ST. MARY'S UNIVERSITY

St. Mary's Law Journal

Volume 49 | Number 4 Article 4

8-2018

Avian Jurisprudence and the Protection of Migratory Birds in North America

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COMMENT

AVIAN JURISPRUDENCE AND THE PROTECTION OF MIGRATORY BIRDS IN NORTH AMERICA

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* J.D., M.A., St. Mary's University, 2018. The author is most grateful to his wife, Madison Bowen, for her relentless love and support through this endeavor. The author extends his sincere thanks to Professor Chad Pomeroy, Dean Amy Hardberger, and the members of the *St. Mary's Law Journal*, Volume 49, for their feedback and edits to this Comment. The author would like to dedicate this Comment to his grandparents, Patricia and Robert M. Ayres, Jr., for their steadfast faith, commitment to the common good, and for the profound opportunity to pursue a legal education.

I. INTRODUCTION

On September 1, 1914, at 1:00 PM, Martha, the last known living passenger pigeon in the world, died at the Cincinnati Zoological Garden at the age of 29.[1] Following a fifty-year unbridled massacre of passenger pigeons in the United States during the latter half of the nineteenth century, Martha was the sole living passenger pigeon in 1914.[2] The passenger pigeon was once the most common bird in North America[3]—and perhaps the world—occupying a well-established place in the American avian landscape. Indeed, the passenger pigeon population had grown to such great numbers in North America that experts predicted extinction of the passenger pigeon was an impossible proposition—a far cry from the grim reality the pigeon faced in the early 1900s.

The passenger pigeon was a remarkable animal. The pigeon was able to achieve significant speed due to its aerodynamic anatomy that helped ease its long annual migratory journey.[4] Each year the passenger pigeon would migrate from eastern Canada to the southern United States, including the Texas uplands.[5] Unlike other species of migratory birds, passenger pigeons migrated in enormous groups, often nesting together in such great

1. *The Passenger Pigeon*, SMITHSONIAN, https://www.si.edu/spotlight/passenger-pigeon [https://perma.cc/EE9M-Z8Z4]. The last passenger pigeon was named after First Lady Martha Washington. *Id.* After Martha's death, the pigeon was frozen and ultimately taxidermied for preservation by the Smithsonian Institute. Henry Nicholls, *2014: The Year of the Passenger Pigeon*, GUARDIAN (Jan. 13 2014, 2:03 PM), https://www.theguardian.com/science/animal-magic/2014/jan/13/2014-martha-passenger-pigeon [https://perma.cc/AH5W-XBSQ].

2. *The Passenger Pigeon*, *supra* note 1.

3. Nicholls, *supra* note 1. It was estimated that at its peak population in the nineteenth century, the total population of the passenger pigeon was estimated to be just under four billion individual birds, though exact population numbers are difficult to estimate. *Id.*

4. *Passenger Pigeon*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/species/birds/passenger_pigeon/natural_history.html [https://perma.cc/276J-C3Q2]. The top speed of the passenger pigeon is estimated to have been around sixty miles per hour. Nicholls, *supra* note 1.

5. *The Passenger Pigeon*, *supra* note 1.

numbers that the trees where the nests were located began to lose their limbs as a result of the number of pigeons occupying a nesting area.[6] This large-group preference of the passenger pigeon was also essential to their reproductive process. Passenger pigeons mated in large groups and were incapable of sustaining their population with only a few birds, which contributed to their ultimate extinction.[7]

Passenger pigeons faced a difficult environment in the mid-nineteenth century. Consumption of the passenger pigeon's meat became popular in the United States and American hunters capitalized on the consumer's demand for the birds.[8] Hunters exhausted the population throughout the latter half of the nineteenth century, and by the time regulatory measures were put into place to protect the pigeon, it was too late—the bird was on an irreversible path to extinction.[9]

The loss of the passenger pigeon to the American avian landscape is a grim example of how poaching and the unregulated taking of migratory birds poses a serious threat to our country's beautiful and diverse wildlife population. The passenger pigeon not only occupied an important place in the North American ecosystem, the bird was a magnificent creature and many early bird observers hailed it as one of the most beautiful avian figures in nature.[10] A nineteenth century Potawatomi tribal leader, Simon Pokagon, recalled watching the migratory patterns of the passenger

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6. *Id.*

> In the winter the birds established "roosting" sites in the forests of the southern states. Each "roost" often had such tremendous numbers of birds so crowded and massed together that they frequently broke the limbs of the trees by their weight. In the morning the birds flew out in large flocks scouring the countryside for food. At night they returned to the roosting area. Their scolding and chattering as they settled down for the night could be heard for miles.

Id.

7. *See id.* (explaining how the large flock size initially brought safety from natural predators, but ultimately made an easy target for human hunters).

8. *Id.* It is estimated that during a five-month period in 1878, 50,000 passenger pigeons were killed each day in Petoskey, Michigan. *Id.*

9. *Id.* In response to the massacre of passenger pigeons in Michigan in 1878, the Michigan legislature passed a bill in 1897 limiting the season for hunting passenger pigeons, but the bill had no meaningful effect on preserving the passenger pigeon populations. *Id.* By the 1890s, the population was hunted to the point of near extinction. *Id.*

10. *Cf.* Adrian Barnett, *Beautiful but Doomed: Demise of the Passenger Pigeon*, NEW SCIENTIST (Aug. 27, 2014), https://www.newscientist.com/article/mg22329841-000-beautiful-but-doomed-demise-of-the-passenger-pigeon/ [https://perma.cc/Z882-226D] (reporting on the 100th anniversary of the last passenger pigeon's death being marked with the publication of three different books about the species).

pigeon: "I have stood by the grandest waterfall of America . . . yet never have my astonishment, wonder, and admiration been so stirred as when I witnessed these birds drop from their course like meteors from heaven."[11] The passenger pigeon's extinction represents one aggravating factor that spurred calls for the U.S. federal government's entry into bird conservation.

Two years after the death of the last passenger pigeon, the United States took a definitive step toward a more aggressive migratory bird conservation policy; the United States and Great Britain entered into a treaty to protect migratory birds across North America.[12] The treaty led the U.S. Congress to pass the Migratory Bird Treaty Act ("MBTA") in 1918[13]—a statute aimed squarely at protecting precious avian migratory species that provide important diversity to our country's ecosystem—such as the passenger pigeon—from human predators.[14] Notwithstanding its venerable status as the first major bird conservation law in the United States, recent interpretations of the statute's criminal liability reveal a split among the U.S. courts of appeals.[15]

Perhaps the most significant, and certainly the most litigated,[16] provision of the MBTA imposes criminal liability on any individual or

11. Barry Yeoman, *Why the Passenger Pigeon Went Extinct*, AUDUBON (May–June 2014), http://www.audubon.org/magazine/may-june-2014/why-passenger-pigeon-went-extinct [https://perma.cc/VZ5L-LCAZ].

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

13. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (2012); *see Migratory Bird Treaty Centennial 1916–2016*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/MBTreaty 100/index.php [https://perma.cc/3KPW-E28X] ("[T]he Convention between the United States and Great Britain (for Canada) for the Protection of Migratory Birds [is] also called the Migratory Bird Treaty . . . .").

14. *100 Years of Nest Protection*, NEST WATCH, http://nestwatch.org/connect/news/ celebrating-100-years-of-nest-protection/ [https://perma.cc/76AW-66ZT].

15. *See* United States v. CITGO Petroleum Corp., 801 F.3d 477, 488–89 (5th Cir. 2015) ("[A] 'taking' is limited to deliberate acts done directly and intentionally to migratory birds. [This] conclusion is based on the statute's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act."). *But see* United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010) ("As a matter of statutory construction, the 'take' provision of the [Migratory Bird Treaty] Act does not contain a scienter requirement.").

16. According to a Westlaw case search, § 703 of the MBTA—the section of the MBTA that makes it illegal to take, kill or possess a migratory bird—has been cited in 470 federal cases since June 4, 1919. WESTLAW, https://next.westlaw.com (locate the Migratory Bird Treaty Act § 703; then

entity that "takes"—another word for kills—a migratory bird protected under the statute.[17] Interpreting the "take" provision in the MBTA caused a recent division among the Second, Fifth, Eighth, Ninth, and Tenth Circuits.[18] Determining whether an individual or entity has committed such a take varies depending in which U.S. circuit the case arises.[19]

The conceptual cause of this division is whether the MBTA imposes strict liability for incidental takes of migratory birds or whether *mens rea* is required to sustain a conviction for a take.[20] This particular dispute over the mental state requirement in the MBTA led the Executive Branch of the U.S. government to assume vastly different approaches to prosecutions brought under the MBTA. The circuit court splits discussed in this Comment arose primarily under the Obama Administration, which

click "Citing References" tab; then click "Cases" tab; and then select "Federal" under the "Jurisdiction" category).

17. *See* 16 U.S.C. § 703 (codifying as unlawful actual or attempted pursuit, hunting, taking, capturing, or killing of migratory birds encompassed by the Act).

18. *Compare CITGO Petroleum Corp.*, 801 F.3d at 492 (stating the MBTA's use of "take" refers to an action that is done knowingly, not an involuntary action), *and* Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (holding that a strict liability of the MBTA would "stretch [the] statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct"), *and* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) (determining Congress explicitly chose to limit the MBTA's criminal liability to intentional actions that cause the death of migratory birds, and, thus, the statute should be read without a strict liability component), *with Apollo Energies, Inc.*, 611 F.3d at 686 (finding, although the MBTA does not explicitly contain mens rea language, "its 'plain language'—an indicia of legislative intent—support[s] a strict liability interpretation"), *and* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978) (holding the MBTA is a strict liability statute and should be construed as such in questions of what criminal liability the MBTA imposes).

19. *Compare Apollo Energies, Inc.*, 611 F.3d at 686 (holding misdemeanor convictions under the MBTA are strict liability offenses and do not need an intent requirement), *and FMC Corp.*, 572 F.2d at 908 (finding the taking of migratory birds under the MBTA is a strict liability offense and no intent is required), *with CITGO Petroleum Corp.*, 801 F.3d at 492 (ruling "the MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds"), *and Newton Cty. Wildlife Ass'n*, 113 F.3d at 115 (holding violations of the MBTA require intent, and, therefore, the statute does not impose strict criminal liability on actions that indirectly cause migratory bird deaths).

20. *See Seattle Audubon Soc'y*, 952 F.2d at 303 ("We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them under the Migratory Bird Treaty Act and the Endangered Species Act."). *But see FMC Corp.*, 572 F.2d at 908 (holding "the statute does not include as an element of the offense 'willfully, knowingly, recklessly, or negligently';" thus, strict liability can be extended when a defendant incidentally caused the death of an MBTA-protected migratory bird).

interpreted the MBTA to impose criminal liability for incidental takes.[21] The Trump Administration changed course, issuing its own directive and committing to not prosecute companies for incidental takes.[22] These dueling approaches underscore the need for clarity in courts' interpretation of the MBTA—an approach that leaves the disposition of incidental take cases at the mercy of ever-changing political winds is not sustainable. Whatever the final equilibrium point is, it is important some level of judicial certainty exists in this area of the law for both bird conservation efforts and the operations of the many industries coexisting with the habitats of our migratory bird populations.[23]

This Comment examines the MBTA's imposition of criminal liability on individuals and entities that "take" protected migratory birds. Part II provides a history of bird conservation in the United States and the relevant legislative responses; Part III examines the key cases that created the circuit split on the issue; Part IV discusses three primary arguments against a strict liability reading of the MBTA; and Part V summarizes this Comment's argument that the MBTA should be read to require *mens rea* intent to sustain a conviction, which is consonant with the common law interpretation of a taking.

II. HISTORY OF AMERICAN BIRD CONSERVATION

A. *Early Bird Conservation Efforts in the United States*

The road to the eventual passage of the MBTA and other federal legislation protecting migratory birds was paved largely by private and non-profit efforts to raise awareness of the need for a comprehensive approach to avian conservation that included both governmental and private players. Thus, a discussion on the MBTA, its history, and its

21. *See, e.g.*, *Apollo Energies, Inc.*, 611 F.3d at 686 (finding the take provision of the Migratory Bird Treaty Act extends to incidental takings).

22. *See* Juliet Eilperin, *Trump Administration Eases Rule Against Killing Birds*, WASH. POST (Dec. 26, 2017), https://www.washingtonpost.com/politics/trump-administration-eases-rule-against-killing-birds/2017/12/26/1be9afe6-ea72-11e7-9f92-10a2203f6c8d_story.html?utm_term=.55507c6561e2 [https://perma.cc/8M9S-R2LT] ("The Interior Department has quietly rolled back an Obama-era policy aimed at protecting migratory birds, stating . . . it will no longer prosecute oil and gas, wind, and solar operators that accidentally kill birds.").

23. *See generally* Tina M. Smith, Comment, *Wildlife Protection and Off-Shore Drilling: Can There Be a Balance Between the Two?*, 6 FLA. A&M U. L. REV. 349, 382 (2011) (discussing the challenges that exist between offshore drilling and the conservation of migratory birds and other wildlife; specifically stating, "Wildlife and off-shore drilling do not complement each other").

interpretation in modern America, must be framed by an examination of the private American conservation efforts that were ultimately buttressed by federal legislation.

The United States has sought to preserve its wildlife—specifically, the migratory bird populations—for over 100 years.[24] Efforts within the conservation community to protect migratory birds and preserve their habitats in the United States date back to the late nineteenth century—marked most notably by the creation of the National Audubon Society.[25] The Society was born in Massachusetts, where the organization's progenitors—Harriet Hemmingway and Mina Hal—established the first chapter of this prominent national organization.[26]

The chief work of the Audubon Society today is to advance the protection of migratory and other wild birds in the United States.[27] The National Audubon Society founders developed the formal bird conservation organization in response to the widespread killing of migratory birds that fueled the rapid growth of the millinery and plume trade in the late 1800s.[28] The Society's work in the late-nineteenth and early-twentieth centuries laid the foundation for a major bird conservation movement in the United States, which ultimately led to the passage of federal legislation aimed specifically at the protection of migratory avian species.[29]

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24. *See The Evolution of the Conservation Movement, 1850–1920*, LIBR. CONG., http://www.loc.gov/teachers/classroommaterials/connections/conservation/history.html [https://perma.cc/2U8V-XLPL] ("Explorers of the American frontier brought back beautiful images of wild lands. When citizens saw these pictures of the nation's wilderness, they began to appreciate and value our country's natural wonders.").

25. *History of Audubon and Science-Based Bird Conservation*, AUDUBON, http://www.audubon.org/content/history-audubon-and-waterbird-conservation [https://perma.cc/SFX4-BZVR].

26. *Id.*

27. *Id.*

28. *Id.* Women's hats made from real bird feathers became a fashion symbol in Europe and eventually in the United States in the second-half of the eighteenth century. Linton Weeks, *Hats Off to Women Who Saved the Birds*, NPR (July 15, 2015, 9:33 AM), https://www.npr.org/sections/npr-history-dept/2015/07/15/422860307/hats-off-to-women-who-saved-the-birds [https://perma.cc/4ZA4-6635]. These hats were fashioned from pheasants and other migratory bird feathers. *Id.* The millinery trade and plume trade are terms that refer to the market in which bird feathers, wings, and whole birds were harvested and sold for fashion purposes. *Cf. id.* ("Dense bird colonies were being wiped out in Florida so that women of the 'private carriage crowd' could make a fashion statement by shopping for aigrettes."). Some figures suggest that upwards of five million North American birds were killed annually. *Id.*

29. *History of Audubon and Science-Based Bird Conservation*, *supra* note 25.

Following its inception in 1905, the Audubon Society realized that, in order for meaningful bird conservation to become a reality in the United States, the organization needed to engage in direct lobbying efforts to secure the passage of legislation at both the state and federal levels that would protect endangered and migratory bird populations in the United States.[30] William Dutcher—the first president of the National Audubon Association—said at the Society's inaugural meeting: "The object of the organization is to be a barrier between wild birds and animals and a very large unthinking class, and a smaller but more harmful class of selfish people."[31] This comment from the organization's president in the early 1900s foreshadowed an issue that persists today: how to handle both the intentional and unintentional killing of rare migratory birds.

The first formal U.S. Government bird conservation efforts also date back to the early 1990s.[32] In 1903, an island near Florida received the first ever National Wildlife Refuge designation from the U.S. government.[33] This designation marked a significant turning point in the bird conservation movement because, for the first time, the U.S. Government recognized the need to further regulate migratory birds in order to ensure

30. *Records from the National Audubon Society (1883–1991)*, *in* NATIONAL AUDUBON SOCIETY RECORDS, MANUSCRIPTS AND ARCHIVES DIVISION, THE NEW YORK PUBLIC LIBRARY, iii (Valerie Wingfield ed., 2011), http://archives.nypl.org/uploads/collection/pdf_finding_aid/mss2099.pdf [https://perma.cc/W6T8-R623].

31. *Id.* (quoting former Audubon National Association President William Dutcher at the Audubon Society's first annual meeting). Dutcher led the Audubon Society into significant battles at the New York State Legislature, which ultimately led to the passage of the "Audubon Plumage Bill" in 1910. *Id.*; *see also* N.Y. ENVTL. CONSERV. LAW § 11-0917 (McKinney 2012) (prohibiting the sale of native bird feathers). This important state legislation took significant steps toward combatting the growing and troubling trend of exploiting migratory birds for commercial purposes in New York State. Despite the legislative action, the exploitation of birds for the sale of their feathers perpetuated in the state of New York. *See* Adee Braun, *Fine-Feathered Friends*, LAPHAM'S Q. (June 28, 2013), http://www.laphamsquarterly.org/roundtable/fine-feathered-friends [https://perma.cc/V6BE-7P2M] (arguing that despite the Audubon Society's efforts—and ultimately the New York State Legislature's action on the issue—prices for wild bird feathers continued to rise as a result of the fashion industry's demand for goods created from migratory birds).

32. *History of the United States Endangered Species Act*, U. OF FLA.: FLA. MUSEUM OF NAT. HIST., https://www.flmnh.ufl.edu/fish/discover/general-topics/about-esa [https://perma.cc/W595-FGSP].

33. *See generally* U.S. NABCI COMM., THE NORTH AMERICAN BIRD CONSERVATION INITIATIVE IN THE UNITED STATES: A VISION OF AMERICAN BIRD CONSERVATION 10 (2000) (noting the designation of the first National Wildlife Refuge in Florida marked "an important point in the history of bird conservation"). The eight-acre island near the Floridian coast received the NWR designation "to protect pelicans and other colonial nesting birds from the excessive millinery trade." *Id.*

the protection of these important species.[34] The National Wildlife Refuge System continues today as a successful method for protecting avian species in the United States.[35] Currently, there are over 560 National Wildlife Refuges across the country accounting for over 150 million acres of protected land.[36]

Discussions continue today on how to properly balance government regulations protecting migratory birds with private enterprise needs.[37] The issue even received the attention of President Donald J. Trump, who mentioned the threat wind turbines pose to migratory birds during a November 22, 2016, interview with the New York Times.[38] This discussion, which was raised during a conversation on United States energy diversity, underscores the important role that the U.S. Government plays in providing a consistent and accurate application of the MBTA.

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34. *Id.*

35. *See* U.S. FISH & WILDLIFE SERV., NAT'L WILDLIFE REFUGE SYS., AMERICA'S NATIONAL WILDLIFE REFUGES (2007) (describing the work of the Department of the Interior's Wildlife Refuge System as "one of America's greatest conservation success stories," and further recognizing that the Refuge System developed under President Theodore Roosevelt has "helped save [the United States'] national symbol, the American bald eagle, from extinction and has protected hundreds of other wild species—including—fish, migratory birds, and many other plants and animals").

36. U.S. FISH & WILDLIFE SERV., NAT'L WILDLIFE REFUGE SYS. HEADQUARTERS, MEET THE NAT'L WILDLIFE REFUGE SYSTEM 4 (2015), https://www.fws.gov/refuges/vision/pdfs/MeetTheNWRSMar2015.pdf [https://perma.cc/LK83-QM54].

37. *See, e.g.*, Monica Antonio, *Dangers of Wind Energy: Wind Turbines Deadly to Golden Eagles, Migratory Birds*, NATURE WORLD NEWS (Oct. 8, 2016, 12:05 PM), http://www.natureworldnews.com/articles/29857/20161008/dangers-wind-energy-turbines-deadly-golden-eagles-migratory-birds.htm [https://perma.cc/PV3A-2P67] (citing a new study examining wind turbines' effect on eagles—a bird species protected under the MBTA—and specifically noting eagles are especially susceptible to collisions with spinning wind turbines due to their unique flight habits and tendencies).

38. *See Donald Trump's New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), http://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html?_r=0 [[https://perma.cc/7Q3A-HPC5]] (providing a transcript of President Trump's full interview with the New York Times, which occurred shortly after his election). In his interview with the New York Times, then President-Elect Trump expressed concern about the death of migratory birds stemming from the rise in wind energy production. *Id.* Trump stated, "The windmills are devastating to the bird population." *Id.* President Trump's discussion about the death of migratory birds in the context of wind energy production underscores the significance and timeliness of the challenge to regulate the taking of migratory birds in the midst of the growing energy demand and production. *See also* Philip Bump, *There's a Lot to Unpack in Just One of Donald Trump's Answers About Energy Policy*, WASH. POST (May 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/26/theres-a-lot-to-unpack-in-donald-trumps-answers-about-energy-policy/ [https://perma.cc/U4NW-JGFR] (reporting during one of President Trump's presidential campaign stops in North Dakota, then-Candidate Trump stated, "[I]f you go to various places in California, wind is killing all of the eagles. . . . [O]ne of the most treasured birds—and they're killing them by the hundreds and nothing happens").

B. *Legislative Measures to Protect Migratory Birds*

Following the mobilization of private groups in support of increased awareness and action to protect migratory bird populations, the U.S. Government responded with its own contribution to the growing conservation movement at the beginning of the twentieth century.[39] The Audubon Society's efforts on bird conservation contributed to the Congress's eventual enactment of legislation that protected migratory and endangered avian species.[40] The Congress's response to the bird conservation effort came in two forms: (1) The passage of the MBTA in 1918;[41] and (2) The Endangered Species Act of 1973 ("ESA").[42] The passage of the MBTA and ESA illustrate Congress's attention to the migratory bird issue and its acknowledgment of the need to protect our country's precious avian wildlife.[43] Federal legislation also, at least to a certain extent, provided some clarity for companies and individuals that engage in activities affecting avian wildlife.

Ultimately, the enactment of the MBTA and the ESA created complex regulatory schemes housed primarily in the U.S. Department of the Interior and the Environmental Protection Agency.[44] Since the passage of the MBTA and ESA, federal regulators continue to face the challenge of

39. *See* Migratory Bird Treaty, *supra* note 12, at 1702 (declaring the U.S. government's commitment to a joint international effort to ensure the protection of migratory bird species).

40. *Records from the National Audubon Society (1883–1991)*, *supra* note 30, at ii ("The Migratory Bird Treaty Act of 1918 between the U.S. and Canada, which incorporated the provisions of the Weeks-McLean Bill, was also passed in large measure through [the] lobbying efforts [of the Audubon movement].").

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

42. *See* Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 (2012) (creating a statutory protection for certain endangered species in the United States).

43. *See, e.g.*, Exec. Order No. 1959 (1914) (establishing an island reservation to protect native birds in Washington State). President Woodrow Wilson issued this executive order in 1914, making it "unlawful for any person to hunt, trap, capture, willfully disturb or kill any bird of any kind" on the reservation. *Id.* This executive order demonstrated President Wilson's commitment to the preservation of wild bird populations in the United States four years before the passage of the MBTA. *Id.* President Wilson would go on to sign the MBTA into law in 1918. NAT'L AUDUBON SOC'Y, *The Migratory Bird Treaty Act, Explained*, AUDUBON (Jan. 26, 2018), http://www.audubon.org/news/the-migratory-bird-treaty-act-explained [https://perma.cc/J7YG-S3A4].

44. *Compare* 16 U.S.C § 703(a) (declaring it unlawful to take or kill any migratory bird), *with* 16 U.S.C. § 1531(b) (authorizing federal departments and agencies to enforce the policy of protecting endangered and threatened species), *and* Kris Dighe & Lana Pettus, *Environmental Justice in the Context of Environmental Crimes*, U.S. ATT'YS' BULL., July 2011, at 3, 7 (listing the agencies responsible for enforcing federal environmental legislation and regulations).

determining the best way to carry out the Congress's intent, while also adapting to a changing wildlife environment and growing threats to migratory birds.[45]

1. The Migratory Bird Treaty Act (MBTA)

The Congress passed the MBTA in 1918 to protect certain migratory bird species that move through the United States in their migratory patterns.[46] The Act codified a 1916 treaty between the United States and Great Britain (then acting on behalf of Canada, a territory of Great Britain) established to protect migratory birds across North America.[47]

The MBTA's primary purpose is to protect migratory birds in North America—hopefully well before the species face the possibility of extinction—by making it a federal crime "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, [or] purchase" a migratory bird covered under the MBTA.[48] The species covered under the MBTA are found in separate treaties: (1) The Canadian Convention of 1916; (2) The Mexican Convention of 1936; (3) The Japanese Convention of 1972; and (4) The Russian Convention of 1976.[49] Altogether, the four treaties lists a total of 1,026 protected avian species.[50] The MBTA provides statutory protection

45. *See* Helen Briggs, *Migratory Birds "Lack World Protection"*, BBC NEWS (Dec. 4, 2015), http://www.bbc.com/news/science-environment-34985273 [https://perma.cc/38PF-2WYW] (discussing the significant dangers migratory birds face across the world, and also noting a recent study that found "[m]ore than 90% of migratory birds are poorly protected on their marathon journeys around the world"); *see also* Rachael Bale & Jani Actman, *How Wildlife May Fare Under Trump*, NAT'L GEOGRAPHIC (Nov. 21, 2016), http://news.nationalgeographic.com/2016/11/wildlife-watch-trump-wildlife-trafficking-animal-conservation/ [https://perma.cc/8UAL-B5LJ] (examining the effect that President Trump's energy policy could have on migratory bird populations, specifically arguing that the new president's drilling proposals "could degrade habitats and disrupt migratory pathways of native species").

46. *See* Migratory Bird Treaty, *supra* note 12, at 1702 (stating migratory birds "traverse certain parts of the United States and the Dominion of Canada" during their migratory flight paths). This statement appeared in the treaty between the United States and Great Britain, which created the purpose the MBTA was drafted to achieve.

47. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/laws/lawsdigest/migtrea.html [https://perma.cc/3ESX-G6UF].

48. 16 U.S.C. § 703.

49. *Migratory Bird Treaty Act: Birds Protected*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php [https://perma.cc/5FCX-SVGQ].

50. List of Migratory Birds, 50 C.F.R. § 10.13 (2015).

for these birds by imposing criminal penalties on persons—and companies—who fail to comply with the protections provided to all covered species.[51]

The varied criminal penalties available under the MBTA have recently become the source of judicial dispute regarding the scope of liability the statute imposes.[52] Criminal enforcement powers under the MBTA rest with federal investigators and U.S. Attorneys.[53] The U.S. Fish & Wildlife Service (USFWS)—a federal agency within the Department of the Interior—oversees the protection of migratory birds under the MBTA and other congressionally-enacted laws protecting avian species.[54] The USFWS possesses the investigative authority to review alleged criminal violations of the MBTA and conducts preliminary inquiries before turning meritorious cases over to a U.S. Attorney for prosecution.[55]

The MBTA criminal penalties accrue if "any person, association, partnership, or corporation . . . violate[s] any provisions of [the MBTA]" with the exception of violations that deal with the sale and bartering of migratory birds.[56] The statute imposes both misdemeanor and felony criminal liability for those individuals or entities convicted of an MBTA offense.[57] Section 707 imposes misdemeanor liability for almost all MBTA offenses, with penalties not to exceed $15,000 and six months in prison, or a combination of the two.[58] If a person knowingly takes a migratory bird with the intent to sell or barter the bird, the person may be charged with a felony; the prison time for such violations could extend to

51. Section 703 of the MBTA makes it a crime "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, [or] purchase" a migratory bird. 16 U.S.C. § 703.

52. *See id.* § 707(a) (making general violations of the MBTA misdemeanor offenses with fines not to exceed $15,000 and prison time not to exceed six months); *see also id.* § 707(b) (raising the crime for MBTA violations to a felony when the defendant knowingly killed a migratory bird with the intent to traffic or barter the bird).

53. *See* Dighe & Pettus, *supra* note 44, at 3, 7 (discussing the U.S. Fish and Wildlife's responsibility to respond to and investigate allegations of MBTA violations).

54. *About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/help/about_us.html [https://perma.cc/Z624-FPRY].

55. *See* Dighe & Pettus, *supra* note 44, at 3, 7 ("Criminal environmental cases are identified or generated in a number of different ways and through a variety of agencies, including the EPA [and] the U.S. Fish and Wildlife Service . . . . [A]gency regulatory personnel discover violations in the course of conducting regular inspections and determine upon review that the violations are criminal.").

56. 16 U.S.C. § 707(a).

57. *Id.* § 707.

58. *Id.* § 707(a).

two years.[59] While there have been efforts to expand felony liability to all MBTA violations, most offenses today remain categorized as misdemeanors.[60]

Section 707(b) is the only part of the MBTA that requires intent: "Whoever, in violation of [the MBTA] . . . knowingly take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird . . . shall be fined not more than $2,000 or imprisoned . . . ."[61] This provision also increases the penalty to a felony for those who kill migratory birds with the intent to traffic the birds.[62] Unlike in other sections of the MBTA where there is no mention of a mental state associated with the offense, Section 707(b) contains specific intent language reflective of the public policy interest against migratory bird trafficking.[63] The absence of specific intent language in other sections of the MBTA, however, does not mean those sections should be construed as strict liability misdemeanor offenses.[64] The language describing MBTA offenses insinuates intent—e.g., "pursue, hunt, take, capture, kill[.]"[65] Thus, the lack of intent language in Section 707(a)—the section describing the elements of the misdemeanor MBTA offense—does

59. *Id.* § 707(b).

60. *Congressman DeFazio Introduces Bill to Make Intentional Killing of Protected Birds a Felony*, AUDUBON SOC'Y PORTLAND, http://audubonportland.org/issues/mbta [https://perma.cc/WCY6-43WW]. Congressman DeFazio's proposed amendment to the MBTA would have made it a felony for any intentional killing of a migratory bird protected under the MBTA. *Id.* In doing so, the amendment would have also added explicit intent language into the general description of a taking in the MBTA—language that is notably absent from the current statute.

61. 16 U.S.C. § 707(b).

62. Section 707(b) of the MBTA contains the felony qualification for violations of the statute:

> Whoever, in violation of this subchapter, shall knowingly—
>
> (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
>
> (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

Id.

63. *See* United States v. Corrow, 941 F. Supp. 1553, 1566 n.17 (D.N.M. 1996), *aff'd*, 119 F.3d 796 (10th Cir. 1997) (noting Congress amended the MBTA in 1986 to specifically add the knowledge requirement only for cases that deal with the taking of migratory birds for the purpose of trafficking the birds).

64. 16 U.S.C. § 707(a); *cf. Corrow*, 941 F. Supp. at 1566 n.17 ("However, this amendment [to Section 707(b)] did not affect [S]ection 707(a) which makes the unlawful possession of feathers a misdemeanor offense.").

65. 16 U.S.C. § 703(a).

not imply that all other offenses, excluding those dealing with violations regarding migratory bird trafficking, should be read as strict liability misdemeanor offenses.[66] The lack of specific intent language in significant portions of the MBTA has led to judicial confusion on this point.

2. The Endangered Species Act (ESA)

The U.S. Congress passed the Endangered Species Act (ESA) in December of 1973.[67] The Congress's goal in crafting the ESA was to protect fish, plants, and other wildlife that had become "so depleted in numbers that they are in danger of or threatened with extinction . . . ."[68] The Congress believed the United States had a duty to the broader international community "to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction."[69]

The purpose of the ESA is to bring listed endangered species back from the brink of extinction by criminalizing the killing of such species and protecting the habitats and ecosystems that are essential for their survival.[70] The Congress recognized that endangered species—such as birds and fish—play an important role in education and recreation in the United States, and it is not only important to protect the animals and plants themselves, but also their habitats.[71]

The protection of avian habitats is the primary area where the MBTA and the ESA part ways in terms of the actions each statute covers. Specifically, the ESA makes it a crime to harm or harass a species protected under the statute, while the MBTA only makes it a crime to "take" and "kill" protected birds.[72] The distinct language found in the

66. *Id.* § 707(a).

67. Endangered Species Act of 1973, 16 U.S.C. § 1531 (2012).

68. *Id.* § 1531(a).

69. *Id.*

70. *See id.* § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species . . . .").

71. *See History of the United States Endangered Species Act*, *supra* note 32 (underscoring the need for the ESA in the early 1970s because the Congress viewed endangered species "as valuable educational, scientific, recreational, historical and esthetical" resources). The ESA placed the responsibility of enforcing its new measures on the U.S. Fish and Wildlife Service—responsible for freshwater animals and migratory birds—and the National Marine Fisheries Service—responsible for enforcing the ESA provisions dealing with animals that live in the ocean or other marine environments. *Id.*

72. *Compare* 16 U.S.C. § 1532 (defining the taking of a protected species as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

ESA and MBTA suggests that the Congress had two separate and unique purposes when it passed the separate acts. While the ESA and MBTA certainly share in a similar mission—the conservation of threatened species in North America—the two statutes target importantly different actions directed toward migratory birds and other wildlife. The ESA's broad prohibition on harming avian habitats and the MBTA's narrower focus on criminal liability for targeting individual birds, support a narrow reading of the MBTA.[73] The ESA—with its broader prohibition on interference with avian habitats—thus stands as an important guidepost for the proper reading of the MBTA within the migratory bird legislative landscape.

III. CIRCUIT SPLIT IN CASES INTERPRETING THE MBTA

The proper interpretation of what criminal culpability the MBTA requires—and specifically, whether intent is required for a conviction under the MBTA—is the subject of much judicial debate.[74] At the core of this debate is whether the MBTA's general prohibition on the "taking" of a migratory bird should be construed as a strict liability offense, or whether a defendant must act affirmatively and intentionally to kill a migratory bird to accrue liability.[75] The issue of intent is straightforward in cases involving individuals who intentionally kill migratory birds. Hunters accused of violating the MBTA, for example, are generally aware that they are shooting at a bird and take the affirmative act to kill a protected avian species.

The importance of intent becomes challenging in situations where ordinary business practices cause the death of migratory birds protected under the Act. In this category of a "take," the defendant might argue a lack of intent to harm migratory birds, and, thus, a criminal conviction

conduct"), *with* Migratory Bird Treaty Act, 16 U.S.C. § 703 (2012) (making it a crime "to pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" a migratory bird protected under the MBTA).

73. *See* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991) (discussing the difference in criminal liability found in the ESA and the MBTA, and arguing the ESA uses language that purposefully broadens criminal liability for actors that take migratory birds beyond the liability found in the MBTA).

74. *See generally* Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 16 (2013) ("Federal judges have struggled with the question of whether to apply the MBTA to incidental taking and, if so applied, determining the scope of prohibited activity.").

75. 16 U.S.C. § 704.

under the MBTA would be inappropriate.[76] A significant portion of these cases concern energy companies—specifically, oil and gas companies—whose activities include the extraction and production of fossil fuels that often affect migratory birds.[77] These cases created a split among the U.S.

76. *See* United States v. CITGO Petroleum Corp., 801 F.3d 477, 488 (5th Cir. 2015) (determining a conviction under the MBTA cannot be upheld absent an intentional act to harm migratory birds). The defendant, CITGO Petroleum, argued that because it never had any intent to harm migratory birds protected under the MTBA—the birds merely flew into oil equalization tanks the company owned—it lacked any intent to harm the birds, and took no affirmative action aimed at killing or capturing migratory birds. *Id.*

77. *See* Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, U.S. Dep't of the Interior, to Sec'y, U.S. Dep't of the Interior 13 (Dec. 22, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf [https://perma.cc/4PE9-FHW5] (discussing the prosecution of energy companies for incidentally causing the deaths of migratory birds and the conflicting decisions reached by circuit courts in deciding "incidental take" cases). There is a trend in recent years to resolve the split among the circuits on the proper interpretation of the MBTA through a regulatory rulemaking process by the introduction of an incidental taking permit program within the U.S. Fish and Wildlife Service. *See* Benjamin Pachito, Note, *Resolving the Migratory Bird Treaty Act Circuit Split: Support for a Strict Liability Standard and Proposal for an Incidental Take Permit*, J. ENERGY & ENVTL. L., Winter 2016, at 62 (advocating for the resolution of the circuit split by implementing a strict liability standard for unintentional MBTA violations, coupled with "an 'incidental take' permit scheme . . . to temper the scope of a strict liability approach"). If such a program were to be successfully enacted, it could provide some relief in the form of certainty for companies engaged in activities that lead to the incidental taking of migratory birds, but such a program would not resolve the split on the proper legal interpretation that persists among the U.S. courts of appeals. *See generally* Benjamin Hanelin et al., *US Fish & Wildlife Service Proposes First-of-its-Kind Migratory Bird Incidental Take Authorizations*, LATHAM & WATKINS LLP (June 2, 2015), https://www.cleanenergylawreport.com/environmental-and-approvals/us-fish-wildlife-service-proposes-first-of-its-kind-migratory-bird-incidental-take-authorizations/ [https://perma.cc/4YJX-YM23] (explaining the programmatic environmental impact statement (PEIS) the U.S. Fish and Wildlife Service is currently pursuing, which is looking at a new rule within the U.S. Fish and Wildlife Service that would provide protection for companies that incidentally take migratory birds protected under the MBTA); *see also* Migratory Bird Permits; Programmatic Environmental Impact Statement Notice of Intent, 80 Fed. Reg. 30032 (May 26, 2015) (providing notice in the Federal Register of the U.S. Fish and Wildlife Service's intent to conduct a PEIS and describing the need for the PEIS). In its efforts to carry out the enforcement of federal laws that deal with fish and wildlife—such as the MBTA, the U.S. Fish and Wildlife Service promulgates rules through an administrative process. *See, e.g.*, *id.* at 30034 (May 26, 2015) (noting the possible actions the U.S. Fish and Wildlife Service is considering to permit incidental take of migratory birds, each of which would require the promulgation of "new regulations under the MBTA, in compliance with the applicable statutory and Executive Branch requirements for rulemaking"). To this end, the U.S Fish and Wildlife Service is in the process of considering a new agency rule that would allow for the issuances of incidental take permits to entities or individuals that anticipate their activities might result in the incidental taking of a migratory bird protected under the MBTA. *Id.* The aim of the proposed incidental take permit is to provide greater legal certainty to actors who might incidentally take migratory birds by offering such actors protection from prosecution following their incidental taking of a migratory bird. *See id.* ("This regulatory process would provide greater certainty for entities that have taken efforts to

courts of appeals on whether intent is required to sustain a conviction or whether the incidental taking of a migratory bird due to a company's business actions is sufficient to convict.[78] The primary cases elucidating the circuit split stem from the Second, Fifth, Eighth, Ninth, and Tenth Circuits.[79]

A. *Cases Holding Intent Is Required Under the MBTA*

One of the most recent federal circuit court opinions dealing with criminal intent and the MBTA is the September 2015 Fifth Circuit decision in *United States v. CITGO Petroleum Corporation*.[80] The *CITGO* holding separates the two intent elements of criminal offenses—*actus reus* and *mens rea*—and states that even if misdemeanor offenses in the MBTA dispose of the *mens rea* requirement, intent to commit the offense is still required.[81] This case indicates that the interpretation of the scope of the

reduce incidental take and significantly benefit bird conservation by promoting implementation of appropriate conservation measures to avoid or reduce avian mortality."). The U.S. Fish and Wildlife Service already provides purposeful take permits—commonly known as migratory bird hunting permits—for those wishing to purposefully take migratory birds that the federal government allows based on the populations of those migratory birds. *Permit Policies & Regulations*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/permits/permit-policies-and-regulations.php [https://perma.cc/EY8G-D8J5] (listing various purposes for which the U.S. Fish and Wildlife Service is authorized to issue migratory bird permits, such as falconry, scientific colleting, and taxidermy). The U.S Fish and Wildlife Service also authorizes the issuance of incidental take permits under other statutes—such as the Endangered Species Act—but to date, the U.S. Fish and Wildlife Service does not have a rule allowing for the issuance of incidental take permits under the MBTA. *See Endangered Species Permits*, U.S. FISH & WILDLIFE SERV. (Apr. 14, 2015), https://www.fws.gov/midwest/Endangered/permits/hcp/index.html [https://perma.cc/L2J8-E8Q4] (listing available permits under the ESA but not under the MBTA.) The process for this new incidental take permit has included the completion of the scoping process, the comment period, and the public meeting period. *See Migratory Bird Permits*, REGULATIONS.GOV, https://www.regulations.gov/document?D=FWS-HQ-MB-2014-0067-0001 [https://perma.cc/P38X-RA4C]] (indicating a comment period end date of July 27, 2015, and a publication period of May 26, 2017).

78. *See, e.g.*, *CITGO Petroleum Corp.*, 801 F.3d at 491–92 (rejecting the holding of the Second and Tenth Circuits that an MBTA conviction can occur even when a defendant incidentally causes the death of a migratory bird protected under the MBTA).

79. United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015); United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

80. United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015).

81. *Id.* at 492.

MBTA's criminal liability remains a litigated issue among the U.S. courts of appeals.[82]

The *CITGO* appeal addressed a conviction for the "taking" of migratory birds in violation of the MBTA.[83] The indictment against CITGO alleged that migratory birds flew into uncovered CITGO-owned oil equalization tanks at the company's Corpus Christi, Texas refinery.[84] Texas environmental inspectors performed a surprise inspection of the oil equalization tanks and "suspected birds had died in the uncovered tanks[.]"[85] The indictment thus alleged CITGO was responsible for the deaths of the birds and could be tried under the MBTA.[86]

The federal district court convicted CITGO on two counts of MBTA violations based on proof that migratory birds died as a result of the company's failure to properly cover the oil equalization tanks.[87] CITGO's appeal challenged the district court's interpretation of the MBTA's "taking" provision.[88] The Fifth Circuit overturned the conviction, holding that even if misdemeanor crimes under the MBTA are strict

82. *See id.* at 491–94 (following the Eighth and Ninth Circuits' interpretation that only "intentional acts (not omissions) that directly (not indirectly or accidently) kill migratory birds" can result in criminal liability under the MBTA).

83. *Id.* at 480–81.

84. *Id.* at 480. An oil equalization tank is a large container used in the oil refinement process, which provides "a way point between the oil-water separators and subsequent treatments" of the oil, and "ensure[s] that a constant and manageable amount of wastewater flows to secondary treatment systems." *Id.* at 479.

85. *Id.* at 480.

86. *Id.*

87. *Id.* at 480–81. In *CITGO*, the grand jury returned a ten-count indictment that included "two counts of knowingly operating [two oil equalization tanks] without emission control devices," which the government alleged violated the Clean Air Act (42. U.S.C. § 7413(c)(1) (2012)). *See id.* at 480 (stating CITGO's uncovered oil equalization tanks constituted a violation of Subpart QQQ of the Clean Air Act). While the Fifth Circuit also considered the convictions under the Clean Air Act on appeal—and ultimately reversed the district court's holding—that issue does not pertain to the incidental taking of migratory birds; rather, it is a completely separate issue, that the Fifth Circuit considered in an entirely different section of the opinion. *Compare id.* at 487–88 (explaining Clean Air Act issue), *with id.* at 489–91 (explaining taking issue)*; see also id.* at 487–88 (holding Subpart QQQ of the Clean Air Act "does not regulate equalization tanks" and, as a result, "CITGO's . . . convictions must accordingly be reversed"). The Fifth Circuit's interpretation of the Clean Air Act and the subsequent reversal of CITGO's conviction under the act is significant, but it will not be addressed in this Comment because the general focus here is on the circuit split pertaining to the proper interpretation of the taking provision found in the Migratory Bird Treaty Act, an entirely separate statute from the Clean Air Act.

88. *See id.* at 481 (footnote omitted) ("CITGO argues that the MBTA only criminalizes acts related to hunting or poaching, not omissions that unintentionally kill birds.").

liability offenses, the defendant must still take an affirmative act intentionally aimed at killing migratory birds to be held criminally liable under the Act.[89] The Fifth Circuit thus held CITGO lacked the requisite *actus reus* to satisfy the requirements of the MTBA.[90] In its holding, the court stated that in order for a defendant to be liable under the MBTA, the "defendant must still commit the act to be liable . . . [and] commit the act voluntarily."[91] The *CITGO* case thus stands for the proposition that even if misdemeanor offenses under the MBTA are indeed strict liability offenses, a voluntary act is still required to sustain a conviction because the *actus reus* requirement still remains in a strict liability reading of the MBTA.[92]

In the 1991 case of *Seattle Audubon Society v. Evans*,[93] the Ninth Circuit held that interference with migratory bird habitats fell short of the threshold required for a "taking" under the MBTA.[94] The case stemmed from the Seattle Audubon Society's effort to stop the Bureau of Land Management from allowing timber harvesting in areas that could affect the northern spotted owl habitat, a bird protected under the MBTA and the Endangered Species Act.[95] The Audubon Society contended that permitting logging in areas that could contain a northern spotted owl habitat constituted a taking of the northern spotted owl.[96]

The Ninth Circuit rejected the Audubon Society's arguments, holding that the MBTA and the ESA differ in regards to the criminal liability each statute imposes.[97] The court found that the breadth of criminal liability

89. *See id.* at 492 ("Accordingly, requiring defendants, as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.").

90. *See id.* (defining the MBTA's *actus reus* as, "'[T]o take[,]' which, even without a *mens rea*, is not something that is done unknowingly or involuntarily").

91. *Id.*

92. *See id.* (reconciling the dispensing of a *mens rea* requirement in the strict liability crime of "taking" under the MBTA with the retaining of an *actus reus* requirement that necessitates "an intentional and deliberate act" in the pursuit of killing migratory birds).

93. Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

94. *Id.* at 302.

95. *Id.*

96. *Id.*

97. *See id.* at 302–03. (distinguishing the MBTA from the ESA on the grounds that the MBTA "describes physical conduct of the sort engaged in by hunters and poachers . . . [and] conduct which was undoubtedly a concern at the time of the statute's enactment in 1918[,]" while the ESA includes broader actions such as "harass" and "harm" that are not found in the MBTA). The court also observed that the Congress amended the MBTA the year after the passage of the ESA, and in those

under the MBTA does not include actions that harass or harm migratory birds.[98] In its holding, the court acknowledged that other courts choose to impose strict liability on actors that cause the death of migratory birds through the inadvertent release of toxic chemicals,[99] but distinguished these cases from those in which the defendant's actions merely interfered with migratory bird habitats.[100] The Ninth Circuit's holding does not eliminate the possibility that certain violations of the MBTA can be construed as strict liability crimes, such as cases that deal with hunting, poaching, and other acts that are directed at migratory birds.[101] The court, however, found the destruction of migratory bird habitats constituted activity that falls outside the scope of the MBTA.[102]

The Eighth Circuit, in *Newton County Wildlife Association v. United States Forest Service*,[103] followed the Ninth Circuit in holding the MBTA was designed to prohibit the actions of poachers and hunters who target migratory birds—thus, it was inappropriate to extend the MBTA beyond its narrow purpose in order to hold companies engaged in commercial activity liable for the unintentional harm caused to migratory birds.[104]

The Newton County Wildlife Association sought an injunction against the U.S. Forest Service after the Forest Service approved the sale of timber

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amendments the Congress failed to include language that extended the MBTA to the same actions that the ESA prohibits. *Id.* at 303.

98. *See id.* ("Habitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA.").

99. *See, e.g.*, United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (holding the death of migratory birds as a result of toxic chemicals released in an open discharge tank constituted a taking of migratory birds on strict liability grounds).

100. *See Evans*, 952 F.2d at 303 ("These cases do not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the 'taking' of migratory birds within the meaning of the Migratory Bird Treaty Act.").

101. *Id.* at 302.

102. *Id.* at 303 (holding "[h]abitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA" and, therefore, the defendant cannot be held liable for taking migratory birds because it interfered with the birds' habitat).

103. Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997).

104. *See id.* at 115 (construing the word "take" in the MBTA as referring to deliberate actions taken by hunters and poachers against migratory birds). The Eighth Circuit also rejected the Newton County Wildlife Association's plea based on the grounds that the MBTA does not extend to federal agency actions, such as the U.S. Forest Service's logging approval under consideration in the case; however, this is an issue wholly separate from the intent versus strict liability issue that remains at the center of the split among the circuit courts. *Id.*

along the Buffalo River.[105] The Wildlife Association argued that the sale of the timber violated the MBTA because logging causes harm to migratory bird habitats.[106] In its holding, the Eighth Circuit rejected the notion that the MBTA imposes strict liability for all offenses under the MBTA.[107] The court stated that while "[s]trict liability may be appropriate when dealing with hunters and poachers . . . it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . that *indirectly* results in the death of migratory birds."[108] The Eighth Circuit's holding draws an important distinction between hunting and poaching activities and commercial activities, while highlighting the danger of adopting a strict liability approach to all criminal conduct under the MBTA.[109]

B. *Cases Holding the MBTA Extends to Incidental Takes*

In *United States v. Apollo Energies, Incorporation*[110]—a case similar to *CITGO*—an oil company was convicted of taking migratory birds in

105. *See id.* at 114 (stating the wildlife association sought an injunction against the United States Forest Service "on the grounds that the Forest Service failed to obtain an MBTA 'special purpose' permit from the U.S. Fish and Wildlife Service").

106. *Id.* at 115.

107. *See id.* at 115 (holding that extending a strict liability reading of the MBTA to activities such as timber harvesting would constitute an extension of the MBTA's scope beyond the statute's stated purpose).

108. *See id.* (issuing a warning of the dangers associated with taking a strict liability reading of the statute as it pertains to hunting and poaching, and extending such a reading to all criminal conduct). The Eighth Circuit drew a significant distinction in its holding on the strict liability reading. *See id.* (differentiating between intentional "conduct directed at migratory birds" and conduct that merely indirectly causes migratory bird fatalities, where application of a strict liability standard is potentially appropriate in the former but unreasonable in the latter). The court held that a strict liability reading may very well be appropriate in cases that deal with hunting and poaching—the very actions the MBTA was designed to prohibit. *See id.* (perceiving strict liability as suitable in instances of conduct expressly proscribed by the MBTA, such as hunting migratory birds). For example, if a hunter aimed his gun at a bird, fired the gun, and killed the bird, but was unware that the bird was protected, then a strict liability of the hunter's actions would be appropriate. *See, e.g.*, United States v. CITGO Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015) ("There is no doubt that a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a 'taking' under the MBTA because he engaged in an intentional and deliberate act toward the bird."). The Eighth Circuit contends that such a reading of strict liability must stop there and cannot be extended under the MBTA's plain language to an "absolute criminal prohibition" on activities that may indirectly cause migratory bird deaths. *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115.

109. *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115.

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

violation of the MBTA.[111] The Apollo case arose after migratory birds were found dead in a piece of Apollo's drilling equipment.[112] Apollo Energies was found guilty of one misdemeanor violation of the MBTA and fined $1,500.[113] The Tenth Circuit affirmed Apollo's conviction, finding violations under MBTA Section 703 are strict liability offenses that "do not require [the] defendants [to] knowingly or intentionally violate the law."[114]

Apollo and its co-defendant argued the MBTA lacks a strict liability component, and further asserted that if, in fact, the MBTA does contain a strict liability component, the prosecution of Apollo was unconstitutional under the circumstances.[115] A key fact in Apollo's trial was that, prior to Apollo's indictment, the U.S. Fish and Wildlife Service was tipped off to a widespread problem of migratory birds dying in oilfield drilling equipment.[116]

Relying on its holding in the 1997 case of *United States v. Corrow*,[117] the Tenth Circuit ruled that misdemeanor violations of the MBTA are strict liability offenses.[118] The Tenth Circuit extended its interpretation to include actions beyond the scope of those found in *Corrow*.[119] The court concluded that its holding in *Corrow* was not limited to the type of activity

111. *Id.* at 682.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* In response to the discovery of the widespread problem of oilfield equipment avian deaths, the U.S. Fish and Wildlife Service embarked on an extensive campaign to alert drilling companies of the dangers drilling equipment pose to migratory birds; the Service provided education for oil companies on how to combat this problem. *Id.* at 682–83. The U.S. Fish and Wildlife Service also provided a grace period for oilfield companies to remedy the dangers to migratory birds in their drilling equipment. *Id.* at 683. After the grace period expired, the U.S. Fish and Wildlife Service searched Apollo's oilfield equipment and found several deceased MBTA-protected birds. *Id.* Apollo argued that despite the U.S. Fish and Wildlife Service's efforts to educate the industry about the problem, the company did not intend to kill migratory birds. *Id.*

117. United States v. Corrow, 119 F.3d 796 (10th Cir. 1997).

118. *Apollo Energies, Inc.*, 611 F.3d at 684–85. The *Corrow* case dealt with a defendant accused of the unlawful trafficking of feathers from MBTA-protected birds. *See Corrow*, 119 F.3d at 805–06 (holding the taking of migratory bird feathers constituted a violation of the MBTA under a strict liability interpretation). In deciding the case, the Tenth Circuit found that the simple language of the statute—specifically, "it shall be unlawful"—was sufficient to read strict liability into the statute for the purposes of criminal liability. *Id.* at 805. The fact that the defendant was in possession of the bird feathers was, in the court's opinion, sufficient evidence to convict the defendant under the plain language of the MBTA. *Id.* at 806.

119. *Apollo Energies, Inc.*, 611 F.3d at 685.

the *Corrow* defendants committed.[120] Rather, the Tenth Circuit stated there was "[n]othing in the structure or logic of the [*Corrow*] opinion [that] lends itself to carving out an exception for different types of conduct, and therefore a scienter requirement for the takings here."[121]

The 1978 case of *United States v. FMC Corporation*[122] dealt with the conviction of a New York pesticide manufacturing company for the unlawful taking of migratory birds under the MBTA.[123] It was alleged in the indictment that FMC deposited a significant amount of hazardous chemical waste—a byproduct of FMC's pesticide manufacturing process—into an open ten-acre pond in New York.[124] The size of the contaminated pond attracted migratory birds, and as a result, several dead migratory birds were discovered in the pond.[125] Additional dead migratory birds were later discovered in the wastewater pond and FMC was eventually indicted on thirty-six counts of taking migratory birds by the means of toxic water.[126]

In its defense, FMC raised the argument that there must actually be intent to kill a migratory bird in order to sustain a conviction for a "taking" under the MBTA.[127] FMC further argued that because the company lacked any intent to kill the birds that died as a result of the hazardous waste deposited in the pond, coupled with the fact that FMC did not take any affirmative action to cause the death of the birds, meant the company lacked the requisite intent needed to uphold a conviction of taking migratory birds under the MBTA.[128]

The Second Circuit disagreed with FMC's interpretation of the MBTA with regard to the level of culpability needed for an MBTA conviction.[129] Instead, the court found that FMC did in fact "perform an affirmative act[:] it engaged in the manufacture of a pesticide known to be highly toxic" and then allowed for the byproduct of the production of this highly

120. *Id.*
121. *Id.*
122. United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).
123. *Id.* at 903–04.
124. *Id.* at 904.
125. *Id.* at 905.
126. *Id.*
127. *Id.* at 906.
128. *Id.*
129. *Id.* at 907.

toxic chemical to be deposited into a large pond that attracted migratory birds.[130] As a result, the Second Circuit upheld FMC's conviction.[131]

The court reasoned that even though FMC might not have been "aware of the lethal-to-birds quality of the water in its [wastewater] pond . . . [FMC] was aware of the danger of carbofuran [(one of the chemicals FMC used to produce pesticide)] to humans."[132] Because the Second Circuit found the MBTA does not contain language that implies a scienter requirement—such as willful, knowing, or reckless—coupled with the significant public policy arguments toward a strict liability reading of the statute, the Second Circuit held that the lower court did not err in convicting FMC for the taking of migratory birds under a strict liability reading of the MBTA that extends to include incidental takings of migratory birds.[133]

The cases above highlight the ongoing struggle in the U.S. courts of appeals to interpret what level of intent, if any, is needed to sustain a misdemeanor conviction of the MBTA. Indeed, the lack of any intent language in the misdemeanor portion of the MBTA makes the resolution of this issue difficult. These cases emphasize that a clear interpretation of the MBTA's criminal liability must emerge to provide clarity and consistency for those navigating the turbulent waters of current MBTA jurisprudence. The next section will outline effective arguments away from a strict liability reading of the MBTA and suggest that courts should hold misdemeanor offenses under the MBTA require intent in order to sustain a conviction.

IV. THE NEED FOR JUDICIAL INTERPRETATION LIMITING THE MBTA TO INTENTIONAL TAKES

The current split of opinion among the U.S. courts of appeals on the proper interpretation of the criminal liability under the MBTA could make the issue ripe for Supreme Court consideration.[134] If the Supreme Court

130. *Id.*

131. *See id.* at 908 (affirming the conviction because "FMC engaged in an activity involving the manufactur[ing] of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing the birds[, which] is sufficient to impose strict liability on FMC").

132. *Id.*

133. *Id.*

134. *See* Sarah Orr & Jennifer Roy, *Court Limits Migratory Bird Treaty Act Applicability to Incidental Take*, LATHAM'S CLEAN ENERGY L. REP. (Sept. 17, 2015), http://www.cleanenergylawreport.com/environmental-and-approvals/court-limits-migratory-bird-treaty-act-applicability-to-incidental-take/ [https://perma.cc/NM3G-6JSS] (explaining that, because of the recent split among

heard a case on the scope of criminal liability under the MBTA, the Court would likely have to decide the significant question of whether actions that result in the death of migratory birds must be intentional, or whether an incidental take conviction is available under the MBTA.

In this Section, I explore the arguments in favor of requiring an incidental take: the need for clear judicial interpretation of this provision due to changing executive branch views on the issue; the common law definition of a "take"; the impracticality of a strict liability reading of a "take" in the MBTA context; and Congress's original intent in drafting the MBTA and the sufficiency of its current language.

A. *Executive Branch Discretion in Prosecuting Incidental Take Cases*

One argument proffered by proponents of a strict liability reading of the MBTA—including the U.S. Fish and Wildlife Service—is that the federal executive branch interpretation of the MBTA coupled with prosecutorial discretion is a solution to the uncertainty surrounding the MBTA's intent language.[135] It is true that the Department of the Interior investigators who look into migratory bird deaths—and the U.S. Attorneys who ultimately carry out the prosecution of the offenses—retain great discretion in deciding what cases will be brought for an indictment and prosecution.[136] But relying on the decisions of executive branch employees and their politically-appointed supervisors is not a sustainable solution for companies and the public who are at the mercy of the federal government. The taking of migratory birds—both intentional and incidental—must be governed by clear lines with firm boundaries.

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the U.S. courts of appeals, there is a possibility the Supreme Court will consider a case that addresses the MBTA intent issue).

135. *See FMC Corp.*, 572 F.2d at 902 ("As stated in one of the early decisions under the Act, '[a]n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine.' Such situations properly can be left to the sound discretion of prosecutors and the courts." (quoting United States v. Schultze, 28 F. Supp. 234, 236 (W.D. Ky. 1939))). *But see* Chris Clarke, *Expert: There's a Problem with Fish and Wildlife's Enforcement of Bird Law*, KCET (Feb. 4, 2014), https://www.kcet.org/redefine/expert-theres-a-problem-with-fish-and-wildlifes-enforcement-of-bird-law [https://perma.cc/W7DA-UM8E] (discussing the challenges posed by the U.S. Fish & Wildlife's broad MBTA discretion and the use of prosecutorial discretion "as a stick to persuade industry to comply with voluntary bird protection guidelines").

136. *See* Ogden, *supra* note 74, at 1 (arguing inconsistencies in U.S. Fish & Wildlife prosecutorial discretion in MBTA cases has led to "legal uncertainty for potential violators, lack of universal compliance with the voluntary guidelines, and steadily escalating bird deaths" among other issues).

The U.S. Department of the Interior adopted markedly different interpretations of the MBTA's extension to incidental takes over the last decade. Under the Obama Administration, the Department of the Interior pursued prosecutions against private companies for incidental takes, such as those described in the cases *supra*.[137] This approach was rooted in the Department's interpretation of the MBTA, which found incidental takes within the scope of the MBTA's criminal liability.[138] In a January 10, 2017, memorandum, then-Solicitor of the Department of the Interior, Hilary Tompkins, stated unequivocally, "The MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to certain factual contexts."[139] In December of 2017—less than a year after President Trump took office—the Trump Administration's Department of the Interior changed course and ended prosecutions under the MBTA for incidental takes.

In a lengthy memorandum from the new Solicitor of the U.S. Department of the Interior, Daniel Jorjani, the Solicitor chastised the application of the MBTA to incidental takes, stating that a prosecution for an incidental take "hangs the sword of Damocles over a host of otherwise lawful and productive actions . . . ."[140] In this memorandum, the Solicitor found—relying on similar arguments offered in this Comment—that the MBTA's prohibitions on killing migratory birds "apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."[141]

The recent Trump Administration's about-face on MBTA interpretation is precisely the reason we need judicial clarity in this area of the law. While it seems that companies and individuals are temporarily safe from prosecution for incidental takes under the shelter of the Department of the

137. *See supra*, Section III (discussing prosecutions and convictions stemming from incidental takings of migratory birds).

138. Memorandum M-37041 from the Solicitor of the U.S. Dep't of the Interior to the Dir. of the Fish & Wildlife Serv. 2 (Jan. 10, 2017), https://www.eenews.net/assets/2017/02/21/document_ew_01.pdf [https://perma.cc/W6U2-LLRM].

139. *Id.* at 30. The Solicitor reached her conclusion that incidental takes fall within the realm of MBTA offenses by relying on the statutory construction of the MBTA, the use of the word "kill" in the statute as a broad term for causing the death of an animal, and that even if the language of the MBTA is ambiguous, "the best reading of the MBTA is that [the] prohibitions apply to incidental take." *Id.*

140. Memorandum from Daniel H. Jorjani, *supra* note 77, at 1.

141. *Id.* at 2.

Interior's December 2017 memorandum, a new administration could just as easily usher in an entirely new interpretation and further expand this ongoing avian statutory midrash that produces confusion among the public and the courts.[142] A clear and unquestionable reading from the courts on the proper interpretation of the MBTA is still needed, regardless of how federal agencies interpret the law.

The mere fact that a federal agency has the ability to choose what cases to bring or how to interpret the law does not provide sufficient protection for innocent civilians that incidentally cause the death of a migratory bird.[143] But more importantly, substituting executive branch interpretation for judicial opinion is a weak foundation on which to build a body of law governing the protection of migratory birds in the United States. The law—both the statutory law and the common law—must provide greater certainty that will outlast the frequent 180-degree shifts found in executive branch statutory interpretation.[144]

142. Midrash is a form of Jewish biblical interpretation, which adds an oral tradition to the reading of the biblical text in the search for truth. *See* David R. Row, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUS. L. REV. 543, 555 (1992) ("The Midrash, then, is an exposition of the [verses] of the Torah which was derived by our Sages after they had probed into the depths of each [verse] and all the words and letters thereof in search of its true inner meaning." (quoting Rabbi Moshe Weissman)); *Midrash*, THE OXFORD ENCYCLOPEDIA OF BIBLICAL INTERPRETATIONS, http://www.oxfordreference.com/view/10.1093/acref:obso/9780199832262.001.0001/acref-9780199832262-e-71?rskey=KyFT2T&result=62 [https://perma.cc/UND3-DPDG] ("The act of interpreting the Bible was an engagement not only with the written word but also with the practices and beliefs of the Jewish people."). Legal scholars have compared American courts' interpretations of the Constitution and legislation to the oral midrash that accompanies and interprets Jewish written law. *See* Row, *supra* note 142, at 555 (comparing the American process of judicial interpretation of the Constitution and legislation to Rabbinic interpretation of the Torah and Takkanot).

143. *See* Andrew W. Minikowski, *A Vision or a Waking Dream: Revising the Migratory Bird Treaty Act to Empower Citizens and Address Modern Threats to Avian Populations*, 16 VT. J. ENVTL. L. 152, 165 (2014) ("[O]ne of the commonly proffered solutions to MBTA's current problems is to simply rely on the sound prosecutorial discretion of the Department of Justice. However . . . [the] MBTA is highly vulnerable to selective prosecution and simply deferring to the discretion of the Department of Justice is unlikely to resolve this issue." (footnotes omitted)).

144. *See* John C. Martin et al., *The Migratory Bird Treaty Act: An Overview*, CROWELL MORING (Nov. 15, 2016), https://www.crowell.com/files/The-Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf [https://perma.cc/N39K-T9AD] (explaining the U.S. Fish & Wildlife's approach has historically been "that the public should rely on FWS's sound exercise of prosecutorial discretion" in cases involving violations of the MBTA).

B. *The Common Law Definition of a "Take"*

The proper interpretation of the provision making it a crime to "take" an MBTA-protected migratory bird is at the center of the split among the U.S. courts of appeals.[145] As discussed *supra*, Section 703 of the MBTA makes the taking of migratory birds unlawful:

> 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 pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . .[146]

The most contentious language here is the word "take," and specifically, the breadth of liability this word imposes on alleged violators of the MBTA. The common law history of "taking" language reveals that the word "take" insinuates deliberate and intentional acts—and thus incidental takes are incompatible with the common law definition of the word.

The Supreme Court addressed the use of the word "take" in a case with similar facts and issues as many of the MBTA cases discussed *supra*. In *Geer v. Connecticut*,[147] the Court held that "all the animals which can be taken upon the earth, in the sea, or in the air—that is to say, wild animals—belong to those who *take* them . . . ."[148] The Court's association of taking wild animals with possession of those wild animals suggests the use of the word "take"—at least in the common law sense—implies something more than accidently causing the death of the

145. *Compare* United States v. CITGO Petroleum Corp., 801 F.3d 477, 488–89 (5th Cir. 2015) ("[A] 'taking' is limited to deliberate acts done directly and intentionally to migratory birds." (citations omitted)), *with* United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997) (interpreting Section 703 of the MBTA as not requiring intent or guilty knowledge).

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

147. Geer v. Connecticut, 161 U.S. 519 (1896).

148. *Id.* at 523 (emphasis added).

animal.[149] By linking possession to killing, the Supreme Court inferred an intent requirement into the word "take"—that is, individuals who possess a dead animal likely intended to kill the animal in order to obtain possession.[150] The possession of an animal further implies the critical element of intent because an individual does not come into possession of an animal accidently—possession is the result of a deliberate act.[151] Therefore, the common law definition of a "take" is rooted in an understanding that a taking leads to control, and thus demands a level of intent on the part of the individual who takes the animal.

Given *Greer's* understood common law definition of taking at the time of the MBTA's passage in 1918, the U.S. Congress was well aware of the common law understanding of what classified as a "taking."[152] Further, as the Fifth Circuit observed in *CITGO*, the Congress is also well aware of how to expand liability beyond the common-law definition of a "take" in the context of wildlife and could have made the conscious effort to do so in drafting the MBTA, like it did with the Endangered Species Act ("ESA").[153]

The Congress passed the Endangered Species Act in 1973, which "provides for the conservation of species that are endangered or threatened throughout all or a significant portion of their range."[154] The ESA defines "take" as interference with wildlife, but expands the definition of the word beyond the traditional common law definition to

149. *See id.* (discussing the government's authority to restrict "the right to reduce animals ferae naturae to possession[,]" but not mentioning any such authority over accidental acts of capture).

150. *See CITGO Petroleum Corp.*, 801 F.3d at 489 (holding the Supreme Court's reading of taking provisions involving wildlife suggests that the word "'take' was a well-understood term of art under the common law when applied to wildlife"). The MBTA was passed less than twenty years after the Supreme Court decided the *Geer* case; therefore, the language in the MBTA was selected based on the *Geer* interpretation of what the word "take" means under the common law when it refers to crimes involving wildlife. *See id.* (relying on *Geer* in rejecting the argument that "Congress implicitly intended to vary from the common law meaning [of "take"] in the MBTA").

151. *See id.* (acknowledging the link between "taking" and intent because "[o]ne does not reduce an animal to human control accidently or by omission; he does so affirmatively").

152. *See id.* at 490 (stating that unless Congress specifically adds additional language, it is presumed that Congress was adopting the common law definition and understanding of the words used in the creation of the statute).

153. *See id.* ("A simple comparison with related statutes, both enacted fifty or more years later, shows that Congress well knew how to expand 'take' beyond its common law origins to include accidental or indirect harm to animals.").

154. *Endangered Species Act (ESA)*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 11, 2016), http://www.nmfs.noaa.gov/pr/laws/esa/ [https://perma.cc/3N7Q-W9C9].

include actions such as "harass" and "harm."[155] The definition of "take" in the ESA demonstrates the Congress's understanding of the common law definition of a take and its desire for the word to incorporate negligence and omission, which were previously not included as part of the common law definition of "take."[156] The Congress's deliberate use of the word "take" in wildlife protection statutes suggests that any statute which fails to include explicit language that expands the definition of a take beyond its common law definition, must be read narrowly as only a prohibition on the purposeful taking of wildlife.[157] The common law history of the Congress's use of a "take" supports an argument away from a strict liability reading of the MBTA and toward a reading that requires intent to sustain a conviction.

C. *The Impracticability of Extending the MBTA to Incidental Takes*

Perhaps the simplest yet most persuasive argument against a strict liability reading of the MBTA is the negative effect such a reading would have on American individuals and companies. The result of a strict liability reading of the MBTA would likely have a detrimental and unintended effect on industries that play an important role in this country's economy. A strict liability reading of the MBTA would run against the spirit of the statute—to protect this country's precious migratory bird population from those who seek to kill and traffic these birds.[158]

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155. *See* United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare, No. CV-88-3476, 1991 WL 41774, at *4 (E.D.N.Y. Mar. 14, 1991) (noting the Ninth Circuit had previously held that "the application of strict liability in wildlife forfeiture actions is necessary to effect Congressional intent" and advocating such a reading should be applied to cases involving violations of the ESA) (quoting United States v. Fifty-Three Electus Parrots, 685 F.2d 1131 (9th Cir. 1982))).

156. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 708 (1995) (holding Congress specifically intended for liability under the Endangered Species Act to encompass incidental harm to wildlife, including "significant habitat modification or degradation that actually kills or injures wildlife"). The Supreme Court's holding here suggests that the ESA's explicit language, which brought actions that harass wildlife within the scope of the ESA, was a deliberate expansion of the definition of a "taking" beyond previously understood interpretations of the word. *See id.* at 701 (effectuating Congress' intent in amending the ESA by recognizing the broadened scope of what a "taking" may entail under the amended statute).

157. *See CITGO Petroleum Corp.*, 801 F.3d at 490 (holding due to "[t]he absence from the MBTA of terms like 'harm' or 'harass', or any other language signaling Congress's intent to modify the common law definition supports reading 'take' to assume its common law meaning").

158. *See* Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (holding the language in the MBTA, specifically "take" and "kill", refer to activities committed by hunters and poachers—individuals that kill migratory birds for sport or for commercial purposes).

The effect of a strict liability reading of the MBTA on the public would be outrageous. Consider the fictional scenario the Fifth Circuit hypothesized in the *CITGO* case of an elderly woman who unintentionally runs over a migratory bird in her car.[159] In a system operating with a strict liability reading of the MBTA, this woman could be indicted, convicted, and sentenced to jail for accidentally killing a migratory bird with her car, without any intent to harm the bird. It is hard to imagine this was the MBTA's drafters' intent when crafting the MBTA.

A strict liability reading of the MBTA would also have an unfortunate effect on this country's business and commerce. A common example of how a strict liability reading of the MBTA would affect industry is the example of wind energy companies that cause the death of migratory birds through windmills. Wind energy in the United States and across North America grew exponentially in recent decades, and the industry continues to play a pivotal role in providing clean and sustainable energy to power our economy.[160] Wind energy companies face the growing danger that, because of the way wind energy is produced, there is a high likelihood that a migratory bird will die as a result of the wind turbines.[161]

Adopting a broad strict liability reading to the MBTA would lead to unfortunate consequences for the growing wind energy production that

159. *E.g., CITGO Petroleum Corp.*, 801 F.3d at 493 (using the example of an individual "whose car accidently collided with the bird" and observing that an individual in such a circumstance "has committed no act 'taking' the bird for which he could be held strictly liable"). Here, the Fifth Circuit uses the analogy of running over a bird in a car to point out the danger of reading a strict liability interpretation into the MBTA. *Id.* This scenario, as the Fifth Circuit observes, distinguishes intentional actions of taking migratory birds from incidental takings—an important distinction that is "inherent in the nature of the word 'taking' and reveal[s] the strict liability argument as a non-sequitur." *Id.*

160. *See generally* Jeff Brady, *Wind Power Continues Steady Growth Across the U.S.*, NAT'L PUB. RADIO (Dec. 21, 2015, 5:30 AM), http://www.npr.org/sections/thetwo-way/2015/12/21/460527376/wind-power-continues-steady-growth-across-the-u-s [https://perma.cc/WF85-EPCB] (discussing the recent growth of the wind energy industry in the United States, specifically noting that as of the end of 2015, there are in excess of "50,000 wind turbines [in forty] states and Puerto Rico").

161. *See* Scott W. Brunner, *The Prosecutor's Vulture: Inconsistent MBTA Prosecution, Its Clash with Wind Farms, and How to Fix It*, 3 SEATTLE J. ENVTL. L. 1, 11 (2013) (arguing that although wind energy provides many benefits to the environment, often times the nature of the production of wind can lead to significant avian deaths); *see also Bird Collisions*, AM. BIRD CONSERVANCY, https://abcbirds.org/threat/bird-strikes/ [https://perma.cc/X5TX-AXJP] (stating wind "turbines killed nearly 600,000 birds in 2012, from Golden Eagles to migratory songbirds" and warning "[b]y 2030 . . . a [ten]-fold increase in turbines is expected to boost annual bird mortality to 1.4 to 2 million[, and h]undreds of thousands or millions more could be killed by collisions with the associated power lines and towers being built to carry electrical energy into the grid").

stands as an effective alternative to traditional energy resources in the United States.[162] If wind energy companies were widely prosecuted and held criminally liable for the incidental taking of migratory birds under the MBTA, these companies would face a tremendous amount of uncertainty in the possible expenses that would accompany an unforeseen death of a migratory bird as the result of wind energy production.[163]

Wind energy is one example of an important U.S. industry that would likely face substantial uncertainty and potentially catastrophic fines and penalties if a strict liability reading of the MBTA was adopted across the United States.[164] There are many companies that operate in other areas of the U.S. economy that could also face steep fines and penalties in the wake of a strict liability interpretation of the MBTA.[165] It is thus important to consider the scope of how a strict liability reading of the MBTA would span to many industries, and ultimately result in a great expenditure of time, effort, and resources to prosecute defendants lacking any intent to harm or kill migratory birds.

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162. *See* Soumya Karlamangla, *Energy Company to Pay $1 Million in Wind Turbine Eagle Deaths*, L.A. TIMES (Nov. 24, 2013), http://articles.latimes.com/2013/nov/24/nation/la-na-nn-wind-energy-eagle-death-20131123 [https://perma.cc/7WEF-AET4] ("In the first case of its kind, a large energy company has pleaded guilty to killing birds at its large wind turbine farms in Wyoming and has agreed to pay $1 million as punishment.").

163. *See* Brunner, *supra* note 161, at 21 ("The fact that wind-farm operators have never been prosecuted for MBTA violations seems to be largely a component of prosecutorial discretion. Indeed, the overall inconsistent and unpredictable MBTA prosecution of unintentional corporate actors seems somewhat related to prosecutorial picking and choosing."); *see also* Minikowski, *supra* note 143, at 165 (stating that in 2013, the Department of Justice prosecuted its first wind farm MBTA violation case). The slow emergence of prosecutions against wind energy companies for the taking of migratory birds underscores the danger in allowing federal prosecutors to determine at what time and what industries are to be prosecuted for violations of the MBTA. The danger of relying on prosecutorial discretion to ensure the proper interpretation and enforcement of the MBTA—especially in cases involving industries such as wind energy—reinforces the notion that the solution to the challenges we face in the MBTA cannot be found by simply relying on the discretion of those charged with investigating and prosecuting MBTA violations. *See id.* at 165–66 (suggesting the danger of selective enforcement could be ameliorated by permitting "citizens and NGOs to privately enforce civil violations under [the] MBTA via a citizen suit provision").

164. *See* Martin et al., *supra* note 144 (noting oil and gas, utility, and wind energy companies have been threatened with MBTA prosecutions).

165. *See* Dave Kolpack, *Seven Oil Companies Charged in Deaths of Migratory Birds*, NEWSOK (Aug. 26, 2011, 12:00 AM), http://newsok.com/article/3598206 [https://perma.cc/8XJE-QX4U] (reporting on the charges of seven oil companies from Kansas, Texas, North Dakota, and Colorado that were indicted for misdemeanor violations of the MBTA after dead migratory birds were discovered inside the companies' reserve pits).

The energy and resources of federal investigators and prosecutors that look into alleged MBTA violations should focus squarely on investigating and prosecuting pressing threats to American migratory birds, such as those individuals and entities that intentionally capture or kill migratory birds. Federal investigators and prosecutors are well-equipped to carry out this mission, as the MBTA provides sufficient prosecutorial power to investigate, prosecute, and secure convictions against defendants that kill migratory birds.[166] A strict liability reading of the MBTA is not needed in order to provide federal prosecutors with the tools needed to successfully protect migratory birds in the United States.

D. *Congress's Intent and the Sufficiency of the MBTA's Language*

Another argument against a strict liability interpretation of incidental takings under the MBTA and toward joining the circuit courts that hold intent is required to sustain a conviction, is that the Congress's intent in drafting the statute was not to create a law that extends broad criminal liability to any entity or individual whose actions incidentally cause the death of migratory birds.[167] Rather, the Congress's aim in drafting the MBTA was narrow—to protect migratory bird populations in North America in compliance with the 1916 treaty and to achieve this goal by making it a crime to kill or capture migratory birds.[168] The MBTA's language is sufficient—without a strict liability reading—to allow the federal government to achieve Congress's mission.[169] In order to understand the Congress's intent in drafting the MBTA—and why Congress's specific construction points toward an intent requirement

166. *See* Migratory Bird Treaty Act, 16 U.S.C. § 706 (2012) (providing that any Department of the Interior employee with power to enforce any provision of the Act, has the power, "without warrant, to arrest any person committing a violation of this subchapter in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction").

167. *See* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991) ("The definition [of a taking in the MBTA] describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.").

168. *See generally* Migratory Bird Treaty, *supra* note 12, at 1702 (stating the goal of the 1916 Convention Between the United States and Great Britain for the Protection of Migratory Birds—which laid the groundwork for the MBTA—was crafted out of a shared commitment between the two nations to save migratory birds in North America "from indiscriminate slaughter").

169. *See* 16 U.S.C. § 703(a) (providing an expansive list of unlawful activities, such as "pursu[ing], hunt[ing], tak[ing], captur[ing], or kill[ing]," which are deemed violative of the MBTA when carried out against "any migratory bird . . . included in the terms of the conventions between the United States" and other countries).

within the statute's criminal liability—it is necessary to examine the Congress's original goal in drafting the MBTA and whether or not the statute can accomplish that goal without a strict liability reading of what constitutes the "taking" of a migratory bird.

The purpose of the MBTA is to prohibit the killing and capture of migratory birds by individuals—such as poachers and hunters—in order to ensure the United States maintains a healthy migratory bird population.[170] The public policy reasoning behind the statute is couched in the understanding that migratory birds are important to the United States' ecosystem, and the protection of these species demands steep penalties for those that kill or capture migratory birds either for personal gain or for some other economic benefit.[171] There is no room for lax interpretation of this statute in cases where the actor intentionally kills a migratory bird—such actions cut to the very essence of why the Congress enacted the MBTA over one hundred years ago.[172] The statute should not be used, however, as a means to frivolously prosecute individuals or corporations that have no intention of killing or taking migratory birds. Using the statute for such a purpose would be a grave misuse of a carefully crafted statute with a clearly defined purpose and would simultaneously stifle this

170. *See* Missouri v. Holland, 252 U.S. 416, 435 (1920) (observing the significance of the MBTA as an important statute to protect against the unlawful killing of migratory birds, and stating that "[b]ut for the treaty and the statute [(MBTA)] there soon might be no birds for any powers to deal with").

171. *See generally* Migratory Bird Treaty, *supra* note 12, at 1702 (recognizing a grave need to protect certain migratory birds that "are either useful to man or harmless" from being hunted or indiscriminately killed). The Treaty between the United States and Great Britain (on behalf of Canada) described the importance of migratory birds to the North American continent and discussed the value these animals add to the continent's ecosystem:

> Whereas, Many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds[.]

Id.

172. *See* Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HIST. CTR. (2014), https://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act [https://perma.cc/U8N6-73T7] (discussing the history of legislation that led to the ultimate passage of the MBTA in 1918). In 1913, the U.S. Congress passed the Weeks-McLean Act, which represented the "first national wildlife conservation law" and was passed "in response to the rampant hunting of migratory birds for their feathers . . . ." *Id.* The Weeks-McLean Act was replaced with the MBTA when President Wilson signed the MBTA into law in 1918. *Id.*

country's economic growth and lead to the unnecessary expenditure of federal and state resources on prosecutions that fall outside the scope of the MBTA.

The context in which the MBTA was crafted—and the ultimate goal the legislation was designed to achieve—also supports a narrow reading of the statute. In examining the original purpose and history of the MBTA, it becomes clear the MBTA evolved out of a shared desire to discourage the killing of migratory birds and, specifically, the trafficking and sale of such birds.[173] The context of the MBTA's drafting reveals a particular and limited aim of the MBTA, which demands an interpretation of the statute that fits tightly within this purpose.

One of the metrics used to grade the success of the MBTA, since its passage in 1918, is the extent to which the statute successfully curbs the trafficking and sale of artifacts, clothing, and accessories made from migratory bird feathers.[174] As discussed above, the work of the Audubon Society and other early bird conservation movements helped push—and ultimately enact—government regulations such as the MBTA, which took aim at hunters, traffickers, and poachers who kill migratory birds to exploit the birds for commercial purposes.[175]

During a June 24, 2014, oversight hearing before a congressional committee, Robert Dreher, the Associate Director of the U.S. Fish and Wildlife Service, was asked about the success of the MBTA since it was passed in 1918.[176] Mr. Dreher stated that conservation laws such as the MBTA "have been successful both in immediately restricting trade in wildlife that was decimating the populations of migratory birds . . . [and] in

173. *See* Migratory Bird Treaty, *supra* note 12, at 1704 (stating the "international traffic [of] any birds or eggs at such time, captured, killed, taken, or shipped" will be unlawful). The treaty between the United States and Great Britain was the framework from which the MBTA was drafted. The treaty highlighted the trafficking of birds as a specific act the treaty sought to outlaw, underscoring the shared concern between the United States and Great Britain in 1916 that the trafficking of migratory birds was a problem the treaty aimed to address.

174. *The U.S. Fish and Wildlife Service's Plan to Implement a Ban on the Commercial Trade in Elephant Ivory*, *Before the Subcomm. on Fisheries, Wildlife, Oceans & Insular Affairs of the H. Comm. on Nat. Res.*, 113th Cong. 33 (2014) (statement of Robert G. Dreher, Associate Director, U.S. Fish & Wildlife Service) (discussing the success of the MBTA "in creating long-term changes in popular culture and taste").

175. *History of Audubon and Science-Based Bird Conservation*, *supra* note 25.

176. *The U.S. Fish and Wildlife Service's Plan to Implement a Ban on the Commercial Trade in Elephant Ivory*, *Before the Subcomm. on Fisheries, Wildlife, Oceans & Insular Affairs of the H. Comm. on Nat. Res.*, 113th Cong. 33 (2014).

creating long-term changes in popular culture and taste."[177] Here, Mr. Dreher underscores the MBTA's success in curbing the illicit taking and trading of wild birds, suggesting that the construction of the MBTA was designed to target poachers and other criminals who illegally prey on wild animals.[178] Mr. Dreher's testimony points to the MBTA's original goal—to prohibit the unlawful taking of migratory birds for trafficking purposes—and the MBTA's success in achieving this goal.[179] The original purpose of the MBTA and the methods deployed to gauge the MBTA's success, pose a significant challenge to advocates of an MBTA interpretation that extends liability to incidental takes—a reading that reaches far beyond the MBTA's target offenders including poachers, thieves, and bird traffickers.

One frequently contested issue concerning the Congress's intent in drafting the MBTA is whether known interference with migratory bird habitats constitutes a "take" under the MBTA.[180] As the court in *United States v. Brigham Oil and Gas*[181] noted, the purpose of the MBTA is *not* to provide an avenue for the government to proceed with prosecutions against companies that engage in otherwise lawful commercial activity, even when that activity interferes with migratory bird habitats.[182] This was indeed the aim of the Endangered Species Act, but was not

177. *See id.* (statement of Robert G. Dreher, Associate Director, U.S. Fish & Wildlife Service) (describing the effect of environmental statutes such as the MBTA that help stifle the trading of animal parts for commercial purposes). The committee hearing in which Mr. Dreher testified dealt specifically with U.S. Fish & Wildlife Service efforts to crack down on the growing ivory trade. *Id.* It is thus expected that Mr. Dreher's comments about the effectiveness of wildlife regulations would be discussed within the framework of fighting the illegal taking of animals for the purposes of trafficking. But, it is important to note that Mr. Dreher praised the MBTA for helping to curb the trafficking of migratory birds, and thus shedding light on the statute's original purpose. *Id.*

178. *Id.*

179. *Id.*

180. *See* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1205 (D.N.D. 2012) (considering a case in which the defendant was charged with taking migratory birds after the birds died as a result of coming in contact with defendant's oil reserve pit).

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

182. *See id.* at 1205 (challenging the ability of the MBTA to extend to a company that engages in commercially useful activity, such as that exhibited by the defendant). The court held that the defendant's activity—producing oil and gas—was "not the sort of physical conduct engaged in by hunters and poachers" and further noted that "such activities do not fall under the prohibitions of the Migratory Bird Treaty Act." *Id.* at 1211. The court makes the important distinction here that the criminal actions the MBTA seeks to guard against—those activities commonly committed by hunters and poachers—are not the same as an oil company's unintentional actions that could be harmful to migratory birds. *Id.*

contemplated in drafting the 1918 MBTA. Prosecuting companies for commercial activity that may have a negative effect on migratory bird habitats comes well short of the type of offense the Congress created in the MBTA.[183]

The public policy argument for companies to avoid engaging in activity that negatively impacts this country's wildlife is certainly important. Migratory birds and other wild species are critical components of the North American ecosystem and companies engaged in commercial activities that indirectly cause the death of migratory birds or bird habitats should do a better job of limiting their business activities' impact on wildlife. It is incumbent on these companies to be leaders in innovative conservation approaches and partner with conservation groups to help protect threatened species.[184] The reward for the company that takes such steps would certainly be reaped in the court of public opinion. But under the MBTA's current language, a reading of the statute that extends liability to companies for incidental takes, or for harm to bird habitats, is a use of the MBTA beyond the statute's purpose and runs outside a proper interpretation of the law.[185] The MBTA should be narrowly construed and used solely in a way consistent with the Congress's intent.

The MBTA's language exists to hold individuals and entities that "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill"

183. *Id.* at 1213.

184. *See* PRIVATE LANDS ADVISORY COMMITTEE, TEX. PARKS AND WILDLIFE DEP'T, VOLUNTARY CONSERVATION PRACTICES (2013) (discussing various voluntary conservation practices oil and gas companies may engage in to curb the effects of oil production on wildlife). The pamphlet lists a number of successful voluntary steps outside of federal and state mandated regulations that oil and gas companies have taken in Texas to protect wildlife in the midst of growing fossil fuel production. *Id.* Among the recommendations made by the Texas Parks and Wildlife Department is to ensure "abandoned wells and well sites are properly closed, plugged and reclaimed"—an especially pertinent step energy companies can take to help protect migratory birds. *Id.*

185. *See* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991) (noting the specific actions attributed to the word "take" under the statute, such as "pursue, hunt, shoot, wound, kill, trap, capture, or collect" and holding these are deliberate actions that hunters and poachers often engage in, and "conduct [that] was undoubtedly a concern at the time of the statute's enactment in 1918"). The Ninth Circuit found that because the actions described under the definition of "take" in the plain language of the MBTA described intentional actions that, if committed, caused the death of migratory birds, a strict liability reading of the MBTA is inappropriate. *Id.* at 303. Further, the Ninth Circuit held the MBTA fails to mention any language that deals with habitat destruction and modification, which provides additional evidence that the statute was crafted to target hunters and poachers that intentionally seek to cause harm to migratory birds protected under the MBTA. *Id.*

migratory birds criminally liable for their actions.[186] In order to achieve its goal to protect migratory birds, the MBTA provides sufficient avenues to achieve its objective.[187] If the Congress desires broader liability beyond the MBTA's current construction, then the Congress must amend the statute to bring other actors—such as those who incidentally take migratory birds or harm avian habitats—within the MBTA's reach.

The disagreements among the U.S. courts of appeals discussed above center largely on the proper interpretation of the Congress's construction of the MBTA.[188] In *United States v. FMC Corp.*, the Second Circuit decided a case with a very similar fact situation as *United States v. Brigham Oil*.[189] The Second Circuit found the MBTA's language insufficiently vague and instead read a strict liability interpretation into the MBTA that now persists as the primary issue in the sparring among the U.S. courts of appeals on the proper interpretation of the MBTA's criminal liability.[190] FMC's defense focused on the notion that the defendant's intent under the statute must be to *kill* a migratory bird.[191] FMC argued it never took a deliberate act that fit within the contours of the MBTA; instead, the company argued it was unaware the chemicals discharged into the retention pond caused the death of migratory birds.[192]

The Second Circuit rejected FMC's arguments, and found the company knowingly discharged hazardous materials into a disposal tank and this was an affirmative act that caused the death of migratory birds; thus the act fell within the MBTA's scope.[193] The court, however, declined to view

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

187. *See Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d at 1205 (holding the interference with a migratory bird's habitat does not reach the level of a "taking" pursuant to the MBTA).

188. *Compare Seattle Audubon Soc'y*, 952 F.2d at 303 ("We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them under the Migratory Bird Treaty Act."), *with* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978) (imposing strict liability and noting Congress "recognized the important public policy behind protecting migratory birds").

189. *Compare FMC Corp.*, 572 F.2d at 907–08 (applying a strict liability interpretation and holding a company engaged in the business of manufacturing chemicals liable for the death of migratory birds impacted by chemicals that washed into a pond), *with Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d at 1211 (expressly finding the "use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act").

190. *See FMC Corp.,* 572 F.2d at 907 ("[S]trict liability has been deemed to apply in various . . . situations and also when a person engages in extrahazardous activities.").

191. *Id.* at 906.

192. *Id.*

193. *Id.* at 906–07.

FMC's actions within the context of the MBTA's statutory construction and purpose.[194] Further, the Second Circuit read into the MBTA a strict liability component—a key element the MBTA's drafters elected not to include when crafting the statute.[195] The Second Circuit chose to replace ambiguity in the MBTA with a strict liability reading—an action that incorrectly reads the statute in favor of the government, not the defendant.[196]

The Second Circuit's reading of the MBTA stretched the MBTA beyond the Congress's intent that formed the backdrop for the introduction and passage of the MBTA.[197] Courts considering cases that

194. *See id.* at 908 (holding FMC's failure "to prevent . . . chemical[s] from escaping into the pond and killing birds . . . is sufficient to impose strict liability"). *But see* United States v. CITGO Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015) (holding the action prohibited under the MBTA is the taking of migratory birds, and even in the absence of explicit *mens rea* in the statute, a taking "is not something that is done unknowingly or involuntarily").

195. *FMC Corp.*, 572 F.2d at 907. The Second Circuit held that it is appropriate to apply the statute as a strict liability statute due to the fact that no intent language is found in the MBTA:

> However, here the statute does not include as an element of the offense "wilfully, knowingly, recklessly, or negligently"; implementation of the statute will involve only relatively minor fines; Congress recognized the important public policy behind protecting migratory birds; FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability on FMC.

Id. at 908.

196. *See* United States v. Santos, 553 U.S. 507, 514 (2008) (holding in criminal statutes that are vague, those laws must "be interpreted in favor of the defendants subjected to them"). The Supreme Court reasoned that in the interest of public policy, individuals should not be held liable "for a violation of a statute whose commands are uncertain or subjected to punishment that is not clearly prescribed." *Id.* The Second Circuit, in dealing with what it viewed as ambiguity in the MBTA, chose not to read the statute in favor of the defendant, but instead read strict liability language into the MBTA. *FMC Corp.*, 572 F.2d at 908.

197. *See* Migratory Bird Treaty Act, 16 U.S.C. § 703(a) (2012) (making it a crime to take a migratory bird). Section 703 of the MBTA contains an extensive list of actions that constitute the unlawful taking of a migratory bird:

> 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 *pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported,* deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . .

Id. (emphasis added).

involve entities or individuals accused of MBTA violations can, and should, use the MBTA to hold those actors that intentionally kill migratory birds liable to the fullest extent of the law. But transforming the MBTA into a strict liability statute that reaches incidental take cases—when there is no indication this is what the Congress intended—constitutes an unfortunate expansion of the MBTA beyond the drafters' intent.[198] The MBTA was established with a clear goal and armed with proper tools to achieve that goal—a broad reading is unnecessary and does not provide a more effective mechanism for the MBTA to achieve its mission.

The statutory construction of the MBTA provides sufficient language for federal prosecutors to successfully bring to justice those individuals who kill migratory birds.[199] A strict and broad interpretation of the MBTA would extend the reach of the MBTA beyond the Congress's intent, and thrust individuals and businesses into the criminal justice process who lack the critical element of intent to "pursue, hunt, take, capture, [or] kill" a migratory bird.[200]

198. The Eighth Circuit observed the limits of the MBTA's criminal liability due to the drafters' intent and understanding of the language they used in writing the statute:

> Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds. Thus, we agree with the Ninth Circuit that the ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."

Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (quoting Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991)).

199. *See* 16 U.S.C. § 703 (containing the general language making it a crime to take a migratory bird); *see also id.* § 707 (elevating the criminal liability to a felony in cases where the defendant killed the migratory bird with the purpose of trafficking the bird). The language in Section 703 of the MBTA provides cause for prosecutors to bring charges against individuals and entities who seek to harm migratory birds. *Id.* § 703. Further, the language in Section 707 broadens prosecutorial authority to permit the prosecution of defendants who engage in the unlawful transportation and carriage of migratory birds. *Id.* § 707. Based on the language used by the drafters of the MBTA, it appears that the goal of the criminal liability imposed under the statute is to prohibit the intentional and purposeful taking and trafficking of migratory birds. The language comes short of imposing strict liability for any action that might contribute to the possible death of a migratory bird.

200. *Id.* § 703(a).

V. CONCLUSION

Avian conservation efforts in the United States have made significant strides from the unregulated massacre of the passenger pigeon in the nineteenth century. Today, we have robust conservation programs across the fifty states, where concerned citizens, non-profit organizations, corporations, and the government work together to defend wildlife from human danger. Our country's growing commitment to protecting avian populations is a highlight of American determination and stewardship. Our government is aware of the value migratory birds contribute to the ecosystem and is resolute in its protection of individual avian species and habitats.

The MBTA is indeed an important figure in this American conservation story. But the need for continual bird conservation measures does not justify a misapplication of perhaps the most significant piece of federal legislation in the bird conservation movement's rich history. It is for this reason that avian jurisprudence must continue. The proper interpretation of the MBTA deserves further judicial attention and a final resolution in favor of a narrow reading of the statute.

In resolving the interpretive dispute plaguing the MBTA, it is critical to look squarely at the MBTA's language to understand the extent of the MBTA's criminal liability. The MBTA's plain language renders an extension of criminal liability to incidental takes incompatible with the intent of the statute's drafters. A final disposition from the courts on the proper interpretation is further needed to provide judicial certainty that transcends individual executive administrations' reading of the statute. Relying on the drastically differing federal agency readings of the MBTA will only prolong the debate on the MBTA's reach. The logical end of a broad MBTA interpretation also proves impractical, as such a reading would thrust innocent citizens and companies into the criminal justice system for crimes that lacked the important element of intent. A strict liability reading of the MBTA that imposes criminal liability to incidental takes, therefore, stretches the statute beyond the drafters' intent.

The MBTA was crafted to target the poaching and hunting of migratory birds—affirmative actions taken with an intent to kill. The MBTA is an effective statutory tool to achieve this goal and preserve America's migratory bird population. Those individuals who take migratory birds in this country will be brought to justice within the confines of the MBTA; a broad reading of the MBTA that extends liability to incidental takes will

not improve the effectiveness or the efficiency of MBTA prosecutions, nor will it bolster the MBTA's contribution to the American conservation movement. It is thus incumbent on U.S. courts of appeals to narrowly construe their reading of the MBTA to the confines of the statute and not extend the MBTA's criminal liability to incidental takes. A narrow reading of the MBTA will provide clarity and practicality to the public, honor the MBTA drafters' intent, and enable the effective and fair administration of justice.