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The Mass Murder of Migratory Birds across America

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Birds are, quite literally, the proverbial "canary in the coal mine." How birds fare in the world indicates how all wildlife and habitat, and by extension human populations, will fare. It is not just poetry that led Rachel Carson to title her seminal work, Silent Spring. All the past administrations for which we have worked have struck a balance and worked diligently and in good faith with industries that had significant impacts on birds, such as oil and gas, coal, electric utilities, commercial fishing, communications, transportation, national defense, and others to reasonably address unintended take. It can be done. In fact, it has been done. Successes in applying this law to minimize the incidental killing of birds are numerous. – Letter of January 10, 2018, from 17 former government conservation professionals objecting to Department of Interior memorandum unilaterally voiding century-old law

One of the ways American politics works these days is to ignore the rule of law while putting on a great fake show of legal probity. The example here is the Trump administration's secret reversal of migratory bird protection law, later imposed on the nation by its own authoritarian fiat, making law without the participation of Congress or any other government agency. The administration's procedure effectively reduces due process of law to the arbitrary ruling of one person. This seems patently unconstitutional on its face, since the Constitution (Article II, section 3) requires that the president "shall take Care that the Laws be faithfully executed."

The bilateral 1916 Migratory Bird Treaty was signed by the United States and Canada, then still part of Great Britain. The Bird Treaty was one of the earliest environmental protection laws, incorporated by Congress into US law in 1918 as the Migratory Bird Treaty Act (16 USC 703ff). For a hundred years, administrations of both parties have faithfully executed the act to protect migratory birds from a host of evolving threats from industries to whom the life or death of birds was inconsequential. These industries became increasingly resentful toward government intrusion on their profits for the sake of wild birds, of all things.

The US Fish and Wildlife Service (FWS) enforced migratory bird law on behalf of the Interior Department in bipartisan fashion across all administrations since the 1970s, from Nixon through Obama.

Image on the right: Shortly after leaving the Port of Valdez, the Exxon Valdez ran aground on Bligh Reef. The picture below was taken 3 days after the vessel grounded, just before a storm arrived.

In 1989, the *Exxon Valdez* oil tanker wreck in Alaska killed some 300,000 birds. The Exxon oil company settled criminal misdemeanor charges brought by the US under the migratory bird act, paying $125 million in fines and restitution (part of Exxon's overall liability of about $1 billion in other legal actions). At the time, Exxon's fine was the largest ever imposed for an environmental crime. As of July 2013, Exxon still had not paid $92 million of the settlement. In October 2015, the US abandoned its claim against Exxon. The Alaskan coast remains polluted by Exxon oil.

In 2010, the *Deepwater Horizon* oil rig explosion and 87-day oil gusher killed 11 people and hundreds of thousands of birds in the Gulf of Mexico. BP (British Petroleum) settled criminal misdemeanor charges brought by the US under the migratory bird act, paying $100 million in fines (part of BP's overall liability of more than $20 billion in other legal actions). In 2012, BP pleaded guilty to manslaughter (among 14 felony counts) and paid $4 billion in criminal fines and penalties. The BP oil spill (over 3 million gallons) was 20 times larger than Exxon's.

The penalties generated by these two events, Exxon and BP, represent 97 percent of the total revenue generated by the migratory bird law for the Fish and Wildlife Service, according to the Washington Post. As of March 2017, the US Fish and Wildlife Service website stated misleadingly:

> The Migratory Bird Treaty Act makes it illegal for anyone to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations.

The FSW misstated the law, which includes the word "kill" among its illegalities. The law (16 US Code 703) is titled: "Taking, killing, or possessing migratory birds unlawful." The law states in relevant, unambiguous part:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to … kill … any migratory bird….

Until 2017, administrations of both parties understood the law to apply equally to any migratory bird killing without a permit, regardless of whether the killing was intentional or unintentional. The Exxon and BP mass bird kills were presumably unintentional. Neither Exxon nor BP challenged that long-established understanding of the law under which they were charged and accepted guilt.

Before 2017, efforts to weaken or repeal the migratory bird law had been ineffective. Congress made changes in migratory bird law on numerous occasions, including in 1960, 1986, 1998, 2002, and 2003, without once changing the law's clear prohibition against killing migratory birds, intentionally or not.

In 1986, in response to a Sixth Circuit federal court ruling, Congress required that any felony charged under the law required an element of intent by the wrongdoer. Congress, as it had before, left misdemeanors to be prosecuted without intent, under strict liability. In other words, if you kill migratory birds then you're liable, whether you intended to or not.

In 2002, Congress explicitly carved out an exception to migratory bird law, allowing the US military to kill birds unintentionally, but only during military readiness activities." Other military activities that killed migratory birds, intentionally or not, were still prohibited. The legislation directed Fish and Wildlife to issue regulations under the authority of the Migratory Bird Treaty Act, which FWS did in 2007. In 2015, Republicans in the House introduced bills to reduce the scope and the financial penalties of the Migratory Bird Treaty Act. Neither bill became law.

In December 2011, the American Bird Conservancy petitioned Fish and Wildlife to undertake the rulemaking process to create regulations under the authority of the migratory bird act that would regulate the impacts of industrial wind power projects on migratory birds. In March 2012, FWS responded, agreeing with the conservancy's analysis of its authority under the law to regulate unintentional bird kills by windmills. But FWS denied the conservancy's request for regulation on the basis that FWS was still working with the wind industry on voluntary guidelines.

The American Bird Conservancy renewed its call for regulation in 2015. On May 26, FWS issued a notice of intent to undertake an Environmental Impact Statement (consistent with the National Environmental Policy Act) in support of regulating unintentional bird kills by windmills, and invited public input in the process.

On January 10, 2017, in the waning days of the Obama administration, the Interior Department's solicitor (agency lawyer) issued a memorandum now deleted from the department's website. The memorandum, Opinion M-37041, was titled "Incidental Take Prohibited Under the Migratory Bird Treaty Act," referring to unintentional bird kills by industrial and commercial operations, specifically including windmills. This memorandum of 30 pages confirmed the department's policy over preceding decades. Solicitor Hilary Tompkins pointed out that, regarding some disputed words in the law:

> … even if the traditional common-law meaning of "take" introduces some ambiguity as to whether that term applies to incidental take, "kill" is unambiguous.

In other words, the government's consistent reading of the law is that killing migratory birds, regardless of intent, is nevertheless illegal. It is incumbent on industrial and commercial actors to anticipate obvious dangers and take actions to mitigate them. Otherwise, they risk prosecution by the government.

The incoming Trump administration didn't see it that way. Trump and many of his supporters were generally anti-regulation, almost any regulation. One billionaire Trump supporter, Harold Hamm (image on the left), founder and CEO of the oil company Continental Resources, had characterized regulation as "death by a thousand cuts." In 2015, Hamm leaned on the University of Oklahoma to dismiss scientists studying the connection between oil fracking and more frequent earthquakes.

In 2011, Hamm had his own unpleasant encounter with the Migratory Bird Treaty Act. Continental and several other oil companies operating in North Dakota were charged with killing birds by failing to put protective netting over oil waste pools. That allowed birds to fly in, get oil-soaked, and die. Continental was charged with killing one phoebe. Hamm was outraged and challenged the charges in US District Court in North Dakota. In January 2012, Judge Daniel Hovland granted the oil companies' motion and dismissed the charges, ruling that the migratory bird law of 1918 was too vague to justify the indictments, even though the law had been enforced this way for decades. The judge wrote, in part, ultimately relying on mind-reading the intent of the 1918 Congress:

> All parties involved in this dispute have acted in good faith, and there is case law which supports the legal arguments both sides have presented. Nevertheless, the criminalization of lawful, commercial activity which may indirectly injure or kill migratory birds is not warranted under the Migratory Bird Treat Act as it is currently written.
>
> This Court believes that it is highly unlikely that Congress ever intended to impose criminal liability on the acts or omissions of persons involved in lawful commercial activity which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act.

This is an apt expression of the mindset of many members of the incoming Trump administration, especially the political appointees at the Interior Department. It's not as though there's no reasonable argument to be had here. Indicting a company on the basis of a single dead phoebe seems ludicrous, but the danger of unprotected waste oil pits is real. The rule of law provides numerous avenues for addressing such competing interests. The Trump administration demonstrated no interest in following anything like the rule of law in any substantive way.

On February 6, 2017, shortly after taking office, the Trump administration suspended the Interior Department's January memorandum supporting decades of precedent in enforcing the Migratory Bird Treaty Act. What happened next was ugly, as described in a lawsuit filed by the National Audubon Society in May 2018:

> Representatives of the oil and gas industry, among others, then lobbied DOI [Interior Dept.] to issue a new directive that would eviscerate any obligation to take migratory bird impacts into consideration when engaging in various industrial activities. For example, on August 31, 2017, the Western Energy Alliance, which represents oil and natural gas companies, sent Secretary of the Interior Ryan Zinke a letter complaining that the "implementation and enforcement of incidental take of migratory birds (including nests and their habitat) … is inhibiting oil and natural gas development." The letter urged Secretary Zinke to issue "guidance that [the] MBTA [Migratory Bird Treaty Act] does not give FWS the authority to regulate incidental take for [sic] migratory birds."
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> On November 3, 2017, the Director of Government Relations for the Independent Petroleum Association of America wrote to the Deputy Director of DOI's Office of External Affairs with the subject line "MBTA" asking, "Any word on the solicitor's opinion yet?"

Within the Interior Department, the review of the migratory bird law was proceeding in private.

The Administrative Procedure Act of 1946 relating to rule making (5 USC 553) requires the rule making agency to make public announcement of and provide for public comment on any rule before adopting it: "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…." Without explaining why, the Trump administration ignored this federal law. The only interested persons known to be involved in the process were lobbyists for oil, gas, and other industries.

The National Environmental Policy Act (NEPA) of 1969 contemplates public knowledge of and participation in environmental policy decisions. A November 2017 federal court decision in Montana addressed the failure of the Obama administration to conduct a proper environmental impact statement before approving the TransCanada pipeline:

> No agency possesses discretion whether to comply with procedural requirements such as NEPA. The relevant information provided by a NEPA analysis needs to be available to the public and the people who play a role in the decision-making process. This process includes the President.

The environmental policy act requires that for all "major federal actions significantly affecting the quality of the human environment," the federal agency taking the action must prepare an environmental impact statement that analyzes the "impact of the proposed action," and "alternatives to the proposed action." (42 U.S.C. § 4332(C)) The Trump Interior Department did not undertake an environmental impact statement relating to migratory bird law and it did not explain its inaction.

The environmental policy act also allows an agency to prepare an environmental

assessment to determine the need for an environmental impact statement. The Trump Interior Department did not undertake an environmental assessment relating to migratory bird law and it did not explain its inaction.

On December 22, 2017, without prior notice, the Interior Department's solicitor Daniel Jorjani issued a memorandum, M-37050, holding that "the Migrant Bird Treaty Act does not prohibit incidental take," meaning that oil companies and others can kill migratory birds without limit as long as they didn't intend to do so. Jorjani's memo took effect immediately, with force of law, permanently replacing the January memo that had restated settled law regarding migratory birds. Smithsonian.com had a December 27 story with a ho-hum attitude, although it did include oil industry lies about lax enforcement against windmills that kill birds.

Effectively, Jorjani determined that black is white. He did it in secret with industry and bureaucratic co-conspirators. There is no evidence that he acted in good faith and there is no further review possible of his memo within the executive branch. He reversed a hundred years of evolving environmental policy protecting migratory birds. He did it with one fell fascist swipe of the pen.

This blatantly undemocratic manner of law-making was largely ignored at the time and has been ever since, with occasional quiet and polite demurrers. There were limited, minor media reports, but no objection from Congress over its usurped authority.

On January 10, 2018, less than three weeks after the decision was made public, 17 former government conservation professionals wrote the letter quoted at the top of this piece. They are "very concerned" by Jorjani's memo and beseech Interior Secretary Ryan Zinke to modify the memo. They write:

> This is a new, contrived legal standard that creates a huge loophole in the MBTA [Migratory Bird Treaty Act], allowing companies to engage in activities that routinely kill migratory birds so long as they were not intending that their operations would "render an animal subject to human control." Indeed, as your solicitor's opinion necessarily acknowledged, several district and circuit courts have soundly rejected the narrow reading of the law that your Department is now embracing….
>
> The MBTA can and has been successfully used to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm. Your new interpretation needlessly undermines a history of great progress, undermines the effectiveness of the migratory bird treaties, and diminishes U.S. leadership.

There is no record that the ethically-challenged Zinke responded before he left office under a cloud. But there is no record of anyone else at the Interior Department responding either. After a few months of stonewalling silence, the department issued a memo on April 11, 2018, offering "Guidance on the recent M-Opinion [37050] affecting the Migratory Bird Treaty Act," addressing "what changes to prior practice should be made" to conform to the 180-degree reversal of department policy. The Washington Post covered this superficially, as if it were both recent and unimportant. The memo asserts, without apparent irony, that:

> The mission of the Service is to work with others to conserve, protect, and

> enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. Migratory bird conservation remains an integral part of our mission.

This dishonest assertion seems designed to blur reality. It states that the National Environmental Policy Act should be followed, even though it was ignored in creating the memo it purports to explain. In the real world, the changes that the Interior Department has made amount to an abdication of any significant responsibility for migratory birds. The Fish and Wildlife Service is no longer enforcing any law against industrial bird kills. The Fish and Wildlife Service is no longer investigating or even keeping records on industrial bird kills. Elizabeth Shogren reports that FWS "saved about $2.5 million by not filling ten positions primarily related to investigating violations of the Migratory Bird Treaty Act." After a century of some protection by the US government, migratory birds are on their own.

Canada has indicated that it will continue to enforce the Migratory Bird Treaty as best it can. It's not clear what Mexico, Japan, and Russia are doing about American treaty violations. It's not clear whether the Trump administration has bothered to inform any other governments of its reversal of the treaty's lawful requirements.

On May 24, 2018, four plaintiffs – the National Audubon Society, the American Bird Conservancy, the Center for Biological Diversity, and the Defenders of Wildlife – filed suit against the Interior Department, the Fish and Wildlife Service, and solicitor Jorjani. The plaintiffs' 35-page filing in US District Court for the Southern District of New York challenges Jorjani's 2017 memo as "unlawful and arbitrary and capricious." The complaint argues that:

> For decades Defendants [US government agencies] have construed the MBTA [Migratory Bird Treaty Act], consistent with its plain language, as protecting migratory bird populations from foreseeable "incidental" killing or "take" caused by major industrial activities that are not specifically directed at migratory birds but nevertheless kill them in large numbers. This interpretation has helped to conserve migratory birds for decades in keeping with the purpose of the MBTA and the international treaties the Act implements.

The plaintiffs ask the court to reinstate the January 2017 solicitor's opinion that restated the settled law of the past century. They also ask the court to vacate Jorjani's December 2017 memo as well as the April 2018 memo issuing "guidelines." The government has moved to dismiss the case. Federal judge Valerie Caproni has not yet ruled on the government's motion. The judge was appointed by President Obama in 2013, before which she was General Counsel of the FBI under Robert Mueller. There have been no hearings on the merits of the case.

On September 5, 2018, the attorneys general for eight states filed suit against the same Defendants – Interior Department, Fish and Wildlife Service, and Jorjani. Led by Barbara Underwood of New York, the other states were California, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, and Oregon. The states' 26-page complaint asks the court to declare "that the Jorjani opinion is arbitrary, capricious, or not in accordance with law" and to vacate the opinion, which would restore the Solicitor's memo of January 2017 restating a century of settled law. The states argue in part that:

> The Jorjani opinion is inconsistent with the Act's text and purposes, is contrary

> to defendants' previous longstanding interpretation of the Act and decades of consistent application of that interpretation, drastically limits the scope of the Act, subjects migratory birds to increased likelihood of death or injury from industrial and other human activities that immediately take or kill or are foreseeably likely to take or kill migratory birds, and harms the States' sovereign, ecological, and economic interests in robust federal protections of migratory birds.

This case is also before Judge Valerie Caproni. There have been no hearings and none are scheduled. The only pending motion is for Dianna Shin of New Jersey to appear *pro hac vice*.

On April 11, the Senate voted 56-41 to confirm David Bernhardt, a career lawyer/lobbyist for the oil industry and their ilk, as Secretary of the Interior. While he served as deputy secretary, Bernhardt was deeply involved in gutting the Migratory Bird Treaty Act, as reported by Elizabeth Shogren of Reveal (and not much of anyone else). Solicitor Jorjani's email October 27, 2017, confirms that Bernhardt "has been plugged in since Day 1" in gutting the migratory bird law. Bernhardt was unanimously confirmed by Republican senators with their longstanding antipathy to environmental laws. They were joined by three other corrupt senators, Democrats-in-name-only Joe Manchin of West Virginia, Martin Heinrich of New Mexico, and Kyrsten Sinema of Arizona.

On April 15, the inspector general of the Interior Department opened an investigation into ethics complaints against Interior Secretary David Bernhardt. The investigation was requested by eight Senate Democrats and four government watchdog groups.

This is about more than just corrupt Democratic senators, this is about more than notoriously corrupt Republican senators, this is about more than just a US cabinet agency engaging in a secret process that reverses a hundred years of legal precedent, this is about more than the failure of mainstream media to cover blatantly unlawful government, this is about more than the failure of the court system to respond in timely fashion to contempt for law, this is about more than the failure of Democrats generally and Democratic presidential candidates in particular to notice the raw success of the Trump administration carrying off the impeachable offense of failing to take care that the law be faithfully executed.

This is about the institutional triumph of American fascism.

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