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Strict liability criminal statutes

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There are a number of federal and state statutes that intentionally and justifiably impose strict criminal liability. Persons who manufacture hazardous explosives and those who keep dangerous animals create serious risks to public safety. Clearly placing the burden of potential criminal liability, even in the absence of criminal negligence or intent, on those persons and entities is appropriate.

There are other statutes, though, that fail to disclose whether the authors intended for the criminal penalties included for noncompliance to be strictly applied or whether criminal liability requires proof of criminal negligence or specific intent. Two such statutes of interest to the maritime community are the Refuse Act of 1899 and the Migratory Bird Treaty Act (MBTA).

The Refuse Act was adopted to address the problem of intentional dumping of trash, waste, and refuse into the navigable waters of the United States, which was reaching serious proportions during that era. The Refuse Act does not address scienter. The early court decisions relating to the act followed the judicial concept that statutes should be interpreted as being consistent with the common law unless otherwise clearly indicated. These courts held that scienter was a necessary, albeit unstated, element of the offense when criminal sanctions were to be applied. Only later did courts begin interpreting the statute literally, allowing convictions when there was no proof of intent. Now, such prosecutions and convictions have become commonplace in those cases where prosecutors fail to exercise discretion in their charging.

The MBTA was enacted in order to implement the Migratory Bird Treaty between the United States and Great Britain (on behalf of Canada). This was during an era when birds were being slaughtered at a tremendous rate and had already resulted in the extinction of the passenger pigeon and various other species. The goal of the treaty and the statute was to protect migratory birds, which includes almost every bird in North America, from unauthorized hunting and hunting methods. The statute provides, in pertinent part, that it is a criminal offense to improperly take or kill any migratory bird. Unfortunately, like the Refuse Act, the MBTA does not address scienter. Early cases were confined to prosecutions for improper hunting, so criminal intent was not litigated. Later, though, aggressive prosecutors began utilizing the MBTA, like the Refuse Act, to go after individuals other than hunters and entities that unintentionally killed migratory birds.

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On 22 December 2017, the Department of the Interior Office of Solicitor issued a memorandum stating that it is now the Department's policy that the MBTA does not prohibit the incidental taking of migratory birds. Henceforth, the Department will only pursue cases involving affirmative actions that have as their purpose the taking or killing of migratory birds. Some may argue with the analysis in the memorandum or with its rather sweeping policy change. A bigger problem is that it only impacts the policy of one federal department, which has limited authority in the enforcement of the MBTA.

It has been the policy of the Department of Justice, in action if not in writing, to pursue prosecutions under the Refuse Act and the MBTA whenever the federal prosecutor (at the Department Headquarters or at a local Office of the US Attorney thought that it was appropriate. There seems to be no detailed guidance to control that discretion. The Refuse Act was first used to prosecute a company for the accidental release of oil into the water during the 1930s. The MBTA was first used in such a manner following the 1989 grounding and oil spill of the Exxon Valdez. Subsequently, the Refuse Act and/or the MBTA routinely appear in charges brought following an oil spill.

In the late 1990s, the maritime community championed an attempt to insert scienter provisions in both statutes. That was met by a vigorous pushback from the Department of Justice. Senior prosecutors from the Environment and Natural Resources Division assured the maritime bar on several occasions that there would never be a prosecution where the only charge was for violation of either the Refuse Act or the MBTA. Such offenses were only charged to increase bargaining leverage in seeking a plea agreement from the defendant for other offenses that included a scienter requirement. The maritime community backed off, given such assertions.

On 6 December 2004, the bulk carrier Selendang Ayu was en route from Seattle, Washington to Xiamen, China carrying 66,000 tons of soybeans. It also had approximately 340,000 gallons of bunkers and other petroleum products (lubricants, etc.) on board. During a winter storm in the Bering Sea, the ship suffered a major engine casualty. Despite the best efforts of the engineering crew, the engine could not be restarted. The bulker eventually grounded off the north shore of Unalaska Island and broke its back in the fierce winter storm, spilling its entire cargo of soybeans as well as its bunkers and other oils. Several thousand seabirds died as a result of the oil spill. The owners of Selendang Ayu spent millions on the environmental response effort and then millions more on the removal of wreck from the isolated shore (full removal was insisted upon by the State of Alaska, which had previously allowed wrecks in similar locations to deteriorate in place). Millions were also paid in natural resource damage claims. None of these expenditures were wholly inappropriate. The US Department of Justice, though, decided that criminal prosecution of the owners was necessary. After opening the case, it could find insufficient evidence of either intentional or negligent criminal conduct. Not deterred, DOJ filed charges against the owners for violation of the Refuse Act (for discharging soybeans in navigable waters of the United States) and for violation of the MBTA (for "taking" migratory seabirds that had ingested the spilled oil). The owners were not able to

argue that they did not intend the grounding to occur; nor could they argue that they were not negligent with regard to the grounding. Neither argument constitutes a defense to a strict liability offense. Left with no choice, the owners entered a plea of guilty and paid a criminal fine of $9 million. This marks the first time in modern history that the Department of Justice has charged a shipowner solely for violation of strict liability crimes. When asked about this litigation, the prosecutor in the US Attorneys' Office in Alaska stated that the attorneys in the Environment and Natural Resources Division insisted on this course of action. When asked, the prosecutors in the Environment and Natural Resources Division insisted that the US Attorneys' Office in Alaska had done the insisting.

Ship owners and operators are left in an untenable position. If oil is spilled through no fault of the crew, will the prosecutor be aggressive and pursue all possible charges, including the no-fault ones or, assuming the ship meets all of its civil obligations, will matters end there? Such outcomes, in criminal matters, should not turn on the roll of the dice.

Congress created this mess by not including in the Refuse Act and the Migratory Bird Treaty Act scienter provisions. It is time for Congress to step up to the plate. In the meantime, courts when handling such prosecutions where there is no showing of criminal negligence or intent, should interpret these statutes conservatively and in accord with the common law by requiring evidence of scienter.