

April 2005

It's the "Supreme Law of the Land": Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by SWANCC

Erin R. Flanagan

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

Erin R. Flanagan, *It's the "Supreme Law of the Land": Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by SWANCC*, 22 Pace Envtl. L. Rev. 175 (2005)

DOI: <https://doi.org/10.58948/0738-6206.1140>

Available at: <https://digitalcommons.pace.edu/pelr/vol22/iss1/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

It's the "Supreme Law of the Land:" Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by SWANCC

ERIN R. FLANAGAN¹

I. INTRODUCTION

With its ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC),² the Supreme Court issued a controversial decision that implicates a major portion of the country's wetlands³ and has generated a heated legal debate.⁴ Although SWANCC's holding is very narrow,⁵ parts of the opinion suggest significant change in the scope

1. Candidate for a Juris Doctor from Pace University School of Law and a Masters in Environmental Science from Yale University School of Forestry and Environmental Studies, 2006. The author thanks Professor Jeffrey G. Miller for sparking the idea for this analysis.

2. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

3. The Association of State Wetland Managers (ASWM) estimates that SWANCC could put between twenty and sixty percent of the nation's wetlands at risk depending on subsequent judicial interpretation of key terms related to the Clean Water Act (CWA), including "navigable-in-fact," "tributary," "adjacent," and "significant nexus." See Jon Kusler, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap*, Association of State Wetland Managers, Inc., at <http://www.aswm.org/fwp/swancc/aswm-int.pdf> (March 31, 2004).

4. See, e.g., Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and To Their Adjacent Wetlands*, 34 ENVTL. L. REP. 10,187 (2004) (refuting the argument that SWANCC correctly construed the CWA); William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10,741 (2001) (arguing that SWANCC misread legislative intent and should be construed narrowly). But see Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11,042 (2002) (arguing that SWANCC correctly interpreted congressional intent and should be applied broadly).

5. The precise question certified by the Court was, "[w]hether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds." Petition for a Writ of Certiorari at *I, 2000 WL 33979599 (2000), (No. 99-1178). The Court answered this question equally narrowly: "[w]e hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's landfill site pursuant to the

of federal jurisdiction under the Clean Water Act (CWA).⁶ Some commentators fear that a broad reading of the more controversial elements of *SWANCC* could erase thirty years of legislative, regulatory, and judicial precedent.⁷ Under this view, *SWANCC* has upped the ante not just for isolated wetlands, but for the entire CWA, as well.

Until *SWANCC*, the CWA's controlling legal principle was that Congress intended federal jurisdiction under the Clean Water Act to extend to the limits of the Commerce Clause.⁸ Since the legislation was enacted, thousands of regulatory actions and hundreds of judicial decisions have followed this fundamental tenet. Prior to *SWANCC*, the Supreme Court had declined to address the issues presented by the petitioners in the case.⁹ In its aftermath, *SWANCC* has created substantial uncertainty regarding the jurisdictional reach of the Clean Water Act and has had a

'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA." *SWANCC*, 531 U.S. at 174. Thus, the Court did not invalidate the underlying wetland preservation regulation, but simply ruled that the 'Migratory Bird Rule' over-extended the U.S. Army Corps of Engineers' statutory authority under the CWA.

6. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000). *E.g.*, the Court held that "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." 531 U.S. at 168. Taken at face value, this statement would invalidate the landmark, unanimous *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside*) decision that found jurisdictional basis for the Army Corps of Engineers over a wetland that was not immediately adjacent to navigable water. Yet *SWANCC* specifically affirmed *Riverside*, holding that wetlands with a "significant nexus" to navigable waters are jurisdictional under the CWA. *SWANCC*, 531 U.S. at 167.

7. See Wood, *supra* note 4.

8. U.S. Const. art. I, § 8, cl. 3. This broad reading is clearly reflected in the House Report on the 1972 legislation which states: "[O]ne term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. The Committee fully intends the term 'navigable waters' to be given the broadest possible constitutional interpretation." H.R. Rep. No. 92-911, at 131 (1972). The Conference Report also made clear that "the conferees fully intend that the [statutorily protected] waters be given the broadest constitutional interpretation." A Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, at 250 (1973). The *SWANCC* Court summarily dismissed Congress' clear intent, noting that the CWA's legislative history reflects nothing more than Congress' limited intent to exercise "its commerce power over navigation." 531 U.S. at 168 n. 3 (emphasis added). The Court did not support its conclusion with any argument.

9. See, *e.g.*, *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995).

particularly destabilizing effect on the statute's wetlands protection program.¹⁰

Since SWANCC, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Army Corps) have made *ad hoc* jurisdictional determinations and, rather than providing regulatory clarification in the wake of the Supreme Court's decision, decided to forego a rulemaking in favor of "preserv[ing] the federal government's authority to protect our wetlands."¹¹ EPA's assurance that the "agencies will continue to monitor the implementation of [CWA's wetlands protection program] to ensure its effectiveness" is a statement of the obvious that provides no practical guidance to the public, legislature, or judiciary.¹² Congress has also debated the reach of the CWA since SWANCC was handed down in 2001, but has yet to pass any clarifying legislation.¹³ Some state legislatures have also tried to fill the gaps created by the Supreme Court in SWANCC.¹⁴ These efforts have been even more fractured than those at the federal level, since state statutes, where they exist at all, generally establish permitting programs to regulate discharges to water, rather than preserve wetlands.¹⁵ Their

10. 33 U.S.C. § 1344 (2000).

11. Press Release, United States EPA and Army Corps of Eng'rs, *EPA and Army Corps Issue Wetlands Decision*, (Dec. 16, 2003), at http://yosemite.epa.gov/opa/adm_press.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument (last visited June 6, 2005).

12. *Id.*

13. Because the SWANCC Court based its decision on its reading of legislative intent, Congress is free to correct any misunderstanding of what it actually intends with the legislation. To this end, a bill to restore the jurisdictional reach of the CWA has been introduced by Representative Oberstar in the House. See Clean Water Authority Restoration Act of 2003, H.R. 962, 108th Congr. (2003). This bill is currently before the House Subcommittee on Water Resources and Environment. Similarly, Senator Feingold has introduced companion legislation in the Senate to restore the reach of the CWA that was rejected by SWANCC. See Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003). The Senate Committee on Environment and Public Works is currently considering this bill.

14. According to ASWM, only fifteen states have laws regulating wetland alterations, which vary greatly in their scope of regulated geography and activities; the remaining thirty-five states currently have no programs to fill the gap. See Kusler, *supra* note 3. Given states' staff and budget constraints, it is unclear how many programs will be established, especially in the absence of federal assistance. Further, some of the most valuable isolated wetlands are located in regions of the country where there are no state wetland laws and where the Department of Agriculture's "Swampbuster" program does not apply. See MARK PETRIE et al., DUCKS UNLIMITED, INC., THE SWANCC DECISION: IMPLICATIONS FOR WETLANDS AND WATERFOWL (Sept. 2001) at http://www.ducks.org/conservation/404_report.asp.

15. See, e.g., CAL. FISH & GAME CODE §§ 1600-1607 (West 1998) which the California legislature employs to protect wetlands. While useful, the code provides only quasi-regulatory protection that is based on contracts entered into between the state's

use for wetland protection is driven largely by an increasing local appreciation of wetlands, instead of clear conservation mandates from the state legislatures. Consequently, wetland protection at the state level is often political, problematic, and incomplete.

While the wheels of the regulatory bureaucracy continue to grind, the nation's wetlands continue to disappear under ever-increasing development pressure, conversion of land use, and mismanagement. Federal and state "no net loss" goals, which were always of questionable efficacy,¹⁶ are becoming even less achievable.¹⁷ Since SWANCC, the United States has lost nearly 900,000 acres of wetlands to development and agricultural activities.¹⁸ Given each individual wetland's fragility and complex ecological function, simply "re-building" these resources is neither entirely feasible, nor always effective.¹⁹

Department of Fish and Game and real estate developers. Disagreements are settled through arbitration. The utility of the code is further limited since its provisions do not apply to wetlands that are not associated with streams or lakes (e.g., many isolated wetlands and tidal wetlands), wetland functions that do not directly support fish and game (e.g., floodwater retention, groundwater recharge, recreation), or projects undertaken by federal agencies. *Id.* §§ 1600, 1602(a), 1606.

16. A unique and important feature of wetlands is their functional integration with the watershed in which they are located. Wetlands are simultaneously susceptible to changes in the watershed and capable of moderating those changes. As a result, the importance of some wetland functions (e.g., pollutant removal, flood attenuation, and habitat connectivity) may not be apparent at the location of the wetland itself, but elsewhere in the watershed. Thus, regulating potential threats to remote benefits from wetlands requires an understanding of the entire watershed. Further, because wetland functions are sometimes intrinsic to their specific location, they are not reproducible elsewhere. *See, e.g.,* Kusler, *supra* note 3; Nature Conservancy, *Landscape-Scale Wetland Management and Restoration Site Conservation Roundtable*, Ecological Management and Restoration Program, Conservation Science Division (July 2000), 5, 7; Nature Conservancy, *Wetland Ecology from a Landscape Perspective*, Wetland Management Network; Summary of Workshop #1, Ecological Management and Restoration Program (Sept. 2001), 5-7, 12; National Research Council, *Riparian Areas: Functions and Strategies for Management* (2002), 3, 8, 123-27.

17. NAT'L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 2,102 (2001).

18. Estimates of wetland losses vary greatly. Research by the U.S. Fish and Wildlife Service estimates that since the 1800s, the conterminous United States has lost approximately 53% of its estimated original 221 million acres of wetlands and continues to lose almost 60,000 acres each year. *See* Thomas Dahl, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997*, U.S. Fish and Wildlife Service (Sept. 1997), at <http://www.nwi.fws.gov/bha/SandT/SandTReport.html> (last viewed Feb. 14, 2004). *See also* *Agriculture Conservation: USDA Needs to Better Ensure Protection of Highly Erodible Cropland and Wetlands*, U.S. General Accounting Office, GAO-03-418 (May 2003), available at <http://www.gao.gov> (last viewed Feb. 22, 2004).

19. For a discussion of wetland functions and values, *see* NAT'L RESEARCH COUNCIL, *supra*, note 17 at 12.

If protection of isolated wetlands is (or should be) a national goal and none of the governmental entities with the power to preserve these resources are exercising that power effectively post-SWANCC, are the wetlands simply left high and dry? Significantly, no. Other federal legislation exists on the books that could be employed to protect "isolated wetlands" that have been placed beyond the reach of the CWA; namely, the Migratory Bird Treaty Act (MBTA), which provides for the protection of not only migratory birds, but also their environments.²⁰ To the extent that the habitats of a long list of bird species protected by the statute are located within "isolated wetlands," the MBTA could shield them from SWANCC-like destruction. To date, however, the courts have not ruled on the use of the MBTA as a habitat protection statute and, on the few occasions that the question might have been raised before the bench, they have either side-stepped or deflected the issue,²¹ often relying on questionable application of the underlying law.²² Regardless, the text, intent, and history of the MBTA are quite clear: arising out of four bilateral conventions entered into by the United States' government over a period of sixty years, the MBTA was "meant to 'give effect to the convention[s] between the United States and [its partners] for the protection of migratory birds,' their nests, and eggs."²³ "Isolated wetlands" that are habitat to the protected birds should be similarly protected under the statute.

This is not a paper about migratory birds *per se*. Their protection and plight under the MBTA has been chronicled elsewhere.²⁴

20. Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 703-712 (2000).

21. See *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1076 (D. Colo. 1999) (setting aside the question of whether the MBTA precludes habitat modification or destruction as inapposite to the facts of the instant case).

22. See *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1573-74 (S.D. Ind. 1996) (holding that destruction of protected birds' habitat by logging activities is not prohibited by the MBTA, because the statute bars only that "physical conduct of the sort engaged in by hunters and poachers"). But see *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1079 (rejecting *Mahler's* "hunters and poachers" limitation as "read[ing] into the statute ambiguities that do not exist").

23. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000) (citing International Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702).

24. See, e.g., Sean D. Murphy, *Exemption of U.S. Military From Migratory Bird Treaty Act*, 97 AM. J. INT'L L. 445 (2003); Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47 (2000); Dennis Jenkins, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. ENVTL. AFF. L. REV. 595 (1997); Benjamin Means, *Prohibiting Conduct, No Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97

Rather, this paper investigates how the Migratory Bird Treaty Act can be used to protect the habitats of migratory birds, particularly those habitats located in "isolated wetlands," the continued vitality of which has been put into play by the Supreme Court's ruling in *SWANCC*. A plain reading of the statute and its underlying treaties indicates that this could and should be the case.²⁵ The legislative history of the MBTA and its treaties supports this finding. There is nothing in the administrative record that contests this assertion. Thus, the appropriate scope of the MBTA rests on the unambiguous language of its underlying treaties and commits and obligates the United States to protect and preserve the migratory birds and their environments in "isolated wetlands" and beyond.

Part I of this paper establishes the constitutional truism that treaties are the "supreme Law of the land"²⁶ and, are to be given the same legal weight as statutes enacted by Congress. Part II provides an overview of the Migratory Bird Conventions as treaties of the United States and demonstrates that the accords provide broad protection to migratory birds and their habitats. Part III discusses the fact that the United States' Migratory Bird Conventions have been codified as the MBTA. Part IV analyzes relevant provisions of the Act and discusses how the courts have ruled on substantive issues brought before them under the Act. Part V presents a "what-if" scenario by analyzing the *SWANCC* facts under the MBTA's protections. Part VI presents conclusions and recommendations for private groups seeking the protection of the MBTA for migratory birds or their environments.

Extending the protections of the MBTA to the habitats of protected wildlife will not resolve the myriad of legal issues presented by "isolated wetlands." Wetlands are simultaneously both water bodies, protected by federal and state laws, and real property, protected under the Fifth Amendment.²⁷ As such, they bestride the

MICH. L. REV. 823 (1998); Erin C. Perkins, *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); Kenneth Clay Ratley, *The Intent Requirement of the MBTA After United States v. Adams: Just What Did Congress Intend?*, 15 J. NAT. RES. & ENVTL. L. 313 (2001); Robb Wolfson, *Birds at a Crossroads: Strategies for Augmenting the MBTA's Sway Over Federal Lands*, 21 VA. ENVTL. L.J. 535 (2003).

25. See 16 U.S.C. §§ 703, 704, 708, 709(a), 712 (2000) (all of which are sections of the MBTA that reference the Migratory Bird Conventions).

26. U.S. CONST. art. VI, cl. 2.

27. U.S. CONST. amend. V.

legal boundary between public resource and private property, a problematic status that makes their protection controversial. Further, wetlands are at the interface between federal authority to regulate water quality²⁸ and local government's responsibility to plan and guide land use.²⁹ However, in that the MBTA and its underlying treaties represent the "supreme Law of the land,"³⁰ "isolated wetlands" that serve as habitat for migratory birds should be afforded an as-yet under-appreciated and applied measure of protection under the MBTA.

II. TREATIES ARE THE LAW OF THE LAND

A. Generally

The Supremacy Clause of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land."³¹ This provision puts treaties on equal footing with constitutionally-valid federal legislative acts and quasi-legislative actions of the Executive. The Supremacy Clause continues to direct that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³² Thus, the Constitution mandates a hierarchy between federal and state governments, whereby treaties prevail over state constitutions and state statutes.

The Constitution gives the President and Senate the power to obligate the United States to requirements set forth in international agreements. Article II, section 2 of the Constitution provides that the President has "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."³³ In order to transform these international obligations into legislative prerequisites, the Constitution's necessary and proper clause entrusts Congress with the power to pass laws to aid the executive enacting the treaty agreements of the United States.³⁴ Working together, the executive

28. 33 U.S.C. § 1251 (2000).

29. U.S. CONST. amend. XI.

30. U.S. CONST. art. I, cl. 2.

31. U.S. CONST. art. VI, cl. 2.

32. *Id.*

33. U.S. CONST. art. II, § 2.

34. *See, e.g., United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998) (holding that the necessary and proper clause enables Congress to pass laws to help effectuate the Article II Treaty Power).

and legislative branches have the power to create and implement legal requirements based on the United States' international agreements that are "the supreme Law of the land."

B. Construction and Interpretation

A treaty is a compact between sovereigns³⁵ and, when executed, becomes part of the municipal law of the land.³⁶ As such, a treaty is to be construed on principles similar to those applied to other written contracts and statutes.³⁷ As a contract between nations, a treaty must, if possible, be construed to give full force and effect to its provisions that bind the contracting powers.³⁸ As the law of the land, a treaty's text, history, and the intent of the enacting parties are properly considered in its interpretation.³⁹

Treaty analysis begins with the text of the treaty itself,⁴⁰ which must be read in light of the conditions and circumstances existing at the time the treaty was ratified in order to give effect to the object and purposes of the contracting states.⁴¹ When a treaty's language is difficult or ambiguous, other general rules of interpretation may be used. For example, treaties are construed more liberally than private agreements.⁴² Where a treaty is open to more than one interpretation, the preferred reading is that which is favorable to rights that could be claimed under its provisions.⁴³ Further, in interpreting an ambiguous passage in a treaty, the courts may look to the history of the treaty, including

35. See *Rainey v. United States*, 232 U.S. 310 (1914); *Charlton v. Kelly*, 229 U.S. 447 (1913).

36. See *Valentine v. United States ex rel. Neidecker*, 229 U.S. 5 (1936); *Asakura v. City of Seattle*, 265 U.S. 332, *opinion amended*, 44 S. Ct. 634 (1924).

37. See *Sullivan v. Kidd*, 254 U.S. 433 (1921); *United States v. Reynes*, 50 U.S. 127 (1850).

38. See *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).

39. See *Sullivan*, 254 U.S. 433; *Reynes*, 50 U.S. 127.

40. *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

41. See *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943); *United States v. Pink*, 315 U.S. 203 (1942); *Santovincenzo v. Egan*, 284 U.S. 30 (1931); *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449 (1930); *Sullivan*, 254 U.S. 433; *Rocca v. Thompson*, 223 U.S. 317 (1912).

42. See *Choctaw Nation of Indians*, 318 U.S. 423; *Pink*, 315 U.S. 203; *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150 (1940); *Valentine*, 229 U.S. 5; *Todok*, 281 U.S. 449; *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Jordan v. K. Tashiro*, 278 U.S. 123 (1928).

43. See *United States v. Stuart*, 489 U.S. 353 (1989); *Bacardi Corp. of Am.*, 311 U.S. 150; *Valentine*, 229 U.S. 5; *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Nielsen*, 279 U.S. 47; *Asakura v. City of Seattle*, 265 U.S. 332, *opinion amended*, 44 S. Ct. 634 (1924).

the record of negotiation and practical construction adopted by the parties.⁴⁴

C. Relation of Treaties to State Law

In its liberal interpretation of a treaty, a court is not required to avoid possible conflict with an existing state statute.⁴⁵ Because the Treaty Power was established in the Federal Constitution,⁴⁶ the terms of the treaty take precedence where there is a conflict between the treaty and a state constitution or state law.⁴⁷ A treaty, however, does not automatically supersede local laws that are inconsistent with it; rather, in order to supersede state law, the treaty provisions must be self-executing or be subject to impending legislation.⁴⁸ Even in such cases, the language of a treaty, wherever reasonably possible, will be construed so as not to override state laws or to impair rights arising under them.⁴⁹ Finally, a treaty will be carefully construed so as not to derogate from the authority and jurisdiction of a state unless such a result is clearly necessary to effectuate the national policy.⁵⁰

D. Enforcement

Treaties are either self-executing or executory (*i.e.* must be implemented through enacted legislation). Self-executing treaties contain provisions that confer certain “local” rights on a signatory sovereign’s citizen residing within the territorial limits of another signatory⁵¹ and that are capable of enforcement between private parties in the courts of the “local” country.⁵² Executory treaties, however, must be implemented by legislation, which creates enforceable rights within the courts of the affected signatory sovereign.⁵³

44. See *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

45. See *Nielsen*, 279 U.S. 47.

46. U.S. CONST. art. VI.

47. See *Zschoernig v. Miller*, 389 U.S. 429 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); *Bacardi Corp. of Am.*, 311 U.S. 150; *United States v. Belmont*, 301 U.S. 324 (1937); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934); *Santovincenzo v. Egan*, 284 U.S. 30 (1931); *Todok*, 281 U.S. 449; *Nielsen*, 279 U.S. 47; *Asakura*, 265 U.S. 332.

48. See *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913).

49. See *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126 (1938); *Todok*, 281 U.S. 449; *Nielsen*, 279 U.S. 47.

50. See *United States v. Pink*, 315 U.S. 203 (1942).

51. See *Bacardi Corp. of Am.*, 311 U.S. 150.

52. See *Edye v. Robertson*, 112 U.S. 580 (1884).

53. See *United States v. Arredondo*, 31 U.S. 691 (1832).

Once they have the force of law, treaties are to be executed in the utmost good faith, with a view to making effective the purposes of the contracting parties.⁵⁴ By express command of the Constitution, it is the duty of the judges of every state to uphold and enforce treaties of the United States,⁵⁵ anything in the constitution or laws of any state to the contrary notwithstanding.⁵⁶ All courts, state and national, must take judicial notice of and be governed by treaties of the United States.⁵⁷ The mandates of a treaty must be obeyed, even though they may affect litigation already before the bar, including the reversal of a prior holding.⁵⁸

III. THE MIGRATORY BIRD CONVENTIONS ARE TREATIES OF THE UNITED STATES THAT LAWFULLY PROTECT MIGRATORY BIRDS AND THEIR HABITATS

The Migratory Bird Treaties were entered into over a period of more than sixty years by the federal government of the United States, and consequently, are binding on state and federal courts. The historical context of the Treaties is particularly important because it eliminates any doubt as to whether the Migratory Bird Treaties were intended to cover the claims arising from the destruction of not only the subject wildlife, but its habitat. The history of the Treaties clearly demonstrates the United States' increasing commitment to the protection of migratory birds and their habitats.

A. Overview

The United States is party to four bilateral conventions that protect migratory birds and their environments. The *Convention for the Protection of Migratory Birds*, signed by on August 16, 1916 by President Woodrow Wilson, is the country's oldest conservation treaty and was entered into by the United States and Great Britain (on behalf of Canada).⁵⁹ The *Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals*, signed on February 7,

54. See *Sullivan v. Kidd*, 254 U.S. 433 (1921).

55. See *United States v. Minnesota*, 270 U.S. 181 (1926).

56. See *Butschkowski v. Brecks*, 94 Neb. 532 (Neb. 1913).

57. See *United States v. Rauscher*, 119 U.S. 407 (1886).

58. See *United States v. Schooner Peggy*, 5 U.S. 103 (1801).

59. *Convention for the Protection of Migratory Birds*, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702 [hereinafter *Canada Convention*].

1936 during the Administration of President Franklin D. Roosevelt, commits the United States and Mexico to the protection of migratory birds and their environments.⁶⁰ On March 4, 1972, on behalf of President Richard Nixon, Secretary of State Henry Kissinger signed *The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment*.⁶¹ Finally, on November 19, 1976, President Jimmy Carter signed the *Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment*.⁶² Thus, over the course of more than sixty years and under the bipartisan leadership of four presidential administrations, the United States has established and reiterated its commitment to the protection of migratory birds and their habitats.

B. The Canada Convention

Article V of the Canada Convention, the United States' first bilateral environmental conservation treaty,⁶³ expressly encompasses both the protection of migratory birds and their habitats. The Treaty provides that "[t]he taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific or propagating purposes under such laws or regulations as the High Contracting Powers may severally deem appropriate."⁶⁴ That the signatories included this provision in a standalone article clearly indicates their intent to not only extend protection to the wildlife itself, but also to the birds' habitats.

60. Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 1936 U.S.T. 86 [hereinafter Mexico Convention].

61. The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329 [hereinafter Japan Convention].

62. Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, U.S.-U.S.S.R., 29 U.S.T. 4647 [hereinafter Soviet Convention].

63. See Canada Convention, *supra* note 59.

64. *Id.* art. V, at 1704. Regulations authorizing the taking and use of migratory birds, nests, or eggs for scientific or propagating purposes were promulgated by Proclamation of July 31, 1918, 40 Stat. 1812.

C. The Mexico Convention

The environmental convention between the United States and Mexico similarly prohibits "the taking of migratory birds, their nests or eggs"⁶⁵ Interestingly, the Mexico Convention also extended the protections of the Canada Convention by calling for the protection of "birds denominated as migratory . . . by means of adequate methods which will permit . . . the utilization of said birds rationally for purposes of sport, food, *commerce and industry*."⁶⁶ This language echoed the Supreme Court's earlier finding that, in protecting migratory birds and their habitats, the Canada Convention shielded "a national interest of very nearly the first magnitude."⁶⁷ Such a finding not only upheld the constitutionality of the Migratory Bird Conventions, but also presaged the Court's expansive reading of Congress' Commerce Clause powers that would culminate in *Wickard v. Filburn*.⁶⁸ Thus, two decades after the enactment of the Canada Convention, the United States reiterated, expanded, and buttressed its intent to protect migratory birds and their habitats.

D. The Japan Convention

That the United States' Migratory Bird Conventions sought to protect more than just the wildlife itself is further evidenced in the 1972 agreement between the United States and Japan, which is unambiguously titled *The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment*.⁶⁹ Expanding beyond the environmental protection guaranteed in the Canada and Mexico Conventions, the Japan Convention recognized that the protected birds and their habitats "constitute a natural resource of great value for recreational, aesthetic, scientific and economic purposes" and called for this "value . . . to be increased with proper management."⁷⁰ Further, similar to the Canada Convention, the Japan Convention included a separate and explicit article that required the signatories to "endeavor to take appropriate measures to preserve and enhance the environment of birds protected" under the

65. Mexico Convention, *supra* note 60, art. III.

66. *Id.* art. I. (emphasis added).

67. *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

68. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

69. Japan Convention, *supra* note 61.

70. *Id.* ¶ 1.

Treaty.⁷¹ In particular, the signatories were obligated to “[s]eek means to *prevent damage* to such birds and *their environment*, including, *especially, damage resulting from pollution*.”⁷² Thirty-six years after the signing of the Mexico Convention, the Japan Convention revitalized and expanded the United States’ commitment to protecting migratory birds and their habitats.

E. The Soviet Convention

As the most recent treaty, the 1976 convention between the United States and Soviet Union⁷³ is particularly indicative of the government’s commitment to the protection of the habitat and vitality of migratory birds. Not only does the preamble to the Soviet Convention cite an enhanced list of commercial interests in protecting migratory birds and their environments,⁷⁴ but it also commits the United States to the protection of “common flyways, breeding, wintering, feeding or moulting areas”⁷⁵ This explicit reference to the discrete geographies used by the protected birds significantly builds upon the protections provided in the earlier Conventions.

Within the body of the agreement, the Soviet Convention specifically enumerates the signatories’ duties to protect the habitat of migratory birds in nine of the Treaty’s twelve articles.⁷⁶ Article I provides for the protection of migratory birds and their environments in “all areas under the jurisdiction of the United States of America”⁷⁷ and “all territories under the jurisdiction of the Union of Soviet Socialist Republics.”⁷⁸ This commitment encompasses all of the United States’ wetlands, “isolated” or not. Article II obligates the signatories, among other things, to “prohibit the taking of migratory birds, *the collection of their nests and eggs and the disturbance of nesting colonies*,” including such “collection” and “disturbance” within the United States’ “isolated wetlands.”⁷⁹

71. *Id.* art. VI.

72. *Id.* art. VI.

73. See Soviet Convention, *supra* note 62.

74. *Id.* ¶ 2, (“[c]onsidering that migratory birds are a natural resource of great scientific, economic, aesthetic, cultural, educational, recreational and ecological value and that this value can be increased under proper management”).

75. *Id.* ¶ 2.

76. *Id.* arts. I, II, IV-IX, XI.

77. *Id.* art. I, ¶ 4(a).

78. *Id.* art. I, ¶ 4(b).

79. Soviet Convention, *supra* note 62, art. II, ¶ 1 (emphasis added).

Article IV of the Convention is dedicated to ensuring that the United States and the Soviet Union "shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of their environment."⁸⁰ Specifically, both countries are required to "warn" each other "in case of substantial anticipated or existing damage to significant numbers of migratory birds or the pollution or destruction of their environment;"⁸¹ "[i]dentify areas of breeding, wintering, feeding, and moulting which are of special [conservation] importance;"⁸² and, "to the maximum extent possible, undertake measures necessary to protect [named] ecosystems . . . against pollution, detrimental alteration and other environmental degradation."⁸³ Thus, the United States is legally obligated to protect against any degradation of the habitat of protected migratory birds, including those habitats located within "isolated wetlands."

Article VII similarly requires the United States to be proactive in its conservation of migratory bird habitats. The United States is obligated, "to the maximum extent possible, to undertake measures necessary to establish preserves, refuges, protected areas, and also facilities intended for the conservation of migratory birds and their environment, and to manage such areas so as to preserve and restore the natural ecosystems."⁸⁴ That the Treaty's legal mandate extends to "isolated wetlands" that serve as habitat for the protected bird species is clear.

The Soviet Convention's remaining five articles establish "special protective measures" for the conservation of endangered migratory birds;⁸⁵ "promote research related to the conservation of migratory birds and their environment;"⁸⁶ expand protective measures to "any species or subspecies of birds" not specifically listed in the convention;⁸⁷ "adopt stricter domestic measures which are deemed to be necessary to conserve migratory birds and their environment;"⁸⁸ and, provide for the amendment of the convention "[i]f necessary to improve the conservation of migratory

80. *Id.* art. IV, ¶ 1.

81. *Id.* art. IV, ¶ 2(a).

82. *Id.* art. IV, ¶ 2(c).

83. *Id.*

84. *Id.* art. VII.

85. Soviet Convention, *supra* note 62, art. V, ¶¶ 1-3.

86. *Id.* art. VI, ¶ 1.

87. *Id.* art. VIII.

88. *Id.* art. IX.

birds or their environment.”⁸⁹ Each article underlines the United States’ obligation to not only protect the subject migratory birds, but also the ecosystems upon which they rely.

Finally, the United States and the Soviet Union undertook to encourage other countries to accede to the Soviet Convention in recognition of the fact

that the migratory birds covered by the Convention on the Conservation of Migratory Birds and Their Environment are an international resource of great ecological value and that they migrate between other countries as well as the [United States] and [Soviet Union] . . . [and] that the protection of these migratory birds and their environment requires expanded international cooperation.⁹⁰

Hence, the United States has continued to expand the commitments it initially made under the Canada Convention⁹¹ to migratory birds and their environments throughout the world. The plain language of the Soviet Convention reflects the culmination of sixty years worth of the United States’ reiterated commitment to the protection of migratory birds and their habitats.

IV. THE MIGRATORY BIRD CONVENTIONS HAVE BEEN IMPLEMENTED BY CONGRESSIONAL LEGISLATION AS THE MIGRATORY BIRD TREATY ACT

The Migratory Bird Conventions are executory treaties that require implementing legislation. Congress first codified the terms of the Conventions as the Migratory Bird Treaty Act in 1916.⁹² Consequently, the MBTA implements the bilateral conservation conventions entered into between the United States, Canada, Mexico, Japan and the Soviet Union. Through its initial codification and subsequent amendments, the Act incorporates the goals and terms of its underlying treaties. As such, the underlying purpose of the Act reflects the Conventions’ commitment to the protection of migratory birds and their habitats.

The Canada Convention was ratified on July 3, 1918 when President Woodrow Wilson signed the Migratory Bird Treaty Act

89. *Id.* art. XI.

90. *See* Soviet Convention, *supra* note 62.

91. Canada Convention, *supra* note 59.

92. 16 U.S.C. §§ 703–712 (2000).

into law.⁹³ The Act's constitutionality was upheld in the seminal *Missouri v. Holland*,⁹⁴ in which Justice Holmes expressed the vital importance of preserving the country's natural resources since "a national interest of very nearly the first magnitude is involved [and this interest] can be protected only by a national action in concert with that of another power"⁹⁵

The initial MBTA provided for the protection of wildlife and its environment by employing nearly thirty verbs and verb clauses to make it unlawful to "take, capture or kill . . . any migratory bird, any part, nest, or egg of any such bird."⁹⁶ This range of protection afforded to both the subject wildlife and its habitat reflected the spirit of Article V of the Canada Convention, expressly encompassing both the protection of migratory birds and their environments by providing that "[t]he taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific or propagating purposes under such laws or regulations as the High Contracting Powers may severally deem appropriate."⁹⁷

Reference to the Mexico Convention was added to the MBTA in the statute's 1936 Amendments.⁹⁸ Likewise, the terms of the Japan Convention were incorporated in the statute's 1974 Amendments;⁹⁹ the Soviet Convention was incorporated in the Act's 1989 Amendments.¹⁰⁰ Thus, full protection to migratory birds and their habitats as set has been incorporated into the MBTA.

Since the Migratory Bird Conventions have been implemented by congressional legislation into federal law, "[t]here is no reason to treat the [MBTA] differently from the [statute's underlying Treaties] since the legislation was meant to 'give effect to the convention[s] between the United States and [its partners] for the protection of migratory birds,' their nests, and eggs."¹⁰¹ The

93. *Id.*

94. *Missouri v. Holland*, 252 U.S. 416 (1920).

95. *Missouri*, 252 U.S. at 435.

96. Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703 (2000)) [hereinafter *Migratory Bird Treaty Act*].

97. Canada Convention, *supra* note 59, art. V.

98. Migratory Bird Treaty Act, *supra* note 96 amended by Pub. L. 74-28, 49 Stat. 1556 (June 20, 1936) (current version at 16 U.S.C. § 703 (2000)).

99. Migratory Bird Treaty Act, *supra* note 96 amended by Pub. L. 93-300, § 1, 88 Stat. 190 (June 1, 1974).

100. Migratory Bird Treaty Act, *supra* note 96 amended by Pub. L. 101-233, § 15, 103 Stat. 1968 (Dec. 13, 1989).

101. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000) (citing Canada Convention, *supra* note 59).

MBTA incorporates the terms of the Treaties in determining, among other things, the extent to which the vitality of migratory birds and their environments are to be protected by the United States Government.¹⁰² Not only because these requirements are treaty obligations, but also because they are federally-enacted law, the legal protections afforded to migratory birds and their environments under the MBTA should be upheld by the courts.

Congress has delegated authority to implement the provisions of the MBTA to the Secretary of Interior (Secretary).¹⁰³ The Secretary does so by promulgating rules and regulations without the approval, ratification, or other action of the President.¹⁰⁴ The Secretary's broad authority allows her to create or allow exceptions to the general provisions of the MBTA.¹⁰⁵ Section 704 limits the Secretary's authority, however, as follows:

Subject to the provisions and in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, and to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture [or] killing of any such bird, or any part, nest, or egg thereof . . . and to adopt suitable regulations permitting and governing the same.¹⁰⁶

Any exceptions created by the Secretary must cohere to the goals and terms of the underlying Canada, Mexico, Japan, and Soviet Conventions as codified in the statute.¹⁰⁷

102. See 16 U.S.C. §§ 703, 704, 708, 709(a), 712 (sections of the MBTA that reference the Migratory Bird Conventions).

103. *Id.* § 712(2).

104. Exec. Order No. 10,250, 16 Fed. Reg. 5385 (June 7, 1951).

105. 16 U.S.C. § 704.

106. *Id.*

107. *Id.* See also *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (Secretary of the Interior may issue permits that exempt entities from the terms of the Act "if this is shown to be 'compatible with the terms of the [Migratory Bird C]onventions.'" (*citation omitted*)).

V. SELECTED PROVISIONS OF THE MIGRATORY BIRD TREATY ACT

A. The MBTA's Prohibitions

Congress has incorporated the objectives of the underlying Migratory Bird Conventions into section 703 of the Migratory Bird Treaty Act by employing nearly thirty verbs and verb clauses that, combined, make it unlawful "by any means or in any manner" to destroy "any migratory bird, any part, nest or egg of such bird" ¹⁰⁸ Thus, the MBTA reflects the underlying Treaties' broad scope that prohibits the intentional and unintentional destruction of migratory birds or their environments on public or private lands within the jurisdiction of the United States. ¹⁰⁹

The courts have commented on the statute's expansive prohibition, noting that "[a]s legislation goes, § 703 contains broad and unqualified language – 'at any time,' 'by any means,' 'in any manner,' 'any migratory bird,' 'any part, nest or egg of any such bird,' 'any product . . . comprised in whole or in part, of any such bird.'" ¹¹⁰ The broad scope of the statute's prohibition mirrors the United States' expansive commitment to the protection of migratory birds and their environments.

The birds and their habitats protected by the MBTA are defined in Title 50 of the Code of Federal Regulations (CFR), which

108. Section 703 sets forth the Act's prohibition, as follows:

Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, 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 between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972[,] and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

16 U.S.C. § 703(a).

109. See, e.g., Soviet Convention, *supra* note 62 art. IV, ¶ 1.

110. *Glickman*, 217 F.3d at 885.

specifies the rules and regulations relating to "Wildlife and Fisheries" as promulgated by the Department of the Interior's Fish and Wildlife Service.¹¹¹ Under authority from Congress, the Secretary has declared that "[m]igratory bird" means any bird, whatever its origin and whether or not raised in captivity, . . . including any part, nest, or egg of any such bird."¹¹² The CFR contains a list of "all species of migratory birds protected by the [MBTA]" that is periodically updated.¹¹³ Although the MBTA initially protected only a small number of birds, the Secretary expanded the Act's coverage in 1971 to include nearly all birds indigenous to North America. Today, thousands of species are included on the protected bird list.¹¹⁴

The Secretary has also defined "take" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect."¹¹⁵ Despite the statute's specific protection of "any migratory bird" and "any part, nest or egg of any such bird," courts generally have focused on whether migratory birds themselves have been "taken" or "killed."¹¹⁶ Causes of action involving migratory birds' "nests" or "eggs" – the protected birds' protected environments – have rarely come before the courts. When these issues have been raised, the judiciary has either side-stepped the issue or viewed the facts unfavorably to narrowly interpret the statute and come to the resulting conclusion that liability does not attach unless birds themselves have been killed.

111. 50 C.F.R. § 10.12 (2004).

112. *Id.*

113. *Id.* § 10.13.

114. *Id.*

115. *Id.* § 10.12.

116. See, e.g., *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (holding that terms "take" or "kill," as used in the MBTA's section making it unlawful, except as permitted by regulations, to take or kill specified migratory birds or their nests or eggs, mean "physical conduct of the sort engaged in by hunters and poachers, conduct that was undoubtedly a concern at the time of the statute's enactment in 1918" (quoting *Seattle Audubon Soc'y v. Evans (Seattle II)*, 952 F.2d 297, 302 (9th Cir.)), *reh'g and sugg. reh'g en banc denied, cert. denied*, 552 U.S. 1108 (1991); *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996) (finding that the MBTA's prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies and parts). Other courts do not require "direct" harm to find against defendants, but do require the death of the protected birds themselves to return a verdict for the plaintiff. See, e.g., *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding that defendant's killing of migratory birds by dumping waste water violated the MBTA); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978) (finding that the death of birds resulting from misapplication of pesticides violated the MBTA).

One line of narrowly-held cases applies the MBTA's prohibitions only when the defendant has undertaken physical conduct associated with hunting and poaching.¹¹⁷ In each case, the plaintiffs unsuccessfully attempted to use the MBTA to enjoin logging activities of the United States Forest Service, alleging that habitat modification or destruction would kill or injure protected migratory birds. In the leading case, *Seattle Audubon Society v. Evans* (*Seattle II*), the Ninth Circuit Court of Appeals found that the MBTA's prohibition did not preclude the Bureau of Land Management "from selling and logging timber from lands within areas that may provide suitable habitat for the northern spotted owl," a protected bird under the Act.¹¹⁸ The court considered the general permit requirements for the taking of the protected migratory birds and correctly found that the applicable regulations define "take" as to " 'pursue, hunt, shoot, wound, kill, trap, capture, or collect,' or to attempt any such act."¹¹⁹ The court then observed that this definition "describes physical conduct of the sort engaged in by hunters and poachers" and, since logging is not hunting, concluded that the MBTA's protections could not be extended to the northern spotted owl.¹²⁰

The *Seattle II* court did not fully apply its own logic to the MBTA's basic prohibition. As the court itself notes, the MBTA "makes it illegal to 'pursue, hunt, take, capture, kill, attempt to take, capture or kill . . . ' any migratory bird or 'any part, nest or egg of any such bird . . . , by any means or in any manner'."¹²¹ However, within two paragraphs, the *Seattle II* court ignores its own citation to the MBTA's strict prohibition against the taking of protected nests and eggs to surprisingly and erroneously conclude that "[t]he statute and regulations promulgated under it make no mention of habitat modification or destruction."¹²² Certainly, the taking of "any . . . nest or egg . . . by any means or in any manner" refers not only to hunting and poaching, but also to "habitat modification or destruction."¹²³ Thus, any logging activities that "take,

117. See *Seattle II*, 952 F.2d 297; *Newton Country Wildlife Ass'n*, 113 F.3d 110; *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541 (W.D. Pa. 1997); *Mahler*, 927 F. Supp. 1559; *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502 (D. Or. 1991).

118. *Seattle II*, 952 F.2d at 302.

119. *Id.* (citing 50 C.F.R. § 10.12 (2004)).

120. *Id.*

121. *Id.* (citing 50 C.F.R. § 10.12) (emphasis added).

122. *Id.* at 302.

123. *Id.* at 302.

capture or kill" "any . . . nest or egg" of a protected migratory bird "by any means or in any manner" are prohibited by the MBTA.¹²⁴ That the Ninth Circuit's "hunters and poachers" argument is conclusory does not make it correct.

Three of the four remaining cases following *Seattle II* merely cite it with approval, rather than present their own analysis.¹²⁵ Only *Mahler v. United States Forest Service*¹²⁶ supplies an independent rationale for limiting the MBTA's prohibition to hunting and similar activities. In *Mahler*, a resident brought action against the United States Forest Service seeking to enjoin a salvage operation for diseased and dying red pine trees in the Hoo-sier National Forest.¹²⁷ The District Court held that habitat destruction and logging during nesting season do not produce "takings" within the meaning of the MBTA¹²⁸ since the Act's prohibition applied only to "activity that is intended to kill or capture birds or to traffic in their bodies and parts."¹²⁹ In *Mahler*, the court summarily disregarded the statute's plain language prohibiting the destruction of migratory birds or their environments "by any means or in any manner."¹³⁰ The court expressed its fear that, if it allowed the statute to have "its full sweep, there is no obvious reason why the MBTA could not apply to any deaths of migratory birds occurring as a result of human activity," including "deaths caused by . . . picture windows in residential dwellings into which birds fly."¹³¹ Despite the MBTA's plain language and precedent to the contrary, the *Mahler* court held that the "better reading of the statute is to find that the prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies and parts."¹³² Thus, rather than offering a limiting construction of the statute, *Mahler* excised a major portion of the plain language; not a novel approach to statutory interpretation, but certainly one of questionable judicial utility and legitimacy.

124. *Id.* at 302.

125. See *Newton Country Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997); *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 548 (W.D. Pa. 1997); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502 (D. Or. 1991).

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

127. *Id.* at 1561-62.

128. *Id.* at 1573.

129. *Id.* at 1583.

130. *Id.*

131. *Id.*

132. *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1583 (S.D. Ind. 1996).

Other courts have provided a better interpretation of the MBTA by recognizing the broad scope of the statute's prohibitions. In a leading case, *United States v. Moon Lake Electric Association*,¹³³ several protected birds were killed while roosting on the defendant's electric power lines. The *Moon Lake* court rejected defendant's assertion that the MBTA regulated only physical conduct associated with hunting and poaching, finding that "the MBTA does not seem overly concerned with how captivity, injury or death [of migratory birds] occurs."¹³⁴ Rather, by prohibiting the act of "killing," in addition to "hunting," "capturing," "shooting," and "trapping," Congress intended the Act to prohibit conduct beyond that normally undertaken by hunters and poachers.¹³⁵ Further, the court noted that the MBTA proscribes taking and killing "by any means or in any manner."¹³⁶

Moon Lake's broader reading of the statute has the support of both the Supreme Court and Circuit courts.¹³⁷ In *Andrus v. Allard*, the Supreme Court upheld the MBTA's prohibitions against commerce in parts of bald eagles and golden eagles, both protected birds under the statute.¹³⁸ In its holding, the Court described the statutory provisions of the MBTA as "comprehensive," "exhaustive," "carefully enumerated," "expansive," and "sweepingly framed."¹³⁹ Likewise, the Court of Appeals for the District of Columbia has held that the MBTA properly prohibits the killing of protected birds by a federal agency.¹⁴⁰ Thus, given Congress' intent and judicial interpretation of the statute, the prohibitions of the MBTA reach far beyond activities related to hunting and poaching.

B. Scienter Under the MBTA

The MBTA is a strict liability statute, the violation of which results in the imposition of either misdemeanor or felony criminal

133. *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999).

134. *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1074.

135. *Id.*

136. *Id.* at 1075, (citing 16 U.S.C. § 703 (2000)).

137. *Andrus v. Allard*, 444 U.S. 51 (1979); *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000).

138. *See Allard*, 444 U.S. 51.

139. *Id.* at 56, 59-60.

140. *Glickman*, 217 F.3d 882.

sanctions.¹⁴¹ Section 707(a) employs strict liability language to subject violators to misdemeanor penalties, as follows:

Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.¹⁴²

To be subject to the Act's felony provisions, however, a violator must have had scienter:

Whoever, in violation of this subchapter, shall knowingly – (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.¹⁴³

The felony provisions further stipulate that whoever violates section 707(b) of the MBTA shall be fined according to the federal criminal procedures,¹⁴⁴ imprisoned for not more than one year, or both.¹⁴⁵ Thus, the Act differentiates between intentional and unintentional violations by imposing different penalties for the strictly-prohibited violation.

Section 707(b) was initially added to the Act in the 1960 Amendments to impose felony penalties for “taking” with the intent to sell or offering to sell or selling a migratory bird, its parts, nests or eggs.¹⁴⁶ However, as enacted, the Amendment did not require scienter prior to the imposition of felony-grade sanctions. In 1985, this construction was found to be unconstitutional when the Sixth Circuit upheld a defendant's due process challenge to a section 707(b) felony charge because the statute lacked an explicit “knowledge” requirement.¹⁴⁷ This decision prompted Congress to

141. In addition to imposing criminal sanctions against violators of the MBTA, courts can grant equitable remedies to plaintiffs seeking injunctive relief through the Administrative Procedures Act (APA). 5 U.S.C. § 702 (2000).

142. 16 U.S.C. § 707(a) (2000).

143. *Id.* § 707(b).

144. *Id.*

145. *Id.* § 707(c).

146. S. REP. No. 86-1779, at 1 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3459.

147. *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985).

adopt the "knowing" element for the imposition of felony penalties in its 1986 Amendments to the Act.¹⁴⁸ By adding the modifier "knowingly" to the statute, Congress sought to "cure the [statute's] unintended infirmity."¹⁴⁹ With the passage of the 1986 Amendments, Congress also intended MBTA misdemeanors to continue to be strict liability crimes, noting that "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. [section] 707(a), a standard which has been upheld in many Federal court decisions."¹⁵⁰

The majority of courts recognize the MBTA's imposition of strict liability.¹⁵¹ Most often citing the Act's plain language and legislative history, courts generally reject defendants' contentions that the MBTA regulates only "intentional harmful" conduct. Within these jurisdictions, "it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge."¹⁵² Thus, it is well-established that the MBTA is a strict liability statute.

C. Proper Plaintiffs Under the MBTA

Clearly, as the agencies responsible for the statute's implementation, the Secretary of the Interior, and the Director of the Fish and Wildlife Service are authorized to bring suit under the

148. Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582, (codified as amended at 16 U.S.C. § 701(b) (2000)).

149. S. REP. NO. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128.

150. *Id.*

151. *See* United States v. Corrow, 119 F.3d 796 (10th Cir. 1997) (holding in accord with the majority of appellate courts that the MBTA is a strict liability statute); United States v. Smith, 29 F.3d 270, 273 (7th Cir. 1994) (there is no scienter requirement expressly written into the MBTA); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) *cert. denied*, 481 U.S. 1019 (1987) (scienter is not an element of criminal liability under the MBTA); United States v. Manning, 787 F.2d 431, 435 n. 4 (8th Cir. 1986) ("it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge"); United States v. Chandler, 753 F.2d 360, 363 (4th Cir. 1985) ("a hunter is strictly liable for shooting on or over a baited area"); United States v. Catlett, 747 F.2d 1102, 1105 (6th Cir. 1984) (violation of the MBTA is a strict liability offense); United States v. Wood, 437 F.2d 91 (9th Cir. 1971) (scienter is not an element of the offense of violating the MBTA); Rogers v. United States, 367 F.2d 998, 1001 (8th Cir. 1966) *cert. denied*, 386 U.S. 943 (1967) (noting that "[i]t has long been held that under the Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703-711, it is not necessary that the government prove that a defendant violated its provisions with guilty knowledge or specific intent to commit the violation"); United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999) (explaining that intent to cause the deaths of seventeen protected birds is irrelevant to prosecuting a case under the MBTA and finding that the majority of circuit courts of appeal have held the MBTA to be a strict liability statute).

152. *Manning*, 787 F.2d at 435 n. 4 (8th Cir. 1986).

MBTA.¹⁵³ Unlike other environmental statutes, however, the MBTA does not contain provisions that establish a private plaintiff's jurisdictional basis¹⁵⁴ or standing.¹⁵⁵ Despite this, citizen plaintiffs may sue federal agencies under the Administrative Procedures Act (APA), which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."¹⁵⁶ Although the APA does not directly grant subject matter jurisdiction to the federal courts,¹⁵⁷ challenges brought under the APA fall within the reach of the general federal jurisdiction statute.¹⁵⁸

The APA requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁵⁹ In order for a court to have jurisdiction over a case brought pursuant to the APA, the complaint must challenge a final agency action.¹⁶⁰ The APA defines agency action to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."¹⁶¹ In determining whether such action is final, the court considers "whether the agency's position is 'definitive' and whether it has a 'direct and immediate . . . effect on the day-to-day business' of the parties."¹⁶² The Supreme Court has defined the circumstances under which the APA permits judicial review of a final agency action: namely, when there is no other judicial remedy, ex-

153. 16 U.S.C. § 706 (2000).

154. Compare 33 U.S.C. § 1369 (2000) (establishing administrative procedure and judicial review under the Clean Water Act).

155. Compare 33 U.S.C. § 1365 (2000) (setting forth the citizen suit provisions of the Clean Water Act).

156. 5 U.S.C. § 702 (2000).

157. See *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

158. 28 U.S.C. § 1331 (2000). See also *Rd. Sprinkler Fitters Local Union 669 v. Herman*, 234 F.3d 1316, 1319 (D.C. Cir. 2000).

159. 5 U.S.C. § 706(2)(A) (2000).

160. *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001) (explaining that for a court to have jurisdiction over a case brought pursuant to 5 U.S.C. section 704, the complaint must challenge a final action of an agency).

161. 5 U.S.C. § 551(13) (2000).

162. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) (quoting *Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (internal quotes omitted)); see also *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that an agency action is final if it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow" (citations and internal quotes omitted)).

cept in cases where (i) judicial review is precluded by statute, or (ii) agency action is committed to agency review.¹⁶³

The courts are split on the issue of allowing private citizens to use the APA to bring suit against federal agencies to enforce against violations of the MBTA. The Eighth Circuit has denied use of the APA as the jurisdictional basis of MBTA claims,¹⁶⁴ holding that the APA “does not provide an independent source of jurisdiction or create a cause of action when none previously existed.”¹⁶⁵ The court upheld defendants’ assertion that the MBTA could only be enforced by agency discretion and not by judicial review.¹⁶⁶ However, more recently and consistently, the Circuit Court of the District of Columbia has upheld plaintiffs’ use of the APA to sue federal agencies for violations of the MBTA.¹⁶⁷ Further, the Ninth Circuit has granted plaintiffs standing based on an established judicial test, rather than the APA.¹⁶⁸ Thus, outside of the Eighth Circuit, plaintiffs may establish standing to bring a suit under the MBTA either through the provisions of the APA or by establishing their right to sue based on judicial precedent. It should be noted that the Supreme Court has not yet considered the constitutionality of granting or denying standing under the APA to private groups looking to enforce the provisions of the MBTA.

163. See *Califano v. Sanders*, 430 U.S. 99 (1977).

164. See *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1302 (8th Cir. 1989); *Newton County Wildlife Ass’n v. United States Forest Serv.*, 113 F.3d 110, 114 (8th Cir. 1997).

165. *Defenders of Wildlife*, 882 F.2d at 1302 (quoting *Billops v. Dep’t of the Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984)).

166. *Id.*

167. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 217 (D.C. Cir. 2003) (noting that the “APA requires courts to set aside agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law’”; *Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 175 (D.C. Cir. 2002) (stating that “law of this Circuit is clear: a plaintiff may sue a federal agency under the APA for violations of the MBTA”); *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001) (holding that Secretary of the Interior’s failure to include subject bird on the list of protected migratory birds can be challenged by plaintiff under APA); *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (finding that federal agency action in violation of MBTA violates the “otherwise not in accordance with law” provision of the APA).

168. *Alaska Fish & Wildlife Fed’n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987), (citing *Allen v. Wright*, 468 U.S. 737 (1984) (stating that, for plaintiff to have standing under the MBTA, the claim must include three allegations; personal injury, which is fairly traceable to defendant’s allegedly unlawful conduct, and which is likely to be redressed by request of relief)).

D. Proper Defendants Under the MBTA

The MBTA provides that that "any person, association, partnership, or corporation" can be sued for alleged violations of the MBTA.¹⁶⁹ While this may seem like a broad group, federal agencies are generally not considered "persons" who may be held liable for violating a statute, since the term "person" does not ordinarily include the sovereign.¹⁷⁰ Thus, although a plaintiff may be proper and have a valid cause of action under the MBTA, if the defendant is the Secretary of the Interior, the Director of the Fish and Wildlife Service, or any other federal agency operating wrongfully under the statute, the court may choose to dismiss the case. This has happened in the Eighth and Eleventh Circuits where courts have held that the MBTA's prohibitions do not apply to federal agencies.¹⁷¹

Regardless of the positions of the Eighth and Eleventh Circuits, courts have long held that suits can be brought against the appropriate federal officer for injunctive relief to enforce section 703 of the MBTA. The cause of action in *Missouri v. Holland*, for example, was a "bill in equity brought by the State of Missouri to prevent a game warden from attempting to enforce the Migratory Bird Treaty Act."¹⁷² Further, the APA authorizes private parties to bring suits against the United States and any federal officers "personally responsible" in federal courts.¹⁷³ Finally, contrary to the Eighth and Eleventh Circuits, the D.C. Circuit Court has held that the broad language of the MBTA applies to the actions of the federal government.¹⁷⁴ Since the jurisdiction of the Federal Court of Appeals is defined in terms of subject matter rather than geog-

169. 16 U.S.C. § 707(a) (2000).

170. See *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (applying sovereignty canon to federal government); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (applying sovereignty canon to state government).

171. See *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (holding that 16 U.S.C. section 703 does not apply to federal agencies); *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (coming to the "tentative conclusion" that 16 U.S.C. section 703 does not apply to federal agencies).

172. *Missouri v. Holland*, 252 U.S. 416, 430 (1920).

173. 5 U.S.C. § 702 (2000).

174. *Humane Soc'y of the United States v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000).

raphy,¹⁷⁵ this is the prevailing majority opinion that has been noted favorably in dictum by the Supreme Court.¹⁷⁶

VI. "WHAT-IF?": ARGUING SWANCC UNDER THE MBTA

It is interesting to consider how *SWANCC* may have come out if it had been argued under the protections of the MBTA, rather than the jurisdictional reach of the CWA under the Commerce Clause. The argument that the activities of the Solid Waste Agency of Northern Cook County resulted in the unlawful "take" of protected birds or their nests or eggs, would have been one of first impression for the federal court that would have heard it. However, the deciding court should not have had much difficulty in determining that the contested landfill was a protected habitat under the provisions of the MBTA both as a matter of fact and law.

The facts of *SWANCC* are straightforward.¹⁷⁷ Petitioner, the Solid Waste Agency, was a consortium of twenty-three suburban Chicago municipalities that had selected a 533 acre wetland as the site for its municipal dump.¹⁷⁸ Because the operation called for filling in some of the ponds, the Solid Waste Agency contacted the Army Corps to determine if a landfill permit was required under section 404(a) of the CWA.¹⁷⁹ The Corps initially concluded that the Solid Waste Agency did not need a section 404 permit because the site did not contain "wetlands," or areas which support "vegetation typically adapted for life in saturated soil conditions."¹⁸⁰ However, the Illinois Nature Preserves Commission corrected the Army Corps and informed it that a number of migratory bird species had been observed at the site.¹⁸¹ The Army Corps reconsidered the permitting issue and ultimately asserted jurisdiction over the wetland.¹⁸² The Army Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November

175. 28 U.S.C. §§ 1292, 1295 (2000).

176. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (dictum that the MBTA applies to federal agencies).

177. See *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

178. *SWANCC*, 531 U.S. at 162.

179. *Id.*

180. *Id.* at 164.

181. *Id.*

182. *Id.*

16, 1987, the Corps formally determined the site contained "waters of the United States" and required the Solid Waste Agency to obtain a section 404 permit.¹⁸³ The Army Corps' eventual rejection of the Solid Waste Agency's permit application as inadequate led to the lawsuit, which ultimately was ruled on by the Supreme Court.¹⁸⁴

Had these facts been argued under the jurisdiction of the MBTA rather than the Clean Water Act, both the Secretary and the Director of the Fish and Wildlife Service would have been an appropriate plaintiff.¹⁸⁵ Likewise, it is highly likely that many environmental advocacy groups could have established standing to sue under the APA.¹⁸⁶ Again, depending on how the case had proceeded, either the regulator or the private plaintiffs could have sought either penalties or equitable relief from the Solid Waste Agency's conversion of the "isolated wetlands."¹⁸⁷ Likewise, if the Secretary or Director of the Fish and Wildlife Service had refused to enforce the MBTA's provisions against the actions of the Solid Waste Agency, a private plaintiff could have brought suit against the federal agency by asserting that the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁸⁸ Thus, on the facts of *SWANCC*, it is entirely plausible that the "isolated wetlands" that were found to be beyond the reach of the Commerce Clause could have been saved under the protections of the MBTA.

The "isolated wetlands" at issue in *SWANCC* were home to migratory birds protected under the MBTA. According to one of the reports submitted by the Solid Waste Agency, the site contained twenty-one acres of ponds ranging from six to thirteen feet deep¹⁸⁹ and comprised habitat for "an exceptionally diverse variety of [at least 128] bird species."¹⁹⁰ Importantly, the site contained what the Fish and Wildlife Service called the "second largest heron rookery in northern Illinois with more than 130

183. *Id.*

184. *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 165-67 (2001).

185. *See* 16 U.S.C. § 706 (2000).

186. 5 U.S.C. § 702 (2000). *See* cases cited *supra* note 164.

187. *See supra* note 138 and accompanying text.

188. 5 U.S.C. § 706(2)(A) (2000).

189. *SWANCC*, Inventory of Fish at the *SWANCC* Balefill Site, A.R. 40313-15. [On file with author].

190. *SWANCC*, Fish & Wildlife Coordination Act Report, A.R. 16383. [On file with author].

birds, [fifteen percent] of the region's herons."¹⁹¹ An amicus brief filed by scientists on behalf of the Army Corps, noted that "[g]reat blue heron rookery sites are rare because herons nest primarily in locations that can support many birds with a combination of high trees for nesting, and abundant shallow waters and saturated wetlands . . . to produce sufficient food . . . for adult herons and their young."¹⁹²

Great blue herons, and presumably many of the other bird species living in the "isolated wetlands" prior to their conversion to a municipal dump by the Solid Waste Agency, are listed on the MBTA's protected bird list.¹⁹³ To the extent that the balefill activities of the Solid Waste Agency resulted in the "take" "by any means or in any manner" of "any migratory bird, any part, nest, or egg of any such bird,"¹⁹⁴ those activities were strictly prohibited by the MBTA and the underlying Migratory Bird Conventions.

It is difficult to imagine that the destruction of the natural wetland by the Solid Waste Agency would not include the felling of "high trees" where the Great Blue Herons and other protected migratory birds had their nests and fed their young. Doubtless, Solid Waste Agency's conversion of the 533 acres of wetland into landfill probably involved many other activities – such as draining and bulldozing the land – that destroyed the birds' habitat. If such fact-finding was not part of the Army Corps' preparation to argue its jurisdictional mandate under the CWA, the Secretary of the Interior or the Fish and Wildlife Service certainly would (or, at least, should) have conducted such due diligence as a basis for upholding the provisions of the MBTA.

Under the Canada and Mexico Conventions, any activity undertaken by the Solid Waste Agency that resulted in the "taking of nests or eggs of migratory [birds]" is expressly prohibited.¹⁹⁵ Had the facts of SWANCC been argued under the protections of the MBTA, the Solid Waste Agency's destruction of the 533 acres of wetland would have been further foreclosed by the United States' obligation to "endeavor to take appropriate measures to preserve and enhance the environment of birds protected" by federal trea-

191. *Id.* at 16386.

192. Brief of Amici Curiae Association of State Wetland Managers, et. al. at 27, *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

193. See 50 C.F.R. § 10.13 (2004) (listing *Ardea herodias* and Great Blue Heron as protected migratory birds under the MBTA).

194. 16 U.S.C. § 703 (2000).

195. See *supra* notes 63-66 and accompanying text.

ties.¹⁹⁶ In fact, the Solid Waste Agency would have been precluded from undertaking any "detrimental alteration of [the protected birds'] environment."¹⁹⁷

Likewise, the court would have been correct to find that, as a matter of law, the MBTA protected the wetlands contested in SWANCC. As noted above, the Constitution expressly commands that state and federal judges uphold and enforce treaties of the United States.¹⁹⁸ The MBTA is the enabling legislation of the four Migratory Bird Conventions entered into by the United States government with each of Canada, Mexico, Japan, and the Soviet Union. As such, the MBTA directly incorporates the mandates of the Treaties, which prohibit the destruction of "any migratory bird, any part, nest or egg of any such bird."¹⁹⁹ Therefore, even if the Solid Waste Agency sought to cloak its demolition of the protected habitat under the guise of an alternative law, the deciding court would nevertheless be obligated to uphold the provisions of the MBTA,²⁰⁰ even if such a holding would reverse a prior holding.²⁰¹

VII. CONCLUSION

The Constitution makes clear the obligation of the courts to uphold treaty promises made by the United States' government. Such a requirement is not only mandated as the "supreme Law of the land," but also makes sense from a practical standpoint since, if we must be a party to "entangling alliances,"²⁰² we should at least do so under one banner. If the Solid Waste Agency's counterpart in Toronto or Mexico City or Tokyo or Moscow converted 533 acres of "isolated wetlands" that were habitat for the bald eagle,²⁰³ there would be no question that they would be in violation of the terms of the MBTA. Of similar certainty is the fact that a lawsuit would result and the law would be upheld. Why, then, should we allow the destruction of statutorily protected habitat here at home? Not only do we owe our treaty partners the honor of up-

196. Japan Convention, *supra* note 61, art. VI.

197. Soviet Convention, *supra* note 62, ¶ 2(a).

198. See cases cited *supra* notes 56-57.

199. 16 U.S.C. § 703 (2000). See cases cited *supra* note 164.

200. See *Butchkowski v. Brecks*, 94 Neb. 532 (Neb. 1913).

201. See *United States v. Schooner Peggy*, 5 U.S. 103 (1801).

202. Thomas Jefferson, First Inaugural Address (March 4, 1801) at <http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinaul.htm> (last visited Apr. 31, 2001).

203. The bald eagle, *haliaeetus leucocephalus*, is a protected migratory bird under the MBTA. See 50 CFR § 10.13.

holding our word, but we also owe it to ourselves to preserve and protect what Justice Cardozo sagaciously characterized in *Missouri v. Holland* as “a national interest of very nearly the first magnitude.”²⁰⁴

204. *Missouri v. Holland*, 252 U.S. 416, 435 (1920).