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Construing the Pelly and Packwood-Magnuson Amendments: The D.C. Circuit Court Harpoons Executive Discretion—American Cetacean Society v. Baldridge, 768 F.2d 425 (D.C. Cir. 1985), cert. granted sub nom. Japan Whaling Association v. American Cetacean Society, 106 S. Ct. 787 (1986) (Nos. 85-954, 955)

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CONSTRUING THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS: THE D.C. CIRCUIT COURT HARPOONS EXECUTIVE DISCRETION—*American Cetacean Society v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom. Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

The United States has been in the forefront of the movement to protect whales from commercial exploitation for over twenty years. Since the late 1960's, government agencies and private organizations have worked together to end commercial whaling. But, in 1984, the Department of Commerce and the pro-whaling Japanese government concluded an agreement[1] that allows Japanese whalers to exceed the sperm whale quota established by the International Whaling Commission (IWC) by a limited amount for four years without sanctions by the United States in exchange for an agreement to honor the International Whaling Commission's commercial moratorium by 1987.[2] The agreement has angered members of Congress and antiwhaling organizations, and has created a controversy that may impair United States-Japanese relations.

Before the United States and Japan concluded the agreement, conservation organizations filed suit in federal court against the Secretaries of Commerce and State.[3] They sought an injunction requiring the Secretary of

1. An exchange of letters between the Secretary of Commerce and the Charge d'Affaires ad interim of Japan confirmed the agreement that, inter alia, specified quotas for commercial whaling for the North Pacific sperm whale stock (western division). Letter from Secretary Baldrige to Charge d'Affaires Murazumi and Summary of Discussions (November 13, 1984) (confirming the whaling agreement) (copy on file with the *Washington Law Review*) [hereinafter cited as Baldrige Letter]; Letter from Charge d'Affaires Murazumi to Secretary Baldrige (November 13, 1984) (confirming the whaling agreement) (copy on file with the *Washington Law Review*).

2. The agreement allows the Japanese to take 400 sperm whales per year for the 1984 and 1985 coastal seasons, and 200 whales per year for the 1986 and 1987 seasons. Baldrige Letter (Summary of Discussions), *supra* note 1, at 2–3. The International Whaling Commission (IWC), *see infra* note 10, had established a quota of zero for the season. *See infra* note 29.

Another provision of the agreement addressed Japan's objection to an indefinite commercial whaling moratorium beginning in the 1986 season. *See* INTERNATIONAL WHALING COMM'N, 33D REPORT 21 (1983). For a discussion of the commercial moratorium, see *infra* note 32. The agreement specified that if Japan withdrew its objection to the moratorium by April 1, 1985, limited its whale harvest for the 1986 and 1987 whaling seasons to the quotas set out in the agreement, and ceased all commercial whaling in subsequent seasons pursuant to the moratorium, the United States would not certify Japan for its 1986 and 1987 whaling. Baldrige Letter (Summary of Discussions), *supra* note 1, at 2–3. Japan withdrew its objection to the commercial whaling moratorium on April 5, 1985, but the withdrawal is effective only if the *American Cetacean* decision, American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398 (D.D.C.), *aff'd on other grounds*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955), is reversed on appeal. Wash. Post, Apr. 6, 1985, at A1, col. 6.

3. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398 (D.D.C.), *aff'd on other*

Commerce to certify the Japanese under the Pelly Amendment to the Fisherman's Protective Act[4] and the Packwood-Magnuson Amendment to the Magnuson Fisheries Conservation and Management Act.[5] They also asked the court to order the Secretary of State to impose sanctions on Japan under the Packwood-Magnuson Amendment. Finally, the plaintiffs sought a permanent injunction preventing the Secretary of Commerce from failing to certify Japan for future violations of IWC whaling quotas.[6]

The district court granted summary judgment for the plaintiffs. The court declared that the Secretary of Commerce has no discretion to refuse certifying the Japanese for exceeding the IWC sperm whaling quota. The court permanently enjoined the Secretary from agreeing not to certify, and from failing to certify, any Japanese whaling activities exceeding IWC quotas. The court ordered the Secretary to certify the Japanese sperm whaling under both the Pelly and the Packwood-Magnuson Amendments.[7] On appeal, the District of Columbia Circuit Court of Appeals affirmed the district court decision on slightly different grounds.[8] The Supreme Court granted certiorari and will hear the case during the 1985–86 term.[9]

A careful examination of the whaling agreement, the Pelly and the Packwood-Magnuson Amendments, and the circuit court decision suggests that the Supreme Court should reverse the appellate court's decision because the agreement is consistent with the amendments and the Secretary of Commerce had discretion not to certify the Japanese in this case.

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grounds, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955). The complaint named the Secretaries of Commerce and State as defendants because they are crucial parties to the determination of violations and sanctions under the legislative scheme. *See infra* notes 5–6 and accompanying text.

4. Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified at 22 U.S.C. § 1978 (1982)). Certification of a country by the Secretary of Commerce occurs after the Secretary has determined that the whaling activities of the country have diminished the effectiveness of an international conservation program. Certification triggers automatic sanctions under the Packwood-Magnuson Amendment and discretionary sanctions under the Pelly Amendment. *See infra* note 26.

5. Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at 16 U.S.C. § 1821(e)(2) (1982)). The Packwood-Magnuson Amendment requires the Secretary of Commerce to certify foreign fishing operations that "diminish the effectiveness of the International Convention for the Regulation of Whaling." *Id.* 16 U.S.C. § 1821(e)(2)(A)(i). The Pelly Amendment has a similar provision. 22 U.S.C. § 1978(a)(1) (1982).

6. *American Cetacean Soc'y*, 604 F. Supp. at 1401.

7. *Id.* at 1411.

8. American Cetacean Soc'y v. Baldrige, 768 F.2d 426, 428 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

9. Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955) (granting certiorari).

I. BACKGROUND

A. The International Whaling Commission

The controversy between the United States and Japan stems from an IWC quota. The IWC was created to conserve whales for current and future use.[10] Representatives of member nations establish whale catch limits, or quotas, at annual IWC meetings.[11] The quotas are normally based on recommendations by the Scientific Committee of the IWC.[12] The quotas are binding[13] if accepted by a three-fourths majority of the representatives.[14]

The IWC quotas have had only a limited effect on harvest levels. The IWC has no power to impose sanctions for quota violations.[15] More importantly, any member of the IWC may exempt itself from an otherwise binding quota by objecting to the quota within ninety days of its passage.[16] The quota, effective for all nonobjecting members, does not bind the objecting country until the objection is withdrawn.[17]

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10. The International Whaling Commission (IWC) was created by The International Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter cited as Whaling Convention]. The Whaling Convention is a multilateral attempt to balance whaling and conservation interests. The purposes of the Whaling Convention are to conserve whales for future generations, to protect whales from overfishing, to manage whale resources for maximum exploitation without endangerment, and to achieve the optimum level of whale resources without serious disruption of the whaling industry. Whaling Convention, *supra*, Preamble, 62 Stat. at 1716, T.I.A.S. No. 1849 at 2, 161 U.N.T.S. at 74. *See also* Christol, Schmidhauser & Totten, *The Law and the Whale: Current Developments in the International Whaling Controversy*, 8 CASE W. RES. J. INT'L LAW 149, 152 (1976).

11. Whaling Convention, *supra* note 10, art. V, para. 1(e), 62 Stat. at 1718, T.I.A.S. No. 1849 at 4, 161 U.N.T.S. at 80.

12. The Scientific Committee is composed of marine scientists from member nations. Since the early 1970's, the Scientific Committee has performed a crucial role in the determination of stock quotas. The Committee, after intensive analysis of records of whale counts, migration patterns, reproductive capacities, and other factors, recommends a quota based on its best judgment of the needs of the particular whale stock. These recommendations are generally given great weight by IWC commissioners in establishing stock quotas. *See Hearing on the Preparations for the 34th IWC Meeting Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 13–14 (1982) (statement of Mr. John Byrne, Administrator, National Oceanic and Atmospheric Administration; United States Commissioner to the IWC) [hereinafter cited as *Preparations for the 34th IWC*].

13. Whaling Convention, *supra* note 10, art. V, para. 3, 62 Stat. at 1719, T.I.A.S. No. 1849 at 5, 161 U.N.T.S. at 80, 82.

14. *Id.*, art. III, para. 2, 62 Stat. at 1717, T.I.A.S. No. 1849 at 3, 161 U.N.T.S. at 78.

15. *Id.*, art. IX, paras. 1, 3, 62 Stat. at 1720, T.I.A.S. No. 1849 at 6, 161 U.N.T.S. at 84. The Whaling Convention assigns responsibility for imposing sanctions for infractions to the member government under whose jurisdiction the infraction occurred.

16. *Id.*, art. V, para. 3, 62 Stat. at 1719, T.I.A.S. No. 1849 at 5, 161 U.N.T.S. at 80, 82.

17. *Id.* Technically, a state that has objected to a quota does not then "violate" it when the state exceeds it. For semantic simplicity, however, this Note will use "violation" to include exceeding a quota after an objection, unless otherwise noted.

For years these limitations on enforcement frustrated the IWC's initial attempts at reducing whale quotas.[18] The limitations have become more significant since the early 1970's as the IWC has begun to focus on conserving and preserving whale stocks through responsible management and restrictions on the whaling industry.[19]

18. Japan and other principal whaling nations persistently resisted conservation efforts within the IWC. Christol, Schmidhauser & Totten, *supra* note 10, at 153. *See also* Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (Part One)*, 6 ECOLOGY L.Q. 323, 358–71 (1977) (brief history of the IWC from 1947–76). In addition, many members of the IWC were represented at the meetings by individuals actively affiliated with the whaling industry. Christol, Schmidhauser & Totten, *supra* note 10, at 154. As a result, the IWC was widely and accurately perceived as a whaling club concerned with allocating the remaining declining stocks of whales among themselves while one species after another became endangered. Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543, 553 (1984).

19. By the early 1970's there was widespread public appreciation that the whaling industry, with the tacit support of the IWC, had been severely overhunting whale populations while showing negligible concern for their survival. Smith, *supra* note 18, at 554. The desperate condition of many whale stocks made it apparent that the IWC could not continue to operate as it had since its inception.

In June 1972, at the United Nations Conference on the Human Environment, 110 nations, including the United States, adopted a resolution calling for improved whale management. The resolution called for an international cooperative effort to strengthen the IWC, increase whale research, and adopt a ten-year whaling moratorium. Report of the United Nations Conference on the Human Environment (Stockholm), A/Conf.48/14/Rev.1 at 12 (June 5–16, 1972) (Recommendation No. 33). The Secretary-General of the United Nations Conference personally presented the resolution to the IWC and rebuked the IWC for its abuse of whale resources. INTERNATIONAL WHALING COMM'N, 24TH REPORT 23–24 (1974).

The IWC rejected the United Nations Conference proposal. Nevertheless, conservationists achieved significant success in whale protection during the early 1970's. Scarff, *supra* note 18, at 368. Changes toward a conservationist policy within the IWC included a gradual shift in IWC membership towards an antiwhaling majority, the emerging significance of the Scientific Committee in the determination of quotas, the start of annual introductions of a resolution calling for a ten-year or indefinite moratorium, and dramatic reductions in whale quotas. *See generally id.* at 323–427.

The United States has played a leading role in conservation efforts within and without the IWC since the early 1970's. Congress has passed several laws to protect whales independently of IWC regulations. The Endangered Species Act of 1969, Pub. L. No. 91–135, §§ 1–5, 83 Stat. 275, (codified as amended in 1973 at 16 U.S.C. §§ 1531–43 (1982)), prohibits all trade in whales with the United States. *See* 16 U.S.C. § 1538(a) (1982). The Marine Mammal Protection Act of 1972, Pub. L. No. 92–522, tit. I, § 101, 86 Stat. 1029 (codified as amended at 16 U.S.C. §§ 1371–77 (1982)), imposes a moratorium on the domestic exploitation of marine mammals. The Pelly Amendment to the Fisherman's Protective Act, 22 U.S.C. § 1978(a)(4) (1982), allows the President to embargo fish-product imports from nations disregarding international whaling conservation programs. *See infra* notes 20–22 and accompanying text; *see also* Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. INT'L L. & POL. 211, 225–33 (1975).

Furthermore, since 1971 Congress annually has passed resolutions supporting a complete commercial whaling moratorium. *See, e.g.*, S.J. Res. 115, 92d Cong., 1st Sess., 117 CONG. REC. 22,668–69 (1971). *See also* H.R. Con. Res. 387, 92d Cong., 1st Sess., 117 CONG. REC. 38,536–40 (1971).

B. United States Domestic Legislation: Teeth for the IWC

Congress passed the Pelly Amendment to the Fisherman Protective Act in the early 1970's.[20] The amendment states that the Secretary of Commerce shall "certify" to the President any country conducting fishing operations that "diminish the effectiveness" of an international fisheries conservation program.[21] The President then has sixty days in which to decide whether to impose sanctions on the offending country.[22]

The Pelly Amendment provided the IWC with teeth to enforce its resolutions, albeit indirectly and at the discretion of the United States government. The Pelly Amendment diminished abusive whaling practices and encouraged whaling nations to join the IWC.[23]

By 1979, however, congressional pressure to modify the Pelly Amendment had grown. The President had never imposed sanctions on certified countries, and this record appeared to encourage whaling nations to disregard the amendment and IWC regulations.[24] The congressional solution was the Packwood-Magnuson Amendment to the Fisheries Conservation and Management Act.[25]

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20. 22 U.S.C. § 1978 (1982). While originally introduced to address a dispute with Denmark over Atlantic salmon fishing, *see infra* note 53 and accompanying text, the amendment's principal utility has been its application to whaling. *See* H.R. REP. No. 1029, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1768, 1770.

21. 22 U.S.C. § 1978(a)(1) (1982).

22. *Id.* § 1978(b). Sanctions under this amendment consist of a prohibition on importation of fish products into the United States from the offending country for as long as the President deems appropriate, and to the extent allowed by the General Agreement on Tariffs and Trade. *Id.* § 1978(a)(3).

23. The first use of the Pelly Amendment was in 1974 after Japan and the Soviet Union exceeded the IWC quota for the 1973 Antarctic minke whale season. *See infra* notes 104–08 and accompanying text. Due to the countries' subsequent conciliatory actions, sanctions were not imposed. *See infra* notes 106, 108. Several years later, numerous nonmember whaling nations were certified under the Pelly Amendment to pressure them to join the IWC. *See infra* note 134.

24. Congress heard testimony that the failure to impose sanctions after certification encouraged nations to view the amendment as a "paper tiger" and to violate IWC resolutions whenever it benefitted them. *Fisheries Conservation and Management Act 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. 327 (1979) (statement of Patricia Forkan, Vice President for Program Coordination for the Humane Society of the United States) [hereinafter cited as *FCMA Oversight Hearings*]. Members of Congress asserted that the Pelly Amendment had been used ineffectively because sanctions were not imposed even under "justifiable circumstances." *Id.* at 323 (statement of Rep. Bonker). The Packwood-Magnuson Amendment was meant to correct this "defect." *Id. See also Hearings on Whaling Policy and International Whaling Commission Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 369 (1979) (statement of Rep. Oberstar) (the only way to stop unregulated killing of whales is to link the Pelly Amendment to fishing privileges in the United States 200-mile fisheries zone) [hereinafter cited as *Whaling Policy and IWC Oversight Hearing*].

25. *See* 125 CONG. REC. 22,083–84 (1979) (statement of Rep. Oberstar). *See also FCMA Oversight*

The Packwood-Magnuson Amendment automatically imposes sanctions on a country once the Secretary of Commerce has certified to the President that the country is diminishing the effectiveness of the Whaling Convention. Certification under Packwood-Magnuson is patterned after certification under the Pelly Amendment.[26] The sanction consists of a reduction of at least fifty percent in the country's catch of fish within the United States fisheries management zone.[27] The President has no discretion to avoid or defer imposing the sanction under this amendment. Congress hoped that the automatic sanction would deter flagrant violations of IWC whaling quotas.[28]

C. *The Present Controversy: Japan's Sperm Whale Catch*

At its 36th meeting in 1984, the IWC affirmed a zero quota for North Pacific sperm whales (western division) for the 1984–85 season.[29] The

Hearings, supra note 24, at 323 (statement of Rep. Bonker).

26. *Compare* 22 U.S.C. § 1978(a)(1) (1982) (Pelly Amendment) *with* 16 U.S.C. § 1821(e)(2) (1982) (Packwood-Magnuson Amendment); *see also* 125 CONG. REC. 22,083 (1979) (statement of Rep. Oberstar); S. REP. No. 72, 96th Cong., 1st Sess. 6 (1979); *FCMA Oversight Hearings, supra* note 24, at 317. Certification follows a finding by the Secretary of Commerce that a state is diminishing the effectiveness of the Whaling Convention or, under the Pelly Amendment, that a country is diminishing the effectiveness of any international fisheries conservation program. *FCMA Oversight Hearings, supra* note 24, at 312.

The Packwood-Magnuson Amendment differs from the Pelly Amendment in several ways. The sanctions under the two amendments differ, *see supra* note 22, *infra* note 27, and are automatic under Packwood-Magnuson but discretionary under Pelly, *see* 125 CONG. REC. 22,083 (1979) (statement of Rep. Breaux). Also, a certification under Packwood-Magnuson is also a certification under Pelly, but the reverse is not necessarily true. The Packwood-Magnuson Amendment states that "[a] certification under this section shall also be deemed a certification for the purposes of [the Pelly Amendment]." 16 U.S.C. § 1821(e)(2)(A)(i) (1982). The Pelly Amendment does not contain corresponding language. *See* 22 U.S.C. § 1978 (1982). Finally, the Packwood-Magnuson Amendment pertains only to acts diminishing the effectiveness of the Whaling Convention, while the Pelly Amendment concerns the diminishing of any international fishery conservation program plus any international program for endangered or threatened species.

27. 16 U.S.C. § 1821(e)(2)(B) (1982). The Secretary of State, after consulting with the Secretary of Commerce, determines the size of the reduction in the fish catch quota.

28. *See* 125 CONG. REC. 22,084 (1979) (statement of Rep. Oberstar). *See also id.* at 21,743 (statement of Sen. Magnuson). Only one certification has occured under either amendment since the Packwood-Magnuson Amendment took effect, *see infra* note 146 and accompanying text, even though the IWC has increasingly passed antiwhaling, preservationist resolutions over the opposition of its now-minority whaling members, and even though more serious violations of quotas and other IWC resolutions have occurred. *See infra* notes 135–48 and accompanying text.

29. The IWC never actually voted for a quota for the season. Instead it relied on an unusual procedure to prohibit sperm whaling. The usual procedure for setting a stock quota begins with a recommendation for a quota by the IWC's Scientific Committee. *See supra* note 12. But at the 1981 IWC meeting, the Committee did not recommend a quota for the North Pacific sperm whale stock because it could not adequately estimate the population of the stock. Rather than setting a quota without a recommendation from the Committee, the IWC passed a resolution stating that "no whales may be

Japanese, however, objected to the quota; under IWC rules they are thus not bound by it.[30] Japan then exceeded the quota during the following whaling season.[31]

When it became apparent that Japan would exceed the sperm whale quota, the United States notified Japan of the possibility of certification and sanctions under the Pelly and the Packwood-Magnuson Amendments. Subsequent negotiations led to an executive agreement that permitted limited harvesting through the 1987 season and required the government of Japan to withdraw its objection to the IWC sperm whale quota and the complete commercial moratorium.[32] The Secretary of Commerce agreed not to certify Japan's sperm whaling if Japan conformed to these provisions even though Japan, in fact, would be exceeding the IWC quota.

II. THE COURT CHALLENGE: *AMERICAN CETACEAN SOCIETY v. BALDRIGE*

Prior to the final agreement, a number of environmental and whale preservation organizations had already challenged the United States-Japanese negotiations. The groups filed a complaint in federal district court to

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taken from th[e] stock until catch limits . . . are established by the Commission." INTERNATIONAL WHALING COMM'N, 33D REPORT 9, table 3 n.1 (1983). This resolution created a zero quota. *Review of the 33d Int'l Whaling Comm'n Meeting Before the Subcomm. on Human Rights and Int'l Org. of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 17 (1981) (statement of Thomas Garrett, Deputy United States Commissioner to the IWC) [hereinafter cited as *Review of the 33d IWC*]. See *infra* notes 114–16 and accompanying text for discussion on the procedure by which the IWC established the sperm whale quota, and the Scientific Committee's opinion that the quota was not needed to protect sperm whales.

At the next meeting, the IWC set a quota of 850 sperm whales to be taken over two years. *Id.* at 24. The quota expired after the 1983–84 season. This left the previous zero quota in effect because the Scientific Committee was once again unable to recommend a quota in 1984. INTERNATIONAL WHALING COMM'N, 35TH REPORT 70 (1985). The Commission did not set a catch limit for the 1984–85 season. The zero quota, therefore, remained effective. *Id.* at 30, table 3 n.1 (1985).

30. Japan objected to the zero quota after the 1981 meeting. INTERNATIONAL WHALING COMM'N, 33D REPORT 9, table 3 n.1 (1983). *See also* Whaling Convention, *supra* note 10, art. V, para. 3, 62 Stat. at 1719, T.I.A.S. No. 1849 at 5, 161 U.N.T.S. at 80, 82. The objection is still in effect. INTERNATIONAL WHALING COMM'N, 35TH REPORT 70 table 3 n.* (1984).

31. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1415 (D.D.C.) (citing plaintiffs' reply memorandum), *aff'd on other grounds*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

32. *See supra* notes 1–2 and accompanying text.

Enacting the complete commercial whaling moratorium was a primary goal of United States whaling policy. *See infra* note 95 and accompanying text. The indefinite commercial moratorium was passed in 1982 by the IWC, and was scheduled to take effect beginning in the 1986 coastal and the 1985/86 pelagic seasons. In 1990 the IWC will assess whether the moratorium should be modified and catch limits reestablished. INTERNATIONAL WHALING COMM'N, 33D REPORT 21 (1983). Achieving full compliance with the moratorium is currently the primary goal of United States whaling policy. The moratorium includes the cessation of sperm whaling.

force the Secretaries of Commerce and State to certify the Japanese and impose sanctions.[33] The district court granted the plaintiffs' prayer for injunction, holding that the Pelly and Packwood-Magnuson Amendments mandate certification of any whaling in excess of IWC quotas.[34]

The decision was affirmed on appeal.[35] In *American Cetacean Society v. Baldrige,* the court of appeals held that the Pelly and Packwood-Magnuson Amendments impose on the Secretary of Commerce a nondiscretionary duty to certify when he determines that the nationals of a state are harvesting whales in excess of an IWC quota.[36] The court principally interpreted the Pelly Amendment certification provision, since the Packwood-Magnuson Amendment borrowed without modification the Pelly certification provision.[37] The court looked to the language and legislative history of the Pelly Amendment and prior related legislation to determine congressional intent regarding the meaning of the controlling phrase, "to diminish the effectiveness" of an international conservation program.[38] The court then examined legislative history subsequent to the passage of the Pelly amendment to discover whether Congress expressed a different intent in the Packwood-Magnuson Amendment.[39]

In its examination of the legislative history of the Pelly Amendment, the court discerned a clear and unequivocal congressional intent that violation of an IWC whaling quota constituted a per se action diminishing the effectiveness of an international program and hence required automatic certification.[40] In addition, the court noted that a 1962 amendment to the

33. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1401 (D.D.C.), *aff'd on other grounds,* 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955). Senator Packwood, sponsor of the Packwood-Magnuson Amendment, also criticized the negotiations and claimed that certification in the sperm whale case is mandatory, not discretionary. He asserted that the amendment left no "wiggle room or gray area" for the Secretary of Commerce to avoid certification by negotiating with the Japanese. Press release from Senator Packwood: Packwood-Magnuson Not Discretionary Policy (November 2, 1984) (copy on file with the *Washington Law Review*). However, his statements cannot be used to discern congressional intent at the time the Packwood-Magnuson Amendment was passed. *See, e.g.,* Blanchette v. Connecticut General Ins. Corps., 419 U.S. 102, 132 (1974) ("Such statements 'represent only the personal views of these legislators, since the statements were made after passage of the Act.'") (brackets omitted) (quoting National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612, 639 n.34 (1967)).

34. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. at 1411. In a subsequent action, the court also rejected the government's plea for a stay of execution of the writ of mandamus pending an appeal. American Cetacean Soc'y v. Baldrige, 604 F. Supp. 1411, 1417 (D.D.C. 1985).

35. American Cetacean Soc'y v. Baldrige, 768 F.2d 426, 445 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

36. *American Cetacean Soc'y,* 768 F.2d at 444.

37. *See supra* note 26 and accompanying text.

38. *American Cetacean Soc'y,* 768 F.2d at 435–39.

39. *Id.* at 439–43.

40. *Id.* at 437.

Tuna Convention Act of 1950[41] (the "Tuna Act") also used the phrase, "to diminish the effectiveness," in a context similar to the Pelly Amendment.[42] This similarity made the legislative history of the Tuna Act relevant to the determination of congressional intent behind the Pelly Amendment.[43] The court found statements in the Tuna Act's legislative history indicating that if a foreign state failed to implement the harvest recommendations of the Inter-American Tropical Tuna Commission, "that failure would automatically result [in the] imposition of the statutory sanctions on the foreign country."[44] The court's review of the Tuna Act confirmed its conclusion that when Congress enacted the Pelly Amendment, Congress intended that violating an internationally set quota would per se "diminish the effectiveness" of the international fishery conservation program.[45]

The court then turned to legislative history of acts subsequent to the Pelly Amendment, including the 1978 "wildlife amendments" to the Pelly Amendment and the Packwood-Magnuson Amendment. The court concluded that Congress expressed no intent to change the meaning of the phrase "diminish the effectiveness" contained in the original Pelly Amendment in the context at issue in the case.[46] Thus the court concluded that Congress intended any act by a country that allowed its nationals to fish in excess of internationally set quotas to be an act which per se diminished the effectiveness of the program. The court held that in such a case the Pelly Amendment automatically requires the Secretary of Commerce to certify that state.[47]

III. ANALYSIS—THE DECISION TO CERTIFY NATIONS THAT OBJECT TO AND EXCEED IWC QUOTAS IS DISCRETIONARY

The *American Cetacean* court misinterpreted the Pelly and Packwood-Magnuson Amendments. It did not adequately examine the legislative history of the amendments. Congress did not mandate certification of every international conservation quota violation, regardless of its consequences; instead, the decision to certify is discretionary in all cases where the violation does not endanger the managed whale population. The *American Cetacean* court failed to consider, first, whether the Japanese whaling

41. *Id. See* 16 U.S.C. §§ 951–61 (1982).
42. *American Cetacean Soc'y*, 768 F.2d at 438.
43. *Id.* at 437–38.
44. *Id.* at 438.
45. *Id.*
46. *Id.* at 443.
47. *Id.* at 444.

activities posed sufficient risk of endangering the sperm whale population to render the Secretary's decision automatic; and second, if the decision was not automatic, whether the Secretary abused his discretion in determining that the Japanese whaling activities should not be certified.

The court also ignored past agency practice and Congressional acceptance of that practice. Congress has been periodically informed that the Secretary of Commerce has consistently interpreted and applied the Pelly and Packwood-Magnuson Amendments in a way that demonstrates that exceeding an IWC quota does not automatically require certification.

A. Congress Did Not Mandate Certification in All Cases of Quota Violations

The Pelly and the Packwood-Magnuson Amendments do not require the Secretary of Commerce to automatically certify a country for objecting to and exceeding an IWC quota where the excess whaling is minor. While contrary statements exist in the legislative record,[48] the legislative history of the amendments as a whole demonstrates that Congress expected the Secretary to exercise discretion in the certification decision. The discretion resides in the Secretary's evaluation of whether effectiveness has been diminished. However, the Secretary must certify after finding that a country has been "diminishing the effectiveness" of the Whaling Convention.[49]

Certification under the amendments results from acts found by the Secretary of Commerce to "diminish the effectiveness" of the Convention.[50] However, the phrase, "to diminish the effectiveness," is not defined in either of the amendments and does not on its face indicate that objecting to and exceeding a quota necessarily is such a diminishment.[51] The

48. *See infra* note 77.

49. 16 U.S.C. § 1821(e)(2)(A)(i) (1982); *see also* 22 U.S.C. § 1978(a)(1) (1982).

50. 16 U.S.C. § 1821(e)(2)(A) (1982). Certification under the Pelly Amendment results from acts that diminish the effectiveness of an international fisheries conservation program, 22 U.S.C. § 1978(a)(1) (1982), which includes the Whaling Convention.

51. If Congress had intended for the Secretary of Commerce to have no discretion in the certification decision, Congress could have stated so clearly and unambiguously. For example, see *infra* note 73. Instead Congress chose not to do so.

Objecting to and then exceeding a quota does not necessarily diminish the effectiveness of the Whaling Convention. The effectiveness of the Convention rests, in great measure, on membership by a wide variety of nations. It must be remembered that each IWC member has the right to object to a quota or resolution. A member strongly opposing a quota can mitigate its effect on the member nation by objecting; otherwise the member's only alternative to accepting the quota would be to resign from the IWC. *See* Scarff, *supra* note 18, at 357. It is preferable for a member to object to a quota rather than resign because, as a member nation, negotiation and ultimate agreement to abide by the quota is more likely. Therefore objecting to and exceeding a quota does not necessarily "diminish the effectiveness" of the Convention.

In addition, the statutory framework of the Convention presumes the eventuality of objections on

legislative history of the two amendments, however, does give meaning to the phrase.[52] A careful reading of that legislative history shows that the Japanese should not be certified in the current case.

1. Legislative History of the Pelly Amendment

Contrary to the *American Cetacean* court's conclusion, the legislative history of the Pelly Amendment is not clear on whether the amendment requires certification of all quota violations. The *American Cetacean* court failed to consider the legislative history as a whole. A thorough examination points instead to the conclusion that Congress directed the Secretary of Commerce to certify a country that objects to and exceeds a fisheries conservation quota when its excess whaling endangers the managed species. Congress did not intend the amendment to cover minor or harmless violations of a conservation program.

Given the ambiguity of the legislative history, the court should have looked first to the primary concern addressed by the Pelly Amendment: the possible extinction of the Atlantic salmon resulting from overfishing in disregard of established salmon quotas.[53] Congressman Pelly introduced the amendment to avert a "severe conservation crisis [threatening] the Atlantic salmon."[54] The discussion of the Pelly Amendment on the floor of the House by Congressman Pelly and other supporters of the amendment demonstrates that the amendment addressed conservation crises where the

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occasion. Nevertheless, relevant quotas remain applicable to nonobjecting members. Thus, despite the objections and excess catches by certain members, the overall objective of reducing the total international catch can be achieved.

52. When the language of a statute is ambiguous or unclear the court may look to legislative history for clarification. *See, e.g.*, United States v. Donruss Co., 393 U.S. 297, 303 (1969). This rule of statutory construction was used by the appellate court in *American Cetacean*. 768 F.2d at 436.

53. Extinction threatened the Atlantic salmon even though their exploitation was regulated by the International Convention for the Northwest Atlantic Fisheries, February 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157. Although salmon are migratory fish, Danish fishermen had discovered where the schools congregated in the ocean and commenced to overfish them severely. International appreciation of the seriousness of this practice led to a total ban on the ocean fishing of the salmon through the International Northwest Atlantic Fishing Commission. *See* 117 CONG. REC. 34,751 (1971) (statement of Rep. Dingell). But the charter of the Commission allowed members to exempt themselves from any quota by means of a timely objection. International Convention for the Northwest Atlantic Fisheries, February 8, 1949, art. VIII, para. 9, 1 U.S.T. 477, 483, T.I.A.S. No. 2089 at 8, 157 U.N.T.S. 157, 170. Denmark filed an objection and became exempt from the ban. *See* 117 CONG. REC. 34,751 (1971) (statement of Rep. Dingell). The Danes' continued overfishing of the Atlantic salmon led to the introduction of the Pelly Amendment. *See infra* note 54.

Congress also desired that the Pelly Amendment protect endangered whale species. Congress hoped that the Pelly Amendment would be useful in "prevent[ing] the extinction of the world's whale population." 117 CONG. REC. 34,754 (1971) (statement of Rep. Hogan).

54. 117 CONG. REC. 34,751 (1971) (statement of Rep. Pelly). *See also* H.R. REP. No. 468, 92d Cong., 1st Sess. 3, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2409, 2410.

fishing activities of a nation threatened the extinction of a regulated international fishery. Representative Pelly stated: "I was prompted to introduce this legislation because of the severe conservation crisis which has arisen with respect to Atlantic salmon."[55] He continued:

> [T]he Atlantic salmon will disappear . . . .
>
> The saga of the Atlantic salmon is unfortunately 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. . . .
>
> . . . [T]he whaling issue and the impending over-exploitation of other living marine resources prompted me to suggest to the committee [on Merchant Marine and Fisheries] that this legislation be expanded to give the President the authority to embargo fishery products in the case of *flagrant violation* of any international fishery conservation program.[56]

Finally: "[T]his 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."[57] During the brief

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55. 117 CONG. REC. 34,751 (1971).

56. *Id.* at 34,752 (statement of Rep. Pelly) (emphasis added).

57. *Id.* (statement of Rep. Pelly).

Other members of Congress expressed similar concerns and objectives:

Statement of Representative Wylie:

> [O]verfishing in this area [by Danish fishermen] has threatened the extinction of this natural resource. . . .
>
> This bill before us would help correct this state of affairs by banning fish imports . . . from nations which endanger American stocks of fish by overfishing. The bill calls on the Secretary of Commerce to inform the Secretary of the Treasury when American stocks of fish are *endangered by overfishing* by foreign fishermen.

Id. (emphasis added).

Statement of Representative Conte: "There is an urgent need to protect stocks of Atlantic salmon from wasteful high seas fishery." *Id.* at 34,753.

Statement of Representative Hicks: "In recent years, extensive fishing by foreign vessels in U.S. coastal waters has caused serious depletion in fish stocks." *Id.*

Statement of Representative Clausen:

> [W]e must take every feasible step to insure that [salmon] are not brought to the brink of extinction by fishermen using calculated plundering for short-term gain.
>
> The North Atlantic salmon is the prime example of a species being ravished thoughtlessly and without regard for appropriate conservation measures. The annual harvest must be controlled so as to insure the continued viability of this great fish. Our approval of [the Pelly Amendment] is the most realistic and effective means to achieve this goal.

Id. at 34,753–54.

Statement of Representative Hogan:

> . . . I joined in cosponsoring [a bill similar in scope to the Pelly Amendment] whose purpose is to protect the existence of the Atlantic salmon. . . .
>
> . . . .
>
> Because this legislation includes marine mammals as well as fish, it may be of some importance

discussion on the Pelly Amendment in the Senate, Senator Stevens also identified protection of the Atlantic salmon from extinction as the main purpose of the amendment.[58] The committee report on the amendment presents a similar purpose.[59]

Because Congress directed the Pelly Amendment to cases where exceeding quotas endangered the existence of a fish or whale stock, Congress intended that such cases be certified as "diminishing the effectiveness" of an international conservation program. However, not all quotas are set at the maximum exploitation level beyond which the managed species will be endangered.[60] A violation of a quota may be minor and inconsequential. There is no indication that Congress required or desired that minor violations be certified. The Pelly Amendment did not address minor violations. Thus, where a country exceeds a quota, the amendment allows the Secretary of Commerce to consider the consequences of the country's action. Where exceeding a quota does not endanger a species, the Pelly Amendment does not require certification.

The *American Cetacean* court ignored the express focus of the Pelly Amendment on the protection of endangered species in its review of the amendment's legislative history. Instead, the court attempted to demonstrate that Congress mandated that virtually any violation of an internationally set fishing quota must be certified. First, the court quoted from a Senate Report that the Secretary of Commerce must certify fishing operations that are inconsistent with international conservation programs.[61] Then the court equated "international conservation *programs*" with "internationally set *quotas*."[62] The court concluded that the quoted statement from the Senate Report plus similar statements from other legislative sources "mak[e] abundantly clear that exceeding internationally set quotas was intended to automatically trigger certification."[63]

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in our continuing efforts to prevent the extinction of the world's whale population.
Id. at 34,754.

58. 117 CONG. REC. 47,054 (1971).

59. H.R. REP. No. 468, 92d Cong., 1st Sess. 5, 6, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2410–12.

60. A quota may be established by using factors other than whale conservation goals and the interests of the whaling industry. The current sperm whale quota, for example, resulted from political concerns rather than scientific judgment. *See infra* note 115.

61. *American Cetacean Soc'y*, 768 F.2d at 436.

62. *Id.*

63. *Id.*

Throughout the section on the Pelly Amendment, the court used phrases such as: "indicate quite plainly," "abundantly clear," "unambiguous passage," "obviously contemplate," and "clearly indicates." *American Cetacean Soc'y*, 768 F.2d at 436–37. This language does not strengthen the court's construction of the amendment.

The court's conclusion is in fact not so clear. The term "internationally set programs" is not equivalent to the term "internationally set quotas." A quota is not a conservation program. A country's fishing operations may exceed a fishing quota, which may have been set far below the level beyond which the fishery would be endangered, by a de minimus amount and yet still support the international conservation program's goal of responsible fisheries management. In such a case, violation of a "quota" is not equivalent to violation of an entire "program."[64] In contrast, where a quota has been set to preserve a depleted fishery, and where a state's fishing operations endanger the fishery by egregiously exceeding the quota, violation of the quota is arguably equivalent to violation of the conservation program that gave rise to the quota. However, by equating "quotas" with "programs," the court rendered even the smallest and most inconsequential violation of a quota automatically certifiable. In doing so, the court entirely failed to account for Congress' express targeting of the Pelly Amendment to the protection of endangered species.[65]

Equating "programs" with "quotas" is particularly inappropriate in the sperm whale case because of the unusual, unscientific, and political manner in which the sperm whale zero quota was set.[66] Given the political nature of the quota and its lack of support from the Scientific Committee,[67] violating the quota by a small and harmless amount can hardly be equated with harming the Whaling Convention and its goal of responsible whale management.

The court noted but dismissed as irrelevant Representative Pelly's statement that the amendment should extend to cover "the case of flagrant violation" of any international fisheries conservation program.[68] When read in conjunction with the numerous statements in Congress of urgency over the need to avert the depletion of whales and other living marine resources,[69] Pelly's statement is relevant as evidence that Congress was little concerned with minor and inconsequential violations of quotas.

64. The court did not address the language of the Packwood-Magnuson Amendment, which expressly conditions certification upon an act diminishing the effectiveness of the Whaling Convention, 16 U.S.C. § 1821(e)(2)(A) (1982), rather than a quota or regulation of the Convention. In this case it is even less "abundantly clear" that exceeding an IWC quota is equivalent to diminishing the effectiveness of the Convention, and hence "automatically triggers certification."

65. *See supra* notes 53–59 and accompanying text.

66. *See infra* notes 114–16 and accompanying text.

67. *Id.*

68. *American Cetacean Soc'y*, 768 F.2d at 437 n.13.

69. *See supra* note 57.

The court stated that no congressional speaker "ever remotely suggested" that there is some exercise of discretion in the certification decision.[70] The suggestion of discretion is in fact implicit throughout the legislative history in Congress' concern with preventing the extinction of the Atlantic salmon, whales, and other living marine resources. Where a violation is minor and inconsequential, there is no indication that Congress intended, or even desired, certification.[71]

The court also inappropriately found support for its position in a statement by the Executive Branch. To show that the Executive Branch itself understood that certification was nondiscretionary in the event of a quota violation, the opinion quoted a Commerce Department statement that, under the Pelly Amendment, the President would be authorized to impose sanctions on countries that ignore the ban on high seas fishing for Atlantic salmon.[72] Once again, the court failed to distinguish the significance of a salmon ban violation, which would endanger the species, from the minor and inconsequential violation of a politically-set whale quota. The statement does not support the court's holding that the Pelly Amendment required certification of inconsequential violations.

A thorough overview of the legislative history of the Pelly Amendment indicates that Congress intended to protect endangered fisheries and marine mammals from overexploitation by fishing operations in disregard of international conservation programs. There is no indication that Congress intended the amendment to require certification of minor, inconsequential violations of fishing or whaling quotas. The Secretary of Commerce may exercise discretion in deciding whether a violation of a quota should be certified under the Pelly Amendment. Where the managed species is not endangered by harvesting in excess of a quota, the Secretary may decide against certification.

The *American Cetacean* court failed to consider the purpose behind the Pelly Amendment in its holding that the amendment mandates automatic certification of quota violations. The court ignored the circumstances surrounding the introduction and passage of the Amendment, and failed to distinguish between serious and inconsequential violations of quotas.

70. *American Cetacean Soc'y*, 768 F.2d at 437.

71. A number of express references by members of Congress to the exercise of discretion in the certification decision appear during consideration of the Packwood-Magnuson Amendment. *See infra* notes 78–79 and accompanying text.

72. *American Cetacean Soc'y*, 768 F.2d at 437.

Instead the court equated conservation "programs" with "quotas," and made inappropriate use of statements from the legislative history.[73]

73. The court also cited the Tuna Convention Act of 1950 (codified as amended at 16 U.S.C. §§ 951–61 (1982)) and its legislative history to confirm its conclusion that exceeding internationally set fishing or whaling quotas would per se diminish the effectiveness of the international fishery conservation program. *American Cetacean Soc'y*, 768 F.2d at 437–38. The court quoted a general principle of statutory construction: "[A]bsent 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." *Id.* at 437 (quoting United Shoe Workers of America v. Bedell, 506 F.2d 174, 183 (D.C. Cir. 1974)).

The court found this rule of construction important because the key phrase in the Pelly Amendment ("to diminish the effectiveness") was previously used by Congress in the Tuna Act in a similar situation. The court noted that Congress spelled out its intended meaning of the phrase, "diminishing the effectiveness" of the conservation recommendations of the Inter-American Tropical Tuna Commission. The phrase was to include those occasions when a "country does not put into effect conservation measures applicable to its own fishermen adequate for the implementation of the [Tuna] Commission's [harvest] recommendations." *Id.* at 438 (statement of Secretary of the Interior, *reprinted in* S. REP. No. 1737, 87th Cong., 2d Sess. (1962)). The failure to implement tuna harvest recommendations would automatically result in the imposition of the statutory sanctions on the foreign country. *Id.* The court concluded that, given the similarities between the Tuna Act and the Pelly Amendment, the "clear congressional intent with respect to the tuna amendments" indicated that Congress similarly intended for exceeding fishing or whaling quotas to constitute a diminishment of the effectiveness of an international fishery conservation program and to automatically trigger certification. *Id.*

The court failed to consider the phrase in question as a whole. There is a crucial difference between the similar phrases of the Tuna Act and the Pelly Amendment. The language of the Tuna Act is more precise and specific than that of the Pelly Amendment. The Tuna Act requires the Secretary of Commerce to act when there is conduct which "diminish[es] the effectiveness of the conservation *recommendations* of the commission . . . ." 16 U.S.C. § 955(c) (1982) (emphasis added). The Pelly Amendment, on the other hand, requires the Secretary to certify after the Secretary determines that foreign nationals are fishing in a manner which "diminish[es] the effectiveness of an international fishery conservation *program* . . . ." 22 U.S.C. § 1978(a)(1) (1982) (emphasis added). It is clear from the express language of the Tuna Act that Congress intended that the Secretary of Commerce sanction a violation of the Tuna Commission's recommendations. It is not clear from the language of the Pelly Amendment that Congress intended the Secretary of Commerce to sanction every violation of a quota of an international fishery conservation program. *See supra* note 51 and accompanying text. The difference in the language of the Pelly Amendment and the Tuna Act suggests that Congress may have intended a different interpretation for the diminishment language for each legislation, thus invalidating the *American Cetacean* court's construction of the Pelly Amendment by Congress' intent in the Tuna Act.

Congress demonstrated in the Tuna Act as amended that, when it means to, it can expressly stipulate the sanctioning of specific acts. Congress chose not to do so, however, in the Pelly Amendment, nor in the Packwood-Magnuson Amendment. Instead, Congress chose to word the amendments broadly and did not designate per se violations in the legislative histories. The vagueness of the two amendments, when contrasted with the precise language and legislative history of the Tuna Act, supports the conclusion that Congress left to the Secretary of Commerce the discretion to determine when an act diminishes the effectiveness of an international fishery conservation program.

The court also ignored key elements of the quoted statutory construction rule from *United Shoe Workers*. Prior legislation is to be consulted only "absent evidence to the contrary" since then "there is hardly a basis for assuming that the lawmakers had anything else in mind." *United Shoe Workers*, 506 F.2d 174, 183 (D.C. Cir. 1974). There is extensive evidence that, unlike Congress' apparent intention in the Tuna Act, Congress intended for the diminishment language in the Pelly Amendment to impart discretion to the Secretary of Commerce in the certification decision. *See supra* notes 48–72 and accompanying text. Thus, since contrary evidence and ample basis for believing Congress had

In the current case, where Japan's sperm whaling during the 1984–85 season did not endanger the stock,[74] the Secretary of Commerce properly exercised discretion and independent judgment in his decision against certification of Japan.

2. *Legislative History of the Packwood-Magnuson Amendment*

The *American Cetacean* court agreed that the Packwood-Magnuson Amendment linked mandatory sanctions to the Pelly certification process for whaling activities.[75] Therefore, the administrative discretion inherent in Pelly Amendment certifications,[76] contrary to the court's conclusion, renders Packwood-Magnuson certifications discretionary as well.

As with the Pelly Amendment, the legislative history of the Packwood-Magnuson Amendment provides additional evidence that certification is discretionary.[77] Supporters of the amendment in both chambers, including

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"something else in mind" existed, the court's reliance on the Tuna Act language was misplaced.

Furthermore, the court failed to consider a related principle of statutory interpretation expressed in the same opinion. The *United Shoe Workers* court continued:

> But the assertion of a general principle of statutory interpretation [that identical phrases in different legislation should be given the same meaning] is not by itself enough; we cannot properly construe even related pieces of legislation without due regard to the purposes they respectively serve. We must fully explore the allegedly analogous statute and compare it, in light of the factual situation at hand, with the language and objective of the statute under investigation.

506 F.2d at 188 (footnotes omitted). The *American Cetacean* court failed to explore fully the Tuna Act and compare it and its purpose with the language and objective of the Pelly Amendment. The court also totally ignored the "factual situation at hand" in its discussion of the relevance of the Tuna Act to the Pelly Amendment. Lacking an adequate and complete comparison of the Tuna Act with the Pelly Amendment, the *American Cetacean* court's premise for finding confirmation of its conclusion in the similar language of the Tuna Act fails.

The court's analysis in this section is faulty for other reasons. The court observed that attachments to the House Report on the Pelly Amendment, H.R. REP. NO. 468, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2409, contained comments from various executive agencies. The court quoted a letter from the Secretary of Commerce included therein stating that the scheme involved in the Tuna Act is "similar in language and approach" to that of the Pelly Amendment. *American Cetacean Soc'y*, 768 F.2d at 437. This statement by the Secretary of Commerce, in reference to the overall scheme of the amendments, does not support the court's argument that the Pelly Amendment diminishment language must be interpreted in light of the nondiscretionary element of the Tuna Act. It may be true that the broad schemes of the different amendments are similar. The statement cannot properly be interpreted, however, to mean that the similarity necessarily extends to fine points such as the similar diminishment language.

74. *See infra* notes 114–16 and accompanying text.

75. *American Cetacean Soc'y*, 768 F.2d at 434–35.

76. *See supra* notes 53–74 and accompanying text.

77. The Packwood-Magnuson legislative history does, however, contain some statements to the contrary. *See, e.g., Hearing on Whaling Operations Conducted Outside the Control of the IWC Before the Senate Comm. on Commerce, Science, and Transp.*, 96th Cong., 1st Sess. 45 (1979) (statement of Sen. Packwood) ("[The Packwood Amendment] says that you cannot fish in the 200-mile zone if you violate the IWC regulations . . . .") [hereinafter cited as *Senate Hearing on Outlaw Whaling*].

Senator Packwood, the bill's principal sponsor, asserted in strong language that the amendment's purpose was to stop illegal and irresponsible whaling practices that were endangering whale populations.[78] Others recognized the significance and relevance of the circumstances of each case in the certification decision.[79] The Packwood-Magnuson Amendment, similar to the Pelly Amendment, addressed serious violations that endangered whale species, rather than minor and inconsequential violations. Hence certification under the Packwood-Magnuson Amendment, just as under Pelly, need not be automatic if the whaling exceeds an IWC quota by a small number

78. 125 CONG. REC. 21,742 (1979) (statement of Sen. Packwood); *id.* at 21,743–44 (statement of Sen. Cannon); *id.* at 22,083 (statement of Rep. Oberstar).

That minor and harmless violations were not the focus of the legislation can be demonstrated in another way. If the flagrancy of a violation were immaterial to whether the act "diminished the effectiveness" of the Whaling Convention, certification should follow the technical act of filing an objection to a quota, and other inconsequential acts. Evidence shows that, however, without more, these types of acts are not certifiable. *See Hearing on U.S. Whaling Policy Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 274 (1983) (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Adminstration, United States Department of Commerce) (an objection is insufficient to trigger certification under either amendment) [hereinafter cited as *Oversight Hearing on U.S. Whaling Policy*]. *Accord Whaling Policy and IWC Oversight Hearing, supra* note 24, at 312 (statement of Richard Frank, Administrator, National Oceanic and Atmospheric Administration, United States Department of Commerce; United States Commissioner to the IWC) (the Pelly Amendment applies to a country that has significantly violated a quota).

79. Representative Breaux, Chairperson of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, the House committee charged with consideration of Packwood-Magnuson, described discretion, or "flexibility," as part of the certification process. *FCMA Oversight Hearings, supra* note 24, at 314 ("[I]n certifying that a country is in violation of some international agreement, . . . there is a lot of flexibility in that certification . . . ."); *Whaling Policy and IWC Oversight Hearing, supra* note 24, at 359 ([T]here is still somewhat a degree of discretion within the certification process as to whether a country is in violation of the terms of the international agreement and that is always going to be there . . . ."). Representative Breaux also stated that the Secretary of Commerce should be careful to examine "all the facts surrounding a possible certification . . . ." 125 CONG. REC. 22,083 (1979).

These statements, however, appear to conflict with another statement by Representative Breaux: "The [Packwood-Magnuson] [A]mendment would require the Secretary of Commerce to deny fishing permits to nationals of those foreign nations which were found to be in contravention of an international conservation agreement . . . ." *FCMA Oversight Hearings, supra* note 24, at 312. This apparent inconsistency was used by the *American Cetacean* court as reason to dismiss all of Representative Breaux's statements. 768 F.2d at 442 n.20. However, the court's dismissal of Representative Breaux's statements is inappropriate. The comment that appeared to describe the amendment as nondiscretionary was a general introductory statement, a one-sentence description of the amendment for the benefit of the rest of the committee and audience. More importantly, the mandatory language of his comment ("the amendment would *require* the Secretary") applied to the imposition of sanctions *after* certification, rather than to the certification decision itself. The language pertaining to the actual certification ("found to be in contravention of an international conservation agreement") does not necessarily suggest that the speaker believed that certification was nondiscretionary. On the other hand, Representative Breaux's descriptions of the certification decision as discretionary are clear, precise, and unambiguous.

Ambassador John Negroponte, Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State, also agreed that certification was discretionary. *FCMA Oversight Hearings, supra* note 24, at 317.

and does not endanger a whale stock. The Secretary of Commerce must consider and balance a number of factors, not just the disregard of a quota.

In its discussion of the Packwood-Magnuson Amendment, the *American Cetacean* court relied on statements by Senator Packwood and others to support its conclusion that Congress intended whaling in excess of IWC quotas to trigger certification automatically.[80] The statements in fact provide no such support. In the statements of Senator Packwood quoted by the court, the Senator persistently referred to the effectiveness of his amendment in attacking illegal whaling. However, illegal whaling is distinguishable from whaling that exceeds an IWC quota but is exempt from the quota and thus is consistent with the provisions of the Whaling Convention. Since the Convention allows a member nation to exempt itself from a regulation,[81] a member, such as Japan, that minimally exceeds a quota after properly exempting itself is not conducting illegal whaling activities. Hence, the Senator's statements on illegal whaling do not support the court's conclusion concerning automatic certification of exempted whaling in excess of IWC quotas. This interpretation provides the court with only ambiguous statements by the Senator, since it is not clear whether "illegal whaling" refers to Convention violations or to exceeding a quota in the fashion provided in the Convention. A more narrow interpretation suggests that the statements refer to illegal whaling not at issue in the Japanese sperm whaling case.

The court used statements of three other congressmen in support of its conclusion of automatic certification. The court quoted Senator Magnuson as stating that: "*If* a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations . . . then that nation will be denied access to fish in our 200-mile fishery conservation zone."[82] This statement provides no additional insight into *whether* minor excess whaling by a country that has properly exempted itself from a quota is automatically certifiable.

The court also quoted Representative Murphy, who noted that "with respect to any nation which the Secretary of Commerce *has certified* as being in violation of the IWC, the Secretary of State is required to immediately [impose sanctions]."[83] This statement is irrelevant to the question of *when* certification is required.

Finally, the court quoted Representative Oberstar, a committee member active in passage of the Amendment, who stated that "[t]he Department of Commerce certifies a nation under the provisions of [the Pelly] amendment

80. *See American Cetacean Soc'y*, 768 F.2d at 440–41.
81. *See supra* note 16 and accompanying text.
82. *American Cetacean Soc'y*, 768 F.2d at 441 (emphasis added).
83. *Id.* (emphasis added).

when a nation is found to have acted in a manner contrary to international agreements for the protection of a fisheries resource."[84] Since the Whaling Convention expressly allows member nations to exempt themselves from quotas and regulations,[85] objecting to and then exceeding a quota by a small amount is not necessarily acting in a manner "contrary to international agreements."

B. Policy Implications of Japanese Certification

Since the court found that the amendments require the Secretary to certify Japan, the court did not go on to consider the reasonableness of the Secretary's decision before it ordered the Secretary of Commerce to certify Japan. After reviewing the circumstances in this case, the court should have approved the Secretary's exercise of discretion as neither arbitrary, capricious, or manifestly contrary to law.[86]

A key consideration in the Secretary's decision against certification was the effect of certification on United States-Japanese trade relations. Congressman Pelly acknowledged to Congress that his amendment would affect foreign relations and that it would be "unwise to tie the hands of the executive" with his amendment.[87] Accordingly, the Secretary considered a number of factors concerning foreign relations in his decision against certification, including the potential damage to United States-Japanese relations from certification.[88] In the arena of foreign relations, the Executive has greater access to information and a superior grasp of policy and political considerations than do Congress or the courts.[89] The Executive also has constitutional predominance in the field of foreign affairs.[90] Yet the amendments as construed by the *American Cetacean* court unduly restrict

84. *Id.*

85. *See supra* note 16 and accompanying text.

86. This is the standard of review for discretionary agency decisions. *American Cetacean Soc'y*, 768 F.2d at 433.

87. 117 CONG. REC. at 34,752 (1971).

88. Concern over the effect of certification on relations between the two countries was a catalyst for the executive agreement. Japan's counterpart to Secretary Baldrige in the negotiations on the agreement wrote in a letter to Secretary Baldrige: "As you know, the Government of Japan is keenly aware that the whaling issue poses a threat of friction between our two countries. The Government of Japan wishes to resolve this issue as quickly and amicably as possible to avoid a confrontation . . . ." Letter from Charge d'Affaires Murazumi to Secretary Baldrige (November 13, 1984) (confirming the whaling agreement) (copy on file with the *Washington Law Review*).

89. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37–39 (1972). The question of whether this case presents an unjusticiable political question is beyond the scope of this article. For a general discussion of the political question doctrine, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 71–79 (1978). For the application of the political question doctrine to foreign affairs, see Baker v. Carr, 369 U.S. 186, 211 (1962). *See also American Cetacean Soc'y*, 768 F.2d at 447–48 (Oberdorfer, J., dissenting).

90. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

the Executive's foreign policy judgment. Japan is one of America's major trading partners and an important ally.[91] If Japan is certified, the automatic Packwood-Magnuson sanctions may impair trade relations at a time when these relations are under increasing strain.[92] In light of the amendments' close relationship with foreign affairs and the state of United States-Japanese trade relations at this time, had the court reached this question, it should have deferred to the Secretary's decision not to certify.[93]

A second factor in the certification decision is that Japan might retaliate against the United States fishing industry, which could significantly harm domestic fishing interests.[94] The Secretary of Commerce has the expertise to assign this factor the appropriate weight in the certification decision.

A third consideration in the Secretary's decision is the effect that certifying Japan will have on the amendments' ability to influence Japan's decision to honor the future commercial whaling moratorium. Achieving full compliance with the moratorium is a primary goal of United States whaling policies.[95] Japan has agreed to the moratorium in exchange for the United States promise not to certify Japan for its current low level of sperm whaling.[96] Japan will withdraw its acceptance if the *American Cetacean Society* decision is affirmed on appeal.[97] In that case the Pelly and Packwood-Magnuson Amendments' sanctions will have to be used to force

91. *See* Staff Editorial, *Tora, Tora, Tariff,* Wall St. J., Apr. 12, 1985, at 24, col. 1.

92. *See* N.Y. Times, Apr. 6, 1985, at A1, col. 3; N.Y. Times, Apr. 8, 1985, at A7, col. 2.

93. It is true that automatic sanctions after certification of a country for endangering whale populations would also impair foreign relations and "tie the hands of the executive." In this case, Congress weighed the effect on foreign relations against the threat to whales and gave greater weight to the protection of whales by providing for automatic sanctions. However, where whale populations are not endangered by whaling practices, as in the current case, Congress intended the executive to balance the relevant factors, including the effect on foreign relations, in the certification decision. See *supra* notes 53–79 and accompanying text for a discussion of the relevant legislative history.

94. The Japanese would probably retaliate against sanctions by refusing to buy fish from Americans. The financial impact on the northwestern United States fishing industry would be disastrous. *See* Seattle Times, Nov. 11, 1984, at A34.

In addition, the impact of the sanctions on Japan will be less than the impact of Japanese retaliation on domestic fishing interests. Currently, Japan is the largest buyer of United States fish products, annually importing approximately $620 million of processed fishery products from the United States. Japan has also established numerous joint ventures in the United States with American fishermen and buys about $9.5 million of fish directly from domestic harvesters. Many of these operations would be at risk. On the other hand, Japan catches only about $296 million in fish from United States waters and exports $310 million of fish products to the United States. *Oversight Hearing on U.S. Whaling Policy, supra* note 78, at 297 (memorandum from subcommittee Chairperson Breaux to subcommittee members).

95. *Hearing on Review of the 34th IWC Meeting Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs,* 97th Cong., 2d Sess. 4 (1982) (staff report on the IWC meeting) [hereinafter cited as *Review of the 34th IWC*]; *Oversight Hearing on U.S. Whaling Policy, supra* note 78, at 246. See *supra* note 32 for a discussion of the commercial moratorium and its significance.

96. Wash. Post, Apr. 6, 1985, at A1, col. 6.

97. *Id.*

Japan to accept the moratorium in addition to the sperm whale zero quota. In terms of international relations, Japan's acceptance of the moratorium under the gentler pressure of negotiation and the threat of certification is preferable to acceptance due to actual economic injury.

In addition, imposing sanctions now will reduce the weight and impact of possible sanctions available later against Japan. The full force of the amendments should be reserved for use against Japan if it violates the commercial moratorium.[98] Certifying the current, relatively insignificant violation will limit the effectiveness of the sanctions in the future.[99] If Japan's allowable catch is reduced 50 to 100 percent upon certification under Packwood-Magnuson,[100] further reductions for violations of the moratorium will have comparatively less impact since they will reduce only the remaining allowable catch, rather than the full initial allowable catch. After enduring the initial sanctions, Japan may decide to disregard the moratorium after deciding that the benefits of doing so may exceed the costs of additional sanctions. The Secretary has more experience and expertise than the courts to balance the benefits of current certification against the negative effects of current certification on the amendments' future effectiveness against Japan.

These factors illustrate the nature of the policy considerations of the certification decision. Because the Secretary of Commerce is better suited than a court for this type of decision, the Secretary's decision to withhold certification pending Japan's performance of the terms of the November agreement, including acceptance of the commercial moratorium, should not be overturned by the court.

C. Agency Interpretation of the Amendments

In refusing to certify Japan in the current sperm whaling controversy, the Secretary of Commerce has interpreted the amendments consistently with past agency practice.[101] Therefore the plaintiffs in *American Cetacean*

98. See *supra* note 32 for a discussion of the commercial moratorium and its significance.

99. *Review of the 34th IWC, supra* note 95, at 33–34.

100. 16 U.S.C. § 1821(e)(2)(B) (1982).

101. Reviewing courts should give substantial deference to the interpretation of a statute by the agency responsible for its administration unless there are compelling reasons to believe that the interpretation is wrong. *E.g.*, E. I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46 (1977). This deference is particularly appropriate where the administration has construed the statute consistently over a period of time. Haig v. Agee, 453 U.S. 280, 291 (1981); *see also* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Deference is also appropriate when Congress has acquiesced in an agency's construction of a statute. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); *see also* Kay v. FCC, 443 F.2d 638, 646, 647 (D.C. Cir. 1970).

In the current controversy the reviewing court should defer to the Secretary of Commerce's interpretation of the Pelly and Packwood-Magnuson Amendments because there are no compelling reasons to believe it is wrong, *see* notes 48–100 and accompanying text (sections III A & B), and

cannot complain that the Secretary of Commerce acted arbitrarily in deciding against certification. In addition, past practice is relevant to the current case because, contrary to the court's finding in *American Cetacean,* Congress has been informed of the Secretary's interpretation.[102]

1. Interpretation of the Pelly Amendment: The Minke Whale Case

The application of the Pelly Amendment by the Department of Commerce before 1979 shows that Japan's disregard of the sperm whale quota need not "diminish the effectiveness" of the Whaling Convention. Whaling nations have been certified under Pelly on several occasions and for various reasons. The 1974 certifications of Japan and the Soviet Union for minke whaling are enlightening because of the apparent similarities between those cases and the sperm whaling case.[103] Japan and the Soviet Union were certified for objecting to and exceeding the IWC Antarctic minke whale quota for the 1973–74 season.[104] They objected to the minke quota and then together exceeded it by 2,713 whales,[105] or approximately fifty percent. After a series of unsatisfactory negotiations with the Japanese and the Soviet Union, the Secretary of Commerce certified that both countries had "exceeded the International Whaling Commission . . . quotas for th[e] season, thereby diminishing the effectiveness of the conservation program of the Commission."[106]

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because it has been applied consistently and with Congress' acknowledgement and acceptance, *see infra* notes 127–34 and accompanying text. *See also* Haviland v. Butz, 543 F.2d 169, 174 (D.C. Cir. 1976) (courts' deference to agency interpretation commands even greater respect when "the case involves the construction of a new statute by its implementing agency") (quoting Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 706 (D.C. Cir. 1974)), *cert. denied,* 429 U.S. 832 (1976). *But cf.* Dames & Moore v. Regan, 453 U.S. 654 (1981) (Court's deference to executive practices stems in part from many more years of congressional acquiescence than in the current case).

102. *See infra* notes 127–34 and accompanying text.

103. The appellate court in *American Cetacean Soc'y* did not address this or any other prior use of either amendment. However, the district court did discuss the 1973 minke whale certification in its opinion. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1402 (D.D.C.), *aff'd on other grounds,* 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

104. *E.g., Preparations for the 34th IWC, supra* note 12, at 10 (Congressional Research Service Report).

105. The President's Message to the Congress Submitting a Report on International Whaling Operation and Conservation Programs, 11 WEEKLY COMP. PRES. DOC. 55–56 (Jan. 16, 1975) [hereinafter cited as President's Message to Congress].

106. Letter from Secretary Dent to President Ford (Nov. 12, 1974) (certifying Japan and the U.S.S.R. under the Pelly Amendment) (copy on file with the *Washington Law Review*) [hereinafter cited as Certification Letter].

Despite his decision to certify, in the next paragraph the Secretary advised against imposing the discretionary Pelly Amendment sanctions prohibiting the import of Soviet and Japanese fish products because these states had accepted new IWC conservation measures. The Secretary also stated that the two coun-

In a required follow-up message to Congress,[107] the President confirmed that Japan and the Soviet Union were certified for exceeding the IWC quota. In a carefully worded statement, the President observed that "[w]hether or not the objection [of Japan and the Soviet Union under the Whaling Convention] is legal . . . does not alter the fact that exceeding the quotas will diminish the effectiveness of the [IWC] program. It constitutes a prima facie case for application of the Pelly Amendment."[108]

At first glance, the present Japanese action appears similar to the 1974 incidents.[109] As in the 1974 incident, Japan has objected to an IWC quota. The sperm whale quota was a severe reduction from the previous year[110] and the quota was consistent with United States policies.[111] Bilateral negotiations began between Japan and the United States over the possibility of certification, and during the negotiations Japan exceeded the IWC quota.[112] On this superficial level, then, certification might be expected to follow.

Closer analysis, however, reveals that the 1974 certifications are distinguishable and do not dictate certification now. Exceeding a quota may be a "prima facie case for application of the Pelly Amendment," but the presumption is rebuttable. The Antarctic minke whale quota, exceeded in

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tries "appeared to be more conciliatory than during previous meetings and, therefore, provided some hope that all member nations would comply with the resolution and with the 1974–1975 quotas." *Id.*

These factors were crucial in the Secretary's recommendation against sanctions. "Since trade sanctions would entail important domestic costs and could generate significant friction in our relations with Japan and the U.S.S.R., such restrictions should be imposed only as a remedy of last resort after all reasonable alternatives for the achievement of the conservation objective have proven ineffective." *Id.* at 2. He left open the possibility that subsequent actions by Japan and the Soviet Union might require a reassessment.

The Secretary could have elected not to certify Japan and the U.S.S.R. in this case. However, since the President could exercise discretion in applying sanctions under Pelly, the Secretary had no reason to exercise discretion to avoid certification even though he believed sanctions were inappropriate.

107. The statute requires the President to notify Congress concerning whether he will impose sanctions. 22 U.S.C. § 1978(b) (1982).

108. President's Message to Congress, *supra* note 105, at 55. The President also accepted the Secretary's recommendation not to impose sanctions. He cited the same reasons provided to him in the letter of certification. See *infra* note 125 for a discussion of the President's message.

109. Congress was reminded of the 1974 certifications on numerous occasions during hearings on the Packwood-Magnuson Amendment. *See, e.g., Senate Hearing on Outlaw Whaling, supra* note 77, at 27, 28 (statement of Tom Garrett, representing Defenders of the Wildlife). With full knowledge of how the Pelly Amendment certification process had been used, Congress linked the process without alteration to the mandatory sanctions to create the Packwood-Magnuson Amendment. Congress thus intended certification for situations similar to the events leading to the 1974 certification.

110. The quota was reduced from about 425 whales to zero. *See supra* note 29.

111. *See Review of the 33d IWC, supra* note 29, at 3 (staff report).

112. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1404 (D.D.C.), *aff'd on other grounds*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

1973, was based on a recommendation by the IWC Scientific Committee.[113] The 1984–85 quota for the North Pacific sperm whale stock (western division) was not based on a Scientific Committee recommendation.[114] Rather, the present quota was largely a political product.[115] In fact, the Scientific Committee declared that the small number of sperm whales that the Japanese desired to take per year (400 for the first two seasons,

113. Reports conflict on this point. According to the Secretary of Commerce, the Scientific Committee proposed at the 1973 IWC meeting that a minke whale quota of 5000 whales for the Antarctic was necessary to prevent the depletion of the stock. The quota, designed to protect the whale stock, was based on the best available scientific judgment. Draft Report to Congress from Secretary Dent to President Ford (Nov. 12, 1974) (copy on file with the *Washington Law Review*). The draft report, which accompanied the letter of certification, was the suggested text for the President's postcertification address to Congress.

This description of the Scientific Committee's recommendation conflicts with an IWC report stating that at the 1974 meeting the Scientific Committee was unable to make any recommendation concerning an appropriate minke whale quota. Instead, according to the IWC report, the Committee advised only that caution be used in setting the quota. INTERNATIONAL WHALING COMM'N, 25TH REPORT 65, (1975). The version provided in the Draft Report, *supra,* is more pertinent to the *American Cetacean* case because it details the information actually used by the Secretary of Commerce in his decision to certify. The Secretary apparently either disregarded or was unaware of the IWC report of the Committee's inability to recommend a quota.

The recommendations of the Scientific Committee are usually given great weight by the IWC. See *supra* note 12 for a discussion on the significance of the Scientific Committee's recommendations to the IWC.

114. INTERNATIONAL WHALING COMM'N, 35TH REPORT 70 (1985). The usual procedure for setting a quota begins with a recommendation by the Scientific Committee for a maximum catch limit. *See supra* note 12. However, the IWC Scientific Committee did not recommend the zero quota nor any other catch limit for sperm whales. INTERNATIONAL WHALING COMM'N, 35TH REPORT 70 (1985).

115. The zero quota was established for political reasons and not for substantiated concerns over depletion of the stock. For example, the IWC Chairperson since 1982, Commissioner Iglesias (Argentina), stated that in the absence of a recommendation by the Scientific Committee, votes on the sperm whale quota would "necessarily be cast on political grounds." *Review of the 34th IWC, supra* note 95, at 10 (staff report). Tom Garrett, the United States Deputy Commissioner to the IWC, testified that a positive quota for sperm whales is "not politically in the cards no matter what the Scientific Committee . . . recommends." *Review of the 33d IWC, supra* note 29, at 18.

The political nature of the sperm whale quota decision stems in part from the success of conservationist and preservationist forces in including nonwhaling countries in the IWC. For instance, between the 1980 and 1981 IWC meetings, conservationists successfully encouraged eight nonwhaling countries to join the IWC. *Id.* at 28 (prepared statement of Mr. Tom Garrett, United States Deputy Commissioner to the IWC). None of these nonwhaling countries opposed the zero quota. *Id.* at 11–12 (staff report) (Twenty-five members voted for the quota. Only Japan voted against it. Ireland, the Peoples' Republic of China, and the Soviet Union abstained. India's commissioner was not present.). This shift in IWC membership was a crucial factor in passing the zero sperm whale quota. *Id.* at 13–14 (staff report).

Representative Bonker, Chairperson of the Subcommittee on Human Rights and International Organizations, described the United States's policy on whaling as "a moral position rather than [one] based on scientific data." *Id.* at 84. It is clear that the United States' position, as well as that of the IWC majority, on the sperm whale quota issue did not have a scientific basis. Since Congress had been concerned with the scientific realities of the possible extinction of whale species when it passed the Pelly and Packwood-Magnuson Amendments, *see supra* notes 53–60, 78 and accompanying text, violations of IWC quotas which result in certification should be determined on a scientific basis.

decreased to 200 for the next two) would not have a significant impact on the sperm whale population.[116] In other words, the Scientific Committee determined that the zero quota was not necessary to protect the stock.

In light of the Scientific Committee's conclusion on the minor impact of the Japanese quota violation, Japan's present conduct is less harmful than the conduct leading to the 1974 certifications. Japan has only minimally exceeded the present quota and the potential consequences to the sperm whale stock are of less gravity than in the minke case. In 1973 the Antarctic minke whale population was estimated at between 150,000 and 299,999 whales,[117] the quota was 5,000 minke whales, and together Japan and the Soviet Union exceeded the quota by over 2,700 whales.[118] The current estimated sperm whale population for the North Pacific (western division) is approximately 200,000.[119] The sperm whale quota was zero, which the Japanese exceeded by about 250 whales.[120] Even if Japan harvested the 400 whales in 1985 permitted by the United States-Japanese agreement,[121] the loss would represent only a small fraction relative to both the total sperm whale population[122] and the 1973 violation of the minke whale quota.[123] Taking 400 whales in 1985 did not endanger the sperm whale stock.[124]

116. INTERNATIONAL WHALING COMM'N, 35TH REPORT 70 (1985) ("[A]t least in the short term (possibly up to 5 years) the current level of catch in the Japanese coastal fishery (catch limit of 400 last year) would have only a small effect on the stock.").

117. The Scientific Committee had difficulty estimating the Antarctic minke population. The 1972 estimate of 150,000+ whales was revised upward in 1973 to 299,999. However, Dr. Chapman of the Committee, an influencial scientist in the IWC, believed that the estimate was excessively high. INTERNATIONAL WHALING COMM'N, 24TH REPORT 42 (1974).

118. *See supra* text accompanying note 105.

119. The Scientific Committee has experienced great difficulty estimating the North Pacific sperm whale population. The Committee has not yet been able to make a reliable estimate or quota recommendation to the Commission. *See, e.g.*, INTERNATIONAL WHALING COMM'N, 30TH REPORT 84 (1980). *See also supra* note 114.

However, the most recent current (1982) stock size estimates are as follows:

Western North Pacific males (age 11+): 61,000
females (age 10+): 137,000
Eastern North Pacific males (age 13+): 111,400
females (mature): 162,600

Gosho, Rice & Breiwick, *The Sperm Whale, Physeter Macrocephalus*, 46 MARINE FISHERIES REV. 54, 62 (1984).

120. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1415 (D.D.C.) (citing plaintiffs' reply memorandum), *aff'd on other grounds*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

121. *See supra* note 2. The amount permitted by the agreement is one-half the amount that the Scientific Committee said would have little effect on the sperm whale stock. *See supra* note 116.

122. A harvest of 400 whales in a year is .2 percent of the current best estimate of the Western North Pacific sperm whale population. See *supra* note 119 for the population estimates.

123. The combined Japanese and Russian harvest in 1973 was 2.6 percent of the 1973 Antarctic minke whale population estimate and 5.1 percent of the 1972 Antarctic minke whale population estimate. See *supra* note 117 for the population estimates.

124. *See supra* note 116.

Consequently the minke whale certifications do not evidence a past agency practice of certification in situations similar to the current case.[125]

2. *Congressional Acquiescence in Agency Construction of the Pelly Amendment After the Minke Whale Certifications*

The *American Cetacean* court failed to explore agency practice under the Pelly Amendment.[126] Past agency practice is relevant in this case, however. The Department of Commerce's interpretation of the Pelly Amendment has been consistent with Congress' intent that certification under the amendment not be automatic for quota violations. In addition, through the House whaling policy oversight subcommittee,[127] Congress has been periodically

125. Congress was informed of the 1974 certification, but the legislative history does not refer to the crucial surrounding circumstances of the minke whale case. References to the 1974 certification in the legislative history of the Packwood-Magnuson Amendment mention little more than that Japan and the Soviet Union were certified for objecting to and exceeding an IWC quota. *See, e.g., Senate Hearing on Outlaw Whaling, supra* note 77, at 27, 28 (statement of Tom Garrett, representing Defenders of the Wildlife); *Preparations for the 34th IWC, supra* note 12, at 10 (staff report).

Furthermore, both President Ford and the Secretary of Commerce appeared to assert that the mere act of exceeding an IWC quota was sufficient for certification. *See* text accompanying notes 106 and 108. Although the legislative and executive documents at first seem to indicate that Congress intended the Secretary of Commerce to certify under the Pelly Amendment and later the Packwood-Magnuson Amendment countries that exceed a quota, closer analysis shows that the documents do not in fact support this proposition. The state of minke whales stocks in 1973 was well known. By 1973 commercial whalers had depleted many whale populations and the IWC had only recently gained the cooperation of many of its members in its efforts at responsible resource management. *See supra* note 19. Congress was aware of the environment in which the certifications occurred, as evidenced by its support since 1972 of a complete commercial moratorium. *Id.* Exceeding any quota in 1973 was a significant "diminishing" because of the desperate state of so many whale stocks. Hence, even though the records of the hearings on the Packwood-Magnuson Amendment appear to show that Congress was aware only that exceeding the 1973 quota led to the 1974 certifications, Congress knew the 1974 certifications were the result of whaling that directly endangered the minke population. Therefore, neither the 1974 certifications nor their consideration by Congress during the Packwood-Magnuson hearings indicates that certification is mandated in the Japanese sperm whaling case.

The President and the Secretary of Commerce acted with similar background data. The proposed draft report to Congress provided by the Secretary of Commerce emphasized the extent of the quota violation, the recommendation by the Scientific Committee, and other factors. Draft Report to Congress from Secretary Dent to President Ford (Nov. 12, 1974) (copy on file with the *Washington Law Review*). The Secretary's statements in the Certification Letter, *supra* note 106 and accompanying text, cannot be considered independently of the context of the events leading to certification. The President's statement that "exceeding the [minke whale] quota . . . constitutes a prima facie case for application of the Pelly Amendment," President's Message to Congress, *supra* note 105, at 55, applied specifically to the minke quota. This statement does not evidence executive intent that exceeding *any* quota constitutes a prima facie case for certification.

126. American Cetacean Soc'y v. Baldrige, 768 F.2d 426, 440 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

127. The House Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries was the oversight committee for United States whaling policy, with "primary authority over all endangered species and marine mammal issues and as

informed of agency practice and has both acknowledged and accepted the practice.

In a whaling policy and IWC oversight hearing on the proposed Packwood-Magnuson Amendment before the whaling policy oversight subcommittee, the United States commissioner to the IWC noted the discretionary nature of Pelly in several remarks. First, he testified that in 1979, when Chile, Peru, and South Korea were certified for flagrant and repeated violations,[128] if mandatory sanctions had been in effect, the Secretary might have declined to certify.[129] This testimony was accepted without comment by the subcommittee primarily responsible for overseeing United States whaling policy and the implementation of fisheries legislation.[130]

In the same hearing, the commissioner also stated that importing nonmember whale meat by a member nation diminished the effectiveness of the IWC and that Japan had allowed these imports.[131] Yet, the Secretary of Commerce had not certified Japan for this act in order to provide Japan the opportunity to stop importing the meat.[132]

This House subcommittee, which conducted most of the Packwood-Magnuson hearings, accepted an interpretation of the Pelly Amendment that allowed the Secretary of Commerce to exercise discretion in the certification decision. Through the subcommittee, Congress was informed of the Secretary of Commerce's exercise of discretion in the decision whether to certify a country as "diminishing the effectiveness" of an international conservation program.[133] Congress' acceptance of the prior use of the Pelly Amendment demonstrates that Congress was concerned with protecting whales from extinction or depletion, and not with certifying countries for the mere technical offenses of objecting to and exceeding a quota.[134] Congress gave the Secretary of Commerce discretion to decide

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such has engaged in a continuing effort to assist in the conservation of whales." *Oversight Hearing on U.S. Whaling Policy, supra* note 78, at 244 (statement of Chairperson Breaux). The subcommittee was, in effect, the eyes of Congress for United States whaling policy, monitoring both congressional and executive practices. The subcommittee conducted the House hearings on both the Pelly and the Packwood-Magnuson Amendments. Beginning in 1981, the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs also shared in monitoring whaling policy for several years.

128. *See infra* note 134.

129. *Whaling Policy and IWC Oversight Hearing, supra* note 24, at 313 (statement of Richard Frank, Administrator, National Oceanic and Atmospheric Administration, Department of Commerce; United States Commissioner to the IWC).

130. *Id.*

131. *Id.* at 324.

132. *Id.* at 322.

133. *See supra* note 127.

134. Congress reviewed other Pelly Amendment certifications during the hearings on the Packwood-Magnuson Amendment. Peru, Chile, and the Republic of Korea were certified in 1978 for conducting whaling activities outside the control of the IWC. The three countries were not IWC mem-

when exceeding an IWC quota is serious enough to warrant certification under the amendments.

3. *Subsequent Action Under the Packwood-Magnuson Amendment*

Since the passage of the Packwood-Magnuson Amendment in 1979, whaling activity has occurred that would have led to certification if the decision were automatic and nondiscretionary. Instead, with one exception, the Secretary of Commerce has never chosen to certify. Although several of these activities potentially had equal or greater impact on whale stocks than Japan's present actions, and even though the whaling oversight subcommittee was informed of the activities and the Secretary's response, neither the subcommittee nor any other congressional body protested any of the Secretary's decisions.

The first incident involved Spanish whaling in 1980. At the 31st annual IWC meeting, the commissioners set the Spain-Portugal-British Isles fin whale stock catch limit for the 1980 season at 143, as recommended by the Scientific Committee.[135] Spain objected to the quota[136] and exceeded it by approximately eighty percent.[137] After negotiating with Spain over the possibility of certification under the amendments, the Secretary of Commerce chose not to certify Spain for its conduct.[138]

Another incident in 1980 involved the Republic of Korea. In 1976, following the recommendation of the Scientific Committee, the IWC granted the endangered North Pacific fin whale stock protected status and

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bers and they persistently exceeded quotas by large amounts for several endangered whale stocks. *Whaling Policy and IWC Oversight Hearing, supra* note 24, at 312. President Carter reported to Congress that the frequent and significant violations of IWC quotas were the basis for the certifications of these countries. President's Message to Congress Transmitting a Report, 15 WEEKLY COMP. PRES. DOC. 265, 266–67 (1979). Other documents state that the reason for certification was their refusal to join the IWC. *Preparations for the 34th IWC, supra* note 12, at 11 (staff report). In either case, the countries were diminishing the effectiveness of the IWC by whaling outside its supervision and control.

This situation is different from the sperm whaling controversy. Japan is acting entirely within its rights under the IWC. Whether due to the egregious nature of their violations or their anti-IWC stance, the certification of Peru, Chile, and Korea therefore provides little additional insight into congressional intentions with regard to the sperm whaling case.

135. INTERNATIONAL WHALING COMM'N, 30TH REPORT 29 (1980).

136. INTERNATIONAL WHALING COMM'N, 31ST REPORT 6 n.* (1981).

137. *Hearing and Markup on Preparations for the 33d Annual Meeting of the IWC Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 23 (1981) (statement of Mr. Craig Van Note, Executive Vice President, Monitor) [hereinafter cited as *Preparations for the 33d IWC*]. Furthermore, many of the whales taken by Spain were undersized. *Review of the 33d IWC, supra* note 29, at 45 (statement of Mr. Tom Garrett, United States Deputy Commissioner to the IWC).

138. Spain agreed to abide by the quota, even though evidence suggests that it subsequently exceeded the limits. *Review of the 33d IWC, supra* note 29, at 43 (statement of Mr. Tom Garrett, United States Deputy Commissioner to the IWC).

set a zero quota.[139] According to the best available evidence, the Republic of Korea harvested these protected whales at an average rate of over thirty a year.[140] Korea also attempted to obstruct IWC monitoring of its whaling by misreporting its take of fin whales.[141] After negotiations with Korea, the Secretary of Commerce did not certify Korea for its violations.

Chile committed several violations of IWC regulations during the 1980–81 seasons as evidenced by processed meat found on its factory ships[142] which themselves were used in contravention of a total ban.[143] The ban and the quotas that Chile violated were binding on Chile because Chile had never objected to them.[144] Even here, the Secretary of Commerce did not certify Chile for any of these activities.[145]

The first certification of whaling activities after the passage of the Packwood-Magnuson Amendment did not come until 1985. The Secretary certified the Soviet Union in March 1985 for objecting to and exceeding its Antarctic minke whale quota of 1941 by about 500 whales.[146] Japan also objected to its Antarctic minke quota but did not exceed it. It was not certified.[147]

In all these cases the Secretary of Commerce consistently interpreted the Pelly and Packwood-Magnuson Amendments as allowing discretion in the certification decision.[148] Congress, through the whaling oversight

139. INTERNATIONAL WHALING COMM'N, 27TH REPORT 8 (1977). Protected status is granted to endangered stocks, which require complete protection from exploitation. *Id.* at 6.

140. *See Review of the 33d IWC, supra* note 29, at 38; *Review of the 34th IWC, supra* note 95, at 96.

141. *Review of the 34th IWC, supra* note 95, at 96. Korea had apparently been reporting its take of fin whales as Bryde's whales, a managed but unprotected stock for which the IWC has established a quota of 19 per year.

142. *Preparations for the 33d IWC, supra* note 137, at 38. The principal evidence of this violation was processed whale meat that Chile sold to Japan, but authorities were unable to identify the species from this evidence.

143. *Id.* at 23 (statement of Mr. Craig Van Note, Executive Vice President, the Monitor Consortium).

144. *See generally supra* notes 16–17 and accompanying text.

145. Chile may not have been certified because the sanctions of the Pelly and Packwood-Magnuson Amendments could not affect Chile since it neither fished in United States waters nor sold fish to the United States. *See Review of the 33d IWC, supra* note 29, at 58 (statement of Rep. Bonker).

146. N.Y. Times, Apr. 4, 1985, at A8, col. 3. The Secretary of Commerce certified the Soviet Union on April 3rd.

147. *Id.*

148. Certification under the amendments has been rejected in other incidents, all with the knowledge of Congress. In 1980 Taiwan allegedly violated an IWC ban on the use of factory ships to harvest other than minke whales and allegedly exceeded IWC quotas. The United States threatened to certify Taiwan for these activities, but certification never occurred because of Taiwan's conciliatory conduct after the negotiations. *See Preparations for the 34th IWC, supra* note 12, at 11.

Allegations also were made before Congress that Portugal had taken several hundred sperm whales annually while not a member of the IWC. *Review of the 33d IWC, supra* note 29, at 58. No action was

subcommittee, was periodically informed of this interpretation and accepted it in each case.[149]

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taken.

A different type of violation involved the nonexplosive (cold) harpoon ban. The IWC banned the use of cold harpoons for humanitarian reasons. INTERNATIONAL WHALING COMM'N, 31ST REPORT 25 (1981). Cold harpoons inflict an unnecessarily cruel and often extended death on whales. *Id.* Five countries objected to this ban: Brazil, Iceland, Japan, Norway, and the Soviet Union. *See Oversight Hearing on U.S. Whaling Policy, supra* note 78, at 258 (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Administration). A congressional staff report asserted that these countries should be certified and that the failure to do so would seriously weaken the effectiveness of the amendments. *Review of the 34th IWC, supra* note 95, at 24. Only Japan has complied with the ban. *See Oversight Hearing on U.S. Whaling Policy, supra* note 78, at 258 (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Administration).

149. The court did not consider prior agency practice in applying the amendments. Instead it concluded that characterization of prior practice did not present a genuine issue of material fact because it found no indications that the prior practice had been accepted, or even acknowledged, by Congress. American Cetacean Soc'y v. Baldrige, 768 F.2d 426, 440 n.19 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955).

The district court in *American Cetacean Soc'y* did consider agency past practice. However, it misconstrued that practice by finding that the Executive's interpretation and application of the amendments consistently resulted in certification for violations of IWC quotas. American Cetacean Soc'y v. Baldridge [sic], 604 F. Supp. 1398, 1407 (D.D.C.), *aff'd on other grounds*, 768 F.2d 426 (D.C. Cir. 1985), *cert. granted sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 787 (1986) (Nos. 85-954, 955). The district court, however, totally ignored the amendments' role in the quota violations detailed *supra* notes 134–48 and accompanying text. Since 1980, with one exception, IWC quota violations have not resulted in certification.

The district court relied on several inappropriate or misconstrued sources to support its position that the Secretary consistently certified whale quota violations. It referred to statements by government officials on the Pelly Amendment to illustrate its view of the government's certification policy. The first quotation, from an unnamed State Department official during an undisclosed House hearing in 1971, stated that the United States would apply trade restrictions to a state violating an international salmon quota. *Id.* at 1406. The next reference was to a 1971 Department of Commerce letter that only described, without comment, the Pelly Amendment. *Id.* Neither reference indicated that the Executive intended to certify every violation of an IWC quota.

The court then considered the 1979 testimony of an official that three non-IWC members who had flagrantly violated IWC quotas (Peru, Chile, and the Republic of Korea) were certified under the Pelly Amendment. The official also stated that the Pelly Amendment would apply to a significant violation of a quota. *Id.* The court felt these statements demonstrated that the Executive has consistently intended to certify a state for exceeding an IWC quota. The court claimed to be "struck by the consistency and clarity of the [Executive's] position." *Id.* at 1407. The court was grasping for evidence; the quoted testimony in fact does not support the court's interpretation of the Executive's position. Rather, the testimony supports the existence of discretion in the certification decision: the amendment applies to flagrant and serious violations; the Secretary of Commerce must determine which violations are sufficiently serious to merit certification.

Next, the court misapplied Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978), a case involving the taking of Bering Sea bowhead whales by Alaska natives. *American Cetacean Soc'y*, 608 F. Supp. at 1407–08. Bowhead whales are one of the most endangered whale species, yet the IWC has usually allowed a small number to be taken each year by Alaska natives because of the important role that whaling has traditionally played in Eskimo culture.

In 1977, however, the IWC followed a recommendation by the Scientific Committee to set a zero quota for the year. The United States did not object to the quota. The Eskimos filed suit to compel the

IV. CONCLUSION

Examination of the language, the legislative history, and the past use of the Pelly and the Packwood-Magnuson Amendments demonstrates that Congress did not require the Secretary of Commerce to certify a country for exceeding an IWC quota. Congress intended the amendments to address whaling practices that endanger whale species, not whaling activities that technically violate IWC quotas but lack significant harmful effects. Congress gave the Secretary of Commerce discretion and flexibility to determine whether a whaling violation was significant enough to require certification. The Secretary's past interpretation and use of the amendments has consistently demonstrated his discretionary powers. The amendments do not mandate certification of Japan's current sperm whaling because this whaling does not endanger whale stocks. Furthermore, the Secretary properly exercised his judgment by withholding certification.

The court in *American Cetacean* misconstrued the amendments when it determined that certification was automatic and nondiscretionary in this

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Secretary of State to do so. The district court noted statements of administrators that the United States must scrupulously observe IWC quotas in order to maintain its leadership in whale conservation, and that a United States' objection to the obviously necessary bowhead quota would have a devastating effect on the future effectiveness of the IWC. The court then interpreted these statements to show that the Executive's desire to maintain the United States' leadership role in the IWC requires the Secretary to certify all whaling in violation of an IWC quota. *Id.* at 1407. This interpretation does not follow from the statements. The United States' interest in maintaining its leadership role in the conservation movement and its reluctance to object to the bowhead quota do not demonstrate a government position against discretion in an entirely separate matter, the certification decision.

The *American Cetacean* court also failed to distinguish the facts of the bowhead case from the current case. The opinion stated that if the taking of 15 or 20 bowhead whales is "a threat to the entire IWC structure, the Court cannot see how the taking of . . . [whales according to the terms of the November agreement] could possibly be countenanced." *Id.* at 1407–08.

In fact, the situations were very different. The Bering Sea bowhead whale is one of the most seriously endangered of all whale stocks. At the 1979 IWC meeting, the Scientific Committee reported that the only safe quota for the bowhead whale was zero and that the population would continue to decline even in the absence of any whaling. INTERNATIONAL WHALING COMM'N, 30TH REPORT 30 (1980). The Committee's estimate of the remaining Bering Sea bowhead population was less than 2300 whales. *Id.* at 103.

The status of the North Pacific sperm whale stock is not so precarious. *See supra* notes 114–16, 119 and accompanying text. Northwest Pacific sperm whales are not endangered and the small number of whales taken by the Japanese will have little effect.

Finally, the court attempted to bolster its argument with an unofficial letter from the Secretary of Commerce to Senator Packwood in July, 1984. The correspondence addressed only the future IWC commercial moratorium. The Secretary stated in the letter that "any continued commercial whaling after the IWC moratorium decision takes effect would be subject to certification." *American Cetacean Soc'y*, 604 F. Supp. at 1408. The court found this statement to be inconsistent with the November agreement. This is technically correct since the agreement allows Japanese whaling to continue for two seasons after the moratorium begins. However, since the most important goal of United States whaling policy is to have the moratorium go into effect, two seasons of low-level Japanese whaling after the moratorium begins pale in significance next to Japan's acceptance of the moratorium. The present agreement is thus consistent with the tenor of the Secretary's letter.

case. The court also ignored the history and past agency interpretation of the amendments, overlooking the many incidents of uncertified whaling violations since the passage of the Packwood-Magnuson Amendment. Those incidents illustrate that Packwood-Magnuson certification, like Pelly certification, is not automatic. The court in *American Cetacean* overstepped its role by ordering certification of Japan.

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