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A Relic of the Past or the Future of Environmental Criminal Law? An Argument for a Broad Interpretation of Liability under the Migratory Bird Treaty Act

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"When Emily Dickinson writes, 'Hope is the thing with feathers that perches in the soul,' she reminds us, as the birds do, of the liberation and pragmatism of belief."[1]

The Migratory Bird Treaty Act is one of our nation's oldest environmental statutes. It was passed decades before the major environmental law renaissance of the 1970s, and is lesser known than the more contemporary wildlife protection statutes that dominate headlines and political debate, such as the Endangered Species Act. The Migratory Bird Treaty Act is a broadly written criminal statute that is unique in the way it provides for the blanket protection of over one thousand native bird species in North America, regardless of whether they are listed as endangered. The Migratory Bird Treaty Act is thus a critically important tool for bird conservation, as it provides legal protection for millions of individual migratory birds that forage, nest, and migrate in an increasingly developed landscape. Nevertheless, the Migratory Bird Treaty Act faces many critics, because its scope potentially criminalizes any human activity that causes the death of a migratory bird, and because it relies on the Fish and Wildlife Service's prosecutorial discretion to temper its broad reach.

Debate over whether the Migratory Bird Treaty Act prohibits incidental take has pitted industrial actors against bird conservationists, and created a

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1. Terry T. Williams, Refuge: An Unnatural History of Family and Place 90 (2d ed. 2001).

circuit split that is made more confusing by courts' conflicting interpretations of the basic elements of the Migratory Bird Treaty Act as a criminal statute. Without more clarity, the future and efficacy of the Migratory Bird Treaty Act are uncertain; however, courts can transform the statute into the effective conservation measure it was intended to be by applying a consistent proximate cause analysis when reviewing alleged violations. A criminal statute that imposes broad liability constrained by prosecutorial discretion may be the best model for addressing diffuse environmental harms in a rapidly changing world. And, clarifying the scope of the Migratory Bird Treaty Act with a consistent legal standard would make it more fair, predictable, and effective in protecting migratory birds in the United States.

INTRODUCTION

In the twenty-first century, the planet faces a host of anthropogenic threats that are exceedingly numerous, diverse, interrelated, and depressing. From the overarching threat of climate change to the related harms it magnifies—such as ocean acidification, loss of biodiversity, and sea level rise—the environmental challenges humans face today are difficult to comprehend and even more difficult to address through the existing legal system. While quite diverse in their impacts, most environmental threats share a common characteristic: that diffuse, small-scale, individual actions combine to create serious problems on a global scale. This is especially true of threats to the survival of migratory birds in North America and around the word.[2]

In many ways, birds are humans' best ambassadors for conservation and the natural world. Birds are beautiful, smart, and social; their capacity for flight has captured the hearts and imaginations of humans throughout history.[3] Birds

2. This Note focuses on migratory birds native to North America, while recognizing that bird species throughout the world face similar threats.

3. *See generally* EDWARD A. ARMSTRONG, THE FOLKLORE OF BIRDS: AN ENQUIRY INTO THE ORIGIN & DISTRIBUTION OF SOME MAGICO-RELIGIOUS TRADITIONS (1958) (detailing humans' fascination with birds in folklore and religious traditions throughout history).

may seem immune to human threats, as they populate skies and gardens in seemingly endless flocks and their morning chatter remains a familiar soundtrack in even the most industrialized and urban environments. But, in reality, many of the 1027 native migratory bird species in the United States are in decline, threatened by a plethora of anthropogenic changes to the natural world,[4] which birds have inhabited for 150 million years.[5] The declining numbers of many species of migratory birds in North America illustrates the challenge of successful conservation measures when threats are diffuse and individualized.[6] Migratory birds' long-term survival is affected each day by the aggregate impact of many small, individual human actions throughout the country: a refinery fails to cover a wastewater pond or a family lets their domestic housecat roam outdoors.

As humans continue to affect drastic, damaging changes to our planet, the existing legal regimes we have long relied on to protect the environment are no longer an adequate fit.[7] Public law may be required to more actively and aggressively police individual actions than in times past.[8] In the realm of criminal law, one solution may be accepting the criminalization of more actions that, on their face, do not signal the type of moral turpitude for which we have traditionally restricted criminal law.[9] We may also be forced to conceptualize environmental criminal law on a more global scale by choosing to penalize actions that have harmful global consequences, even if the local effects are negligible. Though this seems a radical conceptualization of environmental crimes, there is in fact one federal statute that criminalizes the harmful aggregate results of individual acts, and is rooted in an international understanding of environmental threats—the Migratory Bird Treaty Act (MBTA) of 1918.

Congress enacted the MBTA to carry out a convention and treaty between the United States and Canada[10] to protect and conserve migratory birds in North America that were facing grave threats from unregulated commercial

4. *Threats to Birds*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last visited May 10, 2017).

5. Gareth Huw Davies, *Evolution: Birds Arrived Comparatively Late*, PBS, http://www.pbs.org/lifeofbirds/evolution/ (last visited May 9, 2017).

6. *See Threats to Birds*, *supra* note 4.

7. *See* Eric Biber, *Law in the Anthropocene Epoch* 2–4 (U.C. Berkeley Pub. Law Research Paper No. 2834037, 2016), https://ssrn.com/abstract=2834037 (arguing that as we move into the so-called Anthropocene Epoch as a result of many individual, aggregate harms to our environment, current legal systems will be strained and greater government intervention into individuals' lives will be one of the resulting legal outcomes).

8. *Id.* at 4.

9. *Id.* at 51–53.

10. In 1916, Great Britain ratified the treaty on behalf of the Dominion of Canada, which was still dependent on Great Britain in foreign policy matters in the early twentieth century. KURKPATRICK DORSEY, THE DAWN OF CONSERVATION DIPLOMACY: U.S.-CANADA WILDLIFE PROTECTION TREATIES IN THE PROGRESSIVE ERA 5, 15, 215–16 (1998). Congress passed the MBTA to implement the Treaty, and President Woodrow Wilson signed it into law on July 3, 1918. *Id.* at 230.

hunting.[11] The MBTA is less complex than the major American environmental statutes that were enacted decades later in the 1970s; its core provisions are written broadly and make it a crime to kill, take, hunt, or otherwise participate in the sale or trade of 1027 species of native migratory birds.[12] The MBTA is enforced by and at the discretion of the U.S. Fish and Wildlife Service (FWS).[13] Over the years, many of those convicted of violating the MBTA have been industrial operators, particularly in the oil and gas sector.[14]

The MBTA has critics on all sides. Some industry actors believe it is too vague and allows for the arbitrary prosecution of otherwise lawful, economically important commercial activities, privileging the renewable energy industry while targeting oil and gas producers.[15] Bird conservation groups believe it needs to be strengthened by regulation to explicitly hold industries accountable for causing even accidental, unintentional deaths of migratory birds, which are referred to as "incidental take" in wildlife law.[16] This Note argues that the MBTA should simply be interpreted and applied as it is currently written—as a broad, strict liability statute imposing criminal liability on traditionally regulated activities. Its strict liability mens rea is crucial to maintaining a strong incentive for the many industrial actors that should be encouraged to proactively prevent bird mortality, since its potentially broad reach would be tempered by prosecutorial discretion in choosing which cases to investigate or prosecute.

This Note argues that interpreting the MBTA as a strict liability statute, but applying a uniform proximate cause standard, is the best way for courts and prosecutors to resolve confusion over liability for incidental take and uphold its purpose to protect and conserve migratory birds. Though this Note argues that the text of the MBTA should remain unchanged, it concedes that the MBTA's greatest weakness is the confusing and conflicting manner in which different courts have interpreted its provisions. Some courts that have upheld a broader interpretation of the MBTA have looked to the doctrine of proximate cause to constrain the statute's broad reach and to address the constitutional due process claims that often arise in the strict liability context.[17] Though some courts and commentators have criticized the proximate cause inquiry in MBTA cases as

11. *Id.* at 167–72.

12. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–12 (2012); *see also Threats to Birds*, *supra* note 4.

13. Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HISTORICAL CTR., MICH. ST. UNIV. COLL. OF LAW (2014), https://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act.

14. *Id.*

15. *See* Kira Lerner, *FWS Head Blasts Subpoena for Wind Farm Bird Death Docs*, LAW360 (Mar. 26, 2014, 2:53 PM), http://www.law360.com/articles/521229/fws-head-blasts-subpoena-for-wind-farm-bird-death-docs.

16. Frank Graham, Jr., *An MBTA for the 21st Century*, NAT'L AUDUBON SOC'Y (July 7, 2015), http://www.audubon.org/news/an-mbta-21st-century.

17. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 690–91 (10th Cir. 2010); United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999).

ambiguous and confusing for introducing the concept of foreseeability,[18] a clear, consistently applied proximate cause framework is achievable and will reduce uncertainty for regulated parties and agency personnel alike.

Part I of this Note introduces the MBTA and explains its history, purpose and enforcement, including the conditions under which it was first negotiated and enacted in the early twentieth century. It will then explore the changed landscape of threats facing migratory birds a century later. Part II provides an overview of the current circuit court split on the scope of liability under the MBTA and summarizes the confusing legal standards various courts have used to justify their decisions about whether the MBTA prohibits incidental take. Part III breaks down the basic elements of the MBTA as a criminal statute, reaching the conclusion that the best way to clarify the law is to apply a consistent proximate cause analysis to differentiate between activities that have a sufficiently close connection to bird mortality and those that do not. By holding that only actions that are foreseeable and sufficiently causally connected to a bird's death violate the MBTA, and that *all* such actions are violations *regardless of whether or not the death was intentional*, the MBTA can operate as a strong deterrent to individual industrial actions that harm migratory birds in the aggregate. In a world where human actions increasingly threaten biodiversity, such a scheme may offer our best hope for conserving the species that hold such an important place in our global ecosystems and collective psyche.

I. HISTORY, NECESSITY, AND ENFORCEMENT OF THE MBTA

A. History and Purpose of the MBTA

The impetus for the passage of the MBTA came from a realization by scientists, politicians, and ordinary Americans that the unrestricted hunting and mass slaughter of migratory birds in the United States was having a drastic and destructive impact on the bird populations Americans had taken for granted throughout the nineteenth century.[19] Before the enactment of the MBTA in 1918, unrestricted hunting and poaching of migratory birds threatened the survival of many once-plentiful species.[20] The early twentieth century saw the extermination of the passenger pigeon, when the then-abundant species was hunted to extinction within several decades.[21] Other common species, like the American robin and golden plover, were brought "home by bagsful," and

18. *See, e.g.*, Kevin A. Gaynor et al., *Courts Seek Common-Sense Applications to Curb Prosecutions Under Bird Law*, DAILY ENV'T REP. (BNA), Apr. 12, 2012, at B-7 (arguing that proximate cause is a "confusing and ambiguous" legal concept).

19. *See* DORSEY, *supra* note 10, at 167–72.

20. *Id.* at 167–93, 230.

21. *See* 55 CONG. REC. 4820 (1917).

reports detailed how hunters would often kill thousands of these migratory birds each day.[22]

Even early congressional attempts to regulate bird hunting in the United States were driven by broad concerns about conserving and stabilizing bird populations as an important shared resource. After years of advocacy and lobbying, conservationists, scientists, and recreational hunters who wanted to achieve sustainable populations of game birds succeeded in passing the Weeks–McLean Migratory Bird Act in 1913.[23] The Weeks–McLean Act criminalized the killing and transport of migratory birds across state lines within the United States but was declared unconstitutional by two federal district courts for violating the Commerce Clause.[24] Recognizing these constitutional concerns, conservationists pushed ahead to negotiate the international Migratory Bird Treaty (the Treaty) with Canada.[25] The constitutional question was declared moot following the ratification of the Treaty, because the Treaty and the subsequent MBTA replaced the Weeks–McClean Act as the federal statutory scheme for protecting migratory birds.[26]

Echoing the goals of the Weeks–McLean Act, the two nations negotiated the Treaty to curb the indiscriminate slaughter of migratory birds and conserve their populations for the future.[27] The Treaty was formalized on August 16, 1916 and ratified by both nations later that year.[28] The Treaty emphasized the particular dangers birds face when their migratory patterns and ability to nest are disrupted.[29] It further recognized that the migratory nature of birds created an additional difficulty in protecting them, as their constant movement across state and even international lines reduced the effectiveness of state game laws aimed at conserving bird populations.[30] As one congressman opined on the House floor during debate over the MBTA:

> Everyone will admit the necessity of preserving these . . . birds. How may they be conserved? . . . No single State may do so. Perhaps it is not too broad a statement to say that even the United States could not do so . . . and it has become evident that if we are to have any effective law which shall

22. PAUL R. EHRLICH ET AL., THE BIRDER'S HANDBOOK: A FIELD GUIDE TO THE NATURAL HISTORY OF NORTH AMERICAN BIRDS 293, 295 (1988).

23. DORSEY, *supra* note 10, at 167–68.

24. *See* United States v. McCullagh, 221 F. 288, 292 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 158–60 (E.D. Ark. 1914); 55 CONG. REC. 4816 (1917).

25. DORSEY, *supra* note 10, at 192, 197–98.

26. *Id.* at 214. The constitutionality of the Treaty and the MBTA were eventually upheld in *Missouri v. Holland*, where the Court held that neither the Constitution nor the Tenth Amendment prevented the United States from ratifying and implementing an international treaty to protect migratory birds, and noted that "a national interest of very nearly the first magnitude is involved." 252 U.S. 416, 435 (1920).

27. *See* DORSEY, *supra* note 10, at 198–214.

28. 16 U.S.C. § 703(a) (2012); DORSEY, *supra* note 10, at 212–14.

29. *See* 56 CONG. REC. 7358 (1918).

30. *Id.*

> preserve these valuable birds that serve such a useful and necessary purpose it must be through the joint action of both countries.[31]

Following the 1916 Treaty's ratification, Congress passed the MBTA in 1918 to implement the Treaty provisions protecting and conserving native migratory birds in the United States.[32] During debate, some members of Congress objected on the grounds that the Treaty had been pursued as a way to simply make the Weeks–McLean Act—which many considered unconstitutional—constitutional by avenue of executive treaty power.[33] While this concern certainly prompted the negotiation of the Treaty and ultimately led to the MBTA,[34] the Treaty should be viewed in retrospect as an early recognition of purely domestic U.S. law's limits to addressing the international challenge of protecting birds whose migration patterns cross state, national, and even continental borders.[35]

During congressional debate at the time of its passage, MBTA advocates made strong assertions about the agricultural benefits of insectivorous, migratory birds.[36] In the House, members of Congress presented a report from the Bureau of Entomology that insects were causing annual agriculture losses of more than $1.5 billion.[37] Supporters also alluded to birds' positive effects preventing the spread of insect-borne diseases—like malaria and yellow fever—to people and cattle.[38] Supporters of the MBTA in 1918 thus recognized the interconnectedness of bird biodiversity, agricultural health, and the wellbeing of all Americans.

The MBTA's goal of conserving birds has remained unchanged, though the reasoning behind that goal and the methods of achieving it have evolved over time with increased scientific and ecological understanding. Modern understanding of the inherent value of biodiversity and the interconnectedness of global ecosystems has evolved over the last century, but it remains in line with the MBTA's original focus on migratory birds' connection with important aspects of human life and welfare. Today, while some species of migratory birds are recognized as important pollinators[39] and even touted in pest control

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31. *Id.* at 7377 (statement of Rep. Small).

32. § 703(a).

33. 56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston).

34. DORSEY, *supra* note 10, at 192, 213–14.

35. The constitutionality of the MBTA was also challenged, and the Supreme Court affirmed its legality under the President's treaty making authority in *Missouri v. Holland*, 252 U.S. 416, 434–35 (1920).

36. 55 CONG. REC. 4818–19 (1917) (including a report for the Secretary of Agriculture detailing the importance of migratory birds entitled "The Insect Peril"). "Who or what is it that prevents these ravening hordes [of insects] from overrunning the earth and consuming the food supply of all? . . . The bird. Bird life, by reason of its predominating insect diet, is the most indispensable balancing force in nature." *Id.* at 4819.

37. 56 CONG. REC. 7357 (1918) (statement of Rep. Fess).

38. *Id.* at 7361 (statement of Rep. Stedman).

39. *Bird Pollination*, U.S. FOREST SERV., http://www.fs.fed.us/wildflowers/pollinators/animals/birds.shtml (last visited May 9, 2017).

initiatives,[40] commitments to biodiversity and well-regulated recreational hunting, rather than agricultural interests, are the main reasons that advocates and policy makers promote bird conservation.[41] Nevertheless, Congress has continued to acknowledge the overarching importance of bird conservation under the MBTA.[42]

Similarly, while unrestricted hunting was the major threat that originally spurred the passage of the MBTA, its purpose was rooted in the conservation of sustainable bird populations: "[i]f you allow spring shooting, you shoot ducks and geese as they are going to their breeding grounds, and under those circumstances every female bird killed means a loss of a nest and a loss of a considerable number of future birds."[43] The threat to migratory birds in 1918 came almost exclusively from hunters and "pothunters,"[44] but the desire to conserve species by protecting birds from human threats, including damage to habitat and migratory paths, was the overarching goal that led to the signing of the Treaty and passage of the MBTA.

Later conventions with Mexico, Japan, and the Soviet Union also shaped the protections in the current statute, and include language suggesting additional justifications and methods for conserving migratory birds.[45] While the treaties with Canada and Mexico included economic justifications for bird conservation, reminiscent of the reasoning advanced in the House in 1918, later treaties with Japan and Russia signaled the United States' intent to partner with these countries to conserve migratory birds for "noneconomic aesthetic, scientific, and cultural purposes."[46] The Japanese and Russian conventions also included specific language explicitly emphasizing the importance of protecting critical migratory bird habitat.[47] Thus, while the original treaty and domestic legislation that followed may have focused on restricting hunting to achieve their purpose, a strong conservation ethic drove the passage of the MBTA and

40. *See, e.g.*, J.L. Kellermann et al., *Ecological and Economic Services Provided by Birds on Jamaican Blue Mountain Coffee Farms*, 22 CONSERVATION BIOLOGY 1177, 1177 (2008) (explaining findings that migratory birds provide valuable ecological services like pest control for coffee farms in Jamaica); *The Benefits of Barn Owls*, RAPTORS ARE THE SOLUTION, http://www.raptorsarethesolution.org/the-benefits-of-barn-owls/ (last visited May 9, 2017) (a campaign in partnership with the Golden Gate Audubon Society to encourage building Barn Owl boxes to attract owls to perform rodent control in neighborhoods, rather than using harmful pesticides).

41. *See, e.g.*, *Migratory Bird Treaty Reform Act of 1998: Hearing Before the S. Comm. on Env't & Pub. Works on H.R. 2863*, 105th Cong. 2-29 (1998) (testimony of various conservation groups, hunting groups, and senators regarding the purpose and importance of migratory bird conservation).

42. *See* H.R. REP. NO. 105-542, at 2 (1998) (reaffirming the goal of the MBTA by stating, "[t]his Act became our domestic law implementing the Convention and it committed this nation to the conservation of migratory birds").

43. 56 CONG. REC. 7359 (1918) (statement of Rep. Platt).

44. 55 CONG. REC. 4816 (1917) (statement of Sen. Smith).

45. 16 U.S.C. §§ 703–712 (2012).

46. Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 362 (1999).

47. *Id.* at 366.

its subsequent amendments, and thus should drive its enforcement and interpretation in the courts.

The MBTA now protects 1027 species of birds native to the United States.[48] Reflecting the language of the 1916 treaty, the MBTA empowers the Secretary of the Interior to promulgate rules for when and under what conditions migratory birds may be hunted, captured, or killed.[49] Aside from these specific exceptions, however, the core of the MBTA is section 703(a), which states that "it shall be unlawful at any time . . . to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird."[50]

The MBTA makes it a misdemeanor to take or kill migratory birds, and subjects violators to fines up to $15,000 and up to six months in jail.[51] It also makes it a felony to knowingly take a migratory bird with the intent to sell or to sell a migratory bird—offenses that carry a maximum penalty of $2000 and two years in jail.[52] FWS has promulgated regulations to implement the MBTA and several other wildlife statutes that protect birds, including the Endangered Species Act (ESA) and the Bald and Golden Eagle Protection Act.[53] The regulations expand upon some of the more vague language from the Treaty and MBTA itself about allowing the take of birds in certain circumstances.[54] For example, the regulations prescribe in detail the species of game birds that may be hunted, the seasons during which such hunting is lawful, and permitted methods of hunting.[55] As discussed in Part III below, the regulations also define terms relevant to the MBTA, including "take," which has been at the root of much contemporary debate over the scope of the law.[56]

B. Threats to Migratory Birds Today

Today, migratory birds in the United States are no longer threatened primarily by hunters and poachers, but are undergoing population declines due to a variety of human-caused threats.[57] One of the greatest threats facing birds is climate change. In a 2014 report, the National Audubon Society projected that of 588 North American migratory bird species studied, 314 are severely threatened by global warming and stand to lose more than 50 percent of their

48. 16 U.S.C. § 703(b)(1) (2012); *Incidental Take*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/incidental-take.php (last visited May 9, 2017).

49. § 704(a). The specific provisions for the lawful hunting of certain migratory game birds during specified seasons may be found at 50 C.F.R. § 20.20 (2016).

50. 16 U.S.C. § 703(a).

51. § 707(a).

52. § 707(b).

53. 50 C.F.R. § 10.1.

54. *See* §§ 20.1–20.40, 21.21–21.31.

55. *See* §§ 20.100–20.110.

56. § 10.12.

57. *Threats to Birds*, *supra* note 4.

current habitat range by 2080.[58] Human destruction of habitat is another major threat to the survival of migratory birds. Loss or fragmentation of critical stopover habitat due to activities like development, logging, and agriculture, means birds have a reduced chance of surviving their migratory journeys.[59] Furthermore, development and habitat degradation may lead to reduced availability of food, water, and nesting sites crucial to migratory bird survival and reproduction.[60]

Threats to bird habitat due to human disruption and climate change are stark on their own, but human development also leads to other direct threats to birds, such as reflective glass and vehicle collisions. According to the American Bird Conservatory, domestic housecats are currently the leading cause of anthropogenic bird deaths each year.[61] Domestic and feral housecats kill an estimated 2.4 billion birds annually in the United States.[62] High rates of migratory bird mortality also result from collisions with buildings and infrastructure—especially buildings with lots of windows and reflective glass.[63] Disorientation due to artificial light, combined with inclement weather, makes the threat of collision with infrastructure even greater, especially for night migrants who may be attracted to building lights and communication towers.[64] Collisions with vehicles are another leading cause of bird mortality; they are estimated to kill between 89 and 340 million birds each year.[65]

Migratory birds are also threatened by the industrial sector, including electricity distribution and generation, oil production and refining, and pesticide production and use in agriculture.[66] Collisions with electric power lines and related electrocutions continue to represent a top threat to migratory birds, though the power industry has taken steps to reduce bird mortality from

58. *The Audubon Report at a Glance*, NAT'L AUDUBON SOC'Y, http://climate.audubon.org/article/audubon-report-glance (last visited May 10, 2017).

59. *Habitat Impacts*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/habitat-impacts.php (last visited May 10, 2017).

60. *Threats to Birds*, *supra* note 4.

61. *Cats Indoors*, AM. BIRD CONSERVATORY, https://abcbirds.org/program/cats-indoors/ (last visited, May 10, 2017).

62. *Id.*

63. *Buildings and Glass*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/buildings-and-glass.php (last visited Feb. 13, 2017) ("Bird mortality from window collisions in the U.S. is estimated to be between 365 million to 988 million birds annually.").

64. *Id.*

65. *Road Vehicles*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/road-vehicles.php (last visited May 10, 2017).

66. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY IN OILFIELD WASTEWATER DISPOSAL FACILITIES 1 (2009), https://www.fws.gov/mountain-prairie/contaminants/documents/COWDFBirdMortality.pdf; *Electric Utility Lines*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/electric-utility-lines.php (last visited May 10, 2017); *Pesticides*, AM. BIRD CONSERVATORY, https://abcbirds.org/threat/pesticides/ (last visited May 10, 2017).

power lines by using better technology and mitigation techniques.[67] Pesticides and rodenticides commonly used for home lawns and gardens and industrial agriculture are often lethal to birds.[68]

The oil and gas production and refining processes present well-documented industrial threats to birds—between 500,000 and one million birds are killed in oil pits and evaporation ponds each year.[69] FWS suggests that this number might be artificially low, as birds killed in open-air oil pits and ponds may sink or be removed by people or scavengers before the deaths are recorded.[70] Oil development involves the production of a great deal of wastewater, which is often channeled to diversion pits and evaporation ponds where excess oil can be skimmed off the top.[71] When birds land in these open wastewater pits or ponds, they may be killed when they ingest toxins or after their feathers become coated in oil or salt, which leads to sodium intoxication, hypothermia, overheating, and drowning.[72] Migratory birds also die after they are trapped and asphyxiated in "heater treaters" and other oil production equipment.[73]

However, threats to migratory birds from energy production are not limited to the oil and gas sector. As renewable energy production increases in the United States, the impacts on migratory birds that accompany large-scale wind and solar farms have garnered more attention, though they still are not the leading cause of bird mortality among industrial activities.[74] There are currently 48,000 installed wind turbines in the United States—a number that is expected to increase tenfold by 2030.[75] Collisions with wind turbines have been documented to kill over 200 species of migratory birds (most commonly songbirds, hawks, eagles, and falcons).[76] Siting decisions, including whether or not the turbine is located along a migratory pathway, affect wind turbines' rates of bird mortality. [77] Their potentially harmful impact on birds also increases with the height of the turbine.[78] Similarly, high-volume "solar farms" are on

67. *Electric Utility Lines*, *supra* note 66.

68. *Pesticides*, *supra* note 66.

69. U.S. FISH & WILDLIFE SERV., *supra* note 66, at 1.

70. *Entrapment, Entanglement, and Drowning*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/entrapment-entanglement-drowning.php (last visited May 10, 2017).

71. U.S. FISH & WILDLIFE SERV., *supra* note 66, at 1.

72. *Id.*

73. *Entrapment, Entanglement, and Drowning*, *supra* note 70. Heater treaters are pieces of equipment installed at oil wells to separate oil, gas, and wastewater prior to transport. *See* JAMES HAMPTON, U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD DEATHS CAUSED BY HEATER/TREATERS, http://www.rmehspg.org/presentations/HeaterTreater.pdf.

74. *See Threats to Birds*, *supra* note 4.

75. *Bird Collisions*, AM. BIRD CONSERVATORY, https://abcbirds.org/threat/bird-strikes/ (last visited May 10, 2017).

76. *Wind Turbines*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/wind-turbines.php (last visited May 10, 2017).

77. *Id.*

78. *Id.*

the rise, and represent a growing threat to migratory birds.[79] Large-scale solar photovoltaic plants—comprised of thousands of solar panels—may appear like bodies of water to birds, who are killed on impact when they crash into the panel arrays while attempting to land.[80] Concentrated solar thermal plants, including so-called "solar power towers," use mirrors to create intensely concentrated beams of sunlight, which can burn or incinerate birds that fly through them.[81]

Thus, a century after the signing of the Treaty, the MBTA endures as an important safeguard for avian life as human threats to the survival of migratory birds have proliferated, surpassing the more easily identified and prohibited hunting and poaching threats that spurred passage of the MBTA in 1918. The goal of preserving and protecting native migratory birds remains important as ever, though conservation advocates now emphasize biodiversity and ecosystem interconnectedness over the strictly agricultural and recreational hunting concerns that motivated the bill.[82] Debates over the effectiveness, scope, and purpose of the bill continue, but seeking a solution that preserves the MBTA and strengthens its ability to conserve and protect native migratory birds is an important endeavor.

C. Enforcement

MBTA enforcement was the subject of heated congressional debate in 1917 and 1918, and concern that the broadly phrased MBTA criminal provisions leave open the possibility of arbitrary and biased enforcement or over-enforcement against innocent parties remains a major critique. Initial Senate debate centered on concern about delegating game laws to the Secretary of Agriculture and unelected bureaucrats beneath him.[83] Arguments over enforcement also concerned what authority enforcing agents should have to search people's homes and seize prohibited birds when enforcing the law, and whether they must have a warrant.[84] Ultimately, the MBTA required that enforcement agents with the Department of the Interior have an authorized search warrant to search any place on suspicion of a MBTA violation.[85]

Today, only FWS can prosecute MBTA violations, and the agency has broad prosecutorial discretion to determine when and where to enforce its

79. John Upton, *Solar Farms Threaten Birds*, SCI. AM. (Aug. 27, 2014), https://www.scientificamerican.com/article/solar-farms-threaten-birds/.

80. *Id.*

81. *Id.*

82. *See* 56 CONG. REC. 7359 (1918) (statement of Rep. Platt).

83. *See* 55 CONG. REC. 4815–16 (1917) (statement of Sen. Smith); 55 CONG. REC. 5546 (statement of Sen. Reed). "I do not think you ought to delegate the right to some whippersnapper over here in the Department of Agriculture to make it a misdemeanor punishable by being fined or put in jail, or both, for going out and killing a duck." 56 CONG. REC. 7445 (statement of Rep. Bland).

84. 56 CONG. REC. 7,445 (statement of Rep. Bland).

85. 16 U.S.C. § 706 (2012).

provisions. Because an individual who accidentally hits a scavenging crow on the highway or owns a cat that kills an American robin might technically be guilty of "taking" or "killing" a migratory bird, the scope of potential enforcement actions FWS could take is quite expansive. However, as a single agency with a limited budget, the FWS is constrained in its ability to monitor and prosecute all violations of the MBTA, and most often targets industrial actors for enforcement actions.[86] While this discretion seems alarmingly broad and uncertain to some regulated parties, it is in fact a recognized and arguably efficient method of enforcing broad statutes like the MBTA.[87] In addition, some scholars have argued and shown that federal agencies, when faced with the need to use tools like rule making or prosecutorial discretion to apply old statutes to new issues, often do so cautiously and thoughtfully.[88] FWS also employs internal procedures and voluntary guidelines to make it clear to the regulated community which violations it will prioritize and enforce.[89]

In attempts to define the scope of enforcement and liability, the MBTA is often compared to the ESA—the other major wildlife statute carried out by FWS. The ESA complements the MBTA's efforts to protect and conserve birds in the United States by protecting species determined to be threatened or endangered.[90] However, the MBTA differs from the ESA in several respects, not least of which because it attempts to prevent the loss of bird species *before* they become threatened and endangered.[91] While the ESA is aimed at protecting those species which are already endangered and threatened, the MBTA is broader by definition, as it protects 1027 species of native migratory birds, only 92 of which are listed as endangered or threatened under the ESA.[92] Unlike the ESA, which has both civil and criminal provisions, there are no civil

86. *See* Rozan, *supra* note 13.

87. *See* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 Duke L.J. 133, 204–205 (2014) ("There is another enforcement alternative for an agency with a broad regulatory mandate besides general or specific permits—it can choose not to issue any permits . . . that authorize certain activities, and instead it may use its discretion to not prosecute violations of an otherwise applicable regulatory mandate. . . . These kinds of overbroad statutes might allow for relatively simple prosecution of otherwise hard-to-detect regulatory violations, as regulatory agencies can use the frequent but small violations as proxies for more serious, but more difficult-to-prove, violations.").

88. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 3 (2014) (analyzing agency action in the administration of environmental and energy law statutes to illustrate that "even—and perhaps especially—when adapting old statutes to new problems, agencies are surprisingly accountable, not just to the President, but also to Congress, the courts, and the public").

89. *See* U.S. FISH & WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES, at vi (2012), https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf; U.S. FISH & WILDLIFE SERV., 444 FWS 1: ENFORCEMENT PRIORITIES (2005), https://www.fws.gov/policy/444fw1.pdf.

90. 16 U.S.C. § 1531(b).

91. *Compare* 16 U.S.C. § 703(a) (outlawing the "take" or trade of "any migratory bird" or "any part, nest, or egg of any such bird"), *with* 16 U.S.C. § 1531(b) (providing for the conservation of "endangered species and threatened species").

92. *Threats to Birds*, *supra* note 4; *Incidental Take*, *supra* note 48.

penalties for violations of the MBTA and also no mechanism for citizen suits to enforce the law.[93]

Though FWS has promulgated much more detailed regulations regarding enforcement and application of the ESA than it has for the MBTA, there are some important federal regulations that help shape the scope of liability under the MBTA. Wildlife takings regulations promulgated by FWS prescribe the various permits that may be issued for the direct and purposeful take of protected birds under the MBTA.[94] These instances cover situations like control of overabundant bird species[95] and depredation orders for overabundant migratory birds that are harming agricultural interests.[96] The regulations also include a provision authorizing the incidental take of migratory birds for military readiness activities.[97] This regulation was promulgated in response to the 2002 National Defense Authorization Act, which included an express exemption for military activities for incidental take liability under the MBTA.[98]

Though to date FWS has chosen not to implement binding rules or regulations defining any other type of permitted incidental take under the MBTA, in 2012 the agency released voluntary guidelines for the wind power industry to reduce wind facilities' impact on birds and avoid noncompliance with the MBTA.[99] These guidelines suggest facility siting evaluation strategies, research on vulnerable birds in the area, potential mitigation strategies, and continued communication with FWS regarding potential impacts.[100] Compliance with these voluntary guidelines, however, does not guarantee compliance under the MBTA.[101] In 2015, FWS issued a notice of intent to prepare a programmatic environmental impact statement to explore various options for issuing permits for incidental industry take under the MBTA.[102]

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93. *Compare* 16 U.S.C. § 1540 (detailing criminal and civil penalties under the ESA and providing for citizen suits), *with* 16 U.S.C. § 707 (listing only criminal penalties for violations of the MBTA).

94. 50 C.F.R. §§ 21.12–21.15, 21.21–21.31, 21.41–21.54, 21.60–21.61 (2016).

95. *See, e.g.*, § 21.61 ("Population control of resident Canada geese.").

96. *See, e.g.*, § 21.44 ("Depredation order for horned larks, house finches, and white-crowned sparrows in California.").

97. § 21.15.

98. Rozan, *supra* note 13. The language was included in the Defense Authorization bill after Earthjustice successfully sued the U.S. Department of Defense for incidental take of protected birds. *Id.*

99. U.S. FISH & WILDLIFE SERVICE, LAND-BASED WIND ENERGY GUIDELINES, *supra* note 89, at 1.

100. *Id.* at 5.

101. *Id.* at vii.

102. Christopher Brooks, *Will a New Approach Fly? The FWS Considers Implementing an Incidental Take Program Under the Migratory Bird Treaty Act*, 47 TRENDS 12, 12 (2015). The programmatic environmental impact statement will explore four alternatives for an incidental take program: (1) broad industry-wide permitting for certain sectors; (2) giving FWS authority to issue more project-specific permits; (3) permitting certain incidental take through agency MOUs with FWS; and (4) leaving the prosecutorial discretion to FWS while implementing voluntary industry guidelines—essentially the current system. *Id.* at 15; Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032, 30,032–33 (May 26, 2015).

II. FEDERAL CIRCUIT SPLIT AND *CITGO II*

Circuit courts of appeal are split on the question of whether an incidental take is a criminal violation of the MBTA. The Eighth, Ninth, and, most recently, Fifth Circuits have held that the MBTA does not prohibit the incidental take of migratory birds.[103] These cases, explored in more detail in Part III, rejected claims that future timber lease sales and the operation of a refinery with an uncovered oil tank were criminal violations of the MBTA.[104] The Second and Tenth Circuits, on the other hand, have held that incidental take of protected migratory birds in the course of otherwise lawful industrial activity violates the MBTA, upholding convictions of a pesticide manufacturer and an oil and gas producer for the bird mortality that resulted from their plant operations.[105] Numerous other district court opinions have helped shape this divide.[106]

At its core, the circuit split and the broader debate over the purpose and scope of the MBTA are rooted in questions of fairness and due process. The courts that have been reluctant to extend liability to lawful industrial activity were loath to hold that commercial actors contributing to the economy and engaging in the development of valuable natural resources used by all Americans were criminally culpable for doing so.[107] However, concerns over unfair enforcement of the MBTA targeting certain parties are nothing new. Fear that the MBTA would be used as a tool to prosecute "the common people" predates the passage of the bill.[108] As one representative explained during debate over the bill on the House floor in 1918:

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103. United States v. CITGO Petroleum Corp. (*CITGO II*), 801 F.3d 477, 488–89 (5th Cir. 2015); Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991).

104. *CITGO II*, 801 F.3d at 492–93 (finding that bird mortality in the course of normal oil refinery operations did not violate the MBTA); *Newton Cty.*, 113 F.3d at 115-16 (holding that timber sales did not violate the MBTA); *Seattle Audubon*, 952 F.2d at 298–99 (holding the same).

105. United States v. Apollo Energies, 611 F.3d 679, 686 (10th Cir. 2010); United States v. FMC Corp., 572 F.2d 902, 904 (2d Cir. 1978).

106. *Compare* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1088 (D. Colo. 1999) (holding a power company violated the MBTA when protected birds were electrocuted on unprotected power lines), *and* United States v. Corbin Farm Serv., 444 F. Supp. 510, 536 (E.D. Cal. 1978) (finding liability under the MBTA for the otherwise legal application of pesticides to an alfalfa field), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978), *with* United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012) (holding oil and gas companies not liable for bird mortality under the MBTA when birds drowned in their sludge pits), *and* United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170, at *4 (W.D. La. Oct. 30, 2009) (holding Chevron not liable for pelicans that were killed in its oil heads during drilling operations), *and* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (holding that the MBTA was not intended to apply to logging operations).

107. *See, e.g.*, *Brigham*, 840 F. Supp. 2d at 1213 ("This Court believes that it is highly unlikely that Congress ever intended to impose criminal liability on the acts or omissions of persons involved in lawful commercial activity which may indirectly cause the death of birds protected under the Migratory Bird Treaty Act.").

108. 56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston).

> [M]uch as I love the song birds, I would not be willing to allow a thoughtless boy that may rob a bird's nest or may kill a robin to be haled before a court, sent to jail, or fined the heavy fine provided in this bill. I would like to see the song birds protected, but I am not willing to see our country infested by a lot of game wardens, appointed by the Secretary of Agriculture or somebody else having no responsibility to the people, snooping and spying around people's houses, swearing out warrants, haling boys to court, and interfering with the local affairs of our people.[109]

MBTA opponents' concern over unfair and arbitrary enforcement has remained surprisingly consistent over the last century. This unease is echoed in dismissive language about the potentially "absurd results" of the current MBTA regime in the most recent circuit court decision to address the issue of incidental take under the MBTA, *United States v. CITGO Petroleum Corp.* (*CITGO II*):

> If the MBTA prohibits all acts or omissions that "directly" kill birds, where bird deaths are "foreseeable," then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA. This scope of strict criminal liability would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion). . . .[110]

With these choice words, the Fifth Circuit overturned the MBTA conviction of a petroleum refinery operator in Texas, joining the Eighth and Ninth Circuits in interpreting the MBTA as not prohibiting incidental take and deepening the split over the scope of the MBTA.[111]

In *CITGO II*, the Fifth Circuit held that CITGO Petroleum did not violate the MBTA even after inspectors discovered the remains of migratory birds at its Texas refinery.[112] In 2002, an inspection revealed that over thirty protected migratory birds had died after landing in oily water in two of CITGO's uncovered water tanks at its Corpus Christi refinery.[113] The CITGO refinery is located along waters that make up part of an important flyway, or common migration route, for migratory birds.[114] At the refinery, wastewater from normal operations, including sludge and oil, was transported through pipes to two covered oil-water separators, which prevented oil from being discharged into waterways along with treated wastewater.[115] In standard oil-water

109. *Id.*

110. *CITGO II*, 801 F.3d at 494 (footnote omitted).

111. *See id.* at 488–89.

112. *Id.* at 479, 480 n.4.

113. *Id.* at 480 & n.4. The species included northern shoveler ducks, double-crested cormorants, lesser scaup ducks, black-bellied whistling tree ducks, blue-winged teal ducks, fulvous whistling tree ducks, and white pelicans. *Id.*

114. United States' Answering Brief, at 15, United States v. CITGO Petroleum Corp. (*CITGO II*), 801 F.3d 477 (5th Cir. 2015) (No. 14-40128), 2015 WL 222975, *15.

115. *CITGO II*, 801 F.3d at 480.

separators, oil rises to the top and is skimmed off the surface to be recycled. Under subpart QQQ of the Clean Air Act (CAA), refinery operators are required to cover oil-water separators to limit the amount of harmful volatile organic compounds, like benzene, that are released into the air.[116]

In order to control the flow and quantity of wastewater moving through the system, the oil-water separators at the CITGO refinery were connected to two downstream equalization tanks that took on excess wastewater to help the oil-water separators function at maximum efficiency.[117] Unlike the oil-water separators, the equalization tanks did not have roofs.[118] The equalization tanks were located downstream from the oil-water separators, but upstream of the final treatment systems that the wastewater passed through before being discharged into waterways.[119] The equalization tanks ensured that the wastewater treatment system was not overwhelmed by unpredictable flows from the oil-water separators.[120] At the CITGO refinery, excess oil accumulated at the top of the uncovered equalization tanks and in the covered oil-water separators. At both locations it was skimmed off for recycling.[121]

CITGO was convicted in the District Court for the Southern District of Texas of violating the CAA by not covering its equalization tanks while they were being used functionally as oil-water separators, and on three counts of taking migratory birds in violation of the MBTA.[122] The district court denied CITGO's motion to vacate the convictions.[123] CITGO appealed to the Fifth Circuit, which held that the bird deaths were not takings under the MBTA because "the MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds."[124] The Fifth Circuit thus reversed and remanded the district court's decision with instructions to acquit CITGO of both its MBTA and CAA convictions.[125]

The Fifth Circuit's narrow interpretation of take under the MBTA deepened the existing circuit split on the issue. The term "take" appears in most wildlife statutes, but carries different meanings based on statutory interpretation

116. 40 C.F.R. § 60.692-3 (2016).
117. *CITGO II*, 801 F.3d at 480.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. United States v. CITGO Petroleum Corp. (*CITGO I*), 893 F. Supp. 2d 841, 842 (S.D. Tex. 2012).
123. *Id.* at 848.
124. *CITGO II*, 801 F.3d at 494. The Fifth Circuit also held that CITGO had not violated the CAA because the language of Subpart QQQ defined oil-water separators as a specific component in the chain of wastewater treatment that must include specific parts. The court rejected the lower court's reasoning that oil-water separators were broadly defined by whether or not they functioned to separate oil from water. *Id.*
125. *Id.* While the CAA aspect of *CITGO II* offers an interesting review of statutory interpretation of CAA regulations, this Note will focus only on the MBTA aspect of the case and its implications for the scope of MBTA enforcement going forward.

and regulatory definitions.[126] Courts have disagreed on how to construe take under the MBTA, in part because neither the MBTA itself nor the regulations promulgated to enforce it include terms like "harm" and "harass" in their definition of taking.[127] Other wildlife statutes, like the ESA and the Marine Mammal Protection Act, include the terms "harm" or "harass" to signal that incidental, unintentional takings are prohibited.[128] The Fifth Circuit noted at the start of its opinion that CITGO was charged with "'taking' or 'aiding and abetting the taking' of migratory birds, not for 'killing' them," which also would have been possible under the MBTA.[129] It thus focused its decision and reasoning on this "charging term" and concluded that the history and statutory interpretation of the term "take," which was historically used mostly in conjunction with hunting, suggests the MBTA was only meant to cover direct, intentional activities like hunting and poaching.[130]

III. DISSECTING AN MBTA VIOLATION

Critics of the MBTA focus their attention on various aspects of the statute, including the definition of take, the potential for unlimited and arbitrary enforcement, and the MBTA's classification as a strict liability statute, which is relatively unique in wildlife law. Court opinions often blur legal lines—like the distinction between actus reus and mens rea—in making these critiques, which leads to even more confusion about the scope and future usefulness of the MBTA. For example, in *CITGO II*, the Fifth Circuit employed some notably circular logic to hold that strict liability somehow still requires an element of intent,[131] all while claiming *other* courts had confused actus reus and mens rea:

> Strict liability crimes dispense with the first requirement; the government need not prove the defendant had any criminal intent. But a defendant must still commit the act to be liable. . . . "To some extent, then, all crimes of affirmative action require something in the way of a mental element—at least an intention to make the bodily movement that constitutes that act which the crime requires." . . . Here, that act is "to take" which, even without a mens rea, is not something that is done unknowingly or involuntarily.[132]

Because such mischaracterizations of the law make the MBTA appear to be more confusing and ill-suited to addressing modern environmental challenges than it really is, it is instructive to take a closer look at the MBTA

126. Michael E. Field, *The Evolution of the Wildlife Taking Concept from its Beginning to its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 468–71 (1984).

127. *CITGO II*, 801 F.3d at 491.

128. *Id.*

129. *Id.* at 489.

130. *Id.* at 488–89.

131. *Id.*

132. *Id.* at 492 (emphasis omitted) (citation omitted) (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 5.2(e) (5th ed. 2010).

by breaking down its criminal statutory elements to identify where analysis of the MBTA should be focused and clarified.

MBTA violations charged under the "take" or "kill" terms of the statute are result crimes, meaning a violator must not only engage in a certain action or type of *conduct*, but there must be a certain *outcome*—bird mortality—caused by that conduct.[133] Breaking down the MBTA to its basic elements as a criminal statute, there are three relevant ingredients of a violation: (1) actus reus (an affirmative act),[134] (2) mens rea (the required state of mind),[135] and (3) causation (including "but-for" causation and proximate cause).[136] Courts that have construed the MBTA to exclude incidental take as unfair to industry have done so using arguments rooted in each of these elements of a crime.

This Part explores each element in turn, concluding that (1) an act or omission that causes an unintentional bird death still meets the actus reus requirement for a "take" or "kill" under the MBTA; (2) strict liability is the appropriate level of mens rea for the MBTA, allowing prosecutors to more easily enforce select violations that will contribute to a strong deterrent effect in favor of migratory bird conservation; and (3) courts should focus on causation—and the requirement of proximate cause in particular—to ensure that the MBTA is being enforced fairly, and does not violate responsible parties' due process rights.

A. Actus Reus

In general, criminal law punishes only affirmative, voluntary acts.[137] Many courts that have addressed MBTA violations have framed the legal issue of how broadly to interpret the scope of the MBTA around the question of actus reus—seeking to determine the true statutory meaning of the terms "take" and "kill."[138] The Fifth Circuit in *CITGO II* took this route, for example, and conducted a survey of the historical, common law definition of the term "take" and a close textual reading of the wording in the statute itself to hold that

133. *See* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 571 (9th ed. 2012).

134. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.1 (2d ed. 2016).

135. KADISH, *supra* note 133, at 241–42.

136. LAFAVE, *supra* note 134, § 6.4.

137. Omissions or failures to act may constitute appropriate actus reus only when there is a recognized duty to act based upon a certain defined relationship, like a parent's duty to act to save the life of his or her minor child. *Id.* § 6.2(a)(1).

138. *See, e.g.*, Babbitt v. Sweet Home Chapter Cmtys. for a Great Or., 515 U.S. 687, 697 (1995) (construing the broad purpose of the ESA to support a broad definition of the term "take"); United States v. CITGO Petroleum Corp. (*CITGO II*), 801 F.3d 477, 489–91 (5th Cir. 2015) (holding that Congress intended a common-law definition of the term "take"); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170, at *3 (W.D. La. Oct. 30, 2009) (holding that the MTBA was initially conceived for hunters and trappers, not accidental deaths by legal, commercial activity); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1510 (D. Or. 1991) (finding that the MTBA was intended to apply to hunters and poachers). FWS regulations governing the MBTA define "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (2016).

Congress in 1918 could not possibly have intended the MBTA to encompass any acts other than intentional hunting and trapping of birds.[139] The Fifth Circuit adopted Justice Scalia's definition of "take" in his dissent in *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, which drew on ancient Roman law, Blackstone's commentaries, and nineteenth-century U.S. case law to define the term as an affirmative act that reduces "animals, by killing or capturing, to human control."[140] The Fifth Circuit then compared the MBTA to the ESA, noting that Congress could have statutorily prohibited incidental take by defining "take" to include "harm" and "harass" as it did in the ESA, but chose not to in the MBTA.[141]

The court thus held that CITGO's conduct did not meet the MBTA's actus reus requirement, reasoning that every term in the statute should be interpreted in light of the statute's original aim of hunting, which cannot be done unintentionally.[142] However, the debate over whether liability for incidental bird mortality is appropriate does not only occur in instances where parties were charged using the term "take." It extends to instances where defendants are charged with killing under the MBTA,[143] and thus the court's holding in *CITGO II* was less persuasive because it failed to address whether or not this strict interpretation was also meant to extend to the term "kill" under the MBTA.[144] In fact, because the text of the MBTA prohibits both taking and killing migratory birds, and the subsequent regulations define killing as a form of taking, distinctions between the two terms seem essentially arbitrary when interpreting whether or not they were meant to include incidental bird mortality.[145] Contact with the oily water in the equalization tanks likely caused the birds deaths in *CITGO II* by killing if not by taking. The meaningful question that remains, then, is whether CITGO pumping oily water into an uncovered equalization tank meets the actus reus requirement for either killing or taking a bird under the MBTA. Since the refinery affirmatively and intentionally installed two equalization tanks without covers, and affirmatively and intentionally filled the tanks with oily wastewater to relieve pressure on their oil-water separator, it seems likely that these actions would easily fulfill the actus reus requirement. These were affirmative actions that might kill a

139. *CITGO II*, 801 F.3d at 489–91.

140. *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting) (asserting his preferred definition of "take" in a case interpreting the term under the ESA).

141. *CITGO II*, 801 F.3d at 490.

142. *Id.* at 488–89.

143. *See, e.g.*, United States v. FMC Corp., 572 F.2d 902, 903 (2d Cir. 1978) (applying the MBTA to a defendant who killed ninety-two migratory birds).

144. *CITGO II*, 801 F.3d at 489 ("CITGO was indicted for 'taking' . . . of migratory birds, not for 'killing' them. We confine analysis to the charging term.").

145. 16 U.S.C. § 703(a) (2012); 50 CFR § 10.12 (2016). If there is a significant difference between the two terms regarding whether or not they encompass incidental bird deaths, then FWS could start charging all violations under the term "kill" and avoid the interpretation issue. If the distinction is in fact arbitrary, then the court's failure to argue that "kill" should also be interpreted in light of hunting is a significant gap in its reasoning.

protected bird, regardless of how the term "take" was most commonly used a century ago.

Courts should ignore the confusing holding in *CITGO II* and rule consistently that the MBTA's actus reus requirement may be met when industries engage in their normal operations. After meeting this requirement and dispensing with the need to determine intent (discussed below) courts should determine whether these operations were the "but-for" cause and proximate cause of the migratory bird mortality.[146]

B. Mens Rea

The next relevant ingredient of most criminal statues is the element of mens rea—the required mental state one must have at the time of the action in order to be guilty of the crime.[147] Because the required mens rea for crimes has evolved with the common law and has led to a multitude of ambiguous terms and phrases signaling state of mind, the Model Penal Code categorizes mens rea into four distinct levels, in order beginning with the most difficult for a prosecutor to prove: purpose, knowledge, recklessness, and negligence.[148] Crimes that carry the highest degree of moral culpability require a purpose mens rea, meaning the individual acted intentionally and conscientiously to carry out the unlawful act and was purposive towards any corresponding result.[149] Negligence, the lowest level of mens rea, carries the least amount of moral culpability.[150] When a crime requires a negligence mens rea it means that the actor *should* have been aware of the risk of their conduct (and its potential result), but was not.[151] It requires proof that a reasonable person in the same situation would have been aware of the risk.[152]

There is a fifth category of mental state often considered mens rea, although in reality it requires no mental state at all—strict liability.[153] So-called strict liability criminal offenses began to emerge in the twentieth and twenty-first centuries to allow for the criminal prosecution of certain acts without

146. Unwilling to wait for courts to reach this conclusion, some bird conservation activists have mobilized to urge President Obama and FWS to promulgate rules clarifying that "take" under the MBTA includes incidental take. One of their form action letters to the administration reads in part:

> [I]t is vital that you clarify the definition of 'incidental take' under the MBTA and that you establish a framework and appropriate standards for permits that allows these threats to be addressed. Not only will countless birds benefit as a result, but it will also provide greater certainty and clarity for the regulated community.

Nat'l Audubon Soc'y, *Ask President Obama to Strengthen the Migratory Bird Treaty Act*, CARE2PETITIONS, http://www.thepetitionsite.com/takeaction/353/517/848/ (last visited May 11, 2017).

147. KADISH, *supra* note 133, at 242.

148. LAFAVE, *supra* note 134, § 5.1(c).

149. MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 2016).

150. *See id.* § 2.02(2)(d).

151. KADISH, *supra* note 133, at 258 ("The fault is inattentiveness.").

152. MODEL PENAL CODE § 2.02(2)(d).

153. KADISH, *supra* note 133, at 282.

regard to moral culpability or mental state, in order to protect the public from undesirable outcomes.[154] Strict liability statutes were often responses to the harmful side effects of the Industrial Revolution, and the resulting crimes were categorized as "[p]ublic welfare" offenses.[155] They sought to protect the public from actions that might involve diffuse harms to a great number of people, but would be hard to prosecute if a culpable mental state was required.[156] Strict liability offenses are usually considered *malum prohibitim* crimes (made wrong by regulation) rather than *malum in se* crimes (inherently wrong), and often carry low penalties since violators can be prosecuted for actions they did not know (and should not necessarily have known) were wrong.[157]

Within the first several decades of its implementation, courts held that the misdemeanor provisions in section 707(a) of the MBTA were strict liability offenses rooted in the concurrently developing public welfare doctrine. In two early cases, *United States v. Reese* and *United States v. Shultze*, federal district courts held that convictions under the MBTA for hunting doves in a baited field were valid even if the defendants had no knowledge that the field had been baited.[158] In *United States v. Corrow*, the Tenth Circuit upheld the MBTA's classification as a strict liability statute when it reasoned that a defendant attempting to sell protected migratory birds feathers had violated the MBTA, regardless of whether or not he knew or should have known that the feathers came from protected birds.[159] While strongly establishing that the MBTA should be interpreted as a strict liability statute, these cases did so for intentional, not incidental, killing and possession of protected migratory birds.

Congress's subsequent amendments to the MBTA demonstrated its intent that the misdemeanor provision remain a strict liability offense. In 1986, Congress amended the MBTA to require a knowing mens rea for felony violations of the MBTA in section 707(b).[160] In 1998, Congress amended the MBTA to require a knowing mens rea for killing protected game birds with bait.[161] During this amendment process, the language in section 707(a)

154. LAFAVE, *supra* note 134, § 5.5*; see* Morissette v. United States, 342 U.S. 246, 254–56 (1952) (holding that the harm to the public must be diffuse to justify the imposition of strict liability for a criminal offense); United States v. Dotterweich, 320 U.S. 277, 280–81, 285 (1943) (holding that strict liability was appropriate when criminalizing the mislabeling of prescription drugs, since the public welfare was at stake); United States v. Balint, 258 U.S. 250, 251–52, 254 (1922) (holding that strict liability was appropriate for the sale of prohibited narcotics).

155. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55–56, 67–69 (1933).

156. *See* Staples v. United States, 511 U.S. 600, 606–07 (1994); LAFAVE, *supra* note 134, § 5.5.

157. LAFAVE, *supra* note 134, § 1.6(b). Because strict liability offenses are different from those requiring a negligence mens rea, the violation of strict liability offenses carries no moral culpability, because a violation does not signal (as it does for negligence crimes) that the violator should have used due care to perceive the risk.

158. United States v. Reese, 27 F. Supp. 833, 833–34, 836 (W.D. Tenn. 1939); United States v. Schultze, 28 F. Supp. 234, 235–36 (W.D. Ky. 1939).

159. United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997).

160. *History of the Migratory Bird Treaty Act*, 20 Andrews Hazardous Waste Litig. Rep. 5 (2000).

161. *Id.*

remained unchanged, staying silent as to mens rea and the subsequent interpretations applying strict liability. Further, the legislative history makes it clear that Congress intended that the standard for section 707(a) offenses would remain strict liability:[162] "Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. [§] 707(a), a standard which has been upheld in many federal court decisions."[163] These purposeful statutory changes to the MBTA and their accompanying legislative history show that Congress has consistently intended for the MBTA's misdemeanor provision to require strict liability for violators.[164]

Even before these amendments solidified the MBTA as a strict liability statute, the Second Circuit held in *United States v. FMC Corp.* that the pesticide manufacturer FMC Corporation (FMC) violated the MBTA when inspectors discovered dead migratory birds in the manufacturing plant's wastewater holding pond.[165] FMC attempted to scrub the wastewater of toxic chemicals before it reached the pond, but later investigations revealed that the equipment they employed to remove dangerous carbofuran from the water had failed.[166] Birds were attracted to the open water and were poisoned by the carbofuran.[167]

Even though FMC did not intend to kill the birds, the Second Circuit held that its pollution was an affirmative action that fit the definition of a "killing" under the MBTA.[168] The court explicitly held that section 703(a) carried a strict liability standard,[169] and justified this holding by describing the public policy benefits of the MBTA and the dangerous nature of the production of carbofuran: "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."[170] Though still framing the public welfare justification in terms of the toxicity of the chemical to humans, rather than birds, *FMC Corp.* provided a strong example of rooting liability for incidental take under the MBTA in the public welfare rationale for strict liability offenses.[171]

Strict liability, though controversial because it labels an otherwise morally blameless person guilty of a crime, is well suited to address incidental

162. *See* 16 U.S.C. § 707(a) (2012).

163. Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 583 (2012) (quoting S. REP. NO. 99-445, at 16 (1986)).

164. *Id.* at 582–83.

165. United States v. FMC Corp., 572 F.2d 902, 904-05, 908 (2d Cir. 1978).

166. *Id.* at 904–05.

167. *Id.* at 905.

168. *Id.* at 908.

169. *Id.*

170. *Id.*

171. *Id.*

migratory bird mortality because strict liability does not carry the moral blameworthiness associated with other levels of mens rea. Industrial threats to birds are diffuse and important to prevent, but we do not necessarily consider industrial actors contributing lawfully to our economy to be morally blameworthy, even when they incidentally cause the death of a migratory bird. The MBTA does, however, need to be a strong deterrent to stay true to its conservation purpose, and so requiring a "should have known" negligence standard would let too many industrial actors off the hook so long as they could convince a jury that a "reasonable" company would not have predicted the particular circumstance in which a bird was killed.[172] A negligence mens rea standard would dilute the law and make it harder to enforce, so a strict liability approach to violations of the MBTA is both necessary and appropriate.[173]

In 2015, six Republican representatives introduced legislation in the House that would require a knowing mens rea for any violation of the MBTA.[174] The act, entitled the "Clarification of Legal Enforcement Against Non-criminal Energy Producers Act of 2015" (the CLEAN Act), purports to update the MBTA to support an "all-of-the-above domestic energy strategy."[175] The bill expresses common frustrations with the MBTA, including that "criminal prosecution under [the MBTA] has been subjective, selective, and not applied uniformly and fairly across all sectors of society."[176] The CLEAN Act explicitly adds a "with intent knowingly" mens rea to all violations of the MBTA, and further states that '"with intent knowingly' does not include any taking, killing, or other harm to any migratory bird that is accidental or incidental to the presence or operation of an otherwise lawful activity."[177]

The CLEAN Act never made it out of committee, but it serves as an example of the continuing opposition to interpreting the MBTA as a strict liability statute. Nevertheless, the Fifth Circuit in *CITGO II*, while sharing the CLEAN Act sponsors' concerns that the MBTA is subjective and unfair, chose to affirm the interpretation of the MBTA as a strict liability statute and focus only on statutory interpretation regarding the element of actus reus.[178] The MBTA's status as a strict liability statute has thus been affirmed both statutorily and in relevant case law, and this strict liability mens rea should apply to all human-caused bird deaths.

172. *See* Robbins, *supra* note 163, at 595 (noting that jurors may have difficulty grasping or deciding what is "reasonable" for an industrial actor).

173. *Id.* at 595-96.

174. Clarification of Legal Enforcement Against Non-criminal Energy Producers Act of 2015 (CLEAN Act), H.R. 493, 114th Cong. (2015).

175. *Id.*

176. *Id.* § 2.

177. *Id.* § 4.

178. United States v. CITGO Petroleum Corp. (*CITGO II*), 801 F.3d 477, 488 (5th Cir. 2015).

C. Causation

Assuming that the current actus reus and mens rea requirements associated with the MBTA point strongly to liability for incidental take, prosecutors and courts should focus on causation to determine when a commercial actor should be charged or a conviction should be upheld. In criminal law, results crimes require a two-pronged proof of causation. First, the action must be the "factual" cause of the result (the result would not have happened "but for" the action), and second, the action was the "proximate," or legal, cause of the result.[179] Factual cause is generally very easy to demonstrate ("but for" the installation of the equalization tanks in *CITGO II*, the migratory birds certainly would not have died in them).[180] However, proximate cause in criminal law remains a less bright rule, and serves mostly to ensure that "the defendant may fairly be held responsible for the actual result even though it . . . happens in a different way from the intended or hazarded result."[181] In other words, proximate cause exists as a requirement in result crimes to make sure that the action is sufficiently connected to the resulting crime.[182]

Proximate cause must necessarily be determined on the individual facts of each case.[183] Still, two seminal cases have helped define the limits and varying interpretations of proximate cause analysis in criminal jurisprudence: *People v. Arzon*, in which a court held that a man who set fire to a building was responsible for murder even though the fire became deadly as a result of factors outside his control,[184] and *People v. Acosta*, in which a court held that a man who led police on a car chase was the proximate cause of a helicopter crash when the helicopter pilot joined the chase and made a piloting error leading to a deadly crash.[185] Both foreseeability and sufficient connection through a given sequence of events are important factors to consider in assessing proximate cause. *Arzon* makes clear that it is generally foreseeable that fires can and often do spread, and thus the fatalities of two firemen following Arzon's fire were foreseeable enough that he was found to be the proximate cause.[186] The helicopter crash in *Acosta* was also foreseeable, not because car chases often lead to helicopter crashes, but because the chase set in motion a dangerous chain of events that made the resulting helicopter crash close enough to his original action to warrant a finding of causation.[187]

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179. KADISH, *supra* note 133, at 576.

180. *See id.*

181. LAFAVE, *supra* note 134, § 6.4(a).

182. KADISH, *supra* note 133, at 576.

183. Babbitt v. Sweet Home Chapter Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

184. People v. Arzon, 401 N.Y.S.2d 156, 158–59 (Sup. Ct. 1978).

185. People v. Acosta, 284 Cal. Rptr. 117, 127–28 (Ct. App. 1991) (depublished).

186. *See* 401 N.Y.S.2d at 158 ("As for the building itself, it was a wood frame tenement house in the midst of a crowded neighborhood. A major conflagration and the fire which the defendant began was a severe one could easily have engulfed the surrounding area with considerable loss of life.").

187. 284 Cal. Rptr. at 135 ("The events leading up to the helicopter collision were set in motion by appellant's decision to flee from the police. It was predictable that, in response, the police would pursue

The Model Penal Code has also addressed the issue of how to define proximate cause for strict liability offenses, explaining that "[w]hen causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct."[188] For the MBTA, the proximate cause requirement provides an important limit on when prosecutors can charge individuals with violating the MBTA. Under a proximate cause analysis, an actor has only caused the death of a migratory bird when the death was a probable consequence of, and sufficiently connected to, the violator's action.[189] So, in addition to guiding FWS prosecutors, this proximate cause check also enables courts to overturn convictions that are not truly foreseeable or fair.

The Supreme Court first endorsed the concept of applying proximate cause to wildlife law in *Sweet Home*.[190] In a concurrence, Justice O'Connor elaborated on its importance by explaining that applying a tort-like proximate cause standard avoids absurd results under the ESA's broad definition of "harm" so that industrial operators are not held accountable for ESA harms they could never have foreseen or prevented.[191] In addition to the Supreme Court's endorsement in *Sweet Home* of the proximate cause requirement for liability for harming protected wildlife, an earlier Colorado district court decision, *United States v. Moon Lake Electric Ass'n*, provides further support for requiring proximate cause for liability under the MBTA.[192] In that case, an electrical association was charged with the death of thirty-eight birds, including bald and golden eagles, after it failed to install inexpensive protective equipment on its power poles that would protect birds.[193] The court upheld Moon Lake's conviction, clarifying that to be liable under the MBTA bird mortality must be "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury . . . if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act."[194] Because birds landing on power lines was both a reasonably foreseeable result of installing them without protection, and there was no intervening cause of the birds' death, the district court held that Moon Lake was the proximate cause of the bird mortality.[195]

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appellant and use whatever means available to them to locate and capture him. The possibility that during the chase the pursuing police vehicles might be operated in a negligent manner thereby causing a collision was sufficiently foreseeable to establish appellant's conduct as the proximate cause of the accident.").

188. MODEL PENAL CODE § 2.03(4) (AM. LAW INST. 2016).
189. See LAFAVE, *supra* note 134, § 6.4(j).
190. *Sweet Home*, 515 U.S. at 708.
191. *Id.* at 708–09 (O'Connor, J., concurring).
192. United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999).
193. *Id.* at 1071.
194. *Id.* at 1085 (emphasis omitted) (quoting BLACK'S LAW DICTIONARY 1225 (6th ed. 1990)).
195. *Id.*

However, since the Supreme Court applied this analysis in *Sweet Home*, only one circuit court has adopted a proximate cause analysis in a case involving the MBTA. In *United States v. Apollo Energies*, the Tenth Circuit held that bird deaths caused by "unprotected oil field equipment" were takings under the MBTA because the oil producers proximately caused the deaths and evidence existed that the bird mortality was foreseeable.[196] The court explicitly layered a due process justification over the MBTA's strict liability standard, holding that in order to protect the due process rights of actors held strictly liable under the MBTA, their actions must have been the proximate cause of the taking.[197] The Tenth Circuit made the foreseeability requirement even clearer in *Apollo Energies* than it had in *Moon Lake* by tying the foreseeability of the deaths to the fact that the defendants had been warned by FWS agents several times that their equipment was likely to cause bird mortality when birds entered "heater-treater" pipes to build nests.[198] Because FWS had even suggested methods for addressing the problem, the court reasoned that it was consistent with due process requirements and the doctrine of proximate cause to hold Apollo Energies liable for the deaths of migratory birds. In the court's view, additional deaths after taking no action in response to a warning from FWS were completely foreseeable.[199]

A proximate cause requirement recognizes that, while the actor's actions might be otherwise lawful, there is still some opportunity for meaningful deterrence in making certain results illegal. Some commentators have argued that reading a proximate cause requirement into the MBTA creates a "backdoor" mens rea requirement by requiring individuals to exercise due care if they seek to avoid liability.[200] However, a proximate cause analysis serves to ensure that bird mortality is connected enough to the potential violators' actions that holding them accountable would not offend due process, while also encouraging potential violators to take preventative action to avoid liability in the first place. Regulated industries are not only aware that they might be subject to regulation, but are also in a position to research and implement preventative measures.[201] As Professor Kalyani Robbins explained in support of a strict liability standard for the MBTA, "Where there is choice there is fault, and without choice there is no potential for deterrence. . . . The choices at issue merely come earlier in the strict liability context."[202] A strict liability standard

196. United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010). "Apollo admitted at trial that it failed to cover some of the heater-treaters' exhaust pipes as Fish and Wildlife had suggested after the December 2005 inspection." *Id.* at 691.

197. *Id.* at 689–90.

198. *Id.* at 691.

199. *Id.*

200. *See, e.g.*, Robbins, *supra* note 163, at 591–93 (arguing that there is no place for a foreseeability requirement in strict liability crimes, since foreseeability suggests the actor "should have known" of the risk).

201. *See* United States v. Dotterweich, 320 U.S. 277, 284–85 (1943).

202. Robbins, *supra* note 163, at 585–86.

thus allows FWS to deter violations by incentivizing prevention in a way a negligence standard might not, since industries know they may be held accountable for bird deaths that might occur in the future as a result of their operational choices.

Thus, if a protected migratory bird is killed during the operations of an industrial or commercial activity, and if that death was foreseeable and sufficiently connected to operations, criminal liability is appropriate under the MBTA. Such a death might be foreseeable and connected if, as in *Apollo Energies*, FWS previously warned the operators of potential violations and suggested mitigation efforts.[203] It might also be foreseeable and connected if, like the pesticide discharge in *FMC Corp.*, the activity itself was potentially dangerous and hazardous to health.[204] Finally, it might be foreseeable and connected if FWS investigators can compile evidence that birds had died before at the same facility, in similar ways as a result of industrial operations. This clarification of the proximate cause doctrine provides an important judicial check on FWS's prosecutorial discretion by giving courts a framework to review, on a case-by-case basis, when bird mortality was foreseeable and sufficiently connected to the otherwise lawful action to violate the MBTA.

The foreseeable and connected proximate cause framework is consistent with circuit court decisions holding that individuals are not liable under the MBTA when their actions would cause future habitat degradation leading to future bird mortality.[205] In *Newton County Wildlife Ass'n v. U.S. Forest Service*, the Eighth Circuit held that timber sales did not violate the MBTA, even though the eventual timber harvesting itself would likely result in the incidental killing of migratory birds.[206] The court explained that "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."[207] The Ninth Circuit made its position on the issue clear several years before *Newton*, holding in *Seattle Audubon Society v. Evans* that timber sales that destroyed northern spotted owl habitat did not amount to a taking under the MBTA.[208] In *Seattle Audubon*, the Ninth Circuit explained that "the differences in the proscribed conduct under ESA and the MBTA are 'distinct and purposeful,'" and held that timber sales themselves did not amount to takings under the MBTA.[209] Though the courts in both these timber cases did not explicitly discuss a proximate cause analysis,

203. *See Apollo Energies*, 611 F.3d at 686.

204. United States v. FMC Corp., 572 F.2d 902, 904 (2d Cir. 1978).

205. *Compare* Babbitt v. Sweet Home Chapter Cmtys. for a Great Or., 515 U.S. 687, 708 (1995), *with* Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997), *and* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991).

206. *Newton Cty.*, 113 F.3d at 115.

207. *Id.* (emphasis omitted).

208. *Seattle Audubon*, 952 F.2d at 302.

209. *Id.* at 303.

their reasoning supports a finding of no proximate cause because the actions and results are too far apart in the causal chain to be sufficiently connected.

Indeed, following a true proximate cause analysis, these cases did not meet the causation requirement for a violation of the MBTA because other, presently unknown causes could potentially intervene between the time of the lease approval and the alleged bird mortality. Speculation that operations might kill birds in the future, or might disrupt habitat in a way that *may* harm birds is not enough to prove proximate cause and a direct taking under the MBTA.[210] However, the Fifth Circuit incorrectly relied on this distinction as an argument for why take should not include incidental deaths under the MBTA in *CITGO II*.[211] The timber cases are attempts at connecting bird deaths to activities that are truly not "sufficiently connected" to any actual bird death to be deemed the proximate cause of a killing or taking under the MBTA.[212] In fact, at the time of both lawsuits, the logging had not yet occurred, so there was no killing or taking of a bird to investigate, let alone evidence that the bird was killed as a result of the commercial operations, foreseeable or otherwise.[213] Though the Fifth Circuit in *CITGO II* sided with the Eighth and Ninth Circuits to overturn CITGO's takings convictions under the MBTA because the corporation did not intentionally harm migratory birds, *Seattle Audubon* and *Newton County* do not provide persuasive support for an intent requirement since no birds had actually been harmed in either case. They can therefore be distinguished from cases like *FMC Corp.* and *Apollo Energies* without having to define the MBTA so narrowly as to exclude incidental take.

Finally, a proximate cause standard also helps address concerns of potentially unfair or overzealous enforcement of the MBTA on individual cat owners and vehicle operators—even if there is an argument to be made that those actions foreseeably lead to migratory bird mortality. Problems of proof, difficulty investigating and monitoring, and limited resources all suggest that FWS's enforcement authority is better focused on bigger players, like currently regulated industry members who expect their activities to be regulated, and that engage in operations that have the potential to continue causing bird mortality if left unchecked.[214] However, the flexibility of the MBTA means that this

210. *See Newton Cty*, 113 F.3d at 115; *Seattle Audubon*, 952 F.2d at 302.

211. United States v. CITGO Petroleum Corp. (*CITGO II*), 801 F.3d 477, 489 (5th Cir. 2015).

212. *See Newton Cty.*, 113 F.3d at 115 ("In this case, the Wildlife Association alleges . . . that logging under the timber sales *will* disrupt nesting migratory birds, killing some.") (emphasis added); *Seattle Audubon*, 952 F.2d at 302 (The plaintiffs appealed the lower court's decision that the MBTA "does not prohibit the Forest Service and the Bureau of Land Management . . . from selling and logging timber from lands within areas that *may* provide suitable habitat for the northern spotted owl.") (emphasis added).

213. *See Newton Cty.*, 113 F.3d at 115; *Seattle Audubon*, 952 F.2d at 300–01.

214. *C.f.* Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1198 (1995) (explaining that under the current strict liability regime, courts consider individuals engaging in activities with a strong potential to impact public welfare to be on notice that they might be stringently regulated).

possibility remains open should migratory bird populations ever reach such a dire state that individual actions needed to be curtailed to protect and conserve them.

CONCLUSION

Applying the doctrine of proximate cause to incidents of bird mortality has the potential to clarify the scope of the MBTA in a way that provides certainty for commercial actors, conservationists, and judges alike. Employing a framework of foreseeability factors to distinguish incidences of bird mortality that are sufficiently connected to industry action and those that are not will create a strong framework for judicial review of enforcement decisions under the MBTA.

The MBTA was designed so that its broad coverage would necessarily be tempered by the limited authority of FWS to investigate and prosecute all instances of human-caused migratory bird mortality in the United States. As a result, the narrow enforcement mechanism of the MBTA provides an important check on overzealous prosecution, and courts' ability to impose a clear proximate cause analysis provides yet another reassuring check on FWS's prosecutorial discretion. The Fifth Circuit's convoluted holding in *CITGO II*, which attempted to classify bird deaths that were clearly the foreseeable and connected result of industrial operations as outside of the scope of the MBTA, illustrates the need for this clarified standard of review.[215]

Of course, Congress could choose to impose civil penalties under the MBTA in addition to, or instead of, the criminal penalties, which carry controversial stigma associated with criminal liability. FWS could also establish an incidental take program through agency regulatory action, as they have considered in their 2014 programmatic environmental impact statement.[216] Both these changes to the statute might render a proximate cause analysis unnecessary, but would open up an entirely new realm of legal questions and short-term uncertainty about the new regime.

For the sake of protecting the migratory birds that have protected our crops, fueled recreational hunting, and populated our ecosystems and imaginations as they make their long journeys north and south each year, a robust and broad strict liability criminal statute tempered by a proximate cause analysis is the best legal protection we can offer migratory birds. Such a regime, once accepted more uniformly by conservationists and commercial operators and applied more consistently by courts, has the potential to foster a climate of deterrence and compliance with agency guidelines to prevent bird mortality before it happens. This system would incentivize individuals across the nation to prevent bird mortality—both large-scale and individual bird

215. *See CITGO II*, 801 F.3d at 489.

216. *See* Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032, 30,032–33 (May 26, 2015).

deaths—without imposing the stigmatizing label of moral culpability. Thus, it may serve as a model for addressing diffuse environmental threats in the future.