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Defining the Wingspan of the Migratory Bird Treaty Act

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I. INTRODUCTION

The fact that a cat, an ordinary household pet, could be a violator of a federal statute should be troubling to all people.[1] Of course, a cat

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1. *See* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1212-13 (D. N.D. 2012) (explaining that some of the most common killers of migratory birds are cats). Cats, domestic or wild, kill between 1.4 billion and 3.7 billion birds in the United States each year. Chuck

would never be prosecuted; however, this absurd hypothetical presents the reality of the expansive reach of the Migratory Bird Treaty Act (the "MBTA" or the "Act").[2] The interpretation of the MBTA should be one of strict liability, but the United States Fish and Wildlife Service (the "FWS"), the enforcement agency for the Act, should grant permits for incidental takings similar to those listed under the Endangered Species Act. This solution will create certainty in the law and conform to the spirit of the MBTA, while giving commercial entities the option of avoiding criminal liability. Today, whether an action that causes the death of a migratory bird is a violation of the MBTA hinges on either the breadth of the district court's interpretation of the Act[3] or the discretion of the government on whether it should prosecute the violation at all.[4]

The MBTA is different than protection laws for other species because it only provides for criminal sanctions and does not provide an exception for an incidental take.[5] Some federal courts are interpreting the MBTA narrowly and holding that activities indirectly or unintentionally causing the death of a migratory bird are not a violation of the MBTA.[6]

Raasch, *Cats Kill Up to 3.7 Billion Birds Annually*, USA TODAY, Jan. 30, 2013, http://www.usatoday.com/story/news/nation/2013/01/29/cats-wild-birds-mammals-study/1873871/.

2. The Migratory Bird Treaty Act states that:

> it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, 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 manufacture, 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 between the United States and Great Britain for the protection of migratory birds . . . the United States and the United Mexican States for the protection of migratory birds and game mammals . . . the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment . . . and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments.

16 U.S.C.A. § 703(a) (2004).

3. *See* Brigham Oil & Gas, 840 F. Supp. 2d at 1211 (holding that the MBTA's "take" provision only includes acts that are direct or intentional toward birds); *but see* United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010) (holding that the MBTA does not have a scienter requirement and, thus, is strict liability regardless of whether the act was unintentional).

4. Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1197 (2008). The United States Fish and Wildlife Service exercises prosecutorial discretion to decide which actors will be prosecuted for violations of the MBTA. *Id.*

5. Jeffrey Thaler, *Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1138 (2012).

6. Brigham Oil & Gas, 840 F. Supp. 2d at 1212-1213; *see also* United States v. ConocoPhil-

However, other courts are interpreting the scope of the MBTA more broadly and holding that the MBTA is a strict liability statute: if the actor caused the death of a migratory bird, regardless of whether the actor intended to do so, it is a violation.[7] The different rulings of the federal courts ultimately come down to their interpretation of the word "take" in the MBTA language.[8] This split among the federal district courts has created, and will continue to create, drastically conflicting results across the United States. This uncertainty gives insecure guidance to any person undertaking some kind of action that could possibly cause the death of a migratory bird.[9]

This Comment will focus on the widely different interpretations, applications, and enforcement of the MBTA and the consequences that will result if a concrete solution is not implemented soon. Part II will discuss the background, historically and legislatively, that led to the enactment of the MBTA and its current implementation. Part III will discuss the current conflict within the courts regarding how the MBTA is to be applied. In discussing this conflict, this section looks at the particular reasoning behind two of the most recent decisions on this issue and what led each of the courts to different interpretations. Part IV will analyze the correct interpretation of the MBTA and the scope of its liability; explain the need for an immediate and effective solution for the implementation of the statute and why certain other solutions are not workable; and, lastly, analyze the integration of a permit program, like that under the Endangered Species Act, and explain why this will create the best immediate solution.

II. BACKGROUND OF THE MBTA

The lack of bird conservation in the 19th century and the overeagerness to kill birds caused a downward spiral in bird populations.[10] A preservation measure had to be put in place to prevent further popula-

lips Co., No. 4:11-po-002, 2011 WL 4709887 (D. N.D. Aug. 10, 2011); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009).

7. *See generally* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); *see also* United States v. Moon Lake Electric Ass'n, 45 F. Supp.2d 1070 (D. Col. 1999); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

8. 16 U.S.C.A. § 703(a) (2004).

9. Sandra A. Snodgrass, *It's for the Birds – Recent Developments Under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act*, 2 ROCKY MNT. MIN. L. FOUND. PROC. 10A (2012).

10. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 167-68 (1979).

tion decreases, but enforcement and implementation were slow.[11] Once the support for protection grew strong enough, Congress enacted the MBTA to help rejuvenate the bird populations and protect them from future harm.[12] Since its enactment, the MBTA has overcome multiple hurdles and has become stronger than ever in its implementation—but not without a few critics.[13]

A. Early History of Bird Conservation

During the 1800s and into the early 1900s, migratory bird populations were quickly decreasing due to "unchecked overharvesting."[14] During this time, state regulation of hunting game birds was a very slow process; enforcement and acceptance of any such regulations were even slower to take hold within the American community.[15] Birds continued to be intentionally killed, and populations dropped because of the "demand for pies and fancy feathers" and the alleged "right to blast away at any species affording food, profit, or sport."[16]

The bird martyr that became the face of bird conservation reform was the passenger pigeon.[17] In the late 1800s, around five billion of these birds would "darken the sky for many hours in [their] cross-country migrations."[18] Tragically, these birds were extinct by 1900.[19] The primary suspect for causing their sad demise was the class of commercial hunters who sought to kill the pigeons for their meat or for sport.[20] Though the passenger pigeon is given the martyr title, other bird species were also extinct by the end of the 1800s: the heath hen, the golden plover, and the Eskimo curlew.[21] The rapid increase in the amount of hunting in the country forced some birds to become a mere memory.[22]

11. Lilley & Firestone, *supra* note 4, at 1177-78.

12. *Id*. at 1176-77.

13. George Cameron Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970s*, 1978 DUKE L. J. 753, 764 (1978).

14. Lilley & Firestone, *supra* note 4, at 1176. During this time, the norm was for the early American settlers to shoot game birds for their food value and to hunt birds that posed a danger to the safety of the community. Coggins & Patti, *supra* note 10, at 167.

15. Coggins & Patti, *supra* note 10, at 168.

16. *Id*.

17. Snodgrass, *supra* note 9, at 2.

18. Lilley & Firestone, *supra* note 4, at 1177-78.

19. *Id*. at 1178.

20. *Id*.

21. *Id*.

22. *Id*. "[T]he hunting of birds for their fashionable feathers to adorn women's hats and decorate the platters of fancy restaurants had reduced many species to mere remnants of their historical

In 1900, Congress attempted to regulate wildlife exploitation by passing the Lacey Act.[23] This statute sought to regulate wildlife commerce by making it a federal crime to transport illegally killed animals across state lines.[24] The Lacey Act's goal failed when a substantial black market arose because of the statute's lack of enforcement power.[25]

In 1913, Congress tried again to preserve bird species by passing the Weeks-McLean Law of 1913.[26] This statute again prohibited shipment of migratory birds across state lines but additionally made it unlawful to shoot these birds except in accordance with certain hunting regulations.[27] However, the demise of the Weeks-McLean Law came quickly as individuals who were prosecuted under the statute challenged its constitutionality as being outside of the powers given to Congress and in violation of the Tenth Amendment to the United States Constitution.[28] In both *United States v. Shauver*[29] and *United States v. McCullagh*,[30] the Weeks-McLean Law of 1913 was deemed unconstitutional.[31]

B. The MBTA as the Solution

In 1916, the United States and Canada, through Great Britain, entered into a treaty whereby the nations sought to protect migratory birds that were "useful to man or harmless"[32] and that faced danger due to inadequate protection while nesting or travelling to and from breeding grounds.[33] In 1918, Congress enacted and President Woodrow Wilson

populations." *Id*. (internal quotations omitted).

23. *Id*. at 1177. This statute was the first attempt by the federal government to prevent the unfortunate event of species endangerment or extinction. *Id.*

24. Coggins & Patti, *supra* note 10, at 168. Most environmental statutes provide for a criminal punishment because the mere threat of a criminal penalty will normally receive more compliance than an actual civil penalty. Alex Arensberg, Note, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 ECOLOGY. L. Q. 427, 428 (2011). "Corporations that violate environmental civil regulations often simply internalize their cost of noncompliance without ever adjusting their unlawful impact on the environment." *Id.*

25. Lilley & Firestone, *supra* note 4, at 1178.

26. *Id*.

27. Coggins & Patti, *supra* note 10, at 169. Congress was faced with critics stating that the federal government did not have the authority to regulate wildlife. *Id*. In response, Congress declared that the United States had a duty to protect the birds. *Id*.

28. *Id*.

29. United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914).

30. United States v. McCullagh, 221 F. 288, 295-96 (D. Kan. 1915).

31. Coggins & Patti, *supra* note 10, at 169. The government appealed the decision to the United States Supreme Court, and it was granted review; however, before the appeal was ever decided, the treaty between the United States and Canada had already begun creating a new solution – one that would work. *Id*.

32. Lilley & Firestone, *supra* note 4, at 1179 (internal quotations omitted).

33. Robb Wolfson, Note, *Birds at a Crossroads: Strategies for Augmenting the MBTA's*

signed the MBTA to protect these birds from endangerment, or worse – extinction.[34] In 1920, the Supreme Court of the United States upheld the constitutionality of the MBTA in *Missouri v. Holland*,[35] holding that it fell within the treaty power of the federal government.[36]

Subsequent treaties were entered into with Mexico, Japan, and Russia to contribute more protection to birds under the MBTA.[37] Most notable was the treaty with Mexico, which provided that the President of either country could periodically add bird species to the protection of the treaty and, thus, the MBTA.[38] In 1971, President Richard Nixon delegated this power to the Secretary of the Interior who then designated almost every bird species as migratory and, thus, under the protection of the MBTA.[39] The MBTA has since incorporated all four of the treaties' objectives.[40]

The MBTA, because of its wide range of protection measures, became the cornerstone for modern federal wildlife conservation law.[41] The Act protects more than 1,000 species of migratory birds native to the United States or specifically mentioned in corresponding treaties, in-

Sway over Federal Lands, 21 VA. ENVTL. L. J. 535, 537 (2003). An interesting point about this treaty is that it seems that the motivation behind it was actually a strategy by the United States to create a federal statute that would be backed by treaty power and, thus, could withstand constitutional review, unlike its two previous counterparts. *Id.*

34. Lilley & Firestone, *supra* note 4, at 1179. By killing the birds, hunters were allowing the insects to roam free and destroy the food supply that was direly needed for the war effort. Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 831 (1998).

35. Missouri v. Holland, 252 U.S. 416 (1920).

36. *Id*. at 435.

37. Wolfson, *supra* note 33, at 537-38. The treaties became effective in 1936, 1972, and 1978, respectively. *Id*

38. Coggins & Patti, *supra* note 10, at 171-72. In 1971, President Nixon delegated this power to the Secretary of the Interior who then designated almost every bird species as migratory and, thus, under the protection of the MBTA. Wolfson, *supra* note 33, at 538. Also notable, the treaties with Japan and Russia both added to the preservation by seeking to protect bird habitats. *Id.*

39. Wolfson, *supra* note 33, at 538.

40. 16 U.S.C.A. § 703(a) (2004).

> It shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

Id.

41. Coggins, *supra* note 13, at 764.

cluding, but not limited to, "songbirds, waterfowl, shorebirds, seabirds, wading birds, and raptors."[42] The MBTA states that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird" unless the actor is permitted to do so under corresponding regulations.[43] The Act gives the power of enforcement to the Secretary of the Interior.[44] In turn, the Secretary of the Interior has given its authority under the MBTA to the FWS.[45] The FWS has the authority to grant permits to certain actors that will technically violate the statute by directly and intentionally killing a migratory bird.[46] Most significantly, however, the FWS does not give permits to actors who will *indirectly* take or kill a bird under the Act during an otherwise lawful activity.[47]

On Jan. 10, 2001, President Bill Clinton enacted Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," which directed federal agencies to take the necessary steps to protect and preserve migratory birds.[48] The order calls for the agencies to be proactive in protecting birds.[49] For example, federal agencies are to submit an outline to the FWS of how the agency plans to promote preservation of the birds,[50] support specialized planning efforts,[51] and report annually on how many birds were "taken" that year.[52] Unfortunately, an agency's cooperation and participation in accordance with the Executive Order does not earn it any leeway under the MBTA.[53] If the agency kills a migratory bird, and the violation is one the government

42. Snodgrass, *supra* note 9, at 3. The MBTA is considered one of the most expansive species preservation statutes because it not only protects bird species that are common and people may experience every day, but also it protects those bird populations that are endangered or severely declining. *Id.* The species range from "barn swallows and turkey vultures to bald eagles and spotted owls." Lilley & Firestone, *supra* note 4, at 1180.

43. 16 U.S.C.A. § 703(a).

44. 16 U.S.C.A. § 704 (1998).

45. Lilley & Firestone, *supra* note 4, at 1180.

46. *Id.* The details of the MBTA's current permit program will be discussed *infra* Part IV.C.

47. Snodgrass, *supra* note 9, at 3. "Indirectly" can include, for example, resource exploration and development. *Id.*

48. *Id.* at 6.

49. *Id.*

50. These outlines are called Memorandums of Understanding. *Id.* The FWS has received memorandums from the Department of Defense, Department of Energy, U.S. Forest Service, Bureau of Land Management, Minerals Management Service, National Parks Service, and the Federal Energy Regulatory Commission. *Id.*

51. These planning efforts included programs such as the Partners-in-Flight Initiative and the North American Waterfowl Management Plan. *Id.*

52. *Id.*

53. *Id.*

decides to prosecute, the agency will be found criminally liable.[54]

Although the statute has been highly controversial since its enactment,[55] "[t]he origins of modern federal wildlife law may be traced back to the MBTA."[56] With a settled strict liability interpretation of the statute and an effective limiting measure attached to it, the MBTA can truly become the paramount source of bird protection for generations to come.

III. THE PROBLEM

This section discusses the current conflict among the district courts across the country that are faced with an incidental take violation under the MBTA. The different interpretations are not subtle differences in holdings – they are in complete contrast to each other.[57] The different interpretations of the Act have given rise to a severe lack of uniformity in its application and an unpredictability that is halting projects and economic development.[58] This section then goes into more detail about the differing interpretations and the reasoning behind them by looking more closely at two of the most recent MBTA cases.

A. Conflict Among the Courts

Within the last few years, district courts have given the MBTA's misdemeanor provision one of two interpretations: strict liability[59] or excluding lawful, incidental activity.[60] There is no established governing standard or guidance for the lower federal courts because there have only been two appellate cases that discuss the issue of an incidental taking.[61] Courts will continue to produce different rulings on liability under

54. *Id*.

55. Coggins, *supra* note 13, at 766.

56. *Id*. at 764.

57. *See* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1214 (D. N.D. 2012) (holding that only unlawful activity which indirectly kills a migratory bird is in violation of the MBTA); *but see* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999).

58. Snodgrass, *supra* note 9, at 4-5.

59. United States v. Citgo Petroleum Corp., 893 F. Supp.2d 841 (S.D. Tex. 2012); Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999).

60. Brigham Oil & Gas, 840 F. Supp. 2d at 1214; United States v. ConocoPhillips, No. 4:11-po-002, 2011 WL 4709887, at *3 (D. N.D. Aug. 10, 2011); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170, at *3 (W.D. La. Oct. 30, 2009).

61. *See generally* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (involving an actor who was found liable because his substances in his runoff ponds killed birds); *see also* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (involving an oil production company that trapped birds in one of their machines). The problem with having only these two appellate cases to look to is that *FMC Corp.* is more than 30 years old and *Apollo Energies* employed a proxi-

the MBTA for incidental killings of migratory birds until a uniform solution is adopted that solves the issue of how exactly to apply strict liability under the MBTA.[62]

Most recently, the court in *United States v. Brigham Oil & Gas, L.P.*[63] and similar preceding courts have refused to apply the general rule of strict liability to an incidental taking of a migratory bird during lawful commercial activity.[64] In *Brigham Oil & Gas* and *United States v. ConocoPhillips*, several birds were found dead next to the oil companies' open reserve pits.[65] In *United States v. Chevron*,[66] birds became trapped and died between walls of the caisson[67] and the wellhead at an oil well site.[68] These courts adopted the argument that the term "take" contained within the MBTA's prohibitions requires an act that was intentionally geared toward killing or trapping a migratory bird.[69] This argument was premised upon the belief that "take" in its plain meaning is an intentional activity.[70] These courts ultimately held that the MBTA does not prohibit commercial industries from incidentally killing migratory birds if they are engaged in a lawful activity.[71] As will be explained below, this is an incorrect reading of the MBTA, and these particular defendants should have been found in violation of the Act for taking a migratory bird, regardless of whether their activities were lawful or unlawful.

Other district courts have interpreted the MBTA broadly, imposing

mate cause requirement, which is not in accordance with strict liability. Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 598-99 (2012).

62. Robbins, *supra* note 61, at 583.

63. Brigham Oil & Gas, 840 F. Supp. 2d 1202.

64. Snodgrass, *supra* note 9, at 4.

65. Brigham Oil & Gas, 840 F. Supp. at 1205; ConocoPhillips, 2011 WL 4709887, at *1.

66. United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009).

67. A caisson resembles a large pipe surrounding the entire outer wall of the wellhead. *Id.* at *1. Part of it is submerged beneath the water, and approximately six feet of it sticks out from the surface of the water. *Id*. The caisson is installed to protect the wellhead from being damaged by boats hitting it. *Id.*

68. *Id*. A wellhead is "the top of or a structure built over a well." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1421 (11th ed. 2004).

69. Brigham Oil & Gas, 840 F. Supp. at 1208-09. *See* Newton County Wildlife Ass'n v. United States Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) ("Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . that *indirectly* results in the death of migratory birds.").

70. Brigham Oil & Gas, 840 F. Supp. at 1208-09.

71. *Id*. at 1214; ConocoPhillips, 2011 WL 4709887, at *3; Chevron, 2009 WL 3645170, at *3.

strict liability, and have stated that indirect takings of migratory birds will be held in violation of the Act.[72] In *United States v. Moon Lake Electric Association*, the defendant installed electric power poles in an area where there were very few trees; birds took to the electric poles to perch and make nests, causing several bird deaths.[73] In contrast to the *Brigham Oil & Gas* trilogy, the *Moon Lake* court determined that, based on the plain language of the statute and the Congressional intent behind it, the MBTA indeed includes incidental or unintentional acts toward birds.[74] Based on this interpretation, the court held that the defendants were violators of the MBTA because they killed migratory birds without a permit, and that is all that is required under strict liability.[75]

This recent division among the federal district courts has created two different interpretations of the MBTA. These varying decisions by the courts have created confusion and uncertainty among the actors who might potentially violate the Act. If prosecuted under the MBTA, they do not know which interpretation will be applied – and the difference in the interpretations is extreme: either the actor is a criminal, or he is not.

B. Two Cases with Two Different Interpretations

In *United States v. Brigham Oil & Gas, L.P.*, the government filed allegations in the District Court for the District of North Dakota against Brigham Oil & Gas, L.P. and two other neighboring oil and gas production companies for taking migratory birds in violation of the MBTA.[76] The birds were "taken" by flying into or near the companies' oil reserve pits,[77] and they were unable to fly away because they were covered in oil.[78]

72. *See generally* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999); *see also* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (holding that an indirect taking of a migratory bird will be a violation under the MBTA so long as the defendant's actions proximately caused the death of the bird).

73. Moon Lake Electric Ass'n, 45 F. Supp. 2d at 1071.

74. *Id*. at 1073-74.

75. *Id*. at 1088. The defendants *could be* in violation of the statute because the electric company in *Moon Lake* was moving for dismissal of the case, and all the court was asked to do was determine whether to grant the motion. *Id.* at 1071.

76. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1204-06 (D. N.D. 2012). Newfield Production Company and Continental Resources, Inc. were the other two oil companies involved in the action. *Id.*

77. *Id.* at 1204. Oil reserve pits are "lawful areas near gas and oil drilling operations that are used to contain drill cuttings and other byproducts of the drilling." Norman L. Reimer, *When It Comes to Overcriminalization, Prosecutorial Discretion Is for the Birds*, THE CHAMPION 9 (Oct. 2012).

78. Brigham Oil & Gas, 840 F. Supp. at 1204-06. Two Mallards were found in Brigham

The district court did not hesitate before stating that "take" under the MBTA "refers to conduct *directed* at birds, such as hunting or poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths."[79] The court determined that "take" required a direct or intentional act by first looking at the plain meaning of the word, as the statute itself does not define the term.[80]

In furtherance of its reasoning, the court compared the ordinary meaning of "take" with the definition of "take" in FWS regulations and found that the regulations' definition of "take" included only purposeful or intended effects on birds.[81] In addition, the court stated that courts in general are required to interpret criminal statutes narrowly when the statute's terms are uncertain.[82] The court also reasoned that if "take" was to encompass incidental activities, liability would extend to many every day activities, such as "cutting brush and trees, and planting and harvesting crops."[83]

The court found that oil and gas production activities, namely oil reserve pits, are not the kind of activities that can be found in violation of the MBTA because they "are not directed at birds or their habitats," and therefore, the three oil companies were not in violation of the MBTA.[84] The court developed the rule that "lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime."[85] This is one interpretation of the MBTA that has been recognized by multiple courts, as stated above.[86]

In *United States v. Citgo Petroleum Corp.*, the District Court for the Southern District of Texas convicted Citgo on three counts of "unlawfully taking and aiding and abetting the taking of migratory birds" in violation of the MBTA in 2007.[87] Birds were able to fly into uncovered oil

Oil's oil reserve pit. *Id.* at 1204. Two Mallards, one Northern Pintail, and one Red-Necked Duck were found at Newfield Production's site. *Id.* at 1205. One Say's Phoebe was found in Continental Resource's pit. *Id.* at 1206.

79. *Id.* at 1208 (emphasis added).

80. *Id.* at 1208-09. Looking at the Webster's Dictionary definition, "take" means to use control or power to gain possession over something or, specifically aimed at fish or game, to get possession by killing or capturing. *Id.*

81. *Id.* at 1209. The regulations define "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect . . ." 50 C.F.R. § 10.12.

82. Brigham Oil & Gas, 840 F. Supp. at 1211.

83. *Id.* at 1212.

84. *Id.* at 1211, 1214.

85. *Id.* at 1214.

86. *See generally* United States v. ConocoPhillips Co., No. 4:11-po-002, 2011 WL 4709887 (D. N.D. Aug. 10, 2011); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009).

87. United States v. Citgo Petroleum Corp., 893 F. Supp.2d 841, 842 (S.D. Tex. 2012). In a

tanks and, once they landed in the oil, were unable to escape and died.[88] The court found that this taking was a violation under the MBTA.[89] Citgo then moved to vacate the district court's convictions under the MBTA, which led to the decision upon which this Comment is focused.[90]

In its motion to vacate, Citgo's primary contention was that the MBTA does not apply to commercial activities that unintentionally kill migratory birds; instead, it only applies in circumstances of "hunting, trapping, poaching, or similar means."[91] The government argued conversely, stating that the MBTA applies to activities beyond hunting and poaching and could reach businesses that kill migratory birds because of the "at any time, by any means or in any manner" language of the MBTA.[92]

The court acknowledged the differing interpretations among the federal courts: (1) liability for activities similar to hunting and poaching versus (2) liability for any conduct that takes or kills a migratory bird.[93] The court then impliedly adopted the *Brigham Oil & Gas* rule, stated above, that lawful conduct that incidentally kills a migratory bird is not a violation of the MBTA.[94] However, once the court determined that Citgo's tanks were not lawfully operated,[95] it changed its analysis to one of strict liability, following the Tenth Circuit,[96] and affirmed that the

separate trial during the same time, Citgo Petroleum was also convicted of violating the Clean Air Act because it never installed roofs on its tanks at the refinery plant, which was part of an emission control regulation. *Id.*

88. *Id*.

89. *Id.*

90. *Id*. The motion to vacate was based on the argument that the government failed to state an offense under Federal Rule of Criminal Procedure 12. *Id.* The rule allows for a pre-trial motion alleging a "defect in instituting the prosecution." Fed. R. Crim. P. 12(b)(3)(A).

91. *Id*. Citgo used the ruling in *Brigham Oil & Gas, L.P.* to support its argument. *Id.* at 845.

92. *Id.* at 842. The MBTA states that it is "unlawful at any time, by any means or in any manner, to pursue, hunt, take . . . any migratory bird." 16 U.S.C.A. § 703(a) (2004).

93. Citgo Petroleum Corp., 893 F. Supp.2d at 843. Moreover, courts cannot even agree on the intent of Congress in enacting the MBTA. *See* Newton County Wildlife Ass'n v. United States Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (holding that "take" and "kill" under the MBTA means activity that is the kind engaged in by hunters and poachers because this was the intent of Congress at the time of its enactment); *but see* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999) (explaining that Congress intended the MBTA to include acts besides hunting and poaching because it included many activities that could be a violation).

94. Citgo Petroleum Corp., 893 F. Supp.2d at 846-47.

95. *Id.* at 847.

96. United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010). The court held that the "take" provision in the MBTA did not contain a scienter requirement and, thus, was strict liability. *Id.* at 686. However, the court understood the broad reach the Act could have and held that the MBTA also requires that the defendant proximately caused the violation. *Id.* at 690. This Comment will not analyze the proximate cause requirement the Tenth Circuit employed, but it

MBTA is a strict liability statute.[97] Under the strict liability application of the MBTA, the court found that Citgo did violate the Act when it failed to cover the oil tanks, again emphasizing that the failure to cover the tanks was unlawful, and birds were killed as a result.[98]

In conclusion, there are district courts like the one in *Brigham Oil & Gas* that reject the strict liability application of the MBTA by ruling that lawful activity that kills a bird is exempt. On the other hand, district courts like that in *Citgo Petroleum Corp.* rule that the statute is strict liability. With this divide, some actors are convicted, while others, conducting very similar activities, are let off the hook.

IV. SOLVING THE MBTA ISSUE

The MBTA has been called a "heady combination of strict liability, criminal penalty provisions, and vague language,"[99] proving that concretely establishing an accepted interpretation and application will be difficult to achieve. Part A of this section analyzes the correct interpretation of the MBTA's misdemeanor violation and, specifically, whether it includes unintentional acts. Part B looks at the range of consequences of the statute's broad reach and why the current limiting solution is not effective. Lastly, Part C analyzes the proposed solution of implementing an incidental take permit program into the MBTA.

A. Interpretation of the MBTA

Before a solution can be proposed on how to limit the scope of the MBTA, the interpretation of the Act must be confirmed. The majority of authorities hold that the misdemeanor penalty under the statute is one of strict liability.[100] Furthermore, the MBTA's strict liability application results in the confirmation that incidental takings are included within the

is interesting to note that courts applying strict liability recognize the broad implications of the Act and seek some limitation on its reach.

97. Citgo Petroleum Corp., 893 F. Supp.2d at 847. If the court truly meant to hold that the MBTA misdemeanor provision was one of strict liability, then its distinction of lawful activity versus unlawful activity is irrelevant because "strict liability is liability without fault." Robbins, *supra* note 61, at 604.

98. Citgo Petroleum Corp., 893 F. Supp.2d at 848.

99. Means, *supra* note 34, at 824.

100. These authorities include the text of the statute, 16 U.S.C.A. § 703; the legislative intent, S. Rep. No. 99-445, at 16 (1986) ("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."); and the concept of public welfare offenses in the environmental context. Robbins, *supra* note 61, at 583.

MBTA.[101] This section analyzes the authorities that demonstrate that strict liability is the correct interpretation of this statute. In addition, it provides support for including incidental and unintentional "takings" under the statute.

1. Strict Liability

The MBTA makes it unlawful "at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill . . . any migratory bird."[102] Three categories of criminal penalties exist under the MBTA: a Class B misdemeanor with no mens rea, a felony for knowingly being involved in a sale, and a Class A misdemeanor for helping in the "taking" of a migratory bird by baiting.[103] This Comment only focuses on the Class B misdemeanor violation.[104] Recent courts have held that the MBTA is not a strict liability statute in that only intentional conduct toward birds falls within its restrictions.[105] However, this position ignores the logical interpretation of the statute.[106] Although a strict liability interpretation of the MBTA will cause a broad array of consequences, the solution to limiting its reach is deciding when and how to apply it, not changing the meaning of the statute.[107]

Since the inception of the MBTA, the evidence points directly to a strict liability interpretation. First, the plain language of the statute suggests a strict liability interpretation.[108] For misdemeanor violations, the Act does not provide a mens rea[109] requirement to be found liable under the provision: for example, knowingly, recklessly, or negligently.[110] However, the United States Supreme Court has stated that mere silence on a mens rea requirement does not automatically make a statute strict liability.[111]

101. Snodgrass, *supra* note 9, at 4.

102. 16 U.S.C.A. § 703(a) (2004).

103. 16 U.S.C.A. § 707 (1998).

104. This Comment is only focused on the misdemeanor provision in 16 U.S.C.A. § 707(a) because it is the only penalty provision that involves the strict liability and incidental take situation.

105. *See generally* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D. N.D. 2012); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009).

106. *See generally* Robbins, *supra* note 61, at 582-83.

107. *Id*. at 583.

108. United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010).

109. Mens rea is the mental element required to find liability under a particular criminal law. Robbins, *supra* note 61, at 583-84.

110. 16 U.S.C.A. § 707(a) (1998).

111. *See* Staples v. United States, 511 U.S. 600, 605 (1994) (stating that strict liability statutes are generally disfavored, and because providing the necessary mens rea in a statute is the rule, not

To confirm a strict liability reading, there must be evidence, expressed or implied, that Congress intended that reading.[112] The MBTA easily meets this standard.[113] In 1986, Congress amended the MBTA to add the felony violation of selling migratory birds and required a mens rea of "knowingly" for this offense.[114] Congress did not alter the lack of mens rea for the misdemeanor violation and stated: "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. 707(a)."[115] Evidence of intending strict liability for a violation cannot get much stronger than a direct statement by Congress.

Environmental statutes fall within a wide array of public welfare offenses for which "strict liability has been morally and constitutionally accepted in such contexts."[116] Strict liability is the most efficient tool for enforcing environmental legislation because the threat of criminal liability is a better deterrent than its civil counterpart.[117] When Congress enacts a strict liability statute, it is telling the nation that there is a serious danger that must be prevented.[118] Enacting a strict liability statute benefits everyone because "it shifts the risks of dangerous activity to those best able to prevent a mishap."[119] Punishing actors that do not intentionally try or succeed in killing a migratory bird is a sacrifice that must be made in order to achieve the objectives of the statute and combat the dangers posed by inaction.[120]

As stated above, the district court in *Brigham Oil & Gas* argued that the MBTA, as a criminal statute, should be construed narrowly be-

the rare exception, more evidence than silence must be provided to indicate that the legislature intended for the statute to be strict liability).

112. *Id.* at 606.

113. Robbins, *supra* note 61, at 582. "There is little controversy on this issue" of showing strict liability for the misdemeanor violation. *Id.*

114. United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010).

115. S. Rep. No. 99-445, at 16 (1986).

116. Robbins, *supra* note 61, at 594-95; *See also Staples*, 511 U.S. at 606 (explaining that when it is a public welfare offense "[the Supreme Court] has understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the fact that make his conduct illegal. In construing such statutes, [the Supreme Court has] inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.").

117. Arensberg, *supra* note 24, at 428.

118. Robbins, *supra* note 61, at 596.

119. Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U. L. REV. 315, 330 (1999). "Strict liability statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." *Id.* at 331.

120. Robbins, *supra* note 61, at 595-96.

cause the activities intended to be included under it were uncertain.[121] However, as this section shows, there is an abundant amount evidence that the MBTA was intended to be a strict liability application and, as the next section shows, intended to prohibit incidental activities as well.

2. Incidental Takings

The next step in interpreting the MBTA is determining whether the statute addresses incidental activities that kill or take a migratory bird. For the reasons stated below, the Act does address unintentional and incidental activities, as well as intentional acts.[122] Ultimately, because the Act is strict liability, it is irrelevant whether an activity is conducted with the intent to kill or take a migratory bird.[123] It is true that when the Act was originally enacted, the debate centered on the prohibition of intentional acts that killed or took possession of migratory birds, such as hunting or trapping.[124] However, since the MBTA's enactment in 1918, new threats to migratory birds have developed that have the same impact hunting and capturing did in the early 1900s.[125] "Primary administrative emphasis" of the MBTA has shifted to combat the multitude of activities that incidentally cause the death of migratory birds.[126]

In addition, Congress expressed its intent through its choice of words.[127] By stating that a bird cannot be killed by "any means or in any manner," Congress did not limit violators of the Act to only hunters or trappers – it includes any person who kills a migratory bird in any way.[128] Moreover, the term "kill" in the MBTA's list of how to commit a misdemeanor violation suggests that there will be criminal liability regardless of how the death actually occurred – focusing on the end, not the means.[129] The court in *Moon Lake Electric Association* stated that

121. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 1202, 1211 (D. N.D. 2012).

122. Snodgrass, *supra* note 9, at 6.

123. *Id*. The majority of federal courts that have examined the MBTA have ruled that the strict liability essence of the Act prevents a distinction between intentional or unintentional acts. *Id*.

124. 55 Cong. Rec. 4400-01.

125. Lilley & Firestone, *supra* note 4, at 1177. Some of the new threats that have emerged include "hazardous waste pollution, deforestation, [and] the construction of tall buildings and similar structures." *Id*.

126. Coggins, *supra* note 10, at 764.

127. Lilley & Firestone, *supra* note 4, at 1183.

128. *Id*.

129. Rachael Abramson, Comment, *The Migratory Bird Treaty Act's Limited Wingspan and Alternatives to the Statute: Protecting the Ecosystem Without Crippling Communications Tower Development*, 12 FORDHAM ENVTL. L. J. 253, 274 (2000). "The method of death takes a backseat to the resultant kill, which exacts liability." *Id*. This is one point of the application of the MBTA that is cause for broad and unheeded consequences.

the activities listed under the statute, such as pursuing, killing, and wounding, all can be achieved outside of a hunter or poacher capacity.[130] Lastly, the words of the statute support the inclusion of unintentional activities because some of the birds it lists as protected are not those that are normally hunted.[131] If the statute was only meant to include intentional acts, these birds would not have been listed under its protection.[132]

Opponents of the inclusion of incidental takings of birds under the MBTA have proposed that a comparison between the MBTA and the Endangered Species Act ("ESA") shows that the MBTA is to be narrowly interpreted.[133] However, the U.S. Supreme Court has knocked this argument down.[134] Congress' definition of "take" as contained in the ESA includes conduct that was not made a part of the MBTA, such as harass and harm.[135] Proponents of this distinction between the two definitions of "take" posit that, because these activities are more broad than those listed in the MBTA and Congress never went back to add these to the MBTA after enacting the ESA, it must have been Congress' intent to make the ESA's definition of "take" more broad than its MBTA counterpart.[136] The Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[137] however, held that the words that describe "harm" in the ESA's definition of "take" "refer to actions or effects that do not require direct applications of force."[138] Therefore, the Supreme Court has ruled that even though the ESA includes a few more activities under "take," there is no effect on the inclusion of unintentional acts under the MBTA.[139]

Not only has the Supreme Court ruled that "take" under the MBTA includes incidental deaths, but also, in 2001, President Bill Clinton issued Executive Order 13186 to clarify that an incidental "taking" of a

130. United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999).

131. Lilley & Firestone, *supra* note 4, at 1183. For example, the treaty with Canada that ultimately led to and was incorporated into the MBTA highlighted migratory insectivorous birds as being protected. Coggins & Patti, *supra* note 10, at 170. These birds "are never hunted commercially, and because of their small size are rarely shot for any reason;" this provides evidence that the treaty negotiators did not intend protection only of bird victims of hunting. Coggins & Patti, *supra* note 10, at 170-71.

132. Coggins & Patti, *supra* note 10, at 170-71.

133. Means, *supra* note 34, at 828.

134. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 701 (1995).

135. 16 U.S.C.A. § 1532(19).

136. Means, *supra* note 34, at 827-28.

137. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. at 687.

138. *Id*. at 701.

139. Julie Lurman, *Agencies in Limbo: Migratory Birds and Incidental Take by Federal Agencies*, 23 J. LAND USE & ENVTL. L. 39, 49 (2007).

migratory bird is a violation under the MBTA.[140]

It is clear from the weight of authority that the MBTA was enacted with the intent to have strict liability as its enforcement measure. Under the strict liability scheme and the framework that Congress set out in the text of the Act, it is safe to say that incidental or unintentional acts that result in the death of a migratory bird fall under the MBTA, and criminal liability could be the outcome for the actor.

B. Need for a Solution

The MBTA's strict liability undoubtedly has a broad scope of potential violators. This broad application has led to varying decisions by federal courts.[141] The varying decisions are the only real determination of the scope of the Act; thus, the uncertainty that stems from the judgments on both ends of the spectrum creates an unsettling confusion about what kinds of activities are subject to criminal liability. If the spirit of the MBTA is to be upheld and enforced, realistically, an effective limiting principle must be put in place to prevent the "over-inclusiveness" of the statute's prohibitions.[142] The Departments of Interior and Justice need to band together and develop a clear limiting solution that embraces the spirit of the MBTA while giving unintentional violators a proactive option. This section highlights the severe consequences that will result from the Act's broad reach and the lack of uniformity surrounding its implementation. Finally, this section analyzes the prosecutorial discretion theory and explains why this is neither an efficient nor effective way to remedy the broad reach of the Act's prohibitions.

1. Consequences of the MBTA's Broad Reach

A strict application of the MBTA, without any exceptions, would create a never-ending scope of potential liability.[143] It would be "an uncontrollably expansive criminal law."[144] Professor Kalyani Robbins stated that "Congress made a sweeping prohibition that would be unrealistic to enforce – a prohibition that could, at some point, touch nearly

140. Lilley & Firestone, *supra* note 4, at 1186.

141. *See* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202 (D. N.D. 2012); *but see* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999).

142. Robbins, *supra* note 61, at 605.

143. Lurman, *supra* note 139, at 40. "If the prohibition against incidentally taking migratory birds was uniformly and strictly enforced, development activity in Alaska would likely grind to a halt." *Id*.

144. Means, *supra* note 34, at 833.

everyone's activities – and then asked the Secretary to carve out an enforceable plan."[145] "In some situations, the MBTA would impose criminal liability on a person for the death of a bird under circumstances where no criminal liability would be imposed for even the death of another person."[146] Strict liability would reach all actors that killed a migratory bird, including a homeowner who installs windows that stand in the way of a bird's path.[147]

The uncertainty as to whether an actor's lawful actions that indirectly cause the death of a migratory bird could be a violation of the MBTA and therefore, subject the actor to a hefty fine, is one of the most important reasons to settle the dispute over the interpretation of the Act.[148] For example, approximately 444,000 avian deaths occur each year due to lawfully operated onshore wind turbines.[149] Because the MBTA is strict liability with no exceptions for incidental deaths and covers almost all species of birds,[150] there may be no way for wind power companies, in this instance, to avoid liability under the MBTA.[151] Meredith Blaydes Lilley and Jeremy Firestone commented on this uncertainty:

> By criminalizing the take of migratory birds without a permit and simultaneously granting no permits whatsoever for incidental take, the MBTA creates a conundrum for entities engaged in an array of land uses that might result in, albeit unintentionally, migratory bird deaths.[152]

This uncertainty will make creating new companies or moving locations less attractive for business owners because they could be in violation of the MBTA without doing anything unlawful.[153]

Studies within the last several years have shown a decline in the bird populations in the United States; thus, to counteract these statistics,

145. Robbins, *supra* note 61, at 605.

146. Means, *supra* note 34, at 833.

147. Snodgrass, *supra* note 9, at 2.

148. Snodgrass, *supra* note 9, at 4. In 2009, an electrical transmission company and an oil and gas production company were each subject to multi-million dollar penalties under the misdemeanor violation of the MBTA. *Id.* "More generally, under the misdemeanor provision an actor could be subject to fines up to $15,000 and/or imprisonment for up to six months." *Id.* at 3.

149. Thaler, *supra* note 5, at 1138. Interestingly, this number is *less* than the number of deaths that occur each year due to windows, cars, and similar common, everyday things. *Id.*

150. Hadassah M. Reimer & Sandra A. Snodgrass, *Tortoises, Bats, and Birds, Oh My: Protected-Species Implications for Renewable Energy Projects*, 46 IDAHO L. REV. 545, 566 (2010). More specifically, the Act covers all species except for those that are exotic or invasive. *Id.*

151. Thaler, *supra* note 5, at 1138-39.

152. Lilley & Firestone, *supra* note 4, at 1181.

153. Snodgrass, *supra* note 9, at 4-5.

prosecution under the MBTA will likely increase.[154] The increase in MBTA prosecutions will open up many unsuspecting actors to liability, and without a proactive solution for the actors to prevent this, they will suffer the taint of criminal liability and hefty fines.[155]

Congress knows of the broad interpretations being given to the MBTA, and it has chosen not to make any amendment that will limit its scope.[156] Therefore, it is up to the FWS to be the "gatekeeper for proper implementation of the statute" and create a realistic method of applying the MBTA that still adheres to the Act's spirit and goals.[157]

2. Prosecutorial Discretion and Its Downfalls

The FWS has been using prosecutorial discretion as the limiting principle to make MBTA application more realistic.[158] This principle provides that, though an act is technically a violation of the MBTA, the actor will not be prosecuted because the prosecutor chooses not to.[159] For example, if a bird dies because of flying into your window, you will not be prosecuted.[160] However, because enforcement of the MBTA under this theory depends on an unpredictable discretionary judgment, it is not the most efficient or effective solution to limit the broad scope of strict liability under the Act.

Norman L. Reimer, Executive Director of the National Association of Criminal Defense Lawyers, stated that "prosecutorial discretion has become a blank check."[161] The FWS does not have a set prosecutorial policy or any guidelines on how to exercise its discretion in enforcing the MBTA.[162] How is this an effective limiting principle if the enforcing agency implements it on a whim? The lack of guidance and set policy objectives has only continued to expand the scope of the Act, and prosecution has become an unlikely event due to the lack of personnel and other resources within the FWS.[163] As a result, the lack of prosecution

154. *Id*. at 2.
155. *Id*. at 2.
156. Lurman, *supra* note 139, at 60.
157. *Id*.
158. Lilley & Firestone, *supra* note 4, at 1197.
159. Snodgrass, *supra* note 9, at 2.
160. *Id*. at 2.
161. Reimer, *supra* note 77, at 9. Reimer posited that there is overcriminalization under the MBTA because of the emotions involved: for example, seeing birds covered in oil. *Id.*
162. Robbins, *supra* note 61, at 605-06.
163. Lilley & Firestone, *supra* note 4, at 1197-98. "[W]hat is the likelihood of prosecuting the virtually limitless number of activities that can cause the death of migratory birds? [E]nforcing agencies usually do not have sufficient personnel or funds to pursue all possible violations of the

in some areas has created a false sense of security among industry actors because they believe they are now exempt.[164] However, prosecutorial discretion could change in an instant, killing that false belief.[165] This is especially true because prosecution under the MBTA is projected to increase in the near future due to decreasing bird populations. [166] Those actors will therefore suffer the change in discretion and no longer benefit from the ambivalent safety net.

This theoretical solution is unpredictable because the prosecution depends on the administration that is in office at the time.[167] Each time the administration changes, the scope of the discretion will likely change to reflect the new administration's objectives.[168] The strict liability aspect of the MBTA makes enforcement more likely to be affected by ambitions for higher office.[169] If a prosecutor applies the Act's prohibitions more broadly, he or she will likely achieve more convictions because of the all-encompassing strict liability.[170] Essentially, the criminal justice under the MBTA would ultimately depend on the "conscience and circumspection in prosecuting officers."[171]

Another downfall of prosecutorial discretion occurs when the FWS makes a promise but does not back it with a guarantee.[172] The FWS has stated that it will focus its enforcement and prosecution of the MBTA on those actors that have a disregard for the Act's policies.[173] For example, the FWS could use its prosecutorial discretion and choose not to prosecute actors when they have taken measures to mitigate the impact of "taking" any protected birds.[174] However, despite a promise to not prosecute, there is no concrete, expressed authorization to conduct the activity in accordance with mitigation measures, and incidentally take a bird, without the looming threat of prosecution.[175] This lack of a guarantee

laws they administer." *Id* (internal quotations omitted).

164. Lurman, *supra* note 139, at 46.

165. *Id*.

166. Snodgrass, *supra* note 9, at 2.

167. Means, *supra* note 34, at 834-35.

168. *Id*.

169. Abramson, *supra* note 129, at 280-81.

170. *Id*.

171. Corcoran, *supra* note 119, at 345 (internal quotations omitted).

172. Shippen Howe, *The Intersection of the Migratory Bird Treaty Act and Energy Companies: An Uncertain Crossroad*, 41 No.5 ABA TRENDS. 1, 14 (2010).

173. *Id*.

174. Thaler, *supra* note 5, at 1139. An example of this discretion took place when the FWS teamed up with Edison Electric Institute's Avian Power Line Interaction Committee to develop protection plans, and the FWS *impliedly* agreed not to prosecute any bird deaths resulting from these actors' conduct under the MBTA. *Id.*

175. *Id.*

will make actors feel exposed to liability and will impede further large-scale development.[176]

The discretion to prosecute a violator of the MBTA could depend on the type of activity the actor is engaged in that caused the "taking" of the bird.[177] Senators David Vitter of Louisiana and Lamar Alexander of Tennessee wrote a letter to Attorney General Eric Holder, arguing that prosecution under the MBTA has discriminately targeted oil and gas production companies, while wind power projects have been given a "free pass."[178] The Senators sought a clarification on the enforcement policy of the MBTA because one legal energy business was being prosecuted for killing birds while another legal energy business was not being prosecuted for killing birds.[179] The decision to prosecute was being determined, according to the Senators, by the administration's hostile views toward traditional oil and gas energy production versus the more open view toward renewable energy production, like wind power.[180] Regardless of whether this is the reason why wind power facilities have not been prosecuted while their oil and gas counterparts have continually faced prosecution under the MBTA, it is additional evidence to show that prosecutorial discretion is unpredictable and really can be a "blank check;"[181] the Department of Justice can simply decide to prosecute one violator while letting another, who could be equally liable,[182] off the hook.

A reliance on prosecutorial discretion allows the courts to avoid establishing a concrete rule as to how the MBTA should be applied.[183] Some advocates of hardline environmental enforcement might approve of the unpredictability and instability.[184] The uncertainty would ensure the deterrence of actors who might incidentally kill a bird during the course of their business because they know there is always the chance of

176. *Id.*

177. *Vitter, Alexander Say Administration's Policy on Endangered Species Has Ridiculous Inconsistencies*, U.S. Senate Committee on Environment and Public Words Press Releases (Jan. 30, 2013), http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=a4b146be-90b8-38d7-1a0e-113a580a4672.

178. *Id.*

179. *Id.*

180. *Id.*

181. Reimer, *supra* note 77, at 9.

182. *See* Thaler, *supra* note 5, at 1138 (explaining that approximately 444,000 birds are killed by wind power facilities each year).

183. Means, *supra* note 34, at 835-36.

184. *Id*. at 835.

prosecution.[185] However, the invisible rule would create too broad of a prohibition and would deter other crucial things, such as economic development.[186] In addition, it does not set a good precedent for future courts faced with determining how to apply the strict liability because it can be ever changing.[187]

One feasible argument to keep prosecutorial discretion as the limiting principle on the MBTA's span is to exercise the discretion in sentencing as well as in which cases are prosecuted.[188] Under this discretion, the Department of Justice could suggest minimal punishments for those actors who are more "innocent" than others are.[189] Though this theory recognizes that some actors who are prosecuted under the MBTA were not intentionally trying to kill birds and should be punished less, it is entirely subjective and would result in the same problems that prosecutorial discretion poses in general.[190] In addition, Congress created the United States Sentencing Guidelines to end sentencing discretion in other contexts because it should be assumed that anyone awaiting punishment after a trial is not innocent and should not be afforded special treatment.[191]

There is one application of prosecutorial discretion that should still be implemented under the Act. This is the discretion to not prosecute the absurd, technical violations of the MBTA, such as migratory birds being killed by cars, house windows, or planes.[192] For all of the negative and unstable concerns that come with prosecutorial discretion, it is still solely responsible for ensuring these absurd violations are exempted.[193] Moreover, if the implemented limiting principle is the incidental take permit program like that under the ESA, the government should not expect a homeowner or an airplane manufacturer to apply for a permit, outline a mitigation plan, and spend the money to implement it. Therefore, prosecutorial discretion should still apply in the context of the absurd violations.

185. *Id*.

186. Snodgrass, *supra* note 9, at 2. Project developers and other businesses would be skeptical when taking on a new business venture or altering an existing operation because of the threat of prosecution under the MBTA and the resulting taint of criminal liability. *Id.*

187. Means, *supra* note 34, at 835-36.

188. Corcoran, *supra* note 119, at 342.

189. *Id*.

190. *Id*. What constitutes a minimal punishment compared to a severe punishment is hard to determine when different people have different feelings about what is minimal and what is severe. *Id*.

191. *Id*.

192. Corcoran, *supra* note 119, at 346.

193. *Id*.

Though prosecutorial discretion is the limiting principle relied upon today, it is not the most efficient or effective way of dealing with the broad scope of the MBTA. The unpredictable and unguided nature of this limiting technique transcends state borders and leaves actors across the country potentially facing criminal liability without any real proactive redress. The implemented solution must be a concrete rule that can be uniformly applied and predicted.

C. Granting Permits for Incidental Takes

The most realistic and effective solution the FWS can implement to effectively enforce the MBTA is to follow the permit program under the ESA for incidental takings.[194] The permit program has worked for the ESA for almost 40 years, and as the ESA contains a very similar "take" prohibition,[195] the permit program would most likely have the same successful effect on MBTA implementation. The most effective way to implement this solution is to have Congress amend the Act to include incidental take permits. However, Congress has made it clear by its inaction thus far that it is leaving it to the FWS to fix the problems with applying the MBTA.[196] In addition, it is well known that the legislative process is a slow one, and the MBTA needs a solution immediately because of the current "incidental takers" in the country that can only hope they are not a target of prosecution. Therefore, it will be up to the FWS to create and regulate the proposed permit program. This section analyzes the ESA's permit program and suggests why a similar program would eliminate the broad consequences that are possible under the MBTA's current enforcement plan and would finally create a uniform implementation measure.

1. The Permit Program

The ESA makes it unlawful for any person to "take" a species that is listed on the endangered species list under the statute.[197] As stated above, the United States Supreme Court in *Babbitt* held that the "take"

194. 16 U.S.C.A. § 1539(a).

195. "Take" is defined in the ESA to mean to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(19).

196. Lurman, *supra* note 139, at 58. Congress has to be aware of the extremely contrasting views that federal courts have given to the very meaning of the MBTA and its application, and the fact that it has not acted to amend the statute to clarify its intent suggests that it has abandoned the issue and has left it for the FWS to handle. *Id.*

197. 16 U.S.C.A. § 1538.

definition under the ESA includes incidental activities.[198] Under the ESA's exceptions, a taking that is otherwise prohibited under the statute may be permitted for scientific purposes, to enhance the survival rates of the affected species,[199] or when the taking is only incidental to the actor's otherwise lawful activity.[200] These three situations are exempt from the ESA's prohibition only if the Secretary of the Interior chooses to grant a permit to the actor.[201]

Under the permit program, the actor is not simply granted the permit and then let off the hook for criminal liability if an endangered species is taken on his or her watch; instead, requirements must be followed.[202] Before the permit will be granted, the actor must submit a habitat conservation plan ("HCP").[203] At a minimum, this plan must contain the impact that will result from this actor's taking, the steps that will be taken to try to prevent these takings, and an explanation for why the actor is not conducting his activity in an alternative way that would not amount to such a taking.[204] The HCP must be made available for public comment; then, if the Secretary of Interior determines that the take will be incidental and that mitigation measures and funding will be adequate, the permit will be issued to the actor.[205] The permit and the HCP must also comply with the National Environmental Policy Act ("NEPA"), which makes the process even longer for the actor.[206] If the actor is found not in compliance with the granted permit at any time, the permit will be revoked.[207]

The primary contention against incorporating an incidental take permit program into the MBTA or its regulations is that the FWS lacks the resources and personnel to carry it out.[208] A creative solution to fix-

198. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 701 (1995).

199. 16 U.S.C.A. § 1539(a)(1)(A).

200. 16 U.S.C.A. § 1539(a)(1)(B). In 1982, the ESA was amended to allow for incidental take permits primarily because of a campaign initiated by private economic actors and their qualm with the fact that "species with 'no value' were squashing projects economically beneficial to humans." Patrick Duggan, *Incidental Extinction: How the Endangered Species Act's Incidental Take Permits Fail to Account for Population Loss*, 41 ENVTL. L. REP. NEWS & ANALYSIS, 10628, 10628 (2011).

201. 16 U.S.C.A. § 1539(a).

202. 16 U.S.C.A. § 1539(a)(2)(A).

203. *Id.*

204. 16 U.S.C.A. § 1539(a)(2)(A)(i-iii).

205. Duggan, *supra* note 200, at 10630.

206. *Id.* at 10631. Under the ESA, there have been streamlining techniques put in place to make the review by NEPA more expedited. *Id.* Because the ESA covers different policies than the MBTA, if the incidental take permit program is implemented for the MBTA, the FWS can create a similar streamlining technique for these permits.

207. 16 U.S.C.A. § 1539(a)(2)(C).

208. Conrad A. Fjetland, Comment, *Possibilities for Expansion of the Migratory Bird Treaty*

ing the monetary issue is to implement a price or "bird tax" for applying for an incidental take permit.[209] The money received by the FWS for these permits could be put toward funding the early stages of permit implementation, and once the agency has adequate resources, the money could then be used for researching mitigation efforts to further reduce incidental takings.[210] For example, a bird tax paid by a telecommunications industry actor could be put toward research to develop a design for towers with visual or acoustic devices to make them safer for migrating birds.[211] Similarly, in the context upon which this Comment has focused, a bird tax paid by an oil and gas production company could be put toward constructing oil reserve pits or tanks safer for birds by designing a method of covering them. The price of this bird tax will be just another cost of doing business for the actor and much less than what a misdemeanor conviction under the MBTA would cost.[212]

A technique applied to ESA incidental take programs for the wind power industry could be incorporated into an incidental take permit program under the MBTA.[213] In 2010, the "Smart from the Start" initiative was announced by Secretary of the Interior Kenneth Salazar to rapidly increase construction of offshore transmission lines for wind projects.[214] This program has reduced the burden on the FWS for this specific regional project "by removing notice requirements and completing extensive feasibility, resource, and environmental studies . . . before projects were even proposed."[215] This streamlining program allows for an expedited permit granting process when an industry conducting multiple projects in a common geographic area applies for the same type of permit. In this scenario, the FWS only has to look over the environmental assessment, as a whole, once.[216] This program would alleviate the burden placed on FWS personnel and its resources because the permit process would be shortened for projects that qualify for this streamlining. In addition, because some parts of the application will not have to be re-

Act for the Protection of Migratory Birds, 40 NAT. RESOURCES J. 47, 66 (2000). It will take approximately $2,700,000 and 45 more personnel to adequately implement the permit program. *Id*.

209. *See* Abramson, *supra* note 129, at 285-86 (suggesting a bird tax to bring in funding for scientific research).

210. *Id*.

211. *Id*. at 286.

212. *Id*.

213. J. B. Ruhl, *Harmonizing Commercial Wind Power and the Endangered Species Act Through Administrative Reform*, 65 VAND. L. REV. 1769, 1781-82 (2012).

214. *Id.*

215. *Id.* The operations that started this streamlining program were the Atlantic offshore wind projects. *Id.*

216. *Id.* at 1783.

viewed for applicants that are a part of the same geographic area,[217] fewer personnel will be needed to review the applications.

To address the lack of personnel contention by using the framework of the ESA, there will not be the usual, or at least not as much, confusion and tentativeness when starting a new project. As the program is already being implemented successfully in another setting, the FWS can attempt to integrate that work into its routine for MBTA enforcement.

2. Why an Incidental Take Permit Program is the Best Solution

If the FWS created a permit program for the MBTA based on the provision under the ESA, it would provide not only the most effective solution but also the quickest. The permit exception under the ESA is already in place, and the FWS would have an already-developed structure to incorporate into the MBTA. The permit program suggested would actually enhance the goals of the MBTA because the actors receiving the incidental take permits will have to increase their environmental protection and conservation measures.[218] The permits are primarily a solution to reduce the all-encompassing liability under the statute and, thus, protect the incidental violators; however, because of the required implementation of conservation measures, the FWS will also benefit from the hopeful decrease in bird deaths.

Implementing the ESA's permit exception into the MBTA regulations will create more certainty among prominent industries that act lawfully, such as oil and gas drilling companies and wind power facilities.[219] By "buying into" the permit exception, private entities will be able to conduct their business lawfully and not suffer the taint of a criminal conviction.[220] Knowing that there is an option to avoid criminal liability, actors will be much less apprehensive when starting a new project, expanding an existing project, or moving locations.[221] Although a permit program may cause a delay in an actor's project or development because of the detailed requirements and steps in the permit process, the actors will at least have the certainty of knowing that they will not be

217. This program would be a good option in light of the *Brigham Oil & Gas* case because all three oil companies were operating within the same area and exposing birds to the same potential dangers.

218. 16 U.S.C.A. § 1539(a)(2)(A).

219. Snodgrass, *supra* note 9, at 4-5.

220. *See* 16 U.S.C.A. § 703(a) (2004) (stating that it is only unlawful under the Act to take a migratory bird if there has been no permit granted). In my opinion, choosing to buy into a permit program that also serves as a mitigation measure will earn the companies a better goodwill reputation within the community, as well.

221. Snodgrass, *supra* note 9, at 2.

prosecuted so long as they follow the terms of the permit.[222]

This program would be a "win-win" situation for both sides of the issue. Private actors will be able to attain a safeguard from potential criminal liability as long as they maintain otherwise lawful activities. They will have the security of doing business with no apprehension of violating the statute. On the other hand, the MBTA will not be just giving in. Under the program, the FWS will benefit from conservation and mitigation measures that these actors must undertake in order to receive the permit. As the actors will be paying to apply for a permit, the FWS will receive funding to conduct research into other mitigation methods or to sustain its resources under the program. This solution would provide the most realistic way of applying the broad MBTA and still adhere to the original intended spirit of the Act.

V. CONCLUSION

The MBTA is a strict liability statute that includes prohibition of not only intentional takings but also incidental takings of migratory birds. The weight of authority supports both of these propositions. Because the MBTA is a strict liability statute and its prohibitions technically have no real limitations, a clear and certain limiting principle must be implemented to prevent severe consequences. The extreme division among the federal district courts on how to interpret and apply the Act proves the dire need for an immediate solution.

The current method for limiting the MBTA's reach is prosecutorial discretion. This theory is not the most efficient way to limit the MBTA because it ultimately goes against the spirit of the MBTA by prosecuting some violators but voluntarily choosing not to prosecute others. In addition, the principle of discretion provides no clear guidance or predictability for actors that may incidentally violate the Act.

The best solution to address the broad reach of the MBTA's liability is for the FWS to implement an incidental take permit program that is similar to the one under the ESA. Some industry actors, like oil and gas production companies and wind power facilities, will continue to unintentionally kill birds as they continue their lawful business activities. Though the MBTA makes it a crime to allow such deaths, industries that provide energy independence to the United States are not going to pack up shop and stop their business—nor do we want them to do so. This incidental take permit plan will allow industry actors the security of

222. Thaler, *supra* note 5, at 1137.

knowing they will not face criminal liability for accidentally taking a migratory bird, but it will also benefit the FWS by providing additional conservation assistance because of the mitigation measures the actor must put in place to receive the permit. An incidental take permit program for the MBTA will help achieve the goals for which the Act was enacted.