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SPREADING ITS WINGS: USING THE MIGRATORY BIRD TREATY ACT TO PROTECT HABITAT

Collette L. Adkins Giese†

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If we are going to have a treaty about migratory birds, let us have someplace where they can come and remain safely and be a pleasure and companions.1

Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.2

One of the first federal wildlife protection statutes, the Migratory Bird Treaty Act of 19183 (MBTA), remains relatively unchanged over eighty-five years after its enactment.4 Threats to migratory birds, however, have changed dramatically. Concerns about overexploitation of birds prompted the MBTA’s passage,5 but habitat destruction is responsible for the current biodiversity crisis.6 Indeed, more than 1200 species are facing extinction in the United States,7 and habitat destruction is a contributing factor for more than ninety-five percent of these imperiled species.8 Of the more than 800 species of native birds in the United States, 67 are federally listed as endangered or threatened, and “[a]n additional 184 are species of conservation concern because of their small distribution, high threats, or declining populations.”9

4. See infra notes 40–53.
5. See infra Section I.A.
Current environmental laws provide some protection for wildlife habitat. The National Forest Management Act requires the United States Forest Service to retain a diversity of plant communities in national forests. This statute provides no protection for wildlife on private lands, however, and protection of wildlife on public lands often takes a backseat to timber and other consumptive uses. The Endangered Species Act (ESA) protects habitat for threatened and endangered species, but this protection often comes too late to enable species recovery. Consequently, environmentalists are trying to find new tools to protect wildlife habitat.

In the past decade, the MBTA has received some attention from environmental law scholars and practitioners hoping to breathe new life into this relatively ignored statute. Indeed, the MBTA has the potential to be a powerful tool for addressing biodiversity loss. Its expansive language provides protection for more than 800 species of migratory birds on public and private lands. Importantly, the MBTA protects species before they become threatened or endangered. As such, it is well-suited to fill the gaps left by other environmental laws.

This paper analyzes the MBTA’s capacity to protect wildlife habitat. Part I provides an overview of the MBTA, including the context of its passage, its major provisions, and its modest evolution since 1918. Part II summarizes case law interpreting the MBTA in the context of habitat destruction. Part III critically examines the MBTA’s text, legislative history, purpose, and prior applications and argues that the statute should be interpreted to protect bird habitat. Recognizing that the judiciary has been reluctant to give the MBTA this interpretation, the paper concludes by calling for legislative reform.


13. 16 U.S.C. §§ 1533, 1536 (2006) (prohibiting federal agencies from adversely modifying critical habitat and prohibiting significant habitat modification or degradation where it actually kills or injures wildlife).
I. THE MBTA’S ENACTMENT, MAJOR PROVISIONS, AND MODEST EVOLUTION

A. Congress Passed the MBTA in Response to a Decline in Migratory Birds

Mass destruction of birds for food, sport, and millinery purposes occurred at the end of the nineteenth century.17 Several species went extinct, including the passenger pigeon.18 In response to the decline of birds, a bird protection movement formed that sought to achieve legal protections for migratory birds.19 The MBTA is the most important result of these efforts.20

The MBTA gave effect to a treaty signed between the United States and Great Britain on behalf of Canada for the protection of migratory birds (hereinafter “Canadian Convention”).21 In a letter to President Woodrow Wilson urging his approval of the treaty, Secretary of State Robert Lansing summarized the concerns that motivated the treaty negotiations:

Not very many years ago vast numbers of waterfowl and shorebirds nested within the limits of the United States . . . 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.22

This loss of game birds concerned hunters dependent on the

17. See Finet, supra note 14, at 6 n.15.
19. See Finet, supra note 14, at 6 n.15.
20. Congress’s first attempt to protect migratory birds was the 1913 McLean-Weeks Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918). It was declared invalid in multiple federal court rulings as beyond Congress’s power. United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). A date for oral argument was set before the United States Supreme Court, but the case was not heard because Secretary of State Robert Lansing avoided the issue by negotiating a treaty with Canada and invoking the treaty power as the constitutional authority for the MBTA. See Coggins & Patti, supra note 18, at 169. The United States Supreme Court later upheld the MBTA as a valid use of the treaty power. Missouri v. Holland, 252 U.S. 416 (1920).
birds for their sport, but the Canadian Convention also offered protection for non-game birds. Concern for non-game birds came from farmers who wanted protection for birds that feed on insects injurious to crops. In addition, the government recognized aesthetic interests in birds, and that many Americans “have happy memories of their homes made brighter and more attractive by the annual visitation of the robin . . . .”

B. The MBTA's Simple Mandate Has Remained Almost Unchanged Since Enactment

The MBTA is a very simple statute, especially in comparison to other environmental statutes. Its main operative provisions are found in sections 703 and 704(a). Using very expansive language, section 703 prohibits taking “at any time, by any means or in any manner . . . any migratory bird, [or] any part, nest, or eggs of any such bird” unless authorized by the Secretary of the Interior. Section 704(a) authorizes the Secretary to issue regulations that allow the taking of migratory birds that are “compatible with the terms” and “carry out the purposes” of the migratory bird conventions. These two primary sections are supplemented and implemented by eight other sections. The remaining sections cover bird baiting, transportation and importation of birds, arrests and search warrants,

24. H.R. Rep. No. 65-243, at 2 (speaking of a “patriotic duty” to prevent “the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage hem [sic] to the extent of many millions of dollars”).
31. 16 U.S.C. § 704(b) (2006) (providing that it is unlawful to bait a migratory bird and knowingly take a migratory bird over a baited field).
32. 16 U.S.C. § 705 (2006) (providing that it is unlawful to transport or import illegally taken migratory birds across state or country lines).
33. 16 U.S.C. § 706 (2006) (authorizing employees of the Department of the Interior to enforce the Act by arresting without a warrant any person violating the Act in his or her presence).
The MBTA has remained almost unchanged since enactment in 1918. Congress passed technical amendments to the MBTA to incorporate three additional migratory bird conventions, including Mexico in 1936, Japan in 1974, and the U.S.S.R. in 1989. Congress amended the MBTA in 1960 and 1998 to increase fines for violations, and in 1978 to require forfeiture of illegally taken birds.

34. 16 U.S.C. § 707 (2006) (providing a $15,000 fine and/or six months imprisonment for misdemeanor violations of the Act and providing a $2,000 fine and/or two years imprisonment and forfeiture of all equipment used by persons guilty of felony violations, which are defined as knowingly taking with the intent to sell migratory birds).
37. 16 U.S.C. § 710 (2006) (providing that if any clause of the MBTA is found invalid the remaining parts should be unaffected).
39. 16 U.S.C. § 712 (2006) (authorizing the Secretary to issue regulations to allow the taking of migratory birds for subsistence by indigenous inhabitants of Alaska and generally authorizing the Secretary to issue regulations necessary for implementation of the migratory bird conventions).
43. Act of Sept. 8, 1960, Pub. L. No. 86-732, 74 Stat. 866 (1960) (current version at 16 U.S.C. §§ 704, 707 (2006)) (retaining the $500 fine and/or six months in jail for misdemeanor convictions, while adding a felony conviction for taking migratory birds with the intent to sell, subject to a $2000 fine and/or two years in jail and forfeiture of all equipment used in the violation).
bird parts, nests, and eggs. Language added in 1974 clarified that the MBTA’s prohibition on the sale of migratory birds includes “any product . . . composed in whole or part, of any such bird.”

Congress has three times directed the Secretary to promulgate regulations to allow the taking of migratory birds, including take by Alaskan subsistence hunters in 1978, take of overabundant populations of mid-continent light geese in 1999, and take by the military in 2002. While the MBTA is generally a strict liability statute, Congress added scienter requirements in 1986 for felony prosecutions for selling migratory birds, and in 1998 for misdemeanor prosecutions for hunting over baited fields. Most recently, in 2004, Congress amended the MBTA to limit its application to migratory bird species native to the United States or its territories. While there were several other minor or technical amendments, it is clear that the MBTA has gone through a very modest evolution over the ninety years since its passage.

51. Migratory Bird Treaty Reform Act, Pub. L. No. 105-312, § 102, 112 Stat. 2956 (1998) (current version at 16 U.S.C. § 704(b) (amending the Act to make unlawful hunting over baited fields where “the person knows or reasonably should know that” he or she is hunting over baited fields and making baiting a separate offense from hunting over a baited field).
II. COURTS DISAGREE ABOUT WHETHER THE MBTA APPLIES TO HABITAT DESTRUCTION

The MBTA clearly prohibits the taking of migratory birds, but it does not precisely define what activities should constitute a taking. So, it is unclear whether the MBTA should apply to activities that destroy migratory bird habitat. Unlike the ESA, the United States Supreme Court has not interpreted the takings provision in the MBTA, but the issue has been litigated before several appellate and district courts.

A. Several Courts Hold That the MBTA Applies to Physical Conduct of the Sort Engaged in by Hunters and Poachers and Does Not Apply to Indirect Deaths of Migratory Birds Caused by Habitat Destruction

Seattle Audubon Society v. Evans closely explores applicability of the MBTA to habitat destruction. In Seattle Audubon, two bird conservation organizations argued that logging of old-growth timber in Washington and Oregon constitutes a violation of the MBTA because it destroys spotted owl habitat. The Ninth Circuit compared the MBTA and the ESA and concluded that the differences are “distinct and purposeful.” The MBTA’s implementing regulations define “take” as “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt any such act.” The definition of “take” in the ESA, in contrast, is defined in a broader way to include “harass” and “harm.” The Ninth Circuit reasoned that the MBTA’s definition describes “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of

54. The MBTA provides that it shall be unlawful “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill” migratory birds. 16 U.S.C. § 703 (2006). The MBTA’s implementing regulations define take as “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt” any such act. 50 C.F.R. § 10.12 (2009).
55. The definition of take in the ESA includes “harm,” 16 U.S.C. § 1532(19) (2006), and the United States Supreme Court upheld regulations defining harm as “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.” Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 515 U.S. 687, 691, 708 (1995) (citing 50 C.F.R. § 17.3 (1994)).
56. 952 F.2d 297 (9th Cir. 1991).
57. Id. at 298.
58. Id. at 303 (quoting Seattle Audubon Soc’y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991)).
the statute’s enactment in 1918.” The Ninth Circuit also relied on the fact that Congress failed to modify the MBTA to include “harm” or “harass,” even though it amended the MBTA the year following the enactment of the ESA.

The Ninth Circuit emphasized that indirect killing during logging operations is different from direct, but unintentional, killing that occurs when birds are poisoned. With this emphasis, the Ninth Circuit distinguished Seattle Audubon from two cases that held that poisoning of migratory birds falls within the MBTA’s prohibition on taking. In United States v. Corbin Farm Service, the district court ruled that defendants could be charged under the MBTA for bird deaths that occurred after applying a toxic pesticide to an alfalfa field inhabited by migratory birds. In United States v. FMC Corp., the Second Circuit affirmed a criminal conviction for a pesticide corporation’s release of toxic chemicals into a wastewater pond that killed migratory birds.

Most courts construing the MBTA in the context of habitat destruction have followed Seattle Audubon. In Newton County Wildlife Ass’n v. United States Forest Service, for example, the Eighth Circuit reasoned that the MBTA applies only to “physical conduct of the sort engaged in by hunters and poachers” and refused to enjoin four timber sales in the Ozarks National Forest. There have also been several district courts that have considered and rejected arguments that the MBTA applies to indirect bird deaths caused by habitat destruction.

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61. Seattle Audubon Soc’y, 952 F.2d at 302.
62. Id. at 303.
63. Id.
64. Id.
66. Id. at 514, 536. As an example of another corporate criminal conviction under the MBTA, the Exxon Corporation recently pled guilty to violating the MBTA in the deaths of eighty-five protected birds across five central and western states over the past five years. The birds were killed after they came into contact with hydrocarbons at oil tanks, evaporation ponds, natural gas reserve pits, and disposal facilities. United States v. Exxon Mobil Corp., 09-mj-01097 (D. Colo. 2009); Amy Littlefield, Exxon Pleads Guilty in Birds’ Deaths, L.A. TIMES, Aug. 14, 2009, at A15.
67. 572 F.2d 902 (2d Cir. 1978).
68. Id. at 907-08.
69. Id. at 907-08.
70. Id. at 907-08.
71. Id. at 907-08.
B. A Few Courts Hold That the MBTA Applies to Direct Deaths of Migratory Birds from Habitat Destruction That Occurs During the Nesting Season

No federal court has held that the MBTA applies to habitat destruction that indirectly causes deaths of migratory birds by making habitat unsuitable. As such, environmental plaintiffs have focused on logging during the nesting season because it directly destroys nests and eggs and juvenile birds that cannot fly away. Sierra Club v. Martin provides the most complete discussion on the applicability of the MBTA to habitat destruction that directly kills birds. In Martin, the Sierra Club challenged timber sales during the nesting season in Chattahoochee and Oconee National Forests. The district court agreed with the Seattle Audubon line of cases that the MBTA does not apply to habitat destruction that only indirectly kills migratory birds.

that the MBTA does not apply to federal agencies but assuming, arguendo, that it did apply, citing Seattle Audubon and holding that habitat destruction does not fall within the MBTA because it applies only to hunters and poachers; Sierra Club v. Martin, 933 F. Supp. 1559, 1564–65 (N.D. Ga. 1996) (following the Seattle Audubon line in so far as holding that the MBTA does not apply to indirect deaths but granting plaintiffs a preliminary injunction based on claim that timber sales during the nesting season would directly kill migratory birds in violation of the MBTA); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1509–10 (D. Or. 1991) (citing district court cases leading up to Seattle Audubon and finding that the proposed timber sale does not constitute a taking of migratory birds because the MBTA applies only to hunters and poachers); Portland Audubon Soc’y v. Lujan, No. 87-1160-FR, 1991 WL 81838, at *6–7 (D. Or. May 8, 1991) (holding that differences between the ESA and MBTA are “distinct and purposeful” and MBTA does not apply to habitat destruction); Seattle Audubon Soc’y v. Robertson, Nos. 89-160WD, C89-99(T)WD, 1991 WL 180099, at *11 (W.D. Wash. Mar. 7, 1991) (finding that the absence of “harm” and “harass” in the MBTA makes it distinct from the ESA); see also Nat’l Wildlife Fed’n., 126 IBLA 48, 66 (1993) (citing a district court case leading up to Seattle Audubon and holding that approval of a mining plan of operations does not involve a “taking” of migratory birds under the MBTA); In re Bar First Go Round Salvage Sale, 121 IBLA 347, 351–52 (1991) (citing district court cases leading up to Seattle Audubon and rejecting the argument that BLM’s timber sales violate the MBTA and holding that even if MBTA did include habitat modification there is no evidence that the timber sale will kill birds).

But see Or. Natural Res. Council, 116 IBLA 355, 370 (1990) (“Therefore, action which degrades the environment in such a way as to result in the death of a migratory bird is prohibited by section 2 of the MBTA.”).


933 F. Supp. 1559.

Id. at 1562–64.

Id. at 1564–65.
However, the court departed from Seattle Audubon when it held that the MBTA extends beyond hunters and poachers and does apply to timber sales during the nesting season. 77

The court’s decision relies heavily on United States v. Corbin Farm Service, one of the bird poisoning cases, which also held that the MBTA extends beyond hunting and poaching. 78 As in Corbin Farm Service, the court was persuaded by the broad language in the MBTA, which prohibits killing migratory birds “by any means.” 79 The court also reasoned that hunting is not the sole concern of the MBTA because many birds protected by the MBTA are not commonly hunted. 80

Sierra Club v. Martin was not the first case to distinguish between direct and indirect deaths from logging. Martin followed Sierra Club v. United States Department of Agriculture. 81 In Sierra Club v. United States Department of Agriculture, the Seventh Circuit held that the MBTA does not apply to birds killed indirectly by habitat destruction, but the court ordered the agency to consider on remand whether logging during the nesting season would directly kill young migratory birds in violation of the MBTA. 82 Unlike this Seventh Circuit case, the environmental plaintiffs in Sierra Club v. Martin had affirmative evidence of the number of bird deaths that would occur. 83 Given the likelihood of success on its MBTA claim, the district court granted the Sierra Club a preliminary injunction to stop the timber sales. 84 The decision was later reversed by the Eleventh Circuit, which held that the MBTA does not apply to federal agencies, 85 but this holding contradicts a later decision from the D.C. Circuit and dicta from the United States Supreme Court. 86

77 Id.
78 See id. at 1565; United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978); see also supra text accompanying note 66.
80 Id.
81 116 F.3d 1482 (7th Cir. 1997).
82 Id. at *19–20.
83 Martin, 933 F. Supp. at 1563, 1565 (finding that 2,000 to 9,000 juvenile migratory birds will be killed directly by timber sale projects).
84 Id. at 1572–73.
85 Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997).
86 Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 437–38 (1992) (indicating in two sections of its opinion that federal agencies possess obligations under the MBTA); Humane Soc’y v. Glickman, 217 F.3d 882, 886–88 (D.C. Cir. 2000) (holding that the MBTA does apply to federal agencies because the Administrative Procedures Act may be used by a party with standing to challenge government action that would violate the MBTA); see Michael Deminico & Heather Eisenlord, A Proper Refusal of
C. One Court Holds That the MBTA Does Not Apply to Even Direct Deaths of Migratory Birds From Habitat Destruction If the Deaths are Unintentional

In Mahler v. United States Forest Service, another district court addressed whether the MBTA applies to direct deaths of migratory birds caused by habitat destruction. In Mahler, a nearby resident and frequent visitor to the Hoosier National Forest sought to enjoin a timber salvage operation on fifty acres of forest during the nesting season. Even though the court agreed with the plaintiff that logging operations during nesting would directly kill birds, the court refused to enjoin the United States Forest Service. The court held that the MBTA only applies to activities that are “intended to harm birds or to exploit birds, such as hunting and trapping, and trafficking in birds and bird parts.”

The court acknowledged that there have been convictions under the MBTA for unintentional deaths of migratory birds due to poisoning. The court found the strict liability approach unreasonable, however, because it “would impose criminal liability on a person for the death of a bird under circumstances where no criminal liability would be imposed for even the death of another person.” The court was particularly concerned that there would be no stopping point for criminal liability and suggested that strict liability would even require conviction of farmers who run over nests while mowing hay.


88. Id.
89. Id. at 1575.
90. Id. at 1583. Indeed, there is a substantial body of case law holding that the MBTA has no scienter requirement. See United States v. Apollo Energies, Inc., 2009 U.S. Dist. LEXIS 6160 (D. Kan. Jan. 28, 2009) (summarizing cases and affirming misdemeanor convictions under the MBTA for deaths of migratory birds unintentionally killed by devices used in the oil and gas industry to process crude oil).
91. Id. at 1577–79.
92. Id. at 1578.
93. Id. Similar concerns motivated a district court to reverse a conviction under
Unlike most cases dealing with habitat destruction under the MBTA, the Mahler court provided a lengthy analysis of the language, legislative history, and application of the MBTA. The court reasoned that the MBTA’s broad language only extended “by any means or in any manner” to the hunting of migratory birds. The court sifted through the MBTA’s legislative history and found no indication that Congress had intended the MBTA to extend to habitat destruction. Finally, the court was unwilling to accept strict liability because of fear that it would substantially restrict logging on both public and private lands.

III. DESTRUCTION OF HABITAT THAT DIRECTLY KILLS MIGRATORY BIRDS SHOULD BE CONSIDERED A VIOLATION OF THE MBTA

Environmental plaintiffs wishing to use the MBTA to protect migratory bird habitat have been largely unsuccessful, with courts seeking defensible approaches to limit MBTA liability. The Seattle Audubon line of cases emphasizes distinctions between the ESA and MBTA to justify the conclusion that the MBTA applies only to direct physical conduct of the sort engaged in by hunters and poachers. Mahler requires intent to kill migratory birds. A critical analysis of the MBTA’s text, legislative history, purpose, and prior applications shows that both approaches are flawed. The MBTA should not be limited to hunting and poaching nor only intentional acts, but there must be a reasonable stopping point for MBTA liability. Analysis of the closeness of the causal link may offer the best approach to limiting liability.

A. Application of the MBTA Should Extend Beyond Hunting and

the MBTA of a defendant that applied pesticides to seed alfalfa growing on his farm that resulted in the death of a flock of geese that ingested the pesticides. United States v. Rollins, 706 F. Supp. 742 (D. Idaho 1989). The district court commented that because the MBTA is a strict liability statute “a homeowner could be pursued under the MBTA if a flock of geese crashed into his plate-glass window and were killed.” Id. at 744. Finding the statute vague, the district court held that it would be unconstitutional to impose criminal liability because the pesticide was applied with due care and its use in the past had occurred without serious incident. Id. at 743–44.

96. Id. at 1579.
97. Id. at 1580–81.
98. Id. at 1581–82.
99. See supra Part II.
100. See supra Part II A.
101. See supra Part II C.
Poaching

The MBTA uses extremely broad language. Section 703 of the MBTA provides that it shall be unlawful “by any means or in any manner, to pursue, hunt, take, capture, [or] kill” migratory birds. The phrase “by any means or in any manner” emphasizes the MBTA’s expansive scope. In addition, if Congress intended the MBTA to only apply to hunting and poaching, there was no need to include the broader words “take” and “kill.” Admittedly, it is unclear how broadly “take” and “kill” should be interpreted, and there is a strong argument that the MBTA should be interpreted more narrowly than the ESA. Just because there are “distinct and purposeful” differences between the MBTA and ESA, however, does not mean that the MBTA must be limited to hunting and poaching.

Legislative history does not offer a decisive answer to how broadly the MBTA should be interpreted. Some statements by members of Congress indicate that controlling overexploitation of game birds was the MBTA’s primary focus, but others discuss the expansiveness of the MBTA’s prohibitions. Even if negotiation of the original treaty was primarily motivated by concerns about overexploitation of game birds, it is nevertheless clear from the legislative history that concerns about loss of migratory bird habitat and non-game birds were additional motivating factors. Indeed, the MBTA protects more than 800 species, but only a small fraction of these species are commonly sought by hunters or poachers. If the MBTA merely

102. See supra note 28.
104. See supra notes 58-61 and accompanying text.
105. See supra note 58.
106. See, e.g., 55 CONG. REC. 4816 (1917) (statement of Sen. Smith) ("Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.")., cited in United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999) (providing a summary of comments from the Congressional Record indicating that Congress intended the MBTA to regulate recreational and commercial hunting).
107. See, e.g., 56 CONG. REC. 7458 (1918) (statement of Sen. Smith) ("If we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions.")., cited in Moon Lake Elec. Ass'n, 45 F. Supp. 2d at 1080–81 (providing a summary of comments from the Congressional Record indicating that Congress intended the MBTA to regulate more than just hunting and poaching).
108. See supra notes 17–25 and accompanying text.
110. See id.; see also Sierra Club v. Martin, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996)
prohibits hunting and poaching, there was no reason to offer protection to nongame species.

Supporters of a narrow construction of "take" argue that Congress's failure to amend the MBTA to include "harm" and "harass" shows that Congress did not intend the MBTA to apply to habitat.\footnote{111} This reasoning is unpersuasive, however, because Congress was also aware that the MBTA has been applied in contexts outside of hunting and poaching—but Congress did not amend the MBTA to limit its application.\footnote{112} Specifically, the United States Fish and Wildlife Service has prosecuted bird deaths from oil pits,\footnote{113} exposure to pesticides,\footnote{114} and electrocution by electrical wires.\footnote{115} In addition, environmental groups have brought claims involving bird deaths from habitat destruction,\footnote{116} pollution from mine tailings,\footnote{117} and military bombing

\footnote{111}. See Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) (finding the MBTA's definition of "take" did not include habitat modification or degradation due to the fact that Congress failed to modify the MBTA to include harm or harass, even though it amended the MBTA the year following the enactment of the ESA).

\footnote{112}. For example, Congress held hearings in 1985 to discuss whether the operation of a contaminated reservoir by a federal agency violated the MBTA. Agricultural Drainage Problems and Contamination at Kesterson Reservoir: Hearing before the Subcomm. on Water and Power Resources of the H. Comm. on Interior and Insular Affairs, 99th Cong. 10–19, 22–25, 30–39, 42–43, 45–51, 62–65, 104–10, 128–30, 150–51, 215, 523–24, 525–32 (1985). Although the hearings alerted Congress that under current case law the reservoir may violate the MBTA, Congress never amended the MBTA to limit its application to hunters and poachers.


\footnote{114}. See supra notes 63–68 and accompanying text.

\footnote{115}. See infra notes 133–136 and accompanying text.

\footnote{116}. See supra Part II. Congress seemed to acquiesce to the notion that the MBTA applies to migratory bird habitat when it passed Northwest Timber Compromise, which provided a limited exemption from the MBTA for old-growth timber sales in Washington and Oregon from the MBTA. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 745 (1989) (providing in section 318 that certain timber sales afflicting spotted owls would be in compliance with all other environmental laws if the sales meet the requirements in the Northwest Timber Compromise); see Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437–38 (1992) (explaining how the Northwest Timber Compromise exempted certain sales from the MBTA).

exercises. Congress’s failure to amend the MBTA in response to these cases indicates Congress’s acquiescence to a broader application.

Rather than amend the MBTA to narrow its scope, Congress has largely left the MBTA alone. Most amendments to the MBTA have broadened its scope or strengthened its protections. For example, Congress amended the MBTA to incorporate additional migratory bird conventions that expand protections for migratory birds. Importantly, the Japanese and Soviet Conventions include language about protection of migratory bird habitat.

B. Application of the MBTA Should Extend to Unintentional Acts

The MBTA makes a distinction between misdemeanor and felony offenses. Section 707(a) provides that “any person . . . who shall violate any provisions of said conventions or of this [Act] . . . shall be deemed guilty of a misdemeanor.” Section 707(b) provides that “[w]hoever, in violation of this [Act], shall knowingly . . . take by any manner whatsoever any migratory bird with intent to sell . . . such bird, or . . . sell . . . any migratory bird shall be guilty of a felony.”

118. See Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.D.C. 2002). When environmental groups succeeded on their claim that bird deaths during military training exercises violated the MBTA, Congress did not amend the act to restrict its application to hunters. Rather, it provided a temporary exemption for the military until the United States Fish and Wildlife Service promulgates regulations to allow take during military training exercises. See supra note 49.

119. See supra notes 40–53 and accompanying text.

120. The only exceptions thus far were when Congress added scienter requirements for certain offenses, and directed the United States Fish and Wildlife Service to promulgate regulations to allow bird take. See supra notes 47–51 and accompanying text.

121. See supra notes 40–42 and accompanying text.


In 1960, Congress added section 707(b) in response to concerns that market hunters that kill hundreds of birds were subject to the same liability as a sport hunter that took one bird out of season. In 1986, Congress added “knowingly” to section 707(b) because of concerns about the constitutionality of strict liability felony offenses.

If Congress wanted to alter the strict liability scheme for misdemeanors, Congress would have added the term “knowingly” to section 707(a) and section 707(b). Rather, the legislative history makes clear that Congress intended to retain strict liability for misdemeanor offenses: “Nothing 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.”

Mahler construed the MBTA to require intentionality because of concern that any other interpretation would lead to unreasonable results. Nevertheless, most courts that have examined this issue have upheld the strict liability scheme for misdemeanor offenses. Even though adding the intentionality requirement might be a convenient way to limit MBTA liability, this interpretation is simply not what Congress intended.

C. Analysis of the Causal Link May be the Best Approach to Limit MBTA Liability

The MBTA’s language is expansive and provides no clear limits to liability. As a consequence, inconsistent judicial interpretations have created substantial uncertainty. A defensible limit on liability is

127. Id. But see Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1581 (S.D. Ind. 1996) (arguing that Congress retained strict liability only as it affects hunters and poachers, so there is no liability for habitat destruction that leads to the unintentional death of birds).
128. See supra note 93 and accompanying text.
130. See supra Part II.
needed, and analysis of the causal link leading to bird death may offer the best approach.

1. Only a Few Courts Have Used a Causal Analysis to Limit MBTA Liability

The only MBTA case explicitly examining the closeness of the causal link is United States v. Moon Lake Electrical Ass'n. In Moon Lake Electrical Ass'n, the United States Fish and Wildlife Service brought charges against a rural electrical cooperative for the deaths of seventeen migratory birds of prey, caused by the company's failure to install inexpensive equipment on power poles. The court refused to dismiss the charges and used a proximate cause analysis to assess MBTA liability. The court explained:

[T]o obtain a guilty verdict under § 707(a), the government must prove proximate causation, also known as “legal causation,” beyond a reasonable doubt. In this context, “proximate cause” is generally defined as “that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.”

The causal link approach hinges on the directness of the link and the foreseeability of bird deaths. A similar approach was used in Sierra Club v. Martin and Sierra Club v. USDA. These cases made a critical distinction between timber harvest that directly killed migratory birds by cutting down trees containing active nests, and timber harvest that only indirectly killed birds by making habitat unsuitable for migratory birds. Although these cases did not explicitly examine the closeness of the causal link, the analysis of whether the action directly or indirectly killed birds inherently involves a causation analysis.

131. See United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (“Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense.”).
132. One legal scholar has argued that proximate cause is the only comprehensive analytical structure for analyzing MBTA guilt. See Kim, supra note 86, at 140–41.
134. Id. at 1071.
135. Id. at 1085, 1088.
136. Id. at 1085 (emphasis and citation omitted).
137. See supra notes 73–86 and accompanying text.
138. See id.
2. Analysis of the Closeness of the Causal Link Has Many Advantages

The Moon Lake court did not offer any analysis in defense of the causal approach, but it has several advantages. To begin, a causal approach is justifiable based upon the plain language of the MBTA. As Seattle Audubon emphasizes, the MBTA’s statutory language is meaningfully different from the ESA. The inclusion of “harm” and “harass” in the definition of “take” in the ESA allows “take” to encompass indirect actions in the ESA that are not appropriate for the MBTA. The use of a causal approach for the MBTA reflects this difference by requiring a direct link between the action and bird death. Unlike Seattle Audubon, the causal approach recognizes that the MBTA is different from the ESA without arbitrarily limiting it to hunters and poachers.

A second advantage of the causal method is that it comports with prior applications of the MBTA. It is unreasonable to interpret the MBTA broadly when birds are killed from exposure to oil pits and pesticides but purport to limit the MBTA to hunting and poaching when birds are killed from habitat destruction. The causal method offers a reasoned explanation for attaching MBTA liability for direct deaths of birds from oil pits, poisons, and habitat destruction during the nesting season, while not extending liability for habitat destruction that only indirectly kills birds by making habitat unsuitable.

Another advantage is that the causal approach allows the MBTA to respond to modern threats to migratory birds. Overexploitation was once the biggest threat to biodiversity, but habitat destruction and pollution are much bigger threats today. Congress intended the MBTA to protect migratory birds, and even though loss of birds from hunters and poachers may have been a primary focus at the time of enactment, Congress’s expansive language needs to be interpreted broadly for the MBTA to continue to have relevance today.

139. See supra notes 58–61 and accompanying text.
140. See supra note 55.
141. A direct link can be defined as “a natural and continuous sequence, unbroken by any efficient intervening cause.” Moon Lake Elec. Ass’n, 45 F. Supp. 2d at 1085.
142. See supra note 113.
143. See supra notes 65–68 and accompanying text.
144. See supra Part II A.
145. See supra note 6 and accompanying text.
146. See supra Part I A.
147. See supra notes 17–25 and accompanying text.
A final advantage of the causal approach is that it offers some protection for migratory bird habitat without incapacitating the timber industry. By prohibiting habitat destruction that directly kills migratory birds, the causal approach would likely prohibit the timber industry from harvesting during the nesting season. In many parts of the country, timber is already primarily harvested in the winter to prevent damage to soils and vegetation that can occur when the ground is soft. Although prohibiting timber harvest during the nesting season might create some hardship for the timber industry, this application of the MBTA has the advantage of ending the present inconsistency of allowing loggers to kill an unlimited number of migratory birds while at the same time prosecuting individuals for selling a feather.

3. Causal Link Analysis Does Not Provide Needed Certainty

The causal link approach to limiting MBTA liability has many advantages, but it widens potential liability without providing a bright-line test. This uncertainty is problematic. Uncertainty raises due process concerns because the MBTA is a criminal statute. It also generates litigation as environmental groups test legal theories and try to find new ways to use the MBTA to shape land management. Significantly, uncertainty leaves courts in the position of making policy decisions—decisions that should be made by Congress.

Even though the causal link approach would subject many activities to potential MBTA liability, there are constraining factors. First,

148. Because harvesting during the nesting season directly destroys eggs and nests, and kills juvenile birds, the causal link is much closer than timber harvest that merely makes habitat unsuitable for migratory birds. See supra notes 73–86 and accompanying text.

149. Kim, supra note 86, at 150. Logging does kill many birds. One study found that up to 666 nests would be destroyed as a result of four timber sales in Arkansas, and another found that up to 9000 young migratory birds would be killed by seven timber sales in Georgia. See Alliance for the Wild Rockies et al., Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, at 9, available at http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf.

150. For example, an argument can be made that the MBTA should apply to bird deaths from collision with communication towers because the deaths are direct, foreseeable, and avoidable. See Larry Martin Corcoran, Migratory Bird Treaty Act: Strict Criminal Liability for Non-hunting, Human Caused Bird Deaths, 77 DENV. U. L. REV. 315, 351-53 (1999).

151. Id. at 337-38.

152. Kim, supra note 86, at 149.

153. See Corcoran, supra note 150, at 341-42.
prosecutorial discretion will prevent most unreasonable applications of the MBTA. Indeed, the United States Fish and Wildlife Service has never enforced the MBTA against loggers. In addition, judicial discretion in sentencing will ensure that unreasonable applications are met with minor penalties. Finally, the United States Fish and Wildlife Service could use its authority under section 704(a) to promulgate regulations that allow taking of migratory birds by loggers and others, as long as the regulations are consistent with the terms and purposes of the migratory bird conventions.

IV. CONCLUSION

Even though Congress enacted the MBTA over eighty-five years ago, its expansive statutory language provides the capacity to address current threats to migratory birds. Nevertheless, courts are extremely reluctant to apply the MBTA to habitat destruction and generally hold that the statute only applies to hunters and poachers or intentional acts. An analysis of the MBTA’s text, legislative history, purpose, and prior applications shows that the statute should be interpreted broadly to prohibit some habitat destruction. A causal link analysis may offer a reasoned stopping point for liability, but it does not provide needed certainty.

As threats to wildlife change, the need for environmental statutes designed to address these threats increases. Unfortunately, current environmental laws form a fragmented network that leaves wildlife inadequately protected. Extending the MBTA to reach migratory bird habitat would fill one of these gaps. Without a clear mandate from

154. Alliance for the Wild Rockies, supra note 149, at 12 (citing Draft Memorandum from Director, FWS, to Service Law Enforcement Officers, MBTA Enforcement Policy (Mar. 7, 1996)). The United States Fish and Wildlife Service has refused to enforce the MBTA against loggers even in publicized and egregious cases. Id. For example, the agency refused to prosecute a private landowner that logged trees used for nesting by Great Blue Herons, even though the harvest destroyed the entire active rookery. Id. Even if the United States Fish and Wildlife Service refuses to exercise its prosecutorial discretion, environmental groups can use the Administrative Procedures Act to challenge actions of federal agencies that violate the MBTA. See supra note 86. However, environmental groups are powerless to enforce the MBTA on private lands, which supply 94% of the U.S. timber supply. Alliance for the Wild Rockies, supra note 149, at 5.

155. See United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) ("As stated in one of the early decisions under the Act, 'an innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine.'").

Congress, however, the judiciary is unlikely to demand significant changes in management of public lands. As such, Congress should amend the MBTA to explicitly address the current threat that habitat destruction poses to biodiversity.