The Controversial Cormorant: The Second Circuit Defers to Agency Interpretation. Fund for Animals v. Kempthorne

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The Controversial Cormorant: The Second Circuit Defers to Agency Interpretation

Fund for Animals v. Kempthorne

I. INTRODUCTION

Fund for Animals v. Kempthorne questions whether the United States Fish and Wildlife Service (hereinafter “FWS”) violated United States treaties and statutes when disseminating a Depredation Order for double-crested cormorants. Plaintiff, environmental advocacy groups, alleged that Defendant, federal agencies, violated the Migratory Bird Act, the Mexico Convention, and the National Environmental Policy Act when setting forth this Order. Defendants contended that each did not violate these statutes and treaties, but rather set forth a reasonable solution to problems the double-crested cormorants presented to various business and recreational activities.

The Kempthorne court ruled that the agencies in question acted reasonably considering the facts and circumstances of the Order. In the end, the Kempthorne court gives agencies extreme deference. Should the court have exercised more control over the agencies?

II. FACTS AND HOLDING

Plaintiffs included animal advocacy groups: The Fund for Animals, Humane Society of the United States, Defenders of Wildlife, and

1 538 F.3d 124 (2d Cir. 2008).
2 Id. The double-crested cormorant is a large black bird with webbed feet and a partly orange face. Double Crested Cormorant Population, http://www.epa.gov/med/grosseile_site/indicators/cormorants.html (last visited Oct. 4, 2009). The bird is a water bird, seen most often in the Great Lakes Region. Id. It flies and even swims with only its neck and face out of the water. Id. Generally the cormorant stands near the shore with its wings spread wide, attempting to catch food. Id. Its diet includes small lake fish. Id.
3 Kempthorne, 538 F.3d at 126.
4 Id. at 129.
Animal Rights Foundation of Florida. For some of these organizations, the double-crested cormorant has long been a source of concern. Defendants included directors and secretaries of governmental agencies, such as the FWS.

During the 1970s, the double-crested cormorant population fell drastically due to DDE causing the birds’ eggshells to thin. DDE, which is a product of DDT, created serious issues for the birds’ breeding abilities since most eggs did not hatch. Those birds that did hatch experienced contamination issues, causing a high adult mortality rate among the birds. Eventually, after the regulation of DDT, the birds experienced resurgence in population. The EPA noted that the bird’s resurgence has been so successful that it has had disastrous impacts on aquaculture.

After the 1970s, the cormorant population grew so large that fishermen attributed a decline in fish stocks to the rise in the double-crested cormorant population. Complaints especially arose from Mississippi Delta catfish farms. Fishermen sought ways to limit the cormorant population. The cormorant is regulated by treaties, federal statutes, and regulations, and is under the responsibility of the FWS, which

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5 Id. at 124. The Fund for Animals partnered with the Humane Society of the United States in 2005 to litigate animal cases after creating an Animal Protection Litigation Section of the Fund for Animals. FundforAnimals.org, Current Fund Docket, http://fundforanimals.org/courts/ (last visited Sept. 12, 2009).
7 Kempthorne, 538 F.3d at 124.
9 Id.
10 Id.
11 Id.
12 Id.
14 Id.
regulates migratory birds. Therefore, the fishermen approached the FWS in order to reach a viable solution to the cormorant problem.

The FWS approved the Aquaculture Depredation Order in 1998, which allowed the taking of cormorants "when they are found committing or about to commit acts of depredation on aquaculture stocks, subject to various conditions and only within thirteen enumerated states." According to the district court, to take "means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." After enacting the Order, the FWS received even more complaints about the cormorants, this time involving effects other than aquaculture. These complaints attributed erosion, destruction of vegetation, "displacing other bird species, and reducing sport fish populations" to the cormorants. In response, the FWS passed a Notice of Intent to promulgate a nationwide plan to control cormorants in 1999. That same year, the FWS also issued an Environmental Impact Statement (hereinafter "EIS") and developed a "Cormorant Team" consisting of FWS staff from several office locations.

The team created a draft of an EIS, which listed six alternatives for solving issues stemming from the cormorant population surge. These included: "no action . . . ; only non-lethal management techniques; expansion of existing cormorant management policies; a new depredation order; reduction of regional cormorant populations; and frameworks for a cormorant hunting season." The team recommended the Depredation Order.

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15 Fund for Animals v. Kempthorne, 538 F.3d 124, 125 (2d Cir. 2008).
16 Id. at 128 (citing 50 C.F.R. § 21.47 (2008)).
17 Norton, 365 F. Supp. 2d at 400.
18 Id.
19 Id. at 401.
20 Kempthorne, 538 F.3d at 128-29.
21 Id.
22 Id. at 129.
23 Id.
24 Id. The team’s goal was increasing "public resource managers . . . flexibility in dealing with cormorant conflicts while ensuring Federal oversight via reporting and monitoring"
The team proposed that “State, Tribal, and Federal land management agencies . . . implement a [cormorant] management program, while maintaining Federal oversight of [cormorant] populations via reporting and monitoring requirements.”25 The proposal also required agencies to “utilize non-lethal management tools to the extent they consider[ed] appropriate.”26 The proposed rule required annual reports from the land management agencies.27 It also reserved the authority of the FWS to revoke any agency’s authority to take the birds if the agency did not comply with the Order.28

The final Order was published on October 8, 2003 after the EIS was issued in August of that year.29 The final order required the initial use of non-lethal techniques for controlling cormorants.30 It also ordered measures similar to those found in the control efforts on endangered requirements.” Id. (quoting Notice of Availability; Draft Environmental Impact Statement on Double-Crested Cormorant Management, 66 Fed. Reg. 60,218, 60,218 (Dec. 3, 2001)).

25 Id. (alteration in original) (internal quotation marks omitted) (quoting U.S. FISH & WILDLIFE SERV., DEP’T OF THE INTERIOR, DRAFT ENVIRONMENTAL IMPACT STATEMENT: DOUBLE-CRESTED CORMORANT MANAGEMENT 17 (2001)).

26 Id. (alteration in original) (internal quotation marks omitted) (quoting U.S. FISH & WILDLIFE SERV., supra note 25, at 18).

27 Id. (citing U.S. FISH & WILDLIFE SERV., supra note 25, at 19).

28 Id. (citing U.S. FISH & WILDLIFE SERV., supra note 25, at 19).

29 Id. at 130 (citing Notice of Availability; Final Environmental Impact Statement on Double-Crested Cormorant Management, 68 Fed. Reg. 47,603 (Aug. 11, 2003); Migratory Bird Permits; Regulations for Double-Crested Cormorant Management, 68 Fed. Reg. 58,022 (Oct. 8, 2003)). After the draft EIS, the FWS issued a 100-day comment period, during which it received 994 letters, faxes, and emails, and held ten public meetings. Fund for Animals v. Norton, 365 F. Supp. 2d 394,402 (S.D.N.Y. 2005) (citing Notice of Availability; Final Environmental Impact Statement on Double-Crested Cormorant Management, 68 Fed. Reg. at 47,603). 32.2% of the communication supported the new Depredation Order. Id. (citing Notice of Availability; Final Environmental Impact Statement on Double-Crested Cormorant Management, 68 Fed. Reg. at 47,603). The FWS eventually redrafted the rule to only include twenty-four states, including Missouri, rather than forty-eight, identified the agencies to which it would apply, excluded saltwater, and proposed more methods for taking cormorants. Id. at 403-04 & n.4 (citing 50 C.F.R. § 21.48 (2008)). After this redrafting, the FWS again received 10,000 letters, eighty-five percent of which opposed the redraft. Id. at 403.

30 Kempthorne, 538 F.3d at 130 (citing 50 C.F.R. § 21.48(d)(1), (d)(7)).
species under the Endangered Species Act.\textsuperscript{31} Furthermore, under the new Depredation Order, the agencies have to notify the FWS in the event that a “single control event” will take more than ten percent of the cormorants in a “breeding colony.”\textsuperscript{32}

Plaintiffs challenged the Depredation Order on the grounds that it violates relevant treaties and statutes by ‘authoriz[ing] state fish and wildlife agencies, Indian Tribes, and U.S. Department of Agriculture . . . employees to kill an unlimited number of federally protected double-crested cormorants in New York and twenty-four other States, without restrictions on time of year or location of the killings, without any advance notice to the FWS, and without any showing of specific, localized harm caused by the cormorants.’\textsuperscript{33}

Specifically, Plaintiffs argued that the FWS violated the Migratory Bird Treaty Act (hereinafter “MBTA”) because the Depredation Order did not require prior permission to take the birds and was too broad.\textsuperscript{34} Secondly, Plaintiffs argued that the FWS should have established a close season for cormorants, because failing to do so violated the Mexico Convention of 1936.\textsuperscript{35} Thirdly, Plaintiffs argued that the FWS’s Depredation Order was arbitrary and capricious.\textsuperscript{36} Finally, Plaintiffs alleged that the Order violated the National Environmental Policy Act (hereinafter “NEPA”) because it did not allow the public to comment on the order nor did it fully examine the Order’s environmental impact.\textsuperscript{37}

Defendants claimed that no treaties or acts were violated, and that none acted arbitrarily and capriciously when issuing the Depredation

\textsuperscript{31} Id. (citing 50 C.F.R. § 21.48(d)(8)).
\textsuperscript{32} Id. (quoting 50 C.F.R. § 21.48(d)(9)(i)).
\textsuperscript{33} Id. at 126 (alterations in original) (quoting Amended Complaint for Declaratory and Injunctive Relief ¶ 1, Kempthorne, 538 F.3d 124 (No. 104CV00959)).
\textsuperscript{34} Id. at 132.
\textsuperscript{35} Id. at 134.
\textsuperscript{36} Id. at 135.
\textsuperscript{37} Id. at 137.
Order. Defendants answered Plaintiffs’ arguments by maintaining that the authorization was specific and that the Mexico Convention did not require that the FWS give prior permission to take the birds. 38 Secondly, Defendants alleged that the MBTA does not require a close season for the cormorants. 39 The United States District Court for the Southern District of New York dismissed Plaintiffs’ case after all parties moved for summary judgment in the trial court. 40 The district court found that the Order did not violate the MBTA because it is specific as to the extent and the means of taking the birds. 41 The trial court further found that the delegation to other agencies did not violate the MBTA because the delegation did not grant “free reign” nor abdicate its authority to the agencies. 42 Finally, the court found that the Order did not violate the Mexico Convention because the provision requiring a “close season” only applied to game birds, and both parties agree that the cormorant is not a game bird. 43

The Second Circuit affirmed the Southern District of New York’s decision, holding that the Depredation Order does not violate the MBTA or treaties, the FWS did not act arbitrarily and capriciously in adopting this order, and the FWS complied with NEPA when it adopted the Order. 44

III. LEGAL BACKGROUND

A. Statutes and Treaties

In the early twentieth century, the United States and nations within its close proximity experienced difficulty regulating the populations of migratory birds that crossed national borders since there was no consistent

38 See id. at 134.
39 See id.
40 Id. at 126.
41 Id. at 131 (citing Fund for Animals v. Norton, 365 F. Supp. 2d 394, 408-11 (S.D.N.Y. 2005)).
42 Id. (quoting Norton, 365 F. Supp. 2d at 410-11).
43 Id. (citing Norton, 365 F. Supp. 2d at 412-14).
44 Id. at 134, 137.
regulation system among the countries. As a result, the United States, Mexico, the United Kingdom (on behalf of Canada), the Soviet Union, and Japan executed treaties that regulated migratory birds. These treaties regulated the hunting and taking of migratory birds that often crossed international boundaries.

The Mexico Convention is a treaty formed between the United States and Mexico in 1937. This treaty is the only United States treaty that refers specifically to cormorants. This treaty requires the United States to establish "close seasons," or seasons of the year during which it is prohibited to take migratory birds.

The MBTA is the statutory result of these treaties. The Act's purpose is to protect migratory birds by creating a uniform regulation system for their taking and killing migratory birds. The MBTA prohibits the killing of migratory birds without permission from the Secretary of the Interior. The statute notes that the Secretary of the Interior may establish when, how, and to what extent migratory birds may be taken, or killed. The statute, however, does not indicate whether the Secretary may delegate this authority to a third party or agency.

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45 Id. at 125.
46 Id.; see also 16 U.S.C. § 703(a) (2006).
49 Kempthorne, 538 F.3d at 134.
50 The Mexico Convention, supra note 48, art. II(A) ("The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in the preceding Article, including . . . [t]he establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.").
52 Id.
53 Id. § 704(a).
54 Id.
55 Fund for Animals v. Kempthorne, 538 F.3d 124, 133 (2d Cir. 2008).
Migratory birds are further protected by NEPA, an Act that dictates procedural rather than substantive areas of environmental law.\(^5\) The purpose of NEPA is to create a deliberative process before promulgating new regulations affecting the environment, which results in greater protection of animals.\(^5\) NEPA requires agencies to consider interdisciplinary studies, create a systematic procedure, and generate reports detailing environmental impacts when making decisions.\(^5\) This gives the public and other interested parties time to communicate issues to the agency and also holds agencies more accountable for decisions that affect wildlife.\(^5\) Courts must determine whether agency decisions comply with NEPA.\(^6\)

**B. Agency Authority and Judicial Review**

According to the Administrative Procedure Act, courts may overturn an agency decision when it is arbitrary and capricious, contrary to a constitutional right, in excess of a statutory right, without observance of procedure required by law,\(^6\) unsupported by substantial evidence, or

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\(^6\) See id.
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unwarranted by the facts. In general, an agency decision that is reasonable will usually stand. The Administrative Procedure Act granted great power to agencies, which seems reasonable because if agency decisions were simply overturned by courts, the power and expertise of the agency would be wasted. Courts neither have the time nor resources to research specific issues to the extent that agencies can. Therefore, agency authority is an integral part of the American governmental system.

When reviewing agency decisions, a court must give deference to other branches and not overstep its bounds. If the court exercises too

which would avoid or minimize adverse impacts or enhance the quality of the human environment.” Id.


Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 643 (10th Cir. 1990).


Not only does this case involve the separation of the judicial and the executive branches, it also involves a grant of authority from the legislative branch to the executive branch. Congress granted the Secretary of the Interior the authority to fill in the gaps left in the MBTA. Kempthorne, 538 F.3d at 132. Because of this, the court must carefully consider whether the agency effectively utilized its given power. Therefore, the court must determine with what standards it may review the agency decision.

The Secretary of the Interior has a liberal reach of authority. Fund for Animals v. Norton, 365 F. Supp. 2d 394, 407 (S.D.N.Y. 2005) (citing Bailey v. Holland, 126 F.2d 317, 322 (4th Cir. 1942)). After the migratory bird treaties were signed, Congress gave the Secretary of the Interior authority to draft regulations. Id. These regulations determined when and how many migratory birds could be taken or killed. Id.

More issues arise when agencies delegate authority to other entities. The Kempthorne court relied on two particular cases to glean the definition of “delegation.” The first is United States Telecom Ass’n v. FCC, 359 F.3d 554 (D.C. Cir. 2004). This case gave three rules for delegation of authority: the first being that an agency can “condition its grant of permission on the decision of another entity” as long as there “is a reasonable connection between the outside entity’s decision and the federal agency’s determination.” Id. at 567. The second is that the agency may use an “outside entity” to provide the agency with factual information. Id. Finally, the agency may turn to the outside source for “advice and policy recommendations, provided the agency makes the final decision itself.” Id. at 568.

The United States Telecom court also held that “[a]n agency delegates its authority when it shifts to another party ‘almost the entire determination of whether a
much power, it would disrupt the separation of powers system that has long been the roots of American government. In the 2001 Supreme Court case \textit{United States v. Mead Corp.}, the Court noted that “[w]hen Congress has ‘explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,’ and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”\textsuperscript{67}

Courts utilize the “arbitrary and capricious” standard developed in the 1984 Supreme Court decision \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council} when determining whether agency interpretation of a statute is reasonable.\textsuperscript{68} Before going through the traditional \textit{Chevron} analysis, however, a court must first consider the “Chevron Step Zero.”\textsuperscript{69} The purpose of this step is to determine whether the Chevron analysis is even appropriate in the case at hand:

\begin{quote}
\textbf{[A]}dministrative implementation of a particular statutory provision qualifies for \textit{Chevron} deference when it appears
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\textit{specific statutory requirement . . . has been satisfied.”} \textit{Kemptthorne}, 538 F.3d at 133 (omission in original) (quoting \textit{U.S. Telecom}, 359 F.3d at 567). Furthermore, “[a]gencies may seek advice and policy recommendations from outside parties, but they may not ‘rubber-stamp’ decisions made by others under the guise of seeking their ‘advice.’” \textit{Id.} (internal quotation marks omitted) (quoting \textit{U.S. Telecom}, 359 F.3d at 568).
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The \textit{Kemptthorne} court also considered the case \textit{National Park \& Conservation Ass’n v. Stanton}, 54 F. Supp. 2d 7 (D.D.C. 1999). In that case, Plaintiffs challenged a delegation by the National Park Service to private entities. \textit{Id.} at 9. The \textit{National Park} court focused more on the “final reviewing authority” and stated that the key delegation test is whether an agency “retained sufficient final reviewing authority” over the action. \textit{Id.} at 19.

that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.\textsuperscript{70}

After determining that \textit{Chevron} is appropriate, a court considers two steps under the \textit{Chevron} analysis: first, “whether Congress has directly spoken to the precise question at issue,” and secondly, if the intent of Congress is not clear, the court must inquire as to whether the “agency’s answer is based on a permissible construction of the statute.”\textsuperscript{71}

When courts review agency interpretations of treaties, “[r]espect is ordinarily due [to] the reasonable views of the executive branch concerning the meaning of an international treaty.”\textsuperscript{72} However, \textit{Chevron} can also be used to analyze the agency interpretation of the Mexico Convention.\textsuperscript{73} This provides courts with a way to check the agency action on a treaty.

\textbf{IV. INSTANT DECISION}

The Second Circuit split its decision into four issues.\textsuperscript{74} The first was whether the Depredation Order violated the MBTA.\textsuperscript{75} The second was whether the Order violated treaties to which the United States is a party.\textsuperscript{76} The third was whether the FWS acted arbitrarily and capriciously

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\textsuperscript{70} Id. at 776-77 (alteration in original) (quoting \textit{Mead Corp.}, 533 U.S. at 226-27).
\textsuperscript{71} Id. at 772 (internal quotation marks omitted) (quoting \textit{Chevron}, 467 U.S. at 842-43).
\textsuperscript{73} See Brief of Plaintiffs-Appellants at 28-31, \textit{Kempthorne}, 538 U.S. 124 (No. 05-2603-cv).
\textsuperscript{74} See \textit{Kempthorne}, 538 F.3d at 132-38.
\textsuperscript{75} Id. at 132.
\textsuperscript{76} Id. at 134.
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in promulgating the Order. Finally, the court considered whether the FWS violated the NEPA.

A. Violation of the MBTA

Plaintiffs argued that the Order violated the MBTA because according to the MBTA, the takings must be specifically authorized by the FWS. The Second Circuit held that the Order does not violate the MBTA because the Order still requires significant oversight by the FWS over the takings.

The court noted that delegation by an agency to private individuals or organizations is often very troublesome. These private entities may take too many animals and may not account for its actions, creating an issue with the democratic decision-making process of the agencies. The court also noted that outside parties may not share the same concerns as the agency and take their agenda too far. Furthermore, the MBTA did not specifically authorize the delegation of taking powers.

Because the MBTA did not specifically authorize delegation, the court considered the definition of “delegation” and then determined whether the FWS impermissibly delegated this power to a third party. The court noted that delegation occurs when an agency shifts the responsibility of determining whether a “specific statutory requirement has been satisfied” to another party. The court gleaned its definition from

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77 Id. at 135.
78 Id. at 137.
79 Id. at 132.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id. at 132-33.
86 Id. at 133 (internal quotation marks omitted) (quoting U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 567 (D.C. Cir. 2004)).
The court used this definition to determine that the Order only permits a "grant of permission," not a "delegation of authority," since there are restrictions on the takings.88 First of all, the other parties may only take cormorants.89 Secondly, they may only take those birds to "prevent depredations on the public resources of fish . . . , wildlife, plants, and their habitats."90 The court emphasized that the taking restrictions are so great that the restrictions constitute permission to carry out a decision by the FWS, not a delegation of decision-making authority.91

B. Whether the Order Complies with Treaties

Next, the court considered whether the Depredation Order conflicted with treaties to which the United States is a party because the Order failed to establish close seasons for the takings, which may be required by the Mexico Convention.92 The court noted that the Convention is ambiguous as to whether close seasons need to be established for all migratory birds or only game birds.93 The sections in the Convention read that there should be close seasons when taking "migratory birds," not "all migratory birds," a point on which the court focused much of its analysis.94 Furthermore, the Convention created an exception for private game farms and noted that close seasons are when "hunting" would be limited.95 These clues led the court to conclude that a close season is not required by the Convention.

87 Id.
88 Id. (citing U.S. Telecom, 359 F.3d at 567).
89 Id.
90 Id. (alteration in original) (internal quotation marks omitted) (quoting 50 C.F.R. § 21.48(c) (2008)).
91 Id. (citing U.S. Telecom, 359 F.3d at 567).
92 Id. at 134.
93 Id.
94 Id.
95 Id.
The court based its final decision on the fact that it is required to defer to the executive branch when interpreting a treaty. When two interpretations present themselves to a court, the court should defer to the executive branch’s interpretation. Since the FWS’s interpretation of the treaty is reasonable in light of the ambiguity of the Convention, the court noted that it must defer to the agency’s interpretation.

C. Whether the FWS Acted Arbitrarily or Capriciously

The court next considered whether the FWS acted arbitrarily or capriciously in adopting the Depredation Order.

First, the court held that the Order is a rational solution to the problems associated with cormorants. The court cited State Farm, which explained the rule that for an order not to be arbitrary or capricious, there must be a “rational connection between the facts found and the choice made.” The court held that since the Order provides many restrictions on the taking of cormorants, it is not arbitrary or capricious.

Secondly, the court held that the Order is a reasonable response to the harm caused by the cormorants. It reasoned that even though the harm caused by the cormorants is site-specific and the FWS has acknowledged that it could use more information regarding the cormorants’ effect on local habitats, the Order is specific and detailed enough to be reasonable. Not only does it only pertain to affected states, it also allows takings only when the cormorant is “committing or

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96 Id. (quoting El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999)).
97 See id. at 134-35.
98 Id. at 135.
99 Id.
100 Id.
102 Id.
103 Id. at 136.
104 Id.
about to commit . . . depredations."'\textsuperscript{105}  Furthermore, the takings must be annually recorded.\textsuperscript{106}

Thirdly, Plaintiffs suggested an alternative solution to the problem: that the FWS should have adopted a "less drastic liberalized permitting scheme."'\textsuperscript{107} However, again, the court reasoned that when there are two or more solutions to a problem, courts should defer to the executive branch.\textsuperscript{108} Since the FWS's Order is reasonable, the court deferred to its solution.\textsuperscript{109}

D. \textit{Whether the Order Violates the NEPA}

Finally, Plaintiffs asserted that the FWS violated the NEPA when it adopted the Order. The NEPA is a series of statutes that requires agencies to adopt an EIS that "informs decisionmakers" about the environmental impacts of the Order.\textsuperscript{110} This EIS should be site-specific when applicable and provide a very critical analysis of the environmental impacts of the Order.\textsuperscript{111} Plaintiffs alleged that the FWS did not conduct a thorough investigation because it failed to delve into site-specific effects of the Order on the environment.\textsuperscript{112} The court reasoned that the FWS is not obligated to enter into "endless hypothesizing as to remote possibilities."'\textsuperscript{113}

The court held that since the Order allows local entities to take the birds, but does not require the entity to do so, there is no way of knowing

\textsuperscript{105} Id. (alteration in original) (internal quotation marks omitted) (quoting 50 C.F.R. § 21.48(c)(1) (2008)).
\textsuperscript{106} Id.
\textsuperscript{107} Id. (quoting Brief of Plaintiffs-Appellants at 49, \textit{Kemphthorne}, 538 F.3d 124 (No. 05-2603-cv)).
\textsuperscript{108} Id. at 136-37 (citing \textit{Citizens to Pres. Overton Park, Inc. v. Volpe}, 401 U.S. 402 (1971)).
\textsuperscript{109} Id. at 137.
\textsuperscript{110} Id. (quoting 40 C.F.R. § 1502.1 (2008)).
\textsuperscript{111} Id. (quoting 40 C.F.R. § 1502.1).
\textsuperscript{112} Id.
\textsuperscript{113} Id. (quoting \textit{County of Suffolk v. Sec'y of Interior}, 562 F.2d 1368, 1379 (2d Cir. 1977)).
where the takings would occur and thus agencies could not possibly determine the environmental impacts of the takings. Therefore, since there is no certain site-specific action, the FWS only had to prepare a "programmatic EIS," which it did.

V. COMMENT

The Kempthorne court held that the agency decisions were reasonable. However, the analysis that the court used should have been more thorough. The court overly deferred to the agency when determining whether the agency violated the Mexico Convention of 1936. Furthermore, the court failed to properly analyze the agency's actions using the arbitrary and capricious standard set forth by the Supreme Court.

This decision results in great deference to the agencies in question. One must ask whether judicial agency deference is a good policy. Should justices exercise judicial power to the extent that they influence or serve as a police-like check over agencies? Or should the judicial branch give extreme deference to agency decisions?

In this case, the court gave extreme deference to the agency, in one instance disregarding plain language of a treaty and in another instance not

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114 Id. at 137-38.
115 Id. at 138.
116 Id. It is perhaps interesting to note that the first named defendant, Dirk Kempthorne, appointed as Secretary of the Interior by former President George W. Bush, was known for a "voting record on environmental issues in the Senate, saying he had almost always favored changing laws like the Endangered Species Act and the Safe Drinking Water Act to make them more favorable to commercial interests." Michael Janofsky, Idaho Governor Selected to Lead Interior Dept., N.Y. TIMES, Mar. 17, 2008, at A16, available at http://www.nytimes.com/2006/03/17/politics/17interior.html. Kempthorne is notorious among animal advocacy groups because during his tenure, he put fewer species on the endangered species list than any other Secretary of the Interior in history. Press Release, E-Wire, Kempthorne Wins 2007 Rubber Dodo Award: Protects Fewer Species than Any Interior Secretary in History (Aug. 27, 2007), http://www.ewire.com/display.cfm/Wire_ID/4171.
performing a Supreme Court test when needed. This resulted in excessive deference to the point of setting an untidy precedent.\textsuperscript{117}

The court's interpretation of the Mexico Convention was unreasonable. The court stated, "we think that the Mexico Convention itself is ambiguous regarding the question of whether the ‘close seasons’ requirement applies to all migratory birds."\textsuperscript{118} However, the Convention is not ambiguous. When determining the meaning of a treaty, one must "first look to its terms to determine its meaning."\textsuperscript{119}

The meaning of the convention is unambiguous. The title of the Convention is "Convention Between The United States Of America And The United Mexican States For The Protection Of Migratory Birds And Game Mammals."\textsuperscript{120} The treaty does not differentiate between game and non-game migratory birds until Article IV, in which it states, "[t]he high contracting parties declare that for the purposes of the present Convention the following birds shall be considered migratory: Migratory Game Birds . . . Migratory Non-Game Birds."\textsuperscript{121}

The Convention states that all game birds and non-game birds listed are considered to be "migratory," the convention refers to "migratory" birds, and the Convention's purpose is to protect "migratory" birds. Since the word "migratory" continuously refers to both game birds and non-game birds in all provisions of the Convention, one can safely assume that the close season requirement does as well.\textsuperscript{122} The drafters of the Convention were clear.

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  \item \textsuperscript{117} However, this may have been a strategic move, as courts should not overstep constitutional bounds when reviewing agency decisions.
  \item \textsuperscript{118} Kempthorne, 538 F.3d at 134.
  \item \textsuperscript{119} United States v. Al-Hamdi, 356 F.3d 564, 570 (4th Cir. 2004) (internal quotation marks omitted) (quoting United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992)).
  \item \textsuperscript{120} The Mexico Convention, supra note 48.
  \item \textsuperscript{121} Id. art. IV.
  \item \textsuperscript{122} The Mexico Convention's text requiring close seasons:

\begin{quote}
The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private
\end{quote}
\end{enumerate}
\end{footnotesize}
The result was that the court deferred too much to the agency’s decision. Agencies deserve much deference in decision-making because each possesses the time, talent, and resources to fully research upcoming rules and decisions. However, agencies do not deserve so much deference that decisions become unreasonable. The Kempthorne court afforded so much deference to the FWS that future agencies could theoretically argue that any statute is unclear in order to make the agency interpretation seem more reasonable. A court cannot defer to an agency when the agency’s interpretation of a statute is so attenuated from a reasonable interpretation that it stretches the imagination to think of how the agency could have possibly interpreted the rule in such a fashion.

Furthermore, even though Plaintiffs alleged that the decision was arbitrary or capricious, the court did not adequately work through the Chevron analysis; the Supreme Court-promulgated analysis for determining whether an agency interpretation of a statute is reasonable. According to Defendants, the court “is not empowered to substitute its judgment for that of the agency.”123 Furthermore, Defendants argued that “the court need only be satisfied that the agency examined the relevant data and established a rational connection between the facts found and the choice made.”124 The Kempthorne court merely determined that there was substantial evidence to support the agency decisions, not that the action was in fact reasonable in accordance with the Chevron standard. The court ended its inquiry after determining that there was sufficient evidence that the cormorant was hindering other species and habitats and that the Depredation Order was one of many possible responses to the problem.125 Therefore, rather than focusing on the reasonableness of this

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Id. art. II.


124 Id. (quoting Cellular Phone Taskforce v. FCC, 205 F.3d 82, 89 (2d Cir. 2000)).

125 Kempthorne, 538 F.3d at 137.
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measure, the court focused on the substantial evidence supporting the FWS’s action.\textsuperscript{126}

However, the court should have utilized \textit{Chevron}. The \textit{Chevron} analysis should be used when, like in this case, an agency’s \textit{interpretation} of a statute is at issue. Plaintiffs argued that the FWS’s interpretation of the word delegation was amiss.\textsuperscript{127} Furthermore, Plaintiffs argued that the FWS should not have interpreted the MBTA in such a way as to give the FWS the power to issue such a Depredation Order.\textsuperscript{128} Therefore, the situation calls for the \textit{Chevron} analysis.

Next, the court should have considered the two \textit{Chevron} steps. First, the court should have considered “whether Congress [had] directly spoken to the precise question at issue.”\textsuperscript{129} In this case, it had not. Congress had expressly delegated the authority to determine what birds or animals needed to be taken to agencies. Secondly, the court should have considered whether the “agency’s answer is based on a permissible construction of the statute.”\textsuperscript{130} If so, the court must defer to the agency’s decision.\textsuperscript{131} However, once an agency decision reaches step two, it is extremely rare that a court will overturn it.\textsuperscript{132}

Sometimes the many tests courts may use to determine whether an agency’s actions were valid seem daunting.\textsuperscript{133} However, the Second

\textsuperscript{126} See \textit{id.} at 135. It is unclear why the \textit{Kempthorne} court utilizes the \textit{State Farm} case in its analysis rather than the \textit{Chevron} test. See \textit{id.} The District Court utilized the \textit{Chevron} test in its analysis. Fund for Animals v. Norton, 365 F. Supp. 2d 394, 408 (S.D.N.Y. 2005).

\textsuperscript{127} \textit{Kempthorne}, 538 F.3d at 135.

\textsuperscript{128} \textit{Id.}


\textsuperscript{130} \textit{Id.} at 843.


\textsuperscript{132} \textit{Id.} at 775.

\textsuperscript{133} The law governing judicial deference to agency statutory constructions is a ghastly brew of improbable fictions and proceduralism. One reason this state of affairs persists is that courts have failed to resolve a contradiction between two competing, sensible impulses in deference
Circuit's opinion fails to bring clarity to the confusion. The Second Circuit had the opportunity to methodically engage in a clear analysis under the Administrative Procedure Act, but failed to do so. Courts should always attempt to engage in the tightest procedures possible to achieve the fairest result, if only for the reason that the failure to do so may create incorrect precedent. Therefore, this new Second Circuit precedent may change the outcome of future cases, and the potential effects could be dismal.

VI. CONCLUSION

The Kempthorne court overly deferred to the FWS's decision not to establish close seasons for the taking of cormorants and failed to consider all relevant tests under the Administrative Procedure Act when determining that the agency's actions were valid. The court should have conducted the Chevron test to determine whether, pursuant to the Administrative Procedure Act, the FWS acted arbitrarily or capriciously in releasing the Depredation Order. The court did not engage in this test despite the fact that Plaintiffs alleged that the Order violated the MBTA.

In the future, courts should be more diligent in determining the proper tests and standards of review because other administrative law doctrine. Oceans of precedent over the last 150 years have stressed that courts should defer to longstanding, reasonable constructions by agencies of statutes they administer. Then along came Chevron, which extolled agency flexibility and instructed courts to extend strong deference even to interpretive flip-flops. Competition between the virtues of interpretive consistency and flexibility has bubbled through and confused judicial deference analysis ever since. The Supreme Court's recent efforts to limit the scope of Chevron's strong deference to those agency constructions carrying the "force of law" has worsened such confusion, in part because the Court's discussion and application of this concept were incoherent.


134 In Ethyl Corp. v. EPA, the court noted that a court cannot simply "rubber-stamp agency decisions as correct." 541 F.2d 1, 34 (D.C. Cir. 1976).
courts subsequently use the tests to promulgate new opinions. Since the Administrative Procedure Act gives courts direction about how and under what circumstances courts may overturn agency decisions, and case law further clarifies these rules, courts should take care to closely follow these guidelines. Furthermore, courts should not grant agencies unlimited deference. Courts often defer to agencies’ interpretations, citing separation of powers for support. However, courts should not allow agencies to essentially write laws by granting all agency interpretations extreme deference.

While this case’s subject may not seem groundbreaking, the double-crested cormorant’s day in court resulted in a perfect example of a court’s failing to engage in the most thorough judicial standards of review when considering agency decisions. Legal scholars cite Chevron as the beginning of the decrease of judicial deference to agencies, but this court works around that analysis to defer to the agency. Therefore, lawyers and judges alike should more closely consider this case in debates regarding agency deference and decision-making. Courts and lawyers must ponder: is a high level of deference a bad policy?

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135 "No longer is every agency interpretation assumed to be worthy of deference. Instead, a court must first perform a ‘step zero’ analysis to determine if Chevron applies.” Torrey A. Cope, Judicial Deference to Agency Interpretations of Jurisdiction After Mead, 78 S. CAL. L. REV. 1327, 1338 (2005).