DANGEROUS TO BE RIGHT WHEN ESTABLISHED AUTHORITIES ARE WRONG: A PROPOSAL FOR THE PROTECTION OF AMERICA'S MIGRATORY BIRDS

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INTRODUCTION

The United States has an exceptional, observable, and palpable quality beyond its innovation, development, and unique culture. There is something so natural, so genuine, so intertwined in the common image of America that nevertheless seems so foreign in any major urban setting. This description encapsulates the wilderness environment—nature's landscape, America's last bastion for growth and preservation, meant to be an area reserved for citizens seeking a return to solace and for wildlife desiring to exist in peace. Further, of the creatures that inhabit this American environment, birds are especially important for re-instilling the prime reminder that their "symbolism is always connected with an ascension," harkening back to the time before urban development, when indigenous cultures possessed impeccable awareness for their care.[1] Of the innumerable species and forms of wildlife, birds in particular come to mind as a native outside the cities. Thus, when they leave the bustling aurora of the modern city, they should expect to be safe in their forests and amongst their trees, not only from civilization, but also from other human intrusions into their homeland.[2] Recognizing this, Congress long ago decided that the birds' very existence was worth intervention, passing the Migratory Bird Treaty Act (MBTA) in 1918.[3]

The MBTA currently erects a protective wall against several acts impacting all migratory birds "native to the United States."[4] Primarily, the Act

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1. ARNOLD L. GOLDSMITH, THE MODERN AMERICAN URBAN NOVEL: NATURE AS "INTERIOR STRUCTURE" 69 (1991) (recognizing that "the ascent to heaven symbolized by the flight of birds is characteristic of archaic culture").

2. *See* Chris Berdik, *The Roar of Military Jets Triggers a Crusade for Quiet*, HIGH COUNTRY NEWS (May 13, 2019), https://www.hcn.org/issues/51.8/military-the-roar-of-military-jets-triggers-a-crusade-for-quiet.

3. Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (2018).

4. *Id.* at § 703. For the purpose of this Note, any relevant exceptions or inclusions to the migratory birds category will be explicit, whilst protected birds generally will be referred to as "birds" or "migratory birds."

prohibits the "tak[ing]" or killing of migratory birds.[5] What constitutes killing a bird is, of course, fairly obvious and not subject to much debate; however, there is monumental disagreement over the term "take." How should one know when he or she has "taken" a bird, and thus subjected oneself to the provisions of the Act? Of significance to this Note is the scope of the term's inherent *mens rea*, for even beyond the acts which might be considered a "take" lies the further question of whether one can *accidentally* or *inadvertently* "take" a migratory bird. Notably, the issue is of such great prevalence that the protective structure meant to shield America's birds beyond the outright intentional killing context becomes quite obscured across circuit court lines. That is to say that there is a multi-sided circuit split on exactly how much the birds are to be protected under the MBTA's "take" provision and the corresponding extent of liability for those found responsible.

Divergences amongst the circuits are generally resolved by the Supreme Court of the United States,[6] but in this instance the implications of MBTA liability might create a more pressing need for final resolution. The MBTA allows for criminal prosecution for violations of the Act, ranging from misdemeanor convictions and equipment forfeiture, to even imprisonment for felonious conduct.[7] It is thus no mystery as to why defendants might want to argue against a broad interpretation of "take" providing for sanctions against accidental "takes." While such an argument has succeeded in the Fifth, Eighth, and Ninth Circuits,[8] in other circuits, the courts have found "takes" to extend even to acts which are unintentional.[9] From the holistic point of view of these latter courts, as will be detailed below, the idea is that the Act is a *strict liability* statute. The Act applies as such to otherwise lawful activity when an actor is a proximate cause of the "take," and does in fact serve to exact Congress's primary aim in intervening: the protection of America's treasured migratory birds from all human-sourced harm, whether intentional or unintentional.

Throughout this Note, the endorsed rule will be developed as additional ideas and concepts are considered. Part I of this Note begins by providing background on the current statutory protections of the MBTA. Part II describes the abysmal federal circuit split regarding incidental "takes" in the commercial context, supplemented by Solicitor Opinions from the two most recent presidential administrations. Part III then advocates for the superiority of the strict liability standard as the best way to safeguard the very beings that give the United States an indispensable uncultivated haven, representing a temporary catharsis from the modern world. This Note concludes in Part IV with the

5. *Id.*

6. *See* Marbury v. Madison, 5 U.S. 137, 148 (1803); *see also* Ford v. United States, 484 U.S. 1034, 1035 (1988) (White, J., dissenting from denial of certiorari).

7. Migratory Bird Treaty Act, 16 U.S.C. § 707 (2018).

8. *See, e.g.*, United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015); Newton Cnty. 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).

9. *See, e.g.*, United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

explication of an alternative rule, formulated as an impact-dependent amendment to the existing statute that should appease both conservationists and industrial actors in a striking compromise.

I. THE MIGRATORY BIRD TREATY ACT

A. Birds, Corporations, and Hunters

Even before America became a global superpower focused on protecting the world, Congress had already recognized the need to enshrine American avians. Developed as the result of an agreement between Great Britain and the United States in the midst of the Great War, the Migratory Bird Treaty Act of 1918 was designed to implement the provisions of the original international convention,[10] that is, to "insur[e] the preservation of . . . migratory birds as are either useful to man or are harmless."[11] In 1972, Congress amended the MBTA to bring it in line with the provisions of yet another treaty,[12] one primary consideration of which was the understanding that "birds constitute a natural resource of great value for recreational, aesthetic, scientific, and economic purposes."[13] Congress was cognizant of the need to protect America's birds, and made several revisions to affirmatively apprise federal agencies of their objectives. Of significance is a further amendment introduced in 1986, whereby Congress explicitly acknowledged and assented to the strict liability standard for misdemeanors which had been reverberated amongst some federal trial and appellate courts.[14]

In its current form, the MBTA, under § 703(a), makes it,

> . . . unlawful . . . by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, [or] possess . . . 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 . . . .[15]

As is readily apparent, the Act prohibits a broad, if not all-encompassing, array of actions affecting migratory birds. No investigation is required to find that Congress sought to protect migratory birds from almost every intentional harm, denoted in particular by the statute's use of "by any means or in any manner," suggesting a limitless scope as to the methods by which a hunter,

10. United States v. Corbin Farm Serv., 444 F. Supp. 510, 530 (E.D. Cal. 1978).

11. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-G.B., Preamble, Aug. 16, 1916, 39 Stat. 1702.

12. Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Preamble, Mar. 4, 1972, 25 U.S.T. 3329.

13. *Id.*

14. *See* S. REP. No. 99-445, at 16 (1986) ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under [the statute] . . . .").

15. 16 U.S.C. § 703 (2018).

poacher, or other relevant actor may intentionally displace the birds. This prohibition is nevertheless subject to exceptions as permitted by certain regulations.[16] Violations of the MBTA generally invoke a misdemeanor charge, complete with a $15,000 fine or imprisonment of up to six months, or both; in the case of a "take" with an intent to sell or barter a bird, however, the criminal charge is a felony coupled with a $2,000 fine either along with, or in place of, a two-year prison sentence.[17] This misdemeanor-felony distinction is undoubtedly significant; however, because such distinction makes for too complex an argument in this Note, this Note will only discuss penalties and liability under the MBTA as they relate to misdemeanor convictions under § 703(a).

B. Expansion of the MBTA's Coverage

The Secretary of the Interior is given the authority to determine when and how migratory birds may be killed or taken under the Act,[18] and has delegated the authority to the United States Fish and Wildlife Service (FWS).[19] The MBTA itself covers most native American bird species,[20] and thus, the FWS has discretion over a substantial portion of the nation's birds. There is as a result frequent inevitable contact between these birds and humans; for purposes of notice, all of the actions prohibited by the MBTA must be clearly defined. Of the actions prohibited by § 703(a) of the MBTA, "take" is perhaps the most divisive and seemingly the most ambiguous in its application and definition. The MBTA regulations as promulgated by the FWS give some content to the term, stating that "[t]ake means to pursue, hunt, shoot, wound, kill, trap, capture, or collect," or attempt to do such.[21] The various regulations were developed to implement the statutes to be enforced by the FWS, including the MBTA and the accompanying Endangered Species Act.[22] Some affirmation of the use of the

16. *Id.* The Fish and Wildlife Service (FWS) has authority over these regulations, which will also be explicated below. For the purposes of introduction, however, all that is pertinent is that the FWS can make certain exceptions for certain activities which would ordinarily be well within the statute's scope.

17. *Id.* § 707.

18. *Id.* § 704.

19. 50 C.F.R. § 10.13(a) (2019); Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1180 (2008). For clarity's sake, all relevant wildlife agencies will be referred to under the umbrella of Fish and Wildlife Service.

20. Richard H. Mays, Complaint Against Wind Farm Under the Endangered Species Act, Migratory Bird Act, Bald & Golden Eagle Act, & NEPA, 5 ENVTL. L. FORMS GUIDE § 50:46, at 6 (2020).

21. 50 C.F.R. § 10.12 (2019). Preliminary examination reveals some regulatory contrivances in the FWS's definition, given the circular use of several terms encompassed by "take" which are already present in the § 703(a) statutory text, such as "kill" and "capture." *Compare id.* (listing "kill," "hunt," pursue," and "capture" as acts which define "take"), *with* 16 U.S.C. § 703(a) (2018) (listing the same terms as separate acts from "take").

22. *Id.* at § 10.1.

FWS's definition has been found in the courts, albeit in a broader, more extensive sense.[23] Therefore, at base, it is these definitions and bounds by which the terms under both acts are to be construed and enforced.

C. The Endangered Species Act

The renowned Endangered Species Act (ESA)[24] is yet another statute passed to provide an extra layer of protection to all of the most endangered and at-risk wildlife. As the name suggests, the ESA's scope does extend beyond the bird-only coverage of the MBTA; however, its prohibitions apply all the same. The ESA proscribes the take of any endangered species,[25] including bird species, and includes acts which "harass" or "harm" the species,[26] neither of which are terms noted in the MBTA.[27] FWS regulations made pursuant to the ESA again incorporate this terminology into "take" actions under the ESA. Explaining the difference between the two terms, the regulations describe "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns;"[28] the term "harm" in the "take" context entails actions which, in effect, kill or injure wildlife.[29] This discrepancy has led some to subscribe to the belief that "Congress intended to prohibit activities that affect the relevant species indirectly, unintentionally, and/or incidentally" only under the ESA and not the MBTA.[30]

Violations of the ESA can subject defendants to criminal fines capped at a massive $50,000 plus imprisonment, along with an available civil assessment of a maximum $25,000 for each violation.[31] Exceptions are made for violations which were otherwise committed in self-defense against protected wildlife.[32]

D. Executive Understanding of Take

In early 2017, Acting Secretary of the Interior Jack Haugrud announced in a memorandum, known as an M-Opinion, sent to the Acting Solicitor of the Department of the Interior (DOI) that the prior understanding on "take" as

23. *See* United States v. CITGO Petroleum Corp., 801 F.3d 477, 489 (5th Cir. 2015) (defining "take" as meaning to "reduce those animals, by killing or capturing, to human control").

24. Federal Endangered Species Act, 16 U.S.C. §§ 1538–1544 (2018).

25. *Id.* at § 1538.

26. *Id.* at § 1532.

27. *Accord* David Freudenthal et al., A Pendulum Seldom Stops in the Middle: Shifting Views on "Take" of Raptors and Other Migratory Birds, 48 ENVTL. L. REP. NEWS & ANALYSIS 10555, 10558 (2018) ("[T]he MBTA contains none of the terms that would imply that indirect or unintentional take is prohibited.").

28. 50 C.F.R. § 17.3 (2019).

29. *Id.*

30. Freudenthal et al., *supra* note 27, at 10558 (arguing that Congress did not "intend[] to prohibit unintentional or indirect take").

31. Federal Endangered Species Act, 16 U.S.C. § 1540 (2018).

32. *Id.*

defined in the MBTA and established by the Obama Administration would be suspended.[33] Later in 2017, the Principal Deputy Solicitor presented the Trump Administration's understanding of "take" as it applies to the MBTA in another memorandum.[34] The memorandum concluded that the MBTA's statutory prohibitions on "taking" or attempting to "take" "apply only to affirmative actions that have *as their purpose* the taking or killing of migratory birds."[35] Therefore, according to the Trump Administration, "take" in the context of the MBTA only concerns those acts which are undertaken *with an intent to effect* a "take" on migratory birds.[36] Put differently, the MBTA's criminal provisions, per the memorandum, cannot be sanctioned against those who do not *intend* to take the birds, or more specifically, acts which indirectly and inadvertently lead to bird deaths. This Note in the following sections will explain how the diverging Solicitor Opinions and judicial interpretations will affect the enforcement of the MBTA statute, and whether there can be a unified standard for liability.

II. FEDERAL CIRCUITS AND THEIR UNDERSTANDING OF "TAKE": INTENTIONAL TAKINGS VERSUS UNINTENTIONAL TAKINGS

Given that the "Solicitor's M-Opinions are binding on the DOI as a whole . . . [ensuring that] the DOI will take action consistent with the legal interpretation explained by the Solicitor,"[37] the primary issue in the contemporary legal context is whether the split amongst the circuit courts calls for a review of existing divergences in federal case law. To resolve this predicament in the courts, the Supreme Court or Congress will necessarily have to intervene. This Part will discuss the current framework that the federal circuit courts have heretofore laid in deciphering the meaning of "take."

33. Memorandum from K. Jack Haugrud, Acting Sec'y, Dept. of the Interior, to Acting Solic., Dep't of the Interior (Feb. 06, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/temp_suspension_20170206.pdf. The prior Obama Administration's position was that the MBTA's provisions do in fact apply to the accidental or incidental taking of the protected birds, thereby confirming criminal liability under the MBTA for take *resulting from but not as the purpose of* an activity. *See* Memorandum from Hilary C. Tompkins, Solic., Dep't of the Interior, to Dir., Fish and Wildlife Serv. (Jan. 10, 2017), [hereinafter January Memo], https://www.doi.gov/sites/doi.gov/files/uploads/m-37041.pdf.

34. Memorandum from Principal Deputy Solic. Exercising the Authority of the Solic. Pursuant to Sec'y's Order 3345, Dep't of the Interior, to Sec'y, et al., Dep't of the Interior (Dec. 22, 2017) [hereinafter December Memo], https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf.

35. *Id.* (emphasis added).

36. *See generally id.* (dismissing the strict-liability "criminal intent" requirement of the Obama Administration memorandum).

37. Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430, 442 (S.D.N.Y. 2019) (citing Citizens Against Casino Gambling v. Chaudhuri, 802 F.3d 267, 277 n.8 (2d Cir. 2015)).

A. One Wrong Move: Second and Tenth Circuits on Strictest Liability

Attempts to delineate the *mens rea* standard for MBTA criminal penalties took a hold throughout the mid-twentieth century. The Second Circuit in 1978, shortly after the signing of the United States bird convention with Japan and its subsequent implementation by Congress into the MBTA, addressed the issue in *United States v. FMC Corp*.[38] There, FMC Corporation was operating a pesticide plant, which naturally resulted in vast amounts of wastewater.[39] Such large amounts of wastewater were retained in a pond, sizable enough to attract birds to the area, many of which happened to be covered under the MBTA. After some time, dead migratory birds began to appear throughout and around the area.[40] FMC had initially tried to mitigate the pumping of the deadly chemical carbofuran into the pond, but its efforts were ineffective and carbofuran continued to be pumped directly into the pond for the migratory birds to consume.[41] FMC eventually covered up the pond and replaced it with a wastewater treatment facility; regardless, the United States brought charges against the corporation for the migratory bird deaths prior to the pond's closure.[42]

The trial court convicted FMC of unlawfully killing the birds as prohibited under the Act.[43] The Second Circuit, on appeal, was subsequently tasked with determining whether FMC's affirmative act of knowingly engaging in the manufacture of a highly toxic pesticide yet subsequently failing to prevent the chemical from reaching the bird-occupied pond were sufficient to find an MBTA violation. In other words, the unprecedented issue was whether the statute generally required an intent or other *mens rea* to assess liability.[44] Applying the principle of strict liability, the Second Circuit understood that because the carbofuran remained on FMC's property, and the birds were able to find their way to the pond containing the chemical, FMC effectively created a situation in which the interests of wildlife and the destructive capabilities of pesticides would inevitably clash.[45] Thus, even in the absence of FMC's knowledge of the lethality of the pond to birds, FMC still engaged in the pumping activity when it was aware of the chemical's lethal danger to area wildlife and did little to mitigate its effects, and thus could be held strictly liable.[46] However, the court did manage to check the statute's incidental takings scope in recognizing that a limitless construction would "bring every killing

38. United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

39. *Id.* at 904.

40. *Id.* at 905.

41. *Id.*

42. *Id.* at 903.

43. *Id.*

44. *Id.* at 904.

45. *Id.* at 908.

46. *Id.*; *see also* Morissette v. United States, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation, usually is in a position to prevent it.").

within the statute, . . . offend[ing] reason and common sense."[47] Nevertheless, the Court affirmed the "important public policy behind protecting migratory birds" and confirmed that the statute's implementation by way of strict liability would involve only comparatively minor fines.[48]

Thus, the Second Circuit had declared a strict liability standard for MBTA application. Yet, a single circuit's interpretation of a lack of *mens rea* requirement still left much to be desired by way of guidance to the rest of the nation's courts. Enter the Tenth Circuit in *United States v. Apollo Energies, Inc.*, some three decades later in 2010.[49] There, Apollo Energies and Red Cedar were two companies operating several pieces of equipment known as heater-treaters, which separate oil from water when the mixture is extracted from the ground. The heater-treaters were affixed with nine-inch-wide vertical exhaust pipes and movable louvers used to access heating equipment at the structures' base.[50] FWS agents received a tip and searched the heater-treaters and louvers, discovering a number of deceased MBTA-protected birds.[51] Even after an attempted remedy by way of placing metal caps on the exhaust pipes where birds were found, further investigation by FWS revealed additional protected bird carcasses.[52]

The owners of both Apollo Energies and Red Cedar were convicted for violations of the MBTA relating to the birds' deaths.[53] On appeal to the Tenth Circuit, the appellants found themselves in the tightest of binds when the court addressed their argument that the MBTA necessarily carries with it a *mens rea* requirement concerning the capture or collection of protected birds.[54] The court referred to an earlier Tenth Circuit case where it had declared misdemeanors in the MBTA to exact strict liability.[55] Viewing the pertinent case as indistinguishable from that of the court's precedent with regard to the statute's *mens rea*, the court affirmed that collection and capture of birds was well within the "misdemeanor violations [previously referred to] under § 703 [as] strict liability crimes."[56] Ultimately, the court, motivated by its precedent, expressly concluded that the plain language of the statute "supported a strict liability interpretation."[57] The Tenth Circuit inferred from the MBTA's status as "a

47. *FMC Corp.*, 572 F.2d at 905. The Second Circuit expressly foreclosed the admittedly "*reductio ad absurdum* argument" that strict liability would bring every bird death "caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly" in its declaration. *Id.*; *see* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999); *see also* further discussion *infra* Part III.B.

48. *FMC Corp.*, 572 F.2d at 908.

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

50. *Id.* at 682.

51. *Id.*

52. *Id.* at 682–83.

53. *Id.* at 683.

54. *Id.*

55. *Id.* at 685 (citing United States v. Corrow, 119 F.3d 796 (10th Cir. 1997)).

56. *Id.* (emphasis omitted).

57. *Id.* at 686.

regulatory measure designed to protect the public welfare"[58] that a different standard is applied as to the inference of a scienter requirement.[59] Even when faced with precedents from other circuits observing a purposeful or intentional *mens rea* element,[60] the court offhandedly clarified that the sole relevant question to the case at hand, answered in the Government's favor, centered on Apollo Energies' awareness of its heater-treater system's lethal threat prior to the relevant bird deaths.[61] Given this, the Tenth Circuit upheld the conviction for Apollo Energies, finding in such the requisite proximate cause.[62]

Alas, two federal courts of appeal engaged in a reliance on canons of statutory interpretation ultimately favoring strict liability. Under threat of MBTA liability, both Apollo Energies and FMC Corporation attempted to prevent harm to fowl by way of installing ex post facto protective coverings and limiting the birds' access to fatal instruments. The Second Circuit in *FMC Corp.* had managed to find no scienter requirement for the statute, and even though the *Apollo Energies* defendants attempted to utilize the 1986 congressional amendments to the MBTA as further support for their position, the Tenth Circuit still found similarly, with little having changed since in the circuits.[63] However, as the Tenth Circuit acknowledged, some other circuit courts did read the statute with some pedantry, leading to some significant ramifications as to the application of criminal liability under the Act.

B. Do No Wrong: Lawful Commercial Activity in the Fifth, Eighth, and Ninth Circuits

The commercial activity aspect of the MBTA is an important one, requiring clarification and identification of certain elements due to courts' seemingly greater tendency to find liable persons engaged in commerce as compared to private individuals such as hunters.[64] Corporations and similar commercial enterprises should ideally exercise extra precaution in maintaining appropriate and safe facilities as inaccessible by birds if they are to completely shield themselves from criminal sanctions under the statute. But this high diligence standard does not apply to commercial activity in every circuit, as will be discussed below.

58. United States v. Engler, 806 F.2d 425, 432 (3d Cir. 1986).

59. *Apollo Energies*, 611 F.3d at 684–85 (citing *Engler*, 806 F.2d at 432).

60. *See, e.g.*, Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997). This case and its reasoning are addressed in the section below concerning an inference of intent and the Triple Alliance of circuits rejecting strict liability under the MBTA.

61. *Apollo Energies*, 611 F.3d at 686.

62. *Id.* at 690–91.

63. *FMC Corp.*, 572 F.2d at 908; *Apollo Energies*, 611 F.3d at 686.

64. Yet, as some of the more conservative courts admit, strict liability may be easier to apply to individuals engaging in inherently bird-injuring activities. *See, e.g.*, *Newton Cnty.*, 113 F.3d at 115 ("Strict liability may be appropriate when dealing with hunters and poachers."). Assuming *arguendo* that intent to harm birds would not be implicated by hunting or poaching, the analysis for commercial, incidental actors does not change. Accordingly, the non-commercial aspects of strict liability under the MBTA will not be considered for the purposes of the remainder of this Note.

In *United States v. CITGO Petroleum*, the Fifth Circuit rejected the notion that "take" is unbounded by intent and direct purpose.[65] There, CITGO had been using large open-top tanks at one of its petroleum refinery plants, which served to collect wastewater and separate the oil from the water.[66] Ten protected birds were found deceased in the tanks, following which CITGO was accused of violating the MBTA. The birds had flown into the tanks, landing in oil and dying thereafter. The indictment charged that CITGO had taken or otherwise aided and abetted the taking of protected birds.[67] The corporation's primary defenses as to the MBTA charges were premised on an intent element for bird deaths caused by "takings," with ramifications of holding otherwise being that "many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat," would become subject to criminal penalties.[68] The district court nevertheless concluded that, relying in part on the proximate cause standard established in *Apollo Energies*, CITGO's failure to cover the oil tanks over the years—an action it was required to take under other federal laws—made it reasonably foreseeable for protected birds to become fatally trapped in the oil.[69] Thus, CITGO had proximately caused the ten bird deaths and was criminally liable.

Arguments by the Government on appeal referencing *Apollo Energies* failed. The Fifth Circuit made it clear that it refused to align itself with the Second or Tenth Circuits in finding an unintentional take to mandate liability under the statute.[70] Instead, the court declared, somewhat authoritatively and relying heavily on a Supreme Court dissenting opinion regarding another statute, that "takings" are not "[reductions of] an animal to human control accidentally or by omission," but rather affirmative actions.[71] The Fifth Circuit most importantly analyzed the MBTA in the frame of the related ESA, stating that if Congress wished to expand "take," it easily could have done that which it had managed to do with the ESA and defined the term to mean "harass, harm, pursue, hunt," and further, among other terms.[72] Additionally, the culpable nature of the activities covered under the MBTA, according to the court, is not qualified or transformed by the statute's reassurance of illegality regardless of the time or manner in which they are committed.[73] The court reached its final conclusion by stating that a "take" cannot be done "unknowingly or involuntarily."[74] To the Fifth Circuit, an affirmative action taken for the

65. United States v. CITGO Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015).

66. United States v. CITGO Petroleum Corp., 893 F. Supp. 2d 841, 842 (S.D. Tex. 2012).

67. *Id.*

68. *Id.* at 845.

69. *Id.* at 848.

70. *CITGO*, 801 F.3d at 491–94.

71. *Id.* at 489 (citing Babbitt v. Sweet Home Chapter Cmtys. for a Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

72. *Id.* at 490 (emphasis omitted).

73. *See id.* (citing 16 U.S.C. § 703(a) (2012)) (stating that the acts are illegal if committed "at any time, by any means, in any manner").

74. *Id.* at 492.

purpose of causing migratory bird death is required for liability, and the court implicitly noted that CITGO's failure to cover the tanks was not affirmative enough an action to constitute such direct intent.[75]

The Eighth and Ninth Circuits found themselves addressing an originalist interpretation of "take." The Ninth Circuit was the first to confront the issue in *Seattle Audubon Society v. Evans*.[76] In that case, the United States Forest Service had sold logging rights to areas representing habitat of the northern spotted owl—a protected MBTA bird—prompting an environmental group to file an injunctive action against the agency.[77] Timber sales destroyed the owl's habitat, allegedly amounting to an illegal taking under the MBTA.

Undeterred by the fifty-five year difference between the passing of the ESA and the MBTA, the Ninth Circuit seemingly counted the number of actions covered under both Acts and, seeing that the number of terms in the former is greater than those in the latter, held that "take" in the ESA was presumptively "defined in a broader way."[78] The Ninth Circuit agreed with the lower district court, affirming that "the differences in the proscribed conduct under [the two statutes] are 'distinct and purposeful.'"[79] Importantly, the Ninth Circuit inexplicably used the ESA as a source for influence in its understanding of "take" under the MBTA. In doing so, the court revealed that although "[h]abitat destruction causes 'harm' to the owls under the ESA," its effects, "indirectly" resulting from the problem conduct, "does not 'take' them within the meaning of the MBTA."[80] In finding that strict liability made by an *indirect* action as opposed to a *direct* one is inapplicable to takes under the MBTA, the Ninth Circuit established a naturally relative connection between the ESA and the MBTA.[81]

The Ninth Circuit's decision proved persuasive to other circuits faced with the same dilemma. In *Newton County Wildlife Association v. United States Forest Service*, a multitude of wildlife organizations filed an action against the Forest Service for an injunction to prevent certain sales of timber within a national forest.[82] Specifically, the Forest Service had approved four timber sales within the forest, and the organizations on appeal raised the issue of whether the Forest Service had ignored or violated its obligations under the MBTA. The wildlife conglomerate claimed that logging occurring as a result of the timber

75. *Id.* The court did invoke an ornithological approach, noting that most of the bird deaths caused in the United States are those of birds protected under the Act. Unfortunately, the Fifth Circuit did not view this fact as a call for strict liability action. *Id.* at 494.

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

77. *Id.* at 302. (citing 50 C.F.R. § 10.13 (1991)).

78. *Id.* at 303 (citing 16 U.S.C. § 1532(19) (1988)).

79. *Id.*

80. *Id.*

81. As discussed above in this Note, the ESA can be an indication of Congress's intent with regard to similar statutes such as the MBTA. However, the Ninth Circuit in its *Seattle Audubon Soc'y* opinion does not explain the sudden contrast made to the ESA, which is apparently raised *sua sponte* and used as binding evidence of Congress's intent in enacting the MBTA.

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

sales would disrupt and inevitably kill some of the nesting migratory birds in the affected areas.[83] This presumably would implicate the MBTA, and unless the Forest Service obtained a permit as available under the FWS regulations, the agency would be in violation of the Act.

The Eighth Circuit, in addressing the strict liability proposal for "take," understood that "[s]trict liability may be appropriate when dealing with hunters and poachers."[84] Yet, building upon the Ninth Circuit's indirect-direct effects analysis, the court found that such an interpretation for actions like timber harvesting which indirectly result in the death of covered migratory birds would push the statute "far beyond the bounds of reason."[85] Thus, "take," according to the court, applies only to physical conduct of such intentional, direct actors as hunters and poachers.[86] The Eighth Circuit had effectively aligned itself with the Ninth Circuit in its decision. Following *Newton County*, three circuits, covering almost two dozen states, had ruled against the broadest of protections for America's treasured migratory birds.

III. FINDING IN FAVOR OF STRICT LIABILITY FOR INCIDENTAL TAKINGS

A. Congressional Inaction

Although it is apparent that the technological environment and thus the existent threat to American fowl in the 1980s was likely non-cognizable to congressional conservationists during the much earlier Wilson Administration, Congress still managed to explicitly uphold the *lack* of a scienter requirement in re-affirming MBTA sanctions.[87] Beyond this express understanding, Congress was presumably well aware of the *FMC Corp.* strict liability standard[88] and could have clarified a scienter requirement if it had so desired.[89]

Much of the judicial action recognizing a *mens rea* requirement for application of the MBTA sanctions for "take" is based upon an incorrect conflation of congressional *inaction* in the face of demonstrated ability and congressional *implied action*. Referring back to *CITGO Petroleum*, the Fifth Circuit there had contrasted the MBTA with the ESA, the latter statute of which

83. *Id.* at 115.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* S. REP. NO. 99-445, at 16 (1986).

88. *See* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–85 (1988) (recognizing that it is generally presumed "that Congress is knowledgeable about existing law pertinent to the legislation it enacts").

89. *See, e.g.*, United States v. CITGO Petroleum Corp., 801 F.3d 477, 490 (5th Cir. 2015) ("Congress well knew how to expand 'take' beyond its common law origins to include accidental or indirect harm to animals."). That the Fifth Circuit applies this canon of congressional foresight and presumed awareness with little explanation to advance its pro-scienter position when it could just as easily use the same principle as to Congress's powers to clarify in a sentence that intent is required for the statute is bewildering.

lists a number of actions included under its "take" definition.[90] The court failed to notice the fact that the terms within the ESA that compromise "take" are *necessarily* intertwined with an element of intent. Precisely, the ESA statute cited in the case reads as follows: "The Endangered Species Act explicitly defines 'take' to mean 'harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'"[91]

The ESA's definition of "take" interestingly differs from MBTA's "take" by design. In an attempt to obviate this stipulation, one must examine the practicality of the terms in the statute. On their own, all except one of the terms in the ESA definition of "take" have little effect without intent. "Hunt," for example, can only imply intent, since it is defined as "pursu[it] with intent to capture."[92] Thus, an intent to commit the act is clearly required, and any pursuit cannot be a "hunt" without it. Of course, if the prohibited actions did not require intent, virtually all actions that *affect* protected birds in a harmful way would be within the bounds of the ESA. Simply put, "harm" is the only term of almost a dozen that might not necessitate an intent to commit the action.[93] On a different note, the ESA's "take" definition might also be said to be more limited than or just as limited as that of the MBTA. While it is true that the MBTA does have fewer defining terms than the ESA as to "take," fewer terms can still encompass a similar breadth as would a more thorough, exhaustive statute.[94]

"Take" as discussed has been interpreted most expansively in the context of misdemeanor violations under § 703 as a "strict liability crime[]."[95] The Fifth Circuit, however, has imposed a maximum limitation on "take," requiring that there be an affirmative, deliberate action resulting in the assumption of control over a migratory bird.[96] In doing so, the Fifth Circuit forgot to deduce logically the omission aspect of "take." An omission, or failure to act, can also attribute

90. *Id.*

91. *Id.* (emphasis omitted); 16 U.S.C. § 1532(19) (2012).

92. *Hunt*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003).

93. *Harm*, Merriam-Webster Collegiate Dictionary (11th ed. 2003) (defining "harm" as only "to cause harm," which implicates no element of intent).

94. *See, e.g.*, People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1346 n.24 (S.D. Fla. 2016) (acknowledging that although the Marine Mammal Protection Act's definition of take has fewer terms than does that of the ESA, due to similar penalties, administration, and purpose of the statutes, the term "'take' within the meaning of the [statute] should be analyzed reasonably consistent with the ESA"). Courts have also used the statutory construction canon *noscitur a sociis* to determine the meaning of unclear words by the terms immediately surrounding. *See* Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961) (using the doctrine of *noscitur a sociis* to interpret a statutory term from among a list of sources as having the narrower of at least two available meanings). For affirmation that the MBTA is not overbroad, *see* United States v. Apollo Energies, Inc., 611 F.3d 679, 688–89 (10th Cir. 2010) ("The MBTA is not unconstitutionally vague. . . . The actions criminalized . . . may be legion, but they are not vague.").

95. *Apollo Energies*, 611 F.3d at 685.

96. *See CITGO*, 801 F.3d at 489.

fault to the non-actor.[97] If the definition of "take" is to be seen as the reduction of animals to human control by killing or capturing,[98] as the Fifth Circuit suggests,[99] then take is much more prevalent than the Fifth Circuit might want to admit. In *Apollo Energies*, the Tenth Circuit found that the defendant company was aware that birds could be trapped inescapably in its heater-treater equipment.[100] Further, FWS estimates indicate that anywhere from 500,000 to over a million migratory birds are killed annually in heater-treaters, ponds, and oil pits.[101] Migratory birds can easily slip into tight spaces or fall into oil pits, thereby instituting what essentially amounts to an inadvertent capture—and therefore a take—if the birds have no method of exit. To say that MBTA misdemeanor liability can only be extended to these deaths if the responsible actors purposefully led birds to sites where they would drown or the pipes where they would be trapped would be to shear the logical wool from the conservationist, originalist sheep, symbolizing a harbinger for the devolution of existing migratory bird habitats under the guise of ignorance. In other words, in the context of migratory bird take, and against the Fifth Circuit's own disbelief, one absolutely can "reduce an animal to human control accidentally or by omission."[102]

In an additional point, Congress's amendments to the MBTA expressly exempt certain incidental or unintentional takes from the provisions of the Act. One such amendment was enacted in 2002[103] in response to a district court ruling finding the United States military liable for violating the MBTA when several species of protected birds were incidentally killed.[104] Not even one year after the opinion was released, Congress convened to explicitly excuse application of the MBTA from "the incidental taking of a migratory bird by [the military] during a military readiness activity."[105] Most apparently, Congress was conscious of its ability to alter the scope of the MBTA in a triage fashion when the interests of other sectors of the Government overshadowed the mission of the Act. Since, as explained above, minimal action has been taken

97. WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIM. L. § 5.5 (3d ed. 2019) (acknowledging the long-standing practice of punishment accorded to both acts and omissions).

98. *See* Babbitt v. Sweet Home Chapter Cmtys. for a Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

99. *CITGO*, 801 F.3d at 489.

100. *Apollo Energies*, 611 F.3d at 691.

101. *Entrapment, Entanglement & Drowning*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/entrapment-entanglement-drowning.php, (Nov. 30, 2018).

102. *CITGO*, 801 F.3d at 489. The Fifth Circuit used this original quotation in *CITGO* to exclaim how taking an animal by reducing it to human control can only be done affirmatively.

103. BOB STUMP NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003, Pub. L. No. 107-314, § 315, 116 Stat. 2458 (2002).

104. Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated as moot sub nom*. Ctr. for Biological Diversity v. England, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

105. BOB STUMP NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003 § 315.

since the circuits forged their alliances as to a *mens rea* requirement, it can only be reasoned that Congress is acquiescing to the widest scope of liability possible.

From the perspective of logic, strict liability for the take of migratory birds is indubitably broad enough to encompass every intentional activity alluded to in the aforementioned precedents.[106] Obviously, the Act would stand to be of infinitesimal importance if its provisions did not even apply to intentional activity. Congress, through its several revisions of the Act and countless opportunities for judicial restriction, for constraint, for elaboration and clarification of the activities warranting criminal liability, has in effect condoned courts' application of strict liability. If it were otherwise, Congress would be permitting the "unintentional" creation of conditions in which birds might drink toxic water[107] or become fatally trapped in heating vents, which has already been shown to be somewhat more than an uncommon phenomenon.[108]

The courts exclaiming that a "single carve-out from the law [does not] mean that the entire coverage of the MBTA was implicitly and hugely expanded"[109] are misguided. While the 2002 amendment to the MBTA could in a vacuum be considered a carving-out of the statute's applicability, the statute's *mens rea* should not be viewed as a pair of farms, one scienter and one strict liability, with the amendment shepherd responsible for the transfer of one sheep from the former to the latter. Rather, *mens rea* in the context of the MBTA should be viewed as a single, strict liability farm able to support six sheep and currently possessing as many following the removal of an extraneous incidental "takings" sheep from the 2002 amendment. Here, strict liability inherently covers all intentional and purposeful activities. Creating a one-off exception as was done for the military is Congress at worst recognizing an oversight, and at best acknowledging a particularly special need for the carve-out, as opposed to addressing such a broad, statute-defining issue as a scienter element. The military exception is but a single sheep removed from the farm when the shepherd realizes the livestock count is over-capacity. If the standard for MBTA-liable conduct were intentional or deliberate—the highest possible standards—as some circuits tend to believe, Congress would not need to expend the effort to exclude from the statute's application the incidental, i.e., unintentional, takings which would *already* be beyond the scope of the statute's scienter requirement. In other words, expecting the shepherd to maintain only five sheep when the farm could sustain six would be beyond reason; it is most conceivable that the shepherd would be well aware of the farm's capacity, and would not have to remove any more sheep than could be sustained on the land.

106. The idea of a logical root has been evinced and supported by courts since even before the Second World War. *See, e.g.*, United States v. Reese, 27 F. Supp. 833, 835 (W.D. Tenn. 1939) ("Congress deliberately omitted scienter as an essential ingredient of the minor offense under consideration. This concept is logical in light of the known practicality of [Congress] . . . .").

107. *See* United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978).

108. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 691 (10th Cir. 2010).

109. United States v. CITGO Petroleum Corp., 801 F.3d 477, 491 (5th Cir. 2015).

B. Protecting America's Birds and Protecting America

There is no doubt that the current statutory interpretation situation is conflicted at best. Between the Solicitor Opinions and the two primary factions of obstinate circuits reaching definitively and ostentatiously differing conclusions as to Congress's intended scope for "take," it is easy to become confused. Because of the evident inability to predict what the standard will be in a circuit where this issue has not yet been considered, it is of utmost necessity to support a single mode of liability.

This responsibility of course might seem to lie best with Congress as the supreme legislative body.[110] However, upon examination of the initial establishing treaty, the 1916 convention between the United States and Great Britain,[111] every reference to "take" throughout the treaty is made without indication as to its scope, i.e. there is no relevant limitation on conduct as exists elsewhere throughout the MBTA.[112] *Nowhere* throughout the document is there a specific, express mention of intent, understanding of liability, restriction on culpability, or similar explanation. As implemented in the MBTA, the statute as required by the treaty sets forth the treaty's provisions as they appear in the convention. It would be improper to assume that more should be done, that Congress should take it upon itself to place further definition upon the parameters of the treaty and potentially circumvent the goal of the treaty. The treaty itself mandates that the United States through its legislature is to establish a system with the goal of "[accomplishing the treaty's] objects and to the end of concluding a convention" for those purposes.[113] Thus, for Congress to go beyond the bounds of the treaty or place upon it too tight a restriction would risk embarrassing the United States' international reliability and treaty system.[114] It is in effect in both Congress's and the nation's best interests to enact a statute implementing the treaty only using the terms as defined—or not defined, in this case—and to avoid unduly qualifying its provisions.[115] With that said, this situation should be clarified and remedied by the Supreme Court.

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110. *See* Brittany E. Barbee, *To Kill a Migratory Bird: How Incidental Takes by Commercial Industry Activity Should Be Regulated by a New Civil Penalty Regime, Not the Current MBTA*, 24 BUFF. ENVTL. L.J. 91, 114 (2016–2018) ("[I]t is time for lawmakers to craft [a solution] that fits.").

111. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-G.B., Preamble, Aug. 16, 1916, 39 Stat. 1702.

112. *See generally id.*

113. *Id.* at 375.

114. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920) (interpreting the MBTA) ("[T]here may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ."); *see also* Edye v. Robertson, 112 U.S. 580, 598 (1884) (stating that treaties' provisions depend on the enforcement by "the interest and the honor of the governments which are parties to it, If these fail, its infraction becomes the subject of international negotiations and reclamations."). *Edye* makes clear that although treaties do not take precedent over acts of Congress, if a nation's legislature introduces a conflict between a domestic statute and an international treaty provision, there might be international consequences.

115. This might also serve to nullify the conflicting provisions of the treaty in the international sphere. *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (declaring, in the context of

Birds in America are in trouble, even more so than previously thought. In modern America, the bustle of the urban centers often masks the presence of birds in the sky and in parks. The seeming abundance of birds in cities today produces a subconscious shroud, defining the façade that "[t]here are still a lot of birds out there."[116] With an ostensibly immense number of birds, it may be effortless to overlook their stark decline. Yet there is little that can be done by the common citizen in these times to make these birds the topic of conservation.

These American natural flying animals have been a symbol of nature and a catalyst for its worship since before the arrival of Europeans.[117] Preservation of this nature should be of utmost importance to the country as a whole, and its lasting legacy as retaining what the United States Forest Service called an escape to the frontier that has remained with America as an established value since the 1800s.[118] Congress has placed concerns for the best interests of birds at the forefront since at least the early twentieth century. One primary policy behind the proposal of protective legislation was to

> [l]et the songbird live to herald to the world its happy and joyous anthem proclaiming the goodness of God to all its creatures . . . . Civilization, ever advancing along the world's pathway, pleads for humanity, for the birds, so helpless and yet so useful.[119]

And so it was that Congress and its international counterparts have long sought the protection for migratory birds as indicia of a healthy society and a token for nature in the modern world.[120] This desire was reflected even across ideological lines, notably between the United States and the Soviet Union.[121] But alas, neither the Executive in negotiating treaties nor Congress in implementing them can be perfectly sound and detailed. When confronted with the ambiguity behind "take," some courts, like the Fourth[122] and Second Circuits, have recognized the veracity of the true mission of the various treaties and have pointed out that a stern lack of *mens rea* is necessary to fulfill this objective.

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domestic law, that a conflicting statute subsequent to a treaty renders the treaty null to the extent of the conflict as the nation's obligations under the treaty apply to domestic law).

116. Ed Yong, *The Quiet Disappearance of Birds in North America*, ATLANTIC (Sep. 19, 2019), https://www.theatlantic.com/science/archive/2019/09/america-has-lost-quarter-its-birds-fifty-years/598318/.

117. Stephen D. Peet, *Animal Worship and Sun Worship in the East and the West Compared*, 10 AM. ANTIQUARIAN & ORIENTAL J. 69, 72 (1888).

118. U.S. DEP'T OF AGRIC. FOREST SERV., TECH. R. N-30, CHILDREN, NATURE, & THE URBAN ENVIRONMENT: PROCEEDINGS OF A SYMPOSIUM-FAIR 29 (1977).

119. United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978) (citing 56 CONG. REC. 7362 (daily ed. June 4, 1918) (statement of Rep. Stedman)).

120. *About Us: International Cooperation*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/about-us/international.php (Nov. 20, 2017) (discussing the significant benefits of sustainable bird populations and healthy habitats to society).

121. *See, e.g.*, Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

122. *See infra* text accompanying note 156.

It is all but the greatest of stretches to use the ESA, the purpose for which was the provision of a safe ecosystem for "*endangered species and threatened species*,"[123] as opposed to the protection of certain birds generally, as a sort of arbiter for the scope of "take." The Ninth Circuit in *Seattle Audubon Society* erred when it viewed the ESA's statutory definition of "take" to be narrow so as to include only intentional, deliberate actions made in order to cause harm to the birds. Congress meant for the MBTA to be broader on a societal scale, hence the ESA's cornered coverage of only species categorized as endangered or threatened at any time by the federal government, as opposed to the voluminous laundry list of enumerated species in the MBTA.

C. The Inevitable Predictability Defense to Support a Scienter Requirement

Perhaps the most predictable argument is one which is aptly so named: the extent of liability under the MBTA will be impossible to predict in a strict liability regime. So, the argument goes that it would be incredulous to foresee potential future bird deaths, and that all acts not directed towards birds should not be criminalized as such.[124] For those proponents, it would be somewhat of a Sisyphean endeavor to avoid the potential for liability.[125]

While indeed it may be true that foreseeability is a substantial factor in everyday life, and that the MBTA could utilize additional definition, this realization is not a crutch for this Note's argument. It is also a natural thought that a motorist colliding with a bird without intent should not be the basis for criminal liability.[126] But for one to result to *reductio ad absurdum* to chafe down the concept of causation to parsnips is tantamount to intellectual dishonesty. As with every criminal conviction, the MBTA would require the criminal conduct to have caused the result.[127] "Proximate cause" in the sense of a strict liability statute such as the MBTA is defined as actions which produce injury, and "without which the accident could not have happened, if the injury be one which might be *reasonably anticipated or foreseen as a natural consequence* of the wrongful act."[128] Now the picture becomes relatively clear. Absent a reasonable anticipation of the consequence, there would be no legal causation, and therefore no associated liability. Strict liability statutes such as the MBTA do not escape the requirement of legal causation as part of the prosecution's burden.[129] In effect, the lack of a scienter requirement would not

123. 16 U.S.C. § 1531(b) (2018) (emphasis added).

124. *See* United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615, at *19 (D.N.M. Feb. 25, 2009).

125. *See* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) ("Proper application of the law . . . should not lead to absurd results.").

126. *See* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 192 (1979).

127. United States v. CITGO Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015).

128. *Proximate Cause*, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added).

129. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (noting that "proximate causation 'normally eliminates the bizarre'").

guarantee liability under the MBTA for every bird death. The effect is almost a vanishing act of opponents' cries of impossible foresight when considering the fact that deceased migratory birds do not normally constitute a probable or foreseeable circumstance following an airplane takeoff or high-rise cleaning.[130] These circumstances and the actors involved in them would thus not be found to have proximately caused the death of any bird given their innately innocuous status.

Another rendition of this counterargument is buttressed by the commonsense premise that in the situations covered by the structure advanced in this Note, there is indeed foreseeability. For example, a mining company that *negligently* or *recklessly* harbors toxic waste or product by use of accessible, uncovered silos would likely be aware of the increased danger to wildlife, whether or not those birds are protected under the MBTA.[131] In this instance, "there is some element of 'foreseeability,'"[132] demonstrated by the fact that the company would have been "aware of conditions [creating] a likelihood that . . . such an injury" would be suffered.[133] The affirmative, voluntary act in the example would be the production of a highly toxic pesticide or waste product and neglecting to take necessary preventive steps to ensure wildlife safety.[134] As described above in Part II, the Second Circuit found this to be a convincing flashpoint when it assessed liability against a corporation in a similar instance, i.e. on the basis of reasonable foreseeability of the inherent danger posed to local migratory birds by the circumstances the company created. Thus, the argument of predictability is left to balance on only one of its legs.

It would be an almost equally difficult or asinine task to request that Congress, in enacting its laws, state precisely every possible form of conduct prohibited under the statute, or alternatively to make conduct unlawful by such a broad statement that no interpretation of the statute would be possible.[135] Further, the task of determining the true liability of a given defendant should be relegated to the jury and bench trial system.[136] In keeping the MBTA as it is

130. *See Moon Lake*, 45 F. Supp. 2d at 1085.

131. *See Threats to Birds: Electrocutions*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/electrocutions.php (Nov. 16, 2018) (delineating known threats presented by open-air power and distribution lines); *see also* United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010) ("It is obvious the oil equipment can [take or kill migratory birds.]").

132. Coggins & Patti, *supra* note 126, at 192; *see also* Lillie v. Thompson, 332 U.S. 459, 461–62 (1947) (applying the principle to a third-party negligence situation).

133. *Lillie*, 332 U.S. at 461–62*; see generally* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (finding FMC Corporation not per se culpable as there was no knowledge or awareness of the circumstances leading to the deaths of the birds).

134. *See FMC Corp.*, 572 F.2d at 907 ("FMC did perform an affirmative act it engaged in the manufacture of a pesticide known to be highly toxic. Then it failed to act to prevent this dangerous chemical from reaching the pond where it was dangerous to birds.").

135. *Cf.* Coggins & Patti, *supra* note 126, at 193 (explaining throughout that the jury system has a "flexible genius" that will parse the genuine complaints from the "frivolous possibilities").

136. *See id*.

with only slight clarification, if a jury or judge feels that a defendant's conduct does not warrant a criminal sanction, as would most definitely be the case with an alert automobile driver who inadvertently impacted a pelican flying across the freeway, assuming the event were foreseeable in the first place, the adjudicator can relieve the defendant accordingly and still be consistent with the statute's provisions and mission.

D. Delimiting the Strict Liability Proposal

This all may seem like an overbroad expansion of the strict liability standard proclaimed in the Second and Tenth Circuits. However, this Note's explication of a proper resolution does not go without limitations, as some boundaries must be set in order to avoid convicting a defendant who has yet to commit *any* affirmative act or offend all rationality in statutory construction.[137] By analogy, the mere act of placing lethal telephone wires or distribution lines seems hardly distinguishable from that of the mining company described above. Yet, it could not be said that transmission or other electrical towers should be encased in plastic or other shielding to preclude all possible danger to avian creatures. Of primary significance, however, between the aforementioned telecommunications difficulty and, for example, the maintenance of the glass exterior of a skyscraper, is the fact that there are reasonable, proven alternatives in place for only the former activity.[138] As addressed in two opposing circuit opinions, proximate cause might be said to be present when dangerous conditions emerge from a given operation and reasonable harm-free or reducing options exist.[139] In *Apollo Energies*, the Tenth Circuit affirmed convictions for a corporation that was aware that "its equipment was a bird trap that could kill," having been so apprised in December 2005, when FWS alerted the company to issues posed by the failure to cover some of its equipment's exhaust pipes.[140] Recognizing that information relating to available and reasonable precautions and protective measures was present and that the corporation was therefore provided sufficient notice, the Tenth Circuit found that the defendants' convictions in these situations were duly justified,[141] again premised primarily on constitutional notice and buttressed by proximate cause.

The principle of notice attributed to available and reasonably accessible alternatives should be extended to all sources of deaths of or injury to migratory birds caused by commercial sources. For instance, a substantial amount of

137. *See* United States v. CITGO Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015) ("[A] defendant must still commit the act to be liable."); *see also FMC Corp.*, 572 F.2d at 905 (noting that too wide a construction "would bring every killing within the statute . . . [and] would offend reason and common sense").

138. Coggins & Patti, *supra* note 126, at 191.

139. The Tenth Circuit posed and approved of this proximate cause standard in United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010), while the Fifth Circuit explicitly rejected the Tenth Circuit's rendition of strict liability in *CITGO*, 801 F.3d at 493–94.

140. *Apollo Energies*, 611 F.3d at 691.

141. *Id.*

migratory bird injury can be attributed to electrocutions by distribution lines, with estimates ranging from just under a million, up to fourteen million per annum.[142] Perhaps the thought is that this predicament is an inevitable one.[143] Reality, however, demonstrates that in fact reasonably available and cost-effective safeguards exist[144] and can minimize the possibility that a protected bird will be impacted by any such power line. Courts have also begun to recognize such facets of industry and routine practice as a source of liability notice that power lines without appropriate safeguards might provide.[145] Thus, as avian injury on distribution poles is reasonably preventable, and with plenty of precedent indicating an abundance of knowledge, there is no reason as to why these changes cannot be implemented. Of course, this does not go to say that all preventive measures should be taken into consideration no matter their cost or proven effectiveness. The boundary should be within the realm of reason, influenced by due process standards of sufficient notice and time reasonably necessary for a potential violator to act following the discovery of an acceptable prophylaxis to limit their MBTA liability. This is to be limited to commercial conduct, including acts and omissions, in situations in which a migratory bird may be taken.[146] Thus is proposed perhaps the finest edge of this understanding, one that ensures that an impact against a protected bird by either a company or an individual will guarantee the actor is informed that "there ain't no such thing as a free lunch."[147]

It is true of course that such a strict liability standard will do nothing to reverse the plight of the passenger pigeon which may have been the very motivation behind the original convention between the United States and Great Britain.[148] After all, it was two years before the signing of that treaty that the passenger pigeon's last lights went out in the world, having been at least a billion strong a mere forty years earlier.[149] Furthermore, the position advanced in this Note has all but implied the necessary knowledge aspect of potential effects on migratory birds which might bring relevant conduct into the scope of the statute. Put explicitly: the adjusted strict liability standard proposed here is

142. *See Threats to Birds: Electrocutions*, supra note 131.

143. *See* Coggins & Patti, *supra* note 126, at 192.

144. *Threats to Birds: Electrocutions*, supra note 131.

145. *See* United States v. Moon Lake Elec. Ass'n Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999) (MBTA prosecution for company's failure to implement inexpensive safeguards resulting in the deaths of a number of birds).

146. *See* United States v. Van Fossan, 899 F.2d 636 (7th Cir. 1990) (affirming conviction of defendant who inadvertently poisoned two protected birds when trying to eliminate intruding common pigeons).

147. *Id.* at 637. Judge Easterbrook applied the relevant remark there to the context of the birds which had become victims of the poisoning.

148. *See* Krisztina Nadasdy, *Killing Two Birds with One Stone: How an Incidental Take Permit Program under the MBTA Can Help Companies and Migratory Birds*, 41 BOS. C. ENVTL. AFFS. L. REV. 167, 170–71 (2014).

149. JOEL GREENBERG, A FEATHERED RIVER ACROSS THE SKY: THE PASSENGER PIGEON'S FLIGHT TO EXTINCTION xii (2014).

limited to only those acts for which there is at least some knowledge of the reasonably foreseeable take or, by extension, killing of protected birds. It is necessary that "substantial evidence of pervasive industry knowledge"[150] about circumstances allowing for MBTA liability implications exists and is proven by the prosecution. This qualification serves to encompass all the opinions of the federal circuits heretofore discussed and to further guide current courts in navigating this liability sea. It additionally functions as a counter to any novel or idiosyncratic developments which may otherwise in short time fail to provide notice to actors in migratory bird territory of the duty and ability to prevent such deaths or the imposition of knowledge and subsequent failure to comply.[151]

IV. THE ULTIMATE COMPROMISE—A PREFERRED ALTERNATIVE

It should be clear now how far the statute should extend. But the question remains as to which actors *qua* actors will be covered under the Act. Perhaps an objection will be made that while hunters and oil companies are not much different with respect to their takings of migratory birds, an individual who hit a baseball which impacted a bird at 100 miles per hour is ostensibly less culpable. This is entirely reasonable, but is not the position adopted by this Note. To properly serve the purposes of the MBTA, that is, to effectively maintain healthy populations of migratory birds,[152] more must be done as a matter of policy to refine the imprecise bounds of the Act's liability. In doing so, the compromise should apply most specifically to commercial activities, both unintentional and intentional, which *directly* affect migratory birds. This so far is consistent with the interpretations proposed by the circuit courts and serves as a judicial salt lick for a future Supreme Court ruling should the issue come to fruition at that level.

This proposition covers all the bases and links the prior opinions, save for one important outlier which runs counter to the law itself. It is understood that indirect effects on birds relates to damage to their habitat, whether by destruction or modification. Of course, intentional harm to these habitats would find little defense in the courts under such statutes as the ESA,[153] and thus the primary contention with the MBTA is that such harm by virtue of its effect on

150. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 691 (10th Cir. 2010). One specific instance of this principle in action is exemplified importantly in *Apollo Energies*, where the FWS had explained that bird deaths in a certain mechanical component of the oil plant were "brand new" to the FWS prior to agency inspections. *Id.* Significantly, as to one of the defendants, Red Cedar, the Tenth Circuit reversed a lower court's finding of MBTA liability based on a lack of evidence pointing to imputed precognition as to one of the bird deaths with which Red Cedar was charged based on the novelty of bird deaths in heater-treaters. *See id.*

151. *See* Lambert v. California, 355 U.S. 225, 229–30 (1957) (describing due process implications for lack of notice).

152. Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RES. J. 47, 48–49 (2000).

153. *See* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); *see also* Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

the birds' habitat "takes" said birds.[154] The final rule for "take" liability in resolving the circuit split that this Note crafts is as such: strict liability is attributed to commercial acts which directly result in the "take" of a migratory bird, that are conducted with an awareness of the potential for danger of take to migratory birds, and which would be classified as a misdemeanor under § 707(a) the Act. This formulation of the rule incorporates the indirect-direct factor introduced by the Eighth and Ninth Circuits, and synthesizes it with the foreseeability requirement of the Second and Tenth Circuits. Further, and importantly, even if an act conventionally seen as "indirect" as habitat destruction were to occur, the event would likely still be brought under the statute's "direct effects" umbrella, since habitat destruction almost always accompanies deaths of, and therefore takes of, the birds within them.[155] If the rule were to be further abstracted to fully incorporate the Fourth Circuit's view on communication,[156] however, the resultant interpretation would almost indubitably lead to a construction that "offend[s] reason and common sense."[157] Thus, this rule as stated serves to avoid attaching unnecessary criminal liability to those who maintain skyscrapers or merely drive their car down the freeway, as the alternatives to having tall buildings or driving anywhere are currently far too unrealistic and counterintuitive to implement. It also keeps in line with Congress's purpose of protecting migratory birds from further extinction to a reasonable degree, that is, without impeding modern society as it exists.

Adoption of this compromise allows for the gap to be bridged between the two practical circuit factions. The one exception alluded to above is *United States v. CITGO*.[158] Simply put, the *CITGO* court rides strictly against the legislative intent of the statute, seemingly in an oversight. As opposed to merely limiting the strict liability application to acts with direct effects, the Fifth Circuit exclaims that no "take" can be done without knowledge or intent.[159] Contrary to this Note's reading of the case law above, the Fifth Circuit based much of its

154. *Cf. Decline in Bird Populations: Hearing on Going, Going, Gone? An Assessment of the Global Decline in Bird Populations Before the H. Nat. Res. Subcomm. on Fisheries, Wildlife and Oceans*, 110th Cong. (2008) (testimony of Paul Schmidt, Assistant Director for Migratory Birds Program, U.S. Fish and Wildlife Service) (exclaiming that of the many factors affecting declining migratory bird populations, "habitat loss is the most significant").

155. *Threats to Birds: Habitat Impacts*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/habitat-impacts.php (May 24, 2016) (noting that damage to "migratory bird habitat [has] been identified as potentially the largest individual threat to migratory birds").

156. This refers to the construction proffered in *United States v. Boynton*, which indicated that hunters would by a subjective standard be able to inform themselves of certain objective community practices which might indirectly lead to migratory bird "takes" by inquiring with the FWS prior to engaging in the activities. 63 F.3d 337 (4th Cir. 1995). The *Boynton* standard if applied to the context of this Note would be much too burdensome and likely a farfetched reach beyond the text of the statute, since this Note bases its conclusions primarily in the realm of commercial "takes."

157. United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978).

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

159. *Id.* at 492.

opinion on the lack of congressional intent to apply strict liability to misdemeanor crimes. As this Note has demonstrated, Congress was well aware of the existing strict liability standard, and in its 1986 amendment clearly and explicitly stated that "[n]othing in [the] amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under [§ 703(a)]," which at the time had already "been upheld in many Federal court decisions."[160] It is of unsurmountable clarity here that Congress acknowledged the contemporary common law situation and was complacent in the standard's judicial enforcement, which therefore raises the question of why the Fifth Circuit missed its pastoral opening and instead opted to become an appellate black sheep. After all, the *CITGO* court itself re-affirmed a Supreme Court standard that courts are to advise specifically that, absent indications to the contrary, "Congress intends to adopt the common law definition of statutory terms."[161] Congress here undoubtedly acquiesced to the common law definition of "take," and therefore the *CITGO* court provided for itself an apparent exception to the exception in formulating its rule.

CONCLUSION

Strict liability crimes generally "involve statutes that regulate potentially harmful or injurious items."[162] Given the loss of Executive support in late 2017's Solicitor Opinion,[163] it might become significantly more difficult to protect the lives of migratory birds around the nation. Aside from the Department of the Interior's current refusal to prosecute incidental takes, however, it will still be possible for concerned organizations to assess the destruction of bird habitats as a source of direct "takings." Until either a new administration realizes again the purpose of the Act as the Obama Administration did[164] or the Supreme Court or Congress cements the standard for liability for "take," it will be the duty of individuals, companies, and the like to do their best to consider the avian creatures America and its culture view so highly. The importance of this reality cannot be stressed enough, for it would be better to preserve the nation's wildlife and hedonistic release back to nature from modern urban life, than to lament later how admirably prophetic a Congress over a century ago might have been.

160. S. REP. No. 99-445, at 16 (1986).

161. *CITGO*, 801 F.3d at 489 (citing United States v. Shabani, 513 U.S. 10, 13 (1995)).

162. Staples v. United States, 511 U.S. 600, 607 (1994).

163. December Memo, *supra* note 34.

164. January Memo, *supra* note 33.