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International Whaling Commission Regulations and Alaskan Eskimo

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INTERNATIONAL WHALING COMMISSION REGULATIONS AND THE ALASKAN ESKIMO

FEDERAL REGULATIONS–JUSTICIABILITY–INTERNATIONAL WHALING COMMISSION

The United States District Court for the District of Alaska concludes that issuance of regulations by the Secretary of Commerce, so as to comply with amendments to the schedule issued by the International Whaling Commission, is so closely tied to the conduct of U.S. foreign policy that the court lacks the subject matter jurisdiction to decide the issue on its merits. *Hopson v. Kreps*, 462 F. Supp. 1374 (D. Alas. 1979).

In 1978, Eben Hopson, Sr., Lloyd Ahvakana, and Elijah Rock sued individually, and on behalf of other Eskimo who were allegedly dependent upon the bowhead whale for subsistence, in the United States District Court for the District of Alaska. The suit was in response to a change in the federal regulations[1] limiting the number of bowhead whale which could be taken by the Eskimo. This change was mandated by a schedule change of the International Whaling Commission (IWC), to which the United States is bound by international treaty[2] unless objection is made by the United States government within 90 days.[3] In this case there was no objection. The suit alleged that the regulations[4] were not valid, because the IWC was not given the jurisdiction to regulate the aboriginal taking of whales under the 1946 Convention.[5] The plaintiffs further alleged that the U.S. had violated its trust relationship with the Eskimo by issuing the regulations,[6] and that the regulations[7] did not comply with the Marine Mammal Protection Act[8] and the Endangered Species Act.[9] The cause before the court arose as a result of cross-motions for partial summary judgment, filed by both parties, but going only to the validity of the regulations[10] and the IWC schedule.

1. 43 Fed. Reg. 43,309 (1978) (to be codified in 50 C.F.R. § 230).
2. International Convention for the Regulation of Whaling, 62 Stat. 1716 (1948).
3. *Id.* at 1719.
4. *Supra* note 1.
5. 62 Stat. 1716 (1948).
6. *Supra* note 1.
7. *Supra* note 1.
8. 16 U.S.C. § § 1361-1407 (1976).
9. 16 U.S.C. § § 1531-1543 (1976).
10. *Supra* note 1.

BACKGROUND

Although the bowhead has been hunted for centuries by the Eskimo, the numbers taken by the Eskimo are miniscule when compared to the numbers that have been hunted worldwide for commercial, non-subsistence purposes. Commercial pelagic whaling began in the 15th century as the Basques ventured increasingly farther from shore with an ever increasingly sophisticated technology.[11] By the 17th century, Holland dominated the industry, with the bowhead, or right whale, the principal catch.[12] In the decades and centuries thereafter, technologies continued to improve and demand continued to increase as uses for the whale expanded. As one species or geographic region was economically depleted—the number of whale becoming so few they could no longer economically be hunted—a new technology was employed or a new species or region exploited.[13] The bowhead, in fact, was so exploited that it was economically and biologically depleted by the early years of the 20th century, causing the commercial hunting of the bowhead to cease.[14] It remains today as the most endangered species of whale, although all species have likewise been severely exploited and to some extent depleted.[15]

It was this depletion of the whale population that gradually brought about international concern and, eventually, action to regulate the hunting of whale. It is interesting to note, however, that at least initially, this international concern appeared to be less for the plight of the whale than for the whaling industry, which appeared to be in trouble without some international "control."[16]

The first international effort to deal with the problem was the 1931 Convention for the Regulation of Whaling, which met in Geneva. The result was an agreement signed by 28 nations, only some of which subsequently ratified it. The United States ratified the pact in 1932.[17] Although the agreement did prohibit the taking of right whales—most probably including the bowhead, which has been classified as a right whale—it really "did little more than rally the support of nations to the cause of conservation and in that way

11. Scarff, *The International Management of Whales, Dolphins, and Porpoises*, 6 ECOLOGY L. Q. 326, 344 (1977).
12. *Id.* Also note that the "bowhead" and the "right whale" appear to be different names for the same species, at least within Arctic waters.
13. *Id.* at 345, 346.
14. *Id.* at 400.
15. *Id.* at 400.
16. *Id.* at 347-50.
17. 49 Stat. 3079 (1931).

started the proverbial ball on its journey."[18] It was to be a long journey.

Further conferences took place in 1937 and 1938, and according to one authority,[19] the significance of the 1938 conference was that it represented "a great advance to the cause of conservation both in the additional protection given to whales and in the increase of the number of nations that have given their support to the cause." World War II, however, forced a cessation both in whaling and in international concern for the whale.

The next conference was not held until 1944 and essentially reaffirmed the 1937 and 1938 conferences.[20] As were the earlier conferences, the 1944 meeting was well-intentioned but tragically overoptimistic. As a result, the measures adopted were "grossly inadequate to accomplish their goal of conservation."[21]

In 1946 the International Convention for the Regulation of Whaling (the 1946 Convention) was convened by the United States in Washington, D.C. This conference produced an agreement, subsequently ratified by the United States,[22] which went further than its predecessors toward promoting a viable system for conservation. This agreement created the International Whaling Commission (IWC), which was to be comprised of one member from each contracting government.[23] The IWC was authorized to create committees as necessary,[24] to organize studies, to collect statistical information on whale stocks,[25] and to amend the schedules[26] by adopting further regulations necessary to promote the conservation of whale resources. The schedules would name protected species and designate open and closed seasons, areas of sanctuary, size limits, and method and gear permissible for whaling.[27] The agreement also provided that schedule changes would become effective and would be binding within 90 days of the change, unless a contracting government noti-

18. Leonard, *Recent Negotiations Toward the International Regulation of Whaling,* 35 AM. J. INT'L L. 90, 100 (1941).

19. *Id.* at 105.

20. *Supra* note 11, at 351.

21. *Supra* note 11, at 352.

22. 62 Stat. 1716 (1948).

23. *Id.* at 1717. Note that there were originally 15 contracting governments when the agreement was signed in 1946, and today the number of contracting governments stands at 17.

24. *Id.* at 1717. The language of Article III states that the IWC can create "such committees as it considers desirable to perform such functions as it may authorize."

25. *Id.* at 1718.

26. Note that the schedules are merely the regulations created by the IWC, with which the contracting governments must comply unless they object within 90 days.

27. 62 Stat. 1716, 1718 (1948).

fied the IWC of its objection, in which case the schedule change would have no binding effect upon that government. Additionally, each government was to take measures necessary to insure both the application of those provisions to which they had not objected, and the punishment for infractions thereunder.[28]

The next significant event in the history of commercial whaling occurred in 1970 when the U.S. added the eight largest species of whale to its endangered species list.[29] At this juncture the U.S. began to take a leadership role in whale conservation. At the 1972 United Nations Conference on the Environment, the U.S. argued for a 10-year moratorium on all commercial whaling; the conference passed a resolution calling for the IWC to be strengthened, and for the IWC to approve the 10-year moratorium.[30] At subsequent meetings of the IWC, the U.S. continued to argue for the moratorium. The significant turning point came at the 1974 and 1975 meetings, when an Australian compromise proposal on the moratorium concept was passed by the IWC.[31] The compromise required that all whale be placed in one of three categories: sustained management stocks, initial management stocks, and protection stocks.[32] The protection stock was not to be hunted commerically at all, and it was to be the decision of the Scientific Committee of the IWC, solely on the basis of scientific data, which whale species belonged in which category. Hence, the Scientific Committee assumed a role of great importance. Additionally, due in large part to U.S. influence, the IWC became a more effective force in promoting whale conservation; since 1973 no member has objected to any schedule change established by the IWC.[33]

THE IWC BAN ON THE ABORIGINAL TAKING OF WHALE

Prior to 1977, the IWC had never sought to regulate the aboriginal taking of whale, including the bowhead which had been banned to commercial hunting since the early conferences. The number of bow-

28. *Id.* at 1720. In the past the effectiveness of the IWC has been mixed, partly because of constant objections from certain whaling nations, such as Japan, the Soviet Union, and the Netherlands, which have rendered schedule changes inapplicable to those nations. Also, certain member nations have contested vigorously such issues as the presence of international observers on whaling vessels, and national quotas.

29. 50 C.F.R. §17 app. (1971). The species added were the Bowhead whale, the Right whale, the Blue whale, the Sperm whale, the Finback whale, the Sei whale, the Humpback whale, and the Grey whale.

30. U.N. Conference on the Human Environment (Stockholm), U.N. Doc. A/Conf. 48/14, at 23 (June 5-16, 1972).

31. *Supra* note 11, at 369.

32. *Supra* note 11, at 369.

33. Hopson v. Kreps, 462 F. Supp. 1374, 1379 (D. Alas. 1979).

head taken by the Eskimo was minimal and it was realized that the bowhead were critically important to the Eskimo for subsistence. The whale hunt has always been a significant element of Eskimo culture. In addition, the whale has been important to the economic and political structure of the Eskimo village. If the Eskimo were not permitted to hunt the whale, they would not have the meat they use for subsistence, or the other whale products, including bones which are used to produce artwork that is sold to provide substantial income. The Eskimo might thus be forced to depend to an even greater extent upon the outside world and the welfare state.[34]

At the June 1977 meeting of the Scientific Committee of the IWC, the committee estimated that the population of the bowhead whale in the Bering Sea to be approximately 1000 whales, the upper limit being no more than 1600 whales.[35] This was compared with the 11,700 that the committee estimated to be the 1850 population,[36] prior to the era of commercial bowhead exploitation. The committee also considered the fact that the Eskimo during the 1976 season had landed 48 bowhead whale, with eight others lost or killed, and 35 others struck but lost, and that during the spring hunt alone, 26 whale had been landed, two killed but lost, and 77 struck but lost.[37] The significance of these figures became apparent when compared with the average take of bowhead by the Eskimo in the previous years, which for 1965 to 1975 averaged 21.5 bowhead per year.[38] It therefore appeared to the committee that the increased take by the Eskimo, given the small estimate of the stock size, was a threat to the existence of the species, and it recommended to the IWC that the native exemption, present since the first international agreement in 1931, be removed. The IWC adopted the proposal by a vote of 17 to 0, the U.S. abstaining.[39]

The action of the IWC was to cover the remainder of the 1977 season, thus preventing the Eskimo from participating in the fall hunt. The U.S. had 90 days in which to decide whether or not it would object. Prior to its decision, a Final Environmental Impact Statement (FEIS),[40] was prepared, after and as a result of numerous public hearings and much research. The FEIS pointed out the prob-

34. U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, INTERNATIONAL WHALING COMMISSION'S DELETION OF NATIVE EXEMPTION FOR THE SUBSISTENCE HARVEST OF BOWHEAD WHALES 66-73 (1977).
35. Hopson v. Kreps, 462 F. Supp. 1374, 1377 n. 5 (D. Alas. 1979).
36. *Id.* at 1377.
37. *Supra* note 34, at 245.
38. *Supra* note 34, at 241-42.
39. Hopson v. Kreps, 462 F. Supp. 1374, 1377 (D. Alas. 1979).
40. *Supra* note 34.

able results and problems which would arise should the U.S. accept the IWC action or object to the action. The factors considered included the importance of the whale to the Eskimo politically, economically, and socially, the effect on other species, both marine and land, which would be hunted to replace the whale, the effect the decision would have on the IWC and the U.S. role in the IWC, and the effect on U.S. foreign policy in other areas of conservation. According to the FEIS,[41] had the U.S. objected to the IWC proposal, the following might have resulted:

A. The U.S. role within the IWC could have been weakened, as the action by the U.S. would appear cynical and politically motivated.
B. Based on internal political considerations, Japan and the Soviet Union could have objected to crucial quotas issued by the IWC, long sought after and promoted by the U.S.
C. The objections could have led to a disintegration of the IWC.
D. Efforts to expand IWC membership could have been hurt.
E. The credibility of President Carter could have been hurt.
F. U.S. efforts for an international convention for the protection of marine mammals could have been adversely affected.
G. The decision could have affected negatively other worldwide conservation efforts by the U.S.

On the basis of these findings and other considerations, on October 20, 1977, just four days before the expiration of the 90 day deadline, Secretary of State Cyrus Vance announced that no objection would be filed.

ESKIMO SUIT TO COMPEL U.S. OBJECTION

The Eskimo promptly filed suit in the United States District Court for the District of Columbia to compel the Secretary to file an immediate objection with the IWC, contending that by not objecting, the United States' trust obligation to the Eskimo was violated. Judge Sirica, on the basis of the above contention, and upon the assumption that the objection would not harm the United States because it could be withdrawn, issued a temporary restraining order forcing Secretary Vance to file an immediate objection with the IWC. The Secretary thereupon appealed the order to the Court of Appeals for the District of Columbia Circuit.

The first issue which the court in *Adams v. Vance*[42] decided was

41. *Supra* note 34, at 76-80.
42. 570 F.2d 950 (D.C. Cir. 1978).

whether it had jurisdiction to hear the appeal of a temporary restraining order. Normally, Rule 65(b) of the Federal Rules of Civil Procedure[43] would prevent such an appeal. The court reasoned, however, that under the circumstances, the district court order had the effect of a mandatory injunction, as the order would not "merely preserve the status quo pending further proceedings, but commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena."[44] The court therefore concluded that it had the requisite jurisdiction.

The justiciability of the issue was next considered, with the Secretary of State contending that it was a non-justiciable political question. Plaintiffs claimed that the inaction of Vance, in not objecting to the IWC ban, violated a congressional mandate, and that therefore there existed a justiciable controversy. The court, however, stated that it was unnecessary to decide this because, even if it concluded that the issue was justiciable, plaintiffs had not maintained their requisite burden in making "an exceptionally strong showing on the relevant factors."[45] Citing *Samson v. Murray*[46] the court concluded that the district court was "quite wrong in routinely applying to this case the traditional standards governing more orthodox 'stays'," because the subject matter represented a deep intrusion into "the core concerns of the executive branch."[47] Applying the test set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*,[48] the court concluded that to so intrude into the concerns of the executive branch, plaintiffs must first make a strong showing of necessity, which they failed to do in this case. The court went on to explain that there had been no objection to an IWC schedule change since 1973, and for the U.S. to object now would set a bad precedent and deeply undermine the U.S. position in the area of whale conservation. Therefore, it was "clear error" for the district court to find that the objection would not substantially endanger the interests of the U.S.[49] Furthermore, as the order applied only to the fall 1977 hunt, the door would be left open for an objection the following year should the IWC decide to extend the prohibition.[50]

43. FED. R. CIV. P. 65(b).
44. Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1978).
45. *Id.* at 956.
46. 415 U.S. 61, 83-84 (1974).
47. Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978).
48. 559 F.2d 841, 843 (D.C. Cir. 1977).
49. Adams v. Vance, 570 F.2d 950, 957 (D.C. Cir. 1978).
50. *Id.*

ESKIMO SUIT TO PREVENT ENFORCEMENT OF THE REGULATIONS

Subsequently, at the December 1977 meeting of the IWC, the complete prohibition was lifted and a new schedule change was made, allowing the Eskimo to land 12 whale, or strike 18, whichever came first.[51] Later, in June of 1978, the IWC increased the quota to 14 whales landed or 20 struck,[52] and in December of 1978, raised it again to 18 whales landed or 27 struck.[53]

Although the IWC had modified their original prohibition, many of the Eskimo apparently still believed that the regulations[54] were unfair and a threat to their cultural existence. Hence, suit was filed by Eben Hopson, Sr., Lloyd Ahvakana, and Elijah Rock against the U.S. and others, specifically Secretary of Commerce Juanita Kreps, and those responsible for the issuance and enforcement of the regulations in line with the schedule changes of the IWC to which the U.S. had not objected. Plaintiffs' principal contention was that the 1946 Convention did not authorize the IWC to regulate or control the aboriginal taking of whale. Thus, they argued, the schedule change and the regulations[55] enforcing the schedule change were invalid. Plaintiffs also raised two other issues which were not before the court in this case.

The claim that the 1946 Convention did not apply to aboriginal whaling centered on the construction of the term "whale catcher," defined in Article II of the 1946 Convention as "a ship used for the purpose of hunting, taking, towing, holding on to, or scouting for whales."[56] Plaintiffs asserted that the small Eskimo vessel, the *umiak,* was not encompassed by the above definition and was never intended to be.

Prior to addressing this contention, the court had to consider the issue raised by defendants that critical foreign policy considerations were present which rendered the issue a non-justiciable political question. The court, in analyzing the question, examined first the subject matter to determine the extent to which U.S. foreign policy played a role and would be affected by any decision. Secondly the court looked to whether the existence of foreign policy elements would necessarily render the issue non-justiciable and beyond the subject matter jurisdiction of the court.

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51. 43 Fed. Reg. 13,883 (1978) *as amended by* 43 Fed. Reg. 22,213 (1978) (to be codified in 50 C.F.R. § 230).
52. 43 Fed. Reg. 43,309 (1978) (to be codified in 50 C.F.R. § 230).
53. *Supra* note 33, at 1377.
54. 43 Fed. Reg. 43,309 (1978) (to be codified in 50 C.F.R. § 230).
55. *Id.*
56. 62 Stat. 1716, 1717 (1948).

In considering the extent to which U.S. foreign policy played a role in the decision not to object to the schedule change, and the extent to which U.S. foreign policy could be affected by an adverse decision of the court, the district court examined a number of factors. In its opinion the history of the international effort to control whaling was reviewed, as well as the U.S. role in that history, the scientific data that led the IWC to ban bowhead hunting by the Eskimo, the FEIS[57] prepared prior to the decision not to object, the reasoning of the resulting case of *Adams v. Vance,*[58] and finally, affidavits submitted by present and former U.S. officials and the statement of a foreign diplomat.

Most of these factors have been previously explored here, with the exceptions of the affidavits and the statement of the diplomat. The affidavit of Mr. Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries, and the U.S. representative to the IWC, was quoted at great length in the case. According to Negroponte, several problems could result if U.S. courts were to conclude that the 1946 Convention did not apply to aboriginal whaling:

A. The damage to the bowhead whale stock could be irreparable and the U.S. might be blamed by other nations for the decline.[59]

B. United States efforts to develop an effective worldwide program for whale conservation could be damaged. No member of the IWC has ever challenged the applicability of the 1946 Convention to aboriginal whaling, including the U.S., and for the U.S., when confronted with internal political opposition, to give an entirely new interpretation to the convention, would be viewed as an act of hypocrisy.[60]

C. The U.S. role in whale conservation has resulted in the expansion of IWC membership and a decline in objections to IWC proposals. In fact no nation has objected since 1973, even though nations such as Japan and the Soviet Union have experienced socio-economic dislocation as a result of the IWC actions.[61] But the U.S. ability to effectively convince other nations to take measures to conserve the whale could be undermined, as the U.S. action might be viewed as precedent for other nations to also object to IWC regulations and quotas. The objections could also seriously harm the IWC program for conservation.[62]

Negroponte added that he did not believe that the decision would be

57. *Supra* note 34.
58. 570 F.2d 950 (D.C. Cir. 1978).
59. Hopson v. Kreps 462 F. Supp. 1374, 1378 (D. Alas. 1979).
60. *Id.* at 1378-79.
61. *Id.* at 1379.
62. *Id.*

viewed differently by other nations because it emanated from the United States judiciary, as opposed to the executive branch or Congress.[63]

The court also examined a statement by the Danish Commissioner to the IWC made at the June 1977 meeting, and on the basis of that statement concluded that a failure by the U.S. to uphold the IWC schedule change would indeed have serious foreign policy implications not limited to whale conservation, but in other areas of fishery management as well. The court therefore held that the defendants had "established by substantial evidence that the issue presented to this court is directly linked to an important United States position in foreign relations, and that an order of this court on that issue would embarrass, if not destroy that position."[64]

The district court then turned to the analysis of the foreign relations political question: whether the issue, given its close ties to U.S. foreign policy considerations, was a political question and hence unreviewable by the judiciary. It reviewed a number of cases dealing with the political question.

Jensen v. National Marine Fisheries Service (NOAA)[65] was an appeal of an order of the district court dismissing the complaint for lack of jurisdiction. On facts similar to those in *Hopson,* owners and operators of Pacific Ocean fishing boats had sought a declaratory judgment against the enforcement of a regulation of the International Pacific Halibut Commission (IPHC) and the Northern Pacific Halibut Act of 1937.[66] Plaintiffs had argued that the act was not intended to apply to the incidental taking of halibut by fishermen attempting to catch other species, and that under both the Administrative Procedure Act[67] and the Tucker Act[68] the courts were given jurisdiction to decide the issue, since the regulations by the Secretary constituted an "agency" action. The plaintiffs had also contended that Congress had unconstitutionally delegated legislative power to the President when it passed the Northern Pacific Halibut Act, because no guidelines were given in the legislation to the President for approving the IPHC Regulations.

The court in *Jensen,* citing *Chicago & Southern Air Lines, Inc. v.*

63. *Id.* Plaintiffs, however, pointed to the affidavit of Patsy Mink, former Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, in which Ms. Mink stated that it was her belief that the international community would distinguish between a decision of the judiciary and of the other branches of government.

64. *Id.* at 1381.

65. 512 F.2d 1189 (9th Cir. 1975).

66. 16 U.S.C. §§772(b), (d), (e) (1976).

67. 5 U.S.C. §§702, 704 (1976).

68. 28 U.S.C. §1346 (1976).

Waterman Steamship Corp.,[69] held that a Presidential action concerning foreign affairs is committed to the President, and therefore the Administrative Procedure Act is inapplicable, because such a question is political in nature and not a justiciable controversy within the meaning of Article III of the Constitution.[70] Additionally, the court held that plaintiff's second issue, as to the unconstitutionality of the congressional delegation of power to the President, was equally nonjusticiable, and since plaintiffs suffered no injury, there was no case or controversy. The court stated, however, that even had the justiciability issue been resolved in plaintiff's favor, it would still have found the congressional delegation of power to the President proper, since the President is given a great deal of discretion in the area of international affairs.[71]

Thus the district court in *Hopson* analogized the *Jensen* reasoning to the non-justiciable political question analysis before it. It continued the analysis, however, looking to language contained within two other cases, *Oetjen v. Central Leather Co.*[72] and *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*[73]

The court cited *Oetjen* for the proposition that "[t]he nonjusticiability of 'political questions' is a constitutional principle which states that 'the conduct of foreign relations of our government is committed by the Constitution to the executive and the legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.' "[74]

Chicago & Southern was quoted for its statement that "the nature of executive decisions as to foreign policy is political, not judicial" as such decisions are "delicate, complex, and involve large elements of prophecy . . . of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[75]

Applying the *Chicago & Southern* reasoning to the present case, the court concluded that the decision of the executive not to object to the IWC ban on aboriginal hunting did involve a large measure of prophecy and that only the executive had the resources to "deter-

69. 333 U.S. 103, 111 (1948).
70. 512 F.2d 1189, 1191 (9th Cir. 1975).
71. *Id.* at 1191.
72. 246 U.S. 297 (1918).
73. 333 U.S. 103, 111 (1948).
74. Hopson v. Kreps, 462 F. Supp. 1374, 1381 (D. Alas. 1979) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).
75. 462 F. Supp. 1374, 1382 (D. Alas. 1979).

mine the relationship between the bowhead whale regulations and other aspects of American foreign policy."[76]

Finally, the court cited the discussion of the political question in *Baker v. Carr*.[77] In *Baker v. Carr*, the Supreme Court reversed an order of a lower court which had dismissed an action on the grounds that the issue in the case constituted a non-justiciable political question. In reversing, the Supreme Court cited a checklist of factors which independently would indicate the presence of a non-justiciable political question if appearing in a case. The Supreme Court concluded in *Baker v. Carr* that none of the factors was present and that therefore the action did not involve a political question.

The court in *Hopson*, however, concluded that nearly all of the factors in the *Baker* checklist were present and went on to state that to enjoin the Secretary from enforcing the IWC schedule change would "embarrass U.S. foreign policy and confuse even sophisticated observers of the U.S. government."[78] Quoting Jaffe,[79] the court held that this was one of those issues "so closely related to a complex of decisions not within the court's jurisdiction that the resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex."[80]

The court expressed sensitivity to the plight of the Eskimo, but pointed out that the government's policy of working within the system of the IWC had already been of benefit, the IWC having increased its quotas yearly since the original prohibition order.

The district court therefore held "that the regulations promulgated to enforce the Schedule of the International Whaling Commission are so directly linked to the conduct of U.S. foreign relations that this court lacks the subject matter jurisdiction to review their validity."[81] Thus the cross-motions for summary judgment were dismissed without a determination of the merits.

CONCLUSION

In deciding as it did, the court in *Hopson* upheld the power of the Secretary of State, a member of the executive branch, to render a decision which he, in his sole discretion, believed to be in the best interest of the U.S. government. The court's decision was founded on the well-established principle that the power to determine foreign

76. *Id.*
77. 369 U.S. 186, 217 (1962).
78. 462 F. Supp. 1374, 1382 (D. Alas. 1979).
79. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 492 (1965).
80. 462 F. Supp. 1374, 1382-83 (D. Alas. 1979).
81. 462 F. Supp. 1374, 1383 (D. Alas. 1979).

policy is solely within the legislative and executive branches, and hence any such consideration constitutes a political question and is therefore non-justiciable.

The court was undoubtedly correct in holding that it lacked the subject matter jurisdiction to decide the case on its merits, though one is left with the clear impression that had it concluded that the issue was justiciable, it would have granted summary judgment for the defendants. However tragic the effect of the ban on the Eskimo and his culture, extinction of the bowhead would make permanent what a ban makes only temporary. Additionally, it is apparent that had the U.S. been ordered to disobey the IWC schedule, the effect on U.S. foreign policy would have been severe in that many of the truly positive gains of this decade in the area of whale conservation would have been negated, and many species of whale could once again be pushed to the brink of extinction.

The United States, by working within the system of the IWC and by not objecting to the schedule change concerning the bowhead, has not only strengthened the IWC, but has increased its own credibility within the IWC. Since the U.S. decision not to object was made, the IWC ban has been steadily liberalized, not only because of that determination, but also because the Scientific Committee has revised its estimates of the bowhead population upward from the 1977 estimate of 1000[82] to the 1979 estimate of 2264.[83] As a result, the 1979 quota, as mentioned previously, was increased to allow 18 bowhead landed, or 27 struck, whichever occurs first.[84]

Even at its present numbers, there is certainly no guarantee that the bowhead population will win its fight against extinction, but the

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82. *Id.* at 1377 n. 5.

83. Conversation with Jan Barnes, Marine Resources Officer, Office of the Deputy Assistant Secretary of State for Oceans and Fisheries, and a member of the U.S. delegation to the IWC meeting in London, July 9-13, 1979 (July 25, 1979).

The International Whaling Commission has concluded its 1980 meeting, setting quota and policy for 1980. At that meeting the IWC received a report of the Scientific Committee which stated, as to the bowhead, that no further information had been obtained on the size of the bowhead stock, due to inclement weather during the spring of 1979. The committee was therefore forced to rely on the 1979 estimate of 2264. The committee apparently recommended, from a biological standpoint, that no bowhead whale be hunted in 1980. The IWC, however, evidently taking into account other factors, set the 1980 quota for the bowhead at 18 whale struck or 26 landed, whichever occurs first, a decline of 1 from the 1979 quota. *Id.* The Scientific Committee was concerned that a great number of the bowhead taken are immature 2-3 year old whales, due in part to the primitive technology of the Eskimo. Its concern was compounded by the fact that all recent counts of the bowhead have indicated the existence of very few calves. The committee views these factors as indicating that the bowhead stock will inevitably decrease in size in the years to come as the older whale die and fewer whale are born to replace them. *Id.*

84. Hopson v. Kreps, 462 F. Supp. 1374, 1377 (D. Alas. 1979).

actions of the U.S. and the IWC in monitoring the species and controlling the take, even by the Eskimo, will certainly help the bowhead's fight. Though the quota may not be great enough to satisfy many of today's Eskimo, it will insure that tomorrow's Eskimo will have a bowhead to hunt and a culture and a lifestyle in which the bowhead will exist to fulfill its critical role.

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