For the Birds: Judicial Expansion of Executive Power in Fund for Animals v. Kempthorne

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I. Introduction

A father and son bond over their shared love of nature as they travel to observe majestic water birds thriving in their habitats. The pleasure they derive from the birds contrasts with the frustration of the commercial fisherman who fears that his livelihood is threatened by the birds' ravenous appetites. The double-crested cormorant is the source of these diverging emotions and competing interests, which flew into the Second Circuit in Fund for Animals v. Kempthorne (Fund for Animals).

The tension between bird lovers and commercial industry over the regulation of the cormorant population in Fund for Animals is four-fold. Both interests grappled with the United States' international obligations to protect cormorants. Domestic legislation also presented a problem in the attempt to reconcile the preservation of the species with the protection of the United States' fisheries and farms. Additionally, two procedural concerns arose pertaining to cormorant population control. The Second Circuit faced these issues and ultimately ruled for the protection of commercial interests.

This Note will evaluate the Second Circuit's judgment in Fund for Animals. This Note will also argue that the Second Circuit's de-

3. See id. at 126 (discussing conflicting interests of bird lovers and federal legislation protecting industry).
4. For a full outline of the four legal issues in Fund for Animals, see infra notes 33-37 and accompanying text.
5. For a complete discussion of international treaties protecting cormorants, see infra notes 42-47 and accompanying text.
6. For a further discussion of domestic legislation protecting birds, see infra notes 61-64 and accompanying text.
7. For a detailed treatment of the procedural laws involved in the implementation of the Public Resource Depredation Order, see infra notes 75-103 and accompanying text.
8. For a narrative analysis of the Second Circuit's holding in Fund for Animals, see infra notes 126-52 and accompanying text.
9. See Fund for Animals, 538 F.3d at 138 (stating Second Circuit’s holding).
cision represents an expansion of executive power by the judiciary. Part II provides a backdrop for this Note’s treatment of Fund for Animals by discussing the cormorant species along with the arguments against government regulation of the birds. Part III details the legal background and precedent upon which the Second Circuit relied in rendering its decision. Part IV presents the court’s application of this law and its rationale in arriving at its holding. Part V critiques the court’s decision and argues that it represents an extension of executive power. Finally, Part VI discusses both the broad impact the Second Circuit’s decision will have on all types of future legal conflicts and the decision’s potential to encourage government expansion.

II. FACTS

A. Double-crested Cormorants

Double-crested cormorants are large water birds native to North America. These birds are known for their black feathers and contrasting bright orange faces and bills. The cormorant population, estimated at two million birds, largely resides in the Great Lakes region. The birds feed mainly on small fish and vegetation, but their large appetites are grounds for concern among commercial fishermen. Cormorants can cause widespread depre-

10. For a critical analysis of the court’s decision in Fund for Animals, see infra notes 155-83 and accompanying text.
11. For the full factual background, see infra notes 16-40 and accompanying text.
12. For the complete legal background, see infra notes 41-125 and accompanying text.
13. For a full narrative analysis of the court’s holding in Fund for Animals, see infra notes 126-52 and accompanying text.
14. For a detailed critique of the court’s holding in Fund for Animals, see infra notes 155-83 and accompanying text.
15. For a complete treatment of the impact of the court’s decision, see infra notes 184-212 and accompanying text.
17. See id. (describing physical attributes of cormorants).
18. See id. (stating species’ dominance in Great Lakes region of North America). Approximately two million double-crested cormorants live in North America, and seventy percent of them reside in the continent’s interior. Id. Cormorants also reside in Florida, Mexico, Alaska, North Carolina, and along the coasts. Double-crested Cormorant, supra note 1 (discussing range of cormorant habitats).
19. See Indicator, supra note 16 (discussing dietary habits of cormorants and their impact on commercial fishing industry). Cormorants mainly consume small fish, such as yellow perch, but also feed on bass. Id. Since the early 1980s, cormo-
vation of fisheries by consuming large quantities of fish.\textsuperscript{20} When the birds gather in large flocks, they essentially wreak havoc on fish populations and the commercial industries dependant upon them.\textsuperscript{21}

The cormorant population suffered a sharp decline from the 1950s through the 1970s.\textsuperscript{22} During this time, human persecution of the birds was prevalent, accounting for a large number of cormorant deaths.\textsuperscript{23} From the 1970s through the 2000s, the birds enjoyed a population growth; after Congress passed legislation protecting the species, cormorant killings by humans notably decreased.\textsuperscript{24} The U.S. Environmental Protection Agency (EPA), however, predicts that 2007 marked the beginning of another period of cormorant population decline.\textsuperscript{25}

The EPA's prediction of a modern decline in the number of double-crested cormorants finds support in places like California.\textsuperscript{26} Since 1989, the number of breeding cormorants in Northern California's Bay Area has declined by ninety percent.\textsuperscript{27} Such solid evi-

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\item See id. (listing cormorants' adverse effects on fisheries). In addition to harming commercial fisheries, large cormorant gatherings threaten the vegetation of the Great Lakes region. Id. Additionally, the population can take over the habitats of other waterbird species. Id.
\item See Fund for Animals v. Kemphorne, 538 F.3d 124, 128 (2d Cir. 2008) (explaining consequences of large numbers of cormorants). The Fish and Wildlife Service (FWS) has received a growing number of complaints over the last few decades from fishermen and aquaculture facilities that the growing cormorant population is plundering their fish crops. Id.
\item See Indicator, supra note 16 (documenting cormorant population decline).
\item See id. (discussing causes of cormorant decline). Widespread use of the pesticide DDT also contributed to the decrease in the population because it caused reproductive failure within the species. Id.
\item See id. (discussing causes of cormorant population increase). In addition to protective legislation, a decline in commercial fishing and the prohibition of DDT contributed to the revival of the cormorant population. Id.
\item See id. (stating EPA's prediction of another decline in cormorant population). The EPA cites a drop in the availability of the cormorants' food sources and an increase in management projects aimed at reducing the population as the two main reasons for the species' decline. Id.
\item See id. (quantifying decline in Bay Area cormorants). Researchers contribute the decrease in the species to food shortages, human persecution, and environmental stress. Id.
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dence of cormorant decline is cause for concern among bird lovers, who brought their anguish to court in _Fund for Animals._

B. Bird Lovers’ Plight in Court

The plaintiffs in this case consisted of bird-watching organizations and individuals concerned about New York’s cormorant population. They filed a complaint against federal officials, including then-Secretary of the Interior Dirk Kempthorne, challenging the U.S. Fish and Wildlife Service’s (FWS) recent decision to allow various agencies to kill cormorants in an effort to preserve public resources. The FWS’s Public Resource Depredation Order (Depredation Order) authorized state fish and wildlife agencies to take cormorants without a license in an effort to prevent the depredation of fish, wildlife, and plants by the birds. The FWS passed this and other similar orders to protect commercial fishing interests from the cormorants’ insatiable appetites.

The plaintiffs alleged that the Depredation Order violates various legal obligations of the United States government. Specifically, the plaintiffs cited four areas of concern. First, they argued that the Depredation Order violates the United States’ international treaty obligations with Mexico. Second, the plaintiffs contended that the Depredation Order violated the Migratory Bird

29. See _id._ (identifying plaintiffs).
30. See _id._ at 131 (describing plaintiffs’ action against FWS). For a full outline of the plaintiffs’ allegations, see _infra_ notes 33-37 and accompanying text.
31. See _id._ at 130 (discussing provisions of Depredation Order). To “take” a bird means to hunt, shoot, trap, or kill it. _Id._ at 127 (citing 50 C.F.R. § 10.12 (2009)). Specifically, the Depredation Order requires that agents first use non-lethal control methods and take only cormorants. 50 C.F.R. § 21.48(d)(1) (2009). Agents must also give the FWS written notice when they intend to act pursuant to the Depredation Order. _Id._ § 21.48(d)(9) (2009). Additionally, the agents must provide the FWS with an annual report that documents their work under the Depredation Order. _Id._ § 21.48(d)(10)-(11) (2009).
32. See _Fund for Animals_, 538 F.3d at 128 (discussing FWS’s motivation in passing Order). For a discussion of the impact of cormorant flocks on fisheries and vegetation, see _supra_ notes 19-21 and accompanying text.
33. See _id._ at 126-27 (listing Order’s violation of federal laws and international treaties).
34. See _id._ (discussing legal violations).
35. See _id._ at 134 (explaining plaintiffs’ Mexico Convention argument). For a detailed treatment of the United States’ obligations under the Mexico Convention, see _infra_ notes 44-47 and accompanying text.
Treaty Act. Finally, the plaintiffs asserted that the FWS failed to comply with two procedural statutes, the Administrative Procedure Act and the National Environmental Policy Act, when it implemented the Depredation Order.\textsuperscript{37}

The District Court for the Southern District of New York dismissed the plaintiffs' motion for summary judgment.\textsuperscript{38} The plaintiffs appealed this holding to the Court of Appeals for the Second Circuit.\textsuperscript{39} The Second Circuit subsequently affirmed the district court's ruling in favor of the defendants.\textsuperscript{40}

III. BACKGROUND

A. Pre-Depredation Order Regulation of Cormorants

The Public Resource Depredation Order is just one regulation in a history of legislation pertaining to both the control and protection of cormorants.\textsuperscript{41} Since the early twentieth century, the United States has become a party to a number of international treaties that protect migratory birds, including cormorants.\textsuperscript{42} The Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals (Mexico Convention), first enacted in 1936, is one such treaty.\textsuperscript{43}

The Mexico Convention requires the United States and Mexico to establish "close seasons," periods in which the nations cannot take birds.\textsuperscript{44} The treaty protects migratory game birds, such as pi-

\textsuperscript{36} See id. at 132 (describing plaintiffs' reasons why Order violates MBTA). For a discussion of the plaintiffs' MBTA allegations, see infra note 135 and accompanying text.

\textsuperscript{37} See Fund for Animals, 538 F.3d at 126 (listing federal procedural statutes plaintiffs argue Order violates).

\textsuperscript{38} See id. at 131 (discussing procedural history of noted case and district court's holding). The district court granted the defendants' motion for summary judgment and dismissed the plaintiffs' claims. Id.

\textsuperscript{39} See id. at 126 (relating basis for plaintiffs' appeal).

\textsuperscript{40} See id. at 138 (stating Second Circuit's affirmation of district court's holding).

\textsuperscript{41} See id. at 126-28 (providing overview of pre-Depredation Order cormorant legislation).

\textsuperscript{42} See Fund for Animals, 538 F.3d at 126-27 (listing international treaties between United States and other countries). The United States entered into bird protection treaties with numerous European countries, including the United Kingdom, Ireland, and the Soviet Union. Id. at 126. The United States has also signed similar treaties with Japan and Canada. Id.

\textsuperscript{43} See id. at 126-27 (naming Mexico Convention as one international treaty for bird protection).

\textsuperscript{44} Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., art. II(A), Feb. 7, 1936, 50 Stat. 1311 [hereinafter Mexico Convention] (describing close seasons requirement). In addition to requiring close seasons, the Mexico
geons and ducks, and migratory non-game birds, such as cuckoos. The Convention explicitly lists the bird species that fit into these categories. In 1972, the parties amended the Convention to specifically include cormorants as a species of protected birds, but did not specify whether cormorants are game or non-game birds.

The judiciary affords great deference to the Executive branch in the interpretation of treaties such as the Mexico Convention. The United States Supreme Court declared this deference requirement in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng (El Al Israel Airlines)*. In this case, the airline subjected the passenger to an intrusive strip search, and the passenger sued for damages stemming from his psychic and psychosomatic injuries. The airline argued that only bodily injury imposes air carrier liability under the Warsaw Convention. The United States submitted an amicus curie supporting the petitioner’s argument. The Court agreed with the airline, deferring to the United States government’s interpretation of the Warsaw Convention as requiring bodily injury for liability.

Executive deference is not the judiciary’s only treaty interpretation tactic; the Supreme Court articulated another option in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.

Convention mandates a maximum four-month hunting season and a permit requirement. *Id.* For a definition of “take,” see supra note 31.

45. See id. at art. IV (classifying birds protected under Mexico Convention). The Convention lists the bird species by their scientific names. *Id.*

46. See id. (categorizing bird species as migratory game or migratory non-game birds). *Id.* Article IV also gives the United States and Mexican governments the right to place other birds into these categories. *Id.* Such amendment can only occur by common agreement between the two countries. *Id.*


48. See *Fund for Animals*, 558 F.3d at 134 (stressing judicial deference to Executive branch’s interpretation of treaties).

49. 525 U.S. 155, 168 (1999) (holding that respect is due to executive treaty interpretation).


51. *Id.* at 160 (describing airline’s argument). The Warsaw Convention governs airline liability for all international travel. *Id.*

52. See *id.* at 168 (discussing federal government’s amicus curie).

53. See *id.* at 168-69 (stating Court’s holding). The Court declared that respect is due to the Executive branch’s reasonable interpretations of international treaties. *Id.* at 168.

There, the Natural Resources Defense Council (NRDC) challenged an EPA regulation promulgated under the Clean Air Act Amendments of 1977.\textsuperscript{55} This regulation permitted power plants to install equipment that failed to meet certain conditions if the machinery did not increase the plant’s total air pollution level.\textsuperscript{56} The regulation also relaxed conditions by grouping all pollution-emitting equipment into one industrial category, known as “stationary sources.”\textsuperscript{57}

The NRDC argued that this grouping of all machinery into the stationary source category exceeded the EPA’s power.\textsuperscript{58} The Supreme Court disagreed and upheld the regulation.\textsuperscript{59} The Court stated that the judiciary must not confine itself to executive deference; courts must also consider other factors, such as legislative histories, when interpreting statutory provisions.\textsuperscript{60}

In addition to its international obligations to protect cormorants, the United State has domestic duties under the Migratory Bird Treaty Act (MBTA).\textsuperscript{61} The MBTA makes it illegal to take birds protected under the Mexico Convention and other treaties.\textsuperscript{62} The act also grants the authority to designate appropriate times for takings of other birds to the Secretary of the Interior.\textsuperscript{63} In turn, the Secretary of the Interior has delegated this authority to the FWS.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{56} See \textit{id.} at 840 (detailing changes to regulation). The new regulation applied only in states that had previously failed to meet the EPA’s national air quality standards. \textit{id.} at 839-40.
\item \textsuperscript{57} See \textit{id.} (describing regulation’s new industrial grouping). A stationary source is any structure, facility, building, or installation that contributes to air pollution and must meet the requirements of the Clean Air Act. \textit{id.} The regulation permitted qualifying states to classify entire plants as stationary sources. \textit{id.} Because of this broad grouping, the entire plant was subject to the more lenient requirements of the new regulation. \textit{id.}
\item \textsuperscript{58} See \textit{id.} at 840-41 (outlining Council’s challenge to Amendments). According to the Court, the issue in this case was whether the EPA’s regulation, granting states the power to classify entire plants as stationary sources, was based on a reasonable construction of “stationary source.” \textit{id.} at 840.
\item \textsuperscript{59} See \textit{Chevron}, 467 U.S. at 842 (stating Court’s holding).
\item \textsuperscript{60} See \textit{id.} at 859-66 (discussing factors Court considered in arriving at holding). In addition to legislative history, the Court analyzed the statutory language and the policy considerations behind the Amendments to determine the reasonable construction of “stationary source.” \textit{id.}
\item \textsuperscript{62} \textit{id.} § 703(a) (declaring taking of protected bird species unlawful).
\item \textsuperscript{63} \textit{id.} § 704 (delegating authority to take to Secretary of Interior).
\item \textsuperscript{64} 50 C.F.R. § 10.1 (2009) (permitting Secretary’s subdelegation of authority to take to FWS).
\end{itemize}
Such delegation of authority has been a contested issue in American jurisprudence, particularly in United States Telecom Ass'n v. FCC (United States Telecom).\textsuperscript{65} In that case, several telecommunication carriers challenged the Telecommunications Act of 1996.\textsuperscript{66} This act required incumbent local exchange carriers (ILECs) to make network elements available to new carriers known as competitive local exchange carriers (CLECs).\textsuperscript{67} Congress believed that this provision would make it easier for new carriers to enter the market.\textsuperscript{68} The Telecommunications Act vested the power to require ILECs to make the network elements available in the Federal Communications Commission (FCC).\textsuperscript{69} The act also permitted the Commission to subdelegate the power to make impairment determinations to state commissions.\textsuperscript{70}

The ILECs argued that the Telecommunications Act's subdelegation to state commissions was an unconstitutional delegation of power.\textsuperscript{71} The D.C. Circuit held that subdelegations to outside parties are only permissible upon a showing of a reasonable connection between the government and the outside parties' decisions in the situation.\textsuperscript{72} Within this framework, the court concluded, the Telecommunications Act's subdelegation was unconstitutional because it lacked a reasonable connection between the FCC and the

\textsuperscript{65} 359 F.3d 554, 567-68 (D.C. Cir. 2004) (providing guidelines for delegation of authority).

\textsuperscript{66} See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 560 (D.C. Cir. 2004) (outlining ILECs' objections to Telecommunications Act).

\textsuperscript{67} See id. (describing ILECs' duties under Telecommunications Act). CLECs are competitive local exchange carriers. Id. at 561. The act imposed a duty on ILECs to provide unbundled and nondiscriminatory access to network elements to other carriers, including CLECs, at a reasonable rate. Telecommunications Act, 47 U.S.C. § 251(c)(3)(d) (2006).

\textsuperscript{68} See U.S. Telecom, 359 F.3d at 560 (stating aim of Telecommunications Act). This act was a congressional attempt to increase competition within the telecommunications industry. Id. at 561.

\textsuperscript{69} See id. at 561 (explaining FCC's power under Telecommunications Act).

\textsuperscript{70} See id. (addressing FCC's power to subdelegate to state commissions). The authority to determine impairment under the Telecommunications Act is the power to decide which network elements are to be made available to the CLECs. Id. The FCC's subdelegation authority is rooted in the text of the act, which provides that the Commission will not preclude any act or decision of a state commission that fulfills three standards. 47 U.S.C. § 251(d)(3) (2006). These decisions must: 1) establish network access to local exchange carriers; 2) be consistent with the act; and 3) not substantially prevent the act's implementation. See id. § 251(d)(3)(A)-(C).

\textsuperscript{71} See U.S. Telecom, 359 F.3d at 565 (stating ILECs' objection to Telecommunications Act's subdelegation of authority to state commissions).

\textsuperscript{72} See id. at 567 (articulating standard for permissible subdelegation of authority).
state commissions’ decisions. Rather, the FCC delegated authority to resolve an entire issue to the state commissions, leaving states without any FCC decision to connect to.74

B. Procedural Requirements of the Depredation Order’s Implementation

Procedural concerns, in addition to international treaty and statutory matters, affected the implementation of the Depredation Order in this case.75 The Administrative Procedure Act (APA) is one procedural law governing cormorant regulation.76 The APA prohibits agencies from acting arbitrarily or capriciously in the exercise of their duties.77 If a court determines that an agency has acted in an arbitrary or capricious manner, it can set aside the actions and deem them unlawful.78 The Supreme Court defined the standard for determining arbitrariness in Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co. (Motor Vehicles Manufacturers Ass’n).79 In that case, the insurance companies challenged an action of the National Highway Traffic Safety Administration (NHTSA) as arbitrary and capricious.80

The National Traffic and Motor Vehicle Safety Act of 1966 vests the power to issue motor vehicle safety regulations in the Secretary of Transportation or a delegate in the NHTSA.81 In 1972,

73. See id. at 567-68 (analyzing lack of connection between FCC and state commission decisions as basis for court’s holding).
74. See id. (arguing that subdelegation under Telecommunications Act fails to establish reasonable connection with FCC action).
75. For a narrative analysis of the Second Circuit’s treatment of the procedural challenges to the Depredation Order, see infra notes 140-52 and accompanying text.
77. See id. § 2(a) (vesting power to determine nature of agency actions in courts).
78. See id. (permitting courts to set aside unlawful agency actions). In addition to prohibiting arbitrary or capricious behavior, the APA bars agency action that violates constitutional rights and powers, exceeds statutory protections, does not properly observe procedural laws, is not supported by the facts of a given case, or otherwise violates the APA. See id. § (2) (a)-(f). While courts may set aside these types of actions, the act also empowers courts to force an agency to act when it determines that the agency has unlawfully or unreasonably delayed appropriate action. See id. § (1).
the NHTSA used this authority to enact Standard 208, which required automakers to install seatbelts and passive restraint systems, such as airbags, in all vehicles.\textsuperscript{82} Nine years later, the NHTSA rescinded Standard 208’s passive restraint requirement with the issuance of Notice 25.\textsuperscript{83} Andrew Lewis, then-Secretary of Transportation, cited two reasons for this rescission: economic difficulties facing the automobile industry and more recent NHTSA studies that failed to show these systems provided any major safety benefits.\textsuperscript{84}

Insurance companies sued to challenge the NHTSA’s rescission of the passive restraint requirement.\textsuperscript{85} The D.C. Circuit found that the NHTSA’s rescission was arbitrary and capricious under the APA.\textsuperscript{86} The United States Supreme Court subsequently affirmed.\textsuperscript{87} In its decision, the Court articulated the standard for determining whether an agency has acted arbitrarily or capriciously in violation of the APA.\textsuperscript{88} An agency acts this way if it studies information rele-

\textsuperscript{82} See Motor Vehicles Mfrs. Ass’n, 463 U.S. at 34-37 (discussing legislative history of Standard 208). Standard 208 has a lengthy legislative history comprised of sixty lawmaking actions. \textit{Id.} at 34. As used in Standard 208, a passive occupant restraint system is a safety mechanism that protects the driver or passenger without any action on their part, aside from the normal operation of the car. \textit{Id.} at 34-35. In addition to airbags, passive restraints include automatic seatbelts. \textit{Id.} at 35. In 1977, the NHTSA estimated that passive restraints had the potential to prevent 12,000 deaths and over 100,000 injuries every year. \textit{Id.}

\textsuperscript{83} See \textit{id.} at 38 (discussing NHTSA’s rescission of passive restraint requirement).

\textsuperscript{84} See \textit{id.} at 38-39 (detailing agency’s decision to rescind passive requirement). The NHTSA concluded that the installation of passive systems would cost the auto industry approximately $1 billion. \textit{Id.} at 39. Moreover, the agency concluded that this cost was unreasonable when compared with the system’s decreased safety benefits. \textit{Id.}

\textsuperscript{85} See \textit{id.} at 39 (stating petition of insurance companies.) Specifically, State Farm Mutual Automobile Insurance Co. and the National Association of Independent Insurers filed petitions for review of the rescission. \textit{Id.}

\textsuperscript{86} See \textit{id.} (explaining court’s holding). The D.C. Circuit gave three reasons for its determination: a lack of support for the NHTSA’s prediction that the systems would not be used; the NHTSA’s failure to consider whether automakers would install different types of passive belts; and the NHTSA’s negligence in analyzing the benefits of airbags. \textit{Id.} at 39-40.

\textsuperscript{87} See Motor Vehicles Mfrs. Ass’n, 463 U.S. at 46 (stating Court’s holding).

\textsuperscript{88} See \textit{id.} at 43 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). For a full discussion of Burlington Trucks, see infra notes 199-200 and accompanying text.
vant to the action it is taking and fails to provide a rational connection between the information and its chosen course of action.\textsuperscript{89}

The National Environmental Policy Act (NEPA) is a second procedural law governing the implementation of cormorant regulations.\textsuperscript{90} The NEPA requires agencies to prepare an Environmental Impact Statement (EIS) before passing any order, such as the cormorant regulations, that might affect the environment.\textsuperscript{91} An EIS includes the environmental impact of a proposed action and any alternatives to the action.\textsuperscript{92} While the NEPA addresses the elements to be contained in an EIS, it is silent on the exact level of detail required in the statement.\textsuperscript{93} The Second Circuit determined this level of detail in \textit{County of Suffolk v. Secretary of Interior (County of Suffolk)}.\textsuperscript{94}

In 1974, President Jimmy Carter proposed a massive lease of the Outer Continental Shelf (OCS) to private industries for oil and gas production.\textsuperscript{95} Pursuant to this proposal, the Secretary of the

\textsuperscript{89} See \textit{Motor Vehicles Mfrs. Ass'n}, 463 U.S. at 43 (stating arbitrariness standard). In articulating this standard, the Court presented various circumstances which demonstrate an agency's failure to provide a rational connection between information and its chosen action. \textit{Id.} These circumstances include the agency neglecting to consider a key aspect of the issue; the agency's decision counteracting the information available to it; and the agency's action being so implausible that it is not due to simply a difference in view. \textit{Id.}

\textsuperscript{90} National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (2006) (declaring purpose of Act). The NEPA serves four congressional purposes. \textit{Id.} First, it codifies a national policy to promote peace between the citizenry and the environment. \textit{Id.} Second, the NEPA promotes the protection of the environment in conjunction with the advancement of the welfare of mankind. \textit{Id.} Third, it increases the understanding of the ecosystems of the United States. \textit{Id.} Finally, the NEPA establishes a Council on Environmental Quality. \textit{Id.}

\textsuperscript{91} See \textit{id.} § 4321(2)(c) (mandating EIS preparation).

\textsuperscript{92} See \textit{id.} § 4321(2)(C)(i) (requiring EIS to include actual and potential environmental impacts); see also id. § 4321(2)(C)(iii) (listing EIS components). An EIS also includes any unavoidable adverse effects of the action and any irreversible use of resources by the proposed action. \textit{Id.} § 4321(2)(C)(ii); see also id. § 4321(2)(C)(v). The statute additionally requires the EIS to address the relationship between the action's short-term environmental strains and the long-term productivity benefits. \textit{Id.} § 4321(2)(C)(v).

\textsuperscript{93} See \textit{id.} § 4321(2)(C) (listing required parts of EIS).

\textsuperscript{94} 562 F.2d 1368, 1379 (2d Cir. 1977) (establishing required level of detail in EIS).

\textsuperscript{95} \textit{See County of Suffolk v. Sec'y of Interior}, 562 F.2d 1368, 1372-73 (2d Cir. 1977) (describing Presidential proposal). The OCS encompasses underwater lands, soil, and seabed 200 nautical miles off the coasts of the United States. \textit{See OCS Alternative Energy and Alternate Use Programmatic EIS Information Center, The Outer Continental Shelf}, \textit{http://ocsenergy.anl.gov/guide/ocs/index.cfm} (last visited Nov. 25, 2010). The OCS represents the intersection between the federal government's seaward jurisdiction and that of the states. \textit{Id.} Notably, however, the federal government owns the OCS. \textit{County of Suffolk}, 562 F.2d at 1372. The President pro-
Interior prepared an EIS and adopted a leasing schedule. Under this schedule, the Bureau of Land Management designated areas within the OCS for lease and specifically designated fifty to ninety miles off the New Jersey coast as Sale 40. The Bureau then prepared a four-volume EIS for this area. The Secretary of the Interior quickly approved the lease for Sale 40.

New York’s Suffolk and Nassau counties challenged the adequacy of the Sale 40 EIS and sued to enjoin the sale in district court. Specifically, the counties argued that the EIS violated the NEPA by not adequately addressing the impact of pipeline routes in the lease area. The district court held that the EIS violated the NEPA and declared the lease null and void. The Second Circuit reversed, holding that the EIS was sufficient under the NEPA because this act does not require an EIS to address every possible result of a proposed action.

posed the OCS lease program because of the nation’s urgent need for energy at the time. Id. at 1373.

96. See County of Suffolk, 562 F.2d at 1373 (detailing Secretary’s actions in accordance with Presidential proposal). The Secretary’s EIS addressed the lease’s basic environmental impacts and considered alternative energy sources, such as conservation and geothermal energy. Id.

97. See id. (providing background on lease area selection process).

98. See id. (detailing Sale 40 EIS preparation process). State representatives and federal agencies contributed to the final draft of the EIS. Id. Moreover, 137 witnesses testified in preparation hearings for the EIS. Id. All of this input resulted in the 1,998-page Sale 40 EIS. Id.

99. See id. (elaborating on Secretary’s implementation of Sale 40). The Secretary implemented the sale after approving a Program Decision Option Document and conducting several staff meetings. Id.

100. See id. (explaining suit to enjoin sale). Other parties joined an earlier action filed by Suffolk and Nassau counties. Id. The other plaintiffs were the National Resources Defense Council, the State of New York, and numerous Long Island counties. Id. The plaintiffs contended that the EIS violated the NEPA. Id.

101. See County of Suffolk, 562 F.2d at 1374 (addressing issues with pipeline routes in EIS). The court held sua sponte that the EIS had not adequately considered pipeline risk and granted a preliminary injunction before hearing the case. Id.

102. See id. (discussing district court’s holding). The court found the EIS inadequate for three reasons. Id. First, the EIS did not address pipeline routes in the area. Id. Second, the EIS erred in overestimating the area’s production capacity while underestimating the project’s costs. Id. Lastly, the EIS failed to address the process of selecting pipeline tract routes or the alternatives of using less hazardous tracts. Id.

103. See id. at 1379 (detailing Second Circuit’s analysis). The court held that requiring the EIS to include every pipeline route would demand too much speculation and hypothesizing. Id. This requirement, the court explained, was akin to requiring an EIS for a highway to include routes that might never exist to places unknown. Id.
C. The FWS’s Earlier Regulation of Cormorants

The Depredation Order at issue in *Fund for Animals* joins a rich line of FWS attempts to control cormorants.\(^{104}\) Prior to the Depredation Order, the FWS required any person seeking to take migratory birds committing depredation to apply for a permit.\(^{105}\) The agency issued permits only to those applicants who met a detailed list of application requirements.\(^{106}\) The permits were highly conditional and dictated both the methods used to kill the birds and the proper procedures for their disposal.\(^{107}\)

The FWS did not limit cormorant control to the permit process, however.\(^{108}\) The agency would alternatively issue broad depredation orders that demanded a taking.\(^{109}\) This alternative was reserved for emergency situations only, and the FWS required a showing of immediate and serious depredation.\(^{110}\) These orders imposed higher restrictions on taking methods than the typical per-

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104. *See Fund for Animals*, 538 F.3d at 127-31 (providing overview of FWS cormorant regulations).

105. *See id.* at 128 (discussing permit requirement). The FWS requires people to obtain permits before taking, possessing, or moving migratory birds to avoid depredation. 50 C.F.R. § 21.41(a) (2009). The FWS also mandates that people obtain a permit if they wish to herd endangered migratory birds or bald eagles for depredation control. *Id.*

106. *See id.* § 21.41(b) (listing permit application requirements). A permit application must include a description of where the depredation is happening; a list of the wildlife or vegetation at risk from the depredation; and a description of the extent of the damage to these interests. *Id.* § 21.41(b)(1)-(3). Additionally, the application must name the migratory bird species that is committing the depredation. *Id.* § 21.41(b)(4).

107. *Id.* § 21.41(c) (stating permit conditions). The permit requirements specifically dictate that a person use a shotgun smaller than a No. 10 gauge, fired from the shoulder, to take birds. *Id.* § 21.41(c)(2). People may only take birds found within the area specified in the permit. *Id.* Additionally, the FWS prohibits the use of decoys to lure birds. *Id.* § 21.41(c)(3). People must turn over the taken birds to the FWS, which then gives the birds to charities for use as food. *Id.* § 21.41(c)(4). Finally, the FWS limits the tenure of the permits to less than one year. *Id.* §21.41(5)(d).

108. *See Fund for Animals*, 538 F.3d at 128 (discussing alternative authorization for migratory bird takings).


110. *See id.* (highlighting emergency nature of broad depredation orders). The statute explicitly states that such an order can only exist upon a showing that migratory birds have converged and are about to cause serious depredation to agriculture, horticulture, or fishing interests. *Id.*
mit. Additionally, the FWS established statutory procedures for issuing depredation orders for specific bird species.

In 1998, after receiving extensive complaints about cormorant depredation from commercial fishing interests, the FWS adopted the Aquaculture Depredation Order. This order permitted the aquaculture industry to conduct cormorant takings without a permit. Yet, the FWS authorized these takings only under limited circumstances and in restricted locations.

D. Building the Nest: The Research and Preparation Behind the Public Resource Depredation Order

The FWS permit procedures and the Aquaculture Depredation Order proved insufficient in controlling the United States' cormorant population. With more and more complaints flooding the agency, the FWS issued a Notice of Intent in 1999 to undertake a nation-wide cormorant management plan. The agency also produced an EIS for the plan and established a "Cormorant Team" to oversee the management of the birds. The team's first duty was to produce a more complete draft EIS for the project, which it made available for public comment in 2001. This EIS proposed

111. See id. § 21.42(b) (limiting time allowed for depredation). The FWS has the discretion to determine the tenure of the order. Id. The orders limit the takings to those areas that the FWS has determined to be threatened locations. Id. § 21.42(a).

112. See Fund for Animals, 538 F.3d at 128 (discussing availability of depredation orders particular to bird species).

113. See id. (classifying complaints as reason for Aquaculture Depredation Order). For a discussion of the harmful effects of groups of cormorants on fisheries, see supra notes 19-21 and accompanying text.

114. See id. (discussing FWS’s adoption of Aquaculture Depredation Order). This order permitted cormorant takings without permits if the birds were committing depredation on aquaculture stocks. 50 C.F.R. § 21.47(c) (2009). The U.S. aquaculture industry includes various plant and animal species, such as salmon, catfish, shrimp, tilapia, and alligators. NAA Facts, NATIONAL AQUACULTURE ASSOCIATION, http://www.thenaa.net (last visited Nov. 26, 2010).

115. 50 C.F.R. § 21.47(d)(2)-(9) (2010) (listing required conditions). The Aquaculture Depredation Order was applicable in only thirteen states. Id. § 21.47(b). The Depredation Order in Fund for Animals broadened the Aquaculture Depredation Order. Fund for Animals, 538 F.3d at 128.

116. See Fund for Animals, 538 F.3d at 128 (discussing increase in complaints from commercial farmers).

117. See id. at 128-29 (presenting FWS’s Notice of Intent).

118. See id. at 129 (describing EIS and Cormorant Team). This team was comprised of FWS staff members from different offices and worked with the Department of Agriculture’s Animal and Plant Health Inspection Service to develop ways to control the cormorant population. Id.

119. See id. (discussing draft EIS).
six possibilities for controlling cormorant depredation, including the passage of a new depredation order.\textsuperscript{120}

The team endorsed the possibility of a new order that would allow state agencies to develop their own cormorant management plans under FWS supervision.\textsuperscript{121} Pursuant to this recommendation, the FWS proposed the Public Resource Depredation Order in March 2003.\textsuperscript{122} The proposed order contained slight modifications from the team’s recommended order, including a reduction in the number of states where the Depredation Order would permit takings.\textsuperscript{123} The Depredation Order was the result of exhaustive research on the breeding, traveling, and growth patterns of the birds.\textsuperscript{124} The FWS produced the final Public Resource Depredation Order on October 8, 2003.\textsuperscript{125}

IV. NARRATIVE ANALYSIS

A. The Depredation Order vs. the Mexico Convention

The Second Circuit, applying the deference to executive interpretation rule from \textit{El Al Israel Airlines}, held that the Depredation Order does not violate the United States’ obligations under the Mexico Convention.\textsuperscript{126} The Mexico Convention does not explicitly state whether the close seasons requirement applies to all migratory birds or only migratory game birds.\textsuperscript{127} Article II(A) addresses mi-

\textsuperscript{120} See \textit{id.} (listing draft EIS’s cormorant control proposals). The six proposals were: 1) not changing the existing system; 2) using only non-lethal management tactics; 3) expanding the existing system; 4) issuing a new depredation order; 5) reducing the regional cormorant population; and 6) designating a cormorant hunting season. \textit{Id.}

\textsuperscript{121} See \textit{Fund for Animals}, 538 F.3d at 129 (discussing team’s recommendation). The purpose of the new order would be to provide public resource management with more flexibility in controlling the cormorant population while guaranteeing federal oversight of the control policies. \textit{Id.}

\textsuperscript{122} See \textit{id.} (describing proposed Public Resource Depredation Order).

\textsuperscript{123} See \textit{id.} (differentiating FWS’s proposed Order from team’s recommendation). The FWS’s proposal reduced the number of states from forty-eight to twenty-four. \textit{Id.} In addition, the Depredation Order specified the agencies it applied to, limited its applicability to land and freshwater only, and expanded the number of available methods of taking cormorants. \textit{Id.}

\textsuperscript{124} See \textit{id.} at 130 (describing FWS studies).

\textsuperscript{125} See \textit{id.} (discussing publication of Order). For a full discussion of the provisions of the Depredation Order, see \textit{supra} note 31.

\textsuperscript{126} See \textit{Fund for Animals}, 538 F.3d at 134-95 (stating court’s Mexico Convention holding). For a full discussion of \textit{El Al Isr. Airlines}, see \textit{supra} notes 49-53 and accompanying text.

\textsuperscript{127} See \textit{Fund for Animals}, 538 F.3d at 134 (discussing Mexico Convention’s silence on whether close seasons requirement applies to all migratory birds).
migratory bird takings, but not the taking of "all" migratory birds.\textsuperscript{128} This ambiguity, the court reasoned, leaves open the issue of whether the close seasons requirement applies to cormorants because cormorants are migratory, non-game birds.\textsuperscript{129} The Second Circuit recognized that arguments could be made supporting an interpretation of Article II(A) protecting all migratory birds or protecting only migratory game birds.\textsuperscript{130} Pursuant to the judicial tradition of executive deference, the court sided with the FWS, deferring to its interpretation that the close seasons requirement applies only to migratory game birds.\textsuperscript{131} In accordance with the Supreme Court’s decision in \textit{El Al Israel Airlines}, the Second Circuit deferred to the FWS’s interpretation of the Convention because it was reasonable.\textsuperscript{132} With the close season requirement not applying to non-game cormorants, the court held that the Depredation Order does not need to abide by this regulation and, therefore, does not violate the Mexico Convention when it fails to consider close seasons.\textsuperscript{133}

B. The Depredation Order vs. the MBTA

The Second Circuit also affirmed the district court’s finding that the Depredation Order does not violate the MBTA.\textsuperscript{134} The court rejected the plaintiffs’ argument that the FWS’s grant of permission to state fish and wildlife agencies to determine cormorant

\textsuperscript{128} See id. (addressing ambiguity of Article II(A)). For a further discussion of the Article II close seasons requirement, see supra note 44 and accompanying text.

\textsuperscript{129} See \textit{Fund for Animals}, 538 F.3d at 134-35 (discussing court’s belief that Article II(A) may or may not apply to cormorants).

\textsuperscript{130} See id. (detailing opposing arguments regarding cormorant protection under Article II). The court first presented the arguments for excluding non-game birds from protection under Article II(A). \textit{Id.} The language of Article II itself favors this exclusion because it discusses the taking of migratory birds, not all migratory birds. \textit{Id.} at 134. Article II(C) refers back to this provision when it states the minimum length of a close hunting season, further supporting the exclusion of non-game birds. \textit{Id.} Because Article IV distinguishes between game and non-game birds, the court reasoned that the parties to the treaty were aware of this distinction and choose not to include non-game birds under Article II(A). \textit{Id.} at 135. This argument, however, can support the opposite view that Article II(A) protects non-game birds, as the state parties could have believed that the distinction was implied in Article II. \textit{Id.} Finally, the court recognized that Article II’s text does not disprove this article’s applicability to non-game migratory birds. \textit{Id.}

\textsuperscript{131} See id. 134-35 (stating court’s Article II(A) interpretation).

\textsuperscript{132} See id. at 135 (describing Second Circuit’s application of executive deference rule).

\textsuperscript{133} See id. at 134-35 (elaborating on court’s executive deference reasoning).

\textsuperscript{134} See \textit{Fund for Animals}, 538 F.3d at 132 (stating Second Circuit’s MBTA holding). For a discussion of the procedural history of the noted case, see supra notes 38-39 and accompanying text.
takings violates the MBTA. Moreover, the court held that this permission does not rise to the level of a delegation of authority because the Depredation Order gives state agencies very limited discretion.

These discretionary limits, the court reasoned, render the Depredation Order a permissible subdelegation of power. This subdelegation represents a reasonable connection between the state agencies' actions and the FWS's determinations because the order simply permits state agencies to make more localized determinations for the FWS. As such, the Depredation Order passes the reasonable connection delegation test from United States Telecom and, therefore, does not violate the MBTA.

C. Lack of Arbitrary and Capricious Action Under the APA

The Second Circuit declared that the FWS did not act arbitrarily or capriciously when it implemented the Depredation Order and, thus, did not violate the APA. Prior to passing the Depredation Order, the FWS conducted studies pertaining to the depredation effects of cormorant populations on the environment. These studies proved that cormorants caused harm to public re-

135. See Fund for Animals, 538 F.3d at 132 (dismissing plaintiff's MBTA argument).

136. See id. at 138 (providing court's rationale for holding Order is not delegation of authority). The Depredation Order restricts the species, locations, and means by which the state agencies can take cormorants. Id. Additionally, the FWS still holds some authority over the cormorant takings under the Depredation Order. Id. at 134. For example, state agencies must notify the FWS thirty days before conducting a taking that would kill over ten percent of a given cormorant population. Id. The FWS also retains the power to suspend or revoke state agencies' ability to conduct takings upon a showing that the agencies failed to abide by the Depredation Order's conditions or if the takings jeopardize the future of the cormorant population. Id. Lastly, the state agencies must provide the FWS with annual reports of their control efforts that include a count of the cormorants and other birds killed. Id.

137. See id. (classifying Order as subdelegation of power).

138. See id. (describing court's application of U.S. Telecom reasonable connection standard). For a full discussion of this standard, see supra notes 65-74 and accompanying text.

139. See Fund for Animals, 538 F.3d at 132 (stating Second Circuit's MBTA holding).

140. See id. at 135-37 (discussing court's APA holding). For a full discussion of the APA, see supra notes 76-89 and accompanying text.

141. See Fund for Animals, 538 F.3d at 135-36 (detailing FWS studies). These effects included the severe economic losses suffered by commercial fisheries. Id. at 136. For a full discussion on the adverse effects of large cormorant groupings, see supra notes 19-21 and accompanying text.
sources, and the Depredation Order represents the FWS's decision to prevent such devastating effects.142

The Depredation Order limits cormorant takings to times when the birds are committing or about to commit depredation.143 The Second Circuit classified this limitation as the rational connection between the cormorants' threat to nature and the FWS's decision to control them.144 As the Supreme Court reasoned in Motor Vehicles Manufacturers Ass'n, this connection denotes non-arbitrary action.145 Therefore, the FWS complied with the APA when it adopted the Depredation Order.146

D. The FWS Did Not Violate the NEPA

The Second Circuit held that the FWS also complied with the NEPA when it adopted the Depredation Order.147 The basis for the plaintiffs' NEPA argument was that the order's EIS did not include site-specific analyses of the cormorant takings' effects.148 The court held that the NEPA does not demand this level of detail in an EIS.149

As the Second Circuit declared in County of Suffolk, the NEPA does not require an EIS to include every possible effect of an action at every possible location.150 The FWS would have had to engage in much speculation to identify the exact sites where every taking would occur because cormorant depredation is extremely localized and takings are limited to cormorants committing such depredation.151 The NEPA does not require such speculation, and the

142. See Fund for Animals, 558 F.3d at 136 (discussing FWS's motivation for passing Order).
143. See id. (detailing Order's limitations on cormorant takings). In addition to limiting takings to cormorants committing depredation, the Depredation Order applies only in effected states. Id. The FWS also retains the right to prevent any taking that it determines would threaten the long-term survival of the species. Id.
144. See id. (applying rational connection test).
145. See id. (classifying FWS action as non-arbitrary). For a full discussion of Motor Vehicles Mfrs. Ass'n, see supra notes 79-89 and accompanying text.
146. See Fund for Animals, 558 F.3d at 137 (concluding FWS did not violate APA).
147. See id. (stating Second Circuit's NEPA holding).
148. See id. (describing plaintiffs' NEPA challenge).
149. See id. (discussing level of EIS detail required under NEPA).
150. For a full discussion of County of Suffolk, see supra notes 94-103 and accompanying text.
151. See Fund for Animals, 558 F.3d at 137-38 (discussing level of speculation necessary for site-specific analyses).
court held that the FWS did not violate this act when it failed to provide site-specific analyses in the Depredation Order's EIS.152

V. CRITICAL ANALYSIS

A. Expansion of Executive Power Dressed Up as Deference

The Second Circuit determined that the Depredation Order did not violate the Mexico Convention simply by deferring to the FWS's interpretation of the treaty. 155 The court justified its deference by appealing to case law and the "reasonableness" of the executive interpretation of the Mexico Convention.154 At the same time, however, the court acknowledged that a contrary interpretation of the treaty's close seasons requirement might have merit.155 In doing so, the court recognized that the requirement might in fact apply to cormorants.156 Yet, the Second Circuit chose to ignore this possibility and simply justified giving the FWS broader power by appealing to the idea of executive deference.157

The status of executive deference as an optional judicial interpretation technique exacerbates the court's failure to investigate possible alternative interpretations of the Mexico Convention.158 The Supreme Court classified deference merely as a "respect ordinarily due" to the Executive branch.159 As discussed in Chevron, other options, such as examining policy concerns, can aid in the interpretation of an ambiguous treaty provision.160 The Second Circuit, however, appealed only to executive deference without ever exploring other possibilities.161 Deference was not the Second Cir-

152. See id. at 138 (holding FWS not in violation of NEPA).
153. For a narrative analysis of the court's deference to the FWS's interpretation of the Mexico Convention, see supra notes 131-32 and accompanying text.
154. For a full discussion of the executive deference rule from El Al Isr. Airlines, see supra notes 49-53 and accompanying text.
155. See Fund for Animals, 538 F.3d at 134-35 (addressing opposing interpretations of Article II(A)). For a complete treatment of these arguments, see supra note 130.
156. See Fund for Animals, 538 F.3d at 135 (recognizing possibility of Article II(A) cormorant protection).
157. For a narrative analysis of the Second Circuit's Mexico Convention holding, see supra notes 126-33 and accompanying text.
159. See id. (describing executive deference).
160. For a full discussion of Chevron, see supra notes 54-60 and accompanying text.
161. See Fund for Animals, 538 F.3d at 134-35 (discussing court's executive deference application). The plaintiffs argued that Chevron applied in this case, but the Second Circuit dismissed the argument in a footnote without ever discussing the other options of treaty interpretation that Chevron suggests. Id. at 135 n.3.
cuit's only option here, but the court chose to use it to justify its extension of executive power within the FWS.\textsuperscript{162}

B. Hiding Government Expansion with Wordplay

The Second Circuit's decision to uphold the Depredation Order under both the MBTA and the APA represents government expansion via manipulation of the English language.\textsuperscript{163} The court's determination that the order complies with the MBTA rested on judicial juggling of a select group of words.\textsuperscript{164} The Second Circuit declared that the Depredation Order was not an impermissible "delegation" of power to state agencies, but, rather, a permissible "subdelegation" of authority from the FWS to the agencies.\textsuperscript{165} This seemingly creative distinction turns on the existence of "discretionary limits" on the state agencies.\textsuperscript{166}

The court, however, named only one such limit: the timing of permissible takings.\textsuperscript{167} The court wildly interpreted this one limit to represent specific limits on the species, locations, and allowable methods of taking.\textsuperscript{168} Yet, the timing of the takings remained the singular "discretionary limit" on state power and, consequently, the court's decision that the Depredation Order is a "subdelegation" rather than a "delegation" relied solely on creative judicial wordplay.\textsuperscript{169} The Second Circuit, therefore, used the English language to allow expansion of FWS power to the state agencies under the Depredation Order.\textsuperscript{170}

The Second Circuit also relied on creative word usage to uphold the Depredation Order under the APA.\textsuperscript{171} This time, the

\textsuperscript{162} See id. at 135 (discussing Second Circuit's deference to FWS interpretation of Mexico Convention).

\textsuperscript{163} For a complete discussion of the court's MBTA and APA holdings, see supra notes 134-46 and accompanying text.

\textsuperscript{164} For a full discussion of the court's MBTA holding, see supra notes 134-39 and accompanying text.

\textsuperscript{165} See Fund for Animals, 538 F.3d at 133 (classifying Order as subdelegation, rather than delegation, of power).

\textsuperscript{166} See id. (highlighting state discretion as distinction between delegation and subdelegation of power).

\textsuperscript{167} See id. at 133-34 (ruling cormorant takings may only occur when depredation is imminent).

\textsuperscript{168} See id. at 133 (arguing Order's timing limit also limits species, means, and areas of takings).

\textsuperscript{169} See id. (quoting Order). The Depredation Order specifically limits takings for the purpose of preventing "depredations on the public resources of fish, wildlife, plants, and their habitats." Id. (quoting 50 C.F.R. § 21.48(c)(1) (2009)).

\textsuperscript{170} See Fund for Animals, 538 F.3d at 134 (stating court's MBTA holding).

\textsuperscript{171} See id. at 135 (declaring court's determination of non-arbitrary action by FWS under APA).
court classified the "discretionary limit" discussed in its MBTA holding as a "rational connection" that preempts any claim of arbitrary or capricious action by the FWS.\textsuperscript{172} Once again, the court used language manipulation to inflate one aspect of the Depredation Order, the time limit of takings, into a justification for government expansion.\textsuperscript{173} By glorifying the taking time limit as a "rational connection," the judiciary used strategic word juggling to claim APA compliance and, accordingly, to expand government power via the Depredation Order.\textsuperscript{174}

C. The FWS's Free-for-All EIS

The Second Circuit protected the FWS's vague EIS by explaining that American jurisprudence does not require high levels of specificity in these documents.\textsuperscript{175} The court relied on the notion that such a requirement would burden the FWS with excessive speculation.\textsuperscript{176} The Second Circuit dramatically classified the burden as "endless hypothesizing to remote possibilities."\textsuperscript{177} Earlier in its opinion, however, the court described the detailed studies that the FWS conducted before passing the Depredation Order.\textsuperscript{178}

The extensive studies and preparation behind the order beg the question of how "endless hypothesizing" could exist in determining at least some sites for cormorant takings.\textsuperscript{179} Such intricate preparation for the Depredation Order would prevent speculation in the FWS's prediction of such sites.\textsuperscript{180} Studies of cormorant breeding and travel surely yield some indication of specific areas

\begin{itemize}
\item \textsuperscript{172} For a full discussion of the Second Circuit's APA reasoning, see supra notes 140-46 and accompanying text.
\item \textsuperscript{173} See Fund for Animals, 538 F.3d at 135 (describing Order's limit of takings to times of depredation as rational connection, thereby making FWS's action non-arbitrary).
\item \textsuperscript{174} See id. at 135-36 (describing court's APA reasoning).
\item \textsuperscript{175} For a narrative analysis of the court's NEPA holding, see supra notes 147-52 and accompanying text.
\item \textsuperscript{176} See Fund for Animals, 538 F.3d at 137 (discussing speculation of site-specific analyses).
\item \textsuperscript{177} See id. (quoting County of Suffolk v. Sec'y of Interior, 562 F.2d 1368, 1379 (2d Cir. 1977)). For further treatment of the speculation considered in County of Suffolk, see supra note 103.
\item \textsuperscript{178} See Fund for Animals, 538 F.3d at 128-30 (describing studies and preparation conducted for Public Resource Depredation Order).
\item \textsuperscript{179} See id. (discussing preparation behind Order). For a full discussion of the FWS's preparation for the Depredation Order, see supra notes 116-25 and accompanying text.
\item \textsuperscript{180} For the Second Circuit's discussion of the speculation inherent in requiring site-specific analyses in the Depredation Order's EIS, see supra notes 148-52 and accompanying text.
\end{itemize}
affected by the Depredation Order.\textsuperscript{181} Yet, again, the court permitted the extension of executive power via the FWS.\textsuperscript{182} By not requiring a more detailed EIS in a situation where one was surely possible, the Second Circuit permitted the FWS to evade the NEPA and play by its own rules.\textsuperscript{183}

VI. IMPACT

A. Broad Precedential Value

The case law upon which the Second Circuit relied in this case foreshadows the precedential value that \textit{Fund for Animals} will come to provide for courts.\textsuperscript{184} The Second Circuit arrived at its holding largely by appealing to cases with fact patterns substantially different from the case before it.\textsuperscript{185} For example, \textit{El Al Israel Airlines} was a tort action involving a search and seizure of an airport passenger.\textsuperscript{186} Little, if any, similarities existed between this suit and the plaintiffs’ challenge of the Depredation Order, yet the court turned to this precedent to interpret the order’s compliance with the Mexico Convention.\textsuperscript{187} Similarly, \textit{United States Telecom} addressed a challenge to the Telecommunications Act.\textsuperscript{188} While that case had nothing to do with the environment, the Second Circuit used it to determine the constitutionality of the Depredation Order’s subdelegation of authority to state fish and wildlife agencies.\textsuperscript{189}

The holding in \textit{Fund for Animals}, like the cases upon which the court relied, will have broad precedential value and applicability in a variety of cases.\textsuperscript{190} The Second Circuit’s decision, while address-

\begin{itemize}
\item \textsuperscript{181} See \textit{Fund for Animals}, 538 F.3d at 130 (discussing FWS studies).
\item \textsuperscript{182} For an additional discussion of the Second Circuit’s executive expansion in the noted case, see \textit{supra} notes 153-62 and accompanying text.
\item \textsuperscript{183} For a narrative analysis of the court’s NEPA holding, see \textit{supra} notes 147-52 and accompanying text.
\item \textsuperscript{184} For a full discussion of the precedent relied upon in the noted case, see \textit{supra} notes 49-103 and accompanying text.
\item \textsuperscript{185} For the factual backgrounds of cases upon which the Second Circuit relied, see \textit{supra} notes 49-103 and accompanying text.
\item \textsuperscript{186} For a complete discussion of the facts of \textit{El Al Isr. Airlines}, see \textit{supra} notes 49-53 and accompanying text.
\item \textsuperscript{187} For a narrative analysis of the Second Circuit’s application of the executive deference standard from \textit{El Al Isr. Airlines}, see \textit{supra} notes 126-33 and accompanying text.
\item \textsuperscript{188} For the factual background of \textit{U.S. Telecom}, see \textit{supra} notes 65-74 and accompanying text.
\item \textsuperscript{189} For a narrative analysis of the Second Circuit’s application of \textit{U.S. Telecom} to the noted case, see \textit{supra} notes 137-39 and accompanying text.
\item \textsuperscript{190} For a full treatment of the Second Circuit’s reasoning in \textit{Fund for Animals}, see \textit{supra} notes 126-52 and accompanying text.
\end{itemize}
ing a specific environmental issue, embodies broad legal principles that can apply throughout all areas of law.\textsuperscript{191} Common law history already shows that the legal principles in \textit{Fund for Animals} have applied to varying legal scenarios.\textsuperscript{192}

Judicial deference has helped determine the outcomes of a range of cases, including employment discrimination suits.\textsuperscript{193} For example, the United States Supreme Court applied this doctrine in a class action suit brought by American employees of a Japanese corporation.\textsuperscript{194} In arriving at its holding, the Court deferred to the Department of State’s interpretation of a treaty between the United States and Japan because “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”\textsuperscript{195} Similarly, the Court applied judicial deference to the interpretation of the 1881 treaty to determine that Yugoslavian nationals living in the United States have the same rights to estate inheritance as their American citizen counterparts.\textsuperscript{196}

Delegation of authority issues have also emerged in various fields of law, including criminal narcotics cases.\textsuperscript{197} The Supreme Court grappled with this matter after a convicted drug dealer chal-

\textsuperscript{191} For a discussion of the legal principles involved in the noted case, see supra notes 49-103 and accompanying text.

\textsuperscript{192} For detailed treatment of the common law precedent the court used in the noted case, see supra notes 49-103 and accompanying text.

\textsuperscript{193} \textit{Sumitomo Shoji America, Inc. v. Avagliano}, 457 U.S. 176, 178 (1982) (providing basis of employment discrimination case). American employees of a Japanese trading company argued that the company had discriminatory hiring practices. \textit{Id.} The employees brought the class action suit, alleging that the company only hired male Japanese citizens for executive, managerial, and sales positions. \textit{Id.}

\textsuperscript{194} See \textit{id.} (discussing Court’s application of deference to State Department’s interpretation of Friendship, Commerce, and Navigation Treaty).


\textsuperscript{196} See \textit{Kolovrat}, 366 U.S. at 188-91 (providing factual background of case). The next of kin of two decedents, who died without a will, sought to claim their inheritance. \textit{Id.} at 188. The relatives were Yugoslavian nationals living in the United States, and their inheritance was property located in Oregon. \textit{Id.} Oregon law prohibited aliens from claiming such an inheritance. \textit{Id.} The Supreme Court, however, deferred to the State Department’s interpretation of the 1881 Treaty between the United States and Serbia and held that the nationals had the same rights in their inheritance as they would have if they were American citizens. \textit{Id.} at 195.

\textsuperscript{197} \textit{United States v. Giordano}, 416 U.S. 505, 507-12 (1974) (detailing case’s factual background). The Executive Assistant to a state Attorney General ordered a wiretap of Giordano’s communications to his narcotics customer. \textit{Id.} at 508-09. Giordano challenged this wiretap, arguing that the delegation of authority to order the wiretap to the Attorney General’s Executive Assistant was unconstitutional. \textit{Id.} at 508. The Supreme Court ultimately agreed with Giordano. \textit{Id.}
lenged the government’s delegation of the power to wiretap his communications to officials other than the Attorney General. Likewise, arbitrariness concerns have been present across a spectrum of cases, including labor union conflicts. In one such case, the Supreme Court set aside an Interstate Commerce Commission order because the Commission “failed to articulate any rational connection between the facts found and the choice made.” Arbitrariness has also found a place in construction law. The Second Circuit addressed this issue when it upheld the Federal Aviation Administration’s approval for an airport construction project because it was not arbitrary or capricious. Common law demonstrates the broad applicability of the legal principles of judicial deference, delegation of authority, and arbitrariness. The Second Circuit also proved the wide functionality of these principles in Fund for Animals, as the court relied upon factually different cases to arrive at its holding. Future courts can continue to do the same and will apply Fund for Animals to a large variety of conflicts that come before them.

B. Encouragement of Governmental Expansion

Coinciding with Fund for Animals’ capacity for broad application is the case’s potential to encourage further expansion of gov-

198. See id. at 512-14 (describing Supreme Court’s reasoning).
199. Burlington Truck Lines v. United States, 371 U.S. 156, 158-64 (1962) (detailing case’s factual background). Trucking companies and their labor union challenged an order of the Interstate Commerce Commission that granted Burlington permission to conduct business within the union’s designated business area. Id. at 163-64. The Commission’s action was in response to the union’s boycott against another union. Id. at 159.
200. See id. at 167 (stating Court’s holding). The Court declared that the Commission did not base its decision on any proper analysis. Id. The Court held that the Commission’s action violated the APA. Id.
201. Natural Resources Defense Council, Inc. v. FAA, 564 F.3d 549, 551-52 (2d Cir. 2009) (describing factual background of case). In this case, the FAA approved an airport construction project in Bay County, Florida. Id. at 551. The NRDC challenged the FAA’s action as arbitrary and capricious and, therefore, in violation of the APA. Id.
202. See id. at 551-52 (discussing Second Circuit’s determination of FAA action as non-arbitrary).
203. For a full discussion of these legal principles, see supra notes 48-103 and accompanying text.
204. For a complete discussion of the precedent relied upon in Fund for Animals, see supra notes 49-103 and accompanying text.
205. For a narrative analysis of Fund for Animals, see supra notes 126-52 and accompanying text.
ernment powers. The Second Circuit's promotion of executive power is evident in its deferential interpretation of the Mexico Convention and its leniency toward the FWS's NEPA compliance. As a result of the judiciary's agreement with the Executive branch in this case, the FWS received broad authority over the double-crested cormorant population.

_Fund for Animals_ represents judicial vesting of more power in the Executive branch in just one field of law, environmental regulation. Because of the broad precedential value of this case, however, future courts will be able to rely on this decision to justify their own expansion of executive powers in a variety of cases. For example, the Second Circuit has already relied on the case's reasoning to expand executive power in the context of construction law. The broad scope of this case's holding is thus likely to cause executive expansion across the law, not simply within the environmental segment. The Second Circuit's decision in _Fund for Animals_ has the potential to cause a disruption in the balance of power so threatening and democratically absurd that only one colloquialism can aptly describe it: for the birds.

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206. For a critical analysis of the noted case's expansion of executive power, see _supra_ notes 153-83 and accompanying text.

207. For a complete discussion of executive deference in the noted case, see _supra_ notes 126-33 and accompanying text. For a thorough treatment of the Second Circuit's NEPA analysis, see _supra_ notes 147-52 and accompanying text.

208. For a full narrative analysis of the noted case, see _supra_ notes 126-52 and accompanying text.

209. For a critical analysis of the noted case as an expansion of executive power, see _supra_ notes 153-83 and accompanying text.

210. For a discussion of the precedential value of _Fund for Animals_, see _supra_ notes 184-205 and accompanying text.

211. For a discussion of _Natural Resources Defense Council, Inc. v. FAA_, see _supra_ notes 201-02 and accompanying text.

212. For a complete treatment of the noted case's precedential potential, see _supra_ notes 184-205 and accompanying text.

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