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HABITAT PROTECTION AND THE MIGRATORY BIRD TREATY ACT

SCOTT FINET*

* Law Librarian and Associate Professor of Law, Temple University. I am grateful to my colleagues Alice Abreu, Jane Baron, Jeff Dunoff and Muriel Spence for their insightful suggestions and comments on earlier drafts. Indispensable research assistance was enthusiastically provided by my colleagues Burt Benenson, Virginia Gutierrez, John Necci and Larry Reilly, members of the Temple Law Library staff. All errors are mine.

I. INTRODUCTION: THE ACCELERATION OF EXTINCTION

The Earth is losing species at an alarming rate.[1] Much of the loss is due to human activity, including human activity that results in loss of habitat for nonhuman species.[2] In the United States, recognition of the problem of species loss resulted in the passage of the Endangered Species Act[3] [ESA] in 1973. The Migratory Bird Treaty Act[4] [MBTA], enacted

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1. Although the study of mass extinction is a relatively inexact science, one recent estimate places the current rate of extinctions at 27,000 species per year. *See* EDWARD O. WILSON, THE DIVERSITY OF LIFE 280 (1992). Wilson estimates that "[e]ven with . . . cautious parameters, selected in a biased manner to draw a maximally optimistic conclusion, the number of species doomed each year is 27,000." *Id.* The study of mass extinction is currently undergoing something of a revival. "[E]volutionary biologists and paleontologists have long shied away from trying to explain the cause of mass extinctions, because they were considered too complex to understand." RICHARD LEAKEY & ROGER LEWIN, THE SIXTH EXTINCTION: PATTERNS OF LIFE AND THE FUTURE OF HUMANKIND 48 (1995). "[T]he subject of extinction has all but been neglected by evolutionary biologists until very recently." *Id.* at 39. Among the reasons for the recent focus on extinction is "the growing realization that we are witnessing modern extinctions on a cataclysmic scale, the product of human encroachment on ecosystems." *Id.* at 40.

While extinction is an integral and inevitable component of the process of evolution, the current rate of species loss is orders of magnitudes higher than the rate of normal "background" extinctions. *See* WILSON, *supra*, at 280 ("If past species have lived on the order of a million years in the absence of human interference, a common figure for some groups documented in the fossil record, it follows that the normal 'background' extinction rate is about one species per one million species a year. Human activity has increased extinction between 1,000 and 10,000 times over this level in the rain forest by reduction in area alone.")

The scope of the problem is summarized by Wilson: "Clearly we are in the midst of one of the great extinction spasms of geological history." *Id.* There have been five previous extinctions spasms. *See* LEAKEY & LEWIN, *supra*, at 44-58.

2. Leakey & Lewin, *supra* note 1, at 241, use an estimated current extinction rate of 30,000 species per year divided by paleontologist David Raup's estimate of normal background extinction of one species loss every four years to determine that the current extinction rate is "120,000 times above background." *Id.* Although comparable in scale to previous extinction spasms which were "caused by global temperature change, regression of sea level, or asteroid impact," the current extinction spasm is the result of the actions of a single species, homo sapiens. *Id.*

There are three principal ways that human activity causes extinctions. *See id.* at 234; *see also* WILSON, *supra* note 1, at 253 ("From prehistory to the present time, the mindless horsemen of the environmental apocalypse have been overkill, habitat destruction, introduction of animals such as rats and goats, and diseases carried by these exotic animals.") Human activities such as hunting, harvesting and collecting can lead directly to extinction. *See* LEAKY & LEWIN, *supra* note 1, at 175-79. Another type of human activity, the introduction of alien species into new habitats, can lead indirectly to extinction. *Id*. at 192 ("[O]f all the predatory fellow travelers of humans, rats are responsible for the largest number of extinctions. With omnivorous diets, rats dine on the eggs and the young of birds and reptiles, beginning the chain of destruction early in the life cycle."). The third and the most significant cause of extinction is the destruction and fragmentation of habitat. *See id.* at 234; *see also* WILSON, *supra* note 1, at 253 ("[I]n recent centuries, and to an accelerating degree during our generation, habitat destruction is foremost among the lethal forces. . . ."). For further discussion of the link between habitat loss and extinction, see *infra* notes 5, 6.

3. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994). The ESA is the most well-developed expression in federal law of the understanding of the

in 1918, is a much older, but potentially more effective means of dealing with the problem of declining bird populations and extinctions[5] caused by habitat destruction.[6]

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vital importance of habitat for preserving wildlife. The ESA makes it unlawful to "take" an endangered species. *Id.* § 1538. The key term "take" is defined by the ESA to encompass a broad range of behaviors harmful to wildlife, including actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* § 1532(19). The term "harm" includes behavior that damages or reduces the habitat of an endangered species. The regulations promulgated by the Fish and Wildlife Service pursuant to the ESA define "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3 (1995); *see also* Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S. Ct. 2407, 2418 (1995) (The ESA encompasses within the meaning of harm "significant habitat modification or degradation that actually kills or injures wildlife.").

4. Migratory Bird Treaty Act of 1918, ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1994)). The language of the MBTA is broad and comprehensive. The statute's central operative section provides that

> [u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell . . . any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest or egg. . . .

Id. § 703 (1994). The MBTA comprehensively prohibits actions that are harmful to avian life. Exceptions to this prohibition can only be made by the authority of the Secretary of the Interior. The Secretary's authority under the MBTA is described in Section 704:

> Subject to the provisions and in order to carry out the purposes of the conventions . . . 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 . . . of any such bird, or any part, nest, or egg thereof . . . .

Id. § 704. Other sections of the act provide for warrantless arrest (Section 706), restrictions on transportation and importation (Section 705), and criminal penalties for violations (Section 707).

Significant concern has developed regarding the MBTA's strict liability provisions. *See generally* M. Lanier Woodrum, Note, *The Courts Take Flight: Scienter and the Migratory Bird Treaty Act*, 36 WASH. & LEE L. REV. 241 (1979); Steven Margolin, Note, *Liability under the Migratory Bird Treaty*, Act 7 ECOLOGY L.Q. 989 (1979); George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 190-93 (1979). The primary purpose of the strict liability provisions is to enhance the MBTA's enforceability. Without the strict liability provisions enforcement would be less effective because intent would be difficult to prove in many cases. For further discussion of the strict liability aspects of the MBTA, see *infra* Part II.E.3.

The MBTA's broad and encompassing language as well as its strict liability provisions combine to form a powerful environmental statute.

5. Because birds are one of the most visible and widely studied types of wildlife, they can serve as an indicator of the extent of species losses. An estimated twenty percent of all bird species have been eliminated in the past two thousand years. *See* WILSON, *supra* note 1, at 255. Of the approximately 9,040 bird species remaining, another eleven percent are endangered. *See id.* In the United States, populations of several bird species have declined precipitously in the past several

Several factors have a bearing or potentially have a bearing on the MBTA's utility in the furtherance of the goal of preventing extinctions through the protection of bird habitats. Among those factors are the historical interpretation and application of the MBTA by the courts and the administrative agencies charged with enforcement responsibility. For much of the time since its enactment, the MBTA has been viewed, by the courts and federal officials charged with its enforcement, primarily as a hunting regulation statute.[7] The persistence of this vision of the MBTA's scope is one of the important factors limiting efforts to use the MBTA to protect habitat.[8]

Other factors that contribute to the boundaries and structure of the MBTA are the language of the treaties that form the foundation of the MBTA, the MBTA's legislative history, and the relationship between the MBTA and the ESA. The treaties[9] and the legislative history[10] support an understanding of the MBTA that includes concerns about extinction and the promotion of the goal of protecting bird habitats. The ESA's explicit expression of the goal of preventing the extinction of threatened and endangered species through, among other means, the protection of habitat, was a watershed event in wildlife and environmental

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decades. *See id.* at 256 ("From the 1940s to the 1980s, population densities of migratory songbirds in the mid-Atlantic United States dropped 50 percent, and many species became locally extinct."). Several other North American bird species have gone extinct in this century. *See* PETER MATHIESSON, WILDLIFE IN AMERICA 179-82, 276-77 (1959). Examples include the Passenger Pigeon, the Carolina Parakeet, the Dusky Seaside Sparrow, the Heath Hen, and the Ivory-Billed Woodpecker. *See id.*

6. Habitat loss leads to extinction in several ways. Species evolve through the process of natural selection. *See* DANIEL DENNETT, DARWIN'S DANGEROUS IDEA 45-46 (1995). The essence of natural selection is the adaptation, through physiological changes due to random genetic changes, to environmental conditions including the conditions of habitat. *See* LEAKY & LEWIN, *supra* note 1, at 59-60. Species adapt in close relationship to, and are dependent on their habitats. Ironically, it is those species that are most well adapted to their habitats that are most vulnerable to habitat destruction. *See id.* at 191-92. When habitats are destroyed, species must find the same or sufficiently similar habitat in a new location or die. Habitat reduction or fragmentation can also cause extinctions if the remaining fragments are too small or isolated to adequately support a given species. *See id.* According to Leakey & Lewin, "[h]abitats that are disturbed through fragmentation lose species for several reasons. Those which require very large foraging ranges, for instance, will disappear from fragmented habitat; this particularly affects top carnivores. Species that have low population numbers are vulnerable to extinction through chance events." *Id.* at 191. Various forms of human created habitat modifications can also cause extinctions. *See* PAUL EHRLICH & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 143-57 (1981).

7. *See* Coggins & Patti, *supra* note 4, at 182 ("Until recently, reported prosecutions under the MBTA have dealt almost exclusively with hunting violations.") (footnote omitted); *see also infra* Part II.E.2 (discussing the traditional hunting regulation role of the MBTA).

8. *See infra* Part II.E.2.

9. *See infra* Part II.C.

10. *See infra* Part II.B.

regulation.[11] The ESA's support for the goal of protecting habitat has contributed to a greater understanding of the importance of protecting habitat,[12] but it can also have a limiting effect on the application of the MBTA to support the same goal.[13]

This Article's exploration of the dimensions of the utility of the MBTA for protection of bird habitats begins, in Part II, with a discussion of the factors contributing to the scope of the MBTA. The discussion will first focus on the historical circumstances surrounding the creation of the MBTA and the MBTA's legislative history. The discussion then turns to an examination of the treaties and treaty language that serve as a foundation for the MBTA. Using the enactment of the ESA as something of a dividing line, the discussion continues by exploring the traditional MBTA cases followed by several themes from judicial responses to efforts to expand the scope of the MBTA to promote the goal of protecting bird habitats. The themes in this section are the text of the MBTA, the predominant historical application of the MBTA to regulate hunting, the MBTA's strict liability provision, and the effect of the ESA on interpretations of the MBTA. This discussion concludes with the observation that progress towards the habitat protection goal has been limited. In Part III, I suggest an alternative approach for interpreting MBTA cases, the MBTA Habitat Framework, that complements and supplements the dominant vision of the MBTA and may also result in more balanced results and wider protection of bird habitats. This section includes discussion of recent cases that illustrate how the MBTA Habitat Framework could potentially be adopted to resolve conflicts over bird habitats.

II. THE ORIGINS AND INTERPRETATIONS OF THE MIGRATORY BIRD TREATY ACT

A. Forces that Contributed to the Creation of the MBTA

The MBTA was created within the context of gradually increasing recognition of the value and importance of the American wilderness in the late nineteenth and early twentieth century.[14] Within

11. *See infra* Part II.E.4.

12. *See id.* (describing the impact of the ESA on the interpretation and uses of the MBTA).

13. *See infra* notes 83-85 and accompanying text.

14. *See generally* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (3d ed. 1982) (describing the gradual evolution of American wilderness from the subject of conquest and exploitation to one of conservation and preservation); THOMAS R. DUNLAP, SAVING AMERICA'S WILDLIFE: ECOLOGY AND THE AMERICAN MIND (1988) (describing the growth in interest in wildlife conservation).

this context, a bird protection movement was created that culminated in the enactment of the MBTA.[15] Numerous attempts to address the problem through legislation finally succeeded with the passage of the McLean-Weeks Act (McLean-Weeks) in 1913.[16] The constitutionality of McLean-Weeks was challenged and those challenges were upheld in two federal district courts.[17] The constitutionality of McLean-Weeks was never decided by the Supreme Court. To avoid the possibility of a ruling by the Supreme Court that McLean-Weeks was unconstitutional, supporters of bird protection legislation adopted a new strategy. They elected to develop an alternative constitutional basis, the treaty power, for

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15. Enactment of the MBTA was a legislative response to the problem of mass destruction of avian life. At the end of the nineteenth century birds were killed in large numbers for food, sport and millinery purposes. *See* WILLIAM T. HORNADY, OUR VANISHING WILDLIFE: ITS EXTERMINATION AND PRESERVATION 63-69, 143-55 (1970) (1913); OLIVER H. ORR JR., SAVING AMERICAN BIRDS: T. GILBERT PEARSON AND THE FOUNDING OF THE AUDUBON MOVEMENT 27 (1992). By the turn of the century, several species had become extinct and many were threatened with extinction. *See* MATHIESSON, *supra* note 5, at 179-82, 276-78. In response to the mass destruction, a bird protection movement was formed in the later half of the nineteenth century, its leadership drawn from the new science of ornithology. *See* ORR, *supra*, at 22-30. One of the movement's primary goals was to create laws to regulate the taking of bird life. *See id.* The most important statutory result of those efforts is the MBTA.

16. Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918). The McLean-Weeks Act declared that

> [a]ll wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or 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 hereinafter provided. . . .

Id. The statute authorized the Department of Agriculture to adopt regulations regarding closed seasons for hunting. *Id.* §§ 847-848. The statute further provided that "it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons. . . ." *Id.* § 848.

17. *See* United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914). In *Shauver*, the defendant demurred to an indictment for violation of the McLean-Weeks Act on the grounds that the statute was unconstitutional. *See id.* at 155. The court agreed. *Id.* at 160. After examining the constitutional limits on the authority of the federal government to regulate migratory wild game and fish, the court concluded that wildlife is the property of the state in which it is located and that the court was "unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional." *Id.*; *see also* United States v. McCullagh, 221 Fed. 288 (D. Kan. 1914). In *McCullagh*, the defendant demurred to a charge of taking wild duck in violation of the McLean-Weeks Act on the grounds that the statute was unconstitutional. *Id.* at 290. The court agreed, finding that neither the commerce clause nor the general welfare clause provided a constitutional basis for the McLean-Weeks Act. *Id.* at 296.

bird protection legislation.[18] In 1916 a migratory bird protection convention was negotiated with Great Britain on behalf of Canada.[19] Two years later implementing legislation, the MBTA, was passed.[20] The constitutionality of the MBTA was challenged and in 1920 the Supreme Court, basing its decision on the treaty power, upheld the MBTA in the landmark case, *Missouri v. Holland*.[21]

B. The Migratory Bird Treaty Act's Legislative History

We understand hunting, through a contemporary prism, primarily if not exclusively as a recreational activity. At the time the MBTA was enacted, market hunting, that is hunting birds with the intent to sell them, was common.[22] Market hunters targeted a wider variety of bird species than contemporary recreational hunters.[23] It is clear that the statute is at

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18. *See* Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77, 81 (1977) (describing the efforts of the proponents of bird protection to find a secure constitutional basis for the legislation).

19. The Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, August 16, 1916, U.S.-U.K., 39 Stat. 1702 [hereinafter Treaty with Great Britain].

20. Migratory Bird Treaty Act of 1918, ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1994)).

21. Missouri v. Holland, 252 U.S. 416 (1920). The decision has generated considerable discussion. Holmes's reliance on the treaty power to uphold the MBTA has been called an "eternal puzzle" by one commentator. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 351 n.464 (1990) ("The eternal puzzle of *Missouri v. Holland* is, of course, why Holmes went out of his way to intimate that treaty power is not limited by the Constitution's ordinary rules of federalism. Holmes could have demurely placed controls on migratory birds within regulation of interstate and foreign commerce, and then decided only that treaty power extends at least as far as Congress' enumerated legislative powers."). Several contemporary commentators criticized the use of the treaty power to effectuate domestic legislation that had previously been determined to be unconstitutional. *See, e.g.*, Forrest Revere Black, Missouri v. Holland—*A Milepost on the Road to Judicial Absolutism*, 25 NW. U.L. REV. 911 (1931). For a discussion of a Commerce Clause based defense of laws to protect migratory species, see Edward S. Corwin, *Game Protection and the Constitution*, 14 MICH. L. REV. 613, 617 (1916). Above and beyond the constitutional justification, the McLean-Weeks Act "is most advantageously and most correctly viewed as part and parcel of the great movement for the conservation of national resources, for the conservation of the navigable streams of the country, of its forest, of its wild life. . . ." *Id*. at 625.

22. *See* WILLIAM T. HORNADAY, THIRTY YEARS WAR FOR WILD LIFE 156 (1970).

23. *See id.* ("Birds that were not game in any sense whatever entered into the reckoning. In 1902 there were found in one cold storage house in New York the following dead birds, being held for the game market:

Snow Buntings	8,058	Grouse	7,560
Sandpipers	7,607	Quail	4,385
Plover	5,218	Ducks	1,756
Snipe	7,003	Bobolinks	288
Yellow Legs	788	Woodcock	96)

least intended to regulate recreational hunting and eliminate market hunting—two forms of human activity that negatively impact bird populations. But is the scope of the MBTA limited to this form of regulation? If not, what is the proper scope of the MBTA and where are the limits to an expanded scope? One approach to determining the proper scope of the MBTA is to ask: Was the MBTA intended to be limited to the relatively narrow application of hunting regulation or was its intended purpose broader—was it intended as something like a general bird protection statute?

At its inception, the statute was intended to protect more than game birds.[24] The legislative history describes, among other purposes of the statute, the importance of protecting insectivorous birds because of their utility.[25] Today that consideration might be expressed as an understanding and appreciation of birds' roles in a biodiverse ecosystem. Increases in scientific knowledge, particularly the science of ecology, provide a broader, more inclusive vision of the natural world, and support the conclusion that a comprehensive understanding of the MBTA includes the idea that the statute should serve as an important tool for effective management and protection of birds and their habitat. The statute and regulations provide a well-developed approach to managing game birds, but the question of how best to protect nongame birds remains largely unanswered. A significant element in the answer must include protection of the birds' habitat.[26]

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24. *See* 56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston). In arguing against passage of the MBTA, Representative Huddleston stated that "[This bill] puts it within the power of the Secretary of Agriculture to forbid the killing of game birds as much as the killing of song or insectiverous birds. They are put on the same level." *Id.*

25. *See* H.R. REP. NO. 65-243, at 2 (1918) ("By preventing the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage them to the extent of many millions of dollars, [the MBTA] will thus contribute immensely to enlarging and making more secure the crops. . . ."); *see also* 56 CONG. REC. 7360-61 (1918) (statement of Rep. Stedman) ("The protection of insectivorous migratory birds is essential to the preservation of our cotton, grain, and timber crops. . . .").

26. The MBTA's legislative history includes recognition of the importance of habitat in protecting migratory birds. *See* H.R. REP. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President) ("Not very many years ago vast numbers of waterfowl and shore birds nested within the limits of the United States, especially in the far West, but the 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.").

C. The MBTA Treaties

The MBTA incorporates, and implements domestically, four treaties: the original treaty with Great Britain[27] and treaties with Mexico,[28] Japan,[29] and Russia.[30] Along with other purposes, prevention of extinction is a concern of all four treaties. The treaty justifications for preventing extinctions have evolved over time. The 1916 Convention was based on concerns about the possibility of extinction because

> [m]any of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as agricultural crops . . . but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds. . . .[31]

The 1936 Mexican treaty promoted "a rational utilization of migratory birds for the purposes of sport as well as for food, commerce and industry."[32] The treaty states that this is necessary to promote the goal of bird protection so that "species may not be exterminated."[33] By the 1970s, the treaties recognized a widening circle of reasons for protecting birds as "a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value."[34] The treaty with Japan expressly states specific concerns about the link between habitat and extinction, stating, "island environments are particularly susceptible to disturbances . . . many species of birds of the Pacific [I]slands have been exterminated, and . . . some other species of birds are in danger of extinction. . . ."[35]

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27. Treaty with Great Britain, *supra* note 19.

28. The Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, February 7, 1936, U.S.-Mex., 50 Stat. 1311 [hereinafter Treaty with Mexico].

29. The Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, March 4, 1972, U.S.-Japan, 25 U.S.T. 3329 [hereinafter Treaty with Japan].

30. The Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, May 23, 1972, U.S.-U.S.S.R., 29 U.S.T. 4647 [hereinafter Treaty with the U.S.S.R.].

31. Treaty with Great Britain, *supra* note 19, at 1702.

32. Treaty with Mexico, *supra* note 28, at 1301.

33. *Id.*

34. Treaty with the U.S.S.R., *supra* note 30 at 4659. The migratory bird treaty with Japan uses similar language: "birds constitute a natural resource of great value for recreational, aesthetic, scientific, and economic purposes. . . ." Treaty with Japan, *supra* note 29, at 3331.

35. Treaty with Japan, *supra* note 29, at 3331.

The treaties demonstrate knowledge and understanding of the link between habitat and bird protection, and the desire to incorporate that knowledge and understanding in the statute.[36] The treaties' reflection of the understanding and knowledge of the importance of habitat protection increases over time. The 1916 treaty with Great Britain and the 1936 treaty with Mexico advocated the creation of bird refuges.[37] By the 1970s the treaties with Japan and Russia explicitly recognized the importance of protecting habitat.[38] In the treaty with Japan, each party agreed to "endeavor to take appropriate measures to preserve and enhance the environment" of protected birds[39] and to "seek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas. . . ."[40] The treaty with the Soviet Union provides that "To the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate pollution or detrimental alteration of that environment."[41] The parties to the treaty agreed to "identify areas of breeding, wintering, feeding, and moulting which are of special importance to the conservation of migratory birds. . . ."[42] The parties further agreed that "[t]o the maximum extent possible . . ."[43] they would "undertake measures necessary to protect the ecosystems in those special areas [identified] against pollution, detrimental alteration and other environmental degradation."[44]

The treaties demonstrate a gradually expanding scope of protection for migratory birds, including an explicit recognition of the importance of habitat protection. The absence of a provision for habitat protection in the MBTA is notable, particularly in light of the language in the treaties with Japan and Russia. Unless the treaties are self-executing, as one commentator argues,[45] the only treaty provisions that become law

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36. *See generally* Michael Bean, *Migratory Bird Treaty with Russia: Continued International Wildlife Protection*, 7 Envtl. L. Rep. (Envtl. L. Inst.) 10026 (1977).

37. Treaty with Great Britain, *supra* note 19, at 1704 (calling for special protection for two species of ducks); Treaty with Mexico, *supra* note 28, at 1312 (agreeing to a general requirement for the "establishment of refuge zones in which the taking of such birds will be prohibited").

38. Coinciding with the enactment of the ESA, the preeminent habitat protection statute. *See infra* Part II.E.4.

39. Treaty with Japan, *supra* note 29, at 3335.

40. *Id*.

41. Treaty with the U.S.S.R., *supra* note 30, at 4653.

42. *Id*. at 4654.

43. *Id.*

44. *Id*.

45. *See generally* Bob Neufeld, Comment, *The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D. L. REV. 307 (1974) (describing and analyzing the Migratory

in the U.S. are the provisions passed by Congress in implementing legislation.[46] Congressional action implementing some or all of the treaties' habitat protection provisions would help to clarify the statute's scope. Absent this Congressional action, courts have, in a limited way, interpreted the MBTA's broad and encompassing language to provide a degree of habitat protection.[47]

D. Pre-ESA MBTA Cases

Prior to the ESA, judicial interpretations of the MBTA were primarily concerned with examining the statute through a hunting regulation prism. A typical fact pattern in the hunting regulation cases involved some prohibited behavior that provides the hunter with an advantage.[48] "Baiting" or luring cases were common.[49]

Given the expressed purposes of the MBTA and its broad prohibitory language, it is interesting to speculate about the reason why the MBTA's scope was limited in large measure to the regulation of hunting. Prior to the first use of the APA to invoke the MBTA's provisions,[50] there was no basis for standing for private plaintiffs.

Bird Treaty Act conventions to determine if they are self-executing). For a general discussion and analysis of the self-executing nature of treaties, see Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 49 AM. J. INT'L L. 695 (1995).

46. *See* Neufeld, *supra* note 45, at 309; *see also* MICHAEL BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 74 (1977) ("Notwithstanding the many differences among the . . . conventions, the ratification of each new convention did not result in a major overhaul of the Act, but only in technical amendments which merely added appropriate references to each subsequent convention. 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. That concern, however, is alleviated by virtue of the broad and general language which the Act employs.").

47. *See infra* Part II.E.

48. *See, e.g.*, Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938) (interpreting the "baiting" regulation); United States v. Olson, 41 F. Supp. 433 (W.D. Ky. 1941) (regulation making it illegal to hunt from a powerboat is valid); United States v. Chew, 540 F.2d 759 (4th Cir. 1976) (upholding conviction for violation of the daily bag limit).

49. "Baiting" is a term used to describe the practice of spreading corn or some other grain in order to attract and retain birds in the vicinity of the hunting grounds so that they can be more easily killed.

50. The MBTA does not have a provision for private citizen suits. The courts have generally been favorably disposed to find that plaintiffs have standing under Section 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1994). *See* Defenders of Wildlife v. United States Envtl. Protection Agency, 688 F. Supp. 1334, 1349 (D.C. Minn. 1988) (continued registration of strychnine, that results in the death of birds, is reviewable under the APA because it constitutes an illegal taking under the MBTA); Seattle Audubon Soc'y v. Robertson, No. C89-160WD *consolidated with* No. C89-99(T)WD, 1991 U.S. Dist. LEXIS 10131, 30 (W.D. Wash. Mar. 7, 1991) (The APA provides for jurisdiction over an agency action alleged to be in violation of the MBTA); Sierra Club v. Martin, 933 F. Supp. 1559, 1567-69 (N.D. Ga. 1996) (after the most

Governmental enforcement activity and prosecution were the only way the cases made their way into courts. Thus, the pre-1970 decisions reflect the origin of these cases in the prosecutorial discretion and interpretation of the Fish and Wildlife Service, the administrative agency charged with enforcement of the MBTA.[51] That the enforcement preference was

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extensive judicial analysis of private citizen standing under the APA for violations of the MBTA, the court concluded that it has jurisdiction under the APA over alleged violations of the MBTA); Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) ("the [APA] may be used by a party with standing to challenge government action that would violate the MBTA."). *But see* Defenders of Wildlife v. United States Envtl. Protection Agency, 882 F.2d 1294, 1302 (8th Cir. 1989) (An exception to standing under the APA exists when there are "established special statutory procedures relating to specific agencies.") (overruling Defenders of Wildlife v. United States Envtl. Protection Agency, 688 F. Supp. 1334) (citing Bowen v. Massachusetts, 487 U.S. 879 (1988)). Oregon Natural Resources Council v. Bureau of Reclamation, No. 91-6284-HO, 1993 U.S. Dist. LEXIS 7418, *26 (D. Or. April 5, 1993) (plaintiffs are not within the "zone of interests" protected by the MBTA and therefore cannot invoke review of agency action under the APA); Nelson v. Kleppe, 457 F. Supp. 5, 11 (D. Idaho 1976) (plaintiff does not having standing under the APA because the agency decision was within the discretion of the agency's statutory grant of authority); Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1484 (D.C. Or. 1989) (laches bars APA claim) (overruled by Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989) (equitable doctrine of laches must be applied with caution in public interest environmental litigation).

The trend is for the courts to take a broader view of standing for private citizens under the APA, with the most recent decisions granting plaintiffs the opportunity to have agency actions reviewed by the federal courts. This allows private citizens to ask the courts to enforce the broader habitat protection potential of the MBTA.

51. *See* Coggins & Patti, supra note 4, at 205 ("[T]he missing element in domestic migratory bird management has been reference to and implementation of the purposes embodied in the Treaties that the MBTA was intended to implement."). Although information about recent statistical patterns of MBTA was not available from the Fish and Wildlife Service absent a Freedom of Information Act request, recent accounts in the popular press suggest that the officials responsible for enforcing the MBTA may be more willing to fulfill the MBTA's habitat protection potential. *See* Iroquois Transmission Faces Delay, INT'L GAS REP., June 13, 1991, *available in* LEXIS, Nexis file (U.S. Fish and Wildlife Service requires a gas pipeline company to obtain a migratory bird permit before constructing 370-mile pipeline project and required that construction be suspended during the April 1-July 15 New England nesting season); *1993 Chemical Spill Results In Charges Against Marathon Pipeline Company*, PR Newswire, May 30, 1996, *available in* LEXIS, Nexis file (MBTA violations charged against a pipeline company for a spill of naphtha that killed birds and other wildlife); *Corporations Fined for Violations of Migratory Bird Treaty Act*, PR Newswire, July 26, 1996, *available in* LEXIS, Nexis file (two Ohio corporations were fined $26,000 for killing and injuring waterfowl in an oil retention pit); *Oil and Gas Politics*, TEXAS LAW., Jan. 16, 1995, at 16, *available in* LEXIS, Nexis file (federal prosecutions of oil pit violations in Texas resulted in state regulations requiring pits greater that sixteen feet in diameter to be covered with nets); *Business and the Environment; Miners Dig Deep to Give Birds a Safer Passage*, FIN. TIMES, Dec. 19, 1990, at 12 (gold mining company was fined $250,000 for the deaths of 1,001 birds protected by the MBTA in cyanide laden "tailing" pools. Mining companies using the "heap leaching" method are now required to take steps to prevent birds from being harmed by the strip mining operations); *Ship Owner Pleads Guilty in Bering Sea Spill*, The Reuter Eur. Bus. Rep., July 12, 1996, *available in* LEXIS, Nexis file (charges against owners of a ship responsible for spilling oil that resulted in the deaths of over 1,000 birds resulted in criminal and civil fines totaling $92,500).

weighted towards recreational hunters and game birds may have been due to the fact that recreational hunters were better organized, and consequently more effective at advancing their agenda, than other constituencies that benefited or could have potentially benefited from the MBTA.[52] The preference may have also been due to the fact that recreational hunters and game managers more closely identified with the same goals and values. The pre-1970 cases represent a cross section of types of cases that were prosecuted, and thus reflect the enforcement preferences of the Fish and Wildlife Service.[53] Nevertheless, some early cases discuss the threat of extinction and habitat loss, although a close association between the two concepts is not apparent.[54]

E. Factors Influencing the MBTA Habitat Preservation Cases

The ESA symbolizes legal recognition of the vital role of habitat protection in the effort to prevent species loss. Around the time of the ESA's enactment, efforts began to broaden the scope of the MBTA to include protection of bird habitat. The ESA was not directly responsible for these efforts in that there was not a cause and effect relationship. Nevertheless, both the ESA and efforts to broaden the scope of the MBTA are forces in the same trend towards greater habitat protection. Results of those efforts can be found in MBTA case law. In this section, discussion of the factors that influence incorporation of habitat protection values into the MBTA, including the MBTA's text, the dominant application of the MBTA to regulate hunting, and the MBTA's strict

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52. During the congressional floor debates, one of the MBTA's opponents argued that the protection for nongame birds was a Trojan horse for the benefit of wealthy game bird hunters:

> [The bill] is for the benefit of the man who takes his periodical hunt, with his splendid equipment, and who comes home with all the game he can carry, the man for whom you have to have a limit to the quantity of game he may kill. . . . These fancy bird hunters hitch up their end of the bill, the game-bird end, with insectiverous-bird protection in order to benefit themselves and to provide a source of pleasure and amusement for themselves.

56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston). The statement is remarkably accurate in light of the enforcement patterns that developed.

53. The MBTA's prohibition on market hunting essentially eliminated that activity. On the other hand, recreational hunting was permitted but regulated. The reported decisions naturally reflect the regulatory and enforcement efforts. Had recreational hunting been prohibited entirely there would be few cases and probably no interpretative cases at all.

54. *See, e.g.*, Cerritos Gun Club v. Hall, 96 F.2d 620, 624, 625 (9th Cir. 1938) ("In the settlement of the Western and Southern States, with its reclamation of marsh lands for agricultural and other purposes, the natural habitat of the birds in the United States has been greatly diminished, creating a concentration for hunting in the remaining watered areas. . . . How rapidly the number of migratory water fowl is progressing towards extinction has been declared by the Supreme Court in a case sustaining the Migratory Bird Treaty between the United States and Canada.").

liability provision, will culminate in consideration of the relationship of the ESA and the MBTA.

1. MBTA's Text

The MBTA's language is broad and comprehensive.[55] It consists of a broad prohibition on taking,[56] and expressly stated exceptions to the prohibition.[57] Although they have evolved since it was enacted, the language and structure of the contemporary MBTA are similar to the language and structure of the original legislation. The operative language in the 1918 Migratory Bird Treaty Act,[58] "hunt, take, capture, kill . . . or possess," is considerably broader than the wording of the 1916 Convention, which simply prohibits hunting during the closed season.[59] By expanding the Convention's language when creating the 1918 MBTA, Congress made a conscious and considered decision to provide for protection for birds that was broader than the limited focus on hunting in the 1916 Convention.[60] The legislative history demonstrates both

55. *See supra* note 5.

56. "[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill . . . any migratory bird . . . ." Migratory Bird Treaty Act, 16 U.S.C. § 703 (1994).

57. Examples of exceptions are taking pursuant to prior approval of the Secretary of the Interior, including hunting, *see id.* § 704, and taking by Indigenous Alaskans for nutritional and essential needs. *See id.* § 712. The statutory language regulating the trade in birds and bird parts, that closely parallels the language regulating taking, was considered by the Supreme Court in *Andrus v. Allard*, 444 U.S. 51, 60-61 (1979) (footnotes and citations omitted):

> On its face, the comprehensive statutory prohibition [on trade in birds and bird parts] is naturally read as forbidding transactions in all bird parts, including those that compose pre-existing artifacts. While there is no doubt that regulations may exempt transactions from the general ban, nothing in the statute *requires* an exception for the sale of pre-existing artifacts. And no such statutory exception can be implied. When Congress wanted an exemption from the statutory prohibition, it provided so in unmistakable terms.
>
> The structure and context of this enactment—to the extent that they enlighten—also suggest congressional understanding that regulatory authorities could ban the sale of lawfully taken birds, except where otherwise expressly instructed by the statute. If Congress had assumed that lawfully taken birds could automatically be sold under the Act, it would have been unnecessary to specify in § 711 that it is permissible under certain circumstances to sell game birds lawfully bred on farms and preserves.

Id. (citations omitted).

58. Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918).

59. *See* Treaty with Great Britain, *supra* note 19, at 1703.

60. *See* Andrus v. Allard, 444 U.S. 51, 62 n.18 (1979) ("[I]nasmuch as the Conventions represent binding international commitments, they establish minimum protections for wildlife; Congress could and did go further in developing domestic conservation measures.").

concern about the effects of habitat loss[61] and the intent to prevent extinctions.[62] Moreover, the language and structure of the MBTA do not indicate that the statute was not intended to protect habitat.[63]

Stepping back to examine the larger context, apparently the courts had, in a sense, interpreted the MBTA as an enactment of the 1916 Convention language only,[64] until the later Conventions incorporated habitat preservation language.[65] After the Conventions with Japan and Russia, which clearly express the importance of habitat protection, were signed in the 1970s,[66] the federal courts began to experience efforts to expand the MBTA's scope to include elements of habitat protection.

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61. *See supra* Part II.B (discussion of concerns expressed in the MBTA's legislative history about the loss of bird habitat).

62. *See id.* (discussion of congressional intent, expressed in the MBTA's legislative history, to prevent extinction). The primary means of extinction prevention is through habitat protection. *See supra* notes 5, 6 and accompanying text (discussing the importance of habitat protection in preventing extinction); *see also* United States v. Corbin Farm Serv., 444 F. Supp. 510, 530 (E.D. Cal. 1978) (discussing the issue of multiplicity of counts for multiple bird deaths as a result of single act, the prosecution argued that the concern in the legislative history about the "possible extinction of whole species" supported the application of severe penalties for "those whose actions cause the death of many birds, endangering the species"). For further discussion of *Corbin*, see *infra* note 69.

63. *See* North Slope Borough v. Andrus, 486 F. Supp. 332, 362 (D.D.C. 1980) (discussing in dicta a cautionary approach to government activities that potentially harm bird (and other species) habitat. "[T]he government must proceed with caution to ensure that agency action [oil lease activity] does not eventually violate the aforesaid laws [including the MBTA]."). In *North Slope Borough*, plaintiffs were granted an injunction stopping Alaskan offshore oil and gas lease sale. *See id.* at 363. Plaintiffs alleged, among other issues, that the proposed offshore leases would violate the MBTA. *See id.* at 339. The injunction was granted on the basis of non-MBTA related issues. *See id.* at 363. Essentially, the court said that sale of leases in and of itself did not significantly threaten species protected by the MBTA (and other statutes). *See id.* at 360-64. *But see* Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) (discussing the statutory language and legislative history in support of an MBTA interpretation that limits the statute 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."). In *Mahler*, a case that involved the harvesting of trees in the Hoosier National Forest during nesting season, the court ruled against plaintiff's contention, in a motion to reconsider an earlier judgment against the plaintiff, that a distinction should be drawn between indirect takings in the form of habitat modification that do not violate the MBTA and direct takings, which occur when trees with active nests are harvested, and which do violate the MBTA. *See id.* at 1574, 1583. In reaching this conclusion the court closely examined the strict liability aspects of the statute, including "the statutory language and amendments, available legislative history, case law under the MBTA, related legislation, and the history of the MBTA's application since its enactment in 1916. . . ." *Id.* at 1576. For further discussion of *Mahler*, see *infra* notes 109-123 and accompanying text.

64. *See supra* Part II.E.2 (discussing the historical application of the MBTA's language as limited to hunting regulation).

65. *See supra* notes 36-44 and accompanying text (discussing the increasing concern in the migratory bird conventions regarding habitat preservation).

66. *See id*. (discussing the migratory bird conventions with Japan and Russia).

2. Hunting Regulation Precedent

The second major factor that influences the MBTA habitat protection discussion is the MBTA's traditional role as a means of regulating hunting.[67] This traditional role has been cited as support for rejecting initiatives to include habitat protection within the scope of the MBTA.[68] However, the acknowledgment of this primary role has not prevented some courts from finding additional purposes in the statutory language and legislative history.[69]

Considering the language, structure and legislative history as well as the historical context of the creation of the MBTA it is difficult to construct a coherent argument that the MBTA's purpose is limited to

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67. *See supra* Part II.D (discussing the historical interpretation of the MBTA as a hunting regulation statute); *see also* Coggins & Patti, *supra* note 4, at 182-83.

68. *See, e.g.*, Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1509 (D. Or. 1991) ("The fundamental purpose of this act is to protect migratory birds 'from destruction in an unequal contest between hunter and bird,' and to provide severe penalties for market hunters who receive commercial benefit from the sale of migratory bird parts.") (citing United States v. St. Pierre, 578 F. Supp. 1424 (D.S.D. 1983)); United States v. Olson, 41 F. Supp. 433 (D. Ky. 1941)). In *Citizens Interested in Bull Run*, the court ruled against plaintiffs' argument that a proposed timber harvest in the Mt. Hood National Forest would constitute a "taking" under the MBTA because the harvests would diminish habitat for the Northern Spotted Owl. *Id.* at 1510. The court found "that the Act was intended to apply to individual hunters and poachers" and explicitly adopted the reasoning of two similar district court cases, *Seattle Audubon Society v. Robertson*, No. C89-160WD, *consolidated with* No. C89-99(T)WD, 1991 U.S. Dist. LEXIS 10131 (W.D. Wash. March 7, 1991) *28-31 and *Portland Audubon Society v. Lujan*, No. 87-1160-FR 1991 U.S. Dist. LEXIS 6224 (D. Or. May 8, 1991) *15-19. Both cases involved similar fact patterns, issues and holdings. The court rejected the plaintiffs' contentions that planned timber harvests, that would modify Northern Spotted Owl habitat and would result in owl deaths, would violate the MBTA. *Id.*; *see also* Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1574 (S.D. Ind. 1996) ("The MBTA was designed to forestall hunting of migratory birds and the sale of their parts."). For additional discussion of *Mahler*, see *infra* notes 108-122 and accompanying text.

69. *See, e.g.*, United States v. Corbin Farm Serv., 444 F. Supp. 510, 532 (E.D. Cal. 1978) ("Congress was concerned with hunting and capturing migratory birds when it enacted the MBTA . . . ."). The defendants in *Corbin Farm Service* were found guilty of violating the MBTA due to the killing of migratory birds by misapplying a pesticide to an agricultural field. *Id.* The court examined the legislative history in determining that:

> The fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern. Paring the language of section 703 down to its essentials, the section makes it illegal 'at any time, by any means or in any manner, to . . . kill . . . any migratory bird . . . .' The use of the broad language 'by any means or in any manner' belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds. Moreover, a number of songbirds and other birds not commonly hunted are protected by the conventions and so by the Act; Congress imposed criminal penalties on those who killed these birds as well as on persons who hunted game birds. The legislative history of the Act reveals no intention to limit the Act so that it would not apply to poisoning.

Id. at 532.

hunting regulation. The traditional role of the MBTA and a narrow interpretation of the statutory language, structure, and legislative history should not be a limitation on the statute's ability to further habitat protection goals.

3. Strict Liability

A third factor that must be taken into account when considering the expansion of the MBTA to include protection of habitat is the statute's provision for strict liability.[70] The concern is that the strict liability provisions, combined with the broad and encompassing statutory language, have the potential to result in prosecutions for trivial violations.[71] This concern was clearly articulated in *United States v. FMC Corp.*,[72] where the court stated that "[t]aken to its logical extreme, strict liability for habitat destruction could mean that bird deaths due to striking windows or the removal of trees or shrubs could subject a much wider range of people to prosecution."[73]

Strict liability is an essential part of the MBTA. In the absence of strict liability the MBTA would be considerably less effective because it would be much more difficult to enforce. The solution to this dilemma is to provide some reasonable limits on the application of strict liability.[74]

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70. 16 U.S.C. § 703.

71. *See generally* Woodrum, *supra* note 4 (expressing concern about the MBTA's strict liability provisions). Perhaps one of the most extreme responses to the MBTA's strict liability provisions is found in *Mahler v. United States Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996). In *Mahler* the court discussed the MBTA's strict liability and expressed concern that there was "no meaningful limitation" to that liability. *Id.* at 1578. In stark contrast to other MBTA cases, some of them decided under rather difficult and complex fact situations, the *Mahler* court seems to go so far as to say that liability under the MBTA can not exist in the absence of proven intent. *Id.* at 1583. For additional discussion of Mahler, see *infra* notes 108-122 and accompanying text.

72. 572 F.2d 902 (2d Cir. 1978). In *FMC Corp.*, the defendant, a manufacturer of pesticides, allowed toxic wastes to be discharged into a holding pond. *See id.* at 904. The company was responsible for and had a process in place to break down the toxic waste into environmentally safe constituent chemicals. *See id.* at 906. Apparently unknown to the defendant, the process used to break down the toxic wastes was defective; the toxic waste was being pumped directly into the holding pond. *See id.* at 906-07. Birds that used the pond, particularly during migration periods, were killed by the pesticides. *See id.* at 905. The trial jury found the defendant guilty on eighteen counts. *See id.* at 903. On appeal the court held that the MBTA's strict liability standard could be imposed under the circumstances. *Id.* at 908.

73. *Id.* at 905 ("Certainly 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 dwellings into which birds fly, would offend reason and common sense.").

74. For specific proposals, see Coggins & Patti, *supra* note 4, at 192. Coggins and Patti propose a multipart test for determining that a criminal violation of the MBTA has occurred:

> [The act] must be purposeful . . .; it must involve a potentially lethal (to birds) agent . . .; there must be some degree of 'culpability' in the action; and the

Courts have developed means of reasonably limiting the MBTA's strict liability by applying a tort-like standard of care for ultrahazardous activity[75] and by relying on prosecutorial and judicial discretion to impose a "small or nominal fine."[76] In addition, Congress has acted to amend the MBTA so that it now provides an intent requirement for felony convictions for trafficking in birds and bird parts.[77]

Strict liability provisions may also be considered something like a symbolic means of recognizing the importance of effectively implementing the statutory solution to an enormous problem. Finally, strict liability provisions represent a means of communicating the intentions of the statute's creators to judges and prosecutors responsible for effectively enforcing the MBTA.

The strict liability provisions should not impede use of the MBTA for habitat protection purposes.[78] However, given the broad applicability of the statute it seems probable that Congress intended to give wide discretion to courts and prosecutors. There seems to be little if any evidence that the discretion has been abused. The fact that it could be abused is not a good argument for failure to fully enforce the statute. If potential for abuse were the standard determining a law's validity, it would be difficult to make a case for the enforcement of any law, because all or nearly all could be abused.

> consequences for bird mortality must be generally foreseeable should the operation go astray through negligence or accident.

Id.; *see also* Margolin, *supra* note 4, at 1006-09 (describing four factors, "[a]llocation of burden of proof, the substantive law of causation, judicial and prosecutorial discretion, and jury nullification," that can serve as limits on the MBTA's strict liability provisions).

75. *See* United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (overcoming strict liability concerns in general by applying a "rule of reason or . . . common sense"); *see also* United States v. Corbin Farm Serv., 444 F. Supp. 510, 536 ("When 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. If defendants acted with reasonable care or if they were powerless to prevent the violation, then a very different question would be presented." (citation omitted)).

76. United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) ("an innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine" (citation omitted)). "Such situations properly can be left to the sound discretion of prosecutors and the courts." *Id. But see* United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989) ("a violation of due process cannot be cured by light punishment."). The MBTA is unconstitutionally vague as applied to a farmer who killed a flock of geese that were poisoned by pesticide the farmer had applied to a field when the farmer used due care in applying the pesticides and the MBTA "does not state that poisoning . . . migratory birds by pesticide constitutes a criminal violation." *Id.* at 744.

77. 16 U.S.C. § 707(b) (1994).

78. *See* Mahler v. United States Forest Serv., 927 F. Supp. 1559 (S.D. Ind. 1996).

4. The Endangered Species Act

The ESA's emphasis on habitat protection[79] is a seismic shift in wildlife and environmental regulation. It is a strong expression of effective legal recognition of the vital role of habitat protection. However, one of the ESA's drawbacks is that it only applies to species that are already at risk, either threatened or endangered, typically because species population size has been substantially reduced. The smaller the population size the greater the risk of species extinction.[80] Maintaining the "life support system" for endangered species can often be difficult and expensive.[81] These shortcomings can lead to the result that the ESA is "too little and too late in many cases."[82] Greater understanding of the relationship between habitat protection and species preservation resulted in an interest in expanding the traditional scope of the MBTA.[83] Use of the MBTA to protect habitat offers an advantage over the ESA as a tool for species preservation because the MBTA can help to maintain populations before they decline to critical levels, thus avoiding some of the shortcomings of the ESA. Used to protect habitat, the MBTA would complement and operate in coordination with the ESA by protecting bird

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79. *See infra* note 89 and accompanying text. The ESA also provides for federal government acquisition of endangered species habitat, 16 U.S.C. § 1534 (1994); *see* Faith Campbell, *The Appropriations History*, *in* BALANCING ON THE BRINK OF EXTINCTION, 134, 141-43 (Kathryn A. Kohm ed., 1991).

80. *See* WILSON, *supra* note 1, at 227. Wilson uses the following theorem and example to explain the risks inherent in small populations:

> the smaller the average population size of a given species through time, and the more the size fluctuates from generation to generation, the sooner will the population drift all the way down to zero and go extinct. Think of an island with a thousand sparrows on average, varying by chance alone by a hundred individuals either way once or twice a century. Another island holds a hundred sparrows of the same species, and this population also varies by a hundred individuals once or twice in a century. The second population, which is both smaller and experiences a higher degree of fluctuation, faces a shorter life. More precisely, many such populations go extinct sooner than many otherwise comparable larger populations.

Id.

81. *See generally* Tim Clark & Ann Harvey, *Implementing Recovery Policy: Learning as We Go?*, *in* BALANCING ON THE BRINK OF EXTINCTION 147 (Kathryn A. Kohm ed., 1991); Suzanne Winckler, *Stopgap Measures; Preservation of Ecosystems as a Means of Wildlife Conservation*, ATLANTIC MONTHLY, Jan. 1992, at 74.

82. George Coggins, *Snail Darters and Pork Barrels Revisited: Reflections on Endangered Species and Land Use in America*, *in* BALANCING ON THE BRINK OF EXTINCTION 62, 70 (Kathryn A. Kohm ed., 1991) ("Legally, the ESA remains a limited remedy in spite of its strictness. It is too narrow, focusing primarily on single species in single situations. It does not kick in until the population level of a species is at the danger point, and politics can obstruct listing even when the danger is clear.").

83. Coggins & Patti, *supra* note 4, at 166.

species while population sizes are healthy and easily sustainable. The ESA would remain as a last resort.

The ESA can have a negative impact on application of the MBTA. An example can be found in several cases involving timber harvesting.[84] For instance, in *Portland Audubon Society v. Lujan* the court interpreted enactment of the ESA as a limitation on the applicability of the MBTA.[85] Another problem arises when the ESA's focus on protection of species that are threatened with extinction creates the misperception that *only* species that are threatened with extinction warrant legal protection.[86]

Failure to actualize the clearly expressed intention of the treaties to use the MBTA as a means of protecting habitat is inconsistent with the recognition of the vital importance of habitat to the protection of bird species. For example, the treaty with Russia[87] was concluded after the passage of the ESA. The treaty makers must have been aware of the habitat protection provisions in the ESA. Therefore, it seems likely that the treaty makers intended that the contemporary MBTA provide habitat protection measures in addition to, that is, complementary and supplementary to those included in the ESA.[88] Failure to use the MBTA to promote habitat protection allows traditional but ecologically incomplete administrative agency policies and court decisions to control

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84. *See* Portland Audubon Soc'y v. Lujan, No. 87-1160-FR, 1991 U.S. Dist. Lexis 6224, at *19 (D. Or. May 8, 1991) (holding that a proposed timber harvest did not constitute illegal taking under the MBTA); Seattle Audubon Soc'y v. Robertson, No. C89-160WD, *consolidated with* No. C89-99(T)WD, 1991 U.S. Dist. LEXIS 10131 at *27 (W.D. Wash. 1991) ("[T]he differences between a 'taking' under ESA and MBTA are distinct and purposeful."). On appeal the Ninth Circuit Court of Appeals upheld the district court's MBTA ruling in *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991); *see also infra* notes 90-144 and accompanying text (discussing the most recent timber harvesting decisions). *But see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437-38 (1992) (noting in dicta that "[b]efore the [Northwest Timber] Compromise was enacted, the courts adjudicating these MBTA claims were obliged to determine whether the challenged harvesting would 'kill' or 'take' any northern spotted owl with the meaning of [the MBTA]"). This suggests that timber harvesting can result in MBTA violations under some circumstances.

85. *See* Portland Audubon Soc'y, No. 87-1160-FR, 1991 U.S. Dist. Lexis 6224, at *19.

86. *See, e.g.*, United States v. Van Fossan, 899 F.2d 636, 637 (7th Cir. 1990). In a decision that reluctantly upheld defendants conviction for illegally poisoning birds protected by the MBTA, the court said, "Neither the common grackle . . . nor the mourning dove . . . is endangered or even threatened. . . . Although neither species seems to need protection, each is 'migratory' and the regulations under the Migratory Bird Treaty Act do not allow people to poison them. . . ." *Id.*

87. Treaty with the U.S.S.R, supra note 30.

88. The ESA lists several international treaties and agreements, including the migratory bird treaties with Great Britain, Mexico and Japan, under which the United States has made commitments to prevent extinctions. 16 U.S.C. § 1531(a)(4)(A)-(B) (1994). The ESA further declares that one of its purposes is to take appropriate steps to "achieve the purposes of [those] treaties and conventions." *Id.* § 1531(b).

contemporary environmental policy at a time when the need for habitat protection has never been greater.

The position that Congress intended that all habitat preservation take place under the auspices of the ESA and only when a bird species is threatened or endangered, is flawed. This position not only ignores the legislative history of the MBTA and the language of the treaties, it assumes that Congress intended to lurch from crisis to expensive crisis with no possibility of intermediate range solutions.

Despite the potential of habitat protection in the MBTA's underlying treaties, its legislative history, and the structure and language of its text, progress towards achieving broad habitat protection goals under the MBTA has been limited. This is due largely to the MBTA's traditional role as a hunting regulation mechanism, concerns about strict liability, and to a lesser extent, the MBTA's relationship to the ESA. The next section suggests an alternative method for advancing habitat protection goals.

III. THE MIGRATORY BIRD TREATY ACT HABITAT PRESERVATION FRAMEWORK

Birds and humans are two of Earth's most successful vertebrate life forms. Our respective success in populating and using a wide range of habitats has inevitably resulted in conflicts. A more highly evolved and expanded MBTA can serve an important role in maintaining a harmonious balance between the interests of both.

One of the reasons courts struggle with the habitat protection cases is because of the use of analytic tools that are not well adapted to the circumstances of these cases. In general, criminal, tort and property law analyses all presuppose the conduct of relationships among human beings of potentially equal rights, duties and obligations. The MBTA cases are, at a significant level, about the description and regulation from a legalistic point of view, of the relationships between humans and other species. Birds and other nonhuman species do not have rights and therefore can not go to court or be represented in court to enforce their rights. A different analytical perspective is needed to fully understand the MBTA as a vehicle for habitat protection. A proposed MBTA habitat framework (MHF) is outlined below. The proposed framework is intended to be a means of understanding the MBTA habitat protection cases as a logical, cohesive body of law. The MHF is not intended as an instrument for testing the validity of judicial decisions in this area, that is, it is not intended to be used deterministically. Instead the MHF is an

attempt to describe and synthesize the MBTA habitat protection cases, including factors that are often implicit in judicial discussion of MBTA applicability.

The initial issue is an examination of the condition of the habitat in question. At one end of the habitat continuum are entirely human-created, urbanized habitats, frequented primarily by commonplace pigeons and house sparrows. At the other end of the continuum are the pristine wilderness homes of birds like the spotted owl and the marbled murrelet. The more intensive the scope of human activity, the greater the likelihood that the application of the MBTA will be narrow. In habitat zones that have little if any human activity, bird protection goals should be vigorously pursued.

The next issue to be considered is the species' relationship to the habitat. How does it use the habitat: for nesting, feeding, or as a migratory flyway? What time of year is the habitat in use? How much habitat is needed for each individual bird? Does the species in question have any readily available alternatives? When birds' use of the habitat is intensive, particularly when there is no viable alternative habitat, bird protection goals should be weighed accordingly and those habitat requirements should be given adequate protection.

Population levels should be a consideration only in an affirmative manner. In other words, a declining population of a species should be a critical factor in a decision to invoke habitat protections, but a stable and healthy population should not be viewed as an opportunity to ignore the statutory bird protection mandate. When populations are small enough to be threatened or endangered, the ESA with its explicit habitat protection provisions applies, although not necessarily to the exclusion of the MBTA.

The final issue is a consideration of the alternatives to or modification of the human activity (typically economic activity) in question. How can the activity be modified or reorganized to minimize or eliminate interference with bird habitat? This question cannot be answered entirely through economic analysis. Economic analysis is useful, but it is a blunt instrument. Many of the issues involved in these cases are difficult, if not impossible, to measure using the tools of economic analysis. It is also important to realize that economic sacrifices to promote the goal of bird protection are not unprecedented.[89]

89. The "market hunting" industry and the trade in bird parts were essentially eliminated by the passage of the MBTA in 1918. Although economic deprivation arguments are not often raised in MBTA habitat preservation cases, they are often in the background because the human activity

that results in habitat loss is almost always performed with the intent of economic gain. *See, e.g.*, Sierra Club v. Martin, 933 F. Supp. 1559, 1572 (N.D. Ga. 1996) (court unpersuaded by the assertion that "the award of timber contracts contributes to the local economy and that enjoining the sale of timber will affect the regional timber supply"). Economic interests have come to the forefront occasionally in cases where courts have heard claims based on crop damage caused by birds. *See* BEAN, *supra* note 46, at 79 ("[T]he Treaty Act has uniformly been upheld against claims that it constitutes confiscation of private property. . . ."). Property rights consisting of investment in hunting clubs have been found to be secondary to the public interest associated with protecting birds. *See, e.g.*, Cerritos Gun Club v. Hall, 96 F.2d 620, 622 (9th Cir. 1938), in which the court stated that in denying appellants' claim for economic loss:

> The court also takes judicial notice of the existence in the state of California of a large number of such hunting enterprises as those of appellants. The heavy capital investments in such enterprises as the bill alleges, are, in the absence of prohibitive game laws, entirely legal. They create property rights which receive the protection of federal and state courts from those illegally interfering with and frustrating the enterprises which give the property rights their value.
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> *It is obvious that the value of appellants' investments will be totally destroyed* if, as alleged, their occupants and users will cease to use them unless the duck clubs bait the premises to lure the game there. . . . [T]he threatened prosecution, if made, will directly and immediately destroy the only value in use which the investments have.

Id. (emphasis added). Similarly, the public interest in the acquisition of property rights in bird conservation areas is stronger than state law. *See* United States v. North Dakota, 650 F.2d 911, 917-18 (8th Cir. 1981).

> The United States, through its treaty obligations with other nations, is committed to a policy of protecting migratory birds. That policy is implemented in part by federal statutes which preserve natural waterfowl habitat. State legislation which hinders or frustrates those statutes violates the Supremacy Clause Art. VI cl. 2 and cannot stand. . . .
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> The specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right.

Id. (quoting United States v. Albrecht, 496 F.2d 906, 911 (8th Cir. 1974). Courts have consistently held that the public interest in protecting wildlife takes precedence over property rights. *See* Oliver Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?* 80 IOWA L. REV. 297, 312 (1995).

> Supreme Court opinions following *Missouri v. Holland* show wildlife preservation continuing to outweigh other, well-established principles of law. . . . *Id.*
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> Stepping back from their particulars, the Supreme Court's wildlife cases from *Missouri v. Holland* forward have juxtaposed wildlife preservation against an array of economic interests and strong, established doctrines of constitutional, state, tribal, and judicial authority. These were not easy cases, and their outcomes were anything but preordained; indeed, they often surprised both participants and observers. In each case, the Court clearly motivated by

The relationship between the condition of the habitat and value or degree of human activity is important. In general, the greater the degree of human development in a given habitat, the lower the value or gain required to justify the activity that interferes with birds' ability to use the habitat. In areas with little or no human development, the highest possible levels of economic necessity are required to justify activity that interferes with birds' use of the habitat. In the middle of the continuum—in habitats that are shared by birds and humans—there is a presumption that the needs of both birds and humans should be in an approximate balance.

Ideally, MBTA cases should demonstrate an approximation of cost-benefit evaluation that can not be fully expressed and quantified using the tools of economic analysis. The key to understanding the MBTA habitat modification cases and making sense of them as a cohesive, logical area of law is an understanding of courts' often implicit weighing and balancing of interests. Typically the interests of birds (and people who are committed to bird protection) are weighed against some form of human activity that potentially or actually interferes with avian life.

A cluster of cases in the southeast and midwest regions involving timber harvesting can serve as illustrations of how the MHF can be applied to cases with similar fact patterns but radically different outcomes. *Sierra Club v. United States Department of Agriculture* is the first of these three cases.[90] *Sierra Club* involved timber harvesting in the Shawnee National Forest in southern Illinois.[91] As part of the planning process for use of the Shawnee National Forest, the Forest Service adopted an Amended Land and Resource Management Plan [ALRMP].[92] Plaintiffs objected to the plan and sought judicial review alleging that the ALRMP, among other defects, violated the MBTA because it "destroys the essential habitat for neotropical migratory birds . . . and . . . directly kills such birds by allowing logging during neotropical nesting

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> what it perceived as paramount public interest in species survival, stretched certain principles of law and overrode others to find in wildlife's favor.
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> Despite this precedent, no Supreme Court cases have dealt directly with the impact of wildlife laws on private, real property rights. To the extent that lower federal and state courts have done so, however, wildlife conservation has prevailed.

Id. at 316.

90. Sierra Club v. United States Dep't of Agric., No. 94-CV-4061-JPG (S.D. Ill. Sept. 25, 1996).

91. *Id.* at 2-4.

92. *Id.*

periods."[93] The court identified two MBTA issues in *Sierra Club*; whether the ALRMP resulted in habitat modification or degradation that was a "taking" under the MBTA,[94] and whether the ALRMP instigated direct "takings" of young migratory birds by allowing timber harvesting during the nesting season.[95]

The court addressed the habitat modification issue first and held that "a 'taking' does not occur simply because of habitat modification or degradation."[96] The holding was based on the analysis *in Seattle Audubon Society v. Evans*.[97] In that case the court compared the definition of the term "take" in the ESA with that contained in the MBTA. The *Sierra Club* court found that analysis persuasive, saying that "the statutory language of the MBTA differs from the ESA in that the word harm (along with the words harass, wound, and trap) is not included. This is strong evidence that the MBTA does not include a prohibition of habitat modification or degradation."[98]

Turning to the second issue, the court discussed the ALRMP's provisions for establishment of Forest Interior Management Units (FIMUs).[99] FIMUs are 1,100 acre units of forest.[100] A 100-acre core of seven of the eighteen FIMUs is "exempt from management activities."[101] The ALRMP also required that "750 acres of each FIMU consist of trees at least 50 years old."[102] FIMUs are designed to protect the habitat of forest interior bird species that require a "nesting and breeding habitat consisting of large blocks of unfragmented or closed-canopy, mature hardwood forest."[103] The ALRMP prohibited timber harvesting in the FIMUs during nesting season.[104] However, timber harvesting outside the FIMUs was permitted during nesting season.[105] The court found that the Forest Service had "not adequately addressed the issue of whether the ALRMP will violate the MBTA by allowing logging outside the FIMUs

93. *Id.* at 33.
94. *Sierra Club*, No. 94-CV-4061-JPG, at 33.
95. *Id.* at 34.
96. *Id.* at 33.
97. 952 F.2d 297, 302-03 (9th Cir. 1991).
98. *Sierra Club*, No. 94-CV-4061-JPG at 34.
99. *Id.* at 34.
100. *Id.* at 13.
101. *Id.*
102. *Sierra Club*, No. 94-CV-4061-JPG at 13.
103. *Id.* at 12.
104. *Id.* at 34.
105. *Id.*

during the nesting season. . . ."[106] and directed the Forest Service to "more fully address this issue on remand."[107]

The next case in the recent timber harvest decision cluster is *Mahler v. United States Forest Service*.[108] The timber involved in *Mahler* was fifty acres of trees in Indiana's Hoosier National Forest.[109] In 1994, the Forest Service planned to "clearcut" forty-six acres, to "shelterwood" cut four acres, and to sell the timber.[110] As in the other timber harvest cases, the plaintiff challenged the planned harvest under several statutes, including the MBTA.[111] The defendant challenged plaintiff's use of the MBTA, but the court ruled that the plaintiff's invocation of the APA to prevent Forest Service action that would violate the MBTA was valid.[112]

Turning to the merits of the MBTA argument, the court framed the issue as a question of whether the planned harvest "would constitute a 'taking' of migratory birds."[113] The plaintiff argued that the planned harvest would "indirectly 'take' migratory birds by destroying their habitat . . ." and that "logging during nesting season would directly 'take' migratory birds."[114] The court held that "[h]abitat destruction and logging during nesting season do not produce 'takings' of migratory birds within the purview of the MBTA."[115]

To support its decision, the court relied on several prior decisions. The court cited *Seattle Audubon Society v. Evans* for the supporting arguments that the "MBTA and regulations promulgated under it make no mention of habitat modification or destruction. . . ."[116] and "that habitat destruction in the form of logging causes 'harm' under the Endangered Species Act but does not 'take' birds within the meaning of the MBTA."[117] The court then cited *Citizens Interested in Bull Run v. Edrington* in support of the position that the proposed timber sale does

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106. *Sierra Club*, No. 94-CV-4061-JPG at 35 ("[T]here is no attempt to respond to the plaintiffs' logical assumption that forest interior birds will be killed if they are nesting outside the FIMUs and there are no seasonal restrictions . . . placed on logging in these non-FIMU areas.").

107. *Id.*

108. 927 F. Supp. 1559 (S.D. Ind. 1996).

109. *Id.* at 1561.

110. *Id.*

111. *Id.*

112. *Mahler*, 927 F. Supp. at 1562-63.

113. *Id.* at 1573.

114. *Id.*

115. *Id.*

116. *Mahler*, 927 F. Supp. at 1574 (citing Seattle Audubon Soc'y v. Evans, 952 F.2d at 302). *But see supra* notes 24-26 and accompanying text.

117. *Mahler*, 927 F. Supp. at 1574.

not constitute a "taking" of migratory birds within the meaning of the MBTA.[118] The court further found that the MBTA was intended to apply to individual hunters and poachers, and that "a 'taking' under the MBTA does not include habitat modification resulting from Forest Service sales activity."[119]

The court next considered plaintiff's contention that *United States v. FMC Corp.*[120] and *United States v. Corbin Farm Services*[121] supported a decision that the timber harvest constituted a taking.[122] The court relied on the language from *Seattle Audubon Society v. Evans* to distinguish the hazardous substances cases. The court concluded that the MBTA was intended to regulate hunting and trade in bird parts and would not extend its scope.[123]

The day after *Mahler* was decided, the District Court for the Northern District of Georgia issued an injunction against timber harvesting in a similar case, *Sierra Club v. Martin*.[124] The case involved seven timber harvesting projects involving 2,103 acres in two northern Georgia national forests.[125] The court found that the planned harvesting during nesting season would result in the deaths of 2,000 to 9,000 juvenile birds.[126] The issue was whether the timber harvesting during nesting season would violate the MBTA. The court found that a 'taking' "does not occur simply because of habitat destruction or modification."[127] Instead, the court, relying on *Sierra Club v. United States Department of Agriculture*,[128] halted the harvesting because it determined that cutting timber during the nesting season would violate the MBTA.[129] The court stated that the loss of thousands of birds would

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118. *Id.*

119. *Id.* at 1574 (citing *Citizens Interested in Bull Run*, 781 F. Supp. at 1510).

120. 572 F.2d 902 (2d Cir. 1978).

121. 444 F. Supp. 510 (E.D. Cal. 1978).

122. *Mahler*, 927 F. Supp. at 1574 n.8.

123. *Id.* at 1574 n.128 ("[B]oth of these cases [*FMC Corp.* and *Corbin*] involved 'direct, though unintended, bird poisoning from toxic substances . . . .' They do not extend the language of the MBTA to habitat destruction that may lead indirectly to bird deaths.") (quoting Seattle Audubon Soc'y v. Evans, 952 F.2d, 297, 303 (9th Cir. 1991)).

124. Sierra Club v. Martin, 933 F. Supp. 1559 (N.D. Ga. 1996).

125. *Id.* at 1562.

126. *Id.* at 1563.

127. *Id.* at 1564.

128. Sierra Club v. United States Dep't of Agric., No. 94-CV-4061-JPG at 35, (S.D. Ill. Sept. 25, 1996).

129. Sierra Club v. Martin, No. 933 F. Supp. at 1565, 1573 ("[T]he instant case is even stronger than Sierra Club v. USDA, since in this case Plaintiffs have affirmative evidence of the number of deaths that will occur and are not merely relying upon assumptions. In the instant case, the evidence affirmatively shows that thousands of migratory birds will be killed directly by cutting

be an irreparable injury and that the harm associated with delaying the harvest would be minimal.[130] The court focused on the birds' use of the habitat in question, and balanced the long-term damage to the birds (due to loss of habitat during nesting season) against the relatively small impact that delaying the harvest would have on human activity.[131]

Based on the ruling in *Sierra Club v. Martin*, Mahler asked the Indiana District Court to reconsider its decision regarding his MBTA claim.[132] Mahler modified the MBTA argument in his Motion to Reconsider. He drew a distinction between the timber harvesting cases which hold that indirect takings in the form of habitat modification do not violate the MBTA and those cases which hold that direct takings (which occur when trees with active nests are harvested) do violate the MBTA.[133] Upon reconsideration, the court defined the issue as "whether the MBTA applies to logging operations in national forests where those logging operations are not intended to cause the death or capture of birds."[134] The court also considered the more general issue of applicability of the MBTA "to a wide range of human activity that may incidentally and unintentionally cause the death of migratory birds."[135] The court held that the "planned salvage logging activity in the Hoosier National Forest" would not violate the MBTA, "even during nesting season."[136] In reaching this conclusion the court closely examined the strict liability aspects of the statute, including "the statutory language and amendments, available legislative history, case law under the MBTA, related legislation, and the history of the MBTA's application since its enactment in 1916. . . ."[137]

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down the trees with nests and juvenile birds in them. Thus, Defendants' actions clearly violate the MBTA.").

130. *Id.* at 1571 ("The Court finds that the Forest Service will suffer little, if any, harm if an injunction should issue in this case. The timber harvested in the Southern Appalachian national forests constitutes less than 1% of the timber harvested in the five state region. Also, the timber at issue here is only a small percentage of that less than 1%.").

131. *Id.* at 1572 ("As for Defendants' assertion that the award of timber contracts contributes to the local economy, this interest is outweighed by the public interest in preserving vital aspects of the environment.").

132. Mahler v. United States Forest Serv., 927 F. Supp. 1559, 1574-75 (S.D. Ind. 1996).

133. *Id.* at 1576 ("Mahler acknowledges that all logging operations result in habitat modification, but he argues that logging operations conducted during nesting season are different because nests, eggs, and juvenile birds that cannot fly away will be destroyed.").

134. *Id.*

135. *Id.*

136. *Mahler*, 927 F. Supp. at 1576.

137. *Id.*

The court disagreed with the strict liability aspects of the statute,[138] and rejected Forest Service attempts to reconcile *United States v. FMC Corp.*, *United States v. Corbin Farm Services,* and the timber harvesting cases.[139] After examining the language of the MBTA,[140] the history of the MBTA,[141] the application of the MBTA,[142] and related statutes,[143] the court found "that the [MBTA's] prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies or parts."[144]

Sierra Club v. United States Department of Agriculture, *Sierra Club v. Martin*, and *Mahler* have similar fact patterns, but very different outcomes. All three cases involve forests, shared habitat zones that are used primarily by birds and other wildlife. The primary human economic activity, timber harvesting, is intensive but very infrequent. The birds use the habitat for general purposes, but the cases focus on the specific use for nesting. The habitat use issue is crucial to the decisions in *Sierra Club v. United States Department of Agriculture* and *Sierra Club v. Martin*, but was irrelevant to the court in *Mahler*. Unlike the northwestern timber harvesting cases, the ESA does not play a role in this cluster of cases. The varying outcomes of these cases reiterate the difficulty that courts have encountered in timber harvesting cases. The *Mahler* court took pains to reach a specific holding that the planned timber harvest did not violate the MBTA and a more general holding that criticized the strict liability aspects of the MBTA. The reasoning supporting the decisions in *Sierra Club v. Martin* and *Sierra Club v. United States Department of Agriculture* is more closely in concert with the balancing of interests in the MBTA Habitat Framework. These courts used the MBTA as a fulcrum to achieve a balance, by altering the activity that harmed habitat. This result can be compared with the results achieved in other timber harvesting cases which use the ESA or resort to congressional action such as the Northwest Timber Compromise. In

138. *Id.* at 1579 ("Properly interpreted, the MBTA applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting or trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds.").

139. *Id.* at 1578 ("[T]he Forest Service has tried to portray [the] MBTA claims . . . as attempts . . . to bring 'private' actions under the MBTA, which the statute quite clearly does not allow. . . . [T]he Forest Service has tried to argue that no one other than the United States government may invoke the MBTA.").

140. *Mahler*, 927 F. Supp. at 1579-80.

141. *Id.* at 1580-81.

142. *Id.* at 1581.

143. *Id.* at 1581-82.

144. *Mahler*, 927 F. Supp. at 1583.

comparison, the results in *Sierra Club v. Martin* and *Sierra Club v. United States Department of Agriculture* seem to be less costly and drastic, an important advantage associated with using the MBTA to promote bird habitat protection.

IV. CONCLUSION

There has been limited progress towards affirmative judicial recognition of the MBTA's habitat protection potential. This is due in large part to the failure of the courts to effectively implement the intent of the 1918 legislation and the treaties. One avenue that would remedy this situation is a thoughtful enforcement of the statute that adopts the elements of the MBTA Habitat Framework weighing and balancing the myriad factors involved. Sound legislation that incorporates habitat provisions of the treaties, as well as effective enforcement of the statutory and regulatory regime are a better means to legally define the relationship between humans and birds for the long-term benefit of both.

The creators of the MBTA showed tremendous foresight in developing a statutory regime that is broad and flexible enough to accommodate unforeseen future developments. They created and passed on an immensely valuable intellectual and legal framework for protecting a vital element of our natural heritage. Because they had an optimistic, progressive view of human cultural and moral development, it is likely that they anticipated that future generations would have even greater wisdom in filling in the details of the framework and nurturing our inheritance with grace and humility.