5TH CIRC. ESA DECISION HIGHLIGHTS DEFERENCE DISCORD

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On Feb. 13, 2017, a sharply divided Fifth Circuit declined en banc review of Markle Interests LLC v. United States Fish and Wildlife Service,[1] a split-panel decision upholding the Fish and Wildlife Service's designation of unoccupied critical habitat for the dusky gopher frog. The court declined rehearing over the strident dissent of six judges, stating that the Markle decision involved a strategy in judicial review attributed to the dusky gopher frog itself: "play dead, cover their eyes, peek and play dead again."

The Markle decision and the dissent from denial of en banc review involve a recurring conflict between the extent of judicial review and the proper deference to be given to agency action.

The Markle Decision

The dusky gopher frog historically lived in Louisiana, Mississippi and Alabama. By 2001, approximately 100 adults were known to remain in the wild and only in Mississippi. The frog's decline resulted in its listing as endangered under the Endangered Species Act, and the listing required the Fish and Wildlife Service to designate critical habitat for the frog through a two-step process. First, the Fish and Wildlife Service designates the area "occupied" by the frog as critical habitat if the area is shown to have "those physical or biological features ... essential to the conservation of the species."[2] The physical or biological features essential to dusky gopher frog habitat are: (1) ephemeral ponds for breeding; (2) an open-canopy longleaf pine ecosystem; and (3) upland habitat between breeding and nonbreeding habitat that includes specific herbaceous plants under open-canopy longleaf pines.[3] Second, the Fish and Wildlife Service may designate areas as critical habitat that are not occupied by the frog if the Fish and Wildlife Service determines that these "unoccupied" areas are "essential for the conservation of the species."[4]

The dispute in Markle involved the Fish and Wildlife Service's decision to designate 1,544 acres of unoccupied private land in Louisiana (Unit 1) as critical habitat. This designation of unoccupied land necessarily means the Fish and Wildlife Service determined the Unit 1 area to be "essential" for the conservation of the dusky gopher frog. Unit 1 includes five ephemeral ponds, one of the essential features of the frog's habitat, however, 90 percent of the property was covered with closed-canopy pine plantations used for timber harvesting.[5] "It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements."[6]

The Fish and Wildlife Service acknowledged that Unit 1 lacked the essential physical or biological features of the frog's critical habitat, but believed "them to be restorable with reasonable effort."[7] The landowners, on the other hand, confirmed their intent to

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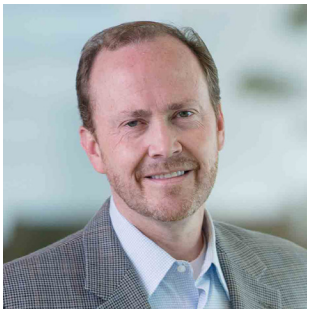

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develop the land for residential and commercial use, and to continue their timber operations in Unit 1.[8] Given that the Fish and Wildlife Service cannot force private landowners to create habitat for an endangered species, Unit 1 was uninhabitable and not expected to be habitable by the dusky gopher frog when the Fish and Wildlife Service designated the land as critical habitat "essential" for the conservation of the species. Judge Priscilla Owen, dissenting from the Markle panel decision, wrote that an "area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation."[9]

The majority in Markle refused to second-guess the Fish and Wildlife Service's designation of the unoccupied critical habitat under a judicial doctrine known as Chevron deference. Named for the U.S. Supreme Court's decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.,[10] Chevron deference generally posits that when Congress has delegated authority to an agency to enforce a statute through binding rules, and the agency interprets and applies that authority in a promulgated final rule, courts will defer to the agency's decision unless unreasonable. "Thus, when the Fish and Wildlife Service promulgates, in a formal rule, a determination that an unoccupied area is 'essential for the conservation' of an endangered species, Chevron deference is appropriate."[11]

Denial of En Banc Review and the Dissent

The Fifth Circuit denied en banc review by an 8-6 vote.[12] In a rare move, the six judges wrote a 31-page dissent to the denial of en banc review. Writing for the dissent, Judge Edith Jones described the issues before the court as turning on statutory construction, not on deference to administrative discretion. Characterizing the Markle decision as "unprecedented," the dissent challenged: (1) whether the ESA and its regulations include a "habitability requirement;" (2) whether the unoccupied Unit 1 land is "essential for the conservation of the frog;" and (3) whether the Fish and Wildlife Service's decision not to exclude Unit 1 is unreviewable because it is committed to agency discretion.[13]

On the question of whether the ESA contains a habitability requirement, the dissent confirmed that "Unit 1 is uninhabitable by the shy frog," but the critical habitat designation could result in economic impacts of $34 million in lost opportunities.[14] Noting that the ESA's unoccupied habitat language requires the Fish and Wildlife Service to determine such areas to be essential for the conservation of the species, the dissent wrote that "the ESA makes clear that a species' critical habitat must be a subset of that species' habitat."[15] "Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it be *habitat*.[16] Following a lengthy review of the context of critical habitat in legislative history and the ESA's scheme, the dissent concluded:

> Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat — a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit — that is, naturally live and grow in — Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.[17]

The dissent further objected because, in the instance of an unoccupied area, the

"specific *areas themselves* must be essential" for the species' conservation.[18] Thus, the designation of unoccupied habitat "entails a broader and more complex investigation" into whether the entire area is essential to the species' conservation.[19] The dissent viewed the Markle decision as making it easier to designate an unoccupied area as critical habitat than an occupied area. "The majority say in one breath that proper designation of occupied critical habitat requires the existence of all physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of unoccupied critical habitat requires only the existence of a single such feature."[20] "In sum, we know from the ESA's text, drafting history and precedent that an *unoccupied* critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation."[21] In the absence of a more demanding and limiting structure for designating unoccupied habitat, the Fish and Wildlife Service would have "free rein to regulate any land that contains any single feature essential to some species' conservation."[22]

The dissent also criticized Markle's holding that the Fish and Wildlife Service's decision not to exclude Unit 1 was unreviewable. The Fish and Wildlife Service is required to take into consideration the economic impact, the impact on national security, and any other relevant impact, of designating an area as critical habitat.[23] Following this impact analysis, the Fish and Wildlife Service may exclude any area from critical habitat if it determines that the benefits of exclusion outweigh the benefits of designating the area as critical habitat.

The Fish and Wildlife Service's economic impact analysis found $0 to $34 million in economic impacts to the Unit 1 landowners.[24] "[T]here is virtually nothing on the other side of the economic ledger," and the economic analysis ends "abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog."[25] Despite the lack of economic impact analysis, the majority held that the Fish and Wildlife Service's decision was "unreviewable."[26]

Noting a strong presumption in favor of judicial review, the dissent wrote that the Supreme Court has held that "the Fish and Wildlife Service's consideration of economic impact of critical habitat is mandatory, not discretionary."[27] Thus, whether the Fish and Wildlife Service properly considers economic impact or not, the Fish and Wildlife Service's ultimate decision regarding designation of critical habitat should be "reviewable for abuse of discretion."[28]

The dissenting judges viewed the lack of review as an "abdication of our responsibility" to oversee agency action and interpret the law."[29] In other words, the court played dead.[30] Characterizing the lack of review as an abdication of judicial responsibility echoes a long line of criticism of Chevron deference.[31]

Fifteen states filed briefs as amicus curiae in support of rehearing in Markle, and numerous other groups filed in support or opposition as well. The Supreme Court extended the time for filing a petition for a writ of certiorari to later this summer, in which event the affirmative vote of four justices would bring the Chevron deference question before the court. Last fall, the court's newest member, Justice Neil Gorsuch, wrote that "Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty."[32] As the elephant in the room, maybe "the time has come to face the behemoth."[33]

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[1] Markle Interests LLC v. United States Fish and Wildlife Service, 827 F.3d 452 (5th Cir. 2016).

[2] Id. at 464 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[3] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,129 (June 12, 2012).

[4] 827 F.3d at 464 (quoting § 1532(5)(A)(ii)).

[5] Id. at 482 (Owen, J., dissent).

[6] Id. at 486 (Owen, J., dissent).

[7] Id. at 482 (Owen, J., dissent).

[8] Id. at 459.

[9] Id. at 486 (Owen, J., dissent).

[10] 467 U.S. 837 (1984).

[11] 827 F.3d at 464.

[12] See Denial of Rehearing En Banc, Markle Interests LLC, et al. v. United States Fish and Wildlife Service, et al., App. No. 14-31008 (5th Cir. Feb. 13, 2017).

[13] Id. at 3.

[14] Id. at 6.

[15] Id. at 8.

[16] Id. at 13 (emphasis in original).

[17] Id. at 17.

[18] Id. at 19 (emphasis in original).

[19] Id. at 20.

[20] Id. at 24 (emphasis in original; citation omitted).

[21] Id. at 23.

[22] Id. at 25.

[23] Id. at 30, citing 16 U.S.C. § 1533(b)(2).

[24] 77 Fed. Reg. at 35,140.

[25] Denial of Rehearing En Banc, at 30-31.

[26] 827 F.3d at 475.

[27] Denial of Rehearing En Banc, at 33 (citing Bennett v. Spear, 520 U.S. 154, 172 (1997)).

[28] Id. at 33.

[29] Id. at 34.

[30] Id. at 3.

[31] See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 514; City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1879, 185 L. Ed. 2d 941 (2013) (noting the growing power of the administrative state.).

[32] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[33] Id. at 1149. (Gorsuch, J., concurring).