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A Murder Most Fowl: *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), and Incidental Killings Under the Migratory Bird Treaty Act

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Note*

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I. INTRODUCTION

For most of recorded history, human beings have looked up at the sky and studied its occupants.¹ In the words of Leonardo da Vinci, “Once you have tasted flight, you will forever walk the earth with your eyes turned skyward, for there you have been, and there you will always long to return.”² The Migratory Bird Treaty Act of 1918 (MBTA),³ a United States federal law passed to implement a treaty between Great Britain (on behalf of Canada)⁴ and the United States,⁵ is no exception to this desire to examine and protect the creatures of the sky.⁶ Almost one hundred years after President Woodrow Wilson

1. See generally VALÉRIE CHANSIGAURD, ALL ABOUT BIRDS: A SHORT ILLUSTRATED HISTORY OF ORNITHOLOGY (3d ed. 2010) (detailing the history of the study of birds).

2. See Roland Flamini, *The Da Vinci Codex: Treasured Sketches of Flight on Rare Display at Smithsonian*, WASH. TIMES (Sept. 12, 2013), <http://www.washington-times.com/news/2013/sep/12/the-da-vinci-codex-treasured-sketches-of-flight-on> [<https://perma.unl.edu/ABW7-LT8U>].

3. See generally 16 U.S.C. §§ 703–712 (2012); Convention Between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, Gr. Brit.–U.S., Aug. 16, 1916, 39 Stat. 1702 [hereinafter U.S.–Great Britain Treaty].

4. The U.S.–Great Britain Treaty involves an agreement between Canada and the United States. However, it was enacted by Great Britain because at that point in history Canada was a province of Great Britain. See generally Peter Oliver, *Canada, Quebec, and Constitutional Amendment*, 49 U. TORONTO L.J. 519 (1999) (detailing aspects of the history of Canadian relations with Great Britain).

5. See U.S.–Great Britain Treaty, *supra* note 3.

6. For more information regarding the United States’ agreements with foreign nations concerning the protection of migratory birds, see the Convention Between the United States and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.–U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647 [hereinafter U.S.–U.S.S.R. Convention]; the Convention Be-

signed it, the Act still attempts to safeguard certain birds that migrate into American territories.⁷ Due to its status as one of the oldest environmental conservation acts in America, the MBTA has been repeatedly amended and expanded in modern times to include subsequently enacted treaties protecting migratory birds with not only Canada but also Mexico, Japan, and Russia.⁸

Congress passed the MBTA to shield certain birds from human interference—the Act criminalizes the taking or killing of nearly one thousand species.⁹ Put most simply, it attempts to facilitate international cooperation by protecting migratory birds that travel long distances across many different countries.¹⁰ To encourage compliance with the statute, Congress granted the U.S. Fish and Wildlife Service statutory authority to investigate and sanction MBTA violators.¹¹

Since its implementation, however, application of the MBTA has been polluted by conflicting judicial interpretations.¹² Specifically, a

tween the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Japan–U.S., Mar. 4, 1972, 25 U.S.T. 3329 [hereinafter U.S.–Japan Convention]; and the Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.–U.S., Feb. 7, 1936, 50 Stat. 1311 [hereinafter U.S.–Mexico Convention].

7. See Jennifer Howard, *Celebrating the Migratory Bird Treaty, A Pact that Transcends Borders*, AM. BIRD CONSERVANCY (Aug. 15, 2016), <https://abcbirds.org/celebrating-the-migratory-bird-treaty-a-pact-that-transcends-borders> [https://perma.unl.edu/72X8-WYGR].
8. See U.S.–U.S.S.R. Convention, *supra* note 6; U.S.–Japan Convention, *supra* note 6; U.S.–Mexico Convention, *supra* note 6.
9. 50 C.F.R. § 10.13 (2013) (providing the list of protected migratory birds). See generally 16 U.S.C. § 701 (2012) (supplying the beginning of the Migratory Bird Treaty Act's codified language, which provides the legal authority for § 10.13).
10. See U.S.–U.S.S.R. Convention, *supra* note 6; U.S.–Japan Convention, *supra* note 6; U.S.–Mexico Convention, *supra* note 6; U.S.–Great Britain Treaty, *supra* note 3; Howard *supra* note 7.
11. See § 701 (“The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this Act . . .”).
12. District- and appellate-court decisions demonstrate this confusion. Some have held that incidental killings of protected birds are sufficient to violate the misdemeanor provision of the MBTA. See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 691 (10th Cir. 2010) (holding Apollo would be liable for incidentally killing the protected birds if it had foreseen that the birds might get caught in the oil drilling equipment); *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978) (holding that killing migratory birds unintentionally with wastewater violated the MBTA); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal.) (holding killing protected migratory birds as a consequence of misusing pesticide violated the MBTA), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978); see also *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1076–77 (D. Colo. 1999) (holding that an electric company that failed to install equipment on its poles, causing the deaths of protected birds, was guilty of violating the MBTA even though it was not an intentional act associated with hunting or poaching). Others have held that only direct killings constitute violations. See *United States v. CITGO Petroleum, Inc. (CITGO II)*, 801 F.3d 477, 492 (5th Cir.

federal circuit split has developed regarding the proper interpretation of the word “take” under § 703(a) of the MBTA for purposes of misdemeanor violations.¹³ Some circuit courts have held that under the Act, taking a bird only includes a direct, affirmative action by a human, like hunting.¹⁴ In contrast, others have interpreted *take* to mean not only direct interaction but also incidental interference with the birds.¹⁵ These inconsistent rulings result in widely different judicial outcomes depending on where the violator injured the MBTA-protected bird.

Recently, the U.S. Court of Appeals for the Fifth Circuit further divided the federal circuits on this issue when, in early September 2015, it reversed the U.S. District Court for the Southern District of Texas’s decision convicting CITGO Petroleum Corporation of three violations of the MBTA.¹⁶ In its opinion, the Fifth Circuit held that those who unintentionally kill migratory birds were not taking¹⁷ the

2015) (declining to adopt a broad reading of the MBTA); *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115–16 (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, such as timber harvesting, that *indirectly* results in the death of migratory birds.”); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991) (holding that those who did not intend to kill migratory birds can be sanctioned under the MBTA, but killing birds indirectly by destroying their habitat is beyond the meaning of the Act); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1212–13 (D.N.D. 2012) (narrowly reading the MBTA by holding direct killing of migratory birds constitutes a violation and explaining that all other incidental killings of the birds were not MBTA violations).

13. Section 703(a) of the MBTA states:

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, order 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

16 U.S.C. § 703(a) (2012).

14. See *CITGO II*, 801 F.3d at 492; *Newton Cty.*, 113 F.3d at 115–16; *Brigham Oil*, 840 F. Supp. 2d at 1212–13; cf. *Seattle Audubon Soc’y*, 952 F.2d at 303 (holding that unintentional killing or taking of migratory birds are MBTA violations but indirectly taking a migratory bird’s habitat, therefore causing its death, is not a violation even if multiple protected birds die as a result of the habitat destruction).

15. See *Apollo Energies*, 611 F.3d at 691; *FMC Corp.*, 578 F.2d at 259–60; *Corbin Farm Serv.*, 444 F. Supp. at 529–32.

16. See *CITGO II*, 801 F.3d at 494.

17. *Id.* at 492–93.

animals as defined by the Act. Therefore, in the Fifth Circuit's view, CITGO Petroleum did not violate the MBTA when it failed to cover its oil tanks, causing migratory birds to fall in and drown.¹⁸ This decision not only absolved the corporation of a fine and three misdemeanor convictions,¹⁹ it also effectively condoned a hazardous industry practice by making it clear that unintentional omissions resulting in the death of the protected birds were not criminal under the MBTA.

This Note focuses on the weaknesses of the Fifth Circuit's decision to interpret the misdemeanor section of the MBTA to penalize only those who affirmatively cause protected birds to die. This Note further argues that the Fifth Circuit should adopt a broader rule regarding MBTA sanctions in order to penalize both direct and incidental killing of migratory birds. Part II of this Note provides background information about the history and language of the MBTA, the details of the current circuit split, and an explanation of the Fifth Circuit's decision. Part III argues that the expansive language of the MBTA supports a broader interpretation of the MBTA. It then examines congressional intent surrounding the Act, which reinforces adopting a rule that includes sanctions beyond direct killings of protected birds through hunting and other affirmative acts. Finally, Part III concludes by reflecting on the policy considerations that support expanding MBTA sanctions to include incidental killing. Part IV provides a conclusion.

II. BACKGROUND: IN THE FIFTH CIRCUIT, A BIRD IN THE HAND IS WORTH ZERO MBTA CITATIONS

For hundreds of years, birds remained virtually unprotected from human slaughter for food, trade, and sport.²⁰ As the twentieth century approached, however, the consequences of failing to prevent the extinction of entire species of animals became more apparent.²¹ This realization resulted in government-imposed conservation initiatives to protect animals facing this threat.²² On both national and interna-

18. *Id.* at 493.

19. *Id.*

20. See Benjamin Barca et. al., *Environmentalism in the Crosshairs: Perspectives on Migratory Bird Hunting and Poaching Conflicts in Italy*, 6 GLOBAL ECOLOGY & CONSERVATION 189, 190–92 (2016) (explaining the longstanding issue concerning the killing of migratory birds in the Mediterranean); see also Luke Dale-Harris, *The Massacre of Europe's Songbirds*, NEWSWEEK (Feb. 7, 2015), <http://www.newsweek.com/2015/02/13/massacre-europes-songbirds-304716.html> [https://perma.unl.edu/LW8D-7REB] (demonstrating that hunting and killing birds for these reasons remains a problem).

21. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 168 (1978).

22. Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1178 (2008) (explaining that “[p]ublic shock over [the] rapid decline of many migratory bird species” led to attempts by Congress to pass environmental-protection legislation).

tional stages, the U.S.–Great Britain Treaty is a notable example of the United States’ efforts to help ensure environmental sustainability. The MBTA, which is Congress’s statutory implementation of the U.S.–Great Britain Treaty, commands that “it shall be unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird.”²³ On its face, this language appears straightforward; nevertheless, several circuit courts stand divided on whether the Act criminalizes incidental as well as direct killings of migratory birds.²⁴

A. God Save the Birds: The History of United States Environmental Protection Legislation and the U.S.–Great Britain Treaty

Even though the MBTA became law nearly one hundred years ago, it was not America’s first attempt to implement legislation geared toward conservation. Before Congress executed the U.S.–Great Britain Treaty by passing the MBTA, it adopted two other pieces of legislation: the Lacey Act and the Weeks–McLean Act.²⁵ As MBTA predecessors, these legislative initiatives help illustrate Congress’s larger and long-standing agenda to regulate human interference with protected migratory birds.²⁶

Using its Commerce Clause authority, Congress passed the Lacey Act in 1900, which imposed criminal sanctions on hunters who attempt to break certain states’ conservation laws.²⁷ In particular, the Lacey Act existed to punish those who illegally hunted wildlife in one state and then traveled with the animal across state borders to a different jurisdiction to avoid penalties.²⁸ When Congress passed this Act, it intended to give the states enforcement power over their environmental-protection laws by extending to each state the power to sanction poachers beyond state lines.²⁹ However, even though courts have deemed the Lacey Act constitutional,³⁰ the law initially had little

23. 16 U.S.C. § 703 (2012).

24. Compare *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010), with *CITGO II*, 801 F.3d at 477.

25. See Coggins & Patti, *supra* note 21, at 169–74 (outlining the history of Congress’s environmental legislation leading up to the MBTA, including the Lacey Act, which gave states jurisdiction to penalize poachers that carry birds outside of their state borders, and the Weeks–McLean Act, which stated that all migratory birds were under U.S. control and custody).

26. See *id.*

27. *Id.*

28. Victor J. Rocco, *Wildlife Conservation Under the Lacey Act*, 80 N.Y. ST. B. ASS’N J. 10, 12 (2008).

29. *Id.*

30. See Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 36–53 (1995) (discussing in detail the amendments of the Lacey Act and the early history of

effect because it was rarely enforced.³¹ Nevertheless, its focus on preventing violators who poach wildlife closely mirrors the MBTA's goal to protect migratory birds from excessive hunting.³²

Despite the Lacey Act's practical failure, Congress persisted with its mission to protect migratory birds by implementing the Weeks–McLean Act, a broader national-conservation law that declared migratory animals to be “within the custody and protection of the Government of the United States.”³³ The Act asserted that protected birds “shall not be destroyed or taken contrary to [the Act's] regulations.”³⁴ Beyond preventing hunting, it also attempted to stop poachers from shipping migratory birds across state lines,³⁵ in part to dissuade violators from selling the protected birds' feathers to merchants for decoration on hats.³⁶ Like its predecessor the Lacey Act, the Weeks–McLean Act focused on regulating certain hunting activity involving protected birds.³⁷ However, its enforcement strategy differed from the Lacey Act because it redistributed “responsibility over migratory birds from individual state governments to the federal government and sought to remedy the tragedy of the commons that was created when an individual state's conservation efforts were undone by excessive harvest and mismanagement by the state's bounds.”³⁸

States'-rights activists, however, disliked Congress's attempt to transfer regulatory power over the birds to the federal government, thereby divesting the states of enforcement power over birds in their territory.³⁹ As a result, the Weeks–McLean Act barely made it beyond the floor of Congress before two district courts demurred due to the Act's bold language.⁴⁰ Shortly after, the Supreme Court granted a writ

litigation); Rocco, *supra* note 28, at 12 (observing that the Lacey Act has been consistently upheld as constitutional).

31. See Lilley & Firestone, *supra* note 22, at 1178.

32. See generally 16 U.S.C. § 703(a) (2012) (making it clear that it is unlawful to hunt a protected migratory bird).

33. Austin Williams, *The Pacific Salmon Treaty: Historical Analysis and Prescription for the Future*, 22 J. ENVTL. L. & LITIG. 153, 182–83 (2007) (quoting Weeks–McLean Act of Mar. 4, 1913, ch. 145, 37 Stat. 828 (1913), *superseded by statute*, 16 U.S.C. §§ 703–12 (2012)).

34. *Other Relevant Laws*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/other-relevant-laws.php#weeks> [https://perma.unl.edu/2U2G-KA9F] (last updated Oct. 17, 2016).

35. Coggins, & Patti, *supra* note 21, at 169.

36. See Lilley & Firestone, *supra* note 22, at 1178.

37. *Id.* at 1178–79.

38. Williams, *supra* note 33, at 182–83.

39. See *United States v. McCullagh*, 221 F. 288, 293 (D. Kan. 1915) (“The power of a state to control and regulate the taking of game cannot be questioned.” (citing *Geer v. Connecticut*, 161 U.S. 519 (1896))).

40. See *id.* at 296; *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914); see also Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007,

of certiorari to analyze the constitutionality of Congress's authority to pass a law that declared all migratory birds property of the United States.⁴¹

Despite challenges to the Weeks–McLean Act, some members of Congress insisted on passing a law meant to protect migratory birds. As such, before the Supreme Court determined the Weeks–McLean Act's constitutionality, bird-conservation advocates within Congress silenced objectors by replacing the Weeks–McLean Act with a similar law—the MBTA—using Congress's well-established treaty power.⁴² To date, the MBTA has never been successfully challenged.⁴³ It celebrates its hundredth birthday in 2018. The law's historic place in American law evidences the United States' long-standing commitment to conservation.⁴⁴ Further, the Executive and Legislative Branches' willingness to utilize the complex treaty method to overcome constitutional attacks⁴⁵ demonstrates their persistent desire to promote conservation.

Early in the Treaty's provisions, the United States and Great Britain proclaim that certain migratory birds “are of great value as a source of food or in destroying insects which are injurious to forests and . . . to agricultural crops” and acknowledged that they “are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds.”⁴⁶ To diminish the vulnerability of these valuable birds, the Treaty states that it would create “some uniform system of protection” to safeguard the endangered animals.⁴⁷ Because the MBTA's aim is to implement the U.S.–Great Britain Treaty, the language within the Treaty regarding its general purpose provides the foundation for the MBTA's intent. To establish its objectives, the Treaty's provisions define which species are protected by the agreement and expressly prohibit hunting the protected animals during certain times of the year.⁴⁸

In the United States, however, merely ratifying the U.S.–Great Britain Treaty, as President Wilson did when he signed it and ex-

1009 (2008) (explaining the states' reaction to the Weeks–McLean Act and its failed enforcement).

41. See Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1160 n.20 (2010).

42. Swaine, *supra* note 40, at 1009; see also 16 U.S.C. §§ 703–12 (2012) (providing the legislation that implemented the Treaty).

43. See generally *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the constitutionality of the MBTA as a permissible use of Congress's treaty power).

44. See U.S.–Great Britain Treaty, *supra* note 3, proclamation.

45. See *Lilley & Firestone*, *supra* note 22, at 1179.

46. U.S.–Great Britain Treaty, *supra* note 3, proclamation.

47. *Id.* para. 4.

48. *Id.* arts. I–II.

changed documents with Great Britain,⁴⁹ does not necessarily make it binding law. While “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,”⁵⁰ treaties are merely negotiated by the President on behalf of the United States and are not made enforceable without the advice and consent of the Senate.⁵¹ Further, even after the Senate gives its consent, some treaties “do not by themselves function as binding federal law” but instead require additional congressional approval through legislation to have legal effect.⁵² The MBTA is an example of a piece of treaty-implementing legislation passed by Congress that makes the objectives of the U.S.–Great Britain Treaty enforceable in the United States.⁵³

B. No Clear Skies Ahead: The Relevant Sections of the MBTA

Not long after Congress passed the MBTA and implemented the U.S.–Great Britain Treaty, the Act faced attacks from states’-rights supporters.⁵⁴ Despite opposition, the U.S. Supreme Court upheld the MBTA’s constitutionality in *Missouri v. Holland* when it held federal enforcement of the Act within state borders did not violate Missouri’s Tenth Amendment rights.⁵⁵ This decision made it clear that treaties entered into by the federal government are considered supreme law of the land if implemented properly; thus, federal law implementing treaties overrides conflicting administrative custom or state law.⁵⁶

Although the MBTA is constitutionally sound, circuit courts stand divided on whether the MBTA’s undoubtedly broad language criminalizes not only affirmative acts but also incidental human interference with protected birds.⁵⁷ According to the Act’s own language, § 703(a) of the MBTA declares that:

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 ship-

49. See U.S.–Great Britain Treaty, *supra* note 3, art. IX.

50. 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall); see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

51. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

52. *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

53. See 16 U.S.C. §§ 703–712 (2012) (providing the statutory authority for implementing the U.S.–Great Britain Treaty).

54. *Coggins & Patti*, *supra* note 21, at 174.

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

56. *Coggins & Patti*, *supra* note 21, at 174.

57. See § 703. Compare *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010), with *United States v. CITGO Petroleum, Inc. (CITGO II)*, 801 F.3d 477, 488 (5th Cir. 2015).

ment, 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 bird⁵⁸

Upon passing this section, Congress tasked the U.S. Fish and Wildlife Service with determining whether a protected bird has been taken pursuant to § 703(a) and charging such perpetrators accordingly.⁵⁹ Offenders of § 703(a) may be sanctioned under any of the MBTA's penalty sections—§§ 704,⁶⁰ 707(a),⁶¹ and 707(b).⁶² Section 707(a) provides for misdemeanor violations and states:

Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.⁶³

On its face, § 707(a) does not include a mens rea requirement for misdemeanor convictions. As such, federal circuit courts have interpreted Congress's silence on mental culpability to mean that Congress intended misdemeanor perpetrators to be held strictly liable for violations.⁶⁴ Indeed, federal circuits are not in disagreement regarding whether § 707(a) calls for strict liability; rather, they disagree regarding *which types* of actions § 707(a)'s strict liability standard applies to.⁶⁵ Some federal circuits have held that only hunting activities fall under this strict liability standard.⁶⁶ Other circuits disagree, holding that strict liability extends beyond hunting to indirect and unintended killings of the protected birds for purposes of MBTA misdemeanor violations.⁶⁷

58. § 703(a).

59. See 16 U.S.C. § 701 (2012) (“The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this Act.”).

60. See 16 U.S.C. § 704 (2012) (providing the statutory language for MBTA violations relating to baiting birds, which is not related to the misdemeanor section discussed in this Note).

61. See 16 U.S.C. § 707(a) (2012) (providing the statutory language for MBTA misdemeanor convictions).

62. See § 707(b) (stating that knowledge is required for a felony conviction under the MBTA).

63. § 707(a).

64. Courts agree that § 707(a) imposes strict liability. See, e.g., *United States v. CITGO Petroleum, Inc. (CITGO II)*, 801 F.3d 477, 488 (5th Cir. 2015); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010).

65. Compare *CITGO II*, 801 F.3d at 488–89, with *Apollo Energies*, 611 F.3d at 682.

66. See, e.g., *CITGO II*, 801 F.3d at 490.

67. See, e.g., *Apollo Energies*, 611 F.3d at 679.

C. Walking on Eggshells: The Federal Circuits Disagree on Whether Incidental Killings May Be Sanctioned Under the MBTA

Since the Supreme Court upheld the MBTA's constitutionality, courts across the country have struggled with the task of interpreting §§ 703(a) and 707(a).⁶⁸ Section 703(a), which is the general statutory provision that renders taking or killing protected migratory birds unlawful, does not include a mens rea requirement. Instead, it simply instructs that "unless and except as permitted by regulation . . . it shall be unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird."⁶⁹ Further, the Act's misdemeanor provision, which is included in § 707(a), is also silent concerning the mental culpability required to justify penalties. Rather, it merely provides:

Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this Act, or who shall violate or fail to comply with any regulation made pursuant to this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$ 15,000 or be imprisoned not more than six months, or both.⁷⁰

As a result of Congress's silence, several courts disagree about the scope of this strict liability standard for misdemeanors—specifically, circuits diverge regarding whether misdemeanor liability extends only to activities associated with hunting or whether it can also be extended to incidental takings of these birds. A long string of federal court opinions demonstrates this confusion,⁷¹ resulting in inconsistent enforcement of the MBTA across jurisdictions.

The Courts of Appeals for the Second and Tenth Circuits have adopted a broad interpretation of the Act, holding that violators can be sanctioned for taking a protected bird under the MBTA either through incidental killings (for instance, by way of hazardous industry practices) or by more direct methods, such as hunting.⁷² In *United States v. FMC Corp.*, for example, the Second Circuit considered an appeal

68. See *CITGO II*, 801 F.3d at 488.

69. 16 U.S.C. § 703(a) (2012); see also Andrew G. Ogden, *Dying for a Solution: Incidental Takings Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1 (2013) ("The result has been the uneven enforcement of the MBTA's prohibitions, legal uncertainty for potential violators, lack of universal compliance with voluntary guidelines and steadily escalating bird deaths.").

70. 16 U.S.C. § 707(a) (2012).

71. See Ogden, *supra* note 69, at 15–28 (providing a lengthy discussion regarding the federal-circuit split surrounding the interpretation of the words *take* and *kill* for purposes of misdemeanor MBTA violations).

72. See generally, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 691 (10th Cir. 2010) (holding Apollo would be liable of incidentally killing the protected birds if it had foreseen that the birds might get caught in the oil drilling equipment); *United States v. FMC Corp.*, 572 F.2d 902, 903 (2d Cir. 1978) (holding that

filed by FMC Corporation after a district court convicted it of MBTA violations for killing protected birds by accidentally poisoning them with a small amount of toxic waste water stored in a pond.⁷³ The court acknowledged that the corporation did not intend to kill the birds and had even taken a number of preventative measures to keep the protected birds away from the toxic pond.⁷⁴ Nevertheless, it held the company strictly liable for killing the birds in violation of the MBTA.⁷⁵ In the Second Circuit's view, because the MBTA lacks a mens rea requirement for misdemeanor convictions in its plain language, the proper interpretation of the Act is one that imposes strict liability regardless of whether the birds' deaths were incidental.⁷⁶ Put differently, the corporation's good intentions and preventative actions were meaningless for the purpose of the MBTA violations because "FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the ponding and killing birds."⁷⁷

In line with this logic, in *United States v. Apollo Energies, Inc.*,⁷⁸ the Tenth Circuit applied this broad strict liability test to oil-drill operators when MBTA-protected birds were found inside drilling equipment.⁷⁹ More specifically, the court held that the MBTA's language endorsed strict liability because "[t]he Act declares it a misdemeanor to 'pursue, hunt, take, capture, [or] kill' birds protected by several international treaties"⁸⁰ without requiring "any particular mental state or mens rea to violate the statute."⁸¹ The court provided additional support for this holding by discussing fairness, notice, and causation at length.⁸²

In contrast, the Courts of Appeals for the Fifth⁸³ and Eighth Circuits have adopted a narrow interpretation of the Act's language, holding that taking the migratory birds included only deaths resulting as a consequence of purposeful acts directed at the wildlife when hunting.⁸⁴ Notably, the Court of Appeals for the Eighth Circuit has refused

killing migratory birds unintentionally with wastewater was a violation of the MBTA).

73. *FMC Corp.*, 572 F.2d at 904.

74. *Id.*

75. *Id.* at 908.

76. *Id.*

77. *Id.*

78. 611 F.3d 679, 681–82 (10th Cir. 2010).

79. *Id.* at 682.

80. *Id.* at 681 (quoting 16 U.S.C. § 703 (2006)).

81. *Id.* at 681–82.

82. *Id.* at 686–90.

83. *See infra* section II.D.

84. *See generally* *United States v. CITGO Petroleum, Inc. (CITGO II)*, 801 F.3d 477, 489 (5th Cir. 2015) (stating that the only way a human can "reduce an animal to human control" is by killing or capturing it, not "accidentally or by omission

to extend MBTA misdemeanor penalties to include incidental killings because, in its view, such an interpretation is not supported by the Act's language or history.⁸⁵ In *Newton County Wildlife Ass'n v. United States Forest Service*, it held that a logging company whose practices risked both disturbing migratory birds' nests and killing the protected animals could not be sanctioned under the MBTA.⁸⁶ While the court agreed with the Second and Tenth Circuits that the absence of a mens rea requirement in the Act's language imposed strict liability on offenders, it held that this stringent standard only applied to hunting and poaching the migratory birds and not to those who incidentally killed them.⁸⁷ The court supported its decision by reasoning that "'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.'"⁸⁸

Although the Second and Tenth Circuits oppose the interpretations of the Fifth and Eighth Circuits regarding which actions establish unlawfully taking a MBTA-protected bird, they are not the only circuits that have addressed the issue. The Ninth Circuit's interpretation of the MBTA provides further confusion. In *Seattle Audubon Society v. Evans*, the Court of Appeals for the Ninth Circuit agreed that omissions do not constitute MBTA violations but applied this holding only to the narrow realm of habitat destruction.⁸⁹ In this case, the Forest Service and the Bureau of Land Management were charged with unlawfully taking owl habitats in violation of the MBTA because their logging practices involved lands housing northern spotted owls.⁹⁰ In the court's words, existing Ninth Circuit case law that imposed penalties on those who incidentally killed migratory birds with pesticides "[did] not suggest that habitat destruction, leading indirectly to birds deaths, amount[ed] to the 'taking' of migratory birds within the meaning of the [MBTA]."⁹¹ In other words, although some incidental kill-

[but] . . . affirmatively"); *Newton Cty. Wildlife Ass'n v. U.S. 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, such as timber harvesting, that *indirectly* results in the death of migratory birds."); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012); *cf.* *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991) (holding those who did not intend to kill migratory birds can be sanctioned under the MBTA when they accidentally poison the birds using pesticides, but also holding killing birds secondarily by destroying their habitat is beyond the meaning of the Act).

85. *See Newton Cty.*, 113 F.3d at 115.

86. *Id.*

87. *Id.*

88. *Id.* (quoting *Seattle Audubon Soc'y*, 952 F.2d at 302).

89. 952 F.2d at 298.

90. *Id.*

91. *Id.* at 303.

ings are MBTA violations in the Ninth Circuit, the court believed habitat destruction⁹² stretched the Act's misdemeanor liability too far.⁹³

D. Ruffled Feathers: *United States v. CITGO Petroleum Corp.* and the Continued Confusion

In line with a more narrow interpretation of the MBTA, in September 2015, the Court of Appeals for the Fifth Circuit joined the Eighth Circuit's approach when it held in favor of CITGO Petroleum Corporation by reversing several of CITGO's environmental infractions, including violations of the Migratory Bird Treaty Act.⁹⁴ Some have applauded the circuit's logic, arguing that the legislative history of the MBTA combined with the statute's plain language requires such an interpretation.⁹⁵ Others believe the court's failure to recognize incidental killings as punishable under the MBTA is an inappropriate understanding of both the statute's plain language and the intent of Congress when implementing the U.S.–Great Britain Treaty.⁹⁶

92. *Id.* To support this proposition, the Ninth Circuit distinguished killing or taking a bird from merely harming it. *Id.* The court held that destroying spotted owl habitats only harmed the migratory bird and reasoned that imposing liability for such a lengthy causal chain leading to the birds' death extended the MBTA beyond Congress's intended scope. *Id.* In the Ninth Circuit's own words, "'take' is defined 'as to pursue, hunt, shoot, would, kill, trap, capture or collect,' . . . [meaning] 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." *Id.* at 302. However, in this opinion, the court also acknowledged a previous holding within the Ninth Circuit in *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978), where the court held a company liable for killing protected birds as a result of misusing pesticides. *Seattle Audubon Soc'y*, 952 F.2d at 303.

93. The court in *Seattle Audubon Society* explained that *Corbin Farm Service*, which involved the sanctioning of owners of an alfalfa field for poisoning protected birds with pesticides, merely stood for the proposition "that the MBTA can 'constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds,'" *Seattle Audubon Soc'y*, 952 F.2d at 303 (quoting *Corbin Farm Serv.*, 444 F. Supp. at 536), but that the "reasoning of [that case] is inappropriate" when considering habitat destruction. *Id.*

94. *United States v. CITGO Petroleum, Inc. (CITGO II)*, 801 F.3d 477, 493 (5th Cir. 2015) ("[T]he MBTA's text provides no basis, explicitly or implicitly, for criminalizing migratory bird deaths because they result from violations of other state or federal laws.").

95. See generally Benjamin Means, Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 824 (1998) ("Extending the MBTA's reach beyond activity directed at wildlife would hamper normal land use activities that often result in bird death—such as farming . . .").

96. Ogden, *supra* note 69, at 11–12 ("[I]ncidental takings are, within certain parameters, a violation of the MBTA.").

The *CITGO* conflict arose when the United States accused CITGO Petroleum Corporation of violating the MBTA and other environmental regulations by failing to cover its oil containers at its Corpus Christi refinery, causing migratory birds to fall into the uncovered tanks and die.⁹⁷ Further, because the tanks in question contained large amounts of oil, authorities determined CITGO was using the containers as oil–water separators, which, pursuant to environmental regulations, must be covered.⁹⁸

The District Court for the Southern District of Texas first tried the case, ultimately holding that CITGO was responsible for killing protected migratory birds. Persuaded by the testimony of multiple CITGO employees who reported bird deaths in the uncovered tanks as early as the mid-1990s, the lower court found that CITGO “knowingly operat[ed] [the tanks] . . . without emission control devices” and therefore unlawfully caused migratory birds to be killed.⁹⁹ Thus, it held that CITGO’s actions constituted an illegal taking of the birds¹⁰⁰ and fined the corporation \$45,000 for violating the MBTA on three of five counts.¹⁰¹ Even though other circuits have held that, historically, Congress understood the word *take* to mean only killing birds as a direct result of hunting,¹⁰² the district court emphasized “[t]he fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern.”¹⁰³ Because Congress had previously amended the MBTA’s felony provision under § 707(b) to include a knowledge requirement back in 1986, in the district court’s view, Congress purposefully decided not to alter the misdemeanor section to include a mental culpability requirement at that time.¹⁰⁴ For these reasons, in the realm of misdemeanors, the district court concluded that the MBTA’s broad language coupled with Congress’s decision to exclude a mens rea standard required the court to impose criminal penalties for incidental killings.¹⁰⁵

On appeal, the Fifth Circuit disagreed with the lower court’s analysis, supporting its reversal with the Act’s plain language, the legisla-

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

98. *Id.* (stating Subpart QQQ of the Clean Air Act requires equalization tanks to be covered).

99. *Id.* at 480–81 (citing *United States v. CITGO Petroleum Corp. (CITGO I)*, 893 F. Supp. 2d 841, 848 (S.D. Tex. 2012)) (summarizing the district court’s findings).

100. *CITGO I*, 893 F. Supp. 2d at 848.

101. *Id.*

102. *See generally* *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991).

103. *CITGO I*, 893 F. Supp. 2d at 843 (quoting *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978)).

104. *Id.* at 845 (citing *United States v. Morgan*, 311 F.3d 611, 615 (5th Cir. 2002)); *see also* S. REP. No. 99–445, at 16 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 (noting that potential § 707(a) violations should be evaluated using a strict liability standard).

105. *CITGO I*, 893 F. Supp. 2d at 848.

tive history surrounding the word *take*, and policy considerations.¹⁰⁶ First, the court analyzed the MBTA through the lens of the Act's plain language.¹⁰⁷ The relevant part of the MBTA states:

Unless and except as permitted by regulations . . . 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 . . . 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.¹⁰⁸

The court guided its understanding by presuming “absent contrary indications . . . Congress intend[ed] to adopt the common law definition of statutory terms.”¹⁰⁹ With this tool of interpretation in mind, the court observed that “[t]he term ‘take’ is ‘as old as law itself,’”¹¹⁰ concluding that Congress must have meant *take* to mean only killing or capturing the birds as a result of an affirmative human action to control them.¹¹¹ In other words, in the Fifth Circuit's view, incidentally killing the birds by omissions did not constitute a taking under the MBTA's plain language.¹¹²

Beyond the statute's plain language, however, the Fifth Circuit noted that Congress's failure to amend the MBTA to unambiguously include incidental killings of migratory birds demonstrated that it did not intend such actions to be violations of the Act.¹¹³ To bolster this argument, the court observed that even after over fifty years of opportunity to amend the provision, Congress has still failed to do so.¹¹⁴ In making this observation, the Fifth Circuit did not address the district court's reasoning that Congress already implied its approval for penalizing incidental killings under § 707(a) when, in 1986, it redrafted the mental requirement for felony convictions.¹¹⁵

Instead, the court focused on its disagreement with the government's logic regarding the relevance of a 2002 amendment that exempted “military readiness activities” from MBTA misdemeanor

106. United States v. CITGO Petroleum, Inc. (*CITGO II*), 801 F.3d 477, 489–94 (5th Cir. 2015).

107. *Id.* at 489–91.

108. 16 U.S.C. § 703 (2012).

109. *CITGO II*, 801 F.3d at 489 (quoting United States v. Shabani, 513 U.S. 10, 11 (1995)).

110. *Id.* at 489 (quoting Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

111. *Id.*

112. *Id.*

113. *Id.* at 490–91.

114. *Id.* at 490.

115. *Id.*; see United States v. CITGO Petroleum Corp. (*CITGO I*), 893 F. Supp. 2d 841, 845–46 (S.D. Tex. 2012).

liability.¹¹⁶ The court argued that even though Congress decided to narrowly exempt these incidental military activities from MBTA penalties, this amendment did not mean that all other types of incidental killings were suddenly violations of the Act.¹¹⁷ In its own words, “[a] single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded . . . Congress had no reason to address the full scope of the MBTA” when it exempted military readiness activities.¹¹⁸

During its analysis, the Fifth Circuit acknowledged the broad holdings of the Second and Tenth Circuits,¹¹⁹ which have adopted expansive MBTA interpretations that include incidental killing partially due to the strict liability language of the Act’s misdemeanor provision and a broad reading of the word *take*. However, in the *CITGO II* court’s view, the strict mental standard found in § 703(a) of the MBTA does not justify extending the meaning of *take* to those who incidentally kill protected birds.¹²⁰

Finally, the Fifth Circuit cited policy considerations when concluding that MBTA liability did not cover indirect or incidental killings.¹²¹ Specifically, the court pointed to the Act’s potentially extensive application because it “protects approximately 836 species of birds.”¹²² An expansive rule that incorporates incidental killings, in the Fifth Circuit’s view, would result in an unreasonable number of MBTA violations, causing “[e]ven domesticated cats [to be] . . . serial violators of the MBTA.”¹²³ Thus, the Court of Appeals for the Fifth Circuit reversed the lower court’s holding, absolving CITGO Petroleum Corporation of three misdemeanor violations of the MBTA and a \$45,000 fine because its incidental omissions did not rise to the level of unlawful MBTA activity.¹²⁴

III. ANALYSIS: DESPITE THE FIFTH CIRCUIT’S RULING, THE MBTA’S LANGUAGE HAS AN EXPANSIVE WINGSPAN

The Fifth Circuit’s decision, which refused to apply the MBTA’s misdemeanor provision to circumstances beyond directly taking the protected birds by hunting or another related, affirmative act, improperly disregarded the MBTA’s expansive language, the congressional

116. *CITGO II*, 801 F.3d at 490; see Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002).

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

118. *Id.* at 491.

119. *Id.*

120. *Id.* at 490–92.

121. *Id.* (citing U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS 2 (2002)).

122. *Id.* at 493.

123. *Id.* at 494.

124. *Id.*

intent surrounding the Act, and persuasive policy considerations that support expanding MBTA sanctions to include incidental killing.

A. The Sky Is the Limit: The MBTA's Language and Legislative History Support Sanctioning Incidental Takings of Protected Birds

The MBTA's language is expansive, commanding:

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, order 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.¹²⁵

Initially, it was well accepted that the U.S.–Great Britain Treaty and, by extension, the MBTA, were implemented in order to prevent hunters and poachers from exterminating migratory birds that were only temporarily hosted by the United States or Canada.¹²⁶ There is equally little dispute, however, that the Treaty also intended to impose an obligation on both the United States and Great Britain to protect migratory birds that are “of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada.”¹²⁷ Thus, Congress likely implemented the Treaty into U.S. law using expansive language,¹²⁸ quoted above, to ensure the Fish and Wildlife Service had broad statutory support when enforcing the treaty to protect the migratory birds.

1. Taking a Different Direction: The MBTA's Plain Language Supports Misdemeanor Penalties for Incidental Takings

In order to ensure faithful execution of the duties imposed on the United States by the U.S.–Great Britain Treaty, Congress adopted the MBTA, and in doing so, included extensive language regarding which

125. 16 U.S.C. § 703(a) (2012) (emphasis added).

126. See generally, e.g., U.S.–Great Britain Treaty, *supra* note 3, proclamation; United States v. CITGO Petroleum Corp. (*CITGO I*), 893 F. Supp. 2d 841, 843 (S.D. Tex. 2012) (“The fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern.”).

127. U.S.–Great Britain Treaty, *supra* note 3, proclamation.

128. See § 703(a) (stating broadly that “it shall be unlawful at any time, *by any means or in any manner*, to pursue, hunt, take, capture, kill, attempt to take, capture” (emphasis added)).

types of human activities constituted violations.¹²⁹ The Supreme Court has commanded that, when beginning statutory analysis in the absence of ambiguity within the text, the law being interpreted should be read consistent with its plain language.¹³⁰ For the purposes of this analysis, the MBTA contains two relevant sections: the definition section under § 703(a) that explains which types of interferences constitute MBTA violations and the misdemeanor penalty provision under § 707(a), which outlines the mental culpability standard for misdemeanor violations and provides details regarding appropriate sanctions.¹³¹

Section 703(a) of the MBTA instructs that “it shall be unlawful at any time, *by any means or in any manner*” to take or kill a protected bird.¹³² Even though the original U.S.–Great Britain Treaty only discussed hunting and shipping of the birds,¹³³ Congress nevertheless chose to carry out the Treaty’s purpose by enacting the MBTA using more expansive language. In fact, in the *CITGO* case, the District Court for the Southern District of Texas penalized CITGO in part because, in its view, “[t]he fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern.”¹³⁴ Congress’s decision to include broad language in the MBTA’s provisions aligns with the legislature’s persistent efforts to pass laws, even as soon as the early twentieth century, that encourage bird-conservation efforts.¹³⁵

The language involved with § 703(a), however, only sets forth which actions violate the MBTA.¹³⁶ The misdemeanor penalty provi-

129. *See generally* 16 U.S.C. §§ 703–712 (2012).

130. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984).

131. *Compare* § 703(a) (“it shall be unlawful at any time, *by any means or in any manner*, to pursue, hunt, take, capture, kill, attempt to take, capture” (emphasis added)), *with* § 707(a) (“[A]ny person, association, partnership, or corporation who shall violate any provisions of [the MBTA] shall be deemed guilty of a misdemeanor.”).

132. § 703(a) (emphasis added).

133. U.S.–Great Britain Treaty, *supra* note 3, arts. II, VI.

134. *United States v. CITGO Petroleum Corp. (CITGO I)*, 893 F. Supp. 2d 841, 843 (S.D. Tex. 2012) (quoting *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978)).

135. *See Coggins & Patti, supra* note 21, at 169–74 (outlining the history of Congress’s environmental legislation leading up to the MBTA, including the Lacey Act, which gave states jurisdiction to penalize poachers that carry birds outside of their state borders, and the Weeks-McLean Act, which stated that all migratory birds were under United States control and custody); *see Lilley & Firestone, supra* note 22, at 1178 (discussing public shock regarding the extermination of birds for frivolous items such as for feathers on women’s hats).

136. § 703(a).

sion of the Act, which is found in § 707(a), further demonstrates the MBTA's broad plain language.¹³⁷ The section provides:

Except as otherwise provided in this section, any person, association, partnership, or corporation *who shall violate any provisions* of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.¹³⁸

Because § 707(a) does not include a mens rea requirement on its face,¹³⁹ courts have held it requires strict liability. Strict liability offenses are, in the words of the United States Supreme Court, crimes “that do not require the defendant to know the facts that make his conduct illegal which do not require a showing of specific intent or guilty knowledge.”¹⁴⁰

In order to properly interpret §§ 703(a) and 707(a), the provisions must first be read carefully in light of the Supreme Court's requirement that, absent ambiguity in the text, courts must read and apply a statute's plain meaning.¹⁴¹ When doing so, the MBTA's language is remarkably clear. The language of §§ 703 and 707 provides that it is unlawful “at any time, *by any means or in any manner*” to take or kill a protected bird,¹⁴² and those “*who shall violate any provisions . . . of this Act . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 [per violation].*”¹⁴³ Thus, pursuant to this plain language, killing a protected bird by any

137. See 16 U.S.C. § 707(a) (2012); *see also* 16 U.S.C. § 704(b) (2012) (providing the statutory basis for convictions regarding baiting of migratory birds); *id.* § 707(b) (2012) (providing the statutory language for the MBTA's felony violations).

138. § 707(a) (emphasis added).

139. See § 707(a).

140. *Staples v. United States*, 511 U.S. 600, 606 (1994).

141. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [But] [t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.” (second omission in original) (citations and quotations omitted)). The Fish and Wildlife Service has taken the position that incidental takings of protected migratory birds are violations of the act. See *Executive Orders: Conservation of Migratory Birds—Questions and Answers*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/executive-orders.php> [<https://perma.unl.edu/6CPQ-BS9C>] (last updated Sept. 22, 2015) (“Existing migratory bird permit regulations . . . do not authorize take resulting from activities such as forestry or agricultural operations, construction or operation of powerlines, and other activities where an otherwise legal action might reasonably be expected to take migratory birds, but is not the intended purpose of the action.”).

142. 16 U.S.C. § 703(a) (2012) (emphasis added).

143. § 707(a) (emphasis added).

means, including failing to cover an oil tank and causing bird deaths like in the *CITGO* case, is a violation of the MBTA.¹⁴⁴

Although the Fifth Circuit agreed with this strict liability reading of § 707(a) for misdemeanors, it failed to properly acknowledge the language of § 703, “by any means or in any manner.”¹⁴⁵ Instead, the court focused its analysis on defining the meaning of the word *take* under the MBTA, holding that it only extended to its old common law definition because of the Act’s legislative history.¹⁴⁶ Therefore, in the court’s view, a taking meant only to “reduce . . . animals, by killing or capturing, to human control”¹⁴⁷ by any means or in any manner. Once it concluded *take* applied exclusively to hunting and capturing,¹⁴⁸ the court held incidental killings could not be takings under the MBTA’s plain language.¹⁴⁹ By diving into an analysis regarding the definition of *take*, however, the court overreached its goal of merely interpreting the plain and unambiguous language of the statute, which clearly commands that killing a protected bird “by any means or in any manner” violates the MBTA.¹⁵⁰ Effectively, the Fifth Circuit entangled its plain-meaning analysis with an evaluation of Congress’s intent through the Act’s legislative history; thus, instead of acknowledging that the MBTA’s text lacks ambiguity and applying the statute’s plain language, it began legislating from the bench.

2. *Under Congress’s Wing: The MBTA’s Legislative History Supports MBTA Penalties for Misdemeanor Incidental Takings*

While the Act’s plain language directly and unambiguously authorizes misdemeanor penalties for those who incidentally take MBTA protected animals,¹⁵¹ it is not the only source that supports this proposition. The Act’s legislative history further emphasizes that the statute’s proper interpretation is one that extends liability to indirect as well as direct takings of protected migratory birds.¹⁵²

144. See §§ 703(a), 707(a).

145. § 703(a) (emphasis added).

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

147. *Id.* (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting)).

148. *Id.* at 490–91.

149. *Id.* at 494.

150. See § 703(a); see also *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”).

151. See 16 U.S.C. § 707(a) (2012).

152. Scott W. Brunner, *The Prosecutor’s Vulture: Inconsistent MBTA Prosecution, Its Clash with Wind Farms, And How to Fix It*, 3 SEATTLE J. ENVTL. L. 1, 15 (2013); see §§ 703(a), 707(a).

In the Fifth Circuit's view, according to the Act's legislative history, the strict liability language found in § 707(a) applies only to hunting activities; therefore, the concept of taking protected birds cannot be expanded to migratory birds that incidentally drown in CITGO Petroleum's uncovered oil tanks because neither Congress's express language nor the Act's legislative history supports broadening the meaning of *take* beyond its common law definition.¹⁵³

In its opinion, the Court of Appeals for the Fifth Circuit heavily emphasized the differences between the words *take* and *harm* when concluding that *take* under the Act encompassed only direct hunting.¹⁵⁴ It drew this conclusion by comparing the MBTA to a similar piece of environmental legislation, the Endangered Species Act (ESA), which Congress passed a few years before the MBTA was amended in 1986 to require knowledge for MBTA felony convictions.¹⁵⁵ In doing so, the court argued that the language of the ESA included the concept of harm, which implied that, under the ESA, incidental interference with protected animals could be penalized.¹⁵⁶ The court then compared the ESA to the MBTA to demonstrate that, under the MBTA, Congress intended the term *take* to be strictly consistent with its traditional, common law definition, which meant to "reduce . . . animals, by killing or capturing, to human control."¹⁵⁷ Otherwise, according to the Fifth Circuit, Congress would have amended § 703(a) of the MBTA in 1986 to include a term similar to *harm*, thereby implying that indirect killings were also MBTA violations.¹⁵⁸ The court concluded that Congress's failure to amend the Act demonstrated that it understood how to expand the common law definition of the word *take* to indirect situations and desired not to do so.¹⁵⁹

What the Fifth Circuit's analysis failed to address, however, is that when Congress amended the MBTA felony provision in 1986, it probably knew that the Act had already been broadly interpreted to penalize activity resulting in incidental takings of protected birds.¹⁶⁰ A

153. *CITGO II*, 801 F.3d at 481.

154. *Id.* at 490.

155. See S. REP. NO. 99-445, at 16 (1986), as reprinted in 1986 U.S.C.C.A.N. 6113, 6128.

156. *CITGO II*, 801 F.3d at 489-91.

157. *Id.* 489-90.

158. *Id.* at 490.

159. *Id.* (stating that "Congress . . . knew how to expand 'take' beyond its common law origins to include accidental or indirect harm to animals" because of its previous amendments to the ESA).

160. As discussed *infra*, at this point in history, at least three courts had interpreted the misdemeanor provision of the MBTA to allow sanctions for incidental killings. See *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding a corporation liable for accidentally killing protected migratory birds with a toxic wastewater pond even though that corporation had taken a number of preventative measures to keep the protected birds away from the water); *N. Slope Borough v.*

Senate report addressing the statute's 1986 amendment expressly stated that "nothing in this amendment [of the felony provision] 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.*"¹⁶¹

As noted in this 1986 report, many federal-court decisions had in fact resolved the interpretation question of § 703(a) of the MBTA.¹⁶² At that point in history, the federal-court decisions Congress was referring to included holdings from the Courts of Appeals for the Second¹⁶³ and Ninth¹⁶⁴ Circuits, and the U.S. District Court for the District of Columbia.¹⁶⁵ Each of these courts held, between 1978 and 1980, that incidental takings or killings of migratory birds were violations of the MBTA's misdemeanor provision.

Andrus, 486 F. Supp. 332, 361–62 (D.D.C. 1980) ("The provisions of this Act apply to the killing of birds 'by any means or in any manner' even if the killing was not intentional." (quoting 16 U.S.C. § 703(a) (1976)); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (holding that MBTA violations occurred when over one thousand protected birds were incidentally killed as a result of feeding in an alfalfa field sprayed with pesticide); *infra* notes 163–65 and accompanying text.

161. S. REP. NO. 99–445, at 16 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6113, 6128; *see also* S. REP. NO. 105–366, at 3 (1998) ("The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA."). After the Senate published this report, courts analyzing the MBTA have accepted that there is little room for debate regarding the misdemeanor section's mental culpability requirement—the provision commands a strict liability analysis. *See generally* *United States v. CITGO Petroleum Corp. (CITGO II)*, 801 F.3d 477, 488 (5th Cir. 2015) ("The act imposes strict liability on violators, punishable by a maximum \$15,000 fine and six months imprisonment." (citing 16 U.S.C. § 707(a) (2012))).
162. S. REP. NO. 99–445, at 16 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6113, 6128. *But see* *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (stating in dicta that "the views of one Congress as to the meaning of an Act passed by an earlier Congress" should not be afforded great weight). While the Supreme Court has stated that these reports should not be afforded great weight, the comments surrounding these documents are Congress's last word about the meaning of § 703(a) and generally align with the language of the MBTA. *See* H.R. REP. NO. 65–243, at 2–3 (1918) (supplying a letter to President Woodrow Wilson urging him to sign the MBTA to preserve the birds from insecticide).
163. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding a corporation liable for accidentally killing protected migratory birds with a toxic waste-water pond even though that corporation had taken a number of preventative measures to keep the protected birds away from the water).
164. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.) (holding that MBTA violations occurred when over one thousand protected birds were incidentally killed as a result of feeding in an alfalfa field sprayed with pesticide), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).
165. *N. Slope Borough v. Andrus*, 486 F. Supp. 332, 361–62 (D.D.C. 1980) ("The provisions of this Act apply to the killing of birds 'by any means or in any manner' even if the killing was not intentional." (quoting 16 U.S.C. § 703(a) (1976))).

Even further, when a federal appellate court finally slightly diverged from the broad rule established by the Second and Ninth Circuits, it was in the early 1990s when the Ninth Circuit clarified that it was inappropriate to sanction habitat destruction, even under § 707(a)'s strict liability standard.¹⁶⁶ In its opinion, the Ninth Circuit acknowledged its previous precedent in *United States v. Corbin Farm Services* and decided not to overrule it.¹⁶⁷ Instead, the court held that habitat destruction, which in its view was not an MBTA violation even under the broad misdemeanor provision, was “inapposite” to killing birds with pesticides in an alfalfa field.¹⁶⁸ Therefore, the court justified its earlier decision to include misdemeanor sanctions for individuals or corporate entities that killed birds indirectly with pesticide.¹⁶⁹

Setting the Ninth Circuit's narrow decision aside, the first federal appellate-court decision to unconditionally hold that MBTA violations required directly killing the protected birds through activities associated with hunting did not surface until 1997 when the Eighth Circuit held, “Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the deaths of migratory birds.”¹⁷⁰

While this Eighth Circuit decision was being litigated, Congress was in the process of drafting yet another amendment to the MBTA. This modification changed the mental culpability requirement for baiting in unauthorized areas from strict liability to a standard of knew or should have known.¹⁷¹ After introducing the bill's draft in 1997, Congress voted to amend this baiting provision in 1998, which is codified in § 704(b).¹⁷² The U.S. Senate Committee Report acknowledged that, up until this change to the baiting requirement, “offenses

166. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991) (stating the district court properly held that though “the MBTA can ‘constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds,’” that reasoning “is inapposite” to cases involving habitat destruction (quoting *Corbin Farm Serv.*, 444 F. Supp. at 536)).

167. *Id.*

168. *Id.* (citing *Corbin Farm Serv.*, 444 F. Supp. at 536). The Ninth Circuit believed habitat destruction was inapposite to directly killing migratory birds with pesticide because habitat destruction merely harmed the protected animals as opposed to actually killing them. *Id.*

169. *Id.*

170. *Newton Cty. Wildlife Ass'n v. U.S. 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, such as timber harvesting, that *indirectly* results in the death of migratory birds.”).

171. *Id.*

172. S. REP. NO. 105-366, at 2 (1998); see 16 U.S.C. § 704(b) (2012) (providing the statutory authority for criminalizing baiting of migratory birds).

under the MBTA were strict liability, a hallmark of the law.”¹⁷³ Further, the report noted that this “elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA.”¹⁷⁴

During this 1998 amendment process, Congress may have been aware of the recent circuit split between the older Second and Ninth Circuit opinions allowing indirect takings and the more recent Eight Circuit opinion requiring direct, affirmative action to find an MBTA misdemeanor violation.¹⁷⁵ Still, the legislature did not overturn the older, broad decisions of the federal circuit courts in favor of the more recent, yet narrower Eighth Circuit¹⁷⁶ opinion.¹⁷⁷ By failing to correct the Eight Circuit’s application of the MBTA, proponents of restricting MBTA liability to include only affirmative activities might argue that the 1998 committee was expressing support for the newer Eighth Circuit decision to sanction only direct, affirmative actions toward the protected birds. Unlike the previous 1986 amendment, however, the report neither expressly cited to the language of § 703(a) nor referenced any recent court decisions dealing with § 703(a).¹⁷⁸ Therefore, it is likely that the 1998 amendment’s purpose was narrowly tailored to address the baiting issue in § 704 without taking the time to even consider, much less correct, the Eight Circuit’s misinterpretation of the law.¹⁷⁹ For these reasons, even though the Eighth Circuit adopted a narrow reading of § 703(a) shortly before Congress considered a different provision of the MBTA, it is unlikely that this situation is an example of Congress acquiescing to the rule embraced by the Eight Circuit.

Even further, a few years later, Congress amended the Act to exempt military readiness activities from MBTA liability when it passed

173. S. REP. NO. 105-366, at 2.

174. *Id.* at 3.

175. Compare *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding a corporation liable for accidentally killing protected migratory birds with a toxic waste-water pond even though that corporation had taken a number of preventative measures to keep the protected birds away from the water), with *Newton Cty.* 113 F.3d at 115 (“Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.”).

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

177. See generally *FMC Corp.*, 572 F.2d at 902; *United States v. Corbin Farm Servs.*, 444 F. Supp. 510 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978).

178. S. REP. NO. 105-366, at 2 (1998).

179. *Id.* at 3 (“The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA.”).

the Bob Stump National Defense Authorization Act.¹⁸⁰ Congress passed this Act in response to sanctions imposed on the U.S. military by the District Court for the District of Columbia—the court held that military activities unlawfully violated the MBTA when they caused protected migratory birds to die accidentally during training.¹⁸¹ The Act gave the Department of the Interior power to “prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities.”¹⁸² By determining that incidental-taking exceptions were necessary to avoid MBTA liability, Congress yet again demonstrated that the MBTA’s misdemeanor provision extended beyond mere hunting into the realm of indirect taking or killing of migratory birds.

In its opinion, the Court of Appeals for the Fifth Circuit attempted to reconcile its decision with the MBTA’s military preparedness amendment by stating: “A single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded. . . . By proceeding in a carefully targeted way, Congress had no reason to address the full scope of the MBTA.”¹⁸³ However, the Fifth Circuit failed to consider this amendment in light of the statute’s plain language and other legislative history that support a broader reading of the statute.

The language of §§ 703 and 707 provides that it is unlawful “at any time, *by any means or in any manner*” to take or kill a protected bird,¹⁸⁴ and those “who shall violate *any provisions . . . of this Act . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 [per violation].*”¹⁸⁵ The statute unambiguously calls for misdemeanor penalties when protected migratory birds are indirectly taken or killed. And if, despite this clear language, Congress truly believed that *take or kill* meant *only* the common law meaning of the word, it would have amended § 703(a) back in 1986 or during any other subsequent amendment process to ensure the language clearly applied solely to direct taking or

180. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002).

181. Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 174 (D.D.C. 2002). Note that the Fish and Wildlife Service, which is the administrative body that enforces the MBTA, refused to grant the military an MBTA permit, which resulted in these violations. See *id.* at 163; see also 16 U.S.C. § 701 (2012) (“The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this Act.”).

182. Bob Stump National Defense Authorization Act for Fiscal Year 2003, at § 315(d).

183. United States v. CITGO Petroleum, Inc. (*CITGO II*), 801 F.3d 477, 491 (5th Cir. 2015).

184. 16 U.S.C. § 703(a) (2012) (emphasis added).

185. 16 U.S.C. § 707(a) (2012) (emphasis added).

killing.¹⁸⁶ This action would have invalidated several federal appellate-court decisions that have held incidental killings could be penalized as misdemeanor violations.¹⁸⁷ Further, Congress would not have determined that incidental-taking exceptions were necessary in any circumstance if it desired the MBTA to only be applicable to affirmative human activity directed at reducing the birds to human control.¹⁸⁸ Thus, the Fifth Circuit's decision in *United States v. CITGO Petroleum, Inc.*, is not only founded on an imprecise reading of the MBTA's plain language but also a misunderstanding of the Act's legislative history.

B. Migrating in the Right Direction: Persuasive Policy Considerations for Sanctioning Incidental Killings

1. Compliance at 5000 Feet: International Obligations and Department of the Interior's Regulations

Despite the Fifth Circuit's determination that misdemeanor penalties under the MBTA do not extend to incidental killings of the birds,¹⁸⁹ there are several persuasive policy considerations in favor of enforcing MBTA sanctions against both direct and indirect takings of protected birds. President Bill Clinton recognized the importance of protecting migratory birds when he stated:

Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. . . . These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with the respect to the United States.¹⁹⁰

In line with this reasoning, in the words of the U.S. Court of Appeals for the District of Columbia Circuit, "[t]here is no reason to treat

186. Congress also might have defined the meaning of the word "direct" killing or taking, which has also caused interpretation issues in the federal courts. *Compare* *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding a corporation liable for killing protected migratory birds with a toxic waste-water pond because such activity was directed at the protect birds), *with* *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (holding activities directed at protected birds means activities associated with hunting).

187. *See generally* *N. Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *FMC Corp.*, 572 F.2d at 902; *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d at 259 (9th Cir. 1978).

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

189. *See id.*

190. Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

the Act differently from the Treaty since the legislation was meant to ‘give effect to the convention between the United States and Great Britain for the protection of migratory birds.’”¹⁹¹ The U.S.–Great Britain Treaty was ratified because of wide spread, international concern regarding the longevity of migratory birds. Thus, the United States has an international obligation to take measures to protect migratory birds that are only temporarily hosted on American territory, regardless of the manner in which the birds are taken or killed.

Even further, the Department of the Interior, through its agency the Fish and Wildlife Service, contends that the MBTA allows sanctions for incidental takings and killings of protected birds, and has stated that it is “the Service’s longstanding position that the MBTA applies to [takings] that [occur] incidental to . . . otherwise lawful activity.”¹⁹² For this reason, the Fish and Wildlife Service has implemented, under congressional orders, special-use permits to authorize incidental taking of protected migratory birds in circumstances like military readiness activities for actions that would otherwise be illegal.¹⁹³

While the policies of regulatory institutions do not provide binding legal precedent, the Department of the Interior’s interpretation through the Fish and Wildlife Service provides additional support for interpreting the MBTA’s misdemeanor sanctions to include indirect as well as direct taking and killing of protected birds.¹⁹⁴ Because Congress has promulgated authority to the Fish and Wildlife Service to implement and enforce the MBTA,¹⁹⁵ the Service’s decision to recommend prosecution for incidental-takings cases is another factor that supports reading the MBTA to include incidental activities.¹⁹⁶

191. *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000) (citation omitted).

192. *Migratory Bird Permits*; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032-01 (proposed May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

193. The military readiness amendment to the MBTA is known as the Bob Stump National Defense Authorization Act. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002). It made military readiness exempt from MBTA sanctions for incidental takings. *See id.* § 315(d) (requiring the Department of the Interior to “prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities”). *But see CITGO II*, 801 F.3d at 490 (interpreting the military-readiness-activities amendment to the MBTA to “not extend to the ‘operation of industrial facilities.’”).

194. *See, e.g., United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682–83 (10th Cir. 2010) (demonstrating the Fish and Wildlife Service’s policy to sanction incidental MBTA takings and killings by explaining that it included a grace period before sanctioning MBTA violators for incidental industrial killings of migratory birds who frequently got trapped in heaters).

195. *See* 16 U.S.C. § 701 (2012).

196. *See, e.g., Apollo Energies*, 611 F.3d at 679; *see also* W. MICHAEL YOUNG, *THE MIGRATORY BIRD TREATY ACT, THE BALD AND GOLDEN EAGLE PROTECTION ACT, AND*

2. *Not Just Winging It: Extending Violations of the MBTA to Include Incidental Killing Does Not Risk Inappropriate Sanctions*

After it concluded that the MBTA's plain language and legislative history did not permit sanctioning indirect killings or takings of migratory birds, the Court of Appeals for the Fifth Circuit cited what it believed were important policy considerations supporting its refusal to extend the MBTA's misdemeanor provision beyond direct, affirmative actions resulting in the deaths of protected migratory birds. According to the Fifth Circuit:

[B]etween 97 and 976 million birds are killed annually by running into windows. Communication towers kill an additional four to five million birds each year Cars may kill approximately 60 million birds each year. Even domesticated cats are serial violators of the MBTA. In Wisconsin alone, the government estimates that domesticated cats kill 39 million birds.¹⁹⁷

Even assuming these statistics are accurate, the court overstates the issue by suggesting that domesticated cats, owners of skyscrapers, and individuals driving cars will be sanctioned under a broader interpretation of the misdemeanor provision. Because enforcement of the MBTA is vested with the Department of the Interior's Fish and Wildlife Service,¹⁹⁸ only realistic prosecutions for taking migratory birds will be pursued.¹⁹⁹ It is impractical to suggest that this agency, whose duty is to implement the MBTA's larger purpose of protecting migratory birds,²⁰⁰ would waste its resources on frivolous investigations into domesticated cats. Additionally, scholars have suggested solutions that would diminish the Fifth Circuit's concern, such as inciden-

THE ENDANGERED SPECIES ACT: PROHIBITIONS AND REMEDIES (2014), https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2014/10/22nd-fall-conference/course_materials/13-young_michael-pa-per.authcheckdam.pdf [<https://perma.unl.edu/RE4C-J8AU>] (describing the relationship between "taking" prohibitions and exceptions of the MBTA, the Eagle Act, and the ESA within the context of the incidental take of wildlife).

197. *CITGO II*, 801 F.3d at 484 (citing U.S. FISH & WILDLIFE SERV., *MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS 2* (2002)).

198. See 16 U.S.C. § 701 (2012) ("The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this Act.").

199. *CITGO II*, 801 F.3d at 484 (([B]etween 97 and 976 million birds are killed annually by running into windows. Communication towers kill an additional four to five million birds each year Cars may kill approximately 60 million birds each year. Even domesticated cats are serial violators of the MBTA. In Wisconsin alone, the government estimates that domesticated cats kill 39 million birds." (citing U.S. FISH & WILDLIFE SERV., *MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS 2* (2002)). Instead of wasting resources prosecuting everyday citizens for unavoidable contact with the migratory birds, the Fish and Wildlife Service will be investigating and prosecuting harmful practices, such as failing to cover oil tanks when it would be relatively costless to do so.

200. See § 701; U.S.–Great Britain Treaty, *supra* note 3, proclamation.

tal-take permits that would be administered through the Fish and Wildlife Service.²⁰¹

Even if, however, the Fifth Circuit is correct in asserting that interpreting the MBTA's misdemeanor provision broadly will result in sanctions for these innocent activities,²⁰² the court overstepped its bound by improperly legislating when it forced the MBTA's plain language and legislative history to comply with the court's beliefs that sanctioning incidental killings would result in a slippery slope of liability. In the event that the MBTA imposes unintended and widespread consequences for these innocent activities, it is the job of the legislature to amend the statute's plain language to correct the issue.

IV. CONCLUSION

When the United States finally succeeded in passing an environmental regulation regarding migratory birds by implementing the U.S.–Great Britain Treaty, it intended to broadly protect migratory birds to ensure that these animals did not go extinct as a result of human interference.²⁰³ Since Congress passed the MBTA, however, the federal circuits have stood divided on how far the strict liability language in the Act's misdemeanor provision extends. While the MBTA's plain language and legislative history support a broad interpretation, the Fifth Circuit still refused to acknowledge that indirect actions merited misdemeanor convictions.²⁰⁴ By absolving CITGO Petroleum Corporation of three misdemeanor convictions under the MBTA, the court effectively excused the corporation's harmful industry practice. In doing so, the Fifth Circuit set a dangerous precedent that corporations need not worry themselves over their influence on the environment, specifically their impact on protected migratory birds.

201. See, e.g., Brunner, *supra* note 152, at 1; Alexander K. Obrecht, *Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NAT. RESOURCES J. 107, 133 (2014) (“An incidental take program would allow the FWS to approve permits for a regulated number of bird deaths caused by permittees. Such a program would provide more protection to industry operators that accidentally kill protected birds, but it would also allow the FWS to regulate migratory bird's deaths and provide for more effective mitigation measures.” (citing HOLLAND & HART, LLC, DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MIGRATORY BIRDS 2–3 (2010), <http://www.ingaa.org/File.aspx?id=11062> [<https://perma.unl.edu/SZA9-X9M7>])); Ogden, *supra* note 69, at 53–76 (noting that an incidental-take permit might fit into the MBTA's current statutory framework with special-purpose permits or permits that allow certain groups to take birds in specific circumstances).

202. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

203. See § 701; U.S.–Great Britain Treaty, *supra* note 3, proclamation.

204. *CITGO II*, 801 F.3d at 484.