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Scott W. Brunner

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Scott W. Brunner[†]

U.S. wind-farm development has exploded in the last two decades. But so have birds—literally. Wind farms are incidentally causing deaths to migratory birds and at an increasing rate each year (the most recent United States Fish & Wildlife Service (USFWS) estimates suggest over 400,000 annually). As a result, the Migratory Bird Treaty Act (MBTA), a nearly 100-year-old U.S. environmental statute, potentially makes wind-farm operators white collar criminals, even if they were acting without intent.

Controversially, wind-farm operators are not being prosecuted for bird deaths, whereas other industry-types have been prosecuted under the MBTA and even convicted on certain occasions. Notable is the 2012 case United States v. Brigham Oil & Gas, where seven oil companies were federally prosecuted for causing a combined twenty-seven bird deaths. These seven companies survived prosecution in North Dakota federal court; however, in light of Brigham Oil and similar cases, the lack of wind-farm prosecution certainly begs the question: Why should some industry-types face prosecution for incidentally killing birds while another industry-type gets a free pass? And regardless of that answer, why are wind-farms being allowed to develop and prosper despite posing increasingly grave threats to U.S. wildlife?

This Article analyzes the lack of wind-farm prosecution, addresses the growing upheaval surrounding it, and argues that the century-old MBTA is due for an update. Alternatively, this Article puts forth that prosecutors' approaches to MBTA prosecution are in dire need of rethinking: guidance pushing usage of prosecutorial agreements—with DPAs and NPAs—may be a temporary solution. Ultimately, the MBTA represents an unforeseen clash between clean

† Associate Attorney, Meissner Tierney Fisher & Nichols, S.C., Milwaukee, Wis.; J.D., 2012, Marquette University Law School; B.A., 2009, University of Minnesota.

energy and wildlife conservation. Past scholarship has focused on how the MBTA's text encompasses wind-farm operators; this Article builds on that by identifying the most appropriate solutions to this conundrum. Reworked statutory language that invokes an incidental-take exception for all industry-types could set the MBTA back to its wildlife-conservation purpose while also ensuring fairer prosecutorial practices and keeping otherwise-innocent wind-farm operators from becoming white collar criminals.

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I. INTRODUCTION

Birds die due to human activity often. They hit buildings, cars, and airplanes by the millions each year.[1] But they also die by landing in oil

1. COMM. ON ENVTL. IMPACTS OF WIND-ENERGY PROJECTS, NAT'L RES. COUNCIL, ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS 71–72 (2007) [hereinafter IMPACTS OF WIND-ENERGY PROJECTS] (noting the millions of birds that are killed by flying into airplanes, cars, and building towers).

pits, feeding on pesticide-filled fields, and blindly flying into wind turbines.[2] Oil companies, farmers, and even wind-turbine operators that accidentally kill birds accomplish the "taking or killing" of a migratory bird, and their actions could result in federal criminal prosecution under the Migratory Bird Treaty Act (MBTA).[3]

However, the MBTA is applied inconsistently to unintentional corporate actors in two ways. First, there is a circuit split over how the MBTA's criminal provisions apply to unintentional corporate actors.[4] For example, in 2011, seven oil companies in North Dakota were prosecuted for violating the MBTA in *United States v. Brigham Oil & Gas L.P.*[5] The district court judge in *Brigham Oil* found for the oil companies, holding that the MBTA did not provide for criminal prosecution of companies that incidentally kill or take migratory birds.[6] However, other courts have found MBTA violations on similar facts.[7] Second, there is disparate treatment of corporate or industrial actors under the MBTA.[8] The oil companies in *Brigham Oil* accounted for a combined twenty-seven deaths of migratory birds.[9] On the other hand, estimates show that wind-turbine operators account for anywhere from 300,000- to 400,000-plus annual migratory bird deaths.[10] Despite these

2. *See* cases cited *infra* Part III.

3. Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2006).

4. Throughout this paper, I use the phrases "unintentional corporate actors" and "unintentional commercial entities." Both of these phrases refer to businesses that accidentally (or *unintentionally*) kill migratory birds as a result of their operations, and whose operations are not associated with hunting, poaching, or game-related activities. Indeed, the MBTA's language includes "association, partnership, or corporation." *See* 16 U.S.C. § 707(a). When I refer to "*corporate* actor" or "*commercial* entity," I am not necessarily distinguishing between business entities; I consider LLCs, partnerships, etc, to all fall under my characterizations of "corporate actors" or "commercial entities."

5. 80 F. Supp. 2d 1202 (D.N.D. 2012).

6. *Id.*; *see infra* Part III.

7. *See infra* Part III.A. The most recent such case is *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2012 WL 3866857 (S.D. Tex. Sept. 5, 2012). Because the *Citgo Petroleum* case was decided during the course of publication, it does not factor into this Article's analysis.

8. Letter from Newt Gingrich to Lamar Smith, Chairman, House Committee on the Judiciary, *available at* http://www.newt.org/wp-content/uploads/2012/02/LamarSmith.pdf [hereinafter Letter from Newt Gingrich] (noting that the U.S. Attorney's decision to prosecute the companies in the *Brigham Oil* case represents an abuse of the judicial system given that no wind turbine operator has ever been prosecuted).

9. Defendants Brigham and Newfield's Joint Memorandum of Law in Support of Motion to Dismiss the Informations at 2 n.1, United States v. Brigham Oil & Gas, L.P., 80 F.Supp.2d 1202 (D.N.D. 2012) (Nos. 11-PO-005-CSM-1, 11-PO-009-CSM-1), 2011 WL 6258226 at *2 n.1.

10. This number is disputed. Some estimates say about 30,000–40,000 annually, but those numbers are more reflective of what existed ten years ago. IMPACTS OF WIND-ENERGY PROJECTS, *supra* note 1, at 70–71 (noting that in 2003 the estimated wind-caused bird deaths were between 20,000 and 37,000); *see also* Letter from Newt Gingrich, *supra* note 8 (mentioning that wind turbines account for 30,000 to 40,000 bird deaths each year). *But see* Press Release, Am. Bird Conservancy, Am. Bird Conservancy Response to Speaker Gingrich's Statement on Energy Indus.

numbers, wind-turbine operators are not being prosecuted through the MBTA.[11] At one particular wind farm—Altamont Pass in California—annual birds deaths have been measured at well over 5,000,[12] which is far more than the few dozen seen in *Brigham Oil*. The total number of deaths caused by wind farms continues to rise as wind-turbine construction blossoms.[13] The increasing wind farm-related bird deaths showcase selective prosecutorial tactics and have caused wind energy, largely considered an environmental champion, to come under fire for threatening wildlife and wildlife habitats.[14]

To be sure, a corporation that accidentally kills a bird is an unlikely white collar criminal. The incidental "taking" or "killing" of a migratory bird[15] certainly does not fit the Federal Bureau of Investigation's

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Killing of Migratory Birds (Feb. 23, 2012), *available at* http://www.abcbirds.org/newsandreports/releases/120223.html [hereinafter American Bird Conservancy Response to Speaker Gingrich] (insisting that Newt Gingrich's numbers were very off, and that USFWS had estimates in 2009 of around 440,000). With more wind turbines in operation, studies indicate that the numbers have crept above 300,000 plus. Albert M. Manville, *Towers, Turbines, Power Lines, and Buildings—Steps Being Taken By the U.S. Fish and Wildlife Service to Avoid or Minimize Take of Migratory Birds at These Structures*, *in* PROCEEDINGS OF THE FOURTH INTERNATIONAL PARTNERS IN FLIGHT CONFERENCE, at 263, 268 (2008); David Urbanski, *'Bird-Brained' Hypocrisy: Oil Companies Prosecuted for 28 Dead Waterfowl While Wind Companies Get Away with Offing 400,000+ Every Year*, THEBLAZE (Sept. 30, 2011), http://www.theblaze.com/stories/bird-brained-hypocrisy-oil-companies-prosecuted-for-28-dead-waterfowl-while-wind-companies-get-away-with-offing-400000-every-year/.

11. Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 ECOL. L.Q. 427, 441 (2011); 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, 72 (2007); Laura J. Beveridge, *The Migratory Bird Treaty Act and Wind Development*, N. AM. WINDPOWER, Sept. 2005, at 36, 36, 38–39, *available at* http://www.stoel.com/files/Stoel0509.pdf.

12. *See, e.g.*, ROBERT W. RIGHTER, WINDFALL: WIND ENERGY IN AMERICA TODAY 106 (2011).

13. *See* Manville, *supra* note 10, at 267–68 (noting that wind-turbine construction has increased upwards to 50% annually).

14. *See, e.g.*, Kevin A. Gaynor et al., *Courts Seek Common-Sense Applications to Curb Prosecutions Under Bird Law*, 43 ER 974 (2012); Michael Bastasch, *Report: Wind Tax Credits Subsidize 'Killing of Federally Protected Birds,'* THE DAILY CALLER (Oct. 5, 2012), http://dailycaller.com/2012/10/05/report-wind-tax-credits-subsidize-killing-of-federally-protected-birds/; Lawrence Hurley, *Lawyers on Alert as Oil Company Challenges Conviction for Bird Kills*, E&E PUBL'G (May 21, 2012), http://www.eenews.net/public/Greenwire/2012/05/21/2; Letter from New Gingrich, *supra* note 8; American Bird Conservancy Response to Speaker Gingrich, *supra* note 10 (noting that in 2009 the USFWS estimated wind turbines caused 440,000 annual bird deaths and that the wind industry has been given a "virtual pass" for years); James M. Taylor, *Enviro Group Sues Wind Farm to Stop Bird Deaths*, HEARTLANDER (Mar. 1, 2004), http://news.heartland.org/newspaper-article/2004/03/01/enviro-group-sues-wind-farm-stop-bird-deaths.

15. *See* 16 U.S.C. §§ 703–712 (2006) (listing the "actions" associated with migratory birds that could result in MBTA liability).

characterization of white collar crime: "lying, cheating, and stealing."[16] Arguably, the MBTA should not even be read to hold corporations criminally liable for incidentally taking or killing migratory birds. However, if the MBTA *is* to be applied to unintentional corporate actors, its application must be fixed in two ways. First, MBTA application needs uniformity across jurisdictions: companies arguably violating the MBTA should not be safe in one jurisdiction because a judge reads the statute narrowly, but liable for MBTA penalties in another jurisdiction because the judge reads the statute broadly. With the current circuit split,[17] either the United States Supreme Court must grant certiorari to remedy this situation or Congress must take legislative action amending the MBTA. Second, U.S. prosecutors should not single out certain industry-types while allowing others, such as the wind-energy industry, to be left unaccountable for violations. If prosecutors continue to charge commercial entities under the MBTA, tools such as non-prosecution agreements (NPAs) or deferred-prosecution agreements (DPAs) may be the best ways to hold parties accountable for MBTA violations in a fair and uniform fashion.

This Article evaluates how best to ensure fairness in the MBTA enforcement of violations by unintentional corporate actors, while still staying true to the MBTA's original intent and wildlife-preservation values. Part II provides background on the MBTA generally, detailing its origin and modern day usage. Part II also provides background on wind-energy development, details the wind industry's connection to bird deaths, and applies the MBTA's plain language to wind-farm operators that unintentionally kill migratory birds. Part III describes previous cases in which the MBTA has been used to prosecute commercial entities that unintentionally killed migratory birds. In particular, Part III describes the recent *Brigham Oil* case and discusses the circuit split concerning whether the MBTA holds commercial entities strictly liable for the unintentional taking or killing of a migratory bird. Part IV examines prosecutorial discretion in the context of MBTA suits. This section describes why the U.S. judicial system's embrace of prosecutorial discretion allows for U.S. attorneys to prosecute oil companies and not wind-turbine operators, if they so choose. Part IV explains why selective prosecution claims do not fit prosecutors' decisions to charge MBTA violations against only certain industry-types; consequently, selective prosecution arguments are not sufficient remedies to the MBTA's inconsistent application by prosecutors.

16. Federal Bureau of Investigation, *White Collar Crime*, http://www.fbi.gov/about-us/investigate/white_collar (last visited Mar. 30, 2012).

17. *See infra* Part III.

Part V suggests that a legislative fix is needed to remedy the current inconsistent, unfair, and arguably improper application of the MBTA's criminal provisions. Part V argues that Congress should amend the MBTA either to incorporate an incidental-take exception or to expressly include *all* unintentional corporate actors under its strict liability provisions. In the alternative, internal United States Department of Justice (U.S. DOJ) guidance should be created to encourage uniform prosecutorial usage of DPAs and NPAs to hold unintentional corporate actors accountable in cases of low-incident bird deaths. The Supreme Court could grant certiorari to address whether a judicially carved-out exception for unintentional corporate actors exists; though waiting for the Supreme Court is not the best option. Finally, Part VI concludes this Article.

II. THE MBTA AND HOW WIND FARMS FIT

A. The Migratory Bird Treaty Act

The MBTA, enacted in 1918,[18] is the oldest federal law dedicated to the protection of wildlife.[19] In fact, it was one of the first federal environmental laws created, with the first major U.S. environmental law being passed in 1899.[20] When the MBTA was created, its focal point was to curb hunting practices in ways that helped conserve wildlife.[21]

18. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918). The MBTA originated as a bilateral treaty between then-British occupied Canada and the United States. *See id.* (giving effect to Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.–Gr. Brit., Aug. 16, 1916, 39 Stat. 1709). For a detailed description of the MBTA's treaty-based origins, see Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1177–80 (2008).

19. The Lacey Act of 1900, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371-3378 (2012)), is the only U.S. federal wildlife conservation law to precede the MBTA, but the Lacey Act was primarily designed to prevent illegal wildlife trafficking, and not focused on wildlife preservation. *See id.*; Mark D. Hopson et al., *Finding the Middle Ground: A Survey of Environmental Misdemeanors*, *in* WHITE COLLAR CRIME, at V-1, V-5 (ABA Institute ed., 2011). Other federal acts dedicated to wildlife preservation enacted subsequent the MBTA include the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (2012)); the Bald and Golden Eagle Protection Act of 1962, ch. 278, 54 Stat. 250 (1940) (as amended by Pub. L. No. 87-884, 76 Stat. 1246 (1962)); and the Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1361-1423H (2012)).

20. The first federal environmental act was the Rivers & Harbors Act of 1899. *See* Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401-416 (1982)). Environmental laws as a whole have a relatively short history. *See* Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 488 (1996).

21. Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47, 50–51 (2000); Steven Margolin, *Liability Under the Migratory Bird Treaty Act*, 7 ECOLOGY L.Q. 989, 997 n.72 (1978).

However, the MBTA criminal provisions are broad, which allows its potential application to actions beyond those of just hunters and poachers.[22]

Individual penalties for the MBTA are not necessarily severe, especially for misdemeanor penalties, under which unintentional corporate actors would most likely incur liability. An unintentional "taking" or "killing" of a migratory bird results in a misdemeanor fine as high at $15,000 or a prison sentence of six months, or both.[23] A felony MBTA conviction for an organization, which requires that the actions resulting in violation be done "knowingly," could result in a fine not more than $500,000, imprisonment of up to two years, or both.[24] However, the penalties are per bird, so depending on the number of bird deaths or takings, the dollar amount can add up rather quickly.[25] Moreover, the dollar amount in an MBTA prosecution might not be the real concern for entities being charged because corporations may also suffer grave reputational harm as a result of prosecution.[26]

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22. Erin C. Perkins, *Migratory Birds and Multiple-Use Management: Using the Migratory Bird Treaty Act to Rejuvenate America's National Environmental Policy*, 92 NW. U. L. REV. 817, 841 (1998) (characterizing the MBTA language as "broad" and "expansive," and noting how the broad and expansive nature of the MBTA's text allows for "near-absolute" protection of migratory birds, irrespective the circumstances).

23. 16 U.S.C. §§ 703, 707(a) (2006); Lilley & Firestone, *supra* note 18, at 1180.

24. 16 U.S.C. § 707(b); 18 U.S.C. § 3571(c)(3) (2006). This Article focuses solely on commercial entities that *unintentionally* kill migratory birds, and thus concerns only the misdemeanor MBTA violation in section 707(a). The MBTA's statutorily crafted felony fine is actually less than the misdemeanor fine, at $2,000 and $15,000, respectively. *See* 16 U.S.C. § 707(a)–(b). However, title 18's alternative fines provision allows the felony fine for organizations to be up to $500,000. 18 U.S.C. § 3571(c)(3); 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, 376 & n.136 (1999–2000).

The MBTA's fine-amount anomaly could exist because, while attention has been paid to amend the misdemeanor fine, the legislature has neglected to keep the felony fine up to speed. For example, the 1960 MBTA amendment set the felony fine at $2,000 and the misdemeanor fine at $500. Migratory Bird Treaty Act, amendment, Pub. L. No. 86-732, § 1, 74 Stat. 866, 866 (1960) (prior to 1998 amendment). However, since the 1960 amendment, the misdemeanor fine has been amended twice (once to $5,000 and then again to the present $15,000), while the felony fine has been left alone. *See Migratory Bird Treaty Act*, DIGEST OF FED. RES. LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERVICE, http://www.fws.gov/laws/lawsdigest/migtrea.html (last visited Apr. 25, 2012).

25. A $15,000 fine seems like a nominal amount, but that amount is per bird, which can quickly escalate the total fine depending on how many bird deaths are being charged. Mark D. Hopson et al., *supra* note 19, at V-5. The discussion in Part III.A points out that some courts disagree over whether the MBTA allows for unintentional corporate actors to be charged multiple counts.

26. *See, e.g.*, David Spence, *Corporate Social Responsibility in the Oil and Gas Industry*, 86 CHI.-KENT L. REV. 59, 76 (2011); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1886–88 (2005).

Following the MBTA's plain language, MBTA penalties attach to corporations through section 703(a), which makes it "unlawful at any time, by any means or in any manner, to . . . take [or] . . . kill . . . any migratory bird, any part, nest or eggs of any such bird," included in the list of migratory birds provided by the United States Fish and Wildlife Service (USFWS).[27] The MBTA expressly lists "association, partnership, or corporation" as potentially liable entities,[28] and on its face, the MBTA is no exception to the typical strict liability nature of federal environmental statutes,[29] with section 707(a) stating as follows:

> . . . [A]ny person, association, partnership, or corporation who shall violate any provisions of . . . this subchapter, or shall violate or fail to comply with any shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both.[30]

Section 707(a) thus specifies that any partnership, association, or corporation *shall* be liable upon violating *any* part of the MBTA. Because taking or killing a migratory bird is a strict liability offense through section 703(a), unintentional corporate actors could be criminally prosecuted for and convicted of killing birds, without proof of mens rea.[31]

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27. 16 U.S.C. § 703(a). The USFWS' list of protected birds reaches over 800. *See* U.S. FISH & WILDLIFE SERV., *Migratory Bird Mortality* (2012), *available at* http://www.fws.gov/birds/mortality-fact-sheet.pdf. *See generally Birds Protected By the Migratory Bird Treaty Act*, USFWS, http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtandx.html#alpha1 (last visited Apr. 2, 2012).

28. 16 U.S.C. § 707(a).

29. *See, e.g.*, Comprehensive, Environmental Response, Compensation, and Liability Act § 107(a)–(b), 42 U.S.C. § 9603(a)–(b) (2006); Robert L. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1147 (1986) (describing the strict liability nature of CERCLA); Edmund B. Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951 (1988) (describing the general strict liability nature of hazardous cleanup crimes, notably CERCLA and RCRA); Lynn L. Bergeson et al., *TSCA and the Future of Chemical Regulation*, 15 EPA ADMIN. L. REP. 1, 9 (2000) (noting the strict liability nature of the Toxic Substances Control Act (citing 15 U.S.C. § 2615 (1994)). *See generally* Robert A. Milne, Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Liability in Substance but Not Form*, 37 BUFF. L. REV. 307 (1988) (describing the courts' general findings of strict liability in environmental statutes). *But see* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2471–73 (1995) (explaining that most environmental laws are not "entirely strict," because often "some factual knowledge is necessary").

30. 16 U.S.C. § 707(a) (2006).

31. *See* David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1417 (2011) (suggesting that any MBTA charge against BP would be a "strict liability offense that was committed as soon as oil from the spill coated migratory birds"); *see also infra* Part III.A. *But see infra* Part III.B (discussing cases in which courts have not tied the strict liability nature of the MBTA to unintentional corporate actors).

If read broadly, the MBTA is not restricted to hunting and conservation regulation. Indeed, its application to broader areas has boomed since the 1970s, when it was first applied beyond its traditional hunting and preservation framework.[32] In the 1970s, prosecutors began charging oil companies for bird deaths that resulted from oil sludge pits[33]—similar to the charges brought in *Brigham Oil*.[34] Courts have recognized that some environmental statutes should be read broadly.[35] However, courts' broad-sweeping readings of environmental statutes are often associated with environmental statutes that are remedial[36]—i.e., statutes that are "protective in nature"[37] or designed to ensure and safeguard the public health and welfare.[38] Statutes that are penal in nature or that take away any substantive rights are not considered remedial.[39] In contrast to remedial statutes, penal statutes should be

32. *See* Fjetland, *supra* note 21, at 51.

33. *See* United States v. Union Tex. Petrol., 73-CR-127, 1973 U.S. Dist. LEXIS 15616 (D. Colo. July 11, 1973); United States v. Stuarco Oil Co., 73-CR-129, 1973 U.S. Dist. LEXIS 15616 (D. Colo., Aug. 17, 1973); Fjetland, *supra* note 21, at 51.

34. *See* discussion of *Brigham Oil infra* Part III.

35. *See* United States v. Gen. Battery Corp., Inc., 423 F.3d 294, 297 (3d Cir. 2005) (noting that CERCLA is a "'sweeping' federal remedial statute" that is designed to be broadly applied across the hazardous substance landscape); *see also* United States v. Bestfoods, 524 U.S. 51, 56 n.1 (1998) (recognizing CERCLA's "sweeping" application); Richard A. Smolen, Note, *Get the Lead Out: Innocent Successor Corporations Responsibility Under CERCLA*—United States v. General Battery Corp.*, Inc., 423 F.3d 294 (3d Cir. 2005)*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 137, 147–48 (2006).

36. *See, e.g.*, Scott D. Deatherage, *Environmental Law*, 64 SMU L. REV. 239, 241 (2011); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Cannon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199 (1996); *see also* Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2211–12 (2003) (noting that one longstanding canon of statutory construction is to read remedial statutes broadly).

37. Watson, *supra* note 36, at 236.

38. *See* Deatherage, *supra* note 36, at 241. Many environmental provisions fit well with the public welfare doctrine. A "public welfare offense" is a "minor offense that involves no moral delinquency, being intended only to secure the effective regulation of conduct in the interest of the community." BLACK'S LAW DICTIONARY 1110 (7th ed. 1999). If the MBTA fell under the public welfare doctrine, it would likely be broadly read and strict liability would be favored. *See* Andrew H. Costinett et al., *Environmental Crimes*, 47 AM. CRIM. L. REV. 441, 506 (2010). However, the MBTA's purpose does not fit the definition of a public welfare offense; rather, the MBTA was designed to curb unethical hunting and poaching practices in light of bird conservation. *See infra* text accompanying note 163. Thus, even though the MBTA at its heart seeks to conserve wildlife, the traditional MBTA violations—unethical hunting—contain an element of moral delinquency not often considered part of public welfare offenses, and section 707 is designed to punish, not remediate. For an opinion that the purely strict liability nature of the MBTA fits squarely within the public welfare realm, see Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579 (2012).

39. Watson, *supra* note 36, at 233–34 (suggesting that statutes containing criminal provisions have purposes inapposite to remedial statutes); *see also* Charles T. Wells & Allen Winsor, *Apportionment from* Hoffman v. Jones *Through the 2011 Legislative Session: Perfecting the Equation of Liability with Fault*, TRIAL ADVOCATE Q., Winter 2012, at 29, 32 ("Remedial statutes

interpreted narrowly.[40] Arguably, the MBTA should be read narrowly, as a penal statute, because it was designed to punish those violating its provisions with prison time or fines, rather than encourage any remedial measures.[41] The MBTA could also be considered remedial, however, because it is geared toward protecting wildlife and could slip into the realm of broadly applied public welfare statutes.[42] The MBTA's punishment-and-protection dual nature reaffirms the confusion over how its terms should be read—broadly versus narrowly.

Finally, one unique and important litigation-based component to the MBTA is that it does not contain a citizens suit provision. This limits who can bring suit alleging MBTA violations. Most federal environmental laws employ citizens suit provisions[43]—or private causes of action to enforce environmental statutes, brought by private attorneys general[44]—but the MBTA contains no private cause of action.[45] Without the potential for citizen enforcement, state and federal prosecutors are left to decide whether entities that take or kill listed birds should be held accountable. The USFWS may offer referrals or guidance to prosecutors over whether to bring MBTA charges,[46] but it is the prosecutors who

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are those which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing." (internal quotes omitted)).

40. Solan, *supra* note 36, at 2212.

41. 16 U.S.C. § 707(a)–(b) (2006). The prison time can reach significant levels too, due to the potential accumulation of counts (at six months per bird for misdemeanors, and two years per bird for felonies). *See id.*

42. *See supra* text accompanying note 38.

43. *See, e.g.*, RICHARD J. LAZARUS, THE MAKING *OF* ENVIRONMENTAL LAW 189–91 (2004); Jonathan H. Adler, *Stand or Deliver: Citizens Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 42 (2001) ("Most major federal environmental laws contain citizen-suit provisions. As a result, environmental citizen suits are now a central element of American environmental law." (internal quotation marks omitted)).

44. *See* LAZARUS, *supra* note 43, at 189–91.

45. *See* Flint Hills Tallgrass Heritage Charity Found., Inc. v. Scottish Power, PLC, 147 Fed. App'x 785, 786–87 (10th Cir. 2005) (rejecting private cause of action by citizens group against wind farm that was unintentionally killing birds); Lilley & Firestone, *supra* note 18, at 1195–96 (noting that the MBTA is "'solely the province of the federal government'" (quoting Beveridge, *supra* note 11, at 38)).

46. The USFWS, a division of the U.S. Department of the Interior, is the federal agency delegated regulatory power over the MBTA. 16 U.S.C. § 704 (2006); Exec. Order No. 13,186, 66 Fed. Reg. 3853, § 3 (Jan. 10, 2001); *see also* NAT'L PARK SERV. & U.S. FISH AND WILDLIFE SERV., *Memorandum of Understanding Between the U.S. Dep't of the Interior Nat'l Park Serv. and the U.S. Fish and Wildlife Serv. to Promote the Conservation of Migratory Birds* (2010), *available at* http://www.fws.gov/migratorybirds/Partnerships/NPSEO13186Signed%204.12.10.pdf ("The FWS is legally mandated to implement the conservation provisions of the MBTA, which include responsibilities for managing bird populations; domestic and international coordination; and the development and enforcement of regulations. The Migratory Bird Conservation Act and the Fish and Wildlife Coordination Act mandate migratory bird habitat conservation, which includes habitat protection through acquisition, enhancement, and/or management to avoid and minimize impacts."); PETER ASMUS, REAPING THE WIND: HOW MECHANICAL WIZARDS, VISIONARIES, AND PROFITEERS

decide unintentional corporate actors' MBTA fate, and this includes prosecutors' decisions whether to bring charges against the wind industry.

B. Wind Farms, the Death of Birds, and MBTA Application

Wind-energy companies fall under the MBTA's scope because wind farms kill birds and the plain language of the MBTA ropes in incidental actions of "associations, partnerships, and corporations."[47] Wind energy has many environmental benefits, but U.S. wind farms incidentally account for approximately 300,000 to 400,000 annual bird deaths.[48] Reports show that turbine-related deaths have increased over the last decade[49]—and it is logical that the number of annual deaths will continue increase as wind-farm development continues.[50]

The wind-energy era began in the 1980s,[51] and is considered an ecological and environmental supplement—and in some ways replacement—to the worldwide dependence on fossil fuels.[52] This understanding (and more notably the hope for replacement) is held primarily by environmentalists.[53] But the desire for efficient and

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HELPED SHAPE OUR ENERGY FUTURE 138 (2001) (identifying that the USFWS has been delegated regulatory authority over the MBTA).

47. As analyzed in Part III, not every judge has read the MBTA to apply to unintentional corporate actors. However, the plain language of the MBTA logically makes any "association, partnership, or corporation" liable for MBTA violations, regardless of intent.

48. Joseph G. Block & Lewis J. Taylor, *The Migratory Bird Treaty Act: The Stealth Environmental Law*, *in* WHITE COLLAR CRIME, at V-27, V-32 (ABA Institute ed., 2011); Urbanski, *supra* note10.

49. In 2002 the USFWS reported an estimate of 33,000, but since then the USFWS has reported estimates nearing annual deaths of 440,000. *Compare* Manville, *supra* note 10, at 268, *with* U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY (2002), *available at* http://www.fws.gov/birds/mortality-fact-sheet.pdf.

50. VAUGHN NELSON, WIND ENERGY: RENEWABLE ENERGY AND THE ENVIRONMENT 221–22 (2009) (suggesting that wind energy will continue to grow, that landowners are increasingly "harvest[ing] the wind," and that "wind energy will [soon] be the most cost-competitive power source on the market"); Manville, *supra* note 10, at 267 (reporting that the number of wind turbines on the U.S. landscape could grow from roughly 23,000 to more than 155,000 by 2020); Thure Traber & Claudie Kemfert, *Gone With the Wind? Electricity Market Prices and Incentives to Invest in Thermal Power Plants Under Increasing Wind Energy Supply*, 33 ENERGY ECON. 249, 249 (2011) (noting that research predicts a 25% annual increase in installed wind power through 2015). *But see* Kathleen Hunter, *Wind Energy Should Mull Tax Credit Phase Out, Baucus Says*, BLOOMBERG BUSINESSWEEK (Mar. 20, 2012), http://www.bloomberg.com/news/2012-03-20/wind-industry-should-consider-tax-credit-phase-out-baucus-says.html (reporting that U.S. senators have pushed to phase out wind-energy tax credits, which could result in less turbine production).

51. NELSON, *supra* note 50, at 216–19; ION BOGDAN VASI, WINDS OF CHANGE: THE ENVIRONMENTAL MOVEMENT AND THE GLOBAL DEVELOPMENT OF THE WIND ENERGY INDUSTRY 3, 17 (2011). Despite its late arrival, wind power became the fastest growing source of energy during the mid-1990s. VASI, *supra*, at 24.

52. VASI, *supra* note 51, at 99–101.

53. *Id.* at 13.

environmentally friendly energy production has global outreach. Indeed, the wind industry is often influenced by international organizations and agreements that seek uniform energy production methods, such as the Kyoto Protocol.[54]

The wind industry's global connection makes even more prominent the fact that wind farms have collided with American wildlife.[55] Coincidentally, the century-old MBTA is positioned perfectly to hold wind farms accountable for their incidental takings and killings of migratory birds. Each time a wind turbine kills a migratory bird, the association, partnership, or corporation that operates that turbine has arguably violated MBTA section 703(a). Even if the bird death was unintentional, a plain reading of section 703(a) ropes in the turbine operator because section 703(a) states that it "shall be unlawful at any time, *by any means or in any manner*," to take or kill a migratory bird.[56] When a turbine operator violates section 703(a), section 707(a) makes the operator liable for a misdemeanor (and a $15,000 per-death fine or six-month prison term) because, as section 707(a) sets forth, the operator would have violated "any provision" of the MBTA.[57] A plain reading of the MBTA makes white collar criminals out of wind-farm operators that accidentally kill birds.

However, wind-farm operators are not being prosecuted despite their apparent MBTA liability.[58] It is arguable that prosecutors are executing good policy by side-stepping the MBTA violations committed by wind farms. Wind farms provide significant environmental benefits, which arguably outweigh any resulting wildlife damage, even if the wildlife damage at a certain wind farm may be more than 5,000

54. *Id.* at 39. *See generally* Press Release, EWEA, Kyoto Protocol: Wind Power Is Essential for Any Government's Top 5 'Climate To-Do' List (Feb. 2005), http://www2.ewea.org/documents/050216%20Kyoto%20signing%20FINAL.pdf (reporting the Kyoto Protocol's recognition of "wind power [as] one of the leading global solutions to tackl[ing] climate change"). The United States never signed the Kyoto Protocol. However, the Protocol's influence on American wind-energy production still helped shape federal wind energy polices (notably, the creation of one federal tax credit policy crediting the construction of turbines that existed through the mid-2000s). VASI, *supra* note 51, at 101.

55. The bird-death problem itself is a global one. European counties are experiencing backlash against wind farms as well, in response to a growing awareness that wind farms pose a threat to migrating birds. *See, e.g.*, Press Release, Spanish Soc'y of Ornithology (SEO/Birdlife), *Spanish Wind Farms Kill 6 to 18 Million Birds & Bats a Year* (Jan. 14, 2012), *available at* http://savetheeaglesinternational.org/?page_id=770.

56. 16 U.S.C. § 703(a) (2006) (emphasis added).

57. *See id.* § 707(a).

58. *See, e.g.*, Robert Bryce, *Windmills vs. Birds*, WALL ST. J. (Mar. 7, 2012), http://online.wsj.com/article/SB10001424052970204781804577267114294838328.html.

migratory bird deaths per year.[59] Moreover, not only are the deaths by wind-farm operators unintentional, but the number is minuscule compared to the overall amount of birds killed by other facets of our society, such as cars or buildings.[60] In any event, the refusal of prosecutors to charge wind farmers is contrary to the wildlife-conservation policy at the heart of the MBTA.[61]

Other industries have not been as fortunate when it comes to prosecution. Notably, oil and gas companies and pesticide manufacturers and distributors have been subject to MBTA prosecution in a handful of cases since the 1970s.[62] This shows that the MBTA lacks uniform enforcement by prosecutors: One *type* of entity arguably escapes liability because of its function (in this case, the wind-energy industry), whereas others are punished or sought to be punished. The next Part details cases where U.S. attorney's brought MBTA charges against other industries.

III. FEDERAL MBTA PROSECUTION OF COMMERCIAL ENTITIES FOR INCIDENTAL BIRD DEATHS

The recent decision by the North Dakota U.S. Attorney to prosecute the companies in *Brigham Oil*[63] has been criticized for being an unfair act toward oil companies.[64] But the decision to prosecute in *Brigham Oil* was not necessarily unprecedented. Since the 1960s, corporate entities have been prosecuted under the MBTA for the incidental taking or

59. Some commentators argue that the bird deaths created by wind farms are menial in the big picture and any detriment wind farms cause to wildlife is outweighed by wind-energy's significant environmental impacts. *See, e.g.*, *Pros and Cons of Wind Power, Turbines and Farms—The Advantages Outweigh the Disadvantages*, GREEN WORLD INVESTOR (Mar. 13, 2011), http://www.greenworldinvestor.com/2011/03/13/pros-and-cons-of-wind-powerturbines-and-farms-the-advantages-outweighs-the-disadvantages/ (suggesting wind industry's low cost and clean energy as benefits outweighing, among other things, wildlife deaths); *Wind Energy*, ALTERNATIVE ENERGY, http://www.altenergy.org/renewables/wind.html (last visited Apr. 14, 2012).

60. IMPACTS OF WIND-ENERGY PROJECTS, *supra* note 1, at 71–72 (noting that buildings kill an estimated 50 million birds annually, and cars an estimated 80 million).

61. McKinsey, *supra* note 11, at 80 (suggesting that current energy policy and wind-farm avian impacts are in confrontation with the MBTA's principles); *see also* Perkins, *supra* note 22, at 822 (noting that the main policy behind the MBTA is bird-species preservation).

62. *See infra* Part III. For a persuasive examination of this controversial discrepancy, see Gaynor et al., *supra* note 14.

63. United States v. Brigham Oil & Gas L.P., 840 F. Supp. 2d 1202 (D.N.D 2012).

64. Bastasch, *supra* note 14 (quoting Robert Bryce of the Manhattan Institute: "There is a pernicious double standard here."); Letter from Newt Gingrich, *supra* note 8; Kate Bommarito, *Senator Inhofe: Justice Department Prosecution of Oil Companies "An Attack" on Oil*, PLAINSDAILY, http://plainsdaily.com/entry/senator-inhofe-obama-administration-will-stop-at-nothing-to-bring-down-us-fossil-fuel-producers/ (Aug. 29, 2011) (describing Oklahoma Senator Jim Inhofe's belief that the *Brigham Oil* case was another example of disfavor toward oil companies); Steve McGough, *Oil & Gas Companies Prosecuted for Bird Deaths . . . Wind Turbine Companies Not as Much*, RADIOVICEONLINE (Feb. 20, 2012), http://radioviceonline.com/oil-gas-companies-prosecuted-for-bird-deaths-wind-turbine-companies-not-so-much/.

killing of migratory birds in a variety of settings. Many instances involved oil companies, where birds accidentally plunged into oil pits or oil equipment and became trapped.[65] However, power-line operators, pesticide companies, farmers, and timber operations have also been subjected to MBTA violations.[66]

Even though the plain language of the MBTA holds all parties, including "associations, partnerships, and corporations,"[67] strictly liable for violating any MBTA provision, different judges have had differing opinions about whether the MBTA criminal provisions apply to unintentional corporate actors. Some judges have exempted unintentional corporate actors, carving-out an exception,[68] which has created a circuit split over how the MBTA is interpreted. This Part discusses the varying interpretations of MBTA criminal provisions according to different U.S. circuit and district courts, starting with courts that found unintentional corporate actors strictly liable under the MBTA.

A. MBTA Cases Where Strict Liability Was Found

Judges have applied the MBTA's criminal provisions to unintentional corporate actors in courts within the United States Courts of Appeals for the Second, Ninth, and Tenth Circuits.[69] The first

65. *See, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (birds caught in oil "heat-treater"); *Brigham Oil*, 840 F. Supp. 2d at 1203 (birds caught in oil pits); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 364517 (W.D. La. Oct. 30, 2009) (birds found in open caisson); United States v. Union Texas Petrol., No. 73-CR-127 (D. Colo. July 11, 1973) (birds landed in oil pits); United States v. Stuarco Oil Co., No. 73-CR-129 (D. Colo. Aug. 17, 1953) (birds landed in oil pits). The *Union Texas* and *Stuarco*, cases were never reported, and *Union Texas* never even went to trial, so even though MBTA charges were brought in these three cases, they are unhelpful for determining the MBTA's application to unintentional corporate actors. *See* Lilley & Firestone, *supra* note 18, at 1182 ("It is difficult to determine the exact significance of these [three] decisions, as they were 'not officially reported.'"). The *Chevron* case, also not reported, involved a guilty plea later flipped on its head by a federal judge utilizing the seldom-used rule of lenity. The judge's reasoning included that the defendants thought they were—indeed, they were—performing perfectly legal activity by installing the caisson. *See Chevron*, 2009 WL 364517, *4; Gaynor et al. *supra* note 14, at B-6.

66. *See, e.g.*, United States v. FMC Corp., 428 F. Supp. 615 (W.D.N.Y. 1977) (chemical company discharging pesticide); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978) (pesticide manufacturer); United States v. Moon Lake Elec. Assoc., Inc., 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999) (electricity provider); United States v. Rollins, 706 F. Supp. 742 (D. Idaho 1989) (alfalfa farmer); Newton Cnty. Wildlife Assoc. v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (timber sale operation); Mahler v. U.S. Forest Serv., 927 F. Supp. 1559 (S.D. Ind. 1996) (timber sale operation).

67. 16 U.S.C. § 707(a) (2006).

68. *See* cases discussed *infra* Part III.B.

69. *See* United States v. FMC Corp., 428 F. Supp. 615 (W.D.N.Y. 1977); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978); United States v. Moon Lake Elec. Assoc., Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999).

occurrence was in 1977, in *United States v. FMC Corp.*[70] In *FMC*, a chemical company was charged and convicted under section 703 of the MBTA for killing ninety-two birds after the company "discharged [a known toxic] pesticide into a nearby settling pond."[71] In holding FMC strictly liable under the MBTA, the court stated,

> [I]mplementation of the statute will involve only relatively minor fines; Congress recognized the important public policy behind protecting migratory birds; FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability on FMC.[72]

In addition to the MBTA's broad statutory language, the *FMC* court found strict liability appropriate because of the U.S. public policy in protecting migratory birds and the relatively small fines.[73] Ultimately, *FMC* started a trend of cases holding commercial entities strictly liable under the MBTA for unintentionally killing migratory birds.

Shortly after *FMC* was decided, the Eastern District of California imposed MBTA strict liability on a pesticides dealer in *United States v. Corbin Farm Service*.[74] In *Corbin Farm*, 1,000 migratory birds had died; however, in contrast to the multiple counts imposed in *FMC*, the *Corbin Farm* court imposed just one count of MBTA violations, reasoning that Congress had not expressly provided through the statute's language that multiple counts were an option.[75] Strict liability was still found despite no intentional taking or killing of birds. The court ran through the MBTA's history, noting that it was created in 1918 and designed to "sav[e] from indiscriminate slaughter of and insur[e] the preservation of such migratory birds" that were listed in conjunction with the Act.[76] But despite that it felt Congress was concerned primarily with hunting when the MBTA was first enacted, the court said that the legislative history gave no implication that the Act was meant to be so limited.[77]

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70. 428 F. Supp. 615 (W.D.N.Y. 1977), *aff'd*, 572 F.2d 902 (2d Cir. 1978).

71. *FMC Corp.*, 572 F.2d at 907–08; Lilley & Firestone, *supra* note 18, at 1182.

72. 572 F.2d at 908.

73. *Id.*

74. 444 F. Supp. 510 (E.D. Cal. 1978).

75. *Id.* at 531 ("This court cannot find that Congress has provided 'clearly and without ambiguity' for multiple counts in prosecutions under the MBTA in circumstances of this case. Accordingly, nine of the ten counts brought against defendants . . . under the MBTA are dismissed.").

76. *Id.* at 530 (quoting H.R. REP. NO. 243, pmbl., 65th Cong., 2d Sess. 3 (1918)).

77. *Id.* at 532. In fact, the court mentioned that a number of birds protected by the MBTA are not hunted birds, notably a variety of songbirds. *Id.* Arguably, the continued inclusion of un-hunted birds or birds at risk on the MBTA's list of protected birds suggests that the purpose of the Act, even if not the case in 1918, stems well beyond just hunting regulation. *See generally* Birds Protected by

The District of Colorado followed form in 1999.[78] In *United States v. Moon Lake Electric Assoc.*, an "electrical distribution cooperative" that provided power to an oil field was charged with MBTA violations for the unintentional "taking and killing" of seventeen protected birds.[79] The *Moon Lake* court noted that "the MBTA does not seem overly concerned with how captivity, injury, or death occurs."[80] The court further noted that, "in drafting the MBTA, Congress did not include any language that would suggest it intended to punish only those who act with specific motives."[81] Furthermore, the court asserted that Congress amended the MBTA after the *Corbin Farm* and *FMC* decisions, in 1986,[82] and could have altered it to not apply to unintentional acts, but Congress chose not to make those changes.[83] Thus, the *Moon Lake* court followed form from *FMC* and *Corbin Farm* in holding a commercial entity strictly liable for unintentionally killing and taking listed birds.[84]

Following *Moon Lake*, owners of oil drilling devices were prosecuted in a Tenth Circuit district for MBTA violations, and this time the case reached the appellate level.[85] The defendants in *United States v. Apollo Energies* were convicted of section 707(a) misdemeanors and fined a combined $1,750 after the USFWS found ten protected birds dead in their equipment.[86] The defendants challenged the convictions, alleging that the MBTA did not maintain a strict liability provision and

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the Migratory Bird Treaty Act, USFWS, http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtandx.html#alpha1 (last visited Apr. 2, 2012).

78. *See* United States v. Moon Lake Elec. Assoc., 45 F. Supp. 2d 1070 (D. Colo. 1999).

79. *Id.* at 1071.

80. *Id.* at 1074.

81. *Id.* at 1075.

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

83. *Moon Lake*, 45 F. Supp. 2d at 1077. In fact, the MBTA was amended in 1986 to include a knowledge element, adding the term "knowingly" to the felony violation, but the misdemeanor provision was left untouched. *See* § 501, 100 Stat. at 3582; Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1173–74 (2010) (suggesting that "[i]f Congress wanted to alter the strict liability scheme for misdemeanors, Congress would have added the term 'knowingly' to section 707(a)" and not just section 707(b)).

84. The *Moon Lake* court did add one component, which it claimed prior cases neglected: "[T]o obtain a guilty verdict under § 707(a), the government must prove *proximate causation* . . . ." *See Moon Lake*, 45 F. Supp. 2d at 1085 (emphasis added); *see also* Lilley & Firestone, *supra* note 18, at 1183–86 (comparing the *FMC*, *Corbin Farm*, and *Moon Lake* cases, among others). Even with the *Moon Lake* proximate cause addition, wind farms that do not take reasonable caution to prevent bird deaths would be potentially liable for MBTA liability because statistics suggest that wind projects are likely to result in at least some avian fatalities. *See* MARKIAN M.W. MELNYK & ROBERT M. ANDERSEN, OFFSHORE POWER: BUILDING RENEWABLE ENERGY PROJECTS IN U.S. WATERS 205–06 (2009) (analyzing *Moon Lake* in the context of wind farms).

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

86. *Id.* at 682.

that, alternatively, if it maintained strict liability, the MBTA would be unconstitutional.[87] The *Apollo* court used previous Tenth Circuit case law to reason that strict liability was a component of the MBTA's criminal provisions.[88] The court asserted as follows: "The question here is whether unprotected oil field equipment can take or kill migratory birds. It is obvious the oil equipment can."[89] The court found that unintentional actions of oil operators properly lead to MBTA prosecution for taking or killing listed birds.[90]

As can be seen from the above cases, the application of MBTA criminal prosecution to unintentional corporate actors has expanded across multiple jurisdictions, even if those jurisdictions did not interpret the statute the same way.[91] Other U.S. circuit and district courts have gone the complete opposite direction by not finding strict liability at all. Wind-farm operators that unintentionally kill migratory birds would not be subject to MBTA criminal liability in the jurisdictions where the following cases were decided.

B. Brigham Oil *and Similar MBTA Cases Where Strict Liability Was Not Found*

The 2012 District of North Dakota decision in *United States v. Brigham Oil & Gas L.P.* evidences the circuit split on whether unintentional corporate actors should be held strictly liable for MBTA violations. The *Brigham Oil* defendants consisted of seven oil and gas companies based out of North Dakota.[92] The seven companies committed a combined "taking" of twenty-seven birds, found dead near the defendants' oil reserve pits.[93] The companies were investigated by a Special Agent for the USFWS, who had observed "oil sheens" on the reserve pits and dead mallards that were "oiled."[94] The companies were subsequently charged in federal court with MBTA section 707(a) misdemeanors for "taking" migratory birds, pursuant to MBTA section

87. *Id.*

88. *Id.* at 684–88 (relying on United States v. Corrow, 119 F.3d 796 (10th Cir. 1997), which found an individual strictly liable under the MBTA for possessing and selling Golden Eagle and Great-Horned Owl feathers).

89. *Id.* at 686.

90. *Id.*

91. For example, *Corbin Farm* differed from *FMC* by finding a "one count" limit regardless of how many birds were killed, and *Moon Lake* incorporated a proximate cause analysis. *See supra* text accompanying notes 75, 84.

92. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1203 (D.N.D. 2012).

93. Defendant's Brigham and Newfield's Joint Memorandum of Law in Support of Motions to Dismiss Informations at 2 n.1, United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012) (Nos. 11-PO-005-CSM-1, 11-PO-009-CSM-1), 2011 WL 6258226 at *2 n.1.

94. *Brigham Oil*, 840 F. Supp. 2d at 1205.

703.[95] Contrary to previous case law in other jurisdictions,[96] the North Dakota district judge dismissed the case.[97] The judge reasoned that "[j]ust as in the case of driving, flying, or farming, the Migratory Bird Treaty Act cannot reasonably be read to criminalize the legal operation of a reserve pit at an oil exploration site."[98] The judge was concerned that reading the MBTA too broadly created "unlimited potential for criminal prosecution,"[99] and he argued that criminalizing commercial activity through the MBTA "stretche[d] far beyond the bounds of reason."[100]

The *Brigham Oil* outcome is not so surprising when considering the few MBTA cases involving corporate activity where defendants' motions to dismiss were actually granted. In fact, the *Brigham Oil* court relied in large part on Eighth Circuit precedent holding that the strict liability portions of the MBTA applied only to hunters and poachers.[101]

In the 1997 Eighth Circuit case *Newton County Wildlife Assoc. v. United States Forest Service*, the Newton County Wildlife Association (NCWA) sued the United States Forest Service (USFS) because it wanted judicial review of four timber sales, alleging MBTA violations by the parties to the timber sales.[102] NCWA sought an injunction to halt the sales, and it argued that the USFS' approval of sales was "contrary to law because [the USFS] ignored or violated its obligations under MBTA."[103] Notably, NCWA argued that the logging necessary for the timber sales would "disrupt nesting, migratory birds killing some," thus violating MBTA section 703.[104] However, the court disagreed with NCWA, reasoning that "it would stretch [the] 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."[105] The *Newton* court restricted the application of the

95. *Id.* at 1204.

96. *See* case discussions *supra* Part III.A.

97. *Brigham Oil*, 840 F. Supp. 2d at 1214.

98. *Id.* at 1213.

99. *Id.*

100. *Id.* at 1214.

101. *See id.* at 1211 (citing Newton Cnty. Wildlife Assoc. v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997)).

102. *Newton*, 113 F.3d at 112.

103. *Id.* at 114.

104. *Id.* at 115.

105. *Id.* The court cited cases from other jurisdictions as support for its assertion that "take" and "kill" meant actions of the sort taken by the hunters and poachers considered when the MBTA was adopted in 1918. *Id.* (citing Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); *accord* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1573–74 (S.D. Ind. 1996); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1509–10 (D. Or. 1991)).

MBTA to unintentional corporate actors because it felt such an application would be too broad an interpretation of the ancient Act.[106]

It is arguable that *Brigham Oil* is distinguishable from *Newton* and thus the *Brigham Oil* judge should not have relied on *Newton*. *Newton* involved claims against a federal agency, whereas *Brigham Oil* was a criminal prosecution of private entities. The *Newton* events were indeed part of a larger, public–private forestry operation. *Brigham Oil* involved purely private enterprise. Still, the *Newton* reasoning was that strict liability should apply only to hunting- and poaching-type activities, not commercial enterprise.[107] Thus, it would seem, *Brigham Oil* and *Newton* consistently establish that in North Dakota and in the Eighth Circuit generally, unintentional corporate actors are free from federal court MBTA criminal prosecution.

The USFS was prosecuted based on alleged MBTA violations again in *Mahler v. United States Forest Service*, a Southern District of Indiana case.[108] In *Mahler*, birds never actually perished; rather, MBTA charges were filed under the allegation that the USFS' planned harvest of red pine trees constituted a "taking" of migratory birds.[109] The *Mahler* court supported a narrow reading of the MBTA similar to the reading in *Newton*.[110] The *Mahler* court based its reasoning on the belief that the "MBTA was designed to forestall hunting of migratory birds and the sale of their parts," and ultimately the court declined that the USFS' action could be subject to criminal suit under the MBTA.[111] The court did not accept a strict-liability MBTA reading for indirect taking,[112] and its exception seems carved-out of legislative history even more than the exception carved-out by the *Newton* and *Brigham Oil* courts. The *Newton* and *Brigham Oil* judges were more concerned about an overly broad application of the MBTA, whereas Judge Hamilton, in *Mahler*, was concerned with the "Congressional purpose behind its enactment."[113]

Strict liability likewise was not applied to the defendant in *United States v. Rollins*, a District of Idaho case decided in 1989.[114] In *Rollins*, the defendant farmer had applied a pesticide mixture to fifty acres of

106. It is worth noting also that the *Newton* court held that the USFS was outside the MBTA's reach because a governmental agency cannot be a "person, association, partnership, or corporation." 113 F.3d at 115.

107. *See id.*

108. 927 F. Supp. 1559 (S.D. Ind. 1996).

109. *Id.* at 1573.

110. Lilley & Firestone, *supra* note 18, at 1184.

111. 927 F. Supp. at 1574.

112. *Id.*

113. *Id.*

114. 706 F. Supp. 742 (D. Idaho 1989).

alfalfa crop, and inadvertently killed a flock of geese.[115] The federal prosecutors argued that the defendant should have known that his alfalfa farm was a feeding area for geese, and that he should have been wary that his pesticides could harm migratory birds.[116] However, the district court overturned a magistrate opinion that held Rollins liable under the MBTA, finding that the MBTA did not give fair notice to Rollins that his conduct could have been criminal under the Act.[117] The court asserted that "[t]he MBTA trapped a farmer who acted in good faith" and that the MBTA could not constitutionally apply criminal violations to Rollins because the MBTA was too vague on whether applying legal pesticide to a field could be illegal conduct.[118] Thus, toxic-substance poisoning by Rollins, the farmer,[119] did not result in MBTA strict liability just as the oil-pit deaths did not create a strict liability crime in *Brigham Oil*.

Judges continue to disagree over whether strict liability under the MBTA applies to commercial entities unintentionally taking or killing migratory birds. Unless the Supreme Court of the United States grants certiorari on an MBTA case, it is likely that some judges will continue to carve-out exceptions for unintentional corporate actors in some circuits, while judges in other circuits will find liable *any* commercial entity that incidentally kills a migratory bird.

Whether a commercial wind-farm operator prosecuted for MBTA violations would be found liable entirely depends on jurisdiction. Even though wind farms would seem to violate the MBTA based on the plain language of the statute,[120] wind farms in North Dakota would seem to get a pass because *Brigham Oil* held that "commercial entities" were not meant to be subject to the MBTA, yet wind farms in Colorado would be treated differently because the Tenth Circuit has read the MBTA in its broadest possible form.

Wind-farm operators may never face the question of MBTA applicability though, because they may never be prosecuted. The U.S. judicial system embraces broad-sweeping prosecutorial discretion, so as long as U.S. attorneys keep from prosecuting wind farms for bird deaths,

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115. *Id.* at 743.

116. *Id.*

117. *Id.* at 744–45.

118. *Id.* For an opinion contrary to the *Rollins* judge, see Dennis Jenkins, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. ENVTL. AFF. L. REV. 595 (1997), arguing that there is "no merit to a contention that the MBTA violates due process because it wholly criminalizes criminal behavior," and that the Supreme Court would be unlikely to infringe upon the MBTA's legislatively induced strict liability requirement.

119. *See* Lilley & Firestone, *supra* note 18, at 1191.

120. *See supra* Part II.B; *see also* McKinsey, *supra* note 11, at 78 ("Because the MBTA's scope is so expansive, its authority reaches probably every wind energy project.").

MBTA application will remain inconsistent across jurisdictions and among different industry-types.

IV. PROSECUTORIAL DISCRETION AND THE MBTA

The fact that wind-farm operators have never been prosecuted for MBTA violations seems to be largely a component of prosecutorial discretion. Indeed, the overall inconsistent and unpredictable MBTA prosecution of unintentional corporate actors seems somewhat related to prosecutorial picking and choosing. An argument can be made (and has been made) that MBTA prosecution of certain industries, and not the wind industry, is invalid selective enforcement.[121] However, it is unlikely that any selective enforcement argument would bear scrutiny because companies (unless alleging discrimination based on race, gender, etc.,) often have no basis for an equal protection claim,[122] which is a necessary component of a selective enforcement claim. U.S. prosecutors are given a well-recognized level of discretion for choosing to bring claims, and courts generally heed to that discretion.[123]

"The [ultimate] question of whether a corporation will be charged and, if so, what crimes will be charged turns on the exercise of prosecutorial discretion."[124] The MBTA is merely one of the many statutes that prosecutors are armed with to decide the fate of potential defendants (choosing, sometimes, at their whim, whether a certain party deserve prosecution).[125] Prosecutors may have a constitutionally limited

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121. *See, e.g.*, United States v. Corbin Farm Serv., 444 F. Supp. 510, 536–37 (E.D. Cal. 1978); Letter from Newt Gingrich, *supra* note 8 (insisting that U.S. prosecutor decisions to prosecute oil companies but not wind farms is a "clear abuse of the justice system").

122. *See* Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, 3 (Michael B. Gerrard & Sheila R. Foster eds., 2008).

123. *See, e.g.*, United States v. Jones, 36 F. Supp. 2d 304 (E.D. Va. 1999) (acknowledging the "presumption of regularly afforded prosecutorial discretion"); Victoria L. Killion, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789 (2009).

124. James Patrick Hanlon, *Principles of Criminal Liability for Corporate Misconduct*, *in* PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 21, 26 (James T. O'Reilly et al. eds., 2009) [hereinafter PUNISHING CORPORATE CRIME].

125. *See* Anthony S. Barkow & Rachel E. Barkow, *Introduction* to PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 1, 1 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) [hereinafter PROSECUTORS IN THE BOARDROOM]; *see also* N. Douglas Wells, *Prosecution as an Administrative System: Some Fairness Concerns*, 27 CAP. U. L. REV. 841, 842 (1999) (noting that the federal prosecutor is an arm of the executive branch and that "[t]he prosecutor decides what crimes to investigate, whom to charge with a particular offense, which plea bargains to enter, when to seek an indictment, and when to prosecute"); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655 (2010) (describing that prosecutors are granted "a menu" of statutes to pick and

role to effect the legislature's polices, but prosecutors are arguably legislating when they use their broad discretionary powers to decide whether, and upon whom, to charge statutory violations.[126] For example, if prosecutors universally refrain from prosecuting the wind industry for bird deaths, then they recreate the MBTA's language to read, "any person, association, partnership, or corporation [*except for those within the wind industry*]"—even though that is not the language Congress adopted. Prosecutorial discretion could be kept in check by guidance, such as with the United States Attorneys' Manual (USAM).

The USAM, set forth by the U.S. DOJ, administers prosecutorial guidelines for deciding whether to charge corporations,[127] but these guidelines are not mandatory. The USAM guidelines are also not binding in court—rather, they serve merely as the name would imply: as *guidance*.[128] The USAM sets forth that, before charging a corporation, prosecutors must weigh "the nature and seriousness of the offense"[129] and the "pervasiveness of wrongdoing within a corporation,"[130] among

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choose between for charging decisions (quoting Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932–33 (2006)).

126. *See* Barkow & Barkow, *Introduction*, *supra* note 125, at 1 (noting that "it is certainly not the case today that prosecutors are merely enforcing preestablished rules"); Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 125, at 177, 178–79 ("[A]djudicative and lawmaking activities . . . are becoming increasingly common in prosecutors' offices around the country."); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 391 (2008) ("By declining prosecution, even when there is probable cause, prosecutors have the power to create exceptions to the reach of valid law—a power that signals the kind of lawlessness at the heart of sovereignty."). Some scholars point out that broadly written statutes present the best opportunities for prosecutors to use their discretion to threaten prosecution or to choose one law over another in charging a defendant. *See* Barkow, *supra*, at 178. The MBTA may be a tried and true example of this—the MBTA's "broad" and "vague" language has been recognized by many courts, *see* cases discussed *infra* Part III.A, so broad language could also explain the inconsistent application of the MBTA to some industries but not others.

127. UNITED STATES ATTORNEY'S MANUAL ch. 9-28.000, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm [hereinafter USAM]; *see also* Hanlon, *supra* note 124, at 27–28; James Patrick Hanlon & Erin Reilly Lewis, *The Federal Criminal Investigation Process*, *in* PUNISHING CORPORATE CRIME, *supra* note 124, at 67, 78–80.

128. *See, e.g.*, San Pedro v. United States, 79 F.3d 1065, 1070 (11th Cir. 1996) ("It is well established that the USAM only provides guidance to officials at the Department of Justice and does not have the force of law."); United States v. Carlson, 969 F.2d 1480, 1495 (3d Cir. 1992); Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 168 (2004). Administrative guidelines and manuals, though they would lack the force of law and would not be granted complete deference by courts, "may merit some deference," and are entitled to respect and allowed the "power to persuade" a court. United States v. Mead Corp., 533 U.S. 218, 220 (2003); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). For a look at the judicial deference afforded to federal decisions whether to prosecute generally, see Wells, *supra* note 125, at 845–46.

129. 9 USAM §§ 28.300, 28.400.

130. *Id.* §§ 28.300, 28.500.

seven other factors for consideration.[131] However, a prosecutor bringing charges against a corporation for MBTA violations need not consider that the violations were relatively minor, that the bird death was accidental, or that no component of the corporation was aware of wrongdoing. In addition, the charging U.S. attorney need not consider that a single wind farm may be responsible for thousands of annual bird deaths,[132] while a few oil companies, as in *Brigham Oil*, may be collectively responsible for only a few dozen bird deaths.[133] Likewise, one prosecutor in a certain U.S. district could decide on a whim to prosecute a wind farm for bird deaths, but a prosecutor in a different district might find wind farms too socially and environmentally beneficial, and thus, refuse to prosecute a wind farm killing just as many birds.[134]

The existing USAM guidance does not fully limit the fact that prosecutors have wide-ranging discretion for determining *who* to charge

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131. *See id.* § 28.300; Hanlon, *supra* note 124, at 28. The complete factors are the following:

> 1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see USAM 9-28.400);
> 2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see USAM 9-28.500);
> 3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see USAM 9-28.600);
> 4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see USAM 9-28.700);
> 5. the existence and effectiveness of the corporation's pre-existing compliance program (see USAM 9-28.800);
> 6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see USAM 9-28.900);
> 7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see USAM 9-28.1000);
> 8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
> 9. the adequacy of remedies such as civil or regulatory enforcement actions (see USAM 9-28.1100).

9 USAM §28.300(a).

132. *See* RIGHTER, *supra* note 12, at 106 (noting the 5,000-plus deaths occurring at Altamont Pass in California).

133. *See supra* note 8 and accompanying text.

134. *Cf.* Sarat & Clarke, *supra* note 126, at 391 ("A prosecutor might decline prosecution because she feels that a suspect is not morally culpable . . . .").

with MBTA violations.[135] And certainly prosecutors lack guidelines specific to MBTA enforcement.[136] This overall prosecutorial autonomy makes it unpredictable whether MBTA violations might be brought in given instances. Arguments have been made that prosecutor decisions to withhold MBTA prosecution from wind-energy entities constitute constitutionally invalid selective prosecution.[137] However, selective enforcement arguments carry little weight in the context of the MBTA.

For example, the defendant pesticides dealer in *Corbin Farm*[138] argued prosecutorial misconduct as one defense against MBTA application to his incidental killing of migratory birds.[139] The *Corbin Farm* defendant asserted that the MBTA had been "applied recently to an arbitrarily selected few," but that argument only captured a small component of a selective prosecution claim.[140] A defendant alleging selective prosecution must also show that "his selection was based on an impermissible ground such as race, religion, or his exercise of his first amendment right to free speech."[141] Thus, it is quite clear that selective prosecution arguments have no place in MBTA defenses based solely on certain industry-types being prosecuted and not others.

Prosecutors seem to have "unfettered discretion"[142] in deciding who to sue under the MBTA. The application of the MBTA to some industries, such as the oil companies in *Brigham Oil*, but not to wind-turbine operators, is a facet of prosecutorial discretion. The overarching broad powers of prosecutors may never diminish. However, in light of the current circuit split and ongoing, inconsistent MBTA prosecution, either legislative change or alterations to *how* prosecutors bring MBTA charges against unintentional corporate actors is necessary.[143]

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135. *See id.*; Wells, *supra* note 125, at 842.

136. Robbins, *supra* note 38, at 605–07 (arguing that more specific MBTA enforcement policies be implemented through regulations or, in the alternative, through written policy statements).

137. *See* Letter from Newt Gingrich, *supra* note 8.

138. United States v. Corbin Farm Serv., 444 F. Supp. 510, 536–37 (E.D. Cal. 1978); *see also* discussion of *Corbin Farm supra* Part III.A.

139. 444 F. Supp. at 536–37. Recall that the *Corbin Farm* defendant had applied a registered pesticide to an alfalfa field, which resulted in numerous bird deaths after birds fed on the field. *Id.* at 515.

140. *See id.*

141. *Id.* (quoting United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975)); *see also* United States v. Armstrong, 517 U.S. 456, 463–64 (1996) ("A selective-prosecution claim is . . . an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."); Bowers, *supra* note 125, at 1659 n.13.

142. Bowers, *supra* note 125, at 1660; Sarat & Clarke, *supra* note 126, at 389 (noting that some consider prosecutorial discretion bordering on "tyrannical power").

143. Block & Taylor, *supra* note 48, at V-32 ("Relying on prosecutorial discretion is not an adequate basis for decisions regarding significant allocations of capital and other resources. It is time for the MBTA to be better defined so that everyone, from oil companies to alternative energy

V. HOW DO WE REMEDY THE INCONSISTENT PROSECUTION OF COMMERCIAL ENTITIES FOR MBTA VIOLATIONS?

The inconsistent MBTA application can be remedied best by an approach that balances environmental accountability, fair prosecution, and recognition of the MBTA's purpose and benefits. There are many benefits to the MBTA, with the most obvious being to protect United States wildlife: the MBTA has an obvious purpose and impact on preventing the destruction of birds by hunters or the loss of certain endangered species,[144] and through the MBTA, the USFWS is able to enforce habitat preservation.[145] The MBTA also holds accountable and punishes intentional actors that wrongfully take advantage of protected birds.[146] In addition, it ensures that commercial entities are not lackadaisical or apathetic toward wildlife. If, for example, oil companies have not done their due diligence in protecting surrounding habitats and wildlife from their facilities, the MBTA arguably becomes an enforcement tool for prosecutors to ensure corporate accountability. Indeed, corporations are more likely to comply with environmental laws and ensure environmental accountability if criminal charges are possible.[147] The MBTA's purpose in ensuring corporate environmental awareness seems clear, but consistent and fair MBTA enforcement is just as important.

When criminal charges are not applied consistently, statutes become inherently unfair.[148] In the instance of wind farms and corporations, there is a circuit split as to whether the MBTA would even apply to unintentional bird deaths, and prosecutor discretion has caused inconsistent application over *who* the MBTA even relates to. Because the MBTA has such strong policy implications regarding wildlife preservation, its criminal provisions are necessary; however, the extent to which unintentional corporate actors could be held liable for bird deaths is debatable.

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developers to farmers, will know what to do to comply with the MBTA, and that it is no longer the stealth environmental law.").

144. *See* Giese, *supra* note 83, at 1160–61.

145. *See id.*; Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 21–30 (1996) (detailing the MBTA's "habitat preservation framework").

146. *See* 16 U.S.C. § 707(b) (2006) (providing felony punishment for "whoever . . . *knowingly* take[s] . . . or sell[s]" any migratory bird (emphasis added)); George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 181–83 (1978) (explaining that the traditional MBTA criminal law focus is on prosecuting illegal hunting, baiting, and possession of migratory birds).

147. Uhlmann, *supra* note 31, at 1443 (noting that the deterrent value of possible criminal charges is higher).

148. *See* Gaynor et al., *supra* note 14, at B-9–B-10 (emphasizing the apparent unfairness, in the MBTA context, when prosecutors pick and choose which industries should be subject to the Act).

Some argue that environmental criminal prosecution should not exist except for in instances involving "(1) significant harm or risk of harm to the environment, or public health, (2) deceptive or misleading conduct, (3) [facilities that] operate outside the environmental regulatory system, or (4) significant and repetitive violations of environmental laws."[149] Commercial entities that incidentally kill or take migratory birds do not necessarily fall into any of these categories. Punishing unintentional corporate actors under the MBTA may not effectively further environmental policies because, relative to the amount of birds dying from other human-related activities, companies causing incidental bird deaths create limited environmental risk and/or wildlife harm.[150] Moreover, unintentional corporate actors are generally not being deceptive, and yet, despite the seemingly minor penalties of the MBTA,[151] these commercial entities could incur significant damages by way of reputational harm.[152] One bird death is arguably enough to warrant a full-blown criminal investigation and punishment.[153] But even indictments for environmental crimes can bring public embarrassment and suggest that the involved corporations are bad corporate actors.[154] These consequences arguably outweigh any environmental policy furthered by such stringent MBTA enforcement. A logical exception could exist for repeat players—commercial entities with histories of killing birds or of being apathetic toward their operations' relationship to surrounding wildlife—as they are likely more blameworthy and present more risk to the environment.[155] However, not all violators seem fit for MBTA criminal prosecution.

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149. David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1226 (2009).

150. The environmental harm caused by a limited number of bird deaths is arguably slim when considering the number of incidental bird deaths that occur on an annual basis. *See, e.g.*, IMPACTS OF WIND-ENERGY PROJECTS, *supra* note 1, at 71–72 (detailing that millions of birds accidentally die from human-related activities each year).

151. *See generally* James Patrick Hanlon, *Criminal Statutory Liability and Interpretation*, *in* PUNISHING CORPORATE CRIME, *supra* note 122, at 47 (noting that strict liability penalties are more tolerable where the penalties are small). The harm created by wind farms is especially slim to those that find wind farms to have an inherent environmental value soaring beyond wind-energy's potential danger to wildlife. *See* sources cited *supra* note 59.

152. *See, e.g.*, Spence, *supra* note 26, at 75.

153. The MBTA has held strong since 1918 that any *single* migratory bird death shall render criminal liability. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918). Therefore, just one bird death may make prosecution worthwhile public policy.

154. *See* Joseph G. Block & David L. Feinberg, *Look Before You Leap—DPAs, NPAs, and the Environmental Criminal Case*, 9 ENVTL. ENFORCEMENT & CRIMES COMM. NEWSLETTER 5 (2008).

155. United States v. FMC Corp., 428 F. Supp. 615, 618 (W.D.N.Y. 1977) (investigations identified bird carcasses at multiple times before charges were brought).

Fair enforcement of the MBTA should not be detrimental to corporations not intending to violate the statute because it is unclear whether Congress even intended for the MBTA to apply to corporations (notably, wind farms).[156] 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.[157] Industries that are subject to the MBTA based on the MBTA's text cannot wait for the United States Supreme Court to grant certiorari to resolve whether strict liability applies to unintentional corporate actors because it is too difficult to predict when (or even if) the opportunity would arise. Ninety-four years have passed, and the Supreme Court has hardly mentioned the MBTA.[158] Much of the fighting has occurred in the federal district courts.[159] Whether the Supreme Court could solve the issue would depend on another court of appeals decision and a favorable result from the Supreme Court's variable certiorari process.[160]

There are more efficacious avenues. Ideally, Congress should modernize this statute, and in the interim, prosecutors should be directed to use DPAs or NPAs to more fairly ensure that corporations are complying with the MBTA and protecting surrounding wildlife, rather than selectively bringing only certain industry-types to court.

A. Redrafting the MBTA to Either Include an Incidental-Take Exception or More Expressly Hold Unintentional Corporate Actors Liable

The MBTA is due for an update. Congress should redefine who can be liable for "taking" or "killing" a migratory bird.[161] The MBTA is

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156. *See infra* text accompanying note 163; *see also* Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1510 (D. Or. 1991) ("The fundamental purpose of [the MBTA] is to protect migratory birds from destruction in an unequal contest between hunter and bird, and to provide severe penalties for market hunters who receive commercial benefit from the sale of migratory bird parts." (internal quotations omitted)); *cf.* Gaynor et al., *supra* note 14, at B-10–B-12 (suggesting relation to the rule of lenity).

157. *See supra* Part III.

158. Robbins, *supra* note 38, at 598.

159. *Id.* Robbins notes that only two appellate cases deal with industrial setting creating indirect harm. *Id.* (citing *FMC Corp.* and *Apollo Energies*). Robbins ignores *Newton* and *Seattle Audubon*. The logging industry seems to fall in line with industrial activity indirectly harming migratory birds. The appellate consideration of the MBTA's language in the industrial or commercial context seems larger than just two cases; though nonetheless, it remains a small pool.

160. *See* SUP. CT. R. 10. *See generally* Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 LAW LIB. J. 194 (2000).

161. *See* McKinsey, *supra* note 11, at 91. Any legislative change to the MBTA potentially results in the United States violating its treaty obligations through one of the four bilateral treaties it incorporates. However, the treaties seem to represent minimum levels of commitment to migratory bird preservation and are generally directed at what birds should be protected. *See* Andrus v. Allard,

nearly one century old, yet its broad language implicates modern technologies, such as wind turbines, that were not even a part of the U.S. commercial or industrial landscape in 1918.[162] When Congress took action in 1918 to address the United States' diminishing migratory bird population, it was largely in response to shrinking game-bird numbers.[163] However, since 1918, the MBTA has only been altered to reflect more bilateral treaties that the United States entered,[164] or to update monetary fine amounts.[165] Moreover, with the prevalence of wind farms, Congress is faced with competing environmental policies.[166] On the one hand, Congress has pushed forth renewable energy policies and incentives[167] at the heart of which wind farms rest. On the other hand, the United States, ninety-four years ago, entered into and legislatively adopted a treaty aimed at protecting migratory birds.[168] That treaty and its wildlife-preserving focuses are still in place today.[169] The result is a quarrel between competing environmental movements: wildlife preservation versus renewable energy.

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444 U.S. 51, 62 n.18 (1979) ("[I]n as much as the Conventions represent binding international commitments, they establish *minimum* protections for wildlife . . . ."); Corcoran & Colbourn, *supra* note 24, at 361–69 (suggesting that the treaties set a bare minimum policy agreement, mostly regarding an economic focus on preservation, and that Congress seems to have flexibility to work with them). While any legislative change to the MBTA must not violate treaty obligations, more specific provisions regarding who can violate the act seem unlikely to do that.

162. *See, e.g.*, McKinsey, *supra* note 11, at 78 ("Because the MBTA's scope is so expansive, its authority reaches probably every wind energy project."); Corcoran & Colbourn, *supra* note 24, at 370, 385–86. *See generally* Paul Boudreaux, *Think Less Like a Mountain, and More Like a Realist*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS 115, 129 (Michael Allan Wolf ed., 2005) ("Without clear definitions and without sensible administrative applications, [environmental] terms can be twisted far from their originally intended meaning. When contortions are made by those hostile to the laws, it is cause for consternation among environmentalists. But when they are made by those supportive of the laws, it is ground for fixing the laws whenever the chance arises.").

163. Finet, *supra* note 145, at 7–8; Lilley & Firestone, *supra* note 18, at 1178. Finet suggests that the legislative history, while unclear, also accounts for Congressional concerns over bird habitat and preservation of "insectivorious" birds, due to their utility. Finet, *supra* note 145, at 8.

164. *See* Lilley & Firestone, *supra* note 18, at 1179 (explaining that the MBTA had been amended to recognize other bilateral treaties between the United States and "Mexico in 1936, Japan in 1972, and the U.S.S.R. in 1976"); *see also* Corcoran & Colbourn, *supra* note 24, at 361–67 (describing the treaty conventions that have been incorporated in the MBTA).

165. See Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, § 103(1), 112 Stat. 2956, 2956 (1998), which amended the misdemeanor fine to become $15,000 per bird death.

166. McKinsey, *supra* note 11, at 91.

167. *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 624; *Business Energy Investment Tax Credit*, AGSTAR, http://www.epa.gov/agstar/tools/funding/incentive/USbusinessenergyinvestmenttaxcredit.html (last visited Apr. 17, 2012) (explaining the tax-incentive program created in 2009 to encourage investment in clean energy projects).

168. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (giving effect to Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.–Gr. Brit., Aug. 16, 1916, 39 Stat. 1709).

169. 16 U.S.C. §§ 703–712 (2006).

Some argue that Congress needs to take a stand on which direction it now serves to promote.[170] There appear two constructive options. Option one is to create an incidental-take exception. This would relieve from MBTA liability all wind farms that unintentionally kill migratory birds, furthering the promotion of clean energy in light of wildlife destruction. Option two is to reaffirm the MBTA's force against *all* commercial entities that unintentionally kill migratory birds by expressly writing into the Act that section 707(a) includes entities with no relation to hunting or gaming. This would reinforce the wildlife preservation policies at the heart of the MBTA.

The incidental-take exception may be the best approach. Not only does it capture the balanced approach discussed above (that takes into account fairness to commercial entities),[171] but, in addition, the MBTA's legislative history suggests that the root of the MBTA is wildlife preservation in lieu of hunting practices.[172] Commercial entities not related to hunting or gaming seem unlikely to have been thought of when the MBTA was created,[173] so the instincts of the judges that have read an exception into the Act may be correct. However, the plain language of the statute still ropes in *all* unintentional corporate entities, so legislation is likely needed to best clear up this confusion. Moreover, judicial opinions that have read-in an incidental-take exception have been criticized by other courts, scholars, and interest groups, for reading the statute too narrowly,[174] so legislative change seems necessary to fix any ambiguities.

John Arnold McKinsey agrees with option one, and has proposed the following language to alter the MBTA:

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170. McKinsey, *supra* note 11, at 91.

171. *See supra* notes 144–147 and accompanying text.

172. H.R. REP. NO. 64-968, at 1–4 (1917); H.R. REP. NO. 64-app'x, at 116 (1917) (remarks by Hon. Dudley Doolittle); *see also* Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. U.S. Forest Serv., 952 F.2d 297, 302 (9th Cir. 1991); Mickell Jimenez, Sierra Club v. Martin*: The Eleventh Circuit's Interpretation of the Migratory Bird Treaty Act*, 18 J. LAND RESOURCES & ENVTL. L. 159, 160 (1998). The 1917 congressional debates surrounding the proposed act show the congressmen at the time expressing, almost exclusively, their concerns over hunting practices, bird populations reduced by hunting, and birds becoming extinct due to shooting. H.R. REP. NO. 64-968, at 1–4; 56 CONG. Rec. 7364, 7370. In showing his distaste for the MBTA, Representative Dudley Doolittle identified that "there were 80,000 wild ducks killed in a single week" due to a hunting expedition, and that "conservation" to many involved in the enactment of the MBTA was to "legislate against . . . the hunting season." H.R. REP. NO. 64-app'x, at 116.

173. See congressional discussions in H.R. Rep. No. 64-968 and H.R. Rep. No. 64-app'x, at 116, which show that most of the discourse surrounding the U.S. legislative enactment of the treaty between the United States and Great Britain involved hunting and gaming, not unrelated commercial enterprise.

174. *See supra* Part III.

> [I]t shall be unlawful at any time, by any means or in any manner, *excepting therein incidental harm or death to birds occurring from birds striking structures, including rotating or stationary wind energy turbine blades reasonably designed to minimize such collisions*, to pursue, hunt, take, capture, kill . . . any migratory bird . . . .[175]

The proposed language only addresses structures. McKinsey's language successfully relieves wind-turbine operators (that meet certain design requirements) from MBTA liability. But McKinsey's language leaves open the likeliness that other industry-types incidentally killing migratory birds, such as the oil companies and pesticides users discussed in Part III, would remain subject to the MBTA: oil pits and crop fields could incidentally lead to bird deaths, and these items do not expressly meet the characterization of a "structure."

A singled-out exception for buildings and wind turbines is a good start, to be sure. Wind turbines, for example, are at the heart of this controversy for their increasing impacts on bird mortality rates and unforeseen clash with the MBTA's conservation policies.[176] If Congress is to work an exception into the MTBA, then wind turbines and standing structures are a good foundation, because what can be more "incidental" than an instance where a bird collides with an already-there structure? Moreover, the word *striking* implies that the bird caused the impact,[177] and not the building. McKinsey's language creates an exception for commercial entities that are certainly incidental when taking or killing migratory birds.

However, a singled-out exception for buildings and wind turbines would do little to relieve the inconsistent MBTA prosecution across certain industry-types. Indeed, all entities that are not wind farms or that incidentally kill birds in ways without structures would still be liable under McKinsey's proposal.[178]

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175. McKinsey, *supra* note 11, at 91. Immunity for companies incidentally killing bats has also been suggested. Laura Householder, *Have We All Gone Batty? The Need for a Better Balance Between the Conservation of Protected Species and the Development of Clean Renewable Energy*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 807, 836–37 (2012) (suggesting that companies incidentally killing bats in violation of the Endangered Species Act should be immune from the citizens suit provision of that Act if they take certain actions to mitigate deaths, and that this would reduce litigation costs and actually *help* endangered species).

176. *See supra* notes 8–9, 13 and accompanying text.

177. See MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 1236 (11th ed. 2011), defining "strike" as "to take a course [or] . . . to aim."

178. Of course, this depends on how "structure" is defined. However, as shown in Part III, oil pits and fields of crops have caused bird deaths resulting in MBTA liability. Even a very loose

If an incidental-take exception is the direction Congress takes, then Congress should create language that is more inclusive than McKinsey's suggestion. Instead of limiting the language to "structures" and spelling out "wind turbines," the exception could read as follows:

> It shall be unlawful at any time, by any means or in any manner, *excepting therein incidental harm or death to birds*
>
> *(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 death to birds*.

This language would capture, for example, oil pits that are designed in a way that can reasonably prevent bird deaths. If an exception is created, then it should be created in a way that does not further inconsistent and unfair application of the MBTA—a more inclusive exception is more likely to ensure fairness.

If an exception is not created, then Congress should incorporate option two. If Congress decides that unintentional corporate actors are meant to be liable for MBTA violations, then it should clarify what is meant by "any person, association, partnership, or corporation."[179] Using option two, a new subsection, *section 707(a)(1)*, could expressly integrate unintentional corporate actors with the following language:

> *Section 707(a) applies even if a person, association, partnership, or corporation is not in the business or practice of hunting, gaming, or poaching.*

This added language would eliminate any judicially carved-out exceptions for unintentional corporate actors, such as the exception adopted by the judge in *Brigham Oil*.[180] Those that currently read the MBTA broadly—such that *any* actors that kill birds are liable under the MBTA, irrespective of *how* the birds died—would certainly favor proposed section 707(a)(1) over the incidental-take exception.[181]

To be sure, option one might be the more sensible approach, because the congressional intent in 1918 seems relatively devoid the

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definition of "structure" would not seem to include an oil pit or agricultural field, and thus those particular entities would still be subject to MBTA liability.

179. *See* 16 U.S.C. § 707(a) (2006).

180. United States v. Brigham Oil & Gas L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012).

181. *See supra* Part III.A; Giese, *supra* note 83, at 1169–74.

thought of MBTA prosecutions of unintentional corporate actors.[182] However, until any congressional action is taken, prosecutors still maintain unfettered discretion. Moreover, if option two is chosen, then all that is fixed is the circuit split. With my proposal for option two—section 707(a)(1)—prosecutors would *still* have unfettered discretion to bring charges against selective commercial entities that accidentally kill birds and to not charge others, such as wind-farm operators.

If there is no congressional action and no legislation crafted to change the incidental-take exception, then DPAs and NPAs may most effectively curb the negative impacts that prosecutorial discretion has on MBTA enforcement. With DPAs and NPAs, reputational harms could be limited for less severe MBTA violators, while full-blown prosecutions could still be used for repeat actors and more blameworthy MBTA violators.

B. Using DPAs and NPAs to Enforce the MBTA

DPAs and NPAs fit nicely with MBTA prosecution of unintentional corporate actors. Prosecutorial agreements would give corporate actors who do not mean to violate the MBTA opportunities to take proactive approaches toward preventing more bird deaths without having to endure embarrassing and costly prosecution.[183] Moreover, prosecutorial agreements could mellow the detriments caused by inconsistent MBTA application across industry-types: with DPAs and NPAs, prosecutors still have wide discretion, but at least those chosen for investigation would not be subject to burdensome litigation.[184] Also, if DPAs or NPAs are

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182. Arguably though, the variety of birds added to the protected list since 1918 suggests that the MBTA's scope has expanded. Each of the Mexico, Japan, and U.S.S.R. treaties contained language suggesting that nongame birds were just as important to protect as game birds. *See* Corcoran & Colbourn, *supra* note 24, at 390 n.233. However, the conventions were steeped primarily in economic factors, and the U.S. legislative history was focused almost exclusively on hunting. *See id.* at 362; *see supra* text accompanying note 163.

183. *See* Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1437–38 (2007) (characterizing prosecutor agreements as a "middle ground" where charges are either deferred or not brought at all); Eric Lichtblau, *Leniency for Big Corporations in the U.S.*, N.Y. TIMES, Apr. 9, 2008, http://www.nytimes.com/2008/04/09/business/worldbusiness/09iht-justice.1.11805997.html?page wanted=2%3C!--
Undefined%20dynamic%20function%20data_sanitationlib::sanitize_string:1%20called--%3E
(noting that some officials believe DPAs allow for more cooperation with defendants and are less likely to be destructive to business); *cf.* Householder, *supra* note 175, at 836 (suggesting that creating immunities for corporations that unintentionally kill bats could shift companies' focuses away from litigation and instead toward mitigation and "actually helping the species").

184. For example, former Attorney General John Ashcroft has commented that prosecutorial agreements can "avoid destroying corporations," and that "a corporate indictment can be a corporate death sentence." Lichtblau, *supra* note 183 (quoting remarks of John Ashcroft at a March 2008 congressional hearing); *see also* Block & Feinberg, *supra* note 154, at 5 (noting that DPA and NPA

encouraged by the U.S. DOJ, then federal prosecutors might be more willing to investigate wind-farms, because DPAs and NPAs encourage proactive, remedial regulation rather than punishment, with, perhaps, less risk of clashing the competing renewable-energy and wildlife-preservation policies than federal prosecution. Successful MBTA-based DPA and NPA implementation would, of course, need stringent internal guidance to prevent further inconsistent MBTA application.[185]

1. Prosecutorial Agreements and Their Benefits and Drawbacks

Prosecutorial agreements allow prosecutors to impose regulatory terms upon actors to ensure forward-looking compliance with federal statutes, without a full-fledged criminal prosecution.[186] In the case of a NPA, "no charging document is filed provided that the company adheres to the agreement."[187] In the case of a DPA, the prosecutor files charges, but "agrees to defer prosecution for a given period of time," and the charges would be dismissed if the charged entity complies with the terms of the agreement.[188] If prosecutors manage to formulate DPAs or NPAs with unintentional corporate MBTA violators, society benefits twice: a DPA or NPA would hold unintentional corporate actors accountable for MBTA violations while also causing them to remediate their properties to prevent further harms. The corporations benefit too: "[D]eferred [or non-] prosecution attempts to avoid harming the employees, investors, and markets that rely upon corporations to survive criminal liability."[189]

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usage could reduce the "public embarrassment and reputational damage" that can result from criminal indictments for corporate environmental harms).

185. *See* Paulsen, *supra* note 183, at 1444, 1455–62 (explaining how prosecutors have wide discretion to select the terms of prosecution agreements and that prosecutors may be prone to "overreaching"). *See generally* Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

186. Barkow & Barkow, *Introduction*, *supra* note 125, at 2–3; *see also* Paulsen, *supra* note 183, at 1439–43 (noting that prosecution agreements "feature a variety of terms," including "provisions about cooperation, acknowledgement of criminal conduct, business reforms, penalties, and independent monitors").

187. Block & Feinberg, *supra* note 154, at 5; *see also* Spivack & Raman, *supra* note 185, at 160.

188. Block & Feinberg, *supra* note 154, at 5. Spivack and Raman refer to this approach as the "typical corporate deferral scenario." Spivack & Raman, *supra* note 185, at 160–61. The deferral approach evidences a prosecutorial focus, in the corporate setting, that seeks to reform and ensure compliance, as opposed to "indict, . . . prosecute, and . . . punish." *Id.* at 161.

189. Greenblum, *supra* note 26, at 1881; *see also* Jill Fisch, Panel Discussion, *Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, 2 J. BUS. & TECH. L. 91, 93–94 (2007) (noting that those really harmed when corporations are criminally prosecuted and sanctioned are the shareholders).

The use of prosecutor agreements has risen steadily since 2000;[190] however, the U.S. DOJ's environmental crimes section has "long resisted the use of DPAs and NPAs as a means of resolving potential criminal charges against corporate defendants."[191] To be fair, prosecutorial agreements let corporations out of more severe punishments and risk that corporations will act less cautiously if they know federal prosecution is paused or dismissed.[192] Some argue that NPAs and DPAs are unsatisfactory responses to criminal activity generally because they let criminals essentially off the hook.[193] And for corporations, DPAs and NPAs are not even complete stops—indeed, in the context of a DPA, where charges have already been filed, the agreement only delays prosecution so long as corporations comply with the regulatory terms.[194] In addition, if a company is public, then SEC reporting requirements may be triggered.[195] MBTA-based DPA and NPA enforcement would have to endure these drawbacks.

The drawbacks can be alleviated, however, by the proactivity DPAs and NPAs employ and the feasibility of monitoring and remediation requirements to prevent further bird deaths.[196] What prosecutorial agreement provisions may include is flexible, with such possibilities as bird death-mitigation reforms, cooperation requirements, public acknowledgements about criminal wrongs, and even penalties.[197] An

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190. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 125, at 11, 12–13 & fig.1.1, tbl.1.1 (noting the rise of DPAs and NPAs from 2000 to 2008, peaking in 2007). The use of DPAs in place of white collar crime prosecutions was infrequent until the late 1990s; Greenblum, *supra* note 26, at 1871–72.

191. Mark D. Hopson et al., *supra* note 19, at V-6. David Uhlmann, once head of the U.S. DOJ's Environmental Crimes Section, has taken the view that it is "wrong to use deferred prosecution agreements to settle corporate crime cases":

> My view is that, if a corporation commits a crime, as when an individual commits a crime, it should be held criminally responsible. It should not be the case that a corporation can pony up large sums of money, agree to cooperate with an investigation, and thereby avoid criminal prosecution.

Russell Mokhiber, *Uhlmann Says It Is Wrong to Defer Prosecution of Corporate Crime*, GREENCHANGE (June 6, 2008), http://www.greenchange.org/article.php?id=2745 (quoting an interview of David Uhlmann with the *Corporate Crime Reporter* in June 2008).

192. *See* Lichtblau, *supra* note 183.

193. *Id.*

194. Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 125, at 38, 39; Paulsen, *supra* note 183, at 1437–38.

195. Block & Feinberg, *supra* note 154, at 7.

196. *See infra* Part V.B.3.

197. *See generally* Paulsen, *supra* note 183, at 1429–43 (noting the variety of potential DPA/NPA features). Federal prosecutors have no requirement to publish or release to the public the terms of corporate prosecutorial agreements; Spivack & Raman, *supra* note 185, at 180–81.

agreement could even require that a MBTA violator announce its MBTA violations publically, holding that company publically accountable but without the potentially more harmful and costly litigation.[198] Ultimately, the NPA/DPA approach ensures flexible fairness. And this approach seems more fitting than either *not* prosecuting violating wind farms at all or *completely* prosecuting clean-energy wind farms for environmental violations that possibly do not outweigh the environmental benefits they produce.[199]

2. The Need for DPA/NPA Guidance

To achieve flexible fairness through prosecutorial agreements, specific, uniform guidance would be necessary as a means for ensuring that MBTA-based DPAs or NPAs effectively relieve the inconsistent corporate MBTA prosecution that currently exists.[200] The "risk of inconsistent policymaking" by prosecutors selectively entering into DPAs or NPAs is high; there are nearly 100 U.S. attorneys, each with relatively unfettered prosecutorial discretion,[201] and surely different viewpoints. Indeed, without DOJ guidance specific to environmental criminal cases, uncertainty over how and when DPAs or NPAs might be used in an MBTA context will continue.[202]

As a general matter, guidance over how and when prosecutors decide to enter into DPAs or NPAs with companies is limited.[203] Guidance currently comes from the DOJ's *Principles of Federal*

Interestingly, arguments have been made that the lack of publication and filing requirements—although the DOJ often issues press releases—causes concern for interested parties and the public, because the terms are nearly impossible to locate. *See id.* However, any public announcement or publication requirement could be written into an MBTA-based DPA or NPA, further highlighting the flexible balance of punishment and reform that these agreements potentially offer.

198. This could even work as a way of "shaming" the company into future compliance. *See generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). And although public shaming would still trigger reputational harm, it would at least not be in combination with lengthy and costly litigation known to impact stock prices and have detrimental effects on shareholders. *See* Fisch, *supra* note 189, at 94.

199. The balance between the environmental pluses and minuses of wind energy turn on clean energy, economic considerations, and potential threats to wildlife; this may be an impossible balance to tip though. *See generally* Reed Elizabeth Loder, *Breath of Life: Ethical Wind Power and Wildlife*, 10 VT. J. ENVTL. L. 507, 517, 526–29 (2008–2009) (suggesting that wind-energy introduces a cost–benefit analysis in the context of wildlife).

200. *See, e.g.*, Anthony S. Barkow & Rachel E. Barkow, *Conclusion* to PROSECUTORS IN THE BOARDROOM, *supra* note 125, at 249, 250 ("As an initial matter, prosecutors should establish internal guidance describing what steps prosecutors should take before imposing regulations on companies.").

201. *See id.* at 251; Block & Feinberg, *supra* note 154, at 8–9 ("Prosecutors have few, if any, rules to guide their discretion" over how DPAs and NPAs will be used and structured).

202. *See* Block & Feinberg, *supra* note 154, at 8.

203. Barkow & Barkow, *Conclusion*, *supra* note 200, at 252, 257 n.2.

Prosecution of Business Organizations,[204] but these guidelines offer little in the way of uniform instruction over what steps prosecutors should take or what considerations they should make before entering agreements in lieu of prosecuting. In order for prosecutorial agreements to meaningfully replace the current mess of MBTA enforcement against unintentional corporate actors, better guidance would be needed.

To start, DOJ guidance should direct prosecutors to go the route of DPAs or NPAs unless the MBTA violator being investigated is highly blameworthy. Highly blameworthy unintentional corporate actors would include repeat offenders (those who have been contacted multiple times about bird deaths[205]), commercial entities causing a high incidence of bird deaths at a particular location,[206] or those that refuse to implement safe equipment.[207] Such guidance would not prevent prosecutors from investigating only certain industry-types, but it would prevent all industry-types subject to the MBTA from enduring embarrassing prosecution except in cases of particularly bad actors.[208] Using DPAs or NPAs for less blameworthy unintentional corporate actors ties back to the policy behind the incidental-take exception proposed above—that the MBTA is not meant to make white collar criminals out of those who accidentally kill birds and that have no relation to hunting or gaming. With proper guidance, DPAs and NPAs become worthwhile, flexible, and fair tools to ensure corporate actors are complying with MBTA provisions and proactively mitigating the harm they cause to migratory birds.

3. Potential MBTA-Based DPA/NPA Measures

MBTA-based DPAs and NPAs would be able to set terms for monitoring and remedial techniques.[209] Proposed technical terms of any

204. 9 USAM § 28.000.

205. *See supra* note 150 and accompanying text.

206. *See, e.g.*, United States v. Corbin Farm Serv., 444 F. Supp. 510, 531 (E.D. Cal. 1978) (noting that 1,000 bird deaths were caused by the defendant); *see supra* note 11 and accompanying text (discussing 5,000(+) annual deaths at Altamont Pass).

207. *E.g.*, Ruffin Prevost, *Utility to Pay for Bird Deaths*, BILLINGS GAZETTE (July 11, 2009), http://billingsgazette.com/news/state-and-regional/wyoming/article_d9fc9894-6e94-11de-8937-001cc4c03286.html (noting PacifiCorp's failure to update power equipment as a factor in why it was prosecuted for killing more than 200 protected eagles).

208. Guidance of this sort would have prevented the seven companies in *Brigham Oil* from being fully prosecuted, because those companies combined for a total of only twenty-seven dead birds. *See supra* note 8 and accompanying text. Restricting prosecution to only highly blameworthy actors is consistent with calls for more commonsense in MBTA enforcement. *See* Hurley, *supra* note 14 (quoting oil and gas law expert Kevin Gaynor, "Questions have to be asked: What we are doing as a society is chasing 27 migratory birds?").

209. *See* Paulsen, *supra* note 183, at 1444–45 (explaining the discretion prosecutors have in setting DPA or NPA terms).

MBTA-based prosecutor agreement are beyond the scope of this paper.[210] However, studies demonstrate that technology to lessen avian mortality exists in a number of forms. For example, marking or placing alerting devices on power-line wires has been found to reduce the number of bird fatalities at power-line sites.[211] Oil pit operators have remedial tactics available as well, such as using nets, closed tanks as replacements to pits, or deterrent methods such as reflectors or flashing lights to attempt to deter birds.[212] Finally, wind turbines can be made less fatal to birds by slowing or altering blade-rotation speed, painting blades, using flashing lights or diverters, or just reducing tower height.[213]

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210. This Article is not meant to craft the best technical NPA or DPA terms or to suggest the best ways available to correct industry infrastructure and operations to comport with surrounding wildlife. Rather, the point is to introduce that remedial options exist.

211. *See, e.g.*, ROBERT K. MURPHY ET AL., UNIV. NEB.–KEARNEY, EFFECTIVENESS OF AVIAN COLLISION AVERTERS IN PREVENTING MIGRATORY BIRD MORTALITY FROM POWERLINE STRIKES IN THE CENTRAL PLATTE RIVER, NEBRASKA 1 (2008–2009); MARCUS L. YEE, CAL. ENERGY COMM'N, TESTING THE EFFECTIVENESS OF AN AVIAN FLIGHT DIVERTER FOR REDUCING AVIAN COLLISIONS WITH DISTRIBUTION POWER LINES IN THE SACRAMENTO VALLEY, CALIFORNIA 2, 22 (2008); Rafael Barrientos et al., *Meta-Analysis of the Effectiveness of Marked Wire in Reducing Avian Collisions with Power Lines*, 25 CONSERV. BIOLOGY 893, 897 (2011).

212. PEDRO RAMIREZ, JR., U.S. FISH & WILDLIFE SERV., RESERVE PIT MANAGEMENT: RISKS TO MIGRATORY BIRDS (2009), *available at* http://tutelasalute.info/pdf/adjacent/3.pdf (noting that netting or immediate removal of drilling can lead to reduced avian mortality); Pepper W. Trail, *Avian Mortality at Oil Pits in the United States: A Review of the Problem and Efforts for Its Solution*, 38 ENVTL. MGMT. 532, 543 (2006) (noting that well-installed netting, with steel frames, or closed tanks instead of pits, reduce avian mortality); Chuck Haga, *Oilfield Operators Urged to Protect Birds, Other Wildlife*, GRAND FORKS HERALD (Aug. 19, 2011), http://www.grandforksherald.com/event/article/id/213274/ (identifying these options, but noting that not all are equally successful).

213. RIGHTER, *supra* note 12, at 107 (mentioning lowering of rotation speed); ANDREA KINGSLEY & BECKY WHITTAM, POTENTIAL IMPACTS OF WIND TURBINES ON BIRDS AT NORTH CAPE, PRINCE EDWARD ISLAND 18 (2001) (identifying studies finding success with lowering height, adding lights or diverters, and painting blades), *available at* http://www.bsc-eoc.org/download/PEIwind.pdf; *see also* CRITERION POWER PARTNERS, LLC, CRITERION WIND PROJECT, GARRETT COUNTY, MARYLAND BAT HABITAT CONSERVATION PLAN 37–45 (2011), *available at* http://www.fws.gov/chesapeakebay/EndSppWeb/Criterion%20docs/Draft%20Criterion%20HCP.pdf (proposing mitigation and monitor program, including design to limit "blade pitch," to reduce bat fatalities). However, slowing rotation speed or stopping turbines can result in revenue losses for operators. *See Scientists Find Successful Way to Reduce Bat Deaths at Wind Turbines*, SCIENCEDAILY (Sept. 28, 2009), http://www.sciencedaily.com/releases/2009/09/090928095347.htm. The Department of the Interior announced new voluntary measures for wind-energy development in March 2012, focused on minimizing harms to wildlife. U.S. FISH AND WILDLIFE SERVICE, LAND-BASED WIND ENERGY GUIDELINES, IV (2012), *available at* http://www.fws.gov/windenergy/docs/WEG_final.pdf; U.S. Dep't of the Interior, *Interior Announces Onshore Wind Energy Guidelines* (Mar. 23, 2012), http://www.fws.gov/cno/press/release.cfm?rid=373. These new guidelines could prove helpful for setting the most appropriate DPA or NPA regulations.

All monitoring could be done by routine ground inspections or by real-time radar.[214] Prosecutors (or the USFWS) could monitor to ensure compliance by enforcing an allotted amount of annual bird deaths, similar to a permit.[215] And, in addition to mitigation strategies and monitoring approaches, prosecutorial agreements could invoke creative punishment tactics in lieu of traditional prosecution. Such tactics seem endless, and could involve less costly (but still effective) methods such as the public announcements or cooperation requirements mentioned above.[216]

In the context of the MBTA, the prosecution agreement benefits arguably offset the negatives (especially considering the number of remedial techniques that agreements could require companies to employ). Corporations unintentionally violating the MBTA may not even know they violated the Act.[217] Plus, with the MBTA's current language, even one dead bird renders actors liable, depending on the U.S. jurisdiction.[218] Minimal damage potentially subjects companies to severe punishment—financially and through reputational harm—but DPAs and NPAs can help ensure fairer application of the MBTA across jurisdictions and among different industry-types while also staying true to the MBTA's preservation focus.

VI. CONCLUSION

The MBTA is in dire need of uniformity in how it positions unintentional corporate actors as white collar criminals. When a bird lands in an oil pit, feeds on pesticide-riddled crops, or hits a wind turbine, criminal prosecution may not be the best response. The plain language of the MBTA provides, however, that everyday commercial

214. Lilley & Firestone, *supra* note 18, at 1211.

215. *Cf.* McKinsey, *supra* note 11, at 91–92 (suggesting that an alternative solution to the incidental-take provision would be a statutorily created "permit"); Lilley & Firestone, *supra* note 18, at 1210. The USFWS has published MBTA permit rules in the *Code of Federal Regulations*, but the permits generally relate to specific business enterprise directly related to migratory birds and protection of migratory birds, and do not include a permit-allotment for incidental takings or killings of migratory birds. *See* Migratory Bird Permits, 50 C.F.R. § 21 (2011). It seems that the MBTA would allow the USFWS to develop a general incidental-take permit so long as the permit is compatible with the terms of treaties connected to the Act. *See* 16 U.S.C. §§ 704, 712 (2006); *see also* HOLLAND & HART LLC, INGAA FOUND., INC., DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MIGRATORY BIRDS 5–8, 46–47 (2010), *available at* http://www.ingaa.org/File.aspx?id=11062 (assessing the feasibility of a USFWS-based incidental-take permit program).

216. *See supra* notes 190–191 and accompanying text.

217. See United States v. Rollins, 706 F. Supp. 742, 744–45 (D. Idaho 1989), where the court suggested that there was no way for the defendant farmer to have known his pesticide application could lead to MBTA liability.

218. *See supra* Part III.

and industrial operators subject themselves to prosecution. If even one bird is killed by a commercial entity's operations, then fines, imprisonment, and reputational damage could soon follow.

The MBTA is ancient—at least in terms of environmental statutes[219]—so a legislative or prosecutorial reform seems appropriate. A plain reading of the MBTA's broad language ropes in any "association, partnership, or corporation,"[220] but that does not mean that the statute was intended to make white collar criminals out of all unintentional corporate actors that incidentally take or kill a migratory bird. In effect, the legislative history suggests that the MBTA was designed to preserve migratory bird populations in lieu of hunting practices,[221] not everything under the sun. Judges are reading the MBTA in countless directions and prosecutors are charging certain industry-types with MBTA violations and not others, such as wind farms. Congress might decide an incidental-take exception is most warranted, or alternatively, it could find that the MBTA is best suited to cover *all* entities that take or kill migratory birds. Either way, legislative action seems necessary to remedy the inconsistent application and use of the MBTA's criminal provisions.

Unless and until legislative action is taken, prosecutors still have unfettered discretion over whether to charge entities with MBTA violations. Prosecutors have been criticized for not charging the wind industry for the 400,000-plus avian mortalities it causes each year.[222] Most recently, the criticisms are in response to the *Brigham Oil* prosecution.[223] Because prosecutors have so much discretion over who to sue, internal guidance pushing DPA and NPA usage could relieve the inconsistent and arguably unfair enforcement of the MBTA. DPA and NPA agreements can lessen the reputational blow that subjects of MBTA prosecutions could incur. Prosecutorial agreements are also proactive—for example, such agreements could push violators to develop bird-friendly infrastructure so that potential fines and indictments may be avoided. In fact, DPAs and NPAs directed at wind-farm operators could bridge the competing renewable-energy and wildlife-preservation policies by forcing the wind-farm operator to meet certain conditions

219. *See* Brickey, *supra* note 20, at 488.

220. 16 U.S.C. § 707(a) (2006).

221. *See supra* text accompanying notes 165, 172.

222. *See* sources cited *supra* notes 8–10, 14.

223. *See, e.g.*, Letter from Newt Gingrich, *supra* note 8; American Bird Conservancy Response to Speaker Gingrich, *supra* note 10. As mentioned previously, the most recent related MBTA decision is *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2012 WL 3866857 (S.D. Tex. Sept. 5, 2012). Further research should assess how the *Citgo Petroleum* case fits among the cases analyzed throughout this Article.

directed at lowering bird fatalities, without causing the reputational harm often resulting from an indictment.

Brigham Oil brought to light the small problem: that the MBTA is being selectively used against certain industry-types and not the just-as-culpable wind farms. However, the larger concern is that the MBTA might have gotten away from its original focus on conservation in lieu of hunting. Congress should flesh out that original purpose, or at least update the Act. An act that is designed around hunting should not make unintentional corporate actors white collar criminals; but if an act is meant to safeguard birds (and make violators criminals) at all costs, then it is only fair to hold all violators accountable and to make sure that they know of that possibility. Prosecutorial agreements would be good supplemental solutions, but legislative reform is required to cure the overall problem of MBTA enforcement against unintentional corporate actors.