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CASENOTE

IF THERE ARE RULES TO FOLLOW, WHY DIDN'T THE DEPARTMENT OF AGRICULTURE FOLLOW THEM?

*Humane Society of the United States v. Glickman*¹

I. INTRODUCTION

The Migratory Bird Treaty Act ("MBTA") delegates the power to regulate migratory birds to the Secretary of the Interior.² Although the MBTA has provided protection to a number of migratory birds since its passage in 1918, there have been repeated attempts to exterminate these birds. One of the most recent attempts was in the early 1990's, when local Virginia officials perceived Canada geese to be a pest that must be eradicated. Virginia's actions in conjunction with the Department of Agriculture to eliminate these birds were thwarted when concerned citizens filed suit in federal court.

II. FACTS AND HOLDING

The Humane Society of the United States ("Humane Society") brought suit against the Department of Agriculture for alleged violations of the MBTA and the National Environmental Policy Act ("NEPA").³ In 1996, the United States Department of Agriculture, Animal and Plant Health Inspection Service-Wildlife Services Division ("APHIS-WS") began to craft a full-scale plan to deal with a perceived Canada geese problem in the state of Virginia.⁴ This proposed plan included a number of methods to control the geese including: biological control, exclusion, habitat alteration, hunting, relocation, nest and egg destruction, capture and euthanasia.⁵

In the last decade, Canada geese have expanded their population base in both the Atlantic Flyway and Virginia.⁶ Due to the population growth, there has been an increase in the number of conflicts that have occurred between the geese and Virginia homeowners, businesses and public institutions.⁷ In Virginia, some reports have indicated that these geese have caused statewide-yields of cereal grains, peanuts, soybeans and corn to be reduced.⁸ The geese droppings have also allegedly spoiled water quality and interfered with people's enjoyment of parks.⁹ These birds have also had various conflicts with aircraft since resident geese are found at many of Virginia's airports and military bases.¹⁰

The Humane Society applied for a temporary restraining order ("TRO") against APHIS-WS to stop the implementation of the Canada Geese Management Plan.¹¹ The Court granted the TRO because the Humane Society was able to demonstrate a strong likelihood of success on both their MBTA and NEPA claims.¹² First, the court found that the Canada Geese Management Plan was contrary to the MBTA because it allowed Virginia state officials to capture and kill the animals without obtaining proper permits from the United States Fish and Wildlife Services.¹³ Second, the Court found that the Humane Society had demonstrated a near-certain chance of success on their NEPA claim.¹⁴

¹ 217 F.3d 882 (D.C. Cir. 2000).

² 16 U.S.C. § 701 (2000).

³ *Humane Society of the United States v. Glickman*, 1999 U.S. Dist. LEXIS 19759 at *2 (D.D.C. July 6, 1999).

⁴ *Id.* This plan was timed to coincide with the annual summer molt. *Id.* Molting is process that the geese go through each year when they shed their feathers. *Id.* APHIS-WS officials are able to catch the birds with more ease during this time because the birds are unable to fly. *Id.*

⁵ *Humane Society*, 1999 U.S. Dist. LEXIS 19759 at *3-4.

⁶ *Id.* at *2. There was an estimated 66,169 Canada geese in Virginia in 1991 and by 1998 there were an estimated 254,000 geese. *Humane Society*, 217 F.3d at 883.

⁷ *Id.*

⁸ *Humane Society*, 217 F.3d at 883.

⁹ *Id.*

¹⁰ *Id.* at 883-884. For example, a passenger jet at Dulles International Airport hit ten Canada geese, causing almost two million dollars worth of damage to the aircraft. *Id.* at 884. At Langley Air Force Base and Norfolk Naval Air Station there have been delays, alterations, aborted flights because of the Canada geese in the area. *Id.*

¹¹ *Humane Society*, 1999 U.S. Dist. LEXIS 19759 at *4.

¹² *Id.*

¹³ *Id.* at **4-5.

On August 28, 1998, APHIS-WS completed a revised plan to address their concerns with the Canada geese in Virginia.¹⁵ In response to the revised plan, APHIS-WS received 302 negative comment letters from a variety of sources.¹⁶ Shortly after the Court granted the Humane Society's TRO, both the APHIS-WS and the Humane Society filed motions for summary judgment.¹⁷ The district court for the District of Columbia granted the Humane Society's motion for summary judgment and enjoined the APHIS-WS from conducting their Canada Geese Management Plan.¹⁸

In *Humane Society of the United States v. Glickman*, the United States Court of Appeals for the District of Columbia upheld the lower court's ruling that the Migratory Bird Treaty Act requires APHIS-WS to obtain a permit from the Department of Interior before the implementation of their Canada Geese Management Plan.¹⁹

III. LEGAL BACKGROUND

A. Migratory Bird Treaty Act²⁰

The Migratory Bird Treaty was entered into at the turn of the twentieth century.²¹ Lawmakers urged President Wilson to adopt a treaty to protect the dwindling population of migratory birds.²² These birds were thought to be valuable for two reasons: first, as a source of food and second, for their help in destroying insects that are injurious to vegetation.²³ On December 8, 1916, Canada and the United States signed a treaty that bound each nation to respect strict prohibitions on taking, capturing, hunting and killing certain migratory birds.²⁴ On July 3, 1918, in addition to the treaty, Congress passed the Migratory Bird Treaty Act.²⁵

Section 701 of the MBTA is a general introduction to the legislation.²⁶ It provides that the duties and powers of Secretary of the Interior are enlarged to include the preservation and restoration of game birds and other wild animals.²⁷ Congress specifically provided in this section that the purpose of the MBTA was the restoration of migratory birds in parts of United States where they have become scarce or extinct and to regulate these animals in localities where they have not existed in the past.²⁸ Section 702 allows the Secretary of the Interior to import eggs of game birds to allow propagation of these birds.²⁹ This section follows the original purpose of the MBTA to ensure that migratory birds have a sufficient population.³⁰

Section 703 states that the taking, killing or possessing of migratory birds is unlawful.³¹ Specifically, the statute provides that "it shall be unlawful at any time, by any means or in any manner ... to capture or kill, attempt to capture or kill ... any such bird or any part ..." ³² This provision applies to any wildlife protected under the conventions between the

¹⁴ *Id.* at *5.

¹⁵ *Id.* at *6. This plan anticipated the capturing and killing of approximately 3,245 resident Canada geese during the molting season. *Id.* While this represents approximately 1.3 percent of Virginia's statewide Canada geese population, it would in the short term destroy the population in the implemented areas. *Id.*

¹⁶ *Id.* After review of the letters APHIS-WS found that there would be no environmental impact resulting from the new plan. *Id.* APHIS-WS finding was contrary to many people's views on the matter. *Id.*

¹⁷ *Id.* at *38.

¹⁸ *Id.*

¹⁹ *Humane Society*, 217 F.3d at 887. The Court's holding essentially provides that the MBTA applies to persons including the state or federal government. *Id.*

²⁰ 16 U.S.C. §§ 701-712 (1999).

²¹ *Humane Society*, 1999 U.S. Dist. LEXIS 19759 at *7.

²² *Id.*

²³ *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

²⁴ *Id.*

²⁵ *Id.* Congress passed this legislation since it was their understanding that they must execute a treaty through legislation in order to make it effective and enforceable in the courts. *Id.*

²⁶ 16 U.S.C. § 701 (2000).

²⁷ *Id.* Interestingly if Congress had not amended this section in 1939, there would be no dispute in this case since section 701 originally provided these powers to the Department of Agriculture. See generally 16 U.S.C. § 742(b) (1999). Thus the Department of Agriculture could use its Canada Geese Management Plan and argue that it is proper under the powers delegated to it in the MBTA.

²⁸ *Id.*

²⁹ 16 U.S.C. § 702 (2000). Under section 702, the Secretary is given wide latitude in the implementation of this section. *Id.*

³⁰ See generally *Humane Society*, 1999 U.S. Dist. LEXIS 19759 at *7.

³¹ 16 U.S.C. § 703 (2000).

³² *Id.* "The fundamental prohibition in the Migratory Bird Treaty Act is couched in ... expansive language." *Humane Society*, 1999 U.S. Dist. LEXIS 19759 at *8. (quoting *Andrus v. Allard*, 444 U.S. 51, 59 (1979)).

United States and Great Britain, Mexico, Japan or the former Soviet Union.³³ However, section 704 authorizes the Secretary of Interior to determine the extent and by what means, it is compatible with those conventions to allow hunting, taking, capture or killing of migratory birds.³⁴ In addition, the Secretary is authorized to adopt suitable regulations permitting and governing these matters.³⁵

In accordance with section 704, the Secretary of Interior has adopted a plethora of regulations.³⁶ One regulation requires that each person planning to hunt migratory game birds in any state except Hawaii provide their name, address and date of birth to the proper state authorities.³⁷ Additionally, the Secretary has limited the type of device³⁸ used to hunt these birds and has made it unlawful for any person to take a migratory bird by baiting³⁹ or through the use of bait.⁴⁰ Besides the regulation of type of device, the Secretary has also limited use of motor vehicles⁴¹ and use of calls and decoys⁴² in the hunting of birds. The Secretary of Interior has gone so far as to regulate the type and amount of shot in the shotgun shells used in the capture of migratory birds.⁴³

Section 706 of the Migratory Bird Treaty Act provides the Secretary of the Interior with the power to enforce the MBTA and the ability to execute search warrants for the enforcement of the Act.⁴⁴ All violations of the MBTA used in connection with a violation, such as improper motor vehicles, guns and other devices are forfeited under section 706 to the United States.⁴⁵ Section 707 imposes a criminal punishment on any person, association, partnership or corporation who violates the MBTA.⁴⁶ As was the case in section 706⁴⁷, section 707 contains a forfeiture clause that provides all guns, traps, nets and other equipment used by any person when engaging in violation of the MBTA are forfeited to the United States.⁴⁸ There are several cases that have dealt with the above-mentioned sections of the MBTA.

B. *Missouri v. Holland*⁴⁹

After the passage of the MBTA, the state of Missouri brought suit to prevent the game warden of the United States from enforcing the Act.⁵⁰ Missouri argued before the Supreme Court that the statute was an unconstitutional interference with rights reserved to the states under the Tenth Amendment.⁵¹ In the Supreme Court's analysis of the claim, the Court examined not only the Tenth Amendment, but also the United States' power to make treaties under

³³ 16 U.S.C. § 703.

³⁴ 16 U.S.C. § 704. The prohibition against killing in the MBTA is not limited to physical conduct normally exhibited by hunters or poachers. *U.S. v. Moon Lake Elec. Assn., Inc.*, 45 F.Supp.2d 1070 (D. Colo. 1999). (*Compare with Newton County Wildlife Assn. v. United States Forest Service*, 113 F.3d 110 (8th Cir. 1997)). Once a migratory bird is killed or captured, a hunter is required to make reasonable efforts to retrieve the bird and retain it in their actual custody. See 50 C.F.R. § 20.25 (2000).

³⁵ 16 U.S.C. § 704. These regulations set out the permits concerning migratory birds as well as other species. *Id.*

³⁶ See 50 C.F.R. 12 et al. (2000).

³⁷ 50 C.F.R. 20.20(b) (2001).

³⁸ See 50 C.F.R. 20.21(a) (2001). This regulation provides that "traps, snares, net, rifle, pistols, swivel guns, shotguns larger than 10 gauge ... poison, drug, explosive or stupefying substances" cannot be used in hunting of migratory birds. *Id.* Under this regulation it seems that the Department of Agriculture would be greatly limited in methods they could use to exterminate the Canada geese under their proposed plan. But under the Special permits for Canada geese *infra*, states are given wide latitude. See 50 C.F.R. 21.27 (2000).

³⁹ "Baiting means the direct or indirect placing exposing depositing, distributing or scattering of salt, grain, or other feed that could serve as lure or attraction to migratory game birds..." 50 C.F.R. 20.11(k)(2001).

⁴⁰ *Id.*

⁴¹ See 50 C.F.R. 20.21(e) (2001).

⁴² See 50 C.F.R. 20.21(f) (2001).

⁴³ See 50 C.F.R. 20.21(j) (2001).

⁴⁴ 16 U.S.C. § 706 (2000).

⁴⁵ *Id.* Section 706 also gives discretion to the Secretary of Interior to decide what will occur in these forfeitures. *Id.* The Department of Interior has set out the forfeiture and seizure procedures in the code of federal regulations. See 50 C.F.R. 12.1 et al. (2000).

⁴⁶ 16 U.S.C. § 707 (2000). These violations are deemed to be a misdemeanor and upon conviction up to an \$15,000 and or imprisonment of six months. *Id.* The provision of Migratory Bird Treaty Act prohibiting the taking, killing or possessing of migratory birds and setting a penalty for a violation has been held to be valid under the commerce clause. See *U.S. v. Bramble*, 894 F. Supp 1384 (D. Hawaii 1995), *affirmed* 103 F.3d 1475.

⁴⁷ 16 U.S.C. § 706 (2000).

⁴⁸ 16 U.S.C. § 707

⁴⁹ 252 U.S. 416 (1920).

⁵⁰ *Id.* at 430.

⁵¹ *Id.* at 431.

Article 2, Section 2 of the United States Constitution.⁵² The Court held that there are limits to the treaty making power of the United States such that if a treaty infringes on the Constitution then it cannot be upheld.⁵³

The Court reviewed two district court cases that found migratory birds were owned by states and should be used for the benefit of the citizens of these states.⁵⁴ The Court quickly dismissed these cases by stating “[w]hether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power.”⁵⁵ Upon review of the MBTA the Court found that the treaty did not contravene any prohibitory words found in the Constitution.⁵⁶ Thus the Court decided that the sole issue before the Court was whether the MBTA was “forbidden by some invisible radiation from the general terms of the Tenth Amendment.”⁵⁷ After review of the transitory nature of the birds and the magnitude of the interest involved, the Court held that MBTA was valid and not forbidden by the Tenth Amendment.⁵⁸

*C. Newton County Wildlife Ass’n v. United States Forest Service*⁵⁹

In 1990’s, there were two key cases that provided guidance to the federal district courts on the question of which persons or organizations were specifically governed by the MBTA. In the first case, *Newton County Wildlife Ass’n v. United States Forest Service*, the Wildlife Association alleged that the Forest Service’s approval of a timber sales contract violated the MBTA.⁶⁰ The Wildlife Association filed a motion for preliminary injunction in order to enjoin the timber sales on the ground that the Forest Service failed to obtain a special purpose permit from the Department of Interior’s Fish and Wildlife Services.⁶¹ The district court denied this motion, holding that it did not have jurisdiction over a separate MBTA claim because there was no private right of action.⁶² Upon review, the Eighth Circuit Court of Appeals agreed with the district court that the MBTA did not create a private right of action.⁶³ According to the Eighth Circuit, the proper tool to review timber sales was the National Forest Service Management Act⁶⁴ (“NFSMA”).⁶⁵

Although the Court found the provision to review timber sales was the NFSMA, it stated that there still was an issue of whether the agency actions were arbitrary, capricious or contrary because it ignored the requirements of MBTA.⁶⁶ In its analysis of this issue, the Court turned to the Forest Service’s obligations under the MBTA.⁶⁷ The Wildlife Association asserted, and the Forest Service agreed, that logging would disrupt the nesting of migratory birds and lead to the death of some of these birds.⁶⁸ Further, under the MBTA the Wildlife Association argued there is an absolute prohibition on the killing of migratory birds.⁶⁹ The government countered that while the MBTA imposes strict liability on violators, an absolute prohibition would be absurd.⁷⁰

Upon review of the parties’ arguments the Court of Appeals found that strict liability was appropriate when dealing with hunters and poachers.⁷¹ However, the Court found that “it would stretch t[he] 1918 statute far beyond the bounds of reason to construe it as to absolute criminal prohibition on conduct, such as timber harvesting that indirectly results in the death of migratory birds.”⁷² The Court also cited the Ninth Circuit, which held that the ambiguous terms

⁵² *Id.* at 432. The Court held that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, section 8, as a necessary and proper means to execute the powers of the Government.” *Id.*

⁵³ *Id.*

⁵⁴ *Id.* In *United States v. Shaver* and *United States v. McCullough* the district court held that Congress had no power to displace the States sovereign control over migratory birds. See *United States v. Shaver*, 214 Fed. 154 (1914); see *United States v. McCullough*, 221 Fed. 288 (1915).

⁵⁵ Holland, 252 U.S. at 433.

⁵⁶ *Id.*

⁵⁷ *Id.* at 433-434.

⁵⁸ *Id.* at 435.

⁵⁹ 113 F.3d 110 (8th Cir. 1997).

⁶⁰ *Id.* at 115.

⁶¹ *Id.* at 116.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 16 U.S.C. §§ 1600 et seq. (2000).

⁶⁵ *Newton County Wildlife Ass’n*, 113 F.3d at 114.

⁶⁶ *Id.*

⁶⁷ *Id.* at 115.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

“take” and “kill” in 16 U.S.C. § 703 are meant to cover the physical conduct engaged in by hunter and poachers.⁷³ In addition, the Court noted the MBTA requires sanctioning of “any person, association, partnership or corporation” that violates the Act.⁷⁴ Based on this language, the Court stated “[s]ince, in common usage, the term ‘person’ does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.”⁷⁵ Based on this discussion, the Court found that the MBTA did not apply to the federal government and thus the Forest Service did not have to apply for a special permit under the MBTA.⁷⁶

D. *Sierra Club v. Martin*⁷⁷

The second key case brought during the 1990’s on the jurisdiction of the MBTA was *Sierra Club v. Martin*, involving the Sierra Club’s allegations that particular Forest Service timber contracts violated the MBTA.⁷⁸ The Sierra Club’s primary basis for these claims was that these contracts allowed timber cutting during the migratory bird-nesting season.⁷⁹ The Forest Service did not dispute that, if under these contracts, a tree was cut down with an active nest, migratory birds would be killed.⁸⁰ In this case, the district court held that the Forest Service’s actions violated the MBTA because thousands of migratory birds would be killed directly by the cutting down of trees with nests of juvenile birds.⁸¹ Therefore, the district court granted the Sierra Club injunctive relief under the Administrative Procedures Act.⁸²

The Forest Service appealed the district court’s ruling, claiming that there was no statutory violation to support the injunction granted.⁸³ The Court of Appeals found the issue before the Court to be “whether the Forest Service’s actions are subject to the MBTA.”⁸⁴ The Court held, by its plain language the MBTA does not subject federal government to its prohibitions.⁸⁵ This finding was based on the fact that the statute includes persons, associations, partnerships or corporations, but not specifically the federal government.⁸⁶

On appeal, the Sierra Club asserted that the MBTA’s prohibition on killing included the federal government.⁸⁷ The Eleventh Circuit Court of Appeals did not find this argument persuasive because it found no congressional intent to support a holding that “person” includes the federal government.⁸⁸ Additionally, the Court found that the application of the MBTA to the federal government would have severely impaired the Forest Services’ ability to comply with the congressional delegation to manage the national forests.⁸⁹ Accordingly, the Court held that the MBTA does not apply to the federal government.⁹⁰

⁷³ *Id.* The Ninth Circuit supported their argument with the assertion that the main concern in 1918, the time of the enactment, was hunters and poachers. See *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). Other district courts have had similar findings. See *Mahler v. United States Forest serv.*, 927 F.Supp. 1559, 1573-74 (S.D. Ind. 1996); see *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F.Supp. 1502, 1509-10 (D.Or. 1991).

⁷⁴ *Newton County Wildlife Ass’n*, 113 F.3d at 115 (quoting 16 U.S.C. § 707(a)).

⁷⁵ *Id.* (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)). In further support their argument the Court of Appeals asserted that the government’s duty to obey the treaty arises from the treaty itself and that the MBTA merely extends it to private persons. *Id.*

⁷⁶ *Id.* at 116.

⁷⁷ 110 F.3d 1551 (11th Cir. 1997).

⁷⁸ *Id.* at 1553.

⁷⁹ *Id.* at 1553. The tree cutting during the nesting season “would directly kill at least 2,000 to 9,000 neotropical migratory birds.” *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The Administrative Procedure Act (“APA”) is codified under 5 U.S.C. § 701-706. *Id.* APA doesn’t expand the substantive duties of a federal agency, but merely provides a framework for judicial review of an agency’s actions. *Id.* at 1555.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when chooses to do so. *Id.* Under the Endangered Species act Congress defined person as “any officer, employee, agent, department or instrumentality of the federal government.” *Id.* (quoting 16 U.S.C. 1532(13)).

⁸⁹ *Id.*

⁹⁰ *Id.*

IV. INSTANT DECISION

In *Humane Society of the United States v. Glickman*, the United States Court of Appeals for the District of Columbia held that because APHIS-WS did not obtain a permit from the Department of the Interior, its implementation of the Canada Geese Management Plan violated section 703 of the Migratory Bird Treaty Act.⁹¹

APHIS-WS did not dispute that although Virginia's Canada geese are year-long residents, they are members of a species that migrate and therefore fall within the auspices of "migratory birds" protected under the MBTA.⁹² The issue in this case, is whether or not the MBTA applies to federal agencies.⁹³ The district court examined the "broad and unqualified language--'at any time,' 'by any means,' 'in any manner,' 'any migratory bird,' 'any part, nest, or egg of any such bird'" that comprises section 703.⁹⁴ The district court held that this language applies to everyone in the United States, including federal agencies such as APHIS-WS.⁹⁵

In contrast, the Court of Appeals noted that under the opening clause of the MBTA there was an exception to the protection provided under the Act.⁹⁶ Under this exception, the Interior Department is given authority to regulate hunting seasons and bag limits for migratory game birds.⁹⁷ In addition to hunting regulations, the Secretary of the Interior is able to issue permits for killing Canada geese and other migratory birds if a reason is shown to be "compatible with the terms of [Migratory Bird] conventions."⁹⁸

In its review of MBTA, the Court noted that nothing in section 703 of MBTA turns on the identity of the perpetrator.⁹⁹ In *United States v. Arizona*¹⁰⁰ the Supreme Court interpreted a similar statute that "framed its prohibition in terms of forbidden acts without mentioning the identity of the transgressor."¹⁰¹ The Supreme Court held that under the statute there was a restriction not only on private parties, but state and federal agencies as well.¹⁰²

APHIS-WS argued that there is structural ambiguity in the criminal penalty provision section 707(a).¹⁰³ The rationale for this argument is that federal agencies cannot be considered "persons" that may be held criminally liable.¹⁰⁴ The Court, citing *United States v. Cooper Corp.*,¹⁰⁵ indicated that "person" does not ordinarily include a sovereign.¹⁰⁶ Under this canon, the Court found that even without a specific review provision, a suit might still be brought against the appropriate federal officer for injunctive relief to enforce section 703 of the MBTA.¹⁰⁷ Accordingly, the Court found that even if it adopted APHIS-WS's argument that federal agencies are not "persons" under section 707(a), it doesn't support the conclusion that Congress meant to exempt federal agencies from section 703 of MBTA.¹⁰⁸ Therefore, the Court held that APHIS-WS, as well as other federal agencies, must follow MBTA guidelines and apply for a permit with the Department of Interior.¹⁰⁹

⁹¹ *Humane Society*, 217 F.3d at 887.

⁹² *Id.* at 884.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 885. This exception specifically states that the Act must be followed "[u]nless and except as permitted by regulations made hereafter provided in this subchapter." *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting 16 U.S.C. § 704).

⁹⁹ *Id.*

¹⁰⁰ *United States v. Arizona*, 295 U.S. 174, 184 (1935) (citing 33 U.S.C. § 401). The statute in question provided that there shall be no "construction of any bridge, dam, dike or causeway over any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of congress shall have been obtained."

¹⁰¹ *Humane Society*, 217 F.3d at 885

¹⁰² *Id.* The plaintiff suggested that this statute only applied to work undertaken by private parties. *Arizona*, 295 U.S. at 184. In response to this argument the Court held that there was no valid argument why they should apply the statute to private parties but not to federal and state agencies. *Id.*

¹⁰³ *Humane Society*, 217 F.3d at 885. This section provides that "any person, association... who violates... any regulation... shall be deemed guilty of misdemeanor and upon conviction shall be fined." 16 U.S.C. § 707(a) (2000).

¹⁰⁴ *Humane Society*, 217 F.3d at 886.

¹⁰⁵ *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). The Court noted that this "cannon not only applies to federal government, but to the States." 217 F.3d at 886 n. 4 (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 1858 (2000)).

¹⁰⁶ *Cooper Corp.*, 312 U.S. at 604.

¹⁰⁷ *Humane Society*, 217 F.3d at 886. The Supreme Court recognized the "equity injunction as a method for review of administrative action" in *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893). *Id.*

¹⁰⁸ *Id.* at 886-887.

¹⁰⁹ *Id.*

V. COMMENT

The Migratory Bird Treaty Act has been attacked since its passage in 1918.¹¹⁰ Yet through these repeated attacks, the Act has remained as protector of migratory birds, our food supply, our forest and our crops.¹¹¹ In *Humane Society v. United States*, the Court of Appeals held that the agencies of federal government must obtain a permit before action is taken against migratory birds, such as the Canada geese.¹¹² The Court's holding in *Humane Society v. United States* created a conflict in the circuits since it was previously thought by some jurisdictions that the MBTA did not apply to the federal government. Although the Eighth and the Eleventh Circuits have held to the contrary, the D.C. Circuit Court of Appeals was correct when it applied the MBTA to the federal government.¹¹³

Under the MBTA, Fish and Wildlife Service ("FWS") is authorized to issue depredation permits for migratory birds that are a serious injury to agriculture or other interests in a particular community.¹¹⁴ In 1997, contrary to past regulations, the Director of FWS issued a memorandum that stated federal agencies no longer needed to obtain a permit before taking and killing migratory birds.¹¹⁵ It is this author's position that the Director's memo providing that permits were no longer required for federal agencies was inconsistent with the MBTA. There is a strict prohibition against the taking or killing of migratory birds under the MBTA.¹¹⁶ The Secretary of Interior can allow killing or taking of these birds only if it is compatible with the terms of the migratory bird conventions.¹¹⁷ It is puzzling that FWS believed these conventions would require everyone except the federal government to apply for a depredation permit.

If APHIS-WS had a desire to carry out the implementation of the Canada Geese Management Plan, why did it not follow the simple process to file a permit under section 21.26?¹¹⁸ Section 21.26 provides state wildlife agencies with special Canada geese permits for management and control activities that are normally prohibited.¹¹⁹ FWS will issue these permits only when granting it will contribute human health and safety, protect personal property or allow the prevention of injury to people or property.¹²⁰ The requirements for this permit are very minimal: a detailed statement describing the activities requested under the permit, an estimate of size of Canada geese population in state, a requested annual take of resident Canada geese, and a statement indicating that the state will inform all employees of such a plan if granted.¹²¹ Under this regulation, the States are given broad discretion in the methods used and Virginia would be allowed to carry out this plan anytime between March 1 and August 1.¹²²

There are two possibilities as to why this permit was never filled out: either there was poor planning in the implementation of the Canada Geese Management Plan or the Department of Interior no longer wanted to deal with these special permits and simply allowed federal agencies to have their way with migratory birds. If the reason was the former, there was even another permit that could have been applied for under the current regulations. If APHIS-WS felt the section 21.26 process was too burdensome, they could have filed for a permit under section 21.27.¹²³ This section allows FWS to issue permits for special activities related to migratory birds.¹²⁴ This section is applicable to the Goose Management Plan since it is not a related activity that is provided for under the MBTA. In order to have a permit granted under this section, the Department of Agriculture must show that the plan is a benefit to migratory bird resources, an important research reason, a reason of human concern for individual birds or another compelling justification.¹²⁵ It seems

¹¹⁰ See *Missouri v. Holland*, 252 U.S. 416 (1920).

¹¹¹ *Id.* at 435.

¹¹² See *Humane Society*, 217 F.3d 882.

¹¹³ See the discussion *supra*, of *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) and *Newton County Wildlife Ass'n v. United States Forest Service*, 113 F.3d 110 (8th Cir. 1997).

¹¹⁴ *Humane Society*, 217 F.3d at 884. A depredation permit is required before any person is able to take a migratory bird for depredation control purposes. 50 C.F.R. § 21.41 (2000). Applications for depredation permits must be submitted to regional directors and must include: a description of area where depredation is occurring, nature of crops or other interests being injured, extent of such injury and particular species committing this injury. *Id.*

¹¹⁵ *Id.* at 884.

¹¹⁶ 16 U.S.C. § 703.

¹¹⁷ 16 U.S.C. § 704.

¹¹⁸ 50 C.F.R. § 21.26 (2001)

¹¹⁹ 50 C.F.R. § 21.26(a)

¹²⁰ 50 C.F.R. § 21.26.

¹²¹ *Id.*

¹²² *Id.* Upon the taking of geese under the special Canada goose permit, the geese can be given to public museums or public institutions for scientific or educational programs or they can be processed for human consumption. *Id.*

¹²³ 50 C.F.R. § 21.27 (2001).

¹²⁴ *Id.*

¹²⁵ *Id.*

that the best position for the APHIS-WS under this section would be to argue that there is compelling justification for this plan because of previous conflicts with the Canada geese.

The gist of APHIS-WS's argument in support of their position is the word "person" in 707(a).¹²⁶ This argument lacks merit even though it is based on the textual canon that the word "person" will generally be held not to include a sovereign. From an initial viewing of the statute, it seems plausible that under the plain meaning of "person," the term would not include a sovereign such as the United States. However, there are two reasons why this argument is improper.

First, while the plain meaning of a word can be dispositive, the word "person" in the statute also needs to be reviewed in the context of the sentence as well as the context of section 707.¹²⁷ Nothing in the Migratory Bird Treaty Act would prohibit a suit being brought against the federal or state government for a violation of this act. Further, even if section 707's criminal provision was found not to apply to the federal government, it does not follow that suit could not be brought for injunctive relief against the appropriate government officer.¹²⁸

The second problem with APHIS-WS's argument is that for every canon there is usually an opposite canon or contradictory canon.¹²⁹ This author would assert it is a very difficult argument to win, if the primary basis for support of a claim is a canon of statutory interpretation. A canon of construction may be used by a court to support a holding in one case, but the same canon might be later disregarded as inapplicable to the facts or ignored by the judges. Thus, it is this author's assertion that courts are quite unpredictable when they apply canons of construction, as such a canon alone will rarely win a case. Accordingly, the Court of Appeals correctly dismissed the statutory canon argument and resolved the case looking at all of the pertinent facts before the court.

VI. CONCLUSION

To protect migratory birds there must be protection from all people including the federal and state governments. Allowing federal agencies to destroy migratory birds merely because of complaints of certain states undermines the protections provided under the Migratory Bird Treaty Act. Contrary to outcomes in the Eighth and Eleventh Circuits, the Court of Appeals for the District of Columbia found the proper result under the MBTA. Migratory birds such as the Canada geese will not be protected until this conflict between the circuits is resolved by a decision of the Supreme Court.

JOSHUA KLINGER

¹²⁶ 16 U.S.C. § 707 (2000).

¹²⁷ *See Id.*

¹²⁸ *Id.*

¹²⁹ Karl Llewellyn was one of the first authors to discuss this idea that an opposite canon exists for almost every substantive canon. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 *Vand. L. Rev.* 395, 401-06 (1950).