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## **Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act**

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## NOTE

### Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act

Benjamin Means

"Nobody is trying to do anything here except to keep pothunters from killing game out of season . . . ."<sup>1</sup>

#### INTRODUCTION

Dissatisfied with the protection afforded wildlife by more recent environmental laws, some environmentalists seek to reinterpret one of the oldest federal environmental laws, the Migratory Bird Treaty Act (MBTA).<sup>2</sup> Long understood simply to regulate hunting,<sup>3</sup> the MBTA makes it illegal to "take" or "kill" migratory birds without a permit.<sup>4</sup> The MBTA imposes strict liability for a violation.<sup>5</sup>

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1. 55 CONG. REC. 4816 (1917) (statement of Sen. Smith).

2. Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994) (original version at ch. 128, 40 Stat. 755 (1918)). For legal scholarship advocating a broad interpretation of the MBTA, see George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1979); Erin C. Perkins, Comment, *Migratory Birds and Multiple-Use Management: Using the Migratory Bird Treaty Act to Rejuvenate America's National Environmental Policy*, 92 Nw. U. L. REV. 817 (1998); Craig D. Sjoström, Comment, *Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371 (1989).

3. See *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996). In concluding that habitat modification does not fall within the ambit of the MBTA, the court noted the complete absence of any such prosecutions in the MBTA's 80-year history. See 927 F. Supp. at 1581. See also *Seattle Audubon Socy. v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991) (holding that the MBTA concerns "physical conduct of the sort engaged in by hunters and poachers").

4. See 16 U.S.C. § 703 ("Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . ."). The accompanying regulations define a "migratory bird" as "any bird, whatever its origin . . . which belongs to a species listed in §10.13. . . ." 50 C.F.R. § 10.12 (1997). As discussed *infra* at note 10, nearly every species of bird in North America is now included.

5. See 16 U.S.C. § 707(a) ("[A]ny person . . . who shall violate any provisions . . . shall be deemed guilty of a misdemeanor and . . . shall be fined not more than \$500 or be imprisoned not more than six months, or both."). See also *United States v. FMC Corp.*, 572 F.2d 902, 906 (2d Cir. 1978) ("[C]ases involving hunters have consistently held that . . . it is not necessary that the government prove that a defendant violated [the MBTA's] provisions with guilty knowledge or specific intent to commit the violation." (quoting *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966))); *United States v. Schultze*, 28 F. Supp. 234, 236 (W.D. Ky. 1939) (finding irrelevant whether defendants knew they were violating the statute).

Misdemeanor convictions still do not require knowledge, but in 1986 Congress amended the MBTA to require that felony violations be committed "knowingly." See 16 U.S.C. § 707(b). A "knowing" violation, however, may not require specific intent to violate the statute. The Senate report states that a defendant must be shown merely to know that his

A heady combination of strict liability, criminal penalty provisions, and vague language, the MBTA appeals to those seeking to control land use activity.<sup>6</sup> Some environmentalists advocate an interpretation of the MBTA that, contrary to legislative intent and 80 years of enforcement practice, would make any activity resulting in the death of migratory birds a violation of the MBTA, regardless of whether the defendants directed their activity at wildlife.<sup>7</sup> This Note argues, however, that the MBTA covers only activity that is directed at wildlife, and that absent such purposive conduct, no violation exists.<sup>8</sup>

Extending the MBTA's reach beyond activity directed at wildlife would hamper normal land use activities that often result in bird death — such as farming, timber harvesting, and brush clearing — because causing the death of almost any bird would amount to a violation of the law. Migratory birds include “many of the most numerous and least endangered species one can imagine.”<sup>9</sup> Almost all species of North American birds, including crows, grackles, and pigeons, are listed by the Interior Department as migratory birds.<sup>10</sup>

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action amounted to a taking and that the item taken was a bird. See S. REP. NO. 99-445, at 16 (1986), reprinted in 1986 U.S.C.A.N. 6113, 6128; cf. *United States v. Dean*, 969 F.2d 187 (6th Cir. 1992) (holding that, for a knowing criminal violation of the Clean Water Act, actual knowledge of the permit requirement need not be shown). See generally Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, ENVTL. L. 1165, 1242 (1995) (concluding that it is still uncertain whether the knowledge requirement will substantially alter the government's burden in proving felony violations of the MBTA).

6. See, e.g., Sjoström, *supra* note 2, at 371 (“The MBTA is a concise statute, written in general language flexible enough to be used in situations beyond its *original scope*. This, ironically, places the MBTA at a certain advantage compared to other, more specific environmental statutes.” (emphasis added)). For the argument that imprecision in drafting should not defeat clearly discernible legislative intent, see generally *infra* Part I.

7. See, e.g., Appellants' Reply Brief at 1-4, *Newton County Wildlife Assn. v. United States Forest Serv.*, 113 F.3d 110 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1035 (1998) (No. 96-3463) [hereinafter Appellants' Reply Brief] (arguing that timber harvesting during nesting season violates the MBTA because it causes bird deaths).

8. This Note does not dispute that the MBTA imposes strict liability. Under strict liability, the government can always prosecute conduct that amounts to a violation — hunting without a permit, for example — and need not show that the defendants had any idea that they were violating the statute. Rather, this Note points out that the inclusion of strict liability language in the statute does not answer the question of what amounts to the *actus reus* of a violation.

9. *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996).

10. See Coggins & Patti, *supra* note 2, at 190 (“The MBTA now protects nearly all native birds in the country, of which there are millions if not billions, so there is no end to the possibilities for an arguable violation.”). For a complete listing of protected migratory birds, see 50 C.F.R. § 10.13 (1997). “[I]f . . . the MBTA prohibits the inadvertently-caused death of any migratory bird . . . land uses on tens of millions of acres would be impaired.” Timber Appellees' Brief at 2, *Newton County Wildlife Assn.*, 113 F.3d 110 (No. 96-3463) [hereinafter Timber Appellees' Brief].

No de minimis exception appears to apply, because the MBTA makes unlawful the taking of a single migratory bird.<sup>11</sup>

Courts disagree about the breadth of the MBTA. Some have read the MBTA broadly and held that it can reach accidental bird death.<sup>12</sup> The Second Circuit, for example, held that a defendant's inadvertent contamination of ground water (which poisoned migratory birds) violated the MBTA.<sup>13</sup> Recently, other courts have read the MBTA more narrowly, confining it to the regulation of hunting.<sup>14</sup> The Eighth Circuit, for instance, held that bird death resulting from timber harvesting did not violate the MBTA because "it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds."<sup>15</sup>

This Note argues that the MBTA applies only to activities directed at wildlife. Part I contends that the language and legislative history of the statute show that Congress intended a narrow reading of the MBTA. Part II demonstrates that, if construed broadly, the MBTA would become a criminal law of disturbing breadth, and that the limiting principles that have been suggested —

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11. See *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 529 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978) ("Looking first at the language of the MBTA itself, it is clear that Congress intended to make the unlawful killing of even one bird an offense."); *cf.* *United States v. FMC Corp.*, 572 F.2d 902, 903 (2d Cir. 1978) (assuming the government's ability to bring separate indictments for individual bird deaths, including 24 counts each involving the death of a single bird). The *Corbin* court determined that where a single act results in multiple bird deaths, the principle of lenity requires that only one violation be charged because it is unclear whether Congress intended to make each death a separate violation. See *Corbin Farm Serv.*, 444 F. Supp. at 531. Assuming the validity of the court's analysis, however, it is still unclear whether separate violations may be charged when the same activity (e.g., timber harvesting) is carried out over a number of days. The prospect of a jail sentence makes the MBTA non-trivial, regardless of the number of violations charged.

12. See *FMC Corp.*, 572 F.2d at 905-08; *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), *rev'd on other grounds*, 110 F.3d 1551, 1555 (11th Cir. 1997); *Corbin Farm Serv.*, 444 F. Supp. at 529, 531-36. The government has also been able to use the threat of criminal prosecution to gain settlements. See Stephen Raucher, Comment, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 *ECOLOGY L.Q.* 147, 170-73 (noting that Exxon pleaded guilty to charges of violating the MBTA and that the strict liability provisions of the MBTA make it "a potent tool").

13. See *FMC Corp.*, 572 F.2d at 907-08.

14. See *Newton County Wildlife Assn.*, 113 F.3d at 115; *Curry v. United States Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997); *Mahler*, 927 F. Supp. at 1573-74.

15. *Newton County Wildlife Assn.*, 113 F.3d at 115. Some courts have found that the MBTA provides no private right of action, see *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997), or that the government has immunity from prosecution, see *Sierra Club*, 110 F.3d at 1556 ("[T]he MBTA does not apply to the federal government."); *Newton County Wildlife Assn.*, 113 F.3d at 116 (finding as alternative reasoning that the permitting requirement of the MBTA does not apply to bird-killing activities of federal agencies). This Note argues for a narrow interpretation of the MBTA, but does not address whether the federal government must follow the MBTA, nor does this Note argue for or against a private right of enforcement.

prosecutorial discretion, extra-hazardous materials, and permit schemes — all suffer from fatal flaws. Part III argues that sound environmental policy for migratory birds can be achieved without an expanded reading of the MBTA.

## I. LANGUAGE AND LEGISLATIVE INTENT

This Part contends that well-accepted principles of statutory interpretation<sup>16</sup> require a narrow construction of the MBTA. Section I.A argues that the language of the statute and of its accompanying regulations covers only activities directed at wildlife. Section I.B argues that the MBTA's legislative history further demonstrates that Congress did not intend the MBTA to reach accidental bird deaths.

### A. *The Language and Regulations*

Statutory interpretation begins with the language of a statute,<sup>17</sup> and the plain language of the MBTA indicates that Congress meant only to regulate activity directed at wildlife. The MBTA specifies 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, [or] attempt to take . . . any migratory bird . . . .”<sup>18</sup> Words like “hunt” and “pursue” clearly require conduct undertaken with the purpose of harming wildlife, and so the debate

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16. Traditional tools of statutory interpretation are designed to determine legislative intent. See *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987) (“On a pure question of statutory construction, our first job is to try to determine congressional intent, using ‘traditional tools of statutory construction.’ If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it.” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987))). Unambiguous statutory language determines the scope of a statute absent “a clearly expressed legislative intent to the contrary . . . .” *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal quotation marks and citations omitted); see also *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-42 (1989); *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988) (holding that clear evidence of legislative intent prevails over other principles of statutory construction).

17. See, e.g., *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990); *Mallard v. United States Dist. Court*, 490 U.S. 296, 300 (1989).

18. 16 U.S.C. § 703 (1994). The full list of prohibited conduct is as follows:

[B]y any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions . . . .

16 U.S.C. § 703.

over the MBTA has largely focused on the meaning of the words "take" and "kill."<sup>19</sup>

Section I.A.1 concentrates on the words "take" and "kill," the statutory language relied upon by the proponents of an expanded MBTA, and shows that the words actually support a narrow interpretation of the MBTA. Section I.A.2 demonstrates that the statutory context of "take" and "kill" resolves any lingering ambiguity in favor of a narrow interpretation. In particular, section I.A.2 contends that the surrounding statutory language — "pursue," "hunt," "capture," "attempt to take" — evinces congressional intent to prohibit only activity directed at wildlife.

### 1. *Take and Kill*

The ordinary meaning of the word "take," when applied to wildlife, denotes intentionally reducing the wildlife to possession. *Webster's Third New International Dictionary* defines "take" as "to get into one's hands or into one's possession, power, or control by force or stratagem: . . . to get possession of (as fish or game) by killing or capturing . . ." <sup>20</sup> This definition makes the intent to possess central. When migratory birds die as a consequence of activity not directed at them, as in crop harvesting, no one reduces the birds to possession, nor does anyone attempt to possess them.

The regulatory definition of "take" accompanying the MBTA does not contradict the ordinary meaning of the word found in *Webster's*. According to the accompanying regulations, which recapitulate much of the language of the MBTA itself, "[t]ake means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."<sup>21</sup> The additional action words in the regulation's definition of "take" — "shoot," "wound," "trap," and "collect" — help confirm that the meaning of "take" should be confined to activity directed at wildlife.<sup>22</sup> It does not make sense to say that one "traps" or "collects" wildlife accidentally. "Shoot" also seems strongly associated with hunting, and "wound," if not restricted to activity directed at wildlife, would make the MBTA absurdly broad.<sup>23</sup>

The MBTA's narrow version of "take" becomes clearer when contrasted with the definition of "take" found in the Endangered

19. See, e.g., *Newton County Wildlife Assn.*, 113 F.3d at 115; *Mahler*, 927 F. Supp. at 1573-74.

20. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2329-30 (1986); cf. *Kepner v. United States*, 195 U.S. 100, 124 (1904) ("[L]anguage used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense . . .").

21. 50 C.F.R. § 10.12 (1997).

22. See *Mahler*, 927 F. Supp. at 1579.

23. See *infra* Part II.

Species Act (ESA).<sup>24</sup> As defined in the ESA, “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . .”<sup>25</sup> The accompanying regulations define “harm” to “include significant habitat modification or degradation where it actually kills or injures wildlife.”<sup>26</sup> If Congress had wanted to include similarly broad language in the MBTA, it could have done so. As one circuit court observed, that Congress did not add broadening words such as “harass” and “harm” to the MBTA shows that the difference between the two laws is “distinct and purposeful.”<sup>27</sup>

“Kill” is less a term of art in wildlife law than “take,” and its scope depends upon statutory context. The dictionary definition does not advance the analysis. “Kill,” according to *Webster’s Third New International Dictionary*, means, “to deprive of life: put to death: cause the death of.”<sup>28</sup> Whatever its potential scope, in the context of the MBTA the better reading of “kill” requires activity directed at wildlife.

The regulations accompanying the MBTA focus exclusively on “take” and thereby avoid the potential for ambiguity in “kill.” The regulations relegate “kill” to the chain of words used to define “take,”<sup>29</sup> rely solely on the word “take” to describe the permit process,<sup>30</sup> and never even bother to define “kill.” Whatever independent meaning “kill” might retain in the statute — despite its

24. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994).

25. 16 U.S.C. § 1532(19).

26. 50 C.F.R. § 17.3. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 701 (1995), the Court relied on the definition of “take” provided by the ESA and its accompanying regulations to conclude that “take” encompassed habitat modification. The Justices interpreted “take” broadly in the context of the ESA, where it is a defined term, despite the traditional understanding of “take” which Justice Scalia, dissenting, felt should outweigh even the use of the words “harass” and “harm” in the statutory definition:

If “take” were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To “take,” when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. This is just the sense in which “take” is used elsewhere in federal legislation and treaty. See, e.g., Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 ed., Supp. V).

*Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting) (citations to cases omitted). Scalia’s dissent provides helpful explication of the standard meaning of the word “take,” notwithstanding the majority’s conclusion that the use of “harass” and “harm” in the ESA’s statutory definition of “take” showed that Congress did not intend to rely on the traditional understanding when it enacted the ESA.

27. *Seattle Audubon Socy. v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991).

28. WEBSTER’S, *supra* note 20, at 1242.

29. See 50 C.F.R. § 10.12 (defining “take” as “to pursue, hunt, shoot, wound, *kill*, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, *kill*, trap, capture, or collect”) (emphasis added).

30. See 50 C.F.R. § 21.11 (general permit requirements); *cf.* *United States v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 37, 44 (1911) (“The presence of such a provision in one part [of a statute] and its absence in the other is an argument against reading it as implied [where omitted].”).

subordination to “take” in the regulations — statutory context sharply limits both “kill” and “take.”

## 2. Context of Take and Kill

The statutory context further demonstrates that “take” and “kill” refer to purposive conduct. Courts may not ignore the context of statutory language.<sup>31</sup> In the MBTA, the words “take” and “kill” are in part defined by the words that surround them. Because all of the words of prohibition in the statute except “take” and “kill” exclusively denote activity directed at migratory birds,<sup>32</sup> it would be logical to assume that “take” and “kill” have a similar meaning — a logic embodied in the principle of *noscitur a sociis*.<sup>33</sup> If a party invitation said, “bring your own beer, whiskey, or other poison,” it would be unmistakably clear that “poison” meant an alcoholic beverage of only normal toxicity. Such is the case here. Even though it is possible to read “take” and “kill” in a more expansive manner, courts may not ignore the language accompanying those words and defy the statute’s obvious purpose.

The MBTA’s prohibition of attempts<sup>34</sup> also suggests that the law is aimed at purposive conduct; one cannot unintentionally attempt to take a bird. It would strain the statutory language and defy common sense to assert that one can be guilty of an attempt for any activity, that, if completed, would cause the death of migratory birds. One hunts birds with the hope and expectation of killing them. Hunters then are at least aware that they may violate the MBTA if they do not carefully follow hunting regulations.<sup>35</sup>

The words “take” and “kill” follow the phrase “by any means or in any manner”<sup>36</sup> and must be read in conjunction with it. The very

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31. See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (objecting to the “divorce [of] the phrase being construed from its context”); *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (“The MBTA . . . should be read as a whole to derive its plain meaning.”).

32. See 16 U.S.C. § 703 (1994). The inclusion of prohibitions on selling and transporting migratory birds, for example, suggests that the statute is concerned with intentional takings, because sales and transport would likely follow an intentional taking. See also *Seattle Audubon Socy.*, 952 F.2d at 302 (remarking that the MBTA “describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918”); *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) (“The connection between these words and hunting . . . is apparent.”).

33. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (defining *noscitur a sociis*: “a word is known by the company it keeps” (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))); see also *BOUVIER’S LAW DICTIONARY* 979 (Baldwin’s Cent. ed., 1926) (“In the construction of laws . . . general words following an enumeration of specific things are usually restricted to things of the same kind . . . as those specifically enumerated.”) (defining the related term *ejusdem generis*).

34. See 16 U.S.C. § 703 (“attempt to take, capture, or kill”).

35. Cf. *United States v. Schultz*, 28 F. Supp. 234, 236 (W.D. Ky. 1939) (finding it irrelevant whether or not defendants knew it was an MBTA violation to hunt in a baited field).

36. 16 U.S.C. § 703.



expansiveness of the phrase, however, cuts against a broad reading of "take" and "kill." If "take" and "kill" include any activity that results in bird death, despite lack of purpose, then "by any means or in any manner" operates to ban ordinary activities to the point of absurdity. Even if the plain meaning of the statute suggested such breadth, it would not control.<sup>37</sup>

Moreover, the broad interpretation would criminalize certain everyday behavior, and the Supreme Court recognizes a strong presumption against criminalizing ordinary activities. In *United States v. X-Citement Video*,<sup>38</sup> for example, the Supreme Court indicated that it would refuse to make a drugstore owner criminally liable merely for developing film, even if the film happened to contain images of children engaged in sex acts.<sup>39</sup> The Court reached that conclusion despite statutory language most naturally read to include drugstore owners and despite the absence of legislative history on point.<sup>40</sup> A broad interpretation of the MBTA would make possible prosecution for farming, timber harvesting, brush clearing, and window installation. The mere possibility of criminal liability for such ordinary behavior is untenable. If, on the other hand, "take" and "kill" require activity directed at migratory birds, then "by any means or in any manner" refers merely to the myriad ways people might devise to hunt birds.<sup>41</sup>

### B. *The Legislative History*

Even if we were beguiled by possible ambiguity and thought that the MBTA's plain meaning seemed to require a broad interpretation of the statute's scope, we might still wonder whether Congress could be supposed to have passed a statute so expansive. We need not speculate; the legislative history of the MBTA makes per-

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37. See, e.g., *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) (quoting *United States v. American Trucking Assn.*, 310 U.S. 534, 543 (1940)). The Court explained:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

38. 513 U.S. 64 (1994).

39. See 513 U.S. at 69.

40. See 513 U.S. at 69 ("We do not assume that Congress, in passing laws, intended such results." (citing *Public Citizen v. Department of Justice*, 491 U.S. 440, 453-55 (1989))); see also *Williams v. United States*, 458 U.S. 279, 286 (1982) (holding that a statute that prohibited the making of false statements to a bank did not apply to the deposit of a "bad check" because "the Government's interpretation . . . would make a surprisingly broad range of unremarkable conduct a violation of federal law").

41. See *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1579-80 (S.D. Ind. 1996).

fectly plain that the MBTA was passed solely to restrict activity directed at wildlife.

Enacted as a wartime measure in 1918, the MBTA regulates hunting for pragmatic reasons. Congress enacted the MBTA as “a food-conservation measure.”<sup>42</sup> The Senator who introduced the bill observed, “[t]his law is aimed at the professional pothunter”<sup>43</sup> and “[n]obody is trying to do anything here except to keep pothunters from killing game out of season.”<sup>44</sup> The sponsoring Senator explained further that “[e]nough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it.”<sup>45</sup> By reducing the insect population, migratory birds would protect crops and ensure a steady supply of food to sustain the war effort.<sup>46</sup> Others who supported the bill shared the sponsoring Senator’s sense of pragmatism. In a letter read into the Congressional Record, the National Association of Game and Fish Commissioners urged the passage of the law as a war measure to maximize food production.<sup>47</sup> An interpretation of the MBTA that impedes the ordinary land use activity associated with food production would thwart congressional intent.

In the wake of court decisions finding earlier laws designed to regulate bird hunting unconstitutional,<sup>48</sup> it seems highly unlikely

42. 55 CONG. REC. 4400 (1917) (statement of Sen. McLean).

43. 55 CONG. REC. 4402 (statement of Sen. Smith).

44. 55 CONG. REC. 4816 (statement of Sen. Smith).

45. 55 CONG. REC. 4816 (statement of Sen. Smith). See also Senator Stedman’s grandiloquent phrasing of the same idea:

[L]et the boll weevil go to rest amidst the happy hunting grounds of his fathers in that great and splendid region of our land where he first saw the light. Let his onward march of destruction be halted forever, and few there will be, even where the doctrine of State rights is most highly cherished, who will lament his departure or criticize those who have hastened his funeral obsequies, as is intended by this act, and may his allies of the same vicious type likewise share his fate. Let the song bird live to herald to the world its happy and joyous anthem proclaiming the goodness of God to all his creatures.

56 CONG. REC. 7362 (1918).

46. See 56 CONG. REC. 7362 (statement of Sen. Stedman) (“Save the birds which destroy the insects and an incalculable service will be rendered to our country by increasing its supply of food so imperatively needed to meet the necessities of the war in which we are now engaged and to the successful issue of which we have pledged our fortunes, our lives, and our honor . . .”).

47. See 55 CONG. REC. 4816 (“Whereas the conservation and protection of the migratory insectivorous birds is so closely related to the conservation of the food, cotton, and timber crops of the country, and the migratory game birds constitute an important source of the food supply. . . . [T]he said bill is, and should be, considered an important war measure . . .”) (quoting June 13, 1917, resolution of the National Association of Game and Fish Commissioners).

48. See *United States v. McCullagh*, 221 F. 288, 295-96 (D. Kan. 1915) (holding that each state has a plenary power over the wildlife within its borders); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914) (“The court is 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.”). The Supreme Court, per Justice Holmes, later upheld the

that Congress would have attempted a law so expansive as to affect farming, timber harvesting, and window installation.<sup>49</sup> Congress also debated extensively “whether it would be an invasion of private property rights to allow federal officials to conduct warrantless searches of farms and houses for illegally shot birds.”<sup>50</sup> The regulation of ordinary land use, if intended, would surely have been debated as an invasion of property rights.<sup>51</sup> If Congress had intended to pass such an expansive law, it seems even more implausible that the timber industry and farming groups would have supported it, as they did.<sup>52</sup>

Congress appeared to treat the MBTA as a hunting statute in 1960, when it added “market hunter” penalties to the MBTA<sup>53</sup> to distinguish for-profit hunters from recreational hunters.<sup>54</sup> The added provisions focused on the sale of birds and bird parts.<sup>55</sup> Had Congress intended the law to extend further, the amendments would have discussed other categories of violators and the penalties appropriate to those categories.

Congress passed up a similar opportunity to expand the scope of the MBTA when it amended the MBTA in 1974, one year after passing the Endangered Species Act, which contains an expansive definition of “take.”<sup>56</sup> It would have been a logical time to expand the MBTA’s scope, but Congress did not do so.<sup>57</sup> Despite consistent judicial application of the MBTA to hunting alone, the 1974 amendment contained none of the expansive language of the ESA. By forbidding the sale of illicitly obtained bird parts, the amendment reinforced the idea that the MBTA concerns itself with activ-

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constitutionality of the MBTA. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (“We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.”).

49. See *Timber Appellees’ Brief*, *supra* note 10, at 28 n.8 (citing cases cited *supra* note 48).

50. *Id.* at 30 (citing 56 CONG. REC. 7356-81, 7440-62, 7472-76 (1918)).

51. See *id.*

52. See 56 CONG. REC. 7357-58.

53. See *Migratory Bird Treaty Act Amendment of 1960*, Pub. L. No. 86-732, 74 Stat. 866 (codified as amended at 16 U.S.C. § 707 (1994)).

54. See *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1580 (S.D. Ind. 1996).

55. See 74 Stat. at 866.

56. See *Endangered Species Act*, 16 U.S.C. § 1532(19) (1994); see also *supra* text accompanying notes 24-27.

57. See *Migratory Bird Act Amendment of 1974*, Pub. L. No. 93-300, 88 Stat. 190 (codified as amended at 16 U.S.C. § 703). Cf. *Merrill Lynch v. J.J. Curran*, 456 U.S. 353, 391 n.92 (1982) (concluding that Congress presumably agrees with the longstanding judicial interpretation of a term in a statute when it subsequently amends the statute without clarification of the term) (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 55 n.4 (1977) (Stevens, J., dissenting)); Perkins, *supra* note 2, at 851 (arguing, perhaps inconsistently, both that the MBTA should be construed broadly and that legislative change is necessary to effectuate such an interpretation).

ity directed at wildlife.<sup>58</sup> The 1974 amendment strongly suggests that the MBTA is a hunting statute, because no one would worry about profits derived from the inadvertent killing of birds.<sup>59</sup>

The fairest reading of the MBTA limits its application to activity directed at migratory birds. That the MBTA prohibits pursuing, hunting, capturing, and the like strongly suggests that Congress intended to restrict only activity directed at migratory birds. By their own lights, and in the context of the rest of the statutory language, "take" and "kill" also seem to focus upon purposive conduct. The legislative history reinforces that understanding.<sup>60</sup> Moreover, expanding the MBTA to encompass activity not intended to cause bird deaths would create a criminal law with no satisfactory limit.

## II. THE IMPRACTICABILITY OF LIMITS ON THE EXPANDED VERSION OF THE MBTA

Reading the MBTA to prohibit all activity that causes the death of migratory birds would make the MBTA an uncontrollably expansive criminal law. Such an interpretation would lead to ridiculous consequences: "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."<sup>61</sup> If "take" and "kill" include incidental bird deaths, all of those examples fall within the literal scope of "by any means or in any manner." In some situations, "the MBTA would impose criminal liability on a person for the death of a bird under circumstances where no criminal liability would be imposed for even the death of another *person*."<sup>62</sup>

That result seems so counter-intuitive that one cannot help but think there must be some way to read the law broadly without en-

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58. See 88 Stat. at 190.

59. See *Mahler*, 927 F. Supp. at 1580 ("This language prohibiting use of secondary products derived from migratory birds again reflects an intent to prohibit activity that is intended to kill or capture birds. There is again no indication that Congress intended to reach activities not even intended to kill or capture birds.").

60. See, e.g., 56 CONG. REC. 7374-77 (1918) (debating vociferously which states' hunters would benefit from the MBTA). See also 56 CONG. REC. 7360 (statement of Sen. Anthony) ("[T]o my knowledge, for the most part, the people who are against this bill are the market shooters, who want to go out and kill a lot of birds in the spring, when they ought not to kill them . . ."). For the argument that modern guns require more stringent hunting controls, see 56 CONG. REC. at 7370 (statement of Sen. Raker) ("The improvement of guns ha[s] been such that [game birds] can be reached in all places, and they are slaughtered promiscuously, many of them for the market and shipped away, but many are destroyed just simply for the fun of shooting.").

61. *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978).

62. *Mahler*, 927 F. Supp. at 1578. For example, an otherwise law-abiding motorist would violate the broad version of the MBTA if a bird flew into the car's windshield, yet the motorist would not violate any law if a pedestrian stepped in the way of the car at the last second.

compassing such oddities. The proponents of a broad reading of the MBTA offer the following limitations to avoid overbreadth: liability restricted by prosecutorial discretion;<sup>63</sup> liability limited to the use of extra-hazardous materials;<sup>64</sup> and liability only for violations of permitting requirements.<sup>65</sup>

Section II.A argues that prosecutorial discretion is not a satisfactory solution to a vastly overbroad criminal law because it renders enforcement unpredictable, and because it does not substitute for rational interpretation. Section II.B dismisses the extra-hazardous materials rationale relied on by two courts as a standard wholly absent from the MBTA, its accompanying regulations, and the legislative history. Section II.C contends that it would be administratively impossible to create a national permitting program sufficient to cover every conceivable means by which birds might die as a result of human activity.

### A. Prosecutorial Discretion

Courts that have expanded the reach of the MBTA,<sup>66</sup> and scholars who advocate such expansion,<sup>67</sup> suggest prosecutorial discretion

63. See *FMC Corp.*, 572 F.2d at 905; *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), *revd. on other grounds*, 110 F.3d 1551, 1555 (11th Cir. 1997); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 536-37 (E.D. Cal. 1978), *affd.*, 578 F.2d 259 (9th Cir. 1978).

64. See *FMC Corp.*, 572 F.2d at 907; *Corbin Farm Serv.*, 444 F. Supp. at 553.

65. See Appellants' Reply Brief, *supra* note 7, at 16-17. One might also argue that the principle of proximate cause provides the needed limit to a broad interpretation of the MBTA. For a good discussion of proximate cause, see generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 46 at 273-74 (5th ed. 1984). Although proponents of an expanded MBTA have not advanced this argument, the Supreme Court suggested proximate cause as a limiting principle in the context of the ESA. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696 n.9, 700 n.13 (1995). At first blush proximate cause may seem plausible as a limiting principle, but, in fact, it would not prevent the criminalization of all or nearly all of the ordinary land use activity that a sensible interpretation of the MBTA would exclude. Installing a picture window, for example, directly and foreseeably causes the death of birds. Unless the window itself operates as an intervening cause, the harm to the bird follows directly from the mounting of the window. Anyone installing windows is aware, or should be aware, of the possibility (if not likelihood) of bird casualties. Similarly, chopping down trees directly and foreseeably causes the death of birds; proximate cause would be reduced to absurdity if it required that the chainsaw itself make contact with the bird. If proximate cause is used more loosely, as little more than an ad hoc judgment made by the trier of fact as to the culpability of the defendant, then it begins to look more like judicial discretion. Cf. KEETON ET AL., *supra*, at 274 ("[P]redicting outcomes in pending cases is hazardous indeed if one looks only to theories."). For an argument that prosecutorial discretion does not provide a satisfactory limit to the MBTA, see *infra* section II.A.

66. See *FMC Corp.*, 572 F.2d at 905-08; *Sierra Club*, 933 F. Supp. at 1564-65; *Corbin Farm Serv.*, 444 F. Supp. at 529, 531-36.

67. See *Coggins & Patti*, *supra* note 2; *Scott Finet, Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1 (1996); *Sjostrom*, *supra* note 2.

as a limiting principle.<sup>68</sup> While it admittedly seems unlikely that a prosecutor would try a case involving a sparrow flying into someone's kitchen window — though a woman was recently prosecuted under the MBTA for giving First Lady Hillary Clinton a “dream catcher” made with bird feathers<sup>69</sup> — there are serious practical and theoretical problems with relying on prosecutorial discretion.

Discretion in enforcing the MBTA would not be predictable. Enforcement policies might vary from administration to administration in dramatic ways, making long-range land use planning much more difficult.<sup>70</sup> People are generally risk averse and will avoid the possibility of criminal prosecution by curtailing otherwise desirable behavior. We could run the risk of deterring land use that is important for food production and timber supply.<sup>71</sup>

Perhaps some environmentalists would welcome the unpredictability of prosecutorial discretion, because it would avoid the problems caused by individuals who stay within the technical boundaries of a law while doing their best to violate its spirit.<sup>72</sup> On the other hand, the fuzzy boundary of the MBTA would be exceptionally broad. The potential scope of the MBTA has already caused apprehension.<sup>73</sup>

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68. See, e.g., *FMC Corp.*, 572 F.2d at 905 (stating that where conviction “would offend reason and common sense,” resolution through nominal penalties “can be left to the sound discretion of prosecutors and the courts”).

69. See Alan McConagha, *Hillary's Feathered Gift Gets Plucked: 'Dream Catcher' is a Nightmare*, WASH. TIMES, Aug. 9, 1995, at A3; *They Swooped*, THE ECONOMIST, Aug. 19, 1995, at 27 (“If you are the sort of American who believes the federal government is bird-brained, here is apparent proof. Peg Bargon, a middle-aged wife and mother in rural Monticello, Illinois, faces the possibility of a year in jail and a fine of \$156,000 because of an eagle feather.”).

70. For an in-depth discussion of the problems associated with prosecutorial discretion, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969); KENNETH CULP DAVIS, *POLICE DISCRETION* (1975); Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

71. This would be especially ironic because in 1918 Congress thought it was passing a law that would aid the war effort by spurring just such productive land use. See *supra* text accompanying notes 42-47.

72. Cf. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) (arguing “that bright-line rules allow the ‘bad man’ to engage in socially unproductive behavior right up to the line; on a pessimistic view of human nature, the chilling effect of standards can be a good thing”).

73. See, e.g., Farley, *Migratory Bird Treaty Act*, ARMY LAW., Dec. 1996, at 29. Prosecutorial discretion would not be a limiting factor at all if environmental groups had either a private right of action to enforce the MBTA against private parties or an Administrative Procedure Act action to enforce the MBTA against federal agencies. Although no appellate court has yet allowed a MBTA claim by a private party to proceed against the government, see, e.g., *Sierra Club v. Martin*, 110 F.3d 1551, 1554-55 (11th Cir. 1997), the issue remains unresolved in most circuits. Moreover, the courts have not considered whether a private party could sue another private party. As the United States Forest Service has explained, “This approach could effectively require that the National Forests be managed predominately as migratory bird reserves even though Congress has directed the Forest Service to manage the National Forests for multiple uses including timber harvest, mining and grazing.” Brief for Federal Appellees at 30, *Newton County Wildlife Assn. v. United States For-*

As a matter of jurisprudence, discretion is not satisfactory because it avoids the question of statutory interpretation: the question of what the law is in the first place.<sup>74</sup> To the extent that the proponents of a broad interpretation of the MBTA rely on discretion, they demonstrate an inability to articulate a theoretical limit to potential liability under the MBTA and turn to common sense as a solution.<sup>75</sup> Prosecutorial discretion becomes the means for salvaging an over-broad law.

Prosecutorial discretion is also less than ideal because not every prosecutor can be counted on to show adequate discretion.<sup>76</sup> This problem may be acute in a pro-environment climate where, "[e]ach year the Department of Justice announces 'record levels' of fines imposed, persons indicted, and jail time served for infractions of environmental regulations."<sup>77</sup> A prosecutor with political ambitions, not unheard of, "might allow public opinion and potential media coverage" to influence the exercise of discretion.<sup>78</sup>

### B. *Extra-hazardous Materials*

The MBTA could also be interpreted to reach beyond conduct directed at birds only when extra-hazardous materials are involved. The extra-hazardous materials extension has some appeal in that it is the only expansive interpretation of the MBTA relied upon by the courts. In *United States v. FMC Corp.*, the Second Circuit found criminal liability where a defendant allowed toxins to seep into a pond causing bird death. According to the court: "[S]trict liability has been deemed to apply . . . when a person engages in extra-hazardous activities. . . . The principle here is the same as in the

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est Serv., 113 F.3d 110 (8th Cir. 1997), cert. denied, 118 S. Ct. 1035 (1998) (No. 96-3463) [hereinafter Brief for Federal Appellees].

74. See *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1582 (S.D. Ind. 1996) ("[T]rust in prosecutorial discretion is not really an answer to the issue of statutory construction.").

75. See *Coggins & Patti*, *supra* note 2, at 191 (arguing that the MBTA should be construed broadly, but nonetheless conceding that "it is questionable as a jurisprudential matter whether the problem [of finding a limit to the law] should be begged simply by reference to prosecutorial discretion").

76. See Gregory A. Zafiris, Comment, *Limiting Prosecutorial Discretion Under the Oregon Environmental Crimes Act: A New Solution to an Old Problem*, 24 ENVTL. L. 1673, 1674 (1994) (arguing that prosecutorial discretion "is susceptible to both abuse and error under normal circumstances, and environmental law by its nature further increases the likelihood of misuse"). Prosecutors may abuse their discretion by using a vague law "to force an unfair plea bargain upon defendants who barely fit the technical requirements of that law." *Id.* at 1681. Elected prosecutors may also succumb to public pressure in high profile environmental cases. See *id.* at 1682 ("Pressure from constituents could coerce locally elected district attorneys into charging local industries for technical violations that would be better handled administratively.").

77. Timothy Lynch, *Polluting our Principles: Environmental Prosecutions and the Bill of Rights*, 15 TEMP. ENVTL. L. & TECH. J. 161, 161 (1996).

78. *Id.* at 170.

tort situation . . . .”<sup>79</sup> In *United States v. Corbin Farm Services*, a district court held that the defendant could be liable under the MBTA for the misapplication of pesticides that resulted in bird death.<sup>80</sup>

The quasi-tort theory of the extra-hazardous materials limit seems curiously out of place in the context of the MBTA. Nowhere does the MBTA or its legislative history mention extra-hazardous materials.<sup>81</sup> Both *FMC* and *Corbin* have been distinguished in subsequent MBTA litigation on the grounds that they constituted an exception to the normal operation of the MBTA — a gentle way of dispensing with a quasi-tort principle that finds no support in the law.<sup>82</sup>

An extra-hazardous materials limit would, in any event, be unsatisfactory to many supporters of a broad MBTA, because they seek to use *FMC* and *Corbin* as the precedential underpinnings of an expanded MBTA and not as a relatively narrow exception to it.<sup>83</sup> The extra-hazardous materials limit, then, has a double disadvantage: it is both inconsistent with any plausible interpretation of the MBTA as enacted and ineffective as judicial legislation.

### C. Permits

Some advocates of a broad interpretation of the MBTA might argue that the MBTA does not require the unreasonable result of banning all land use activity, but only makes the reasonable demand that such activity first be permitted by the Fish and Wildlife Service. Permitting is not a reasonable solution for two reasons: 1) no such permitting scheme is currently available; and 2) even if available, such a scheme would have to be nationwide and incredibly intrusive in order to cover everything from farming to installing picture windows. It is hard to imagine what benefit such an administratively unworkable permit system would be to migratory birds.

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79. *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

80. *See United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 536 (E.D. Cal. 1978), *affd.*, 578 F.2d 259 (9th Cir. 1978).

81. *See Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1583 n.9 (S.D. Ind. 1996) (dismissing the extra-hazardous materials limit as having “no apparent basis in the statute itself or in the prior history of the MBTA’s application since its enactment”). None of this is to suggest that the indiscriminate use of pesticides is beyond the reach of the law. “The Federal Insecticide, Fungicide, and Rodenticide Act . . . would protect birds if only it were enforced . . . .” Ted Williams, *Silent Scourge: Legally-Used Pesticides are Killing Tens of Millions of America’s Birds*, AUDUBON, Jan.-Feb. 1997, at 28, 35.

82. *See, e.g., Mahler*, 927 F. Supp. at 1576-83, 1583 n.9.

83. None of the recent lawsuits against the timber industry, for example, would have been viable under a theory of extra-hazardous materials. *See Mahler*, 927 F. Supp. at 1583, n.9 (stating that the extra-hazardous materials limit “would not support application of the MBTA’s prohibitions to logging activities”).



The statute requires that every activity that falls within the ambit of "take" and "kill" must receive a permit,<sup>84</sup> regardless of the ease or complexity of the permitting process, but no such permit exists for incidental bird death. The general permit provision in the regulations essentially restates the language of the MBTA:

No person shall take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase or barter, any migratory bird . . . except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part . . . .<sup>85</sup>

Beyond that vague framework, no mechanism exists for permitting general land use activity. Nor do any of the special permit provisions cover land use activity that might indirectly cause the death of migratory birds.<sup>86</sup> That the specific permits only include activities directed at wildlife suggests further that no one intended to make incidental bird death a criminal violation.

Only a general permit could include every means or manner of bringing about the untimely demise of migratory birds, because processing millions of individual permit applications would be administratively infeasible. The current general permit contains a provision for state game departments that requires "accurate records of . . . the species and numbers of birds acquired."<sup>87</sup> The new general permits, whatever they looked like, probably could not realistically include such a requirement. For example, an airline pilot is unlikely to know how many birds fly into the engines, and highly unlikely to be able to identify them by species. All the current special permits in the MBTA require such accounting, and, as one court observed: "The detailed reporting requirements show that the regulations for exceptions are not compatible with logging operations or other activities that may unintentionally destroy some nests and cause the deaths of some birds."<sup>88</sup>

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84. See 16 U.S.C. § 703 (1994) ("Unless and except as permitted by regulations . . . it shall be unlawful . . . to pursue, hunt, take . . .").

85. Migratory Bird Permits, 50 C.F.R. § 21.11 (1997).

86. See, e.g., 50 C.F.R. § 21.21 (import and export permits); 50 C.F.R. § 21.22 (banding or marking permits); 50 C.F.R. § 21.23 (scientific collecting permits); 50 C.F.R. § 21.24 (taxidermist permits). No permits for activity such as timber harvesting, farming, or flying planes are available under the MBTA's regulatory scheme. 50 C.F.R. § 21.27 allows for additional special purpose permits but imposes substantial requirements, including maintenance of detailed records of all birds acquired under the permits, that make it unsuitable as a means of issuing general permits to cover bird death. On private land, prohibiting productive land use without compensation might even violate the "Takings" clause of the Fifth Amendment. See generally 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.12 n.39 (2d ed. 1992).

87. 50 C.F.R. § 21.12.

88. *Mahler*, 927 F. Supp. at 1582 n.6. Creating a new permit program would also require following the Administrative Procedure Act's notice-and-comment rulemaking procedures, see 5 U.S.C. § 553 (1994), and could take two or three years. In the meantime everything that falls within the scope of a broadened MBTA would be transitionally illegal. Perhaps some

A scheme that could include and somehow regulate everything from yardwork to flying an airplane during the fall migration is unimaginable. Yet, if the MBTA included incidental migratory bird deaths, such a permit scheme would somehow have to be created. Fortunately, such a reading of the MBTA is counter to its plain text and legislative history.

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Once interpreted broadly, the MBTA does not admit of limits. Prosecutorial discretion is both theoretically unsatisfying and practically unreliable — as the woman prosecuted for giving Hillary Clinton a “dream catcher” made from bird feathers would readily testify. Nothing in the text of the statute suggests extra-hazardous materials as a limit. Finally, the MBTA’s permit requirement would be overwhelmed if asked to cover every conceivable type of land use activity and every citizen engaged in such activity. Instead of looking to an expanded MBTA, environmentalists should rely on existing environmental land use regulations.

### III. MORE RECENT ENVIRONMENTAL LAWS

In the 80 years since the MBTA, Congress has passed a multitude of environmental laws.<sup>89</sup> This Part asserts that the MBTA does not stand alone and argues that the current environmental framework is more than adequate to protect migratory birds. The newer laws reflect a more contemporary understanding of ecosystems — for example, the importance of habitat<sup>90</sup> — and work together to balance the use and preservation of the environment. The MBTA, narrowly interpreted, provides an important part of the environmental framework by requiring permits for activity intended to cause the death of migratory birds. This Part contends that a broadly interpreted MBTA, however, would conflict with the land use planning contemplated by other environmental laws.

The Migratory Bird Conservation Act (MBCA), passed a decade after the MBTA, is the MBTA’s closest relation and shares the “Protection of Migratory Game and Insectivorous Birds” chapter of the United States Code.<sup>91</sup> As one court explained: “Together, the Treaty Act — in regulating hunting and possession — and the Conservation Act — by establishing sanctuaries and preserving natural

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exception could be crafted to avoid the temporary illegality, but it is unclear what a final permit program would look like.

89. See, e.g., Migratory Bird Conservation Act, 16 U.S.C. § 715 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994); North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-4414 (seeking to “protect, enhance, restore and manage . . . wetland ecosystems and other habitats for migratory birds”).

90. See, e.g., 16 U.S.C. § 1532(5) (defining “critical habitat”).

91. 16 U.S.C. § 715 (1994).

waterfowl habitat — help implement our national commitment to the protection of migratory birds.”<sup>92</sup> The MBCA authorizes the Secretary of the Interior to purchase land and water,<sup>93</sup> provided “that such [habitat] is necessary for the conservation of migratory birds.”<sup>94</sup> Such purchases arguably would never become necessary if landowners had to maintain their lands so as never to cause the death of migratory birds. Thus, a broad interpretation of the MBTA would in effect import much of the habitat preservation of the MBCA into the MBTA, rendering unnecessary the compensation allowances.<sup>95</sup>

On National Forest System lands, comprising over 191 million acres,<sup>96</sup> the Multiple-Use Sustained-Yield Act of 1960<sup>97</sup> (MUSYA), the National Forest Management Act of 1976<sup>98</sup> (NFMA), and implementing regulations provide protection for migratory birds. In MUSYA, Congress declared the policy “that the national forests are established . . . for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>99</sup> The NFMA gives substance to that policy by requiring the Secretary of Agriculture to assure that development plans accommodate multiple uses<sup>100</sup> and “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives . . . .”<sup>101</sup> The MBTA does not provide for a balancing of competing uses and, broadly construed, would impede the purpose of the MUSYA and NFMA. Under a broadened MBTA, the Forest Service could not, for example, decide that the loss of some grackles was outweighed by the benefit of a certain amount of timber harvesting.<sup>102</sup>

92. *United States v. North Dakota*, 650 F.2d 911, 913-14 (8th Cir. 1981), *aff'd*, *North Dakota v. United States*, 460 U.S. 300 (1983).

93. *See* 16 U.S.C. § 715a; 16 U.S.C. § 715d.

94. 16 U.S.C. § 715c.

95. *But cf.* *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702-03 (1995) (rejecting a similar argument in the context of the ESA).

96. *See* USDA Forest Service, *Land Areas of the National Forest System* (visited Nov. 11, 1998) <<http://www.fs.fed.us/database/lar/lartab1.htm>>.

97. 16 U.S.C. §§ 528-531.

98. 16 U.S.C. § 1600 (1994).

99. 16 U.S.C. § 528.

100. *See* 16 U.S.C. § 1604(e)(1).

101. 16 U.S.C. § 1604(g)(3)(B). *See also* 36 C.F.R. § 219.19 (1998) (“[W]ildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.”); James A. Siemans, Comment, *A “Hard Look” at Biodiversity and the National Forest Management Act*, 6 TUL. ENVTL. L.J. 157, 177 (1992) (identifying problems in the implementation of the NFMA, but concluding that “[w]ere NFMA implemented faithfully, the national and global decline in biodiversity would be significantly redressed”).

102. Although the Endangered Species Act also prohibits balancing, it limits such strict protection to wildlife in imminent danger of extinction. The MBTA, if broadly interpreted,

Ironically, an absolute ban on activity that destroyed any bird might prevent activity beneficial to birds in the aggregate. As the government argued in its brief to the Eighth Circuit, the timber harvesting there at issue would "enhance diversity of migratory birds by providing needed habitat for early successional species, including migratory birds like the white-eyed vireo and yellow breasted chat, while, at the same time, providing for the needs of migratory birds that need more mature forest, such as the ovenbird and scarlet tanager."<sup>103</sup> The Ruffed Grouse also thrives in the brush land which grows in after a clearcut.<sup>104</sup>

The Endangered Species Act heightens the level of protection afforded to creatures in danger of extinction. As discussed,<sup>105</sup> its definition of "take" does include activities that "harm" or "harass" a listed species.<sup>106</sup> Extending such stringent protection to all migratory birds would conflict with the idea of balancing multiple uses endorsed by Congress in the MUSYA and would render the ESA duplicative (at least with regard to migratory birds). Such a change in the law should be created by a new statute, not the reinterpretation of an old one.

Many of the migratory birds covered by the MBTA are thriving and, therefore, do not need stringent protection. One might argue that we should not wait until a species is endangered before we protect it,<sup>107</sup> but environmental regulation is not all-or-nothing. The issue is not whether we should provide any protection to migratory birds. Rather, the question is whether we should allow the public interest in migratory birds to supersede our interest in productive land use.

### CONCLUSION

The MBTA's plain meaning and legislative history require a restrained interpretation. If interpreted broadly, the MBTA would resist principled limitation; prosecutorial discretion, extra-hazardous materials, and permit schemes all fail to provide a meaningful limit. Moreover, the fate of migratory birds does not depend upon such a strained interpretation of the MBTA. More recently minted

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would give the maximum level of protection to virtually every bird. The granting of permits might ameliorate the problem to some extent, but, as explained *supra* section II.C, would first require the difficult task of expanding the permitting system to include general permits for activity not directed against wildlife.

103. Brief for Federal Appellees, *supra* note 73 at 9.

104. See *Ruffed Grouse Habitat* (visited Nov. 14, 1998) <<http://www.vermontel.com/~epgorge/habitat.htm>>. The ruffed grouse is one of North America's most popular game birds; it is not, however, protected by the MBTA. See 50 C.F.R. § 10.13 (1997).

105. See *supra* text accompanying notes 24-27.

106. See 16 U.S.C. § 1532(19) (1994).

107. See *Coggins & Patti*, *supra* note 2, at 206; *Perkins*, *supra* note 2, at 820.

environmental laws protect wildlife and seek to achieve a balance of various kinds of land use.

When the MBTA is construed sensibly, as a whole and in light of legislative history, it can be read only to criminalize activity directed against migratory birds.