Seton Hall University
eRepository @ Seton Hall

Student Works | Seton Hall Law

2024

Stop Winging It! Time for the Courts to Fly in Formation and Provide Greater Protections to Migratory Birds.

Ryan Dana

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

 Part of the Law Commons

Stop Winging It! Time for the Courts to Fly in Formation and Provide Greater Protections to Migratory Birds.

Ryan Dana

November 29, 2022

Table of Contents

Introduction

Between 500 million and 1 billion birds are accidentally killed annually in the United States (U.S.) due to manmade sources.[1] These accidental deaths include collisions with human-made structures such as vehicles, buildings and windows, power lines, communication towers, and wind turbines; electrocutions; oil spills and other contaminants; pesticides; and commercial fishing by-catch among other activities.[2] This is a staggering number of deaths with serious ecological implications. Indeed, the environmental benefits of birds cannot be overstated. They aid in pest control, pollination, spreading seeds, cycling nutrients, fertilizing marine ecosystems, and maintaining the delicate ecological balance in forests, among other benefits.[3]

For these reasons it is imperative that humans do everything in our power to protect as many birds as possible from these accidental deaths. But is there a solution? Can humans find a compromise between economic growth and bird conservation? Perhaps the answers lie in a law passed over a century ago to help fight the same issues migratory birds are facing today.

In the late eighteenth and early nineteenth century, with few regulations in place, hunters were decimating U.S. bird populations across the country. During this time many bird species went extinct including Labrador Ducks and Carolina Parakeets.[4] Numerous other species became critically endangered.[5] Finally, after mounting public outrage, and the creation of non-profits like

[1] Erickson, Wallace P.; Johnson, Gregory D.; Young, David P. Jr. 2005. A summary and comparison of bird mortality from anthropogenic causes with an emphasis on collisions. In: Ralph, C. John; Rich, Terrell D., editors 2005. Bird Conservation Implementation and Integration in the Americas: Proceedings of the Third International Partners in Flight Conference. 2002 March 20-24; Asilomar, California, Volume 2 Gen. Tech. Rep. PSW-GTR-191. Albany, CA: U.S. Dept. of Agriculture, Forest Service, Pacific Southwest Research Station: p. 1029-1042.
[2] *Ibid*.
[3] Jessica Law, Why we need birds (far more than they need us), www.birdlife.org (last visited Sep. 21, 2022, at 5:01 PM), https://www.birdlife.org/news/2019/01/04/why-we-need-birds-far-more-than-they-need-us.
[4] Jesse Greenspan, The History and Evolution of the Migratory Bird Treaty Act, www.audubon.org (last visited Sep. 21, 2022, at 5:21 PM), https://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act.
[5] *Id*.

the Audubon Society, action was taken by the federal government. In a treaty made with Canada[6] the Migratory Bird Treaty stated,

> The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland […], being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries.[7]

Two years later the treaty was fully implemented when congress passed the Migratory Bird Treaty Act of 1918 (MBTA). The MBTA was one of the first federal environmental legislative acts of its kind and still stands firm today, currently covering 1,026 species including common birds like the American crow and 74 rare birds like the spectacled eider.[8]

While the MBTA has been transformative for migratory bird preservation there remains a discrepancy among the courts of the United States regarding incidental takings of migratory birds.[9] The confusion arises from an important question; under the MBTA can a person or entity be held criminally liable if a migratory bird accidentally dies from that person or entities indirect, unintentional actions? The Second and Tenth Federal Circuit Courts have held yes. Conversely, the Fifth, Eighth and Ninth Circuit Courts emphatically have held no. Meanwhile, the First, Third, Fourth and Eleventh Circuit Courts have been silent on the issue. And so far, the U.S. Supreme Court has declined to take up the issue. Hence, the resulting circuit split has led to confusion among people and corporate entities all while also causing harm to migratory birds.

---

[6] The 1916 treaty signatories were the United States of America and the United Kingdom of Great Britain and Ireland acting on behalf of the Dominion of Canada. Since then, the treaty has broadened its international scope via treaties with Mexico in 1936, Japan in 1972 and Russia (then the Union of Soviet Socialist Republics) in 1976. (https://www.fws.gov/law/migratory-bird-treaty-act-1918).

[7] Convention Between the United States and Great Britain for the Protection of Migratory Birds Source: The American Journal of International Law, Vol. 11, No. 2, Supplement: Official Documents (Apr. 1917), pp. 62-66

[8] 85 FR 21262.

[9] "Incidental taking" is synonymous with "accidental death." Incidental take is the proper legal terminology used by the federal government when enacting laws or regulations regarding accidental deaths.

Perhaps the easiest way to remedy the situation and the one that best protects migratory birds would be by statutory means. H.R. 4833, a bill currently on the floor of the House of Representatives, would, if passed and later enacted, make all incidental takings a strict liability offense and overhaul the current permit system to include additional safeguards like mitigation fees and environmental impact statements.[10] H.R. 4833 and the broad interpretation approach of strict liability will be further justified by way of an analysis consisting of three parts.

Part I of this article will begin by discussing the history and the current state of the MBTA. This part will also look at the different types of takings under the MBTA and distinguish them. Finally, the part will briefly discuss the changing views of "taking" by different executive administrations. Part II will investigate the two federal circuit court interpretations of incidental takings under the MBTA. We will see two competing interpretations develop over the course of the past half century — one narrow in reading and the other one broad. Part III will then dissect H.R. 4833. The impact of this bill will be analyzed by looking at its potential additions as a means of providing a possible solution to the circuit split. Most importantly, this part will show what the potential benefits of adopting H.R. 4833 are on migratory birds, the U.S. budget, and the judicial system. Part IV will sum up key points and conclude the article.

PART I: THE MIGRATORY BIRD TREATY ACT OF 1918

A. The History of the MBTA

[10] Migratory Bird Protection Act of 2021, H.R. 4833, 117th Cong. (2021). congress.gov/bill/117th-congress/house-bill/4833?s=1&r=64.

In the nineteenth century feathered fashion was *the* status symbol for well to do women of the time.[11] Hats adorning egret feathers,[12] muffs and tippets made of Herring Gulls,[13] even earrings displaying the heads of Red-legged Honeycreepers.[14] The fashion frenzy was not without its downsides. In 1886 alone, 5 million birds were massacred to satisfy the booming fashion industry.[15] *Good Housekeeping* reported in its winter of 1886-1887 issue: "At Cape Cod, 40,000 terns have been killed in one season by a single agent of the hat trade."[16] The unfettered hunting of bird populations continued into the early twentieth century leading to the extinction of countless bird species and pushing many other species to the brink of extinction.[17] Extinctions only exacerbated the issue as the birds became more rare. For example, the scarcity of herons caused the price for plumes to jump to $32 per ounce, which made the plumes worth about twice their weight in gold.[18]

Beginning at the turn of the twentieth century new legislation was passed to combat the declining bird populations. First there was the Lacey Act, still in effect today, which banned trafficking fish, wildlife, or plants that were illegally taken, possessed, transported, or sold.[19]

---

[11] A hatful of horror: the Victorian headwear craze that led to mass slaughter, historyextra.com, (last visited November 5, 2022, at 6:55 PM) https://www.historyextra.com/period/victorian/victorian-hats-birds-feathered-hat-fashion/.

[12] Angela Serratore, Keeping Feathers Off Hats–and On Birds, www.smithsonianmag.com, (last visited November 5, 2022, at 7:06 PM) https://www.smithsonianmag.com/history/migratory-bird-act-anniversary-keeping-feathers-off-hats-180969077/

[13] *Id*.

[14] Katy Canales, The deadly nature of fashion, www.vam.ac.uk, (last visited November 5, 2022, at 7:06 PM) https://www.vam.ac.uk/blog/museum-of-childhood/the-deadly-nature-of-fashion

[15] Douglas Brinkley, *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America*, 11 (2009).

[16] Marty Crump, *A Year with Nature: An Almanac*, 311 (2018).

[17] Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, www.audubon.org (last visited Sep. 27, 2022, at 5:00 PM), https://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act.

[18] Herbert Keightley Job, *Wild wings; adventures of a camera-hunter among the larger wild birds of North America on sea and land*, 145 (1905).

[19] The Lacey Act has a long history of successful enforcement as a statute prohibiting trade of illegally taken fish, plant, and wildlife, and over a century of case law is readily available. As recently as 2021 the Act was enforced when three men were convicted of conspiracy, theft of public property, depredation of public property, trafficking in unlawfully harvested timber, and attempting to traffic in unlawfully harvested timber against the Act. 16 U.S.C. § 3372.

Penalties for noncompliance are hefty fines and even imprisonment.[20] Next there was the Weeks-McLean Migratory Bird Act which prohibited the spring hunting and marketing of migratory birds and the importation of wild bird feathers for women's fashion.[21] The Weeks-McLean Law would later be replaced by the MBTA.[22] The final piece of legislation before the enacting of the MBTA was the Underwood Tariff Act of 1913. The act banned all importation of feathers except for purposes of scientific research or education, excluding ostrich and some domestic birds.[23]

At last, in 1916, the United States and Great Britain, acting on behalf of Canada, entered into a treaty where both parties adopted a uniform system of protection with the goal of preserving bird populations native to North America.[24] Two years later, to implement the new treaty, Congress enacted the Migratory Bird Treaty Act of 1918.[25] Soon thereafter, the MBTA would be brought into question in the landmark 1920 United States Supreme Court case of *Missouri v. Holland*.

In that case it was argued that the MBTA infringed on the rights of the individual states under the Tenth Amendment. In a seven to two decision authored by Justice Oliver Wendell Holmes, the Supreme Court upheld the exercise of the treaty power and found no violation of the Tenth Amendment.[26] The Court reasoned that the national interest in protecting wildlife could be protected only by national action.[27] The Court further reasoned that the Supremacy Clause of the United States Constitution renders treaties the "supreme law of the land," a finding that trumps any state-level concerns with regard to the provisions of any treaty. Since the 1920 challenge in

[20] 16 U.S.C. § 3373.
[21] Important Dates in the Conservation of Migratory Birds, www.fws.gov, (last visited Sep. 27, 2022, at 8:51 PM) https://www.fws.gov/program/migratory-birds/about-us.
[22] *Ibid*.
[23] *Id.*
[24] *Id*.
[25] *Id.*
[26] *Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L.Ed. 641 (1920).
[27] *Id*. at 648.

Missouri v. Holland the MBTA has stood as the preeminent bird legislation and has continued to expand, adding new bird species and participating countries.

B. Provisions of the MBTA

A migratory bird species is protected by the MBTA if it meets one or more of the following criteria:

1. It occurs in the United States or U.S. territories as the result of natural biological or ecological processes and is currently, or was previously listed as, a species or part of a family protected by one of the four international treaties or their amendments.[28]
2. Revised taxonomy results in it being newly split from a species that was previously on the list, and the new species occurs in the United States or U.S. territories as the result of natural biological or ecological processes.[29]
3. New evidence exists for its natural occurrence in the United States or U.S. territories resulting from natural distributional changes and the species occurs in a protected family.[30]

The Act has 11 sections addressing the following:

The taking of migratory birds,[31] permitted takings of migratory birds,[32] enforcement of the MBTA,[33] penalties for violations, [34] the unlawful transportation or importation of migratory birds;[35] arrests, and search warrants;[36] state regulation;[37] authorization of appropriations;[38] breeding on farms and preserves;[39] regulations implementing the treaties and conventions;[40] and seasonal takings for needs of indigenous Alaskans.[41]

[28] Migratory Bird Treaty Act of 1918, www.fws.gov, (last visited Oct. 24, 2022, at 7:57 PM) https://www.fws.gov/program/migratory-birds/about-us.
[29] *Ibid*.
[30] *Ibid*.
[31] 16 U.S.C. §703.
[32] *Id*. § 704.
[33] *Id*. § 706.
[34] *Id*. § 707.
[35] *Id*. § 705.
[36] *Id*. § 706.
[37] *Id*. § 708.
[38] *Id*. § 709(a).
[39] *Id*. § 711.
[40] *Id*. § 712(2).
[41] *Id*. § 712(1).

Some takings are permitted per § 703 as indicated by the line "Unless and except as permitted by regulations made as hereinafter provided…"[42] This comes in two forms: exceptions and purchased permits. There are several exceptions to the MBTA:

> For employees of the Department of the Interior as necessary in performing their official duties,[43] employees of certain public and private institutions,[44] licensed veterinarians who temporarily possess, stabilize, or euthanize sick and injured migratory birds,[45] and any person may remove a migratory bird from the interior of a building or structure for the welfare of the bird or safety of nearby people.[46]

A person or business can also purchase a permit which will grant them the ability to take protected birds. These permits include:

> Permits for import and export of migratory birds,[47] banding or marking permits,[48] scientific collecting permits,[49] rehabilitation permits,[50] Falconry standards and falconry permitting,[51] raptor propagation permits,[52] waterfowl sale and disposal permits,[53] special purpose permits,[54] depredation permits,[55] special Canada goose permits,[56] and special double-crested cormorant permits.[57]

Failure to comply with the MBTA can come with hefty fines or even jailtime. § 707 provides that any person, association, partnership, or corporation that violates any provisions or fails to comply with any regulation made pursuant to the MBTA is guilty of a misdemeanor and upon conviction can be fined up to $15,000 or be imprisoned for up to six months, or both.[58] Those

[42] § 703(a).
[43] 50 CFR 21.12(a).
[44] 50 CFR 21.12(b).
[45] 50 CFR 21.12(c).
[46] 50 CFR 21.12(d).
[47] 50 CFR 21.67.
[48] 50 CFR 21.70.
[49] 50 CFR 21.73.
[50] 50 CFR 21.76.
[51] 50 CFR 21.82.
[52] 50 CFR 21.85.
[53] 50 CFR 21.88.
[54] 50 CFR 21.95.
[55] 50 CFR 21.100.
[56] 50 CFR 21.120.
[57] 50 CFR 21.123.
[58] 16 U.S.C. § 707(a).

who knowingly take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter, or offer to barter such bird or sell, offer for sale, barter or offer to barter, any migratory bird is guilty of a felony and can be fined up to $2,000 or imprisoned for up to two years, or both.[59] Finally, any guns, traps, nets and other equipment used during the crime are forfeited to the United States.[60] Forfeiture can even include the motor vehicle used during the crime.[61]

With a general understanding of the main portions of the MBTA it is now possible to turn to the relevant excerpt of the MBTA for the discussion. § 703; that is, "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 . . . any migratory bird, [or] any part, nest, or egg of any such bird."[62]

The issue is that the MBTA does not give a definition of the word "take." The Code of Federal Regulations (CFR) provides little relief as well. As it relates to the MBTA, the CFR defines "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect"[63] While this may look like a satisfying enough definition at first glance it actually further complicates the issue. While pursuing, hunting, and capturing unambiguously require an action that is directed at migratory birds, killing and wounding do not. One cannot accidentally hunt a bird, nor can one accidentally capture a bird. However, one can accidentally kill a bird or accidentally wound a bird. As a result, courts of the U.S. are split over whether these accidental deaths, called incidental takings, are not punishable because of the lack of intent or if they are strict liability crimes that do not require any intent.

C. The Three Types of Takings

[59] *Id*. § 707(b).
[60] *Id*. § 707(c).
[61] *Ibid*.
[62] *Id*. § 703(a).
[63] 50 CFR 10.12 "Take".

Courts have had to grapple with the lack of a clear definition for over a century. But to understand incidental takings, it is important to know what an incidental taking is not. The courts have looked at three different types of acts that result in the taking of migratory birds. These categories are:

(1) direct and intentional acts or omissions;

(2) direct and unintentional acts or omissions; and

(3) indirect and unintentional acts or omissions (incidental takings).

Direct actions refer to actions that are generally associated with taking a migratory bird. These actions are most commonly hunting, baiting, and capturing migratory birds. Intentional acts refer to actions that intend to take a bird. In other words, the act serves the purpose of taking a migratory bird. Direct and intentional acts or omissions are explicitly prohibited by the language of the MBTA.

Direct and intentional acts are exemplified in *Humane Society of the United States v. Glickman*.[64] To manage an exploding population of Canada Geese, the U.S. Department of Agriculture introduced a scheme whereby the government would capture and kill the geese in order to fight the overpopulation. The D.C. Circuit struck down the scheme arguing, among other things, that it clearly violated § 703 of the MBTA and would require proper permits to be enforced.[65] Indeed, the action was direct; the killing of geese and the killings were systematic proving the intention of the Department of Agriculture.

Similarly, direct and unintentional actions are those where the offender is direct in activity (hunting, poaching, shooting etc.) but has no intention of taking the migratory bird. Direct and unintentional takings are generally viewed as strict liability crimes, and proof of intent to take or

[64] *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).
[65] *Id*. at 888.

knowledge of taking a migratory bird is not needed to establish a misdemeanor violation. An example of this can be seen in *United States v. Pitrone*.[66] In *Pitrone*, a taxidermist was convicted of hunting migratory birds to stuff and then sell. He argued that he could not be convicted because, among other things, he was not aware that he was hunting protected migratory birds. The First Circuit, however, held that § 707(b) was not a specific intent crime. Furthermore, it held that the government only had to show that the defendant knowingly hunted and sold a bird, not that he had knowingly hunted and sold a specific bird listed in the MBTA.[67]

Finally, there are indirect and unintentional actions, also called incidental takings. The Department of the Interior (DOI) defines incidental takings as a "take that results from an activity, but is not the purpose of that activity."[68] Examples of this would be bird deaths from collisions with human-made structures or from pollutants. Unlike the other two types of takings there is no consensus on if incidental takings are a strict liability crime. Not even the Fish and Wildlife Service (FWS), the agency that oversees the management of fish, wildlife, and natural habitats, has been consistent on its reading of incidental takings.

Beginning in the 1970s, the FWS interpreted incidental takings as a strict liability offense.[69] This remained the status quo up and throughout President Obama's Administration. In fact, just as the administration was departing, then DOI Solicitor Hilary Tompkins issued a Memorandum Opinion, called M-37041, which officially stated that the FWS interpreted incidental takings under the MBTA as strict liability offenses.[70] However, the official view made an abrupt change under President Trump's Administration. In December of 2017, the DOI Principal Deputy Solicitor

[66] *United States v. Pitrone*, 115 F.3d 1 (1st Cir. 1997).
[67] *Id*. at 5.
[68] Memorandum M–37041 from Solicitor at 1, DOI, to Dir., FWS (Jan. 10, 2017).
[69] *Id*. at 13.
[70] *Id*. at 2.

issued a new Memorandum Opinion, called M-37050, which took the position that the MBTA did not prohibit incidental takings.[71] And then only a few years later President Biden's Administration revoked that view in favor of the previous Obama Administration's ruling. Consequently, the FWS published a final rule in the federal register stating that,

> On January 7, 2021, we, the U.S. Fish and Wildlife Service (we, the Service, or USFWS), published a final rule (January 7 rule) defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. We now revoke that rule for the reasons set forth below. The immediate effect of this final rule is to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017.[72]

Simultaneously, the FWS also published an advanced notice of proposed rulemaking aimed at codifying the Biden Administration's interpretation of the MBTA's incidental take provision and creating new incidental take regulations.[73] Although these administrative actions appear valid, there is no overreaching law by Congress that would finally settle this conflict on a more permanent basis.

Interestingly, Canada also experiences the same issue regarding incidental takings. The Migratory Bird Convention Act[74] lacks effective powers to address "incidental take," described as unintentional killing of birds or the "inadvertent" destruction of nests or eggs associated with large-scale human activities such as logging, crop harvest, and commercial fishing.[75] After many years of attempting to develop regulations to permit "incidental take," Environment and Climate Change Canada, the Canadian department responsible for coordinating environmental policies and

[71] Memorandum M–37050 from Principal Deputy Solicitor, DOI, to Sec'y. DOI (Dec. 22, 2017).
[72] 86 FR 1134 at 1134.
[73] 86 FR 54667.
[74] The Migratory Bird Convention Act is the equivalent legislation of the Migratory Bird Treaty Act in the United States.
[75] Savannah Carr-Wilson, Calvin Sandborn and Stephen Hazell, "Modernizing the Migratory Birds Convention Act: Three Necessary Reforms to Better Protect Migratory Birds" Unpublished paper (Last visited Nov. 24, 2022, at 2:30 PM).

programs, abandoned this tactic and settled on publishing guidelines to reduce risks of sectoral activities to migratory birds.[76] These are nonbinding guidelines.

Part II: The Federal Circuit Split on Strict Liability Explained

There are two federal circuit court interpretations of incidental takings under the MBTA. One side employs a narrow interpretation of the language and legislative intent which results in an understanding that incidental takings are not strict liability crimes. The other side opts for a broader interpretation of the language that combines both tort and constitutional law, which results in an understanding that incidental takings are a strict liability crime. The former is the interpretation espoused by the Fifth, Eighth and Ninth Federal Circuits and the latter by the Second and Tenth Federal Circuits.

A. The Narrow Interpretation of "Taking"

The Fifth Circuit cemented its narrow interpretation in the landmark case of *United States v. CITGO Petroleum Corp*.[77] In that case CITGO was charged with unlawfully taking and aiding and abetting the taking of migratory birds under MBTA § 707(a) after ten dead birds were found in two large open-top oil-water separator tanks. CITGO appealed to the Fifth Circuit arguing that the MBTA only criminalizes intentional acts related to hunting or poaching, not omissions that unintentionally kill birds.[78]

The court was sympathetic to the reasoning of CITGO. First, drawing on Justice Scalia's dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[79] the court found that Congress's silence on a definition for take meant it intended the common law definition to

[76] Edward Chesky, "Is the migratory bird convention act actually saving birds?" oursafetynet.org, (Last visited Nov. 24, 2022, at 2:30 PM), https://www.oursafetynet.org/2020/06/15/is-the-migratory-bird-convention-act-actually-saving-saving-birds.
[77] *United States v. CITGO Petroleum Corp*., 801 F.3d 477
[78] *Id*. at 481.
[79] *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, 515 US 687 (1995).

control.[80] This meant, as applied to wildlife, that to "take" is to "reduce those animals, by killing or capturing, to human control."[81] Following from this definition the court stated, "one does not reduce an animal to human control accidentally or by omission; he does so affirmatively."[82] In drawing this conclusion, the court reversed the criminal conviction for the death of the migratory birds that flew into and died in the oil-water separator tanks.[83] The court additionally added that criminalizing indirect and unintentional takings would give the government almost unchecked power because an upwards of 900 million birds are accidentally killed. The Court quipped, "Even domesticated cats are serial violators of the MBTA. In Wisconsin alone, the government estimates that domesticated cats killed 39 million birds."[84]

The government did not refute the exegesis of the Court but did claim that Congress expanded the definition of "take" by negative implication. Essentially, in 2002, a district court held that the United States military violated the MBTA when migratory birds were accidentally killed during training exercises in the Pacific. In response the Congress quickly exempted "military readiness activity" from MBTA liability for incidental takings. The exemption notably did not extend to the "operation of industrial facilities." Accordingly, the government asserted, Congress implicitly expanded "take" beyond its common-law meaning.[85] The Court quickly dispelled of this reasoning stating that a single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and massively expanded. More to the point, it was an exceptionally narrow exemption, as it did not even protect all military activities.[86]

---

[80] *CITGO Petroleum Corp*., 801 F.3d at 478
[81] *Id*. at 481.
[82] *Id*. at 481.
[83] *Id*. at 484.
[84] *Id*. at 494.
[85] *Id*. at 490.
[86] *Id*. at 491.

By way of different analysis, the Ninth Circuit came to its narrow interpretation in *Seattle Audubon Society v. Evans*.[87] In December 1988, the Forest Service had adopted a new plan to manage the spotted owl on the National Forests in Oregon and Washington because they had recently been moved to the endangered species list. As a result of the new plan, logging could begin in and around the natural habitat of the owls. The Portland and Seattle Audubon Societies sued for injunctive relief arguing that timber sales which destroy owl habitats were tantamount to a "taking" under the MBTA.[88]

The National Forest Service's principal contention was that it was no longer required to plan for the future survival of the spotted owl because the FWS had declared the owl threatened under the Endangered Species Act (ESA). The Forest Service contended that it was required to plan for "viable" species, and that a species declared threatened or endangered under the ESA is no longer viable.[89]

The Ninth Circuit looked at both statutory intent[90] and the differences in language between the MBTA and the Endangered Species Act. The court found that "the [MBTA's] definition [of "take"] describes 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. The statute and regulations promulgated under it make no mention of habitat modification or destruction."[91] The court noted that in the ESA's definition of "take" includes the term "harm," which encompasses habit modification or degradation.[92] As a result, the court felt that the differences in the proscribed

[87] *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).
[88] *Id*. at 303.
[89] *Id*. at 298.
[90] While the Migratory Bird Treaty Act of 1918 is legislation implementing the Migratory Bird Treaty of 1916 between the U.S. and Great Britain (for Canada), courts of the U.S. have only looked at the intent of Congress passing the 1918 legislation and not the intent of the treaty makers in 1916.
[91] *Id*. at 303.
[92] *Ibid*.

conduct under ESA and the MBTA were "distinct and purposeful."[93] As a result, a take in the MBTA is confined to those activities like hunting and poaching.

The Eight Circuit, using the same framework, came to the same conclusion as the Ninth Circuit in *Newton County Wildlife Association v. U.S. Forest Service*.[94] In this case, several nongovernmental organizations sued the U.S. Forest Service alleging that the Forest Service violated the MBTA by failing to obtain special permits from the FWS for timber sales that would disrupt nesting of migratory birds and thus result in the death of some birds.[95] The Eight Circuit disagreed with the Plaintiffs. The court declared,

> Initially, we note that MBTA's plain language prohibits conduct directed at migratory birds – "pursue, hunt, take, capture, kill, possess," and so forth. The government argues that the statute imposes "strict liability" on violators, except for felony violations, which under a recent amendment must be done "knowingly." 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. Thus, we agree with the Ninth Circuit that **the ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.**[96]

The Eighth Circuit drew from the Ninth Circuit's opinion in *Seattle Audubon Society v. Evans* in concluding that there is no strict liability for incidental takings. Both Circuits focused on the legislative intent of the MBTA.

The Eighth and Ninth Circuit's roadmap for invalidating strict liability for incidental takings is notably a different approach from the Fifth Circuit. All three circuits reached the same conclusion but, unlike the Fifth Circuit, the Eighth and Ninth Circuit considered the intent of the legislators at the time the MBTA was enacted in 1918. The Eighth and Ninth Circuit believed that

[93] *Ibid*.
[94] *Newton Cty. Wildlife Ass'n v. United States Forest Serv*., 113 F.3d 110 (8th Cir. 1997).
[95] *Id*. at 115.
[96] *Ibid*. [emphasis added].

at the time the MBTA was ratified the intent of the legislation was to only penalize hunters and poachers not unrelated activities. Meanwhile, the Fifth Circuit, using Scalia's dissent in *Babbitt*, found that the legislature intended on the common law definition of "take" to control.

The conclusions of the Eighth and Ninth Circuit Courts are erroneous. They artificially narrow the intent of the legislature. It is fair to say the legislators were concerned with hunting and poaching, two activities that decimated bird populations in the eighteenth and nineteenth century. Even so, the overall concern of the legislators was bird population declines and combatting those declines. It can be decoded then from the text of the MBTA that indirect activities that lead to severe population decreases was also a concern of the legislators. With a broader view it can be asserted that the legislative intent was to prohibit incidental takings. As for the Fifth Circuit's reasoning, it is far more valid. Statutory silence can be replaced with common law interpretations.[97] Still, as will be seen below, combining well founded notions in tort and constitutional law is a stronger base for analysis.

B. The Broad Interpretation of "Taking"

In contrast to the Fifth, Eighth and Ninth Circuits, the Second and Tenth Circuits have reached the opposite conclusion. These two courts view the incidental takings of protected migratory birds as strict liability crimes with varying limitations. The Second Circuit came to this conclusion in *United States v. FMC Corp.*[98] FMC operated a chemical plant where it manufactured various pesticides. Production required large amounts of wastewater.[99] The wastewater was stored in a ten-acre pond which held approximately 12 million gallons of water.[100] The pond also held

[97] *See generally* Antonin Scalia & Bryan A. Garner, Reading Law (2012).
[98] *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).
[99] *Id*. at 904.
[100] *Ibid*.

small amounts of wash water from the production of carbofuran.[101] The pond attracted migrating birds killing dozens of the birds.[102] FMC attempted several solutions, but birds kept getting in and dying. Eventually, charges were brought under the MBTA, and the jury convicted FMC of 18 counts of the 36 counts in the indictment.[103]

On appeal, FMC argued that it had no intention to kill birds, that it took no affirmative act to do so, possessed no scienter, and thus should not have been held liable under the MBTA.[104] FMC further argued that, even in public welfare offenses, some "act" must be intended.[105] The court was not sympathetic. Indeed, the court held that FMC did take an affirmative act in killing the birds.

> Here FMC did perform an affirmative act - it engaged in the manufacture of a pesticide known to be highly toxic. Then it failed to act to prevent this dangerous chemical from reaching the pond where it was dangerous to birds and other living organisms that ingested, or came into close contact with, the chemical. Such a situation is analogous to the situations in the various tort notions of strict liability which have insinuated themselves into American law since the English case of *Rylands v. Fletcher*.[106]

Strict liability has been deemed to apply in various *Rylands v. Fletcher* situations where a person engages in extra hazardous activities. [107] The court, based off of this well-established tort rule, held that holding toxic materials in a pool was an extra hazardous activity and as a result FMC was liable for any damage caused by the pool regardless of intent or knowledge. Since *FMC*, however, several federal courts have limited the application of strict liability in the context of the MBTA by

---

[101] *Ibid.*
[102] *Ibid.*
[103] *Id.* at 903.
[104] *Id.* at 906.
[105] *Ibid.*
[106] *Id.* at 907.
[107] In *Rylands v. Fletcher*, a reservoir was built on the site of an abandoned coal mine. When the reservoir was filled, water leaked through the unused shaft and into an adjoining mine owned and operated by the plaintiff. The plaintiff was granted damages for the injury to his mine caused by the flooding. It was understood that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. *Rylands v. Fletcher*, 3 Hurl. & C. 774 (1865), L.R. 1 Ex. 265 (1866).

requiring that the acts or omissions must be the proximate cause of the incidental migratory bird taking as will be seen below.[108]

The Tenth Circuit has also addressed this issue — not once but twice. The first time was in *United States v. Corrow*.[109] In that case an aficionado of Navajo culture and religion purchased several Navajo artifacts and attempted to resell them. Subsequently, the defendant was convicted of trafficking Native American cultural items in violation of 18 U.S.C.S. § 1170, 25 U.S.C.S. §§ 3001(3)(D), 3002(c), and 18 U.S.C.S. § 2, and of selling golden eagle, great horned owl, and buteonine hawk feathers in violation of 16 U.S.C.S. §§ 703, 707(b)(2), and 18 U.S.C.S. § 2.[110] The court held that the misdemeanor crime was a strict liability offense for two reasons: one, because the plain language of §703 renders simple possession of protected feathers unlawful ("it shall be unlawful"); and, two, like other regulatory acts where the penalties are small and there is "no grave harm to an offender's reputation," conduct alone is sufficient.[111]

Again, the question of strict liability would arise a little over a decade later in *United States v. Apollo Energies, Inc.*[112] Two Kansas oil drilling operators were charged with violating the MBTA after dead migratory birds were discovered lodged in a piece of their oil drilling equipment.[113] After a trial before a magistrate judge, Apollo Energies was convicted of taking or possessing migratory birds, each misdemeanor violations. The federal district court affirmed the conviction, concluding that violations of § 703 of the MBTA were strict liability offenses, which do not require that defendants knowingly or intentionally violate the law.[114] On appeal, Apollo

[108] *United States v. Apollo Energies, Inc*., 611 F.3d 679, 690 (10th Cir. 2010) (citing BLACK'S LAW DICTIONARY (6th ed. 1990)).
[109] *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997).
[110] *Id*. at 798.
[111] *Id*. at 805.
[112] *United States v. Apollo Energies, Inc*., 611 F.3d 679 (10th Cir. 2010).
[113] *Id*. at 682.
[114] *Id*. at 682.

renewed their challenge to the MBTA, claiming (1) it is not a strict liability crime to take or possess a protected bird; or, (2) if it is a strict liability crime, the MBTA is unconstitutional as applied to their conduct.[115]

The court concluded that the district court correctly held that violations of the MBTA were strict liability crimes, thus keeping to its holding in *Corrow*; however, the court did refine its prior position. The Tenth Circuit emphasized that in order to satisfy due process as demanded by the U.S. Constitution, the application of strict liability to incidental takings of migratory birds must be limited to acts or omissions that proximately caused the deaths of birds. This is because due process requires that citizens be given fair notice of what conduct is criminal.[116] Adding the element of proximate cause effectively puts a wrongdoer on notice that what they did could be or was criminal and they could be held liable for it. Taking inspiration from similar lower court decisions the Tenth Circuit echoed, "proximate cause is an 'important and inherent limiting feature' to the MBTA, and that liability would attach where the injury 'might be reasonably anticipated or foreseen as a natural consequence of the wrongful act."[117]

Upon reflection, the broad interpretation put forward by the Second and Tenth Circuit is the superior line of reasoning. These two Circuits have a coherent and fair understanding of "take" as established in the MBTA. These Circuits have incorporated long held traditions of tort and constitutional law while also providing protection to migratory birds. Thus, it is the views of the Second and Tenth Circuit that should be adopted as a uniform system throughout the United States. It strikes a balance where businesses can grow without unnecessary hinderances while penalizing negligent entities that have a reasonable understanding that their actions are dangerous. The

[115] *Ibid.*
[116] *Id*. at 687.
[117] *Id*. at 690.

byproduct of which is a healthier more sustainable ecosystem where migratory birds can also thrive.

PART III: Remedying the Circuit Split through Statute

Not since *United States v. Apollo Energies, Inc*. has the question of strict liability reached a circuit court. The split over strict liability offenses for incidental takings continues. One solution would be for the Supreme Court of the United States of America to make a final ruling on the issue. A decision by the Supreme Court would apply a uniform definition for all courts in the U.S. to adhere to. This is an unlikely solution. Not since *Missouri v. Holland*, over a century ago, has the highest court of our nation heard a case regarding the MBTA. The most recent occasion where the Supreme Court heard a case fairly similar to the issue at hand was in the 1995 case *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[118]

In *Babbit* the court had the difficult task of interpreting the term "harm" as used in the ESA. The specific issue was if the definition of "harm" as an expansion of the word "take" in the ESA included habitat modification that kills or injures wildlife.[119] The Secretary of the Interior defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife."[120] Several landowners, logging companies, and timber workers challenged the regulation on its face, claiming that Congress did not intend the word "take" to include habitat modification.[121] Ultimately, the Supreme Court, in an opinion written by Justice Stevens, agreed with the Secretary of the Interior. In doing so Justice Stevens wrote that an ordinary understanding of the word "harm" supports the Secretaries interpretation.[122] The broad purpose of the ESA, the

[118] *Babbitt*, *supra* note 80, at 690.
[119] *Id.* at 690.
[120] *Id.* at 690.
[121] *Id*. at 692.
[122] *Id*. at 697.

Court asserted, supported the Secretary's decision to extend protection against activities that caused the precise harms Congress enacted the statute to avoid[123] and that the permit process strongly suggested that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings.[124]

It is submitted that *Babbit* required an analysis almost identical to the cases reviewed throughout the circuit courts regarding "take" in the MBTA. Indeed, applying a similar line of reasoning, it may be possible for the Supreme Court to solve the circuit split regarding incidental takings in the MBTA. Unfortunately, an MBTA case is unlikely to find its way to the desk of the nine Supreme Court justices. And, more pragmatically, the current makeup of the Supreme Court suggests that the court would likely favor the view of Justice Scalia in his *Babbit* dissent and the positions of the Fifth, Eighth and Ninth Circuits. This outcome would be detrimental to migratory birds. Nevertheless, through statutory means it is possible to reconcile the split in a way beneficial to migratory birds.

A. H.R.4833: "To amend the Migratory Bird Treaty Act"

On July 29, 2022, H.R. 4833 was introduced in the House of Representatives by Representative Alan Lowenthal of California District 47.[125] At its core, H.R. 4833 would help ensure the continued success of federal migratory bird conservation by clarifying and codifying that migratory birds are protected from both intentional killings and unintentional harm.[126] This bipartisan legislation appears promising, in that it already has 86 cosponsors.[127] The bill also has

[123] *Id*. at 698.
[124] *Id*. at 699.
[125] H.R.4833 - Migratory Bird Protection Act of 2021, www.congress.gov (last visited Nov. 11, 2022, at 11:35 AM) https://www.congress.gov/bill/117th-congress/house-bill/4833?s=1&r=92.
[126] H.R. 4833, *supra* note 10.
[127] H.R. 4833 has support from 82 Democrats and 4 Republicans from the following states and territories (in alphabetic order): Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Northern Marianna Islands. Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington, Washington D.C., and Wisconsin.

the support of dozens of organizations representing millions of conservationists.[128] Some of these organizations include the Wildlife Society,[129] the National Audubon Society,[130] and the Humane Society.[131]

The proposed bill has four amendments to the MBTA with two amendments of substance. The bill amends section 2(a), by inserting "incidentally take," before "attempt to take,".[132] This would resolve any doubt about legislative intent. Furthermore, the MBTA is amended by inserting a new § 14 titled "Incidental Take of Migratory Birds." The section begins with § 714(a): "It shall be a violation of this Act for any person to incidentally take a migratory bird as a result of a commercial activity except as authorized by this section and regulations issued pursuant to this section."[133] Again, this new section leaves no room for doubt with regards to legislative intent. The statute states clearly that certain commercial activity can lead to a criminal penalty. §§ 714(b)-(l) deals with permits allowing certain industries to operate so long as they take certain steps to manage and minimize the negative impacts they produce. The new permit system is similar to the current regime.

One notable subsection is the inclusion of a mitigation fee in § 714(f). The relevant part reads,

> The mitigation fee for each general permit shall be the amount that the Secretary determines reasonably compensates, through habitat restoration or other appropriate measures, for any

[128] Support H.R. 4833, wildlife.org (last visited Oct. 23, 2022, at 3:00 PM), https://wildlife.org/wp-content/uploads/2021/10/MigratBirdCongressPRINT.pdf.
[129] *Ibid*.
[130] Urge Congress to Support the Migratory Bird Protection Act, www.thepetitionsite.com, (last visited Nov. 11, 2022, at 2:10 PM) https://www.thepetitionsite.com/takeaction/653/275/832/.
[131] Kitty Block and Sara Amundson, Massive win for migratory birds as much-needed protection gets restored, blog.humanesociety.org, (last visited Nov. 11, 2022, at 2:13 PM) https://blog.humanesociety.org/2021/10/biden-administration-restores-migratory-bird-treaty-act.html?credit=blog_post_100821_id12531.
[132] Support H.R. 4833, wildlife.org (last visited Oct. 23, 2022, at 3:00 PM), https://wildlife.org/wp-content/uploads/2021/10/MigratBirdCongressPRINT.pdf.
[133] *Ibid.*

> incidental take of migratory birds that results from the covered commercial activity after the application of any mitigation measures specified…[134]

The fee determination would be based on objective and standardized metrics such as the size or capacity of a facility for which a person seeks coverage.[135] Although under the current regime there are some permits that require fees, the fees generally range between zero dollars to one hundred dollars per permit.[136] There is no specified destination for the permit fee money besides going to the FWS and the DOI. This new section provides for the specific and targeted use of money collected from the issuing of permits. Mitigation fees are an adequate addition to permit fees and will directly help migratory birds by directing money into habitat restoration and bird rehabilitation.

Another notable change would be the found in § 714(g). This section provides that, before issuing a general permit pursuant to subsection (b), the Secretary of the Interior acting through the Director of the United States Fish and Wildlife Service would consult the United States Fish and Wildlife Service and the National Marine Fisheries Service pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(2)), and prepare an Environmental Impact Statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).[137]

As established by the National Environmental Policy Act of 1969, an environmental impact statement is a government document that outlines the impact of a proposed project on its surrounding environment. The addition of a required environmental impact statement is an extra safeguard to ensure only safe and necessary projects receive a permit. It also helps the government,

[134] *Ibid.*
[135] *Ibid.*
[136] 50 CFR part 21.
[137] H.R. 4833 *supra* note 10.

the public and private companies further understand what the implications of proposed projects are.

Naturally, a subsection has been added to H.R. 4833 for a new penalty regarding incidental takings. This new penalty states that violators of the MBTA, due to an incidental taking, or those that violate the terms of a permit, or any rule issued by the Secretary to administer § 14 of the MBTA could face a fine of up to $10,000 dollars per violation. Additionally, if the unpermitted incidental take were to be caused by conduct that is "reckless" or "grossly negligent" the violator could face the penalties found currently in § 707(a).[138]

Mitigation fees, environmental impact statements, required consultation with certain departments and new penalties are all important additions that would add a new layer of protection. The benefits of H.R. 4833 cannot be overstated. The new additions would create stability and certainty for birds and business. The Wildlife Society has emphasized that the bill would create stronger conservation protections for migratory birds against industrial hazards.[139] The bill would also bring greater regulatory certainty to industry by establishing a permitting program for incidental take, where permits would be based on best management practices that minimize harm to birds.[140] Lastly, the bill would create additional resources for bird conservation by establishing a mechanism for industry to fund the mitigation of harm caused by industrial activities.[141] The minimized harm would aid in staving off bird population decline and, in turn, benefit the ecological balance that birds contribute to their environments.

[138] "Violator is charged with a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both." 16 U.S.C. §707(a).
[139] Support H.R. 4833, wildlife.org (last visited Oct. 23, 2022, at 3:00 PM), https://wildlife.org/wp-content/uploads/2021/10/MigratBirdCongressPRINT.pdf.
[140] *Ibid.*
[141] *Ibid.*

Those that are concerned about Canada's role in the adoption of H.R. 4833 need not worry. While the MBTA and its Canadian counterpart, the Migratory Bird Convention Act, are very similar legislation in wording and design, there is an immense amount of freedom between the two countries in enforcing the treaty. Indeed, the Migratory Bird Treaty in its current form only states that to ensure the long-term conservation of migratory birds, migratory bird populations shall be managed in accord with the following conservation principles:

> to manage migratory birds internationally; to ensure a variety of sustainable uses; to sustain healthy migratory bird populations for harvesting needs; to provide for and protect habitat necessary for the conservation of migratory birds; and to restore depleted populations of migratory birds.[142]

Means to pursue these principles may include, but are not limited to:

> monitoring, regulation, enforcement and compliance; co-operation and partnership; education and information; incentives for effective stewardship; protection of incubating birds; designation of harvest areas; management of migratory birds on a population basis; use of aboriginal and indigenous knowledge, institutions and practices; and development, sharing and use of best scientific information.[143]

As a result, both the U.S. and Canada may, and do, pass amendments to their respective legislation without the consent of the other. Meaning that consent from the Canadian government is not a hinderance to the passing of H.R. 4833.

B. The Ghost of H.R. 5552

While H.R. 4833 is currently being considered by Congress it is concerning that this is not the first bill of its kind. Roughly 18 months before H.R. 4833 was H.R. 5552, a bill with the same name, contents, and creator. H.R. 5552 was introduced on January 8, 2020, with 95 cosponsors.[144]

---

[142] Protocol Between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, CA.-U.S., Dec. 14, 1994. E101589 - CTS 1999 No. 34.
[143] *Id*.
[144] "H.R. 5552 — 116th Congress: Migratory Bird Protection Act of 2020." www.GovTrack.us. 2020. (last visited Oct. 26, 2022, at 9:15 AM) https://www.govtrack.us/congress/bills/116/hr5552.

A week later a committee voted to issue a report to the full chamber recommending that the bill be considered further. It is noteworthy that only about 1 in 4 bills are reported out of committee, so this was a promising start.[145] The House Committee on Natural Resources issued another report on the bill, but the bill eventually died in the 116th Congress.[146] It was reintroduced as H.R. 4833 in the 117th Congress and since then, H.R.4833 has been referred to the House Subcommittee on Water, Oceans, and Wildlife for further consideration.

Although H.R. 5552 ended up dying, the House Committee on Natural Resources report on that bill presents vital information about its successor, H.R. 4833. In that report the Congressional Budget Office (CBO) estimated that enacting H.R. 5552 would reduce direct spending by $251 million over the 2020– 2030 period.[147] Using information from the 2017 Economic Census and from the FWS, the CBO also estimated that between several thousand and 15,000 entities would seek incidental take permits under the bill and pay roughly $100 for a permit.[148]

Further estimates show that had the bill been enacted each permitted entity would pay, on average, several thousand dollars annually in mitigation fees starting in 2021.[149] The federal government would collect about $25 million annually starting in 2021 and, in total, $251 million over the 2020–2030 period. Estimates show that violations would occur infrequently; thus, the increase in revenues would probably be insignificant over the 2020–2030 period.[150] H.R. 5552 would have also authorized the annual appropriation of $10 million for FWS to develop a permitting program for the incidental take of migratory birds and to conduct related research.

[145] *Id*.
[146] *Id*.
[147] H.R. Rep. No. 116–482, 2020.
[148] *Id*.
[149] *Id*.
[150] *Id*.

Based on historical spending patterns for similar activities, CBO estimated that implementing H.R. 5552 would cost $56 million over the 2020–2025 period.[151] Overall, the bill would have saved the U.S. money while benefitting the environment. This is something Democrats and Republicans alike could support.

So even though H.R. 4833 is merely a second iteration, it nevertheless is a promising bill that enjoys support from both sides of the aisle. Still, it remains to be seen if this bill makes it onto the floor for a vote in the near future. Once the bill makes its way to the floor of the House of Representatives it is very likely to pass and be sent to the Senate. Certainly, if the bill was to pass the Senate, also currently controlled by Democrats, and be sent to the desk of President Biden the bill would become a law. As discussed above, President Biden has gone out of his way to push the FWS to enforce incidental takings as a strict liability offense so it is very likely he would sign H.R. 4833.[152] It is important to note that only 4 percent of proposed bills have been enacted during the 117th Congress and the 117th Congress concludes on January 3, 2023. So, it is an uphill battle to be sure but if it does not gain the support needed it can be reintroduced in the 118th Congress.[153]

PART IV: A BETTER FUTURE IS POSSIBLE

There is an ecological catastrophe already in the process. In 1970, an estimated 10 billion birds were in the U.S. and Canada at spring breeding time.[154] Since then, the number has dropped by about 3 billion.[155] Grassland bird numbers alone have been reduced by 53%, or a loss of more than 720 million birds since 1970. Shorebird numbers have dropped by about a third. A large

[151] *Id*.
[152] 86 FR 1134, *supra* note 75, at 1134.
[153] Statistics and Historical Comparison, govtrack.us (last visited Oct. 26, 2022, at 6:16 PM) https://www.govtrack.us/congress/bills/statistics.
[154] Joshua Rapp Learn, "Bird numbers drop 3 billion since 1970", wildlife.org (last visited Oct. 23, 2022, at 4:32 PM) https://wildlife.org/bird-numbers-drop-3-billion-since-1970/.
[155] *Ibid*.

diversity of other species have also experienced losses.[156] In fact, more than one in four birds in the U.S. and Canada have disappeared within the lifetime of a person born in 1970.[157] The great importance of the bird on the ecosystem means we must act soon or else birds and those systems in nature that rely on the birds will suffer irreparable harm.

The MBTA has a solid foundation from which the United States can further enact further safeguards to protect migratory birds. However, two opposing interpretations of the MBTA in the Federal Circuit Courts has caused harmful confusion. One interpretation argues that incidental takings are not a strict liability offense, defanging the legislation and contributing to the soaring number of dead migratory birds. The other interpretation adheres to long held traditions in tort law and has deemed incidental takings a strict liability offense. It is the latter view that should be adopted nationwide in order to fix the split in the federal circuits.

H.R. 4833 would adopt that latter view, thus breathing new life into the century's old legislation. It would make incidental takings illegal, develop a new permit system and increase funds for habitat restoration. In doing so, it would bring regulatory consistency and stronger protection for migratory birds in the United States. Yet it remains to be seen if the federal government is committed to this noble cause.

In *Missouri v. Holland*, Justice Holmes wrote that, "a national interest of very nearly the first magnitude is involved… But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."[158] Now, our country finds itself in the same situation that Holmes wrote about over a century ago.

---

[156] *Ibid.*
[157] Gustave Axelson, "Nearly 30% of birds in U.S., Canada have vanished since 1970", (last visited Oct. 23, 2022, at 4:36 PM) https://news.cornell.edu/stories/2019/09/nearly-30-birds-us-canada-have-vanished-1970.
[158] *Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L.Ed. 648 (1920).

The U.S. should honor what he wrote and amend the MBTA so that the U.S. can again, as was first attempted in 1916, aid the winged protectors of this nation's forests before it is too late.