comm. on the Climate Crisis, 116th Cong., Rep. on Solving the Climate Crisis, at 60 (Comm. Print 2020) (recommending Congress amend the Federal Power Act to direct FERC to find rates "unjust, unreasonable, unduly discriminatory, or

byproducts or costs associated with gasoline-generated engine exhaust like pollution, reduced life expectancy, increase healthcare cost, and infant mortality. Factoring in the externalities to make sure the DoD understands the actual price they are paying for sustainable and non-sustainable solutions is the best way for the DoD procurement officials to take advantage of the innovation that will come from the Incidental Take Permit Program. It will make purchasing sustainable solutions at a premium more acceptable.

IV. Part IV Summary

The Incidental Take Permit Program will lead to innovation in industry, especially the renewable energy industry. That innovation will provide sustainable solutions that will solve many of DoD's problems and help DoD meet its operational energy goals. However, for the DoD to take advantage of these inevitable sustainable solutions, DoD and their procurement officials must change the way they think about procurement. They must stop viewing price as the "coin of the realm" and start reassessing the "value" of the goods and services we buy in light of their effects on the environment. To do this, the DoD has to understand, identify, and value environmentally-related externalities as part of a more sophisticated, critical analysis of lifecycle cost.

Conclusion

The MBTA arose in response to hunters and poachers who destroyed abundant migratory bird species across the United States. Despite Congress' focus on hunting and poaching when it enacted the MBTA, the statute contains no explicit restriction on the type of conduct it covers. The MBTA language and FWS enforcement of the MBTA now

preferential if they do not incorporate the cost of externalized greenhouse gas emissions")_ and "Solving the Climate Crisis," available at https://climatecrisis.house.gov/report.

include industrial activities originally outside the MBTA scope. The FWS' expansion of liability under the MBTA to include incidental industrial take created a significant circuit split: one side applying strict liability to industrial activities limited only by proximate cause, and the other refusing to use the MBTA to indirect and unintentional take outside the original scope of hunting and poaching. The conflicting approaches created confusion for FWS, industry, and lower court confusion that requires congressional or FWS attention.

Without congressional intervention, the MBTA will continue to be stuck with varying interpretations from court to court, preventing the migratory birds' effective and uniform conservation congress can eliminate the confusion by amending the MBTA. A congressional mandate authorizing an Incidental Take Permit Program would clarify the FWS, industry, and courts requirements. Additionally, the added certainty for industry, specifically the renewable energy industry, will significantly benefit the DoD's ability to protect our national security.

Congressional intervention and their creation of an Incidental Take Permit Program are of national importance because they have national security implications. Like the renewable energy industry, the certainty for industries will lead to innovation that can change how the DoD operates. The DoD's procurement and use of the design that stems from the renewable energy industry's certainty regarding liability will save lives, money, and the planet while ensuring the FWS honors its responsibility in the treaties to preserve migratory birds. However, DoD must put themselves in a position to take advantage of this wave of innovation in the renewable energy industry by forming an

aggressive sustainable program that focuses on Life Cycle analyses, including environmental externalities and not just paying the lowest price items.