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EXECUTIVE SUMMARY

"This case is for the birds: migratory birds, protected by the MBTA"

—Judge Easterbrook,
United States v. Van Fossan,
899 F.2d 636 (7th Cir. 1990)

This case is for the birds, seeking to find the scope of protection afforded to migratory birds under the Migratory Bird Treaty Act (MBTA) of 1918. The United States Forest Service (Forest Service) and Blackacre Forest Products (Blackacre) are appealing the United States District Court for the District of New Union's decision in which the court held the issue ripe for review, holding in favor of Citizens to Save the Birds (CSB), finding that the Forest Service was bound to act in accordance with the MBTA and that the MBTA's misdemeanor provision is one of strict liability. Accordingly, the court found that migratory bird deaths would result from the clearcutting of the Big Tree Tract, in violation of the MBTA.

This appeal highlights four legal issues concerning whether timber harvesting can be prevented in order to protect migratory birds from being killed. First, whether the citizen's group, CSB, has standing to bring these issues.

Second, whether the MBTA's misdemeanor provision is a strict liability offense. Third, whether the MBTA can prevent clearcutting. And finally, whether the MBTA is "law" for the purposes of APA review. All four of these issues are discussed in this memorandum, with both sides of the argument presented, as well as sample questions that may be used to question participants on their knowledge of the issues.

The MBTA was enacted in 1918, to implement a convention between the United States and Great Britain which addressed the massive number of migratory bird deaths occurring from recreational hunting and market hunting. The MBTA has since been amended to implement conventions that the United States has signed with Mexico, Japan, and the Soviet Union. The MBTA makes all hunting of migratory birds unlawful unless the hunting is authorized by regulations adopted pursuant to the MBTA. Section 703 of the MBTA provides that:

> it shall be unlawful at any time, *by any means* or in *any manner*, to pursue, hunt, take capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell . . . any migratory bird, any part, nest, or egg of any such bird . . .

However, under the MBTA, the Secretary of the Interior is authorized to determine under what circumstances the hunting of migratory birds is permissible; therefore, the MBTA is not a blanket prohibition against killing migratory birds, it simply prohibits killing migratory birds in an unauthorized manner. For example, the Department of the Interior has promulgated regulations allowing hunters to kill migratory birds, as long as the hunters do no hunt over baited fields, or not within authorized hunting seasons.

The instant case arises because many migratory birds have made their homes in the United States' national forests that are harvested for timber. The United States Fish and Wildlife Service (Forest Service) is the agency responsible for administration of the national forests; its actions are governed under the National Forest Management Act (NFMA). Historically, forest management began with two broad goals:

to protect favorable water flows and to furnish a continuous supply of timber. Today, the goal of forest management has broadened, seeking to balance the multiple uses of our national forests, such as tree harvesting *and* wild life conservation. The issues presented in the instance case highlight the difficulty in finding this balance: protecting migratory birds and at the same time, allowing timber harvesting that will disrupt birds' habitats.

The Administrative Procedure Act (APA) sets forth the applicable scope of review for administrative decisions, requiring a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*. An agency's actions, such as the Forest Service's actions, can only fail to be "in accordance with law" when the agency's actions are subject to that law. Here, the issue is whether the Forest Service's actions are subject to the MBTA. If the Forest Service's actions are, the Forest Service may have violated the MBTA; if not, the Forest Service cannot have violated the MBTA.

Suggested Questions for Judges

Sample Questions on Standing and Ripeness Issues

Is CSB's claimed injury directly traceable to the actions of the Forest Service?

Is there a substantial likelihood that the court can provide relief that would redress the alleged injury?

The Supreme Court has interpreted the standing doctrine at times stringently, while at other times generously granting standing. Where is the Supreme Court on the standing doctrine today?

How can the injury be characterized: concrete, particularized, or merely hypothetical?

How can this issue be considered ripe for judicial review when Blackacre has not engaged in any clearcutting?

Section 10(a) of the APA requires that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the rele-

vant statute, is entitled to judicial review thereof," only if the agency action is final. Is CSB challenging a final agency action?

What is the "zone of interest" test, and can CSB show that it was intended to be protected by the MBTA?

Sample Questions on the Strict Liability Issue

Is the absence of a mens rea requirement conclusive that the misdemeanor provision is a strict liability offense?

Are there any cases in which the court has interpreted a statute that is silent on mens reas to require scienter?

Did Congress clearly intend the MBTA's misdemeanor provision to be a strictly liable offense?

How can one argue that the misdemeanor provision is not a strict liability offense when the judicial precedent overwhelmingly interprets the MBTA misdemeanor provision as a strict liability provision?

Many courts interpreting the MBTA's misdemeanor provision as a strict liability provision have noted that absurd results occur; do these results raise any due process concerns?

Is there any trend by the Supreme Court in interpreting strict liability criminal statutes?

Is the MBTA a public welfare statute? If it is, would the Supreme Court interpret this public welfare statute as a strict liability statue?

What interpretation of the MBTA's misdemeanor provision best serves the purposes for which the statute was enacted?

Sample Questions on the Timber Harvesting Issue

Does the legislative history support using the MBTA to prevent the extinction of birds, or is the MBTA simply a bird hunting statute?

Is there any language in any of the treaties which recognizes or advocates bird habitat protection?

Does the broad language of the MBTA support judicial interpretation that it is a general bird protection statute, protecting birds, regardless of the activities that cause harm?

Have courts accepted a broad reading of the MBTA to include protecting birds from deaths other than from hunting?

How can it be reconciled that, for the first time in eighty years, the MBTA should be interpreted as prohibiting timber harvesting, when it is an activity supported by Congress, as seen by the passage of forest management legislation and by a long history of timber harvesting?

Does the existence of other legislation created to protects bird habitats support the argument that these later statues would not be needed if the MBTA already protected bird habitats?

How can the court's holding in *Mahler*, that the MBTA was not to be applied to "wide range of human activity [including logging] that may incidentally and unintentionally cause the death of migratory birds," be distinguished from the present case?

Sample Questions on Review Under the APA

Does the *Chrysler* Supreme Court decision support reviewing the Forest Service's actions for compliance with the MBTA?

Do the MBTA's prohibitions include federal agency actions since the prohibitions are stated broadly, "it is unlawful" to "kill," it is unlawful for *any person*"?

Must the MBTA apply to all federal agencies, including the Forest Service, if the United States is to meet its obligations under the 1916 treaty and subsequent amendments?

Distinguish or support the most recent tree harvesting case, *Sierra Club v. Martin*, where the Eleventh Circuit held that the MBTA, by its plain language, does not apply to the Forest Service, and therefore, no violation of the MBTA could occur by any formal action of the Forest Service.

Was the intent of the MBTA to subject the federal government to its prohibitions?

Distinguish the Endangered Species Act in which Congress defined "person" to include "any officer, employee, agency, department, or instrumentality of the Federal Government," from the MBTA which did not include the government in its definition of "person."

Is there support for the argument that, even if the MBTA applied to the Forest Service, the agency has absolute discretion to not to enforce the law?

In 1897, Congress established the National Forest System "to conserve the water flows, and to furnish a continuous supply of timber for the people." Would an interpretation that the MBTA applies to the Forest Service ignore Congress' directive to manage the national forest for timber production?

Would an interpretation that the MBTA applies to the Forest Service impair its ability to manage national forests for timber production?

Is there support for the argument that Congress intended for the Forest Service to follow the NMFA's regulatory process, rather than the MBTA's criminal prohibitions, in addressing conservation of migratory birds?

Is the Forest Service's action arbitrary or capricious, or not in accordance with law?

QUESTIONS PRESENTED

I. IS THE POTENTIAL FOR BIRD DEATHS AN INJURY THAT IS RIPE FOR JUDICIAL REVIEW AS WELL AS MEETING THE STANDING REQUIREMENT OF A PRESENT INJURY?

Under Supreme Court precedent, CSB must meet stringent standing requirements. The Supreme Court's interpretation of the standing doctrine has been a swinging pendulum: from strict to generous, to strict again. The swing is clearly evinced in the three recent Supreme Court cases starting with *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 727, 734 (1972), in which the Court generously granted a group of Washington

D.C. law students standing to challenge a rate increase the Interstate Commerce Commission granted for train transportation of recycled materials The Court accepted that the students would be injured by a rate increase that would allegedly "cause increased use of non-recyclable goods, thus resulting in the need to use more natural resources to produce such goods, . . . resulting in more refuse that might be discarded [along hiking trails used by the students] in national parks in the Washington area . . ." *Id.* at 734. Today, this type of indirect and remote injury would probably not meet standing requirements. In 1990, the Supreme Court restricted the limits of standing by narrowly construing the injury-in-fact requirement. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). In *National Wildlife Federation*, plaintiffs challenged a Bureau of Land Management program which reclassified federal lands opening certain land to the public. *Id.* at 871. Plaintiffs claimed that the program violated the Federal Land Policy and Management Act and NEPA. *Id.* The Court denied standing, finding that that the group lacked a concrete injury; two plaintiffs affirming that their use of land "in the vicinity" of the federal lands was not an injury sufficient to meet standing requirements. *Id.* at 891. The standing "hurdle" was further raised in 1992, when the Supreme Court tightened the "injury-in-fact" standing requirement, holding that an injury must be "certainly impeding," and "concrete and particularized." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court denied standing to a citizens group challenging the Secretary of Interior's decision to limit the Endangered Species Act (ESA), holding that a group member's intent to visit the area in the future did not meet the "imminent" injury standing requirement. *Id.* at 556. The Court also held that plaintiffs did not have a redressible claim; it was uncertain if the contested regulations even applied to agency. *Id.* at 568.

In order for CSB to gain access to the court, it must overcome several standing hurdles. First, CSB must show that it has an injury sufficient to meet standing, as required by the Constitution as interpreted by the Supreme Court. Second, because the MBTA does not provide a private right of action,

CSB must meet the standing requirements of § 702 of the APA. In order for CSB to establish a right to relief under the § 702 of the APA, its challenge must be to a final agency action and the injury caused by the action must be within the "zone of interests" sought to be protected by the MBTA. In addition to standing requirements, CSB must show that its challenge is ripe for judicial review.

The argument that CSB has standing is discussed in Section I.A. In summary, CSB has an injury that meets standing requirements: its members use the forest to be harvested for bird observation and clearcutting will cause direct and indirect deaths of the many migratory birds that nest in the trees planned for cutting, adversely affecting the activities of CSB members. Direct deaths will result from harvesting trees that contain nests with eggs or chicks. Indirect deaths will result from the destruction of habitat caused by the loss of mature forest. These injuries meet the injury-in-fact requirement for standing: they are concrete, particularized, redressible, and fairly traceable to the actions of the Forest Service. Finally, CSB's claim is ripe for review because both the plan and sale are final agency actions and the Forest Service will take no further action giving rise to review at a later time.

The argument that CSB lacks standing is discussed in Section I.B. In summary, CSB lacks standing because its injury does not meet the "injury-in-fact" requirement: it lacks a concrete, particularized, and imminent injury. Although the timber sale has occurred, Blackacre has not engaged in any tree harvesting activities and nothing requires it to do so in the future. In addition to not meeting standing requirements, CSB's claim is also not ripe for review because Blackacre has not harvested during nesting season and is not about to do so, thus no specific injury action has yet progressed to a sufficient point for meaningful judicial resolution of the issue.

A. There is an Injury that Meets Standing and Ripeness Requirements

1. The Timber Sale Causes an Injury-in-Fact

The doctrine of standing is based upon the United Stated Constitution's limit on federal courts to adjudication of "cases" and "controversies." U.S. Const. art III, § 2, cl. 1. Three requirements must be present for a plaintiff to meet constitutional standing. First, plaintiff must have suffered an "injury in fact," one that is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560-561, 578. Second, there must be a causal connection between the injury and the conduct complained of and the injury must be "fairly . . . trace[able] to the challenged action of the defendant . . . Third, it must be 'likely,' as opposed to merely "speculative," that the injury will be redressed by a favorable decision." *Id.*

In addition to these constitutional standing requirements, a plaintiff may have to meet additional statutory "standing" requirements. Since the NFMA does not provide a private right of action, establishing the circumstances under which a person can challenge agency action under the NFMA, CSB's action is governed by section 10(a) of the APA which provides "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. To establish a right to relief under § 702 of the APA, CSB must establish that it has been harmed by a final agency action. *See* 5 U.S.C. § 704. Second, under the "zone of interest" test CSB must show that its injury is within the "zone of interest" sought to be protected by the statutory provision at issue. *See National Wildlife Federation*, 497 U.S. at 886.

CSB meets all standing requirements. First, the injury is "concrete and particularized," not hypothetical: the timber sale has occurred and even though the harvesting has not yet occurred, it is "certainly impeding" and "imminent." *See Defenders of Wildlife*, 504 U.S. at 555 (stating that assertions of

potential future injury can satisfy the injury-in-fact test, as long as the injury is actual or imminent). CSB's claim of injury is "imminent," as the Environmental Impact Statement states that " . . . if cutting occurs during spring or summer months, it will undoubtedly result in the loss of nests with their eggs of chicks. . . ." as well as particularized: "[a] total of over one hundred nest containing one to three chicks each." (R. 2). The contract has been finalized and harvesting will definitely occur; therefore, there is no reason to postpone litigation.

Second, the injury CSB complains of is directly caused by, and can be traced to, the Forest Service's action. The Forest Service has failed to protect migratory birds by not restricting the contract terms to limit the season in which clearcutting can occur. This failure allows Blackacre to harvest during nesting season, as it has already confirmed it will do, because it does not believe it is violating the MBTA. (R. 2). The injury is directly caused by the Forest Service because it is the only agency granted the authority to control this activity under the NFMA. Finally, CSB's injury is redressible. To be redressible, the court must be able to offer the plaintiff resolution to the injury suffered. Here, the court can rescind the contract, or in the alternative, the court can restrict Blackacre's tree harvesting activities not during nesting season. Courts have held contracts that violate the MBTA to be invalid. *See Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. United States Fish and Wildlife Service*, 829 F.2d 933, 938 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988) (holding the agreement United States Fish and Wildlife Service entered into allowing hunting of migratory birds was violation of the MBTA and invalid).

Under similar circumstances, the Seventh and Ninth Circuit have held that a challenge to national forest land use plan is justiciable, even before the plan is implemented. In *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994), the Ninth Circuit held that land use plans play an important if not critical role in forest management and, to the extent that they "predetermine the future, [they] represent a concrete injury that plaintiffs must . . . have standing to chal-

lenge." (citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). The Ninth Circuit rejected the argument that the two Supreme Court cases (*National Wildlife Federation* and *Defenders of Wildlife*) established a new, stricter burden on plaintiffs to establish with specificity an injury-in-fact caused by a challenged government action. *Resources Limited*, 35 at 1300 citing *Portland Audubon Society v. Babbitt*, 998 F.2d 705, 707 (9th Cir.1993). Here, the plan has been implemented and the contract has been finalized allowing tree harvesting; these are injuries that merit standing for judicial review.

In a more recent decision, the Seventh Circuit held that citizen plaintiffs have standing to challenge forest plans, stating that "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." *Sierra Club v. Marita*, 46 F.3d 606, 611-612 (7th Cir. 1995) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, *aff'd*, 263 U.S. 350 (1923)). In *Sierra Club v. Marita*, the court found plaintiffs met the injury requirements from affirmative evidence showing that thousands of migratory birds would be directly killed by cutting down the trees with nests and juvenile birds in them. *Id.* at 609. Similarly, CSB has affirmative evidence showing that bird deaths will occur and thus can meet standing requirements.

CSB should be granted standing to contest the contract which allows migratory birds to be killed by tree harvesting. In *Alaska Fish and Wildlife Federation and Outdoor Council*, 829 F.2d at 938, plaintiffs met all standing requirements to contest cooperative agreements allowing Alaskan Natives to hunt migratory birds under certain circumstances. The court found that the plaintiffs had an injury which was traceable to the actions of the government and there was substantial likelihood that the court could grant relief to address the injury. *Id.* at 937.

2. CSB's Claim is Ripe for Review

CSB must also show that its claim is sufficiently mature to be considered a "controversy" as required by Article III of the Constitution. U.S. Const. art III, section 2, cl. 1. In *Ab-*

bott Laboratories v. Gardener, 387 U.S. 136, 148-149 (1967), the Supreme Court explained the requirement of ripeness prevents courts from "entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] the agencies from judicial interference until an administrative decision has been formalized." The *Abbott* court explained that ripeness requires the court to balance (1) the fitness of the issues for judicial decision and (2) the hardship of the parties of withholding court consideration. *Id.*

Under the *Abbott* decision's factors, CSB's challenge is ripe for review. First, the issue is fit for judicial decision because the Forest Service has taken final action and will take no further action giving rise to review at a later time. Second, if judicial review is withheld, CSB will suffer great hardship for it will have no other opportunity to stop the bird deaths that will result from clearcutting the forest pursuant to the contract. Indeed, courts have held that plaintiffs "need not wait to challenge a specific project when their grievance is with an overall plan." *See Sierra Club v. Marita*, 46 F.3d 606, 614 (1995) (quoting *Seattle Audubon*, 998 F.2d at 703); *see also Portland Audubon* Society, 998 F.2d at 708 (holding challenge to timber management plan ripe for review, rather than when individual sales are announced because, "to the extent the timber management plans pre-determine the future," and failure to comply with NEPA represents a concrete injury which would undermine any future challenges by plaintiffs.).

B. CSB Suffers No Injury and There is No Present Dispute Before the Court

1. The Supreme Court Has Narrowly Defined Injury to Meet Standing Requirements

CSB should be denied review of its claims because it can not meet the Supreme Court's strict requirements of standing. In *Defenders of Wildlife*, the Supreme Court tightened the injury-in-fact requirement to require that the injury be "imminent." 504 U.S. at 560. This decision highlights the Supreme Court's recent trend to tighten standing require-

ments and the fact that CSB will not be able to meet the injury-in-fact requirement of standing. First, the injury is entirely hypothetical. Even though there is a contract allowing timber harvesting, Blackacre *may or may not* harvest during nesting season. If Blackacre chooses to harvest during seasons that birds are not nesting, there is no injury. Further, CSB's claim of indirect deaths from habitat destruction due to tree harvesting is too remote and speculative to meet the injury-in-fact standing requirement. CSB does not have an injury that meets the Supreme Court's "certainly impending" requirement. The Eighth and Eleventh Circuits have denied justiciability in similar situations, the former for a lack of standing and the latter for a lack of ripeness. In *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994), the Eighth Circuit held that plaintiffs lacked standing to sue the Forest Service stating that forest plans are only management tools; therefore, a plaintiff can suffer no injury-in-fact, holding that "[a]ssertions of potential future injury do not satisfy the injury-in-fact test." *Id.* at 758.

Second, the injury CSB complains of is not directly caused by, and can not be traced to, the Forest Service's actions. The line of causation between the conduct and the injury is too attenuated. Plans are nothing more than broad statements of intent and guidelines for management. *See Sierra Club v. Marita*, 46 F.3d at 611 (forest land use plans are broad conceptual plans without action and, in the absence of action, no imminent injury can occur). CSB's claim of injury is too remote and attenuated to be fairly traceable either to the plan or to the contract for sale of timber land. The Supreme Court requires more than just a plan, it requires an injury that is actually occurring or "certainly impending" to constitute an injury-in-fact. Even the contract for the timber sale does not meet the "certainly impeding" requirement because the injury *may or may not* occur.

CSB will not be able to meet the "zone of interest" test. In *National Wildlife Federation*, the Supreme Court stressed that in considering claims brought under the APA, courts must pay particular attention to what constitutes the "relevant statute" for purposes of the "zone of interest" test. "The

relevant statute . . . is the statute whose violation is the gravamen of the complaint." Here, the "zone of interest" is the NMFA, which includes timber and wilderness usage. *See* 16 U.S.C. § 1604(e). The NMFA does not forbid the sale of timber or any other forest related activity because it will result in the death of migratory birds. To the contrary, the NFMA's purpose is to balance multiple uses of forest, including wildlife and timber harvesting. *See* 16 U.S.C. § 528.

2. CSB's Claim is Not Ripe for Review

The Supreme Court requires that challenges to agency actions be ripe, defining a ripe action as when "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action . . ." *National Wildlife Federation*, 497 U.S. at 891. In addition, when the action challenged is an agency action, the APA allows judicial review only when there is a final agency action. *See* 5 U.S.C. § 704. The contract to allow timber harvesting is not a final agency action because there is no date for harvesting, nor there is any requirement to harvest. In *Wilderness Society v. Alcock*, 83 F.3d 386, 389 (11th Cir. 1996), the court held that plaintiff's challenge to a land use management plan as violating NEPA was not ripe for judicial review until a second stage of decision making occurred. Here, no injury will occur until Blackacre makes a separate and independent decision to harvest tress. Under the terms of the contract with the Forest Service, only Blackacre can make the final decision as to whether to harvest trees during nesting season. If, and when, Blackacre makes this decision, CSB's claim will be ripe for review.

II. IS THE MBTA'S MISDEMEANOR PROVISION A STRICT LIABILITY CRIMINAL OFFENSE?

The question of whether the MBTA's misdemeanor provision is a strict liability offense arises because § 707(a), lacks a mens rea requirement. The absence of a mens rea requirement seems to indicate that the provision is a strict liability

offense, however, courts often interpret statutes silent on mens reas to require scienter.

The arguments that the MBTA's misdemeanor provision should be interpreted as a strict liability offense is discussed in Section II.A. In summary, the argument for strict liability is that Congress clearly intended the MBTA's misdemeanor provision to be a strictly liable offense. When Congress added a mens reas requirement to the MBTA's felony provision, it chose not to add a mens rea requirement to the misdemeanor provision. Courts interpret this legislative history as showing that Congress knew the misdemeanor provision was a strict liability provision and intended it to remain so. In addition, judicial precedent overwhelmingly interprets the misdemeanor provision as a strict liability provision.

The arguments that the MBTA's misdemeanor provision should not be interpreted as a strict liability offense is discussed in Section II.B. In summary, interpreting the MBTA's misdemeanor provision as a strict liability provision leads to absurd results, troubling many courts and raising due process concerns. The Supreme Court has increasingly interpreted strict liability criminal statutes to include mens rea, thus avoiding the due process problem. In fact, all Supreme Court opinions in the last twenty-five years have interpreted strict liability criminal statutes to include a mens rea requirement. The only statutes in which the Supreme Court has interpreted silence on mens rea to mean congressional intent for strict liability are public welfare statutes. The Supreme Court, however, has narrowly defined public welfare offenses to include only offenses that regulate the handling of items of special danger to the public. The MBTA clearly does not fall into this category; therefore, the Supreme Court would interpret the MBTA's misdemeanor provision to require mens rea.

A. The MBTA's Misdemeanor Provision is a Strict Liability Offense

1. The Language of the Statute and the Legislative History Supports this Interpretation

The MBTA provides that "unless and except as permitted by regulations . . . it shall be unlawful at anytime, by any means or in any manner, to . . . kill . . . any migratory bird . . ." 16 U.S.C. § 703. The MBTA's misdemeanor penalty provision, § 707(a) contains no mens rea requirement:

> . . . any person . . or corporation who shall violate any provisions of said conventions of this subchapter . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

16 U.S.C. § 707(a). Lacking any indication of mens rea, scienter is not an element of criminal liability under the misdemeanor section. This absence of mens rea implies that the provision is a strict liability one. Courts, however, when faced with a criminal statute silent on mens reas, will look to the intent of Congress to determine whether it creates strict liability. There is nothing in the legislative history of the MBTA evincing that Congress intended a scienter requirement. Moreover, the Supreme Court has interpreted legislative silence on mens rea in several cases as evidence that Congress did not intend to require mens rea. *See e.g. United States v. Balint*, 252 U.S. 250, 254 (1922) ("[c]ongress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the [dangerous] drug, and concluded that the latter was the result preferably to be avoided."); *United States v. Dotterweich*, 320 U.S. 277 (1943) ("[l]egislation dispens[ing] with the conventional requirement for criminal conduct, awareness of some wrongdoing, will be upheld in situations where it is in the interest of the larger good to place the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *United States v. Freed*, 401 U.S. 601, 609 (1971) (regu-

latory measure lacking scienter requirement was upheld in the interest of public safety).

Congress has shown that it intended the MBTA's misdemeanor provision to embody strict liability by its 1986 amendment to section 707(b), the MBTA's felony provision. This provision originally contained no scienter requirement, but was amended to require scienter. Section 707(b) now provides:

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

16 U.S.C. § 707(b). By this amendment, Congress clearly required mens rea for the felony provision but not for the misdemeanor provision. Congress knew the misdemeanor provision was a strict liability provision and intended it to remain as one. The 1986 Senate Report accompanying the amendment states: "[n]othing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions." Sen. Rep. No. 445, 99th Cong., 2d Sess. 16 (1986).

Congress intended to affirm the numerous judicial decisions that previously held the misdemeanor provision to be a strict liability provision. In addition, Congress added a mens rea requirement for the felony provision in response to a judicial decision which reversed a conviction of MBTA felony on the grounds that strict liability for felony violated due process. *See United States v. Wulff*, 758 F.2d 1121, 1124 (6th Cir. 1985). The *Wulff* court, after reviewing Supreme Court opinions, held that while strict liability violates due process for felonies, it is acceptable for misdemeanor offenses. *Id.* at 1124.

The *Wulff* decision follows the general rule that strict liability offenses pass constitutional muster for misdemeanor

provisions, but seldom for felony provisions. Misdemeanors and felonies are treated differently by constitutional standards because of the differing severity of the sanctions and the damage to reputation by conviction. *See e.g. Morissette v. United States*, 342 U.S. 246 (1952) (sanctions strict liability crimes where "penalties . . . are relatively small, and conviction does no grave danger to an offender's reputation."). By their very nature, misdemeanor provisions, with small penalties, meet this constitutional requirement whereas felony provisions do not. *See e.g. United States v. St. Pierre*, 578 F. Supp. 1424, 1429 (W.D.S.D. 1983) ("There can be no question but that a felony conviction irreparably damages a person's reputation in this respect.").

2. Precedent Overwhelmingly Interprets the Misdemeanor Provision as a Strict Liability Provision

Since the inception of the MBTA in 1918, the overwhelmingly majority of courts have interpreted misdemeanor hunting violations under the MBTA as a strict liability offense. The courts have consistently held it is not necessary that the government prove a defendant violated the MBTA's misdemeanor provision with guilty knowledge or specific intent to commit the violation. *See United States v. Schultze*, 28 F. Supp. 234 (W.D.Ky. 1939) (convicting defendants "even though there was not evidence of any guilty knowledge or intent upon his part at the time of the commission of the offense."); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966), *cert. denied*, 386 U.S. 943, 1001 (1967) (holding that "[i]t has long been held that under the MBTA, 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. Brandt,* 717 F.2d 955 (6th Cir. 1983) (scienter is not an element of offense under the MBTA).

Indeed, all Circuits considering the issue, except for the Fifth Circuit, have held that the MBTA's misdemeanor provision is a strict liability offense. In *United States v. Delahoussaye,* 573 F.2d 910 (5th Cir. 1978), the court required "a reason to know," for conviction under the MBTA. *Id.* at 958.

The court reasoned a minimum level of scienter was necessary for conviction under the MBTA, stating that "[a]ny other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such, as, say judges who might find such a consequence unacceptable. On the other hand to require a higher form of scienter, actual guilty knowledge, would render the regulations very hard to enforce and would remove all incentive for the hunter to clear the area, a precaution which can reasonably be required." *Id.* However, the *Delahoussaye* decision is a minority viewpoint; in fact, only the Fifth Circuit holds this view.

Even in the transition from the traditional use of the MBTA in hunting cases to protecting migratory birds from other causes of death, the courts have held defendants to be strictly liable for causing bird deaths. *See United States v. Corbin Farm Service*, 444 F. Supp. 510 (D. Cal. 1978) (farmer held to be strictly liable for unintentionally killing migratory birds by spreading a toxic pesticide to his alfalfa field); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (pesticide manufacturer held to be strictly liable under MBTA for killing geese by inadvertently allowing a highly toxic pesticide to escape from its manufacturing plant into its on-site pond). *But see United States v. Rollins*, 706 F. Supp. 742, 744 (D. Idaho 1989) (MBTA's penalty provision unconstitutionally vague as applied to a farmer inadvertently poisoning a flock of geese by applying pesticides to his field, the MBTA "does not state that poisoning . . . migratory birds by pesticide constitutes a criminal violation.").

Congress intended the MBTA's misdemeanor provision to be a strictly liable offense as the MBTA's legislative history indicates. Further, the courts have so interpreted Congress' intent in numerous decisions, over several decades.

B. The MBTA's Misdemeanor Provision is not a Strict Liability Offense

1. Absurd Results Have Troubled Courts

Several courts have been troubled that meaningful limits do not exist in applying the MBTA's strict liability provisions. Courts pose examples of the absurd results that may occur in literally applying this provision without a scienter requirement. In *Mayer*, the court questioned whether "a homeowner who cuts down a dead tree, not knowing that it contains an active nest of migratory birds, or perhaps just a single egg in a nest invisible from the ground, commits a federal crime." 927 F. Supp. 1559 (S.D. Ind. 1996). The Second Circuit warned "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." *FMC*, 572 F.2d at 905.

Several courts have "reluctantly" held defendants strictly liable although troubled by the result. For example, in *Catlett*, defendants were convicted for hunting migratory birds on a baited field in violation of regulations promulgated under the MBTA. *See United States v. Catlett*, 747 F.2d 1102 (6th Cir. 1984), *cert. denied*, 471 U.S. 1047 (1985). Regulations promulgated under the MBTA, allow sport hunters to shoot migratory birds under specified conditions, one of which is that a hunter may not do so over a baited field. *See* 50 C.F.R. § 20.21 (a baited field is one that is spread with corn or wheat to attract birds). The *Catlett* court was reluctant to convict noting, "the unfortunate defendants were apparently unaware of, and had not participated in, the baiting of the field," and that, "[a] subjectively 'innocent' person can unwittingly run afoul of the regulation." Nonetheless, the court held that the MBTA "established that scienter is not required for a conviction." *Id; see also Brandt*, 717 F.2d at 958 (the court "reluctantly" convicted unknowing defendants, conceding "that it is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only."). Mistakenly relying on the MBTA's status as a public welfare offense

(as discussed in the next Section, the MBTA is not a public welfare offense), the *Catlett*, court reasoned that all "'public welfare' offenses in which scienter is not a requirement run the risk of convicting innocent persons, but have been long accepted by courts." 747 F.2d at 1104-1105.

The *Rollins* court refused to apply the MBTA's strict liability provision because it would "offend reason and common sense." 706 F. Supp. at 742. The *Rollins* court held the MBTA's penalty provision unconstitutionally vague as applied to a farmer who inadvertently poisoned a flock of geese by applying pesticides to his field. *Id.* at 743. The court held Rollins was not liable under the MBTA because he had used due care in applying the pesticides, stating that the MBTA "does not state that poisoning . . . migratory birds by pesticide constitutes a criminal violation." *Id.* at 744. The *Rollins* court refused to apply the MBTA to "trap a farmer who acted in good faith" and noted its "queasiness" over the potential reach of the MBTA's strict liability provision, concerned that "a homeowner could be pursued under the MBTA if a flock of geese crash in to his plate-glass window and were killed [or that] an airplane pilot could be prosecuted if geese were sucked into his jet engines." *Id.*

2. The Supreme Court Interprets Most Offenses to Contain a Mens Rea Requirement

Under Supreme Court precedent, the MBTA's failure to mention mens rea in its misdemeanor provision should not be interpreted as creating a strict liability offense. Principles of criminal law favor scienter requirements for criminal offenses. Historically, mens reas, a "guilty mind," was an indispensable element for every criminal violation. *See Balint*, 252 U.S. at 251. The "existence of mens rea is the rule of, rather than the exception to the principles of Anglo-American criminal jurisprudence" *See United States v. United Stated Gypsum Co.*, 438 U.S. 422, 436 (1978). Offenses that lack a mens rea requirement are generally disfavored. *See United States v. Liparota*, 471 U.S. 419, 426 (1985). Precedent requires the court to presume a mens rea requirement even when statutory crimes derived from the common law are si-

lent as to scienter. *See Balint*, 258 U.S. at 251-252. The Court views offenses that are silent on mens rea as ambiguous on the state of mind required for conviction, and following the rule of lenity, will interpret them in favor of the defendant to require mens rea. *See Morissette*, 342 U.S. at 263 ("mere omission . . . of intent [in the statute] will no be construed as eliminating that element from the crimes denounced."); *Liparota*, 471 U.S. at 427 (requiring mens rea in order to keeping with the longstanding recognition of the principle of lenity).

The Supreme Court has indicated that due process sets limits on the imposition of strict criminal liability. *See Lambert v. California*, 355 U.S. 225 (1957) (holding felony registration law violated due process when applied to a person who has no actual knowledge of his duty to register). The Supreme Court has increasingly interpreted statutes silent on mens rea to include it, thus avoiding the inherent due process problems that arise with strict liability offenses. This trend is clear: all Supreme Court opinions in the last twenty-five years have interpreted such statutes to include a mens rea requirement. For example, the Supreme Court in *Liparota* avoided due process problems by interpreting the statute to require mens rea. 471 U.S. at 419. "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement and that criminal offenses requiring no mens rea have a generally disfavored status." *Id.* (quoting *Gypsum*, 438 U.S. at 422). *See also Morissette*, 342 U.S. at 246 (holding that criminal intent is an essential element of the crime of knowing conversion of government property); *Staples v. United States*, 511 U.S. 600 (1994) (holding that the government is required to prove beyond a reasonable doubt that defendant knew weapon he possessed had characteristics that brought it within regulation).

The Supreme Court has interpreted congressional silence on mens rea as creating strict liability only for statutes regulating potentially harmful or injurious items. These statutes are commonly referred to as public welfare statutes. The rationale for dispensing with mens rea in public welfare

offenses is that the defendant knows that he is dealing with a dangerous device which may harm the public; therefore, he should be aware of the probability of strict regulation. Thus, he is placed on notice that he must determine "at his peril" whether is conduct comes within the statute's inhibition. Clearly, the MBTA does not regulate this type of activity.

In *Morissette*, the Supreme Court explained that a different standard applies to criminal statutes that are regulatory, designed to protect the public welfare, and have no origin in the common law. *See* 342 U.S. at 246. For those statutes, commonly called "public welfare" statutes, intent is not always a necessary component. *Id.* The Supreme Court has accepted Congressional silence on mens rea as dispensing with a scienter requirement for statutes regulating potentially harmful or injurious items. *See Freed*, 401 U.S. at 609 (regulatory measure lacking scienter requirement was upheld in the interest of public safety, "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"); *Dotterweich*, 320 U.S. at 277 ("[l]egislation dispens[ing] with the conventional requirement for criminal conduct, awareness of some wrongdoing, will be upheld in situations where it is in the interest of the larger good to place the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *Balint*, at 258 U.S. at 254 ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the [dangerous] drug, and concluded that the latter was the result preferably to be avoided.").

The MBTA is not a public welfare offense statue and thus would not be interpreted to lack a mens rea requirement. Unlike *Freed*, *Dotterweich*, and *Balint*, all cases in which the underlying statute regulate conduct that posed a threat to public safety, the MBTA does not regulate this type of conduct. "The protection of migratory birds, albeit a legitimate issue of public concern, can hardly be equated with the health and safety concerns associated with hand-grenades and drug distribution." *United States v. Engler*, 806 F.2d 425, 441 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987) (concurring

opinion of Higginbotham). "A violation of the MBTA simply does not fall into the category of felony offenses that the Supreme Court has recognized as constitutional without proof of scienter. The killing of a migratory birds is neither a public welfare offense or is conduct that the average person would realized was criminal." *Id.* at 441.

III. DOES THE MIGRATORY BIRD TREATY ACT PROHIBIT THE KILLING OF MIGRATORY BIRDS BY CLEARCUTTING FORESTS DURING BIRD NESTING SEASON?

Depending upon whether the glass is half full or half empty, the legislative history supports interpreting the MBTA to prevent extinction of birds by protecting bird habitats or simply as a bird hunting statute. The question for the court to answer is whether the MBTA merely protects birds from extinction from hunters or from extinction from any cause. In answering this question, the statutory language, amendments, legislative history, and case law under the MBTA must be considered.

The arguments for interpreting the MBTA to prohibit killings from tree harvesting are discussed in Section III.A. In summary, the MBTA should be read more broadly than as simply a "bird hunting statute." The legislative history includes the protection of migratory bird habitats as one of the purposes to be accomplished by the MBTA. In addition, the MBTA is the implementing statute for several international treaties that have demonstrated a gradually expanding recognition of the importance of habitat protection for birds. Since 1916, each amendment to the original treaty has increasingly incorporated provisions to carry out this goal. Further, the MBTA's broad language indicates the intent of Congress to regulate all causes of bird deaths. Finally, the recent acceptance by the courts of a broader use of the MBTA supports the proposition that the MBTA is more than just a "bird hunting statute," and is designed to prevent bird deaths, regardless of the cause of death.

The arguments for interpreting the MBTA not to prohibit tree harvesting which may cause bird deaths is discussed in Section III.B. In summary, the MBTA was intended only to regulate the hunting of birds, not the cutting of timber or other non-avian related economic activities that may indirectly kill birds. This use of the MBTA would be a great expansion of the historical application of the MBTA. Several courts when faced with expanding the MBTA beyond the activity of hunting have held that the MBTA does not apply to a "wide range of human activity [including logging] that may incidentally and unintentionally cause the death of migratory birds." *See Mahler*, 927 F. Supp. at 1576. The historical context of the MBTA clearly indicates the intent of the MBTA: to eliminate market hunting and to regulate recreational hunting, the two forms of human activity that were decimating bird populations. Further, the historical interpretation and application of the MBTA by the courts and the enforcement officials of the Fish and Wildlife Service has been primarily a hunting statute.

Finally, the MBTA has existed for over eighty years and during this time logging activity has occurred continuously, even during nesting seasons, resulting in the deaths of migratory birds. It is incongruous that, for the first time in eighty years, the MBTA be interpreted as prohibiting timber harvesting, an activity supported by Congress, as seen by the passage of forest management legislation without regard to bird deaths occasioned by a long history of timber harvesting.

A. The MBTA Prohibits Tree Harvesting Which May Cause Bird Deaths

1. The Legislative History and Treaties Support the Protection of Bird Habitats

The MBTA implements provisions of treaties between the United States, Great Britain, Mexico, and Japan for the protection of certain migratory birds. *See* The Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, August 16, 1916, U.S.-U.K., 39 Stat. 1702; The Convention between

the United States and Mexico for the Protection of Migratory Birds and Game Mammals, February 7, 1936, U.S.-Mex., 50 Stat. 131; The Convention Between the United Sates of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, March 4, 1972, U.S.-Japan, 25 U.S.T. 3329, 3335; The Convention Between the United Sates of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, March 4, 1972, U.S.-U.S.S.R., 29 U.S.T. 4647, 4653-4654.

These treaties were enacted as a response to massive numbers of bird deaths, including the extinction of certain bird species. At the time of the MBTA's enactment the greatest concern with bird protection was controlling recreational hunting and eliminating market hunting, the predominant activities impacting bird populations and raising concern for bird extinction:

> Not very many years ago vast numbers of waterfowl and shore birds nested within the limits of the United States, especially in the far West, but the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits

H.R. Rep. No. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President). Specifically, the treaty sought to protect migratory birds which were ". . . in danger of extermination through lack of adequate protection during nesting season or while on their way to and from their breeding grounds. . . ." *Convention* at 1702. Preventing uncontrolled hunting was a concern of all four treaties, however, this concern for hunting should not be read as a limitation on control of other activities that cause bird deaths.

The primary means of extinction at the time of enactment of the MBTA was from hunting, but today the primary means of bird extinction is through loss of habitat, a concern mentioned in Lansing's letter in terms of the extent of agri-

culture and the drainage of swamps. Clearly, the MBTA was enacted to prevent bird extinction, regardless of the cause. Congress showed great foresight by wording the MBTA with language broad and flexible enough to accommodate unforeseen future developments. In *Corbin*, the court agreed that Congress was concerned with hunting and capturing migratory birds when it enacted the MBTA, however, the court noted that this historical concern should not be interpreted as a limitation on regulating other causes of bird deaths:

> [t]he fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern. Paring the language of section 703 down to its essentials, the section makes it illegal, at any time, by any means or in any manner, to . . . kill . . . any migratory bird . . . The use of the broad language 'by any means or in any manner' belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted to captured migratory birds. . . . The legislative history of the Act reveals no intention to limit the Act so that it would not apply to [other activities, such as] poisoning.

Id. at 532. The treaties seek to prevent species extinction, regardless of cause. The 1916 Convention warned that migratory birds ". . . are in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds. . . ." H.R. Rep. No. 65-243 (1918).

The treaties demonstrate a gradually expanding recognition of the importance of habitat protection for birds. In 1972, the treaty with Japan expressly stated specific concerns about the link between habitat and extinction, stating, "island environments are particularly susceptible to disturbances . . . many species of birds of the Pacific [I]slands have been exterminated, and . . . some other species of birds are in danger of extinction. . . ." U.S.-Japan Treaty, 25 U.S.T. at 3335. That treaty specifically requires each party to "endeavor to take appropriate measures to preserve and enhance the environment" of protected birds and to "seek means to prevent damage to such birds and their environment, includ-

ing, especially, damage resulting from pollution of the seas. . . ." *Id.* Finally, the 1972 treaty with the Soviet Union states: "[t]o the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate pollution or detrimental alteration of that environment. . . . and to identify areas of breeding, wintering, feeding, and moulting which are of special importance to the conservation of migratory birds. . . ." U.S.-U.S.S.R. Treaty, 29 U.S.T. at 4653-4654.

Each time Congress approved a migratory bird treaty and amended the MBTA to refer to it, Congress incorporated the purposes of the new treaty into the MBTA. Congress' amendments indicate that it intended to expand the MBTA's prohibition to fulfill the purposes of the treaties. *See* Bob Neufeld, Comment, *The Migratory Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D. L. Rev. 307 (1974) (arguing that the treaty provisions are self-executing law). As the focus of the treaties has grown from killing birds by hunting to killing birds by habitat destruction, so too has the MBTA's prohibition expanded.

Analyzing the evolution of the purposes of the treaties which form the basis of the MBTA, it is quite possible that the MBTA is entering new era of congressional intention to protect birds from "any and all" environmental harms. While Congress arguably may have intended the MBTA primarily as a hunting regulation statute, in its recent amendments to the MBTA, Congress intends that its broad language protect birds from other harms, including habitat destruction. Finally, the recent acceptance by the courts of a broader use of the MBTA supports the proposition that the MBTA is more than just a "hunting statute." *See e.g. FMC*, 572 F.2d at 902 (pesticide manufacturer held to be strictly liable under MBTA for killing geese by inadvertently allowing a highly toxic pesticide to escape from its manufacturing plant into its on-site pond); *Corbin*, 444 F. Supp. at 510 (farmer held to be strictly liable for unintentionally killing migratory birds by spreading a toxic pesticide to his alfalfa field); *But see Mahler*, 927 F. Supp. at 1574 n.128 (holding that *FMC* and *Corbin*

do not extend the language of the MBTA to habitat destruction that may lead indirectly to bird deaths.).

B. The MBTA Does Not Regulate Tree Harvesting

1. The MBTA is Only a Bird Hunting Statute

The MBTA was intended only to regulate the hunting of birds, not the cutting of timber or other non-avian related economic activity that may incidentally kill birds. *See e.g. Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509 (D. Or. 1991) (stating that the fundamental purpose of the MBTA was to protect migratory birds from extinction from bird hunters and to provide severe penalties for market hunters who receive monetary benefit from the sale of migratory bird parts.); *Mahler*, 927 F. Supp. at 1579 ("[p]roperly interpreted, the MBTA applies to activities that are intended to harm birds or to exploit birds, such as hunting or trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds."). Protecting bird habitats would be a great expansion of the historical application of the MBTA. Several courts when faced with expanding the MBTA beyond the activity of hunting have held that the MBTA does not apply to a "wide range of human activity [including logging] that may incidentally and unintentionally cause the death of migratory birds," *Id.* at 1576.

This historical interpretation and application of the MBTA by the courts as well as the enforcement officials of the Fish and Wildlife Service is dispositive of the fact that the MBTA is primarily a bird hunting statute. The overwhelming number of MBTA convictions are of defendants for hunting birds. *See e.g. Lansden v. Hart*, 168 F.2d 409 (Ill. 1948), *cert. denied*, 335 U.S. 858 (holding the MBTA prohibits all hunting of migratory birds except as permitted by regulation); *United States v. Boyton*, 63 F.3d 337 (4th Cir, 1995) (holding defendants strictly liable for hunting migratory birds in baited field).

It is clear that the MBTA was intended only to regulate bird hunting. The purpose of the treaty between the United

States and Great Britain was to eliminate market hunting and to regulate recreational hunting, the two forms of human activity that were severely depleting bird populations. *See e.g. United States v. Lumpkin*, 276 F. 580 (N.D.Ga.1921) (stating that the Treaty of Aug. 16, 1916, with Great Britain only regulates the hunting and killing of migratory birds and does not cover other efforts to protect migratory birds.) Even the most recent amendment to the MBTA in 1986, making it a felony to knowingly engage in the selling of migratory bird parts, is dispositive that the scope of the MBTA clearly remains a "bird hunting statute."

Other legislation has been created to protect habitats. *See e.g.* Bald and Golden Eagles Protection Act of 1940, 16 U.S.C. § 668 (protection of bald and golden eagles and their habitats); Endangered Species Act of 1973, 16 U.S.C.A § 1531-1544 (protection of endangered species including their habitats); Wilderness Act of 1964, 16 U.S.C. ' 1131-1136 (establishing a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas"); Fish and Wildlife Conservation Act of 1980, 16 U.S.C. §§ 2901-2912 (conservation of fish and wildlife and their habitats); Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4901-4916, 943 (protection of wild exotic birds and their habitats). These statutes would be unneeded if the MBTA already protected birds habitats.

2. Eighty Years of Concurrent Existences: National Forest Management and the MBTA

The fact that the MBTA has existed for over eighty years during which substantial timber logging activity has occurred with congressional authorization. It is more than fair to assume that timber harvesting has occurred during nesting seasons and have resulted in the deaths of migratory birds. Therefore, it is hard to imagine that for the first time in eighty years the MBTA should be interpreted to prohibit timber harvesting.

Timber harvesting and the MBTA have concurrently existed for over eighty years. The first act granting authority to the Forest Service to manage National Forests was the Or-

ganic Administration Act of 1897. 16 U.S.C. §§ 473-482, 551. It provided authority for two simple purposes: to protect "favorable . . . water flows" and "to furnish a continuous supply of timber." 30 Cong. Rec. 967 (1897); 16 U.S.C. § 475. Accepting these purposes, it is difficult to argue that just nineteen years later Congress would enact the MBTA to prohibit the Forest Service from furnishing a continuous supply of timber because timber harvesting would kill migratory birds or active nests "by any means or in any manner." *See Sierra Club v. Martin*, 110. F.3d 1551, 1556 (11th Cir. 1997). This interpretation of the MBTA would severely impair the Forest Service's ability to comply with Congress' directive to manage the national forests for timber harvesting. *Id.*

The Organic Administration Act of 1897 was the sole authority for regulating national forests for over sixty years. In 1960, in response to increasing demand for timber as well as the need to utilize the national forests for other uses, Congress passed the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) 16 U.S.C §§ 528-531. It added uses such as outdoor recreation and wildlife protection as purposes to be served by national forests. *See* 16 U.C.S §§ 528-529. However, recreation, range, and "fish" purposes are "to be supplemental to, but not in derogogation of, the purposes for which the national forests were established." *United States v. New Mexico*, 438 U.S. 696, 714 (1978) (quoting H. R. Rep. No. 1551, 86th Cong., 2d Sess., 4 (1960)). As such, secondary purposes cannot oust a primary purpose.

In 1976, a short time after enacting the MUSYA, the NFMA was passed in response to the environmental awareness that "the days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions." 122 Cong. Record 5618-5619 (1976). The NFMA was also a congressional response reversing the clearcutting ban set forth in *West Virginia Division of the Izaak Walton Legue of America v. Butz*, 522 F.2d 945 (4th Cir. 1975), which held

that the Organic Act prevented clearcutting as a timber harvesting method.

As indicated by the forest management legislation discussed above, it is clear that the purpose of federal forest management evolved from the management of a single natural resource to the balanced management of multiple uses of the national forests. The MBTA was never intended, as indicated by its legislative history and applied case law, to exceed the purpose of regulating bird hunting and to eliminating market hunting. It would be a misapplication of the MBTA and a usurpation of the Forest Service's authority under the NMFA to conclude that the MBTA prevents tree harvesting because birds or their habitats may be impacted by tree harvesting.

When national forest legislation was first enacted, its purposes were the provision of timber, not protection of birds. The MBTA did not change the purpose of forest management to the protection of birds. Congress, through the legislation discussed above, repeatedly authorized timber harvesting and sales after the enactment of the MBTA without the slightest hint that it intended for national forests to be managed to prevent bird deaths in the course of timber harvesting. Even when Congress amended the forest management laws to make protection of wildlife a purpose of forest management, it did not make it a primary purpose nor mandate that forest harvesting kill no birds and wildlife. "[I]t would stretch [the MBTA] 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." *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997).

Finally, the recent MBTA challenges to timber harvesting have been rejected by the courts. In *Sierra Club v. United States Department of Agriculture*, 116 F.3d 1482 (7th Cir. 1997), plaintiffs objected to the Forest Service's plan which determined the future use of the Shawnee National Forest, alleging the plan violated the MBTA because it allowed logging to occur during nesting periods which would destroy bird habitats as well as directly kill migratory birds.

The court held that MBTA does not protect modifications to or degradation of a migratory birds habitat. *Accord Seattle Audubon Society*, 952 F.2d at 302-303 ("there is strong evidence that the MBTA does not include a prohibition of habitat modification or degradation," holding that timber management plans of United States Forest Service did not violate the MBTA by allowing the logging of the habitat of the northern spotted owl). In *Mahler*, the plaintiff argued that although the MBTA does not prohibit indirect takings of birds such as habitat destruction, it does prohibit direct takings by timber harvesting during nesting season where active nests exists. The court held that neither type of "takings," direct or indirect, are prohibited by the MBTA and further, "a 'taking' under the MBTA did not include habitat modification. 927 F. Supp at 1574; *accord Citizens Interested in Bull Run*, 781 F. Supp. at 1504 (habitat modification is not within the scope of the MBTA, "the Act was intended to apply to individual hunters and poachers."). Courts have rejected a broad interpretation of MBTA. Further, the Forest Service's consistent interpretation for eighty years of the MBTA should not be overturned, especially when the result would have such profound implications for timber harvesting throughout the country.

IV. IS THE MBTA "LAW" WITH WHICH ACTIONS UNDER NFMA MUST BE IN ACCORD FOR PURPOSES OF JUDICIAL REVIEW UNDER THE APA?

The APA sets forth the applicable scope of review for administrative decisions, requiring a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*" 5 U.S.C. § 706(2)(A) (emphasis added). An agency's actions can only fail to be "in accordance with law" when the agency's actions are subject to that law. The resulting question is whether the Forest Service's actions are subject to the MBTA. If the Forest Service's actions are, the Forest Service may have violated the MBTA; if not, the Forest Service cannot have violated the MBTA.

The arguments for interpreting the MBTA to apply to the Forest Service is discussed in Section IV.A. In summary, the MBTA should be interpreted to apply to actions taken by the Forest Service because the Supreme Court's *Chrysler* decision supports the argument that the MBTA is applicable "law" for purposes of review under the APA. Second, the MBTA must apply to all federal agencies, including the Forest Service, if the United States is to meet its obligations under the 1916 treaty and subsequent amendments.

The arguments for not interpreting the MBTA to apply to the Forest Service is discussed in Section IV.B. In summary, the MBTA should not apply to actions taken by the Forest Service because there is no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the legal basis for the complaint. Here, the MBTA is not the relevant statute because the MBTA, by its plain language does not apply to the federal government. Moreover, jurisdiction to review the timber sale is conferred by the NMFA, not the MBTA.

A. The MBTA is "Law" Which the Forest Service Must Consider for Purposes of APA Review

1. The Supreme Court's Chrysler Decision is Precedent for this Interpretation

Under precedent of *Chrysler Corp. v. Brown,* CSB can enforce the MBTA through the APA, even notwithstanding the fact that the MBTA is a criminal statute which creates no private right of action. *See* 441 U.S. 281 (1979). *Chrysler* sought to enjoin agency disclosure claiming the disclosure was inconsistent with the Freedom of Information Act (FOIA) and the Trade Secrets Act, a criminal statute, that proscribes disclosure of trade secrets of certain classes of business and personal information. The Court found that FOIA is purely a disclosure statute and afforded Chrysler no private right of action to enjoin agency disclosure and that the Trade Secrets Act, a criminal statute, also did not afford a private right of action to enjoin disclosure in violation of the statute. *Id.* at 285. However, the Court could review the government's deci-

sion to disclose trade secrets under the APA to determine if disclosure is "authorized by law" within the meaning of the Trade Secret Act. *Id.* The Court explained that section 10(a) of the APA provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to review thereof." *Chrysler* holds that any person adversely affected by an agency's violation of a criminal statute can obtain judicial review of that agency's action under APA § 702. *Id.* at 318. Applying the holding of *Chrysler*, the Forest Service's decision to allow tree harvesting during nesting season should be reviewed under the APA to determine if this action is "in accordance with law." In reviewing this action, the court should find that it is undisputed that contracts allowing timber harvesting during nesting season will result directly in the death of migratory birds; therefore, these actions constitute violations of the MBTA and are "not in accordance with law."

Recent court decisions support that the MBTA applies to the Forest Service. In *Mahler*, the court noted that "the [APA] may be used by a party with standing to challenge government action that would violate that MBTA. This result is correct because the APA permits challenges to agency action that are contrary to law; it is reasonable because citizens can reasonably expect that the government should abide by the same laws imposed on private citizens." 927 F. Supp. at 1579. In *Sierra Club v. USDA*, the court found that the MBTA applies to the Forest Service. The court remanded the case to the lower court to determine whether the Forest Service's Management Plan would violate the MBTA by allowing logging, i.e., the killing of migratory birds, during nesting season. *Id.*

Finally, the MBTA is law relevant to review under the APA, despite being a criminal statute. Although the MBTA is a criminal statue, it can be invoked in a civil context. The Supreme Court has held that civil remedies may be appropriate even where only criminal remedies are provided by a federal statute. *See e.g. Wyndotte Transportation Co. v. United States*, 389 U.S. 191, 201-202 (1967) (holding that the United States could bring a civil action against corporate violators of

the River and Harbors Act); *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-492 (1960) (permitting the United States to collect civil damages from violators of the Rivers and Harbors Act.).

2. The MBTA Must Apply to Federal Agencies If the United States is to Meet Its Obligations Under the 1916 Treaty and Subsequent Amendments

The MBTA must apply to the Forest Service for the United States to meet its obligations under the 1916 Treaty as well as its subsequent amendments. Article VIII of the Treaty states this commitment: "the High Contracting Powers agree themselves to take, or purpose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention." The Convention at 1704.

The MBTA's prohibitions include federal agency actions because the prohibitions are stated broadly, "it is unlawful" to "kill," it is unlawful for *any person*." 16 U.S.C. § 707(a). The government must comply with its own criminal laws. The Department of the Interior (DOI), which administers the MBTA, must interpret it to apply to apply to the government and its employees, since DOI has promulgated regulations exempting its personnel from the requirements of obtaining MBTA permits for the taking of birds under limited circumstances. *See* 50 C.F.R § 21.12(a). This regulation would be unnecessary if the MBTA did not apply to the government.

B. MBTA is not "Law" for Purposes of Review Under the APA

1. There Is No Right To Sue For Violation of APA In the Absence of Relevant Statutes Whose Violation Forms the Legal Basis For Complaint.

The MBTA is a criminal statute and does not address formal agency action. Because the MBTA does not address agency actions, agency actions are not statutory violations for which an APA remedy would be appropriate. The APA sim-

ply provides a framework for judicial review of agency action. 5 U.S.C. § 702. Section 702 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 review thereof." However, this section itself does not confer jurisdiction to review agency action. Therefore, "[t]here is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation forms the legal basis for [the] complaint." *National Wildlife Federation*, 497 U.S. at 871. "The plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States." *See Preferred Risk Mutual Insurance Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (holding that the Lanham Act does not apply to the federal government; therefore, there is no basis for an APA challenge)

In *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d at 1294, plaintiffs sued EPA to cancel its strychnine pesticide registration, claiming these activities violated the MBTA. The court held that the MBTA does not create a private right of action. *Id.* at 1302. "Although the APA may state the scope of review under 5 U.S.C. § 706, FIFRA [Federal Insecticide, Fungicide and Rodenticide Act] still provides the mechanism for obtaining judicial review. Thus, the APA does not operate separately from FIFRA, but instead as a part of FIFRA." *Id.* at 1302-03. Holding that FIFRA was the proper statute for judicial review, the court explained that "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the . . . established special statutory procedures relating to specific agencies." *Id.* at 1302-03 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). Most recently, in *Sierra Club* v. Martin, the Eleventh Circuit held that the MBTA, by its plain language, does not apply to the Forest Service; therefore, no violation of the MBTA could occur by any formal action of the Forest Service. *See* 110 F.3d at 1555. "An agency's actions could only

fail to be 'in accordance with law' when that agency's actions are subject to that law." *Id.*

2. The MBTA, By Its Plain Language, Does Not Apply to the Federal Government.

The MBTA is a criminal statute whose enforcement is within the discretion of the Fish and Wildlife Commission. Plaintiffs cannot collaterally enforce the terms of the MBTA through the APA because the plain language of the MBTA does not subject the federal government to its prohibitions. *See Newton*, 113 F.3d at 115 (holding that the MBTA does not apply to the actions of federal government agencies). The MBTA is a criminal statute making it unlawful only for "persons, associations, partnerships, and corporations" to "take" or "kill" migratory birds. *See* 16 U.S.C. § 707(a). Congress did not intend to hold the federal government to regulation under the MBTA as it did directly in the ESA in which Congress defined "person" to include "any officer, employee, agency, department, or instrumentality of the Federal Government." 16 U.S.C. § 1532(13); *see also Martin*, 110 F.3d at 1556 (finding no expression of Congressional intent which would warrant holding that a 'person' includes the federal government). Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so. Moreover, even if the MBTA applied to the Forest Service, the agency has absolute discretion to not to enforce the law. *See Heckler v. Chaney,* 470 U.S. 821, 831 (1985) (holding that the decision whether to prosecute or enforce a law has been assigned to an agency's absolute discretion).

3. Jurisdiction To Review the Timber Sales Is Conferred By the NMFA, Not the MBTA.

The historical context of the MBTA's enactment further demonstrates that it does not apply to the Forest Service. In 1897, Congress established the National Forest System "to conserve the water flows, and to furnish a continuous supply of timber for the people.'" Cong. Rec. 967 (1897). It is unlikely that Congress enacted the MBTA, barely twenty years

later, to prohibit the Forest Service's already authorized logging on federal lands which will inevitably result in the deaths of individual birds and destruction of nests. An interpretation that the MBTA applies to the Forest Service ignores Congress' directive to manage the national forest for timber production. *See Seattle Audubon Society*, 952 F.2d at 302 (9th Cir. 1991) (stating that the purpose of the MBTA is to regulate the hunting, capture, possession, and sale of migratory birds, not to regulate logging activities). Moreover, to interpret the MBTA to apply to the Forest Service would impair its ability to manage national forests for timber production. *See Martin*, 110 F.3d at 1556.

Congress' continued enactment of legislation relating to management of the national forest system further supports that the MBTA does not apply to the federal government. National Forest planning is regulated by the NFMA, 16 U.S.C. §§ 1600-1614 and its implementing regulations, 36 C.F.R., part 219 (1997). The purpose of the NMFA is for the Forest Service to manage forests for multiple uses that include timber production. *See* 16 U.S.C § 528. In accordance with NMFA, the Forest Service develops a Land and Resource Management Plan (LRMP) for each National Forest. Through the NMFA, Congress prescribes the procedures the Forest Service is to follow and the factors it is to consider in making land management decisions, *See* 16 U.S.C. § 1604. The proper review of actions challenging timber sales under the APA is the Forest Service's compliance with viability regulations that require, in the context of multiple planning, that a habitat be provided within the forest to support a minimum number of reproductive individuals. 36 C.F.R. § 219.19.

Congress intended that the Forest Service follow the NMFA's regulatory process, rather than the MBTA's criminal prohibitions, in addressing conservation of migratory birds. The Forest Service ensures the impact of land management on migratory birds populations by ensuring the viability of native species as directed by 36 C.F.R. § 219.19. The viability regulation require, in the context of multiple use planning, that habitats within the forest to support a minimum number of reproductive individuals in order to "maintain viable popu-

lations of existing native and desired non-native vertebrate species in the planning area." *Id.* The Forest Service's compliance with the viability regulations is subject to judicial review in actions challenging timber sales brought under the NFMA. *See e.g. Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 759-63 (9th Cir. 1996) (reviewing Forest Service's substantive duty under the NFMA to provide for plant and animal communities in challenge to proposed timber sale in national forest).