[ORAL ARGUMENT SCHEDULED FOR OCTOBER 8, 2002]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5163
(Consolidated with No. 02-5180)

CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff-Appellee,

v.

HON. GORDON R. ENGLAND, Secretary of the U.S. Navy,
HON. DONALD H. RUMSFELD, Secretary of Defense
Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION; U.S. REPRESENTATIVES JAMES V. HANSEN, KEN CALVERT, AND BOB BARR; AND U.S. SENATOR JESSE HELMS AS AMICI CURIAE IN SUPPORT OF APPELLANTS URGING REVERSAL

INTERESTS OF AMICI CURIAE

The interests of the amici curiae Washington Legal Foundation (WLF), et al., are as stated in their motion and notice filed with the Court on July 16, 2002, seeking leave to participate in this case. Over opposition by the Plaintiff-

Appellee, the Court granted WLF's motion on August 8, 2002.

INTRODUCTION AND SUMMARY

Plaintiff-Appellee, Center for Biological Diversity (CBD), brought this action to enjoin the United States Navy and Marines from conducting critical live-fire training exercises on Farallon de Medinilla (FDM), an uninhabited 200-acre island located in the Commonwealth of the Northern Mariana Islands (CNMI) in the Western Pacific. CBD alleges that a handful of non-endangered migratory birds on FDM have been, and are likely to be, harmed or killed as result of those activities. CBD alleges that the taking of these few birds violates the Migratory Bird Treaty Act, 16 U.S.C. § 703, et seq. (MBTA), a strict liability criminal statute, and therefore, it is entitled to an injunction to stop the Navy's training under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2).

The essence of CBD's standing to bring this case is the following: one of CBD's members is a bird watcher who lives in Guam, and sometimes travels to other area islands, approximately 50 to 200 miles away from FDM. To the extent that a migratory bird on FDM -- whose species are not threatened or endangered for purposes of the Endangered Species Act -- is killed on FDM during the Navy's training exercises, that is one less bird out of hundreds or thousands of others that might have flown to the other islands, at a time and a

place where the CBD member might have been bird watching, and thus, his aesthetic enjoyment from bird watching has been allegedly irreparably injured. Notwithstanding that the record is devoid of any evidence showing that the overall populations of any of the migratory bird species in question are diminishing, the district court concluded that this highly speculative and hypothetical impairment of aesthetic interests satisfied the injury-in-fact requirement of Article III. Center for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 173 (D.D.C. 2002). Not only was this ruling erroneous, the Navy's activities, if anything, likely have enhanced CBD's bird watching opportunities.

Having found that CBD had standing, the district court quickly concluded that the Navy was committing criminal acts by conducting its live-fire training exercises at FDM during a time of war and hostilities. Id. at 174. The court subsequently issued what can only be described as a breathtaking exercise of judicial power: a "cease-fire" order halting all live-fire training exercises at FDM -- an injunctive order that figuratively, if not literally, stopped the Navy and Marines dead in the water.[1] Center for Biological Diversity v. Pirie, 201 F.

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[1] According to the Declaration of H.T. Johnson, Assistant Secretary of the Navy (May 13, 2002):

> "[I]mmediately after the remedy hearing on April 30, 2002, the Navy cancelled all training at FDM for the period of the injunction. . . . As a direct result of that order, a Marine Corps training exercise that was scheduled to occur at FDM the next day did not

Supp. 2d 113 (D.D.C. 2002). The district court clearly breached the separation of powers by encroaching upon, if not unconstitutionally usurping, the President's Article II powers, including his exclusive power as Commander in Chief. The district court dangerously and needlessly imperiled the safety of the men and women in the military, as well as our national security.

As far as the district court was concerned:

> Congress and the President together passed the MBTA and made defendants' [military training] activity a crime, and together have given the citizens of this country the right to sue their federal government civilly when it violates the law. That is the beginning and the end of this Court's inquiry.

191 F. Supp. 2d at 177. The district court's analysis was well off the mark.

Enacted in 1918, the primary purpose of the MBTA, as noted by the Supreme Court in Missouri v. Holland, 252 U.S. 416 (1920), and cited in CBD's Complaint, was the preservation of migratory birds that were "of great value as a source of food and in destroying insects injurious to vegetation." Id. at 435; Compl. ¶ 8, JA__. Neither CBD nor Missouri v. Holland refers to the purpose of the MBTA as a protection of aesthetic interests of bird watchers. Rather,

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> occur. In addition, training involving the USS Kitty Hawk Battle Group that was scheduled to occur in May also has been cancelled."

Id. at ¶ 3 (emphasis added) (attached hereto as Addendum A).

Congress enacted the MBTA during World War I as a necessary means to protect our economic well-being and national security:

> Its passage is demanded by a sense of patriotic duty to our entire country. By preventing the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage them to the extent of many millions of dollars, it will thus contribute immensely to enlarging and making more secure the crops so necessary to the support and maintenance of the brave men sent to the battlefields by the Republic, to preserve the honor of its flag, and to protect the lives of its citizens wherever engaged in lawful pursuits. * * * This bill . . . is demanded by practically all the farmers in our land, through their different organizations, State and National.

H.R. Rep. No. 65-243, at 2 (1918).[2]

Yet the district court turned the purpose of the MBTA on its head by preventing our troops from conducting necessary military training exercises on FDM because a few non-endangered migratory birds might become collateral damage. The Congress and the President that enacted the MBTA would surely be surprised to learn that the MBTA -- a criminal statute lacking a "citizen suit"

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[2] There were critical food shortages during the Great War for both America and its allies. President Woodrow Wilson made an urgent appeal to the American people, warning that without "abundant food, alike for the armies and peoples now at war, the whole great enterprise upon which we have embarked will break down and fail. . . . The time is short. It is of the most imperative importance that everything possible be done, and done immediately, to make sure of large harvests." Woodrow Wilson, An Appeal to the American People (April 15, 1917), in 42 THE PAPERS OF WOODROW WILSON, APRIL 7 – JUNE 23, 1917, at 71, 73 (Arthur S. Link, David W. Hirst, et al., eds., 1983). The positive responses by the American people and the departments of all levels of government were overwhelming, including the passage of the MBTA. See 55 Cong. Rec. 4400 (1917) (remarks of Sen. McLean that the MBTA "is a food conservation measure").

provision -- enacted to support our troops, could be used as a weapon by any bird watcher to obtain a court-ordered "cease fire" to prevent our troops from conducting necessary live-fire training exercises, especially before being sent into combat during a time of war and hostilities.[3]

This Court need not reach the merits of CBD's Complaint because the Court lacks jurisdiction to hear the case for two reasons: CBD lacks standing to bring this case, and, as noted by the Navy in its opening brief, the United States has not waived sovereign immunity under the APA, which specifically exempts judicial review of "military authority exercised in the field in time of war." 5 U.S.C. § 701(b)(1)(G). Gov't Br. 14-23. Amici urge the Court to reverse the judgment below for lack of standing because, if the case is dismissed only on sovereign immunity grounds, then CBD may likely refile the case when the current war and hostilities have ceased, and thus, cause needless expenditure of additional judicial resources. In order to forestall this potential waste of

[3] When the MBTA was enacted, certain migratory birds were actually being pressed into wartime service. During World War I, carrier, or homing, pigeons played a vital role helping the United States and its allies by delivering coded messages between military units in the field of battle, as well as by conducting aerial surveillance of enemy positions with the use of automatic miniature cameras strapped to their breasts. www.si.edu/resource/faq/ nmah/cherami.htm. Carrier pigeons were also used in World War II and the Korean War. Because the U.S. military intentionally placed those birds in harm's way, and knew that some of them would likely be injured or killed, under the CBD's and district court's reading of the MBTA, this too may have violated the MBTA.

resources, amici urge the Court to reverse on both jurisdictional grounds with alternative holdings.

Even if the district court had jurisdiction to hear this case, and even if unintentional and incidental takes of migratory birds by the government violate the MBTA, amici urge this Court to reverse the district court's injunctive relief as a clear abuse of the court's equitable discretion, a violation of the President's Commander in Chief power under Article II, and contrary to the public interest.

ARGUMENT

I. CBD LACKS STANDING UNDER ARTICLE III

CBD alleges injury not only to itself as an institution, but also to a few of its members who allegedly reside in or visit Guam and the CNMI, although none are alleged to have visited FDM. Compl. ¶¶ 3-4; JA ___. In order to have standing to bring this case in its own right, CBD must show that it has suffered an Article III injury-in-fact as an institution. In order to have standing to vindicate its organizational or associational interests, it must show that its members have suffered Article III injury. The district court addressed only the standing of CBD as an association on behalf of its members. 191 F.Supp.2d 161, 171 (D.D.C. 2002). Since CBD may attempt to argue institutional standing in this Court, amici will demonstrate that CBD lacks standing in either capacity.

To satisfy Article III's standing requirements:

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth v. Laidlaw, 528 U.S. 167, 180-81 (2000) (emphasis added). A party challenging agency action under the APA, as CBD purports to do in this case, must also meet the prudential prong of standing by showing that the interest it seeks to protect is "arguably within the zone of interest to be protected or regulated by the statute" in question. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

While general factual allegations may be sufficient at the pleading stage to withstand a motion to dismiss (although they were insufficient here), at the summary judgment stage, which was the posture of the case below, a plaintiff can no longer rest on mere allegations, but must set forth evidence to support its claims. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). CBD thus had the burden of proving that "it has indeed suffered" the requisite injury to

satisfy Article III. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379, n.21 (1982) (emphasis added). CBD failed with both of the Declarations it submitted: one by Ralph Frew, a CBD member from Guam who enjoys occasional bird watching, and the other by Bruce D. Eilerts, CBD's Assistant Executive Director.

CBD's focus on allegations that a few migratory birds were harmed or killed on FDM by the Navy is misplaced; for standing purposes, the focus must be on precisely how that conduct injures CBD or its members. As Laidlaw made abundantly clear, the relevant showing is "not injury to the environment but injury to the plaintiff." 528 U.S. at 181. Furthermore, the injuries to the plaintiff, even aesthetic ones, must be concrete and not speculative. Thus, Laidlaw recognized that environmental plaintiffs can adequately allege injury-in-fact when they allege in specific, nonconclusory terms that they use the affected area, and are persons "for whom the aesthetic and recreational values of the area will be lessened." Id. at 183 (emphasis added). Laidlaw thus distinguished the earlier precedents in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (where allegations of speculative injury were found wanting), and found that the "affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." Laidlaw, 528 U.S. at

183-84 (emphasis added). In Laidlaw, members of Friends of the Earth experienced actual, perceptible harm to their physical senses, and to their aesthetic and recreational enjoyment, because of the pollution in the nearby river. One affidavit said that the river "looked and smelled polluted," while others averred that they actually avoided using the river and the area for swimming, hiking, fishing, bird watching and the like. Id. at 181-82.

Even assuming that a few non-endangered migratory birds have been or will be killed by the Navy's exercises, CBD's allegations of injury to itself as an institution or as an association on behalf of its members do not meet the Laidlaw standard. CBD's injuries are not concrete or perceptible; rather, they are speculative, conjectural, and otherwise insufficient for standing under Article III.

A. CBD Lacks Institutional Standing

In order to obtain standing for itself as an institution, CBD must satisfy the injury requirements under Article III, just as any individual plaintiff must do. A close examination of CBD's Complaint and the Declaration of its officer, Bruce D. Eilerts, shows that CBD has fallen far short of alleging, let alone demonstrating, that it has suffered the requisite injury in fact.

CBD's allegations of its interests and injuries are described in its Complaint as follows:

> ¶ 3. Plaintiff Center for Biological Diversity . . . is a non-profit New Mexico corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands and waters. The Center and its members routinely engage in bird watching, wildlife observation, nature photography, aesthetic enjoyment, and other recreational and educational activities concerning the migratory birds that defendants harm in violation of the MBTA. In addition, the Centers' members derive scientific, recreational, and aesthetic benefits from the existence in the wild of many [but not all] of these birds and species. These interests will be irreparably damaged if defendants continue to engage in activities that harm the birds in violation of law.
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> ¶ 4. The above-described . . . interests of plaintiffs [sic] and their [sic] respective members have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by defendants' failure to comply with the MBTA by harming migratory birds at FDM.

Compl. ¶¶ 3-4; JA __ (emphasis and brackets added). In the first place, since CBD is a non-profit corporation, and thus, an artificial entity, it is hard to fathom how it can engage in and enjoy recreational activities or bird watching. Rather, CBD has alleged that only its "members" derive certain benefits from the existence of "many" (but not all) of the birds in question. CBD does not allege, for example, that it sponsors bird watching activities, let alone any that were adversely affected by the Navy's exercises, or that it had to expend additional resources to enhance the habitat of the migratory birds in question.

In short, CBD has not alleged any concrete or specific injury to its own

institutional interests, let alone irreparable ones, from the taking of a few non-endangered birds on FDM. The Eilerts Declaration merely describes in general terms CBD's various activities and programs, none of which are adversely affected by the Navy's activities. Eilerts Decl. ¶¶ 1-5.

Paragraph 6 of the Eilerts Declaration states:

> [The] Center and its members have for some time been concerned about the use of the largest and most important seabird colony remaining in the northern Mariana Islands, located on [FDM], by the U.S. military for high explosive, live-fire training operations. Because of its concerns regarding the protection of biodiversity in Pacific islands generally, and the protection of migratory birds as well as endangered species and marine mammals at FDM in particular, the Center wishes to ensure that the military complies with all relevant environmental laws, statutes, policies, and regulations at FDM.

Id. ¶ 6 (emphasis added). For the first time, some reference is made to CBD's interest in the migratory birds on FDM, but even here, the interests are described as generalized "concerns" about the birds' protection, and CBD's "wish" to ensure that the government complies with the law. It is well-settled, however, that general "concerns" or a deep interest about a problem are insufficient injuries to satisfy Article III, as are "wishes" to have the government comply with the law. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

The final paragraph of the Eilerts Declaration jumps to the conclusion that

the Navy's activities "directly impair the Center's ability to accomplish its goal of protecting and conserving the ecosystem, biological diversity, and recovery and conservation of protected species populations." Eilerts Decl. ¶ 7. Yet we are not told just how the Navy's activities impair CBD's ability to accomplish its goals.

In short, CBD has failed abysmally to adequately allege and demonstrate that it has suffered a "concrete and particularized" injury which is "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. at 560-61 (emphasis added). Thus, CBD lacks standing as an institution.

B. CBD Lacks Associational Standing

The district court erroneously found that CBD had standing because the bird watching activities of its members were being impaired by the Navy's activities. 191 F.Supp.2d at 172. CBD failed to explain how the Navy's actions on FDM have "substantially" (Frew Decl. ¶ 1; JA __) or "irreparably" (Compl. ¶¶ 3, 4; JA __) impaired its members' bird watching interests. Indeed, as will be discussed infra, the Navy's activities likely have enhanced, rather than impaired, those aesthetic interests.

As previously noted, Laidlaw made clear that aesthetic interests can constitute injury-in-fact when there are actual or imminent injuries to those interests that were perceptible; not speculative or conjectural, as is the case here.

See Central & South West Serv., Inc. v. EPA, 220 F.3d 683 (5th Cir. 2000) (Sierra Club members' concern that defendant's undisputed pollution activities might interfere with their drinking water supply was too speculative and insufficient to establish injury-in-fact under Laidlaw).

With respect to the migratory birds in question, Mr. Frew has stated that he has "recently observed" members of the migratory bird species on Guam, Saipan, and Tinian. Frew Decl. ¶ 3; JA __.[4] He alleges that members of these species visit "all of the Mariana Islands and nest on many of them, including Farallon de Medinilla." Id. (emphasis added). But as for any actual impairment to his bird watching interests -- the key issue for standing purposes -- Mr. Frew comes up short. He simply declares that it is his "understanding" that the military bombing "kills or otherwise harms" some non-endangered seabirds, and "therefore diminish[es] [his] ability to continue to enjoy and study these birds throughout the Marianas chain." Frew Decl. ¶ 5; JA __. This "injury" is not only nonexistent, it is cast in purely conclusory and speculative terms.

In the first instance, the birds in question are all non-endangered species, and therefore, the killing of a few birds a year on FDM can hardly be said to

[4] The court can take judicial notice that these islands are anywhere from 45-200 miles from FDM. Rand McNally, The International Atlas 99 (1969).

"diminish [Mr. Frew's] ability to enjoy and study these birds throughout the Marianas chain." He has not explained how the loss of a few of these non-endangered birds out of the hundreds and thousands on the island of FDM and elsewhere in the CNMI has diminished his aesthetic enjoyment of bird watching.

In that regard, the Navy's reliance on this Court's opinion in Humane Society v. Babbitt, 46 F.3d 93 (D.C.Cir. 1995) is dispositive of the standing issue. Gov't Br. 24-26. If, as in Humane Society, the effective loss of one of four endangered Asian elephants did not constitute an aesthetic injury to those who wish to study and view the species, the loss of just a few non-endangered migratory birds out of thousands of such birds does not impair bird watcher's aesthetic interests. Mr. Frew has not alleged that the number of migratory bird sightings has perceptibly diminished over the years as a result of the military exercises. And while it is true that the Navy's use of the FDM has increased recently due to recent events, no supplemental declarations or affidavits have been submitted indicating fewer bird sightings due to thes activities.

At best, the bird loss is de minimis, and has no perceptible impact, in the literal and legal sense of the word, on the aesthetic interests of bird watchers. CBD bases its injury on the speculative theory that Mr. Frew might have had a

remote chance (say, one out of million or more), of observing one particular migratory bird, if only it had not been killed, in addition to the many other birds that he had already observed, or had a chance to observe. This type of injury falls far short of an actual impairment of "aesthetic" interests that have been otherwise recognized by the courts to establish standing.

If this type of injury were deemed sufficient, then, as the Navy argued, any bird watcher could claim injury if he lives within, or even at the outermost edge of, the migratory range of a bird species, and if one or two members of the plentiful species were killed anywhere within the range as a result of government agency conduct. Gov't Br. 26, n.12. To paraphrase United States v. Van Fossan, "this [standing theory] is for the birds." 899 F.2d 636, 637 (7th Cir. 1990).

More importantly, amici suggest that the Navy's use of FDM may in fact have increased Mr. Frew's chance of observing more birds, thereby enhancing, rather than impairing, his aesthetic interests. As noted in the record, the Navy has taken extensive measures to prevent and mitigate any harm to the birds. Gov't Br. 5-7. For example, targets are placed away from primary bird habitats, training exercises are not scheduled during the nesting seasons, and other mitigation measures have been taken. Furthermore, before the live-fire training exercises begin, the Navy conducts non-lethal "hazing" of the birds to shoo them

off the island. See Exhibit 15 to Atchitoff Declaration; JA __. The military exercises that soon follow involve the use of loud and noisy ordnance, guns, and other munitions which most certainly frighten any remaining birds, causing them to fly away from FDM. Thus, more birds will likely be available for the viewing and enjoyment of Mr. Frew and CBD's members as those birds fly from FDM to the quieter islands nearby, as Mr. Frew claims that they easily do.

In addition, the record shows that the Navy has undertaken habitat enhancement and mitigation efforts on the other islands in the CNMI where Mr. Frew has visited or can visit. See generally Declaration of Lieutenant Commander Kramps; JA__. According to Rear Admiral Tom Fellin, Commander of U.S. Naval Forces Marianas, the Navy is budgeting $100,000 a year to enhance bird habitats on neighboring islands.[5] Thus, by shooing and frightening the birds off FDM, and enhancing the bird habitat of nearby islands where CBD's members actually visit or reside, those members will likely have an opportunity to observe not just the same number of birds that would otherwise be available for viewing if the Navy were not using FDM, but probably more birds for their aesthetic enjoyment.

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[5] See Donovan Brooks, Saipan Officials Worried About Attempt To Halt Navy's Bombing Exercises, Stars and Stripes, March 8, 2001.

CBD and the district court relied on Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986), where the Court, in passing, found that whale watchers had standing. That case is distinguishable from the facts here for several reasons. Preliminarily, amici notes that standing was not mentioned or briefed in Japan Whaling Ass'n at the lower court level, was not an issue presented to the Supreme Court, and was barely mentioned in a sentence or two in the briefs and in the decision. Not surprisingly, Japan Whaling Ass'n has been subsequently criticized by the Supreme Court itself.

In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Court noted:

> [I]t goes to the outermost limit of plausibility -- to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist" (citing Japan Whaling Ass'n).

Id. at 566-67. First, by describing the allegation of injury to one's ability to observe a threatened species as the "outermost limit of plausibility," the Lujan Court gave reason enough to carefully scrutinize CBD's standing.

Secondly, and more importantly, the Lujan Court's "outermost limit" reference to the Japan Whaling Ass'n case was made in the factual context where

a particular whale "species [was] threatened."[6] Id. In the case at bar, none of the bird species in question are endangered or threatened by the Navy's activities.

The alleged impairment of the aesthetic interests in this case is thus quite unlike those in Japanese Whaling, and more like those found wanting for standing purposes in Humane Society v. Babbitt, supra. See also Atlantic States Legal Foundation v. Babbitt, 140 F.Supp.2d 185 (N.D.N.Y. 2001) (bird watchers lack standing to challenge destruction of up to 7,500 nests of double breasted cormorants which are migratory birds, on small island in Lake Ontario five miles from shore, since plaintiffs' aesthetic interests not directly affected). In short, CBD has not demonstrated that its members have suffered the requisite concrete or imminent harm to their interests to satisfy the standing requirements of Article III.

C. CBD Lacks Prudential Standing

To satisfy the prudential prong of standing, CBD must show that the interest it seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute. . . in question." Ass'n of Data Processing Serv. Orgs.

[6] See generally Respondent's Motion to Expedite in Japan Whaling Ass'n v. American Cetacean Society (Jan. 2, 1986) (discussing impending threat of irreparable loss of three entire species of whales).

v. Camp, 397 U.S. 150, 153 (1970). As previously noted, Congress enacted the MBTA primarily to protect migratory birds that are insectivorous to protect our nation's crops, farmers, and the food supply. In addition, the MBTA was enacted to protect game birds for the benefit of hunters who would kill the birds for sport or food. The interests of protecting bird watchers appears to be, at best, a tertiary interest. The "essential inquiry . . . is whether Congress `intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" Clarke v. Securities Indus. Ass'n 479 U.S. 388, 399 (1987) (quoting Block v. Community Nutrition Inst., 467 U.S. 340, 347 (1984)). Congress clearly intended to rely upon the Department of Interior and government prosecutors to ensure that the MBTA was properly enforced. Congress did not intend that this criminal statute should be enforced by bird watchers against anyone, let alone our military departments. See Oregon Natural Resources Council v. Bureau of Reclamation, 1993 U.S. Dist. LEXIS 7418 **27-29 (D. Or. April 5, 1993) (bird watchers are not within the "zone of interests" protected by the MBTA, and therefore cannot invoke review of agency action under APA).

Accordingly, CBD has failed to satisfy both the constitutional and prudential requirements for standing.

II. APPLYING THE MBTA TO MILITARY TRAINING EXERCISES

AT FDM WOULD NOT ONLY HARM NATIONAL SECURITY, BUT ALSO WOULD THREATEN THE SEPARATION OF POWERS BY ENCROACHING ON THE PRESIDENT'S COMMANDER IN CHIEF POWER UNDER ARTICLE II.

Even if the district court had jurisdiction to hear this case, the Navy presents compelling reasons why it was an abuse of discretion for the district court to enjoin the continued live-fire military exercises on FDM. The essence of the Navy's argument, fully supported in the record by the unrefuted Declarations of several Navy and Marine Commanders, is that an injunction against the military exercises would seriously disrupt military preparedness and harm our national security; accordingly, the district court abused its discretion by enjoining the exercises. See Gov't Br. 36-37; 40-43; Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 2001)). These national security concerns are particularly important at this time, considering that our troops are not only deployed in Afghanistan in our war against terrorism, but also are preparing for possible military action against Iraq.[7]

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[7] In making its sovereign immunity argument under the APA, the Navy correctly observed that the United States is at war, and that Congress has authorized the President to take military action to meet the threat. Gov't Br. 15-21. President Bush has told the military and the public: "The message is for everybody who wears the uniform: get ready. The United States will do what it takes to win this war. * * * We're at war. There has been an act of war declared upon America by terrorists, and we will respond accordingly." President George W. Bush, Remarks at Camp David (Sept. 15, 2001) (transcript available at www.whitehouse.gov). Any argument by CBD to the contrary raises a nonjusticiable political question. See Sanchez-Espinozo v. Reagan,

In addition to these national security arguments, this Court should consider the related argument that applying MBTA to the facts in this case raises serious separation of power concerns. Under Article II, § 2, the President is not only the chief executive, but also the "Commander in Chief of the Army and Navy of the United States." While the exact contours of that sole power of the President have not been plumbed by the Supreme Court,[8] there can be no question that the Commander in Chief power is directly implicated in this case.

The Commander in Chief power certainly gives the President broad authority to direct our military forces in combat and hostilities. To be sure, Congress has important powers under Article I, § 8, "to declare war;" "to raise and support Armies;" "to provide and maintain a Navy;" and to make rules for

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770 F.2d 202, 210 (D.C. Cir. 1985).

[8] In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Court declined to expound on the extent of the Commander in Chief power; rather, it determined what the power did not include, namely, the seizing of domestic steel mills during the Korean War. On the other hand, the Supreme Court has determined that the President's authority to "classify and control access to information bearing on national security. . . flows primarily" from the President's Commander in Chief power under Article II, and exists apart from any explicit Congressional grant. Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988). The courts have declined to rule on the constitutionality of legislation such as the War Power Resolution that purports to limit when the President may send troops into hostilities. Cf. Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (President has independent authority under Commander in Chief powers to repel aggressive acts from third parties, and courts "may not review the level of force selected," citing The Prize Cases, 67 U.S. (2 Black) 635 (1862)). See also J. Terry Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 Notre Dame L. Rev. 187 (1975).

the "Government and Regulation of land and naval Forces," such as promulgating the Uniform Code of Military Justice. But Congress could not constitutionally fetter the exercise of the Commander in Chief's powers by prohibiting the President and the Secretary of Defense from properly training and preparing the troops for combat -- training that could easily include joint exercises with our allies -- simply because a few migratory birds may likely be harmed in the process.

The Commander in Chief power would most certainly encompass the President's authority to conduct necessary live-fire military exercises such as those in this case. Indeed, such training, even in peacetime, also promotes the national security by demonstrating to our potential adversaries that our armed forces are ready and capable of fighting and winning any military confrontation, and thereby, deters the initiation of hostile military actions against the United States and its allies. Live-fire training prepares our troops for actual combat and reduces the risk of harm our troops may suffer from the enemy or inadvertently from friendly fire. Thus, the conduct of these vital military live-fire training exercises, which are only one-step removed from actual combat activities, easily falls within the President's core Commander in Chief power.

The MBTA would be unconstitutional if it were interpreted to be

applicable to the facts of this case. Congress could perhaps use its power of the purse to prohibit the expenditure of funds for training exercises where migratory birds may be harmed, but applying the MBTA here raises serious separation of powers concerns.[9] This Court should apply the familiar Ashwander principles of constitutional avoidance, see Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), and interpret the MBTA in such a way to avoid the separation of powers problems presented if the MBTA were applied to the President's exercise of his Commander in Chief power. The Court can do this either by reading the MBTA narrowly so as to exclude its application to unintentional takes of migratory birds when our armed forces conduct live-fire training exercises, or by considering this constitutional question in its analysis of whether the district court properly exercised its equitable powers.

The Supreme Court was faced with an analogous separation of powers question in an as-applied case concerning the application of the Federal Advisory Committee Act (FACA) to the exercise of the President's appointment powers

[9] That is not to say that Congress has no power in this area. Congress could enact environmental laws that apply to military activities that are far removed from actual combat or live-fire training exercise, such as the siting of a proposed Army or Navy base so as not to harm environmental interests. Although Congress has authorized the Executive to take certain species in the interests of national security under other environmental statutes, and is considering similar legislation that deals with the very subject of this litigation, that does not mean that the current version of MBTA is constitutional as applied to the facts here.

under Article II regarding the nomination and appointment of judges to the federal bench. In Public Citizen v. U.S. Dep't of Justice, 491 U.S. 479 (1989), the Court narrowly interpreted the FACA to exclude FACA's application to the American Bar Association's (ABA) Committee on Federal Judiciary when it gives advice and recommendations to the Attorney General as to the suitability of possible federal judicial nominees. The Court did so because, inter alia, FACA's application would otherwise implicate the President's Article II Appointment power. Id. at 466-67 ("there is no gainsaying the seriousness of these constitutional challenges").

Justice Kennedy, in his concurring opinion, joined by Justice O'Connor and Chief Justice Rehnquist, sharply disagreed with the majority, and asserted that the literal terms of FACA clearly encompassed the operation of the ABA Committee; therefore, it was necessary to reach the constitutional question implicated by the application of FACA. Id. at 482 (Kennedy, J., concurring). Justice Kennedy concluded that separation of powers precluded Congress from encumbering the President's express powers under Article II with FACA. Id. In doing so, Justice Kennedy surveyed and analyzed the Court's jurisprudence on the limits of the powers and prerogatives of the President and concluded that the decisions fell into two categories.

In the first category, where the "power at issue was not explicitly assigned by the text of the Constitution to be within the sole province of the President," the Supreme Court has engaged in "something of a balancing approach, asking whether the statute at issue prevents the President `from accomplishing [his] constitutionally assigned functions.'" Id. at 484 (citations omitted). Thus, for example, the Supreme Court has determined that the President's explicit power to appoint officers of the United States gives rise to his implied power to remove officers that overrides Congressional restrictions on the removal of officers. Myers v. United States, 272 U.S. 52, 115-16 (1926).

In the second category of cases, Justice Kennedy observed that "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by the Legislative Branch." Id. at 485 (emphasis in original). Thus, although the President remained free to nominate any person he desired to the federal bench, Justice Kennedy concluded the application of FACA to the candidate screening process was an unconstitutional infringement of that express power, even though the infringement may be minor. As Justice Kennedy put it:

> Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for the Court to arrogate to

itself the power to adjust a balance settled by the explicit terms of the Constitution.

Id. at 486.

Clearly, the Commander in Chief power is an explicit and exclusive power of the President, and thus falls well within the second category of cases discussed by Justice Kennedy. The President is Commander in Chief "in time[s] of peace and war, thus embracing control of `the disposition of troops, the direction of vessels of war and the planning and execution of campaigns,' and are exclusive and independent of Congressional power." Wright, Validity of the Proposed Reservations to the Peace Treaty, 20 Colum. L. Rev. 121, 134 (1920). And even if the President's power to conduct military exercises were only an implied but necessary power of the Commander in Chief power, and thus, fell within the first category of cases discussed by Justice Kennedy requiring a balancing approach, Congress cannot through the MBTA so encumber the President's ability to carry out these live-fire training activities. Neither the legislative nor the judicial branch can constitutionally issue a "cease fire" order to the Navy; that power belongs to the President alone as Commander in Chief.[10]

[10] The district court could also have declined to exercise its equitable injunctive powers because of the trivial nature of the violations. The unintentional "takes" here are "too trivial to warrant setting in motion the elaborate and ponderous machinery of this federal court to try them. . . . [T]hey are more or less unintentional and trifling infractions of statutory regulations. . . and that `de minimis non curat lex' operates in the field of criminal as of civil law." In re

Nor did Congress intend that the MBTA be used in such a fashion. As previously noted, the Congress that enacted the MBTA during World War I to protect insectivorous migratory birds to protect our food supply for our troops, would surely be appalled, to say the least, that the law could be used to prevent critical live-fire training by our troops before being sent into battle by the President. Congress is presumed to legislate in a way that is respectful of the powers of the coordinate branches of government. Interpreting the MBTA as inapplicable in this case, and refraining from enjoining vital military training exercises, would be in accord with both congressional intent, the Constitution, and the public interest.

In its Complaint, CBD invoked Justice Holmes' statement that the preservation of migratory birds, "which are `of great value as a source of food and in destroying insects injurious to vegetation,' is a `national interest of very nearly the first magnitude.' Missouri v. Holland, 252 U.S. 416, 435 (1920)." Compl. ¶ 8; JA __. But none of the seabirds in this case have been identified as being a "source of food," or a species that destroys insects that damage crops.

Informations Under Migratory Bird Treaty Act, 281 F. 546 (D. Mont. 1922).

And even if they were such birds, ensuring our national security and the readiness of our armed forces, especially during a time of war, is not just a national interest of "very nearly the first magnitude," it is a national interest of the very first magnitude.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reverse.

Respectfully submitted,

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