Military Exemptions from Environmental Regulations: Unwarranted Special Treatment or Necessary Relief

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MILITARY EXEMPTIONS FROM ENVIRONMENTAL REGULATIONS: UNWARRANTED SPECIAL TREATMENT OR NECESSARY RELIEF?

I. INTRODUCTION

During 2002, Pentagon officials, citing concerns about military training and readiness, proposed a six-prong legislative agenda that sought both increased flexibility in dealing with migratory birds and marine mammals and easier standards for air quality and cleanup of toxic waste sites. As a result, the Pentagon won a broad temporary waiver from the 1918 Migratory Bird Treaty Act (MBTA) under the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Stump Act). The Pentagon, however, has since been confronted with significant opposition from Senate Democrats in seeking exemptions from the Endangered Species Act, the Marine Mammal Protection Act, the Clean Air Act and the Clean Water Act.

The Pentagon now seeks an executive order from President Bush to obtain exemptions from environmental agency regulations to benefit national security. In addition, the Pentagon requests broader exemptions from Clean Air Act regulations during wartime and other national emergencies, as well as a lower burden to protect endangered species’ critical habitats.

Recently, environmentalists seeking government compliance with environmental regulations have brought suit against the Department of Defense (DoD), forcing the judicial system to address


3. Heilprin, supra note 1, at 13 (describing temporary exemption from Migratory Bird Act as merely partial victory, due to Senate democratic opposition to Pentagon's other proposals for exemptions from eight landmark environmental laws).

4. See id. (noting that Pentagon officials now want order from President Bush to help Pentagon prevail in disputes with environmental agencies).

5. See id. (discussing Pentagon's "wish list" of environmental regulations).
the matter. In January 2003, the United States Court of Appeals for the District of Columbia issued an opinion in Center for Biological Diversity v. England, overturning the district court's ruling and ultimately holding that military personnel are exempt from the MBTA in light of the Stump Act.

This Comment will discuss the DOD's success in its efforts to obtain exemptions from environmental regulations, focusing primarily on the MBTA, the Stump Act and the D.C. Circuit Court of Appeals' recent decision in Center for Biological Diversity v. England. Part II of this Comment discusses the facts and background surrounding the MBTA, Center for Biological Diversity v. England, and the Stump Act. Part III first discusses the court's analysis of Center for Biological Diversity v. England in the various stages of the federal court system. Part III then discusses Congress's intent in passing the Stump Act, focusing on the debate between Congressional Republicans and Democrats. Part IV concludes with a discussion of the implications that the Stump Act and Center for Biological Diversity v. England may have on the DOD's agenda to achieve additional exemptions from other environmental regulations.

II. FACTS AND BACKGROUND

A. Recent Pentagon Activity

Currently, the Pentagon is advancing its legislative agenda by first seeking an executive order from President Bush to help the Pentagon prevail in disputes with the Environmental Protection


7. See id. (overturning district court's issue of injunction halting all live fire training activities on island of Farallon de Medinilla to force compliance with MBTA).


9. For a discussion of facts and background, see infra notes 13-129 and accompanying text.

10. For a discussion of the court's analysis, see infra notes 130-85 and accompanying text.

11. For a discussion of congressional debate regarding the exemption granted to the military pursuant to the Stump Act, see infra notes 186-240 and accompanying text.

12. For a discussion of the implications of Ctr. for Biological Diversity v. England and the exemption granted to the military through the Stump Act, see infra notes 241-50 and accompanying text.
Agency (EPA) for the sake of national security. In addition, the Pentagon is requesting an executive order that would change various Department of Interior and Department of Commerce regulations and increase the military's flexibility in complying with environmental standards.

The Pentagon purportedly relies on the Chairman of the House Resources Committee, Representative Richard Pombo of California, as well as the Chairman of the House Energy and Commerce Committee, Representative Billy Tauzin of Louisiana, for assistance in furthering its legislative agenda. Furthermore, the Pentagon reportedly depends on the Chairman of the Senate Environment and Public Works Committee, Senator James Inhofe of Oklahoma, for further legislative assistance. All three committees have some jurisdiction over military issues. The Chairman of the House Armed Services subcommittee on readiness, Representative Joel Hefley of Colorado, planned to begin hearings in February 2003 to evaluate how endangered species issues impair military training. More conservative leaders of House and Senate environmental panels have led the Department of Defense to raise its expectations that Congress will grant the military more exemptions from environmental laws in the future.

B. Migratory Bird Treaty Act

The MBTA prohibits the killing of migratory birds without a permit. Enacted in 1918, it is the nation's oldest conservation law
and provides protection for over 850 species of migratory birds.\textsuperscript{21} Many of these migratory birds are threatened or endangered.\textsuperscript{22} The Act established U.S. obligations under four separate treaties to "protect migratory birds and guide cooperative conservation management with Canada, Mexico, Japan, and Russia."\textsuperscript{23} Before the MBTA's enactment in 1918, many migratory birds were on the brink of extinction.\textsuperscript{24} Through international coordination and domestic conservation programs, the MBTA helped restore many species of migratory birds.\textsuperscript{25}

Despite its age, two important questions regarding the MBTA's impact on federal agencies remained unsettled, even into the late 1990s.\textsuperscript{26} First, it was uncertain whether the MBTA applied to federal agencies.\textsuperscript{27} Second, it remained unsettled whether the MBTA's prohibition on unpermitted takings of migratory birds extended to indirect, unintentional killings resulting from otherwise lawful activities.\textsuperscript{28}

In 2000, the Court of Appeals for the District of Columbia made a determination on the first issue in *Humane Society v. Glickman*.\textsuperscript{29} The court held that federal agencies were subject to the MBTA's prohibition on unpermitted takings of migratory birds and additionally were subject to suit under the Administrative Procedures Act for MBTA violations.\textsuperscript{30}


\textsuperscript{22} See id. (discussing protection offered by MBTA).

\textsuperscript{23} Id. (statement of Rep. Dingell) (noting background facts of MBTA within commentary on issue of whether to pass Stump Act).

\textsuperscript{24} See id. (discussing rationale for creating MBTA).

\textsuperscript{25} See id. (noting programs that helped restore migratory birds).

\textsuperscript{26} Scott M. Farley, *Excuse Me, Sir, Do You Have a Permit for That Bomb?*, 2002 Army Law 58, 59 (discussing recent judicial application of MBTA through today).

\textsuperscript{27} See id. at 58-59 (citing Major Jeanette Stone, *Migratory Bird Treaty Act May Now Apply to Federal Agencies*, Army Law, at 40-41 (Nov. 1999), and discussing circuit split regarding enforcement of MBTA on federal agencies).

\textsuperscript{28} See id. (noting that private parties had been treated equally as to intentional and unintentional takings, but issue was still unclear as to whether federal agencies would receive same treatment); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174.

\textsuperscript{29} See Humane Soc'y v. Glickman, 217 F.3d 882, 887 (D.C. Cir. 2000) (establishing that federal agencies are subject to MBTA prohibitions).

\textsuperscript{30} See Scott M. Farley, *supra* note 26, at 59 n.10 (noting FWS, in response to *Humane Society v. Glickman*, issued Director's order on December 20, 2000 stating, "It is our position that the take of migratory birds by federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA."); see also Jamie R. Clark, U.S. Fish and Wildlife Service, Director's Order (Dec. 20, 2000), available at http://policy.fws.gov/do131.html.
C. Center for Biological Diversity v. England

The United States District Court for the District of Columbia sent a shock wave through the military in March 2002. The court issued an injunction barring any further training activities — with the potential to wound or kill migratory birds — on the small, uninhabited island of Farallon de Medinilla (FDM), until the Navy obtained a permit from the U.S. Fish and Wildlife Service (FWS).34

1. Farallon de Medinilla

Farallon de Medinilla is a very small, uninhabited island located north of Guam, which serves as the Pacific Fleet's only U.S.-controlled shooting range available for live-fire training.35 The island has been leased to the United States as a target range by the Commonwealth of the Northern Mariana Islands government since 1976.36

The island consists of hilly plateaus with steep cliffs and provides a home to many species of birds and wildlife.37 Diverse vegetation covers the island and provides shelter, foraging, roosting and nesting for a number of species of migratory birds.38 Numerous

31. 191 F. Supp. 2d 161, 174, 178-79 (holding military was violating MBTA).
32. See id. (holding military exercises on FDM violated MBTA).
34. Farley, supra, note 26, at 58 (discussing district court holding in Center for Biological Diversity v. Pirie).
35. See generally Farallon de Medinilla, available at http://www.globalsecurity.org/military/facility/farallon-de-medinilla.htm (Mar. 12, 2003) (hereinafter “FDM Website”) (describing geography and location of FDM as uninhabited 200-acre island, standing 280 feet above sea level). The island is roughly three miles by one-half mile in size. Id.
36. See id. (explaining FDM is classified as public land that is under lease by United States military from Commonwealth of Northern Marianas until 2075 and noting that people of Northern Marianas are American citizens).
38. See id. Surveys conducted during the 1980s and 1990s verified the presence of great frigatebirds, masked boobies, brown boobies, red-footed boobies, sooty terns, brown noddies, black noddies, fairy terns, cattle egrets, red-tailed
bird species live on FDM varying from a handful to thousands, and most species use the island as a breeding ground. 39

2. Military Activities on FDM

The U.S. government has used FDM for military training exercises for over thirty years. 40 Between 1995 and 1999, the Department of Defense (DoD) prepared an environmental impact statement regarding its military activities in the Mariana islands, as required by the National Environmental Policy Act of 1969. 41 The 1999 Environmental Impact Statement, which the DoD prepared, described the training exercises on FDM as including a variety of air-to-surface gunnery exercises. 42 The DoD announced its decision in 1999 to “continue to use suitable DoD controlled lands in the Mariana islands to support various specific military training activities to ensure the readiness of U.S. forces tasked with fulfilling regional readiness and operational contingency missions.” 43

The DoD maintains that FDM has been an “irreplaceable asset in maintaining the combat readiness of the United States military units.” 44 FDM plays a distinctive role in national defense. 45

tropicsbirds, white-tailed tropicsbirds, Pacific golden plovers, whimbrels, bristle-thighed curlews and ruddy turnstones.  Id.

39. See id. (noting that “[e]ach breeding colony can serve the seabird population from tens of thousands of square miles of surrounding ocean” and that “[i]n particular, FDM is one of only two great frigatebird breeding colonies in the Mariana island chain, and is the largest known nesting site for masked boobies in the Mariana and Caroline islands”).


42. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 165-66. The court described air-to-surface gunnery exercises generally and noted that:

[aircraft operating from aircraft carriers deliver 500-pound bombs and air-to-ground missiles to the surface of FDM. Aircraft fire machine guns, cannons, and missiles at the surface of FDM. According to the EIS, annual training consists of four 5-day Navy exercises, three 3-week Marine Corps exercises, and five 14-day combined force exercises.  Id.

43. See id. at 168 (discussing DoD’s final EIS issued with Record of Decision indicating that DoD planned to continue training on FDM to maintain operational readiness).

44. Id. at 165 (noting that in 1983 Commonwealth of Northern Mariana Islands leased FDM to U.S. for fifty years for “use as an aircraft and ship ordnance impact target area”).

45. See FDM Website, supra note 35 (discussing critical role of FDM in live-fire training necessary to forward deployed forces in Pacific and general operational readiness).
location of the island provides frequent access to high fidelity, scenario-based targets, which support established training requirements.46

The DoD indicated that since the September 11, 2001 terrorist attacks and the subsequent initiation of military exercises in Afghanistan, they have increased the use of FDM.47 Major General James E. Cartwright said that "FDM's critical role in Marine aviation military readiness, and therefore national security, has dramatically increased since the September 11, 2001 terrorist attacks" and "it is essential that FDM be available for immediate and continuous use."48

3. Injury to Military from Terminating Exercises on FDM

Live-fire target training is, without dispute, crucial to the readiness of United States Armed Forces.49 The DoD emphasizes that FDM is critical to the military's ability to conduct live-fire training in the Pacific because it is the only air-to-ground target range under U.S. control in the entire Western Pacific.50 Without FDM, no alternative means exist for supporting large scale shore-based excursions.51 FDM reportedly provides the only target range in the

46. See id. (stating that "the air and sea space in the Farallon provides sufficient room for the many different attack profiles necessary [for] . . . American fighter pilots [to] maintain capability and proficiency in precision-guided arms and specific target engagement. These are perishable skills that require frequent access to high-fidelity, scenario-based targets.").

47. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 166 (noting use of FDM as training ground has increased since September 11, 2001 terrorist attacks).

48. See id. (providing justification for increased use of FDM).

49. See id. at 168 (citing remarks of Vice Admiral of Navy in charge of Seventh Fleet, James W. Metzger that FDM consists of "ideal hydrographic characteristics, geography, and a surrounding airspace unencumbered by heavily used commercial air corridors and sea-lanes, [making FDM] uniquely well suited for live-fire training"). Major General James Cartwright, the commanding officer of the First Marine Aircraft Wing supplemented Admiral Metzger's comments, stating that, the protected air and sea space surrounding [FDM] provides sufficient room for many different attack profiles necessary to replicate combat conditions and the simultaneous maneuver a co-location of all supporting fires and units require in our combat training. As such it is integral to the combat readiness of 1st MAW squadrons.

Id.

50. See id. at 168-69 (discussing importance of live-fire training on FDM).

51. See id. (demonstrating that crucial programs will suffer without access to FDM). One program, the Strike Fighter Advanced Readiness Program, is mandatory for naval aviators; use of FDM allows this training to occur without leaving the Western Pacific. According to Vice Admiral Metzger, "the importance of this fact cannot be overestimated" because "access to [FDM] provides monetary and manpower cost-savings that cannot be recouped by any other means," and allows the Navy to train without "degradation in force." Id.
Pacific where strike aircraft can use air-to-ground live ordnance with “tactically realistic and challenging targets in airspace which allows the use of high altitude.” Aviation Ordnanceman Airman Adam Gee, a new member of the Fighter Squadron in the Pacific Airwing, spoke in September 2002 of the value of these air-to-ground exercises on FDM. Airman Gee stated: “[i]t was a great learning experience for me. . . . This was the first time I got to see a lot of these weapons in person. Until now I had only seen them in books I studied.” In effect, FDM is essential to air-wing readiness.

FDM is also vital for Navy surface ship weapons handling and training. It is the only U.S.-controlled target range in the Western Pacific theater where Sailors and Marines can participate in integrated naval gunfire training. Vice-Admiral Metzger stated that losing FDM will unquestionably make it difficult to maintain an acceptable level of readiness.

52. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 169 (describing importance of FDM for air wing readiness).

53. See Lt. j.g. Nicole Kratzer, NNS020926-CVW5 Conducts Training on Farallon de Medinilla, available at http://www.globalsecurity.org/military/library/news/2002/09/mil-020926-usn01.htm (Sept. 26, 2002) (discussing that Japanese restrictions prevented ordnancemen from performing certain tasks, but that on FDM they were able to go through entire process of building, inspecting, loading and unloading live weapons).

54. See id. (quoting Gee and recognizing that U.S.S. Kitty Hawk and air wing sailors had great opportunity to train and did superb job at safely loading ordnance and achieving outstanding completion rate).

55. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 168-69 (noting fundamental importance of air wing training on FDM).

56. See id. at 169 (citing FDM as most practical and cost-efficient location).

Vice-Admiral Metzger has stated:

The Navy and U.S. Marine Corps team require realistic training opportunities in order to master the tasks inherent in actual naval combat. Naval guns are unique weapons in that they are fired by the Navy but directed, spotted, and adjusted by Marines forward positioned ashore. Proficiency in Naval Surface Fire Support cannot be attained without live-fire exercises . . . . The Farallon De Medinilla target range located in Guam provides these crucial training opportunities and is critical to the Navy maintaining its dominant expertise in the SEVENTH fleet area of operations.

Id.

57. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 169 (noting that only alternative sites for this type of training are located in other countries, such as Korea and Japan). Relying on other countries presents problems with availability and increased logistical expenses. Id. In addition, those other counties can only provide portions of the capabilities found on FDM. Id.

58. See id. at 169 (noting that loss of one target will not cause complete collapse in readiness, but will make it difficult to maintain acceptable level of readiness).
Without the FDM target range, live-fire training for the Pacific Fleet's forward deployed naval forces would be contingent upon access to ranges controlled by non-U.S. entities. Some have anticipated that within six months of closing FDM, air-wing and surface unit readiness would decline to "not ready" status.

Since the September 11, 2001 terrorist attacks, the importance and use of FDM for military training has become even more critical. Because FDM is the only U.S. controlled target range in the West Pacific, its value is "significantly enhanced," and "without [FDM], and with all other ranges in the Pacific theater under foreign control, we would be at the mercy of host governments for our readiness and training." Vice-Admiral Metzger has underscored that closing FDM will mean that some units may not have adequate range training time before they engage in combat operations supporting Operation Enduring Freedom. Further, Major General Cartwright declared that "[g]iven the foreseeable or potential military action in response to possible terrorist events, it is essential that FDM be available for immediate and continuous use."

4. Navy's Application to FWS for Permit Denied

Because the MBTA prohibits harm to migratory species without a permit from the Fish and Wildlife Service, the Navy applied for a permit in 1996. The Navy included in its application some

59. See FDM website, supra note 35 (discussing effects on military readiness if training on FDM is halted).
60. See id. (stating that "range is used about five days each month by the Navy, Marines, and Air Force, and provides training opportunities unmatched in the region").
61. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 169 (stating that since September 11, 2001, Navy has increased surge in number of units required for combat operations on very short notice and Navy relies on FDM for qualification and range practice for short notice units).
62. Id. at 170 (explaining use of foreign ranges is inefficient and can inhibit mission readiness because of need for requisite advance notice and prior coordination).
63. See id. (recognizing Vice-Admiral Metzger's remarks and noting Major General Cartwright's statement that, "[t]he capability to execute a security mission (protecting the lives of US citizens and property) while at the same time conducting necessary training for future missions could not occur if the live-fire range at FDM were closed.").
64. See id. at 170 (discussing how security risks through world make extra time and distance to alternative firing ranges problematic, which renders use of FDM vital to national security).
65. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 166-67 (describing permit request as including defendants' activities on FDM and asking for permission to "incidentally" take migratory birds, including some which are known to nest on and inhabit FDM).
of the measures it would take to mitigate harm to migratory species.\textsuperscript{66} Later that year, FWS refused to issue a permit, stating that it could not issue a permit authorizing the Navy's conduct because the conduct was unintentional.\textsuperscript{67} FWS maintained that unintended conduct, by its nature, would make it impossible for the Navy to ensure compliance with a permit's required limitations and conditions.\textsuperscript{68}

After FWS denied the Navy's request, the Navy continued to use the range on FDM, maintaining that the MBTA did not apply to federal agencies.\textsuperscript{69} Neither the Navy nor the DoD has applied for a permit since the 1996 denial.\textsuperscript{70} Nevertheless, upon learning of the pending \textit{Center for Biological Diversity v. Pirie} lawsuit, the FWS informed the Navy and DoD that it believed their actions on FDM were "consistent with the responsibilities of the United States under the migratory bird treaties on which the MBTA is based."\textsuperscript{71} FWS also stated that it has long engaged in using "enforcement discretion" for activities that may be prosecuted pursuant to the MBTA, but are not covered by the MBTA permitting regulations.\textsuperscript{72} The Acting Director of FWS informed both the Navy and DoD that FWS

\textsuperscript{66.} See \textit{id.} (explaining that Navy would take several measures to mitigate damage to migratory species including (1) limiting training sessions to seasons in which birds are not nesting, (2) firing at designated targets located away from concentration of nesting birds, and (3) hazing birds off island prior to live-firing).

\textsuperscript{67.} See \textit{id.} at 167 (noting that FWS's letter to Navy stated "there are no provisions for the Service to issue permits authorizing UNINTENDED conduct on the part of a permittee.").

\textsuperscript{68.} See \textit{id.} (explaining that FWS was concerned with biological impact of Navy's activity on birds, stating that [p]opulations sizes are variable and can be limited to less than ten individuals of several of the species inhabiting the Island. In these cases, the proposed take of five birds could have significant impact on local nesting populations. Furthermore, current breeding data indicates that many of the species which populate the Island breed year round; therefore, conducting activities April through January would not ensure that birds are not nesting during that time period.)

\textit{Id.}

\textsuperscript{69.} See FDM website, \textit{supra} note 35 (observing that Navy continued to use FDM for live-fire exercises after FWS's refusal to issue permit). The Navy stated that it places targets away from primary bird habitat, and that it budgets $100,000 annually to improve bird habitats on neighboring islands. \textit{Id.}

\textsuperscript{70.} See \textit{Ctr. for Biological Diversity v. Pirie}, 191 F. Supp. 2d at 167-68 (noting Navy made similar requests prior to 1996, all were denied by FWS, and neither Navy nor DoD requested permit since 1996 denial).

\textsuperscript{71.} See \textit{id.} at 168 (discussing correspondence from Acting Director of FWS to Secretary of Defense, Donald H. Rumsfeld and Secretary of Navy, Gordon R. England).

\textsuperscript{72.} See \textit{id.} (stating FWS had no choice but to deny Navy's application for permit because MBTA permitting regulations only allow for killing of predatory migratory birds that are somehow harming crops or causing other injuries).
would "exercise its discretion to not take enforcement action" against the Navy and DoD.\textsuperscript{73}

5. \textbf{Effects on Migratory Birds on FDM}

The DoD and environmentalists agree that military training activities on FDM will kill migratory birds protected by the MBTA.\textsuperscript{74} The FWS noted that bombing on FDM has resulted in unexploded ordnance falling in active nesting areas.\textsuperscript{75} Furthermore, FWS contends that, although peaks in the breeding seasons exist, breeding probably occurs year-round on FDM, thereby making bombing at any time a risk to migratory birds.\textsuperscript{76} Experts have found that even if the military takes precautionary measures to mitigate the damage to migratory birds, training activities may nevertheless cause significant bird mortality and habitat modification.\textsuperscript{77}

6. \textbf{Effect on the Economies of Northern Marianas and Guam}

The military training that occurs on FDM is vital to the economies of both the Northern Marianas and Guam.\textsuperscript{78} Reportedly, leaders of these territories sent correspondence to the DoD, expressing their appreciation for the military because of how greatly it contributes to the economy.\textsuperscript{79} When the Guam Chamber of Commerce commissioned a survey in 2001, more than 80\% of Guam's regis-

\textsuperscript{73.} See \textit{id.} (summarizing that, even in light of environmentalists' suit against Navy and DoD for violation of MBTA, FWS would not take enforcement action against Navy or DoD to halt military training activities on FDM).

\textsuperscript{74.} See \textit{id.} at 166 (discussing harm to birds on FDM, and noting that DoD has admitted that live-fire training on FDM will occasionally kill migratory birds protected by MBTA).

\textsuperscript{75.} See \textit{Ctr. for Biological Diversity v. Pirie}, 191 F. Supp. 2d at 166. The FWS remarked in 1996 that:

\textit{There is no question that bombing of this island will result in the death of seabirds, migratory shorebirds, and possibly even the endangered Micronesian megapode. On several occasions we observed boobies nesting very close to unexploded ordnance. While the unexploded ordnance may not provide an immediate threat to the birds, it does indicate that bombs do fall in active nesting areas.}

\textit{Id.}

\textsuperscript{76.} See \textit{id.} (explaining that although there may be peaks in seabird breeding season, breeding probably occurs year-round).

\textsuperscript{77.} See \textit{id.} (recognizing 1996 report of FWS wildlife biologist Michael Lusk, who concluded that training has potentially significant impacts that cannot be completely mitigated).


\textsuperscript{79.} See \textit{id.} (stating Guam’s Chamber of Commerce intended to end perception that Guam was against hosting more military personnel).
tered voters supported an even greater military presence in the future.80 Leaders of Guam believe that with the terrorist war, Guam and Northern Marianas may get an economic boost due to increased military spending.81

7. Procedural History of Center for Biological Diversity v. England

The controversy behind this lawsuit began when a birdwatcher and former leader of the Audubon Society local to the Farallon de Medinilla area notified the Center for Biological Diversity (CBD) of the depleting number of birds on the island.82 As a result, the Center for Biological Diversity brought suit against the Department of Defense for inhibiting the ability of birdwatchers to observe wildlife.83

The plaintiffs contended that by conducting bombing and other live-fire military training activities on FDM without a MBTA permit, the military was causing a significant loss of bird life on the islands in violation of the MBTA and the APA.84 Although the DoD applied for a MBTA permit in 1996, FWS denied the request.85 Ultimately, the district court ruled that, although the killing of the migratory birds was unintentional, the military's live-fire training exercises without a permit violated the MBTA and APA.86 The district court, however, delayed determining whether to issue an injunction enjoining the military from conducting training exercises on FDM.87

80. See id. (noting results of 2001 survey of Guam voters).
81. See id. (recognizing that Guam's leaders have been wanting to grow Guam's and Northern Marianas' economies for years with little success, but they hope boost in military spending resulting from War on Terrorism will improve both territories' economies).
82. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 172-73 (describing birdwatcher's particular experiences leading up to his initiation of this lawsuit).
83. See id. (holding that Center for Biological Diversity had standing to bring cause of action on behalf of birdwatchers).
84. See id. at 163 (summarizing plaintiff's suit against defendants, Secretary of Defense, Donald Rumsfeld and Acting Secretary of Navy Robert Pirie, in their official capacity as head of branches of engaging in live-fire exercises on FDM).
85. See id. at 166-68 (discussing military's 1996 application for MBTA permit and subsequent denial).
86. See id. at 177-79 (holding that defendants DoD's decision to continue military training exercises on FDM without MBTA permit constituted violation of MBTA and APA, thereby granting plaintiff's motion for summary judgment).
87. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d at 178-79 (ordering attorneys for both parties to prepare briefs for March 13, 2002 hearing regarding whether to issue injunction enjoining military from further conducting live-fire training exercises on FDM).
The DoD filed a motion for stay of injunction pending appeal, but the district court denied the motion on May 1, 2002. The district court issued a temporary injunction, quickly followed by an order permanently enjoining the military from conducting live-fire training exercises on June 3, 2002. On June 5, 2002, the D.C. Circuit Court of Appeals granted the DoD's emergency motion for stay of injunction pending appeal on the grounds that the DoD sufficiently demonstrated irreparable injury, and because of the likelihood of the DoD's success on the merits.

On January 23, 2003, the United States Court of Appeals for the District of Columbia vacated and remanded the district court's ruling in Center for Biological Diversity v. Pirie. The court remanded the case with instructions to dismiss the case as moot in light of the December 2002 Amendments to the MBTA through the Stump Act. This ruling is the latest statement from the judicial system regarding the debate over whether the armed services should be granted exemptions from environmental regulations.


1. Creation and Legislation of Section 315

Congress enacted the Stump Act on December 2, 2002, following months of debate in Congress regarding one provision: section 315 of the Stump Act. Congress stated that section 315 applied to

89. See id. at 122 (issuing temporary thirty-day injunction and further ordering that, at end of period, court will make final judgment as to appropriateness of permanent injunction, leaving room specifically within thirty-day period for "administrative or congressional action"); see also Ctr. for Biological Diversity v. England, 2002 U.S. App. LEXIS 11493 at *1-2 (D.C. Cir. June 5, 2002) (citing date of district court's order of permanent injunction as June 3, 2002).
90. See id. (noting appellants DoD satisfied requirements to warrant issuance of stay of injunction pending appeal).
92. See id. at *2 (citing United States v. Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001)).
94. See id. Generally, the Stump Act authorized appropriations for the fiscal year 2003 for military activities of the Department of Defense, for military construction, and the Department of Energy's defense activities. See id. Section 315 was a "rider" on the Stump Act insofar as it was a small provision attached to the very lengthy defense appropriations legislation. Id.
"[i]ncidental taking of migratory birds during military readiness activities." Essentially, this provision grants the military an exemption from section 703 of the MBTA, which makes the taking, killing or possessing of migratory birds unlawful. The Senate enacted section 703 only after substantive changes were made to the version previously approved by the House. The first version of the Stump Act granted the military blanket exemptions from the MBTA, as well as the Endangered Species Act, and met significant opposition from Senate Democrats.

Eventually, legislators compromised and made two changes to the MBTA exemption, while altogether abandoning the Endangered Species Act exemption. The first key change required the Department of Interior to exercise its regulatory authority over the DoD's activities which impact migratory birds. The second material change required the DoD to take appropriate action to mitigate the impact of its activities on migratory birds.

2. Section 315: Substance

The overall purpose of the Stump Act was to authorize appropriations for military activities of the DoD for military construction and defense activities of the Department of Energy, as well as to

95. Id. The Stump Act states: "During the [interim] period . . . section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned." Id.

96. 16 U.S.C. § 703 (2003). The MBTA states: it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take capture, kill . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions between the United States and Great Britain for the protections of migratory birds . . .

Id.


98. See Heilprin, supra note 1 (discussing reasons why Pentagon has until now only been able to obtain exemptions from MBTA).


100. See id. (discussing in subsection (b) ways in which Secretary of Defense must work in consultation with Secretary of Interior in monitoring, minimizing and mitigating adverse impacts of military readiness training on migratory bird species).

101. See id. Section 315's plain language shows that legislators aimed to avoid giving blanket exemptions to the military to engage in military readiness training without any regard for the life of migratory bird species. Id.
MILITARY EXEMPTIONS FROM REGULATIONS

prescribe personnel strengths for each fiscal year for the Armed Forces.\textsuperscript{102} Section 315 of the Stump Act grants the Armed Forces a temporary exemption from the MBTA and includes six subsections.\textsuperscript{103}

Subsection (a) grants the military interim authority for incidental takings of migratory birds.\textsuperscript{104} It states that section 2 of the MBTA shall not apply to the incidental takings of migratory birds by members of the armed forces during military readiness activities authorized by the Secretary of Defense or the secretary of the appropriate military department.\textsuperscript{105}

Subsection (b) requires that the Secretary of Defense, in consultation with the Secretary of the Interior, shall identify measures to minimize any adverse impacts of military training activities on migratory birds.\textsuperscript{106} Specifically, subsection (b) requires that the Secretary of Defense and Secretary of the Interior perform two duties.\textsuperscript{107} First, they must identify measures that will minimize and mitigate adverse impacts of military training on migratory bird species.\textsuperscript{108} Second, they must monitor the impact of their training activities on migratory bird species.\textsuperscript{109}

Subsection (c) discusses the length of the interim period.\textsuperscript{110} It requires that the interim period begin on the date of enactment of the Stump Act and end on the date on which the Secretary of the

\textsuperscript{102} See id. (stating general purposes of Stump Act).
\textsuperscript{103} See id. Section 315 is entitled “Incidental Taking of Migratory Birds During Military Readiness Activities.” Id.
\textsuperscript{104} See Bob Stump Act § 315(a) (mandating that section 2 of Migratory Bird Treaty Act shall not apply to military personnel engaging in readiness training).
\textsuperscript{105} See id. The Stump Act states:
During the period described in subsection (c), section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense of the Secretary of the military department concerned.

\textit{Id.}

\textsuperscript{106} See id. § 315(b) (stating title of subsection (b) as “Identification of Measures to Minimize Impact of Activities”).
\textsuperscript{107} See id. (discussing that two duties described within subsection (b) are to be performed within time constraints explained in subsections (c) and (d)).
\textsuperscript{108} See id. § 315(b)(1) (stating Secretaries have duty “to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military readiness activities on affected species of migratory birds”).
\textsuperscript{109} See Bob Stump Act § 315(b)(2) (stating Secretaries also carry duty “to monitor the impacts of such military readiness activities on affected species of migratory birds”).
\textsuperscript{110} See id. § 315(c) (describing interim period by stating that “[t]he period described in this subsection is the period beginning on the date of the enactment of this Act and ending on the date on which the Secretary of the Interior publishes [a notice] in the Federal Register . . .”).
Interior publishes a notice in the Federal Register stating that three things have occurred. First, the Secretary of the Interior must give notice that regulations authorizing the Armed Forces to incidentally take migratory birds have been prescribed pursuant to section 315(d) of the Stump Act. Second, the Secretary of the Interior must give notice that all legal challenges to the regulations have been exhausted pursuant to section 315(e) of the Stump Act. Third, the Secretary of the Interior must give notice that regulations authorizing the incidental takings have taken effect. Once these three factors have been met, the interim period is over.

Subsection (d) requires the Secretary of the Interior to exercise his authority under the MBTA by prescribing regulations exempting the Armed Forces for incidental takings of migratory birds during military training. The Secretary of the Interior must commence the process of making these regulations within one year from the date of enactment of the Stump Act.

111. See id. § 315(c)(1-3) (listing three items which Secretary of Interior must give notice of in Federal Register in order to end interim period).
112. See id. § 315(c)(1) (stating Secretary of Interior must give notice that "regulations authorizing the incidental taking of migratory birds by members of the Armed Forces have been prescribed in accordance with the requirements of subsection (d)").
113. See id. § 315(c)(2) (stating that Secretary of Interior must give notice that "all legal challenges to the regulations and to the manner of their promulgation (if any) have been exhausted as provided in subsection (e)").
114. See Bob Stump Act, § 315(c)(3) (stating that Secretary of Interior must give notice that "the regulations have taken effect").
115. See id. § 315(d) (discussing incidental takings after interim period). Section 315(d) states:

(1) Not later than the expiration of the one-year period beginning on the date of enactment of this Act, the Secretary of the Interior shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act (16 U.S.C. 704(a)) to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned. (2) The Secretary of the Interior shall exercise authority under paragraph (1) with the concurrence of the Secretary of Defense.

116. Id. See also 16 U.S.C. 704(a) (2001). Section 704(a) provides, in part: the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Id.
Subsection (e) provides for legal challenges to the regulations prescribed pursuant to Section 315 of the Stump Act. Basically, subsection (e) provides that all parties seeking judicial review of these regulations file an action in federal court within 120 days of the date on which the regulations are published in the Federal Register. After that date, all legal challenges to the regulations and to the manner of their promulgation will be considered "exhausted."

Subsection (f) provides a definition for "military readiness activity," a term used throughout Section 315 of the Stump Act. This definition is important because Section 315 provides the Armed Services with an exemption from the MBTA, but this exemption extends only to "military readiness activities." Subsection (f) describes "military readiness activities" as "(A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use."

In summary, Section 315 of the Stump Act exempts the Armed Forces from MBTA regulations during military readiness activities. This exemption will last for the defined interim period. During this interim period, the Secretary of the Interior has until

Bob Stump Act, § 315. Because the Stump Act was passed on December 2, 2002, one can infer from its language that the deadline for the Secretary of the Interior to comply with section 315(d) of Stump Act is December 2, 2003.

117. See id. § 315(e). The Bob Stump Act states: "an action seeking judicial review of regulations prescribed pursuant to this section or of the manner of their promulgation must be filed in the appropriate Federal court by not later than the expiration of the 120-day period beginning on the date on which such regulations are published in the Federal Register. Upon the expiration of such period and the exhaustion of any legal challenges to the regulations pursuant to any action filed in such period, there shall be no further judicial review of such regulations or of the manner of their promulgation."

Id.

118. See id. (stating 120-day period will begin on date regulations are published in Federal Register).

119. See id. (emphasizing that after expiration of 120-day period, there shall be no further judicial review of these regulations).

120. See id. § 315(f) (defining "military readiness activity").

121. See Bob Stump Act § 315 (a), (f) (noting under subsection (a), section 2 of MBTA shall not apply to incidental taking of migratory birds by member of Armed Forces during military readiness activities).

122. See id. § 315(f) (describing "military readiness activity").

123. See id. § 315(a) (generally describing purpose of section 315).

124. See id. § 315(c) (noting exemption described in section 315 is not permanent, but rather applies for interim period).
December 2, 2003 to commence creating a regulation exempting the Armed Forces from the MBTA during military readiness activities, pursuant to his power to create exemptions under the MBTA.\textsuperscript{125} Within 120 days of the regulation’s publication in the Federal Register, all actions seeking judicial review of the regulation must be filed in federal court.\textsuperscript{126} Once those actions are exhausted, the Secretary of the Interior must file in the Federal Register a notice that (1) he created the regulation as instructed by section 315(d), (2) all legal challenges to the regulation are exhausted, and (3) the regulation has taken effect.\textsuperscript{127} The interim period will end on the date the Secretary of the Interior files this notice in the Federal Register.\textsuperscript{128} Finally, during the interim period and thereafter, the Secretary of Defense and Secretary of the Interior must monitor whether military readiness activities adversely impact migratory bird species, as well as identify measures to minimize and mitigate those adverse effects.\textsuperscript{129}

III. ANALYSIS

A. \textit{Center for Biological Diversity v. England}\textsuperscript{130}

The court’s analysis in \textit{Center for Biological Diversity v. Pirie} and its continued analysis throughout the subsequent appeal adds value in understanding \textit{Center for Biological Diversity v. England} and its implications.

\textsuperscript{125} See id. § 315(d) (explaining Secretary of Interior has one year from date of enactment of Stump Act to begin creating regulation exempting military from MBTA pursuant to power under section 3(a) of MBTA).

\textsuperscript{126} See Bob Stump Act, § 315(e) (regarding limitation of judicial review to 120-day period after publication of Secretary of Interior’s regulation in Federal Register pursuant to subsection (d) of Section 315 of Stump Act).

\textsuperscript{127} See id. § 315(c) (describing process by which interim period begins and ends).

\textsuperscript{128} See id. § 315(c) (stating interim period ends on date Secretary of Interior publishes notice of material described in subsection (c) of section 315 of Stump Act).

\textsuperscript{129} See id. § 315(b) (describing duty of Secretary of Defense and Secretary of Interior to monitor adverse effects and identify measures to minimize their impact).

1. Center for Biological Diversity v. Pirie: District Court Grants CBD’s Motion for Summary Judgment and Rules Against DoD: March 2002

In March 2002, the District Court for the District of Columbia granted CBD’s motion for summary judgment against the DoD, finding that the DoD had violated and was continuing to violate the MBTA and the APA by killing migratory birds on Farallon de Medinilla without a permit.131

Both the plaintiffs and the defendants motioned for summary judgment in Center for Biological Diversity v. Pirie.132 The court used the standard applicable to motions for summary judgment, which requires that judgment only be granted if one of the parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed.133

The court first addressed the DoD’s argument that CBD lacked standing.134 To satisfy the case or controversy requirement of Article III of the Constitution, the plaintiff must prove three points.135 First, a plaintiff must show that he has suffered a “concrete and particularized injury that is actual or imminent not merely conjectural or hypothetical.”136 Second, the plaintiff must demonstrate that the injury is fairly traceable to the defendant’s challenged action.137 Finally, the plaintiff must establish that a court decision can fairly redress the injury.138 In addition to proving the case or controversy requirement, an organization must meet three requirements to have standing to sue on behalf of its members.139 First, those members must have standing to sue in their own right.140

132. See id. (granting plaintiff’s motion for summary judgment while denying defendant’s motion for summary judgment in Ctr. for Biological Diversity v. Pirie).
133. See id. at 170-71 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) and Rhoads v. McFerran, 517 F.2d 66, 67 (2d Cir. 1975)).
134. See Ctr. for Biological Diversity, 191 F. Supp. 2d at 171-73 (rejecting defendant’s argument that CBD lacked standing in this case).
135. See id. at 171 (citing case or controversy requirements as required by Article III of U.S. Constitution). See also U.S. Const. art. III.
137. See Ctr. for Biological Diversity, 191 F. Supp. 2d at 171 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
138. See id. (discussing three requirements plaintiff must show to establish standing).
139. See Laidlaw, 528 U.S. at 180-81 (noting that for organization to have standing to sue on behalf of members it must meet three requirements).
140. See id. at 181 (stating that members must have standing independent of organization to sue on matter at hand).
Second, the interests at stake must be germane to the organization’s purpose.\textsuperscript{141} Third, neither the claim asserted nor the relief requested can require the participation of the organization’s individual members in the lawsuit.\textsuperscript{142}

The court held that CBD met the requirements for an organization to have standing to sue on behalf of its members.\textsuperscript{143} According to the court, the protection of migratory birds was germane to CBD’s organizational purpose, and neither the claim nor the requested relief required any individual members of CBD to participate in the suit.\textsuperscript{144}

The DoD argued that CBD failed to show that any of its members suffered a concrete injury resulting from the training activities on FDM.\textsuperscript{145} According to the DoD, any injury to the birdwatcher who initiated Center for Biological Diversity v. Pirie is remote because he does not visit FDM, but merely observes the birds on FDM from remote islands.\textsuperscript{146} The court held that the birdwatcher’s ability to observe the birds on FDM is “undeniably harmed” by the DoD’s activities there.\textsuperscript{147} According to the court in Center for Biological Diversity v. Pirie, CBD met the requirements for standing because it showed (1) that its members suffered an actual and particularized injury, (2) that the injury was directly caused by the DoD’s unauthorized killing of migratory birds on FDM, and (3) that the injury was redressable by an injunction halting those activities.\textsuperscript{148}
Second, the court focused on CBD's argument that the DoD had violated the MBTA and the APA's prohibition of unlawful agency action.\textsuperscript{149} In addressing whether the DoD's actions on FDM violated the MBTA, the court noted that the MBTA's prohibition against killing migratory birds fully extends to federal agencies.\textsuperscript{150} The court found that the DoD's activities clearly violated the MBTA and that the DoD could not find any other authorization for their activities pursuant to the MBTA regulations.\textsuperscript{151} The court rejected the DoD's argument that the killings of migratory birds on FDM are unintentional, finding instead that the killings are intentional because the DoD engages in training activities knowing that birds will be killed as a consequence.\textsuperscript{152} The court further noted that even if the deaths were unintentional, the MBTA prohibits both intentional and unintentional killings of migratory species.\textsuperscript{153}

After establishing that the DoD violated MBTA, the court determined that because of this violation, the DoD had also violated the APA. CBD argued that, even though the MBTA provides no private cause of action against the government to enforce MBTA provisions, the government had violated the APA's prohibition on unlawful agency action.\textsuperscript{154} The DoD argued that plaintiff's APA claim failed on two grounds.\textsuperscript{155} First, DoD argued that APA only authorizes review of final agency actions.\textsuperscript{156} In determining whether an action constitutes "final agency action," courts consider "whether the agency's position is 'definitive' and whether it has a 'direct and immediate . . . effect on the day-to-day business' of the

\begin{itemize}
\item \textsuperscript{149} See id. at 173-75 (addressing plaintiff's argument that DoD violated both MBTA and APA by engaging in described training activities on FDM).
\item \textsuperscript{150} See id. at 173 (citing holding of Humane Soc'y v. Glickman, 217 F.3d 882 (D.C. Cir. 2000)). See also supra notes 26-33 and accompanying text (discussing historical context of applicability of MBTA prohibitions extended to federal government).
\item \textsuperscript{151} See id. at 174 (holding FWS never issued DoD permit constituting permissible exception to MBTA prohibitions).
\item \textsuperscript{152} See id. The court even went so far as to state DoD's argument was "misleading" and that knowledge of bird deaths resulting from live-fire training exercises sufficiently constitutes "intent" under the MBTA. Id.
\item \textsuperscript{153} See id. at 174-75 (citing other cases where courts have refused to include knowledge requirement in MBTA analysis).
\item \textsuperscript{154} See 5 U.S.C. § 706(2)(A) (1966) (making agencies liable for any action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
\item \textsuperscript{155} See Cr. for Biological Diversity, 191 F. Supp. 2d at 176-77 (rejecting DoD's defenses that (1) plaintiffs failed to challenge "final agency action," and that (2) FWS had prosecutorial discretion on matter).
\item \textsuperscript{156} See 5 U.S.C. § 704 (1966) (requiring that for court to have jurisdiction pursuant to APA, complaint must challenge "final agency action").
\end{itemize}
The DoD argued that CBD was challenging the general practices of the United States in conducting military training exercises on FDM and not any specific activity. The court disagreed with this argument and held that CBD was specifically challenging a Record of Decision to continue live-fire military training exercises on FDM. According to the court, the DoD’s Record of Decision challenged by CBD constituted “final agency action.”

Second, the DoD argued that plaintiffs’ APA claim failed because prosecuting unintentional killings of migratory birds is a matter which is appropriately left to the FWS’s prosecutorial discretion. The court disagreed with this argument, holding that a federal agency, such as FWS, should not have prosecutorial discretion in determining whether another federal agency violated a federal law.

From the foregoing analysis, the court concluded that the DoD’s decision to continue military training on FDM violated the MBTA and the APA and granted CBD’s motion for summary judgment. Yet, the court refrained, at that time, from issuing any injunctions against the DoD.

2. District Court Issues Injunction Against DoD: May 2002

After the court considered the parties’ submissions regarding a remedy, it issued an injunction that enjoined the DoD from engaging in any military training exercises with potential to wound or kill migratory birds. The plaintiffs asked the court to consider the
applicable sections of the MBTA and the APA. The defendants, on the other hand, asked the court to consider only the APA, arguing that only the APA authorizes the injunctive relief which plaintiffs sought. In its opinion, the court rejected the DoD’s argument that the court had the discretion to grant the military equitable relief for the sake of national security. The court addressed the issue of whether Congress intended the APA to limit the court’s equitable discretion. In its analysis, the court noted that section 702 of the APA created the right to sue the United States and waived the United States’ sovereign immunity in non-damages actions. The court also stated that section 706 of the APA states the court’s scope of review in reviewing claims of agency violations. After a lengthy analysis, the court held that Congress had not clearly and equivocally limited the court’s discretion under the APA.

In determining the proper remedy, the court recognized precedent which stated that even if the court determines it has some discretion, it cannot exercise its discretion to provide relief. Furthermore, the court held that the facts of Center for Biological Diversity of any administrative or congressional action before issuing permanent injunction).

166. See id. at 116 (discussing plaintiffs’ and defendants’ arguments regarding which law to consider).

167. See id. at 116-17 (stating that focus on language, history, and purpose of APA was more important than contingency of liability under section 706 of APA on violation of another law).

168. See id. at 118. The court stated:

a court can not conclude that an injunction must issue solely based on
the fact of the statutory violation itself . . . . Rather, a court must inquire
in to the language and purpose of the statute at issue in order to assess
whether Congress has clearly limited the usual range of equitable options
available to a court so as to constrain the court’s discretion.

Id. (citations omitted).

169. See id. (examining relevant language of APA).

170. See Ctr. For Biological Diversity v. Pirie, 201 F. Supp. 2d at 118 (quoting section 706’s “scope of review” provision). “The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . .” Id.

171. See id. at 119 (holding that plain text, legislative history, and case law support finding that Congress has not clearly and unequivocally limited court’s discretion under APA).

172. See id. (citing United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 497 (2001) (stating “a court sitting in equity cannot choose to grant no relief because ‘a court sitting in equity cannot ignore the judgment of Congress deliberately expressed in legislation . . . . A district court, cannot, for example, override Congress’ policy choice, articulated in a statute, as to what behavior should be prohibited.’”).
mandate that an injunction halting all live-fire training exercises on FDM is the only option which will guarantee compliance with the APA and the MBTA. The court rejected the DoD's argument that the court should only issue an injunction ordering the DoD to obtain a permit from FWS. In summary, the court found issuing an injunction enjoining the DoD from any further live-fire military training on FDM to be the only viable option.

3. DoD's Emergency Motion for Stay of Injunction Pending Appeal Is Granted by D.C. Circuit Court: June 2002

In June 2002, the United States Court of Appeals for the District of Columbia granted the DoD's emergency motion for stay of injunction pending appeal. The court stayed the district court's prior order permanently enjoining the military from conducting military training exercises on FDM which would potentially harm or kill migratory birds. According to the court, the DoD sufficiently demonstrated irreparable injury would result otherwise. In addition, the court found that in its appeal, the DoD showed a likelihood of success on the merits. The court held that the combination of these two factors warranted a stay of injunction.


In January 2003, the United States Court of Appeals for the District of Columbia vacated the district court's judgment in Center

173. See id. at 120 (explaining there are no mitigating actions U.S. could take, other than stopping live-fire training exercises altogether, that would ensure that no migratory birds would be wounded or killed).
174. See id. at 120-21 (stating that forcing DoD to obtain permit from FWS is not viable remedy because FWS rejected DoD's application for permit on at least two prior occasions).
175. See Ctr. For Biological Diversity v. Pirie, 201 F. Supp. 2d at 122. Despite ultimately issuing the injunction, the court noted that it "of course recognizes the weight and importance of the United States' interest in using FDM for military training, particularly at this point in time . . . ." Id.
177. See id. at *2 (finding that district court's order permanently enjoining DoD from training on FDM should be stayed pending appeal).
178. See id. (noting that DoD showed irreparable injury).
179. See id. (noting that likelihood of success on merits was factor to be considered).
180. See id. (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).
for Biological Diversity v. Pirie, remanding the case with instructions to dismiss the case as moot in light of the December 2002 Amendments to the MBTA through the Stump Act. The concise opinion stated that both parties agreed the appeal was moot in light of the Stump Act. The Court of Appeals noted, however, that plaintiff CBD was opposed to vacating the district court’s decision, claiming that the Stump Act was enacted to “overturn an unfavorable precedent” and “manipulate the judicial system.” The Court of Appeals found that this argument lacked evidence, noting that “[t]he legislature may act...because the lawsuit has convinced it that existing law is flawed.”

B. Stump Act

The Stump Act was introduced in the House of Representatives (House) on April 23, 2002, and an amended version was passed on May 9, 2002. The amended version was passed in the Senate on June 27, 2002. The Stump Act was enacted on December 2, 2002. Throughout the legislative process, many legislators voiced their opinions on whether to grant the Armed Services an exemption from the MBTA during military readiness activities. This debate, which occurred in both the House and the Senate, provoked the two conflicting schools of thought on whether the interest in protecting the environment outweighs the interest in
providing for the national defense. Broadly, Republicans and Democrats are split on this issue; more narrowly, there exists a clear rift between unyielding environmentalists and those who regard our national defense as the highest priority.

1. Congressional Arguments in the House of Representatives

In the House, debate over this issue arose in four major instances. On May 9, 2002, the debate began with Representative (Rep.) Weldon, a Republican from Pennsylvania, who supported granting the Armed Services exemptions from MBTA. Rep. Weldon stated that he believed the quality of the military has suffered because of "taking a holiday in the nineties by cutting back on military spending." Citing multiple pieces of environmental legislation he supported and terming himself a "green Republican," Rep. Weldon provided firm support in favor of granting the Armed Forces exemptions from the MBTA. Rep. Weldon further stated that the bill does not "gut" environmental laws and answers to the need for Congress to make sure the military is properly trained. Rep. Weldon then explained how military training at Camp Pendleton in California suffers because of stiff environmental regulations. Rep. Weldon described how Marines, who engage in amphibious

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189. See id. at H2251-52 (showing debate between Congressman Dingell and Weldon over issue).


193. 148 CONG. REC. H2249, H2250-51 (daily ed. May 9, 2002) (statement of Rep. Weldon). Rep. Weldon stated his view that "[w]e have cut back across the board and now we are trying to play catch-up, and it is impossible. This bill makes a good downpayment in trying to reverse that, but it is not enough." Id. at 2251.

194. See id. at H2251. Rep. Weldon stated, "I will take a back seat to no one on environmental votes. I have been a green Republican, voting and endorsing and cosponsoring the Clean Air Act, clean water, endangered species, wetlands protection. I serve on the Migratory Bird Commission." Id.

195. See id. (explaining why exempting Armed Forces from MBTA is necessary).

196. See id. (noting that Camp Pendleton is top training site for Marines' amphibious forces).
combat training, are forced to take buses between the shore and the ground where they train in order to avoid certain endangered species.\textsuperscript{197} Furthermore, Rep. Weldon asserted that the disputed portions of the Stump Act aim at making sure soldiers, sailors, corpsmen and Marines receive adequate training.\textsuperscript{198} He argued that the lives of members of the Armed Forces are undoubtedly as valuable as that of other species.\textsuperscript{199} Rep. Weldon pointed out that "those who say that somehow this bill is rolling back environmental laws . . . are grossly misinformed."\textsuperscript{200}

Rep. Weldon also noted that the Armed Forces are not set on destroying the environment, as some would believe, and presented evidence that the Navy spends more money on oceanographic research than any other Federal agency.\textsuperscript{201} Finally, Rep. Weldon argued that poor local zoning and planning has caused California to become so "built up" that "endangered species had no place to go except for our military base," and it is unfair to force the military to bear the brunt of those mistakes.\textsuperscript{202} Rep. Weldon concluded by stating that "[w]e are trying to do the right thing. We are also trying to protect our troops. We are also trying to give some relief so our military personnel can be properly trained and equipped when they are called upon to protect America."\textsuperscript{203}

Rep. Dingell, a Democrat from Michigan, disagreed and called this provision of the Stump Act "a fine example of high-handed arrogance by the Republican leadership . . . ."\textsuperscript{204} Rep. Dingell stated that in his dealings with the military, he has found that they

\textsuperscript{197} See id. (asserting that our nation then asks these men to risk their lives).

\textsuperscript{198} See 148 Cong. Rec. H2249 at H2251 (daily ed. May 9, 2002) (statement of Rep. Weldon) (explaining that provision at issue is not about rolling back, but rather is opportunity to allow proper training to take place).

\textsuperscript{199} See id. (asking rhetorically, "Is a snail darter's life more important than the soldier?").

\textsuperscript{200} Id. (stating that those in favor of military exemptions from environmental regulations are concerned about protecting environment).

\textsuperscript{201} See id. (statement of Rep. Weldon) ("Every oceanographic research school, Scripps, Woods Hole, gets all or a bulk of their money from naval research accounts.").

\textsuperscript{202} See id. (statement of Rep. Weldon) (stating he recently took helicopter ride along California coast and saw only remaining open area of coastal land was Camp Pendleton).

\textsuperscript{203} Id.

\textsuperscript{204} See 148 Cong. Rec. H2249, H2251 (daily ed. May 9, 2002) (statement of Rep. Dingell) (stating that he feels House has not had adequate opportunity to discuss important environmental matters affected by Stump Act). Id.
"constantly seek to get out from under environmental laws." According to Rep. Dingell, this provision gives the military another opportunity to avoid environmental laws. Rep. Dingell talked about how this provision should have been discussed through a more lengthy process so that environmentalists could have been heard. He argued that World Wars I, II and numerous other wars were fought with the MBTA in full effect; but, he failed to account for any changes America might have seen in the last fifty years that would have affected the ability of the Armed Forces to train in full compliance with environmental regulations. Although Rep. Dingell recognized the need to maintain military readiness in light of the terrorist attacks of September 11, 2001, he failed to stipulate how the military could achieve such readiness when hindered by environmental regulations like the MBTA.

Rep. Rahall, a Democrat from West Virginia, also spoke out in opposition to granting the Armed Forces exemptions from the MBTA. According to a statement issued by Rep. Rahall and Rep. Dingell, "[t]his legislation while important to our national security and military preparedness has been misused as a vehicle to bypass committee jurisdiction and public process in order to create unprecedented and unwarranted exemptions to key environmental laws." Rep. Rahall and Rep. Dingell also argued that the DoD...
has failed to show that exemptions to . . . environmental laws are necessary or that training is hindered because of those laws."\textsuperscript{212} In addition, Rep. Rahall asserted that granting the Armed Forces exemptions from the MBTA would compromise U.S. International treaty obligations and could set an unfavorable precedent for other countries.\textsuperscript{213} Finally, Rep. Rahall contended that granting exemptions to the Armed Forces meant granting the military unprecedented, self-regulatory authority.\textsuperscript{214}

Additionally, Rep. Gephardt, a Democrat from Missouri, spoke briefly on the matter.\textsuperscript{215} According to Rep. Gephardt, permitting the military exemptions as a rider on the Stump Act shows that Republicans are "eroding environmental protections in a way that is completely inappropriate and unnecessary."\textsuperscript{216}

Rep. Hunter, a Republican from California, favored the exemptions and emphasized that in times of war, people on the battlefield rely on good training to survive.\textsuperscript{217} Further, he stated that environmental regulations encroach upon many training bases in the United States, noting that at Camp Pendleton, stiff environmental regulations allow the military to use only one-third of the training ground available.\textsuperscript{218} Rep. Hunter firmly stated that "[t]hese are reasonable positions that we have taken, reasonable restrictions on

\textsuperscript{212} See id. at 2254 (anticipating GAO report which will provide data that military has not been adversely affected by environmental laws).

\textsuperscript{213} See id. Rep. Rahall stated, "[This] could establish a negative precedent for other signatory nations to exempt their own activities from such obligations or consider other forms of retaliation." Id.

\textsuperscript{214} See 148 CONG. REC. H2249, H2254 (daily ed. May 9, 2002) (statement of Rep. Rahall). Rep. Rahall further stated that no federal agency or state has such self-regulatory authority, yet he failed to recognize that the Armed Forces cannot be accurately be equated with other federal agencies. Id.

\textsuperscript{215} See id. at H2255 (statement of Rep. Gephardt) Rep. Gephardt's remarks on the issue, expressing opposition to the provision, were limited to two paragraphs of text. Id.

\textsuperscript{216} See id. (stating that Republicans are not taking adequate time to listen to input from States, local communities, environmentalists, and Committee on Resources).

\textsuperscript{217} See id. at H2256 (referring to Operation Enduring Freedom when stating "we are in a war right now").

\textsuperscript{218} See id. (statement of Rep. Hunter) Rep. Hunter described other instances where military training was limited by environmental regulations:

You have to build foxholes only where you have tape that has been laid out in an environmentally-sensitive manner. . . Go to bases like Mountain Home Air Force Base in Idaho, where only one plane at a time can train on the training field, which is like having one football player on the team be allowed out on the field at the same time.

Id.
the environmental laws to help our people stay alive on the battlefield.”

Rep. Markey, a Democrat from Massachusetts, spoke against the exemptions arguing that the military can adequately train with the MBTA regulations in place. Rep. Markey argued that “in this legislation, the Republican Majority says we must destroy the environment in order to save America from the terrorist threat.” Additionally, Rep. Markey said that there are individuals who are “committed to dismantling the environmental laws that protect public health and the environment.”

The debate continued on May 15, 2002 to the extent that Rep. Maloney, a Democrat from Connecticut, issued an extension of remarks on the issue. Although Rep. Maloney supported the Stump Act, he expressed his displeasure with the provision granting the Armed Forces exemptions from the MBTA. According to Rep. Maloney, if the exemption is necessary, either the Secretary of the Interior or the licensing process available through FWS should provide for it.

On November 12, 2002, the debate on military exemptions arose again. At this point, the provision exempting the Armed Forces from the MBTA had been organized into its final form. Rep. Hansen from Utah spoke in favor of the exemptions. He expressed dismay for the opinion that environmental regulations


220. See id. at H2263 (statement of Rep. Markey) (“Our military personnel are well-trained and ready for action and they have successfully coexisted with environmental laws for the past 3 decades.”).

221. See id. (claiming Republicans are proposing broad exemptions from environmental laws using national security and military readiness as excuses).

222. See id. (stating his belief that anti-environmentalists attempt to further their agenda by disguising it within the need for national security to avoid “public outcry”). Rep. Markey further stated, “Don’t be fooled by the new national security wrapping. This is the same old package—the elimination of laws inconvenient to some but crucial for protecting public and environmental health.” Id.


224. See id. (noting that he wished there was more opportunity to debate this issue on floor).

225. See id. (expressing disapproval of blanket exemptions).


227. See id. Here, Rep. Hefley of Colorado clarifies some of the language within Section 315 of the Stump Act. Id. at H8536.

228. See id. at H8539 (statement of Rep. Hansen) (“I think some people are more interested in how they are scored with the League of Conservation Voters than they are in training our boys and the girls who fight in this thing.”).
should take priority over training the young men and women of the Armed Forces.\textsuperscript{229} Furthermore, Rep. Hansen indicated that the final version of Section 315 of the Stump Act is so watered down that the military was quite disappointed with the outcome.\textsuperscript{230} He concludes by recognizing that the military is now in a difficult position, having lost most of Camp Pendleton, most of Fort Hood, most of the Utah test and training range, as well as other training grounds because of environmental regulations.\textsuperscript{231}

A speech by Rep. Dingell led to the final debate in the House on the issue pertaining to Section 315 of the Stump Act.\textsuperscript{232} This speech primarily contained rhetoric identical to his earlier speech on the issue.\textsuperscript{233} But, his remarks may have been even more extreme insofar as he stated that this provision "will effectively give the Defense Department license to bomb and destroy at will the natural habitats of migratory birds, endangering more than one million birds and curtailing the enjoyment of more than 50 million bird enthusiasts in this country."\textsuperscript{234}

2. Congressional Arguments in the Senate

The Senate spent less time debating this issue.\textsuperscript{235} Senator Levin, a Democrat from Michigan, announced his support for the final form of Section 315.\textsuperscript{236} He expressed his satisfaction with the

\textsuperscript{229} See id. ("This time we are just bending over backwards to make sure that we take more care of the slimy slug than we do the guy in the tank or on the ground or in the airplane.").

\textsuperscript{230} See id. (quoting discussion Rep. Hansen had with Pentagon where Pentagon said, "Mr. Chairman, we would just as soon not have had the compromise that came out.").

\textsuperscript{231} See 148 CONG. REc. H8535 at H8537 (daily ed. Nov. 12, 2002) (statement of Rep. Hansen) (stating, "it really pains me that we have found ourselves in this position.").


\textsuperscript{233} See supra notes 204-13 and accompanying text (demonstrating Rep. Dingell's point of view from his preceding speech on this topic).


\textsuperscript{235} See 148 CONG. REc. S10858 (daily ed. Nov. 13, 2002). (demonstrating that Senate spent seventy-five minutes debating issue). Such discussion in the Senate on this issue may have been limited because this section of the Stump Act was a very small fraction of all the provisions set forth in the Stump Act. See Bob Stump Act, \S\ 315(c)(2), 116 Stat. 2458 (showing overall length of Stump Act to be quite substantial).

final form, which consisted of a modified exemption for the Armed Forces from the MBTA. Similarly, Senator Akaka, a Democrat from Hawaii, felt the compromise was fair. He stated, "I continue to believe that when the Department's training and needs for land, sea and air space conflict with other needs in our society... our focus should be first and foremost on ensuring that all parties involved work together in a spirit of cooperation."  

IV. IMPACT

As recently as February 26, 2003, President Bush has praised the Northern Marianas' role in advancing national security. Live-fire training has been able to resume after the enactment of the Stump Act and the D.C. Circuit's decision in Center for Biological Diversity v. England. As a result, the Navy has conducted at least twenty-one days of live fire training exercises on FDM. Live fire training exercises were occurring throughout March 2003.

Throughout the debate over this issue, some Democrats and environmentalists may have the impression that those who prioritize the training and safety of the Armed Services want to destroy the environment. This viewpoint fails to account for the many conservatives who have concerns about both national defense and the environment. Senator John Warner, the top Republican on the Armed Services Committee stated, "In no way are we trying to
roughshod over this body of environmental laws . . . in the name of national security.”

Today, in the midst of Operation Iraqi Freedom, it seems unfortunate that the Armed Forces were temporarily halted from performing live-fire training exercises to prepare for the combat in which they now struggle. The men and women serving in the Armed Forces must be given the opportunity to train effectively in order to survive. As recently as March 7, 2003, the Bush Administration asked Congress for more exemptions from the environmental regulations which are obstructing military training. Reportedly, the administration is “moving early” to promote this plan and the House and Senate Armed Services Committees are currently discussing them in committee hearings. The outcome of the Bush administration’s push for further exemptions remains uncertain, but as increasing numbers of men and women die each day while serving the United States in Operation Iraqi Freedom, it seems appropriate that Congress does everything in its power to help them train and effectively execute their mission.

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245. See id. (showing divergence in viewpoints on issue).
246. See supra, notes 82-92 and accompanying text (discussing procedural history of Center for Biological Diversity v. Pirie and Center for Biological Diversity v. England).
248. See id. (reporting that Bush administration has asked Congress to exempt DoD from broad array of environmental laws governing air pollution, toxic waste, endangered species, and marine mammals).
249. See id.