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Can an Oil Pit Take a Bird?: Why the Migratory Bird Treaty Act Should Apply to Inadvertent Takings and Killings by Oil Pits

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INTRODUCTION

Federal courts currently disagree about the scope of criminal liability under the Migratory Bird Treaty Act (hereinafter "MBTA" or "Act"). The controversy involves the meaning of the word "take" and whether it applies to legal, commercial activity not directed at harming birds. The issue has recently arisen in the oil and gas context, where the question is whether an oil pit can "take" a migratory bird in the course of its ordinary, regulated, use.

Many sources can be used to inform the proper scope of MBTA liability, including the history of the legislation, the text and plain language of the statute, and case law from the lower courts. This paper will discuss the different possible interpretations of the MBTA, arguing that oil pit operators should be held strictly liable for taking and killing migratory birds in the course of their operations.

Part I introduces the relevant statutory text. Part II explores the current Federal Circuit Court split in interpreting the Act. Part III analyzes why the *Citgo*[1] court properly interpreted the MBTA to apply to oil pits that take and kill birds during the course of their normal, regulated activity by looking to the history, text, and purpose of the Act. Part IV dispels any concerns about unconstitutional or inappropriate application by arguing that vigorous proximate cause analysis and prosecutorial discretion work to ensure absurd results do not occur. The article concludes that to permit oil companies' operations to continue to capture and kill birds, albeit inadvertently, is contrary to the express purpose of Congress and that in order for the MBTA to have any meaning, it must be interpreted to apply to those

[1] United States v. Citgo Petroleum Corp., 893 F. Supp. 2d 841 (S.D. Tex. 2012) *rev'd*, 2015 WL 5201185 (5th Cir. Sept. 4, 2015).

whose operations are the proximate cause of "takings" and "killings" of migratory birds.

The MBTA's purpose is to protect migratory birds, not just to protect them from acts directed at harming them. Courts should interpret MBTA liability to apply when migratory bird deaths occur as a result of oil pit operations.

I
THE MBTA

The MBTA provision at issue reads:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions . . .[2]

Within the meaning of the MBTA, "migratory birds" includes "many of the most numerous and least endangered species one can imagine."[3] The U.S. Department of the Interior lists almost all species of North American birds as migratory birds, including crows, grackles, and pigeons.[4] No de minimis exception appears to apply, because the MBTA makes unlawful the taking of any single migratory bird.[5] The

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2 16 U.S.C.A. § 703 (West 2004).

3 Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1576 (S.D. Ind. 1996).

4 *See* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 190 (1979) ("The MBTA now protects nearly all native birds in the country, of which there are millions if not billions, so there is no end to the possibilities for an arguable violation."). For a complete listing of protected migratory birds, see 50 C.F.R. § 10.13 (1997).

5 "[I]f . . . the MBTA prohibits the inadvertently-caused death of any migratory bird . . . land uses on tens of millions of acres would be impaired." Timber Appellees' Brief at 2, Newton County Wildlife Assn., 113 F.3d 110 (No. 96-3463) [hereinafter Timber Appellees' Brief]. *See also* Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 842 (1998).

key statutory language is: "[I]t shall be unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird."[6]

The question that courts are currently grappling with is whether in the context of the MBTA "take" refers exclusively to conduct directed at harming birds, such as hunting and poaching, or whether it is intended to include acts or omissions that merely have the incidental effect of causing bird deaths. As the plain language of the text helps illuminate, the MBTA cannot be interpreted to apply only to intentional harmful conduct.

In *United States v. Corrow*,[7] the Tenth Circuit joined the majority of Circuit Courts of Appeal in holding that section 707(a) of the MBTA creates a strict liability crime.[8] This means that it is not necessary to prove that the defendant intended to violate the MBTA. In other words, the defendant does not need to intended or acted with the purpose to "take" or "kill" the birds, or even have done so negligently; the taking or killing must simply have occurred.[9]

The fact that Congress made MBTA violations strict liability crimes further indicates that it was not Congress's objective to limit liability to intentionally harmful acts toward birds. The MBTA certainly reaches conduct beyond hunting, including oil pit deaths.

II
CURRENT FEDERAL COURT SPLIT IN INTERPRETING CRIMINAL LIABILITY FOR MBTA VIOLATIONS: WHAT DOES "TAKE" MEAN IN THE MBTA? MUST THE ACTION BE DIRECTED AT BIRDS IN ORDER TO CONSTITUTE A TAKING?

Many courts have found that the MBTA is ambiguous as to when criminal liability attaches. The finding of ambiguity is supported by the aforementioned disagreement among Federal District Courts.[10] The Eighth and Ninth Circuits have concluded that the term "kill" in the MBTA means physical conduct of the sort engaged in by hunters and

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6 16 U.S.C.A. § 703.

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

8 *Id.* at 805.

9 United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1073-74 (D. Colo. 1999); *see also* United States v. Manning, 787 F.2d 431, 435 n. 4 (8th Cir. 1986); *see also* S. Rep. No. 99-445, at 16 (2008), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 ("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 by many Federal court decisions.").

10 *See supra* Introduction.

poachers.[11] The Second Circuit, conversely, has determined that a corporation who performs an affirmative act that is not related to hunting but nonetheless results in the death of migratory birds, can be held strictly liable under the MBTA.[12]

A. Oil Field Equipment Can "Take" Birds

In 2012, in *United States v. Citgo Petroleum Corp.*, the District Court for the Southern District of Texas held that "[i]f an operator who maintains a tank or pit does not take protective measures necessary to prevent harm to birds, the operator may incur liability under federal and state wildlife protection laws."[13] The court in *Citgo* determined that it was reasonably foreseeable that the operation of open oil pits would result in migratory bird deaths.[14] The court held that oil field equipment can "take" birds.[15] Additionally, liability for the charged conduct was appropriate because the defendant oil company proximately caused the harm to birds.[16]

B. Simply Maintaining a Pit in Which Birds Die Does Not Trigger Liability

In the same year, in *United States v. Brigham Oil & Gas, L.P.*, the District Court for the District of North Dakota held the opposite—that simply maintaining a pit in which birds die does not trigger liability. The *Brigham* court held that oil and gas companies' use of reserve pits

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11 *See* Newton Cty. Wildlife Assoc. v. United States Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991).

12 United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978) (holding that "where corporation engaged in manufacture of pesticide known to be highly toxic and then failed to act to prevent dangerous chemical from reaching the pond where it was dangerous to birds and other living organisms that ingested or came into close contact with chemical, corporation did perform an affirmative "act" for which it could be held strictly liable under Act, even though corporation was not aware of the lethal-to-birds quality of water in its pond"); *see also* United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615 (D.N.M. Feb. 25, 2009) (concluding that "Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths").

13 United States v. Citgo Petroleum Corp., 893 F.Supp.2d 841, 847 (S.D. Tex. 2012), *rev'd* 2015 WL 5201185 (5th Cir. Sept. 4, 2015).

14 *Id.*

15 *Id.*

16 *Id.* at 848. *See also* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

to hold drill cuttings and oil and gas fluids accumulated during commercial drilling operations did not violate the MBTA prohibition against the "taking" or "killing" of protected migratory birds.

The court interpreted the Act to require some intentional behavior directed at birds in order for liability to attach. While several birds died in or near the pits, the pits were directed at commercial oil production, not at harming birds. Even though several bird deaths occurred in or near the pits, since the pits were not directed at birds or their habitat and constituted commercial activity that only incidentally injured protected bird species, the court determined that Brigham Oil & Gas did not "take" or "kill" migratory birds within the meaning of the MBTA to subject them to criminal liability.[17]

III
WHY THE *CITGO* INTERPRETATION WAS CORRECT[18]

In deciding *Brigham*, the court noted 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."[19]

Certainly, it is true that Congress could not have meant to criminalize normal land use and commercial activities; however, maintaining oil pits is an act distinguishable from lawn mowing, timber harvesting, driving, skyscraper building, and other legal commercial activities. The actors in the oil business are knowledgeable about their operations and the way that birds fly into, become trapped, and die in their oil pits. Oil companies have been educated by the Fish and Wildlife Service about the harm that their pits cause to birds and how they can prevent them.[20] Fish and Wildlife Service agents suggest to oil companies various methods of repelling birds, including "zon guns

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17 United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1213 (D.N.D. 2012).

18 Citgo appealed the verdict, and the Fifth Circuit Court of Appeal, reviewing the issues de novo, reversed the MBTA convictions, agreeing with the Eighth and Ninth Circuit Courts "that a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds." The Fifth Circuit's decision was "based on the statute's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act." *United States v. CITGO Petroleum Corp.*, No. 14-40128, 2015 WL 5201185, at *9 (5th Cir. Sept. 4, 2015).

19 *Id.*

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

(loud cannons), cracker shells (loud shotgun shells) and netting" over the pits.[21]

Oil companies are not analogous to the schoolboy who hits his baseball into a tree and accidentally kills a bird. The schoolboys of the world are not going to be held liable under this strict liability regime. Vigorous proximate cause analysis coupled with prosecutorial discretion will avoid such results. Additionally, it is helpful to point to the nearly one hundred years of enforcement history of the MBTA and the lack of any such cases being brought.[22] On policy grounds, it is simply unacceptable to construe the MBTA so as to allow for oil companies to get away with causing bird "takings." It completely undermines the express purpose and intent of the Act, which is to protect migratory birds from being taken or killed.

Interpreting the MBTA to criminalize legal corporate conduct not aimed at causing harm to migratory birds, is not, as some might argue, contrary to the legislative intent or the history of enforcement practice of the Act. Additionally, it would not make any activity resulting in the death of migratory birds a violation of the MBTA, regardless of whether the defendants directed their activity at wildlife.[23]

In order for the MBTA to have any meaning, it must be interpreted to allow for the sanctioning of private actors like oil companies, whose operations are the proximate cause of "takings" and "killings" of migratory birds. Congress enacted the MBTA for the preservation of migratory bird species. While the text of the statute clearly indicates a list of prohibited actions, it is not exhaustive.

In light of the text of the Act and its purpose and legislative history, the MBTA should be read to apply to oil companies engaged in legal, permitted activities in order to help ensure the protection of migratory birds. Such an interpretation would not put schoolboys at risk of criminal liability because vigorous proximate cause analysis, as discussed *infra* Conclusion, would prohibit it and prosecutorial discretion, as also discussed *infra* Conclusion, still serves an important role to ensure cases that are brought are carefully selected to advance the purpose of the MBTA.

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21 *Id.*

22 Means, *supra* note 5, at 824.

23 *Id.*

A. Statutory Interpretation: History, Text, Purpose

> Any question of statutory interpretation begins with looking at the plain language of the statute to discover its original intent. To discover a statute's original intent, courts first look to the words of the statute and apply their usual and ordinary meanings. If after looking at the language of the statute the meaning of the statute remains unclear, courts attempt to ascertain the intent of the legislature by looking at legislative history and other sources. Courts generally steer clear of any interpretation that would create an absurd result which the Legislature did not intend.[24]

Other rules of statutory interpretation include reading the statute in an internally consistent fashion, ensuring that the particular section of the statute at issue is consistent with the rest of the enacted language.[25] The legislature is presumed to act intentionally when including language in one section, but not another.[26] Courts may also look at the common usage of the word and dictionaries, as well as how the word or phrase is used in other, related legislation.[27]

1. History of the MBTA

The MBTA was enacted to give effect to a treaty between the United States and Great Britain.[28] The treaty was "for the protection of migratory birds" and arose from the nations "being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless"[29] The United States and Great Britain agreed that "as an effective means of preserving migratory birds there shall be established . . . close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities."[30] The expanded convention, which includes Mexico, Japan, and Russia, seeks to "protect migratory birds . . . in order that the species may not be exterminated" by "employ[ing] adequate measures which will

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24 Legal Information Institute, *Statutory Construction*, Cornell University Law School, https://www.law.cornell.edu/wex/statutory_construction (last visited Apr. 3, 2015).

25 *Id.*

26 *Id.*

27 *Id.*

28 *See* Missouri v. Holland, 252 U.S. 416, 430–31 (1920).

29 Act of Aug. 16, 1918, 39 Stat. 1702.

30 *Id.* at Art. II. "The MBTA has since been amended to implement conventions which the United States has signed with Mexico, Japan, and the Soviet Union." *See* Alaska Fish and Wildlife Fed'n and Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 940 (9th Cir. 1987).

permit a rational utilization of migratory birds for the purposes of sport as well as for food, commerce and industry."[31]

It is clear from the above-referenced intent that the drafter's goal of the MBTA was to protect migratory birds for a variety of purposes. It was envisioned that a regulatory permitting scheme and hunting regulations would be a means of achieving the preservation of the specified migratory bird species. There is clearly no indication that the Act was meant to apply only to hunting; in fact, it is expressly broader than that. The MBTA was enacted for the purpose of permitting a rational use of migratory birds for sport, food, commerce, and industry.[32]

The MBTA is a criminal statute making it unlawful, a misdemeanor, for persons, associations, partnerships, and corporations to "take" or "kill" migratory birds. It is a strict liability offense, meaning that there is no "guilty mind" requirement.[33] A defendant will be convicted even if he was genuinely ignorant of one or more of the factors that made the act or omission criminal.[34] Misdemeanor convictions still do not

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31 Act of Mar. 15, 1937, 50 Stat. 1311 (those measures include close seasons for the taking of migratory birds, their nests and eggs, establishment of refuge zones, limits on the length of hunting seasons, and the prohibition of killing migratory insectivorous birds except when they become injurious to agriculture and constitute plagues). *See also* United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615, at 4 (D.N.M. Feb. 25, 2009).

32 *Id.*

33 *See* 16 U.S.C. § 707(a) ("[A]ny person . . . who shall violate any provisions . . . shall be deemed guilty of a misdemeanor and . . . shall be fined not more than $500 or be imprisoned not more than six months, or both."). *See also* United States v. FMC Corp., 572 F.2d 902, 906 (2d Cir. 1978) ("[C]ases involving hunters have consistently held that . . . it is not necessary that the government prove that a defendant violated [the MBTA's] provisions with guilty knowledge or specific intent to commit the violation." (quoting Rogers v. United States, 367 F.2d 998, 1001 (8th Cir. 1966)); *see also* United States v. Schultze, 28 F. Supp. 234, 236 (W.D. Ky. 1939) (finding irrelevant whether defendants knew they were violating the statute).

34 The court in United States v. Apollo Energies, Inc., 611 F.3d 679, 684–85 (10th Cir. 2010) cited United States v. Engler, 806 F.2d 425, 432 (3d Cir. 1986) stating that "[l]ike other regulatory acts where the penalties are small and there is 'no grave harm to an offender's reputation.'" The Supreme Court has long recognized a different standard applies to those federal criminal statutes that are essentially regulatory. *Id.* (relying on Morissette v. United States, 342 U.S. 246 (1952)). "Simply stated, then, 'it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge." *Id.* at 805 (quoting United States v. Manning, 787 F.2d 431, 435 n.4 (8th Cir. 1986)).

require knowledge, but in 1986 Congress amended the MBTA to require that felony violations be committed "knowingly."[35]

This stricter standard helps ensure that criminal liability is applied justly; that the schoolboys accidentally harming protected species are not punished as criminals. While misdemeanors are still serious crimes, proximate cause analysis and prosecutorial discretion work to ensure that schoolboys are not prosecuted. The knowledge requirement for a felony conviction ensures that punishment is proportionate to the crime, and that the actors who act knowingly in violation of the MBTA are punished more severely than those who lack the requisite mens rea.

By including associations, partnerships, and corporations as possible defendants, it is evident that Congress intended for the MBTA to reach conduct beyond hunting. While it may not have envisioned oil pits as sources of takings, it expressly provided that liability could extend beyond individuals' purposeful conduct. In line with its purpose, MBTA should be applied to oil companies whose operations of oil pits are taking and killing migratory birds.

The MBTA was made famous in 1920 by the Supreme Court's decision in *State of Missouri v. Holland* (hereinafter "*Holland*").[36] The Act was then, and continues to be, universally recognized as a conservation statute.[37] In *Holland*, the Supreme Court declared the protection of migratory birds a "national interest of very nearly the first magnitude."[38] This declaration of the importance of protecting migratory birds has been used in more recent cases to justify a broad

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35 Means, *supra* note 5, at 823. *See* 16 U.S.C. § 707(b) (West 1998). A "knowing" violation, however, may not require specific intent to violate the statute. The Senate report states that a defendant must be shown merely to know that his action amounted to a taking and that the item taken was a bird. *See* S. Rep. No. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128; *cf.* United States v. Dean, 969 F.2d 187 (6th Cir. 1992) (holding that "for a knowing criminal violation of the Clean Water Act, actual knowledge of the permit requirement need not be shown"). *See generally* Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1242 (Fall 1995).

36 State of Missouri v. Holland, 252 U.S. 416 (1920).

37 *Id. See also* United States v. Pitrone, 115 F.3d 1, 2 (1st Cir. 1997); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986); Gibbs v. Babbitt, 214 F.3d 483, 500 (4th Cir. 2000); Hoffman Homes, Inc. v. Envtl. Prot. Agency, 999 F.2d 256, 261 n.3 (7th Cir. 1993); Newton Cty Wildlife Ass'n v. Forest Serv., 113 F.3d 110, 114 (8th Cir. 1997); United States v. Mackie, 681 F.2d 1121, 1123 (9th Cir. 1982); United States v. Hardman, 297 F.3d 1116, 1121 (10th Cir. 2002).

38 State of Missouri v. Holland, 252 U.S. at 435.

definition of "taking."[39] The interest at stake is the preservation of migratory birds. Attributing liability to oil companies, who allow migratory birds to get into, trapped, and die in their oil pits, would help serve that interest. These cases have also relied on the broader definition of "taking" found in the Endangered Species Act,[40] which will be discussed later in Part III.

The MBTA extends federal protection to migratory birds covered by the four conventions.[41] Specifically, section 703 of the MBTA makes it unlawful to "hunt, take, capture, [or] kill" any migratory bird included in the terms of the Canadian, Mexican, Japanese, or U.S.S.R. conventions.[42] Those who argue for a narrow reading of the MBTA, to include only actions performed for the purpose of taking or killing birds, like poisoning, trapping, or hunting, style a type of slippery slope argument.

The argument for a strict, narrow reading of forbidden activity is that it prevents an interpretation that leads to absurd results like constraining normal land use activities.[43] There is an unreasoned fear that under a slightly broader interpretation of the MBTA, one that would allow liability to be attributed to oil companies, causing the death of almost any bird would result in a criminal violation.[44] Clearly, this interpretation of the MBTA is illogical and against Congress's intent.

Statutory construction and enforcement, however, are not all or nothing constructs. The court in *Citgo* was correct in applying criminal

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39 *See* Portland Audubon Soc. v. Lujan, No. CIV. 87-1160-FR, 1991 WL 81838, at 6 (D. Or. May 8, 1991). *See* also Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); Andrus v. Allard, 444 U.S. 51, 62 (1979).

40 *Id.*

41 Hill v. Norton, 275 F.3d 98 (D.C. Cir. 2001).

42 Fund for Animals v. Williams, 246 F. Supp. 2d 27, 38 (D.D.C. 2003), *amended* 311 F. Supp. 2d 1 (D.D.C. 2004), *vacated on other grounds by* Fund For Animals, Inc. v. Hogan, 428 F.3d 1059 (D.C. Cir. 2005).

43 *See Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996). Some regular land use activities result in incidental bird deaths including farming, timber harvesting, and brush clearing.

44 *See* United States v. Corbin Farm Serv., 444 F. Supp. 510, 529 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978). *See also* Means, *supra* note 5. "The *Corbin* court determined that where a single act results in multiple bird deaths, the principle of lenity requires that only one violation be charged because it is unclear whether Congress intended to make each death a separate violation." *Cf.* United States v. FMC Corp., 572 F.2d 902, 903 (2d Cir. 1978).

liability to an oil company whose legal, commercial activity was resulting in migratory bird deaths. Contrary to what the court in *Brigham* suggested, *Citgo* did not set a precedent that would allow for the schoolboy to be criminally prosecuted. There are limits that can be imposed so as to protect migratory birds in line with the purpose of the MBTA and still prevent absurd results.

2. Text: Plain Language, Ordinary Meaning and Dictionary Definition, Regulatory Meaning, Contextual Understanding

a. Plain Language

Statutory interpretation begins with the language, the actual enacted text, of the statute.[45] Words and phrases in the text cannot be read in isolation. Courts must look to the particular statutory language at issue in addition to the language and design of the statute as a whole.[46] When Congress expresses its will in "reasonably plain terms," the plain language should be conclusive.[47] In this case, however, it is not clear whether the terms are "reasonably plain" as evidenced by the aforementioned disagreements among courts.

The MBTA makes it unlawful, except as permitted by regulations, to "take" or "kill" specified migratory birds or their nests or eggs. The current dispute among the courts, where some have interpreted "take" to mean only physical conduct of the sort engaged in by hunters and poachers,[48] while others have interpreted "take" to include activities that result in the incidental deaths of birds, like oil pits,[49] arose because the MBTA does not define the term "take."

b. Ordinary Meaning and Dictionary Definition

Rules of statutory interpretation direct courts to construe terms according to their ordinary meaning. For purposes of the MBTA, when applied to wildlife, the ordinary meaning of the word "take" refers to a "purposeful attempt to possess wildlife through capture, not incidental

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45 *See, e.g.*, Pennsylvania Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 557–58 (1990); Mallard v. United States Dist. Court, 490 U.S. 296, 300 (1989).

46 Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251, 1257 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)).

47 Southern Ute Indian Tribe, 151 F.3d at 1256 (10th Cir. 1998).

48 This is certainly the type of conduct that Congress envisioned when enacting the MBTA in 1918. *See* Newtown Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997); *see also* Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703-712 (West 2004).

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

or accidental taking through lawful commercial activity."[50] The court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, deferred to the Department of Interior's definition of "take" as a reasonable interpretation of the MBTA's plain language.[51]

When applied to wildlife, the ordinary meaning of the word "take" means removing the wildlife into possession. Webster's Third New International Dictionary defines "take" as "to get into one's hands or into one's possession, power, or control by force or stratagem: . . . to get possession of (as fish or game) by killing or capturing"[52] This definition clearly applies to intentional conduct like trapping and hunting; however, it can also apply to conduct not aimed at the removal of wildlife into possession. The definition does not indicate any intent necessary, rather it simply requires gaining possession by killing or capturing, which is precisely what is occurring in the oil pits.

While the ordinary meaning of "take" as applied to wildlife is contrary to the intent of the legislature, it helps explain why Congress included "kill" as an alternative. If the plain meaning of "take" as applied to wildlife normally refers to purposeful attempts to remove the subject from its normal habitat, "kill" then expands this. A killing can certainly be incidental or accidental. The oil companies, and the type of activity at issue, gain possession of the migratory birds by killing them. As aforementioned, the killing does not have to be intentional by definition; it can be incidental, an unintended consequence of an activity, as it is in the case of the oil pits. When read properly as a whole, the prohibition should certainly apply to the oil companies whose operations inadvertently "take" and "kill" migratory birds.

c. Regulatory Meaning

The regulatory definition of "take" accompanying the MBTA aligns with the Webster's meaning aforementioned. According to the accompanying regulations, which recapitulate much of the language of the MBTA itself, "[t]ake means to pursue, hunt, shoot, wound, kill,

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

51 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *see also* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999).

52 Webster's Third New International Dictionary (Unabridged) 2329–30 (1986); *see also* Kepner v. United States, 195 U.S. 100, 124 (1904) ("[L]anguage used in a statute which has a settled and well-known meaning . . . is presumed to be used in that sense . . .").

trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."[53]

Some courts have argued that the additional action words in the regulation's definition of "take"—"shoot," "wound," "trap," and "collect"—help confirm that the meaning of "take" should be confined to activity directed at wildlife.[54] Some courts have disagreed with this assertion that wounding, trapping, and collecting can be done unintentionally.[55] The above-listed words are often associated with hunting, but they can certainly refer to other actions as well. As evidenced by the fact that migratory birds are being unintentionally taken and subsequently killed by oil pits, taking and killing can be unintentional. Oil companies are not setting out to "wound," "trap," or "collect" birds, but that is what is resulting as a consequence of their actions.[56]

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53 50 C.F.R. § 10.12 (1997) defines "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." *See also* Benjamin Means, *supra* note 5, at 823.

54 *See* Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1579 (S.D. Ind. 1996).

55 The court in *Seattle Audobon Soc'y v. Evans* held that the ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); Mahler v. United States Forest Serv., 927 F.Supp. 1559, 1573–74 (S.D.Ind.1996); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F.Supp. 1502, 1509–10 (D.Or.1991); Newtown Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997).

56 "The Secretary of the Department of the Interior ("the Secretary") defines "taking" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12. The MBTA, when combined with the Secretary's definition of "take,"

> prohibits the following types of conduct: pursuing, hunting, capturing, killing, shooting, wounding, trapping, collecting, possessing, offering for sale, selling, offering to barter, bartering, offering to purchase, purchasing, delivering for shipment, shipping, exporting, importing, delivering for transportation, transporting, carrying, and receiving. Considering the ordinarily understood meaning of these words, only hunting, capturing, shooting, and trapping identify conduct that could be construed as solely the province of hunters and poachers. In contrast, pursuing, killing, wounding, collecting, possessing, offering for sale, selling, offering to barter, bartering, offering to purchase, purchasing, delivering for shipment, shipping, exporting, importing, delivering for transportation, transporting, carrying, and receiving all constitute acts that may be performed without exhibiting the physical conduct normally associated with hunting and poaching.

United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999).

d. Contextual Understanding

"Take" and "kill" in the MBTA are defined in part by the words that surround them.[57] The other words in the prohibition are often, but not exclusively, associated with activities directed at birds. Congress likely listed these actions because they all undoubtedly result in the type of harm to birds that it sought to prevent; however, the list is not exhaustive. To exclude migratory bird deaths that result from oil pit operations would undermine Congress's express goal of preserving migratory bird species.[58]

Some argue that the prohibition of attempts in the MBTA suggests that the Act is not aimed at unintentional conduct, and that it is not possible to unintentionally attempt to take a bird.[59] However, it is important to note that the prohibited attempted actions are in addition to the acts, which indicates that Congress meant to prohibit a wide range of activities in order to protect migratory birds. Another argument for a narrow reading is that punishing unintentional or accidental conduct would violate Due Process[60] because people are not on notice that their conduct may be prohibited. This concern can be easily done away with.

In *United States v. FMC Corp*., the court concluded that by imposing strict liability on FMC Corp. it did not "dictate that every death of a bird will result in imposing strict criminal liability on some party."[61] The court explained that the defendant's choice to engage in an activity involving the manufacture of a highly toxic chemical and its failure to prevent that chemical from escaping into a pond and killing birds were

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57 "Further, the doctrine of *noscitur a sociis* does not compel me to conclude that Congress intended the word "kill" to serve the same function as the words 'hunting,' 'shooting,' and 'trapping.'" United States v. Moon Lake Elec. Ass'n at 1079 (D. Colo. 1999).

58 Convention Between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, (Feb. 7, 1986) 50 Stat. 1311.

59 *See* 16 U.S.C. § 703 ("attempt to take, capture, or kill").

60 U.S. Const. amend. XIV, § 1,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

61 United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1998).

sufficient grounds to impose strict liability.[62] The *FMC Corp.* court reasoned that a construction that would bring every killing within the statute, "such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense."[63]

Courts have long noted that there are alternatives to the strict liability regime for actors who are engaging in more "innocent" violations of the MBTA. In *United States v. Schultze*, the court articulated that "[a] n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine"[64] and that these situations could be left to prosecutorial and judicial discretion.[65] Similarly, the court in *United States v. Moon Lake Elec. Ass'n, Inc.*, acknowledged that even under a strict liability standard the government still had to prove that the defendant's conduct constituted both the cause in fact and proximate cause of the migratory bird's death.[66] Requiring the government to prove that the conduct constituted both the cause in fact and proximate cause of the taking is a limiting feature of the MBTA. It serves to limit both arbitrary and overbroad enforcement so that the schoolboys who accidentally hit a bird while playing baseball escape liability.

The MBTA's language and regulations suggest that Congress intended to prohibit conduct beyond that of hunters and poachers. Congress prohibited killing, in addition to hunting, shooting, and trapping. The MBTA does not appear to be concerned with how the bird was taken or killed.

As the court in *Moon Lake* notes, the MBTA forbids the sale of protected birds regardless of how the birds were obtained.[67] Even if a bird is found that died of natural causes, its carcass cannot be sold; nor may anyone who possesses bird parts lawfully killed before the MBTA

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62 *Id.*

63 *Id.* at 905.

64 United States v. Schultze, 28 F. Supp. 234, 236 (W.D. Ky. 1939).

65 *Id.* Prosecutorial discretion can be problematic in some circumstances; however, when dealing with a small nominal fine, there are fewer concerns of abuse and arbitrary enforcement.

66 United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999).

67 16 U.S.C. § 668(a) (2015). *See also* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. at 1074-75.

was passed, lawfully sell those bird parts after 1918.[68] Additionally, Congress did not include any language in the MBTA that suggests that it intended to only punish those acting with specific motives.[69] In fact, by making it a strict liability crime to "take" or "kill" migratory birds Congress did away with any possibility of requiring specific motives.

"Take" and "kill" must be read in conjunction with the phrase that precedes them: "by any means or in any manner."[70] This phrase appears to be Congress's attempt to apply liability to more classes of activities. If Congress had intended to limit the MBTA's application to activities directed at migratory birds, it did not have to include "by any means or in any manner."[71] Evidently, by adding this phrase Congress intended for the MBTA to apply to activities beyond hunting and poaching. As further evidence, Congress is aware that both private and government sectors have interpreted the MBTA as proscribing conduct beyond that normally exhibited by hunters and poachers and has done nothing to stop that interpretation.[72]

While the MBTA certainly proscribes action beyond that directed at intentionally harming birds, there are limits. The Supreme Court has recognized a strong presumption against criminalizing ordinary activities.[73] Congress meant for there to be a reasonable limit on the

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68 *Id. See also* Andrus v. Allard, 444 U.S. 51, 56, 61–62 (1979) (both the MBTA and the BGEPA prohibit commerce in parts of protected birds, without regard to when those birds are originally taken).

69 *See* Andrus v. Allard, 444 U.S. at 56, 57, 59–60 (1979) (describing the statutory prohibitions of the MBTA as "comprehensive," "exhaustive," "carefully enumerated," "expansive," and "sweepingly framed").

70 16 U.S.C. § 703 (West 2004).

71 *Id.*

72 *See Agricultural Drainage Problems and Contamination at Kesterson Reservoir: Hearings before the Subcomm. on Water and Power Resources of the H. Comm. on Interior and Insular Affairs*, 99th Cong. 10–19, 22–25, 30–39, 42–43, 45–51, 62–65, 104–110, 128–130, 150–151, 215, 523–524, 525–532, Serial No. 99–3 (1985) (discussing in detail whether the Department of Interior violated the MBTA because of its operation of a contaminated reservoir in California's San Joaquin Valley); *see* also United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1074–75 (D. Colo. 1999).

73 *See* United States v. X-Citement Video, 513 U.S. 64, 69 (1994), indicating that the Supreme Court would refuse to make a drugstore owner criminally liable merely for developing film, even if the film happened to contain images of children engaged in sex acts. The Court reached that conclusion despite statutory language most naturally read to include drugstore owners and despite the absence of legislative history on point. "We do not assume that Congress, in passing laws, intended such results." *See id.* at 69 (citing Public Citizen v. Department of Justice, 491 U.S. 440, 453-55 (1989)); *see also* Williams v. United States, 458 U.S. 279, 286 (1982) (holding that a statute that prohibited the making of false

application of the Act, especially with it being a strict liability offense. The legislative history of the MBTA reinforces that understanding. Congress could not have been targeting regular farming, timber harvesting, brush clearing, and window installation activities. Even if the plain meaning of the statute suggested such vast applicability, it would not be controlling.[74] Congress wanted to stop excessive bird deaths occurring from means beyond just hunting.[75]

3. Legislation

a. The Legislative Intent and Purpose of the MBTA

Even if reasonable minds could differ about the scope of the plain meaning of the text of the MBTA, the legislative history of the Act makes clear that Congress intended to direct its prohibitions at more than purposive conduct toward birds. Congress's ultimate goal was to protect migratory birds from harm.

The MBTA gave effect to a treaty between the United States and Great Britain "for the protection of migratory birds" which arose from their "being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless"[76] The MBTA was enacted in 1918 as a wartime

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statements to a bank did not apply to the deposit of a "bad check" because "the Government's interpretation . . . would make a surprisingly broad range of unremarkable conduct a violation of federal law").

74 *See, e.g.*, Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966) (quoting United States v. American Trucking Assn., 310 U.S. 534, 543 (1940)). The Court explained:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.

75 *See, e.g.*, 56 CONG. REC. 7374-77 (1918) (debating vociferously which states' hunters would benefit from the MBTA). *See also id.* at 7360 (statement of Sen. Anthony) ("[T]o my knowledge, for the most part, the people who are against this bill are the market shooters, who want to go out and kill a lot of birds in the spring, when they ought not to kill them."). For the argument that modern guns require more stringent hunting controls, see *id.* at 7370 (statement of Sen. Raker) ("The improvement of guns ha[s] been such that [game birds] can be reached in all places, and they are slaughtered promiscuously, many of them for the market and shipped away, but many are destroyed just simply for the fun of shooting."). *See also* Means, *supra* note 5, at 842.

76 Missouri v. Holland, 252 U.S. 416, 431 (1920); 39 Stat. 1702.

measure for food conservation.[77] The sponsoring Senator further explained that "[e]nough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it."[78]

The logic was that by reducing the insect population, migratory birds would help protect crops and maintain a steady supply of food for the wartime effort.[79] The National Association of Game and Fish Commissioners in a letter read into the Congressional Record, pushed Congress to pass the MBTA as a measure to maximize food production.[80] There appears to be an overall sense of pragmatism among the bill's supporters.

At the time of the MBTA's enactment, Congress's primary concern was preserving birds from harm to help farmers and boost food supply. While this was the primary concern due to war, Congress surely did not mean for the MBTA to be a temporary solution or to allow bird deaths resulting from sources other than out-of-season hunters. Out-of-season hunters were simply the best example of people who were taking migratory birds. It is likely that Congress did not consider oil pit deaths in passing the MBTA; however, that does not mean that those deaths do not constitute "takings" under the meaning of the Act.

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77 55 CONG. REC. 4400 (1917) (statement of Sen. McLean).

78 *Id.* at 4816 (statement of Sen. Smith). *See also* Senator Stedman's phrasing of the same idea:

> [L]et the boll weevil go to rest amidst the happy hunting grounds of his fathers in that great and splendid region of our land where he first saw the light. Let his onward march of destruction be halted forever, and few there will be, even where the doctrine of State rights is most highly cherished, who will lament his departure or criticize those who have hastened his funeral obsequies, as is intended by this act, and may his allies of the same vicious type likewise share his fate. Let the song bird live to herald to the world its happy and joyous anthem proclaiming the goodness of God to all his creatures.

56 CONG. REC. 7362 (1918). *See also* Means, *supra* note 5, at 842.

79 *See* 56 CONG. REC. 7362 (statement of Sen. Stedman) ("Save the birds which destroy the insects and an incalculable service will be rendered to our country by increasing its supply of food so imperatively needed to meet the necessities of the war in which we are now engaged and to the successful issue of which we have pledged our fortunes, our lives, and our honor.").

80 *See* 55 CONG. REC. 4816 ("Whereas the conservation and protection of the migratory insectivorous birds is so closely related to the conservation of the food, cotton, and timber crops of the country, and the migratory game birds constitute an important source of the food supply [T]he said bill is, and should be, considered an important war measure.") (quoting June 13, 1917, resolution of the National Association of Game and Fish Commissioners)).

Those who advocate for a narrow interpretation of "take," to include only purposive action directed at harming or killing birds, argue that interpreting the MBTA to criminalize incidental bird deaths in oil pits would be interpreting it in such a way that would make other incidental birth deaths that result from legal behavior equally criminal.[81] This is simply not true considering the history of the MBTA. It is unlikely that Congress at this time would have attempted to pass a law so expansive as to affect so many ordinary activities.[82]

Contemplating the MBTA, Congress was concerned whether it would be an invasion of private property rights to allow federal officials to conduct warrantless searches of farms and homes for illegally shot birds."[83] Surely, the regulation of ordinary land use would have been as debated as an invasion of property rights. The regulation of ordinary land use is an incredible invasion of privacy, yet was not addressed. Congress did not discuss it because it did not intend for the Act to reach it.

Congress's intention could not have been to regulate ordinary land use activities like timber harvesting, lawn mowing, and driving that would incidentally take birds. Additionally, the timber industry and farming groups supported the MBTA.[84] If Congress had intended it to be so expansive as to prohibit regular timber harvesting and farming activities, the Act would have been against their interest and those groups certainly would not have supported it like they did.[85]

The legislative history also suggests that Congress intended for the MBTA to regulate more than just hunting and poaching.[86] At least one

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81 *See, e.g.*, Means, *supra* note 5, at 823.

82 Earlier court decisions had found laws designed to regulate bird hunting unconstitutional. *See* United States v. McCullagh, 221 F. 288, 295–96 (D. Kan. 1915) (holding that each state has a plenary power over the wildlife within its borders); United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914) ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.") The Supreme Court, per Justice Holmes, later upheld the constitutionality of the MBTA. *See* Missouri v. Holland, 252 U.S. 416, 435 (1920) ("We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.").

83 Timber Appellees' Brief at 30, *Newton County Wildlife Assn.*, 113 F.3d 110, (No. 96-3463) (citing 56 CONG. REC. 7356–81, 7440–62, 7472–76 (1918)).

84 *Id.*

85 *See* 56 CONG. REC. 7357–58.

86 *See, e.g.*, H.R. No. 65–243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President) ("[T]he extension of agriculture, and particularly the draining on a large

Congressman recognized a difference between the physical acts of hunting and killing.[87] Other Congressmen construed the MBTA as having a very broad scope:

> If the Secretary . . . does not want you to do so, you will never kill another duck or any bird protected by this bill, whether it is a game bird or not. Therefore, it seems to me that we ought not to adopt the bill. It is too far reaching. [T]he bill provides that it shall be unlawful to take any bird or have in possession any part of a bird except in accordance with regulations adopted by the Secretary. If he adopts such regulations, you cannot kill a bird or have any part of a bird in your possession. That is all there is to that.[88]

This broad scope was further noted by at least two Congressman who anticipated application of the MBTA to children who act through inadvertence or through accident:

> What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest and breaks one of the eggs, whereupon he is hauled before a court for violation of a solemn treaty entered into between the United States of America and the Provinces of Canada.[89]

In response, another Representative noted "Gentlemen conjure up the idea that a bureaucracy will be created, and that every innocent boy who goes out to play upon the streets and breaks a bird's egg through accident is to be haled 500 miles away and punished as if he were

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scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits.") (referenced by Rep. Baker during the House floor debate, 56 CONG. REC. 7370 (June 4, 1918)); 56 CONG. REC. 7371 (June 4, 1918) (statement of Rep. Walsh: "This act prevents people from killing."); 56 CONG. REC. 7448 (June 6, 1918) (statement of Rep. Robbins: differentiating between the "shooting" of game birds and the "destruction" of insectivorous birds); 56 CONG. REC. 7458 (June 6, 1918) (statement of Rep. Smith: "If we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions.").

87 *See, e.g.*, 56 CONG. REC. 7446 (June 6, 1918) (statement of Rep. Stevenson: "[Rep. Bland] says also that they can not hunt ducks in Indiana in the fall, because they can not kill them. I have never been able to see why you cannot hunt, whether you kill or not. There is no embargo on hunting, at least down in South Carolina . . . .").

88 56 CONG. REC. 7364 (June 14, 1998) (statement of Rep. Huddleston); *accord* 55 CONG.REC. 4399 (June 28, 1917) (statement of Sen. Reed, describing the MBTA as "absolutely prohibiting the killing of game anywhere under any circumstances").

89 56 CONG. REC. 7454 (June 6, 1918) (statement of Rep. Mondell).

committing an offense of the highest degree, and with all the rigors of the criminal law."[90]

It is evident that there is no clearly expressed legislative intent that the MBTA is to regulate only physical conduct associated with hunting or poaching. Even if the nature of physical conduct prohibited by the MBTA were ambiguous, the legislative history of the MBTA supports interpreting it to reach conduct of the sort engaged in by oil companies.[91] Though legislative history may be examined as a secondary source of a statute's meaning, "the weight such history is given in construing a statute may vary according to factors such as whether the legislative history is sufficiently specific, clear and uniform to be a reliable indicator of intent."[92] The legislative history, especially coupled with the broad, inclusive language of the text of the Act is sufficiently clear to establish that the MBTA proscribes the taking or killing of migratory birds, even if those takings or killings are not the intended result of the conduct.

The court in *Brigham*, after determining that the MBTA is ambiguous with respect to the meaning of the term "kill" and its application to bird deaths related to commercial activity, looked to the history and policy of the Act. The *Brigham* court concluded that "Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths."[93] In light of the legislative history aforementioned, the *Bringham* court's conclusion is clearly too narrow a reading of the MBTA. Additionally, the courts conclusion fails to consider the substance of the MBTA and its prohibitions on the taking or killing hundreds of bird species that are not hunted by humans.

Congress was unmistakably primarily concerned with hunting; however, the statutory language also makes clear that hunting was not its sole concern. In determining the criminal liability of a poisoning scheme, the court in *United States v. Corbin Farm Service*, discussed

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90 56 CONG. REC. 7456 (June 6, 1918) (statement of Rep. Dempsey).

91 United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1080–82 (D. Colo. 1999).

92 Miller v. C.I.R., 836 F.2d 1274, 1282 (10th Cir. 1988).

93 United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D.N.D. 2012). *See also* United States v. Chevron, No. 09–CR–0132, 2009 WL 3645170 (W.D .La. Oct. 30, 2009) (rejecting plea agreement with respect to the death of 35 Brown Pelicans entrapped in an uncovered oil well caisson because the activity did not constitute a crime under the MBTA).

how the use of "by any means or in any manner" in section 703 contradicts the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds.[94]

Additionally, a number of songbirds and other birds that are not commonly hunted are protected by the MBTA. Congress imposed criminal penalties on those who kill those birds as well as on people who hunt game birds. The *Corbin Farm Service* court also noted that there is no explicit intention of Congress to limit the MBTA so as for it not to apply to poisoning.[95] This case articulated the proposition that Congress intended for the MBTA to apply to more than just hunters, holding that the MBTA can constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds.[96]

Notably, the MBTA protects many species that are not considered game birds. If the MBTA were to proscribe solely hunting activity, it would make no sense for there to be a list of approximately 925 birds, many of which have not been traditionally hunted by humans.[97] Clearly Congress intended to protect all of these species by proscribing more than just hunting.[98] As one Congressman articulated, "[T]he purpose of this bill is to give effect to the convention. . . . Insectivorous migratory

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94 *See* United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

95 *Id.* at 532.

96 *Id. See also* United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989) (noting that criminal liability could be imposed for the unintentional killing of migratory birds, but finding the MTBA did not apply to landowner who inadvertently killed a flock of geese by applying a registered pesticide to his fields in the prescribed manner). This case affirms that the MBTA is not too broad if read to apply to oil pit deaths. Courts will not interpret the MBTA in such a way as to apply criminal liability to individuals engaged in normal land use activities. *But see* North Slope Borough v. Andrus, 486 F.Supp. 332, 361–62 (D.D.C. 1980), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980) (in a civil action to enjoin an oil and gas offshore lease sale that would potentially violate the MBTA, the court stated that the MBTA prohibits the killing of birds by any means or in any manner, even if the killings were not intentional).

97 *See* 50 C.F.R. § 10.13 (listing approximately 925 protected bird species, many of which are not game birds and have not been traditionally hunted by humans).

98 *See* 56 CONG. REC. 7357 (June 4, 1918) (statement of Rep. Fess: "I am in favor of protecting the birds. My admiration for our little friends of the air makes me unfriendly to the habit of killing off these winged visitors, whether game birds, migratory birds, or other species, if they are not nuisances.").

birds as well as migratory game birds are embraced in the terms of the treaty."[99]

b. Legislation Related to the MBTA

Related statutes can often shed light upon a previous enactment.[100] There are several pieces of environmental legislation that work together to help implement the national commitment to the protection of migratory birds. These include the Endangered Species Act, the MBTA which regulates taking and killing, and the Conservation Act, which establishes sanctuaries and preserves natural waterfowl habitat.[101]

The Endangered Species Act (hereinafter "ESA") and the MBTA use "taking" in ways that may be unequivocal. The ESA, enacted in 1973, included "harass" and "harm" in its definition of "take."[102] "Harm" is the broadest term in the ESA. It is not included in the regulations under the MBTA. "Harm" is defined by ESA Regulation to include habitat modification or degradation.[103] "Harm" under the ESA definition of "take" means: "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[104]

In 1974, a year after the enactment of the ESA, Congress amended the MBTA and did not modify its prohibitions to include "harm." The Ninth Circuit observed that the fact that Congress did not add broadening words such as "harass" and "harm" to the MBTA shows that the difference between the two laws is "distinct and purposeful."[105] This, however, does not stand. The lack of modification to the MBTA to include "harm" in 1974 in no way seems to suggest that the MBTA regulates only the type of physical conduct normally exhibited by hunters and poachers. The 1974 MBTA amendment was ministerial; it

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99 56 CONG. REC. 7360 (June 4, 1918) (statement of Rep. Stedman).

100 Andrus v. Allard, 444 U.S. 51, 62 (1979).

101 *See* United States v. North Dakota, 650 F.2d 911, 913-14 (8th Cir. 1981), *aff'd*, North Dakota v. United States, 460 U.S. 300 (1983). *See also* Means, *supra* note 5.

102 An Act to Provide for the Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants, Pub. L. No. 93–205, § 3 (14), 87 Stat. 885 (1973).

103 Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) (quoting 50 C.F.R. § 17.3.).

104 *Id.*

105 *Id.*

simply recognized the execution of a treaty between the United States and Japan.[106]

More important to note in the MBTA's history is that Congress reviewed and substantially amended the Act in 1986 and did nothing to destroy the legal validity of the holdings of *United States v. FMC Corp*[107] which held that the killing of migratory birds by the dumping waste water violated the MBTA, and *Corbin Farm Serv.*[108] which held that the death of birds resulting from a misapplication of pesticides violated the MBTA. Neither of the acts criminalized in the aforementioned cases are physical acts normally associated with hunting or poaching.

IV
DISPELLING CONCERNS: WHY MBTA LIABILITY IMPOSED ON OIL COMPANIES WILL NOT LEAD TO ABSURD RESULTS, CONSTITUTIONAL PROBLEMS, OR OVERBROAD ENFORCEMENT

Those who advocate for a narrow application of MBTA liability fear that if liability is imposed on this particular legal commercial activity, it will be imposed on all kinds of other legal activities like construction, driving, or the schoolboys with baseballs. This slippery slope argument does not hold up. Absurd results can easily be avoided by applying a vigorous proximate cause analysis. Additionally, prosecutorial discretion serves as another limiting feature that plays an important role in the determination and application of criminal liability under the Act.

A. Constitutional and Prosecutorial Discretion Concerns

Courts have recently expanded the MBTA's reach.[109] Some defendants have attempted to argue that the MBTA is violating equal protection by being selectively enforced to target large, deep-pocketed

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106 *See* Act of Jun. 1, 1974, Pub.L. No. 93–300, 88 Stat 190 (1974) (acknowledging The Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, U.S.-Jap., Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990).

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

108 United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

109 *See FMC Corp.*, 572 F.2d at 905–08; Sierra Club v. Martin, 933 F. Supp. 1559, 1564–65; United States v. Corbin Farm Serv., 444 F. Supp. at 529, 531–36.

groups.[110] However "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation . . ."[111] An equal protection violation does not exist so long as the selective enforcement is not deliberately based upon an unjustifiable standard such as race, religion, or some other arbitrary classification.[112]

1. Constitutional Concerns

Although section 703 is a strict liability crime, it is important to note a few things. First, at common law, crime was a "compound concept" consisting of both an "evil-meaning mind" and an "evil-doing hand."[113] This definition means that a traditional element of criminal violations was that the accused have committed the act with intent or knowledge, also known as the mens rea.[114] Later in the mid-twentieth century, a new category of crimes arose in which there was no mens rea requirement.[115]

In *Morissette v. United States,* for example, the Supreme Court gave a stamp of approval to regulatory crimes that lacked or had a minimal mens rea element.[116] The *Morisette* Court reasoned that while the strict liability crimes at that time technically did not require mens rea, the "accused, if he d[id] not will the violation, usually [wa]s in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[117] Additionally, the "penalties commonly [we]re relatively small," and did not cause "grave damage to an offender's reputation."[118]

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110 United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1083–84 (D. Colo. 1999).

111 Potter v. Murray City, 760 F.2d 1065, 1071 (citing United States v. Amon, 669 F.2d 1351, 1355–56 (10th Cir.1981)). *See also* United States v. Blitstein, 626 F.2d 774, 782 (10th Cir.1980) ("[M]ere failure to prosecute other offenders is no basis for a finding of denial of equal protection.").

112 U.S.C.A. Const. Amend. XIV; *see also Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d at 1073.

113 Morissette v. United States, 342 U.S. 246, 251 (1952).

114 *See* 1 SUBST. CRIM. L. § 5.5 (2d ed.) ("For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault.").

115 United States v. Apollo Energies, Inc., 611 F.3d 679, 687 (10th Cir. 2010).

116 *Morissette*, 342 U.S. at 251.

117 *Id.* at 256.

118 *Id.*

Due process requires citizens be given fair notice of what conduct is criminal. A criminal statute cannot be so vague that "ordinary people" are uncertain of its meaning.[119] However, when, as in the case of oil pits, predicate acts which result in criminal violations are commonly and ordinarily not criminal, the court must inquire into fair notice again. In the context of laws criminalizing the possession of dangerous items such as drugs or explosives, the Supreme Court has stated when items have characteristics such that a reasonable person would expect the items to be regulated, strict liability for violations of those regulations passes constitutional scrutiny.[120] Additionally, due process prohibits criminalizing acts that the defendant does not cause.[121] Causation limits criminal sanctions of a defendant's conduct, whether the conduct includes affirmative actions or proscribed omissions.[122]

In *United States v. Apollo Energies, Inc.*, oil drilling operators were charged with violating the MBTA after dead migratory birds were discovered lodged in a piece of their oil drilling equipment called a heater-treater.[123] Defendants appealed, challenging the MBTA, claiming: (1) it is not a strict liability crime to take or possess a protected bird; or (2) if it is a strict liability crime, the Act is unconstitutional as applied to their conduct.[124] The Tenth Circuit affirmed that the MBTA violations were strict liability crimes, but held that a strict liability interpretation of the MBTA for the conduct charged could only satisfy due process if the defendants proximately caused the harm to the birds.[125] The court stated that due process requires criminal defendants have adequate notice that their conduct is a violation of the Act, and in so noting, affirmed the conviction of one of the defendants.[126]

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119 *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

120 *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564–65 (1971) ("In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . 'mens rea.'").

121 *See* Lambert v. California, 355 U.S. 225, 228 (1957) (striking down as unconstitutional "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case").

122 Staples v. United States, 511 U.S. 600, 607 n.3 (1994).

123 United States v. Apollo Energies, Inc., 611 F.3d 679, 682 (10th Cir. 2010).

124 *Id.*

125 *Id.*

126 *Id.*

In the *Apollo* case, the Fish and Wildlife Service (hereinafter "FWS") notified the defendants that birds were becoming trapped in the heater-treaters and dying.[127] FWS embarked on an educational campaign and provided a grace period where it recommended no prosecutions under the MBTA while the educational campaign was ongoing. Once the grace period ended, FWS checked on Apollo's heater-treaters and found protected birds lodged in them.[128] The court found that defendants had sufficient notice, that the MBTA was not too vague, and that the defendants failed to take remedial measures to ensure the protection of migratory birds.

2. Prosecutorial Discretion

Those who advocate for broad applicability of the MBTA suggest that prosecutorial discretion can serve as a limiting force.[129] This is not appropriate.[130] There are serious constitutional vagueness concerns when prosecutorial discretion is the sole limiting principle in enforcing a law. Relying solely on prosecutorial discretion would make MBTA enforcement discretion unpredictable and enforcement policies would vary dramatically from administration to administration. This volatility runs the risk of deterring land use that is important for food production and timber supply because people are generally risk averse and will avoid the possibility of criminal prosecution by curbing otherwise

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127 *Id.* at 682–83.

128 *Id.* at 683.

129 *See, e.g.*, United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (stating that where conviction "would offend reason and common sense," resolution through nominal penalties "can be left to the sound discretion of prosecutors and the courts"). *See* Means, *supra* note 5, at 842,

> While it admittedly seems unlikely that a prosecutor would try a case involving a sparrow flying into someone's kitchen window—though a woman was recently prosecuted under the MBTA for giving First Lady Hillary Clinton a "dream catcher" made with bird feathers—there are serious practical and theoretical problems with relying on prosecutorial discretion.

See Alan McConagha, *Hillary's Feathered Gift Gets Plucked: 'Dream Catcher' is a Nightmare*, WASH. TIMES, Aug. 9, 1995, at A3; *They Swooped*, THE ECONOMIST, Aug. 19, 1995, at 27 ("If you are the sort of American who believes the federal government is bird-brained, here is apparent proof. Peg Bargon, a middle-aged wife and mother in rural Monticello, Illinois, faces the possibility of a year in jail and a fine of $156,000 because of an eagle feather.").

130 *See* Baggett v. Bullitt, 377 U.S. 360, 373–74 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); Keyishian v. Bd. of Regents of Univ. of State of New York, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case.").

desirable behavior.[131] Relying solely on prosecutorial discretion would make absurd results possible.

Prosecutorial discretion is also undesirable because it avoids statutory interpretation.[132] Prosecutorial discretion becomes a means of salvaging an overbroad law. Prosecutorial discretion also falls short as a solution because not every prosecutor can be relied on to demonstrate adequate discretion.[133] This may be an acute problem in a pro-environment climate where, "[e]ach year the Department of Justice announces 'record levels' of fines imposed, persons indicted, and jail time served for infractions of environmental regulations."[134] A prosecutor, particularly one with political ambitions, "might allow public opinion and potential media coverage" to influence the exercise of discretion.[135]

Prosecutorial discretion is supposed to do a lot of work in our system, but commentators and other courts have overstated the extent it is relied on. Despite this overstatement, prosecutorial discretion still plays an important role in the criminal law system. It is evident that prosecutorial discretion has been a successful tool in the enforcement of the MBTA over the course of the last century and that prosecutors are selectively and carefully bringing cases. This is illuminated by the fact that there are no examples of any absurd cases being brought before courts.

The United States Department of Justice (hereinafter "DOJ") has guidelines designed to assist prosecutors in selecting cases to bring when an environmental crime has occurred. The information contained in those guidelines is:

> intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to or undermine the goal of encouraging

131 For an in-depth discussion of the problems associated with prosecutorial discretion, see Kenneth Culp Davis, *Discretionary Justice* (1969); Kenneth Culp Davis, *Police Discretion* (1975); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

132 *See* Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1582 (S.D. Ind. 1996) ("[T]rust in prosecutorial discretion is not really an answer to the issue of statutory construction.").

133 Timothy Lynch, *Polluting our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. ENVTL. L. & TECH. J. 161, 170 (1996).

134 *Id.* at 161.

135 *Id.* at 170.

> critical self-auditing, self-policing, and voluntary disclosure. It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.[136]

In its guidelines, the DOJ highlights that there are no dispositive factors, but that prosecutors should consider voluntary disclosure, cooperation, preventative measures and compliance programs, pervasiveness of noncompliance, internal disciplinary action, and subsequent compliance effort.[137]

While historically the majority of the cases that have been brought have involved hunting or other similar intentional conduct directed at harming birds, some courts have accepted arguments similar to those in *Citgo* for years and the cases being brought now continue to be reasoned and carefully selected in accordance with the above guidelines. Based on the history of cases brought and the way liability has been construed, no overly strict definition of kill is necessary to avoid absurd results. If there were a serious problem with the breadth of the MBTA or its enforcement discretion, there would be at least one schoolboy in a federal penitentiary for taking or killing a migratory bird in violation of the Act.

B. Vigorous Proximate Cause Analysis Avoids Absurd Results

The MBTA has an inherent and important limiting feature in its misdemeanor provision, thus there is no need to rely solely on prosecutorial discretion. In order to obtain a guilty verdict under section 707(a), the government must prove proximate causation (legal causation) beyond a reasonable doubt.

> Central to all of the Supreme Court's cases on the due process constraints on criminal statutes is foreseeability—whether it is framed as a constitutional constraint on causation . . .and mental state

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136 *Factors in Decisions on Criminal Prosecutions for Environmental Violations*, The United States Department of Justice (July 1, 1991), http://www.justice.gov/enrd/3058.htm.

137 *Id.*

> . . . ,or whether it is framed as a presumption in statutory construction . . .When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point.[138]

Proximate causation is generally defined as:

> that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.[139]

Since the death of a protected bird is:

> generally not a probable consequence of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability under [section] 707(a), even if such activities would cause the death of protected birds.[140]

Therefore, if the law is properly applied, no absurd results will come out of MBTA prosecutions. Activities for which one could foresee the unintended result of a migratory bird death would remain innocent, while allowing for oil companies who know that their operations are killing migratory birds and fail to take adequate remedial measures to be appropriately punished.

Some might argue that if you hit a bird with your car, there is a direct and causal link to the bird's death. What could you possibly expect to happen when you hit a bird with the force of a moving vehicle? While this is true, it is not reasonably foreseeable that you will hit a bird with your car or that bird will fly into the window of your seventh floor apartment. These situations occur infrequently and prosecutors are not likely to target these incidental deaths. In contrast, if you are out hunting for deer and you shoot a bird, that constitutes proximate cause because you knew something was going to die when you were firing a gun—the objective of the trip was to kill something. Foreseeability is a key element, but that argument only comes up when no direct link between the conduct and the result exists. Prosecutorial discretion, as

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138 United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010).

139 Black's Law Dictionary, 1225 (6th ed. 1990).

140 United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1084–85 (D. Colo. 1999).

aforementioned, still plays an important role in determining who is susceptible to liability under the MBTA.

Additionally, other parts of the MBTA and its regulations work to avoid absurd results. Section 711 allows "breeding of migratory game birds on farms and preserves and the sale of birds so bred . . . for the purpose of increasing the food supply."[141] Section 704 authorizes and directs the Secretary "to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or expert of any such bird."[142] It is clear that reasonable regulation by the Secretary of the Interior, along with proper application of the law, which includes, as aforementioned, under section 707(a), that the government to prove proximate cause beyond a reasonable doubt, can effectively avoid absurd and unintended results.

CONCLUSION

In order for the MBTA to have any meaning it must be interpreted to allow for the sanctioning of private actors like oil companies, whose operations are the proximate cause of "takings" and "killings" of migratory birds. Congress provides a list of activities expressly prohibited, but did not indicate that the prohibitions were exhaustive. Additionally, including the catchall "by any means or any manner" indicates that Congress was not interested in the way in which

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141 16 U.S.C. § 711 (2015).

142 16 U.S.C.A. § 704 (West 2004). In accordance with section 704, the Secretary has established when and how migratory birds may be taken, killed, sold, etc. *See generally* 50 C.F.R. § 19 (proscribing airborne hunting); 50 C.F.R. §§ 20.1–20.155 (establishing open seasons, hunting methods, bag limits, and various other rules for migratory bird hunting); 50 C.F.R. § 21 (establishing certain permit requirements); 50 C.F.R. § 21.12 (exempting, from the permit requirements, the Department of the Interior, state game departments, municipal game farms or parks, public museums, public zoological parks, accredited institutional members of the American Association of Zoological Parks and Aquariums, and public scientific or educational institutions); 50 C.F.R. §§ 21.13–21.14 (exempting captive-reared mallard ducks and other captive-reared migratory waterfowl); 50 C.F.R. §§ 21.28–21.29 (permitting falconry); 50 C.F.R. §§ 21.41–21.42 (allowing the issuance of depredation orders permitting the killing of migratory game birds "upon the receipt of evidence clearly showing that migratory, game birds have accumulated in such numbers in a particular area as to cause or about to cause serious damage to agricultural, horticultural, and fish cultural interests."); 50 C.F.R. §§ 21.43–21.47 (permitting the killing of certain depredating larks and sparrows in California, Purple Gallinules in Louisiana, jays in Washington and Oregon, Double–Breasted Cormorants at aquaculture facilities, and certain blackbirds, cowbirds, grackles, crows, magpies anywhere); *see also* United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1084–85 (D. Colo. 1999).

migratory birds were being harmed, simply that the harm was occurring.

There is also no reason to fear overbroad and absurd enforcement, as there are built-in mechanisms in the provisions of the MBTA to prevent this, as well as court precedent that ensures the right type of cases are prosecuted. Congress enacted the MBTA for the preservation of migratory bird species. Allowing oil companies' operations to continue to capture and kill birds, albeit inadvertently, is contrary to the express purpose of Congress and should not be permitted.