Boston College Environmental Affairs Law Review

Volume 19 | Issue 2 Article 3

12-1-1991

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THE CONGRESSIONAL ROLE IN INTERNATIONAL ENVIRONMENTAL LAW AND ITS IMPLICATIONS FOR STATUTORY INTERPRETATION

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I. INTRODUCTION

A host of environmental problems have international dimensions. The United States's climate may depend in part on how much deforestation occurs in the Amazon jungle.[1] The ozone layer, which protects the earth's surface from ultraviolet rays, will survive only if many countries cut back on their production and use of chlorofluorocarbons (CFCs).[2] Growing recognition of the fact that one nation's environmentally destructive practices can threaten the ecology and even the survival of another nation has led and will continue to lead to the growth of international environmental law.[3] The United States

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[1] *See* Henry W. Mcgee, Jr., & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics and International Cooperation*, 21 U. MIAMI INTER-AM. L. REV. 513, 519–20 (1990). *See generally* 22 U.S.C. § 2151p-1(a) (1988).

[2] *See generally* Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 261 (1989); John W. Kindt & Samuel P. Menetee, *The Vexing Problem of Ozone Depletion in International Environmental Law & Policy*, 24 TEX. INT'L L. J. 261 (1989); Nancy D. Adams, Comment, *Title VI of the 1990 Clean Air Act Amendments and State and Local Initiatives to Reverse the Stratospheric Ozone Crisis: An Analysis of Preemption*, 19 B.C. ENVTL. AFF. L. REV. 173 (1991); Joel A. Mintz, Comment, *Progress Toward a Healthy Sky: An Assessment of the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 YALE J. INT'L L. 571 (1991).

[3] *See generally Note, Developments–International Environmental Law*, 104 HARV. L. REV. 1484 (1991). This Article uses the term "international environmental law" to include international agreements and state practice responding to environmental problems affecting more than one country. Environmental problems include problems of pollution, global warming

has been a leader in environmental law, and international environmental issues have become the subject of our foreign policy.[4] Consequently, Congress and the President have begun to clash in the international environmental area and will probably clash more often in the future.

Because of the proliferation of federal statutes addressing international environmental issues, many of these quarrels will center on disagreements over statutory interpretation.[5] The United States Supreme Court's 1986 ruling that questions regarding the interpretation of international environmental statutes[6] are justiciable even

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and endangered species. This definition of international environmental law excludes law aimed at promoting conservation of resources in order to promote orderly international trade and relations, such as most fisheries agreements. *Id.* at 1500.

[4] *See* Philip Shabecoff, *The Environment As a Diplomatic Issue*, N.Y. TIMES, Dec. 24, 1987, at A24.

[5] Questions involving the interpretation of international environmental statutes already have begun to flood the courts. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (interpreting statute that requires Secretary of Commerce to sanction acts diminishing effectiveness of international fisheries agreements); Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988) (controversy over denial of incidental take permit under Marine Mammal Protection Act), *cert. denied*, 488 U.S. 1004 (1989); United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985) (criminal conviction under Migratory Bird Treaty Act does not require scienter); Man Hing Ivory & Imports, Inc. v. Deukmejian, 702 F.2d 760 (9th Cir. 1983) (preemption of California law forbidding trade in certain animal products under Endangered Species Act); Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth., 659 F.2d 168 (D.C. Cir. 1981) (challenge to export regulations pertaining to bobcats under Convention on International Trade in Endangered Species of Wild Fauna and Flora and implementing legislation), *cert. denied*, 454 U.S. 963 (1981), *vacated*, 725 F.2d 726 (1984); Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980) (challenge to Commerce Department regulations implementing International Whaling Commission schedule); United States v. Molt, 599 F.2d 1217 (3rd Cir. 1979) (Lacey Act violation cannot be based on foreign revenue law); Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978) (claim that statutes recognizing Eskimo land rights required Secretary of State to object to International Whaling Commission quota); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977) (holding that criminal sanctions under Marine Mammal Protection Act do not apply to takings within another country's territorial sea); United States v. 3210 Crusted Sides of Caiman Crocodilius Yacare, 636 F. Supp. 1281 (S.D. Fla. 1986) (civil forfeiture case against foreign importer of animal hides); Carpenter v. Andrus, 485 F. Supp. 320 (D. Del. 1980) (controversy over imported leopard skin under Endangered Species Act); *see also* Balelo v. Baldridge, 724 F.2d 753 (9th Cir.) (Fourth Amendment challenge to use of observers on fishing boats to enforce Marine Mammal Protection Act), *cert. denied*, 467 U.S. 1252 (1984).

[6] "International environmental statutes" include laws aimed at affecting the environmental practices of a foreign nation in United States territorial waters, on the high seas, or in its own territory. *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407 (1988); Driftnet Impact Monitoring, Assessment and Control Act of 1987, Pub. L. No. 100-220, 101 Stat. 1477 (codified at 16 U.S.C. § 1822 (1988)); Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1882 (1988); Ports and Waterways Safety Act, 33 U.S.C. §§ 1221–1222 (1988), 46 U.S.C. § 391a (1988); International Environmental Protection Act of 1983, 22 U.S.C. § 2151 (1988). They also include statutes implementing international agreements. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988); Endangered Species Act, 16 U.S.C.

if they touch upon foreign policy[7] means that courts will have to face these quarrels over statutory interpretation.

This Article focuses on the question of how courts should interpret international environmental statutes that might impinge on the President's foreign affairs power. In particular, it asks whether a court should avoid overruling executive action in foreign affairs absent a "plain statement" in the text of such a statute that unmistakably precludes the challenged executive action. This question has become important because the Supreme Court's recent cases involving the President's foreign affairs power tacitly have departed from the rule requiring deference to congressional intent when that intent clearly is established through a statute's text and legislative history.[8] By paying deference to executive branch interpretations of unambiguous legislation, the Court has gone beyond the rule of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* requiring deference to administrative agency interpretations of ambiguous statutes.[9]

This tacit departure from the norms of statutory interpretation allows the Court to evade constitutional questions about the distribution of powers, to avoid embarrassing the President by limiting

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§ 1531 (1988); Lacey Act,16 U.S.C. §§ 3371–3378 (1988) (implementing Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249). In addition, many domestic environmental statutes have sections that require consultations with foreign governments about domestic environmental regulations having international affects. *See infra* notes 78–80 and accompanying text. Other statutes request or require the President to negotiate international agreements regarding specific environmental matters. *See infra* notes 82–87 and accompanying text.

[7] *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 229–30 (1986).

[8] *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2770 (1990) (rejecting Interstate Commerce Commission's negotiated rate policy as inconsistent with Interstate Commerce Act); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (using legislative history and statutory language to overrule administrative interpretation of asylum requirements); Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter . . ."). *See generally* Nicholas Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

[9] *Chevron*, 467 U.S. at 842–43. The *Chevron* Court concluded that neither the Clean Air Act nor its legislative history showed any Congressional intent on whether the Environmental Protection Agency (EPA) could treat an entire plant as a "stationary source" under the Act. *Id.* at 851. It deferred to the agency's statutory interpretation, but commented that deference would not be appropriate if Congress had spoken to the question at issue. *Id.* at 842–43. Some commentators have criticized deference to administrative agencies even when the statute interpreted is ambiguous. *See, e.g.*, Sanford Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757 (1991) (examines judicial deference to executive branch action in environmental foreign policy in the face of contrary congressional intent); Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 COLUM. L. REV. 986 (1987).

its freedom of action, and to make legal rules governing foreign affairs into flexible instruments of the President's policy. Nevertheless, this Article argues that a proper understanding of the extent of congressional power in the international environmental area, the nature and function of legislation in this area, the political processes that normally resolve environmental separation of powers questions, and the courts' role in this context preclude extraordinary deference to executive actions when a relevant statute governs those actions.

Section II argues that the Constitution gives Congress broad power to regulate international environmental affairs. This power extends so far as to allow congressional legislation to overrule executive agreements in this area. Section III describes the role of federal legislation in addressing environmental problems. While most federal legislation leaves the executive branch a significant amount of latitude to conduct environmental foreign affairs, Congress occasionally has attempted to regulate the international environment in much the same way it regulates the domestic environment: by imposing sanctions on wrongdoers. Statutes of this type pose special problems because they may replace presidential discretion in foreign affairs with a mandatory duty to impose on a foreign party a sanction to which that party did not agree in multilateral or bilateral negotiations. Unilateral action nonetheless can be an effective tool in foreign affairs. Courts interpreting such statutes should recognize that the efficacy of unilateral action depends heavily upon even-handed predictable enforcement.

Section IV examines the implications of Congress's role in international environmental affairs for statutory interpretation. It argues that the Supreme Court's statutory interpretation in foreign affairs generally, and in international environmental affairs in particular, has been unduly deferential to the executive branch. Section IV relies upon Section II's discussion of the constitutional bases of presidential and congressional power and Section III's examination of federal statutes' role in international environmental affairs in order to criticize the Court's extreme deference as inimical both to an appropriate balance of power between the President and Congress and to the development of international environmental law.

II. Constitutional Power to Regulate the International Environment

Because Congress's powers to regulate the international environment are extensive, they tend to conflict with the President's broad

but ill-defined power to conduct foreign affairs. Congressional authority in the area of international environmental affairs derives from the Constitution's text, while the President's power in this area derives from custom and the broad dicta in *United States v. Curtiss-Wright Export Corp.*[10] Thus, the assumption, that the President's foreign affairs power is plenary is more problematic in international environmental affairs than it would be, for example, with regard to the exercise of the War Powers, an area in which the Constitution assigns the President a role as commander-in-chief, or the recognition of foreign governments, an area in which the President has the power to receive ambassadors.[11]

The absence of any textual basis for the President's power over international environmental affairs suggests that federal statutes even should supersede sole executive agreements in this area. All in all, congressional power over international environmental affairs appears superior to that of the executive branch.

A. Congressional Powers to Regulate the International Environment

The Constitution grants Congress the power to regulate international commerce,[12] "punish . . . offenses against the law of nations,"[13] and ratify treaties.[14] Pursuant to its international commerce clause power, Congress has passed legislation restricting imports to protect marine mammals and endangered species,[15] discouraging the funding of deforestation through foreign aid expenditures,[16] regulating the

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[10] 299 U.S. 304 (1936).

[11] Environmental issues, in theory, can impinge upon the President's authority in these areas. This has not yet occurred in international environmental affairs as this Article defines the term. If cases arise in the international arena that implicate an enumerated presidential power, then the analysis would be more complicated than in a "pure" environmental case. The analysis of problems implicating the president's power as commander-in-chief, for example, would have to include questions relating to the scope of presidential power in that area. This Article addresses only international environmental affairs that do not involve the President's enumerated powers.

[12] U.S. CONST. art. I, § 8, cl. 3.

[13] *Id.* cl. 10. The full text of the clause grants Congress the power "[t]o define and punish piracies and felonies committed on the high seas, and offences against the law of nations." *Id.* In modern terms, this clause gives Congress the power to define and punish violations of international law.

[14] *Id.* art. II, § 2, cl. 2.

[15] *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1362, 1371–1384, 1401–1407 (1988); Lacey Act, 16 U.S.C. §§ 3371–3378 (1988); Endangered Species Act, 16 U.S.C. §§ 1531–1543 (1988).

[16] *See* 1986 Foreign Assistance Act, 22 U.S.C. § 2101p-1 (1988).

killing of endangered marine mammals in United States waters,[17] and threatening unilateral imposition of standards on oil tankers in the absence of an international agreement adequately protecting against oil spills.[18] Acts punishing importers of animal products made from species defined as endangered in foreign laws and the Convention in Trade of Endangered Species[19] and reducing fishing allocations of those who violate international agreements[20] involve not just Congress's international commerce power, but also its power to punish offenses against the law of nations.

Congress also has exercised its power to ratify treaties in the international environmental area. For example, it recently ratified the Montreal Protocol, which aims to protect the earth's ozone layer from CFCs.[21] Of course, the President also has broad powers in the area of foreign affairs and has used them to address international environmental problems.

B. The President's Foreign Affairs Power

The Constitution explicitly bestows only a few modest foreign affairs powers upon the President, while granting Congress quite extensive authority.[22] Nevertheless, in *Curtiss-Wright*,[23] the United States Supreme Court declared that the President has "plenary and exclusive power . . . as the *sole organ* of the federal government in the field of international relations."[24]

This sweeping statement is pure dictum. *Curtiss-Wright* did not involve a challenge to the President's power as the sole decision-

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[17] *See* Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1362, 1371–1384, 1401–1407 (1988).

[18] 46 U.S.C. § 391(a)(7) (1988); S. REP. No. 724, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2781, 2783.

[19] *See* Lacey Act, 16 U.S.C. §§ 3371–3378 (1988); Endangered Species Act, 16 U.S.C. §§ 1531–1543 (1988).

[20] *E.g.*, 16 U.S.C. § 1821(e) (1988).

[21] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 27 I.L.M. 1550 (entered into force Jan. 1, 1987).

[22] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37 (1972). The President has the power to act as commander-in-chief of the armed forces, to receive ambassadors, and, with the advice and consent of the Senate, to make treaties and appoint ambassadors and other officers of the United States. U.S. CONST. art. II, §§ 2, 3. The President also has the "executive power," and the responsibility to "take Care that the Laws be faithfully executed." *Id.* §§ 1, 3.

Congress's enumerated powers include the power to declare war, to establish, support, and regulate the armed forces, to define and punish offenses against the law of nations, and to regulate foreign commerce. *Id.* art. I, § 8.

[23] 299 U.S. 304 (1936).

[24] *Id.* at 320.

maker in foreign affairs. Instead, it involved a nondelegation challenge[25] to President Roosevelt's decision to bar arms exports by Curtiss-Wright pursuant to authority given him by Congress.[26] Thus, the "sole organ" language cannot justify claims of executive branch authority over foreign affairs absent an express delegation of authority by statute. *Curtiss-Wright* merely sustained the executive's use of explicitly delegated authority. Commentators have criticized *Curtiss-Wright*'s sweeping dicta sharply,[27] pointing out that the President's authority to act as the federal government's "sole organ" in communicating with foreign governments does not permit him to formulate and conduct foreign policy by himself.[28]

The Court took a different tack to resolving a separation of powers question in *Youngstown Sheet & Tube Co. v. Sawyer*.[29] It overturned President Truman's order to seize a steel mill to avoid a work stoppage that might have threatened the United States's war effort in Korea.[30] Justice Black, writing for the majority, concluded that President Truman's order was an act of presidential lawmaking.[31] The seizure was therefore unlawful, because the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[32] The *Youngstown* majority squarely rejected the notion of inherent presidential authority based on a provision of the Constitution or act of Congress.

The current Court formally has endorsed neither the narrow approach toward presidential power of Justice Black's opinion in *Youngstown* nor the sweeping implications of Justice Sutherland's "sole organ" language in *Curtiss-Wright*. Instead, the Court has embraced the analysis embodied in Justice Jackson's concurrence in *Youngstown*,[33] and applied it in *Dames & Moore v. Regan*[34] to determine the issue of the President's foreign affairs power in upholding the Iranian hostage settlement.

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[25] *Id.* at 315.

[26] *Id.* at 311–13.

[27] *See generally* Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

[28] Glennon, *supra* note 27, at 15.

[29] 343 U.S. 579 (1952).

[30] *Id.* at 583.

[31] *Id.* at 585, 587–89.

[32] *Id.* at 585.

[33] 343 U.S. at 634–45 (Jackson, J., concurring).

[34] 453 U.S. 654, 674 (1981).

The Jackson concurrence in *Youngstown* suggested that presidential power depends heavily upon congressional will.[35] Executive actions that statutes expressly authorize are presumptively valid.[36] Initiatives that Congress has not authorized expressly are legitimate if within the President's constitutional powers, but subject to further inquiry if within an area of concurrent authority.[37] Finally, "[w]hen the President takes measures incompatible with the . . . will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[38]

The *Dames & Moore* Court endorsed this tripartite framework with the caveat that not all executive action fits "neatly" into three precise categories.[39] The Court placed the President's actions with regard to the Iranian hostage crisis in the category of measures authorized by Congress, and therefore regarded them as presumptively valid.[40] More specifically, the Court held that the International Emergency Economic Powers Act[41] authorized President Carter's decision to nullify attachments and liens on Iranian assets in the United States in order to facilitate the return of United States hostages.[42] The Court also upheld the suspension of claims pending against Iran in American courts because, according to the Court, Congress implicitly had approved this action.[43] As a matter of Court doctrine, then, the President's foreign affairs power depends heavily upon congressional will, at least in areas that the Constitution has not entrusted to him.[44] In practice, however, Justice Sutherland's suggestion that presidential power is unlimited remains very influential.[45]

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[35] *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

[36] *See id.* at 637.

[37] "In this area, any actual test of power is likely to depend on . . . events . . . rather than on abstract theories of law." *Id.* Hence, custom is relevant to this inquiry.

[38] *Id.*

[39] Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981). The Court recognized the analytic utility of Justice Jackson's scheme, but agreed with Justice Jackson's comment in *Youngstown* that his scheme may be "somewhat over-simplified." *Id.* at 669.

[40] *Id.* at 674, 675–88.

[41] 50 U.S.C. §§ 1701–1706 (1988).

[42] Dames & Moore, 453 U.S. at 660, 669–74.

[43] *Id.* at 686; *see also*, Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1255, 1310–11 (1988) (criticizing the Supreme Court's decision in *Dames & Moore*).

[44] *See Dames & Moore*, 453 U.S. at 668–69.

[45] *See* Koh, *supra* note 43, at 1307–13 (arguing that *Curtiss-Wright* has greatly influenced Court's statutory construction in foreign affairs area).

The President has used his foreign affairs power to promote international environmental goals—indeed, diplomatic activity, ranging from informal dispute resolution to the negotiation of treaties, remains the most important means of resolving international environmental problems.[46] The Montreal Protocol,[47] limiting the worldwide production of ozone-destroying CFCs, represents just one prominent example of the importance of executive negotiations in international environmental affairs.[48] The President's custom of active participation in international environmental affairs provides another source of law supporting presidential power in this area, despite the lack of specific textual support in the Constitution.

C. Executive Agreements

The Constitution expressly authorizes the President to make treaties with the advice and consent of two-thirds of the Senate.[49] Presidential agreements with foreign states that the President chooses not to submit to the Senate for approval as treaties are called "executive agreements."[50] The Supreme Court has determined that these agreements are within the President's foreign affairs power, notwithstanding the Treaty Clause of the Constitution.[51] The Court has held that executive agreements, like treaties, bind the United States internationally,[52] affect private rights,[53] and supersede inconsistent state laws.[54]

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[46] *See generally* JOHN E. CARROLL, ENVIRONMENTAL DIPLOMACY: AN EXAMINATION AND A PROSPECTIVE OF CANADIAN–U.S. TRANSBOUNDARY ENVIRONMENTAL RELATIONS (1983); GREGORY WHETSTONE, ACID RAIN IN EUROPE AND NORTH AMERICA: NATIONAL RESPONSES TO AN INTERNATIONAL PROBLEM (1983).

[47] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 27 I.L.M. 1550 (entered into force Jan. 1, 1987).

[48] The United States and Canada have settled environmental disputes primarily through diplomatic rather than legal means. Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-U.S. Relations: A Survey and Evaluation of Techniques and Mechanisms*, 1986 CAN. Y.B. INT'L L. 247, 253; Robert H. Braver, Note, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute*, 23 VA. J. INT'L L. 463, 473 (1983).

[49] U.S. CONST. art. II, § 2, cl.2.

[50] Peter J. Lesser, 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, 672 (1983).

[51] Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). *See generally* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); Lesser, *supra* note 50.

[52] *Pink*, 315 U.S. at 203; *Belmont*, 301 U.S. at 331.

[53] Dames & Moore, 453 U.S. at 674, n.6.

[54] *Pink*, 315 U.S. at 230; *Belmont*, 301 U.S. at 330–31.

When the President makes law through diplomatic activity by reaching executive agreements, he may create conflicts with various federal statutes.[55] Precedent, commentary, and the lack of constitutionally-enumerated presidential powers in the international environmental area compel the conclusion that federal statutes supersede inconsistent sole executive agreements.[56] The Supreme Court never has resolved the question of whether sole executive agreements—those made pursuant to the President's constitutional powers rather than pursuant to a statute—supersede previously enacted federal statutes as formal treaties do.[57] The overwhelming majority of authority on this question, however, suggests that executive agreements do not trump prior statutes in any area.[58]

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[55] Sole executive agreements are those that the President makes on the basis of his own power. Lesser, *supra* note 50, at 673. They differ from executive agreements made pursuant to a statute. *See id.* at 682–86.

[56] *Id.*

[57] The Supreme Court held in *Pink* and *Belmont* that sole executive agreements constitute valid, self-executing federal laws. *Pink*, 315 U.S. at 203; *Belmont*, 301 U.S. at 324. However, no statutes addressed the specific issues considered in those two cases. *Pink* and *Belmont* do not address the precise question of which valid law governs a case when a statute and a sole executive agreement conflict. Hence, the Restatement (Third) of Foreign Relations has concluded that the status of executive agreements "relative to earlier Congressional legislation has not been authoritatively determined." RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. j (1987).

Under the "last-in-time" rule, statutes supersede prior executive agreements and treaties. *See* Head Money Cases, 112 U.S. 580 (1884); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870); Taylor v. Morton, 23 F. Cas. 784 (C.D.C. Mass. 1855) (No. 13,799), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1863).

[58] For example, in *Seery v. United States*, the United States Court of Claims allowed a just compensation claim to go forward in spite of an executive agreement between the United States and Austria that settled the plaintiff's claim. 127 F. Supp. 601 (Ct. Cl. 1955), *cert. denied*, 359 U.S. 943 (1959). The Claims Court said that a sole executive agreement could nullify neither the act of Congress consenting to suit nor the plaintiff's constitutional rights. *Id.* at 607.

The United States District Court for the District of Colorado has held that the President may not supersede the Internal Revenue Code by executive agreement. Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983). In *O'Connor v. United States*, the Supreme Court interpreted the executive agreement in a manner that would not conflict with the Internal Revenue Code that the Colorado district court had indicated would control. 479 U.S. 27 (1986).

See also W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENT 344 (1941) ("Congress apparently possesses the final power in case of conflict between a legislative and an executive act."); Edwin Borachard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 671 (1944); Arthur H. Dean, *Amending the Treaty Power*, 6 STAN. L. REV. 589, 607 (1954) ("Unlike a treaty . . . an executive agreement is inoperative as law in the United States to the extent that it conflicts with a prior act of Congress in an area of congressional competence"); Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939); McDougal & Lans, *supra* note 50, at 317 ("A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation"). *But see* Jack M. Goldklang, *The President, The Congress, and Executive Agreements*, 24 VA. J. INT'L L. 755 (1983); Craig Mathews, *The Constitutional Power of the President to Conclude Inter-*

In the environmental area, the case for the supremacy of a statute over a subsequently enacted executive agreement is overwhelming. As noted above, federal statutes regarding the international environment involve Congress's international commerce power.[59] Article I of the Constitution vests that power in Congress.[60] Moreover, Congress has the power to define and punish offenses against the law of nations.[61] This enumerated power provides a constitutional basis for legislation implementing fisheries agreements and addressing international environmental problems.[62]

By contrast, no constitutionally enumerated power of the President would support an executive agreement that violated or conflicted with a federal statute regulating international commerce or punishing a violation of the law of nations.[63] If the President has any constitutional authority in this area, it must be an unenumerated power to act as "sole organ" of the nation in foreign affairs. As mentioned above, however, the Supreme Court has endorsed the theory of the Jackson concurrence in *Youngstown*, which suggests that presidential power depends in some measure upon congressional will, especially in areas where the Constitution explicitly bestows power upon Congress. Moreover, the case law on conflicts between executive agreements and federal statutes in the area of international commerce supports the conclusion that more general cases on the separation of powers have suggested.

For example, a 1953 decision by the United States Court of Appeals for the Fourth Circuit, *United States v. Guy W. Capps, Inc.*,[64] affirmed the supremacy of federal statutes by invalidating a contract

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national Agreements, 64 YALE L.J. 345, 381 (1955) (suggesting that the President should be able to supersede legislation during national crisis); HENKIN, *supra* note 22, at 186 ("If one grants the President some legislative authority in foreign affairs—as in regard to sovereign immunity—one might grant it to him in this respect too").

Dictum in Judge Learned Hand's opinion in *Ozanic v. United States* supports the notion that executive agreements can supersede statutes. 188 F.2d 228 (2nd Cir. 1951). In denying a Yugoslavian claim settled by an executive agreement pursuant to the Lend-Lease Act of 1941, Judge Hand noted that the executive's constitutional power to settle claims with a foreign government repeals congressional consent to be sued. *Id.* at 231.

[59] *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 241 (1986) (Marshall, J., dissenting); *see also supra* notes 15–20 and accompanying text.

[60] U.S. CONST. art. I, § 8, cl. 3.

[61] *Id.* cl. 10.

[62] HENKIN, *supra* note 22, at 322 n.24.

[63] The President's enumerated powers include power as commander-in-chief, the power to make treaties (with the Senate's consent), the power to appoint ambassadors, and the power to take care that the laws be faithfully executed. *See* U.S. CONST. Art. II, §§ 2, 3. Laws referred to in the "take care" clause probably do not refer to international law. HENKIN, *supra* note 22, at 55–56.

[64] 346 U.S. 884 (1953).

made pursuant to an executive agreement.[65] The court voided the executive agreement because Congress had not authorized it, and because it "contravened provisions of a statute dealing with the very matter to which it related."[66]

The Supreme Court's recent decision in *Japan Whaling Ass'n v. American Cetacean Society*[67] indirectly supports this view. The case seemed to involve a conflict between a federal statute that required the Secretary of Commerce to impose sanctions upon countries whose citizens violated internationally-established whaling quotas[68] and an executive agreement that promised to forego sanctions against a violator in exchange for the violator's promise of future compliance.[69] The Court did not consider explicitly the possibility that the executive agreement might supersede an earlier statute. It purported to treat the case as a pure question of statutory interpretation.[70] The failure of any justice to mention any constitutional issue suggests that the Court regards the proposition that a federal statute supersedes an executive agreement in the area of international environmental affairs as settled law.

Whether or not executive agreements supersede statutes as a general matter, they do not supersede statutes regulating foreign commerce and not touching upon enumerated presidential powers. Thus, Congress, not the President, has a strong case for plenary power to regulate the international environment. This implies that statutory construction biased in favor of the President may undercut constitutional principle.

III. THE CONGRESSIONAL ROLE IN INTERNATIONAL ENVIRONMENTAL AFFAIRS

Congress has not only a strong constitutional claim to a role in international environmental affairs, but also a strong tradition of concern and involvement.[71] It recognized that environmental prob-

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[65] *Id.*

[66] 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

[67] 478 U.S. 221 (1986).

[68] *Id.* at 223–29; *see* Packwood Amendment to the Magnuson Fishery Conservation Act, 16 U.S.C. § 1821(e)(2)(B) (1988) (requiring 50% reduction in offending nation's fishing allocation in United States water).

[69] *Japan Whaling Ass'n*, 478 U.S. at 227–28.

[70] *Id.* at 230.

[71] Executive branch diplomacy, however, remains an extremely important means of addressing international environmental problems. *See generally* CARROLL, *supra* note 46; WHETSTONE, *supra* note 46.

lems exist world-wide and explicitly supported international cooperation in solving these problems in one of the earliest modern environmental statutes, the National Environmental Policy Act (NEPA) of 1969.[72]

A. The International Role of Domestic Environmental Statutes

The United States's domestic environmental statutes contribute to the generation of an international political climate more receptive to environmental responsibility. For example, over thirty countries have passed legislation resembling NEPA, which requires federal agencies to evaluate the environmental consequences of proposed major federal actions before going forward with their plans.[73] These domestic environmental statutes implement and, as evidence of state practice, create customary international law.[74] Under international law, states have an obligation to ensure that their activities do not cause significant injury to the environment of other states or areas beyond their boundaries.[75] As a corollary, states often have a duty to notify and consult with neighboring states about environmental problems.[76]

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[72] National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, § 102(2)(E), 83 Stat. 852, 853 (1970) (codified at 42 U.S.C. § 4332(2)(f) (1988)).

[73] MANDELKER, NEPA LAW AND LITIGATION, (1991 Supp.) at 167.

[74] *See infra* note 81 and accompanying text. Domestic statutes can create customary international law to the extent that they provide evidence of state practice. *See generally* G. I. Tunkin, *Remarks on the Juridicial Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419, 429 (1961). Determining which state practices count as customary international law poses a difficult theoretical problem that is beyond the scope of this Article. *See generally* Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980). *See also* Note, *supra* note 3, at 1504 (only state practice carried out with conviction that international law requires that practice constitutes source of customary international law).

[75] Restatement (Third) of the Law, The Foreign Relations Law of the United States, § 601 provides:

> (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1987). Moreover, a state is responsible to other states for violations of these obligations under § 601(1). *See id.* § 601(2).

[76] *Id.* § 601 n.7.

In the area of transboundary pollution, for example, the United States traditionally has fulfilled this obligation through a long-standing practice of executive consultation with Canada.[77] Congress has institutionalized this practice in the Environmental Protection Agency (EPA). Thus, the Clean Air Act provides for foreign participation in hearings preceding the revision of state implementation plans;[78] the Clean Water Act requires the EPA to invite foreign countries to hearings under certain circumstances;[79] and the Environmental Pesticides Control Act requires the EPA to notify foreign governments and international agencies when the agency cancels a pesticide's registration.[80] Congress also creates international law by ratifying and implementing formal international agreements that the President has concluded.[81]

B. Statutes Directly Regulating Foreign Relations

While many of the United States's domestic statutes have an international environmental dimension, most do not attempt to control the conduct of other nations. Congress has found, however, that it is powerless to protect the United States's environment without trying to regulate other countries' citizens as well. As a result, Congress has passed laws discouraging funding of environmentally destructive development projects abroad, regulating foreign nationals' conduct within the United States's territorial sea, guiding diplomatic negotiations with foreign nations, and directly punishing other countries conduct outside the United States through sanctions.

1. Legislation Relating to Negotiation

Congress has refrained from regulating the negotiation of international agreements through detailed legislation. Generally, legis-

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[77] *Id.* (citing 1980 memorandum of intent regarding transboundary air pollution (United States Dep't of State, Press Release No. 209A, Aug. 6, 1980)).

[78] 42 U.S.C. § 7415 (1988). A finding that air pollution from the United States is endangering the public health or welfare of a foreign country triggers a revision of a state implementation plan under the Clean Air Act. *Id.*; *see also* Her Majesty the Queen in RT of Ontario v. EPA, 912 F.2d 1525 (D.C. Cir. 1990) (holding that EPA had not issued findings triggering revision).

[79] 33 U.S.C. § 1320(a) (1988).

[80] 7 U.S.C. § 136o(b) (1988). United States companies may export pesticides not approved for use in this country if they notify the foreign government that the pesticide has not been registered in the United States. *Id.* § 136o(a). The law also requires the EPA to cooperate in international efforts to improve pesticide research and regulation. *Id.* § 136o(d). If the chemical exporter is a corporation, the Toxic Substances Control Act similarly requires the EPA to advise foreign countries of chemical test data and actions taken under EPA evaluation. 15 U.S.C. § 2611(b) (1988).

[81] *E.g.*, Governing International Fishery Agreement with Japan, Pub. L. No. 100-220, 101 Stat. 1459 (1987) (codified at 16 U.S.C. § 1823 (1988)).

lation addressing international environmental diplomacy and negotiation deliberately leaves the President substantial discretion. For example, the Global Climate Protection Act of 1987[82] aims to spur international action on the issue of global warming and influence policy priorities; however, it avoids restraining the President significantly. The Act declares general goals for United States policy,[83] including working toward multilateral agreements;[84] calls for the formulation of a national policy on global warming;[85] requires a report from the President on climate change;[86] and urges, rather than directs, the President to give climate protection a high priority on the agenda of United States-Soviet relations.[87] Congress has directed the President to seek agreements on specific topics. Both the Marine Mammal Protection Act[88] and the Ports and Waterways Safety Act[89] encourage the President to seek international agreements promoting the statutes' goals.[90] Neither, however, addresses particulars.

The President must be careful only to negotiate agreements that Congress will support if he wishes to avoid the embarrassment of congressional refusal to bind the nation to presidentially negotiated environmental agreements. Nevertheless, the dynamics of the negotiation process suggest that the congressional reluctance to regulate diplomacy strictly is wise policy. Congress cannot foresee, at the time it passes legislation, how other countries will react to various proposals and events. The President must be free to adjust to the changing international arena in order to negotiate successfully. Thus, environmental legislation usually directs that the President seek to achieve a general goal through negotiation and leaves the timing and precise content of proposals to presidential discretion.

2. Unilateral Action

While Congress generally has not regulated diplomacy, it has restricted foreign aid in pursuit of environmental goals and unilat-

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[82] Pub. Law No. 100-204, §§ 1101–1106, 101 Stat. 1407 (1987).

[83] *Id.* § 1103(a).

[84] *Id.* § 1103(a)(4).

[85] *Id.* § 1103(b).

[86] *Id.* § 1104. Congress required the Secretary of State and EPA Administrator to summarize current scientific understandings of global climate change, assess the United States's efforts to address this problem, and describe a strategy for enhancing international cooperation. *Id.*

[87] *Id.* § 1106.

[88] 16 U.S.C. §§ 1361–1407 (1988).

[89] Pub. L. No. 95–474, 92 Stat. 1471 (1978) (codified at 33 U.S.C. § 1221 (1988) and 46 U.S.C. §§ 214, 391a (1988)).

[90] 16 U.S.C. § 1378 (1988); 3 U.S.C. § 1230 (1988).

erally applied sanctions to foreign citizens to promote international environmental standards. Neither of these actions requires negotiation.

a. Foreign Aid

United States foreign aid to Brazil and other South American countries has funded projects that required cutting down trees in the Amazon jungle. Growing awareness that deforestation helps cause global warming[91] has prompted Congress to restrict foreign aid used for these purposes. The Foreign Assistance Act of 1986 directs the President to deny assistance for colonization of forest lands, dam construction and road building projects in forests, and the conversion of forest land to cattle ranches.[92] The Act contains exceptions for activities that directly improve the livelihood of the rural poor and support sustainable development if these activities are conducted in an "environmentally sound manner."[93]

The Foreign Operations, Export Financing, and Related Appropriations Act of 1991 (1991 Act) further restricts foreign aid while promoting environmental initiatives by the multilateral development banks.[94] These banks are international institutions that pool funds from all over the world in order to make loans to promote economic development, especially in poorer countries.[95] They include the International Bank for Reconstruction and Development, the International Development Association, and the International Finance Corporation.[96] Bank-funded mining, dam construction, and road building projects have hastened the destruction of tropical rainforests and other natural resources.[97]

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[91] *See* 22 U.S.C. § 2151p-1(a) (1988) ("Congress is particularly concerned about the continuing and accelerating alteration, destruction, and loss of tropical forests in developing countries, which pose a serious threat to . . . the environment. Tropical forest destruction and loss . . . can result in desertification and destabilization of the earth's climate.").

[92] 22 U.S.C. § 2151p-1(c)(15) (1988).

[93] *Id.* The statute describes the forest lands to which it applies somewhat ambiguously. The prohibition of aid to cattle ranching and colonization applies simply to "forest lands." *Id.* The ban on aid to road construction and dams applies only to "relatively undegraded forest lands." *Id.* § 2151p-1(c)(15)(B).

[94] Pub. L. No. 101-513, § 533, 104 Stat. 2013 (1990) (codified at 22 U.S.C.A. § 2621 (West Supp. 1991)).

[95] BEREND A. DEVRIES, REMAKING THE WORLD BANK 8–16 (1987).

[96] *See id.* The World Bank includes the International Bank for Reconstruction and Development and the International Development Association. The International Finance Corporation is an affiliate of the World Bank. *Id.* at 8.

[97] Bruce Rich, *Funding Deforestation: Conservation Woes at the World Bank*, NATION, Jan. 23, 1989, 88, 88–93; *see* Mcgee and Zimmerman, *supra* note 1, at 527, 544–47.

In recent years, environmental groups and others have pressured the banks to promote "sustainable economic development," meaning economic development strategies that do not destroy the world's resource base. The 1991 Act supports these efforts. It forbids the use of United States funds for timber extraction and other projects causing significant loss of tropical rainforests.[98] It also directs the United States executive director of each multilateral development bank to promote "sustainable" management of natural resources.[99] More specifically, it requires these directors to expand bank programs in energy conservation;[100] improve cost-benefit analysis of projects increasing "power-generating capacity;"[101] conduct environmental assessments of proposed energy projects early in the project cycle, with public participation and consideration of alternatives to the proposed projects;[102] include environmental costs in economic assessments;[103] and provide technical assistance.[104]

b. Sanctions

Congress has used unilateral sanctions to prod other nations into adopting multilateral agreements on oil pollution, induce their compliance with established international standards, and impose upon them the United States's environmental norms. These efforts have produced some noteworthy successes.

The attempts to discourage oil spills from ships provide an excellent example of Congress and the President using a statute as a tool to force progress in international negotiations.[105] Unilateral action by the United States pursuant to statutes designed to force international agreement led directly to the 1978 International Conference on Tanker Safety and Pollution Prevention.[106] The United States later adopted the international convention formulated at the conference.[107]

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[98] 22 U.S.C.A. § 2621(c)(3) (West Supp. 1991).

[99] *Id.* § 262l(a).

[100] *Id.* § 262l(a)(1).

[101] *Id.* § 262l(2).

[102] *Id.* § 262l(3).

[103] *Id.* § 262l(4).

[104] *Id.* § 262l(5).

[105] *See generally* D. ABECASSIS AND R. JARASHOE, OIL POLLUTION FROM SHIPS (2d ed. 1985) (examining international, British, and United States laws on marine pollution); J. KINDT, 2 MARINE POLLUTION AND THE LAW OF THE SEA 1153–1213 (1986) (emphasizing international aspects but including major United States legislation in the area).

[106] ABECASSIS, *supra* note 105, at 441.

[107] *Id.*

Congress enacted The Ports and Waterways Safety Act (PWSA) in 1972 to require that the United States Coast Guard promulgate rules and regulations to protect the environment.[108] PWSA section 201(7) mandated that the United States unilaterally impose tanker design and construction standards upon foreign vessels by 1976, unless relevant standards were adopted sooner by international agreement.[109] The congressional committee recommending the legislation preferred international standards.[110] President Carter followed up on the congressional initiative by directing the Secretary of Transportation to prepare new regulations on tanker construction and equipment, ordering the Coast Guard to board tankers for inspection, and encouraging the Department of State to seek an international agreement.[111]

The 1978 International Conference on Tanker Safety and Pollution Prevention was convened in London specifically to discourage the unilateral action that the United States promised.[112] The conference amended the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).[113] MARPOL, as amended, has the most wide-ranging and strict provisions relating to oil pollution of any international agreement ever adopted.[114]

While this strategy did not involve Congress's enacting a rigid legal rule to govern the precise content of the negotiations, it did involve a threat to impose standards unilaterally. The success of the strategy probably depended in part upon other nations' belief that the United States would carry out its threat. Rigid law strictly interpreted conveys threats effectively.

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[108] Pub. L. No. 92-340, 86 Stat. 424 (1972).

[109] 46 U.S.C. §§ 3704–3709 (1988).

[110] S. REP. No. 724, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2781, 2783.

[111] ABECASSIS, *supra* note 105, at 451.

[112] *Id.* at 453. Nevertheless, Congress amended the 1972 legislation to impose standards on foreign and domestic ships in United States waters. *See* Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978) (codified at 33 U.S.C. §§ 1222, 1224, 1228, 1232 (1988) and 46 U.S.C. §§ 214, 391a (1988)). Although the 1978 amendments represented Congress's independent judgment about what standards should govern vessels in United States waters, Congress adopted the international standards to the extent feasible. In fact, the 1978 amendments went further than the Conference on Tanker Safety and Pollution Prevention in certain respects. ABECASSIS, *supra* note 105, at 454.

[113] ABECASSIS, *supra* note 105, at 36–37.

[114] *Id.* at 37. The United States signed MARPOL 73/78 on June 27, 1978. The Senate ratified the convention on July 2, 1980, and Congress implemented the convention with the passage of the Act to Prevent Pollution from Ships on October 21, 1980. *Id.* The convention entered into force in the United States on October 2, 1983. *Id.* at 454. Because the convention is so ambitious, only 33 parties had adopted it as of December 31, 1984. These parties, however, represent 70% of the world's tonnage. *Id.* at 20.

Congress's attempts to preserve dolphins provide a good example of conservation through the use of economic sanctions against countries that have not adopted United States conservation practices.[115] The United States has had some success in discouraging the incidental drowning of dolphins in tuna fishers' nets.[116] The country controls the yellowfin tuna market, and a provision of the Marine Mammal Protection Act (MMPA) restricts imports of tuna caught without adherence to United States conservation guidelines.[117] As a result, several countries including the Congo, New Zealand, Senegal, and Spain have directed their fleets to follow United States procedures for releasing dolphins.[118] Moreover, MMPA established a permit system to limit the number of marine mammals either the United States fleet or a foreign fleet may capture within the United States fishery conservation zone.[119]

The Packwood Amendments to the 1976 Fishery Conservation and Management Act[120] provided automatic sanctions for acts diminishing the effectiveness of international fishery programs.[121] Presidents have secured promises of future compliance with fishery agreements by threatening to use these sanctions.[122] The Act has been less than totally successful, however, in discouraging whale harvesting by Japan and the Soviet Union. One critic has attributed this lack of success in part to the executive branch's failure to use the sanctions the Act provides.[123]

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[115] International sanctions alone do not account for this progress. The United States for a time invested in research for fishing gear designed to catch tuna without catching porpoises. KINDT, *supra* note 105, at 1337. Moreover, the United States regulates its own fleet very carefully to avoid taking porpoises. *See* Balelo v. Baldridge, 724 F.2d 753 (9th Cir. 1984) (upholding regulation requiring vessel owners to consent to placement of observers on their boats who could collect data for use in civil or criminal penalty proceedings).

[116] *See* Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407. Dall's porpoise mortality has declined from 20,000 porpoises per year in the late 1970s, to around 6000 in 1982. MARINE MAMMAL COMMISSION, ANNUAL REPORT OF THE MARINE MAMMAL COMMISSION, CALENDAR YEAR 1982: A REPORT TO CONGRESS 45 (1982).

[117] Laurel L. Hyde, Comment, *Dolphin Conservation In the Tuna Industry: The United States Role in an International Problem*, 16 SAN DIEGO L. REV. 665, 691 (1979).

[118] *Id.* at 692.

[119] MMPA establishes a moratorium on the "take" of all marine mammals within 200 miles of the United States coast. 16 U.S.C. §§ 1362, 1371–1372 (1988). The statute, however, allows the Secretary of Commerce to issue marine mammal take permits under some circumstances. 16 U.S.C. §§ 1371–1375, 1381 (1988). MMPA applies to foreign as well as domestic fishing fleets. *See* Federation of Japan Salmon Fisheries Cooperative Ass'n v. Baldridge, 679 F. Supp. 37 (D.D.C. 1987) (preliminary enjoining Secretary of Commerce from issuing take permit to Japanese Salmon Fishery).

[120] 16 U.S.C. § 1821(e)(2) (1988).

[121] *Id.*; 22 U.S.C. § 1978(a)(1) (1988).

[122] Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 225 (1986).

[123] Don Bonker, *U.S. Policy and Strategy in the International Whaling Commission:*

While statutes play a relatively minor role in negotiation between the United States and other countries, they have controlled unilateral action in the area of international environmental affairs. Multilateral actions may be preferable to unilateral actions designed to prevent international environmental injury, but unilateral action offers advantages that one cannot ignore.[124] Unilateral action is easier than multilateral action and can encourage desirable state practices, protect the environment, and even promote multilateral agreements.[125]

A statute mandating sanctions provides a special advantage in the environmental context—it forces countries to internalize the costs of their environmentally destructive practices. The problem of "externalities" is central to environmental law.[126] A country dumping waste into the ocean, harvesting the last of an endangered species, or cutting down rainforests realizes most of the economic benefits of its activity, but others help bear the environmental costs.[127] Because the country is able to externalize these costs, it may carry on activities even when the cost of the environmental destruction far exceeds the value of the economic gain.[128] By making a country pay these costs itself, unilateral action may change what a country rationally pursuing its self-interest will do. In theory, at least, a country will not conduct economic activity when costs exceed revenues. Costs will exceed revenues more often for environmentally destructive

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Sinking or Swimming?, 10 OCEAN DEV. & INT'L L. 41, 52–53 (1981); *see also Japan Whaling Ass'n*, 478 U.S. 221 (1986).

[124] *See* Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51, 79–83 (1981). *See generally*, LAW INSTITUTIONS, AND THE GLOBAL ENVIRONMENT (John L. Hargrove ed., 1972); Samuel A. Belcher, *An Overview of International Environmental Regulation*, 2 ECOLOGY L.Q. 1, 75–90 (1972); Coan, et. al., *Strategies for International Environmental Action: The Case for and Environmentally Oriented Foreign Policy*, 14 NAT. RESOURCES J. 87 (1974); Marshall I. Goldman, *Pollution: International Complications*, 2 ENVTL. AFF. 1, 12–14 (1972); Allan Gotlieb & Charles Dalefen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law*, 67 AM J. INT'L L. 299 (1973); Jon L. Jacobson, *Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action*, 9 SAN DIEGO L. REV. 454 (1972).

[125] Bilder, *supra* note 124.

[126] *See* ANDERSON ET. AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 3–4 (1977). *See generally* ENVIRONMENTAL PROTECTION: LAW & POLICY 15–50 (Anderson et. al. eds., 1990).

[127] *See generally* Kenton Miller, et. al., *Deforestation & Species Loss: Responding to the Crises in* PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 78, 93 (Jessica Mathews ed., 1991).

[128] *See generally* ANDERSON, ENVIRONMENTAL IMPROVEMENT, *supra* note 126; Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

activity if the state carrying out the activity must pay some cost associated with the environmental harm.

Unilateral action sometimes can bring about results more quickly than multilateral action.[129] This can be important when multilateral agreements have proved impossible and the environmental problem needing resolution involves irreversible consequences. For instance, the process of negotiation may be too slow to save an endangered species. Legislation providing for unilateral action also promotes policy stability over a longer period of time than a President's term in office. Consistent, stable policy may help solve stubborn long-term environmental problems. Of course, legislation may prove overly rigid—it is not a panacea.

When generally accepted principles of international law support sanctions, compliance will be more likely than when they do not. For instance, the United States's threats to regulate tankers visiting its ports and its laws regulating the taking of marine mammals in its territorial waters have proved fairly successful because no one doubts the legitimacy of the United States's regulation of activities within its territorial seas. Unilateral imposition of sanctions upon foreign countries for their actions taken outside of United States territorial waters poses special difficulties.[130] Courts must appreciate these difficulties in order to interpret statutes imposing them properly. Obviously, no country will restrict its activities in response to a statute unless the sanctions imposed seem substantial and the norm that the statute enforces appears legitimate. Consistent application will make the threat of the sanction more credible and enhance the legitimacy of the norm it is trying to enforce.

Environmental standards have a certain credibility which unilaterally imposed trade or military policies lack. A statutory provision, like the Packwood Amendment to the Magnuson Fishery Conservation and Management Act,[131] which provides sanctions for taking endangered whales, seems on its face to be aimed at a world-wide problem. By contrast, a unilaterally imposed restriction on another nation's military activity would appear to be nothing but a naked assertion of self-interest. This is not to say that statutes threatening unilaterally imposed sanctions should dominate international environmental policy. Multilateral and bilateral processes are probably more effective at disseminating information that might persuade

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[129] Bilder, *supra* note 124, at 79–80.

[130] *Id.* at 68.

[131] 16 U.S.C. § 1821(e)(2) (1988).

countries to give up their own financially advantageous activities for the sake of minimizing global environmental damage.[132] It is not possible to characterize unilateral action as inherently either desirable or undesirable.[133] A comprehensive and effective system of international environmental control will require a mix of multilateral agreements and unilateral legislation.[134] Understanding the importance of unilateral international action, however, should enhance the interpretation of statutes that might impinge upon the presidential foreign affairs power. This understanding should encourage respect for Congress's role and consistent application of its laws.

IV. JUDICIAL REVIEW

A. Current Doctrine and Practice

In the international environmental area, administrative agencies exercise the powers that statutes delegate to the executive branch.[135] Judicial review of agency action under these statutes commonly focuses upon the question of whether the agency has complied with the statute it administers.[136] The court must determine congressional intent from the statute's text and legislative history.[137] If either the text or the legislative history speaks clearly to the issue before the court, the court must follow the intent of Congress as expressed in the statute or legislative history.[138] Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[139] federal courts must defer to an administrative agency's interpretation of a statute if the statute's text is ambiguous and the legislative history does not speak to the

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[132] *See generally* Bilder, *supra* note 124, at 90. Congress has also spurred multilateral information exchange. *See* Driftnet Impact Monitoring, Assessment and Control Act, Pub. L. No. 100-220, Title IV, § 1404, 101 Stat. 1477, (1987) (codified at 16 U.S.C. § 1822 (1988)) (requiring international negotiations aimed at assessing impact of driftnetting on marine mammals).

[133] Bilder, *supra* note 124, at 95.

[134] *Id.* at 95.

[135] *See supra* note 5.

[136] *See infra* note 149 and accompanying text.

[137] Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 427–49 (1987) (applying legislative history and statutory language to overrule administrative interpretation of asylum requirements); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2770 (1990) (rejecting Interstate Commerce Commission's negotiated rate policy as inconsistent with Interstate Commerce Act). *See generally* Zeppos, *supra* note 8.

[138] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter . . . ").

[139] 467 U.S. 837 (1984).

issues before the court.[140] *Chevron* and its successors hold that courts should not defer to an agency's interpretation of its statute if clear legislative intent emerges from an examination of a statutory text and its legislative history.[141]

In practice, however, the Supreme Court often ignores legislative history and even plain statutory language in order to uphold the President's actions in foreign affairs against challenges to statutes delegating power to the executive.[142] The Court brought this tradition of extraordinary statutory interpretation to *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,[143] a case in which the government successfully argued that a NEPA claim implicated national security.[144] *Weinberger* stemmed from a citizen group's attempt to force the United States Navy to prepare an environmental impact statement (EIS) regarding the effect of storing nuclear weapons at a facility in Hawaii.[145] The Navy claimed that the Freedom of Information Act (FOIA) precluded its writing an EIS because information about whether it stored nuclear weapons at the facility was classified.[146] In ruling for the Navy, the Court ignored the language of the FOIA amendments that required it to determine *de novo* whether the Navy properly had classified the information.[147]

Similarly, the Court showed extraordinary deference to the executive branch in *Japan Whaling Ass'n v. Cetacean Society*.[148] In that case, wildlife conservation groups challenged the executive branch's response to the Japanese harvesting of Northern Pacific sperm whales. The International Whaling Commission, an international body established to regulate whale harvests under the Inter-

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[140] *Id.* at 843–44.

[141] *Id.* at 842–43. The Court explained, "[i]f the intent of Congress is clear, that is the end of the matter . . . ". *Id.* The post *Chevron* Court has repudiated agency interpretations inconsistent with a statute's text and legislative history. *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759, 2770 (1990); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

[142] *See, e.g.*, Regan v. Wald, 468 U.S. 222 (1984) (arguably ignoring plain statutory language to uphold travel restrictions to Cuba); Dames & Moore v. Regan, 453 U.S. 654, 671–74 (interpreting International Emergency Economic Power Act, 50 U.S.C. §§ 1701–1706 (1982), in order to uphold President Carter's hostage agreement). *See generally* Koh, *supra* note 43, at 1309–10.

[143] 454 U.S. 139 (1981).

[144] *Id.* at 143–47.

[145] *Id.* at 141–42.

[146] *Id.*

[147] *See* 5 U.S.C. § 552(a)(4)(B) (1988); Morton H. Halperin, *The National Security State: Never Question the President*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986, at 50, 54 (Herman Schwartz ed., 1987).

[148] 478 U.S. 221 (1986).

national Convention on the Regulation of Whaling (ICRW),[149] had established a zero quota for the harvest of Pacific sperm whales in 1981.[150] Japan had continued to harvest whales notwithstanding the zero quota.[151] The statute before the Court required the Secretary of Commerce to impose sanctions upon countries whose fishing "diminishes the effectiveness" of the ICRW.[152] These sanctions included a reduction, by at least fifty percent, of the offending nation's fishery allocation within the United States's fishery conservation zone.[153]

Instead of sanctioning Japan for its failure to accept the zero quota, the Secretary of Commerce concluded an executive agreement with Japan that appeared to promise compliance by 1988.[154] The Supreme Court ignored clear legislative history showing that Congress intended the mandatory imposition of sanctions for violations of international whaling quotas, and upheld the Secretary's decision.[155] Although the Court claimed to be following the *Chevron* rule in *Japan Whaling Ass'n*, all commentators have agreed that neither legislative history nor the words of the statute justified the extraordinary deference to the executive branch in this case.[156]

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[149] Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S 72 (entered into force Nov. 10, 1948).

[150] *Japan Whaling Ass'n*, 478 U.S. at 227.

[151] *Id.* at 227. Japan served a timely notice that it would not comply with the quota, which it had the right to do under the convention. *Id.* at 224, 227.

[152] *Id.* at 225–26 (citing 22 U.S.C. §§ 1978(a)(1), 1978(a)(4) (1988); 16 U.S.C. §§ 1821(e)(2)(A)(i), 1821(2)(A)(i) (1988).

[153] *Japan's Whaling Ass'n*, 478 U.S. at 225–26.

[154] *Compare Japan Whaling Ass'n*, 478 U.S. at 227 (majority opinion) *with Japan Whaling Ass'n*, 478 U.S. at 246 (Marshall J., dissenting).

[155] The United States Court of Appeals for the D.C. Circuit's opinion concluded that the legislative history indicates "quite plainly that fishing in excess of internationally set quotas was considered an *automatic* trigger of certification." American Cetacean Soc'y v. Baldridge, 768 F.2d 426, 436 (D.C. Cir. 1985) (emphasis added), *rev'd sub nom.* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986). *See* S. REP. NO. 582, 92d Cong., 1st Sess. 2 (1971); *Hearing on Whaling Policy and International Whaling Commission Oversight Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 301, 322–23 (1979) [hereinafter *Whaling Policy Hearing*]; H.R. REP. NO. 468, 92d Cong., 1st Sess. 5, 8–10 (1971); *Hearings on S. 1242 et al. Before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce*, 92d Cong., 1st Sess. 47 (1971).

[156] *See* Ronald J. Haskell, *Abandoning Whale Conservation Initiatives in* Japan Whaling Association v. American Cetacean Society, 11 HARV. ENVTL. L. REV. 551 (1987) (arguing that Congress intended to mandate sanctions under circumstances of case, and the Supreme Court should have used doctrine that equitable remedies were discretionary to refuse to order Secretary to impose them); Melinda K. Blatt, Case Note, *Woe for the Whales*, 55 U. CIN. L. REV. 1285, 1296 (1987); Virginia A. Curry, Note, Japan Whaling Association v. American Cetacean Society*: The Great Whales Become Casualties of the Trade Wars*, 4 PACE ENVTL. L. REV. 277, 278 (1986) (arguing that Court decided to allow Secretary of Commerce to favor international trade over conservation); *see also* Christopher S. Gibson, *Narrow Grounds for*

The *Japan Whaling Ass'n* decision reversed a two-to-one decision of the United States Court of Appeals for the District of Columbia Circuit.[157] The majority on the Court of Appeals had upheld a district court decision ordering the Secretary of Commerce to impose sanctions.[158] Judge Oberdorfer's dissent argued for the result that the Supreme Court majority ultimately reached: a decision allowing the Secretary of Commerce to avoid imposing sanctions.

Judge Oberdorfer had argued that a different standard of review applies in cases affecting foreign affairs.[159] In particular, according to Judge Oberdorfer, because the Secretary of Commerce had relied upon his reading of the Pelly and Packwood Amendments to form an international agreement, the court should not overrule the Secretary unless his interpretation was clearly erroneous.[160] The judge further suggested that a court should interpret an ambiguous statute addressing foreign relations in favor of the executive branch rather than in accordance with its legislative history.[161] In effect, he called for a plain statement rule whereby a court only would read a statute to constrain the President in foreign affairs if the actual language of the statute admitted of no other interpretation.

Although the Supreme Court did not formally adopt the doctrine that Judge Oberdorfer advocated, it did what he suggested in *Japan Whaling Ass'n*. Judge Oberdorfer's dissent articulately justified the different standard of review often used in foreign affairs cases in practice without explicit justification. It represents an influential alternative to the *Chevron* approach for international environmental affairs cases limiting the President's foreign affairs power.

B. The Proper Role for the Court

Neither the Constitution, history, nor sound policy justifies the deferential approach that Judge Oberdorfer advocated and that the Supreme Court has used in practice. This Article already has indicated that the claim that the President possesses some sort of constitutional prerogative to do as he pleases in this particular area of

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a Complex Decision: The Supreme Court's Review of an Agency's Statutory Construction in Japan Whaling Association v. American Cetacean Society, 14 ECOLOGY L.Q. 485, 513–16 (1987).

[157] *Japan Whaling Ass'n*, 478 U.S. at 229, *overruling* American Cetacean Soc'y v. Baldridge, 768 F.2d 426 (D.C. Cir. 1985).

[158] *Japan Whaling Ass'n*, 478 U.S. at 228–29.

[159] American Cetacean Soc'y v. Baldridge, 768 F.2d at 445–49 (Oberdorfer, J., dissenting).

[160] *Id.* at 447–48.

[161] *Id.* at 449.

foreign affairs is untenable. Rather, statutes delegating congressional power to the President may limit the President's authority.

A proper understanding and respect for Congress's historical role in international environmental protection should inform courts approach to this area, not a flawed assumption that the President has plenary authority. The courts should enhance the efficacy of unilateral legislation and promote dialogue and compromise between Congress and the executive branch on issues of power and policy.[162]

1. Enhancing the Efficacy of Unilateral Legislation

The legitimacy of an environmental standard depends in part upon its consistent application. A lack of uniform, predictable enforcement of international environmental statutes increases the likelihood that the country upon which sanctions are imposed will interpret the enforcement effort not as an even-handed application of principled environmental law, but as an affront to the country.

Special deference to the executive branch will allow the law to fluctuate with the politics of each administration and thereby lose its legitimacy. Extreme doctrines of deference make it impossible for groups to insist on consistent application of statutorily established enforcement practices. Absent that constraint, the pressures on an administration to vary its use of sanctions according to the status of its relations with the violator and its whole array of policy goals will be overwhelming.

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[162] Jesse Choper has argued that political rather than judicial processes should settle separation of powers conflicts whenever possible. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260–379 (1980). Choper assumes that courts must refrain from issuing orders to the executive branch in order to make sure that political processes resolve separation of powers conflicts. *Id.* Congress and the executive branch, however, engage in a political process when Congress passes a statute delegating power to the President. *See infra* notes 167–69 and accompanying text. Congress consults with the executive branch about the appropriate amount of discretion the President should have. *See* CHOPER, *supra*, at 260–379. If courts fail to issue orders implementing the statutes that Congress passes and the President signs, they subvert the political compromises that these statutes embody. They allow one branch of government, the executive, to redefine the political relationship unilaterally. This subverts the political processes that the Constitution envisions.

Choper apparently recognizes that his argument against the justiciability of separation of powers claims cannot apply to cases requiring that a President follow a statute. *Id.* at 270–71. His argument, however, implies that the judiciary ought not pass on claims that the executive branch has ignored a statute if it asserts that it has inherent power to take the action attacked in court.

2. Promoting Political Resolution of Policy Questions

Because the United States cannot hope to persuade other nations to adopt environmentally sound practices without requiring United States businesses and citizens to meet the same standards, the executive branch and Congress need each other.[163] While the President and Congress do not always agree, they generally resolve disputes through political compromises. Congress needs the executive branch to negotiate solutions to environmental problems, and the executive needs Congress to enact treaties and pass legislation bringing the United States into compliance with international standards. For example, President Carter's success with MARPOL derived in part from the unity of design between him and Congress.[164]

Congressional committees regularly consult with executive branch officials about efforts, including negotiated efforts, to deal with international environmental problems.[165] The Case Act reinforces this informal practice by requiring the President to report executive agreements to Congress.[166] Deference to the executive encourages the administration to conduct its own foreign policy rather than work with Congress.

3. Promoting the Political Definition of the Scope of the President's Foreign Affairs Power

Records of congressional hearings show not only consultation about policy, but also discussions about the appropriateness of legislative restriction on the President's discretion in matters of foreign

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[163] *Hopson v. Kreps* painfully illustrates the problem presented by the necessity to obey international norms ourselves in order to be able to successfully further them in the international arena. 622 F.2d 1375 (9th Cir. 1980). The International Whaling Commission (IWC), by eliminating the "native subsistence" exemption to its quotas, prohibited Eskimos from hunting the bowhead whale, an important part of their diet and culture. *Id.* at 1377. The Eskimos brought suit challenging the authority of the IWC to eliminate this exemption and the authority of the Secretary of Commerce to implement the new restriction. *Id.* The court held that the issue was justiciable and remanded the case. *Id.* at 1377–82. The D.C. Circuit earlier had reversed a district court order directing the Secretary of State to object to the IWC's zero quota for bowhead whales. *See* Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978). The court ruled that the district court's preliminary injunction was inappropriate, because filing an objection would have an irreversible consequence—serious damage to United States efforts to promote international protection of marine mammals. *Id.* at 956–57.

[164] *See supra* notes 105–14 and accompanying text.

[165] *See, e.g., Whaling Policy Hearings, supra* note 155, at 301, 312–320, 324 (discussing United States negotiating position in the IWC and related matters).

[166] 1 U.S.C. § 112(b) (1988).

policy. For example, during the hearings on proposed amendments to the Magnuson Fishery Conservation and Management Act, Representative Breaux asked Richard Frank, the administrator of the National Ocean and Atmospheric Administration, if he believed that the sanctions Congress had empowered the President to use to compel other nations to comply with international fishing conservation regulations would be more effective if they were made automatic instead of discretionary.[167]

Moreover, unlike in the war powers area, the President has signed, not vetoed, legislation such as the Packwood Amendment to the Pelly Magnuson Act,[168] MMPA,[169] and the Foreign Assistance Act of 1986,[170] each of which limits his freedom. Courts should enforce the political bargains these pieces of legislation represent. Special deference to the executive branch's unilateral reinterpretation of statutes only serves to undermine the political resolution of foreign policy and separation of powers questions.

C. The Costs of the Chevron *Rule*

Adherence to the rule limiting courts' deference to agency decisions to those cases where neither the statutory language nor the legislative history resolves a question does have some costs in the foreign affairs area. Judge Oberdorfer seemed most concerned about embarrassing the President by ordering the repudiation of an agreement that undercut a statute.[171] Professor Michael Glennon has expressed the view, however, that the President should be embarrassed when he acts without legal authority in foreign affairs.[172] In any case, adherance to *Chevron*'s limitations on deference may entail embarrassing a President whose foreign policy exceeds the bounds of a statute.

More important, applying the limitations in *Chevron* to legislation requiring very specific actions, such as legislation requiring automatic economic sanctions in defined circumstances, will limit the President's ability to respond flexibly to foreign policy situations. In

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[167] *Whaling Policy Hearings*, *supra* note 155, at 312–13 (1979). Frank indicated that the administration had not yet formulated a position on that question, and that nonmandatory sanctions had proved effective in the past.

[168] 15 WEEKLY COMP. PRES. DOC. 1435 (Aug. 15, 1979).

[169] 8 WEEKLY COMP. PRES. DOC. 1618 (Oct. 21, 1972).

[170] 22 WEEKLY COMP. PRES. DOC. 1453 (Oct. 24, 1986).

[171] American Cetacean Soc'y v. Baldridge, 768 F.2d 426, 447 (D.C. Cir. 1985) (Oberdorfer, J., dissenting).

[172] Glennon, *supra* note 27, at 5, 11–20.

international environmental affairs, however, Congress has limited only the President's flexibility with the President's consent. Congress and the President must decide through the legislative process whether flexible, ad hoc decisions or consistent, principled policy should govern foreign affairs. Congress, not the federal courts, should correct for overly rigid legislation.[173]

IV. CONCLUSION

Courts should abandon extraordinary deference to executive branch interpretations of international environmental statutes. Judicially enforceable international environmental law will promote an appropriate and politically negotiated constitutional balance between the President and Congress in international environmental affairs. Moreover, it will enhance the legitimacy and long-term efficacy of whatever unilateral legislation Congress enacts and the President signs.

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[173] The history of Japanese salmon fishing under the Marine Mammal Protection Act shows that Congress in fact has made such adjustments. Congress has amended the North Pacific Fisheries Act of 1954 twice in order to avoid restricting Japanese salmon fishing. *See* 16 U.S.C. § 1034(b) (1988); 16 U.S.C. § 1034(b) (1988). These amendments implement negotiated agreements allowing the Japanese to fish for salmon in United States waters. *See* The International Convention for the High Seas Fisheries of the North Pacific Ocean (INPCF), 4 U.S.T. 380, T.I.A.S. No. 2786 (1952). The protocol amending this treaty in 1978 allowed the Japanese to fish for salmon inside the United States Exclusive Economic Zone. 30 U.S.T. 1095, T.I.A.S. No. 9242 (Apr. 25, 1978). *See generally* Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988).