

January 2021

Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases under the Migratory Bird Treaties

Larry Martin Corcoran

Elinor Colbourn

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Larry Martin Corcoran & Elinor Colbourn, Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases under the Migratory Bird Treaties, 77 Denv. U. L. Rev. 359 (1999).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

SHOCKED, CRUSHED AND POISONED: CRIMINAL ENFORCEMENT IN NON-HUNTING CASES UNDER THE MIGRATORY BIRD TREATIES

LARRY MARTIN CORCORAN AND ELINOR COLBOURN*

I. THE MIGRATORY BIRD TREATIES AND CONVENTIONS

At the beginning of the Twentieth Century, market hunters or “pot hunters” killed migratory birds on a vast scale for profit; “[s]ome massacred birds for the sheer hell of it.”¹ “In danger of extermination” were many bird species valued as food as well as for their role in destroying insects that damaged vital food crops.² Sportsmen, farmers, and the general public supported protection of migratory birds primarily for economic but also for aesthetic reasons.³

* Trial Attorney and Senior Trial Attorney, respectively, Wildlife and Marine Resources Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C. The authors wish to thank John T. Webb, Assistant Chief of the Wildlife and Marine Resources Section, without whose support, advice, encouragement, guidance, and wisdom this article would not have been possible, and Robert S. Anderson, Senior Trial Attorney of the Wildlife and Marine Resources Section whose initiative, direction, and support got this article off the ground. The views expressed in this article are solely those of the authors and do not purport to reflect the views of the Department of Justice or any other agency.

1. See *United States v. Moon Lake Elec. Ass'n.*, 45 F.Supp. 2d 1070, 1080 (D. Colo. 1999) (quoting remarks of eight different Senators and Congressmen); see also 55 CONG. REC. 7441 (daily ed. June 6, 1918) (statement of Rep. Miller).

2. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 168 (1979). Coggins' account of the historical evolution of the MBTA is derived from P. MATTHISSEN, *WILDLIFE IN AMERICA* (1959); J. TREFETHAN, *AN AMERICAN CRUSADE FOR WILDLIFE* (1975); and Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976). See Coggins & Patti, at 167 n.18. See also 56 CONG. REC. 7370 (daily ed. June 4, 1918) (statement of Rep. Raker) (“promiscuous slaughter”); David G. Lombardi, *The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot For Hunting Migratory Waterfowl*, 22 AKRON L. REV. 343 (1989).

3. Convention between the United States and Great Britain for the Protection of Migratory Birds, August 16, 1916, preamble, 39 Stat. 1702 (1916) [hereinafter Canadian Convention].

4. See S. REP. NO. 65-27, at 2 (1917). The House Report expressed similar concerns and support. See H.R. REP. NO. 65-243, at 2 (1918); see also 16 U.S.C. § 711 (1994) (allowing regulated breeding and sale of migratory birds “for the purpose of increasing the food supply” - the only explicit statutory exception to the general prohibitions of the act; discussion *infra* Part II.A (MBTA Enactment)). The need to feed American soldiers engaged in combat in the Great War was also cited as a reason for preserving the birds. H.R. REP. NO. 65-243, at 2 (1918) (“it will thus contribute immensely to enlarging and making more secure the crops so necessary to the support and maintenance of the brave men sent to the battlefield by this Republic”).

A. *The Migratory Bird Act of 1913*

In response to the pressures and concerns described above, Congress enacted the Migratory Bird Act in 1913.⁵ The Act provided that all "migratory game and insectivorous birds [that] . . . do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations."⁶ The Act authorized and directed the Department of Agriculture to adopt suitable regulations for closed hunting seasons and also made violations of the regulations petty misdemeanors.⁷

The 1913 Act was challenged immediately as an unauthorized intrusion into matters reserved to the states by the United States Constitution. Two courts rejected claims that the Act was authorized by the Commerce Clause of the Constitution.⁸ The position of the government could not have been helped by its advocacy. In the first case, *United States v. Shauver*, the government initially conceded that the act could not "be sustained under the commerce clause."⁹ In the second case, *United States v. McCullagh*, the court believed the government should not have placed reliance on the commerce clause.¹⁰ The appeal of *Shauver* to the Supreme Court was withdrawn, after having been argued twice,¹¹ when the Migratory Bird Treaty Act (MBTA) became law.¹²

B. *Treaty Power as the Solution*

Secretary of State Robert Lansing and Senator Elihu Root conceived a constitutional solution to the need for federal protection of migratory birds by invoking the treaty power¹³ and negotiating the first of what would become four

5. See Act of March 4, 1913, ch. 145, 37 Stat. 828, 847-48 (1918). The Act consisted of four paragraphs inserted into the Bureau of Biological Survey portion of the Department of Agriculture appropriations bill.

6. *Id.* at 847.

7. See *id.* at 847-48; see also *Carey v. South Dakota*, 250 U.S. 118, 119-20 (1919) (citing 38 Stat 1960 (1913), as amended by 38 Stat. 2024 (1914) and 38 Stat. 2032 (1914)).

8. See *United States v. McCullagh*, 221 F. 288, 292 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914). More recently, the Supreme Court has said that "the underlying assumption that the national commerce power does not reach migratory wildlife is clearly flawed." *Andrus v. Allard*, 444 U.S. 51, 64 n.19 (1979) (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)).

9. *Shauver*, 214 F. at 160; U.S. CONST. art.I, § 8, cl. 3 ("The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

10. See *McCullagh*, 221 F. at 291.

11. MICHAEL J. BEAN AND MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 17-18 (3d ed. 1997). Chapter 2 of BEAN & ROWLAND presents an informative discussion of the development of wildlife law from Roman times to the present.

12. See *Coggins & Patti*, *supra* note 1, at 169. Pessimism over the prospects for the *Shauver* appeal may have been unfounded. In 1919, the Supreme Court affirmed a conviction under state law for transportation of wild ducks. See *Carey*, 250 U.S. at 122. The defendant argued that state law had been abrogated by the 1913 federal Migratory Bird Act. *Id.* at 120. The Supreme Court's opinion never questioned the validity of the 1913 Act but, instead, upheld the state conviction on the ground that the "provision of the state law is obviously not inconsistent with the federal law." *Id.* at 121.

13. The treaty power is found in Article 2, Section 2, Clause 2 of the United States Constitution which provides that: "He [the President] shall have Power, by and with the Advice and

bilateral treaties for the protection of migratory birds.¹⁴ On July 7, 1913, the Senate adopted a resolution requesting the President to negotiate treaties for the protection of migratory birds.¹⁵ The first treaty, the Canadian Convention, was concluded and ratified in 1916 and sought to protect birds migrating between the United States and Canada.¹⁶ Three further conventions followed with Mexico (1936),¹⁷ Japan (1972),¹⁸ and the former Soviet Union (1976).¹⁹

C. *The Treaties*

The MBTA, which implements these treaties, expressly cites to the conventions for identification of birds covered by the Act,²⁰ limits on implementing regulations,²¹ the scope of misdemeanor criminal violations,²² and limits on state or territorial regulations.²³ Therefore, before addressing the MBTA itself, it is

Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;" S. REP. NO. 65-27, at 2 (1917) (August 17, 1916 letter, Sen. Lansing to the President).

14. See Coggins & Patti, *supra* note 2, at 169; see also BEAN & ROWLAND, *supra* note 11, at 17-18 (noting Department of Agriculture urged the Department of State to conclude a treaty).

15. See S. REP. NO. 65-27, at 2 (1917).

16. See Canadian Convention, *supra* note 3. On December 14, 1995, the United States and Canada signed a Protocol amending the Canadian Convention. See S. TREATY DOC. NO. 104-28, August 2, 1996 (Message transmitting Protocol with Protocol attached) [hereinafter Protocol]. The Senate ratified the Protocol on October 23, 1997, but the Protocol does not go into effect until the Parties exchange instruments of ratification. See Protocol, art. II. Although the Protocol was drafted to ensure conformity with aboriginal rights in Canada and with subsistence use by indigenous inhabitants of Alaska, the Protocol effectively rewrote the Convention in order to update it. The revisions redrafted the list of migratory birds by using current taxonomic classifications (Article I), added conservation principles to be used in management of migratory bird populations (Article II), added provisions for preservation and enhancement of the environment (Article IV), and added educational and other purposes as permissible purposes for taking nests and eggs (Article V). The Protocol did not alter Article VII of the original Convention which allows either party to issue permits to kill migratory birds that become seriously injurious to agriculture or to other interests of any particular community.

17. See Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 [hereinafter Mexican Convention].

18. See Convention between 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, March 4, 1972, 25 U.S.T. 3329 [hereinafter Japanese Convention].

19. See Convention between the United States of America and the Union of the Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, November 19, 1976, 29 U.S.T. 4647 [hereinafter Soviet Convention].

20. See 16 U.S.C. § 703 (1994) (referring explicitly to the conventions entered into between the United States with Great Britain, Mexico, Japan, and the Soviet Union); see also *id.* § 715(j) (defining "migratory birds" for purposes of the MBTA by reference to the conventions).

21. See *id.* § 704 (referencing different limitations as "[s]ubject to the provisions and . . . compatible with the terms of the conventions"); see also *id.* § 712 (authorizing regulations as necessary to implement the conventions but without the explicit limitations on compatibility written into 16 U.S.C. § 704).

22. See *id.* § 707 ("any person . . . who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor").

23. See *id.* § 708.

well to review the provisions of the underlying conventions and particularly the more significant differences among these provisions.²⁴

1. Reasons for the Conventions.

The preamble to the Canadian Convention cited only economic factors as reasons for its execution, such as the value of migratory birds as food or as predators of insects that were injurious to crops and to public forests.²⁵ The Mexican Convention cited a broader need to utilize migratory birds rationally "for purposes of sport, food, commerce, and industry."²⁶ The later Japanese and Soviet Conventions broadened the list of reasons even further to include non-economic aesthetic, scientific, and cultural purposes.²⁷ The evolution of reasons for the Conventions continues with the recent Canadian Protocol which lists "conservation principles" to guide actions taken pursuant to that Convention.²⁸ However, the "conservation principles" of the Protocol still have a distinctly economic flavor, speaking of restoring and maintaining populations and habitat of healthy migratory bird populations to maintain a variety of "sustainable uses" and "harvesting needs."²⁹

2. Areas of Applicability.

Neither the Canadian Convention nor the Mexican Convention contains any provisions specifying their geographic coverage. The Japanese and Soviet Conventions expressly define the areas subject to the Conventions as those areas under the jurisdiction of the respective parties.³⁰ The Soviet Convention goes further in one respect. Article IV.3 of the Soviet Convention allows the parties to agree on areas of special importance to migratory birds, including areas not within the jurisdiction of either the United States or the Soviet Union.³¹ The parties are required to ensure that any person subject to their respective jurisdictions

24. See generally *Migratory Bird Treaty With Russia: Continued International Wildlife Protection*, 7 ENVTL. L. REP. 10026 (Feb. 1977) (discussing similarities and differences in the various treaties); see Cyril De Klemm, *The International Law of Migratory Species, Migratory Species in International Law*, 29 NAT. RESOURCES J. 935 (1989) (discussing international treaties which protect migratory species of fish, birds, and terrestrial animals).

25. See Canadian Convention, *supra* note 3 ("whereas" paragraphs). In upholding the constitutionality of the MBTA, the Supreme Court described the Canadian Convention as being intended to protect birds as a source of food and as consumers of insect pests. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

26. Mexican Convention, *supra* note 17, art. I; see also Canadian Convention, *supra* note 3 ("whereas" paragraphs).

27. See Japanese Convention, *supra* note 18 (referring specifically in introductory paragraphs to migratory birds as a recreational, aesthetic, scientific, and economic natural resource); see Soviet Convention, *supra* note 19 (referring in the introductory paragraphs to recreational, aesthetic, scientific, economic, cultural, and ecological values).

28. See Protocol, *supra* note 16, art. II.

29. See *id.*

30. See Japanese Convention, *supra* note 18, art. I; see Soviet Convention, *supra* note 19, art. I.4.

31. See Soviet Convention, *supra* note 19, art. IV.3 (list number II on the "Migratory Bird Habitat" Appendix).

will act in accordance with the Convention's principles regarding such "migratory bird habitat."³²

3. Protected Birds.

Each Convention addresses the problem of defining exactly which birds are protected somewhat differently. The Canadian Convention defines "migratory birds" simply as: migratory game birds, migratory insectivorous birds, and migratory non-game birds.³³ For game birds, the Canadian Convention lists five families, and for each family it lists the common names of groups or species included in the family.³⁴ For insectivorous and non-game birds, however, the Convention lists the groups or species, but not the families.³⁵

The Mexican Convention similarly lists families of birds that "shall be considered migratory," distinguishing migratory game birds from migratory non-game birds.³⁶ Unlike the Canadian Convention, however, the Mexican Convention does not elaborate upon the species included in the listed families.³⁷ Although the restrictive provisions of the Mexican Convention include a specific prohibition against killing migratory insectivorous birds,³⁸ does not define this group or list any families of insectivorous migratory birds.³⁹

The Japanese and Soviet Conventions take a different approach to defining migratory birds. Both define migratory birds to mean species "for which there is positive evidence of migration between the two countries."⁴⁰ The Japanese Convention also includes species or subspecies common to both countries, even in the absence of migration.⁴¹ In contrast, the Soviet Convention includes species or subspecies common to both countries only if they share a common migration area, even if the common area is in a third country.⁴² In addition, both Conventions include a list of individual species that the parties have determined meet the definition of "migratory birds."⁴³

32. *Id.*

33. See Canadian Convention, *supra* note 3, art. I.1, 2, 3.

34. See *id.* art. I.1(a) (listing Families Anatidae or waterfowl, Gruidae or cranes, Rallidae or rails, Limicolae or shorebirds, and Columbidae or pigeons).

35. See *id.* arts. 1.2, 3.

36. See Mexican Convention, *supra* note 17, art. IV.

37. See *id.*

38. See *id.* art. II(E).

39. See *id.* art. IV. Pursuant to Article IV of the Mexican Convention, the United States and Mexico subsequently identified additional migratory birds covered by the Convention but made no distinction between insectivorous and other migratory birds. See also Coggins & Patti, *supra* note 2, at 172 n. 55 (stating that by regulation, the birds were "treated as nongame birds, and protected from hunting").

40. Japanese Convention, *supra* note 18, art. II.1 (a); Soviet Convention, *supra* note 19, art. I.1 (a).

41. See Japanese Convention, *supra* note 18, art. II.1 (b).

42. See Soviet Convention, *supra* note 19, art. I.1 (a)-(b).

43. See Japanese Convention, *supra* note 18, art. II.2 and Annex; Soviet Convention, *supra* note 19, art. I.3 and app. Alone among the Conventions, the Soviet Convention expressly provides for either party to implement more protective measures for listed *and* unlisted species. See Soviet Convention, *supra* note 19, art. VIII (unlisted species), IX (stricter domestic measures).

4. Restrictions and Exceptions.

Each Convention makes some type of provision for closed seasons and for prohibitions on killings and/or nest or egg collection.⁴⁴ Certain exceptions from the hunting prohibitions appear in three of the Conventions for certain indigenous persons.⁴⁵ The Mexican and Japanese Conventions also provide an exception for "private game farms."⁴⁶

44. See Canadian Convention, *supra* note 3, art. II (establishing certain "close [sic] seasons" on hunting). For migratory game birds, the Canadian Convention provides for a closed season from March 10 through September 1, except for certain shorebirds for which the closed season is from February 1 through August 15. The Canadian Convention also prescribes two special, transitional closed seasons for species in need of a recovery period, one of 10 years and one of five years. See Canadian Convention, *supra* note 3, art. III (10-year closed season for certain listed species) and art. IV (5-year closed season or other appropriate regulations for wood duck and eider duck). The Protocol retains a single closed season from March 10 through September 1 for migratory game birds. See Protocol, *supra* note 16, art. I.1 (a).

The Canadian Convention also prohibits the taking of nests and eggs, except for regulated scientific or propagative purposes. See Canadian Convention, *supra* note 3, art. V. The Protocol does not explicitly retain the prohibition on the taking of nests and eggs; it only prohibits their offer for sale. See Protocol, *supra* note 16, art. II.2. However, its express exceptions for the taking of eggs by indigenous Alaskans and aboriginal Canadians suggests an implicit prohibition on taking eggs. See Protocol, *supra* note 16, art. II.4. In addition, the U.S. regulatory definition of "migratory bird" presently includes "any part, nest, or egg of any such bird." 50 C.F.R. § 10.12 (1998).

The Canadian Convention and the Protocol both allow the parties to prescribe hunting seasons restricted to not more than three and one-half months. See Canadian Convention, *supra* note 3, art. II.1; Protocol, *supra* note 16, art. II.1(a).

The Mexican Convention requires the parties to establish closed seasons, during which the taking of migratory birds, nests, and eggs is prohibited. See Mexican Convention, *supra* note 17, arts. II.A, D. Unlike the Canadian Convention, the Mexican Convention does not set forth any specific closed season, except for wild ducks. See Mexican Convention, *supra* note 17, art. II.D. The Mexican Convention requires the parties to limit hunting seasons to a maximum of four months, and the parties agree to prohibit hunting from aircraft. See Mexican Convention, *supra* note 17, arts. II.C, F. Under the Mexican Convention the taking of insectivorous migratory birds is prohibited without any provision for hunting, which effectively creates an all-year closed season, similar to the Canadian Convention, but it makes no mention of nests or eggs of insectivorous birds. See Mexican Convention, *supra* note 17, art. II.E. However, the Mexican Convention does not define insectivorous migratory birds. See *supra* note 39 and accompanying text.

As in other respects, the restrictions and exceptions in the Japanese and Soviet Conventions follow a different model from the Canadian and Mexican Conventions. Neither the Japanese nor the Soviet Convention specifies closed seasons. Instead, each contains a general prohibition on the taking, sale or exchange of migratory birds and eggs followed by a list of exceptions. See Japanese Convention, *supra* note 18, art. III.1 (a)-(e); Soviet Convention, *supra* note 19, art. II.1(a)-(d) (includes a prohibition against the disturbance of nesting colonies). Both Conventions include exceptions allowing indigenous peoples of Alaska, Siberia, or Pacific Trust Territories to take birds for personal needs. See Japanese Convention, *supra* note 18, art. III.1 (e); Soviet Convention, *supra* note 19, art. II.1 (c). Both Conventions also excepted regulated hunting during hunting seasons. See Japanese Convention, *supra* note 18, art. III.1 (c); Soviet Convention, *supra* note 19, art. II.1 (b). Instead of setting a maximum duration for the hunting season, the Japanese and Soviet Conventions simply require that the hunting seasons be established to maintain migratory bird populations. See Japanese Convention, *supra* note 18, art. III.2 (also requires that hunting seasons be established to avoid principal nesting season); Soviet Convention, *supra* note 19, art. II.2.

45. See Japanese Convention, *supra* note 18, art. III.1 (e); Soviet Convention, *supra* note 19, art. II.1 (c) (exceptions for indigenous peoples of Alaska, Siberia, or Pacific Trust Territories to take

The Conventions all provide some type of exception from the taking prohibitions for scientific, propagative, and in some cases educational purposes.⁴⁷ The Canadian and Mexican Conventions also allow action to be taken against injurious birds,⁴⁸ and both the Japanese and the Soviet Conventions permit the regulated taking of migratory birds or eggs to protect persons or property.⁴⁹

5. Transportation.

Each of the Conventions contains provisions restricting or regulating the transportation of migratory birds, eggs, and their parts. The Canadian Convention prohibits the interstate (or inter-province) shipment of migratory birds and parts during the closed season, except for scientific or propagative purposes, and prohibits the international trafficking in any birds or eggs taken either during the closed season or at any time in violation of state or provincial law.⁵⁰ The Canadian Convention also requires shipment between the countries of migratory birds, parts, or eggs to be labeled.⁵¹

The Mexican Convention prohibits transportation of migratory birds and parts during the closed season except pursuant to regulations, from private game farms or when used for scientific purposes, propagative, or museum use.⁵² Unlike the Canadian Convention, the transportation restrictions of the Mexican Convention are not limited to interstate transportation.⁵³ The Mexican Convention also requires a permit for transportation of migratory birds and parts between the countries without restriction to the closed season.⁵⁴

birds for personal needs); Canadian Convention, *supra* note 3, art. II.1 ("Indians may take at any time scoters for food but not for sale"), II.2 (noting that for migratory insectivorous and non-game birds the closed season is all year, except that Eskimos and Indians may take at any season, for personal use (not for sale), certain specified non-game birds), II.3 (describing non-game closed season and exception for Eskimos and Indians to take auks, auklets, guillemots, murrets and puffins). The Protocol retains the all-year "close" season on insectivorous and non-game migratory birds. *See* Protocol, *supra* note 16. However, the Protocol expands the exception for hunting and egg gathering by Alaska residents and removes the exception allowing Indians to take scoters. *See* Protocol, *supra* note 16.

46. Mexican Convention, *supra* note 17, arts. II.A, E; Japanese Convention, *supra* note 18, art. III.1 (d).

47. *See* Canadian Convention, *supra* note 3, art. II; Mexican Convention, *supra* note 17, art. II.A; Japanese Convention, *supra* note 18, art. III.1(a); Soviet convention, *supra* note 19, art. II.1(a).

48. *See* Canadian Convention, *supra* note 3, art. VII. (allowing regulated taking, "under extraordinary conditions," of birds "seriously injurious to the agricultural or other interests of any particular community."); Mexican Convention, *supra* note 17, art. II.E (allowing killing of insectivorous migratory birds "when they become injurious to agriculture and constitute plagues"). The Mexican Convention does not express any exception for non-insectivorous birds, *i.e.*, all those listed in the Convention. *See supra* note 39 and accompanying text (describing the absence of any insectivorous birds in the Mexican Convention migratory bird listing).

49. *See* Japanese Convention, *supra* note 18, art. III.1 (b); Soviet Convention, *supra* note 19, art. II.1 (d).

50. *See* Canadian Convention, *supra* note 3, art. VI.

51. *See* Canadian Convention, *supra* note 3, art. VI.

52. *See* Mexican Convention, *supra* note 17, art. II.A.

53. *See* Mexican Convention, *supra* note 17, art. II.A.

54. *See* Mexican Convention, *supra* note 17, art. III.

The Soviet Convention prohibits the importation and exportation of migratory birds, nests, eggs, and parts, subject to the regulated exceptions allowed for taking of the same.⁵⁵

The only transportation restrictions in the Japanese Convention relate to birds in danger of extinction,⁵⁶ a category distinct from migratory birds.⁵⁷ As to birds in danger of extinction, the parties are required to control their importation and exportation.⁵⁸

6. Habitat.

The Convention provisions relating to habitat are becoming increasingly important as issues are litigated regarding the scope of activities intended to be prohibited under the MBTA.⁵⁹ As with the purposes of the Conventions, over time the desire to protect both the birds *and* their habitats became explicit.

The Canadian Convention has no provisions relating to migratory bird habitat. The Mexican Convention contains only an agreement to establish "refuge zones in which the taking of such birds will be prohibited."⁶⁰ However, both the Japanese and the Soviet Conventions have a number of provisions relevant to habitat.

The Japanese and Soviet Conventions obligate the parties to establish refuges and to undertake to preserve *and* enhance the environment of migratory birds.⁶¹ Both Conventions specify steps the parties are to take to protect and enhance the environment of migratory birds, including restricting the importation of live animals and plants injurious to the birds or their environments,⁶² *i.e.*, exotic species.

The Soviet Convention also requires the parties together to identify and list breeding, wintering, feeding, and moulting areas of special importance in their jurisdictions.⁶³ In addition, the Soviet Convention requires the parties to create lists of "migratory bird habitat" of special importance that are within or outside their jurisdiction.⁶⁴ As to the later habitats, the parties are to "undertake measures necessary to ensure that any citizen or person subject to its jurisdiction will act in accordance with the principles of this Convention in relation to such areas."⁶⁵

55. See Soviet Convention, *supra* note 19, art. II.1.

56. See Japanese Convention, *supra* note 18, art. IV.3.

57. See Japanese Convention, *supra* note 18, art. V.2 (referring to "migratory birds and birds in danger of extinction," as two distinct categories).

58. See Japanese Convention, *supra* note 18, art. IV.3.

59. See *infra* Part III.B.2 (Habitat Modification by Timber Harvest - No Problem).

60. See Mexican Convention, *supra* note 17, art. II.B.

61. See Japanese Convention, *supra* note 18, arts. III.3 ("sanctuaries"), VI (both as to Article III migratory birds and Article IV birds in danger of extinction); Soviet Convention, *supra* note 19, arts. IV.1, VII ("preserves, refuges, protected areas").

62. See Japanese Convention, *supra* note 18, arts. VI (b)-(c); Soviet Convention, *supra* note 19, art. IV.2 (b).

63. See Soviet Convention, *supra* note 19, art. IV.2(c).

64. See Soviet Convention, *supra* note 19, arts. IV.2(c) ("list number I"), IV.3 ("list number II").

65. Soviet Convention, *supra* note 19, art. IV.3.

7. Endangered Birds and Research.

Again showing the gradual expansion in breadth of the Conventions, the later Japanese and Soviet Conventions, in contrast to the earlier Canadian and Mexican, have provisions relating to birds in danger of extinction.⁶⁶ The later Conventions require the parties to identify and report to each other species in danger of extinction.⁶⁷ The Japanese Convention requires the parties to control the importation and exportation of endangered species but does not specify the nature of the controls.⁶⁸ The Soviet Convention requires the parties to take into account the management plans for any endangered species.⁶⁹

II. MBTA IMPLEMENTATION OF THE CONVENTIONS

A. MBTA Enactment

The Conventions were not perceived to be self-executing⁷⁰ and Congress has implemented all four Conventions primarily through the MBTA.⁷¹

Proponents of the original MBTA focused, as did the initial Conventions, primarily on the economic benefits derived from migratory birds, including their value "as a source of food or in destroying insects."⁷² Opponents of the Act generally did not dispute the economic value of migratory birds nor even the need to conserve them. Instead, opposition arose from a belief that the Act violated

66. See Japanese Convention, *supra* note 18, art. IV. See also Japanese Convention, *supra* note 18, art. V.2 (discussing both "migratory birds and birds in danger of extinction") (emphasis added).

67. See Japanese Convention, *supra* note 18, art. IV.2; Soviet Convention, *supra* note 19, art. V.2.

68. See Japanese Convention, *supra* note 18, art. IV.3.

69. See Soviet Convention, *supra* note 19, art. V.3. Birds in danger of extinction now receive protection under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 – 1544 (1994 & Supp. 1998), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087.

70. For a discussion of the extent to which international treaties are self-executing, see generally Comment, *The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D. L. REV. 307, 312-16 (1974) (observing that with the exception of Article VII, every reference in the Canadian Convention to implementing laws or regulations refers to an exception to the prohibitions of the Convention, and in 1951, a State Department memorandum used the MBTA as an example of a self-executing treaty).

71. The MBTA was enacted in 1918 and amended in 1936, 1960, 1969, 1974, 1978, 1986, 1989, and 1998. In 1939, responsibility for enforcing the statute was shifted to the U.S. Department of the Interior from the U.S. Department of Agriculture. See 1939 Reorganization Act Plan No. II, § 4(f), 53 Stat. 1431, 1434. The MBTA is presently codified at 16 U.S.C. §§ 703-712. Subsequently other statutes were enacted, in whole or in part, to implement the migratory bird conventions. See Migratory Bird Conservation Act, 16 U.S.C. §§ 715-719c (1994 & Supp. 1998) (providing for the implementation of the Migratory Bird Convention); Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994 & Supp. 1998); Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668 *et seq.* (1994).

72. S. REP. NO. 65-27, at 2 (1917); H.R. REP. NO. 65-243, at 2-3 (1918); 55 CONG. REC. 7448 (1918) (statement of Rep. Robbins) (acknowledging the importance of "insectivorous migratory birds" in protecting food crops).

states' rights under the constitution,⁷³ and from concerns over the warrantless search provisions of the Act as originally proposed.⁷⁴

Congress gave only limited attention to the scope of the MBTA's protection, now perhaps its most controversial aspect.⁷⁵ Opponents charged that the Act would reach general killings of birds.⁷⁶ Proponents did not contest the opponents' broad reading⁷⁷ but, instead, argued that broad powers were needed for effective enforcement,⁷⁸ and that any harshness would be tempered by prosecutorial discretion and judicial lenity.⁷⁹

After modifying the bill to require warrants for searches,⁸⁰ Congress enacted the MBTA on July 3, 1918.⁸¹ Since that time, Congress has amended the Act to implement each of the three succeeding Migratory Bird Conventions with Mexico, Japan, and the former Soviet Union.⁸² The Supreme Court has held that the

73. See 56 CONG. REC. 7360-81 (1918); *id.* at 7446-47 (statement of Rep. Tillman); *id.* at 7449 (statement of Rep. Caraway); *id.* at 7450-51 (statement of Rep. Mondell); *id.* at 7452 (statement of Rep. Huddleston). See also *id.* at 7445 (statement of Rep. Bland) (questioning the constitutionality of delegation of authority to define illegal actions by regulation). But see *id.* at 7448 (statement of Rep. Robbins) (arguing the need for consistent enforcement and hunting seasons from state to state).

74. See 65 CONG. REC. at 7440-61 (1918). Opponents warned that federal officers "will pin the bottom of an oyster can upon their coats and invade the homes of free citizens." *Id.* at 7449 (statement of Rep. Caraway); *id.* at 7447 (statement of Rep. Tillman) ("Such a person may come with the end of a tomato can appended to the lapel of his coat as his badge of authority. . .").

75. See *United States v. Moon Lake Elec. Ass'n*, 45 F.Supp. 1070, 1079-82 (D. Colo. 1999) (providing a thorough presentation of the legislative history of the MBTA).

76. "When you kill any kind of bird . . . you will kill it by permission of the Secretary of Agriculture . . ." 65 CONG. REC. 7364 (1918) (statement of Rep. Huddleston); see *id.* at 7453 (statement of Rep. Green) ("The effect of this is to put the whole thing absolutely in the power of the Secretary of Agriculture to make regulations . . .").

77. Proponents did contest one extreme reading. Opponents of the Act raised specters of a "barefoot boy" who kills a songbird or takes a robin's egg, suggesting that he would be "hauled before a court, sent to jail, or fined the heavy fine provided by this bill." *Id.* at 7364 (statement of Rep. Huddleston); see *id.* at 7455 (statement of Rep. Mondell). See *id.* at 7447 (statement of Rep. Tillman) (stating bill would make "mollycoddles" and "sissies" of our boys). Proponents of the Act suggested such concerns were fanciful. See *id.* at 7456 (statement of Rep. Dempsey) ("to imagine [such prosecutions] and to spend time in talking about them would be bad enough if it were done in sport"); *id.* at 7367 (statement of Rep. Platt) ("Now, of course, it is utter nonsense to talk about the little boy going to school with birds' eggs in his hands to show the scholars. He would come under the provisions of the bill in regard to providing eggs for scientific purposes.").

78. See *id.* at 7441 (statement of Rep. Miller); *id.* at 7454 (statement of Rep. Lea) (arguing that effective enforcement requires discretionary power to prescribe appropriate regulations).

79. See *id.* at 7441 (statement of Rep. Miller) (explaining that advice and cooperation of game commissions will temper any "high-handed or arbitrary" actions by the Department); *id.* at 7444 (statement of Rep. Dowell) (stating punishment will be solely a matter for the courts, not for the Department); *id.* at 7452 (statement of Rep. Flood) (rejecting notion that maximum fine of \$500 and maximum imprisonment of one day is severe); *id.* at 7457 (statement of Rep. Cooper) (suggesting that maximum penalties are not severe).

80. See 16 U.S.C. § 706 (1994).

81. 40 Stat. 755 (1918); see 16 U.S.C. § 706.

82. See 16 U.S.C. §§ 703, 712; BEAN & ROWLAND, *supra* note 11, n.43 (observing "[n]otwithstanding the many differences among them, the ratification of each new convention did not result in a major overhaul of the Act but only in technical amendments that merely added appropriate references to each subsequent convention").

conventions “establish *minimum* protections for wildlife; Congress could and did go further in developing domestic conservation measures” (*i.e.*, the MBTA).⁸³

B. Constitutional Challenges

Rooted in the exercise of treaty powers, the MBTA, unlike the Migratory Bird Act of 1913, withstood judicial scrutiny. First and most importantly, the Supreme Court upheld the constitutionality of both the MBTA and the Canadian Convention as valid exercises of treaty powers.⁸⁴ The Court observed that, “[h]ere a national interest of very nearly the first magnitude is involved.”⁸⁵

The Supreme Court later held that MBTA prohibitions on the sale of bird parts are not Fifth Amendment “takings” of property.⁸⁶ The MBTA “taking” (*i.e.*, hunting) prohibitions also were held not to constitute a Fifth Amendment taking, even when private lands are consequently closed to hunting.⁸⁷ “Numerous cases have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking.”⁸⁸ Moreover, a property owner has no unconditional or absolute right to kill federally-protected wildlife, including migratory birds, in defense of his property. The Ninth Circuit stated,

83. *Andrus v. Allard*, 444 U.S. 51, 62 n.18 (1979) (emphasis added). *But see* BEAN & ROWLAND, *supra* note 11, n.43 (“Thus, to the extent that the new features of the later conventions cannot be subsumed within the general language of the Act, those features remain unimplemented by domestic legislation.”).

84. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920). The Supreme Court’s reliance on the Federal government’s treaty powers contrasts with its reliance on commerce clause powers to validate subsequent environmental legislation. Its reliance on treaty powers derived from a more restrictive view of the scope of the Commerce Clause in 1913 than just 25 years later, by which time the judicial climate had changed markedly. In *Cerritos Gun Club v. Hall*, 96 F.2d 620, 624 (9th Cir. 1938), a suit to enjoin prosecution under the MBTA for luring migratory game fowl, the Ninth Circuit said, “[w]e are fully in accord with Judge Evans’ opinion and the government’s contention that these birds may be regulated by Congress as subject of [sic] interstate commerce.” Similarly, in *Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir. 1937), the Seventh Circuit, in reviewing MBTA convictions, opined, “[o]ur conclusion therefore is that the legislation was authorized by the Commerce Clause, as well as by the treaty.” *See also Andrus*, 444 U.S. at 63 n.19 (“the underlying assumption that the national commerce power does not reach migratory wildlife is clearly flawed”) (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)).

85. *Holland*, 252 U.S. at 435.

86. *See Andrus*, 444 U.S. at 64, 67-68; *see also* *United States v. Richards*, 583 F.2d 491, 496 (10th Cir. 1978) (stating that defendant’s possession of sparrow hawks pursuant to state permits prior to federal regulation did not create property rights; therefore, the subsequent federal regulations prohibiting sale of the birds did not cause an unconstitutional deprivation of property).

87. *See Lansden v. Hart*, 168 F.2d 409, 412 (7th Cir. 1948) (observing that the Presidential Proclamation closed land to hunting around State game preserve); *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) (noting that the regulation closed private lands to hunting around federal wildlife refuge); *Bishop v. United States*, 126 F. Supp. 449, 452 (Ct. Cl. 1954) (holding that the United States was not liable for a taking in relation to the damage caused by the prohibition against hunting on private lands).

88. *Christy v. Hodel*, 857 F.2d 1324, 1334 (9th Cir. 1988) (citing, for example, *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1428-29 (10th Cir. 1986) (summarizing decisions of courts rejecting compensation demands under different legal theories), *cert. denied*, 480 U.S. 951 (1987)), *cert. denied*, 490 U.S. 1114 (1989). *See also Sickman v. United States*, 184 F.2d 616, 619 (7th Cir. 1950) (noting that depredation by protected wildlife is compensable under Federal Tort Claims Act), *cert. denied*, 341 U.S. 939 (1951).

“we decline plaintiff’s invitation to construe the fifth amendment as guaranteeing the right to kill federally-protected wildlife in defense of property.”⁸⁹ Instead, “regulations require landowners to seek the assistance of a governmental official who is expected to act in the public interest.”⁹⁰

Finally, the MBTA has survived at least one challenge alleging that it was unconstitutionally vague and overbroad.⁹¹ Other courts have found vagueness in particular regulations or applications.⁹² However, reflecting the struggle courts encounter in applying the MBTA’s strict liability standard, discussed *infra* Part III. B.

C. Structure of the MBTA

The MBTA in many ways acts as a skeleton upon which the implementing regulations necessarily place the flesh. For example, the MBTA initially sets forth a sweeping prohibition against taking, killing or possessing “at any time, by any means or in any manner,” migratory birds, parts, nests, eggs or products thereof.⁹³ While it is seemingly overreaching on its face, this prohibition was written in contemplation of modifying its regulations. Under Section 704 of the MBTA, the Secretary of the Interior is

authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, next, or egg thereof, and to adopt suitable regulations permitting and governing the same⁹⁴

The Secretary also is explicitly authorized (though not directed) to issue implementing regulations related to the Conventions.⁹⁵ These implementing

89. *Christy*, 857 F.2d at 1330.

90. *United States v. Darst*, 726 F. Supp. 286, 288 (D. Kan. 1989).

91. *See United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994) (ruling that the ban on the possession of bald eagle feathers was neither vague nor overbroad based on the “plain language” of the statute).

92. *See United States v. Chew*, 540 F.2d 759, 761 (4th Cir. 1976) (holding that the definition of “bag limit” was vague, ambiguous, and overbroad, but the conviction was upheld because there was no ambiguity as to “killing,” with which defendant was charged); *United States v. Rollins*, 706 F. Supp. 742, 744-45 (D. Idaho 1989) (holding that the MBTA criminal provision was unconstitutionally vague as applied where, *inter alia*, pesticides were used in accordance with the instructions on the label).

93. 16 U.S.C. § 703 (1994). For the exact language of this prohibition, *see infra* Part II.D.

94. *Id.* § 704.

95. *See id.* § 712(2). Section 712 also provides specific authorization for the Secretary to issue regulations “to assure that the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of the State of Alaska shall be permitted for their own nutritional and other essential needs” *Id.* § 712(1). This statutory provision has not been used following the Ninth Circuit’s decision in *Alaska Fish & Wildlife Fed’n & Outdoor Council v. Dunkle*, 829 F.2d 933, 945 (9th Cir. 1987) (holding that the regulations must comport with the most restrictive provisions of the Conventions). Because the Canadian Convention did not contain an exemption that would comport with this statutory provision, implementing regulations for Section 712 are not in effect. The still-pending Canadian Protocol may remove this impediment by permitting such takes by indigenous peoples. *See infra* Part III.A.2 (Exclusion of Non-Native Species) for discussion of the exclusion of

regulations, discussed in relevant part *infra*, delineate hunting seasons and methods, provide complete exemptions for certain limited activities by limited groups of people, and provide for permits for other types of activities, rendering the initial flat prohibition eminently workable.

The MBTA also includes a prohibition against the transportation or importation of certain migratory birds, parts, eggs or nests thereof, depending on the manner and place of previous acquisition and possession.⁹⁶ States and Territories are explicitly free to make and enforce laws and regulations that provide even further protection to migratory birds, nests and eggs, consistent with the MBTA and the Conventions.⁹⁷ The MBTA also provides for seizure and forfeiture of birds, parts, nests, or eggs thereof that are, in some manner, found to have been obtained or handled contrary to the provisions of the MBTA.⁹⁸

Finally, and for our present purposes most importantly, the MBTA sets forth the parameters for both felony and misdemeanor criminal violations of the general prohibition of Section 703.⁹⁹

D. General Prohibitions

The general MBTA proscription states:

Unless and except as permitted by regulations made as hereinafter provided, . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, . . . sell, . . . barter, . . . purchase, . . . ship, . . . or . . . transport . . . any migratory bird, any part, nest, or eggs of any such bird, . . . included in the terms of the conventions between the United States and Great Britain . . . [Mexico] . . . Japan . . . [and the Soviet Union].¹⁰⁰

non-native species from the conventions; *infra* Part III.C.1 (Rights Under the Conventions) for discussion of Native Americans' rights under the Conventions.

96. See 16 U.S.C. § 705.

97. See *id.* § 708.

98. See *id.* § 706.

99. See *id.* § 707. The remaining MBTA provisions relate to appropriations and arrest and search warrant powers. *Id.* §§ 706, 709a.

100. *Id.* § 703. Section 703 also prohibits attempts or offers to do most of the prohibited activities. In 1998, Congress added a new prohibition on the use of bait:

(b) It shall be unlawful for any person to -

(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on, or over the baited area.

Section 102(b), Migratory Bird Treaty Reform Act of 1998 (enacting 16 U.S.C. § 704(b)). Note that the Reform Act makes it a crime to take either (1) by aid of baiting, or (2) on or over any baited area, terms that are more fully described by regulation. See 64 Fed. Reg. 29799, 29804 (June 3, 1999) (promulgating 50 C.F.R. § 20.11(j) (1998) (baited area) and (k) (baiting)). The new crime for placement of bait does not appear to apply to placement of bait in aid of hunting that is not conducted on or over the baited area even though the hunting itself is illegal. A full discussion of issues related to migratory game bird hunting, including baiting, is beyond the scope of this article.

As noted above, these broad prohibitions of the MBTA¹⁰¹ are circumscribed by the regulations contemplated therein.¹⁰²

E. Regulatory Exceptions

Definitions of terms used in the MBTA are contained both in the migratory bird hunting and permit regulations,¹⁰³ and begin the process of qualifying the broad prohibitions, and in the general regulations.¹⁰⁴ The hunting regulations establish hunting season exceptions to the prohibitions, including season lengths and bag limits, which are revised annually.¹⁰⁵ Permanent migratory game bird regulations specify tagging and identification requirements, prohibit certain hunting methods, and address related matters.¹⁰⁶

In addition to the exceptions for hunting, the regulations provide all-important exceptions for otherwise-prohibited activities.¹⁰⁷ Each of the exceptions generally requires either (1) that the person undertaking the otherwise-prohibited activity fall into a particular job category, or act with regard to only captive-reared species; or (2) that a permit authorizing the activity in question be obtained in advance of the activity.¹⁰⁸

1. Permit-less Exceptions

The first, permit-less type of exception encompasses Department of Interior enforcement personnel who must, to perform their official duties, take, acquire, possess, transport or "dispose of migratory birds, or their parts, nests or eggs."¹⁰⁹ A similar job-related exception applies to "[s]tate game departments, municipal game farms or parks, and public museums, public zoological parks, accredited members of the American Association of Zoological Parks and Aquariums and

101. The MBTA itself does contain one restriction on the breadth of this prohibition when it provides that "[n]othing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply." 16 U.S.C. § 711. However, even that limitation is again dependent on "proper regulation." *Id.*

102. For a brief description of experience with regulations in the first 60 years of the MBTA, before the advent of regulatory challenges by environmentalists, see Coggins & Patti, *supra* note 2 at 197. The regulations have not been revised to reflect the recent, December 14, 1995, Protocol with Canada.

103. See 50 C.F.R. §§ 20.11 (Migratory Bird Hunting definitions), 21.3 (Migratory Bird Permits definitions). The major difference between Part 20 and Part 21 is that Part 20 was meant to, and largely does apply only to migratory game birds. Compare *id.* § 20.1(a) with *id.* § 21.1.

104. See *id.* §§ 10.11, 10.12. For example, "Take means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 10.12. However, "barter" and "sale" are defined in neither the MBTA nor in the implementing regulations.

105. See *id.* §§ 20.100-110 (Part 20, subpart K). A discussion of migratory bird hunting regulations is beyond the scope of this article.

106. See *id.* §§ 20.21, 20.36, 20.81, 20.131-134 (Part 20, subparts A through J and L).

107. See *id.* §§ 21.11, 21.12.

108. The regulations maintain a clear distinction between game and non-game migratory birds (see *id.* §§ 10.12, 20.11), as did the Canadian and Mexican conventions. Game bird hunting and related activities are regulated by *id.* § 20 (Part 20, Migratory Bird Hunting).

109. *Id.* § 21.12(a).

public scientific or educational institutions."¹¹⁰ This exemption allows them to acquire migratory birds, their parts, nests, eggs, or progeny, without a permit but only where the person from whom they receive the item legally acquired it pursuant to a permit or under Section 21.12(a).¹¹¹ A further general exception is granted for the acquisition, possession and transportation of lawfully acquired and properly marked captive-reared migratory waterfowl, and is extended to include sale, trade, disposition and donation where the waterfowl in question are mallard ducks.¹¹² Finally, any person may sell or barter the feathers of migratory waterfowl¹¹³ "killed by hunting, . . . or seized and condemned by Federal or State game authorities" for the making of fishing flies, bed pillows, mattresses, and similar commercial uses.¹¹⁴ They may not be used for millinery or ornamental use, nor for mounted specimens of birds taken.¹¹⁵

2. Exceptions Requiring a Permit.

a. Common Permits

Of greater significance with relation to enforcement of the United States' treaty obligations under the MBTA are exceptions that require prior acquisition of a permit, especially for takings of migratory birds by private citizens.¹¹⁶ Several of the possible permits address pre-existing interests and industries affected by the prohibitions of the MBTA. For example, a permit can be obtained authorizing "taxidermy services on migratory birds or their parts, nests or eggs."¹¹⁷ Permits are available for scientific collecting activities and falconry activities, including raptor propagation.¹¹⁸ Complementing the exceptions established for captive-reared migratory waterfowl, permits are also available to authorize the sale, trade, donation or other disposal of "captive-reared and properly marked migratory waterfowl or their eggs."¹¹⁹

Many of these possible permits are conditioned on the permittee maintaining records of their activities. For example, a person holding a taxidermist permit is required to keep accurate records on a yearly basis "showing the names and addresses of persons from and to whom migratory birds or their parts, nests or eggs were received or delivered, the number and species of such, and the dates of receipt and delivery," as well as records documenting his legal "acquisition of any captive reared" migratory waterfowl from a holder of a current waterfowl

110. *Id.* § 21.12(b).

111. *See id.* § 21.12(b).

112. *See id.* §§ 21.13, 21.14.

113. Waterfowl is a synonym for the bird family Anatidae. *See Canadian Convention, supra* note 3, art. I(a).

114. 50 C.F.R. § 20.91

115. *See id.*

116. *See id.* §§ 21.21-28, 21.30.

117. *Id.* § 21.24

118. *See id.* §§ 21.23, 21.28, 21.30. Note that persons engaged in falconry may also be affected by the Endangered Species Act, 16 U.S.C. §§ 1531-1544, the Lacey Act, 16 U.S.C. §§3371-3378, the Bald and Golden Eagle Protection Act, 16 U.S.C. §§668-668d. Persons must possess a permit in order to take, possess, sell, etc. any raptor for falconry. *See id.* § 21.28. For a discussion of federal falconry regulations, *see* Robert F. Kennedy, Jr., *Falconry: Legal Ownership and Sale of Captive-Bred Raptors*, 4 PACE ENVTL. L. REV. 349, 358-60 (1987).

119. 50 C.F.R. § 21.25.

sale and disposal permit.¹²⁰ Such records, and even just the requirement that they be created and maintained, can significantly enhance enforcement capabilities and can be an effective deterrent to potential violators.

b. Special Purpose Activities Permits

Two additional types of permits are of significant interest. First, special purpose permits may be issued for "special purpose activities related to migratory birds, their parts, nests, or eggs."¹²¹ Such permits are a catchall intended to address circumstances in which a proposed activity would benefit the migratory bird resource, or is justified by "important research reasons, reasons of human concern for individual birds, or other compelling justification[s]."¹²² Over the years special purpose permits have come to be used for six identifiable categories of activities: (1) wildlife rehabilitation, (2) special purpose possession (i.e., educational purposes), (3) captive-bred migratory game bird activities¹²³, (4) Indian religious uses (other than eagle parts which are addressed under 50 C.F.R. Part 22), (5) salvage of dead birds, and (6) miscellaneous activities such as, historically, airport safety.¹²⁴

c. Depredation Permits and Orders

Second, and perhaps most importantly, permits are available for the taking, possession or transportation of migratory birds for depredation control purposes.¹²⁵ Permit applications for taking depredating migratory birds must describe the area where depredations occur, the nature of the interests injured, the extent of the injury, and the particular migratory bird species committing the injury.¹²⁶ While the regulations list the basic information that must be included for this type of permit application, there is no guidance for what circumstances

120. *Id.* § 21.24(d)(1); *see also* §§ 21.23(c)(4) (requiring reports on scientific collection activities), 21.24(d)(1) (requiring annual reports from holders of waterfowl sale and disposal permits).

121. *Id.* § 21.27.

122. *Id.*

123. At least those captive-bred migratory game birds, such as sandhill cranes, not already covered under the provisions addressing captive-bred migratory waterfowl, *id.* §§ 21.14, 21.25, as discussed above.

124. The MBTA regulations are periodically revised, including those governing the special purposes permits. It is anticipated at this time that some of the most common categories of special purposes permits, such as those issued for wildlife rehabilitation, will be addressed separately under the proposed revised regulations rather than continuing under the old catchall special purpose regulations. Interview with George Allen, United States Fish and Wildlife Service (Oct. 13-14, 1999).

125. *See* 50 C.F.R. § 21.41. "Depredation" is not explicitly defined in the regulations. *See, e.g., id.* §§ 10.12 (general definitions), § 21.3 (Migratory Bird Permit definitions). No permit is required for activities that merely herd or scare depredating migratory birds, except threatened or endangered species, or bald or golden eagles, for which permits are required under the Endangered Species Act, 16 U.S.C §§ 1531-1544, and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d. *See id.* § 21.2(b).

126. *See id.* § 21.41(b). *See also id.* Part 13 (General Permit Procedures), which specifies additional permit application requirements.

would allow proper issuance of the depredation permit.¹²⁷ Thus, the regulations effectively grant broad discretion to issue such depredation permits with the respective Regional Directors of the United States Fish and Wildlife Service.¹²⁸

Some instruction as to the circumstances in which takings of depredating migratory birds could be expected to be authorized may be gleaned from analogous regulations. Regulations authorize the Director of the USFWS to issue standing depredation orders in the Federal Register “[u]pon the receipt of evidence clearly showing that migratory game birds have accumulated in such numbers in a particular area as to cause or about to cause serious damage to agricultural, horticultural, and fish cultural interests.”¹²⁹ Such standing orders, as opposed to permits, are used in circumstances involving chronic and well-documented instances of depredation to authorize persons to kill, without a depredation permit, particular species of birds found depredating in particular locations. For example, in March 1998, the Service promulgated regulations authorizing until April 30, 2005 (unless specifically revoked earlier), under certain conditions, the killing of double-crested cormorants when the cormorants were found committing or about to commit depredations to aquaculture stocks on premises used for the production of such stocks.¹³⁰

To ensure that depredation permits are not abused, birds killed pursuant to a depredation permit, or a depredation order, must be disposed of in accordance with the law. This usually requires turning the birds over to a Fish and Wildlife Service representative for disposition to a charitable or similar institution.¹³¹ The birds can be used for food by charitable or other institutions, or in some cases provided to a scientific or educational institution, but are not to enter commercial trade or otherwise conflict with the intentions and goals of the Migratory Bird Treaties entered into by the United States.¹³²

F. *Criminal Provisions*

The MBTA provides for both felony and misdemeanor offenses. The types of activities that can form the basis of a felony offense are more limited than the types that can form the basis of a misdemeanor. In addition, a felony offense includes a basic *mens rea* requirement of knowledge.

1. Felony Offenses

Where no exception applies and no permit has been obtained, the MBTA, 16 U.S.C. § 707(b), provides:

Whoever, in violation of this subchapter shall *knowingly*

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

127. See *id.* § 21.41(b). See also 50 C.F.R. § 2.1 (describing responsibility of various field installations for performing program operations of the FWS).

128. See *id.* § 21.41. See also *id.* §§ 2.1 (describing responsibility of various field installations for performing program operations of the FWS), 2.2 (listing locations and geographic jurisdiction of seven FWS regional offices).

129. *Id.* § 21.42.

130. See *id.* § 21.47.

131. See *id.* § 21.41(c)(4).

132. See *id.*; 16 U.S.C. §§ 704, 712 (1994) (authorizing regulations).

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony¹³³

[Emphasis added.]¹³⁴

Thus, felony offenses are reserved for activities involving an element of commerce, that is, sale or barter, as well as knowledge.¹³⁵ The maximum penalties for a felony violation are two years imprisonment, a \$250,000 fine for an individual (\$500,000 for an organization), or both.¹³⁶

133. The person committing the violation must have knowledge that he or she is conducting the activity giving rise to the violation but need not know the law. That is, the government must show that the defendant's actions were intentional but need not show that the defendant knew they were illegal.

It is not intended that proof be required that the defendant knew the taking, sale, barter or offer was a violation of the subchapter, nor that he know the particular bird was listed in the various international treaties implemented by this Act.

United States v. Pitrone, 115 F.3d 1, 5 (1st Cir. 1997) (quoting S. Rep. 99-445 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128). *See also Pitrone*, 115 F.3d at 6 (contrasting "knowingly" with "willfully" - a word which is conspicuously absent from Section 707 (b) - [and which] sometimes has been construed to require a showing that the defendant knew his behavior transgressed the law.").

134. 16 U.S.C. § 707(b). Although not made explicit, the MBTA felony provision also includes trafficking in bird parts. *See* 50 C.F.R. § 10.12 ("migratory bird" means any bird . . . including any part, nest, or egg of any such bird, or any product"); *Pitrone*, 115 F.3d at 8-9 (MBTA felony conviction of taxidermist for unpermitted sale of mounted waterfowl).

135. Congress did not add the "knowing" scienter requirement to the felony provision until 1986. Title V, § 501 of Pub. L. No. 99-645, 100 Stat. 3582, 3590 (1986). It did so in response to the Sixth Circuit holding that when creating a crime which carries a substantial penalty, "Congress must require the prosecution to prove the defendant acted with some degree of scienter." *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985). The procedures leading to the *Wulff* decision were curious. The original indictment alleged the defendant "knowingly" violated the MBTA. *See Wulff*, 758 F.2d at 1122. The defendant moved to strike the word "knowingly" as surplusage, to which the prosecution agreed. *See id.* The defendant then moved to dismiss the indictment as a violation of due process because the MBTA did not require guilty knowledge, a motion the trial court granted following the defendant's conviction at trial. *See id.* The Sixth Circuit held that Congress intended the MBTA to be a strict liability statute and the court refused to read a scienter requirement into the Act. *See id.* at 1124. Consequently, the court held that the failure to require proof of some degree of scienter in the MBTA felony provision violated due process. *See id.* at 1125.

Immediately after Congress amended the MBTA in response to the *Wulff* decision, the Third Circuit rejected the reasoning of *Wulff*. *See United States v. Engler*, 806 F.2d 425, 435 (3d Cir. 1986). The Third Circuit agreed with the Sixth Circuit that the MBTA violations, including the felony violation, were strict liability offenses and that the court could not supply a scienter requirement not intended by Congress. *See Engler*, 806 F.2d at 431-32. Nevertheless, in a very thoroughly reasoned opinion, the Third Circuit observed that the Supreme Court repeatedly affirmed felony convictions in strict liability criminal prosecutions. *See id.* at 433-35. Significantly, in reaching its result, the Third Circuit rejected the prosecution's concession that the absence of a scienter requirement in the MBTA felony provision violated due process. *See id.* at 433.

136. *See* 16 U.S.C. § 707(b) (stating two year imprisonment); 18 U.S.C. § 3571(b)(3), (c)(3) (providing fine amount). Alternative fines equal to twice the pecuniary gain or loss caused by the offense are also available. *See id.* § 3571(d). The MBTA does not set minimum fines. For non-petty offenses, including all felonies, the Sentencing Guidelines do set minimum fines depending on the severity of the offense. *See U.S. SENTENCING GUIDELINES MANUAL* §§ 5E1.2(c) (1998) (setting

2. Misdemeanor Offenses

The MBTA provides that:

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 [50 C.F.R. Parts 20 and 21] made pursuant to this subchapter shall be deemed guilty of a misdemeanor¹³⁷

In contrast to the felony offense, no knowledge is required for a misdemeanor conviction under the MBTA—it is a strict liability offense.¹³⁸

For offenses committed before October 30, 1998, the maximum penalties were six months imprisonment, a \$5,000 fine for an individual (\$10,000 for an organization), or both.¹³⁹ As of October 30, 1998, Congress increased the maximum fine to \$15,000 for both individuals and organizations.¹⁴⁰

minimum fines for individuals), 8C2.4(a) (setting “base fines” for organizations); 18 U.S.C. § 19 (petty offenses defined) (1994).

137. 16 U.S.C. § 707(a).

138. See *infra* note 206.

139. See 16 U.S.C. § 707(a) (specifying maximum imprisonment); 18 U.S.C. § 3559(a)(7) (defining a Class B misdemeanor); *id.* §§ 3571(b)(6), (c)(6) (setting alternative maximum fines for Class B misdemeanors). As with felonies, a fine equal to twice the pecuniary gain or loss caused by the offense, whichever is greater, is available as an alternative fine for any MBTA misdemeanor offense. *Id.* § 3571(d). In contrast to MBTA felonies, the Sentencing Guidelines do not set minimum fines for MBTA misdemeanors because, with the exception of the new misdemeanor for placing bait, the maximum sentence for MBTA misdemeanors is not greater than six months, making them Class B misdemeanors. See *id.* § 3559 (7) - (9) (defining Class B and C misdemeanors and infractions - offenses punishable by six months or less, i.e., petty offenses); U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (1994) (explaining that sentencing guidelines do not apply to Class B or C misdemeanors or to an infraction).

The district court for each judicial district may, for petty offenses, by local rule, provide that “a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing the termination of the proceedings.” FED. R. CRIM. P. 58(d)(1). Many MBTA violations are resolved by such “forfeiture of collateral,” a process analogous to paying a traffic ticket without appearing in court.

140. See 16 U.S.C. § 707(a); Migratory Bird Treaty Reform Act of 1998, Pub. Law No. 105-312, § 103 (amending 16 U.S.C. § 707(a) (defining the maximum fine)). Although the maximum MBTA misdemeanor fine exceeds that specified by the statutory definition of a petty offense (\$5,000 for individuals and \$10,000 for organizations), see 18 U.S.C. §§ 19, 3559(a)(7), 3571(b)(6), & (c)(6), at least one court has held, in the context of the Endangered Species Act, that a maximum fine as great as \$25,000 does not alter the otherwise “petty” classification of an offense (with a maximum prison term of 6 months or less) for the purposes of the Sixth Amendment right to trial by jury. See *United States v. Clavette*, 135 F.2d 1308, 1310 (9th Cir. 1998). See also S. REP. NO. 105-366.

III. ENFORCEMENT ISSUES

A. *What is Protected*

The scope of the MBTA in terms of the types of birds it protects is quite broad. It has been said that the regulatory "list of migratory birds entitled to protection includes almost all native North American birds."¹⁴¹

Evidence of actual migration between the United States and treaty countries is not required. Birds bred and raised in captivity are included if they are members of listed species¹⁴² although the regulations create exceptions for captive-reared migratory waterfowl.¹⁴³ Birds acquired before the MBTA prohibitions were enacted, known as "pre-Act" birds, as well as their parts and products may also be subject to the Act's prohibitions.¹⁴⁴ The MBTA protects some species not listed in the Conventions¹⁴⁵ and, in some respects, the coverage of the MBTA

141. Coggins & Patti, *supra* note 2, at 180 ("but excludes some non-migratory species such as quail, prairie chickens, and turkeys, and introduces ('exotic') species such as starlings, house sparrows, and ring-necked pheasants").

142. See 50 C.F.R. § 10.12 (1998) (defining "migratory bird" as: "whatever its origin, whether or not raised in captivity"); *United States v. Richards*, 583 F.2d 491, 495 (10th Cir. 1978) ("[t]he fact that captive birds do not migrate is immaterial."); *United States v. Lumpkin*, 276 F. 580, 584 (N.D. Ga. 1921) (setting forth jury instruction to determine if the birds which the defendant shot were migratory birds); see also 50 C.F.R. § 21.3 (defining "captivity"). *But see* *United States v. Connors*, 606 F.2d 269, 272 (10th Cir. 1979) (holding that captive-reared ducks are not included in the treaties). The *Connors* decision purported to interpret an ambiguity in the treaties, the first two of which include only *wild* ducks and the last of which includes ducks without any limitation. See *Connors*, 606 F.2d 272. The decision, however, relied upon the regulatory definition of migratory *game* birds, as an agency interpretation of an ambiguity. See 50 C.F.R. § 20.11 (1998). *Connors* was probably erroneous when decided and of even less weight in light of subsequent amendments to the regulations and to the Canadian Convention, for the following reasons: (1) *Connors* was charged with hunting migratory birds, not migratory *game* birds, therefore, the migratory *game* bird definition in the regulations, upon which the court relied, was not the agency's interpretation of the meaning of migratory bird; (2) Even the definition of migratory *game* birds, 50 C.F.R. § 20.11, upon which the court relied, no longer limits its scope to only *wild* ducks. *Connors*, 606 F.2d at 271; and (3) Section 712 of the MBTA authorizes the Secretary "to issue such regulations as may be necessary to implement the provisions of the conventions." 16 U.S.C. § 712. Presently, the Secretary defines migratory birds to include captive-raised birds. See 50 C.F.R. § 10.12. The definition, which is broader than that of the Conventions, recognizes that wild and captive-breed birds are indistinguishable and regulation of both is necessary to assure that wild birds are protected. Thus, the regulatory definition is necessary to implement the protections of the Conventions. See also BEAN & ROWLAND, *supra* note 11, at 92-93 (arguing that *Connors* is clearly wrong in light of *Andrus v. Allard*, 444 U.S. 51 (1979)).

143. See 50 C.F.R. §§ 21.13 & 21.14. See also *id.* §§ 21.28 through 21.30 (Falconry).

144. See 50 C.F.R. § 21.2(a) (stating that pre-Act birds, but not their off-spring, may be possessed or transported but not sold, imported, bartered, etc.); *Andrus*, 444 U.S. at 60-61, 63.

145. See Coggins & Patti, *supra* note 2, at 172 ("Raptors such as hawks and owls, formerly considered shootable pests, are now protected by the MBTA even though they were listed in neither the 1916 nor the 1936 Convention."). Although not listed in any convention when first regulated, some raptors were listed in the subsequent Japanese and Soviet Conventions. See Japanese Convention, *supra* note 18, annex (listing Osprey, Gyrfalcon, Peregrine Falcon, and miscellaneous hawks); Soviet Convention, *supra* note 19, appendix (listing Gyrfalcon, Peregrine Falcon, Merlin, and Osprey). A better example of species not listed in the Conventions but regulated by the MBTA may be captive-raised birds. See *infra* note 192.

extends beyond migratory birds. For example, MBTA Section 705 makes it illegal to transport any bird, bird part, nest, or egg, taken or carried contrary to the law of the State, Territory, Province of Canada, or District in or from which it was taken or carried.¹⁴⁶ Section 705 is not limited to migratory birds.¹⁴⁷

Although the coverage appears broad, the issue of which particular species of birds are covered under the Act is the subject of some difference of opinion.¹⁴⁸ Nevertheless, the issue has been litigated only once, in a recent, unreported decision.¹⁴⁹ The MBTA prohibitions refer to the terms of the Conventions¹⁵⁰ and Congress has defined migratory birds as those which are such under the Conventions;¹⁵¹ however, as explained above, the four Conventions cited by the MBTA define migratory birds differently.¹⁵² For example, the Canadian Convention defined migratory game birds by taxonomic families and by common names of included species or groups of birds,¹⁵³ while the Mexican Convention lists families without listing included species.¹⁵⁴ The Japanese and Soviet Conventions each define migratory birds as those species, common to each respective country, that migrate between the countries or, in the case of the Soviet Convention, migrate to a common area in a third-country.¹⁵⁵

Guidance on the precise scope of protected species may be found in several places.

1. The Implementing Regulations

Pursuant to his authority under Section 704 of the MBTA, the Secretary of Interior has undertaken to define "migratory birds" falling within the protection of the MBTA.¹⁵⁶ Originally, the regulatory definition of migratory birds mimicked the definition of the MBTA and cited to the Canadian and Mexican Conventions and bird family lists.¹⁵⁷

146. See 16 U.S.C. § 705.

147. See *id.*

148. See BEAN & ROWLAND, *supra* note 11, at 71 ("[T]here has even been controversy over what species are protected by the various conventions.").

149. The United States District Court for the District of Columbia recently dismissed a *pro se* lawsuit to compel the Secretary of the Interior to list the mute swan as a migratory bird under the MBTA. Joyce M. Hill v. Babbitt, Memorandum Opinion (D. D.C. Civ. No. 1:99CV01926, Sept. 27, 2000). See *infra* note 202 (discussing the Hill decision).

150. See 16 U.S.C. § 703.

151. See *id.* § 715j ("Migratory birds" defined). Section 715j is not part of the MBTA, but its definition is applicable to the MBTA. See *id.*; see also 50 C.F.R. § 20.11 (1998) (defining migratory game birds). The MBTA and the definition of "migratory bird," 16 U.S.C. § 715j, cite the original Canadian, Mexican, Japanese, and the Soviet Conventions, but not the December 14, 1995 Protocol, which substituted an updated list of migratory birds for that contained in the Canadian Convention.

152. See text, *supra* Part I.C.3 (Protected Birds) (comparing the different definitions of migratory birds in the four Conventions).

153. See Canadian Convention, *supra* note 3, art. I.1.

154. See Mexican Convention, *supra* note 17, art. IV.

155. See Japanese Convention, *supra* note 18, art. II; Soviet Convention, *supra* note 19, art. I. The Japanese and Soviet Conventions also list each individual species of migratory bird covered by each Convention. See Japanese Convention, *supra* note 18, annex; Soviet Convention, *supra* note 19, appendix.

156. See 50 C.F.R. §§ 10.12-.13.

157. See *id.* § 10.1(1961).

Between 1950 and 1970, however, the Department of the Interior issued a series of eight publications on "Birds Protected by Federal Law" as *Wildlife Leaflets*, "official" publications of the Bureau of Sport Fisheries and Wildlife of the Fish and Wildlife Service.¹⁵⁸ Those eight publications, which were predecessors to the present regulatory list of migratory birds, consistently excluded exotic species. By 1968 the regulations contained two overlapping definitions. Part 1 of Subchapter A, containing general definitions, defined migratory birds with a simple, unqualified list of family names.¹⁵⁹ Part 10 of Subchapter B, dealing with hunting and possession of wildlife, defined migratory birds within the conventions as "all those species of wild birds which (a) are indigenous to the United States and (b) belong to one of the following listed families of birds: (1) *Migratory game birds* (i) Anatidae . . ."¹⁶⁰ Those twin regulatory definitions remained unchanged until 1972 when, as part of a reorganization of the hunting regulations, the Subchapter B definition of migratory birds was deleted and a new definition of migratory game bird was added which simply listed family names, omitting the previous requirement that they be indigenous to the United States.¹⁶¹ The following year, 1973, a further reorganization of the regulations deleted the general definition in Subchapter A, moved the Subchapter B definition of migratory game birds, and added a new definition of migratory birds.¹⁶²

Beginning with the regulatory list of protected birds promulgated in 1973, the regulations have listed protected birds by species, using both their common and scientific names. The regulatory list has always excluded species, even within families designated in the Conventions, that are not native to the United States.¹⁶³ However, the definition of migratory bird as set forth in the 1973 regulations simply cited to the MBTA for the terms of the Conventions.¹⁶⁴

Presently, Department of the Interior regulations define protected birds only in terms of the list of migratory bird species.¹⁶⁵

The significance of this definitional history is that although the regulatory definitions expressly, or through the Conventions, defined migratory birds by families, the Secretary of the Interior never interpreted the Conventions to include every species within each family and, in particular, never interpreted the Conventions to include species not native to the United States.

When the definitions were promulgated, there was no suggestion that the changes reflected any change in the Secretary's long-standing interpretation of the Conventions—protecting only indigenous species of the listed bird

158. *Wildlife Leaflet* Nos. 327 (1950), 432 (1961), 455 (1963), 469 (1965), 472 (1966), 475 (1967) 486 (1969), and 494 (1970). John T. Trapp of the United States Fish and Wildlife Service provided this information.

159. See 50 C.F.R. § 1.11 (1968).

160. *Id.* § 10.1 (1968) (emphasis in original).

161. See 37 Fed.Reg. 13472 (July 8, 1972) (promulgating 50 C.F.R. § 10.11 (1972)).

162. See 38 Fed.Reg. 22015 (August 15, 1973) (promulgating 50 C.F.R. § 10.12 (definitions)).

163. See 38 Fed.Reg. 22015 (August 15, 1973) (promulgating 50 C.F.R. § 10.13 (1974) ("List of migratory birds")).

164. See 38 Fed.Reg. 22015, 22016 (August 15, 1973) (promulgating 50 C.F.R. § 10.12 ("Definitions")).

165. See 50 C.F.R. § 10.12 (1998) (defining migratory birds in terms of the 50 C.F.R. § 10.13 ("List of migratory birds")).

families.¹⁶⁶ Public comments on the 1977 revisions focused exclusively on which birds should be listed within the meaning of the treaties.¹⁶⁷ There was no suggestion that the Conventions protected all species of each family of birds listed in the Conventions. In particular, there was no suggestion that the Conventions included non-native birds that were introduced into the United States, and for which the United States had not been a normal part of their range.¹⁶⁸

The need for a specific list of protected birds arises from latent ambiguities in the Conventions, individually and collectively. In his 1985 revisions to the migratory bird list, the Secretary of the Interior described some of the ambiguities and other factors influencing his interpretations of the Conventions, concluding that “[b]ecause of taxonomic changes over the years, there is a need to better define and interpret the species intended to be afforded protection under the various migratory bird treaties.”¹⁶⁹ He also noted that many of the scientific “names appearing in the treaties are no longer in use.”¹⁷⁰ In addition, new data and the review of old data demonstrated the need for the addition of some birds of regular occurrence in the United States, the deletion of some bird species because the records had been disavowed and because their occurrence was deemed accidental, *i.e.*, the United States is outside the species’ normal range and occurrence was deemed infrequent and irregular.¹⁷¹ Similar concerns motivated the previous revision of the migratory bird list in 1977, when the present regulatory definition of “migratory bird” was adopted.¹⁷²

2. Exclusion of Non-Native Species

It has been the policy of the United States for at least 22 years to restrict the introduction of non-native or exotic species into ecosystems of the United States.¹⁷³ The policy has been expressly premised¹⁷⁴ on the National Environ-

166. See 38 Fed. Reg. 22,015 (August 15, 1973); 37 Fed. Reg. 13,472 (July 8, 1972).

167. See 42 Fed. Reg. 59,358 (November 16, 1977) (amending 50 C.F.R. § 10.12 (“migratory bird definition”) and 50 C.F.R. § 10.13 (“List of migratory birds”).

168. See 50 Fed. Reg. 13,708-22 (April 5, 1985); 42 Fed. Reg. 59,358-62 (November 16, 1977).

169. 50 Fed. Reg. 13,708 (April 5, 1985) (“Revised List of Migratory Birds”).

170. *Id.* An example of ambiguities resulting from differences in nomenclature and changes in scientific understanding are found with the swans, family Anatidae. The Canadian and Mexican conventions listed simply Anatidae. The Japanese convention listed the Whooper swan, and the Soviet convention listed the Whooper, Whistling, and Bewick’s. However, federal regulations presently list only the Whooper, Tundra, and Trumpeter, not Whistling nor Bewick’s. The explanation for the seeming discrepancy is found in changing nomenclature and scientific understanding. The Tundra swan is also known as the Whistling swan, both Tundra and Whistling being described by the scientific name *Cygnus columbianus*. Compare Soviet Convention, *supra* note 19, appendix (listing scientific name for Whistling swan), with 50 C.F.R. § 10.13 (1998) (listing scientific name for Tundra swan). Bewick’s swan was once listed as a separate species with its own scientific name, *Cygnus Bewickii*, but present scientific classification includes it in the same species with Whistler and Tundra swans, *Cygnus columbianus*. See 50 Fed. Reg. 13,708, 13,709 (April 5, 1985) (“*Cygnus Bewickii* is included in *Cygnus columbianus*”).

171. See Revised List of Migratory Birds, 50 Fed. Reg. 13,709.

172. See Revised List and Definition of Migratory Birds, 42 Fed. Reg. 59,358 (November 16, 1977) (to be codified at 50 C.F.R. pt. 10) (amending 50 C.F.R. § 10.12 (migratory bird definition), and 50 C.F.R. § 10.13 (migratory bird list)).

173. See Exec. Order No. 11,987, 42 Fed. Reg. 26,949 (May 24, 1977); Exec. Order No. 13,112, 64 Fed. Reg. 6,183 (February 3, 1999) (Section 2(a)(3) of which orders each federal agency “not [to] authorize, fund, or carry out actions that it believes are likely to cause or promote the

mental Policy Act of 1969,¹⁷⁵ for the entirely logical reason that one cannot protect the environment of the United States if one allows the entry of injurious non-native species¹⁷⁶ into our environment.¹⁷⁷ If one were to read the migratory bird Conventions to protect non-native species of migratory birds, a conflict would arise between the MBTA and current national policy. A close examination of the Conventions supports a conclusion that they do not protect non-native species.

By their terms, the Japanese and Soviet Conventions only protect species and subspecies that migrate between the two countries and the United States.¹⁷⁸ In addition, both Conventions list every species of bird protected by the Conventions.¹⁷⁹ An examination of those lists reveals that all of the listed species exist naturally, from wild origin, within the United States and its territories.¹⁸⁰ In addition, at least one species common to both countries, the mute swan, is not included, presumably because, while it is a native wild bird in Japan, it is only a feral or captive non-native bird in the United States.¹⁸¹

Similarly, each particular species or group of species listed under the Canadian Convention is native to North America.¹⁸² However, the listed families (as opposed to species) in that Convention encompass additional species or groups of species that are not individually listed in the treaty, but those omitted species and groups of species are not native to North America.¹⁸³ Thus, examples of the

introduction or spread of invasive species in the United States.”). Executive Order 13,112 supersedes Executive Order 11,987. See Exec. Order No. 13,112, 64 Fed. Reg. 6,186 (Section 6(b) revoked the 1977 Executive Order); see also Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. §§ 4701 – 4751 (undertaking to prevent unintentional introduction and dispersal of non-indigenous species into waters of the United States, especially from ballast water of ships).

174. See Exec. Order No. 11,987, 42 Fed. Reg. 26,949 (May 24, 1977) (“in furtherance of the purposes and policies of . . . the National Environmental Policy Act of 1969”); Exec. Order No. 13,112, 64 Fed. Reg. 6183 (February 3, 1999).

175. 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 *et seq.*(1994)).

176. See, e.g., 16 U.S.C. § 4702(2) (Supp. 1998) (stating “aquatic nuisance species’ means a non-indigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters”); Exec. Order No. 13,112, 64 Fed. Reg. 6,183 (Section 1(g) defining “Native species” as one present “other than as a result of an introduction”).

177. See 16 U.S.C. § 4701(a)(2) (Supp. 1998) (“when environmental conditions are favorable, non-indigenous species become established, may compete with or prey upon native species of plants, fish, and wildlife, may carry diseases or parasites that affect native species, and may disrupt the aquatic environment and economy of affected nearshore areas”); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (declaring: “to promote efforts which will prevent or eliminate damage to the environment and biosphere”).

178. Japanese Convention, *supra* note 18, art. II.1; Soviet Convention, *supra* note 19, art. I.1.

179. See Japanese Convention, *supra* note 18, art. II.1; Soviet Convention, *supra* note 19, art. I.3(a).

180. See Exhibit 8 in support of the United States Motion for Summary Judgment, Declaration of Robert J. Blohm [Chief, Branch of Surveys and Assessments, Office of Migratory Bird Management, United States Fish and Wildlife Service], at ¶ 11, *Hill v. Babbitt, et al.*, Civ. No. 1:99CV01926 (HHK), D. D.C. [hereinafter Blohm Declaration].

181. See Blohm Declaration, *supra* note 180, at ¶ 12.

182. See Blohm Declaration, *supra* note 180, at ¶¶ 7, 9.

183. See Blohm Declaration, *supra* note 180, at ¶¶ 7-9.

family Limicolae¹⁸⁴ (shorebirds) listed in the Convention include those groupings of species with examples native to North America, e.g., avocets, but not the groupings of shorebirds that are exclusively non-native, e.g., thick-knees and pratincoles.¹⁸⁵

The Canadian Convention's listing of migratory insectivorous birds also strongly suggests that only native species were intended to be covered. The list of migratory insectivorous birds in the Convention consists of common name groupings of species, e.g., warblers.¹⁸⁶ All of those groupings include species native to North America.¹⁸⁷ "However, the Convention does not include any of the many similar groupings of migratory insectivorous birds native exclusively to areas outside of North America."¹⁸⁸ Furthermore, the "Canadian Convention expressly limits its application" to only "wild" birds for some listed types.¹⁸⁹ Thus, for the purposes of the Canadian Convention, "the Anatidae (waterfowl) include only brant (which have not been domesticated),"¹⁹⁰ "wild ducks, geese, and swans,"¹⁹¹ and the Columbidae (pigeons) "include only doves and 'wild pigeons.'"¹⁹²

Despite the apparent intention of the parties to exclude from protection under the conventions and the MBTA non-native or exotic species, a debate over protection of non-native species nevertheless can arise from the language of the Mexican Convention and the decision of the Ninth Circuit in *Alaska Fish and Wildlife Federation and Outdoor Council v. Dunkle*.¹⁹³ In 1987, the Ninth Circuit

184. See Blohm Declaration, *supra* note 180, at ¶¶ 7-9 n.1. ("Since the Convention was adopted, formal classification of birds has changed significantly, such that the shorebirds then grouped together as the Limicolae have been split several separate taxonomic families, now grouped in the Order Charadriiformes and including more than 50 species . . . in North America.").

185. See Blohm Declaration, *supra* note 180, at ¶ 8. ("Similarly, the examples of the Gruidae (cranes) listed in the Convention are limited to two species native to North America: little brown or sandhill cranes, and whooping cranes. None of the 13 species of cranes not native to North America is listed.").

186. See Canadian Convention, *supra* note 3, art. I.2.

187. See Blohm Declaration, *supra* note 180, at ¶ 9.

188. Blohm Declaration, *supra* note 180, at ¶ 9.

189. Blohm Declaration, *supra* note 180, at ¶ 10; see also Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (1918) (protecting "All wild geese, wild swans, brandt, wild ducks, . . . wild pigeons, and all other migratory game and insectivorous birds which . . . do not remain permanently the entire year within the borders of any State or Territory").

190. Blohm Declaration, *supra* note 180, at ¶ 10.

191. Canadian Convention, *supra* note 3, art. I.1(a).

192. Canadian Convention, *supra* note 3, art. I.1(e). Although the Conventions protect only "wild" birds, the Secretary of the Interior is free to extend protection to domestic or captive-raised birds if doing so furthers the purposes of and is consistent with the Conventions. See 16 U.S.C. § 712(2) (authorizing regulations as may be necessary to implement the Conventions). Because of the impossibility of distinguishing wild and captive-bred birds, and the consequential difficulties in enforcing the prohibitions of the Conventions, the Secretary has defined migratory birds to include captive-raised birds of the listed species. See 50 C.F.R. § 10.12 (1998) (defining migratory birds).

193. 829 F.2d 933 (9th Cir. 1987). In *Dunkle*, the Ninth Circuit reviewed a challenge to a Fish and Wildlife Service agreement with Alaska natives under which the Service had been allowing natives to take migratory birds and eggs in violation of the MBTA. In order to limit and control the technically illegal hunting, the Service had negotiated agreements with native organizations to, in effect, regulate the illegal hunt. See *Dunkle*, 829 F.2d at 935-36. The Ninth Circuit found that,

held, in *Dunkle*, that the MBTA required implementing regulations to be compatible with the most restrictive of the conventions.¹⁹⁴

The Mexican Convention defines migratory birds by listing the scientific names of bird families,¹⁹⁵ as does the Canadian Convention.¹⁹⁶ However, unlike the Canadian Convention, the Mexican Convention does not list species or groups of birds included within the families.¹⁹⁷ Thus, in applying the *Dunkle* decision, it may be argued that, notwithstanding the exclusion of non-native species by the Canadian, Japanese and Soviet Conventions, the listing of families by the Mexican Convention without identifying particular species within those families and without explicitly excluding non-native species, provides MBTA protection for all species and subspecies within those families regardless of whether they are native to the United States or North America.

Under the Ninth Circuit's *Dunkle* analysis, the Mexican Convention may be the most restrictive in that it arguably protects the broadest scope of birds, and the regulations therefore must be compatible with those restrictive terms. On the other hand, the Soviet Convention requires the parties to control the "establishment in the wild of live animals . . . that may be harmful to migratory birds or their environment."¹⁹⁸ Such harmful animals commonly include non-native species of birds that compete with native species for resources within the same ecological niche. Thus, reading the Mexican Convention to protect non-native species of listed families of migratory birds, even if harmful to native species, would create a conflict with the Soviet Convention. Such a situation arose with the mute swan in the Chesapeake Bay.

The mute swan is a non-native, introduced species of Anatidae,¹⁹⁹ a family listed in the Mexican Convention.²⁰⁰ "The mute swan occup[ies] habitat and consume[s] food used by migratory, endangered, and threatened species, which the federal government is obligated to preserve."²⁰¹ Control of mute swans is thus called for under the express terms of the Soviet Convention. To effectively implement that intent and the provisions of all of the Conventions, the MBTA regulatory provision relied upon by the Ninth Circuit should be read as it is written, not as the Ninth Circuit interpreted in *Dunkle*. In other words, regula-

because only some and not all of the Conventions provided for native hunting, the Service could not enter into the agreements it had made. *See id.* at 940-41, 945.

194. *See id.* at 941. The Ninth Circuit found the Canadian Convention the most restrictive, and it did not allow for the out-of-season native hunting at issue. *See id.* Nevertheless, the Ninth Circuit held that the principle of unreviewable enforcement discretion allowed the Service to continue to decline prosecution of illegal hunting by Alaska natives. *See id.* at 938. Consequently, the Fish and Wildlife Service could allow totally uncontrolled illegal hunting but not controlled hunting.

195. *See* Mexican Convention, *supra* note 17 art. IV.

196. *See* Canadian Convention, *supra* note 3, art. I.

197. *See* Mexican Convention, *supra* note 17, art. IV.

198. Soviet Convention, *supra* note 19, art. IV.2(b).

199. *See* Exhibit 1 in support of United States Motion for Summary Judgment, Declaration of Keith M. Weaver [Supervisory Refuge Operations Specialist at the Blackwater National Wildlife Refuge complex with the United States Fish and Wildlife Service], ¶¶ 5-8, *Hill v. Babbitt*, Civ. No. 1:99CV01926 D. D.C. [hereinafter *Weaver Declaration*].

200. *See* Mexican Convention, *supra* note 17, art. IV.

201. *Weaver Declaration*, *supra* note 199, at ¶ 16.

tions must be "compatible with the terms of the conventions," plural, *i.e.*, all the Conventions.²⁰²

B. *Scope of Prohibited Activity*

A second area of dispute important to those seeking to enforce the MBTA, and one which has been extensively litigated but not yet resolved, is the precise scope of activities prohibited by the MBTA. Historically, criminal prosecutions under the MBTA have focused, as did the original treaties, on hunters, poachers and other related activities.²⁰³ Beginning in the 1970's, this began to change.²⁰⁴ Both federal prosecutors and private citizens²⁰⁵ brought cases in which persons or federal agencies were accused of violating the MBTA through activities such as

202. 16 U.S.C. § 704 (Supp. 1998); *see also id.* § 712(2) (also listing all four conventions); *supra* note 192, (discussing secretary's authority under 16 U.S.C. § 712(2) to regulated non-treaty birds if necessary to implement the Conventions).

The United States District Court for the District of Columbia recently denied a request to compel the Secretary of the Interior to list the mute swan as a migratory bird protected under the MBTA. *Hill v. Babbitt*, Memorandum Opinion (D. D.C. Civ. No. 1:99CV01926, Sept. 27, 2000). The court found that the Canadian and Mexican conventions do protect all swans, but that the Japanese and Soviet treaties do not protect mute swans. *See Hill*, Memorandum Opinion at 8-10. Relying on "deductive logic" and a simple hypothetical, the court reasoned that a hypothetical mute swan migrating from Russia through Canada to the United States would create a conflict between application of the Russian and Canadian treaties. *See id.* at 13. The district court treated the conflict in the treaties as an ambiguity to be analyzed using the two step analysis of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *See Hill* at 11. Reading the law in an effort to determine Congress's intent, the court did not find persuasive arguments that MBTA protection is limited to "wild," native birds. *See id.* at 12-13. Relying instead on the provision authorizing the Secretary to prescribe hunting regulations, and without further explanation, the court found the Secretary could reasonably exclude mute swans from MBTA protection. *See id.* at 13 (citing 16 U.S.C. § 704). The court did not address the Ninth Circuit's *Dunkle* holding, which requires application of the most restrictive convention. *See Alaska Fish & Wildlife Fed'n & Outdoor Council v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987). The plaintiff in *Hill* has appealed the dismissal of her lawsuit. *See Joyce T. Hill v. Babbitt*, D.C. App. No. 00-5432.

203. *See Scott Finet, Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1 (1996).

204. *See Coggins & Patti, supra* note 2, at 174, 196 (arguing that the original intent of the drafters of the Canadian Convention and of Congress was to protect migratory birds from more than just hunting and poaching); Mickell Jimenez, *Sierra Club v. Martin: The Eleventh Circuit's Interpretation of the Migratory Bird Treaty Act*, 18 J. LAND RESOURCES & ENVTL. L. 159, 160 (1998) ("Congress intended primarily to protect migratory birds from swamp drainage and hunters." (citing H. R. Rep. No. 64-1430, at 2 (1917)); Steven Margolin, *Liability under the Migratory Bird Treaty Act*, 7 ECOLOGY L. Q. 989, 997 n. 72 (1979) (quoting 49 CONG. REC. 1485 (1913)). *But see Benjamin Means, Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 824 (1998) ("This Note argues, however, that the MBTA covers only activity that is directed at wildlife, and that absent such purposive conduct, no violation exists."). It should be noted that H.R. Rep. No. 64-1430 incorporated a letter from Secretary of State Robert Lansing. It is the letter alone that referred to the impact of draining on migratory birds: "[T]he extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits." H.R. Rep. No. 64-1430, at 2 (1917) (August 17, 1916, letter, Secretary of State Robert Lansing to the President, submitting the treaty for transmission to the Senate).

205. Issues relating to ability of private citizens to bring suit under the MBTA, either directly or through the APA, are beyond the scope of this article.

pesticide use, wastewater discharge, timber harvest, and the maintenance of power poles. Inextricably intertwined with, and informing the issue of whether the MBTA addressed such non-hunting, and in some cases indirect, takings, was the fact that the MBTA is, for such activities, a strict liability statute.²⁰⁶

1. Must Not Poison

First, a series of cases were decided between 1973 and 1975 in which companies were prosecuted under the MBTA for migratory bird deaths associated with oil sump pits operated by companies.²⁰⁷ The courts regularly found the

206. The MBTA as a strict liability statute was first affirmed in 1939, in *United States v. Reese*, 27 F. Supp. 833, 835 (W.D. Tenn. 1939), where the court stated:

There appears no sound basis here for an interpretation that the Congress intended to place upon the Government the extreme difficulty of proving guilty knowledge of bird baiting on the part of persons violating the express language of the applicable regulations promulgated pursuant to the statute [MBTA]; but it is more reasonable to presume that Congress intended to require that hunters shall investigate at their peril conditions surrounding the fields in which they seek their quarry.

See Reese, 27 F. Supp. at 835. Since 1939, the federal courts of appeal have almost uniformly held the misdemeanor provision of the MBTA, Section 707(a), to be a strict liability criminal statute. *See United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (quoting *United States v. Manning*, 787 F.2d 431, 435 n.4 (8th Cir. 1986)); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986) (“Scienter is not an element of criminal liability under the Act’s misdemeanor provisions”); *Manning*, 787 F.2d at 435 n. 4 (“it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge.”); *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985) (“a hunter is strictly liable for shooting on or over a baited area.”); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984) (holding that “scienter is not required for a conviction” under the MBTA).

In *Morissette v. United States*, the Supreme Court discussed reasons for strict criminal liability for “public welfare offenses”— offenses that “are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.” *Morissette v. United States*, 342 U.S. 246, 255 (1952).

For policy arguments both for and against strict liability under the MBTA, compare Margolin, *supra* note 204, at 996-99, with M. Lanier Woodrum, *The Courts Take Flight: Scienter and the Migratory Bird Treaty Act*, 336 WASH. & LEE L. REV. 241, 250-51 (1979) (arguing that Congress did not intend the MBTA to impose strict criminal liability). To the extent that Woodrum argued that Congress did not intend the MBTA to impose strict liability, Congress subsequently proved Woodrum wrong. *See S. REP. NO. 99-445*, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 (stating that, when Congress added the *scienter* requirement for MBTA felony offenses, “[n]othing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions.”); *S. REP. NO. 105-366*, at 2 (1998) (when enacting the *scienter* requirement for baiting offenses, Congress said, “[t]he 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.”).

207. *See Coggins & Patti*, *supra* note 2, at 183-85 (citing *United States v. Stuarco Oil Co.*, 73-CR-129 (D. Colo. 1973) (company charged and pled *nolo contendere* to 17 counts under the MBTA for deaths of birds resulting from company’s failure to build oil sump pits in a manner that could keep birds away); *United States v. Union Tex. Petroleum*, 73-CR-127 (D. Colo. 1973) (prosecution of oil company for maintenance of oil sump pit); *United States v. Equity Corp.*, Cr. 75-51 (D. Utah 1975) (company charged with and plead guilty to 14 counts under the MBTA for deaths of 14 ducks caused by the company’s oil sump pits); *United States v. Union Pac. R.R.*, CR-1-90-8 (N.D. Tex. May 1, 1990)).

companies strictly liable for the migratory bird deaths caused by the operation of these sump pits.²⁰⁸

Then, in January of 1978, the Eastern District of California, in *United States v. Corbin Farm Service*,²⁰⁹ expressly found that the MBTA prohibited acts other than just hunting-related acts and acts specifically intended to kill migratory birds. In *Corbin Farm*, the United States charged a pesticide dealer, his employee, an aerial spray operator, and the owner of the field sprayed, with 10 counts for bird deaths resulting from the single application of pesticides to an alfalfa field.²¹⁰ Pointing to the language in § 703 of the MBTA that it shall be unlawful at any time, “by any means or in any manner” to take migratory birds, the court determined that such take by poisoning was a prohibited activity under the strict liability MBTA misdemeanor take prohibitions.²¹¹

In applying the MBTA prohibitions to such indirect poisoning actions, however, the Court, in *Corbin Farm*, was concerned with the issue of scienter. The issue was, and remains, that if the MBTA applies to more than just hunting and poaching, and if it truly provides for strict liability, are there any limits to liability if even the most apparently innocuous action resulted in the take of a migratory bird? Hypotheticals repeatedly heard in this debate include striking a migratory bird while driving a car, or putting a picture window in a building into which a migratory bird flies.²¹² The District Court in *Corbin Farm* dealt with such concerns in part, and significantly, by noting in its discussion that “[w]hen dealing with pesticides, the public is put on notice that it should exercise care to prevent injury to the environment and to other persons; a requirement of reasonable care under the circumstances of this case does not offend the Constitution.”²¹³ The court seemed to feel it could borrow from tort law to justify strict application of the MBTA to various inherently dangerous activities such as hunting and pesticide poisoning.²¹⁴

208. See Coggins & Patti, *supra* note 2, at 183-85.

209. 444 F. Supp. 510 (E.D. Ca. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

210. *Corbin Farm Serv.*, 444 F. Supp. at 515.

211. *Id.* at 532 (emphasis added).

212. See Coggins & Patti, *supra* note 2, at 192 (referring to a car and building); *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (referring to a car, plane, and building); *Corbin Farm Serv.*, 444 F. Supp. 510, at 535 (referring to a car); *United States v. Moon Lake Electric Ass'n.*, 45 F.Supp.2d 1070, 1084 (D. Colo. 1999) (quoting *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1582-83 (S.D. Ind. 1996)).

213. *Corbin Farm Serv.*, 444 F. Supp. at 536.

214. An issue inherent in many MBTA prosecutions, and particularly those involving less immediate consequences, such as poisonings, is the determination of the appropriate “unit of prosecution,” e.g., is the number of violations determined by the number of bird deaths, the number of causative actions, or the number of species taken. See *United States v. Corbin Farm Serv.*, 578 F.2d 259, 260 (9th Cir. 1978).

The “unit of prosecution” in different cases has varied; but, in most cases, the appropriateness of the “unit of prosecution” was not raised. See, e.g., *Corbin Farm Serv.*, 578 F.2d at 260 (providing one count per transaction resulting in bird deaths); *FMC Corp.*, 572 F.2d at 903 (noting one count per species per day); *United States v. Rogers*, 367 F.2d 998, 999 (8th Cir. 1966) (one count per day); *United States v. Stuarco Oil Co.*, 73-CR-129 (D. Colo. 1973) (one count per bird); see Coggins & Patti, *supra* note 2, at 183-85 (citing *United States v. Equity Corp.*, Cr. 75-51 (D. Utah 1975) (one count per bird)). Compare *United States v. Tempotech Indus. Inc.*, 1996 WL 14056 (2d Cir.) with *Jackson v. United States*, 517 U.S. 1192 (1996) (describing a Lacey Act

The following month, the Second Circuit, in *United States v. FMC Corporation*,²¹⁵ used related logic to affirm MBTA misdemeanor convictions for bird deaths resulting from FMC's discharge of wastewater from pesticide manufacturing into a pond that attracted migratory birds.

"FMC argue[d] that it had no intention to kill birds, that it took no affirmative act to do so, possessed no scienter, and thus should not be held liable under the Act."²¹⁶ The court rejected FMC's argument, quoting from *Morissette* that "[t]he criminal law may punish 'neglect where the law requires care, or inaction where it imposes a duty.'"²¹⁷ Wrestling with the same concerns as the *Corbin Farm* court, the Second Circuit took that court's rationale one step further and analogized expressly to the body of tort law that holds persons engaged in inherently dangerous activities should be held strictly liable for damages caused by those activities.²¹⁸ Nonetheless, the court was careful to note that "[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party."²¹⁹

The FMC court also stated, "[c]ertainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential buildings into which birds fly, would offend reason and common sense."²²⁰ The court noted that, in any event, "[s]uch situations properly can be left to the sound discretion of prosecutors and the courts" and that "an innocent technical violation . . . can be taken care of by the imposition of a small or nominal fine."²²¹

Following the logical progression of these cases, in the early 1990's three district courts found that cyanide leaching processes, used in mining operations to extract precious metals, created cyanide-laced tailings or settlings ponds that

prosecution that grouped violations into five counts by year, "[s]o long as the method of aggregating offenses is reasonable — and here it was, given the ongoing multi-year nature of the scheme — the government need not charge a defendant with the smallest 'unit of prosecution' available.").

Only in *Corbin Farm* did the court discuss and enter a holding concerning the appropriate "unit of prosecution." The Ninth Circuit adopted the opinion of the District Court which examined historical charging practices and legislative history. *See Corbin Farm Serv.*, 578 F.2d at 260; *Corbin Farm Serv.*, 444 F. Supp. at 527-29, 531. The appropriate "unit of prosecution" remains unsettled, although the *Corbin Farm* decisions provide one well-reasoned alternative. For a discussion of the *Corbin Farm* decisions' treatment of the "unit of prosecution," see Margolin, *supra* note 204, at 1001-04.

215. 572 F.2d 902 (2d Cir. 1978).

216. *FMC Corp.*, 572 F.2d at 906.

217. *Id.* at 907 (quoting *Morissette v. United States*, 342 U.S. 246, 255 (1952)).

218. *See id.* (citing *Rylands v. Fletcher*, Hurl. & C. (1856, L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868)); *see also* *United States v. Van Fossan*, 899 F.2d 636, 637-39 (7th Cir. 1990) (holding that the MBTA prohibited poisoning of migratory birds by strychnine-laced grain). *But see*, *United States v. Rollins*, 706 F. Supp. 742, 744-45 (D. Idaho 1989) (where a farmer applied pesticides in what the court found not to be a reckless manner, the court found that the MBTA was unconstitutionally vague as applied to the farmer, but not that the MBTA was limited to hunting and poaching related activities).

219. *FMC Corp.*, 572 F.2d at 908.

220. *Id.* at 905.

221. *Id.* (quoting *United States v. Schultze*, 28 F. Supp. 234, 236 (W.D. Ky 1939)). *But see* *Rollins*, 706 F. Supp. at 745 ("With deference to the respected tradition of the Second Circuit, a violation of due process cannot be cured by light punishment.").

attract and kill migratory birds, thereby exposing operators to criminal liability under the MBTA.²²² Similarly, Exxon Corporation and Exxon Shipping Company, owners and operators of the oil tanker *Exxon Valdez*, were found criminally liable under the MBTA for migratory bird mortalities caused by an accidental oil spill when the vessel ran aground in Prince William Sound and discharged oil.²²³ In perhaps the most extreme example of an indirect taking, EPA registration of a pesticide under FIFRA²²⁴ was found to have violated the taking prohibition of the MBTA when migratory birds died from ingestion of strychnine-laced grain.²²⁵

One might then conclude that it has been generally established that, scienter issues notwithstanding, the MBTA prohibition against taking applies to takings attributable to other than just traditional hunting and poaching activities. This is not quite so.²²⁶

2. Habitat Modification by Timber Harvest—No Problem

In 1991, the first of a series of citizen suit cases held that the MBTA did not prohibit at least indirect takings resulting from habitat modification caused by timber harvest. Departing from the inherently dangerous activity type of analysis used in the poisoning cases, these Courts reasoned primarily that timber activities do not constitute a taking of migratory birds within the meaning of the MBTA,²²⁷ because the MBTA “was intended to apply to individual hunters and poachers.”²²⁸ In justifying this conclusion, the Ninth Circuit, in *Seattle Audubon*,

222. See *United States v. Kennecott Communications Corp.*, No. N-90-16M (D. Nev. Mar. 8, 1990); *United States v. Echo Bay Minerals Co.*, No. CR N-90-52-HDM (D. Nev. 1990); *United States v. Nerco-Delamar Co.* (a.k.a. Delamar Silver Mine), No. CR 91-032-S-HLR (D. Idaho Apr. 21, 1992).

223. *United States v. Exxon Corp.*, No. A90-015 CR (D. Alaska, sentencing April 24, 1991).

224. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994).

225. See *Defenders of Wildlife v. Adm'r EPA*, 688 F. Supp. 1334, 1354-55 (D. Mn. 1988), *rev'd on other grounds*, 882 F.2d 1294 (8th Cir. 1989).

226. See also *Coggins & Patti*, *supra* note 2, at 193-94 (describing possible impact on other wildlife statutes of construing “kill” or “take” to include negligent or hazardous activity with foreseeable consequences).

227. In MBTA challenges to timber harvesting, a number of courts have also held that the MBTA is not applicable to the federal government, but those holdings have recently been called into question. See cases cited *infra* note 238. In the closing days of his administration, President Clinton signed an Executive Order requiring federal agencies to implement the spirit of the MBTA, if not the letter of the law. See Executive Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 17, 2001) (Section 3(a) of which requires agencies “taking actions that have, or are likely to have a measurable negative affect on migratory bird populations” to enter into agreements with the FWS to “promote the conservation of migratory bird populations”).

228. *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Ore. 1990); see *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (“the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘physical conduct of the sort engaged in by hunters and poachers’”) (quoting *Seattle Audubon Soc’y v. United States Forest Serv.*, 952 F.2d 297, 302 (9th Cir. 1991)); *Seattle Audubon Soc’y*, 952 F.2d at 303 (finding that the MBTA definition of take describes physical conduct of the sort engaged in by hunters and poachers), *cert. granted on other grounds*, 501 U.S. 1249 (1991); *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (“The better reading of the statute is to find that the prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies and parts.”); *Curry v. United States Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Penn. 1997) (“the loss of migratory birds as a result of timber sales of the type at issue in this case do not constitute a ‘taking’

found it significant that the definition of take under the MBTA, and thus the scope of prohibited activity, differs from that set forth in the Endangered Species Act of 1973.²²⁹ The MBTA definition of take does not include the terms "harass" and "harm."²³⁰ The court reasoned that this difference showed that the MBTA had not addressed habitat modification problems, unlike the expanded scope of the ESA that included takes (harassing or harming animals) caused by habitat modification.²³¹ The court made no attempt to reconcile its holding with, for example, cases where habitat was modified by the introduction of oil instead of the removal of trees.

3. Must Not Fold, Spindle, or Mutilate the Occupied Tree

Thus, the issue of whether the MBTA applies at least to direct takings caused by non-hunting related activities, including habitat modification, is still somewhat open to debate. At least two district courts have found that a violation of the MBTA would result from timber harvesting, even though it is not a hunting-related activity, but only where the harvesting is demonstrated to directly kill migratory birds.²³² In other words, although the MBTA might be read to not apply to habitat modification such as timber harvest that indirectly may kill migratory birds, it could prohibit the direct taking of a bird or a nest and eggs even though they were taken by means of tree-cutting rather than collection or shooting.²³³ This rationale comports with the Ninth Circuit's reasoning in *Seattle*

or 'killing' within the meaning of the MBTA") (citing *Newton County Wildlife Ass'n*). "[T]he MBTA applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds." *Mahler*, 927 F. Supp. at 1579. *But see Humane Soc'y v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000) (discussing without deciding whether the MBTA applies to timber harvesting).

229. See 16 U.S.C. § 1532(19) (1994).

230. See *Seattle Audubon Soc'y*, 952 F.2d at 303.

231. See *id.* Three of the four treaties address the need for refuges and habitat protection. See Mexican Convention, *supra* note 17, art. II.B; Japanese Convention, *supra* note 18, arts. III.3, VI; Soviet Convention, *supra* note 19, arts. IV, VII. However, the general prohibitions of the MBTA do not address habitat destruction or preservation. See 16 U.S.C. § 703.

232. See *Sierra Club v. Martin*, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996) (finding plaintiffs seeking injunctive relief had shown a likelihood of success on the merits of their underlying MBTA claim, where the Forest Service authorized timber harvest that had been demonstrated would result in the deaths of thousands of migratory songbirds), *reversed on other grounds*, 110 F.3d 1551 (11th Cir. 1997) (finding the MBTA did not apply to federal government agencies). See also *Jimenez*, *supra* note 204, at 159 (discussing the decision in *Sierra Club v. USDA*, No. 94-CV-4061-JPG (S.D. Ill. Sept. 25, 1995), which remanded a Management Plan to the Forest Service for further consideration of whether the plan would violate the MBTA, where the Plan allowed logging during the nesting season).

233. See 16 U.S.C. § 703 (stating that it is unlawful to traffic in "any migratory bird, any part, nest, or egg of such bird, or any product . . ."); see also Canadian Convention, *supra* note 3, art. V ("The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, . . ."); Mexican Convention, *supra* note 17, art. II.A ("parties agree to establish laws, [and] regulations . . . [for] '[t]he establishment of close seasons, which will prohibit . . . the taking of migratory birds, their nests or eggs . . .'"); Japanese Convention, *supra* note 18, art. III.1 ("The taking of the migratory birds or their eggs shall be prohibited."); Soviet Convention, *supra* note 19, art. II.1 ("Each Contracting Party shall prohibit the taking of migratory birds, the collection of their nests and eggs and the disturbance of nesting colonies."). The 1995 Protocol amending the Canadian

Audubon Society as well. The Ninth Circuit, in *Seattle Audubon Society*, stated, “[c]ourts have held that the Migratory Bird Treaty Act reaches as far as direct, though unintended, bird poisonings from toxic substances. . . . Habitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA.”²³⁴

4. Must Not Shock—Electrocution.

More recently, the issue of the application of the MBTA to non-hunting activities has been exhaustively analyzed in *United States v. Moon Lake Electric Association*.²³⁵ In *Moon Lake* the question was whether the MBTA applied to the deaths of migratory birds that were killed by the defendants’ electric power poles.²³⁶ Deaths of migratory birds due to electric towers, television towers, and other man-made structures have been documented since the 1950s. In some incidents thousands of migratory birds have died in a single night from collisions with smokestacks or television towers.²³⁷ In *Moon Lake*, a rural electric distribution cooperative was operating some 2,450 power poles without installing inexpensive equipment on the poles that could have prevented the deaths of some 38 birds of prey caused by the poles.²³⁸

Convention expands the limited scientific and propagation exceptions to include educational and other purposes consistent with the principles of the Protocol. *See* Protocol, *supra* note 16, art. V.

234. *Seattle Audubon Soc’y*, 952 F.2d at 303 (citations omitted). *But see* BEAN & ROWLAND, *supra* note 11, at 81 (explaining that the basis of the *Seattle Audubon Society* decision was that “the conduct simply did not fall within the Treaty Act’s prohibitions. The decision thus would appear to preclude criminal prosecution of a logger or timber company under the Treaty Act even if the logger or timber company intended to kill birds by logging.”).

235. 45 F. Supp. 2d 1070 (D. Colo. 1999).

236. *See Moon Lake*, 45 F. Supp. 2d at 1071.

237. *See* John L. Trapp, *Bird Kills at Towers And Other Man-Made Structures: An Annotated Partial Bibliography (1960-1998)* (visited Nov. 8, 1999) <<http://www.fws.gov/r9mbmo.html>>.

238. *See Moon Lake*, 45 F. Supp. 2d at 1071. One cannot help but wonder whether the outcome would have been the same had such an inexpensive solution not been available. The government’s prosecution of the electric company in *Moon Lake* and its defense of the U.S. Forest Service timber harvest activities (including those that cause direct take) are reconcilable in that it had been the position of the government (and the prevailing case law) that the MBTA does not apply to the federal government. *See Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (“The MBTA . . . does not subject the federal government to its prohibitions.”); *Newton County Wildlife Ass’n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (stating “that MBTA does not appear to apply to the actions of federal government agencies.”); *Curry v. United States Forest Serv.*, 988 F. Supp. 541, 548 (W.D. Penn. 1997) (“The MBTA, by its plain language, does not subject the federal government to its prohibitions.”).

Whether the government will persist in arguing that the MBTA civil provisions do not apply to the federal government is uncertain in light of a recent decision of the United States Court of Appeals for the District of Columbia in *Humane Soc’y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (challenge to USDA takings, without a MBTA permit, of specimens of exploding population of non-migrating Canada geese in the Chesapeake Bay area). The court observed that the Department of the Interior’s longstanding position prior to 1997 had been that the MBTA restricted federal agencies in the same manner as it restricted private citizens. *See Humane Soc’y*, 217 F.3d at 884. The court also observed that the USDA did obtain a permit for similar destruction of migratory birds in other parts of the country, *e.g.*, Puget Sound. *See id.* at 884 n.2. The court reasoned that section 703 of the MBTA, which prohibits unpermitted harm to migratory birds, does not turn on the identity of the perpetrator, *e.g.*, private or federal, and that a suit for injunctive relief would be appropriate against federal officers to assure compliance with the MBTA. *See id.* at 885-86. The court expressly rejected the conclusions of the courts in *Newton County* and *Sierra Club v. Martin*

The *Moon Lake* Court, like others before it, wrestled with the issue of how far the strict liability law might reach. However, based on both the plain language of the statute and its legislative history, the District Court in *Moon Lake* expressly rejected the limitation used by the Ninth Circuit, *i.e.*, that the MBTA regulates “only the sort of physical conduct [normally] exhibited by hunters and poachers.”²³⁹ The *Moon Lake* Court also did not rely on the inherently dangerous analogy, nor the discretion of prosecutors, to avoid such undesirable results. Instead, to describe a rational parameter for the MBTA’s strict liability misdemeanor, the Court cited the fundamental requirement that the government must show proximate cause even in strict liability cases.²⁴⁰ Thus, the Court reasoned, “[b]ecause the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, . . . , or living in a residential dwelling with a picture window, such activities would not normally result in liability under § 707(a) [the MBTA misdemeanor provision], even if such activities would cause the death of protected birds.”²⁴¹

While the debate continues over the application of the MBTA to activities beyond the ken of the hunters and poachers of 1918, the proximate cause analysis provided by *Moon Lake* may be utilized again in the future.²⁴²

C. Native American Issues

Another increasingly important issue in enforcing the MBTA is the relationship between the statute and the interests and rights of Native Americans.

1. Rights Under the Conventions.

Three of the four Conventions implemented by the MBTA make some exception for Eskimos, Indians, or indigenous inhabitants. The Canadian Convention states, “Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold for sale.”²⁴³ The Japanese Convention allows that “[e]xceptions to the prohibition on taking may be permitted [for] . . . [t]aking by Eskimos, Indians, and indigenous peoples of the Trust Territory of the Pacific Islands for their own food and clothing.”²⁴⁴ And the Soviet Convention similarly provides that, “[e]xception to these prohibitions may be made . . . [f]or the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of . . . the State of Alaska for their own nu-

and held that the prohibitions of section 703 do apply to federal agencies. *See id.* at 888. However, the court’s opinion assumed, for the sake of argument and without deciding, that the criminal provisions of section 704 would not apply to federal agencies, because that section uses the term “person” which does not normally include the sovereign. *See id.* at 886.

239. *Moon Lake*, 45 F. Supp.2d at 1079.

240. *See id.* at 1077.

241. *Id.* at 1085. Under the Endangered Species Act, such unintended takings may be authorized by an incidental take permit. *See* 16 U.S.C. § 1539(a)(1)(B) (1994). However, neither the MBTA nor its implementing regulations contains any similar means for authorizing such incidental takes.

242. A full analysis of the possible use of this type of proximate cause analysis to provide logical parameters for the scope of the MBTA appears in a related article in this volume.

243. Canadian Convention, *supra* note 3, art. II.3.

244. Japanese Convention, *supra* note 18, art. III.1(e).

tritional and other essential needs . . . during the seasons established"²⁴⁵ In addition, the recent December 14, 1995 Protocol rewrote the Canadian Convention in order to accommodate the rights of Canadian aboriginal peoples and of indigenous inhabitants of Alaska, both native and non-native Americans.²⁴⁶

In *Alaska Fish and Wildlife Federation and Outdoor Council v. Dunkle*,²⁴⁷ the Ninth Circuit held that any exceptions to the MBTA prohibitions the Secretary of the Interior may create by regulation may be no more permissive than the most restrictive of the Conventions.²⁴⁸ The court held that the rights of native Americans under the Canadian Convention were more restrictive than their rights under the Soviet Convention²⁴⁹ and, consequently, the Secretary of the Interior could not enter into an agreement that would have allowed native American residents of Alaska to exercise their hunting rights under the Soviet Convention.²⁵⁰ However, the intent of the drafters of the recent Canadian Protocol, and the intent of the Senate in ratifying it, was clearly to grant special privileges to residents of Alaska.

2. Rights Under Indian Treaties.

In addition to rights granted by the Conventions, Native Americans prosecuted for wildlife violations can raise defenses based upon alleged exclusive treaty rights to hunt or fish. Treaty rights can even be raised in the absence of an express treaty provision.²⁵¹ When treaty rights appear to conflict with a wildlife statute, courts will try to interpret both so as to avoid conflict and to give effect to both. However, when treaty rights and a wildlife statute cannot be reconciled, the issue becomes whether Congress intended enactment of the wildlife statute to limit or abrogate the existing treaty rights.²⁵² In the absence of a clear indication that Congress intended to abrogate the treaty rights, courts will uphold the

245. Soviet Convention, *supra* note 19, art. II.1(c).

246. See Protocol, *supra* note 16, art. II.4(a) & (b).

247. 829 F.2d 933 (9th Cir. 1987); see text, *supra* Part III.A.2 (Exclusion of Non-Native Species).

248. See *Dunkle*, 829 F.2d at 941. In contrast to the Ninth Circuit, the Supreme Court has said that the terms of the Conventions do not carry great weight in interpretation of the MBTA. See *Andrus v. Allard*, 444 U.S. 51, 62 n.18 (1979) ("But the language of the [Japanese] Convention, like the terms of the other Conventions, does not carry great weight in the interpretation of the statute."). In fairness to the Ninth Circuit, it also relied heavily on legislative history that contemplated amendments to the other Conventions in order to allow the hunting rights Congress recognized in the Soviet Convention. See *Dunkle*, 829 F.2d at 940-41 (citing S. REP. NO. 1175, 95th Cong., 2d Session., reprinted in 1978 U.S. CODE & ADMIN. NEWS 7641; 124 CONG. REC. 31,532 (1978) (statement by Senator Gravel)). But see *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (explaining that the Court may resort to legislative history only if the intent of the statute is unclear). In addition, the *Dunkle* court did not find a conflict between the different conventions but, instead, simply a difference in scope. See *Dunkle*, 829 F.2d at 941.

249. Although three of the four Conventions make some allowance for native or aboriginal rights, the Mexican Convention makes none. Consequently, it is unclear how the Ninth Circuit concluded the Canadian Convention is the most restrictive with respect to Native American hunting rights. See *Dunkle*, 829 F.2d at 941 ("The United States-Canada Convention is the most restrictive of the four treaties, and all of the Secretary's regulations must be in accord with that treaty.").

250. See *id.* at 945.

251. See *United States v. Dion*, 476 U.S. 734, 738 (1986) ("These rights need not be expressly mentioned in the treaty.").

252. See *Dion*, 476 U.S. at 738-39.

treaty rights and dismiss the prosecution. The standards used for determining Congress's intent have varied between and within courts.²⁵³

There have been instances in which courts have upheld treaty rights to hunt migratory birds and, consequently, dismissed MBTA prosecutions.²⁵⁴ However, recent prosecutions under related wildlife statutes have been upheld, since courts have found that the wildlife statutes abrogated treaty rights.²⁵⁵ Even in instances in which courts have upheld treaty rights to hunt migratory birds, some have not found a right to sell the bird products.²⁵⁶

3. Religious Freedom Restoration Act.

Relevant to all prosecutions, but especially to those against native Americans, is the potential for defenses based on the Religious Freedom Restoration Act (RFRA),²⁵⁷ which provides that:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.²⁵⁸

Application of RFRA and treaty rights is rapidly evolving and a full discussion of their application is beyond the scope of this article.

D. Extraterritorial Application

Another area of significant concern for enforcement efforts is the geographic scope of the MBTA.

There is no doubt that the restrictions of the MBTA bind all those who act within United States territory.²⁵⁹ At the other end of the spectrum, it seems to be accepted that the MBTA does not bind foreign nationals acting within foreign territory.²⁶⁰ Questions have arisen, however, when U.S. nationals act within the

253. *See id.* ("We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated.").

254. *See United States v. Bresette*, 761 F. Supp. 658, 664-65 (D. Minn. 1991) (confirming that the Chippewa enjoy the treaty right to sell migratory bird feathers); *United States v. Cutler*, 37 F. Supp. 724, 725 (D. Idaho 1941) (confirming that the Shoshone and Bannock enjoy the treaty right to kill migratory birds).

255. *See Dion*, 476 U.S. at 743-46 (holding that the Bald Eagle Protection Act abrogated treaty rights, so that treaty rights could not be asserted against prosecution under *either* the Eagle Protection Act *or* the Endangered Species Act).

256. *See United States v. Dion*, 752 F.2d 1261, 1264 (8th Cir. 1985) (en banc) (Yankton Sioux), *rev'd on related grounds*, 476 U.S. 734 (1986).

257. 42 U.S.C. § 2000bb-bb-4 (1994).

258. *Id.* § 2000bb-1(a)-(b).

259. United States territory, for this purpose, is most conservatively defined to include a marginal belt of the sea extending outward from the coastline three nautical miles. However, an executive proclamation states the zone could extend outward from the coastline for twenty-four geographical miles. Proclamation No. 7219, 64 Fed. Reg. 48,701 (1999).

260. In some limited cases, United States criminal jurisdiction has been found in instances involving a foreign national acting in a foreign territory. *See United States v. Pizzarusso*, 388 F.2d 8,

territory of foreign sovereigns, and when acts occur outside the territory of any sovereign, *e.g.*, on the high seas or in Antarctica.

1. Legal Framework for Determining Extraterritorial Application.

Generally, "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority . . . is a matter of statutory construction."²⁶¹

As a matter of statutory construction, it is presumed that Congress has not exercised its authority to apply legislation beyond the territorial jurisdiction of the United States.²⁶² The primary purpose of this presumption has been described as protecting "against unintended clashes between our laws and those of other nations which could result in international discord."²⁶³

The presumption can be overcome with regard to criminal statutes if (1) a clear expression of contrary intent appears in the legislation, or (2) the statute belongs to a particular class of statutes the nature of which inherently requires its application beyond the territorial jurisdiction of the United States. This special class of statutes has been described as those:

which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses . . . are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.²⁶⁴

While on its face the class of statutes described in *Bowman* appears fairly restrictive, subsequent decisions by Circuit Courts of Appeals have interpreted *Bowman* liberally to allow extraterritorial application either where the govern-

9-11 (2d Cir. 1968) (finding jurisdiction where foreign national made false statements in her visa application, because such actions have potentially adverse effects upon security of governmental functions); *Rocha v. United States*, 288 F.2d 545, 548-50 (9th Cir. 1961) (finding jurisdiction in relation to visa fraud due to adverse effect produced by alien's entry into the United States).

One might argue that the taking of a migratory bird by a foreign national in a foreign territory, so that the bird consequently does not migrate back into the United States, would similarly produce a sufficient domestic adverse effect to support extraterritorial application, particularly where the foreign territory was also a signatory to one of the bilateral migratory bird treaties and thus already committed to maintaining the migratory bird populations for both nations to enjoy. *But see United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) (holding sovereigns generally enjoy control over the natural resources within their territories and the exploitation thereof).

261. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citations omitted).

262. See *Arabian*, 499 U.S. at 248; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) ("the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears"); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) ("legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"); *United States v. Bowman*, 260 U.S. 94, 98 (1922) (recognizing presumption of territorial jurisdiction with regard to crimes against private individuals or their property).

263. *Arabian*, 499 U.S. at 248.

264. *Id.*

ment's own interests are at stake *or* where the nature of the offense would appear to require, as a practical matter, extraterritorial application for effective enforcement.²⁶⁵

Overlaid on this two-part analysis are considerations of fundamental principles of international law. Three tenets of international law commonly are cited in relation to considerations of extraterritoriality. First, citizenship alone is a "relationship sufficient to justify the exercise of jurisdiction" by a sovereign.²⁶⁶ Second, any exercise of jurisdiction must be reasonable with respect to a person or activity "having connections with another state."²⁶⁷ And third, "a sovereign may regulate the ships under its flag and the conduct of its citizens while on those ships."²⁶⁸

2. When In Rome . . .

The question of whether the MBTA applies to U.S. nationals acting within a foreign territory was the subject of a Solicitor's Opinion dated December 11, 1980.²⁶⁹ In a four-page summary opinion, the Office of the Solicitor opined that the fundamental prohibitions of the MBTA do not apply to U.S. nationals acting within foreign territories. Using a *Bowman*-based analysis, the Solicitor found that because the underlying migratory bird treaties contemplated that each country would enact implementing legislation, and because persons of any nationality would be bound by that implementing legislation when inside the territory of another party, a lack of extraterritorial application of the MBTA would not curtail the scope or usefulness of the MBTA.²⁷⁰ This rationale also implicates a basic premise behind the presumption against extraterritoriality. That is, particularly where the foreign sovereign has its own statutes addressing the very conduct at issue, extraterritorial application may cause discord if the United States were to attempt to enforce its own implementing legislation to actions taken within the foreign sovereign's territory. Moreover, the opinion concluded, there is no clear expression of Congressional intent to the contrary to be found within the MBTA.²⁷¹ Thus, the general presumption against extraterritorial application is not overcome.

265. See *United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980) ("The nature of the enactment here in question mandates an extraterritorial application under the second category described in *Bowman*"); *Brulay v. United States*, 383 F.2d 345, 350 (9th Cir. 1967); *United States v. Thomas*, 893 F.2d 1066, 1068-69 (9th Cir. 1990).

266. *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir. 1977).

267. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 403(1) (1987).

268. *United States v. Bowman*, 260 U.S. 94, 97 (1922) (noting U.S. ships on the high seas are constructively a part of the territory of the United States); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 502 (1986); Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) (setting forth five fundamental bases in international law for extraterritorial jurisdiction: (1) territorial; (2) national (sovereign's own citizens); (3) universal (physical custody of perpetrator of universally abhorrent crime such as terrorism); (4) passive personal (based on nationality of the person injured); and (5) protective (based on actions at issue having potential adverse effects on security or governmental functions)).

269. See Solicitor's Opinion re Extraterritorial Application of Section 2 of the Migratory Bird Treaty Act, December 11, 1980.

270. See *id.* at 3-4.

271. See *id.* at 4.

Significantly, the Opinion noted that, under the Soviet Convention, the parties could, by mutual agreement, "designate areas of special importance to the conservation of migratory birds outside the areas under their jurisdiction," and that they would attempt to ensure that their citizens, or those subject to their jurisdiction, would act in accordance with the principles of the treaty in relation to those areas.²⁷² Were the parties to designate such areas, which to date they have not, the opinion acknowledges that arguably the MBTA would apply to acts of U.S. citizens within those areas. The opinion does not state on what basis such extraterritorial application would be extended. Perhaps it would simply be because one would expect any such designation to include a clear expression from Congress on this issue. Or perhaps the intent of the Soviet Convention Treaty alone would lead to this conclusion, as will be explored further below.

The position that the MBTA does not apply to U.S. citizens when they are acting in foreign territory is also supported by a 1977 decision in which the Fifth Circuit Court of Appeals determined that the moratorium provision of the Marine Mammal Protection Act did not apply to United States citizens acting in the waters of a foreign sovereign and in accordance with that sovereign's statutes.²⁷³ The Fifth Circuit cited many of the considerations relied upon by the Solicitor's Memorandum. The authors have found no information indicating any significant continuing dissent from the conclusion reached in the 1980 Solicitor's Memorandum regarding this issue.²⁷⁴

3. When In Limbo . . .

a. *The Crisis*

An entirely different equation comes into play when dealing with the actions of persons, both U.S. citizens and foreign nationals, in areas such as the high seas, Antarctica, or the Exclusively Economic Zones ("EEZ"), that are neither U.S. territory per se, nor the territory of foreign sovereigns.²⁷⁵ The stakes for this issue are quite high both for migratory birds and for fishermen because a significant number of migratory bird deaths occur in conjunction with ocean fishing activities.

For example, it has been documented that sixty-one species of birds have been killed by long-line fisheries when they attempt to eat bait.²⁷⁶ Of these species, twenty-five have been accorded "threatened" status by the World Conservation Union as either critically endangered, endangered or vulnerable.²⁷⁷ It has also been documented that populations of southern albatross have been declining

272. Soviet Convention, *supra* note 19, at art. IV, para. 3.

273. See *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

274. *But see, supra* note 260.

275. It is quite possible for a statute to have extraterritorial application in some circumstances but not in others. For example, a statute that Congress explicitly states is applicable on the high seas, may still, lacking a further explicit statement, not be applicable in a foreign territory. This results from the differing degrees of incursion on foreign sovereignty implicated in the different circumstances.

276. Interview with Al M. Manville II, Ph.D., Wildlife Biologist, Office of Migratory Bird Management, U.S. Fish & Wildlife Service (Feb. 10, 2000) (referencing *Constituent Briefing: U.S. National Plan of Action for the Reduction of Incidental Catch of Seabirds in the Longline Fisheries*, National Marine Fisheries Service (Jan. 19, 2000)).

277. *Id.*

in direct correlation to long-line fishing efforts in the southern ocean fisheries and these incidental takes are considered incompatible with a sustainable southern albatross population.²⁷⁸ The U.S. Fish and Wildlife Service stated that a conservative estimate of the number of seabirds taken worldwide in long-line fisheries alone in a given year is in the hundreds of thousands.²⁷⁹

b. The Existing Policy

The first time the Solicitor's Office addressed this broader issue of extraterritorial application in areas outside of any particular sovereign's territory, it was not analyzed in depth. Instead, the Solicitor issued a four-page Memorandum in early 1981 that relied on its 1980 Memorandum. This 1981 Memorandum erroneously represented that the earlier Opinion addressed the more general issue of any extraterritorial application of the MBTA, not just its application to acts that occur in foreign territory.²⁸⁰

Like the 1980 Memorandum, the 1981 Memorandum was initiated primarily to address only a very narrow issue—the application of the MBTA to foreign nationals acting outside of United States territory. Also like the 1980 Memorandum, the 1981 Memorandum noted one possible indicia of at least some extraterritorial application; it acknowledged that the Negotiation Report from the American Delegation for the Soviet Convention stated that “it was the intention of the ‘American negotiators to have this Convention apply to the fifty states (including the high seas out to the 200 mile limit).’”²⁸¹ But the Memorandum went on to conclude that there is nothing in the legislation that indicates this intention was carried out by Congress and concluded that an individual violating the MBTA outside the jurisdiction of the United States could not be prosecuted by the United States.²⁸²

c. The Future as Congress Intended

In fact, the issue of extraterritorial application of the MBTA, particularly to U.S. citizens within territories for which there is no sovereign power, is not so

278. *Id.*; Nigel G. Brothers, et al., *The Incidental Catch of Seabirds by Longline Fisheries: Worldwide Review and Technical Guidelines for Mitigation*, Food and Agriculture Organization, Fisheries Circular No. 937 (1999).

279. *Id.*

280. Memorandum from Assistant Solicitor, Fish and Wildlife, to Office of Migratory Bird Management, Fish and Wildlife Service dated March 27, 1981 (“In a December 11, 1980, memo to the Chief, Division of Law Enforcement, from the Assistant Solicitor, Fish and Wildlife, we pointed out that section 2 [16 U.S.C. § 703] of the MBTA does not apply extraterritorially. In other words, an individual (including a United States citizen) violating the MBTA outside the jurisdiction of the United States could not be prosecuted by the United States.”).

A third Solicitor's Memorandum dated October 6, 1987, concluded that the Presidential Proclamation that established the 200-mile Exclusive Economic Zone did not alter the 1980 and 1981 conclusions that the MBTA does not apply extraterritorially. Memorandum from Charles P. Raynor, Assistant Solicitor, to Frank Dunkle, Director, Fish and Wildlife Service dated October 6, 1987.

281. Memorandum from Assistant Solicitor, Fish and Wildlife, to Mark Schaffer, Office of Migratory Bird Management, Fish and Wildlife Service pg. 3 n.2 (March 27, 1981).

282. *See id.* (mentioning a State Department “informal opinion” indicating that agency's belief that jurisdiction extended only to the territorial seas).

clear cut as one might imagine from the brief Solicitor's Opinion. Both from a legal and a pragmatic perspective, the MBTA should be found to apply at least as to U.S. citizens and U.S. flag vessels acting within areas outside of any foreign territory.

i. Congressional Intent

Congress did not include within the MBTA any explicit general statement of congressional intent with regard to the extraterritorial application of the MBTA. Parts of the MBTA and references to the MBTA in subsequent legislation, however, weigh in favor of finding at least limited extraterritorial application.

First, the legislation itself provides that it "shall be unlawful to ship, transport, or carry, by any mean whatsoever, . . . to or through a foreign country, any bird, or any part, nest, or egg thereof" which was taken, or transported at any time in violation of the laws of the State, Territory, or district in which it was taken or from which it was shipped.²⁸³ In other words, if a bird is taken in violation of a State law, and then carried by another individual through Brazil, that act of carriage through Brazil is illegal under the MBTA. This appears on its face to be an explicit extraterritorial application of the MBTA.

This provision of the MBTA addresses actions involving a bird illegally taken within the United States. While indicative of an intent to apply at least parts of the MBTA extraterritorially, this raises at least two questions: (1) why did Congress specify that carriage through a foreign country, which implicates direct sovereignty issues, is illegal while not explicitly addressing the issue of such carriage on the high seas or at least within the EEZ; and (2) did Congress mean to apply the statute extraterritorially *only* where the bird in question was illegally obtained in the United States originally, thus indicating that a bird taken outside of the United States would not be covered by the MBTA?

In the absence of any discernable reason to distinguish carriage through a foreign country from carriage through a global commons in this circumstance, the Congressional intent that at least Section 705 be given extraterritorial applications should be read to extend to all extraterritorial areas since Congress has stated that it should apply in what is normally the most limited circumstance for extraterritorial application. As to the second question, additional light may be shed on this by reference to a second expression of Congressional intent regarding the MBTA.

In the recently enacted Antarctic Conservation Act,²⁸⁴ Congress specifically provided that a criminal conviction under that Act, which covers only actions in the Antarctic, "shall not be deemed to preclude a conviction for such an act under any other law, including, but not limited to, the Marine Mammal Protection Act (MMPA) of 1972, the Endangered Species Act of 1973 and the *Migratory Bird Treaty Act*."²⁸⁵ The MMPA and the ESA expressly prohibit takings of marine mammals and endangered species, respectively, within the United States, its

283. 16 U.S.C. § 705 (1994) (emphasis added).

284. 16 U.S.C. §§ 2403-12 (1988).

285. The Antarctic Conservation Act, 16 U.S.C. § 2408(c) (1994) (emphasis in original).

territorial seas, and on the high seas.²⁸⁶ Antarctica has been commonly equated with the global commons of the high seas.²⁸⁷ If Congress did not intend the MBTA to have at least extraterritorial application as far as Antarctica and the high seas, this statutory language would become superfluous, violating another basic tenet of statutory construction.

Thus, the express language of both the MBTA and the Antarctic Conservation Act supports an interpretation that (1) the MBTA "take" prohibitions under Section 703 were intended to apply within the United States *and* areas that are not subject to another sovereign, including Antarctica and on U.S. flagged ships on the high seas; and (2) the MBTA transport prohibitions under Section 705 were intended to apply even within foreign territories to the extent that the birds at issue were illegally handled in the first instance within the United States.

ii. *Nature of the Statute*

Even if the intent of Congress were not clear, under *Bowman* and its progeny, the nature of the MBTA appears to require, as a practical matter, extraterritorial application for effective enforcement.

The migratory birds at issue by their very nature are frequently found outside the territorial extent of the United States. One oft-cited example is the northern fulmar which spends the vast majority of its time on the high seas, only returning to land to nest, typically on lands outside the territorial limits of the United States. If the MBTA were effective only as to actions taken within the territorial limits of the United States, it would afford virtually no protection for the northern fulmar, to which the MBTA expressly applies.²⁸⁸ Similarly, both the Japan and Soviet Conventions protect only birds that migrate between those countries and the United States.²⁸⁹ Neither of these countries share with the United States a land border, or an extensive border between territorial waters. Since the migration therefore requires that the birds fly over international waters, a failure to apply the MBTA within these waters will result in a significant gap in the protection of the birds covered by these treaties. Since "[t]he natural inference from the character of the offense is that the sea would be a probable place for its commission",²⁹⁰ it must be concluded that Congress intended the MBTA to apply beyond the territorial United States.

Moreover, as noted above, the necessity of extraterritorial application is underscored by the language of the Soviet Convention, discussed above, that

286. See 16 U.S.C. § 1372(a)(1)-(2) (1994) (addressing Marine Mammal Protection); 16 U.S.C. § 1538(a)(1)(B),(C) (1994) (addressing Endangered Species); *United States v. Mitchell*, 553 F.2d 996, 997, 1004-05 (5th Cir. 1977) (holding that Congress did not intend the MMPA moratorium provisions to apply within foreign territories and acknowledging the intended application of the MMPA's prohibition provisions to the high seas).

287. See *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993) (quoting Executive Order 12114, 3 C.F.R. 356 (1980) and giving both Antarctica and the oceans as examples of "the global commons outside the jurisdiction of any nation").

288. 50 C.F.R. § 10.13 (1998) (listing the Northern Fulmar as a migratory bird protected under the MBTA).

289. See *Japanese Convention*, *supra* note 18, art. II.1.A; *Soviet Convention*, *supra* note 19, art. I.1.A.

290. *United States v. Bowman*, 260 U.S. 94, 99 (1922).

contemplates the designation of areas of special conservation importance outside the jurisdiction of either nation, in which their citizens would be bound by the principles of the treaty.²⁹¹ The mere fact that the MBTA is the implementing statute of four international agreements reflects the necessity of international cooperation and enforcement to carry out its purpose.

iii. International Law Issues

The basic principles of international law further support the application of the MBTA in areas that are not subject to another sovereign, and to actions involving birds illegally handled in the first instance within the United States.

International law supports the exercise of criminal jurisdiction by the United States over its own citizens, wherever they may be found. International law further supports the exercise of criminal jurisdiction by the United States over United States' flagged ships. Furthermore, it is "reasonable" for a sovereign to exercise jurisdiction over persons in other sovereign territories where the individual possesses or controls an item previously rendered contraband within the territory of the United States.²⁹²

Most cases that address the issue of whether a statute has extraterritorial application where Congress has not specifically so stated are (1) fact-specific and (2) pragmatic, recognizing basic tenets of international law and diplomacy. One can view the cases as a sliding scale. At one extreme are cases where the nature of the statute and the facts presented do not seem to require or contemplate extraterritorial application while to find such extraterritorial application would likely cause significant international tensions.²⁹³ At the other extreme are cases where the nature of the statute and the facts appear to demand extraterritorial application and international repercussions are likely to be nonexistent.²⁹⁴ The MBTA falls into this latter end of the scale.

IV. CONCLUSION

While the MBTA has been in effect for close to a century, its mandates have become increasingly significant, and controversial, as the protection of migratory birds runs into conflict with activities and appurtenances of modern society that did not exist, or were not so prevalent, when the Act was passed. The extent and importance of the MBTA's prohibitions, particularly their application to situations outside the context of domestic hunting, is just now being appreciated, as are the profound impacts that such non-hunting activities have on the natural resource that the MBTA, and its underlying treaties, are intended to protect and perpetuate. But while the applications may be novel, the purpose of the prohibitions remains exactly the same – preservation of migratory birds.

291. Soviet Convention, *supra* note 19, art. IV.3.

292. See *United States v. McRary*, 665 F.2d 674 (5th Cir. 1982) (finding extraterritorial application of federal kidnapping statute justified where victim was taken within United States territory before being transported in foreign commerce).

293. See *EEOC v. Arabian Oil Co.*, 499 U.S. 244 (1991) (finding Title VII does not apply to U.S. citizens working in foreign territories).

294. See *United States v. Pizzarusso*, 388 F.2d 8, 9 (2d Cir. 1968) (finding extraterritorial application for false statements made in the context of applying for a visa at a U.S. consulate).

The question now will be whether or not just human utilization of, but also human impacts upon the migratory birds will be controlled under the MBTA. The courts have and will continue to provide some interpretive guidance on issues such as extraterritorial application, protected species, and the scope of the strict liability taking prohibitions. Ultimately the Secretary of the Interior, through the FWS, or the legislature may also be called upon to address at least some of these issues.