CITATION: 106 S.CT. 2860 INSTA-CITE ONLY PAGE

1 AMERICAN CETACEAN SOCIETY V. BALDRIDGE, 604 F.SUPP. 1398
(D.D.C., MAR 05, 1985) (NO. CIV A 84-3414)
STAY DENIED BY

2 AMERICAN CETACEAN SOC. V. BALDRIGE, 604 F.SUPP. 1411
(D.D.C., MAR 13, 1985) (NO. CIV A 84-3414)
AND DECISION AFFIRMED BY

3 AMERICAN CETACEAN SOC. V. BALDRIGE, 768 F.2D 426, 247 U.S.APP.D.C. 309
(D.C.CIR., AUG 06, 1985) (NO. 85-5251)
CERTIORARI GRANTED BY

4 JAPAN WHALING ASSOCIATION V. AMERICAN CETACEAN SOCIETY, 106 S.CT. 787,
88 L.ED.2D 766 (U.S., JAN 13, 1986) (NO. 85-954, 85-955)
AND JUDGMENT REVERSED BY

=> 5 JAPAN WHALING ASS'N V. AMERICAN CETACEAN SOC., 106 S.CT. 2860,
92 L.ED.2D 166, 54 U.S.L.W. 4929 (U.S.DIST.COL., JUN 30, 1986)
(NO. 85-954, 85-955)

DIRECT HISTORY INFORMATION - 1938 TO DATE
TO DISPLAY ANOTHER INSTA-CITE RESULT, TYPE A CITATION AND PRESS ENTER
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FOR FURTHER EXPLANATION . . . . . ENTER HELP

industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;

(vi) whether, and to what extent, the fishing vessels of such nation have traditionally engaged in fishing in such fishery;

(vii) whether, and to what extent, such nation is cooperating with the United States in, and making substantial contributions to, fishery research and the identification of fishery resources; and

(viii) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

(2) (A) For the purposes of this paragraph—

(i) The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of Title 22.

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

Pelkwood Amendment

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) that—

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

(C) The following apply for purposes of administering subparagraph (B) with respect to any foreign country:

(i) If on the date of certification, the foreign country has harvested a portion, but not all, of the quantity of fish specified under any allocation, the reduction under subparagraph (B) for that allocation shall be applied with respect to the quantity not harvested as of such date.

(ii) If the Secretary notified the Secretary of State that it is not likely that the certification of the foreign country will be terminated under section 1978(d) of Title 22 before the close of the period for which an allocation is applicable or before the close of the remedial period (whichever close first occurs) the Secretary of State, in consultation with the Secretary, shall reallocate any portion of any reduction made under subparagraph (B) among one or more foreign countries for which no certification is in effect.

(iii) If the certification is terminated under such section 1978(d) of Title 22 during the remedial period, the Secretary of State shall return to the foreign country that portion of any allocation reduced under subparagraph (B) that was not reallocated under clause (ii); unless the

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CHAPTER 14—REGULATION OF WHALING

SUBCHAPTER I—WHALING TREATY ACT

Sec.

901 to 915. Repealed.

SUBCHAPTER II—WHALING CONVENTION ACT

916. Definitions.
916a. United States Commissioner.
(a) Appointment.
(b) Deputy Commissioner.
(c) Compensation.
916b. Acceptance or rejection by United States Government of regulations, etc.; acceptance of reports, recommendations, etc., of Commission.
916c. Unlawful acts.
(a) Whaling, transporting, or selling violations; records; reports.
(b) Acts of commission or omission.
916d. Licenses.
(a) Issuance.
(b) Licenses and fees required.
(c) Disposition of fees.
(d) Application; conditions precedent.
(e) Additional conditions.
916e. Failure to keep returns, records, reports.
916f. Violations; fines and penalties.
916g. Enforcement.
(a) Enforcement officers; arrests; search and seizure of vessels; disposal of property.
(b) Stay of execution upon posting of bond; bond requirements.
916h. Cooperation between Federal and State and private agencies and organizations in scientific and other programs.
(a) Agency cooperation.
(b) Authorization for Federal agency cooperation.
916i. Taking of whales for biological experiments.
916j. Allocation of responsibility for administration and enforcement.
(a) Administration and general enforcement.
(b) Enforcement relating to whaling vessels.
(c) Enforcement by officers and employees of coastal States.
916k. Regulations; submission; publication; effectiveness.
916l. Authorization of appropriations.

SUBCHAPTER I—WHALING TREATY ACT

§§ 901 to 915. Repealed. Aug. 9, 1950, c. 653, § 16, 64 Stat. 425

Historical Note

Sections, Act May 1, 1936, c. 251, §§ 1 to 15, 49 Stat. 1246–1249, related to the hunting of whales. See sections 916 to 916*l* of this title.

SUBCHAPTER II—WHALING CONVENTION ACT

Cross References

Review and report by Marine Mammal Commission of activities of United States under this subchapter, see section 1402 of this title.

§ 916. Definitions

When used in this subchapter—

(a) Convention: The word "convention" means the International Convention for the Regulation of Whaling signed at Washington under date of December 2, 1946, by the United States of America and certain other governments.

(b) Commission: The word "Commission" means the International Whaling Commission established by article III of the convention.

(c) United States Commissioner: The words "United States Commissioner" mean the member of the International Whaling Commission representing the United States of America appointed pursuant to article III of the convention and section 916a of this title.

(d) Person: The word "person" denotes every individual, partnership, corporation, and association subject to the jurisdiction of the United States.

(e) Vessel: The word "vessel" denotes every kind, type, or description of water craft or contrivance subject to the jurisdiction of the United States used, or capable of being used, as a means of transportation.

(f) Factory ship: The words "factory ship" mean a vessel in which or on which whales are treated or processed, whether wholly or in part.

(g) Land station: The words "land station" mean a factory on the land at which whales are treated or processed, whether wholly or in part.

(h) Whale catcher: The words "whale catcher" mean a vessel used for the purpose of hunting, killing, taking, towing, holding onto, or scouting for whales.

(i) Whale products: The words "whale products" mean any unprocessed part of a whale and blubber, meat, bones, whale oil, sperm oil, spermaceti, meal, and baleen.

(j) Whaling: The word "whaling" means the scouting for, hunting, killing, taking, towing, holding onto, and flensing of whales, and the possession, treatment, or processing of whales or of whale products.

(k) Regulations of the Commission: The words "regulations of the Commission" mean the whaling regulations in the schedule annexed to and constituting a part of the convention in their original form or as modified, revised, or amended by the Commission from time to time, in pursuance of article V of the convention.

(*l*) Regulations of the Secretary of Commerce: The words "regulations of the Secretary of Commerce" mean such regulations as may be issued by the Secretary of Commerce, from time to time, in accordance with sections 916i and 916j of this title.

(Aug. 9, 1950, c. 653, § 2, 64 Stat. 421; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Short Title. Section 1 of Act Aug. 9, 1950, provided: "That this Act [enacting this subchapter] may be cited as the 'Whaling Convention Act of 1949'."

Separability of Provisions. Section 15 of Act Aug. 9, 1950, provided that: "If any provision of this Act [sections 916 to 916*l* of this title] or the application of such provision to any circumstances or persons shall be held invalid, the validity of the remainder of the Act [said sections] and the applicability of such provision to other circumstances or persons shall not be affected thereby."

Transfer of Functions. In subsec. (*l*), "Secretary of Commerce" was substituted for "Secretary of the Interior" in view of: the creation of the National Oceanic and Atmospheric Administration in the Department of Commerce and the Office of Administrator of such Administration; the abolition of the Bureau of Commercial Fisheries in the Interior Department and the Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in the Secretary of the Interior or the Interior Department which were administered through the Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in Appendix 1 to Title 5, Government Organization and Employees.

Moratorium on Commercial Killing of Whales. Pub.L. 96–60, Title IV, § 405, Aug. 15, 1979, 93 Stat. 405, provided that:

"(a) The Congress finds and declares that—

"(1) whales are a unique marine resource of great esthetic and scientific interest to mankind and are a vital part of the marine ecosystem;

"(2) the protection and conservation of whales are of particular interest to citizens of the United States;

"(3) in 1971 the Congress adopted resolutions requesting the Secretary of State of negotiate a ten-year moratorium on the commercial killing of whales;

"(4) the United States, which effectively banned all commercial whaling by United States nationals in December 1971, has sought an international moratorium on the commercial killing of whales since 1972;

"(5) the United Nations Conference on the Human Environment adopted a resolution in 1972 calling for a ten-year moratorium on commercial whaling;

"(6) the United Nations Governing Council for Environment Programs in 1973 and 1974 confirmed such call for a ten-year moratorium, and the Council continues to support ongoing efforts relating to whale conservation;

"(7) the International Convention for the Regulation of Whaling, signed in 1946, as implemented by the International Whaling Commission, is not providing adequate protection to whales;

"(8) the data-gathering structure established under the International Whaling

means the scouting for, hunting, and flensing of whales, and the whales or of whale products.

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"(6) the United Nations Council for Environment Programs and 1974 confirmed such call for a moratorium, and the Council support ongoing efforts relating conservation;

"(7) the International Convention the Regulation of Whaling, signed as implemented by the International ing Commission, is not providing protection to whales;

"(8) the data-gathering structure lished under the International

Commission has not provided all the available data necessary for sound whale conservation;

"(9) there is strong evidence that the members of the International Whaling Commission continue to import, in some instances in increasing amounts, whale products from countries not members of the Commission; and

"(10) defects in the implementation of the International Convention for the Regulation of Whaling by the International Whaling Commission allow harvests of the declining whale species.

"(b) The Congress urges—

"(1) the International Whaling Commission to agree to a moratorium on the commercial killing of whales; and

"(2) Brazil, Denmark, Iceland, Japan, Norway, the Soviet Union, and the Republic of Korea, as parties to the International Convention for the Regulation of Whaling and which still engage in commercial whaling, and Chile, the People's Republic of China, Peru, Portugal, the Democratic Republic of Korea, Spain, and Taiwan, as countries which are not parties to the Convention and which still engage in commercial whaling, to recognize and comply voluntarily with a moratorium on the commercial killing of whales, as endorsed by the United Nations Conference on the Human Environment and the United Nations Governing Council for Environment Programs."

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Code of Federal Regulations

Whaling provisions—
International Regulatory Agencies, see 50 CFR 351.1 et seq.
National Marine Fisheries Service, see 50 CFR 230.1 et seq.

Library References

Fish ⇐8, 10, 12, 13.
International Law ⇐7.
United States ⇐29, 35, 85.
C.J.S. Fish §§ 26, 28 et seq., 36.
C.J.S. International Law §§ 23, 24.
C.J.S. United States §§ 34, 35, 37, 62 to 64, 123.

§ 916a. United States Commissioner

(a) Appointment

The United States Commissioner shall be appointed by the President, on the concurrent recommendations of the Secretary of State and the Secretary of Commerce, and shall serve at the pleasure of the President.

(b) Deputy Commissioner

The President may appoint a Deputy United States Commissioner, on the concurrent recommendations of the Secretary of State and the Secretary of Commerce. The Deputy United States Commissioner shall serve at the pleasure of the President and shall be the principal technical adviser to the United States Commissioner, and shall be empowered to perform the duties of the Commissioner in case of the death, resignation, absence, or illness of the Commissioner.

(c) Compensation

The United States Commissioner and Deputy Commissioner, although officers of the United States Government, shall receive no compensation for their services.

(Aug. 9, 1950, c. 653, § 3, 64 Stat. 421; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Alternate United States Commissioners. Secretary of State authorized to designate Alternate United States Commissioners, see sections 2672a and 2672b of Title 22, Foreign Relations and Intercourse.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

United States Commissioner defined, see section 916 of this title.

§ 916b. Acceptance or rejection by United States Government of regulations, etc.; acceptance of reports, recommendations, etc., of Commission

The Secretary of State is authorized, with the concurrence of the Secretary of Commerce, to present or withdraw any objections on behalf of the United States Government to such regulations or amendments of the schedule to the convention as are adopted by the Commission and submitted to the United States Government in accordance with article V of the convention. The Secretary of State is further authorized to receive on behalf of the United States Government reports, requests, recommendations, and other communications of the Commission, and to act thereon either directly or by reference to the appropriate authority.

(Aug. 9, 1950, c. 653, § 4, 64 Stat. 422; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan. No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

Publication of regulations of Commission in Federal Register, see section 916k of this title.

§ 916c. Unlawful acts

(a) Whaling, transporting or selling violations; records; reports

It shall be unlawful for any person subject to the jurisdiction of the United States (1) to engage in whaling in violation of the convention or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce; (2) to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any whale or whale products taken or processed in violation of the convention, or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce; (3) to fail to make, keep, submit, or furnish any record or report required of him by the convention, or by any regulation of

Note

Alternate United States Commissioners, see sections 2672a and 2672b of Title 22, Foreign Relations and Intercourse.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

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the Commission, or by any regulation of the Secretary of Commerce, or to refuse to permit any officer authorized to enforce the convention, the regulations of the Commission, this subchapter, and the regulations of the Secretary of Commerce, to inspect such record or report at any reasonable time.

(b) Acts of commission or omission

It shall be unlawful for any person or vessel subject to the jurisdiction of the United States to do any act prohibited or to fail to do any act required by the convention, or by this subchapter, or by any regulation adopted by the Commission, or by any regulation of the Secretary of Commerce.

(Aug. 9, 1950, c. 653, § 5, 64 Stat. 422; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

Fines and penalties for violations, see section 916f of this title.

§ 916d. Licenses

(a) Issuance

No person shall engage in whaling without first having obtained an appropriate license or scientific permit. Such licenses shall be issued by the Secretary of Commerce or such officer of the Department of Commerce as may be designated by him: *Provided,* That the Secretary, in his discretion and by appropriate regulation, may waive the payment of any license fee or the requirement that a license first be obtained, in connection with the salvage of any "Dauhval" or unclaimed dead whale found floating or stranded.

(b) Licenses and fees required

The following licenses and fees shall be required for each calendar year or any fraction thereof and shall be nontransferable except under such conditions as may be prescribed by the Secretary:

(1) Land-station license for primary processing of whales, $250.

(2) Land-station license for secondary processing of parts of whales delivered to it by a land station licensed as a primary processor, $100.

(3) Factory-ship license for primary processing of whales delivered by whale catchers, $250.

(4) License for any vessel used exclusively for transporting whale products from a factory ship to a port during the whaling season, $100.

(5) Whale-catcher license, $100.

(c) Disposition of fees

All moneys derived from the issuance of whaling licenses shall be covered into the Treasury of the United States, and no license fee shall be refunded by reason of the failure of any person to whom a license has been issued to utilize the facility in whaling for which such license was issued.

(d) Application; conditions precedent

Any person, in making application for a license to operate a whale catcher, must furnish evidence or affidavit satisfactory to the Secretary of Commerce that, in addition to conforming to other applicable laws and regulations, (1) the whale catcher is adequately equipped and competently manned to engage in whaling in accordance with the provisions of the convention, the regulations of the Commission, and the regulations of the Secretary of Commerce; (2) gunners and crews will be compensated on some basis that does not depend primarily on the number of whales taken; and (3) no bonus or other partial remuneration with relation to the number of whales taken shall be paid to gunners and crews in respect of the taking of any whales, the taking of which is prohibited.

(e) Additional conditions

Any person, in making application for a license to operate a land station or a factory ship must furnish evidence or affidavits to the satisfaction of the Secretary of Commerce that, in addition to conforming to other applicable laws and regulations, such land station or factory ship is adequately equipped to comply with provisions of the convention, of the regulations of the Commission, and of the regulations of the Secretary of Commerce with respect to the processing of whales or the manufacture of whale products.

(Aug. 9, 1950, c. 653, § 6, 64 Stat. 422; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Refund of License Fees Paid Under Subchapter I of this Chapter. Section 16 of Act Aug. 9, 1950, provided in part that the Secretary of the Interior is authorized to refund any part of a license fee paid under former section 908 of this title that is in excess of the license fee required under this section.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

§ 916e. Failure to keep returns, records, reports

Any person who fails to make, keep, or furnish any catch return, statistical record, or any report that may be required by the convention, or by any regulation of the Commission, or by this subchapter, or by a regulation of the Secretary of Commerce, or any person who furnishes a false return, record, or report, upon conviction, shall be subject to such fine as may be imposed by the court not to exceed $500, and shall in addition be prohibited from whaling, processing, or possessing whales and whale products from the date of conviction until such time as any delinquent return, record, or report shall have been submitted or any false return, record, or

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report shall have been replaced by a duly certified correct and true return, record, or report to the satisfaction of the court. The penalties imposed by section 916f of this title shall not be invoked for failure to comply with requirements respecting returns, records, and reports.

(Aug. 9, 1950, c. 653, § 7, 64 Stat. 423; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

West's Federal Forms

Fine, see § 7535.

§ 916f. Violations; fines and penalties

Except as to violations defined in clause 3 of subsection (a) of section 916c of this title, any person violating any provision of the convention, or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce upon conviction, shall be fined not more than $10,000 or be imprisoned not more than one year, or both. In addition the court may prohibit such person from whaling for such period of time as it may determine, and may order forfeited, in whole or in part, the whales taken by such person in whaling during the season, or the whale products derived therefrom or the monetary value thereof. Such forfeited whales or whale products shall be disposed of in accordance with the direction of the court.

(Aug. 9, 1950, c. 653, § 8, 64 Stat. 423; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

Failure to keep returns, records, and reports, see section 916e of this title.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

§ 916g. Enforcement

(a) Enforcement officers; arrests; search and seizure of vessels; disposal of property

Any duly authorized enforcement officer or employee of the Department of Commerce; any Coast Guard officer; any United States marshal or deputy United States marshal; any customs officer; and any other person authorized to enforce the provisions of the convention, the regulations of the Commission, this subchapter, and the regulations of the Secretary of Commerce, shall have power, without warrant or other process but subject to the provisions of the convention, to arrest any person subject to the jurisdiction of the United States committing in his presence or view a violation of the convention or of this subchapter, or of the regulations of the Commission, or of the regulations of the Secretary of Commerce and to take such person immediately for examination before a justice or judge or any other official designated in section 3041 of Title 18; and shall have power, without warrant or other process, to search any vessel subject to the jurisdiction of the United States or land station when he has reasonable cause to believe that such vessel or land station is engaged in whaling in violation of the provisions of the convention or this subchapter, or the regulations of the Commission, or the regulations of the Secretary of Commerce. Any person authorized to enforce the provisions of the convention, this subchapter, the regulations of the Commission, or the regulations of the Secretary of Commerce shall have power to execute any warrant or process issued by an officer or court of competent jurisdiction for the enforcement of this subchapter, and shall have power with a search warrant to search any vessel, person, or place at any time. The judges of the United States district courts and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases. Subject to the provisions of the convention, any person authorized to enforce the convention, this subchapter, the regulations of the Commission, and the regulations of the Secretary may seize, whenever and wherever lawfully found, all whales or whale products taken, processed, or possessed contrary to the provisions of the convention, of this subchapter, of the regulations of the Commission, or of the regulations of the Secretary of Commerce.

Any property so seized shall not be disposed of except pursuant to the order of a court of competent jurisdiction or the provisions of subsection (b) of this section, or, if perishable, in the manner prescribed by regulations of the Secretary of Commerce.

(b) Stay of execution upon posting of bond; bond requirements

Notwithstanding the provisions of section 2464 of Title 28, when a warrant of arrest or other process in rem is issued in any cause under this section, the marshal or other officer shall stay the execution of such process, or discharge any property seized if the process has been levied, on receiving from the claimant of the property a bond or stipulation for double the value of the property with sufficient surety to be approved by a judge of the district court having jurisdiction, conditioned to deliver the property seized, if condemned, without impairment in value or, in the discretion of the court,

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n value or, in the discretion of the

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to pay its equivalent value in money or otherwise to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court and judgment thereon against both the principal and sureties may be recovered in event of any breach of the conditions thereof as determined by the court.

(Aug. 9, 1950, c. 653, § 9, 64 Stat. 423; Oct. 17, 1968, Pub.L. 90–578, Title IV, § 402(b)(2), 82 Stat. 1118; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Change of Name. In subsec. (a), "United States magistrates" was substituted for "United States commissioners" pursuant to Pub.L. 90–578. See chapter 43 (section 631 et seq.) of Title 28, Judiciary and Judicial Procedure.

Transfer of Functions. In subsec. (a), "Department of Commerce" substituted for "United States Fish and Wildlife Service of the Department of the Interior" and "Secretary of Commerce" for "Secretary of the Interior", see Transfer of Functions note set out under section 916 of this title.

United States Fish and Wildlife Service, consisting of the Bureau of Commercial Fisheries and the Bureau of Sport Fisheries and Wildlife, succeeded and replaced the Fish and Wildlife Service of the Interior Department under provisions of Fish and Wildlife Act of 1956, as originally provided in section 742b(a) and (d) of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938. See, also, Pub.L. 90–578, 1968 U.S. Code Cong. and Adm.news, p. 4252.

West's Federal Forms

Bond given after arrest of vessel, see § 11253 and Comment thereunder.
Complaint, see § 7001 et seq.
Initial appearance before magistrate, see § 7041 et seq.
Magistrate's arrest warrants, see § 7031 et seq.

Code of Federal Regulations

Seizure, forfeiture, and disposal, procedures, see 50 CFR 219.1 et seq.

§ 916h. Cooperation between Federal and State and private agencies and organizations in scientific and other programs

(a) Agency cooperation

In order to avoid duplication in scientific and other programs, the Secretary of State, with the concurrence of the agency, institution, or organization concerned, may direct the United States Commissioner to arrange for the cooperation of agencies of the United States Government, and of State and private institutions and organizations in carrying out the provisions of article IV of the convention.

(b) Authorization for Federal agency cooperation

All agencies of the Federal Government are authorized, on request of the Commission, to cooperate in the conduct of scientific and other programs, or to furnish facilities and personnel for the purpose of assisting the Commission in the performance of its duties as prescribed by the convention.

(Aug. 9, 1950, c. 653, § 10, 64 Stat. 424.)

Historical Note

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

§ 916i. Taking of whales for biological experiments

Nothing contained in this subchapter shall prevent the taking of whales and the conducting of biological experiments at any time for purposes of scientific investigation in accordance with scientific permits and regulations issued by the Secretary of Commerce or shall prevent the Commission from discharging its duties as prescribed by the convention.

(Aug. 9, 1950, c. 653, § 11, 64 Stat. 424; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

Regulations of Secretary of Commerce, see section 916 of this title.

§ 916j. Allocation of responsibility for administration and enforcement

(a) Administration and general enforcement

The Secretary of Commerce is authorized and directed to administer and enforce all of the provisions of this subchapter and regulations issued pursuant thereto and all of the provisions of the convention and of the regulations of the Commission, except to the extent otherwise provided for in this subchapter, in the convention, or in the regulations of the Commission. In carrying out such functions he is authorized to adopt such regulations as may be necessary to carry out the purposes and objectives of the convention, the regulations of the Commission, this subchapter, and with the concurrence of the Secretary of State, to cooperate with the duly authorized officials of the government of any party to the convention.

(b) Enforcement relating to whaling vessels

Enforcement activities under the provisions of this subchapter relating to vessels engaged in whaling and subject to the jurisdiction of the United States primarily shall be the responsibility of the Secretary of the Treasury in cooperation with the Secretary of Commerce.

(c) Enforcement by officers and employees of coastal States

The Secretary of Commerce may authorize officers and employees of the coastal States of the United States to enforce the provisions of the convention, or of the regulations of the Commission, or of this subchapter, or of

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the regulations of the Secretary of Commerce. When so authorized such officers and employees may function as Federal law-enforcement officers for the purposes of this subchapter.

(Aug. 9, 1950, c. 653, § 12, 64 Stat. 425; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

Cross References

Regulations of Secretary of Commerce, see section 916 of this title.

Code of Federal Regulations

Whaling provisions, National Marine Fisheries Service, see 50 CFR 230.1 et seq.

Notes of Decisions

1. Justiciable controversy

Suit brought on behalf of Alaskan Eskimos against Secretary of Department of Commerce and other government personnel and agencies presented justiciable question as to whether International Whaling Commission exceeded its jurisdiction under International Whaling Convention when it eliminated a native subsistence whaling exemption for hunting of bowhead whales and as to whether Department of Commerce was authorized to implement such Commission regulations. Hopson v. Kreps, C.A. Alaska 1980, 622 F.2d 1375.

§ 916k. Regulations; submission; publication; effectiveness

Regulations of the Commission approved and effective in accordance with section 916b of this title and article V of the convention shall be submitted for appropriate action or publication in the Federal Register by the Secretary of Commerce and shall become effective with respect to all persons and vessels subject to the jurisdiction of the United States in accordance with the terms of such regulations and the provisions of article V of the convention.

(Aug. 9, 1950, c. 653, § 13, 64 Stat. 425; 1970 Reorg.Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090.)

Historical Note

Transfer of Functions. Transfer of functions to Secretary of Commerce from Secretary of the Interior by Reorg.Plan No. 4 of 1970, see Transfer of Functions note set out under section 916 of this title.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

§ 916l. Authorization of appropriations

There is hereby authorized to be appropriated from time to time, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of the convention and of this

subchapter, including (1) contributions to the Commission for the United States share of any joint expenses of the Commission agreed by the United States and any of the other contracting governments, and (2) the expenses of the United States Commissioner and his staff, including (a) personal services in the District of Columbia and elsewhere, without regard to the civil-service laws and chapter 51 and subchapter III of chapter 53 of Title 5; (b) travel expenses without regard to subchapter I of chapter 57 of Title 5 and section 5731(a) of Title 5; (c) transportation of things, communication services; (d) rent of offices; (e) printing and binding without regard to section 501 of Title 44, and section 5 of Title 41; (f) stenographic and other services by contract, if deemed necessary, without regard to section 5 of Title 41; (g) supplies and materials; (h) equipment; (i) purchase, hire, operation, maintenance, and repair of aircraft, motor vehicles (including passenger-carrying vehicles), boats, and research vessels.

(Aug. 9, 1950, c. 653, § 14, 64 Stat. 425.)

Historical Note

References in Text. The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of that Title.

Codification. In cl. (a), "chapter 51 and subchapter III of chapter 53 of Title 5" was substituted in text for "the Classification Act of 1923, as amended" on authority of Pub.L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631 (the first section of which enacted Title 5, Government Organization and Employees), and of section 1106(a) of Act Oct. 28, 1949, c. 782, Title XI, 63 Stat. 972, which provided that references in other laws to the Classification Act of 1923 shall be considered to mean the Classification Act of 1949.

In cl (b), "subchapter I of chapter 57 of Title 5 and section 5731(a) of Title 5" was substituted for "the Travel Expense Act of 1949 and section 10 of the Act of March 3, 1933 (U.S.C., title 5, sec. 73b)" on authority of Pub.L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

In cl. (e), "section 501 of Title 44" was substituted for "section 11 of the Act of March 1, 1919 (U.S.C., title 44, sec. 111)" on authority of Pub.L. 90–620, § 2(b), Oct. 22, 1968, 82 Stat. 1305, the first section of which enacted Title 44, Public Printing and Documents.

Legislative History. For legislative history and purpose of Act Aug. 9, 1950, see 1950 U.S.Code Cong.Service, p. 2938.

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INTERPRETIVE NOTES AND DECISIONS

Regulation of Secretary of Commerce (50 CFR § 258.8(g)) limiting payments under Fishermen's Protective Act (22 USCS §§ 1971 et seq.) to losses sustained by members of crew of seized vessels who are citizens and resident aliens, to exclusion of nonresident aliens, is invalid, since with respect to crew members, as opposed to owners, Act makes no distinction between citizens and aliens serving on privately owned United States vessels, thus, Secretary's regulation is inconsistent with Act and does not reflect its purpose. Cruz v Zapata Ocean Resources, Inc. (1982, CA9 Cal) 695 F2d 428.

§ 1978. Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

CODE OF FEDERAL REGULATIONS

This section is no longer cited as authority for:
50 CFR Part 258.

INTERPRETIVE NOTES AND DECISIONS

Legislative history of Pelly Amendment and Packwood Amendment [16 USCS § 1821] do not require Secretary of Commerce to certify that all departures from international whaling quotas diminish effectiveness of International Convention for Regulation of Whaling (62 Stat 1716, TIAS No. 1849) even though there are hints of automatic certification rule; evidence that Congress enacted Pelly Amendment primarily as means to enforce international salmon fishing quotas against 3 particular foreign nations does not establish that Pelly Amendment requires automatic certification of every nation whose fishing operations exceed international conservation quotas. Japan Whaling Asso. v American Cetacean Soc. (1986, US) 92 L Ed 2d 166, 106 S Ct 2860.

Discretionary standard under term "diminish the effectiveness" in Pelly Amendment contained in House Committee Report accompanying addition to Pelly Amendment designed to enhance enforcement of Convention on International Trade in Endangered Species (27 UST 1087, TIAS No. 8249) also applies to enforcement of International Convention for Regulation of Whaling (62 Stat 1716, TIAS No. 1849) where inter alia, (1) both Conventions are designed to conserve endangered or threatened species, (2) both operate in similar and often parallel manner, and (3) nothing in legislative history shows Congress intended phrase to be applied inflexibly with respect to fishing quotas as opposed to endangered species quotas. Japan Whaling Asso. v American Cetacean Soc. (1986, US) 92 L Ed 2d 166, 106 S Ct 2860.

Relevant use of "diminish the effectiveness" in Tuna Convention Act (16 USCS §§ 951 et seq.) and 1984 Eastern Pacific Tuna Licensing Act (16 USCS §§ 972 et seq.), lends support to position that Congress intended vast range of judgment be employed under effectiveness standard in Pelly and Packwood Amendments (16 USCS § 1821) in connection with Secretary of Commerce's certification as to whether departure by foreign nation from agreed limits on whaling diminished effectiveness of international conservation agreement where nothing in history of Tuna Acts indicated that effectiveness standard used in Tuna Acts calls for automatic certification upon violation of quotas. Japan Whaling Asso. v American Cetacean Soc. (1986, US) 92 L Ed 2d 166, 106 S Ct 2860.

Secretary of Commerce is not required under Pelly Amendment and Packwood Amendment [16 USCS § 1821] to certify that foreign nation which has exceeded international whaling quotas, has diminished effectiveness of international agreement regulating whaling, and thus subjecting foreign nation to mandatory economic sanctions where Secretary has agreed not to certify foreign nation under Amendments and foreign nation in exchange has agreed to future compliance with harvest limits and to cessation of commercial whaling activities within 4 years, since Secretary's action under these circumstances is not forbidden by statutory language or legislative history of Amendments and is reasonable construction of Amendments. Japan Whaling Asso. v American Cetacean Soc. (1986, US) 92 L Ed 2d 166, 106 S Ct 2860.

In enacting 22 USCS § 1978, Congress intended that where foreign nation allows its nationals to fish in excess of recommendations set by international fishery conservation program, secretary is mandated to certify foreign country under act; secretary's duty to certify is mandatory and nondiscretionary; secretary has duty to certify nation under act where its nationals have harvested sperm whales in excess of harvest quotas set by fishery conservation program. American Cetacean Soc. v Baldrige (1985, App DC) 768 F2d 426.

Notice and hearing are only required for taking of property rights and involving revocation of revocable license given to foreign country to come into United States waters to fish does not require trial-type hearing. American Cetacean Soc. v Baldridge (1985, DC Dist Col) 604 F Supp 1398.

Commerce secretary is not required to adopt substantive interpretative regulations prior to exercising his duty to certify finding that foreign nation is acting so as to diminish effectiveness of international whaling convention to president. American Cetacean Soc. v Baldridge (1985, DC Dist Col) 604 F Supp 1398.

§ 1979. Fishermen's Protective Fund

There is created a Fishermen's Protective Fund which shall be used by the Secretary of State to reimburse owners of vessels for amounts determined and certified by him under section 3 [22 USCS § 1973]. The amount of any claim or portion thereof collected by the Secretary of State from any foreign country pursuant to section 5(a) [22 USCS § 1975(a)] shall be deposited in the fund and shall be available for the purpose of reimbursing vessel owners

extent and in such amounts as are provided in advance in appropriation Acts" for "October 1, 1978".

1981. Act Oct. 26, 1981, in subsec. (c), inserted the sentence beginning "Those fees not currently . . . ."; and in subsec. (e), substituted "October 1, 1984" for "October 1, 1981".

Other provisions:

Application of amendments made by Act Oct. 26, 1972. For the application of amendments made to this section by Act Oct. 26, 1972, see § 6 of such Act which appears as 22 USCS § 1972 note.

CODE OF FEDERAL REGULATIONS

Fishermen's Protective Act procedures, 50 CFR Part 258.
Foreign fishing, 50 CFR Part 611.

CROSS REFERENCES

This section is referred to in 22 USCS § 1975.

§ 1978. Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

(a) Certification to President. (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) In administering this subsection, the Secretary of Commerce or the Secretary of the Interior, as appropriate, shall—

(A) periodically monitor the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) and (2);

(B) promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraph (1) or (2); and

(C) promptly conclude; and reach a decision with respect to; any investigation recommended under subparagraph (B).

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent

that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

(b) Notification to Congress. Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefore.

(c) Importation of fish products from offending country prohibited. It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

(d) Periodic review by Secretary of Commerce or Secretary of the Interior; termination of certification; notice. After making a certification to the President under subsection (a), the Secretary of Commerce or the Secretary of the Interior, as the case may be, shall periodically review the activities of the nationals of the offending country to determine if the reasons for which the certification was made no longer prevail. Upon determining that such reasons no longer prevail, the Secretary concerned shall terminate the certification and publish notice thereof, together with a statement of the facts on which such determination is based, in the Federal Register.

(e) Penalties; forfeiture; customs laws. (1) Any person violating the provisions of this section shall be fined not more than $10,000 for the first violation, and not more than $25,000 for each subsequent violation.

(2) All fish products and wildlife products brought or imported into the United States in violation of this section, or the monetary value thereof, may be forfeited.

(3) All provisions of law relating to the seizure, judicial forfeiture, and condemnation of a cargo for violation of the customs laws, the disposition of such cargo or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as such provisions of law are applicable and not inconsistent with this section.

(f) Enforcement. (1) Enforcement of the provisions of this section prohibiting the bringing or importation of fish products and wildlife products into the United States shall be the responsibility of the Secretary of the Treasury.

(2) The judges of the United States district courts, and United States commissioners [magistrates] may, within their respective jurisdictions,

upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act [22 USCS §§ 1971 et seq.] and regulations issued thereunder.

(3) Any person authorized to carry out enforcement activities hereunder shall have the power to execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this section.

(4) Such person so authorized shall have the power—

(A) with or without a warrant or other process, to arrest any persons subject to the jurisdiction of the United States committing in his presence or view a violation of this section or the regulations issued thereunder;

(B) with or without a warrant or other process, to search any vessel or other conveyance subject to the jurisdiction of the United States, and, if as a result of such search he has reasonable cause to believe that such vessel or other conveyance or any person on board is engaging in operations in violation of this section or the regulations issued thereunder, then to arrest such person.

(5) Such person so authorized, may seize, whenever and wherever lawfully found, all fish products and wildlife products brought or imported into the United States in violation of this section or the regulations issued thereunder. Fish products and wildlife products so seized may be disposed of pursuant to the order of a court of competent jurisdiction, or, if perishable, in a manner prescribed by regulations promulgated by the Secretary of the Treasury after consultation with the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services].

(g) Regulations. The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of the Interior are each authorized to prescribe such regulations as he determines necessary to carry out the provisions of this section.

(h) Definitions. As used in this section—

(1) The term "person" means any individual, partnership, corporation, or association.

(2) The term "United States", when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, and the United States Virgin Islands.

(3) The term "international fishery conservation program" means any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea.

(4) The term "fish products" means fish and marine mammals and all products thereof taken by fishing vessels of an offending country

whether or not packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof.

(5) The term "international program for endangered or threatened species" means any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.

(6) The term "wildlife products" means fish (other than those to which paragraph (4) applies) and wild animals, and parts (including eggs) thereof, taken within an offending country and all products of any such fish and wild animals, or parts thereof, whether or not such products are packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof. Such term does not include any wild animal or fish if brought or imported into the United States for scientific research.

(7) The term "taking" means—

(A) for purposes of subsection (a)(2)—

(i) to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or

(ii) to attempt to engage in any such conduct with respect to,

animals to which an international program for endangered or threatened species applies; and

(B) for purposes of paragraph (6), any conduct described in subparagraph (A)(i), whether or not such conduct is legal under the laws of the offending country, undertaken with respect to any wild animal.

(Aug. 27, 1954, ch 1018, § 8, as added Dec. 23, 1971, P. L. 92-219, 85 Stat. 786; Sept. 18, 1978, P. L. 95-376, § 2, 92 Stat. 714; Aug. 15, 1979, P. L. 96-61, § 3(b), 93 Stat. 408.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The customs laws", referred to in this section, appear generally as 19 USCS §§ 1 et seq.

Explanatory notes:

The bracketed word "magistrates" is inserted in subsec. (f)(2), on the authority of Act Oct. 17, 1968, P. L. 90-578, Title IV, § 402(b)(2), 82 Stat. 1118; for provisions relating to United States magistrates, see 28 USCS §§ 631 et seq.

The bracketed words "Secretary of Health and Human Services" are inserted in subsec. (f)(5) on authority of Act Oct. 17, 1979, P. L. 96-88, Title V, § 509, 93 Stat. 695, which appears as 20 USCS § 3508, and which redesignated the Secretary of Health, Education, and Welfare as the Secretary of Health and Human Services and provided that any reference to the Secretary of Health, Education, and Welfare, in any law in force on the effective date of such Act Oct. 17, 1979, shall be deemed to refer and apply to the Secretary of Health and Human

Services, except to the extent such reference is to a function or office transferred to the Secretary of Education or the Department of Education under such Act Oct. 17, 1979.

Amendments:

1978. Act Sept. 18, 1978, in subsec. (a), designated existing provisions as para. (1) and, in para. (1) as so designated, deleted "Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products of the offending country for such duration as he determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade." following "President.", and added paras. (2) and (3); in subsec. (b), inserted "or the Secretary of the Interior" and "or wildlife products" wherever appearing; in subsec. (c), inserted "or wildlife products"; in subsec. (d)(2) inserted "and wildlife products"; in subsec. (e), in para. (1), inserted "and wildlife products", in para. (4)(B), inserted "or other conveyance", in para. (5), inserted "and wildlife products" and substituted "Fish products and wildlife products" for "Any fish products"; in subsec. (f) substituted ", the Secretary of Commerce, and the Secretary of the Interior are each" for "is"; in subsec. (g), in para. (3), substituted "in effect" for "in force" and substituted "which is in force with respect to the United States," for "to which the United States is a signatory party,", and added paras. (5)–(7).

1979. Act Aug. 15, 1979, in subsec. (a), redesignated former para. (3) as para. (4) and added para. (3); redesignated former subsecs. (d) to (g) as subsecs. (e) to (h); and added subsec. (d).

CODE OF FEDERAL REGULATIONS

Foreign fishing, 50 CFR Part 611.

CROSS REFERENCES

This section is referred to in 16 USCS § 1821.

§ 1979. Fishermen's Protective Fund

There is created a Fishermen's Protective Fund which shall be used by the Secretary of the Treasury to reimburse owners of vessels for amounts certified to him by the Secretary of State under section 3 [22 USCS § 1973]. The amount of any claim or portion thereof collected by the Secretary of State from any foreign country pursuant to section 5(a) [22 USCS § 1975(a)] shall be deposited in the fund and shall be available for the purpose of reimbursing vessel owners under section 3 [22 USCS § 1973]; except that if a transfer to the fund was made pursuant to section 5(b)(1) [22 USCS § 1975(b)(1)] with respect to any such claim, an amount from the fund equal to the amount so collected shall be covered into the Treasury as miscellaneous receipts. There is authorized to be appropriated to the fund (1) the sum of $3,000,000 to provide initial capital, and (2)

Identify those persons who have
ie access to the statistics;
Contain procedures to identify
outine users and their use of the
and
Provide for safeguarding the

This system will require that all
ns who have access to the data be
ned of the confidentiality of the
These persons shall be required
n a statement that they:
Have been informed that the
re confidential, and
Have reviewed and are familiar
the procedures to protect data
entiality.

Release of statistics.

The Assistant Administrator
not disclosre to the public any
ics required to be submitted
a PMP or FMP in other than
gate or summary form except as
ed by court order. Disclosure as
ed by court order shall be made
after approval of the NOAA
of General Counsel.
All requests for statistics submit-
response to a requirement of a
or FMP shall be processed con-
with NOAA Freedom of Infor-
n Act (FOIA) regulations (15
Part 903), NOAA Directives
al 21-25, Department of Com-
Administrative Orders 205-12
5-14, and 15 CFR Part 4.
The Assistant Administrator
nave the authority to issue ini-
nials of requests subject to the
for statistics submitted in re-
to a PMP or FMP. Initial deni-
all indicate that exemption 3 of
(5 U.S.C. 552(b)(3)) is the basis
nial, making specific reference
ion 303(d) of the Act and recit-
its entirety the first sentence of
ection. Furthermore, citing this
ion, the denial shall indicate
ne application of section 303(d)
discretionary and shall refer spe-
y to the appropriate portion of
plicable PMP, FMP, or imple-
g regulation that required the
sion of the requested statisitcs.
tion (b)(4) (5 U.S.C. 552(b)(4)),
as other applicable FOIA ex-

emptions, may be cited in addition, where appropriate.

(2) Appeals from initial denials should be addressed to the Administrator of NOAA, Department of Commerce, Washington, D.C. 20230. The Administrator shall not make a discretionary relase of statistics unless, upon review, it is determined that the Assistant Administrator improperly applied exemption (b)(3) to the requested statistics. In such cases the Administrator will instruct the Assistant Administrator to release the statistics to the requestor.

PART 604—OMB CONTROL NUMBERS FOR NOAA INFORMATION COLLECTION REQUIREMENTS

AUTHORITY: Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520 (1982).

§ 604.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This part collects and displays control numbers assigned to information collection requirements of the National Marine Fisheries Service by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA) of 1980. This part fulfills the requirements of section 3507(f) of the PRA, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

50 CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648—)
§ 611.3	-0089
§ 611.4	-0075
§ 611.50	-0075
§ 611.61	-0075
§ 611.70(j)(9)	-0075
§ 611.80	-0075
§ 611.81	-0075
§ 611.82	-0075
§ 611.90	-0075
§ 611.92	-0075
§ 611.94	-0075
§ 630.4	-0149
§ 630.5 (a)	-0013
§ 630.5 (b) and (c)	-0016
§ 638.4(g)	-0097
§ 638.4(h)	-0136
§ 641.4	-0097
§ 642.4	-0097
§ 650.4	-0097
§ 651.4	-0097
§ 651.22	-0016
§ 652.4	-0097
§ 652.5(a)(2) (iii) and (iv)	-0114
§ 652.5 remaining paragraphs of (a)	-0013
§ 652.5(b)(5)	-0016
§ 652.5(b)(7)	-0097
§ 652.7(a)(4) and (l)	-0097
§ 654.4(b)	-0097
§ 654.5(a)	-0016
§ 654.5(b)	-0013
§ 655.4(a)	-0097
§ 655.4(b)(2)	-0097
§ 655.22(e)(2)	-0114
§ 658.5	-0013
§ 663.4	-0114
§ 663.10	[1] -0097
§ 669.6	-0097
§ 671.4 (a) through (d)	-0016
§ 671.4(e)	-0114
§ 672.4	-0097
§ 672.5(a)(2)(ii)	-0016
§ 672.5(b)(4) and (c)(4)	-0114
§ 674.4	-0097
§ 674.5	-0016
§ 675.4	-0097
§ 675.5(a)	-0016
§ 675.5(b)	-0114
§ 680.4	-0097
§ 680.5	-0016
§ 681.4	-0097
§ 681.5(a)	-0016
§ 681.5(c)	-0013

[1] Pending.

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PART 611—FOREIGN FISHING

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AUTHORITY: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 971 *et seq.*, 22 U.S.C. 1971 *et seq.*, and 16 U.S.C. 1361 *et seq.*

SOURCE: 43 FR 59293, Dec. 19, 1978, unless otherwise noted.

Subpart A—General

SOURCE: 50 FR 34979, Aug. 28, 1985, unless otherwise noted.

§ 611.1 Purpose and scope.

(a) This part governs all foreign fishing over which the United States exercises exclusive fishery management authority under the Magnuson Fishery Conservation and Management Act. Foreign vessels which are not operated for profit and are conducting recreational fishing only must comply with the provisions of this section, § 611.2, § 611.6(a)(1), applicable portions of § 611.7, and § 611.15.

(b) For additional provisions governing the Japanese harvest of salmonids, see the International Convention for the High Seas Fisheries of the North Pacific Ocean (TIAS 2786, as amended in 1962, TIAS 5385 and in 1978, TIAS 9242).

(c) Other U.S. laws and regulations apply to foreign vessels fishing in the U.S. FCZ, such as the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361, and 50 CFR Part 216).

§ 611.2 Definitions.

In addition to the definitions contained in the Magnuson Act, and unless the context requires otherwise, in this Part 611, the terms used have the following meaning (some definitions in the Magnuson Act have been repeated here to aid fishermen in understanding the regulations):

Agent means a person appointed and maintained within the United States who is authorized to receive and respond to any legal process issued in the United States to an owner and/or operator of a vessel operating under a permit and of any other vessel of that nation fishing subject to the jurisdiction of the United States. Any diplomatic official accepting such an appointment as designated agent waives diplomatic or other immunity in connection with such process.

IV. Conclusion

The new Ohio cumulative voting statutes are a positive step toward meeting the modern-day challenge of reconciling the needs of corporations and investors. Overall, the 1986 amendments, while still protecting minority shareholders of private corporations, give greater freedom to all corporations in hopes of making Ohio more attractive to new business incorporation. The basic drawback of these provisions is also their greatest strength. The legislature has written the law in a highly technical manner to the extent that players in the Ohio corporate world may be left somewhat confused. On the other hand, this specificity leaves little doubt as to the protective intent of the legislature concerning matters of incorporation, procedure, and removal. Whether Ohio law makers, through measures such as these, will be able to keep existing corporations in Ohio and attract new incorporations remains to be seen.[91]

June A. Striegel

91. Ohio has gained 14,029 new incorporations for profit in 1986 as of September 30. If this rate continues for the remainder of the year, the state will show a nine percent increase this over year 1985. Letter from J. Brunner, Legislative Counsel for Ohio Sec. of State, to J. Striegel (Sept. 30, 1985) (discussing 1986 new incorporations).

55 UNIVERSITY OF CINCINNATI LAW REVIEW 1285 (1987)

CASE NOTES

WOE FOR THE WHALES: *Japan Whaling Association v. American Cetacean Society,* 106 S. Ct. 2860 (1986).

To promote the conservation and development of whale populations, fifteen nations formed the International Convention for the Regulation of Whaling ("ICRW").[1] Both the United States and Japan are members of the ICRW.[2] To accomplish its objectives, the ICRW established the International Whaling Commission ("IWC") and authorized it to set whale harvest quotas.[3] IWC quotas are binding on ICRW member nations unless a nation files a timely objection to a quota, thereby exempting itself from compliance.[4] The IWC has no power to enforce its quotas or to impose sanctions against objecting, non-complying nations.[5]

Congress enacted two statutory amendments to compensate for the IWC's lack of enforcement authority. In 1971, Congress passed the Pelly Amendment to the Fisherman's Protective Act of 1967 ("Pelly Amendment").[6] The Pelly Amendment directs the Secretary of Commerce to certify to the President if nationals of a foreign country conduct fishing operations in a manner that "diminishes the effectiveness" of an international fishery conservation program, such as the ICRW.[7] If the Secretary makes a certification, the President may direct the Secretary of the Treasury to impose import sanctions on the fish products of the certified nation.[8] In 1979, Congress passed the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976 ("Packwood-Magnuson Amendment").[9] The Packwood-Magnuson Amendment directs the Secretary of Commerce to certify if foreign nationals are

1. Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2863 (1986) (White, J.) (5-4 decision). For information regarding the formation and objectives of the ICRW, see *infra* notes 26-28 and accompanying text.

2. *Japan Whaling,* 106 S. Ct. at 2863.

3. *Id.* For a discussion of the IWC, see *infra* notes 29-34 and accompanying text.

4. *Japan Whaling,* 106 S. Ct. at 2863. For information regarding the objection provision of the ICRW, see *infra* notes 32-34 and accompanying text.

5. *Japan Whaling,* 106 S. Ct. at 2863.

6. *Id.* For the text of the Pelly Amendment, see *infra* note 39.

7. *Japan Whaling,* 106 S. Ct. at 2863. For a discussion of the Pelly Amendment's certification procedure, see *infra* notes 41-44 and accompanying text.

8. *Japan Whaling,* 106 S. Ct. at 2863. For information regarding the imposition of sanctions under the Pelly Amendment, see *infra* note 45.

9. *Japan Whaling,* 106 S. Ct. at 2864. For the text of the Packwood-Magnuson Amendment, see *infra* note 52.

conducting fishing operations in a manner to "diminish the effectiveness" specifically of the ICRW.[10] A certification under the Packwood-Magnuson Amendment requires the Secretary of State to reduce the offending nation's fishing rights in United States waters.[11]

In 1981, the IWC set a zero quota for sperm whales.[12] In 1982, the IWC ordered a five-year moratorium on commercial whaling beginning in 1985.[13] Japan filed objections to both these limitations, thereby exempting itself from compliance.[14] Subsequently, government officials recognized that the United States could certify Japan and impose economic sanctions under either the Pelly or the Packwood-Magnuson Amendment should Japan continue to whale in excess of the IWC zero quota and moratorium.[15] In 1984, the United States and Japan concluded an executive agreement.[16] Pursuant to the terms of the executive agreement, Japan pledged to restrict its whaling as of 1984 and to cease whaling by 1988.[17] Despite Japan's non-compliance with the IWC quotas, Secretary of Commerce Malcolm Baldrige agreed not to certify Japan under either the Pelly or the Packwood-Magnuson Amendment if Japan would adhere to the terms of the executive agreement.[18]

Several conservation groups filed suit in federal district court for the District of Columbia seeking a writ of mandamus to compel the Secretary to certify Japan.[19] Because the district court found that

10. *Japan Whaling*, 106 S. Ct. at 2864. For information regarding certification under the Packwood-Magnuson Amendment, see *infra* notes 54-55 and accompanying text.

11. *Japan Whaling*, 106 S. Ct. at 2864.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 2865. For a more detailed discussion of the negotiations and the executive agreement between Japan and the United States, see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE FIFTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 303-04 (1984). Specifically, the November 1984 agreement was comprised of two parts. The first part allowed Japan to take up to 400 sperm whales during both the 1984 and 1985 whaling seasons in return for Japan's pledge to withdraw its objection to the IWC sperm whale quota as it applied to Japanese whaling activities and to cease commercial whaling by 1988. The second part allowed Japan to take up to 200 sperm whales during both the 1986 and 1987 whaling seasons in return for Japan's pledge to withdraw its objection to the IWC moratorium as it applied to Japanese whaling activities. *Id.* at 304.

18. *Japan Whaling*, 106 S. Ct. at 2865.

19. *Id.* The original plaintiffs to the action were American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut

any whaling in excess of IWC quotas necessarily diminished the effectiveness of the ICRW, it ordered the Secretary to certify Japan.[20] The District of Columbia Court of Appeals affirmed.[21] On certiorari to the United States Supreme Court, *held:* Reversed. Neither the Pelly Amendment nor the Packwood-Magnuson Amendment imposes a mandatory duty on the Secretary of Commerce to certify every violation of International Whaling Commission quotas as "diminishing the effectiveness" of the International Convention for the Regulation of Whaling.[22]

I. HISTORY

A. The International Convention for the Regulation of Whaling

Humans have been hunting and killing whales for centuries. Only in this century, however, have whale harvesters achieved advances in harvesting technology enabling them to decimate the world's entire whale population.[23] Attempts to curb and regulate whaling in the first half of the twentieth century were unsuccessful.[24] The world's whaling nations became concerned that overharvesting of whales would destroy whaling as a viable commercial enterprise.[25] To promulgate more stringent regulations, representatives of fifteen whaling nations signed the International Convention for the Regulation of Whaling ("ICRW") on December 2, 1946.[26] The goals of the

Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former United States Representative to the IWC. *Id.* at n.2.

20. *Id.* at 2865.

21. *Id.*

22. *Id.* at 2872.

23. *See* Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543, 544-45 (1984); *see also* Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. INT'L L. & POL. 211, 211 (1975) (several species of whales threatened with extinction due to zeal of commercial whalers) [hereinafter Note, *Legal Aspects*]; Comment, *Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?*, 14 CAL. W. INT'L L. REV. 114, 121-22 (1984) (discussing history of human whaling activities and developments in whaling technology).

24. *See* Dobra, *Cetaceans: A Litany of Cain*, 7 B.C. ENVTL. AFF. L. REV. 165, 171 (1978); Smith, *supra* note 23, at 545-47; Comment, *supra* note 23, at 122. The major shortcoming of early attempts to regulate whaling was either the lack of a quota system to limit the number of whales harvested or the presence of a quota system with limitations too lenient to prevent overexploitation. *See* Smith, *supra* note 23, at 545-47.

25. *See* Note, *Legal Aspects*, *supra* note 23, at 216; Comment, *supra* note 23, at 122.

26. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 (entered into force November 10, 1948) [hereinafter ICRW]. The fifteen charter members of the ICRW were the United States, Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Soviet Union, the United Kingdom, and South Africa. *Id.*

ICRW were primarily economic;[27] however, the ICRW members also recognized that the world's whale population represented a valuable natural resource that should be preserved for future generations.[28]

To implement both its economic and environmental goals, the ICRW first established the International Whaling Commission ("IWC").[29] The ICRW next established a Schedule setting restrictions and limits on whale harvesting.[30] The IWC is responsible for amending the Schedule, as circumstances require, to promote both the conservation and utilization of whale resources.[31] Following notice by the IWC to the ICRW member nations of a Schedule amendment, an amendment becomes effective as to member nations in ninety days.[32] A Schedule amendment, however, does not bind any member nation presenting the IWC with an objection to the amendment before the ninety-day period expires.[33]

The IWC has been largely unsuccessful as a conservation body because no provision of the ICRW grants the IWC authority to enforce its quotas and restrictions against objecting nations.[34] To compensate for the IWC's lack of enforcement authority, Congress enacted two statutory amendments designed to promote adherence to international whaling quotas and restrictions.[35] These two amendments are the Pelly Amendment to the Fisherman's Protective Act of 1967[36] and the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976.[37] Through these Amendments, Congress has sought to implement the United States' whale conservation policy.[38]

Japan joined the ICRW in 1951. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2863 (1986).

27. The founding members of the ICRW indicated that their purpose was "to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry . . ." ICRW, 62 Stat. at 1717.

28. *Id.* at 1716.

29. *Id.* at 1717, art. III, para. 1. For a thorough discussion of the structure and history of the IWC, see Smith, *supra* note 23, at 547-50.

30. ICRW, 62 Stat. at 1723-27. The ICRW Schedule is a detailed compilation of the requirements and restrictions on whaling incident to membership in the ICRW. It includes requirements that inspectors be present on whaling vessels and whale processing stations and that statistical information including the number of whales harvested, the sex and length of the whales, and the name of the vessel taking the whales be provided to the IWC. Among its restrictions are limits and prohibitions on the species, number, and size of whales that may be taken and on the location of waters from which they may be taken. *Id.*

31. *Id.* at 1718, art. V, para. 1. Specifically, the IWC may amend the Schedule to fix

> (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

Id. at 1718-19, art. V, para. 1.

32. *Id.* at 1719, art. V, para. 3.

33. *Id.* Thus, by filing a timely objection to an IWC Schedule amendment, an ICRW member can "opt out" of compliance with IWC quotas and restrictions. Because of the object/opt out provision, the ICRW is "subject to the same problem confronting most other international organizations: a state cannot be bound without its consent." Smith, *supra* note 23, at 548.

B. *The Pelly Amendment*

The Pelly Amendment to the Fisherman's Protective Act of 1967 ("Pelly Amendment")[39] arose out of the United States' frustration with the inability of international fishery programs to effectively conserve fish stocks.[40] The Pelly Amendment established a certifica-

34. *See* Dobra, *supra* note 24, at 172; Smith, *supra* note 23, at 548-49; Note, *Legal Aspects, supra* note 23, at 217-18. Another source of the IWC's ineffectiveness is the leverage members may gain by threatening to object to and opt out of compliance with highly restrictive IWC Schedule amendments. Such threats raise the scenario of unlimited whaling, a conservation nightmare. Thus, through this ploy, nations have been able to coerce the IWC into settling for less restrictive quotas on the ground that some limitation on whale harvesting is better than no limitation at all. *See* Smith, *supra* note 23, at 560; Note, *Legal Aspects, supra* note 23, at 218-19; *see also* Comment, *supra* note 23, at 123 (opt-out provision used to avoid restrictive whaling measures).

35. *See* Note, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT'L L. & ECON. 577, 583-84 (1985) [hereinafter Note, *Whaling Accord*]; Comment, *supra* note 23, at 136-37.

36. 22 U.S.C. § 1978 (1982).

37. 16 U.S.C. § 1821 (1982 and Supp. II 1984).

38. As a policy matter, the United States has taken a conservationist stance regarding commercial whaling. *See* Note, *Legal Aspects, supra* note 23, at 214-17.

39. 22 U.S.C. § 1978 (1982). For purposes of this discussion, the critical provisions of the Pelly Amendment provide: "When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President," *id.* at § 1978(a)(1), and "[u]pon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products . . . from the offending country for such duration as the President determines appropriate . . ." *Id.* at § 1978(a)(4).

40. The impetus for the passage of the Pelly Amendment actually was not Congress's dissatisfaction with the ICRW, but rather its dissatisfaction with the International Convention for the Northwest Atlantic Fisheries (ICNAF), July 3, 1950, 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157. The ICNAF was established to protect and conserve the fishery resources of the Northwest Atlantic, notably the Atlantic salmon. As with the ICRW, the conservation goals of the ICNAF were compromised by provisions enabling member nations to object to and opt out of compliance with ICNAF Commission quotas. During congressional debate on the Pelly Amendment, Congressman John Dingell stated that the Pelly Amendment was necessary to quell the

tion procedure[41] through which Congress sought to compel compliance with the terms of international fishing agreements, such as the ICRW.[42] The certification of a foreign nation under the Pelly Amendment involves two steps. First, the Secretary of Commerce must determine whether foreign nationals are conducting fishing operations in a manner that diminishes the effectiveness of an international fishery conservation program.[43] Second, if the Secretary makes an affirmative determination, he must certify his finding to the President.[44] Upon certification, the President may exercise his discretion to impose sanctions against the offending nation.[45]

Congress believed that the Pelly Amendment certification procedure would serve two purposes. First, the threat of sanctions would deter nations from violating the terms of international fishery conservation agreements.[46] Second, in the event a nation did violate the terms of such an agreement, the offending nation could be punished by the imposition of sanctions.[47] Thus, at the time of its passage, Congress perceived the Pelly Amendment to be a potent weapon in the battle to protect world fish populations from excessive commercial fishing.[48]

overfishing of Atlantic salmon, a practice contrary to sound conservation policies. 117 CONG. REC. 34751 (1971).

41. *See* 22 U.S.C. § 1978(a)(1).

42. *See* 117 CONG. REC. 34753 (1971) (remarks of Rep. Keith). Although the Pelly Amendment was designed to protect the Atlantic salmon from overharvesting, *see supra* note 40, all other species of marine life protected under an international fishery conservation program likewise would be covered by the certification procedure. *See* 22 U.S.C. § 1978(a)(1), (h)(3). Whales, protected under the ICRW, thus were included within the Pelly Amendment's certification procedure. During the congressional debate on the Pelly Amendment, it was recognized that whales as well as salmon were suffering the effects of overharvesting. *See* 117 CONG. REC. 34752 (1971) (remarks of Rep. Pelly). Hope was expressed that the Amendment would prove effective in conserving the world's whale population from extinction. *Id.* at 34754 (remarks of Rep. Hogan).

43. 22 U.S.C. § 1978(a)(1).

44. *Id.*

45. The President imposes sanctions by directing the Secretary of the Treasury to prohibit the importation of fish products from the offending nation. 22 U.S.C. § 1978(a)(4). The prohibition may extend to all or any part of the fishery exports of a certified nation, 125 CONG. REC. 22084 (remarks of Rep. Oberstar), and may extend for as long a period as the President deems to be appropriate. 22 U.S.C. § 1978(a)(4).

46. *See* 117 CONG. REC. 34752 (1971) (remarks of Rep. Wylie); *id.* at 34753 (remarks of Rep. Keith).

47. *Id.* at 34753 (remarks of Rep. Keith).

48. *Id.* (remarks of Rep. Conte) (enactment of Pelly Amendment would be great help in saving world's whale population and vital step in solving Atlantic salmon problem); *id.* (remarks of Rep. Keith) (enactment of Pelly Amendment would prove invaluable in ending exploitation of fisheries resources and would provide means to effectively enforce international fishery conservation programs).

Despite its promise of effecting Congress's conservation goals, the Pelly Amendment proved ineffective in application. Between the Amendment's enactment in 1971 and the enactment of the Packwood-Magnuson Amendment in 1979, the Secretary of Commerce certified foreign nationals as "diminishing the effectiveness" of international fishery conservation programs five times; yet, in no case did the President exercise his discretionary power to impose sanctions against the offending nations.[49] Congress recognized that the element of discretion in the Pelly Amendment's certification procedure was not conducive to achieving its goal of protecting fish and whale populations.[50] To provide for more effective whale conservation, Congress passed the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976 ("Packwood-Magnuson Amendment").[51]

C. *The Packwood-Magnuson Amendment*

The provisions of the Pelly and the Packwood-Magnuson Amendments are similar.[52] Under the Packwood-Magnuson Amendment, however, whales were singled out by Congress to receive protection

49. *See* 125 CONG. REC. 22084 (1979) (remarks of Rep. Oberstar). For a history of the certifications under the Pelly Amendment and their results, see Comment, *supra* note 23, at 137-38.

50. *See* 125 CONG. REC. 22084 (1979) (remarks of Rep. Oberstar). It should be noted that to the extent that the *threat* of imposition of sanctions may deter foreign nations from "diminishing the effectiveness" of international fishery programs, the Pelly Amendment has been at least partially successful in effecting whale conservation. *See* Comment, *supra* note 23, at 138-39; *see also* Dobra, *supra* note 24, at 179 (threat of U.S. imposition of sanctions under Pelly Amendment spurred IWC into action to protect whales); Note, *Legal Aspects*, *supra* note 23, at 232 (Pelly Amendment has proved valuable as implied threat of U.S. retaliation against nations endangering whales).

51. 16 U.S.C. § 1821 (1982 & Supp. II 1984); *see* 125 CONG. REC. 22083-84 (remarks of Rep. Oberstar).

52. For purposes of this discussion, the relevant provisions of the Packwood-Magnuson Amendment are:

> The term 'certification' means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of title 22 [the Pelly Amendment],

16 U.S.C. § 1821(e)(2)(A)(i), and

> if the Secretary issues a certification with respect to any foreign country, then each allocation [of the total allowable level of foreign fishing which is permitted with respect to each fishery subject to the exclusive fishery management authority of the United States] that is in effect for that foreign country on the date of issuance . . . shall be reduced by the Secretary of State, in consultation with the Secretary [of Commerce], by not less than 50 percent.

greater than that provided for fish and marine mammals generally under the Pelly Amendment.[53] First, the Packwood-Magnuson Amendment is directed at fishing activities that diminish the effectiveness specifically of the ICRW.[54] Second, under the Packwood-Magnuson Amendment, sanctions are to be imposed automatically when a nation is certified by the Secretary of Commerce.[55] Congress believed that by removing the element of discretion in imposing sanctions and by providing for a specific penalty to result from certification, the Packwood-Magnuson Amendment would improve the effectiveness of whale conservation efforts.[56]

In addition, Congress believed that the stringency of the Packwood-Magnuson Amendment's certification and sanction procedure would alert whaling nations that the United States intended to enforce the quotas and restrictions set by the IWC.[57] Congress envisioned that the Packwood-Magnuson Amendment's mandatory sanctions would cause whaling nations to cease violating the ICRW, thereby halting the destruction of the world's whale population.[58] Despite congressional commitment towards enforcing the quotas of the IWC through the provisions of the Packwood-Magnuson Amendment, no certification has been made under the Amendment to date.[59]

Id. at § 1821(e)(2)(B). To compare these provisions with the provisions of the Pelly Amendment, see *supra* note 39.

53. The Pelly Amendment directs the Secretary of Commerce to certify foreign nations "diminish[ing] the effectiveness" of any "international fishery conservation program." 22 U.S.C. § 1978(a)(1). The Packwood-Magnuson Amendment, however, directs the Secretary to certify those nations "diminish[ing] the effectiveness" of "*the International Convention for the Regulation of Whaling*". 16 U.S.C. § 1821(e)(2)(A)(1) (emphasis added). Initially, the Packwood-Magnuson Amendment was envisioned to apply to *any* international fishery conservation program to which the United States was a party, as did the Pelly Amendment. The Packwood-Magnuson Amendment, however, was revised to restrict certification under the Fishery Conservation and Management Act to those fishing operations that "diminish the effectiveness" of the ICRW because "whales . . . are the living resources of the ocean that are in such dire need of protection at this time." 125 CONG. REC. 22082 (1979) (remarks of Rep. Murphy).

54. *See* 16 U.S.C. § 1821(e)(2)(A)(i).

55. *See* 16 U.S.C. § 1821(e)(2)(B)(ii). Generally, the use of the word "shall" in a statute indicates a command. *See* MCI Telecommunications Corp. v. Federal Communications Comm'n, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (citing Escoe v. Zerbst, 295 U.S. 490, 493 (1935)).

56. *See* 125 CONG. REC. 22084 (1979) (remarks of Rep. Oberstar).

57. *See id.* at 22083 (remarks of Rep. Oberstar).

58. *Id.*

59. *See* Comment, *supra* note 23, at 137. Because the Supreme Court in Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2872 (1986), upheld the Secretary of Commerce's decision not to certify Japan under either the Pelly or the Packwood-Magnuson Amendment, it remains true in 1986 that no certification has been made under the Packwood-Magnuson Amendment.

II. *JAPAN WHALING ASSOCIATION V. AMERICAN CETACEAN SOCIETY*

The controversy arising out of Secretary of Commerce Baldrige's decision not to certify Japan's IWC quota violations resulted in the first judicial interpretation of the Pelly and Packwood-Magnuson Amendments.[60] In *Japan Whaling Association v. American Cetacean Society,* the United States Supreme Court was presented with the question of whether either Amendment required the Secretary of Commerce ("Secretary") to certify foreign nations whaling in excess of IWC quotas.[61] The Court held that neither the Pelly nor the Packwood-Magnuson Amendment imposes a mandatory duty on the Secretary of Commerce to certify every foreign nation exceeding IWC quotas.[62]

In reaching its decision, the Court resolved two issues. The first issue was whether the case presented a nonjusticiable political question because it involved foreign affairs.[63] Specifically, the case involved the power of the Court to command the Secretary to repudiate the U.S.-Japanese executive agreement. The second issue was whether the Pelly or the Packwood-Magnuson Amendment provided the Secretary with discretion to certify a foreign nation's violations of IWC whaling quotas.[64] The Court first discussed the political question doctrine and held that the case presented a justiciable controversy even though it concerned foreign affairs.[65] The Court viewed the substance of the case as presenting a "purely legal question of statutory interpretation."[66] Because it is the constitutional duty of the judiciary to interpret statutes, the Court stated that it must fulfill its responsibility to interpret the Pelly and Packwood-Magnuson Amendments.[67]

60. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986) (White, J.) (5-4 decision). The only prior case discussing either Amendment was Adams v. Vance, 570 F.2d 950, 956 (D.C. Cir. 1977) (discussing Pelly Amendment). *See* Note, *Whaling Accord, supra* note 35, at 589 n.88.

61. *See Japan Whaling,* 106 S. Ct. at 2867.

62. *Id.* at 2872.

63. *Id.* at 2865.

64. *See id.* at 2867.

65. *Id.* at 2866. The Court recognized that its decision could affect the United States foreign affairs and that foreign affairs is an area reserved for the action of Congress and the Executive branch. The Court pointed out, however, that not every case touching on foreign affairs precludes judicial review. *Id.* (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

66. *Id.* at 2866.

67. *Id.* "[U]nder the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

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The Court devoted the bulk of its opinion to determining the Secretary's discretion to certify Japan's whaling activities under the Pelly and Packwood-Magnuson Amendments.[68] The Court stated that the statutory language pertinent to triggering certification under the Packwood-Magnuson Amendment is "diminish the effectiveness."[69] The Court noted that these words are not defined in the Packwood-Magnuson Amendment. The Amendment does not specify any factors that the Secretary should consider in making his certification decision, nor does it state that any whaling in excess of IWC quotas mandates certification.[70] Because of the ambiguity of the statutory language, the Court looked to the legislative histories of the Pelly and Packwood-Magnuson Amendments to ascertain congressional intent regarding certification.[71] The Court found that the legislative histories did not indicate that Congress intended every violation of IWC quotas to result in certification.[72]

Because the Court found no congressional intent that all IWC quota violations need be certified, the Court deferred to the Secretary's interpretation of the Amendments under his administrative authority.[73] The Court deemed reasonable the Secretary's interpretation of the Amendments as providing him discretion to determine

68. *Id.* at 2867-68.

69. *Id.* at 2867.

70. *Id.*

71. *See id.* at 2868-71.

72. *See id.* at 2871. In its discussion of the legislative history, the Court cited a statement from the House Report supporting a 1978 addition to the Pelly Amendment. The statement indicated that, while serious violations of IWC quotas could well be grounds for a certification, an isolated or trivial violation would not warrant certification. *Id.* (citing H.R. REP. No. 95-1029, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1768, 1779). The Court asserted that this statement clearly indicated that the Secretary is to exercise discretion to determine whether a particular fishing activity "diminishes the effectiveness" of an international fishery conservation program like the ICRW. *Id.* at 2870. The Court conceded that in the legislative histories of the Amendments there were "scattered statements hinting at the *per se* rule advocated by [the plaintiff conservation groups]." The Court concluded, however, that read as a whole, the histories did not clearly indicate that Congress intended for all violations of IWC quotas to be certified. *Id.* at 2871.

73. *Id.* at 2867-68. The proposition that a court should defer to an executive official's construction of a statutory scheme under his administrative authority unless it is arbitrary or unreasonable is central to the scheme of administrative law. *See, e.g.*, Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781-83 (1984) (upheld Environmental Protection Agency regulation as based on Agency's reasonable construction of term "stationary sources" in Clean Air Amendments); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971) (upheld Secretary of Transportation's decision under Department of Transportation Act and Federal-Aid Highway Act to route freeway through public park as within his discretion); *see also* Kleppe v. Sierra Club, 427 U.S. 390, 412-15 (1976) (reversed lower court's decision requiring Department of Interior to prepare environmental impact statement pursuant to National Environmental Policy Act after Department determined statement not necessary); Administrative Procedure Act, 5 U.S.C. § 706 (1982) (scope of judicial review of agency action).

whether the whaling activities of foreign nations "diminish the effectiveness" of the ICRW.[74] Accordingly, the Court found that the Secretary was entitled to determine that Japan's limited whaling in excess of the IWC zero quota would not diminish the effectiveness of the ICRW.[75] The Court declined to impose an obligation on the Secretary to certify that every IWC quota violation necessarily "diminishes the effectiveness" of the ICRW.[76]

In contrast to the majority, which focused on the discretion of the Secretary of Commerce to make certifications under the Amendments, Justice Marshall in his dissent focused on Japan's whaling activities in relation to the 1982 IWC zero quota for sperm whales.[77] The dissent asserted that by focusing on the discretion of the Secretary, the majority missed the most significant aspect of the case—that in light of the IWC's determination that only a zero quota on sperm whales could protect the species from extinction, Japan's violation of the quota clearly "diminish[ed] the effectiveness" of the ICRW.[78]

The dissent noted that past Secretaries of Commerce administering the Pelly Amendment had equated IWC quota violations with a diminution in the effectiveness of the ICRW. Thus, the consistent practice of the Secretary of Commerce had been to certify nations whaling in excess of IWC quotas.[79] The dissent argued that Secretary of Commerce Baldrige eschewed the consistent Commerce Department interpretation of the Pelly Amendment and declined to certify Japan because he desired to impose a penalty on Japan different from the one prescribed by Congress in the Packwood-Magnuson Amendment.[80] The dissent asserted that by negotiating with Japan for a promise of future compliance with IWC quotas rather than adhering to the Packwood-Magnuson Amendment's certification procedure, the Secretary substituted his judgment for that of Congress as to what constituted the most effective method of punishing quota violators. The dissent contended that by "manipulat[ing]" the Packwood-Magnuson Amendment's certification proce-

74. *Japan Whaling*, 106 S. Ct. at 2872.

75. *See id.* at 2871-72.

76. *Id.*

77. *Id.* at 2873 (Marshall, J., dissenting). Justices Brennan, Blackmun, and Rehnquist joined Justice Marshall's dissent.

78. *See id.*

79. *See id.* at 2872.

80. *Id.* at 2874.

dure in this manner, Secretary of Commerce Baldrige ignored the will of Congress and exceeded his authority.[81]

Justice Marshall also addressed the issue of secretarial discretion as framed by the majority.[82] The dissent argued that the majority had simply ignored the court of appeals' citations to the legislative histories of the Amendments, which indicated that Congress intended to impose a mandatory duty on the Secretary to certify nations whaling in excess of IWC quotas.[83] The dissent agreed with the lower court's interpretation of congressional intent, and asserted that the majority offered nothing to contradict it.[84] The dissent concluded that the majority's decision empowered the Secretary of Commerce to disregard congressional intent, thereby compromising the United States' policy of whale conservation.[85]

III. Discussion

Ostensibly, the Supreme Court's decision in *Japan Whaling Association v. American Cetacean Society* was based on statutory interpretation of the Pelly and Packwood-Magnuson Amendments.[86] Had the Court based its decision purely on statutory interpretation, however, its examination of the Amendments' legislative histories should have led the Court to conclude that Congress intended violations of IWC quotas to result in certification.[87] The fact that the Court declined to recognize a nondiscretionary duty of certification for IWC quota violations indicates that its decision actually was based on its desire to uphold the executive branch's preeminent au-

81. *Id.*

82. *See id.* at 2874-76.

83. *See id.* at 2875-76. The court of appeals in American Cetacean Soc'y v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), quoted numerous statements from the legislative histories of the Pelly and Packwood-Magnuson Amendments. *See Baldrige,* 768 F.2d at 436-37, 439-43. Summarizing statements from the legislative history of the Pelly Amendment, the *Baldrige* court contended that "the determination that a country was 'violating,' acting 'inconsistent with,' or failing to 'abide by' [IWC quotas] was equated with the fact of certification." *Id.* at 436. Summarizing statements from the legislative history of the Packwood-Magnuson Amendment, the *Baldrige* court supported the conclusion that Congress intended for violations of the ICRW to trigger automatically a finding of diminished effectiveness. *Id.* at 441-42. The *Baldrige* court concluded that "where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary." *Id.* at 444.

84. *Japan Whaling,* 106 S. Ct. at 2875.

85. *See id.* at 2876. The dissent opined that the Court's decision left Congress no closer to achieving its whale conservation goals than it had been in 1971, before either the Pelly or the Packwood-Magnuson Amendment was enacted. *Id.*

86. *Id.* at 2866, 2872.

87. For further discussion and for support of this proposition, see *infra* text accompanying notes 91-96.

thority in the field of foreign affairs.[88] By declining to recognize a mandatory certification duty, the Court improperly authorized the Secretary of Commerce to disregard Congress's purpose of protecting the world's whale population from extinction through the certification and sanction provisions of the Pelly and Packwood-Magnuson Amendments.[89]

Specifically, the Court in *Japan Whaling* declined to recognize a nondiscretionary duty of certification for IWC quota violations.[90] The Court's decision that certification under the Pelly and Packwood-Magnuson Amendments is discretionary directly contradicts Congress's purposes in enacting the Amendments.[91] Taken as a whole, the legislative histories support the determination by the court of appeals and the dissent that Congress intended for violations of IWC quotas to result in certification under either the Pelly or the Packwood-Magnuson Amendment.[92] As suggested by the dissent, the *Japan Whaling* majority simply disregarded the court of appeals' extensive citations to the legislative histories and, rather summarily, reached an opposite conclusion.[93]

88. For further discussion and for support of this proposition, see *infra* text accompanying notes 97-103.

89. For further discussion and for support of this proposition, see *infra* text accompanying notes 104-07.

90. *Japan Whaling,* 106 S. Ct. at 2872.

91. Concern for the survival of endangered fish and marine mammal species and the desire to penalize infractions of international fishery conservation agreements prompted Congress to enact the Pelly Amendment. *See, e.g.,* 117 Cong. Rec. 34750 (1971) (remarks of Rep. Dingell) (statement of purpose of Pelly Amendment); *id.* at 34751-52 (remarks of Rep. Pelly) (severe conservation crisis respecting Atlantic salmon and whales prompted introduction of Pelly Amendment); *id.* at 34753 (remarks of Rep. Keith) (Pelly Amendment provided means to punish nations failing to live up to international conservation compacts); *see also* 22 U.S.C. § 1978 (1982) (title of Pelly Amendment—"Restriction on importation of fishery or wildlife products from countries which *violate* international fishery or endangered or threatened species programs") (emphasis added). Congress enacted the Packwood-Magnuson Amendment to improve the effectiveness of the Pelly Amendment, thereby reinforcing its commitment to fish, specifically whale, conservation. *See, e.g.,* 125 Cong. Rec. 22084 (1979) (remarks of Rep. Oberstar) (Packwood-Magnuson improved effectiveness of ICRW by providing for specific penalty); *id.* at 22083 (Packwood-Magnuson directed at fishing activities diminishing effectiveness of ICRW because whales in dire need of protection); *id.* at 22083 (Commerce Department to certify under Amendment when nation acts contrary to international agreement for protection of fishery resources).

92. For a summary of the court of appeals' determination of Congress's intent regarding the Pelly and Packwood-Magnuson Amendments' certification provisions, see *supra* note 82. *See also* 125 Cong. Rec. 22081-84 (1979) (House debate on Packwood-Magnuson Amendment); 117 Cong. Rec. 34750-54 (1971) (House debate on Pelly Amendment).

93. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2874-75 (1986) (Marshall, J., dissenting).

The *Japan Whaling* majority cited several statements from the legislative histories suggesting that only the most persistent and flagrant violations need be certified. Consequently, the majority interpreted the Amendments to allow the Secretary of Commerce to decide whether, under the circumstances of the particular case, IWC violations need be certified.[94] The statements cited by the Court, however, are at odds with the majority of the statements in the histories and with the conservation purposes of Congress. Such statements and purposes support an interpretation of the Amendments as requiring certification for violations of IWC quotas. When faced with two alternative constructions of a statute, either of which might be considered reasonable, it is the duty of the Court to uphold the interpretation that best embodies the statutory scheme and purposes manifested by Congress.[95] In this case, interpreting the Amendments to require the Secretary to certify ICRW member nations violating IWC quotas is most consistent with the conservation purposes expressed by Congress.[96]

The result in *Japan Whaling* thus indicates that despite the Court's assertion that the case presented a "purely legal question of statutory interpretation", a factor unrelated to statutory construction influenced its decision. This factor is the Court's recognition that its decision could violate the principle of separation of powers.[97] Specifically, the Court recognized that the Pelly and Packwood-Magnuson Amendments' certification and sanction provisions were

94. *See id.* at 2869-70.

95. *See* Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 625 & n.7 (1982).

96. For a discussion of Congress's conservation purposes, see *supra* note 91.

97. Stated generally, the principle of separation of powers is that each of the three branches of government, Executive, Legislative, and Judicial, should exercise its own constitutional powers and should refrain from exercising the constitutional powers of the other branches. *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935); O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928). Recently, while acknowledging the separation of powers principle generally, the Supreme Court has rejected the "archaic" view that separation of powers requires "three airtight departments of government." Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 441-43 (1977); *see also* United States v. Nixon, 418 U.S. 683, 707 (1974) (although Framers of Constitution provided for three co-equal branches of government, separate branches not intended to operate with absolute independence). For discussions of the separation of powers doctrine, see generally J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS ch. 5 (1980); M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS(1967); Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984); Sharp, *The Classical American Doctrine of "the Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

related to the conduct of the United States' foreign affairs.[98] The power to act in the field of foreign affairs is delegated principally to the Executive branch.[99]

The Court no doubt was cognizant of the effects that compelling certification and triggering the Packwood-Magnuson Amendment's mandatory sanctions could have on U.S.-Japanese relations.[100] Understandably, the Court was loathe to invade the field of foreign affairs by causing the United States to repudiate the executive agreement with Japan.[101] The Court, however, avoided resolving explicitly the separation of powers issue by applying the rule that the judiciary should defer to an executive official's reasonable interpretation of a statute under his administrative authority.[102] By applying this "administrative deference" rule, the Court was able to uphold Secretary Baldrige's decision not to certify Japan and to preserve the authority of the executive branch in the field of foreign affairs.

It was improper, however, for the Court to apply the "administrative deference" rule in *Japan Whaling*. The Court noted that the "administrative deference" rule may be applied only when Congress's intent regarding the question at issue is unclear.[103] The legislative histories of the Pelly and Packwood-Magnuson Amendments clearly indicate that Congress intended for violations of IWC quotas to be certified.[104] The Supreme Court in *Japan Whaling* should not have interpreted the Amendments to contradict their purpose of encour-

98. *See Japan Whaling*, 106 S. Ct. at 2866. "We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field." *Id.*

99. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-19 (1936) (President is constitutional representative of United States with regard to foreign nations). Congress also acts in the field of foreign affairs through its power to regulate commerce with foreign nations. U.S. CONST., art. I, § 8, cl. 3.

100. *See Japan Whaling*, 106 S. Ct. at 2866. For a discussion of the political and economic ramifications of a United States certification of Japan, see Note, *Whaling Accord*, *supra* note 35, at 585-87; Comment, *supra* note 23, at 139-41.

101. *See Japan Whaling*, 106 S. Ct. at 2866; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936) ("As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*") (quoting Mackenzie v. Hare, 239 U.S. 299, 311 (1915) (emphasis added by *Curtiss-Wright* Court)); *see also* American Cetacan Soc'y v. Baldrige, 768 F.2d 426, 447-48 (D.C. Cir. 1985) (Oberdorfer, J., dissenting); Adams v. Vance, 570 F.2d 950, 954-55 (D.C. Cir. 1977).

102. *See Japan Whaling*, 106 S. Ct. at 2867-68. For an explanation of judicial deference to agency statutory interpretations, see *supra* note 73.

103. *Japan Whaling*, 106 S. Ct. at 2867.

104. For a discussion of congressional intent regarding certification, see *supra* notes 91-92 and accompanying text.

aging compliance with the terms of the ICRW.[105] By deferring to the Secretary's interpretation of the Pelly and Packwood-Magnuson Amendments as providing him discretion to certify IWC quota violations, the Court has allowed the Secretary to compromise the conservation goals of Congress.[106]

The Court could have found the controversy to be nonjusticiable as a political question if it were concerned that it would violate the separation of powers principle by compelling the Secretary to certify Japan, thereby causing the United States to repudiate the executive agreement.[107] The Court, however, chose not to do so. The Court declared the controversy to be justiciable and stated that it presented a purely legal question of statutory interpretation. Therefore, the Court should have put aside its concerns with the impact of a certification on foreign affairs and reached a decision in *Japan Whaling* consonant with the conservation goals expressed by Congress in the Pelly and Packwood-Magnuson Amendments.

The Court's decision that certification under the Pelly and Packwood-Magnuson Amendments is discretionary requires prompt congressional reaction. After *Japan Whaling,* it is foreseeable that the Secretary of Commerce could decline to certify a nation's whaling violations whenever the Secretary perceives that a certification would be adverse to the United States' foreign policy interests. To prevent secretarial discretion from swallowing the United States' policy of whale conservation, Congress should act to amend the Pelly and Packwood-Magnuson Amendments to require specifically that the Secretary must certify IWC quota violations.

Congress could accomplish this by adding a subsection to the Pelly Amendment providing that a nation conducting fishing operations in violation of a quota, restriction, or regulation set by an international fishery conservation program shall be deemed to diminish the effectiveness of such a program despite its formal objection to the quota, restriction, or regulation. Similarly, Congress should add a subsection to the Packwood-Magnuson Amendment providing that a nation conducting whaling operations in violation of an IWC quota, restriction, or regulation shall be deemed to diminish the effectiveness of the ICRW despite its formal objection to

105. *See* New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 419-20 (1973) (Court cannot interpret federal statutes to negate their stated purposes).

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

107. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (controversy may be declared nonjusticiable as political question if by rendering decision Court would display "a lack of the respect due coordinate branches of government" or cause "embarrassment from multifarious pronouncements by various departments on one question").

the quota, restriction, or regulation. These simple additions to the Pelly and Packwood-Magnuson Amendments would supplant secretarial discretion and uphold congressional commitment to whale conservation. They would provide a powerful incentive for whaling nations to abide by the IWC's strictures on commercial whaling, thereby saving the world's whale population from extinction.

IV. Conclusion

Because of its deference to the authority of the executive branch in the field of foreign affairs, the Court in *Japan Whaling Association v. American Cetacean Society* has declined to interpret the Pelly and Packwood-Magnuson Amendments in a manner consistent with Congress's intent regarding whale conservation. By doing so, the Court has jeopardized the United States' policy of whale conservation and has frustrated Congress's purpose of protecting the world's whale population from extinction due to commercial whaling. To preserve the United States' policy of whale conservation, Congress should act to amend the language of the Pelly and Packwood-Magnuson Amendments to mandate that the Secretary of Commerce certify any foreign nation whose nationals fail to abide by IWC quotas, restrictions, or regulations.

Melinda K. Blatt

JAPAN WHALING ASSOCIATION and Japan Fisheries Association, Petitioners

v.

AMERICAN CETACEAN SOCIETY et al.

Malcolm BALDRIGE, Secretary of Commerce, et al., Petitioners

v.

AMERICAN CETACEAN SOCIETY et al.

Nos. 85–954, 85–955.

Argued April 30, 1986.

Decided June 30, 1986.

Wildlife conservation groups brought action for declaratory relief and injunction, alleging that cabinet members breached statutory duty with respect to enforcement of international whaling quotas. The United States District Court for the District of Columbia, Charles R. Richey, J., 604 F.Supp. 1398, granted mandamus relief, and denied stay pending appeal, 604 F.Supp. 1411. The Court of Appeals, J. Skelly Wright, Circuit Judge, 768 F.2d 426, affirmed. Certiorari was granted. The Supreme Court, Justice White, held that: (1) political question doctrine did not bar judicial resolution of controversy; (2) under Pelly and Packwood Amendments, Secretary of Commerce was not required to certify that Japan's whaling practices diminished effectiveness of International Convention for Regulation of Whaling; and (3) Secretary's decision to secure certainty of Japan's future compliance with a program per executive agreement, rather than rely on possibility that certification and imposition of economic sanctions would produce same or better results, was reasonable construction of the Amendments.

Reversed.

Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun, and Rehnquist joined.

1. Constitutional Law ⇐68(1)

Political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to halls of Congress or confines of executive branch.

2. Constitutional Law ⇐68(1)

Political question doctrine did not bar judicial resolution of controversy as to whether, under Pelly and Packwood Amendments, Secretary of Commerce was required to certify that Japan's whaling practices diminished effectiveness of International Convention for Regulation of Whaling because Japan's harvest exceeded quotas established under Convention since challenge to decision not to certify Japan for harvesting whales in excess of quotas presented purely legal question of statutory interpretation. Fishermen's Protective Act of 1967, § 8, as amended, 22 U.S.C.A. § 1978; Magnuson Fishery Conservation and Management Act, § 201, as amended, 16 U.S.C.A. § 1821.

3. Fish ⇐12

Under Pelly and Packwood Amendments, Secretary of Commerce was not required to certify that Japan's whaling practices diminished effectiveness of International Convention for Regulation of Whaling because Japan's annual harvest exceeded quotas established under Convention. Fishermen's Protective Act of 1967, § 8, as amended, 22 U.S.C.A. § 1978; Magnuson Fishery Conservation and Management Act, § 201, as amended, 16 U.S.C.A. § 1821.

4. Fish ⇐12

Enactment of Packwood Amendment did not negate view of Secretary of Congress that he is not required to certify every failure to abide by whaling limits of International Convention for Regulation of Whaling. Fishermen's Protective Act of 1967, § 8, as amended, 22 U.S.C.A. § 1978; Magnuson Fishery Conservation and

Management Act, § 201, as amended, 16 U.S.C.A. § 1821.

5. Fish ⇐12

Decision of Secretary of Commerce to secure certainty of Japan's future compliance with International Convention for Regulation of Whaling program per executive agreement, rather than rely on possibility that certification of whaling practices as diminishing effectiveness of Convention and imposition of economic sanctions would produce same or better results, was reasonable construction of Pelly and Packwood Amendments. Fishermen's Protective Act of 1967, as amended, 22 U.S.C.A. § 1978; Magnuson Fishery Conservation and Management Act, § 201, as amended, 16 U.S.C.A. § 1821.

Syllabus *

The International Convention for the Regulation of Whaling (ICRW) included a Schedule regulating whale harvesting practices of member nations (including the United States and Japan) and setting harvest limits for various whale species. It also established the International Whaling Commission (IWC) and authorized it to set harvest quotas. However, the IWC has no power to impose sanctions for quota violations, and any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit. Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, directing the Secretary of Commerce (Secretary) to certify to the President if nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of an international fishery conservation program. The President, in his discretion, may then direct the imposition of sanctions on the certified nation. Later, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, requiring expedition of the certification process and mandating that, if the Secretary certifies that nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of the ICRW, economic sanctions must be imposed by the Executive Branch against the offending nation. After the IWC established a zero quota for certain sperm whales and ordered a 5-year moratorium on commercial whaling to begin in 1985, Japan filed objections to both limitations and thus was not bound thereby. However, in 1984 Japan and the United States concluded an executive agreement whereby Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988, and the Secretary agreed that the United States would not certify Japan under either the Pelly Amendment or the Packwood Amendment if Japan complied with its pledges. Shortly before consummation of the executive agreement, several wildlife conservation groups filed suit in Federal District Court, seeking a writ of mandamus to compel the Secretary to certify Japan, and the court granted summary judgment for the groups, concluding that any taking of whales in excess of the IWC's quotas diminished the effectiveness of the ICRW. The court ordered the Secretary immediately to certify to the President that Japan was in violation of the sperm whale quota. The Court of Appeals affirmed.

Held:

1. The political question doctrine does not bar judicial resolution of the instant controversy. The courts have the authority to construe international treaties and executive agreements and to interpret congressional legislation. The challenge to the Secretary's decision not to certify Ja-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

pan presents a purely legal question of statutory interpretation. The Judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may have significant political overtones. Pp. 2865–2866.

2. Neither the Pelly Amendment nor the Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas. The Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than to rely on the possibility that certification and imposition of economic sanctions would produce the same or a better result, is a reasonable construction of the Amendments. Pp. 2867–2872.

(a) Under the terms of the Amendments, certification is neither permitted nor required until the Secretary determines that nationals of a foreign country are conducting fishing operations in a manner that "diminishes the effectiveness" of the ICRW. Although the Secretary must promptly make a certification decision, there is no statutory definition of the words "diminish the effectiveness" or specification of the factors that the Secretary should consider in making the decision entrusted to him alone. The statutory language does not direct the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling schedule. Pp. 2867–2868.

(b) Nothing in the legislative history of either Amendment addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whaling. The history of the Pelly Amendment and its subsequent amendment shows that Congress had no intention to require the Secretary to certify every departure from the limits set by an international conservation program, and that Congress used the phrase "diminish the effectiveness" to give the Secretary a range of certification discretion. Although the Packwood Amendment was designed to remove executive discretion in imposing sanctions once certification had been made, Congress specifically retained the identical certification standard of the Pelly Amendment, and the legislative history does not indicate that the certification standard requires the Secretary, regardless of the circumstances, to certify each and every departure from the ICW's whaling Schedules. Pp. 2868–2871.

247 U.S.App.D.C. 309, 768 F.2d 426, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and REHNQUIST, JJ., joined.

Arnold I. Burns, New York City, for petitioners in No. 85–955.

Scott C. Whitney, Washington, D.C., for petitioners in No. 85–954.

William D. Rogers, Washington, D.C., for respondents.

Justice WHITE delivered the opinion of the Court.

In these cases, we address the question whether, under what are referred to in these cases as the Pelly and Packwood Amendments, 85 Stat. 786, as amended, 22 U.S.C. § 1978; 90 Stat. 337, as amended, 16 U.S.C. § 1821 (1982 ed. and Supp. II), the Secretary of Commerce is required to certify that Japan's whaling practices "diminish the effectiveness" of the International Convention for the Regulation of Whaling because that country's annual harvest exceeds quotas established under the Convention.

I

For centuries, men have hunted whales in order to obtain both food and oil, which in turn, can be processed into a myriad of other products. Although at one time a harrowing and perilous profession, modern

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technological innovations have transformed whaling into a routine form of commercial fishing, and have allowed for a multifold increase in whale harvests worldwide.

Based on concern over the effects of excessive whaling, 15 nations formed the International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948). 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.*, at 1717, and today serves as the principal international mechanism for promoting the conservation and development of whale populations. See generally Smith, The International Whaling Commission: An Analysis of the Past and Reflections on the Future, 16 Nat. Resources Law. 543 (1984). The United States was a founding member of the ICRW; Japan joined in 1951.

To achieve its purposes, the ICRW included a Schedule which, *inter alia*, regulates harvesting practices and sets harvest limits for various whale species. Art. I, 62 Stat. 1717, 1723–1727. In addition, the ICRW established the International Whaling Commission (IWC) which implements portions of the Convention and is authorized to amend the Schedule and set new harvest quotas. See Art. III, 62 Stat. 1717–1718; Art. V, 62 Stat. 1718–1719. See generally Smith, *supra*, at 547–550. The quotas are binding on IWC members if accepted by a three-fourths' majority vote. Art. III, 62 Stat. 1717. Under the terms of the Convention, however, the IWC has no power to impose sanctions for quota violations. See Art. IX, 62 Stat. 1720. Moreover, any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit unless and until the objection is withdrawn. Art. V, 62 Stat. 1718–1719. All nonobjecting countries remain bound by the amendment.

Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress passed the Pelly Amendment to the Fishermen's Protective Act of 1967. 22 U.S.C. § 1978. Principally intended to preserve and protect North American Atlantic salmon from depletion by Danish fishermen in violation of the ban imposed by the International Convention for the Northwest Atlantic Fisheries, the Amendment protected whales as well. See 117 Cong.Rec. 34752 (1971) (remarks of Rep. Pelly); H.R. Rep. No. 92–468, p. 6 (1971), U.S.Code Cong. & Admin.News 1971, p. 2409. The Amendment directs the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program...." 22 U.S.C. § 1978(a)(1). Upon certification, the President, in his discretion, may then direct the Secretary of the Treasury to prohibit the importation of fish products from the certified nation. § 1978(a)(4). The President may also decline to impose any sanctions or import prohibitions.

After enactment of the Pelly Amendment, the Secretary of Commerce five times certified different nations to the President as engaging in fishing operations which "diminish[ed] the effectiveness" of IWC quotas. H.R.Rep. No. 95–1029, p. 9 (1978), U.S.Code Cong. & Admin.News 1978, p. 1768; 125 Cong.Rec. 22084 (1979) (remarks of Rep. Oberstar). None of the certifications resulted in the imposition of sanctions by the President. After each certification, however, the President was able to use the threat of discretionary sanctions to obtain commitments of future compliance from the offending nations.

Although "the Pelly Amendment ... served the useful function of quietly persuading nations to adhere to the decisions of international fishery conservation bodies," H.R.Rep. No. 95–1029, *supra*, at 9,

U.S.Code Cong. & Admin.News 1978, pp. 1768, 1773, Congress grew impatient with the executive's delay in making certification decisions and refusal to impose sanctions. See 125 Cong.Rec. 22083 (1979) (remarks of Rep. Murphy); *id.*, at 22084 (remarks of Rep. Oberstar). As a result, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (1982 ed. and Supp. II). This Amendment requires the Secretary of Commerce to "periodically monitor the activities of foreign nationals that may affect [international fishery conservation programs]," 22 U.S.C. § 1978(a)(3)(A); "promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification ...," § 1978(a)(3)(B); and "promptly conclude; and reach a decision with respect to; [that] investigation." § 1978(a)(3)(C).

To rectify the past failure of the President to impose the sanctions authorized—but not required—under the Pelly Amendment, the Packwood Amendment removes this element of discretion and mandates the imposition of economic sanctions against offending nations. Under the Amendment, if the Secretary of Commerce certifies that "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling," 16 U.S.C. § 1821(e)(2)(A)(i), the Secretary of State must reduce, by at least 50%, the offending nation's fishery allocation within the United States' fishery conservation zone. 16 U.S.C. § 1821(e)(2)(B). Although the Amendment requires the imposition of sanctions when the Secretary of Commerce certifies a nation, it did not alter the initial certification process, except for requiring expedition. It was also provided that a certificate under the Packwood Amendment also serves as a certification for the purposes of the Pelly Amendment. 16 U.S.C. § 1821(e)(2)(A)(i).

In 1981, the IWC established a zero quota for the Western Division stock of Northern Pacific sperm whales. The next year, the IWC ordered a 5-year moratorium on commercial whaling to begin with the 1985–1986 whaling season and last until 1990. In 1982, the IWC acted to grant Japan's request for a two year respite—for the 1982–1983 and 1983–1984 seasons—from the IWC's earlier decision banning sperm whaling.

Because Japan filed timely objections to both the IWC's 1981 zero quota for North Pacific sperm whales and 1982 commercial whaling moratorium, under the terms of the ICRW, it was not bound to comply with either limitation. Nonetheless, as the 1984–1985 whaling season grew near, it was apparently recognized that under either the Pelly or Packwood Amendments, the United States could impose economic sanctions if Japan continued to exceed these whaling quotas.

Following extensive negotiations, on November 13, 1984, Japan and the United States concluded an executive agreement through an exchange of letters between the Charge d'Affaires of Japan and the Secretary of Commerce. See App. to Pet. for Cert. in No. 85–955, pp. 102A–109A. Subject to implementation requirements,[1]

1. The details of the Japanese commitments were explained in a summary accompanying the letter from the Charge d'Affaires to the Secretary. First, the countries agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective April 1, 1988. App. to Pet. for Cert. in No. 85–955, pp. 104A–105A. Japan fulfilled this portion of the agreement on December 11, 1984. *Id.*, at 110A, 112A–114A.

Second, the two nations agreed that if Japan would end all commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Japan agreed to harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whale species—under limits acceptable to the United States after consultation with Japan—through the end of the 1986–

Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988. *Id.*, at 104A–106A. In return and after consulting with the United States Commissioner to the IWC, the Secretary determined that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to discontinue all commercial whaling by 1988, "would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program." *Id.*, at 107A. Accordingly, the Secretary informed Japan that, so long as Japan complied with its pledges, the United States would not certify Japan under either Amendment. See *id.*, at 104A.

Several days before consummation of the executive agreement, several wildlife conservation groups [2] filed suit in District Court seeking a writ of mandamus compelling the Secretary of Commerce to certify Japan.[3] Because in its view any taking of whales in excess of the IWC diminishes the effectiveness of the ICRW, the District Court granted summary judgment for respondents and ordered the Secretary of Commerce immediately to certify to the President that Japan was in violation of the IWC sperm whale quota. 604 F.Supp. 1398, 1411 (DC 1985). Thereafter, Japan's Minister for Foreign Affairs informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the District Court's order. App. to Pet. for Cert. in No. 85–955, pp. 116A–118A.

A divided Court of Appeals affirmed. 247 U.S.App.D.C. 309, 768 F.2d 426 (1985). Recognizing that the Pelly and Packwood-Magnuson Amendments did not define the specific activities which would "diminish the effectiveness" of the ICRW, the court looked to the Amendments' legislative history and concluded, as had the District Court that the taking by Japanese nationals of whales in excess of quota automatically called for certification by the Secretary. We granted certiorari, 474 U.S. ——, 106 S.Ct. 787, 88 L.Ed.2d 766 (1986), and now reverse.

II

We address first the Japanese petitioners' contention that the present actions are unsuitable for judicial review because they involve foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international agreement. Relying on the political question doctrine, and quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1969), the Japanese petitioners argue that the danger of "embarrassment from multifarious pronouncements by various departments on one question" bars any judicial resolution of the instant controversy.

1987 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate commercial whaling operations by withdrawing its objection to the 1982 IWC moratorium on or before April 1, 1985, effective April 1, 1988. *Id.*, at 105A–106A.

2. The original plaintiffs to this action are: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former United States Representative to the IWC.

3. In addition, plaintiffs also requested (1) a declaratory judgment that the Secretary's failure to certify violated both the Pelly and Packwood Amendments, because any whaling activities in excess of IWC quotas necessarily "diminishes the effectiveness" of the ICRW; and (2) a permanent injunction prohibiting any executive agreement which would violate the certification and sanction requirements of the Amendments. 604 F.Supp. 1398, 1401 (DC 1985). The Japan Whaling Association and Japan Fishing Association (Japanese Petitioners), trade groups representing private Japanese interests, were allowed to intervene.

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[1] We disagree. *Baker* carefully pointed out that not every matter touching on politics is a political question, *id.*, at 209, 82 S.Ct., at 706, and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.*, at 211, 82 S.Ct., at 707. The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The judiciary is particularly ill-suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *United States ex rel. Joseph v. Cannon*, 206 U.S.App.D.C. 405, 411, 642 F.2d 1373, 1379 (1981), cert. denied, 455 U.S. 999, 102 S.Ct. 1630, 71 L.Ed.2d 865 (1982) (footnote omitted).

[2] As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.[4]

4. We also reject the Secretary's suggestion that no private cause of action is available to respondents. Respondents brought suit against the Secretary of Commerce, the head of a federal agency, and the suit, in essence, is one to "compel agency action unlawfully withheld," 5 U.S.C. § 706(1), or alternatively, to "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). The "right of action" in such cases is expressly created by the Administrative Procedure Act (APA), which states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," § 704, at the behest of "[a] person ... adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (1982 ed., Supp. II). A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review. See, *e.g.*, *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967).

It is clear that Respondents may avail themselves of the right of action created by the APA. First, the Secretary's actions constitute the actions of an agency. See 5 U.S.C. § 551(1); *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S., at 410, 91 S.Ct., at 820. In addition, there has been "final agency action," in that the Secretary formally has agreed with the Japanese that there will be no certification, and this appears to be an action "for which there is no other adequate remedy in a court," as the issue whether the Secretary's failure to certify was lawful will not otherwise arise in litigation. Next, it appears that respondents are sufficiently "aggrieved" by the agency's action: under our decisions in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), they undoubtedly have alleged a sufficient "injury in fact" in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the "zone of interests" protected by the Pelly and Packwood Amendments. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184

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III

[3] The issue before us is whether, in the circumstances of these cases, either the Pelly or Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas. We have concluded that certification was not necessary and hence reject the Court of Appeals' holding and respondents' submission that certification is mandatory whenever a country exceeds its allowable take under the ICRW Schedule.

Under the Packwood Amendment, certification is neither permitted nor required, until the Secretary makes a determination that nationals of a foreign country "are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness" of the ICRW. It is clear that the Secretary must promptly make the certification decision, but the statute does not define the words "diminish the effectiveness of" or specify the factors that the Secretary should consider in making the decision entrusted to him alone. Specifically, it does not state that certification must be forthcoming whenever a country does not abide by IWC Schedules, and the Secretary did not understand or interpret the language of the Amendment to require him to do so. Had Congress intended otherwise, it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits.

Here, as the Convention permitted it to do, Japan had filed its objection to the IWC harvest limits and to the moratorium to begin with the 1985–1986 season. It was accordingly not in breach of its obligations under the Convention in continuing to take whales, for it was part of the scheme of the Convention to permit nations to opt out of Schedules that were adopted over its objections. In these circumstances, the Secretary, after consultation with the United States Commissioner to the IWC and review of the IWC Scientific Committee opinions, determined that it would better serve the conservation ends of the Convention to accept Japan's pledge to limit its harvest of sperm whales for four years and to cease all commercial whaling in 1988, rather than to impose sanctions and risk continued whaling by the Japanese. In any event, the Secretary made the determination assigned to him by the Packwood Amendment and concluded that the limited taking of whales in the 1984 and 1985 coastal seasons would not diminish the effectiveness of the International Convention for the Regulation of Whaling or its conservation program, and that he would not make the certification that he would otherwise be empowered to make.

The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781–2782, 81 L.Ed.2d 694 (1984). But as the courts below and respondents concede, the statutory language itself contains no direction to the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling schedule. The language of the Pelly and Packwood Amendments might reasonably be construed in this manner, but the Secretary's construction that there are circumstances in which certification may be withheld, despite departures from the Schedules and without violating his duty, is also a reasonable construction of the language used in both amendments. We do not understand the Secretary to be urging that he has *carte blanche* discretion to ignore and do nothing about whaling in excess of IWC Schedules. He does not argue, for exam-

(1970). Finally, the Secretary has failed to point to any expressed intention on the part of Congress to foreclose APA review of actions under either Amendment. We find, therefore, that respondents are entitled to pursue their claims under the right of action created by the APA.

ple, that he could refuse to certify for any reason not connected with the aims and conservation goals of the Convention, or refuse to certify deliberate flouting of schedules by members who have failed to object to a particular schedule. But insofar as the plain language of the Amendments is concerned, the Secretary is not forbidden to refuse to certify for the reasons given in this case. Furthermore, if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the "executive department's construction of a statutory scheme it is entrusted to administer," *Chevron, supra,* 467 U.S., at 844, 104 S.Ct., at 2782, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. ——, ——, 106 S.Ct. 455, ——, 88 L.Ed.2d 419 (1985). See *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. ——, ——, 105 S.Ct. 1102, ——, 84 L.Ed.2d 90 (1985).

IV

Contrary to the Court of Appeals and respondents' views, we find nothing in the legislative history of either Amendment that addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whaling. The Pelly Amendment was introduced in 1971 to protect Atlantic salmon from possible extinction caused by overfishing in disregard of established salmon quotas. Under the International Convention for the Northwest Atlantic Fisheries (ICNAF), zero harvest quotas had been established in 1969 to regulate and control high seas salmon fishing. 117 Cong.Rec. 34751 (1971) (remarks of Rep. Dingell). Denmark, Germany, and Norway, members of the ICNAF, exercised their right to file timely objections to the quotas, however, and thus were exempt from their limitations. Although respondents are correct that Congress enacted the Pelly Amendment primarily as a means to enforce those international fishing restrictions against these three countries, particularly Denmark, they fail to establish that the Amendment requires automatic certification of every nation whose fishing operations exceed international conservation quotas.

Both the Senate and House Committee Reports detail the "conservation nightmare" resulting from Denmark's failure to recognize the ICNAF quota; a position which "effectively nullified" the ban on high seas harvesting of Atlantic salmon. S.Rep. No. 92–582, pp. 4–5 (1971); H.R. Rep. No. 92–468, pp. 5–6 (1971), U.S.Code Cong. & Admin.News 1971, p. 2409. In addition, Danish operations were seen as leading to the "eventual destruction of this valuable sports fish," a matter of "critical concern" to both the Senate and House Committees. S.Rep. No. 92–582, at 4; H.R. Rep. No. 92–468, at 5, U.S.Code Cong. & Admin.News 1971, p. 2412. There is no question but that both Committees viewed Denmark's excessive fishing operations as "diminish[ing] the effectiveness" of the ICNAF quotas, and envisioned that the Secretary would certify that nation under the Pelly Amendment. The Committee Reports, however, do not support the view that the Secretary must certify every nation that exceeds every international conservation quota.[5]

5. The Court of Appeals relied upon the statement in S.Rep. No. 92–582 that the purpose of the Amendment was "'to prohibit the importation of fishery products from nations that do not conduct their fishing operations in a manner that is consistent with international conservation programs. It would accomplish this by providing that whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he must certify such fact to the President.'" 247 U.S.App.D.C. 309, 768 F.2d 426, 436 (1985) (emphasis omitted), quoting S.Rep. No. 92–582, at 2. This is indeed an explicit statement of purpose, but this is not the operative language in the statute chosen to effect that purpose. The section-by-section analysis contained in the same Report recites that the operative section directs the Secretary of Commerce to certify to the President the fact that nationals of a foreign country, directly or

The discussion on the floor of the House by Congressman Pelly and other supporters of the Amendment further demonstrates that Congress' primary concern in enacting the Pelly Amendment was to stave off the possible extermination of both the Atlantic salmon as well as the extinction of other heavily fished species, such as whales, regulated by international fishery conservation programs. 117 Cong.Rec. 34752–34754 (1971) (remarks of Reps. Pelly, Wylie, Clausen, and Hogan). The comments of Senator Stevens, acting Chairman of the reporting Senate Committee and the only speaker on the bill during the Senate debate, were to the same effect. See 117 Cong.Rec. 47054 (1971) (if countries continue indiscriminately to fish on the high seas, salmon may become extinct). Testimony given during congressional hearings on the Pelly Amendment also supports the conclusion that Congress had no intention to require the Secretary to certify every departure from the limits set by an international conservation program.[6]

Subsequent amendment of the Pelly Amendment in 1978 further demonstrates that Congress used the phrase, "diminish the effectiveness," to give the Secretary a range of certification discretion. The 1978 legislation expanded coverage of the Pelly Amendment "to authorize the President to embargo wildlife products from countries where nationals have acted in a manner which, directly or indirectly, diminishes the effectiveness of any international program for the conservation of endangered or threatened species." H.R.Rep. No. 95–1029, p. 8 (1978), U.S.Code Cong. & Admin. News 1978, p. 1772. This extension was premised on the success realized by the United States in using the Amendment to convince other nations to adhere to IWC quotas, thus preserving the world's whale stocks. *Id.*, at 9.

In the House Report for the 1978 amendment, the Merchant Marine and Fisheries Committee specifically addressed the "diminish the effectiveness" standard and recognized the Secretary's discretion in making the initial certification decision:

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

indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international conservation program whenever he determines the existence of such operations. *Id.*, at 5. These are not the words of a ministerial duty, but the imposition of duty to make an informed judgment. Even respondents do not contend that every merely negligent or unintentional violation must be certified. It should be noted that the statement of purpose contained in the House Report tracks the language of the operative provisions of the Amendment. H.R.Rep. No. 92–468, p. 2 (1971).

6. Representative Pelly testified at the Senate hearings that the sanctions authorized by the Amendment were to be applied "in the case of flagrant violation of any international fishery conservation program to which the United States has committed itself." 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). Similarly, Donald McKernan, Special Assistant for Fisheries and Wildlife, and Coordinator of Ocean Affairs, United States Department of State, stated:

"We do not anticipate that there would be any need to invoke the proposed legislation where conservation needs are effectively met by the agreement of all nations involved to an international conservation regime.

"However, there are some situations where one or more nations have failed to agree to a program otherwise agreed among the involved nations, or having once agreed failed to abide by the agreement.

"Under the proposed legislation, if the action of such countries diminished the effectiveness of the international fishery conservation program, consideration would need to be given to taking trade measures as necessary to support the conservation program." *Id.*, at 97.

this section." *Id.*, at 15, U.S.Code Cong. & Admin.News 1978, p. 1779.

This statement makes clear that, under the Pelly Amendment as construed by Congress, the Secretary is to exercise his judgment in determining whether a particular fishing operation "diminishes the effectiveness" of an international fishery conservation program like the IWC.[7]

The Court of Appeals held that this definition applies only to the 1978 addition to the Pelly Amendment, designed to enforce the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, and not to the ICRW. We are unpersuaded. Congress perceived the two Conventions as seeking the same objectives. Both programs are designed to conserve endangered or threatened species, whether it be the sperm whale or the stumptail macaque. See H.R.Rep. No. 95–1029, pp. 9–10 (1978). This explains why the House Report noted that the purpose behind the 1978 extension of the Pelly Amendment was "to expand the success the United States has achieved in the conservation of whales to the conservation of endangered and threatened species." *Id.*, at 9, U.S.Code Cong. & Admin.News 1978, p. 1773.

Both Conventions also operate in a similar, and often parallel, manner,[8] and nothing in the legislative history of the 1978 amendment shows that Congress intended the phrase "diminish the effectiveness" to be applied inflexibly with respect to departures from fishing quotas, but to be applied flexibly *vis-a-vis* departures from endangered species quotas. Without strong evidence to the contrary, we doubt that Congress intended the same phrase to have significantly different meanings in two adjoining paragraphs of the same subsection. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. ——, ——, 105 S.Ct. 3275, ——, 87 L.Ed.2d 346 (1985); *Morrison-Knudson Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633, 103 S.Ct. 2045, 2050, 76 L.Ed.2d 194 (1983). Congress' explanation of the scope of the Secretary's certification duty applies to both the original Pelly Amendment and the 1978 amendment: the Secretary is empowered to exercise his judgment in determining whether "the trade or taking [is] serious enough to warrant the finding that the effectiveness of the international program in question has been diminished." H.R.Rep. No. 95–1029, *supra*, at 15, U.S.Code Cong. & Admin.News 1978, p. 1779.

[4] Enactment of the Packwood Amendment did not negate the Secretary's view

7. The Committee also detailed two actions which "dramatically demonstrate[d] the value of the Pelly amendment to the United States in the conduct of international fishery negotiations." H.R.Rep. No. 95–1029, p. 9 (1978), U.S. Code Cong. & Admin.News 1978, p. 1773.

"In November, 1977, the Secretary of Commerce reported to the President that two nonmembers of the IWC—Peru and Korea—were taking whales in excess of IWC quotas. In March, 1978, the Secretary of Commerce reported to the subcommittee that although these nations are violating IWC quotas, certification under the Pelly amendment is pending a thorough documentation and substantiation of each action that may diminish the effectiveness of the IWC conservation program." *Ibid.* The fact that the Committee approved of the Secretary's actions in not automatically certifying these nations, even though they were found to be taking whales in excess of IWC quotas, is additional evidence that the Pelly Amendment does not require the *per se* rule respondents now urge.

8. The CITES regulates trade in endangered and threatened species through inclusion of those species in one of three Appendices. CITES, Arts. II–IV, 27 U.S.T. 1092–1097. The ICRW regulates whaling through the use of a Schedule which sets harvest limits for whale species. ICRW, Art. V, 62 Stat. 1718–1719. The CITES requires a two-thirds majority vote to amend an Appendix to include an additional species. CITES, Art. XV, 27 U.S.T. 1110–1112. The ICRW requires a three-fourths majority vote to amend the Schedule or to adopt regulations. ICRW, Art. III, 62 Stat. 1717. Both Conventions also contain analogous procedures for member nations to file timely objections to limitations imposed by the Convention. Compare CITES, Art. XV, 27 U.S.T. 1110–1112, with ICRW, Art. V, 62 Stat. 1719. See generally Recent Development, International Conservation—United States Enforcement of World Whaling Programs, 26 Va.J.Int'l L. 511, 531–532 (1986).

that he is not required to certify every failure to abide by ICW's whaling limits. There were hearings on the proposal but no Committee Reports. It was enacted as a floor amendment. It is clear enough, however, that it was designed to remove executive discretion in imposing sanctions once certification had been made—as Senator Packwood put it, "to put real economic teeth into our whale conservation efforts," by requiring the Secretary of State to impose severe economic sanctions until the transgression is rectified. 125 Cong.Rec. 21742 (1979). But Congress specifically retained the identical certification standard of the Pelly Amendment, which requires a determination by the Secretary that the whaling operations at issue diminish the effectiveness of the ICRW. 16 U.S.C. § 1821(e)(2)(A)(i). See 125 Cong.Rec. 21743 (1979) (remarks of Sen. Magnuson); *id.*, at 22083 (remarks of Rep. Breaux); *id.*, at 22084 (remarks of Rep. Oberstar). We find no specific indication in this history that henceforth the certification standard would require the Secretary to certify each and every departure from ICW's whaling Schedules.[9]

It may be that in the legislative history of these amendments there are scattered statements hinting at the *per se* rule advocated by respondents, but read as a whole, we are quite unconvinced that this history clearly indicates, contrary to what we and the Secretary have concluded is a permissible reading of the statute, that all departures from IWC schedules. regardless of the circumstances, call for immediate certification.[10]

V

We conclude that the Secretary's construction of the statutes neither contradicted the language of either Amendment, nor frustrated congressional intent. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S., at 842–843, 104 S.Ct., at 2781–2782. In enacting these Amendments, Congress' primary goal was to protect and conserve whales and other endangered species. The Secretary furthered this objective by entering into the agreement with Japan, calling for that nation's acceptance of the worldwide moratorium on commercial whaling and the withdrawal of its objection to the IWC zero sperm whale quota, in exchange for a transition period of limited additional whaling. Given the lack of any express direction to the Secretary that he must certify a nation

9. Indeed, to the extent that the hearings on the Packwood Amendment are indicative of congressional intent, they support the Secretary's view of his duty and authority to certify whaling in excess of IWC limits. Hearings before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 96 Cong., 1st Sess., 311–312, 317 (1979).

We note also that in 1984, Senator Packwood introduced a further amendment to the Packwood-Magnuson Amendment. This proposal required that "[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission shall be deemed to be certified for the purposes of this [act]." Quoted in Comment, The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment, 19 Geo.Wash.J.Int'l L. & Econ. 501, 533, n. 220 (1986). Congress thus had the express opportunity to mandate that the Secretary certify any foreign nation which exceeds an IWC quota, but chose not to do so.

10. The "diminish the effectiveness of" standard has been used in legislation other than the Pelly and Packwood Amendments. It first appeared in the 1962 amendment to the Tuna Convention Act of 1950, 64 Stat. 777, 16 U.S.C. § 951 *et seq.* It was also used in 1984 in the Eastern Pacific Tuna Licensing Act, 16 U.S.C. § 972 *et seq.* (1982 ed., Supp. II), which was enacted to implement the Eastern Pacific Ocean Tuna Fishing Agreement. Nothing has been called to our attention in the history of these acts to indicate that this standard calls for automatic certification once the Secretary has discovered that foreign nationals are violating an international fishing convention or agreement. Indeed, to the extent they are relevant, they lend affirmative support to the position that Congress has employed the standard to vest a range of judgment in the Secretary as to whether a departure from an agreed limit diminishes the effectiveness of the international conservation effort and hence calls for certification.

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whose whale harvest exceeds an IWC quota, the Secretary reasonably could conclude, as he has, that, "a cesation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development." Affidavit of Malcolm Baldrige, Brief for Petitioners in No. 85–955, Addendum III, pp. 6A–7A.

[5] We conclude, therefore, that the Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments. Congress granted the Secretary the authority to determine whether a foreign nation's whaling in excess of quotas diminishes the effectiveness of the IWC, and we find no reason to impose a mandatory obligation upon the Secretary to certify that every quota violation necessarily fails that standard. Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice MARSHALL, with whom Justice BRENNAN, Justice BLACKMUN, and Justice REHNQUIST join, dissenting.

Since 1971, Congress has sought to lead the world, through the repeated exercise of its power over foreign commerce, in preventing the extermination of whales and other threatened species of marine animals. I deeply regret that it will now have to act again before the Executive Branch will finally be compelled to obey the law. I believe that the Court has misunderstood the question posed by the case before us, and has reached an erroneous conclusion on a matter of intense worldwide concern. I therefore dissent.

Congress began its efforts with the Pelly Amendment, which directs that "[w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President." 22 U.S.C. § 1978(a)(1). That Amendment, although apparently mandatory in its certification scheme, did not provide for a mandatory response from the President once the certification was made. Rather, the President was empowered, in his discretion, to impose sanctions on the certified nations or not to act at all. § 1978(a)(4).

This executive latitude in enforcement proved unsatisfactory. Between 1971 and 1978, every time that a nation exceeded international whaling quotas—on five occasions—the Secretary of Commerce duly certified to the President that the trespassing nation had exceeded whaling quotas set by the International Whaling Commission and had thus diminished the effectiveness of the conservation program. See App. 168, 177.* Although the offending nations had promised immediate compliance, the Secretary apparently believed that he was obliged to certify the past violations. Yet on the basis of those assurances, the President each time exercised his option under the Pelly Amendment to impose no sanctions on the violators. *Id.*, at 193, 195.

Unhappy with the President's failure to sanction clear violations of international whaling agreements, Congress responded in 1979 with the Packwood Amendment. That Amendment provides that if the Secretary of Commerce certifies that a country is diminishing the effectiveness of the International Convention for the Regulation of Whaling, the Secretary of State must reduce the fishing allocation of the offending nation by at least 50 percent. 16 U.S.C. § 1821(e)(2). It also provides cer-

* Citations to "App." refer to the joint appendix filed by the parties in the Court of Appeals; the Solicitor General sought and was granted leave not to file a joint appendix in this Court.

tain time limits within which the Executive Branch must act in imposing the mandatory sanctions. The automatic imposition of sanctions, it seemed, would improve the effectiveness of the Pelly Amendment by providing a definite consequence for any nation disregarding whaling limits. See 125 Cong.Rec. 22084 (1979) (statement of Rep. Oberstar).

In 1984, the Secretary of Commerce for the first time declined to certify a case of intentional whaling in excess of established quotas. Rather than calling into play the Packwood Amendment's mandatory sanctions by certifying to the President Japan's persistence in conducting whaling operations, Secretary Baldrige set about to negotiate with Japan, using his power of certification under domestic law to obtain certain promises of reduced violations in future years. In the resulting compromise, the Secretary agreed not to certify Japan, provided that Japan would promise to reduce its whaling until 1988 and then withdraw its objection to the international whaling quotas. Arguing that the Secretary had no discretion to withhold certification, respondents sought review of the Secretary's action in federal court. Both the District Court, 604 F.Supp. 1398 (DC 1985), and the Court of Appeals, 247 U.S.App.D.C. 309, 768 F.2d 426 (1985), found that Congress had not empowered the Secretary to decline to certify a clear violation of International Whaling Commission (IWC) quotas, and ordered the Secretary to make the statutory certification. This Court now renders illusory the mandatory language of the statutory scheme, and finds permissible exactly the result that Congress sought to prevent in the Packwood Amendment: executive compromise of a national policy of whale conservation.

I

The Court devotes its opinion to the question whether the language of the Pelly or the Packwood Amendment leaves room for discretion in the Secretary to determine that a violation of the whaling quota need not be certified. Although framed in the same way by the Court of Appeals and by the parties before this Court, that issue is not the most direct approach to resolving the dispute before us. Indeed, by focusing entirely on this question, the Court fails to take into account the most significant aspect of this case: that even the Secretary himself has not taken the position that Japan's past conduct is not the type of activity that diminishes the effectiveness of the whale conservation program, requiring his certification under the Pelly Amendment. In the face of an IWC determination that only a zero quota will protect the species, never has the Secretary concluded, nor could he conclude, that the intentional taking of large numbers of sperm whales does *not* diminish the effectiveness of the IWC program. Indeed, the Secretary has concluded just the opposite. Just four months before the execution of the bilateral agreement that spawned this litigation, Senator Packwood wrote to the Secretary as follows:

> "It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which continues commercial whaling after the IWC moratorium takes effect would definitely be certified. I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.
>
> "What I am asking, Mac, is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson." App. 197 (Letter from Sen. Packwood to Secretary Baldrige, June 28, 1984).

The Secretary expressed his agreement:

> "You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to

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certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC." *Id.*, at 198 (Letter from Secretary Baldrige to Sen. Packwood, July 24, 1984).

It has not been disputed that Japan's whaling activities have been just as described in that correspondence. The Secretary's expressed view is borne out by his apparent belief, four months later, that he held sufficient power under domestic law to threaten certification in an effort to extract promises from Japan regarding its future violations. Presumably he would not threaten such certification without believing that the factual predicate for that action existed.

I cannot but conclude that the Secretary has determined in this case, *not* that Japan's past violations are so negligible that they should not be understood to trigger the certification obligation, but that he would prefer to impose a *penalty* different from that which Congress prescribed in the Packwood Amendment. Significantly, the Secretary argues here that the agreement he negotiated with Japan will—in the future—protect the whaling ban more effectively than imposing sanctions now. Brief for Federal Petitioners 43. But the regulation of future conduct is irrelevant to the certification scheme, which affects future violations only by punishing past ones. The Secretary's manipulation of the certification process to affect punishment is thus an attempt to evade the statutory sanctions rather than a genuine judgment that the effectiveness of the quota has not been diminished.

The Secretary would rewrite the law. Congress removed from the Executive Branch any power over penalties when it passed the Packwood Amendment. Indeed, the Secretary's compromise in this case is precisely the type of action, previously taken by the President, that led Congress to enact the mandatory sanctions of the Packwood Amendment: in 1978, five nations had been found to have exceeded quotas, but the President had withheld sanctions upon the promise of future compliance with international norms. Here, the future "compliance" is even less satisfactory than that exacted in the past instances: instead of immediate compliance, the Secretary has settled for continued violations until 1988. And in 1988 all that Japan has promised is to withdraw its formal objection to the IWC moratorium; I see no indication that Japan has pledged to "cease commercial whaling by 1988," *ante*, at 2865, or to "dismantle its commercial whaling industry." Brief for Federal Petitioners 43. The important question here, however, is not whether the Secretary's choice of sanctions was wise or effective, but whether it was authorized. The Court does not deny that Congress intended the consequences of actions diminishing the effectiveness of a whaling ban to be governed exclusively by the sanctions enumerated in the Packwood Amendment, with the optional addition of those provided in the Pelly Amendment. Thus, when the Secretary's action here, well-intentioned or no, is seen for what it really is—a substitute of his judgment for Congress' on the issue of how best to respond to a foreign nation's intentional past violation of quotas—there can be no question but that the Secretary has flouted the express will of Congress and exceeded his own authority. On that basis alone, I would affirm the judgment of the Court of Appeals.

II

A quite separate concern is raised by the majority's treatment of the issue that it does address. The Court peremptorily rejects the Court of Appeals' conclusion that Congress intended the Pelly Amendment to impose a nondiscretionary duty on the Secretary of Commerce to certify whenever a nation has exceeded whaling quotas. Asserting that "we find nothing in the legislative history of either Amendment that addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whal-

ing," *ante*, at 12, the Court has simply ignored the many specific citations put forth by respondents and the Court of Appeals to just such authority, and has offered nothing to contradict them.

The Court of Appeals devoted voluminous portions of its opinion to excerpts from legislative history establishing that Congress expected that substantial violations of whaling quotas would always result in certification. Illustrative of these are the following exchanges between Members of Congress and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, discussing the meaning of the Pelly Amendment in preparation for the 1979 legislation:

> "Mr. McCLOSKEY.... Now, it seems to me the discretion then is left with the President and the Secretary of the Treasury, not with the Secretary of Commerce. If you have determined, as you in your testimony indicate, that Japan is importing non-IWC whale products, *I do not see where you have any discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change*.... [T]he certification is a mandatory act under the law. It is not a discretionary act.
>
> "Mr. FRANK. That is correct.
>
> . . . . .
>
> "Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing. But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas, or the elimination of any imported fish products from that country and, the second part is the optional authority that the President has.
>
> "Mr. FRANK. That is correct. The first one is mandatory on the Secretary of Commerce. The second is discretionary on the part of the President." Hearings 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, 322–323 (1979) (emphasis added).

Representative Breaux summarized the Administration's representations to Congress:

> "Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the importation of whale meat [which involve discretion on the part of the Secretary]." *Id.*, at 359 (remarks of Rep. Breaux).

This and other legislative history relied on by the Court of Appeals demonstrates that Congress believed that, under the Pelly Amendment, when a nation clearly violated IWC quotas, the only discretion in the Executive Branch lay in the choice of sanction. The Packwood Amendment removed that discretion. The majority speculates that "it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits," *ante*, at 2867. However, because everyone in the Congress and the Executive Branch appeared to share an understanding that quota violations would always be considered to diminish the effectiveness of a conservation program, in accord with the consistent interpretations of past Secretaries of Commerce, there was no need to amend the statute. It was only when Secretary Baldrige became dissatisfied with the Packwood Amendment sanctions that the certification obligation was ever questioned.

The sole support that the Court offers for its position is the unobjectionable proposition, in a House Report, that " '[a]n iso-

lated, individual violation of a convention provision will not ordinarily warrant certification under this section.'" *Ante*, at —— (quoting H.R.Rep. No. 95–1029, p. 15 (1978)). Petitioners indeed have a respectable argument that the Secretary was left with some inherent discretion to ignore violations of a *de minimis* nature. Such an argument, however, has no relevance to this case. It is uncontested here that Japan's taking of whales has been flagrant, consistent and substantial. Such gross disregard for international norms set for the benefit of the entire world represents the core of what Congress set about to punish and to deter with the weapon of reduced fishing rights in United States waters. The Court's decision today leaves Congress no closer to achieving that goal than it was in 1971, before either Amendment was passed.

III

I would affirm the judgment below on the ground that the Secretary has exceeded his authority by using his power of certification, not as a means for identifying serious whaling violations, but as a means for evading the constraints of the Packwood Amendment. Even focusing, as the Court does, upon the distinct question whether the statute prevents the Secretary from determining that the effectiveness of a conservation program is not diminished by a substantial transgression of whaling quotas, I find the Court's conclusion utterly unsupported. I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress' pointed response to a question long pondered: "whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff." H. Melville, Moby Dick 436 (Signet ed. 1961).

Roland V. ACOSTA

v.

LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES et al.

No. 85–1500.

June 30, 1986.

Plaintiff whose civil rights action was dismissed and against whom attorney fees were awarded moved to alter or amend judgment. The District Court denied the motion, and plaintiff filed notice of appeal, before order denying the motion to alter or amend judgment was entered. The Court of Appeals dismissed the appeal as prematurely filed. Plaintiff petitioned for writ of certiorari. The Supreme Court granted the writ and held that the notice of appeal was ineffective.

Affirmed.

Justice Brennan would grant the petition for certiorari and set the case for oral argument.

Justice Marshall dissented from summary disposition.

1. Federal Civil Procedure ⇐2747

Petition for certiorari was not "frivolous" in action involving direct conflict between federal circuits over interpretation of rules of appellate procedure.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts ⇐668

Notice of appeal, filed before order denying appellant's motion to alter or amend judgment was entered on docket, was premature and ineffective. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.; F.R.A.P. Rule 4(a)(2, 4), 28 U.S.C.A.