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Message:

From: Emily

This IMO directive also cautioned against using old remedies for new evils.[162] The 1984 HNS conference's reflexive use of the oil pollution compensation regime developed in the 1969 CLC and 1971 Fund Convention reflected that much-abused diplomatic methodology. In drafting the HNS Convention, the IMO Legal Committee seemed to believe that retrenchment and elaboration on the oil pollution regime were preferable to innovative experimentation. They reasoned that regimes created from scratch are risky. Yet the result of the 1984 negotiations demonstrates that this conservatism was unjustified. Only when the IMO rejects the oil pollution compensation model for an HNS regime will it make any progress.

Diplomats and international lawyers are practical people. They know the dangers when law and policy outpace the economic and technological parameters of the activities they wish to regulate and the conditions they seek to ameliorate. They have typically not made advances in the international law of liability and compensation for pollution at sea until they are caught in the wake of a major incident. Perhaps an HNS treaty will only be concluded after such a disaster. This is the true tragedy of new evils: they must first become familiar before they can be treated. But by then it is often too late.

DAVID J. BEDERMAN

instruments have been in force for a reasonable period of time and experience has been gained of their operation." Id.

162. This is a restatement of Francis Bacon's aphorism: "[H]e that will not apply new remedies must expect new evils, for time is the greatest innovator . . . ." F. Bacon, Of Innovations, The Essays 138 (Essay No. 24) (13th ed. 1880).

26 VIRGINIA JOURNAL OF INTERNATIONAL LAW 515 (Winter 1986)

RECENT DEVELOPMENT

INTERNATIONAL CONSERVATION—UNITED STATES ENFORCEMENT OF WORLD WHALING PROGRAMS—THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY A NATION FOR EXCEEDING THE WHALING QUOTAS OF THE INTERNATIONAL WHALING COMMISSION

On November 8, 1984, ten environmental groups[1] led by Greenpeace U.S.A.[2] filed suit in the United States District Court for the District of Columbia requesting the court to order the Secretary of Commerce to certify[3] Japan (pursuant to the Pelly[4] and Packwood-Magnuson[5] Amendments to various fishery conservation

1. The plaintiffs were the American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, and Thomas Garrett. Plaintiffs' Complaint at 1, 2, American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398 (D.D.C. 1985) [hereinafter cited as *American Cetacean Society I*]. On December 13, 1984, the Connecticut Cetacean Society, Defenders of Wildlife, and Friends of the Earth joined the plaintiffs in this suit. Plaintiffs' Amended Complaint at 2, *American Cetacean Society I*.

2. Founded in 1979, Greenpeace U.S.A. is an environmental group consisting of 435,000 members and 21 staff spanning 6 regional offices. This organization protects endangered species through nonviolent actions such as interfering with whale hunts and filing suits to protect whales. Greenpeace U.S.A. also monitors other environmental concerns including radioactive and toxic waste dumping, nuclear weapons testing, and acid rain. The organization publishes a quarterly magazine entitled Greenpeace Examiner. 1 Encyclopedia of Associations 3983 (20th ed. 1986).

3. See infra notes 4, 5.

4. Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified at 22 U.S.C. § 1978 (1982)). The Pelly Amendment requires the Secretary of Commerce to certify to the President any nation that "diminish[es] the effectiveness of an international fishery conservation program." 22 U.S.C. § 1978(a)(1) (1982). Upon notice of certification, the President has the discretion to impose a fishery products importation ban on the offending nation. Id. See also infra notes 27-33 and accompanying text.

5. Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at 16 U.S.C. § 1821(e)(2) (1982)). Under the Packwood-Magnuson Amendment, when the Secretary of Commerce certifies a nation for "diminishing the effectiveness" of the IWC's programs under the ICRW, see infra notes 8, 9, the Secretary of State must reduce that nation's foreign fishing allocation under the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1982) [hereinafter cited as FCMA], by at least fifty percent. Id. § 1821(e)(2)(B); see also infra notes 29-42 and accompanying text.

acts[6]) for harvesting whales[7] in "violation"[8] of the International Whaling Commission's[9] (IWC or "the Commission") zero quotas.[10]

6. See infra notes 27-30 and accompanying text.

7. Journalists noted the departure of Japanese whalers from port in mid-October and early November 1984 to hunt whales. Plaintiffs' Amended Complaint at 12-13, *American Cetacean Society I*. On November 11, 1984, conservationists photographed whaling vessels returning to Wadaura, Japan with two sperm whales for processing. Id.; *American Cetacean Society I*, 604 F. Supp. at 1404.

8. The plaintiffs and both the district and circuit courts failed to distinguish between a nation that "exceeds" and a nation that "violates" an IWC quota. See infra note 10. They demonstrated their confusion by using these terms interchangeably in their discussions of the legal ramifications of Japan's whaling activity.

The plaintiffs asserted that "[t]he taking of whales *in excess of an IWC quota* diminishes the effectiveness of the Convention, whether or not a nation has filed an objection to that quota," Plaintiffs' Amended Complaint at 13, *American Cetacean Society I* (emphasis added), and accordingly urged "[t]hat defendant Baldrige . . . be permanently enjoined from agreeing not to certify, and from failing to certify, any whaling activities by nationals of Japan that *violate IWC whaling quotas*." Id. at 18 (emphasis added). The district court held that "the Secretary of Commerce had a clear and nondiscretionary duty to certify the Japanese whaling *in excess of the established IWC quotas*," *American Cetacean Society I*, 604 F. Supp. at 1411 (emphasis added), and noted that "[t]he Secretary may not now distort his clear congressional mandate by permitting a foreign nation (here Japan) to *violate the IWC quotas* without that nation facing the immediate consequences." Id. (emphasis added). The circuit court based its holding that "the Secretary is required by law to certify a foreign country whose nationals are harvesting whales *in excess of ICRW quotas*," American Cetacean Soc'y v. Baldrige, 768 F.2d 426, 428 (D.C. Cir. 1985), cert. granted, 106 S. Ct. 787 (1986) (emphasis added) [hereinafter cited as *American Cetacean Society III*], on an analysis that asked, among other things, "[d]oes whaling *in violation of an IWC quota* require that the Secretary conclude that the foreign nation is 'diminishing the effectiveness' of the ICRW?" Id. at 435-36 (emphasis added).

The International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter cited as ICRW], provides that a member nation that has filed a timely objection to a Schedule amendment is not bound by that provision unless it withdraws its objection. ICRW, supra, art. V, § 3(c). Since Japan filed timely objections to both the IWC's 1981 adoption of a zero quota for North Pacific sperm whales and 1982 passage of a commercial whaling moratorium, *American Cetacean Society I*, 604 F. Supp. at 1403, it was not bound under international law to follow these IWC regulations. See ICRW, supra, art. V, § 3(c). Japan exceeded, but did not violate, these whaling quotas.

Accordingly, the more accurate question posed by this litigation is whether the Pelly and Packwood-Magnuson Amendments require the Secretary of Commerce to certify a nation which *exceeds* the IWC's quotas. To preserve accuracy in its description of the plaintiffs' claim and the district and circuit courts' opinions, this Comment will use the exact terms employed with confusion by these parties. However, in its analysis of the circuit court's holding, this Comment will use the terms "exceed" and "violate" with an understanding of their difference in meaning.

9. On December 2, 1946, the plenipotentiaries of 15 whaling nations, including the United States, gathered in Washington, D.C., and signed the ICRW, supra note 8. The President of the United States ratified the ICRW on July 18, 1947, and it entered into force on November 10, 1948. Id.

Article III, section 1 of the ICRW provides for the establishment of the International Whaling Commission (IWC), to be composed of one representative from each member nation. Id. art. III, § 1. Article IV requires the Commission to

Five days later, the Commerce Secretary concluded an executive agreement with Japan which granted Japan four years of limited whaling without certification in return for its commitment to the IWC's commercial whaling moratorium in 1988.[11] On cross-motions

(a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;

(b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;

(c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.

Id. art. IV. Article V holds the Commission responsible for amending the Convention's whaling schedule to meet changing circumstances. Id. art. V.

10. The IWC adopted a zero quota for North Pacific sperm whales in 1981 and voted in 1982 to implement a commercial whaling moratorium beginning in 1986. *American Cetacean Society III*, 768 F.2d at 431. Japan was not bound under international law to comply with these quotas because it filed timely objections to these amendments pursuant to article V, section 3(c) of the ICRW, supra note 8. See infra notes 25, 44-45 and accompanying text.

The Japan Whaling Association and the Japan Fisheries Association intervened as defendants in this litigation and argued that because Japan had made timely objections to the IWC quotas, it was not violating the Commission's regulations and was not vulnerable to certification. *American Cetacean Society I*, 604 F. Supp. at 1401. The district court dismissed this claim based on the plain words and legislative histories of the Pelly and Packwood-Magnuson Amendments, see supra notes 4, 5, which clearly indicate that certification applies to any nation that "diminish[es] the effectiveness" of the IWC's program. Id. at 1408-09; see 22 U.S.C. § 1978(a)(1) (1982); 16 U.S.C. § 1821(e)(2)(A)(i) (1982). The circuit court made a similar finding, *American Cetacean Society III*, 768 F.2d at 429, and this Comment does not further consider the intervenors' claims.

The environmentalists claimed that Japan was "diminish[ing] the effectiveness" of the ICRW, see supra note 8, by violating the IWC's whaling quotas, see supra note 9, that the Secretary of Commerce had a statutory duty to certify Japan, and that the Secretary of State was required to reduce Japan's fishing allocation under the FCMA pursuant to certification. They requested that the court permanently enjoin the Commerce Secretary from failing to, or agreeing not to certify Japan for violating the whaling quotas, and the Secretary of State from failing to or agreeing not to reduce Japan's fishing allocation pursuant to certification. *American Cetacean Society I*, 604 F. Supp. at 1401.

11. *American Cetacean Society I*, 604 F. Supp. at 1404; see infra notes 48-50 and accompanying text.

On November 19, 1984, the environmentalists reminded the Secretary of Commerce by letter that Japan was continuing to violate the IWC's sperm whale zero quota and thus merited certification. *American Cetacean Society I*, 604 F. Supp. at 1404. The Secretary responded on November 30, 1984, that pursuant to the November 13, 1984 executive agreement, see infra note 43, he would not certify Japan. *American Cetacean Society I*, 604 F. Supp. at 1404. Pursuant to this agreement, Japan withdrew its objection to the 1981 sperm whale zero quota on December 11, 1984. Id. See Letter from Yoshio Okawara, Ambassador of Japan, to Malcolm Baldrige, United States Secretary of Commerce (Dec. 11, 1984) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Dec. 11, 1984 Okawara letter]; Letter from Malcolm Baldrige, United States Secretary of Commerce, to Yoshio Okawara, Ambassador of Japan (Dec. 11, 1984) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Dec. 11, 1984 Baldrige letter]. The environmentalists responded to the Commerce Secretary's letter by submitting

for summary judgment,[12] the district court held that certification was mandatory and ordered the requested writ of mandamus.[13] On appeal to the United States Court of Appeals for the District of Columbia Circuit, *held*, affirmed.[14] Although the Secretary of Commerce has certification discretion in some cases, the Pelly and Packwood-Magnuson Amendments require the Secretary to certify a nation for whaling in excess of the IWC's regulations.[15] *American*

an amended complaint to the district court on December 13, 1984. See Plaintiffs' Amended Complaint, *American Cetacean Society I*.

12. The environmentalists claimed that the Pelly and Packwood-Magnuson Amendments require the Secretary of Commerce to certify Japan for violating the IWC's quotas. *American Cetacean Society I*, 604 F. Supp. at 1401. The government claimed that the Commerce Secretary has discretion under the amendments to determine whether Japan's actions "diminish the effectiveness" of the IWC's programs under the ICRW and that the executive agreement actually increased the success of this international conservation program. Id.

13. Id. The district court subsequently denied the government's motion for a stay pending appeal because the petition did not show a strong likelihood of prevailing on the merits, that irreparable harm would ensue without such relief, that substantial harm would accrue to other parties interested in the suit, or that a stay was within the public interest. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1411, 1417 (D.D.C. 1985) [hereinafter cited as *American Cetacean Society II*]. The court suggested that the President could appeal to Congress for emergency action to rectify the situation. Id. at 1416.

The government, however, successfully appealed to the United States Court of Appeals for the District of Columbia Circuit for an emergency stay. See American Cetacean Soc'y v. Baldrige, No. 85-5251 (D.C. Cir. Mar. 25, 1985) (order granting stay pending appellate review). Shortly thereafter, Japan's Minister for Foreign Affairs informed the Secretary of Commerce that Japan would withdraw its objection to the IWC's commercial whaling moratorium when the U.S. government obtained reversal of the district court order. See Letter from Shintaro Abe, Minister for Foreign Affairs of Japan, to Malcolm Baldrige, United States Secretary of Commerce (Apr. 5, 1985) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Apr. 5, 1985 Abe letter]; Letter from Clarence Brown, Acting Secretary of Commerce, to Shintaro Abe, Minister for Foreign Affairs of Japan (Apr. 5, 1985) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Apr. 5, 1985 Brown letter].

14. *American Cetacean Society III*, 768 F.2d at 428. Judge Wright, joined by Judge Tamm, wrote the opinion for the panel majority. Judge Oberdorfer of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1982), dissented. *American Cetacean Society III*, 768 F.2d at 427.

15. *American Cetacean Society III*, 768 F.2d at 428. The circuit court ruled that the Secretary violated his "statutory mandate" by concluding the executive agreement with Japan. Id. at 444. Nevertheless, the court *sua sponte* stayed the mandamus for 90 days to allow the government to petition for a rehearing *en banc*. Id. at 445.

On October 11, 1985, the court denied the government's request for a rehearing because it was not supported by a majority of the court's nine "active judges." See American Cetacean Soc'y v. Baldrige, No. 85-5251 (D.C. Cir. Oct. 11, 1985) (order denying the federal appellants' petition for rehearing) (this order noted the death of Judge Tamm, who participated in the panel decision, on September 22, 1985). Only seven judges considered the government's petition because Judges Mikva and Wald recused themselves. Judges Ginsburg, Bork, Scalia, and Starr favored rehearing *en banc* and noted their "substantial agreement"

Cetacean Society v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787 (1986).[16]

I. THE INTERNATIONAL WHALING COMMISSION AND U.S. ENFORCEMENT OF COMMISSION WHALING QUOTAS

Since its creation forty years ago under the International Convention for the Regulation of Whaling[17] (ICRW), the IWC has evolved from a small collection of nations interested in strengthening the whaling industry[18] into a large international organization primarily devoted to cetacean protection.[19] In its early years, the Commission restricted whaling to control whale oil prices and to allow whale stocks to rejuvenate for future harvesting.[20] Over time,

with Judge Oberdorfer's dissent, while Judges Robinson, Wright and Edwards voted against such action. Id. Although the petition failed to gain the requisite concurrence of five judges, a majority of the judges participating in the rehearing decision did support it. See Note, Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals, 70 Va. L. Rev. 1505, 1541-42 (1984) (suggesting that the federal courts of appeals interpret the statute authorizing them to sit *en banc*, 28 U.S.C. § 46(c) (1982), as providing for a rehearing whenever a majority of the judges eligible to vote for this action so elect). Nevertheless, the court stayed the mandamus through December 4, 1985, to allow the government to petition the United States Supreme Court for a writ of certiorari. See American Cetacean Soc'y v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3412 (U.S. Dec. 4, 1985) (No. 85-955).

16. On January 13, 1986, the Supreme Court granted the government's request to review the circuit court's decision. See High Court To Get A Case On Whaling, N.Y. Times, Jan. 14, 1986, at A6, col. 1. The Court scheduled Baldrige v. American Cetacean Society, No. 85-955, and Japan Whaling Association v. American Cetacean Society, No. 85-954, for expedited argument in April 1986. Id.

17. See supra note 8.

18. As noted in the preamble of the ICRW, the 15 signatory nations established the Convention and its Commission in 1946 "to provide for the proper conservation of whale stocks and thus make possible *the orderly development of the whaling industry*." ICRW, supra note 8, Preamble (emphasis added).

For comprehensive discussions of the history of whaling and international attempts to regulate the industry, see generally R. Burton, The Life and Death of Whales (2d ed. 1980); Friends of the Earth, The Whaling Question: The Inquiry by Sir Sydney Frost of Australia (1979); McHugh, Rise and Fall of World Whaling: The Tragedy of the Commons Illustrated, 31 J. Int'l Aff. 23 (1977); Scarff, The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment, 6 Ecology L.Q. 326 (1977); Smith, The International Whaling Commission: An Analysis of the Past and Reflections on the Future, 16 Nat. Resources Law. 543 (1984).

19. Currently, 41 nations have ratified the ICRW and become members of the IWC. See 1985 Treaties in Force 311. Since 1976, the Commission has maintained a permanent office in Cambridge, England with a full-time, scientific staff. Friends of the Earth, supra note 18, at 43.

20. The Commission's first whaling regulations reflected its industry orientation. The regulations set quotas in terms of Blue Whale Units (BWU's): one BWU equalled one blue

however, the warnings of scientists and concerned environmentalists have led the IWC to adopt more conservationist goals.[21] In 1982, the IWC completed this evolution in its mandate by adopting a commercial whaling moratorium which commences in 1986.[22]

Like many other international conservation organizations, however, the IWC has enjoyed only limited success because of its lack of enforcement mechanisms.[23] The Commission's regulations apply

whale, or two fin whales, or two-and-one-half humpback whales, or six sei whales. See K. Allen, Conservation and Management of Whales 27 (1980). The Commission set its first annual whaling quota at 16,000 BWU's. Friends of the Earth, supra note 18, at 44.

While the BWU system helped regulate the whaling industry by limiting the total number of whales that could be captured, it did not limit catches of individual species. Accordingly, nations harvested whales in a progression from large to small species, driving each stock close to extinction before moving on to the next smaller species. See R. Burton, supra note 18, at 167-68. At the insistence of scientists and environmental groups, the Commission finally abandoned the BWU system in 1971 and adopted instead whaling quotas for individual species. See Scarff, supra note 18, at 367.

21. The IWC's movement toward its present conservationist stance started in the late 1950's when it established a scientific committee of population biology experts from nonwhaling nations to provide an unbiased and improved assessment of the world's whale stocks. See Scarff, supra note 18, at 362. This committee's recommendations led the Commission to make two major reforms. In 1971, it implemented an international observer scheme whereby member nations exchange representatives to monitor each other's compliance with the IWC quotas, id. at 365-67, and in 1972, the Commission replaced the BWU quota system with an individual whale species quota scheme. Id. at 367.

In 1974, the Commission took another significant step for whale conservation by adopting a New Management Procedure (NMP) which improves the individual whale species quota scheme by placing the various whale species into three protection categories: Initial Management Stocks, Sustained Management Stocks, and Protection Stocks. See Friends of the Earth, supra note 18, at 45-46. Finally, in 1982, the IWC demonstrated its commitment to cetacean conservation by voting to implement a commercial whaling moratorium beginning in 1986. See infra note 22.

22. The Commission adopted a commercial whaling moratorium in 1982 by a vote of 25 in favor, 7 opposed, and 5 abstaining. Those in favor of the measure were Antigua, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, the Federal Republic of Germany, India, Kenya, Mexico, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, the Seychelles, Spain, Sweden, the United Kingdom, and the United States. Brazil, Iceland, Japan, Korea, Norway, Peru, and the Union of Soviet Socialist Republics voted against the measure, while Chile, the People's Republic of China, the Philippines, South Africa, and Switzerland abstained. See Birnie, Countdown to Zero, 7 Marine Pol'y 64 (1983).

The IWC delayed the implementation of the moratorium until 1986 so that whaling nations could phase out their operations without suffering extreme economic hardship and to allow the Commission's scientists to record the present status of the world's whale population. The Commission also agreed to evaluate the effects of the moratorium on whale populations by 1990. For a thorough discussion of the Commission's moratorium decision, see generally id.

23. As the circuit court noted, international fishery and wildlife programs typically lack enforcement capabilities. *American Cetacean Society III*, 768 F.2d at 428.

only to its member nations,[24] and a member nation that makes a timely objection to a particular regulation is not responsible for complying with that provision.[25] Moreover, the ICRW does not provide the Commission with an international legal means of enforcing member nation compliance.[26]

The United States responded to this deficiency in the IWC's enforcement mechanisms by enacting two domestic laws designed to promote world compliance with the Commission's conservation programs. In 1971, Congress passed the Pelly Amendment[27] to the Fishermen's Protective Act of 1967,[28] and in 1979, it adopted the Packwood-Magnuson Amendment[29] to the Fishery Conservation and Management Act of 1976[30] (FCMA).

24. Article V, section 3 of the ICRW provides that amendments to the Schedule go into effect for the "*Contracting Governments*" 90 days after notification by the Commission. ICRW, supra note 8, art. V, § 3 (emphasis added).

25. Under article V, section 3(c) of the ICRW, a member nation that has filed a timely objection to a Schedule amendment is not bound by that provision unless it withdraws its objection. Id. art. V, § 3(c).

26. Article IX of the ICRW holds each member nation responsible for prosecuting "infractions against or contraventions of" the ICRW by persons or vessels under its jurisdiction and for reporting the infraction and sanctions imposed to the IWC. Id. art. IX.

27. Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified at 22 U.S.C. § 1978 (1982)). See also infra notes 31-36 and accompanying text.

28. Act of August 27, 1954, ch. 1018, 68 Stat. 883 (codified as amended at 22 U.S.C. §§ 1971-1980 (1982 & Supp. 1985)). Congress designated the act the "Fishermen's Protective Act of 1967" in a 1968 amendment, Pub. L. No. 90-482, § 4, 82 Stat. 730 (1968). The purpose of the act is "to protect the rights of vessels of the United States on the high seas and in territorial waters of foreign countries." S. Rep. No. 2214, 83d Cong., 2d Sess. 1, reprinted in 1954 U.S. Code Cong. & Ad. News 3382, 3383. Under this statute, when a U.S. vessel is seized by a foreign country in its territorial waters or on the high seas on the basis of claims that are not recognized by the United States or are inconsistent with international law, or on the basis of claims by the foreign country's exclusive fishery management authority that are not related to fishery conservation and management or that fail to recognize the traditional fishing practices of U.S. vessels, the Secretary of State must take all necessary actions to protect and secure the release of the vessel and its crew. 22 U.S.C. § 1972 (1982). The Secretary of State must also calculate the amount of any fine, license fee, registration fee, or any other direct charge paid to the foreign government to secure the release of the vessel and crew, id., and reimburse the owner of the seized vessel, id. § 1973, from the Fishermen's Protective Fund. Id. § 1979.

29. Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at 16 U.S.C. § 1821(e)(2) (1982)). See also infra notes 38-42 and accompanying text.

30. 16 U.S.C. §§ 1801-1882 (1982). Congress enacted the FCMA "to provide for the protection, conservation, and enhancement of the fisheries resources of the United States." H.R. Rep. No. 445, 94th Cong., 2d Sess 21, reprinted in 1976 U.S. Code Cong. & Ad. News 593. The statute creates a U.S. fishery conservation zone extending 200 nautical miles seaward from the U.S. coast, 16 U.S.C. § 1811 (1982), and establishes regional fishery management councils, id. § 1852, to provide the government with fishery management plans for this conservation zone. Id. § 1853. The United States exercises exclusive fishery management

The Pelly Amendment uses the threat of a ban on the import of fish products from offending nations as leverage[31] to encourage foreign nations to comply with international fishery programs.[32] The statute provides in pertinent part:

> When the Secretary of Commerce determines that the nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
>
> . . .
>
> Upon receipt of any certification . . . the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products . . . from the offending country for such duration as the President determines appropriate.[33]

While this statute gives the President discretion regarding the use of its sanction, it requires the President to inform Congress of actions taken in response to a certification and to explain any decision not to impose a fish products importation ban.[34]

Designed to apply to both member and nonmember nations of

control over the fishery conservation zone, id. § 1812, and may allocate surplus fishery resources from this region to foreign nations pursuant to various statutory guidelines. Id. § 1821.

31. Originally, this legislation was drafted solely to encourage international compliance with efforts to conserve the North American Atlantic salmon under the International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157 [hereinafter cited as ICNAF]. Legislators predicted that the Pelly Amendment would force Denmark to comply with the ICNAF program when Denmark realized that it risked losing a $10 million American import market for harvesting salmon worth only $63 thousand in trade with the United States. S. Rep. No. 582, 92d Cong., 1st Sess. 2-6 (1971). This prediction was accurate. After the Pelly Amendment passed, Denmark negotiated with the United States to phase out its Atlantic salmon fishing over a four-year period in return for not being certified. Brief for the Federal Appellants at 21, *American Cetacean Society III*.

32. As enacted, the Pelly Amendment applies to activities that "diminish the effectiveness" of an "international fishery conservation program," 22 U.S.C. § 1978(a)(1) (1982), which is defined as "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." 22 U.S.C. § 1978(h)(3) (1982). This definition includes the ICRW.

33. Id. §§ 1978(a)(1), (4).

34. See id. § 1978(b).

the IWC,[35] the Pelly Amendment has successfully coerced nations to join the Commission and comply with its regulations.[36] Nevertheless, in 1979, Congress recognized the public's growing concern for the protection of whales[37] and grew impatient with the executive branch's delay in making certification decisions and imposing sanctions.[38] Accordingly, the legislature enacted the Packwood-

35. The Pelly Amendment applies to *any* nation that "diminishes the effectiveness of an international fishery conservation program." See id. § 1978(a)(1). It was originally designed to enforce compliance by Denmark with the ICNAF's ban, see supra note 31, even though Denmark had objected to the Convention's program. S. Rep. No. 582, 92d Cong., 1st Sess. 4 (1971).

36. In November 1974, the Secretary of Commerce certified Japan and Russia for exceeding the IWC's 1973 Southern Hemisphere minke whale quota although both nations had filed timely objections to it. The President decided not to sanction these nations after both elected to comply with the regulation. See Defendant's Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, Affidavit of Dean Swanson 2-3, *American Cetacean Society I* [hereinafter cited as Swanson Affidavit]. Similarly, the Secretary of Commerce certified Chile, Peru, and the Republic of Korea in December 1978, for exceeding IWC quotas even though they were not members of the Commission. These countries avoided the President's sanctions by joining the IWC and complying with its regulations. Swanson Affidavit, supra, at 3.

37. See, e.g., Greenpeace Ship Towed to Port for Hampering Icelandic Whaling, N.Y. Times, Aug. 20, 1979, at A13, col. 1 (Greenpeace ship captain arrested by the Icelandic coast guard for hindering a whaler); A Round for the Whales, N.Y. Times, July 18, 1979, at A22, col. 1 ("thousands of citizens who have campaigned against [whaling] have reason to celebrate" the IWC's adoption of a moratorium on whaling by factory ships); N.Y. Times, Oct. 27, 1978, at 66 (Supp. Material) (the newspaper was on strike at the time) (two canoeists embark on an eleven-thousand mile voyage to urge an international whaling moratorium); F.B.I. Inquiry Leads to the Arrest of Man Linked to Whaling Plot, N.Y. Times, July 17, 1978, at B4, col. 5 (conservation activist arrested for attempting to blow up whaling ships in South America); Whale Quotas Set at London Talks, N.Y. Times, July 1, 1978, at 5, col. 1 (two dozen protestors pour fake whale blood on the Japanese delegation at the IWC's meeting in London to protest Japan's whaling industry); Climber Scales Sears Tower, N.Y. Times, May 2, 1978, at 18, col. 1 (climber hangs a banner which calls for an end to whaling in Russian and Japanese); N.Y. Times, Mar. 29, 1977, at 39, col. 2 (President and Mrs. Carter attend a famous cellist's recital to benefit whale conservation groups); Soviet Whalers Foiled by Canada Protesters, N.Y. Times, July 20, 1976, at 34, col. 3 (Greenpeace activists in three rubber boats form a "floating picket line" between a Soviet whaler and a pod of sperm whales); No Hope for Whales, N.Y. Times, May 2, 1976, at 14, col. 3 ("[t]he massacre of the great whales is one of the most horrible and tragic of man's blunders, and its occurrence today is utterly senseless"). Since 1979, public demand for whale conservation has been equally intense. See infra note 130.

38. See 125 Cong. Rec. 22,083 (1979) (statement of Rep. Murphy) (commenting that the certification process was "taking entirely too much time" and that "it is the intent of the [Packwood-Magnuson] amendment to make it clear that Congress expects [the Secretaries of Commerce and the Interior] to act swiftly and promptly in making such investigations in the future"); id. at 22,084 (statement of Rep. Oberstar) (commenting that the Packwood-Magnuson Amendment was designed "in light of the extensive delays in certifications in the past" and "would require the Secretary [of Commerce] to expedite his investigation for possible certification").

Magnuson Amendment to put "real economic teeth into [the nation's] whale conservation efforts."[39] This amendment imposes a mandatory sanction—at least a fifty percent reduction of the FCMA fishing allocation[40]—on any nation that the Commerce Secretary certifies as "diminish[ing] the effectiveness" of the IWC's programs under the ICRW.[41] Like the Pelly Amendment, the Packwood-Magnuson Amendment has achieved great success in forcing nations to comply with the Commission's whaling regulations.[42]

II. THE COMMERCE SECRETARY'S EXECUTIVE AGREEMENT WITH JAPAN

The threat of sanctions under the Pelly and Packwood-Magnuson Amendments led Japan to negotiate with the United States in 1984 to avoid a certification confrontation.[43] Since it had

39. Id. at 21,742 (statement of Sen. Packwood). Senator Magnuson proclaimed that this legislation provided "a significant addition" to the Pelly Amendment's arsenal of sanctions. Id. at 21,743.

40. See 16 U.S.C. § 1821(2)(B) (1982). Senator Packwood explained the powerful nature of this sanction: "The privilege of fishing in our 200-mile zone is an infinitely superior economic privilege and any country in its right mind when forced to the decision between fishing in the 200-mile zone and giving up illegal whaling is going to give up illegal whaling." 125 Cong. Rec. 21,743 (1979). See also id. at 22,084 (statement of Rep. Oberstar) (concluding that a "prudent nation" will not sacrifice half of its U.S. fishing allocation to continue whaling).

41. 16 U.S.C. § 1821(2)(A)(i) (1982). A certification under the Packwood-Magnuson Amendment also constitutes a certification under the Pelly Amendment. Id.

42. In 1980, U.S. negotiators employed the threat of certification under the Pelly and Packwood-Magnuson Amendments to convince Spain to comply with an IWC fin whale quota to which it had objected. Swanson Affidavit, supra note 36, at 4. That same year, a similar threat led the Republic of Korea to comply with the Commission's restriction on the use of nonexplosive harpoons to which it had objected. Id. In 1981, the threat of U.S. sanctions convinced Taiwan to outlaw whaling. Id. at 4-5. This same weapon led Chile in 1983 to agree to curtail whaling indefinitely in return for one final year of harvesting Bryde's whales in excess of the IWC's quota without certification. Id. at 5. The Commerce Secretary first used certification under the Packwood-Magnuson Amendment in April 1985 against Russia for exceeding the IWC's 1984 minke whale quota. Brief for the Federal Appellants at 23-26, *American Cetacean Society III*. In July 1985, Russia announced that it would cease all commercial whaling by 1987. While Russia attributed its decision to the unprofitability of whaling because of declining whale stocks, conservationists cited the imposition of the Packwood-Magnuson Amendment's sanctions as the decisive factor. Letter from the Federal Appellants to the Clerk of the United States Court of Appeals for the District of Columbia Circuit (July 25, 1985) (citing the N.Y. Times, July 20, 1985, § 1, at 2, col. 1).

43. Japan's Fisheries Agency Director General met with the United States Commissioner to the IWC in Washington, D.C. on October 16-17 and November 1-13, 1984, to discuss Japan's whaling activities and the certification process. Their negotiations led to the November 13, 1984 executive agreement between the United States and Japan. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 15, *American Cetacean Society I*. See infra notes 48-50 and accompanying text. See also *American Cetacean Society I*, 604 F. Supp. at 1404.

filed timely objections to both the IWC's 1981 adoption of a zero quota for North Pacific sperm whales[44] and 1982 passage of a moratorium on all commercial whaling,[45] Japan was not internationally obligated to obey these Commission regulations.[46] However, Japan recognized that the United States could and probably would impose economic sanctions if Japan continued to harvest whales without negotiating.[47]

On November 13, 1984, Japan and the United States concluded their whaling discussions by way of an executive agreement.[48] In a formal exchange of letters between Japan's Chargé d'Affaires *ad interim* and the United States Secretary of Commerce, the United States allowed Japan to catch four hundred sperm whales during each of the 1984 and 1985 seasons without being certified if it withdrew its objection to the IWC's zero quota for sperm whales by December 13, 1984, to become effective April 1, 1988. Additionally, the United States permitted Japan to capture two hundred sperm whales and an "acceptable" number of Bryde's and minke whales[49] in each of the 1986 and 1987 seasons without being certified if it withdrew its objection to the Commission's commercial whaling moratorium by April 1, 1985, also to become effective April 1, 1988.[50]

44. *American Cetacean Society I*, 604 F. Supp. at 1403. Japan was the only IWC member nation to object to this quota. Id.

45. Id. The Soviet Union and Norway joined Japan in objecting to this quota. Id.

46. See supra note 25 and accompanying text.

47. Letter from Yasushi Murazumi, Chargé d'Affaires *ad interim* of Japan, to Malcolm Baldrige, Secretary of Commerce of the United States (Nov. 13, 1984) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Nov. 13, 1984 Murazumi letter].

48. *American Cetacean Society I*, 604 F. Supp. at 1404. While the district court loosely qualified this agreement between Japan's Chargé d'Affaires *ad interim* and the United States Secretary of Commerce as an "arrangement," id., the circuit court more accurately characterized the accord as an executive agreement. *American Cetacean Society III*, 768 F.2d at 431.

49. The United States specified that it would use the most recent IWC quotas as the guideline for Japan's "acceptable" Bryde's and minke whale harvest. Letter from Malcolm Baldrige, Secretary of Commerce of the United States, to Yasushi Murazumi, Chargé d'Affaires *ad interim* of Japan (Nov. 13, 1984) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Nov. 13, 1984 Baldrige Letter].

50. *American Cetacean Society I*, 604 F. Supp. at 1404. See Nov. 13, 1984 Murazumi letter, supra note 47; Nov. 13, 1984 Baldrige Letter, supra note 49. Pursuant to this agree-

In protest of the Commerce Secretary's decision not to certify Japan, the environmentalists in *American Cetacean Society* asked the district court to interpret the statutory language of the Pelly and Packwood-Magnuson Amendments to *require* the Commerce Secretary to certify a nation that "violates" the IWC's regulations.[51] The court agreed with the environmentalists' statutory interpretation and ordered the Commerce Secretary to certify Japan.[52] On appeal, the circuit court affirmed this ruling based on its own analysis of the legislative histories of the Pelly Amendment,[53] an amendment to the Tuna Convention Act,[54] an amendment designed to enforce the Convention on International Trade in Endangered Species of Wild Fauna and Flora[55] (CITES), and the Packwood-Magnuson Amendment.[56]

III. THE CIRCUIT COURT'S INTERPRETATION OF THE COMMERCE SECRETARY'S STATUTORY RESPONSIBILITIES

The circuit court first addressed[57] whether whaling in "viola-

ment, Japan withdrew its objection to the IWC's sperm whale zero quota on December 11, 1984. See Dec. 11, 1984 Okawara letter, supra note 11; Dec. 11, 1984 Baldrige letter, supra note 11. Following the district court's decision in *American Cetacean Society I*, Japan stipulated that the withdrawal of its objection to the IWC's commercial whaling moratorium would be conditioned on an appeals court judgment favoring the U.S. government. See Apr. 5, 1985 Abe letter, supra note 13; Apr. 5, 1985 Brown letter, supra note 13.

51. *American Cetacean Society I*, 604 F. Supp. at 1401; see supra note 8.

52. Id. at 1411.

53. 22 U.S.C. § 1978 (1982). See infra notes 57-71 and accompanying text.

54. 16 U.S.C. §§ 951, 955-957, 959 (1982). See infra notes 73-80 and accompanying text.

55. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 0 [hereinafter cited as CITES], was implemented in the United States by the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982). In 1978, Congress expanded the Pelly Amendment to protect endangered species. See Pub. L. No. 95-376, 92 Stat. 714 (1978) (codified at scattered subsections of 22 U.S.C. § 1978 (1982)). See infra notes 81-84 and accompanying text.

56. 16 U.S.C. § 1821(e)(2) (1982). See infra notes 85-86 and accompanying text.

57. In his dissent, Judge Oberdorfer indicated that the majority had overlooked the "threshold question" of justiciability. *American Cetacean Society III*, 768 F.2d at 447. Citing Baker v. Carr, 369 U.S. 186 (1962), he suggested that the court consider "the possible consequences of judicial action," id. at 211, on the conduct of foreign affairs, especially the danger of "multifarious pronouncements by various departments on one question." Id. at 217. However, the *Baker* Court cautioned, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at 211. Indeed, the courts have consistently addressed questions involving the allocation of foreign relations powers between the executive and legislative branches. See United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1954) (invalidating a sole executive agreement between the United States and Canada that conflicted with an earlier congressional statute); Hopson v. Kreps, 622 F.2d 1375, 1379 (9th Cir. 1980) ("Questions of statutory authority are clearly susceptible of judicial handling and involve the classic judicial function of construing statutes to determine whether agencies have acted outside their jurisdiction."). See also Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517, 542 (1966).

tion" of an IWC quota "diminish[es] the effectiveness" of the ICRW under the Pelly Amendment.[58] Although the statute does not define this critical language,[59] the court held that the congressional committee reports and floor statements[60] on the Pelly

58. *American Cetacean Society III*, 768 F.2d at 435-36. See supra note 8 (the more accurate question is whether whaling *in excess of* an IWC quota "diminishes the effectiveness of the ICRW under the Pelly Amendment").

59. In construing a statute, courts look first to "the language of the statute itself." Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980). However, as Justice Holmes noted in Towne v. Eisner, 245 U.S. 418 (1918), courts must be careful to recognize the context of the statutory language: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Id. at 425. Accordingly, even when a statute's language is clear, courts often analyze its legislative history to resolve "any lingering doubt as to its proper construction." United States v. Clark, 454 U.S. 555, 561 (1982). See infra note 60. See generally Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983) (discussing federal courts' confusion regarding the use of legislative history in statutory construction and urging the adoption of "commonsense rules" controlling the use of various legislative materials in adjudication).

60. Chief Justice Marshall long ago observed that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805). In Marshall's day, it was easier for judges to determine congressional intent since a few House and Senate leaders controlled the legislative process. Wald, supra note 59, at 206. By contrast, the modern legislative process consists of "a cacophony of many voices and many themes," much of which occurs behind closed doors outside the public's view. Id.

Nevertheless, courts consider congressional committee reports the most accurate demonstration of legislative intent. Id. at 201; see SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.) ("[W]hile members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way."). Courts also look to the floor debates, favoring statements by the bill's sponsors or managers over speeches by less involved legislators. Wald, supra note 59, at 201-02; see S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972) ("In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws."). In selective cases, courts rely on congressional hearing testimony by executive department officials or outside expert witnesses to provide meaning to a statute. Wald, supra note 59, at 202. Lastly, recognizing the legislature's habit of formulating policy through a succession of issue-related statutes or amendments, courts infer statutory intent from congressional action in related legislation. Id.

Ironically, the most critical stages of the legislative process—the committee and subcommittee markups, in which legislators first discuss the specific language and intent of the proposed law, and the conference committee, where important members of both houses meet to resolve statutory differences before submitting a uniform proposal to their respec-

Amendment demonstrate "quite plainly that fishing in excess of internationally set quotas was considered an automatic trigger of certification."[61] The court cited three items in support of its decision: the Senate Report[62] that indicates that the Secretary of Commerce must certify any nation whose fishing operations are not "consistent with international conservation programs";[63] the Senate[64] and House[65] Reports that explain that the certification provision is designed to "insure that the Congress is made aware of the failure of any foreign country to abide by an international fishery conservation program";[66] and floor statements of several legislators, which the court interpreted to demonstrate that any conservation program "violation"[67] would be answered by certification.[68]

tive chambers for final passage—are not recorded for the public. Id. Thus, courts are left to construe statutes using an incomplete legislative record, consisting mainly of "[r]hetoric to justify the legislation, not necessarily to explain it." Id. at 206.

To make matters worse, courts do not share a uniform approach to statutory construction using legislative materials. Id. at 214; see Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 590 (1982) (Stevens, J. dissenting) (criticizing the Court's inconsistent approach to statutory interpretation). Judge Wald of the United States Court of Appeals for the District of Columbia Circuit suggests: "[I]n the present state of the law, the various approaches to statutory construction are drawn out as needed, much as a golfer selects the proper club when he gauges the distance to the pin and the contours of the course." Wald, supra note 59, at 215-16. Accordingly, she concludes that courts need "commonsense rules" to govern the use of the various legislative documents in statutory interpretation, id. at 200, and that Congress must correct judicial holdings that misinterpret critical statutes by enacting clearer legislation. Id. at 216.

While this Comment criticizes the circuit court's statutory analysis in *American Cetacean Society III*, it recognizes the difficulties inherent in ascertaining legislative intent and the potential for giving greater weight to some legislative materials over others to reach a particular outcome. Accordingly, this Comment's conclusion favoring reversal of the circuit court's decision is also grounded on an examination of the equities involved in the mandamus decision. See infra notes 130-63 and accompanying text.

61. *American Cetacean Society III*, 768 F.2d at 436.

62. S. Rep. No. 582, 92d Cong., 1st Sess. 2 (1971).

63. *American Cetacean Society III*, 768 F.2d at 436.

64. S. Rep. No. 583, 92d Cong., 1st Sess. 6 (1971).

65. H.R. Rep. No. 468, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. Code Cong. & Ad. News 2409, 2414.

66. *American Cetacean Society III*, 768 F.2d at 436.

67. Many legislators either were not careful with their choice of words or were confused by the Pelly and Packwood-Magnuson Amendments when they stated that international conservation program "violations" merit certification. See, e.g., infra notes 68, 86. A nation can only "violate" an IWC international conservation program if it is a member of the ICRW, supra note 8, *and* it exceeds a quota without having filed a timely objection. ICRW, supra note 8, art. V, § 3. However, the plain words and legislative histories of the Pelly and Packwood-Magnuson Amendments clearly indicate that certification applies to *any nation* which "diminish[es] the effectiveness" of the Commission's programs under the ICRW. See supra note 10. This distinction must be kept in mind when weighing the significance of the

Further, the circuit court noted that the executive branch has adopted the required-certification interpretation of the Pelly Amendment.[69] In support of its conclusion, the court cited a 1971 letter from the Commerce Department to the House Merchant Marine and Fisheries Committee,[70] which provides that "the existence of [the International Convention for the Northwest Atlantic Fisheries (ICNAF) ban on high seas fishing for Atlantic salmon] would . . . authorize the President to impose sanctions against countries which do not abide by that ban."[71] The court read the letter to demonstrate the executive branch's belief that certification automatically follows a fishing quota violation.[72]

The court continued its legislative analysis of this critical statutory phrase by recognizing that it was first employed in a 1962 amendment to the Tuna Convention Act of 1950.[73] This amendment requires the Secretary of the Interior[74] to establish regulations to ban tuna imports from foreign countries found to be fishing "in such a manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the [Inter-American Tropical Tuna] Commission."[75] Examining

congressional floor statements as a means of defining the Pelly and Packwood-Magnuson Amendments' ambiguous statutory phrase.

68. *American Cetacean Society III*, 768 F.2d at 436-37. The court stressed Senator Stevens' statement that "the act is not limited to the particular fish product taken in *violation* of a particular fish conservation program." Id. (citing 117 Cong. Rec. 47,053 (1971) (emphasis added)). The court also noted Representative Dingell's comment that reflected the language used by the reporting committees: "[T]he purpose of [the bill] . . . is to authorize the President of the United States to prohibit the importation into this country of fishery products from nations that do not conduct their fishing in a manner that is consistent with international fishery conservation programs." *American Cetacean Society III*, 768 F.2d at 437 (citing 117 Cong. Rec. 34,750 (1971)).

69. *American Cetacean Society III*, 768 F.2d at 437.

70. The House Merchant Marine and Fisheries Committee printed this letter in its House Report for the Pelly Amendment. See H.R. Rep. No. 468, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. Code Cong. & Ad. News 2409, 2415-17.

71. *American Cetacean Society III*, 768 F.2d at 437.

72. Id.

73. Id. at 438. Tuna Convention Act of 1950, ch. 907, 64 Stat. 777 (codified as amended at 16 U.S.C. §§ 951-961 (1982)); 1962 amendment, Pub.L. No. 87-814, 76 Stat. 923 (codified at 16 U.S.C. §§ 951, 955-957, 959 (1982)). Similar to the Pelly Amendment in purpose, this legislation is designed to promote compliance with the recommendations of the Inter-American Tropical Tuna Commission, an international conservation organization that lacks authority to promulgate regulations and enforcement mechanisms. See H.R. Rep. No. 2409, 87th Cong., 2d Sess. 10, reprinted in 1962 U.S. Code Cong. & Ad. News 3192.

74. The Secretary of Commerce later assumed these specific duties of the Secretary of the Interior pursuant to 1970 Reorg. Plan No. 4, 5 U.S.C. app. 1 (1982).

75. 16 U.S.C. § 955(c) (1982).

the Interior Department's statement regarding the implementation of the amendment,[76] the court concluded that the legislation requires certification when a nation exceeds the Commission's recommendations.[77] The court noted further that the federal regulations enacted pursuant to the tuna amendment[78] are consistent with this interpretation.[79] Accordingly, it held that by using the "diminish the effectiveness" phrase in both the tuna and Pelly Amendments, Congress intended to require certification.[80]

Proceeding to the Pelly Amendment's subsequent legislative history,[81] the circuit court acknowledged that Congress has defined the phrase "diminish the effectiveness" to give the Commerce Secretary certification discretion in a 1978 amendment which expands the Pelly Amendment to enforce CITES.[82] In the House Report for this amendment, the Merchant Marine and Fisheries Committee indicated that

> [t]he nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.[83]

However, the court held that this definition applies only to the amendment designed to enforce CITES, an international program which the court deemed quite different from the ICRW in that CITES addresses trade between nations and provides member nations with significant implementation discretion.[84]

The circuit court also held that the legislative history of the Packwood-Magnuson Amendment confirms its required-certification interpretation of the Pelly Amendment.[85] The court cited floor statements by the Packwood-Magnuson Amendment's sponsors which indicate that the amendment requires certification for "violations" of international whaling regulations.[86]

From its evaluation of the legislative history for the critical statutory phrase, the circuit court concluded that the Pelly and Packwood-Magnuson Amendments clearly require the Secretary of Commerce to certify a nation that exceeds the IWC's quotas.[87] Accordingly, the court held that the Commerce Secretary had a "nondiscretionary duty" to certify Japan and that he violated his statu-

76. The Interior Department's statement is reprinted in S. Rep. No. 1737, 87th Cong., 1st Sess. 7 (1962). While the court read the statement as requiring the Secretary of the Interior to promulgate regulations prohibiting a foreign nation that exploits tuna resources from exporting tuna into the United States, this Comment interprets the statement as providing the Secretary with discretion to negotiate with the offending nation for adequate assurances of future compliance before resorting to certification. See infra note 99 and accompanying text.

77. *American Cetacean Society III*, 768 F.2d at 438.

78. The Secretary of the Interior promulgated implementing regulations, 50 C.F.R. § 281 (1985), which address restrictions on tuna imports.

79. *American Cetacean Society III*, 768 F.2d at 438 n.16. The court based its conclusion on 50 C.F.R. § 281.5 (1985), which lists the considerations pertinent to an investigation as to whether a nation is conducting fishing operations that "diminish the effectiveness of the conservation recommendations of the Commission." The court held that this regulation does not provide the Department of the Interior with discretion in deciding whether to certify a nation for exceeding the Tuna Commission's recommendations, but this Comment interprets the regulation otherwise. See infra note 100 and accompanying text.

80. *American Cetacean Society III*, 768 F.2d at 438. Relying on United Shoe Workers v. Bedell, 506 F.2d 174, 183 (D.C. Cir. 1974), the court noted that "absent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning [in subsequent legislation], since there is hardly a basis for assuming that the lawmakers had anything else in mind." *American Cetacean Society III*, 768 F.2d at 437.

81. The court noted that subsequent legislative history is critical to the interpretation of statutory provisions because it provides the most recent expression of congressional intent. *American Cetacean Society III*, 768 F.2d at 439.

82. Id. at 442. See supra note 55.

83. H.R. Rep. No. 1029, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 1768, 1779 [hereinafter cited as 1978 Pelly Amendment House Report].

84. *American Cetacean Society III*, 768 F.2d at 442-43.

85. Id. at 440. However, as the court noted, neither the House Report, H.R. Rep No. 170, 96th Cong., 1st Sess. (1979), nor the Senate Report, S. Rep. No. 72, 96th Cong., 1st Sess. (1979), provides insight into the legislature's intent regarding the Packwood-Magnuson Amendment because the amendment was proposed after the bill to which it was attached had been reported out of committee. *American Cetacean Society III*, 768 F.2d at 440.

86. *American Cetacean Society III*, 768 F.2d at 440-41. Senator Packwood noted in discussion of the proposed amendment, "if any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately . . . lose 50 percent of their allocation for fishing within our 200-mile zone." 125 Cong. Rec. 21,742-43 (1979). Similarly, Senator Magnuson indicated that

> [i]f a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations or for engaging in trade that diminishes the effectiveness of the international regime regulating the taking of whales, then that nation will be denied access to fish in our 200-mile fishery conservation zone.

Id. at 21,743. See supra note 67 (many legislators either were not careful with their choice of words or were confused by the Pelly and Packwood-Magnuson Amendments when they stated that international conservation program "violations" merit certification).

87. *American Cetacean Society III*, 768 F.2d at 444.

tory mandate by concluding the 1984 executive agreement.[88] Noting that the plaintiffs had a clear right to relief and that no alternative remedies were available, the court affirmed the writ of mandamus.[89]

IV. ANALYSIS OF THE DECISION

Examination of the circuit court's opinion reveals that it is flawed in several respects. First, contrary to the court's conclusion, the legislative history of the critical statutory phrase demonstrates congressional intent to provide the Secretary of Commerce with certification discretion. At the very least, legislative intent regarding certification is ambiguous, which should lead the court to defer to the Commerce Department's statutory interpretation. Finally, even if certification is not discretionary, mandamus relief is inappropriate for a variety of legal and policy reasons.

A. *The Pelly and Packwood-Magnuson Amendments Provide Certification Discretion*

The legislative history of the Pelly Amendment is as ambiguous as its critical statutory phrase "diminish the effectiveness." Instead of explicitly requiring the Secretary of Commerce to certify a nation that "exceeds" international fishery conservation programs, the Senate and House Reports call for certification when a nation fails to act "consistent with" or to "abide by" these programs.[90] Such language does not demonstrate clear congressional intent to require certification for all departures from international conservation programs. A nation such as Japan, which exceeds an international fishery conservation program but agrees to take remedial action to come into compliance with the program, has chosen to "abide by" the program and therefore does not merit certification.

On the House floor, Representative Pelly explained that his amendment was designed to penalize nations that *flagrantly* violate international programs. He emphasized that his legislation constituted "a clear directive" from Congress to the President that the United States would no longer allow foreign nations that choose to "*flount* [sic] international conservation measures" to

88. Id.
89. Id. at 444-45.
90. See supra notes 62-66 and accompanying text.

profit from American trade.[91] He also stated that the amendment allowed the President to "embargo fishery products in case of *flagrant* violation of any international fishery conservation program."[92] Representative Pelly envisioned that the Commerce Secretary would have certification discretion under his amendment.[93]

Further, contrary to the court's conclusion, the executive branch has never interpreted the Pelly Amendment as requiring certification for all departures from international fishery programs. The Department of Commerce did write to the House Merchant Marine and Fisheries Committee[94] to confirm that the Pelly Amendment's definition of "international fishery conservation program" encompassed the ICNAF ban on high seas fishing for Atlantic salmon.[95] However, the court cited this 1971 letter out of context,[96] because the Commerce Department did not specify what actions would merit certification. Instead, the Department repeated the ambiguous phrase used in the House Report, that the Pelly Amendment authorizes the President to sanction those nations that do not "abide by" the ICNAF ban.[97]

Congress first used the phrase "diminish the effectiveness" in the 1962 amendment to the Tuna Convention Act of 1950 to give the Department of the Interior discretion in handling nations that exploit tuna resources.[98] The Interior Department's statement regarding the statute's implementation allows that Department discretion in certifying nations which exceed the Tuna Commission's recommendations:

> The Department . . . *would seek*, in concert with the De-

91. 117 Cong. Rec. 34,752 (1971) (emphasis added).
92. Id. (emphasis added).
93. The court dismissed these statements by the Pelly Amendment's sponsor in a footnote, explaining that they were irrelevant because they did not address whether nonflagrant activities would merit certification. *American Cetacean Society III*, 768 F.2d at 437 n.13. Representative Pelly's statements merit greater respect, however, as they call into question the court's conclusion that the legislature intended that certification follow every international fishery program violation.
94. See supra notes 70-72 and accompanying text.
95. The Departments of State and Commerce each confirmed by letter to the House Merchant Marine and Fisheries Committee that the ICNAF ban would qualify under the amendment's definition of "international fishery conservation ban." H.R. Rep. No. 468, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. Code Cong. & Ad. News 2409, 2415-17.
96. See supra notes 69-72 and accompanying text.
97. H.R. Rep. No. 468, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. Code Cong. & Ad. News 2409, 2415-17.
98. See supra notes 73-75 and accompanying text.

> partment of State, to obtain from all governments whose fishermen exploit the tuna resources of the regulatory area, both members and nonmembers of the Commission, *assurances that those governments would take adequate action.* . . . We would expect that there would be further discussions with officials of those governments regarding the particular measures to be adopted, discussions aimed at satisfying us that appropriate measures would be adopted, that enforcement capabilities were adequate, and that the intent was bona fide. . . . *Should that government fail to take adequate action, we would institute certification procedure* in respect of tuna offered for entry from that country.[99]

The federal regulations enacted pursuant to the amendment confirm that certification is discretionary by enumerating several factors for the agency to consider in determining whether to certify a foreign nation for exploiting tuna resources, including whether the nation's "repeated and flagrant fishing operations . . . seriously threaten the achievement of the objectives of the Commission's recommendations."[100]

In the 1978 amendment to the Pelly Amendment to enforce CITES, Congress explicitly defined the phrase "diminish the effectiveness" to give the Secretary of Commerce certification discre-

99. S. Rep. No. 1737, 87th Cong., 2d Sess. 7, 8 (1962) (emphasis added).

100. 50 C.F.R. § 281.5 (1985) provides in pertinent part:

> In making a finding as to whether or not a country is condoning the use of vessels in the conduct of fishing operations in the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the Commission, The [sic] Bureau Director shall take into account, among such other considerations as may appear to be pertinent in a particular case, the following factors:
>
> . . .
>
> (6) . . . The quantity of species subject to regulation taken from the regulatory area by the country's vessels contrary to the Commission's conservation recommendations and its relationship to (i) the total quantity permitted to be taken by the vessels of all countries participating in the fishery and (ii) the quantity of such species sought to be restored to the stocks of fish pursuant to the Commission's conservation recommendations.
>
> (7) Whether or not repeated and flagrant fishing operations in the regulatory area by the vessels of the country seriously threaten the achievement of the objectives of the Commission's recommendations.

Noting the discretionary nature of this provision's language, the government questioned the circuit court's contrary ruling. See Petition for Rehearing and Suggestion for Rehearing *En Banc* at 6-7, *American Cetacean Society III*.

tion.[101] As the House Report notes, the legislature passed this amendment to expand the success realized by the United States "in the conservation of whales to the conservation of endangered and threatened species."[102] Unlike the court,[103] Congress recognized the similarities in purpose and structure of CITES and the ICRW. The House Report notes that CITES is designed to prevent indirectly the decline in endangered species, such as whales, through trade regulation.[104] Moreover, CITES employs an endangered species classification system[105] and voting and objection procedures[106] which are quite comparable to those of the ICRW.[107]

101. See supra note 82 and accompanying text.

102. 1978 Pelly Amendment House Report, supra note 83, at 1773. Floor statements by Representatives Leggett and Murphy affirmed this intent. Representative Leggett noted that:

> [I]n order to expand the success the United States has achieved in the conservation of fish and particularly whales under section 8 of the act—better known as the Pelly amendment—a number of conservation organizations strongly suggested the use of the Pelly amendment concept to extend additional protection to endangered and threatened species of wildlife.
>
> . . .
>
> The amendment adopted by the committee would allow the Pelly amendment to be invoked in order to prohibit imports of any wildlife products from the offending nations whenever a determination is made by the Secretary of the Interior or the Secretary of Commerce, for instance, that wildlife products protected under the Convention [CITES] are being shipped between two nations and that the actions of such nations are diminishing the effectiveness of an international program for endangered or threatened species.

124 Cong. Rec. 9280 (1978). Similarly, Representative Murphy explained that:

> [This amendment] would use—what is known as the Pelly amendment concept—to extend additional protection to endangered and threatened species of wildlife. In accomplishing this purpose, the bill would prohibit imports of any wildlife products from offending nations whenever the Secretary of the Interior or the Secretary of Commerce determines that wildlife products protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora are being shipped between two nations and that the actions of such nations are diminishing the effectiveness of an international program for endangered or threatened species.

Id. at 25,415.

103. See supra note 84 and accompanying text.

104. 1978 Pelly Amendment House Report, supra note 83, at 1774.

105. Compare CITES, supra note 55, art. II (endangered and threatened species classifications), with the ICRW's protection and sustained management stock categories as explained in Gambell, Whale Conservation: Role of the International Whaling Commission, 1 Marine Pol'y 301, 308 (1977). See Petition for Rehearing and Suggestion for Rehearing *En Banc* at 8, *American Cetacean Society III*.

106. Compare CITES, supra note 55, art. XV (two-thirds majority required for adoption of regulations), with ICRW, supra note 8, art. III (three-fourths majority required for adoption of regulations). Also compare CITES, supra note 55, art. XV(1)(c) (reservation process), with ICRW, supra note 8, art. V(3) (objection process). See Petition for Rehearing and Suggestion for Rehearing *En Banc* at 8, *American Cetacean Society III*.

107. 1978 Pelly Amendment House Report, supra note 83, at 1774.

Since Congress recognized the similarities between the ICRW and CITES and decided against specifically limiting the coverage of the CITES amendment,[108] congressional clarification of the meaning of "diminish the effectiveness" applies to both the Pelly Amendment and the CITES amendment.

Finally, the legislative history of the Packwood-Magnuson Amendment demonstrates that Congress once again employed the phrase "diminish the effectiveness" to give the Secretary of Commerce certification discretion. Representative Breaux, who chaired the subcommittee that conducted hearings on this amendment, recognized that "[t]he Secretary has the discretion in making a certification decision."[109] On the House floor, he expressed his hope

108. By comparison, Congress specifically limited the Commerce Secretary's certification authority under the Packwood-Magnuson Amendment to living marine resources. See S. Rep. No. 72, 96th Cong., 1st Sess. 6 (1979).

109. Fishery Conservation and Management Act Oversight: Hearings on H.R. 1798 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries of the House of Representatives, 96th Cong., 1st Sess. 317 (1979). Subcommittee Chairman Breaux had the following conversation with Ambassador Negroponte on the final day of hearings on this provision:

> Mr. Breaux: I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration.
>
> First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will be in fact imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement.
>
> . . .
>
> Mr. Breaux: . . . What is wrong with telling a nation which flagrantly diminishes the effectiveness of a treaty, saying to that nation that they cannot have the right or privilege within our 200-mile zone?
>
> Mr. Negroponte: Well, I think it is in part a question of degree, Mr. Chairman. Does the punishment fit the crime?
>
> Mr. Breaux: The Secretary has the discretion in making a certification decision.

Id. at 314-15, 317. Thus, Subcommittee Chairman Breaux concluded that while the Packwood-Magnuson Amendment stripped the Executive of discretion in sanctioning a certified nation, it still gave the Secretary of Commerce the same discretion enjoyed under the Pelly Amendment in the certification process.

The court deemed other statements by Mr. Breaux contradictory and held that his comments did not accurately portray the legislature's intent. *American Cetacean Society III*, 768 F.2d at 441 n.20. Yet, as the government noted in its Petition for Rehearing and Suggestion for Rehearing *En Banc* at 10-11, *American Cetacean Society III*, the court cited the representative's other statements out of context. Moreover, if Mr. Breaux did make contradictory statements about the statute's meaning after chairing three days of hearings on this subject, the court's finding of clear legislative intent is dubious indeed.

that the Secretary would be "especially careful to examine all the facts surrounding a possible certification."[110] Similarly, Representative Oberstar implied that not every whaling quota violation would merit certification under the Packwood-Magnuson Amendment. He explained that the statute was designed to "end the *unnecessary and reckless* violations of [the IWC's programs] and the irresponsible destruction of whales."[111]

In signing this provision into law, President Carter interpreted both the Packwood-Magnuson and Pelly Amendments as providing the executive branch with discretion in the certification process:

> With regard to both the Packwood-Magnuson and Pelly amendments, the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation. However, in those negotiations all nations will be informed of the implications of these two amendments and the determination of this Government to use them if remedial action is not undertaken.[112]

Thus, the Executive confirmed that the Secretary of Commerce has the option not to certify a nation for exceeding an international fishing program if the nation agrees to take remedial action.

Contrary to the circuit court's finding, the complete legislative history of the phrase "diminish the effectiveness" demonstrates congressional intent to provide the Secretary of Commerce with discretion in certifying a nation that exceeds an international conservation program. Accordingly, the Commerce Secretary did have legislative authorization to allow Japan four years of limited whaling without certification in return for its future commitment to the IWC's commercial whaling moratorium.

110. 125 Cong. Rec. 22,083 (1979).

111. Id. (emphasis added).

112. Fishery Conservation and Management Act Amendments: Statement on Signing S. 917 Into Law (Aug. 15, 1979), 2 Public Papers of the President 1435 (1979) (Administration of Jimmy Carter).

B. *Judicial Deference to Administrative Interpretations of Ambiguous Statutes*

At the very least, congressional intent regarding the statutory phrase "diminish the effectiveness" is ambiguous. Courts confronted with such ambiguous statutes give significant weight to applicable administrative interpretations[113] according to the policy articulated by Chief Justice Warren in *Udall v. Tallman*:[114]

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."[115]

More recently, in *Federal Election Commission v. Democratic Senatorial Campaign Committee*,[116] the Court cited *Tallman* in support of its decision to uphold the Federal Election Commission's interpretation of a provision of the Federal Election Campaign Act of 1971.[117] The Court reasoned that the statute did not expressly or implicitly prohibit the agency action, although Congress could have written it to do so had it desired.[118] Likewise, Congress could have written the Pelly and Packwood-Magnuson Amendments specifically to require the Commerce Secretary to certify any foreign nation which "exceeds an international fishery

113. See generally Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549 (1985). Professor Diver explains that "it is a defining characteristic of the administrative state that most statutes are not direct commands to the public enforced exclusively by courts, but are delegations to administrative agencies to issue and enforce such commands." Id. at 551. He concludes that "a strong presumption of deference to interpretations lying within an agency's prima facie policymaking domain best accommodates the competing demands for responsibility and initiative in the administrative state." Id. at 599.

Obviously, in cases where the statute's meaning is clear and an administrative interpretation conflicts with the provision's plain meaning, courts will prohibit the conflicting agency action. See, e.g., SEC v. Sloan, 436 U.S. 103 (1978) (prohibiting the SEC from suspending trading for more than 10 days because the Securities and Exchange Act of 1934 explicitly provides this time limit).

114. 380 U.S. 1 (1965).

115. Id. at 16 (quoting Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946)).

116. 454 U.S. 27 (1981).

117. Id. at 39.

118. Id. at 39-40.

conservation program." Its failure to do so implies that certification is not mandatory.

Further, as Chief Justice Warren noted in *Zemel v. Rusk*,[119] "[u]nder some circumstances, Congress' failure to repeal or revise [a statute] in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress."[120] Such judicial deference is particularly appropriate in the realm of foreign affairs, where in authorizing action by the Executive or an executive agency, Congress often uses broad statutory language to avoid impinging on the President's exclusive power "to speak or listen as a representative of the nation."[121] As the Court noted in *United States v. Curtiss-Wright Export Corp.*:

> [p]ractically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.[122]

Recognizing the Executive's primacy in the realm of foreign relations, the judiciary has upheld administrative interpretations of foreign affairs laws in the face of congressional inaction. For instance, the Court recently relied on *Zemel* in *Haig v. Agee*[123] to sustain the President's longstanding interpretation of the Passport Act of 1926 as authorizing the revocation of a passport on national security grounds since there was no evidence of legislative intent to repudiate this construction.[124] Similarly, in *Dames & Moore v. Re-*

119. 381 U.S. 1 (1965).

120. Id. at 11. In *Zemel*, the Court held that congressional inaction validated the State Department's traditional interpretation of the Passport Act of 1926, ch. 772, 44 Stat. 887 (codified at 22 U.S.C. §§ 211a, 217a (1982)), as providing authorization for the agency to impose area restrictions. Id. at 10-13.

121. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (upholding a joint resolution of Congress authorizing the President to ban the sale of arms to countries engaged in armed conflicts in the Chaco).

122. Id. at 324.

123. 453 U.S. 280 (1981).

124. Id. at 293-301. The *Agee* Court upheld the Executive's interpretation of the particular statutory language in question even though it had only been exercised on a few occasions. Id. at 302. Chief Justice Burger explained, "the continued validity of the power is not

gan,[125] the Court held that while neither the International Emergency Economic Powers Act nor the Hostage Act authorizes the President to suspend claims on a foreign nation, Congress, through a history of acquiescence, has approved such executive action.[126]

Application of the statutory construction principles enunciated in the *Zemel* line of cases to the facts at issue in *American Cetacean Society* demonstrates that the Commerce Secretary's consistent interpretation of the Pelly and Packwood-Magnuson Amendments' broad statutory phrase "diminish the effectiveness" should be upheld. On three separate occasions the Secretary of Commerce has agreed not to certify a nation for exceeding an international fishery conservation program in return for its commitment to comply with that program within a few years.[127]

Moreover, as the Court provided in *United States v. Rutherford*:[128] "[s]uch deference [to administrative interpretations] is particularly appropriate where . . . an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."[129] Here, despite intense protest by countless environmental groups concerning the plight of the world's cetaceans[130] and the

diluted simply because there is no need to use it." Id. Thus, the Commerce Secretary's interpretation of the Pelly and Packwood-Magnuson Amendments as providing discretion not to certify a nation in return for its commitment to future compliance with an international fishery conservation program should be upheld even though it has only been employed three times. See infra note 127 and accompanying text.

125. 453 U.S. 654 (1981).

126. Id. at 677-79.

127. The Secretary of Commerce used the Pelly Amendment upon its enactment in 1971 to force Denmark into compliance with the ICNAF program. Denmark agreed to phase out its Atlantic salmon fishing over four years to avoid certification. See supra note 31. Later in 1983, the combined threat of the Pelly and Packwood-Magnuson Amendments enabled the Commerce Secretary to force Chile to agree to cease whaling indefinitely in return for one last year of harvesting Bryde's whales in excess of the IWC quota without certification. See supra note 42. The Commerce Secretary's 1984 executive agreement not to certify Japan in return for its future compliance with the IWC's commercial whaling moratorium is the most recent action based on this administrative statutory interpretation. See supra notes 48-50 and accompanying text.

128. 442 U.S. 544 (1979).

129. Id. at 554. The *Rutherford* Court did not disturb the Food and Drug Administration's interpretation that the Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-392 (1982)), protects terminally ill patients because public protest had not caused Congress to challenge it. *Rutherford*, 442 U.S. at 552-54.

130. See, e.g., Japan's Cease-Fire on Whales, N.Y. Times, Apr. 12, 1985, at A26, col. 1 ("protection of whales is long overdue"); Watching Whales Off Mexico, N.Y. Times, Nov. 25, 1984, § 10, at 3, col. 1 (American Cetacean Society offers whale-watching tours to promote whale conservation, education, and research); Japan Should Retire Its Harpoon, N.Y.

present federal court challenge by thirteen of these parties in *American Cetacean Society*,[131] Congress has neither voiced its disapproval of such executive action nor clarified its legislative intent.[132] Accordingly, precedent suggests that the Commerce Secretary does indeed have certification discretion.

C. *Equitable Considerations Dictate Against Mandamus Relief*

Even assuming that the Secretary of Commerce had a clear statutory obligation to certify Japan for exceeding the IWC's quotas, equitable considerations dictate against mandamus relief.[133] The

Times, Sept. 8, 1984, at 20, col. 1 (Greenpeace International editorial urging Japan, Norway, and the Soviet Union to join the majority of nations practicing whale conservation); A Siberian Sojourn Ends Well for Foes of Whaling, N.Y. Times, July 25, 1983, at A2, col. 3 (seven Greenpeace members, who were seized when they landed illegally in Siberia to expose Soviet whaling activity, explain their ordeal after their return to the United States); Inflating the Whales, N.Y. Times, Jan. 17, 1983, at A12, col. 2 (six conservation groups plan to "beach" three 30-foot inflatable whales on the White House sidewalk to protest Japan's continued whaling during its Prime Minister's visit); An American Protests on a Whaler in Japan, N.Y. Times, Mar. 28, 1981, at 4, col. 3 (a Greenpeace activist chains herself to a Japanese harpoon to protest Japan's whale hunt). See also supra note 36.

131. See supra note 1.

132. Concededly, on February 7, 1985, Representatives Bonker, Yatron, and Gejdenson introduced House Concurrent Resolution 54, which attacks the 1984 executive agreement between the United States and Japan as a violation of U.S. law and calls on the Secretary of State to reduce the fishing allocations of foreign nations that object to the IWC quotas under the ICRW or "which otherwise take actions which diminish the effectiveness of the Convention." H.R. Con. Res. 54, 99th Cong., 1st Sess. 3 (1985). This resolution was referred to the House Committee on Foreign Affairs, 131 Cong. Rec. H403 (daily ed. Feb. 7, 1985), where it was approved by the Subcommittee on Human Rights and International Organizations, 131 Cong. Rec. D712 (daily ed. June 19, 1985), and ordered reported by the full committee. 131 Cong. Rec. D1053 (daily ed. Sept. 19, 1985). However, Congress has not taken action on this resolution. 2 Cong. Index (CCH) 34,516 (Apr. 3, 1986). Accordingly, the resolution only reflects the views of a few individual legislators, none of whom were active participants in the enactment of the Pelly or Packwood-Magnuson Amendments.

133. It is somewhat surprising that the plaintiffs only sought a writ of mandamus compelling the Secretary of Commerce to certify Japan when they could have attempted to invalidate the 1984 executive agreement with Japan under United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953). In *Guy W. Capps*, the Fourth Circuit nullified an executive agreement concluded by the Acting Secretary of State with Canada which directly conflicted with the earlier enacted Agricultural Act of 1948, ch. 827, 62 Stat. 1247 (codified as amended at 7 U.S.C. §§ 602, 608c, 612c, 624 (1982)). *Guy W. Capps*, 204 F.2d at 658. The court noted that "while the President has certain inherent powers under the Constitution . . . , the power to regulate interstate and foreign commerce is not among [them] but is expressly vested by the Constitution in the Congress." Id. at 659. Accordingly, the court held that the executive branch did not have the power to enter into an executive agreement contradicting an existing statute regulating commerce. Similarly, plaintiffs here could have argued that because the executive branch is not constitutionally empowered to conclude executive agreements about commerce-related international conservation program enforce-

judiciary has traditionally been cautious in granting writs of mandamus[134] because, as Justice Rutledge noted, "the cure sought [with mandamus] may be worse than the disease."[135]

In his *American Cetacean Society* dissent, Judge Oberdorfer argued that mandamus was inappropriate because the United States and Japan had exchanged promises in reliance on the Executive's

ment, an executive agreement that conflicts with a previously enacted statute governing such matters is invalid.

Plaintiffs may have elected against this strategy for two reasons. First, while *Guy W. Capps* is often cited for the proposition that a sole executive agreement may not supersede a prior conflicting statute, the power of this holding remains in question since the Supreme Court explicitly avoided adjudicating this issue. United States v. Guy W. Capps, Inc., 348 U.S. 296, 305 (1955), aff'g on other grounds, 204 F.2d 655 (4th Cir. 1953). Moreover, the American Law Institute leaves open the validity of this proposition by suggesting that

> a sole executive agreement within the President's constitutional authority is federal law, and U.S. jurisprudence has not known federal law of different status under the Constitution. "All Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."

Restatement (Revised) of Foreign Relations Law of the United States § 135 reporters' note 5 (Tent. Draft No. 6 1985) [hereinafter cited as Revised Restatement] (quoting The Federalist No. 64 (J. Jay)). See L. Henkin, Foreign Affairs and the Constitution 186, 432-33 (1972). Compare Note, Superseding Statutory Law By Sole Executive Agreement: An Analysis of the American Law Institute's Shift in Position, 23 Va. J. Int'l L. 671 (1983) (criticizing the American Law Institute's suggestion in the 1980 Tentative Draft that a sole executive agreement should be capable of superseding a prior inconsistent statute) with Goldklang, The President, The Congress and Executive Agreements, 24 Va. J. Int'l L. 755 (1984) (providing examples of sole executive agreements that are not subject to congressional invalidation).

Second, plaintiffs may have avoided this strategy because they recognized that even a judicial invalidation of the executive agreement would not abrogate the international obligations which the agreement created. See infra notes 143-50 and accompanying text. The plaintiffs probably sacrificed the *Guy W. Capps* argument so as not to draw judicial attention to the underlying international obligations created by the disputed executive agreement.

134. In his dissent, Judge Oberdorfer criticized both the district and circuit courts for not considering the equities involved in the mandamus decision. *American Cetacean Society III*, 768 F.2d at 449. Relying on Whitehouse v. Illinois Central Railroad Co., 349 U.S. 366, 373 (1954), he reminded both courts that "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *American Cetacean Society III*, 768 F.2d at 449.

135. Colegrove v. Green, 328 U.S. 549, 566 (1946) (Rutledge, J., concurring) (emphasis added). In *Colegrove* the Court declined to invalidate Illinois' existing electoral system just prior to a congressional election because invalidation would have harmed more state voters than it was intended to help. Id. at 553. Two years later in a similar case, MacDougall v. Green, 335 U.S. 281 (1948), rev'd on other grounds, 394 U.S. 814 (1968), Justice Rutledge noted again in concurrence that mandamus relief to invalidate a provision of the Illinois Election Code on the eve of a congressional election was inappropriate since it would injure more voters than it was intended to aid. Id. at 287.

interpretation of the Pelly and Packwood-Magnuson Amendments' statutory language.[136] And indeed, the Supreme Court has traditionally recognized the importance of upholding agreements.[137] For instance, in *Federal Power Commission v. Tuscarora Indian Nation*,[138] the Court stated that "agreements are made to be performed—no less by the Government than by others."[139] The holding in that case turned on the Court's finding that the government had not entered into an agreement.[140] In dissent, Justice Black disagreed with that finding and chided the Court that "[g]reat nations, like great men, should keep their word."[141]

In November 1984, the United States assured Japan by way of an executive agreement that it would not certify Japan for its present whaling. In return for this promise, Japan withdrew its objection to the IWC's 1981 sperm whale zero quota.[142] By effectively ordering the Commerce Secretary to revoke this agreement despite Japan's detrimental reliance on it, the circuit court may have threatened the harmonious working relationship that the United States has enjoyed with Japan. More generally, other nations may become hesitant to rely on U.S. executive agreements if federal courts have the power to invalidate them.

Furthermore, executive agreements create international obligations which must be upheld even though a court may find that an official violated his statutory mandate in concluding such an agreement. This policy is expressed in article 46, section 1 of the Vienna Convention on the Law of Treaties[143] which provides:

> A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to con-

136. *American Cetacean Society III*, 768 F.2d at 449.

137. Id.

138. 362 U.S. 99 (1960).

139. Id. at 124.

140. Id.

141. Id. at 142 (Black, J., dissenting). Recently, the Court noted its approval of Justice Black's statement in Central Intelligence Agency v. Sims, 105 S. Ct. 1881, 1891 n.20 (1985) (upholding the government's promise of confidentiality to its intelligence sources).

142. See supra note 48.

143. Vienna Convention on the Law of Treaties, May 23, 1969, 1980 Gr. Brit. T.S. No. 58 (Cmd. 7964) (entry into force Jan. 27, 1980), reprinted in 63 Am. J. Int'l L. 875 (1969) [hereinafter cited as Vienna Convention]. The United Nations Conference on the Law of Treaties approved the Convention by a vote of 79 to 1 in Vienna on May 22, 1969. The Convention entered into force on January 27, 1980, after it had been ratified by 35 nations. See Revised Restatement, supra note 133, intro. note, pt. III, at 1.

> clude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.[144]

Section 2 of that article notes that "[a] violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith."[145] Certainly the Commerce Secretary's interpretation of the Pelly and Packwood-Magnuson Amendments' undefined statutory provision is not a manifest violation of internal law sufficient to permit the United States to invalidate its agreement with Japan.

While the United States has not ratified the Vienna Convention,[146] it has recognized the Convention as "the authoritative guide to current treaty law and practice."[147] Further, as the State Department's Legal Adviser, Green H. Hackworth noted, U.S. policy towards international agreements is consistent with that expressed by the Vienna Convention:

> [I]f the President enters into an obligation with a foreign government, that foreign government is entitled to rely upon it. It is not under the obligation of inquiring into our constitutional processes. It takes the word of the head of the State.
>
> If the obligation is violated, it is a violation of an international obligation pure and simple, whether the President exceeded his authority or not.[148]

More recently, the American Law Institute incorporated the language of article 46, section 1 of the Vienna Convention into section 311 of its 1985 Tentative Draft of the Revised Restatement of Foreign Relations Law of the United States.[149] The Revised Restatement also notes that the use of an executive agreement does not constitute a "'manifest' violation" for purposes of invalidating the United States' consent, except in highly unusual circumstances.[150] Thus, according to both customary international law and U.S. practice, the circuit court's decision to invalidate the Commerce Secretary's executive agreement with Japan by granting mandamus relief constitutes a clear violation of international law.[151]

144. Vienna Convention, supra note 143, art. 46, § 1.

145. Id. art. 46, § 2.

146. The President submitted the Vienna Convention to the Senate for its advice and consent on November 21, 1971. The Senate has yet to approve the Convention, most likely because it addresses "treaties" instead of "international agreements," which are defined to include executive agreements. See Revised Restatement, supra note 133, intro. note, pt. III, at 4.

147. S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971), quoted in Revised Restatement, supra note 133, intro. note, pt. III, at 1.

148. Hearings on S. 1385 (St. Lawrence Waterway) Before the Senate Committee on Commerce, 78th Cong., 2d Sess. 230 (1944) (statement of Green H. Hackworth, Legal Adviser to the U.S. Department of State), reprinted in W. Bishop, International Law 116 (3d ed. 1971). See also L. Henkin, supra note 133, at 187 (international agreements, defined to include executive agreements, "provide a major part of the international rights and obligations of the United States," and, under the law of treaties principle *pacta sunt servanda*, must be observed); Sayre, Constitutionality of the Trade Agreements Act, 39 Colum. L. Rev. 751, 755 (1939) ("from the point of view of international law, treaties and executive agreements are alike in that both constitute equally binding obligations upon the nation").

In addition to these compelling legal arguments against mandamus relief, strong policy reasons suggest that granting the writ of mandamus is inappropriate. The environmentalists asked the court to order the Secretary of Commerce to certify Japan on the theory that the Packwood-Magnuson Amendment's automatic economic sanction—a reduction in Japan's fishing allocation by at least fifty percent—will force Japan to abide by the IWC's commercial whaling moratorium immediately instead of two years from now as provided by the 1984 executive agreement.[152] But while Congress originally enacted this statute to enforce such compliance, the legislature currently is attempting to strengthen the U.S. fishing industry by reducing foreign fishing in territorial waters.[153] These

149. Compare Vienna Convention, supra note 143, art. 46, § 1, with Revised Restatement, supra note 133, § 311(3).

150. Revised Restatement, supra note 133, § 311 comment c. The Revised Restatement suggests that the President might commit a "manifest" violation by concluding an agreement of "sufficient formality, dignity and importance," such as the U.N. Charter or NATO, on his own authority. Id.

151. The environmentalists argued that Japan acted at its own peril in concluding the executive agreement with the United States because it had prior knowledge of the environmentalists' suit challenging the Commerce Secretary's decision not to certify Japan. Respondents' Brief in Opposition to Petitions for Writs of Certiorari at 21-22, *American Cetacean Society III*. Japan, however, had no reason to believe that a federal court would find that the Secretary of Commerce had violated his statutory duty. The Commerce Secretary had consistently interpreted the ambiguous statutory language of the Pelly and Packwood-Magnuson Amendments as providing certification discretion, and Congress had never challenged this construction. See supra notes 99-132 and accompanying text. Accordingly, the Commerce Secretary's decision not to certify Japan did not constitute a "manifest" violation pursuant to either article 46, section 1 of the Vienna Convention, supra note 143, or section 311 of the Revised Restatement, supra note 133, which would allow the United States to revoke this executive agreement. See supra notes 143-50 and accompanying text.

152. Plaintiffs' Amended Complaint at 17, 18, *American Cetacean Society I*.

153. Interview with Joseph T. Plesha, Counsel for the Senate Commerce Committee, Washington, D.C. (Jan. 6, 1986) [hereinafter cited as Plesha Interview]. Foreign nations still have access to U.S. fishery resources through the recent development of joint venture pro-

efforts may effectively nullify the Packwood-Magnuson Amendment's ability to enforce the IWC's regulations.

In its Fiscal Year 1986 Budget Reconciliation Bill,[154] the House of Representatives proposed to strengthen the domestic fishing industry by changing the calculation of fishing fees under section 204(b)(10) of the FCMA.[155] This proposal called for an increase in foreign fishing fees by approximately sixty-nine percent, or thirty-seven million dollars.[156] Japan's Minister of Economics protested that this proposal would "make foreign fishing operations . . . uneconomical."[157] Although this bill was subsequently removed from the budget package,[158] it indicates the legislature's inclination to reduce foreign fishing.

Two Senate proposals confirm this intent. The Senate Commerce Committee currently is considering bills that would drastically reduce foreign fishing. One proposal calls for an annual increase in foreign fishing fees by fifty percent and a scheduled reduction in the Total Allowable Level of Foreign Fishing (TALFF), culminating in a complete phase-out of foreign fishing in the North Pacific by 1990.[159] The second proposal does not alter foreign fishing fees but does provide for the elimination of most foreign fishing by 1990 through an annual reduction in TALFF.[160]

The executive branch is also participating in the effort to strengthen the domestic fishing industry. Over the last five years, the Secretary of Commerce, upon the advice of the regional fishery management councils, has reduced TALFF by thirty-five percent.[161] As a result, foreign nations which legally harvested

grams, in which they buy fish harvests from U.S. fishermen on the high seas for processing on their own factory ships. Such programs strengthen the U.S. fishing industry by expanding markets for U.S. harvesters. Id.

154. H.R. 3500, 99th Cong., 1st Sess. 1 (1985).

155. Id. at 426. See supra note 6.

156. See H.R. Rep. No. 300, 99th Cong., 1st Sess. 545 (1985); Letter from Peter Y. Sato, Economics Minister of Japan, to Edward Wolfe, Deputy Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs (October 7, 1985) (opposing the proposed increase in foreign fishing fees) (copy on file at the offices of the Virginia Journal of International Law) [hereinafter cited as Sato Letter].

157. Sato Letter, supra note 156.

158. Plesha Interview, supra note 153.

159. S. 1245, 99th Cong., 1st Sess. 7 (1985). Ninety-three percent of all foreign fishing in U.S. territorial waters takes place in the North Pacific. Accordingly, the proposal to exclude foreign nations from these waters would lead to a drastic reduction in all foreign fishing. Plesha Interview, supra note 153.

160. S. 1386, 99th Cong., 1st. Sess. 1 (1985); Plesha Interview, supra note 153.

161. Plesha Interview, supra note 153. The North Pacific Fishery Management Council (NPFMC) provides the Secretary of Commerce with suggested annual TALFF levels for the North Pacific. Id.

2,176,789 metric tons of fish from U.S. waters in 1980 were only able to catch 1,425,560 metric tons in 1985.[162] Furthermore, the Commerce Secretary has set initial TALFF for 1986 at 611,157 metric tons, which constitutes a seventy-two percent reduction since 1980.[163] If Congress compounds the effects of this executive action by adopting an additional scheduled TALFF reduction or by raising foreign fishing fees, foreign nations will have diminished economic incentive to fish in U.S. waters, and the Packwood-Magnuson Amendment's economic sanction may no longer have the strength to force nations such as Japan into immediate compliance with the IWC's commercial whaling moratorium.[164]

At the same time, there are no indications that Japan will adversely affect the sperm, Bryde's, and minke whale stocks by catching the limits approved by the United States in the 1984 executive agreement. The IWC's Scientific Committee noted in its 1984 Report that an annual catch limit of four hundred sperm whales could be maintained for five years with "only . . . a small effect on the stock in the short term."[165] Japan's harvest—limited by the 1984 executive agreement to four hundred sperm whales in 1984 and 1985, and two hundred sperm whales in 1986 and

162. Id.

163. Interview with Joseph T. Plesha, Counsel for the Senate Commerce Committee, Washington, D.C. (Mar. 17, 1986).

164. The environmentalists argue that the imminent nullification of the Packwood-Magnuson Amendment's coercive economic sanction provides a compelling reason for requiring the Commerce Secretary to certify Japan while the sanction might still curtail Japan's whaling activity. Brief for the Respondents at 14, *American Cetacean Society III*, cert. granted, 106 S.Ct. 787 (1986) (Nos. 85-954, 85-955). The question then becomes whether the Packwood-Magnuson Amendment's sanction currently is strong enough to lead the court to certify Japan and abrogate the 1984 executive agreement with confidence that this action will result in Japan's immediate compliance with the IWC's commercial whaling moratorium. No matter how this issue is resolved, it constitutes only one of several considerations pertinent to the analysis of the equities involved in the mandamus decision.

Ordering the Secretary of Commerce to certify Japan is inappropriate because it forces the United States to revoke its whaling agreement with Japan, see supra note 43, and violate international law. See supra notes 134-51 and accompanying text. Such action is not merited since the executive agreement limits Japan's whale harvests to levels approved by the IWC's scientists. See infra notes 165-66 and accompanying text.

165. Report of the Scientific Committee (IWC 36/4) 10.1.1.7, at 23 (May 26, 1984) (copy on file at the offices of the Virginia Journal of International Law); see also Reply Brief of Federal Appellants at 8 n.4, *American Cetacean Society III*. The scientists were unable to determine the long-term effects of a catch of two thousand sperm whales over five years since they were in the midst of analyzing two competing sperm whale population models. Id.

1987—falls far short of this figure. Similarly, the 1984 executive agreement limits Japan's 1986 and 1987 Bryde's and minke whale harvests to the IWC's most recent quotas, which have been endorsed by the Commission's Scientific Committee.[166]

Thus, mandamus relief is inappropriate because "the cure sought [is] worse than the disease."[167] The Secretary of Commerce has concluded an executive agreement that obligates Japan to comply with the IWC's commercial whaling moratorium after two more years of limited whaling. An order requiring the Commerce Secretary to certify Japan would force the United States to abrogate that agreement and violate an international law obligation. Further, even certification may not force Japan into immediate compliance with the commercial whaling moratorium since Congress' current attempts to reduce foreign fishing may extinguish the coercive power of the Packwood-Magnuson Amendment's automatic economic sanction. Finally, this relief is inappropriate since the executive agreement only permits Japan to harvest whales in accordance with levels approved by the IWC's scientists.

V. CONCLUSION

In the final analysis, *American Cetacean Society* is a peculiar case with grave consequences. It is the first case to seek judicial interpretation of the Commerce Secretary's duty under the Pelly and Packwood-Magnuson Amendments to certify a nation that "diminish[es] the effectiveness" of the IWC's regulations. At the same time, it may also be the last case of its kind since, by phasing out foreign fishing, Congress may effectively strip these statutes of their economic teeth. With the undermining of these provisions, no domestic or international sanctions will remain to force a nation to abide by the IWC's policies. Thus, while the judiciary's interpretation of these statutory provisions in *American Cetacean Society* may not have major precedential significance, its ultimate holding will greatly affect the certainty of Japan's compliance with the IWC's commercial whaling moratorium.

The Secretary of Commerce has, perhaps for the last time, successfully used the threat of certification under the Pelly and

166. See supra notes 48-50 and accompanying text. See also Reply Brief of Federal Appellants at 8-9 n.4, *American Cetacean Society III*.

167. Colgrove v. Green, 328 U.S. 549, 566 (1946) (Rutledge, J. concurring). See supra note 135 and accompanying text.

Packwood-Magnuson Amendments to bring Japan into compliance with the IWC's commercial whaling moratorium after only two more years of whaling at levels considered safe by the Commission's scientists. The environmentalists wish to trade the certainty of Japan's future compliance with the IWC's program under the 1984 executive agreement for the risk that the Packwood-Magnuson Amendment's automatic economic sanction will still force Japan to comply with the commercial whaling moratorium immediately upon certification by the Commerce Secretary. If the environmentalists have erred in their prediction, it will be virtually impossible to force Japan to comply with the Commission's conservation policies.

Sadly, the circuit court adopted the environmentalists' faulty interpretation of the Pelly and Packwood-Magnuson Amendments as requiring the Secretary of Commerce to certify a nation that departs from international conservation programs.[168] Neglecting to perform the requisite analysis of the equities involved,[169] the court affirmed the writ of mandamus ordering the Commerce Secretary to certify Japan for whaling in excess of the IWC's quotas, effectively abrogating the 1984 executive agreement. The environmentalists have accordingly claimed the circuit court's decision as a victory for their cause.[170] Unless the Supreme Court reverses this holding, it may prove to be a major loss.

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168. *American Cetacean Society III*, 768 F.2d at 439.

169. See supra note 134.

170. See Appeals Court Backs Curbs on Japan Whaling Off United States, N.Y. Times, Aug. 7, 1985, at A3, col. 5 (Greenpeace spokesman praises the ruling and claims that it marks "the final demise of the whaling bloc").

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NOTE

THE U.S.-JAPANESE WHALING ACCORD: A RESULT OF THE DISCRETIONARY LOOPHOLE IN THE PACKWOOD-MAGNUSON AMENDMENT

I. INTRODUCTION

The whale has symbolized many things over time: redemption to Jonah,[1] profit to whalers, and conservation to environmentalists.[2] Today, as the focal point of legislation that the Supreme Court will consider in *American Cetacean Society v. Baldrige*,[3] the whale plays more than a symbolic role. By deciding the degree of discretion delegated to the executive branch in this legislation, the Court in *American Cetacean Society* will quell the dispute between conservationists and whalers,[4] the friction between the United States and Japan in trade relations,[5] as well as the tension between Congress and the executive branch over their respective powers to influence international affairs.

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1. *Jonah* 1:17.

2. In general, environmentalists are concerned about protecting the whale because they recognize the importance of preserving an endangered species. Senator Alan Cranston expressed this concern: "[T]he death of a species is profound, for it means nature has lost one of its components, which played a role in the interrelationship of life on earth." 116 CONG. REC. 17,198 (1970). Conservationists specifically are striving to save the whale to allow scientists to study the whale's large and highly convoluted brain and to monitor the effects of pollutants in the ecosystem on them. Note, *Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?*, 14 CAL. W. INT'L L.J. 114, 119-20 (1984).

3. 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986).

4. The conflict between conservationists and whalers is found even within the central whaling conservation body. *See infra* note 23 and accompanying text.

5. In January, 1986, the U.S. merchandise trade deficit totaled $16.5 billion. During that month, Japan "ran a $5.5 billion surplus with the United States." Auerbach, *U.S. Trade Deficit Hits Another Record in January*, Wash. Post, Mar. 1, 1986, at D1, col. 2. Since Japan is a leading whaling nation, negotiating over the number of whales Japan can harvest represents a potential means by which the United States can bargain for greater access to Japanese markets. Burgess, *Japan Links Whaling Ban to Court Case*, Wash. Post, Apr. 6, 1985, at A1, col. 6 (stating that although the Japanese agreement to end whaling in 1988 "was not formally linked to tense negotiations over bilateral trade . . . under way between the [United States and Japan], . . . Japanese officials see it as a major concession in the total picture of ties with the United States"); Wash. Post, Oct. 18, 1984, at A19, col. 1 (maintaining that confrontation over whaling "could escalate into a serious trade war between the United States and one of its best trading partners [Japan]"); *see infra* notes 68-70 and accompanying text.

To decide the *American Cetacean Society* case, the Court must interpret a phrase contained in both the Pelly[6] and Packwood-Magnuson[7] Amendments. These amendments, enacted to enforce international fishery conservation treaties, provide that the Secretary of Commerce (Secretary) shall "certify" nations when he determines that through their fishing activities they have "diminish[ed] the effectiveness" of an international conservation program.[8] This provision, unfortunately, does not clearly indicate the degree of discretion delegated to the Secretary in deciding whether to certify. In *American Cetacean Society,* the district and circuit courts held that the Secretary *must* certify under both the Pelly and Packwood-Magnuson Amendments when a nation's whaling exceeds the International Whaling Commission's (IWC or Commission)[9] yearly quota.[10] In effect, the holdings equate violations of an IWC quota with diminished effectiveness, thus limiting the Secretary's discretion to decide whether to find diminished effectiveness and therefore whether to certify.

This note traces the origins of the Pelly and Packwood-Magnuson Amendments. It summarizes the arguments advanced by the parties in *American Cetacean Society* supporting and rejecting the existence of secretarial discretion in deciding whether to certify a nation that violates an IWC quota. The note then discusses and evaluates the courts' interpretation of this issue. The note defends the Secretary's use of discretion in declining to certify Japan and deciding to enter into a whaling agreement with Japan. The note also proposes revisions to the Pelly and Packwood-Magnuson Amendments that would make them more precise. The note concludes that *American Cetacean Society* was wrongly decided because the Packwood-Magnuson Amendment contains a loophole through which executive discretion was delegated to the Secretary of Commerce in the certification stage of the Pelly and Packwood-Magnuson Amendments.

II. Background

A. *The International Convention for the Regulation of Whaling*

Although whaling has existed for centuries,[11] only in the last two hundred years has the whale been threatened with extinction.[12] Before the advent of whaling, there were an estimated 3.9 million whales.[13] By 1975, the number of whales had decreased

6. Pelly Amendment to the Fisherman's Protection Act of 1967, 22 U.S.C. § 1978 (1982). The Pelly Amendment provides that:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

Id. § 1978(a)(1).

7. Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821 (1982). The Packwood-Magnuson Amendment provides that:

> The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling.

Id. § 1821(e)(2)(A)(i).

8. 22 U.S.C. § 1978(a)(1); 16 U.S.C. § 1821(e)(2)(A)(i). The terms "diminished effectiveness" and "certification" as used in the Pelly and Packwood Magnuson Amendments are interrelated. Certification is the first stage of enforcement in both the Pelly and Packwood-Magnuson Amendments. The second stage of enforcement involves the imposition of sanctions.

In order to certify, the Secretary of Commerce (Secretary) must first find that a nation, through its fishing activities, has diminished the effectiveness of an international conservation program. This note focuses on the nature and extent of the Secretary's discretion to find diminished effectiveness. Since a finding of diminished effectiveness mandates certification under both amendments, finding diminished effectiveness is practically synonymous with certification.

An issue of executive discretion arises in determining what factors the Secretary can consider when deciding whether a nation's fishing activities have diminished the effectiveness of a treaty. The amendments do not specify whether the Secretary should only consider a nation's violation of the International Whaling Commission (IWC or Commission) quotas or whether the Secretary should consider additional factors, such as trade relations with the violating nation or the violating nation's future intention to abide by the IWC quotas. Because discretion is involved in deciding whether to find diminished effectiveness, it is inevitably involved in the certification decision.

9. The Commission was created by the International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 [hereinafter cited as ICRW]; *see infra* notes 19-22 and accompanying text.

10. *American Cetacean Soc'y,* 768 F.2d at 444; 604 F. Supp. at 1411.

11. Norwegian cliff drawings from as early as 2200 B.C. illustrate men catching whales. Japan Whaling Ass'n, Man, Whales & the Sea 5 (available at the Embassy of Japan, 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008). Today, the whale is harvested mainly for its oil which can be processed into lamp fuel, margarine, shampoo, candles, ink, and even lubricant for intercontinental missiles. Note, *supra* note 2, at 118. The oil is derived from the blubber, meat, and bones. Only the Japanese eat whale meat as a part of their regular diet. *Id.*

12. *See* Smith, *International Whaling Commission: An Analysis of the Past and Reflections on the Future,* 16 Nat. Resources Law. 543, 544 (1984). Technological developments of the last two centuries have transformed whaling from a harrowing, life-threatening struggle into a routine commercial fishing expedition. For a discussion of these technological innovations, see *infra* note 17.

13. Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment* (pt. 1), 6 Ecology L.Q. 323, 330 (1977).

to 2.1 million.[14]

The market for whaling products has fluctuated throughout history. Although the discovery that the sperm whale was a source of lamp oil caused an expansion of the whaling industry in the eighteenth century,[15] the discovery of petroleum and the invention of the electric light in the nineteenth century reduced the demand for, and consequently the price of, sperm whale oil.[16] Nevertheless, the scarcity of whales threatened the industry toward the end of the nineteenth century because whale hunting continued as technological advances facilitated their capture.[17] Governmental support to whalers also enhanced their superiority over their prey.[18]

After World War II, the United States, concerned about excessive whaling, called for a conference of whaling nations to discuss the problem.[19] In 1946, whaling nations[20] convened the International Convention for the Regulation of Whaling (ICRW) for the purpose of regulating the whaling industry and sustaining the whale crop.[21] The Convention created the IWC whose principle task has become the establishment of yearly limits or quotas for the whaling of various species throughout the world's oceans.[22]

14. *Id.* The number of mature whales has dropped from 2.4 million to 1.2 million. *Id.* More importantly, four of nine great whale species are seriously endangered and the stock of certain species on which the industry concentrates are severely depleted. Smith, *supra* note 12, at 543 n.4.

15. Smith, *supra* note 12, at 544.

16. *Id.* at 545.

17. *Id.*; Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549, 558 (1979). Technological innovations such as the exploding harpoon, the factory ship, and the stern slipway benefited the whaling industry and caused a decline in whale populations. Note, *supra* note 2, at 121. The exploding harpoon, invented in 1865, enabled whalers to catch the faster whales, such as the blue whale, because only one strike was needed to catch the whale. The factory ship, developed in 1903, allowed whalers to process the whales while at sea. *Id.* at 128 n.137. In 1925, whalers began to use the stern slipway to haul whales onto the stern and begin processing while still at sea. *Id.* at 121 n.71.

18. The Japanese government, for example, strongly supports its whaling industry. Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. INT'L L. & POL. 211, 212 n.8 (1975).

19. Levin, *supra* note 17, at 566-67.

20. The founding members of the ICRW were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, and the United States. ICRW, *supra* note 9, proclamation.

21. Levin, *supra* note 17, at 567; Smith, *supra* note 12, at 547.

22. The ICRW grants the IWC authority to carry out the treaty's purposes. ICRW, *supra* note 9, art. III. The IWC currently consists of 40 members. Each member nation is represented by one commissioner on the IWC. *Id.* art. III, para. 1. The commissioners meet each year to review catches, to set quotas, and to decide whether new regulations are needed. Smith, *supra* note 12, at 547. The IWC has authority over all "factory ships, land stations, and whale catchers" and all waters in which whaling is pursued. ICRW, *supra* note 9, art. I, para. 2; Smith, *supra* note 12, at 547. The IWC has three advisory committees. The Scientific Committee reviews catch data and rate depletion, and recommends quotas as well as research needs. INT'L WHALING COMM'N R.P. 12; *see* Smith, *supra* note 12, at 548. The Technical Committee drafts amendments and reviews alleged infractions of IWC rules. INT'L WHALING COMM'N R.P. 12; *see* Smith, *supra* note 12, at 548. The Finance and Administrative Committee manages personnel, budgets, and expenditures. INT'L WHALING COMM'N R.P. 13; *see* Smith, *supra* note 12, at 548.

Amendments to the ICRW can be enacted only by unanimous agreement and ratification by each member. An amendment to the quota schedule, however, only requires a three-quarters majority. ICRW, *supra* note 9, art. III, para. 2; *see also* Note, *supra* note 2, at 123 (detailing the Convention's voting requirements). To aid in enforcement, members must have government inspectors at shore stations, ICRW, *supra* note 9, sched., para. 19(b) (amended 1974), and two whaling inspectors on every one of its factory ships. *Id.* para. 19(a); Smith, *supra* note 12, at 549 & nn. 41 & 42.

The IWC was not created solely for the purpose of conservation; the treaty itself indicates a desire to preserve the status quo so that the whaling industry could continue, and possibly grow and prosper.[23] The IWC has continuously struggled with this conflict between conservationist and commercial objectives.[24] That member nations have shifted their predominantly market-oriented objectives at the IWC's inception to concerns about preserving the whale regardless of market conditions demonstrates the IWC's evolving concern with conservationist goals.[25]

23. The Preamble to the ICRW incorporates the goal of sustaining the whaling industry: "increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources." ICRW, *supra* note 9, preamble; *see* Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?*, 10 OCEAN DEV. & INT'L L.J. 41, 44 (1981-1982).

24. *See* Levin, *supra* note 17, at 579; Smith, *supra* note 12, at 549-50.

25. Although their objectives often conflict, countries supporting the whaling industry, as well as those supporting conservationist goals, share a common interest — the continued existence of the whale. *See* Note, *supra* note 2, at 120. In the past, whaling nations have been able to maintain high quotas in the IWC due to the willingness of other member nations to preserve the status quo unless scientific data indicated that a reduction in the quotas was necessary to preserve certain whale species. Note, *supra* note 18, at 217. These high quotas arguably have caused the commercial extinction of the most valuable whale species. *Id.* at 216-17.

Several attempts have been made by member nations to alter the IWC. Carlson, *The International Regulation of Small Cetaceans*, 21 SAN DIEGO L. REV. 577, 616 (1984). In 1981, for example, 26 member nations met to discuss improving the effectiveness of the IWC. *Id.*; *see* Report of the Preparatory Meeting to Improve and Update the International Convention for the Regulation of Whaling, 1946 (Reykjavik, May 1981), IWC/33/20 (1981) [hereinafter cited as Report]. This group's proposals were dismissed after the 26 member nations concluded that the Commission was "flexible enough to provide for management of all cetacean populations." Carlson, *supra*, at 616-17 (quoting Report, *supra*, at 4).

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By amending its schedule of quotas, the IWC has clearly established conservation as its primary purpose.[26] The parties to the IWC have imposed a five-year moratorium on all commercial whaling beginning with the 1985-1986 season to facilitate both the regeneration of whales and scientific study.[27] The Commission thus set a zero-quota for these seasons. Of the forty IWC members, only Japan, Norway, and the Soviet Union filed objections to this moratorium.[28]

B. *The Pelly and Packwood-Magnuson Amendments*

Although the IWC has played a central role in the world effort to protect the whale from extinction,[29] it has been nearly impotent in enforcing its quotas.[30] For example, its rules allow a member nation to exempt itself from a quota merely by filing an objection.[31] Thus, despite the Commission's progressive nature at its inception,[32] today, the IWC is perceived as conservative,[33] not only because of exemption provisions,[34] but also because of its unanimous voting requirement for any institutional change in

26. ICRW, *supra* note 9, sched., para. 10(e) (Feb. 1983). The amendments were enacted despite the widespread belief that the conservationists were not unified enough to defeat the whalers. *See* Bonker, *supra* note 23, at 53-54.

27. The IWC schedule stated:

> [C]atch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. The provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modifications of this provision and the establishment of other catch limits.

ICRW, *supra* note 9, sched., para. 10(e) (Feb. 1983); *see* Carlson, *supra* note 25, at 612.

28. Carlson, *supra* note 25, at 613.

29. *See generally* Smith, *supra* note 12 (discussing the IWC's function in preserving the whale); Note, *supra* note 2 (discussing the IWC's role).

30. Smith, *supra* note 12, at 548. Some commentators blame the IWC for the near extinction of certain whale species. *Id.* at 543. Before 1965, the IWC was considered to be a total failure. Note, *supra* note 18, at 217.

The IWC has been criticized for: (1) failing to reduce quotas early enough to save some species, *id.* at 218; (2) failing to create an enforcement program to obtain accurate scientific data, Smith, *supra* note 12, at 559; Note, *supra* note 18, at 217-18; and (3) being influenced by political concerns. Levin, *supra* note 15, at 580.

Other commentators, however, maintain that the IWC has made an honest effort to preserve whales. *See* Smith, *supra* note 12, at 544 (concluding that "although the IWC has been largely ineffective in preserving whale stocks in the past, it is nonetheless a valuable international body, and its continued participation in the whaling crisis is essential to ensure the survival of the whale").

31. A member nation has 90 days in which to file an objection. ICRW, *supra* note 9, art. V, para. 3.

32. *See* Scarff, *supra* note 13, at 358.

33. *See* Smith, *supra* note 12, at 548.

34. ICRW, *supra* note 9, art. V, para. 3; *see* Smith, *supra* note 12, at 559. Also, a nation can withdraw from the IWC on June 30 of any year if notice is given on or before January 1 of that year. ICRW, *supra* note 9, art. XI; *see* Smith, *supra* note 12, at 559.

the Convention.[35] The ICRW Charter contains only one enforcement provision,[36] allowing the IWC to "take appropriate measures" to punish infractions.[37] Enforcement under this provision, however, has been lax, with sanctions typically limited to the withholding of whaling bonuses.[38]

In an effort to promote enforcement of the quotas of international fishery conservation programs,[39] Congress passed the Pelly Amendment[40] in 1971. Although the Pelly Amendment was enacted primarily to stop nations from taking Atlantic salmon on the open seas,[41] it also sought to protect the whale.[42]

The Pelly Amendment authorizes the Secretary of Commerce to investigate the fishing operations of foreign nationals, and to "certify"[43] a country if he determines that its nationals are conducting fishing operations in a manner that diminishes the effectiveness of any international fishery conservation program.[44] After a country has been certified, the President may direct the Secretary of the Treasury to prohibit importation of fish products from the offending nation.[45] Under the amendment, executive action is discretionary: the President may decline to order any import prohibition.[46]

Although the Pelly Amendment's threat of sanctions served its intended purpose by pressuring countries either to join the IWC or to abide by the Commission's quotas,[47] Congress nevertheless

35. A unanimous vote of the member nations is required to amend the ICRW. Scarff, *supra* note 13, at 357.

36. ICRW, *supra* note 9, art. IX.

37. *Id.*

38. Smith, *supra* note 12, at 549.

39. "International fishery conservation program" means "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." 22 U.S.C. § 1978(h)(3) (1982).

40. *Id.* § 1978.

41. *See* H.R. Rep. No. 468, 92d Cong., 1st Sess. 4-6, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2409, 2412-14.

42. *See infra* note 104.

43. For an explanation of the certification process, see *supra* note 8.

44. For the definition of international fishery conservation program, see *supra* note 39.

45. 22 U.S.C. § 1978(a)(4).

46. If the President takes no action, he must inform Congress within 60 days of certification of his reasons for declining to impose sanctions. *Id.* § 1978(b).

47. Both Japan and the U.S.S.R. were certified under the Pelly Amendment on November 12, 1974. Letter from Secretary of Commerce Frederick B. Dent to President Gerald R. Ford (Nov. 12, 1974) (on file with author). Both countries objected to the

decided to enhance the amendment's effectiveness.[48] Thus, in 1979, Congress passed the Packwood-Magnuson Amendment.[49] This amendment requires the Secretary to certify any nation if he determines that nationals of that country are directly or indirectly conducting fishing operations or engaging in trade which diminishes the effectiveness of the ICRW.[50]

In contrast to the Pelly Amendment, certification under the Packwood-Magnuson Amendment automatically triggers a minimum fifty-percent reduction in the fishing allocation of the offending nation within the U.S. 200-mile fishing zone.[51] The Secretary of State, in consultation with the Secretary of Commerce, is empowered to impose these sanctions.[52] The Secretary of State has no discretion to decide whether to impose a sanction once the Secretary of Commerce has certified a nation for diminishing the effectiveness of the ICRW.[53] The Packwood-Magnuson Amendment has proved so effective that a former U.S. Representative to the IWC, Thomas Garrett, stated that its sanctions are the foundation upon which the system of international

5000 quota on the Antarctic minke whales for 1973-1974. The countries were certified after Japan harvested 3713 and the Soviet Union harvested 4000 of these whales. President Ford forestalled the sanctions when both nations agreed to accept the 1974-1975 quotas. *See Preparations for the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 10 (1982) [hereinafter cited as *Preparations Hearing*]; Note, *supra* note 2, at 137-38.

On December 14, 1978, the Secretary also certified Chile, Peru, and Korea for exceeding an IWC quota. Letter from Secretary of Commerce Juanita M. Kreps to President Jimmy Carter (Dec. 14, 1978) (on file with author). These countries were not IWC members, but avoided sanctions by joining the IWC within 60 days. *See Preparations Hearing, supra*, at 11 (reporting that on February 13, 1979, "President Carter notified Congress that he would decline to declare an embargo based on the actions taken by these nations to become IWC members and the assurances which IWC membership gave for future compliance"); Note, *supra* note 2, at 138.

48. *See* 125 CONG. REC. 22,084 (1979) (statement of Rep. Oberstar) ("In order to improve the effectiveness of the Pelly amendment, [the Packwood-Magnuson amendment] will provide for a specific penalty to result from certification."); *see also* President's Statement on Signing S. 917 into Law, 15 WEEKLY COMP. PRES. DOC. 1435 (Aug. 15, 1979) (stating that provisions in the Packwood-Magnuson Amendment are "definite improvements to the Pelly [A]mendment").

49. Pub. L. No. 96-61, 93 Stat. 407 (codified at 16 U.S.C. § 1821); *see* Note, *supra* note 2, at 137.

50. 16 U.S.C. § 1821(e)(2)(A)(i).

51. *Id.* § 1821(e)(2)(B).

52. *Id.*

53. The Secretary of State does have some discretion over the severity of the sanctions imposed. *Id.* § 1821(e)(2)(b). The sanctions, however, must represent at least a 50% reduction in the fishing allocation of the violating nation within the U.S. 200-mile fishing zone. *Id.*

whaling controls has been built.[54]

C. *The Secretary of Commerce's Predicament in Applying the Amendments to Japan*

Applying the Pelly or Packwood-Magnuson Amendments to Japanese whaling would be significant for two reasons. First, Japan is the most visible and outspoken whaling nation.[55] The country is one of the largest reapers of the whale population[56] and one of the most vocal opponents of the "save the whale" efforts. Also, the whale is deeply embedded in Japanese history and mores.[57] In light of Japan's dominant position in the whaling industry, application of the Pelly and Packwood-Magnuson Amendments to Japan would open the door to future U.S. action against other whaling nations. Were the United States to impose sanctions against Japan, such action would represent an attack on the leader of the whaling industry and would signal the demise of whaling as a viable commercial enterprise.

Second, imposing sanctions under these amendments in response to Japanese violations of the IWC regulations could have adverse economic repercussions for the United States.[58] While it is true that Japan would incur sanctions amounting to approximately $230 million under the Packwood-Magnuson Amendment alone,[59] the United States would also suffer if Japan were to retaliate by applying economic pressure against the United States.[60]

Japan has, in the past, used strong-arm tactics to advance its goals in the whaling industry.[61] For example, in 1978, Japan succeeded in forcing Panama to drop its IWC moratorium proposal

54. Garrett Affidavit at 3, *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398 (D.D.C. 1985).

55. Note, *supra* note 18, at 212.

56. *See* Smith, *supra* note 12, at 556.

57. *See* Japan Whaling Ass'n, Traditions of Diet: The Whale and the Japanese; Japan Whaling Ass'n, In Defense of Whaling: The Japanese Speak Out; Japan Whaling Ass'n, Man, Whales & the Sea (all available at the Embassy of Japan, 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008).

58. *See* Note, *supra* note 2, at 140.

59. The economic impact of cutting the Japanese fishing quota in half within the 200-mile limit would amount to at least $231 million. Burgess, *Japan Links Whaling Ban to Court Case*, Wash. Post, Apr. 6, 1985, at A1, col. 6. The Japanese catch at least $460 million worth of fish within the U.S. 200-mile fishing zone. *Id.; Japan Agrees to End Whaling*, N.Y. Times, Apr. 6, 1985, at 2, col. 4 (assessing the worth of Japan's fish harvest in U.S. waters to be nearly $500 million).

60. *See* Note, *supra* note 2, at 140; *see also infra* notes 64-67 and accompanying text.

61. *See* Note, *supra* note 2, at 140.

by threatening to cancel its sugar contracts with that country.[62] Similarly, in 1980, Japan applied the same tactics against the Seychelles by threatening to cancel a fishery development agreement.[63]

Japan has threatened to stop U.S. fish exports to Japan.[64] Imposition of this sanction would destroy two-thirds of the Alaskan fish processing industry.[65] Furthermore, some observers believe that enforcement of the Packwood-Magnuson Amendment could incite Japan to revoke its salmon treaties with the United States.[66] This retaliatory action could have a $100 million impact on U.S. trade.[67]

Moreover, because of its favorable balance of trade, Japan may be able to exercise economic leverage against the United States and thereby pressure it to increase the number of whales its fishermen can harvest without reprisal.[68] At the time the Secretary of Commerce entered into the whaling agreement with Japan, the Reagan administration had been pursuing trade negotiations with the Japanese with a "sense of urgency"[69] in order to encourage the Japanese to open their markets to U.S. products.[70]

62. *Id.* at n.263.
63. *Id.*
64. *Id.* at 140.
65. *Id.*
66. *Id.*
67. *Id.*
68. The trade deficit with Japan was $39.5 billion in 1985. Wash. Post, Jan. 1, 1986, at D1, col. 1. This figure represents nearly one-third of the total U.S. trade deficit of $123.3 billion. Auerbach, *U.S. Jitters over Japan Persist,* Wash. Post, Apr. 10, 1985, at F1, col. 4.

Some economists believe that if Japanese trade barriers are not lowered, the situation may "ultimately explode in a mutually destructive protectionist spasm." Samuelson, *Trade Diplomacy Failing,* Wash. Post, Apr. 10, 1985, at F1, col. 1. In response to U.S. pressure, Japan announced on December 21, 1985 that it agreed to $260 million in trade concessions. Kilborn, *Japanese Agree for the First Time to Give U.S. Trade Concessions,* N.Y. Times, Dec. 22, 1985, at 34, col. 1. Despite these concessions, Japan still ran a record $5.5 billion surplus with the United States in January 1986, $700 million greater than in December. Auerbach, *U.S. Trade Deficit Hits Another Record in January,* Wash. Post, Mar. 1, 1986, at D1, col. 2.

69. Auerbach, *supra* note 68 (discussing negotiations between the United States and Japan to resolve trade problems resulting from tariffs and other import restrictions imposed by the Japanese).

70. The negotiations focused on four product areas: telecommunications, sophisticated electronics, forestry products, and pharmaceutical and medical equipment. *Id.* Even though agreements have been reached in these areas since the circuit court decided the *American Cetacean Soc'y* case, the friction between the United States and Japan over trade relations remains. According to a senior Reagan administration official, "trade still remains the major problem in U.S.-Japanese relations despite gains over the past year in getting Japan to open up its markets. 'With larger deficits looming, we have to keep it [trade] on the front burner.' " Auerbach, *Frictions Eased as Nakasone, Reagan Meet,* Wash. Post, Apr. 13, 1986, at F1, col. 4.

Had the United States imposed sanctions against Japan under the Pelly and Packwood-Magnuson Amendments, Japan could have stymied the bilateral trade negotiations.

III. The *American Cetacean Society* Case

A. *Facts*

The application of the Packwood-Magnuson Amendment to Japan became a contested issue in the fall of 1984 when Japan realized that sanctions would be automatically imposed if the Secretary certified it under the Packwood-Magnuson Amendment. Such sanctions would cost Japan an estimated $230 million in fishing revenue.[71] Japan therefore sought to avoid certification. Because of the limitations placed on the Secretary of State's discretion to impose sanctions once a nation is certified under the Packwood-Magnuson Amendment, Yasushi Murazumi, the Japanese Attaché in Washington, contacted Malcolm Baldrige, the Secretary of Commerce, in October 1984 in an effort to circumvent the imposition of sanctions.[72] After a series of bilateral discussions and an exchange of letters,[73] the two countries quickly reached an agreement that was formalized on November 13, 1984.[74]

The United States and Japan reached agreement on four points. First, Japan agreed to withdraw its objection to the IWC's general moratorium on whaling by April 1, 1985.[75] Second, if Japan ceased all commercial whaling by the end of the 1987 season, and withdrew its objection to the IWC zero quota by December 13, 1984, the United States would permit Japan to harvest up to 400 sperm whales during the 1984 and 1985 seasons without sanction.[76] Third, if Japan ceased all commercial whaling by April 1, 1988, the United States would permit Japan to harvest up

71. *See supra* note 59.
72. *See* Wash. Post, Oct. 18, 1984, at A19, col 1; Appellants' Brief at 8, American Cetacean Soc'y v. Baldrige, 768 F.2d 428 (D.C. Cir. 1985), *cert. granted,* 106 S. Ct. 787-88 (1986) [hereinafter cited as Appellants' Brief].
73. The bilateral discussions between Japan and the United States were conducted in Washington, D.C. from November 1 - November 12, 1984. These discussions led to the exchange of letters comprising the whaling accord.
74. Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific Between the United States and Japan (Nov. 13, 1984) (on file with author) [hereinafter cited as Whaling Accord].
75. *Id.* at 2-3.
76. *Id.* at 2.

to 200 sperm whales in the 1986 and 1987 seasons, as well as other species, subject to limits acceptable to the United States.[77] Fourth, the United States agreed that if Japan satisfied the above three conditions, the United States would not consider it to be diminishing the effectiveness of the IWC or any other international agreement, for the purposes of U.S. law, by continuing to whale.[78]

In accordance with this agreement, the United States did not certify Japan under the Pelly or Packwood-Magnuson Amendments. Thus, the Japanese were allowed to harvest a certain number of sperm whales and to retain their full fishing rights within the U.S. 200-mile fishing zone.[79] In return for their promise of future adherence to the IWC, the Japanese sidestepped the Packwood-Magnuson sanctions.[80]

On November 8, 1984, the parties opposed to Japanese whaling in violation of IWC quotas[81] filed suit in district court against Secretary of Commerce Malcolm Baldrige and Secretary of State George Shultz.[82] The plaintiffs requested three forms of relief: (1) a preliminary injunction prohibiting the Secretary of Commerce from failing to certify Japan and prohibiting the Secretary of State from failing to reduce Japan's fishing quota in U.S. waters,[83] (2) a declaratory judgment that certification and the imposition of sanctions are mandatory when any country violates IWC quotas because such violations diminish the effectiveness of

77. *Id.*
78. *Id.*
79. *See id.*
80. *See supra* note 59.
81. The plaintiffs were various organizations and individuals whose goals include the preservation of whales and other wildlife: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, and Thomas Garrett, former U.S. Representative to the IWC. Plaintiffs' Complaint, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) [hereinafter cited as Plaintiffs' Complaint].
82. Although both Secretary of Commerce Baldrige and Secretary of State Shultz were named as defendants in this case, this note focuses on the Secretary of Commerce's role in the certification process. Once a nation is certified, the Secretary of State must automatically impose sanctions under the Packwood-Magnuson Amendment. *See supra* notes 51-53 and accompanying text. In contrast, the Secretary of Commerce arguably possesses discretion to decide whether to certify a nation that has violated IWC regulations. *See infra* notes 204-39 and accompanying text.
83. Plaintiffs' Complaint, *supra* note 81, at 15.

the ICRW,[84] and (3) a permanent injunction prohibiting the Secretary of Commerce from failing to certify and prohibiting the Secretary of State from failing to impose sanctions if the Japanese continue to harvest whales in violation of the IWC quotas.[85]

The *American Cetacean Society* case presents a difficult legal question:[86] Do the Pelly and Packwood-Magnuson Amendments require the Secretary of Commerce to find diminished effectiveness when a nation fishes in excess of an international fishing agreement, or does the Secretary of Commerce retain the discretion to decide whether diminished effectiveness exists notwithstanding a violation of an international fishing agreement?

B. *Plaintiffs' Argument*

Plaintiffs claimed that the whaling accord between the United States and Japan wholly disabled the IWC as an effective organization for protecting the whale.[87] To support this claim, plaintiffs relied on *Adams v. Vance*[88] where Alaskan natives protested an IWC decision not to set a "subsistence" quota for the endangered bowhead whale.[89] Prior to this decision, the IWC had allocated to the Eskimos a small subsistence quota allowing them to harvest bowhead whales for cultural and dietary use, but not for commercial purposes.[90] Subsequently, however, the Alaskan natives were prohibited from harvesting any bowhead whales for cultural use as well. While the United States could have filed an objection to the IWC quota, it refused to do so.[91] Consequently, the Eskimos sued to compel the Secretary of State to file such an objection.[92]

The United States argued in *Adams* that the Secretary of State refused to file an objection because the killing of even a small number of bowhead whales would have a devastating impact on the IWC.[93] The government argued that an objection by the

84. *Id.* at 15-16.
85. *Id.* at 16.
86. Judge Charles R. Richey, the district court judge deciding the case, apparently did not find the issue to be complex. He stated that this issue was "in actuality very simple." 604 F. Supp. at 1405.
87. Plaintiffs' Complaint, *supra* note 81, at 13.
88. 570 F.2d 950 (D.C. Cir. 1978). This is the only case prior to *American Cetacean Soc'y* that discusses the Pelly Amendment.
89. *Id.* at 952.
90. *Id.*
91. *Id.*
92. *Id.* at 953.
93. *Id.* at 956 n.13.

United States would weaken both the IWC and the United States vital leadership role in IWC efforts to conserve whale populations.[94] The court of appeals in *Adams* agreed with the government's position and vacated the district court order that impelled the government to contest the quota.[95] In light of the government's stance in *Adams,* the plaintiffs in *American Cetacean Society* contended that Japan's taking of over 400 endangered whales in the 1985 season and 1200 whales over a three-year period would certainly hinder the IWC's effectiveness.[96]

Plaintiffs further used *Adams* to demonstrate that the executive branch had previously found that violation of any whaling quota diminishes the effectiveness of an international fishery conservation agreement.[97] In an affidavit submitted by the government in *Adams,* Patsy Mink, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, stated that "[a] United States objection [to the IWC quota] at this time would seriously weaken the effectiveness of the International Whaling Commission as an instrument of conservation."[98] Plaintiffs thus argued that the terms of the U.S.-Japanese whaling accord contravened the government's position in *Adams* that any action taken by the United States not pursuant to the IWC's regulations would injure both U.S. and IWC efforts to preserve the whale.[99]

In addition to relying on executive branch practice, the plaintiffs claimed that the language and legislative history of the Pelly and Packwood-Magnuson Amendments compel equating a violation of an IWC quota with diminished effectiveness[100] despite the amendments' failure to mention any quotas.[101]

Focusing on the legislation's objectives, the plaintiffs concluded that Congress intended to prohibit whaling in excess of the quota regardless of any bilateral agreement permitting such whaling.[102] First, the plaintiffs stressed the Pelly Amendment's

94. *Id.*
95. *Id.* at 957.
96. *See* Plaintiffs' Motion for Summary Judgment at 31, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), *aff'd,* 768 F.2d 426 (D.C. Cir. 1985), *cert. granted,* 106 S. Ct. 787-88 (1986) [hereinafter cited as Plaintiffs' Motion For Summary Judgment].
97. *Id.*
98. 570 F.2d at 956 n.13.
99. Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 32, 35.
100. *See* Plaintiffs' Complaint, *supra* note 81, at 13.
101. 22 U.S.C. § 1978; 16 U.S.C. § 1821.
102. Plaintiffs' Complaint, *supra* note 81, at 13.

stated purpose of halting the overfishing of Atlantic salmon[103] and whales[104] by those nations that invoke technical treaty rights to circumvent international fishery conservation measures.[105] In

103. "[This bill], as introduced[,] was designed to protect Atlantic salmon of North American origin." 117 CONG. REC. 34,750 (1971) (statement of Rep. Dingell).

104. The Pelly Amendment unquestionably was intended to improve the effectiveness of the IWC. Representative Pelly clarified this intent when introducing the bill:

> The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proven to be a cloak for over-exploitation on a grand scale.

117 CONG. REC. 34,752 (1971) (statement of Rep. Pelly); *see also* H.R. REP. No. 468, 92d Cong., 1st Sess. 6, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2409, 2414 (stating that the amendment "should not be geared exclusively to conservation of the North Atlantic Salmon, but should be applied generally to international fishery conservation programs").

Not every member of Congress who supported the Pelly Amendment did so solely to protect the Atlantic salmon or the whale. The motive of some members of Congress was to protect U.S. fishermen from foreign competition within U.S. territorial waters. 117 CONG. REC. 34,753 (1971) (statement of Rep. Scott) (contending that "another compelling reason for supporting [the Pelly Amendment] is the tremendous fishing activity that is going on just off our shores by foreign fishing fleets"); *id.* (statement of Rep. Hicks) (pressing for legislation to be enacted not only to conserve the fisheries resources, but also to "protect the economic interests of American fishermen").

105. Representative Pelly himself explained that "[u]nder the terms of the governing convention, individual nations are permitted to exempt themselves from the decisions of the commission." *Id.* at 34,752. Pelly viewed these exemptions as "unfortunate." *Id.*

A Department of State representative testified that the department believed that:

> [I]f the majority of nations did accept a regulation or a ban on salmon fishing and that regulation applied to U.S. fishermen, and one of the nations of the convention or one of the nations not a member didn't agree with it, as far as trade with the United States was concerned, . . . such trade restrictions would be applied to fishery products of that nation.

Atlantic Salmon: Hearings on H.R. 3304, H.R. 3305, H.R. 3841, H.R. 4928 and H.R. 7242 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st. Sess. 394 (1971).

Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, testified before the Subcommittee on Fisheries and Wildlife Conservation that:

> We have used the Pelly Amendment most recently in connection with the [sic] Peru, Chile, and South Korea. They were the most flagrant violators because they were taking whales without regard to IWC quotas . . . . IWC resolutions are not binding. If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly Amendment would apply.

Whaling Policy and International Whaling Commission Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 312 (1979) [hereinafter cited as *Whaling Policy Hearings*].

In a letter to the House Committee on Merchant Marine and Fisheries, the Commerce Department stated that the bill would "authorize the President to impose sanctions against countries which do not abide by that ban whether or not they are members of

the House debate on the Pelly Amendment, for example, Representative Wylie implied that only through economic pressure could the United States counter these evasions.[106]

Plaintiffs also noted that the Pelly Amendment's legislative history indicates that Congress intended the Secretary to certify a nation violating an international fishery conservation treaty regardless of that nation's objection.[107] President Ford supported this view, stating that despite such an objection, exceeding the quotas diminished the program's effectiveness.[108] The Pelly Amendment's legislative history is replete with such phrases as "must" certify,[109] "would be required to certify,"[110] and "directs" the Secretary to certify.[111] Furthermore, Congress apparently enacted the Pelly Amendment because it was reluctant to leave the fate of the whale to executive branch discretion.[112]

[the convention] and whether or not, if members of [the convention], they have not accepted the ban." H.R. REP. No. 468, 92d Cong., 1st Sess. 10, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2409, 2416.

106. 117 CONG. REC. 34,754 (1971) (statement of Rep. Wylie) (arguing that "being cut off from U.S. markets may be the only method of forcing other nations into negotiating conservation treaties").

107. Appellees' Brief at 17-18, American Cetacean Soc'y v. Baldrige, 768 F.2d 428 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) [hereinafter cited as Appellees' Brief].

108. President Ford stated: "Whether or not the objection is legal, however, does not alter the fact that exceeding the quotas will diminish the effectiveness of the program. It constitutes a prima facie case for application of the Pelly Amendment." Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 8 (citing The President's Message to the Congress Submitting a Report on International Whaling Operations and Conservation Programs, 11 WEEKLY COMP. PRES. DOC. 55 (Jan. 16, 1975)).

109. 117 CONG. REC 47,053 (1971) (statement of Sen. Stevens); *see* Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 20.

110. 117 CONG. REC. 34,751 (1971) (statement of Rep. Dingell); *see* Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 20.

111. H.R. REP. No. 468, 92d Cong., 1st Sess. 6, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2409, 2414; *see* Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 20.

112. This reluctance to vest discretion in the executive branch is evidenced by the provision in the Pelly Amendment requiring the President to report to Congress within 60 days of certification if he decides not to impose a sanction. *See supra* note 46. In addition, the legislative history indicates that Congress expected the Pelly Amendment to be enforced with little equivocation.

Representative Pelly stated:

> I do not expect that this discretion will become an excuse for inaction on the part of the Secretary of Commerce or the President. We are dealing with an aspect of foreign relations, and it is unwise to tie the hands of the Executive, but the enactment of this legislation represents a clear directive from the Congress to the President that the United States will not permit foreign countries which flount [sic] international conservation measures to profit through continued access to the American marketplace.

117 CONG. REC. 34,752 (1971) (statement of Rep. Pelly).

The plaintiffs addressed the language of the Packwood-Magnuson Amendment, noting that the amendment specifically incorporates the Pelly Amendment's definition of certification.[113] Because the later amendment also contains the phrase "diminish the effectiveness,"[114] the plaintiffs argued that Congress intended the phrase to have the same meaning under the Packwood-Magnuson Amendment as it has under the Pelly Amendment.[115]

Furthermore, because the Packwood-Magnuson Amendment's language is stricter than the Pelly Amendment's language, it better supports an interpretation equating a quota violation with diminished effectiveness.[116] For example, the Packwood-Magnuson Amendment states that after the Secretary finds diminished effectiveness, he "shall" sanction.[117] Under canons of statutory construction, "shall" usually means "must."[118] The plaintiffs contended that this language indicates the statute's mandatory nature supporting a strict construction in favor of certification.[119]

Finally, the plaintiffs referred to a letter written by the Secretary of Commerce in response to an inquiry from Senator Packwood[120] regarding the interpretation of the amendment with respect to the IWC's 1986 total moratorium. In reply, the Secretary stated that he believed that any whaling exceeding the IWC quota would automatically diminish the effectiveness of the IWC and thereby be subject to certification.[121] Although not legally binding on the Secretary's actions, the plaintiffs claimed that this

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113. A certification under the Packwood-Magnuson Amendment "shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1969." 16 U.S.C. § 18(e)(2)(A)(1). This language implies that conduct sufficient to diminish the effectiveness of an international conservation program under the Packwood-Magnuson Amendment also triggers certification under the Pelly Amendment.

114. 16 U.S.C. § 1821(e)(2)(A)(i).

115. *See* Appellees' Brief, *supra* note 107, at 20.

116. Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 8.

117. 16 U.S.C. § 1821(e)(2)(B).

118. *See* United States *ex rel.* Arcara v. Flynn, 11 F.2d 899, 900 (W.D.N.Y. 1926) (holding that the court must recommend against deportation of an alien convicted of a crime of moral turpitude within 30 days when the statute says "shall" recommend within 30 days); *see also* BLACK'S LAW DICTIONARY 1233 (5th ed. 1979) ("used in statutes, contracts, or the like, [shall] is generally imperative or mandatory").

119. Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 19.

120. Letter from Senator Packwood to Secretary of Commerce Malcolm Baldrige (June 28, 1984) (on file with author).

121. The Secretary stated:

> You noted in your letter the widespread view that any continued commercial

letter provided insight into both the Secretary's interpretation as well as the public's understanding of the amendment.[122] Consequently, the plaintiffs contended that the Secretary should be estopped from promoting a contrary meaning.[123]

C. *Defendants' Argument*

The defendants, Secretary of Commerce Malcolm Baldrige and Secretary of State George Shultz, conceded that under the Packwood-Magnuson Amendment, the Secretary of Commerce possesses no discretion to certify once he has determined that diminished effectiveness exists.[124] The issue in the case, as they phrased it, was "whether any and all whaling inconsistent with the Schedule triggers certification irrespective of circumstances, of ongoing negotiations, and of commitments induced by the threat of certification."[125]

Viewing effectiveness as a long-term issue,[126] the defendants argued that the U.S.-Japanese whaling accord enhanced, rather than diminished, the effectiveness of the IWC.[127] They noted Japan's future intention to abide by the moratorium and to

whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC . . . .

Any government that chooses to ignore the commercial whaling moratorium implemented by the IWC and thereby diminishes the effectiveness of the IWC should be prepared to accept the consequences of this non-compliance.

Letter from Secretary of Commerce Malcolm Baldrige to Senator Packwood (July 24, 1984) (on file with author).

122. Plaintiffs' Motion for Summary Judgment, *supra* note 96, at 38. The Secretary conceivably intended his letter to assuage Senator Packwood's concerns about the potential for sluggish enforcement of the amendment. It is also conceivable that Senator Packwood made this inquiry pursuant to investigation for yet another, stricter piece of whaling legislation.

123. *Id.*

124. Defendants' Cross Summary Judgment Motion at 9, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) [hereinafter cited as Cross Motion].

125. *Id.* at 10.

126. *See* Cross Motion, *supra* note 124, at 15 n.6.

127. Appellants' Brief, *supra* note 72, at 16. Factually, the defendant-intervenors, the Japan Whaling Association and the Japan Fishing Association, agreed with the defendants. They claimed that plaintiffs were silent in their pleadings about the 1984 IWC Scientific Committee's data because that Committee's findings would support the defendants' position. Defendant-Intervenors' Summary Judgment Motion at 9, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986). In reply to a Japanese request for consideration of whether the present size of the catch would have any significant impact on the whale population, "[t]he Committee agreed that, if continued for a short period (possibly up to 5 years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term." *Id.*

The defendant-intervenors, however, disagreed with some of the defendants' legal arguments. While the plaintiffs maintained that certification is always mandatory, the defendant-intervenors contended that a member nation cannot be certified after filing an objection, regardless of the resulting harm to the IWC. The defendant-intervenors argued that imposing sanctions against nations that merely exercise their right to file an objection violates both the IWC and international law. *Id.* at 19. The defendants disagreed with this extreme viewpoint. Defendants' Opposition to Intervenor Summary Judgment Motion at 1, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986). Judge J. Skelly Wright addressed this issue in the circuit court's decision, stating that nowhere does the IWC forbid a nation from passing domestic legislation to aid IWC enforcement. *American Cetacean Soc'y*, 768 F.2d at 429 n.1.

retract its objection.[128] They further contended that without this accord, Japan might never abide by the quotas.[129] In support of their argument, the defendants submitted an affidavit by Secretary of Commerce Baldrige stating: "In my judgment, the [whaling accord] reflects the best way to achieve Japanese compliance with the Schedule to the International Convention for the Regulation of Whaling . . . ."[130]

The defendants also argued that Congress granted the Secretary of Commerce the same discretion in making his diminished effectiveness decision under the Packwood-Magnuson Amendment as under the Pelly Amendment.[131] The Secretary could thus decide whether to find diminished effectiveness regardless of the quota while considering other factors and circumstances.[132] The Pelly Amendment's legislative history, defendants claimed, indicates that when enacting the amendment, Congress did not intend to preclude use of secretarial discretion.[133] Representative Breaux, Chairman of the House Committee on Fisheries and Wildlife Conservation, for example, opined that both the Pelly and Packwood-Magnuson Amendments include discretionary features in the certification stage.[134]

128. Appellants' Brief, *supra* note 72, at 16.

129. *Id.* The argument that Japan might never abide by the quotas is spurious because it would be uneconomical for Japan to violate the IWC quotas indefinitely. The Japanese whaling industry earns only $50 million a year while sanctions under the Packwood-Magnuson Amendment would total at least $230 million. *Japan Agrees to End Whaling*, N.Y. Times, Apr. 6, 1985, at 2, col. 4; *see supra* note 59.

130. Baldrige Affidavit at 1, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398, *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) [hereinafter cited as Baldrige Affidavit].

131. Appellants' Brief, *supra* note 72, at 13.

132. Cross Motion, *supra* note 124, at 9-10.

133. *Id.*

134. Rep. Breaux stated:

Additional support for the defendants' interpretation came from the executive branch. President Carter, upon signing the Packwood-Magnuson Amendment, noted the Secretary of Commerce's discretion to negotiate with foreign nations before certifying them.[135] The President stressed the amendment's potential use as leverage and as a weapon of last resort.[136]

To emphasize the discretionary aspect of a diminished effectiveness finding, the defendants presented Congress' only explicit explanation of the phrase. This explanation is contained in a House report accompanying a bill enacted one year before the passage of the Packwood-Magnuson Amendment that expanded the coverage of the Pelly Amendment to international protection of endangered species.[137] This report provided:

> I understand under the Pelly Amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration. First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will be in fact imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood Amendment, you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement.

Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine Fisheries, 96th Cong., 1st Sess. 314-15 (1979) [hereinafter cited as *Fishery Conservation Hearings*].

The defendants' argument that the amendments grant the Secretary the discretion to consider other factors and circumstances in addition to the violation of IWC regulations is strengthened by a colloquy concerning the flexibility of the Packwood-Magnuson Amendment in the legislative history:

> Mr. Breaux: What is wrong with telling a nation which flagrantly diminishes the effectiveness of a treaty, saying to that nation that they cannot have the right or privilege of fishing within our 200 mile zone?
> Mr. Negroponte: Well, I think that it is in part a question of degree, Mr. Chairman. Does the punishment fit the crime?
> Mr. Breaux: The Secretary has the discretion in making a certification decision.

Id. at 317. Mr. Negroponte was the Deputy Assistant Secretary of State.

135. President Carter stated:

> With regard to both the Packwood-Magnuson and Pelly amendments, the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation. However, in those negotiations all nations will be informed of the implications of these two amendments and the determination of this Government to use them if remedial action is not undertaken.

President's Statement on Signing of the Fishery Conservation and Management Amendments, 15 WEEKLY COMP. PRES. DOC. 1435 (Aug. 15, 1979).

136. *Id.*

137. Appellants' Brief, *supra* note 72, at 13-14.

> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.[138]

Not only is such flexibility legally permissible, the defendants argued, but it is also necessary for the executive branch to pursue the goals of the Pelly and Packwood-Magnuson Amendments effectively.[139]

The defendants agreed with the statement made by President Ford[140] that exceeding the IWC quota is a prima facie case for certification.[141] They maintained, however, that the Secretary may also consider other factors when deciding whether to apply the Pelly or Packwood-Magnuson Amendments.[142]

Indeed, the executive branch has applied this flexible approach throughout the history of both the amendments to assure future compliance with international standards.[143] The Secretary has not hesitated to certify nations violating the quotas when those

138. *Id.* (quoting H.R. REP. No. 1029, 95th Cong., 1st Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1768, 1779).

139. Cross Motion, *supra* note 124, at 9-13.

140. *See supra* note 108.

141. Cross Motion, *supra* note 124, at 15 n.6.

142. *Id.* at 10.

143. Appellants' Brief, *supra* note 72, at 19. The Danish salmon dispute exemplifies the Secretary's flexible approach to certification. The International Commission for the Northwest Atlantic Fisheries (ICNAF) banned Atlantic high sea salmon fishing. Denmark objected to this prohibition. After the Pelly Amendment was enacted, Denmark agreed to phase out its violations gradually over a four-year period. In turn, the Secretary did not certify under the Pelly Amendment. Cross Motion, *supra* note 124, at 14; *see also* Swanson Affidavit at 2, American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) (attesting that rather than immediately certifying Denmark's violation of the ICNAF, the United States instead negotiated to secure the end of future Danish salmon fishing).

Another example of the Secretary's flexible approach toward certification was the Secretary's response to Spain's objection to an IWC quota that restricted the number of whales its fishermen could harvest. Shortly after the Packwood-Magnuson Amendment was enacted, the United States held bilateral negotiations with Spain. Appellants' Brief, *supra* note 72, at 23. After being advised of the applicability of the new legislation, Spanish whalers abided by the quota. *Id.*

The Secretary of Commerce also did not certify Iceland and Brazil for using cold harpoons to kill minke whales in violation of an IWC regulation because these countries agreed to abide by the commercial moratorium. *Id.* at 24.

nations refused to assure the United States of their future intention to comply with the IWC.[144] The Secretary has not certified noncomplying nations that express their intention to abide by the quotas in the future.[145] The Secretary argued that certification, applied in this manner, is a tool that is persuasive, coercive, and flexible.[146] In other words, future compliance with IWC quotas may sufficiently mitigate any present damages and thereby avoid diminishing the Convention's effectiveness.[147]

The defendants also relied on *Adams v. Vance*[148] to support their position, extracting a different interpretation than did the plaintiffs.[149] In the defendants' view, the factual question of how many whales can be killed without diminishing the effectiveness of the IWC was not the determinative factor.[150] They argued instead that the single legal proposition emanating from the *Adams* case is that the courts should defer to the Secretary's decision in those matters that are within his discretion and expertise.[151]

The defendants also contended that the courts should defer to executive action as a matter of public policy.[152] They suggested that the *Adams* case demonstrated the degree to which foreign policy concerns are entangled in international whale conservation, and, as such, the case supports their position deferring to the executive branch's decisions concerning whaling.[153]

The appellant-intervenors[154] contested the Packwood-

144. Appellants' Brief, *supra* note 72, at 19.

145. *Id.* at 26.

146. *Id.*

147. Cross Motion, *supra* note 124, at 15 n.6.

148. 570 F.2d 950 (D.C. Cir. 1978); *see supra* notes 88-99 and accompanying text.

149. Appellants' Brief, *supra* note 72, at 29-30.

150. *Id.*

151. *Id.* at 29.

152. Cross Motion, *supra* note 124, at 13.

153. The court in *Adams* stated:

> This country's interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters. Accordingly, while we do not determine the justiciability of a request for relief of this kind [due to time constraints], we think it clear that if such a request is justiciable, the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed.

570 F.2d at 955; *see* Appellants' Brief, *supra* note 72, at 19.

154. The Appellant-Intervenors were the Japan Whaling Association and the Japan Fishing Association.

Magnuson Amendment's mandatory nature.[155] They found irrelevant the provision for automatic sanctions,[156] and asserted that the term "shall" applies only when the Secretary of Commerce has determined that a treaty's effectiveness has been diminished.[157] The plaintiffs' brief supports rather than counters this position by stating that "whenever" the Secretary of Commerce determines that nationals of a foreign country are conducting fishing operations in a manner which diminishes the effectiveness of the treaty, there must be certification.[158] Furthermore, although Congressman Breaux stated that "if" one violates an international treaty, there must be certification,[159] as plaintiffs state, he conceded that there is "a degree of discretion within the certification process as to whether a country is in violation of the terms of the international agreement."[160]

The defendants argued that the legislative history demonstrates that Congress intended to equate diminished effectiveness with "flagrant violations,"[161] or "flaunting" of IWC regulations.[162] Thus, the Secretary of Commerce must use discretion to determine which violations flaunt or flagrantly violate the IWC quotas.

Similarly, the defendants contended that Secretary Baldrige's letter in response to Senator Packwood's inquiry regarding the quotas did not detract from their argument.[163] The letter stated that any country that "ignores" the IWC regulations would be violating the Pelly and Packwood-Magnuson Amendments.[164] According to defendants, the Japanese were respecting rather

155. *See supra* notes 117-18 and accompanying text.

156. *See supra* notes 51-53 and accompanying text.

157. Appellant Reply Brief of Intervenors at 7, American Cetacean Soc'y v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986) [hereinafter cited as Intervenors' Reply Brief].

158. *Id.* at 6-7.

159. *Id.* at 7; Plaintiff's Motion for Summary Judgment, *supra* note 96, at 31, 35 (citing *Whaling Policy Hearings*, *supra* note 105, at 322-23; *Fishery Conservation Hearings*, *supra* note 134, at 323).

160. Intervenors' Reply Brief, *supra* note 157, at 7 (citing *Whaling Policy Hearings*, *supra* note 105, at 359).

161. Cross Motion, *supra* note 124, at 12.

162. *Id.* at 11.

163. Appellants' Brief, *supra* note 72, at 20 n.7; *see supra* notes 120-22 and accompanying text.

164. Letter from Secretary of Commerce Malcolm Baldrige to Senator Packwood (July 24, 1984) (on file with author).

than ignoring the IWC, and otherwise cooperating with international conservation efforts.[165] "To punish a nation which is making good faith efforts to bring itself into line with major conservation decisions is a foolish elevation of form over substance which Congress did not intend."[166]

If the amendments are ambiguous, the defendants argued that the court should defer to the Secretary's interpretation as a proper judicial method of statutory construction.[167] Citing the Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc.*,[168] the defendants claimed that the executive's interpretation of the amendment should be overruled only if it were unreasonable.[169] In *Chevron,* the Court held that if a statute is silent or ambiguous on a point, then the agency interpretation of the statute should be upheld if it is a permissible reading.[170] In *National Wildlife Federation v. Gorsuch,*[171] the Court of Appeals for the District of Columbia afforded even greater deference to executive discretion. The court held that to be valid, an agency's interpretation of a statute need only be "sufficiently reasonable," provided that the agency's interpretation neither contradicts the language of the statute nor frustrates congressional intent.[172]

165. Cross Motion, *supra* note 124, at 10.

166. *Id.*

167. Appellants' Brief, *supra* note 72, at 11.

168. 467 U.S. 837 (1984).

169. Appellants' Brief, *supra* note 72, at 11-12.

170. The Court stated:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)). The issue in *Chevron* was whether the agency could adopt a "bubble" approach to combat pollution when the statute used the term "stationary source." The district court held that the agency's interpretation of the statutory language was incorrect. The Supreme Court held that because Congress had not spoken clearly on the issue, the Court should defer to executive discretion and expertise to fill gaps and ambiguities in the statute. *Id.* at 865-66. The Court should only ask whether the agency reached a permissible policy decision, not whether it reached the best answer. *Id.*

171. 693 F.2d 156 (D.C. Cir. 1982).

172. *Id.* at 171. The issue in *National Wildlife Fed'n* was whether dam-induced water quality changes constituted "discharge of a pollutant" under § 502(12) of the Clean Water Act, 33 U.S.C. § 502(12). The EPA argued for a narrow reading of the statute so that dams would not be required to obtain discharge permits. The court upheld the interpretation of the EPA Administrator because the interpretation was reasonable, not inconsistent with congressional intent, and entitled to great deference. 693 F.2d at 183.

D. *American Cetacean Society v. Baldrige*

1. The District Court Opinion

On March 5, 1985, Judge Charles R. Richey of the District Court for the District of Columbia ruled that the legislative history of the Packwood-Magnuson Amendment illustrates that Congress intended the Secretary to certify any violation of an IWC quota.[173] Judge Richey concluded that the Secretary lacked discretion to avoid certification despite any ongoing negotiations or bilateral agreements.[174] The court's opinion closely paralleled the plaintiffs' arguments.

Judge Richey determined that Congress used the phrase "diminished effectiveness" in the Packwood-Magnuson Amendment in exactly the same manner as it used the phrase in the Pelly Amendment: "The legislative history shows no evidence that Congress intended to alter the meaning of this key phrase . . . ."[175] Therefore, Judge Richey held that both the Pelly and Packwood-Magnuson Amendments require certification whenever an IWC quota is violated.[176] He further asserted that allowing 1200 sperm whales to be killed over the next four years would represent a complete reversal of U.S. policy because the Secretary had successfully argued in *Adams* that the taking of fifteen to twenty bowhead whales by Alaskan natives constituted a great threat to the effectiveness of the IWC.[177]

173. *American Cetacean Soc'y,* 604 F. Supp. at 1408-09. Judge Richey stated that "[t]he legislative history and consistent agency interpretation shows that any nation which exceeds the IWC quotas will be viewed as acting to diminish the effectiveness of the IWC and will be certified, regardless of the nations own view of the propriety of the quotas themselves." Judge Richey also commented that "[t]his case is a simple issue of statutory interpretation." *Id.* at 1410. Consequently, he first analyzed the plain meaning of "diminished effectiveness." *Id.* at 1404. Finding these words undefined, unclear, and ambiguous, he then turned to the legislative history and the secretary's own interpretation of the Pelly and Packwood-Magnuson Amendments for guidance. *Id.* at 1405.

174. *Id.* at 1406.

175. *Id.*

176. *Id.* at 1407.

177. *Id.* The defendants and intervenors appealed the court's opinion. On appeal, the arguments on both sides were nearly identical to those presented to the district court.

During the period between the district court's decision and appellate review, several events of interest occurred. On April 3, 1985, Secretary of Commerce Malcolm Baldrige certified the Soviet Union for violating international whaling law. Wash. Post, Apr. 4, 1985, at A4, col. 1; N.Y. Times, Apr. 4, 1985, at A8, col. 4. The Soviet Union exceeded its minke whale quota by 500 whales. This violation triggered certification under the Packwood-Magnuson Amendment. Certification of the Soviet Union halved their fishing

2. The Circuit Court's Opinion

On August 5, 1985, the Court of Appeals for the District of Columbia Circuit affirmed Judge Richey's findings in an opinion written by Judge J. Skelly Wright.[178] Believing that the case involved a purely legal issue, the court conducted a de novo review.[179] The court equated certification with recognition of a violation so that any violation of an IWC sanction would automatically trigger sanctions.[180] Therefore, neither negotiations nor any other consideration of long-term impact should stay certification once the Secretary was notified of a quota violation.[181]

As the district court found, Judge Wright determined that "a certification under the Pelly Amendment but qualifying under the Packwood-Magnuson Amendment . . . is also a certification for purposes of the discretionary Pelly amendment sanctions."[182] The court stated that the Packwood-Magnuson Amendment was enacted merely to provide new sanctions, not to alter the certification process.[183]

In addition, the court determined that no secretarial discretion exists given an IWC quota violation under either the Pelly or Packwood-Magnuson Amendments: "[W]e see no indication that Congress was either aware of or acquiesced in such a practice."[184] The court held that under both the Pelly and Packwood-

in the U.S. 200-mile fishing zone and inflicted a penalty of at least $17 million. Wash. Post, Apr. 4, 1985, at A4, col. 3. President Reagan, however, decided not to enforce the Pelly Amendment sanctions. Office of the Press Secretary, Press Release to the Congress of the United States (May 31, 1985) (on file with author).

The Secretary, however, did not sanction the Japanese for violating the quota while he did sanction the Soviet Union. One reason sanctions were imposed against the Soviet Union but not against Japan is that the Japanese approached the Secretary to discuss their quota violations while the Soviet Union failed to do so. Secretary Baldrige stressed that the Soviet Union had been warned "well in advance" of certification. N.Y. Times, Apr. 4, 1985, at A8, col. 4.

Three days after certification of the Soviet Union, Japan announced that it would withdraw its objection to the whaling moratorium. Wash. Post, Apr. 6, 1985, at A1, col. 4; N.Y. Times, Apr. 6, 1985, at 1, col. 3. Despite the favorable response it generated, this announcement was misleading. Under the terms of the whaling accord, the Japanese were required to withdraw their objection by April 1. Furthermore, the withdrawal was explicitly conditioned upon a favorable resolution of the case in the court of appeals. Wash. Post, Apr. 6, 1985, at 13, col. 4. Greenpeace labeled the Japanese move a "public relations ploy." *Id.*

178. *American Cetacean Soc'y*, 768 F.2d 426.
179. *Id.* at 432.
180. *Id.* at 437.
181. *Id.*
182. *Id.* at 435.
183. *Id.*
184. *Id.* at 440.

Magnuson Amendments, certification must result from either: (1) violations of IWC regulations, or (2) other actions which diminish the effectiveness of international conservation programs or regulations.[185] Thus, the court found that Congress intended the Secretary to exercise discretion only in situations where no regulation was violated, but effectiveness was diminished.[186]

The court stated that the references in the legislative history to "flagrant violations" and "flaunting" of the IWC's regulations only indicate that actions which flagrantly violate the IWC quotas would be certified.[187] The court concluded that statements in the legislative history were not intended to mean that non-flagrant violations would not result in certification,[188] and thus held that these two phrases were not directly relevant to the outcome of the case.[189]

Disregarding mention of flaunting and flagrant violations in the legislative history of the Pelly and Packwood-Magnuson Amendments, the court referred to the legislative history of another piece of fishery conservation legislation, the Tuna Convention Act of 1950 (Tuna Act),[190] to interpret the meaning of the phrase diminished effectiveness.[191] In a provision added to the Tuna Act in 1962, Congress required the Secretary of Commerce to prohibit tuna imports "whenever fishing was being conducted 'in such a manner or in such circumstances as would tend to diminish the effectiveness' of the international recommendations."[192] The legislative history of this provision strongly urges that the prohibition apply when a "*country does not put into effect conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations.*"[193]

The court stated that because the Tuna Act granted the Secretary no discretion to decide whether to impose sanctions when a nation violated a quota under the Tuna Act, he similarly lacked discretion under the circumstances covered by the Pelly or

185. *Id.* at 441.
186. *Id.* at 443.
187. *Id.* at 437 n.13.
188. *Id.*
189. *Id.*
190. 16 U.S.C. §§ 951-961 (1982).
191. 768 F.2d at 437.
192. *Id.* at 437-38 (quoting 16 U.S.C. § 955(c)).
193. *Id.* at 438 (emphasis in original) (quoting S. REP. No. 1737, 87th Cong., 2d Sess. 7 (1962)).

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Packwood-Magnuson Amendments.[194] In interpreting the meaning of diminished effectiveness in the amendments, the court adopted the definition provided in the Tuna Act based upon the rule of statutory construction that "absent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning, since there is hardly a basis for assuming that the lawmakers had anything else in mind."[195]

In dissent, Judge Louis F. Oberdorfer argued that secretarial discretion was vested by the very terms of the Pelly Amendment.[196] His reading of the legislative history suggested that only those actions which ignore, flaunt, or are flagrantly violative of the quotas should be certified.[197]

Judge Oberdorfer found the terms "flaunt," "ignore," and "flagrantly violate" highly relevant: "The use of such language strongly implies that Congress understood the Pelly Amendment as giving the Secretary the discretion to distinguish between an egregious violation warranting certification and an accommodation which bent but did not break the program."[198] Judge Oberdorfer did not believe that Japan disregarded the IWC quota, and he would have found that the Secretary acted properly in deciding not to certify.[199] He also believed that the equities in the case rested with the Secretary because of the foreign policy implications.[200]

194. *Id.* at 438.

195. *Id.* at 437 (quoting United Shoe Workers v. Bedell, 506 F.2d 174, 183 (D.C. Cir. 1974)).

196. *Id.* at 445 (Oberdorfer, J., dissenting) (sitting by designation).

197. *Id.* at 448.

198. *Id.*

199. *Id.*

200. *Id.* at 449. Judge Oberdorfer stated that if the statute involved domestic affairs, he might have joined the majority. *Id.* at 448.

In another case involving foreign policy implications and the interpretation of a statutory phrase delineating secretarial discretion, CIA v. Sims, 105 S. Ct. 1881 (1985), the Supreme Court held that Congress delegated broad discretion to the Director of the CIA to protect the identity of intelligence sources. In *Sims*, the CIA refused a request under the Freedom of Information Act, 5 U.S.C. § 552 (1982), for the names of individuals and institutions who had performed research to counter Soviet and Chinese brainwashing techniques. In support of its refusal to provide the information requested, the CIA invoked § 102(d)(3) of the National Security Act of 1947, codified as amended at 50 U.S.C. § 403(d)(3) (1982), which states that the CIA director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 105 S. Ct. at 1882-83 (quoting 50 U.S.C. § 403(d)(3)). The court of appeals suggested that an individual qualifies as an "intelligence source" only when the CIA demonstrates that such protection is necessary to get information that could not otherwise be obtained. *Id.* at 1888. Interpreting the plain meaning of the statute, the Supreme Court held that the director's decision to withhold the requested information was lawful because the statute contains no "limiting language," thus making the arbitrary restriction imposed by the court of appeals invalid. In addition, the legislative history clearly "intended to give the Director . . . broad power to protect the secrecy and integrity of the intelligence process." *Id.* The Court held that the court of appeals' restrictive view of § 102(d)(3) was a "crabbed reading" of the statute that contravened the statute's plain meaning, the statute's legislative history, and the "harsh realities of the present day." *Id.* at 1890-91.

IV. Analysis

The per se rule established in *American Cetacean Society,*[201] requiring the Secretary of Commerce to certify whenever a nation violates an IWC quota, is incorrect because it conflicts with congressional delegation of power to the Secretary of Commerce. A court is not a legislative body.[202] It may not rescind the discretionary power delegated by Congress to the executive branch in order to expand what it believes to be the policies that Congress intended to promote.[203] The Supreme Court should therefore reverse.

201. 768 F.2d at 444; 604 F. Supp. at 1410.

202. Gaddis v. Calgon Corp., 449 F.2d 1318, 1319 (5th Cir. 1971) ("rewriting of [a] statute, plain on its face, is an example of law-making as distinguished from statutory interpretation that is beyond the power of the courts").

203. *See* United States v. Rutherford, 442 U.S. 544, 553 (1979) (stating that "the construction of a statute by those charged with its administration is entitled to substantial deference").

In *Rutherford,* the Food and Drug Administrator determined that laetrile was a "new drug" within the meaning of 21 U.S.C. § 321(p) and therefore had to be approved by the Secretary of Health, Education and Welfare before it could be distributed interstate. 21 U.S.C. § 355(a), (b). A "new drug" is "[a]ny drug . . . not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling . . . ." 422 U.S. at 546-47 (quoting 21 U.S.C. § 321(p)(1)). The Court of Appeals for the Tenth Circuit held that the terms "safety" and "effectiveness" have no reasonable application in the context of terminally ill cancer patients whose disease is, by definition, incurable and fatal. *Id.* at 551. The court thus upheld the district court's injunction which allowed cancer patients to use the drug. *Id.*

The Supreme Court reversed, holding that the implied exemption the court of appeals created was contrary to the court's power:

> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied (citations omitted).

Id. at 555. Because Congress could have reasonably intended the interpretation made by the agency, the Court upheld that interpretation. *Id.* Similarly, a literal interpretation of the Pelly and Packwood-Magnuson Amendments does not yield a result so manifestly unreasonable that it could not fairly be attributed to congressional design. *See supra* note 200; *see also* 16 C.J.S. *Constitutional Law* § 192 (1984) (noting that a court "cannot rewrite a statute in accordance with its own notions or to conform to what it believes to be the legislative intent").

A. *Secretarial Discretion*

1. Foreign Policy Implications Necessitate Secretarial Discretion

The district and circuit courts correctly decided that diminished effectiveness is identical in both the Pelly and Packwood-Magnuson Amendments.[204] The district and circuit courts, however, both proposed a strict per se standard for certification when a quota is violated.[205] Clearly, this standard is too inflexible. It deprives the Secretary of Commerce the discretion Congress delegated to him through the Pelly and Packwood-Magnuson Amendments. This discretion is necessary to effectuate international trade objectives.

The Secretary's past decisions to certify certain nations under the Pelly Amendment[206] should not bind him to certify other nations in similar circumstances in the future. Under the Pelly Amendment, certification has little significance because it does not trigger automatic sanctions. Pelly certification merely threatens the imposition of sanctions.[207] Under the Packwood-Magnuson Amendment, however, certification represents more than a mere threat. The amendment mandates sanctions once a nation is certified, regardless of the sanctions' implications or the subsequent corrective action taken by the offending nation.[208] Packwood-Magnuson certification therefore concerns not only conservation efforts, but also international relations.[209] The Secretary is understandably more reluctant to certify under the Packwood-Magnuson Amendment than under the Pelly Amendment because of the concomitant foreign policy ramifications.

In response to the constraints the Packwood-Magnuson Amendment placed on his power to certify, the Secretary, in negotiating the whaling accord, invoked the discretion that he always possessed, but never fully exercised, under the Pelly Amendment. To further foreign policy objectives, the Secretary assumed that he had the discretion to use the certification process in a different manner under the Packwood-Magnuson Amendment than he had used it under the Pelly Amendment.

204. 768 F.2d at 435; 604 F. Supp. at 1406.
205. *Id.* at 444; 604 F. Supp. at 1410.
206. *See supra* note 47.
207. The President has discretion to decide whether to impose sanctions under the Pelly Amendment. *See supra* notes 45-46 and accompanying text.
208. *See supra* notes 51-53 and accompanying text.
209. *See supra* note 200 and accompanying text.

2. The Secretary's Use of Discretion to Redefine Statutory Terms

In both the Pelly and Packwood-Magnuson Amendments, Congress failed to set explicit guidelines for the Secretary's certification decisions. The only guidance contained in the legislative history is that Congress intended sanctions to be imposed against those nations that "flagrantly violate"[210] or "flaunt"[211] the IWC. Unfortunately, Congress did not define these terms. Presumably, Congress left the definition of these important terms to the discretion of the Secretary.

Because the question of certification turns on how the Secretary defines the terms "flaunt," "flagrant violation," and "diminished effectiveness," the Secretary is able to control the certification process by interpreting these terms flexibly. Judging from his conduct toward Japan, the Secretary apparently defined the terms in this circumstance to include the violators' intentions. Under the Pelly Amendment, the violators' intentions are irrelevant. The certification determination is purely a question of arithmetic: the number of whales that a nation harvested as compared to the number allotted under the quota. If a nation's whale harvest exceeded the quota, certification followed.

The Secretary's decision to modify the meaning of the terms "flaunt," "flagrant violation," and "diminished effectiveness" must be considered in light of the negotiations he was pursuing with the Japanese.[212] Before deciding not to certify Japan, the Secretary apparently considered both Japan's violation of the quotas and its willingness to abide by the quotas in the near future. Had he simply compared the number of whales caught by the Japanese to the number of whales allowed under the IWC quotas, he would have found diminished effectiveness and certified. The Secretary's exercise of discretion in applying the Packwood-Magnuson Amendment to Japan indicates that he reevaluated how he would find diminished effectiveness and that he interpreted the terms more flexibly.

The court of appeals erroneously stated that the legislative history discussing the terms "flaunt" and "flagrant violation" is irrelevant.[213] These phrases provide the only guidance available in evaluating the Secretary's discretion. The notion that these

210. *See supra* note 161 and accompanying text.
211. *See supra* note 162 and accompanying text.
212. *See supra* notes 69-70 and accompanying text.
213. *See supra* notes 187-89 and accompanying text.

terms do not help determine whether the Secretary must certify a nation for nonflagrant violations is peculiar. The court's conclusion would be more acceptable if there were clear legislative history regarding nonflagrant violations. However, the tone of the legislative history, as well as the absence of other legislative indicia to the contrary, binds the Secretary to certify a nation only when its actions flagrantly violate the IWC's regulations.

Furthermore, the circuit court erred in attempting to define diminished effectiveness as used in the Pelly and Packwood-Magnuson Amendments by substituting the legislative history of the Tuna Act.[214] The comparison between the 1962 revision of the Tuna Act and the amendments is tenuous, because the Tuna Act was enacted nine years before the Pelly Amendment and seventeen years before the Packwood-Magnuson Amendment. Considering the changes in the composition of Congress during that time, there is no evidence whatsoever that Congress intended the term diminished effectiveness to have the same meaning in the amendments as it did under the Tuna Act. The court demonstrated that Congress specifically clarified the meaning of diminished effectiveness under the Tuna Act. Later Congresses, however, made no effort to similarly restrict the definition of diminished effectiveness under the Pelly or Packwood-Magnuson Amendments, nor did the legislators evoke the Tuna Act or its legislative history when drafting the Pelly and Packwood-Magnuson Amendments. Such an omission indicates either that Congress did not intend to interpret diminished effectiveness in the same manner or that Congress intended to grant the Secretary the discretion to interpret the term as he thought appropriate.

3. The Secretary's Decision to Shift His Discretion from the Post-Certification Stage of the Pelly Amendment to the Pre-Certification Stage of the Packwood-Magnuson Amendment

By entering into a whaling accord with Japan,[215] the Secretary of Commerce acted astutely. He compensated for the power expressly removed by the Packwood-Magnuson Amendment — the ability to negotiate and compromise *after* certification — by creatively expanding the power that remained — his discretion to negotiate and compromise in the pre-certification stage. Either

214. *See supra* notes 190-95 and accompanying text.
215. *See supra* notes 71-74 and accompanying text.

by design or by mistake, a loophole exists in both the Pelly and Packwood-Magnuson Amendments that leaves the Secretary discretion to decide whether to certify.

Under the Pelly Amendment, certification triggers negotiations while sanctions serve as threats, thereby providing the Secretary with leverage during negotiations.[216] By mandating sanctions, the Packwood-Magnuson Amendment eliminates the post-certification stage, used under the Pelly Amendment for negotiations. Through his interpretation of the Packwood-Magnuson Amendment, however, the Secretary combined the discretion to certify[217] and to impose sanctions[218] into a pre-certification stage. Under the Pelly Amendment, the Secretary's discretion to certify and to impose sanctions had involved a two-step process. Had the Packwood-Magnuson Amendment not been enacted, the Secretary would have certified Japan under the Pelly Amendment and then negotiated with the Japanese to determine ways to meet the IWC's goals and to avoid U.S. sanctions. In the circumstances of *American Cetacean Society,* the Secretary recognized that a Japanese violation of the IWC quota was imminent. He negotiated and settled the dispute without certifying.[219] Applied in this manner, the Secretary's discretion in the pre-certification stage of the Packwood-Magnuson Amendment is as broad as his power in both the certification and sanction stages of the Pelly Amendment. Under this interpretation of the Packwood-Magnuson Amendment, the Secretary can continue to use the threat of sanctions as leverage in negotiations as he did under the Pelly Amendment.

In 1984, Senator Packwood proposed an amendment to the Packwood-Magnuson Amendment that would mandate certification whenever a nation violates an IWC quota.[220] The proposal's

216. *See supra* note 47 and accompanying text.
217. 22 U.S.C. § 1978(a)(1), (2).
218. *Id.* § 1978(a)(4).
219. The Secretary's decision not to certify Japan in this case is consistent with other actions taken by the previous Secretary under the Packwood-Magnuson Amendment. *See supra* note 143.
220. Senator Packwood's proposal, drafted in the summer of 1984 and circulated to members of relevant Senate and House Committees, stated:

> Any nation whose nationals conduct commercial whaling operations during or after the 1985/1986 pelagic whaling season or the 1986 coastal whaling season, unless such whaling has been authorized by the International Whaling Commission, shall be deemed to be certified for the purposes of this [act]. Such nations shall also immediately be subject to the sanctions provided by subparagraph (B) of this paragraph as soon as the Secretary has determined that such commercial whaling operations are being conducted.

defeat lends support to the proposition that Congress did not intend to restrict the Secretary's discretion.[221]

The Secretary also believed that the discretion remaining in the pre-certification stage of the Packwood-Magnuson Amendment authorized him to consider U.S. foreign policy concerns as well as preservation concerns. By using this discretion, the Secretary could use the whaling issue as leverage in trade negotiations with Japan.[222] His efforts arguably prevented the Japanese from imposing economic penalties in retaliation for U.S. whaling sanctions and avoided complicating the ongoing trade negotiations between the United States and Japan.[223]

B. *Statutory Interpretation*

The canon of statutory construction that the plain language of a statute should govern if its terms are unambiguous[224] supports the Secretary's use of discretion. The Pelly Amendment states that "[w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President."[225] The use of the phrase "[w]hen the Secretary of Commerce determines" indicates that both the decision to certify and the factors to be considered in such a determination rest with the Secretary of Commerce. This view is supported by the fact that in exercising his discretion to find diminished effectiveness,

Brief for Intervenors at 22, American Cetacean Soc'y v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted*, 106 S. Ct. 787-88 (1986).

221. The six-year gap existing between the enactment of the Packwood-Magnuson Amendment and this proposal's defeat decreases the persuasiveness of the argument.

222. Possibly the Secretary believed that Japan would be more likely to make concessions in trade negotiations with the United States if the United States applied the amendment more leniently, especially since whaling is less an economic issue than a cultural and nationalistic issue for the Japanese. According to Samuelson, the Japanese are more responsive to factors of pride than to direct economic pressure. Samuelson, *U.S.-Japan Trade Diplomacy is Failing*, Wash. Post, Apr. 10, 1985, at F1, col. 4. Therefore, because whaling is a matter of national pride to the Japanese, Wash. Post, Apr. 6, 1985, at A1, col. 6, the Secretary probably believed that it would be better to compromise with Japan in negotiating the whaling accord so that the Japanese would be willing to accommodate the United States in the ongoing trade negotiations.

223. *See supra* notes 58-67 and accompanying text.

224. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (referring to "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself"). Absent a clearly expressed legislative intent to the contrary, the words of the statute should control. *Id.*

225. 22 U.S.C. § 1978(a)(1) (1982).

the Secretary can consider the "manner" and "circumstances" of the situation.[226]

The court of appeals held that certification under the Packwood-Magnuson Amendment was equivalent to that under the Pelly Amendment.[227] The court reasoned that Congress had not intended to change the certification standard when it enacted the Packwood-Magnuson Amendment.[228] Under the Pelly Amendment's certification process, the Secretary would have possessed the discretion to negotiate a whaling accord with Japan. Therefore, according to the court's own reasoning, he also would have had the power to negotiate a whaling accord under the Packwood-Magnuson Amendment.

In addition to the plain language of the amendment, other factors support the Secretary's use of discretion. Congress' failure to provide the Secretary with guidelines on the implementation of certification under the Pelly and Packwood-Magnuson Amendments implies that the Secretary was vested with discretion when certifying countries. Furthermore, the implementation of both the Pelly and Packwood-Magnuson Amendments requires the Secretary to apply his discretion and expertise. For example, under the Pelly Amendment, the Secretary of Commerce is empowered to draft regulations implementing the statute.[229] Similarly, under the Packwood-Magnuson Amendment, the Secretary of State must consult the Secretary of Commerce concerning both the imposition of sanctions[230] and the reallocation of a certified nation's fishing rights within the U.S. 200-mile fishing zone.[231] Moreover, the Packwood-Magnuson Amendment empowers the Secretary to decertify a nation if the underlying rationale justifying certification no longer exists.[232] This broad delegation makes the Secretary the sole judge of when to terminate certification. Since the Secretary possesses the discretion to decertify a nation, impliedly he also should possess the discretion to decide when to certify a nation.

The language concerning the imposition of sanctions is stricter in the Packwood-Magnuson Amendment than it is in the Pelly

226. *Id.*

227. 768 F.2d at 435.

228. *Id.*

229. 22 U.S.C. § 1978(g).

230. 16 U.S.C. § 1821(e)(2)(B).

231. *Id.* § 1821(e)(2)(C)(ii).

232. The statute provides that the Secretary may terminate certification "if the reasons for which the certification was made no longer prevail." 22 U.S.C. § 1978(d).

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Amendment because the Packwood-Magnuson Amendment requires the automatic imposition of sanctions after certification.[233] The court's holding that both amendments are to be governed by a stricter certification standard apparently stems from confusing the certification process with the imposition of sanctions. Although the Packwood-Magnuson Amendment eliminated the decision of whether to impose sanctions, the amendment left untouched the Secretary of Commerce's discretion to decide whether to certify.

C. *Rational Basis Standard of Review*

The court's application of a per se standard in *American Cetacean Society* is not a reasonable interpretation in light of the plain meaning of the amendments and their legislative history. Yet even if it were, the court should have deferred to the agency's interpretation because as long as the agency's decision is reasonable, it must be upheld regardless of whether the court can provide an alternative or better interpretation.[234] In light of the plain language of the amendment and foreign policy concerns, the Secretary reasonably interpreted the Packwood-Magnuson Amendment.

The standard of review imposed by the Court of Appeals for the District of Columbia Circuit in *National Wildlife Federation* is one of sufficient reasonableness.[235] There, the court stated that "if the agency's construction neither contradicts the language of the statute nor frustrates congressional policy, our inquiry is a limited one."[236] The Secretary of Commerce's construction of the Pelly and Packwood-Magnuson Amendments clearly met this standard. The Secretary's interpretation neither contradicted the language of either amendment nor frustrated congressional intent. In enacting the Pelly and Packwood-Magnuson Amendments, Congress intended to protect the whale and other endangered species.[237] The Secretary furthered this objective by

233. *See supra* notes 51-53 and accompanying text.

234. Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984); *see supra* notes 168-70 and accompanying text.

235. 693 F.2d 156, 171 (D.C. Cir. 1982) (stating that "[t]he agency's construction must be upheld if, in light of the appropriate degree of deference, it is 'sufficiently reasonable,' even if it is not 'the only reasonable one or even the reading the court would have reached' on its own") (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)).

236. *Id.*

237. *See supra* notes 41-42 & 50 and accompanying text.

entering into the whaling accord with Japan.[238] Congress nowhere stated that the Secretary must certify a nation violating an IWC quota if the violation is not flagrant. Nor did Congress indicate its willingness to implement the amendments regardless of their potentially damaging effect on foreign policy. In fact, by imposing a per se standard, the court may be frustrating congressional intent.

Responsibility for any potential negative effect of the U.S.-Japanese whaling accord on the IWC would lie with Congress for its imprecision in drafting the amendment. The court incorrectly placed the burden of proving Congress' delegation of power on the Secretary. Because courts often defer to the expertise of administrative agencies, Congress should be more explicit when delegating authority. If Congress is silent on a particular instance of delegation to the executive branch, the courts should interpret this silence as congressional intent to confer discretion on the agency to implement the statute's mandate.[239]

V. Recommendations to Congress

The courts' per se rule that certification automatically follows either a violation of IWC regulations or other actions that diminish the effectiveness of the regulations has the advantage of easy applicability. Congress, however, did not mandate certification in both situations but instead stated that the Secretary need certify only after finding diminished effectiveness. A violation of an IWC regulation is merely a factor for the Secretary to consider when determining whether a nation's whaling will diminish the effectiveness of the ICRW.

Congress could strengthen the Packwood-Magnuson Amendment and legitimate the holding of *American Cetacean Society* by revising the Packwood-Magnuson Amendment to provide that a violation of an IWC quota will result in automatic certification.

238. In his affidavit for the district court case, Secretary of Commerce Baldrige claimed that he believed that the U.S.-Japanese whaling accord would, in the long run, help preserve the whale: "[I]n my judgment, the exchange of letters reflects the best way to achieve Japanese compliance with the Schedule to the International Convention for the Regulation of Whaling."). Baldrige Affidavit, *supra* note 130, at 1.

239. In CIA v. Sims, 105 S. Ct. 1881 (1985), the Supreme Court admonished Congress to draft legislation more precisely: "Congress certainly is capable of drafting legislation that narrows the category of protected sources of information." *Id.* at 1888 n.13. The same onus to draft legislation carefully should be placed on Congress in this case, particularly because of the foreign policy implications involved.

Congress also could include an emergency escape clause permitting the Secretary to avoid certification in extraordinary situations and requiring him to report to Congress within sixty days when he decides not to certify. This modification would allow the Secretary to retain some degree of discretion while requiring him to provide a reasonable explanation of why he believes a particular situation warrants inaction.

Alternatively, Congress could overturn the district and circuit courts' opinions. Congress could accomplish this objective by specifically incorporating the amendments' legislative history into the statutory language. Thus, the amendments would state that only actions which "flaunt" or "flagrantly violate" an international fishery agreement must be certified. If the Secretary determines that a minor violation is acceptable in light of other factors, such as the nation's promise to conduct scientific research for the IWC in the future, he should possess the discretion to decide not to certify.

Congress should allow the Secretary to retain some degree of discretion in deciding whether to certify because the Secretary is the person who has the most expertise in enforcing the amendments effectively. In addition, Congress is incapable of anticipating every scenario in which the certification issue could arise. Congress should thus grant the Secretary discretion to enforce the amendments flexibly in response to the demands of any given situation.

VI. Conclusion

Clearly, the Secretary of Commerce had greater discretion to act under the Pelly and Packwood-Magnuson Amendments than the district court or the court of appeals acknowledged by applying a per se rule. The plain language of the amendments should dictate the degree of secretarial discretion. Congress granted the Secretary discretion to determine whether a nation's whaling in excess of quotas diminishes the effectiveness of the IWC. In addition to the plain language of the amendments, Congress' failure to provide meaningful criteria limiting the Secretary's discretion to certify also dispels the notion that Congress intended a per se rule to apply.

If the Supreme Court determines that the amendments and their legislative history are ambiguous, then the standard of rationality enunciated in *Chevron* and its progeny require that deference should be accorded to the Secretary's interpretation of

the amendments because of the Secretary's expertise in this area and the foreign policy implications involved.[240] The Secretary's determination that a quota violation may not, in a particular instance, diminish the effectiveness of the ICRW, and that certification is therefore not appropriate, is certainly a rational interpretation of the amendments. To hold that the Secretary has no power to determine whether a nation's quota violations diminish the effectiveness of the IWC is to improperly interfere with the Secretary's ability to effectively perform his duties.

Andrew Joseph Siegel

240. *See supra* notes 170-72 and accompanying text.