Vanderbilt Journal of Transnational Law

Volume 20
Issue 1 *January 1987*

Article 3

1987

# United States Whale Policy: The Judiciary Casts Its Vote in Favor of a Moderate Approach

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# United States Whale Policy: The Judiciary Casts Its Vote in Favor of a Moderate Approach

TABLE OF CONTENTS



## I. INTRODUCTION

The United States Supreme Court intervened recently in a whaling policy conflict between the legislative and executive branches. The Court cast its deciding vote in favor of the compromise approach adopted by the Secretary of Commerce (the Secretary) rather than the strict conservationist position endorsed by Congress. The specific issue in the dispute was whether conservation statutes prohibited the Secretary from substituting statutory sanctions designed to encourage whale conservation for promises of future adherence to international whale conservation efforts. Characterizing the dispute as a question of statutory interpretation, the

Court ultimately endorsed the Secretary's interpretation of his duties as discretionary with respect to the whaling statutes. The issue, however, was much more complex than the Court's characterization suggested because the decision would affect both United States whale policy and international whale conservation efforts which both stood at crucial points at the time of the decision.

The initial and present goals of the International Whaling Commission (IWC) are in conflict. Established to conserve the whaling industry, the IWC has shifted its orientation toward whale protection.[1] This shift occurred because of the efforts of conservationist nations such as the United States. Although ecologically beneficial, the shift threatens to destroy the internal structure of the IWC.

United States whale policy has developed from equally contradictory bases. Its position as a leader of conservation efforts is offset by its tradition in whaling, its continued support for aboriginal whaling, and its hollow threats of sanctions against nations that fail to protect whales. Given this contradiction, the United States has struggled to apply existing legal sanctions. Congress seems to take an uncompromising position on sanction enforcement while the President favors a more moderate conciliatory approach.

The case presented to the Supreme Court required, therefore, more than statutory interpretation. The parties asked the Court to decide which approach to follow,[2] in effect inviting the Court to make foreign policy. Furthermore, the dispute involved an executive agreement that contradicted prior federal law. The issue of whether an executive agreement overrides prior, inconsistent federal law is unsettled in this case. More importantly, because the dispute involves separation of powers issues and requires a foreign policy determination, judicial review may have been inappropriate.

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1. *See generally* P. BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING (1985).

2. *See* Japan Whaling Ass'n v. American Cetacean Soc., ____ U.S. ____, 106 S.Ct. 2860, 2872 (1986) (Marshall, J., dissenting). Marshall argued that the Court's decision gave the Secretary the power to act contrary to a clear congressional directive. *Id.*

## II. INTERNATIONAL WHALING REGULATION

### A. *Whaling Regulation Prior to the International Convention for the Regulation of Whaling*

In the early part of this century, observers noted the need for whaling regulations to remedy the marked decrease in whale catches and stocks[3] caused by technological advances and distorted whaling economics.[4] Specifically, improved technology facilitated whaling without accounting for the diminishing number of available whales.[5] The economic consequences of unrestricted whaling prompted whalers to overinvest in equipment while ignoring both the lack of increased demand for whale products and any possible long-term effects on the whale supply.[6] Whalers based this short-term thinking in part on the traditional notion of infinite marine resources.[7] The whale's demise disposed of that notion.[8]

Recognizing the need for some sort of international whaling regulation, twenty-six nations[9] signed the Convention for the Regulation of Whaling in 1931 (1931 Convention).[10] Specifically, the 1931 Convention protected calves and suckling whales, prohibited the killing of right

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3. P. BIRNIE, *supra* note 1, at 105-09; Christol, Schmidhauser & Totten, *The Law and the Whale: Current Development in the International Whaling Controversy*, 8 CASE W. RES. J. INT'L L. 149, 149-50 (1976). League of Nations observers stated that the League would provide the best means for handling whaling regulation.

4. Note, *Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?*, 14 CAL. W. INT'L L. J. 114, 121 (1984) [hereinafter Note, *Enforcement Questions*].

5. Technological advancements such as the shell harpoon, which provided greater harpoon accuracy, and the floating factory ship, which allowed whalers to process their harvest at sea, increased the whaling industry's efficiency. Note, *The Conservation of Whales*, 5 CORNELL INT'L L. J. 99, 100 (1972) [hereinafter Note, *The Conservation of Whales*]. The advent of sonar along with the use of helicopters for tracking would further help whalers hunt whales. *See id.*

6. Keen, *The 200-Mile Zone in U.S. Ocean Policy*, in THE WHALING ISSUE IN U.S. - JAPAN RELATIONS 164, 178-79 (J. Schmidhauser & G. Totten, eds. 1978) [hereinafter THE WHALING ISSUE]. Whalers harvested whales primarily for their oil. Whaling practice stifled the reproduction of whale stocks because females contain the most oil. *See* Note, *The Conservation of Whales*, *supra* note 5, at 99.

7. See Freidheim, *Constructing a Theory of the 200-Mile Economic Zone*, in THE WHALING ISSUE, *supra* note 6, at 152-54.

8. *Id.* at 154-55.

9. Perhaps more notable than the signatories were those whaling nations which did not sign: Japan, Chile, Argentina, and the USSR. *See* Note, *The Conservation of Whales, supra* note 5, at 103.

10. Convention for the Regulation of Whaling, *opened for signature* Sept. 24, 1931, 49 Stat. 3079, T.I.A.S. No. 880, 155 L.N.T.S. 3586 [hereinafter 1931 Convention].

whales, required the licensing of whaling vessels, covered all oceans, and placed enforcement responsibilities in the hands of each nation.[11] However, the 1931 Convention applied only to baleen whales, leaving toothed whales unprotected.[12] The motive of many nations complying with the regulations was not to protect whales, but to prevent overproduction of whale oil.[13] Generally, the 1931 Convention failed to provide effective whale conservation because of its narrow scope, limited acceptance, and lax enforcement.[14] Since 1930, commentators had been expressing the need for more effective and scientifically-based restrictions.[15] The Agreement for the Regulation of Whaling (1937 Agreement) followed.[16] The 1937 Agreement covered more whale species, outlawed the killing of gray and right whales, established minimum catch lengths for each regulated species, defined catch seasons, delineated geographical boundaries for factory ships, and required each nation to compile and communicate statistical data of each hunt.[17] Despite these changes, the 1937 Agreement made few substantive alterations in international whaling regulation.[18]

The conservation efforts of the 1937 Agreement suffered from many of the same flaws as the 1931 Convention. Lack of acceptance,[19] lax en-

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11. *Id.*, arts. 1, 4, 5, 8 & 9.

12. *Id.*, art. 2. Baleen whales have no teeth, but have a special bone over which they sift their food. Common varieties of toothless whales are gray, sei, humpback, finback, right, and blue. The other general type of whales has teeth. Beaked, sperm, and killer whales as well as dolphins and porpoises represent this category. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 3 (1975).

13. Omura, *Origin of the International Whaling Commission*, in THE WHALING ISSUE, *supra* note 6, at 28-29.

14. Note, *The Conservation of Whales, supra* note 5, at 103. The 1931 Convention suffered also from a lack of effective enforcement provisions and imprecise definitions of harvest seasons, whale ages, and activities constituting violations. *Id.* at 102-03.

15. Jessup, Editorial Comment, *The International Protection of Whales*, 24 AM. J. INT'L L. 751, 752 (1930) (suggested that future measures include international conventions, national legislation, and scientific studies).

16. Agreement for the Regulation of Whaling, *opened for signature* May 7, 1937, 52 Stat. 1460, T.I.A.S. No. 933, 190 L.N.T.S. 4406 [hereinafter 1937 Agreement].

17. *Compare id.*, arts. 4, 5, 7, 9 & 13-17 *with* 1931 Convention, *supra* note 10, arts. 1, 4, 5, 7 & 9 (to show what changed and what remained). *See generally* Note, *The Conservation of Whales, supra* note 5, at 102-05 (discusses both early attempts at whaling regulation).

18. Note, *The Conservation of Whales, supra* note 5, at 105.

19. Only nine nations originally signed the 1937 Agreement. Japan, Chile, and the USSR did not. Japan, however, stated that it would abide by the agreement even though it did not sign it. Japan failed to comply with the 1937 Agreement. *See id.* at 104.

forcement,[20] and rigidity[21] undermined its effectiveness. The participating countries again supported whaling regulation to protect the whaling industry rather than to protect the whale.[22] Furthermore, the regulations were ineffective conservation measures because they reflected accommodation of the interests of whaling nations to gain acceptance rather than to insure whale protection.[23] In short, the early regulatory schemes failed to provide effective whaling conservation. They did provide, however, a glimpse of the problems facing future international regulatory measures.

### B. *Whaling Regulation Under the International Convention for the Regulation of Whaling*

In 1946, fifteen nations signed the International Convention for the Regulation of Whaling (ICRW).[24] The ICRW sought to conserve whales while protecting whaling nations from "widespread economic and nutritional distress."[25] Specifically, the ICRW placed enforcement responsibilities with each signatory nation, provided objection and withdrawal procedures, and promulgated an original schedule of regulations.[26] This original schedule laid out various restrictions on whaling techniques and practices, required statistical reports of whale catches, outlawed the commercial taking of gray and right whales, set minimum catch lengths, provided an exception for aboriginal whaling, and established a quota of 16,000 blue whale units[27] for operations in the

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20. The 1937 Agreement incorporated the 1931 Convention's enforcement provisions. The only difference was that the 1937 Agreement required one governmental observer on each factory ship. *Compare* 1937 Agreement, *supra* note 16, art. 1 *with* 1931 Agreement, *supra* note 10, art. 1.

21. *See* Hopson v. Kreps, 622 F.2d 1375, 1376 (9th Cir. 1980) (general discussion of the historical problems of international whaling regulation). The method for amending the 1931 Convention and the 1937 Agreement—formal protocol—discouraged change. *Id.*

22. *See* 1937 Agreement, *supra* note 16, at preamble; Note, *Enforcement Questions*, *supra* note 4, at 122 (both regulatory schemes aimed at protection of the whale oil industry).

23. Note, *The Conservation of Whales*, *supra* note 5, at 105.

24. International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter ICRW]. Among the original signatories were the whaling nations of Chile, Argentina, and the USSR. Japan ratified the ICRW in 1951. P. BIRNIE, *supra* note 1, at 216.

25. ICRW, *supra* note 24, at preamble. In addition, the ICRW was designed "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." *Id.*

26. *Id.*, arts. V, IX, XI & Schedule.

27. *Id.*, Schedule ¶8(b) defined one blue whale unit as one blue whale, two fin

Antarctic Ocean.[28] The ICRW also established the International Whaling Commission (IWC) and empowered it to amend the ICRW by adopting conservation regulations.[29]

Early IWC actions catered to the short-term economic concerns of the whaling industry rather than to effective conservation.[30] This orientation began to shift in the 1960s when the IWC enacted the first quota reductions in 1963[31] followed by a ban on blue whale hunting in 1964.[32] Between 1972 and 1982, the IWC moved toward conservation by reducing catch limits by approximately seventy-three percent, limiting the use of factory ships, creating a sanctuary in the Indian Ocean, and replacing the blue whale unit with specific catch limits for each species.[33] The IWC replaced the blue whale unit with catch limits based on the "maximum sustainable yield," a figure determined by calculating the number of whales that can be taken from each species without endangering it.[34]

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whales, two and one half humpback whales, or six sei whales. The blue whale unit was based on the amount of oil that could be extracted from each species of whale. *See* Note, *Enforcement Questions, supra* note 4, at 125.

28. *See* ICRW, *supra* note 24, Schedule ¶¶ 2, 8, 9 & 16.

29. *Id.*, arts. III, V. The IWC is composed of one representative of each signatory nation. *Id.*, art. III, § 1. The IWC's power to adopt regulations includes the power to set maximum catch limits. *Id.*, art. V, § 1(e). The ICRW requires that any amendments:

> (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings;. . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry. . . .

*Id.*, art. V, § 2.

The IWC's power to amend the ICRW without formal protocol gave the ICRW the flexibility the 1931 Convention and the 1937 Agreement lacked. *See Hopson*, 622 F.2d at 1376.

30. *See* Christol, Schmidhauser & Totten, *supra* note 3, at 155.

31. *Id.* at 154.

32. Note, *The Conservation of Whales, supra* note 5, at 108. The IWC's Scientific Committee recommended the ban in 1963 after noting the dangerously low number of blue whales estimated to be alive. *Id.* at 108. The IWC's own blue whale unit contributed to the blue whale's demise because the blue whale unit encouraged whalers to concentrate their efforts on blue whales. *See* Note, *Enforcement Questions, supra* note 4, at 125.

33. *United States Whaling Policy Oversight, 1983: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 98th Cong., 1st Sess. 247 (1983) (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Administration, Department of Commerce) [hereinafter *Hearings I*]. *See generally* P. BIRNIE, *supra* note 1, at 407-508, 600-34 (summary of each IWC meeting).

34. Note, *Enforcement Questions, supra* note 4, at 126. The maximum sustainable

Several developments prompted the move toward conservation. First, the complexion of IWC membership changed to predominantly nonwhaling nations.[35] Second, the United States, an advocate of conservation, strongly supported IWC actions.[36] Furthermore, economic considerations within the whaling industry made whaling nations more amenable to conservation.[37]

The IWC's shift toward whale conservation culminated in a 1982 moratorium on commercial whaling.[38] This ban went into effect for the 1985-86 pelagic season[39] and the 1986 coastal season. The moratorium represented a compromise of the more radical measures proposed by the IWC delegates.[40] Furthermore, to both gain acceptance from the whaling nations and to comport with the purposes of the ICRW the moratorium contained a delayed commencement provision and a measure for early

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yield is based on statistical information regarding overall species population. *Id.* at 126-27. The IWC uses the maximum sustainable yield figure for each species to set the individual quotas. *Id.* The blue whale unit, with its focus on whale oil, proved to be a poor resource management tool because it failed to account for the danger of extinction possible for each species. *Id.* at 125.

35. *See* P. BIRNIE, *supra* note 1, at 613. Canada, a whaling nation, withdrew in 1981 and was replaced by eight nonwhaling nations in 1982. By the IWC's 1982 meeting, three-fourths of its members were nonwhaling nations. *Id.* at 613-14.

36. Note, *Hopson v. Kreps: Bowhead Whales, Alaskan Eskimos, and the Political Question Doctrine,* 9 HASTINGS CONST. L.Q. 231, 243-45 (1981) [hereinafter Note, *Hopson v. Kreps*].

37. *Hearings I, supra* note 33, at 247 (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Administration, Department of Commerce).

38. The moratorium measure states:

> . . . notwithstanding the other provisions of paragraph 10 catch limits for all the killing for commercial purposes of whales from all stocks for the 1986 coastal and 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990, at the latest the Commission [IWC] will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

Paragraph 10(e), IWC Schedule (Feb. 1983), *reprinted in Hearings I, supra* note 33, at 247. Because the provision covers only whaling for "commercial purposes," it has no effect on aboriginal whaling.

Brazil, Iceland, Japan, the People's Republic of Korea, Norway, Peru, and the USSR voted against the moratorium. Chile, South Africa, the Phillipines, and the People's Republic of China chose not to vote. P. BIRNIE, *supra* note 1, at 614, n.60.

39. Pelagic whaling refers to whaling operations in which the whale is processed at sea.

40. P. BIRNIE, *supra* note 1, at 614-15. Other proposals included a two year phase out, a ten year moratorium, a permanent ban on commercial whaling, and a permanent ban on all whaling. *Id.*

IWC review.[41] Despite these compromises, four nations objected,[42] contending that the moratorium violated the ICRW.[43] Ultimately, even if the moratorium fails, it remains important because the IWC put whale conservation and protection ahead of the whaling industry's short-term economic concerns.[44]

While the moratorium puts commercial whaling on hold legally, it also focuses attention on the ICRW's internal problems and on whale conservation in general. First, the moratorium demonstrates that the ICRW charged the IWC with conflicting duties.[45] The IWC's duty to protect whales contravenes its traditional purpose to develop an industry which has hunted whales to near extinction. Second, the moratorium illustrates how the IWC must dilute conservation measures to gain ultimate approval by member nations.[46] In particular, the IWC delayed the moratorium and provided for repeal in less than five years. Third, the ban reveals that the ICRW, like its predecessors, lacks the authority to implement and enforce its regulations.[47] Specifically, the IWC's observer schemes, designed to aid enforcement, have proved ineffective as most violations remain unreported.[48] Fourth, whaling may escape restriction. Whalers may circumvent regulations through the aboriginal exception or by pirate whaling.[49] Additionally, nations may avoid regulations through

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41. *Id.* at 614.

42. The four objectors were Japan, Norway, Peru and the USSR. Peru, however, withdrew its objection one year later. *Id.* at 615, 626.

43. The objectors' main contention was that the ICRW requires any amendments to have a scientific basis. *See id.* at 615; *see also supra* note 29. The Scientific Committee did not endorse the ban because the committee failed to find the scientific information necessary to justify the moratorium. P. BIRNIE, *supra* note 1, at 616. In contrast, the United Nations Conference on the Human Environment indicated that a moratorium would have a scientific basis given the whale's role in the world's ecosystem. *See* United Nations Conference on the Human Environment, U.N. Doc. A/Conf. 48/14/Rev. 1, at 12, Recommendation 33 (1972); Nishiwaki, *Failure of Past Regulations and the Future of Whaling,* in THE WHALING ISSUE, *supra* note 6, at 44, 49. Japan charged that the moratorium was politically motivated rather than scientifically based. P. BIRNIE, *supra* note 1, at 616.

44. *See* Note, *The Conservation of Whales, supra* note 5, at 110.

45. *See* Note, *Enforcement Questions, supra* note 4, at 123; ICRW, *supra* note 24, at preamble; see also supra note 25 and accompanying text.

46. *See* P. BIRNIE, *supra* note 1, at 608.

47. *See* Note, *The Conservation of Whales, supra* note 5, at 110-11; *see also* 1931 Convention, *supra* note 10, art. I; 1937 Agreement, *supra* note 24, art. IX; *supra* notes 14, 19, 21 and accompanying text.

48. Note, *Enforcement Questions, supra* note 4, at 127-29.

49. *Id.* at 129-31.

the objection or withdrawal provisions of the ICRW.[50] Last, new and old concepts of the law of the sea threaten to undermine IWC authority. The modern concept of 200-mile Exclusive Economic Zones (EEZs)[51] and the traditional concept of the sea as common property undermine the IWC's jurisdiction over all whales.[52]

These problems suggest that the moratorium threatens to destroy the ICRW by alienating its member nations.[53] Should the ICRW fail, whaling regulation will be left to each nation and to the market forces of supply and demand for whale products. Relying on market forces to regulate whaling will in effect sacrifice protection for economic feasibility. This in turn may mean extinction for various species of whales.[54] Unilateral conservation measures, however, may provide an effective alternative to international schemes.

## III. UNITED STATES WHALING POLICY

Despite its tradition as a whaling nation,[55] the United States is a leader in whale conservation efforts. United States policy reflects public sympathy for the plight of the whale. Graphic documentaries revealing the whale's plight[56] and media campaigns by conservation groups have aroused public emotions.[57]

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50. *Id.* at 115; *see* ICRW, *supra* note 24, art. V, § 3(c), & art. XI.

51. The United Nations Third Conference on the Law of the Sea (UNCLOS) established the 200-mile exclusive economic zone (EEZ) concept giving each nation authority over the first 200 miles of their coastal waters. EEZs were designed to protect the fishery resources of developing nations from exploitation by the developed nations. Third U.N. Conf. on the Law of the Sea, U.N. Doc. A/Conf. 62/WP. 10/Rev. 2, Part V, arts. 55-58; *see also* Note, *Enforcement Questions, supra* note 4, at 135-36. The IWC's jurisdiction over each nation's EEZ is questioned. *See id.* at 133-36.

52. *Id.* at 132-33.

53. *See* P. BIRNIE, *supra* note 1, at 624.

54. *See* Christol, Schmidhauser & Totten, *supra* note 2, at 155-56. Among the troubles facing the Japanese whaling industry are the increasing attractiveness of substitutes to whale products and the financial burden of production capacities far beyond IWC quotas. Hirasawa, *The Whaling Industry in Japan's Economy*, in THE WHALING ISSUE, *supra* note 6, at 82, 86, 95.

55. The United States whaling industry flourished from 1750 to 1850. *Nishiwaki, supra* note 43, at 45. The industry's prosperity ended when its main product, oil, dropped in value and fell prey to a substitute, petroleum. *Id.* Commercial whaling officially ended in 1970. Coggins, *supra* note 12, at 4. All that remains of U.S. whaling is done by Alaskan Eskimos pursuant to permits from the Secretary of Commerce and the ICRW Schedule's exception for aboriginal whaling. *See Hearings I, supra* note 33, at 272 (statement of Rep. Breaux).

56. *See* Coggins, *supra* note 12, at 14.

57. Totten, *Nature of the Whaling Issue in U.S. - Japan Relations*, in THE WHAL-

Although the United States signed each of the three whaling conventions, it did not take a leadership role in whale conservation until the 1970s. Since 1971 the United States has asserted its conservationist policies through the IWC, diplomacy, and domestic legislation. Secretary of State Alexis Johnson opened the 1971 meeting of the IWC with an attack on both the continued use of the blue whale unit for quotas and the overall ineffectiveness of the IWC in achieving conservation.[58] One year later at the 1972 IWC meeting, the United States called for a ten year moratorium on whaling.[59] Although the IWC rejected this moratorium, it did discard the blue whale unit.[60] Beginning in 1972, the United States attempted to convince the IWC to implement a moratorium on commercial whaling.[61] The IWC finally adopted the United States-backed moratorium in 1982.

At home, the United States government attacked whaling economically. In 1971, it outlawed the importation of products made from eight "endangered"[62] species of whales pursuant to the Endangered Species Act of 1969.[63] Consequently, the United States eliminated twenty percent of the world market for those products.[64] Additionally, Congress passed the Marine Mammal Protection Act of 1972 (MMPA)[65] which banned the importation of products made from marine mammals and virtually outlawed whaling by United States citizens.[66]

In order to effectuate existing IWC regulations,[67] Congress adopted

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ING ISSUE, *supra* note 6, at 1, 1-4.

58. P. BIRNIE, *supra* note 1, at 413.

59. The United States proposal was made in conjunction with the resolution passed at the 1972 United Nations Convention on the Human Environment which called for a ten year moratorium on whaling. *Id.* at 422-23. The moratorium proposal failed, in part because the IWC's Scientific Committee did not recommend the moratorium because the ban had no scientific basis. *See id.* at 430.

60. *Id.* at 421.

61. *Hearings I, supra* note 33, at 246 (statement of Dr. John Byrne, Administrator, National Oceanic and Atmospheric Administration, Department of Commerce).

62. Coggins, *supra* note 12, at 4-5.

63. Endangered Species Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, repealed Pub. L. No. 93-205, § 13, 87 Stat. 884, 902 (1973). Congress overhauled the act with the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 7 and 16 U.S.C.).

64. Coggins, *supra* note 12, at 4-5.

65. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 1361-1407 (1982)) [hereinafter MMPA].

66. 16 U.S.C. § 1371(a) (1982).

67. See Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?*, 10 OCEAN DEV. & INT'L L.J. 41, 43 (1981) [hereinafter Bonker on Policy and Strategy].

the Pelly Amendment to the Fishermen's Protective Act in 1971.[68] The Pelly Amendment empowered the President to impose economic sanctions on nations whenever the Secretary of Commerce "certified" to him that foreign nationals were "directly or indirectly, . . . conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery program. . . ."[69] The amendment provided that upon such a finding the President could prohibit the importation of fish products from the offending nation.[70]

In 1974 the Secretary of Commerce certified that Japan and the USSR diminished the effectiveness of the ICRW by taking minke whales in excess of IWC quotas. The Secretary made the certifications despite the fact that each country filed a valid ICRW objection to the quota.[71] President Ford, however, chose not to cut off the importation of Japanese and Soviet fish products because both nations agreed to abide by future IWC regulations.[72] In 1979, the Secretary of Commerce certified that Spain took whales in excess of an IWC quota. Spain also filed a valid objection to the quota. Again, the government withheld sanctions when Spain agreed to follow future IWC quotas.[73]

United States negotiators did use the threat of Pelly Amendment certification to coax non-IWC members such as Chile, Peru and the Republic of Korea to join by 1979.[74] Through the Pelly Amendment, the United States helped enforce IWC quotas against both objecting IWC members and non-IWC members. In addition, the United States established through its practice that continued whaling in excess of IWC quotas diminished the effectiveness of the ICRW and could result in United States sanctions against violators.

By passing the Packwood-Magnuson Amendment to the Fisheries Conservation and Management Act,[75] Congress further assisted the IWC

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68. Pelly Amendment to the Fisherman's Protection Act, Pub. L. No. 92-219, 85 Stat. 786 (codified as amended at 22 U.S.C. § 1978 (1982)).

69. *Id.*, § 1978(a)(1), (4).

70. *Id.*, § 1978(a)(4).

71. *Preparations for the 34th International Whaling Commission Meeting: on Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 10-12 (1982) [hereinafter *Preparations for the 34th IWC Meetings*].

72. *Id.*

73. *Id.*

74. *Id.*

75. Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976, Pub. L. No. 96-61, § 3(a), 93 Stat. 407 (codified as amended at 16 U.S.C. § 1821 (1982)).

regulatory efforts. The Packwood-Magnuson Amendment, adopted in 1979, refers specifically to the ICRW, expands the list of activities which may diminish the effectiveness of the conservation program, and mandates sanctions upon certification.[76] Under the Packwood-Magnuson Amendment "fishing operations," "trade," or "taking" could diminish the effectiveness of IWC conservation efforts and trigger certification.[77] The legislation provided that upon certification the Secretary of State must impose sanctions. Specifically, the Secretary of State in consultation with the Secretary of Commerce, must reduce the offending nation's fishing allocation in the United States EEZ by at least fifty percent.[78] The most important feature of the Packwood-Magnuson Amendment is its nondiscretionary sanctions. Intended to give "teeth" to whale protection, these sanctions force IWC violators to choose between whaling and fishing in the United States EEZ.[79]

The Secretary has yet to issue a certification under the Packwood-Magnuson Amendment.[80] United States diplomats, however, argue that the threat of sanctions has deterred five of the nine IWC whaling nations from objecting to the 1982 commercial whaling moratorium.[81] Additionally, Peru's withdrawal of its objection to the moratorium may be attributed in part to the threat of United States sanctions. Some Congressmen, however, contend that the Packwood-Magnuson and Pelly Amendments have done little to promote whaling conservation because the amendments failed to persuade Norway, Japan, and the USSR to observe the moratorium.[82] Despite this shortcoming, United States efforts have

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76. *Id. See also* Note, *Enforcement Questions, supra* note 4, at 137 (describes the effects of both the Packwood-Magnuson and Pelly Amendments on United States whale conservation policy).

77. 16 U.S.C. § 1821(e)(2)(A) (1982). This provision expands the list of activities that may trigger certification. *Compare* 22 U.S.C. § 1978(a)(1) (only fishing operations trigger certification under the Pelly Amendment).

78. 16 U.S.C. § 1821(e)(2)(B).

79. 125 CONG. REC. 21742, 21743 (1979). The intent of the Packwood-Magnuson Amendment was to increase significantly whale protection by sending a message to the world that the United States would enforce the ICRW. *See id.* at 21743-44, 22083.

80. In 1980, United States diplomats used the threat of Packwood-Magnuson certification and sanctions to persuade Taiwan and the USSR to comply with IWC quotas. *Preparations for the 34th IWC Meeting, supra* note 71, at 11-12.

81. *See Hearing and Markup on H.R. Res. 3416, H. Con. Res. 69, H.R.J. Res. 136; Hearings Before the House Comm. on Foreign Affairs and Subcomm. Human Rights and International Organizations*, 98th Cong., 2d Sess. 106 (1984) (statement of Mark Cheater, Legislative Director for Wildlife Issues, Greenpeace, U.S.A.) [hereinafter *Hearings II*].

82. *See* Note, *Enforcement Questions, supra* note 4, at 139.

helped the IWC become more effective as an international body by buttressing its enforcement efforts.[83] At the same time, Congress has asserted a foreign policy preference by directing negotiations toward conservation.[84]

## IV. The Current Conflict

When the IWC adopted the moratorium on commercial whaling, it set the stage for a showdown. For the first time the IWC put whale protection ahead of the whaling industry's short term interests. As a result, the division between whaling and nonwhaling members of the IWC widened. The IWC's scientific committee and the United Nations Food and Agriculture Organization both criticized the moratorium because of its lack of scientific basis.[85] Additionally, the possibility of withdrawals by and objections from the major whaling nations threatened to disintegrate the IWC.[86]

Although Congress and the President agree that conservation is the ultimate goal, they disagree on the means for achieving conservation.[87] Congress supports trade and fishing sanctions.[88] President Reagan, on the other hand, threatens sanctions, but has yet to impose them.[89] Congressmen have attacked the President for sacrificing whale protection for other policy concerns such as balance of trade, tariffs and trade barriers.[90] Any commercial whaling violates IWC regulations while the IWC

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83. *See* Note, *Hopson v. Kreps, supra* note 36, at 243-44.

84. *See* Coggins, *supra* note 12, at 58. By adopting unilateral sanctions for IWC violations, Congress put whale conservation above potential problems in international law and foreign relations. *Id.* at 51. Congress seemed willing to take these risks because conservation efforts had continually failed and whale protection was urgent. *See id.* at 51-52.

85. P. Birnie, *supra* note 1, at 616-174.

86. *Id.* at 624.

87. *See Hearings I, supra* note 33, at 294 (statement of Rep. Breaux).

88. *See supra* notes 62-70, 72-79 and accompanying text; *see also* 130 Cong. Rec. E4441 (daily ed. Oct. 10, 1984) (statement of Rep. Waxman) (calls on President to use his authority to help implement the IWC moratorium).

89. *See supra* notes 80-82 and accompanying text; *see also* President's Message to the Congress on Whaling Activities of the U.S.S.R., 21 Weekly Comp. Pres. Doc. 727-28 (June 3, 1985) (President explains his reasons for not invoking Pelly Amendment sanctions but assures that he is working toward whale conservation) [hereinafter President's Message].

90. *See Hearings I, supra* note 33, at 283 (statement of Rep. Bonker). Representative Bonker alleged that the administration has enjoyed "the luxury" of saying it was opposed to commercial whaling while actually pursuing conservation as little as possible. *Id.* Bonker has argued further that economic sanctions should be invoked wherever ap-

moratorium is in effect. Violations also trigger the Pelly or Packwood-Magnuson certifications and sanctions. Given this regulatory framework, the question is whether the United States will implement the executive or the congressional approach to achieve whale conservation.[91]

In the period between the moratorium's declaration and its commencement, both Congress and the President sought to avoid a confrontation. Congress urged the President and Secretary of State to persuade Japan, Norway, Peru, and the USSR to withdraw their objections.[92] Further, the Department of State vowed to use all legal and diplomatic means possible to carry out this task.[93] This was not an easy undertaking because the United States position has appeared ambivalent, if not hypocritical.[94] The United States has consistently threatened economic sanctions, but has refrained from imposing them by accepting compromises from violating nations.[95] Furthermore, while the United States objects to commercial whaling, it continues to allow aboriginal whaling.[96] Whether one whales for profit or for culture, whales still die.[97] As a result of these apparent contradictions, the United States managed to persuade only one state, Peru, to withdraw its objection to the moratorium.

Negotiations between the United States and the USSR were also unproductive. In April 1985, Secretary of State Baldridge certified the

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plicable in order to insure that the threat of sanctions will be believable. *See* Bonker on Policy and Strategy, *supra* note 67, at 52-53.

91. *See* Japan Whaling Ass'n v. American Cetacean Soc., ____ U.S. ____, 106 S.Ct. 2860, 2873 (1986) (Marshall, J. dissenting).

92. *See, e.g.*, H.R. Con. Res. 69; *Hearings II, supra* note 81, at 25-30 (statement of Rep. Bonker); 130 CONG. REC. E4441 (daily ed. Oct. 10, 1984) (statement of Rep. Waxman).

93. *See Hearings II, supra* note 81, at 26-30 (statement of R. Tucker Scully, Department of State).

94. Bonker on Policy and Strategy, *supra* note 67, at 51. Saving whales has rarely been a high priority in United States foreign policy. One weakness has been that the United States lacks a comprehensive conservation policy from which to build an effective strategy. *Id.*

95. *See supra* notes 71-74, 80-81 and accompanying text.

96. In 1977, the IWC removed the exemption by which Alaskan Eskimos took bowhead whales and placed a ban on the hunting of Arctic bowhead whales. *See* P. BIRNIE, *supra* note 1, at 485-86. The United States did not object. *See* Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1977) (court dismissed an action by Alaskan Eskimos to compel the Secretary of State to object to the IWC's measure). The United States played a key role in rescinding the ban and having aboriginal whaling of Arctic bowheads reinstated on a limited basis. *See* P. BIRNIE, *supra* note 1, at 500-01. United States law provides a special exception which allows Alaskan Eskimos to hunt whales. *See* 16 U.S.C. § 1371(b) (1982).

97. *See Hearings I, supra* note 33, at 272 (statement of Rep. Breaux).

USSR under the Pelly Amendment and the Packwood-Magnuson Amendment. The Packwood-Magnuson Amendment sanctions were applied and the Soviet fishing allocation in the United States EEZ was cut in half.[98] However, President Reagan chose not to impose the Pelly sanctions. The President, in a speech to Congress, noted the need for whale conservation, but explained that cutting off the importation of Soviet fish products would not affect the Soviets' objection.[99] He speculated that imposition of sanctions would be detrimental to the United States because it would eliminate jobs generated by the joint United States-USSR fishing operation.[100]

Negotiations with Japan proved more successful. The United States entered the negotiations fearing a direct economic confrontation.[101] The whaling issue traditionally has stirred animosity between Japan and the United States because of their differing views on whale conservation. As consumers of whales and whale products, the Japanese saw whale conservation as a threat to the supply of food resources.[102] As nonconsumers, the United States viewed the whale as a vital part of the world ecosystem threatened by humans.[103] As negotiations continued, the United States observed a decline in the Japanese whaling industry.[104] On November 13, 1984, the Japanese agreed to withdraw their objection to the moratorium and suspend all commercial whaling by 1988. In return, the Secretaries of State and Commerce agreed: (1) not to certify any further Japanese violations of IWC quotas under the Pelly and Packwood-Magnuson Amendments, and (2) not to reduce any Japanese fishing allocations due to certification.[105]

Before the agreement took effect, the American Cetacean Society and other wildlife conservation groups filed suit in the United States District Court for the District of Columbia requesting declaratory and injunctive

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98. *See* President's Message, *supra* note 89, at 728.

99. *Id.* at 727-28.

100. *Id.* at 728.

101. *See Hearings II, supra* note 81, at 22 (statement of R. Tucker Scully, Department of State).

102. Schmidhauser & Totten, *Policy Proposals on the Whaling Issue: Product of the Japanese-American Deliberation in Two International Interdisciplinary Conferences*, in THE WHALING ISSUE, *supra* note 6, at 257-58.

103. *Id.* at 265.

104. *Hearings I, supra* note 33, at 274-75 (statement of Dr. John Byrne, Administrator, Department of Commerce).

105. Commercial Whaling Harvest Agreement, Nov. 13, 1984, United States-Japan, T.I.A.S. No. _____ (not yet officially published, copy available from author).

relief.[106] The plaintiffs sought a declaratory judgment claiming that the Secretary of Commerce violated a statutory duty by not certifying that Japanese whaling practices diminished the effectiveness of the ICRW. The plaintiffs also moved to permanently enjoin the Secretaries of State and Commerce from either agreeing not to certify Japanese whaling operations which exceed IWC quotas or not to cut Japanese fishing quotas as a result of certification.[107] The Japanese Whaling and Fisheries Associations intervened.[108] The district court granted summary judgment in favor of the plaintiffs, issued the desired order,[109] and later denied a stay pending appeal.[110]

The District of Columbia Circuit affirmed, but granted a ninety day stay due to the foreign relations ramifications of the decision.[111] The appellate court focused on disputes of law and accepted the uncontroverted fact that Japanese whaling companies, pursuant to an IWC objection, took sperm whales in the 1984-85 season despite the IWC's zero quota for sperm whales. The court framed the issue as a question of statutory interpretation: whether the Pelly and the Packwood-Magnuson Amendments charged the Secretary of Commerce with a nondiscretionary, ministerial duty to certify to the President activities which diminish the ICRW's effectiveness.[112] The court then considered whether mandamus was the proper relief under the circumstances.[113]

The court identified two steps in the certification process: (1) determining whether the activities had "diminished the effectiveness of the international fishery program"; and (2) establishing the actual certification.[114] The court noted that the statute did not define "diminishing the effectiveness," the standard for certification.[115] The court therefore reviewed legislative histories and other uses of the phrase in similar contexts. The court found that violation of an internationally-set quota con-

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106. American Cetacean Soc. v. Baldridge [sic], 604 F. Supp. 1398 (D.D.C. 1985). The plaintiffs were frustrated with the ineffectiveness of whale conservation achieved by the United States. *Id.* at 1401.

107. *Id.*

108. The Japanese companies as defendant-intervenors argued that: 1) due to their objection, they were not technically violating the ICRW; and 2) permanent injunctive relief was not appropriate in this situation. *Id.*

109. *Id.* at 1411.

110. American Cetacean Soc. v. Baldridge [sic], 604 F. Supp. 1411, 1412.

111. American Cetacean Soc. v. Baldrige, 768 F.2d 426, 445 (D.C. Cir. 1985).

112. *Id.* at 432, 434.

113. *Id.* at 433.

114. *See id.* at 436.

115. *Id.* at 436; *see also* 16 U.S.C. § 1821(e)(2)(A)(1); 22 U.S.C. § 1978(a) (1982).

stitutes per se diminishing the effectiveness of the quota.[116] The court concluded that although the Secretary of Commerce has discretion to certify in some situations,[117] the Secretary had no discretion in this case.[118]

In a five to four decision, the Supreme Court reversed the D.C. Circuit.[119] The Court held that the dispute presented a justiciable issue, but determined that the Pelly and Packwood-Magnuson Amendments did not require the Secretary to certify all violations of IWC quotas. The majority first rejected the Japanese petitioners' contention that the case presented a nonjusticiable political question.[120] The Court acknowledged that the dispute involved foreign affairs, but stated that the crucial issue was a justiciable question of statutory interpretation.[121] Relying on *Baker v. Carr*,[122] the Court explained that not every question which has foreign policy ramifications presents a nonjusticiable dispute.[123]

Proceeding to the merits, the Court considered "whether, in the circumstances of these cases, either the Pelly or Packwood [-Magnuson] Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas."[124] The Court stated the statute did not require certification until the Secretary established that a nation's activi-

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116. *See* 768 F.2d at 435-43. Past practice supports this view. That is, whaling in excess of IWC limits has triggered certification in prior instances. *See supra* notes 71-74 and accompanying text.

117. The Secretary of Commerce would have discretion when actions do not violate the IWC regulations technically, but undermine the achievement of the regulations. *See id.* at 434.

118. *See id.* at 443.

119. Japan Whaling Ass'n v. American Cetacean Soc., 106 S.Ct. 2860 (1986). Justice White wrote the majority opinion joined by Chief Justice Burger and Justices Powell, Stevens, and O'Connor. Justice Marshall authored the dissenting opinion joined by Brennan, Blackmun, and Rehnquist.

120. *Id.* at 2866. The Japan Whaling Association argued that the issue was not proper for judicial decision because a judicial decision would result in a wide variety of public statements by the co-ordinate branches of the United States government. This argument was based on the prudential considerations discussed in Baker v. Carr, 369 U.S. 186, 217 (1962).

The circuit court never addressed the issue squarely. The court tacitly adhered to the doctrine by identifying the issue as one of statutory interpretation. *See American Cetacean Soc. v. Baldrige,* 768 F.2d at 432. In dissent, Judge Oberdorfer accused the circuit court of ignoring the justiciability problems. *Id.* at 447 (Oberdorfer, J., dissenting). Oberdorfer concluded that the dispute presented a nonjusticiable issue because of the complicated foreign policy ramifications. *Id.*

121. *Japan Whaling Association,* 106 S.Ct. at 2866.

122. 369 U.S. 186 (1962).

123. 106 S.Ct. at 2866.

124. *Id.* at 2867.

ties " 'diminishe[d] the effectiveness' of the ICRW."[125] The Court observed that the statute does not state that whaling in excess of IWC quotas diminished the effectiveness of the ICRW. Instead, Congress left the phrase undefined. Because Congress did not define the standard, the Court deferred to the Secretary's interpretation.[126]

The Court again reviewed the legislative histories of the Pelly and Packwood-Magnuson Amendments to determine whether the Secretary's interpretation contradicted congressional intent. The Court cited Committee and House Reports that specifically state that the Secretary did not have an absolute duty to certify all violations of internationally-set conservation quotas.[127] Further, the Court stressed that passage of the Packwood Amendment did not change the standard for certification.[128] The Amendment, rather, required mandatory sanctions upon certification. The Court concluded that the legislative history did not prohibit the Secretary's interpretation. In addition to its statutory analysis, the Court justified its result on policy grounds. Securing Japan's compliance with IWC quotas in the future would better serve whale conservation than imposing sanctions for past conduct in hopes of coercing future compliance.[129]

In the dissenting opinion, Justice Marshall argued that the Secretary lacked the discretion necessary to make the agreement because Japan's whaling in excess of IWC quotas per se diminished the effectiveness of the ICRW and, therefore, warranted certification. The dissent affirmed the lower court's objection to the Secretary's interpretation of the standard for certification used in the Pelly and Packwood-Magnuson Amendments.[130] Marshall explained that the majority, the lower courts, and even the parties themselves overlooked the most direct approach to resolution of the dispute. He emphasized that the facts demonstrate that Japanese past conduct diminished the effectiveness of the ICRW.[131] Furthermore, the dissent argued that the legislative history of the Pelly and Packwood-Magnuson Amendments lent no support to the Secretary's interpretation of his powers.[132]

Justice Marshall prefaced his legal analysis with a survey of past United States practice under the Pelly and Packwood-Magnuson

125. *Id.*
126. *Id.* at 2868.
127. *Id.* at 2868-70.
128. *Id.* at 2870-71.
129. *Id.* at 2871.
130. *Id.* at 2873 (Marshall, J., dissenting).
131. *Id.* at 2873-74.
132. *Id.* at 2875-76.

Amendments.[133] He observed that in all prior cases the Secretary certified violations of IWC quotas. He stated that the Secretary appeared to act under a duty to certify violations of IWC whaling quotas.[134] Each of the certified violations went unsanctioned, however, under the Pelly Amendment. President Reagan instead threatened sanctions under the Pelly Amendment and certification under Packwood-Magnuson to persuade the violators to follow IWC schedules in the future. Justice Marshall argued that Congress passed the Packwood-Magnuson Amendment because the President treated IWC violators too softly.[135] Consequently, Marshall viewed this case as one fight in the continuing battle over which branch of government should determine United States whale policy.

In his legal analysis, Marshall considered whether the Japanese through their past conduct had diminished the effectiveness of the ICRW.[136] Marshall found that no one, not even the Secretary of Commerce, contended that Japanese whaling in excess of IWC quotas did not diminish the effectiveness of the ICRW. Marshall quoted a letter written prior to the executive agreement with Japan in which the Secretary stated that whaling in excess of IWC quotas warranted certification.[137] Marshall concluded that the undisputed facts demonstrate that Japan took sperm whales in excess of the amount specified by the IWC. In addition, given the Secretary's prior practice, he did not have discretion to withhold certification.[138]

Marshall defended the lower courts' interpretations of the statutes,[139] arguing that the majority ignored legislative intent that whaling in excess of IWC quotas would mandate certification. Although the Secretary may have discretion over certification when the violations are negligible, Japan's continued whaling in spite of an IWC ban was not a negligible

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133. *Id.* at 2872-73. The dissent quotes a letter Secretary Baldrige had written in response to correspondence he received from Senator Packwood. *Id.* at 2873-74. The dissent also quoted excerpts from Packwood's letter which stated that he expected any whaling in excess of the IWC moratorium to warrant certification. *Id.* at 2873.

134. *Id.* at 2072.

135. *Id.*

136. *Id.* at 2874.

137. *See id.* at 2873-74. Marshall added that the Secretary's actions indicate that he wished to rewrite the law. Specifically, the Secretary used his power over the certification decision to side-step the sanction mandated by Congress. *Id.* at 2876.

138. *Id.* at 2874-76.

139. *Id.* at 2876. The dissent stated further that it was, "troubled that this Court [the majority] is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress'. . ." will on how to pursue whale conservation. *Id.*

incident.[140]

As a result of the division on this Supreme Court decision, the executive prevailed in the United States showdown on whale conservation. Consequently, the United States has adopted a compromise approach to whale conservation. Any notion that IWC violations mandate sanctions from the United States is eliminated. Therefore, the Pelly and Packwood-Magnuson provisions become discretionary sanctions which the executive may invoke if it chooses to adopt a hard-line approach to whale conservation. If Congress wishes to impose mandatory sanctions on IWC violators, it will have to pass another statute.

Both the majority and dissenting opinions invite criticism. The majority's treatment of the political question doctrine was incomplete because it characterized the issue as one of statutory interpretation. Similarly, the dissent ignored an important issue — the effect of an executive agreement on a prior inconsistent statute. The dissent stated that the Secretary of Commerce lacked the authority to conclude the agreement but failed to carry the argument to its logical conclusion. The dissent's approach invalidates an executive agreement. United States law is not clear on whether this is possible. The remainder of this Note will consider the political question and executive agreement issues raised by this dispute but not rigorously addressed by the Court.

## V. JAPAN WHALING ASSOCIATION V. AMERICAN CETACEAN SOCIETY UNDER A COMPLETE POLITICAL QUESTION ANALYSIS

A majority of the Supreme Court disposed of the Japan Whaling Association's claim that the controversy was inappropriate for judicial resolution without thoroughly considering that claim. By characterizing the issue as statutory interpretation, the Court sidestepped a political question analysis.[141] A thorough analysis of this case under the political question doctrine reveals the strength of the Japanese petitioner's contention.

The political question doctrine grew out of the constitutional requirement of live "cases or controversies"[142] and from principles of separation of powers. The leading case, *Baker v. Carr*,[143] surveyed prior case law and articulated a six part inquiry for political question analysis:

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140. *See id.* at 2866.

141. *See* Note, *Hopson v. Kreps, supra* note 36, at 231-32. *See also* U.S. CONST. art. III, § 2, cl. 1.

142. *See Baker v. Carr*, 369 U.S. at 210. *See generally* Note, *Hopson v. Kreps, supra* note 36, at 231-41 (discussing the political question doctrine since *Baker*).

143. 369 U.S. 186 (1962).

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[144]

The *Baker* Court indicated that its test applied to all political question analyses whether raised in a domestic or foreign relations context.[145]

By including a discussion of justiciability in the foreign affairs context, the *Baker* Court sought to eliminate the confusion surrounding the political question doctrine.[146] Previously, the Supreme Court indicated that issues involving foreign relations were by nature nonjusticiable political questions.[147] The *Baker* Court replaced this approach to foreign relations issues with the six part test, noting that courts must undertake a "discriminating analysis" of both past practices in similar situations and of the ramifications and consequences of a judicial determination.[148] As a result of the *Baker* decision, courts have given extra consideration to the last four elements of the six part test,[149] labeling these factors the "prudential considerations."[150]

Courts generally defer to foreign relations decisions made by the executive and legislative — the "political" — branches.[151] As a rule, courts

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144. *Id.* at 217.

145. *See id.* at 211-13, 217; Note, *Hopson v. Kreps, supra* note 36, at 235. The dispute in *Baker* focused on a state voter apportionment statute.

146. *See* 369 U.S. at 211. The Court remarked, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211.

147. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

148. 569 U.S. at 211-12.

149. *See, e.g.*, Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1513-15 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 105 S.Ct. 2353 (1985); Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973); Cranston v. Reagan, 611 F. Supp. 247, 253-54 (D.D.C. 1985); Dresser Industries, Inc. v. Baldridge [sic], 549 F. Supp. 108, 110 (D.D.C. 1982). *But see* Hopson v. Kreps, 622 F.2d 1375, 1378-81 (9th Cir. 1980).

150. *See Ramirez de Arellano*, 745 F.2d at 1513.

151. *See, e.g.*, Reagan v. Wald, 468 U.S. 222, 243 (1984); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

consider challenges to the desirability, wisdom, or propriety of foreign policy as nonjusticiable political questions.[152] Courts have found justiciable issues in the foreign affairs context when the dispute involves constitutional rights, treaties, statutes, congressional directives, administrative procedures, or personal rights.[153]

### A. *The Baker Tests in the Foreign Affairs Context*

#### 1. Prong One: Textual Commitment

Determining to which branch the Constitution commits decisionmaking power "turns on an examination of the constitutional provisions governing the exercise of the power in question."[154] Based on the Constitution, courts have declared that the following decisionmaking powers are implicitly or explicitly committed to the political branches: the power to recognize foreign governments;[155] the power to dispose of foreign aid;[156] the power to settle mutual claims with foreigners;[157] the power to set military policy;[158] the power to regulate international commerce;[159] the power to adopt the regulations of international organizations;[160] and the power to establish foreign policy.[161]

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152. *See, e.g., Harisiades*, 342 U.S. at 589-90; *Johnson,* 339 U.S. at 789.

153. *See* Note, *Hopson v. Kreps*, *supra* note 36, at 231-33. The political question doctrine acts to restrain the exercise, rather than the existence of federal judicial power. *Id.* at 232.

154. Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J. concurring in the judgment); *See also* Flynn v. Schultz, 748 F.2d 1186, 1191 (7th Cir. 1984).

155. *See, e.g., Oetjen*, 246 U.S. at 302; *Goldwater*, 444 U.S. at 1007 (Brennan, J., dissenting) (recognizing foreign governments is the power of the President); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978).

156. *See* Dickson v. Ford, 521 F.2d 234, 236 (5th Cir. 1975).

157. *See, e.g.,* Dames & Moore v. Regan, 453 U.S. 654, 683 (1981) (power of the executive when interdependent with recognizing a foreign government); United States v. Pink, 315 U.S. 203 (1942).

158. *See, e.g., Johnson*, 339 U.S. at 789; *Ramirez de Arellano*, 745 F.2d at 1513-14; Crockett v. Reagan, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (per curiam), *cert. den.*, 467 U.S. 1251 (1984).

159. *See, e.g.,* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 143 (D.C. Cir. 1974).

160. *See, e.g.,* United States v. Decker, 600 F.2d 733, 737 (9th Cir. 1979); Jensen v. National Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975); *Cranston*, 611 F. Supp. at 253.

161. *See, e.g.,* Matthews v. Diaz, 426 U.S. 67, 81 (1976); Zemel v. Rusk, 381 U.S. 1, 17 (1965); *Harisiades*, 342 U.S. at 589; *Ramirez de Arellano*, 745 F.2d at 1512.

The *Baker* Court, however, explained that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds Constitutional authority."[162] When a "political" case focuses on personal rights or statutory interpretation, courts have the decisionmaking power.[163] The Court seemed concerned that "political" labels rather than the nature of the issues would determine the outcome of the political question inquiry.[164]

The Constitution's vague allocation of foreign affairs powers invites competition between the political branches.[165] When these separation of powers disputes arise, the judicial branch claims the textually committed authority to settle them.[166] Courts seldom settle these "boundary disputes."[167] A court may instead find another justiciability problem and dismiss the case,[168] or alternatively dismiss the case and wait for the controversy to reach a stalemate or constitutional impasse.[169] Because the law remains unsettled as to the question of whether a direct conflict between the political branches presents a justiciable issue, the executive and legislative branches continue to dispute their respective authority.[170] For the most part, foreign affairs questions remain immune from judicial inquiry because the Constitution vests so much authority over foreign affairs in the political branches.[171]

### 2. Prong Two: Appropriate Standards

The second *Baker* prong basically tests whether a court requires decisionmaking standards other than traditional judicial discovery and management.[172] Under this test courts find no justiciability problem when the

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162. *Baker*, 369 U.S. at 217.

163. *See id.*

164. *See id.*

165. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 90 (1972).

166. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 549 (1969); *Goldwater*, 444 U.S. at 1007 (Brennan, J., dissenting); *Mitchell*, 488 F.2d at 614. The rationale is that settling separation of powers disputes is part of the judiciary's duty to interpret the law. 444 U.S. at 1007 (Brennan, J., dissenting).

167. L. HENKIN, *supra* note 165, at 209-10.

168. *E.g., Flynn*, 748 F.2d at 1191-93 (dismissed for prudential reasons); *Mitchell*, 488 F.2d at 616 (dismissed because the necessary evidence was inaccessible).

169. *See Goldwater*, 444 U.S. at 1001 (Powell, J. concurring in the judgment).

170. *See Flynn*, 748 F.2d at 1191 n.5; L. HENKIN, *supra* note 165, at 92.

171. *See Goldwater*, 444 U.S. at 999 (Powell, J., concurring in the judgment).

172. *See id.* at 1000; *see also Baker*, 369 U.S. at 214 (discusses the rationale behind this part of the political question analysis). The rationale is that statutory and constitutional interpretation require "no special competence or information beyond the reach" of the usual judicial inquiry. 444 U.S. at 1000 (Powell, J., concurring in the judgment).

issue is statutory or constitutional interpretation.[173] In *Ramirez de Arellano v. Weinberger*,[174] for example, a United States citizen sought compensation from the United States government because it seized some of his land in El Salvador for a military training post. The court held that it possessed the decisionmaking standards necessary to decide the case because resolution of the dispute hinged on statutory and constitutional interpretation.[175]

But courts have refused to pass on the merits of cases which involved a standardless decision[176] or of cases in which the necessary information was inaccessible.[177] In *Flynn v. Schultz*,[178] the court dismissed a suit to compel the Secretary of State to order a United States diplomat to testify in a civil trial. The *Flynn* court reasoned that the statutory standard, "unjustly deprived of liberty," required a subjective inquiry beyond a court's competence.[179] Similarly, the court in *Crockett v. Reagan*[180] refused to consider the merits of a claim that the President had violated his legal duty to report to Congress about the activities of United States military personnel in El Salvador. The *Crockett* court explained that it could not rule on the case because the resources and expertise necessary to solve the factual dispute were not available to the courts.[181] In sum, courts have been reluctant to solve disputes involving foreign affairs in which resolution would require either a subjective inquiry or evidence which is beyond the court's control.

### 3. Prong Three: Prudential Considerations

Traditionally courts avoided foreign affairs cases because the judiciary was ill-equipped to handle the delicacies and complexities of interna-

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173. 745 F.2d at 1500.

174. 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 105 S. Ct. 2353 (1985).

175. *Id.* at 1513. The court stated that the plaintiff's entitlement to compensation required only a decision on the government's authority to occupy and use the plaintiff's property. The court held it was competent to decide the case because the plaintiff's claim did not challenge United States foreign policy. *Id.*

176. *See, e.g., Goldwater*, 444 U.S. at 1003 (Rehnquist, J., concurring in the judgment) (the decision whether to abrogate a treaty involved political standards which were not subject to judicial review); *Flynn*, 748 F.2d at 1193.

177. *See, e.g., Crockett*, 720 F.2d at 1356; *Mitchell*, 488 F.2d at 616 (most of the relevant evidence was inaccessible because it was held by foreign governments or was privileged).

178. 748 F.2d 1186 (7th Cir. 1984).

179. *Id.* at 1193.

180. 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

181. *Id.* at 1356.

tional relations.[182] The last four prongs of the *Baker* test reflect this traditional notion. Specifically, the third prong discourages judicial determination of issues that would initially require a foreign policy decision.[183] The fourth prong adds that a court should not decide a case in which a judicial decision may demonstrate a lack of respect for the policy choices made by the other branches of government. Similarly, the fifth prong states that courts should not decide controversies in which the nation should stand behind a previously made political decision.[184] Finally, the sixth prong prohibits judicial decisions which result in embarrassment caused by "multifarious pronouncements."[185] The common concern of the four prudential considerations is that judicial resolution may disturb foreign policy and therefore undermine United States diplomacy.[186]

For example, the dispute in *Cranston v. Reagan*[187] involved an executive agreement pertaining to the peaceful uses of nuclear energy. Although the Administration concluded the agreement pursuant to statutory authorization and subsequent congressional approval, the plaintiffs alleged that the Secretary of State exceeded his authority when making the pact. The *Cranston* court acknowledged that it had authority and competence to settle the dispute, but refrained, reasoning that the court should not question "agreements which are the product of delicate and extensive international negotiation."[188] The consequences to a unified foreign policy undermined by judicial decisionmaking may encourage abstention by courts which otherwise have the authority to resolve political questions.

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182. *See* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111.

183. *Baker*, 369 U.S. at 217. *See Oetjen*, 246 U.S. at 302 (once a political decision is made concerning which government to recognize as the sovereign of a foreign country, the judiciary should not review it).

184. *See* Dresser Industries, Inc. v. Baldridge [sic], 549 F. Supp. 108, 110 (D.D.C. 1982); *but see Ramirez de Arellano*, 745 F.2d 1500 (D.C. Cir. 1984). The *Dresser Industries* court explained that the national interest of maintaining a firm foreign policy stance outweighs the individual's claim. *Id.* The foreign policy matter at issue was the United States response to events in Poland. *Id.*

185. *Baker*, 369 U.S. at 217. *See* Cranston v. Reagan, 611 F. Supp. 247, 253 (D.D.C. 1985).

186. Put another way, the thrust of the prudential considerations is to prevent judicial decisions on the merits of cases due to reasons other than judicial competence or the language of the constitution. *See Cranston*, 611 F. Supp. at 253.

187. 611 F. Supp. 247 (D.D.C. 1985).

188. *Id.* at 253. The court added that the plaintiffs had other recourse, but failed to utilize it. That is, the three plaintiffs who served in Congress had the opportunity to block the agreement when it was considered for approval in the Congress. *Id.* at 253-54.

### B. *Political Question Challenges to United States Whale Conservation Policy*

In two prior cases dealing with United States whale conservation policy federal courts considered the applicability of the political question doctrine. In *Adams v. Vance*,[189] Alaskan Eskimos sought an order to compel the Secretary of State to file an objection to the IWC's 1977 ban on the hunting of Arctic bowhead whales. The *Adams* court dismissed the suit because the plaintiffs failed to establish that they were entitled to relief.[190] The court speculated that even if the plaintiffs had demonstrated their right to relief, the issue would not be justiciable because an order compelling an objection to the IWC ban would undermine the United States' position as a leader in whale conservation efforts.[191]

Alaskan Eskimos again challenged United States whale conservation policy in *Hopson v. Kreps*.[192] In *Hopson*, the district court dismissed the claim because the dispute raised a nonjusticiable political question. The district court applied the six-part *Baker* test and found justiciability problems under each prong.[193] The Ninth Circuit, however, reversed finding no political question problems.[194] The court characterized the issue as statutory and treaty interpretation, noted that the judiciary's role was to determine the law, and concluded that the district court erroneously dismissed the case.[195] Commentators criticized the Ninth Circuit's analysis because it failed to pursue the political question inquiry beyond the first prong of the *Baker* test.[196]

In *Japan Whaling Association*,[197] the Supreme Court held that the case did present a justicable question.[198] The Court addressed the first two elements of the *Baker* test, but failed to consider fully the prudential factors in the analysis.[199] The Court implicitly considered the first prong by declaring that the judiciary's role was to resolve questions of statutory

189. 570 F.2d 950 (D.C. Cir. 1977).
190. *Id.* at 954-57.
191. *Id.* at 954.
192. 462 F. Supp. 1374 (D. Alaska 1979), *rev'd*, 622 F.2d 1375 (9th Cir. 1980). The plaintiffs claimed that the Secretary of Commerce, as their legal trustee, had a duty to object to the IWC's regulations on noncommercial Arctic whaling. 462 F. Supp. at 1377.
193. 462 F. Supp. at 1382-83.
194. 622 F.2d at 1378.
195. *Id.* at 1378-80.
196. *See* Note, *Hopson v. Kreps*, *supra* note 36, at 253-54.
197. Japan Whaling Ass'n v. American Cetacean Soc., 106 S.Ct. 2860 (1986).
198. *Id.* at 2866.
199. *See id.*

interpretation.[200] The Supreme Court approached the second prong in a similar fashion. The Court explained that appropriate standards of judicial decisionmaking were available because resolution of the case "call[ed] for applying no more than the traditional rules of statutory construction. . . ."[201] Without mentioning the second *Baker* prong explicitly, the Court declared that its approach in *Japan Whaling Association* employed traditional standards of decisionmaking.[202]

The Court mentioned two prudential factors, but failed to analyze them. Specifically, the Court acknowledged the Japanese petitioners' contention that a decision on the merits would result in the type of "multifarious pronouncement" against which *Baker* cautioned.[203] In addition, the Court recognized that the dispute centered on the relationship between the statute and the political branches.[204] However, the Court's discussion of the *Baker* prudential considerations went no further.[205] Nowhere did the Court consider the ramifications of a decision on the merits.

The ramifications of the Court's decision extend beyond determining the Secretary of Commerce's discretion in certifying violations of IWC quotas. First, the Court endorsed the Secretary's interpretation of the statute despite apparently contradictory legislative history.[206] Second, the Court left the United States with only discretionary sanctions to persuade countries to comply with IWC schedules.[207] Third, the Court's decision validated an executive agreement despite its apparent conflict with a federal statute.[208] Finally, by finding a justiciable controversy and reaching a decision on the merits, the Court chose to cast the deciding vote in a separation of powers dispute over foreign policy.

Furthermore, by neglecting to consider the effects of its decision, the Court ignored the last four parts of the *Baker* analysis. Considering only the first two prongs of the test left the Court free to render a decision. By choosing to render a decision on the merits rather than dismissing the case for nonjusticiability, the Court contributed to "multifarious pro-

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200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 2865.
204. *Id.* at 2866.
205. *See id.*
206. *Compare supra* notes 127-29 and accompanying text *with supra* notes 78-79, 115-18, 136-37 and accompanying text.
207. *See supra* note 75-79, 137 and accompanying text.
208. *See supra* note 127-29 and accompanying text.

nouncements" on United States whale policy.[209] Most disturbingly, however, the Court shaped foreign policy. The Court pronounced in effect that the United States is willing to compromise on whale policy.

Whether a thorough political question analysis would yield a justiciable issue is not as important as careful consideration of all the ramifications of a judicial decision on the merits. Ignoring the prudential considerations of the *Baker* test means reversing entirely the old notion that foreign affairs issues were by nature nonjusticable. The prudential considerations retain the prior sensitivity to judicial interference in foreign policy. While the United States has an interest in settling separation of powers disputes, it also has an interest in remaining a trustworthy partner in diplomatic negotiations.[210] Traditionally, the judiciary has not played a major role in setting foreign policy. In *Japan Whaling Association*, however, the Court sets a dangerous precedent because it resolved a foreign policy dispute by characterizing the issue as statutory interpretation.

## VI. THE JAPAN-UNITED STATES WHALE CONSERVATION AGREEMENT UNDER UNITED STATES LAW

The *Japan Whaling Association* majority endorsed the Secretary of Commerce's interpretation of the statutes and consequently upheld the agreement with Japan.[211] The dissent argued that the Secretary had no statutory authority to make a compromise agreement.[212] Had the Court adopted the dissent's reasoning and affirmed the lower courts, it would have rendered the executive agreement ineffective. Although the Secretary may have violated his statutory duty, the dissent's analysis avoided the unsettled issue of whether an executive agreement supersedes prior inconsistent federal law.

The Constitution does not specify the status of executive agreements, but courts have afforded them "similar dignity" as treaties in superseding state law.[213] When a treaty and a federal statute conflict, courts apply a later-in-time rule under which a treaty supersedes any prior, in-

209. *See American Cetacean Soc. v. Baldrige [sic]*, 768 F.2d at 447-48 (D.C. Cir. 1985) (Oberdorfer, J. dissenting), *rev'd sub. nom.* Japan Whaling Assn' v. American Cetacean Soc., 106 S.Ct. 2860 (1986).

210. *See Save the Executive*, Wall St., J. Feb. 25, 1986, at 30, col. 1.

211. *See* 106 S. Ct. at 2872.

212. *See* 106 S.Ct. at 2876 (Marshall, J. dissenting).

213. United States v. Pink, 315 U.S. 203, 230 (1942). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937).

consistent federal law.[214] If a court attributed treaty status to an executive agreement, it too would supersede prior inconsistent federal law.

Executive agreements, however, have not received that treatment. In *United States v. Guy W. Capps, Inc.*,[215] the Fourth Circuit held that an executive agreement could not supersede prior federal law.[216] In *Capps*, the dispute arose when a trade agreement with Canada regarding the importation of potatoes contradicted a prior statute.[217] The *Capps* court characterized the issue as a fight over the regulation of international commerce and concluded that the prior statute must be given effect over the sole agreement.[218] The Fourth Circuit reasoned that the actions of one person could not nullify an act of Congress.[219] The Supreme Court affirmed the decision on other grounds but expressly refused to discuss the executive agreement issue.[220] Nevertheless, the *Restatement (Second) of Foreign Relations Law of the United States* adopted the Fourth Circuit's view.[221]

The tentative drafts of the *Restatement (Revised) of Foreign Relations of the United States* indicated that the issue remains unsettled. The first tentative draft stated that executive agreements do supersede prior, inconsistent federal law.[222] This adopted the approach taken by Louis Henkin in *Foreign Affairs and the Constitution*.[223] Henkin stressed the President's unique role in foreign affairs and argued that all constitu-

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214. *See* The Head Money Cases, 112 U.S. 580, 598-99 (1884). *See generally* Note, *Superseding Statutory Law By Sole Executive Agreement: An Analysis of the American Law Institute's Shift in Position*, 23 VA. J. INT'L L. 671, 671-72 (1983) [hereinafter *Superseding Statutory Law*] (discusses how courts handle conflicts of statutes and treaties). The converse is true as well. *Superseding Statutory Law*, at 671.

215. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

216. 204 F.2d at 658.

217. *Id.* at 657.

218. *See id.* at 659-60.

219. *See id.* at 658-59; *see also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 6) § 135, Reporter's Note 5 (1985) [hereinafter Tentative Draft No. 6].

220. 348 U.S. at 305.

221. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 144(1)(b) (1965) [hereinafter RESTATEMENT (SECOND)].

222. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(1) (Tent. Draft No. 1, 1980) [hereinafter Tent. Draft No. 1]; *see generally Superseding Statutory Law, supra* note 213, at 671-96 (critical analysis of the tentative draft's position; suggests it should be discarded). *See also* Tent. Draft. No. 1, § 308.

223. *Superseding Statutory Law, supra* note 213, at 675; *see* L. HENKIN, *supra* note 165, at 186.

tional acts of power should have the same status.[224] However, the sixth tentative draft retreated from this position[225] and only addressed the issue in its comments and notes.[226] Comment (c) indicated that an executive agreement may supersede prior federal law depending on the authority on which the agreement was based.[227] Furthermore, comment (c) identified three bases of authority for executive agreements and laid out three corresponding categories: a) agreements pursuant to the President's own authority (sole executive agreements); b) agreements pursuant to treaties (treaty-agreements); and c) agreements pursuant to congressional authorization (congressional-executive agreements).[228] As comment (c) indicates, treaty-agreements and congressional-executive agreements are capable of superseding prior inconsistent federal statutes. Reporter's note 5 discussed at length the power of a sole executive agreement. Although the note laid down no blanket rule, it discussed the precedents and indicated that agreements pertaining to diplomacy or the recognition of governments would indeed supersede prior law.[229]

Sole executive agreements carry as much constitutional authority on a subject as the President has with respect to that subject.[230] When entering an agreement, the President may draw from his constitutional authority as Chief Executive or Commander-in-Chief of the armed forces, his power to appoint ambassadors, or his duty to execute the laws.[231] The Supreme Court dealt with agreements based on the President's clear authority in *United States v. Belmont*[232] and *United States v. Pink*[233] where, in both cases, the Court held that executive agreements supersede prior inconsistent state laws.[234] In each case the Court upheld the sole executive agreement because it was interdependent with the recognition of a foreign government and reflected the President's authority over for-

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224. L. HENKIN, *supra* note 165, at 184-88. Furthermore, American jurisprudence does not recognize another level of federal law somewhere above state law but somewhere below federal law. *See* Tent. Draft No. 6, *supra* note 218, § 135 Reporter's Note 5.

225. *Compare* Tent. Draft No. 1, *supra* note 222, § 135(1) *with* Tent. Draft No. 6, *supra* note 2214, § 135.

226. *See* Tent. Draft No. 6, *supra* note 219, § 135 comment c, reporter's note 5.

227. *See* Tent. Draft No. 6, *supra* note 219, § 135 comment c.

228. *Id.*

229. *Id.*

230. *See Superseding Statutory Law, supra* note 213, at 684-86.

231. *Id.* at 684-86; *see* U.S. CONST. art. II §§ 1-3.

232. 315 U.S. 203 (1942).

233. 301 U.S. 324 (1937).

234. *See* 301 U.S. at 331; 315 U.S. at 230.

eign affairs.[235] The dispute in *Capps*, however, pitted an executive agreement against a prior federal statute regulating international commerce. The Fourth Circuit found that the agreement was ineffective because the executive agreement contravened prior Congressional policy.[236] Unlike *Belmont* or *Pink*, the case did not involve the executive's clear authority.

Treaty-agreements such as agreements made under the United Nations treaty and agreements executed to implement the NATO treaty[237] draw authority from both the treaty's constitutional status as supreme law of the land and from the President's duty to carry out the law.[238] Generally, treaty-agreements receive the same status as the treaty itself.[239] Problems develop, however, when the agreement exceeds the language and intended scope of the treaty.[240]

Congress may authorize international executive agreements before or after the President makes an agreement.[241] When Congress delegates portions of its foreign affairs power, the President acts with the sum of his power and the power of Congress.[242] Congressional-executive agreements, therefore, carry the constitutional authority of both Congress and the President. The only limitation on presidential authority would be the limits provided in the statute which grants authority to enter into the agreement.[243] Additionally, Congress may agree to executive agreements by drafting the necessary implementing legislation, by appropriating funds, or by refusing to challenge the agreement.[244] A congressional

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235. *See* 301 U.S. at 331; 315 U.S. at 230.

236. *Capps*, 204 F.2d at 659.

237. *See* Note, *Executive Agreements: Beyond Constitutional Limits*, 11 HOFSTRA L. REV. 805, 811-12 and n.33 (1983) (general discussion of treaty-agreements) [hereinafter Note, *Executive Agreements*].

238. *See id. See also Superseding Statutory Law, supra* note 213, at 684; U.S. CONST. arts. II, § 3, VI.

239. *See* Tent. Draft No. 6, *supra* note 218, § 135 comment c.

240. *See* Note, *Executive Agreements*, *supra* note 237, at 812-14. A treaty-agreement may supercede prior federal law just as a treaty would provide the treaty-agreement comports to the language and intent of the treaty. *Id.*

241. *See* Tent. Draft No. 6, *supra* note 219, § 135 comment c. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 674-75, 687-88 (1981); American Bitumuls & Asphalt Co. v. United States, 146 F. Supp. 703, 708 (Cust. Ct. 1956).

242. *See* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109-10 (1948).

243. *See, e.g.*, Miranda v. Secretary of Treasury, 766 F.2d 1, 3 (1st Cir. 1985); United States v. Yoshida Int'l Inc., 526 F.2d 560, 582 (C.C.P.A. 1975); *American Bitumuls & Asphalt Co.*, 146 F. Supp. at 711-12.

244. L. HENKIN, *supra* note 165, at 173-75 (appropriating funds). *See Dames & Moore*, 453 U.S. at 687-88 (not challenging agreement); Mitchell v. Laird, 488 F.2d

challenge to an executive agreement may suggest that the President acted outside of his authority and necessitate a separation of powers analysis.[245]

In *Dames & Moore v. Regan*,[246] the Supreme Court upheld an executive agreement with Iran for a settlement of mutual claims. The Court noted that the agreement drew authority from the President's power to recognize foreign governments because it involved recognition of the new government in Iran.[247] The Court added that Congress authorized the agreement through both prior legislation and acquiescence to prior practice.[248]

If Congress does not challenge a treaty-agreement or congressional-executive agreement it is most enforceable because, given the opportunity, Congress declined to address the particular issue or to challenge executive authority.[249] The enforcement of agreements which Congress does not challenge also conforms to Justice Jackson's three zones of presidential authority described in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[250] A treaty-agreement has, at the least, executive authority behind it. A congressional-executive agreement bears both executive and congressional constitutional authority. Either of these agreements may therefore preempt prior federal law.[251]

When Congress speaks directly against an agreement, rejects an agreement, or claims that the Executive has exceeded boundaries of authority, conflicts arise. The dispute necessitates a comparison of the constitutional authority of each branch with respect to the issue.[252] For example, courts

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611, 615 (D.C. Cir. 1973) (various forms of assent); Leary, *International Executive Agreements*, 72 L. LIBR. J. 1, 4 (1979) (implementation legislation).

245. If a conflict arises, the inquiry may turn to a separation of powers analysis under Justice Jackson's three categories of executive power described in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J. concurring). Jackson stated that in situations of conflict with Congress, the President would be acting with the least amount of authority. The President's authority would be the difference between his constitutional authority and that of Congress. *Id.* at 637-38.

246. 453 U.S. 654 (1981).

247. *See id.* at 683 (citing Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951)).

248. *See id.* at 677, 686. The *Dames & Moore* court cited Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11, that an executive order has great authority when the order is part of an ongoing, continuous practice which had yet to be challenged by Congress. *Dames & Moore*, 453 U.S. at 686.

249. *See* L. HENKIN, *supra* note 165, at 175-76.

250. 343 U.S. 637, 678 (Jackson, J. concurring).

251. This possibility is left open by § 135 of Tent. Draft No. 6, *supra* note 219, § 135 comment c, reporter's note 5.

252. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 678 (Jackson, J. concurring);

have held that executive orders which exceed the scope of the international trade regulation power granted by Congress are void.[253] Because trade regulations restrict international commerce, a president's actions which exceed his authority are ineffective. This result is consistent with the Jackson analysis because executive acts which contradict prior congressional acts carry the least amount of constitutional authority.[254] In an area of congressional prominence such as international commerce, legislative will is more persuasive than executive will. Yet if the issue were the recognition of a foreign government, the executive's pronouncement would be controlling because of constitutional authority and past practice.

Characterization of the issues, therefore, plays a key role in assessing the validity of an executive agreement. The first determination is whether the agreement is a sole agreement, a treaty agreement, or a congressional-executive agreement. The second determination is whether the political branches conflict on an issue. The third determination is the nature of the issue itself. Application of this three-part test to the *Japan Whaling Association* case indicates that the majority's result was not improper.

Neither the majority nor the dissent in *Japan Whaling Association* discussed in detail the legal effect of the executive agreement with Japan. The majority did not reach the issue because it found that the conduct by the Secretary of Commerce did not contradict congressional intent.[255] Justice Marshall's dissent, on the other hand, held that the Secretary had no statutory authority to execute the agreement and declared that the Secretary's actions contradicted congressional policy.[256] The dissent, however, failed to pursue the issue any further.

The dissent treated the agreement as a sole executive agreement which attempted to regulate international commerce and contradicted the will of Congress.[257] The dissent indicated, first, that the agreement derives authority only from the executive branch because it contains no references to any treaties, statutes, or congressional directives which charge the executive with a duty to negotiate whale conservation agreements. Second, Justice Marshall characterized the context of the dispute as in-

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*see also* United States v. Pink, 315 U.S. 203 (1942).

253. *See, e.g., Yoshida Int'l, Inc.*, 526 F.2d at 582-83; *American Bitumuls & Asphalt Co.*, 146 F. Supp. at 710-12. *Cf. Miranda*, 766 F.2d at 5 (upheld President's order that was rationally related to his statutory authority).

254. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (Jackson, J. concurring).

255. *See* 106 S. Ct. at 2872.

256. *See id.* at 2874, 2876 (Marshall, J. dissenting).

257. *See id.* at 2872-74.

ternational commerce.[258] Last, the dissent cited the legislative history of the Pelly and Packwood-Magnuson Amendments to illustrate a conflict of policy between the legislative and executive branches.[259]

The dissent, therefore, would have affirmed the Fourth Circuit result in *Capps* by rendering invalid a sole executive agreement pertaining to international commerce when it conflicted with a prior federal statute. The characterization as a sole executive agreement is improper. Admittedly, the Pelly and Packwood-Magnuson Amendments do not authorize agreements which compromise their sanctions.[260] Similarly, the legislation which implements the ICRW,[261] provided neither the Secretary of Commerce nor the Secretary of State with the authority to compromise IWC regulations in bilateral agreements. Other statutes, however, do grant the secretaries the power to make agreements.[262] Specifically, United States law empowers the secretaries to make fishing allocations within the EEZ and grants the Secretary of State the authority to negotiate international fishing agreements.[263] Fishing allocations within the United States EEZ played an integral part in the executive agreement with Japan. In addition, the Marine Mammal Protection Act (MMPA)[264] charged the secretaries with the job of negotiating with other nations to bring about marine mammal conservation.[265] The agreement, therefore, may be a congressional-executive agreement because its topic fits within the parameters of congressional authorization.

The dissent's depiction of the conflict included review of the parameters of congressional authorization. The dissent found that the executive branch's application of the law contradicted the legislative intent.[266] The applicable statutes send conflicting messages, however, and fail to set clear boundaries for agreement-making authority.[267] Furthermore, con-

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258. *See id.* at 2872.

259. *See id.* at 2875-76.

260. *See* 16 U.S.C. § 1821 (1982); 22 U.S.C. § 1978 (1982).

261. Whaling Convention Act of 1949, ch. 653, § 4, 64 Stat. 422 (1950) (codified as amended at 16 U.S.C. § 916b (1982)).

262. *See, e.g.,* The Whale Conservation and Protection Study Act, Pub. L. No. 94-532, § 4, 90 Stat. 2492 (1976) (codified as amended at 16 U.S.C. § 917(c) (1982)) (directed the Secretaries to negotiate bilateral whale conservation agreements with Mexico and Canada).

263. 16 U.S.C. § 1821(c) (1982).

264. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1982)).

265. *See* 16 U.S.C. § 1378(a) (1982); *see also Legal Protection for Marine Mammals, supra* note 11, at 30.

266. *See* 106 S. Ct. at 2874-76 (Marshall, J. dissenting).

267. *See supra* notes 62-70, 260-65 and accompanying text.

gressional resolutions and debates send confusing signals. Congress has asserted its support for enforcement of IWC actions, but has called on the executive to negotiate compliance.[268] Resolutions after the 1984 agreement with Japan demonstrate congressional support for the IWC moratorium, but do not directly call for rescission of the agreement.[269] Finally, Congress and President Reagan do agree that whale conservation is the goal.[270] They disagree, nonetheless, on the means to effectuate conservation efforts.

The dissent made a crucial characterization by portraying the conflict as a matter of international commerce. Marshall did so by finding that the trade regulation and fishing allocation sanctions involved commerce. The dissent's characterization makes sense when the conflict is depicted as a question of choosing the sanctions to effect whale conservation policy. Yet the heart of the plaintiffs' contention is not that the sanctions were improper, but that the sanctions were not imposed. Thus, the plaintiffs are challenging the propriety of the conduct of United States whale conservation policy. Trade burdens, therefore, are only the consequences of United States policy. Such broadside attacks on policy are usually screened by the political question doctrine.[271] Had the issue been characterized as one of foreign relations, therefore, the case probably would have been dismissed as nonjusticiable.

While courts are reluctant to infer congressional authorization, they strain to find concordant practice among the branches.[272] Given the numerous conflicting signals sent by Congress, courts could easily identify evidence of accord. For example, the executive commonly uses sanctions to coax compliance with some policy objective. Sanctions provide a bargaining chip in negotiations. Therefore, Congress should have expected such bargaining. Given congressional expectations and the judicial preference for finding accord, perhaps the majority's result was not improper even without an express analysis of the viability of the executive agreement.

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268. H.R. Con. Res. 69, 98th Cong., 1st Sess. (1984); 130 CONG. REC. E4441 (daily ed. Oct. 10, 1984) (statement of Rep. Waxman). *See supra* note 92.

269. H.R. Con. Res. 54, 99th Cong., 1st Sess. (1985); H.R. Con. Res. 23, 99th Cong., 1st Sess. (1985); 131 CONG. REC. E453 (daily ed. Feb. 7, 1985) (statement of Rep. Bonker introducing H.R. Con. Res. 54).

270. *See* President's Message, *supra* note 86, at 727-28; *Hearings II, supra* note 81, at 3.

271. *See, e.g., Ramirez de Arellano*, 745 F.2d at 1513-14; Dickson v. Ford, 521 F.2d 234, 236 (5th Cir. 1975). *See also supra* notes 151-52 and accompanying text.

272. L. HENKIN, *supra* note 165. *See, e.g., Dames & Moore*, 453 U.S. 654 (1981); *Miranda*, 766 F.2d 1 (1st Cir. 1985).

Had Congress authorized the agreement with Japan or expressly granted the Secretary authority to bargain Pelly and Packwood-Magnuson Amendment certification, this dispute would not exist. Because the dissent concluded that the Secretary had acted outside of his statutory authority, it should have addressed the viability of executive agreements. The majority, on the other hand, had no need to discuss that issue because it found that the executive agreement was not in conflict with prior federal law.

## VII. CONCLUSION

The Supreme Court's decision in *Japan Whaling Association* temporarily settled the question of whether the United States would pursue whale conservation with a hard line or moderate approach. The Court's decision to affirm the moderate approach will affect United States conservation efforts as well as the IWC's efforts. Conservationists argue that a strict approach to whale protection is the only effective alternative. Current United States policy and law reject that view. Had a full Court adopted a strict conservationist position with Justice Marshall and the other three dissenters, United States whale policy would be markedly different. United States policy would be certain and predictable. But, academic certainty and predictability may not protect whales.

This hard line conservationist approach would present whaling nations with the alternative of whaling or continuing to fish in the United States EEZ. To Japan, this would pose a dilemma given the extent of Japanese fishing in the United States EEZ.[273] Yet the Japanese may find it more profitable to continue whaling because they could substitute lost fishing opportunities in other countries' EEZs.[274] The Soviets would not face a similar dilemma because they presently have no fishing allocation in the United States EEZ. The decision may also be easy for other whaling nations who may be able to fish elsewhere. United States law is set to cancel all foreign fishing in the United States EEZ.[275] If that happens, Packwood-Magnuson Amendment sanctions would be meaningless.

Moreover, mandatory sanctions leave United States negotiators in a tenuous bargaining position because they lose all discretion and flexibility. Absent bargaining power, the United States will not have the means to persuade whaling nations to discontinue whaling or even to conserve whales.

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273. *See* P. BIRNIE, *supra* note 1, at 627. The Japanese stand to lose 100,000 tons of fish. *Id.*

274. *See* Note, *Enforcement Questions, supra* note 4, at 139.

275. *Id.* at 140.

The moderate conservation approach adopted by the Court, nonetheless, may offer a more effective solution. With discretionary certification, United States diplomats can use the threat of sanctions to negotiate compliance. Because international schemes function better on cooperation than on coercion, the executive's interpretation of certification may be best for whale conservation.

Although the court's result provides the benefits of a moderate approach to whale conservation, its legal reasoning is flawed. The Court had the opportunity to dismiss the case for lack of a justiciable issue simply by acknowledging that the dispute involved complicated foreign policy matters. Instead of characterizing the case as a nonjusticiable foreign policy dispute, the Court analyzed it as a matter of statutory interpretation. Even if the case involved a statutory interpretation question, the Court should have cited the *Baker* prudential considerations and dismissed the dispute. Instead, the Court rejected the political question arguments without analyzing the four prudential factors.

Had the Court dismissed the case for lack of a justiciable issue, the result would have been more reasonable. It would have left the agreement with Japan intact without giving the executive free rein to pursue or not pursue whale conservation. Furthermore, removing mandatory sanctions weakens the United States' position as a consistent leader in whale conservation. Finally, by avoiding a thorough political question analysis and ignoring the prudential considerations in particular, the Court gives the judiciary a vote in foreign policy.

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