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# ***United States v. Hayashi*:<sup>1</sup> Taking Aim at the Marine Mammal Protection Act**

MARC A. YAGGI\*

*Although man's record as a steward of the natural resources of the Earth has been a discouraging one, there has long been a certain comfort in the belief that the sea, at least, was inviolate, beyond man's ability to change and to despoil. But this belief, unfortunately, has proved to be naïve.*<sup>2</sup>

## **I. Introduction**

For centuries, man has harvested fish from the world's oceans, for both business and pleasure, with relentless fervor and a blatant disregard for the incidental killing of marine mammals. Each year, thousands of harp seals drown in cod nets and an estimated 12,000 or more endangered and threatened sea turtles die in shrimp nets.<sup>3</sup> Additionally, numerous dolphins are slaughtered by purse-seine fishing,<sup>4</sup> a

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\* B.S., 1993, The Pennsylvania State University; J.D. expected 1997, Pace University School of Law. The author wishes to dedicate this Article to his mother, father, and brother for instilling in him a respect for all things in Nature. Also, the author gives special thanks to Patricia M. Carroll and her group for their editing efforts.

1. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994).

2. RACHEL CARSON, *THE SEA AROUND US* 16 (spec. ed. 1989).

3. See G. TYLER MILLER, JR., *LIVING IN THE ENVIRONMENT* 379 (8th ed. 1994).

4. Purse-seine fishing is a method of catching a large number of fish that feed near the surface of the ocean by surrounding them with a net and pulling the bottom closed. See *id.* Dolphins and yellowfin tuna commonly swim together; therefore, fishing vessels often set purse-seine nets on dolphins to catch tuna. Such actions often result in the death of some or all of the dolphins trapped in the nets. See *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 967 (N.D. Cal. 1990).

method of catching tuna.<sup>5</sup> In order to reduce the number of marine mammals slaughtered, Congress passed the Marine Mammal Protection Act of 1972 (MMPA).<sup>6</sup> The MMPA was designed to reduce the number of dolphins killed by commercial tuna fishermen from approximately 400,000 per year to 20,500 per year.<sup>7</sup> In addition to establishing restraints on commercial fishermen, it was deemed unlawful for any non-commercial or non-permitted commercial fisherman to "take"<sup>8</sup> any marine mammal.<sup>9</sup> Although the statute prohibits the "taking" of any marine mammal, fishermen still continue to be a menace to marine mammals.

One case in which a non-commercial fisherman was charged with violating the "takings" provision of the MMPA<sup>10</sup> was *United States v. Hayashi*.<sup>11</sup> David Hayashi fired two rifle shots into the water in an attempt to dissuade four porpoises from interfering with his tuna catch.<sup>12</sup> Hayashi was tried on stipulated facts and convicted, before a Magistrate Judge, for "taking" a marine mammal.<sup>13</sup> On appeal, the District Court of Hawaii affirmed the conviction by written order.<sup>14</sup> Hayashi then appealed to the United States Court of Appeals, Ninth Circuit, on the grounds that the MMPA and its implementing regulations were unconstitutional due to vagueness<sup>15</sup> and that the evidence on which the conviction

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5. See MILLER, *supra* note 3, at 379.

6. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988) [hereinafter MMPA].

7. See MILLER, *supra* note 3, at 379.

8. The MMPA defines "take" as "to harass, hunt, capture, kill, or attempt to harass, hunt, capture, or kill any marine mammal." MMPA, 16 U.S.C. § 1362(12).

9. See *id.* § 1372(a).

10. See *id.* § 1372.

11. 22 F.3d 859.

12. See *id.* at 861.

13. See *id.*

14. See *id.*

15. Hayashi argued that there was a "lack of direction and clarity in the [MMPA] as it relates to 'harassing' conduct . . ." See Reply Brief for the Defendant-Appellant at 2, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 92-10044) [hereinafter Appellant's Reply Brief].

was based was insufficient.<sup>16</sup> The court of appeals reversed Hayashi's conviction, holding that there was insufficient evidence to support the defendant's conviction because the MMPA and its implementing regulations do not make it a crime to reasonably deter porpoises from eating part of a fisherman's catch.<sup>17</sup>

This Article analyzes the *Hayashi* decision and the 1994 Amendments to the MMPA<sup>18</sup> which stem directly from the *Hayashi* decision,<sup>19</sup> allowing general deterrence measures to be used on marine mammals to protect fishing gear, catch, property, and persons.<sup>20</sup> Thus far, only proposed regulations have been set forth. The proposed regulations undermine the policies and goals of the MMPA and appear to have been drafted in unjustifiable haste because (1) they fail to provide sufficient guidance to fishermen and (2) they suggest the use of potentially harmful deterrent measures which either could injure or kill marine mammals, or drive them out of their natural habitat.<sup>21</sup>

Part II of this Article discusses the MMPA's legislative history, goals, policies, and "takings" provision. Additionally, Part II notes previous administrative proceedings that interpret the "takings" provision of the MMPA, and it addresses the 1994 Amendments to the MMPA that allow for the use of general deterrence measures on marine mammals. Part III

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16. See *id.* "Moreover, the record is devoid of any evidence that, whatever Hayashi's intent, his actions had any results." *Id.*

17. See *Hayashi*, 22 F.3d at 860.

18. Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532 (1994) [hereinafter MMPA Amendments of 1994]. This Act enacts 16 U.S.C. §§ 1386 to 1389 and provisions set out as notes under 16 U.S.C. §§ 1361, 1362, 1374, 1538 and 1539, amends 16 U.S.C. §§ 1361, 1362, 1371, 1372, 1374, 1375, 1379, 1380, 1382 to 1384, 1407, 1421 to 1421h and 4107, and repeals 16 U.S.C. §§ 1384 and 1407.

19. See George A. Chmael II et al., *The 1994 Amendments to the Marine Mammal Protection Act*, 9 NAT. RESOURCES & ENV'T 18, 20 (Spring 1995). The MMPA was amended shortly after the Ninth Circuit entered its decision. Letter from Katherine Hazard, U.S. Dep't of Justice, Environment & Natural Resources Division (Oct. 12, 1995) (on file with author).

20. See Chmael, *supra* note 19, at 18.

21. For a discussion about marine mammal habitats and feeding habits, see Dwight F. Davis, *About Marine Mammals* (last modified Aug. 14, 1995) <<http://www.marinelab.sarasota.fl.us/WMARINE.HTM>>.

of this Article discusses the facts, procedural history, majority opinion, and dissenting opinion of *United States v. Hayashi*,<sup>22</sup> and then Part IV analyzes the *Hayashi* decision. Part V of this Article discusses and analyzes the proposed rules for implementing the general deterrence Amendments to the MMPA. Finally, Part VI of this Article concludes by demonstrating how the flawed reasoning of the *Hayashi* decision led to a hasty congressional amendment that will effectively undermine the goals of the MMPA.

## II. Background

### A. Marine Mammal Protection Act<sup>23</sup>

The Marine Mammal Protection Act was enacted, in 1972, to protect and restore marine mammal populations.<sup>24</sup> Three distinct interests led to the enactment of the MMPA: (1) a commercial interest that recognized marine mammals as an important resource that could be utilized indefinitely under proper management; (2) a scientific interest that believed marine mammals play an important role in the marine ecosystem; and (3) a civic interest that encompassed diverse concerns such as a high regard for animal intelligence,<sup>25</sup> widespread fondness for the mammals,<sup>26</sup> and outrage over the depleted populations of marine mammals.<sup>27</sup> All three of these groups felt that marine mammals should be left undisturbed.<sup>28</sup> The legislative background of the MMPA expresses Congress' deep concern for the mistreatment of marine mam-

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22. 22 F.3d 859.

23. MMPA, 16 U.S.C. §§ 1361-1407.

24. See Chmael, *supra* note 19, at 18.

25. See Elise Miller, Comment, *The Fox Guarding the Henhouse: Conflicting Duties Under the Marine Mammal Protection Act*, 21 SANTA CLARA L. REV. 1063 (1991). The cerebral cortex of marine mammals is similar to that of humans. See *id.*

26. See Nancy Kubasek et al., Comment, *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. ENVTL. L. & POL'Y 1 (1994-95).

27. See *id.*

28. See MICHAEL J. BEAN, *THE EVOLUTION OF WILDLIFE LAW* 281, 282 (rev. ed. 1977). "The Committee was impressed by the wide support for the principle of broader and more adequate protection for marine mammals, expressed by representatives of conservation and environmental organizations, humane groups, independent scientists, state agencies and agencies of the Federal Gov-

mals and for the increased protection of these mammals in the future.<sup>29</sup>

Congress set forth broad goals for the MMPA. "[I]t is the sense of the Congress that [marine mammals] should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem."<sup>30</sup> To achieve these goals, Congress empowered the Secretary of Commerce and the Secretary of the Interior to promulgate regulations for the MMPA.<sup>31</sup> The Sec-

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ernment and others." H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4145.

29. See H.R. REP. NO. 92-707, *reprinted in* 1972 U.S.C.C.A.N. 4144.

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interest; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

*Id.* at 4144-45. In the legislative history, Congress also expressed the inability that government has had in preventing the destruction of marine mammals. For example, the legislative history states that "another problem to which marine mammals may be inadvertently exposed is the operation of high-speed boats. Manatees and sea otters have been crippled and killed by motorboats and at present the Federal government is essentially powerless to force these boats to slow down or to curtail their operations." *Id.* at 4147. In fact, the habit of manatees' feeding in shallow areas often results in injuries from contact with boat propellers. Approximately 1,000 manatees exist in the waters surrounding Florida. The Florida Department of Natural Resources reported in 1987 that 113 manatees were killed by high-speed boats; in 1988, 133 manatees were killed; in 1989, 160 manatees were killed; and in 1990, 200 manatees were killed. Many experts have predicted that the manatee could become extinct by the end of this decade. See Ellen Michaud, *Florida's Refuge for the Manatee*, N.Y. TIMES, Dec. 8, 1991, at 16.

30. MMPA, 16 U.S.C. § 1361(6).

31. See MMPA, 16 U.S.C. § 1362(11).

The term "Secretary" means - (A) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to members of the order *Cetacea* and members, other than walruses, of the order *Pinnipedia*, and (B) the Secretary of the Interior as to all responsibility, authority,

retary of Commerce, through the National Marine Fisheries Service (NMFS), implements the Act with regard to *cetaceae*<sup>32</sup> and *pinnipedia*<sup>33</sup> (excluding walruses) members.<sup>34</sup> All other marine mammals (manatees, polar bears, dugongs, sea otters, and walruses) are the responsibility of the Secretary of the Interior.<sup>35</sup> Additionally, an independent advisory board, the Marine Mammal Commission, was created to assess the current status of marine mammal stocks and to review the efficacy of marine mammal protection programs.<sup>36</sup>

Numerous court opinions have given a broad interpretation to the goals of the MMPA as set forth by Congress. In *Committee for Humane Legislation, Inc. v. Richardson*,<sup>37</sup> various environmental groups challenged the legality of a permit allowing purse-seine fishing for yellowfin tuna "on porpoise."<sup>38</sup> The district court voided the permit and the United States Court of Appeals, District of Columbia Circuit affirmed.<sup>39</sup> In affirming the district court's decision, the court of appeals agreed that "the [Marine Mammal Protection] Act

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funding, and duties under this chapter with respect to all other marine mammals covered by this chapter. *Id.*

32. *Cetaceans* are "of a group of hairless, fishlike water mammals with paddlelike forelimbs: whales, porpoises, and dolphins are *cetaceans*." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 298 (2d ed. 1983) (emphasis added).

33. *Pinnipedia* are defined as "a suborder of aquatic carnivorous mammals, having flippers, including the seals and walruses." *Id.* at 1365.

34. See BEAN, *supra* note 28, at 284.

35. See *id.*

36. See *id.* The Marine Mammal Commission was set up as a three member group with their primary function being to review existing and proposed programs that affect marine mammals. The Commission is to propose any changes deemed necessary. "This Commission would be aided in its efforts by a nine-member Scientific Advisory Committee composed of members qualified to review management and research programs and, if necessary, to carry out its own search." H.R. REP. NO. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144, 4154.

37. 540 F.2d 1141 (D.C. Cir. 1976).

38. See *id.* "On porpoise" refers to a common method of purse-seine fishing. Dolphins swim on the surface of the water above schools of yellowfin tuna. Thus, fishermen place seine nets where the dolphins are swimming in order to catch the yellowfin tuna swimming below them. See MILLER, *supra* note 3, at 379. See also *supra* note 4 and accompanying text for a discussion on purse-seine fishing.

39. See *Comm. for Humane Legislation*, 540 F.2d at 1148.

was to be administered for the benefit of protected species rather than for the benefit of commercial exploitation."<sup>40</sup>

Similarly, in *Kokechik Fishermen's Ass'n v. Secretary of Commerce*,<sup>41</sup> the Circuit Court of the District of Columbia granted a preliminary injunction enjoining the Secretary of Commerce from issuing a permit to allow foreign commercial fishermen to "take" salmon from U.S. waters without first determining the extent to which certain seals would be affected by the fishing.<sup>42</sup> When discussing the MMPA, the court noted that Congress effected a moratorium on the "taking" of marine mammals "because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the ecosystems they inhabit."<sup>43</sup> Additionally, the court stated that "[t]he MMPA does not allow for a Solomonian balancing of the animals' and fisheries' interests such as the Secretary attempted. The interest in maintaining healthy populations of marine mammals comes first and the Secretary cannot ignore the fur seals."<sup>44</sup> Therefore, the court held that issuing a permit would be contrary to the requirements of the MMPA.<sup>45</sup>

Furthermore, the Ninth Circuit, the same circuit that decided *Hayashi*, has purported broad goals for the MMPA.<sup>46</sup> In *Balelo v. Baldridge*, the plaintiffs challenged the validity of a regulation that required vessel owners to consent to the placement of observers on their vessels to take notes on the incidental "takings" that occurred on the vessel.<sup>47</sup> In determining that the regulation was valid, the *Balelo* court inter-

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40. *Id.*

41. 839 F.2d 795 (D.C. Cir. 1988).

42. *See id.* at 796.

43. *Id.* at 801.

44. *Id.* at 802.

45. *See Kokechik Fishermen's Ass'n*, 839 F.2d at 802.

46. *See Balelo v. Baldridge*, 724 F.2d 753 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984).

47. *See id.* Regulations, promulgated by the Department of Commerce, require a "vessel certificate holder of any certified vessel" to "allow an observer duly authorized by the Secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations . . . ." Taking and Related Acts Incidental to Commercial Fishing Operations, 50 C.F.R. § 216.24(f)(1) (1996).



puted Congress' overriding purpose in enacting the MMPA to be the protection of marine mammals.<sup>48</sup> In a compelling concurrence, Judge Nelson emphasized that "[i]f the world loses genetic diversity, it has truly suffered irreparable harm. Marine mammals have long been threatened by the onslaught of technology; if we must take drastic steps to avoid further encroachment, so be it."<sup>49</sup>

The MMPA is a relatively lengthy, complex statute; the provision relating to the *Hayashi* case and the general deterrence Amendment, the "taking" provision, is a fundamental element of the Act.<sup>50</sup> The MMPA created a moratorium on the taking and importation of marine mammals and marine mammal products.<sup>51</sup> The prohibition against "taking" is broad. "Take" is defined as "to harass, hunt, capture, kill, or attempt to harass, hunt, capture, or kill any marine mammal."<sup>52</sup> Enacted regulations further define the term "take."<sup>53</sup> The inclusion of "harassment" within the scope of the definition of "take" evinces an intent to prohibit even unintentional acts that adversely affect marine mammals.<sup>54</sup> No previous federal wildlife law had used such a broad understanding of "taking."<sup>55</sup>

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48. See *Balelo*, 724 F.2d at 756.

49. *Id.* at 768.

50. See BEAN, *supra* note 28, at 286.

51. See MMPA, 16 U.S.C. § 1371.

52. *Id.* § 1362(12).

53. Pursuant to the regulation, [t]ake means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

50 C.F.R. § 216.3 (1995).

54. See BEAN, *supra* note 28, at 286. "According to the House Committee Report, '[t]he act of taking need not be intentional: the operation of motor boats in waters in which these animals are found can clearly constitute harassment.'" *Id.* at n.21 (citing H.R. REP. NO. 92-707, *reprinted in* 1972 U.S.C.C.A.N. 4144, 4155).

55. See *id.* at 286.

A number of exceptions<sup>56</sup> to the moratorium on "taking" marine mammals were developed by Congress in an effort to offset the adverse effect of the MMPA on the commercial fishing industry,<sup>57</sup> as well as to allow for continued scientific research and public display of mammals.<sup>58</sup> Additionally, there is an exemption for the taking of marine mammals by Alaskan natives.<sup>59</sup>

To punish violators of the MMPA, Congress included penalty provisions in the Act.<sup>60</sup> Penalties for violating any provision of the MMPA can be either civil or criminal.<sup>61</sup> Additionally, there is a provision for the seizure and forfeiture of cargo which is employed in unlawfully taking a marine mammal.<sup>62</sup> Congress also incorporated a provision authorizing

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56. Section 1371 of the MMPA provides exceptions for "taking" marine mammals.

Except as provided in subparagraphs (B) and (C), the provisions of this Act shall not apply to the use of measures — (i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch; (ii) by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property; (iii) by any person, to deter a marine mammal from endangering personal safety; or (iv) by a government employee, to deter a marine mammal from damaging public property, so long as such measures do not result in the death or serious injury of a marine mammal.

MMPA, 16 U.S.C. § 1371(a)(4)(A).

57. See *Hayashi*, 22 F.3d at 870.

58. See MMPA, 16 U.S.C. § 1371(a)(1)-(2).

59. The exemption for Alaskan natives allows a "taking" for two purposes: (1) for subsistence purposes; and (2) for creating and selling authentic native articles of handicrafts and clothing. The latter exemption is restricted to certain terms, and both exemptions do not apply to acts conducted in a wasteful manner. See *id.* § 1371(b).

60. See *id.* § 1375.

61. See *id.* § 1375(a)(1), (b).

(a)(1) Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation . . . (b) Any person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both.

*Id.*

62. See MMPA, 16 U.S.C. § 1376(a)-(b).

the payment of an award, up to \$2,500, to any person who furnishes information that leads to a conviction under the MMPA.<sup>63</sup>

## B. Administrative Decisions Interpreting the "Taking" Provision

### 1. *In re David Gerald Patterson*<sup>64</sup>

In 1980, the Department of Commerce brought a civil penalty proceeding under the MMPA<sup>65</sup> against David Gerald Patterson alleging that he unlawfully took one or more seals by shooting at them.<sup>66</sup> Patterson and a friend were attempting to secure a spot for fishing when a California Fish and Game warden observed Patterson firing a gun at harbor seals.<sup>67</sup> Both shots hit the water near the seals, but whether any seal was actually hit was disputed.<sup>68</sup>

The Administrative Law Judge (ALJ) presiding over the case found that the alleged violation occurred as charged.<sup>69</sup> In his analysis, the ALJ scrutinized the definition of "take" and determined that regardless of whether Patterson actually hit any seal, the seals were disturbed and molested by the scattered shotgun pellets in their vicinity.<sup>70</sup> Thus, David Patterson was assessed a penalty of \$1,000.<sup>71</sup>

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(a) Any vessel or other conveyance subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall have its entire cargo or the monetary value thereof subject to seizure and forfeiture . . . (b) Any vessel subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall be liable for a civil penalty of not more than \$25,000 . . .

*Id.*

63. *See id.* § 1376(c).

64. 2 O.R.W. 249 (NOAA 1980).

65. MMPA, 16 U.S.C. §§ 1361-1407.

66. *See Patterson*, 2 O.R.W. at 249.

67. *See id.* at 250.

68. *See id.*

69. *See id.*

70. *See id.* at 251.

71. *See Patterson*, 2 O.R.W. at 258. Nine hundred dollars of this penalty was suspended for two years on the condition that Patterson commit no further violations of the MMPA during that period. *See id.* at 256. The motivation behind the compassionate penalty stemmed from Patterson's good faith belief that

## 2. *In re Grady L. Oliver*<sup>72</sup>

Another penalty proceeding brought under the "taking" provision charged Grady L. Oliver with three separate counts of shooting at seals or sea lions on three occasions during a charter fishing excursion.<sup>73</sup> A sport fisherman who was on the same boat as Oliver testified that Oliver fired a double-barrelled shotgun at sea lions on three separate occasions.<sup>74</sup> At the time of the shooting, the vessel was approximately fifty feet from the sea lions and the shots struck in the immediate vicinity of the sea lions.<sup>75</sup> Oliver testified that he was attempting to frighten the sea lions away from the vessel.<sup>76</sup> Oliver also was attempting to dissuade the sea lions from chasing away the salmon.<sup>77</sup>

In considering the language and purpose of the MMPA, the ALJ concluded that Oliver's actions constituted a violation of the MMPA.<sup>78</sup> The ALJ concluded that Oliver's act, and similar acts of using a lethal weapon to discourage natural predation, was an impermissible harassment.<sup>79</sup> The ALJ acknowledged that marine mammals have numerous body cavitiessuscepting them to a significant chance of shotgun pellets entering and injuring the mouth, nostrils, eyes, or blowhole of the mammal.<sup>80</sup> Oliver was assessed a \$15,000 penalty.<sup>81</sup>

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he was accorded the exemption of a Native American, and the belief that Native Americans could hunt and fish. The ALJ considered this civil rights assertion a powerful and emotional issue. *See id.*

72. 3 O.R.W. 236 (NOAA 1983).

73. *See id.*

74. *See id.* at 237.

75. *See id.*

76. *See id.*

77. *See Oliver*, 3 O.R.W. at 238.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 240.

### 3. *In re Christopher Munkers*<sup>82</sup>

In another case, Christopher Munkers was alleged to have "taken" a herd of nearly seventy seals by overt actions when he caused them to retreat into the ocean.<sup>83</sup> A California Department of Fish and Game biologist, who was performing a harbor seal tally, observed Munkers waving his arms and approaching the seals, causing them to slip into the water.<sup>84</sup>

In his decision, the ALJ held that Munkers did unlawfully "take", by harassment, approximately sixty marine mammals<sup>85</sup> by intentionally approaching them and causing them to retreat into

the sea.<sup>86</sup> Christopher Munkers was fined \$200 for his actions.<sup>87</sup>

### C. The 1994 Amendments to the MMPA

In April of 1994, seven months after the *Hayashi* decision, the MMPA was amended to allow the use of general deterrence measures on marine mammals to protect a person, property, fishing gear, or a catch.<sup>88</sup> This Amendment was a direct result of the legal dispute in the *Hayashi* case.<sup>89</sup> Section 4(a)(4) of the Amendment reads:

(A) Except as provided in subparagraphs (B) and (C), the provisions of this Act shall not apply to the use of measures—(i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch; (ii) by the owner of other

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82. 4 O.R.W. 707 (NOAA 1986).

83. *See id.* at 707-08.

84. *See id.* at 708-09.

85. The Department of Commerce alleged the "taking" of seventy marine mammals. *See id.* at 707. However, the ALJ concluded that only approximately sixty seals were taken. *See id.* at 712.

86. *See Munkers*, 4 O.R.W. at 712.

87. *See id.* at 713.

88. *See MMPA Amendments of 1994*, *supra* note 18, Pub. L. No. 103-238, 108 Stat. 532, 533.

89. *See Chmael*, *supra* note 19, at 20.

private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property; (iii) by any person, to deter a marine mammal from endangering personal safety; or (iv) by a government employee, to deter a marine mammal from damaging public property, so long as such measures do not result in the death or serious injury of a marine mammal. (B) The Secretary shall, through consultation with appropriate experts, and after notice and opportunity for public comment, publish in the Federal Register a list of guidelines for use in safely deterring marine mammals . . . . (C) If the Secretary determines, using the best scientific information available, that certain forms of deterrence have a significant adverse effect on marine mammals, the Secretary may prohibit such deterrent methods, after notice and opportunity for public comment, through regulation under this Act.<sup>90</sup>

On April 28, 1995, proposed regulations were set forth in the *Federal Register* that would allow citizens to deter marine mammals from the following: damaging fishing gear and catch, damaging private property, endangering public safety, or damaging public property.<sup>91</sup> The proposed regulations contain preliminary versions of guidelines for safely deterring marine mammals and preliminary versions of guidelines for deterrence measures that would be prohibited under the MMPA.<sup>92</sup>

The deterrence regulations are divided into three categories: "passive" deterrence measures, "preventive" deterrence measures, and "reactive" deterrence measures.<sup>93</sup> The "passive" deterrence measures were designed to prevent marine mammals from gaining access to property, people, or fishing

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90. MMPA Amendments of 1994, *supra* note 18, Pub. L. No. 103-238, 108 Stat. 532, 533.

91. See Taking and Importing of Marine Mammals; Deterrence Regulations and Guidelines, 60 Fed. Reg. 22,345 (1995) (to be codified at 50 C.F.R. § 216) [hereinafter Taking and Importing of Marine Mammals].

92. See *id.*

93. See *id.* at 22,345-46.

gear or catch;<sup>94</sup> the "preventive" deterrence measures were fashioned to dissuade marine mammals from interacting with property, people, or fishing gear or catch;<sup>95</sup> and the "reactive" deterrence measures were created to stop a dangerous or damaging interaction.<sup>96</sup>

To aid in the proper use of the various deterrence measures, the proposed rules state that the acts of deterrence should not: "(1) [r]esult in a separation of a female marine mammal from its unweaned offspring; (2) break the skin of a marine mammal; (3) be directed at the head or eyes of a marine mammal; or (4) be used on *pinnipeds* hauled out on unimproved private property (i.e. a rock, ledge, or beach)."<sup>97</sup> Beyond these four cautions, the proposed rules include a caveat that any deterrence resulting in serious injury or death to a marine mammal is unacceptable and would violate the MMPA.<sup>98</sup>

### III. *United States v. Hayashi*<sup>99</sup>

#### A. Facts

David Hayashi and his son were fishing for Ahi<sup>100</sup> off the coast of Hawaii on January 24, 1991.<sup>101</sup> At one point during the fishing trip, four porpoises began to chase and eat the

94. See *id.* at 22,345. The proposed rules for "passive" measures would include the use of predator nets, rigid fencing, or other fixed barriers. See *id.* at 22,346.

95. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. 22,346. These measures would include using underwater acoustic devices that generate sounds known to be annoying, certain light explosives to startle marine mammals, or boat hazing (boat noise or using nets to block marine mammal approach). See *id.*

96. See *id.* at 22,346. Included under "reactive" measures are the following: prodding a marine mammal with blunt poles, pushing or herding an animal with plywood or canvas, spraying mammals with water, and using noisemakers and light explosives. See *id.*

97. *Id.*

98. See *id.*

99. 22 F.3d 859.

100. Ahi is the Hawaiian word for tuna. See Brief for the Plaintiff-Appellee at 1, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 91-10044) [hereinafter Appellee's Brief].

101. See *Hayashi*, 22 F.3d at 861.

tuna off the Hayashis' lines.<sup>102</sup> In an attempt to deter the porpoises from biting at the tuna, David Hayashi fired two rifle shots into the water, to the immediate rear of the porpoises.<sup>103</sup> At the time of the shooting, Hayashi's boat was approximately twenty-five yards from the porpoises.<sup>104</sup> The four porpoises were not hit by the rifle shots.<sup>105</sup> Upon reeling the fishing lines in, Mr. Hayashi and his son discovered that a portion of one of the tuna had been eaten.<sup>106</sup>

Later, a state enforcement officer notified the National Marine Fisheries Service (NMFS) that someone had fired shots at dolphins from Hayashi's boat.<sup>107</sup> In February 1991, NMFS agents interviewed Hayashi and his son and took written statements from them.<sup>108</sup>

## B. Procedural History

In April of 1991, Hayashi was charged by the United States Attorney's Office with "knowingly taking" a marine mammal in violation of the MMPA.<sup>109</sup> Thereafter, the parties consented to proceed on stipulated facts before a Magistrate Judge.<sup>110</sup> The stipulated facts consisted of the following: the Hayashis' statements, the NMFS report, and notes from the interviews with Hayashi and his son.<sup>111</sup> Hayashi's motion to dismiss for unconstitutional vagueness was denied by the Magistrate Judge, and Hayashi was subse-

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102. *See id.*

103. *See* Appellee's Brief at 1, *Hayashi* (No. 91-10044).

104. *See id.* at 2.

105. *See Hayashi*, 22 F.3d at 861.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* The "taking" provision provides: "[i]t is unlawful . . . for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States . . ." MMPA, 16 U.S.C. § 1372(a)(2)(A).

110. *See Hayashi*, 22 F.3d at 861.

111. *See id.*



quently convicted.<sup>112</sup> The Magistrate Judge sentenced Hayashi to one year of unsupervised probation.<sup>113</sup>

Upon conviction, the defendant appealed to the district court on the grounds that the statute was unconstitutionally vague and that the evidence was insufficient.<sup>114</sup> The district court affirmed the defendant's conviction<sup>115</sup> and ruled that the statute was not unconstitutionally vague and that there was sufficient evidence to prove Hayashi's guilt beyond a reasonable doubt.<sup>116</sup> Following the affirmance, the defendant filed a timely appeal to the United States Circuit Court of Appeals, Ninth Circuit, challenging the lower courts' findings on both grounds.<sup>117</sup>

The court of appeals reversed the lower courts' decisions, holding that the act of firing rifle shots into the water to divert dolphins from fishing lines could not be the basis of criminal liability under the MMPA.<sup>118</sup> Thus, there was insufficient evidence to support the conviction, and the issue of unconstitutional vagueness was not addressed.<sup>119</sup> The case was decided on September 27, 1993, with an Order Amending Opinion on Denial of Rehearing and Rehearing *En Banc* on April 26, 1994.<sup>120</sup>

112. *See id.*

113. *See* Defendant-Appellant's Opening Brief at 1, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 92-10044) [hereinafter Appellant's Opening Brief].

114. *See Hayashi*, 22 F.3d at 861. *See supra* notes 15-16 and accompanying text for a further discussion of the grounds upon which Hayashi's appeal was based.

115. *See id.*

116. *See* Appellant's Opening Brief at 1-2, *Hayashi* (No. 92-10044).

117. *See id.* at 2.

118. *See Hayashi*, 22 F.3d at 860-61. *See infra* notes 148-53 and accompanying text for an explanation of why criminal charges against Hayashi were not appropriate.

119. *See Hayashi*, at 861 n.1.

120. *See id.* at 859.

With these amendments, a majority of the panel has voted to deny the appellee's petition for rehearing. An active judge made a *sua sponte* request to rehear the case *en banc*. The government also requested *en banc* rehearing in its response papers. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. FED. R. APP. P. 35. The

C. The Court of Appeals' Majority Decision<sup>121</sup>

In the majority's discussion of the charges against Hayashi for violating the "takings" provision of the MMPA,<sup>122</sup> the court explained that penalties under the "takings" provision can be either civil or criminal;<sup>123</sup> however, a criminal conviction requires a mens rea of "knowingly".<sup>124</sup> Hayashi was charged under the MMPA for "taking" a marine mammal in U.S. waters.<sup>125</sup>

According to the MMPA, "take" is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal."<sup>126</sup> The government agreed with the court of appeals that "harass" or "attempt to harass" were the only possible terms that may apply to the defendant's actions.<sup>127</sup> Neither the statute nor the regulations implementing the statute defines "harass", but the definition of "take" is extended in the implementing regulations to include: "the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal . . .".<sup>128</sup> The court of appeals decided that the "disturbing or molesting" clause was the only provision that may be applied to the defendant's actions, and it subsequently concluded that the regulation does not reach Hayashi's conduct.<sup>129</sup>

Before supporting its conclusion, the court of appeals addressed errors that were committed by both parties and the

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petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.

*Id.* at 860.

121. *Id.* at 861-66.

122. See MMPA, 16 U.S.C. § 1372(a)(2)(A).

123. See *supra* note 61-62 and accompanying text for a discussion of the penalty provisions in the MMPA.

124. See MMPA, 16 U.S.C. § 1375(b). "Any person who knowingly violates any provision of this subchapter . . . shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both." *Id.*

125. See *Hayashi*, 22 F.3d at 861.

126. MMPA, 16 U.S.C. § 1372.

127. See *Hayashi*, 22 F.3d at 861.

128. 50 C.F.R. § 216.3.

129. See *Hayashi*, 22 F.3d at 861-62.

lower courts.<sup>130</sup> First, the parties employed the incorrect regulatory definition of a "taking" under the MMPA, and subsequently, this definition was incorrectly adopted by both the Magistrate Judge and the district court.<sup>131</sup> The United States Attorney's Office incorrectly set forth the regulatory definition of "harass" at 50 C.F.R. § 17.3.<sup>132</sup> This regulation defines "harass" as: "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include . . . breeding, feeding, or sheltering."<sup>133</sup> The government also included the regulatory definition of "harass" at 50 C.F.R. § 216.3<sup>134</sup> in its brief, but argued that § 17.3 was more appropriate.<sup>135</sup> Following the plaintiff's lead, the defendant promoted this regulatory definition of "harass" as well, and the lower courts adopted the definition in its analysis.<sup>136</sup>

The use of 50 C.F.R. § 17.3 was error because it is a regulation issued by the National Fish and Wildlife Service, under the Department of the Interior, for implementing the Endangered Species Act.<sup>137</sup> This error was compounded by the fact that § 17.3 includes negligent conduct in the definition, while the information charged Hayashi with "knowingly" taking.<sup>138</sup> Thus, the district court's conclusion rested on the erroneous belief that a criminal conviction, under the MMPA, could be found by negligent conduct.<sup>139</sup> The court of

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130. *See id.* at 862.

131. *See id.*

132. *See id.*

133. 50 C.F.R. § 17.3 (1995).

134. *See supra* note 53 for the regulatory definition of "take" that applies to the MMPA.

135. *See Hayashi*, 22 F.3d at 862.

136. *See id.*

137. *See id.* Endangered Species Act (ESA) §§ 2-18, 16 U.S.C. §§ 1531-44 (1994).

138. *See Hayashi*, 22 F.3d at 863.

139. *See id.*

In addressing Hayashi's insufficiency claim, the district court held that, '[f]iring the rifle in waters containing porpoises was a negligent act that created a likelihood of injury to the porpoises.' Although it went on to suggest that the evidence also showed an intentional attempt to stop the porpoises from eating, the district

appeals conceded that § 17.3 could be useful authority, but only the facially applicable regulatory definition could be used to convict Hayashi.<sup>140</sup> Essentially, the defendant was convicted under the wrong regulatory definition and the incorrect mens rea.

Although the previous decisions were marred by error,<sup>141</sup> the court of appeals decided to continue its analysis rather than dismiss the case; it was able to do so because the case was not tried before a jury, and so there was a clear factual record to review without perpetuating the fundamental errors previously made. Therefore, the court considered whether there was sufficient evidence to convict the defendant.<sup>142</sup>

Judge Reinhardt and the majority found the terms "harass", "disturb", and "molest" to be rather general terms that must be considered in their context.<sup>143</sup> Following the rule of statutory construction, *noscitur a sociis*,<sup>144</sup> which states that words in a list should be given related meaning, the court of appeals grouped "harass" with "hunt", "capture", and "kill".<sup>145</sup> Since the court of appeals determined "hunt", "capture", and "kill" to be "direct intrusions" upon the normal ac-

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court's erroneous belief that negligence could support an MMPA criminal conviction tainted its consideration of Hayashi's appeal.

*Id.*

140. See *id.* at 863-64.

141. In addition to the errors that the court dealt with, there was a controversy over who represented the United States. The United States Attorney's Office filed a brief and argued the case in the court of appeals; however, upon reaching the court of appeals, other branches of the Department of Justice are to represent the United States. Telephone Interview with Edward H. Kubo, Assistant U.S. Attorney, District of Hawaii (Oct. 8, 1995).

142. See *Hayashi*, 22 F.3d at 863.

143. See *id.* at 864.

144. See *id.* (citing Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977)). *Noscitur a sociis* is the doctrine of statutory construction that determines the meaning of a word from its accompanying words. See BLACK'S LAW DICTIONARY 956 (6th ed. 1991).

145. See *Hayashi*, 22 F.3d at 864.

The latter three each involve direct and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, 'harassment,' to constitute a

tivities of a marine mammal, it held that for "harassment" to reach the level of a "taking", it must entail a "direct intrusion" similar to the other terms.<sup>146</sup> The court of appeals furthered this "direct intrusion" reasoning by making a common sense argument that "take" strongly suggests a serious disruption of the mammal's routine.<sup>147</sup>

The majority opined that its deduction comports with 50 C.F.R. § 216.3 and the MMPA because the underlying concern of the prohibition against disturbing mammals was to protect them in nature, not when they are endangering life or property.<sup>148</sup> "Interpreting the act and regulations otherwise, as prohibiting isolated interference with abnormal marine mammal activity, would lead to absurdity . . . . Nothing could legally be done to save a modern-day Jonah from the devouring whale, or to deter a rampaging polar bear from mauling a child."<sup>149</sup>

The court of appeals concluded that the porpoises were engaged in an act<sup>150</sup> that was not part of their normal eating habit,<sup>151</sup> and the defendant's firing of rifle shots was not sig-

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'taking' under the MMPA, must entail a similar level of direct intrusion.

*Id.*

146. *See id.*

147. *See id.* at 864. "Interpreting 'harassment' under the MMPA to involve a direct and significant intrusion also comports with a common understanding of the term 'take,' of which 'harass' is simply one form. To 'take' a marine mammal strongly suggests a serious diversion of the mammal from its natural routine." *Id.* In further support of their reasoning, the court used the legislative history that refers to marine mammals that "have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities." *See Hayashi*, 22 F.3d at 864 n.12 (quoting H.R. REP. NO. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144, 4144). The court used this quote to reason that a "taking" must be a seriously intrusive act. *See id.*

148. *See id.* at 865.

149. *Id.*

150. The porpoises were eating or attempting to eat the tuna being reeled in by the Hayashis' fishing lines. *See id.* at 861.

151. Human feeding of marine mammals potentially could lead to dangerous modifications of their normal feeding patterns because they might become dependent upon feeding off of fishing lines. *See Feeding Populations of Marine Mammals in the Wild*, 56 Fed. Reg. 11,693, 11,696 (1991), codified at 50 C.F.R. 216.

nificant enough to be a "taking".<sup>152</sup> Therefore, criminal liability could not be attached to the defendant.<sup>153</sup>

#### D. The Court of Appeals' Dissent<sup>154</sup>

In his dissent, Circuit Judge Browning deemed the majority's decision an unjustifiable restriction of the breadth of the MMPA to avoid subjecting Hayashi to a criminal prosecution that the majority regarded as unreasonable.<sup>155</sup> Judge Browning saw this restriction as ignoring the purpose of the MMPA and weakening the MMPA's public policy as set forth by Congress.<sup>156</sup>

While the majority regarded a conviction of Hayashi as unreasonable, Judge Browning regarded the decision as implicating much more than Hayashi's freedom; it involved defining the scope of the Secretary's authority to regulate activities that affect marine mammals.<sup>157</sup> The means by which the Secretary ensures the protection and survival of marine mammals stems directly from the "taking" provision.<sup>158</sup> The restrictive view that the majority adopted regarding the term "take" curtails the core provision of the MMPA, the "takings" provision, as envisioned by Congress when the MMPA was enacted in 1972.<sup>159</sup>

Judge Browning explained in his analysis of the MMPA's legislative history, statutory language, and implementing regulations that these provisions all point to a sufficiently broad interpretation of "take" which would encompass the defendant's act of deliberately firing his rifle near porpoises.<sup>160</sup> Congress' goal in enacting the MMPA was "the optimum protection of the marine mammals affected by the bill."<sup>161</sup>

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152. See *Hayashi*, 22 F.3d at 865.

153. See *id.* at 866.

154. *Hayashi*, 22 F.3d at 866-71 (Browning, Cir. J., dissenting).

155. See *id.* at 866.

156. See *id.*

157. See *id.*

158. See *id.* at 867.

159. See *Hayashi*, 22 F.3d at 867 (Browning, Cir. J., dissenting).

160. See *id.*

161. See *id.* (citing H.R. REP. NO. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144, 4147-48).

Terms such as "harass" were used to broaden the definition of "taking".<sup>162</sup> In fact, Judge Browning noted that the Commerce Department proposed to eliminate "harassment" for being too broad, but Congress rejected that proposal.<sup>163</sup>

After discussing the breadth of the MMPA, Judge Browning rejected the reasoning behind the majority decision. First, the dissent dismissed the majority's reliance on the rule of statutory construction, *noscitur a sociis*,<sup>164</sup> which states that words in a list should be given a related meaning. Judge Browning pointed out that a word must have a character of its own that is not submerged by its association with other words.<sup>165</sup> He reasoned that "harass", "hunt", "capture", and "kill" all relate to varying degrees of intrusiveness, and that therefore, the word "harass" must have a specific meaning of its own.<sup>166</sup> Browning also pointed out that when a rule of construction conflicts with the clear intent of Congress, the rule of construction should be ignored.<sup>167</sup> Since the legislative history and statutory language indicate a broad interpretation of the "take" provision, the application of *noscitur a sociis* was in direct conflict with Congress' intent and was, therefore, an erroneous employment of statutory construction.<sup>168</sup>

Judge Browning found further support for his argument that a "taking" does not require a "direct and significant intrusion," as the majority suggested, from 50 C.F.R. § 216.3.<sup>169</sup>

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162. See *id.* at 867.

163. See *id.* at 868 (citing H.R. REP. NO. 92-707, reprinted in U.S.C.A.N. 4144, 4157).

164. See *supra* note 144 and accompanying text.

165. See *Hayashi*, 22 F.3d at 868 n.3 (Browning, Cir. J., dissenting) (citing *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923)).

166. See *id.* at 868.

167. See *id.* (citing *Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990)).

168. See *id.* at 868 n.3 (Browning, Cir. J., dissenting).

169. See *id.* at n.4. 50 C.F.R. § 216.3 reads, in part:

taking includes: to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill, any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing

A restraint or detention, no matter how temporary, is a "taking", but does not seem to be a "direct and significant intrusion."<sup>170</sup> The regulatory inclusion of the collection of dead animals is also in conflict with the majority's requirement of a "direct and significant intrusion" on life-sustaining activities.<sup>171</sup> Additionally, Judge Browning noted, the tagging of a marine mammal is a humane means of tracking mammals with minimal intrusion on their activities, yet it is also covered in the regulatory definition of "take".<sup>172</sup> Therefore, Judge Browning concluded that a "taking" under the MMPA is much less restrictive than the majority's view.<sup>173</sup>

The dissent also found the majority's opinion that the "take" provision only applies to normal mammal behavior, and their subsequent characterization of the porpoises' actions as abnormal, to be unfounded.<sup>174</sup> Judge Browning opined that restricting the scope of the "taking" definition to "normal marine mammal behavior" would require courts and regulators to formulate a system of rules around the elusive concept of "normal marine mammal behavior."<sup>175</sup> Furthermore, the porpoises in question were not behaving abnormally, for they were "merely competing with Hayashi for the same catch."<sup>176</sup> One of the main purposes of the MMPA is to protect marine mammals from the harm created by the fishing industry.<sup>177</sup> Excluding activities such as those of the

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or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

50 C.F.R. § 216.3.

170. See *Hayashi*, 22 F.3d at 868-69 (Browning, Cir. J., dissenting).

171. See *id.*

172. See *id.*

173. See *id.* at 869 n.5.

174. "[The porpoises] were merely competing with Hayashi for the same catch." *Id.* at 869.

175. See *Hayashi*, 22 F.3d at 869 (Browning, Cir. J., dissenting).

176. See *id.*

177. See *id.* (citing H.R. REP. NO. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144, 4147-48). For a discussion of the purpose of the MMPA, see *supra* notes 23-29 and accompanying text.



porpoises<sup>178</sup> in the case at bar frustrates this main purpose of the MMPA.<sup>179</sup>

Further support for Circuit Judge Browning's rejection of the majority's holding can be found in the "taking" exemptions and exceptions codified in the MMPA and its regulations.<sup>180</sup> A 1988 Amendment to the MMPA gave commercial fishermen an exemption<sup>181</sup> to "take" marine mammals to protect catch, gear, or person, as long as the action was "not expected to cause death or injury to a marine mammal."<sup>182</sup> Judge Browning opined that the existence of this statutory and regulatory exemption for commercial fishermen contradicts the majority's decision.<sup>183</sup> Hayashi shot at the porpoises to protect his catch.<sup>184</sup> The dissent stated that if an act to protect catch was not prohibited, the Secretary would not have promulgated an exception to such conduct.<sup>185</sup> Judge Browning noted that, in essence, the majority extended the exemption to all fishermen, not just commercial fishermen as the Secretary authorized.<sup>186</sup> It is not within the court's power to apply a commercial fisherman's exemption to a non-commercial fisherman.<sup>187</sup> Judge Browning noted that Congress' purpose in creating the MMPA with exceptions was to protect

178. See *supra* note 150 for a description of the porpoises activities.

179. See *Hayashi*, 22 F.3d at 869 (Browning, Cir. J., dissenting).

180. The Secretary was given the power to promulgate exceptions and exemptions where necessary. See MMPA, 16 U.S.C. § 1371(3)(A). Permits allowing "takings" may be issued for commercial fishermen, scientific purposes, public display, and Alaskan natives. See *id.* §§ 1374, 1371(b). Aside from these exceptions, all "takings" are barred by the MMPA. See *id.* § 1371.

181. See *supra* note 56 and accompanying text for a discussion of the exemptions to the "takings" provision of the MMPA.

182. *Hayashi*, 22 F.3d at 870 (citing 50 C.F.R. §§ 229.6(c)(5), 229.7(d)) (Browning, Cir. J., dissenting).

183. See *id.* at 870.

184. Although Hayashi was a part-time commercial fisherman, he did not claim that his activities fell under the commercial fisherman exemption, and the record did not permit a determination of that question. See *id.*

185. See *id.*

186. See *id.*

187. "It is irrelevant that the majority extends to non-commercial fishermen only 'some portion of the protections' afforded to commercial fishermen by Congress and the Secretary, or that the protections the majority extends to non-commercial fishermen are moderate and reasonable, if indeed they are." *Hayashi*, 22 F.3d at 870 (Browning, Cir. J., dissenting).

dolphins without completely destroying the tuna industry.<sup>188</sup> Non-commercial fishing was not included in the exceptions because it does not involve a large economic interest that Congress wished to protect.<sup>189</sup>

Judge Browning concluded his dissent by noting that the Secretary has the authority to strike a balance between the protection of marine mammals and the health of the commercial fishing economy.<sup>190</sup> However, the majority's approach of adding an exemption to non-commercial fishermen renders the Secretary's power to implement the MMPA meaningless.<sup>191</sup> Browning concluded by stating that "[t]he majority's view is bad policy as well as bad law."<sup>192</sup>

#### IV. Analysis of the Decision

The most striking problem with the *Hayashi* decision is that the defendant's acts appear to be a clear violation of the MMPA. "[T]he Defendant's shots were done with an intent to 'disturb' the porpoises because he admitted that he intended to 'scare' them."<sup>193</sup> The MMPA's enacting regulations clearly define "take" as "to disturb or molest."<sup>194</sup> The fear, the increased heart rate, and the feeling of uncertainty when four rifle shots explode into the water would be a disturbing event to any human being. Certainly, a porpoise would be just as disturbed.

Administrative law judges consistently have held that firing a weapon at a marine mammal, similar to *Hayashi's*

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188. *See id.*

189. *See id.* at 871.

190. *See id.*

191.

The Secretary has the expertise and ability to study the effects of commercial fishing techniques on marine mammals and to expand or contract an exemption as new information evolves. Under the majority's approach, an exemption for non-commercial fishing is written into the definition of "taking," and the Secretary is powerless to alter the exemption or impose conditions or limitations upon it.

*Id.* at 870.

192. *Hayashi*, 22 F.3d at 870.

193. Appellee's Brief at 6, *Hayashi* (No. 91-10044).

194. *See* 50 C.F.R. § 216.3.

action, is a violation of the "take" provision of the MMPA.<sup>195</sup> In fact, many defendants have been convicted for actions much less disturbing than Hayashi's. For example, Christopher Munkers was fined for violating the "take" provision merely for approaching marine mammals and waving his arms.<sup>196</sup> More closely on point, Grady L. Oliver was assessed a monetary penalty after firing a shotgun at sea lions.<sup>197</sup> Just as Hayashi attempted to "scare" the porpoises, Oliver testified that he intended to "frighten" the sea lions.<sup>198</sup> David Gerald Patterson also was fined for firing shots at harbor seals.<sup>199</sup> The harbor seals were not hit by the shots, but the mere act of shooting was a harassment.

Although these actions were all administrative actions, they still involved the interpretation of the "take" provision as applied to shooting at or scaring marine mammals. It seems unreasonable that the majority failed to consider the firing of four rifle shots at a group of porpoises a "harassment" when the three aforementioned actions concluded that the shooting at and the "frightening" of marine mammals is a "harassment" in violation of the MMPA.

The majority's decision also contradicts with the MMPA's goals and purpose. "The evident purpose of the MMPA was to protect these mammals in their natural habitat."<sup>200</sup> Allowing a non-commercial fisherman to fire rifle shots at porpoises, without punishment, is far from protecting marine mammals in their natural habitat.

The majority contended that the "take" provision does not apply when marine mammals act in an abnormal manner, and that the dolphins in the *Hayashi* case were not acting pursuant to normal dolphin behavior. This contention can be refuted in two ways. First, porpoises are not acting abnormally when chasing tuna. It is commonplace for dol-

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195. See *supra* notes 64-87 and accompanying text.

196. See *Munkers*, 4 O.R.W. at 707, 709.

197. See *Oliver*, 3 O.R.W. at 240.

198. See *id.* at 237.

199. See *Patterson*, 2 O.R.W. at 249.

200. Appellee's Brief at 9, *Hayashi* (No. 91-10044).

phins and tuna to swim together.<sup>201</sup> Thus, by his actions, the defendant significantly disrupted the porpoises' normal behavioral pattern of feeding. Additionally, there is no provision in the MMPA that requires "normal" mammal behavior for the "take" provision to apply. It would be nonsensical not to use deterrent measures to protect oneself from an abnormal attack, such as deterring a rampaging polar bear from mauling a child, to which the majority compared dolphins chasing tuna.<sup>202</sup> However, the majority cannot read a requirement of normal behavior into the statute. There is too little known about marine mammal behavior for this requirement to be plausible.

If "normal" marine mammal behavior were required for the "take" provision to apply, the Commerce Department and the Department of Interior would have the unmanageable job of differentiating between normal marine mammal behavior and abnormal marine mammal behavior. In fact, part of the impetus behind the MMPA was scientists' belief that marine mammals play a vital role in the marine ecosystem.<sup>203</sup> This impetus reflects the lack of scientific certainty regarding marine mammals because it was the scientists' *belief* that led to the protection of marine mammals, not the scientists' certainty.<sup>204</sup> If scientists do not have conclusive knowledge regarding normal marine mammal behavior, then certainly the Department of Commerce and the Department of Interior would not be capable of determining what constitutes normal marine mammal behavior. Further support for this contention can be found in the MMPA provision, which specifically exempts permitted scientists from the "take" provision, so that they may continue to research and attempt to understand marine mammal behavior.<sup>205</sup>

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201. See *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991).

202. See *Hayashi*, 22 F.3d at 865.

203. See *supra* notes 25-28 and accompanying text.

204. "It is undeniable that the levels of knowledge of scientists on marine mammals are very low." H.R. REP. NO. 92-707, *reprinted in* 1972 U.S.C.C.A.N. 4144, 4152.

205. See MMPA, 16 U.S.C. § 1374(c)(3).

The majority held that a person's actions must manifest a "direct intrusion" on the activities of a marine mammal to be punishable under the "take" provision of the MMPA.<sup>206</sup> However, the requirement of a "direct intrusion" on the activities of marine mammals conflicts with the congressional intent behind the enactment of the MMPA. Additionally, this requirement creates a narrow construction of the term "take" while the goals of the MMPA provide for a broad interpretation of its provisions.<sup>207</sup> Furthermore, the MMPA's legislative history indicates that the Department of Commerce considered the MMPA definition of "take" to be too broad and proposed to delete the term "harass" from the definition of "take".<sup>208</sup> However, the MMPA's inclusion of the term shows that Congress was satisfied with the liberal construction of "take" and neglected to heed the Commerce Department's suggestion.<sup>209</sup> Additionally, the activities labelled as a "take" under 50 C.F.R. § 216.3 include many activities that result in little intrusion on marine mammal activities<sup>210</sup> and show that the regulators followed Congress' lead in affecting a liberal construction of the term "take". Thus, it can be seen that Congress set forth a broad interpretation of "take" and the majority, in *Hayashi*, unjustifiably restricted that interpretation.

Another problem with the decision is that it transgresses the concept of checks and balances. In the *Hayashi* case, the court infringed on the power of Congress, as well as on the Commerce Department's authority. By exempting *Hayashi* from the "take" provision, the majority effectively extended an exemption that was expressly granted only to commercial fishermen to non-commercial fishermen also. This action is outside the scope of the court's power and restricts the power of Congress and the Department of Commerce to implement

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206. See *Hayashi*, 22 F.3d at 865; see *supra* notes 121-53 and accompanying text.

207. See *supra* note 30 and accompanying text.

208. See H.R. REP. NO. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144, 4157, 4198-4201.

209. See MMPA, 16 U.S.C. § 1362(12).

210. See *supra* note 169 for the regulatory definition of take under 50 C.F.R. § 216.3.

amendments and regulations to the MMPA. Had the act of "taking" marine mammals not been prohibited, the Commerce Department would not have created an exception for commercial fishermen; and had Congress or the Commerce Department wished to extend such an exemption to non-commercial fishermen, it would have been expressly codified in the C.F.R. or the MMPA.

#### V. Analysis of the 1994 Amendment and Proposed Regulations

As a direct result of the *Hayashi* decision, Congress passed an amendment<sup>211</sup> to the MMPA allowing general deterrence measures to be used to protect fishing gear, catch, and personal/public property. Thus far, only the proposed regulations have been set forth by the Department of Commerce.<sup>212</sup> The proposed regulations will have the effect of undermining the goals of the MMPA because the proposed regulations are vague and ill-prepared.

The 1994 Amendment allowing the use of general deterrent measures on marine mammals is a prime example of how the 104th Congress is gutting environmental laws. For some environmental laws, such as the Endangered Species Act,<sup>213</sup> Congress has initiated an indirect attack on the law by attempting to slash the law's primary source of funding.<sup>214</sup> Another example includes the use of attaching riders to bills in order to weaken certain environmental laws.<sup>215</sup> Other times, such as with the MMPA, Congress enacts an amend-

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211. See MMPA Amendments of 1994, *supra* note 18, Pub. L. No. 103-238, 108 Stat. 532.

212. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. 22,345.

213. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44.

214. The House and Senate Spending Bill proposed to eliminate much of the Endangered Species Act's funding. See John H. Cushman, Jr., *Spending Bill Would Reverse Nation's Environment Policy*, N.Y. TIMES, Sept. 22, 1995, at A4.

215. The 104th Congress attached a rider to the National Highway System Bill (S. 440) that barred the U.S. Environmental Protection Agency from implementing a Clean Air Act program that required the use of better systems for inspecting autos for pollution. See NATURAL RESOURCES DEFENSE COUNCIL, *THE YEAR OF LIVING DANGEROUSLY: CONGRESS AND THE ENVIRONMENT IN 1995* 20 (Dec. 1995).

ment with the potential of defacing the environmental law,<sup>216</sup> and cuts the budget for the law's implementing agency.<sup>217</sup> The future of our environmental laws seems to be in jeopardy.<sup>218</sup>

Although the Amendment to allow general deterrence measures will not completely gut the MMPA, many aspects of the Amendment will hinder the progress that the MMPA has made since 1972.<sup>219</sup> It is reasonable to allow fishermen to use certain deterrent measures to protect themselves, and, in some instances, their property.<sup>220</sup> However, it seems unreasonable to allow fishermen to deter marine mammals from interfering with their catch. Defending one's person or property from damage is extremely different from defending a possible fishing catch from interference by a marine mammal. When one's person or property is in jeopardy, there is a risk of injury or death to that person; however, when a marine mammal interferes with a catch, the marine mammal is merely attempting to feed from its normal diet. Surely, if two fishermen managed to hook the same fish, it would not be acceptable for one fisherman to fire light explosives at or to hit the other fisherman. Yet, the Amendment and the proposed regulations purport to allow the average fisherman to do just that to marine mammals. Should these regulations be

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216. See MMPA Amendments of 1994, *supra* note 18, Pub. L. No. 103-238, 108 Stat. 532.

217. See *infra* notes 247-51 and accompanying text for a discussion regarding Congressional budgeting.

218. It is difficult to forecast the extent to which environmental laws, such as the MMPA, will be eviscerated, especially with Congressmen such as the House Majority Whip DeLay (R.-TEX), who has proposed to completely repeal the Clean Air Act Amendments of 1990. See H.R. 479, 104th Cong., 1st Sess. (1995). See also NATURAL RESOURCES DEFENSE COUNCIL, STATE OF NATURE (Dec. 8, 1995). DeLay also coined this year's Nobel Peace Prize, awarded to the researchers that first identified the stratospheric ozone threat, the "Nobel Ap-peacement Prize." See NATURAL RESOURCES DEFENSE COUNCIL, THE YEAR OF LIVING DANGEROUSLY: CONGRESS AND THE ENVIRONMENT IN 1995 8 (Dec. 1995).

219. See *infra* notes 245-49 and accompanying text.

220. The proposed regulations do not mention how severe damage to property must be to warrant deterrence measures. This is another example of flaws in the proposed regulations. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. 22,345.

codified, the MMPA will be one more environmental law to suffer at the hands of the 104th Congress.

These new proposed regulations attempt to exempt non-commercial fishermen from certain protective aspects of the "take" provision. The regulations protect public property, private property, personal safety, and fishing gear or catch. Deterrent measures may be used to protect these interests, so long as the action does not result in the death or serious injury of a marine mammal.<sup>221</sup> The proposed rules suggest various measures for fishermen to use when attempting to deter marine mammals.<sup>222</sup> These measures are categorized as "passive",<sup>223</sup> "preventive",<sup>224</sup> and "reactive".<sup>225</sup>

One problem with the proposed rules is that the Department of Commerce failed to define the degree of possible damage that is required to allow the use of deterrent measures as it relates to the property, catch, or person. The rules do not delineate what constitutes the serious injury that is prohibited. Further, the proposed regulations fail to define the limits of many of the deterrence measures. For example, some of the noisemaking measures may be safe at one frequency level, but may cause serious injury at another frequency level.

"Boat hazing" is recommended as a "preventive" measure in the proposed regulations.<sup>226</sup> The proposed regulations define boat hazing as "patrolling a net or an area in a small boat and deterring marine mammals with boat noise or by blocking their approach at the surface."<sup>227</sup> This definition is too ambiguous to be enacted as part of the regulations because it does not provide adequate guidelines for fishermen to ensure marine mammal safety. A proper speed and a proper distance for the boats should be specified to ensure that no

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221. See *id.* at 22,346.

222. See *supra* notes 93-96 and accompanying text.

223. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. at 22,346.

224. See *id.*

225. See *id.*

226. See *id.*

227. See *id.*



marine mammal will suffer injury from the boat hazing. The Marine Mammal Center suggested, in its public comments, that a minimum approach distance be specified to prevent boat strikes and propeller wounds to marine mammals.<sup>228</sup> Similarly, the Center for Marine Conservation mentioned the likelihood of injuries that would result from the impact of vessels on marine mammals.<sup>229</sup> Furthermore, in enacting the MMPA, Congress expressed concern over the deaths and injuries suffered by marine mammals at the hands of boat operators.<sup>230</sup> Without specific boat speeds and distances to ensure marine mammal safety, this proposed deterrent measure will be inapposite to one of the congressional concerns that led to the enactment of the MMPA in 1972.

The proposed regulations relating to "preventive" and "reactive" measures recommend the use of light explosives on *pinnipeds*.<sup>231</sup> While the proposed rules claim that there is no evidence of light explosives causing adverse effects on marine mammals,<sup>232</sup> some scientists argue that light explosives can produce hearing loss and internal injuries in marine mammals.<sup>233</sup> Furthermore, particles of rock and sand may become dislodged by the blast and inflict injuries upon marine mammals.

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228. See Letter from Krista Hanni, Director of Science, *The Marine Mammal Center*, to William W. Fox, Jr., Director, Office of Protected Resources, *National Marine Fisheries Service* (June 30, 1995) (on file with author).

229. See Letter from Nina M. Young, Marine Mammologist, *Center for Marine Conservation*, to Dr. William W. Fox, Jr., Director, Office of Protected Resources, *National Marine Fisheries Service* (June 30, 1995) (on file with author) [hereinafter Letter from Nina M. Young]. The Center for Marine Conservation mentions the impact of vessels on marine mammals as potentially causing blunt trauma or resulting in dislocation or fracture of limbs or appendages. See *id.*

230. See *supra* note 29 and accompanying text.

231. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. at 22,346.

232. See *id.*

233. See Letter from Albert C. Myrick, Jr., Wildlife Biologist, to William W. Fox, Jr., Director, Office of Protected Resources, *National Marine Fisheries Service* (June 20, 1995) (on file with author). Mr. Myrick goes so far as to suggest that the authors of the proposed regulations volunteer as swimming targets for the so-called insignificant devices. See *id.*

Light explosives are only proposed for use on *pinnipeds*;<sup>234</sup> however, this does not provide sufficient protection to *cetaceans* that are in the vicinity of the fishermen using light explosives on a *pinniped*. To protect *cetaceae* members, the Department of Commerce should determine a minimum distance from *cetaceans* that a fisherman must be in order to use light explosives on a *pinniped*.

The "reactive" measures also suggest the prodding of marine mammals with blunt poles.<sup>235</sup> Prodding marine mammals with blunt poles could cause serious injury to the mammals. Dislocation or fracturing of limbs and appendages may occur when fishermen prod the marine mammals.<sup>236</sup> Other difficulties may result if a blunt pole becomes lodged in a marine mammal's orifice or if fishermen strikes the mammal, rather than prod the mammal. The regulations specify that acts of deterrence that result in serious injury to marine mammals are prohibited;<sup>237</sup> however, the prodding of mammals with a blunt pole seems highly likely to result in serious injury.

"Noisemakers" are recommended for use as "reactive" measures to stop dangerous or damaging interactions.<sup>238</sup> The Marine Mammal Commission has expressed concern over whether the unrestricted use of noisemakers is truly safe.<sup>239</sup> Some types of noises may have the adverse effect of driving marine mammals out of important habitats.<sup>240</sup> Adverse effects, such as forcing marine mammals to abandon habitats, offset the goal of the MMPA to preserve the marine ecosystem.

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234. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. at 22,346.

235. See *id.*

236. See Letter from Nina M. Young, *supra* note 229.

237. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. at 22,345.

238. See *id.* at 22,346.

239. See Letter from John R. Twiss, Jr., Executive Director, Marine Mammal Commission, to Dr. William W. Fox, Jr., Director, Office of Protected Resources, National Marine Fisheries Service (Aug. 30, 1995) (on file with author).

240. See *id.*

The regulations propose "underwater acoustic devices" as "preventive" measures.<sup>241</sup> One wildlife specialist argued against the use of such devices because of the adverse impacts they could have on "non-target" species.<sup>242</sup> The frequencies at which these acoustic devices operate may drive marine mammals out of feeding areas.<sup>243</sup> The MMPA was intended to protect resources without disrupting marine mammal behavior. The legislative history of the MMPA includes the health and stability of the marine ecosystem as a goal of the MMPA.<sup>244</sup> If marine mammals are driven out of important and traditional feeding areas, the health and stability of the marine ecosystem is weakened, and thus, the goals of the MMPA are undermined.

The Department of Commerce is responsible for implementing regulations that promote the protection of *cetaceans* and *pinnipeds*.<sup>245</sup> With the 1994 Amendment, the Commerce Department has proposed regulations that likely will subject more marine mammals to injury and death. Additionally, regulations that provide for the use of numerous deterrent measures that have not been proven safe were proposed by the Department.

The proposed regulations should not be codified until the Department of Commerce performs substantial studies indicating that the proposed measures are the safest available means of deterring marine mammals. It seems unlikely that the Department of Commerce will have the opportunity to perform any studies sufficiently comprehensive to deem any means of deterrence truly safe. Currently, the 104th Congress also has proposed to cut environmental spending in,

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241. See Taking and Importing of Marine Mammals, *supra* note 91, 60 Fed. Reg. at 22,346.

242. See Letter from Sharon B. Young, Wildlife Specialist, *The Humane Society of the United States*, to Dr. William W. Fox, Jr., Director, Office of Protected Resources, *National Marine Fisheries Service* (June 31, 1995) (on file with author).

243. See *id.*

244. See *supra* note 30 and accompanying text.

245. See MMPA, 16 U.S.C. §§ 1361-1407.

among others, the Department of Commerce.<sup>246</sup> Specifically, the 104th Congress has proposed to cut the Ocean and Coastal Management budget by eight percent, as opposed to the President's ten percent proposed budget increase.<sup>247</sup> Congress also proposed a budget for Fisheries research and development that was ten percent lower than the President's request.<sup>248</sup> Congressional proposals are approximately twelve million dollars and twenty-one million dollars less than the President's requests, respectively.<sup>249</sup> Each of these programs operate under the authority of the Department of Commerce.<sup>250</sup> If these proposed budget cuts pass for the fiscal year 1996, they will certainly result in less spending on marine mammal behavior research. With the possibility of such drastic budget cuts, it will be nearly impossible for the Department of Commerce to determine that the proposed regulations are safe measures.

Finally, the regulations are vague and leave many key terms undefined. Yet, the Department of Commerce expects the average fisherman to determine what deterrent measures are appropriate for use. If the proposed rules are implemented, marine mammals will suffer injury and death at the hands of both non-commercial fishermen and commercial fishermen, who lack the proper guidance for deterring marine mammals safely. Fishermen need unambiguous, defined regulations relating to general deterrence measures if the Department of Commerce intends to prevent the high risk of accidents that will occur without such guidance.

## VI. Conclusion

Since its inception in 1972, the MMPA has made great strides in increasing the populations of marine mammals. A

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246. See NATURAL RESOURCES DEFENSE COUNCIL, *THE YEAR OF LIVING DANGEROUSLY: CONGRESS AND THE ENVIRONMENT IN 1995* 11 (Dec. 1995).

247. See *id.*

248. See *id.* Unsurprisingly, Congress' only environmentally-related proposed budget increase that was equal to or higher than the President's was for road building in National Forests, under the Department of Agriculture. See *id.*

249. See *id.*

250. See NATURAL RESOURCES DEFENSE COUNCIL, *THE YEAR OF LIVING DANGEROUSLY: CONGRESS AND THE ENVIRONMENT IN 1995* 11.

recent study reported that the Pacific walrus population is at or near historic high levels.<sup>251</sup> Polar bear stocks are considered healthy and increasing.<sup>252</sup> Additionally, the south-central Alaska sea otter population is beginning to recover from the Exxon Valdez oil spill.<sup>253</sup> These statistics are examples of the progress the MMPA has made in replenishing marine mammal populations. However, the purposeful and accidental injuring and killing of marine mammals should be a continuing concern for the citizens, the marine scientists, the judiciary, and the legislature of the United States.

Fishermen, whether commercial or private, have ravaged the seas and destroyed numerous marine mammals. At times, the destruction is the result of marine mammals trapped in a fishing net. Other times, the destruction can be attributed to careless actions or harassment by fishermen and boaters. In any case, the overwhelming sentiment of United States' citizens has been to increase protection for *pinnipeds* and *cetaceans*, not to increase the risk of their destruction. By allowing fishermen to use general deterrence measures, many of which are yet to be proven safe, the court, the legislature, and the executive branch increase the decimation of the marine mammal population that was just be-

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251. See *Concerning Reauthorization of the Marine Mammal Protection Act: Congressional Testimony on Marine Mammal Protection Act Before the House Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong. (1994) (statement of Mollie Beattie, Director, U.S. Fish and Wildlife Service), available in 1994 WL 14168552 (page numbers not available online).

The Pacific walrus, a population shared with Russia, had an estimated minimum population of 201,000 in 1990 based on a joint Russia/U.S. population survey. Although this estimate is less than the estimate of 232,000 animals derived from the 1985 survey, anomalous ice conditions prevailed during the 1990 survey and comparing the two estimates is, at best, a tenuous proposition.

*Id.*

252. See *id.*

253. See *id.* Fortunately, the sea otters and other animal and plant life are beginning to recover from the spill, even though Exxon's \$2.5 billion clean-up was considered to have done more harm than good. See Will Nixon, *Off the Critical List: Without Much Help From a \$2.5 Billion Cleanup, Alaska's Prince William Sound is Rapidly Recovering*, E: THE ENVIRONMENTAL MAGAZINE, Oct. 1995, at 19.

ginning to reap the benefits of the MMPA. The extent to which the ramifications of the recent alteration of the MMPA will affect marine mammals is uncertain; however, the outlook is not optimistic. Unfortunately for marine mammals, when David Hayashi took aim at the four porpoises, he, in actuality, took aim at all marine mammals.