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INTERNATIONAL REGULATION OF WHALING: THE UNITED STATES' COMPROMISE

INTERNATIONAL CONSERVATION—United States enforcement of international whaling programs—Neither the Pelly Amendment nor the Packwood Amendment require the Secretary of Commerce to certify to the President of the United States International Whaling Commission quota violations by a foreign nation. *Japan Whaling Association v. American Cetacean Society,* 106 S.Ct. 2860 (1986).

INTRODUCTION

Between 1931 and 1971, more than two million whales were harvested worldwide.[1] The total mortality rate of the species, which included mortality from whaling, has been "in excess of the maximum rate allowable for the steady maintenance of their numbers."[2] It is a fundamental tenet in international law that all nations have a duty to conserve the living resources of the sea, if only to ensure a renewable yield.[3] Whether for economic, political, or conservationist purposes, many nations have become parties to agreements concerned with the nonexploitation of whales.[4] The International Convention for the Regulation of Whaling (ICRW)[5] produced one such agreement.

The ICRW developed a schedule to regulate harvesting practices and set harvest limits for various whale species.[6] In addition, the ICRW established the International Whaling Commission (IWC) to carry out certain duties, such as amending the schedule and setting new harvest quotas.[7] However, the IWC has no power to impose sanctions for quota violations.[8]

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1. THE WHALING ISSUE IN U.S.-JAPAN RELATIONS 230 (J. Schmidhauser and G. Totten III ed. 1978).
2. *Id.* at 35.
3. Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, Switzerland, Apr. 29, 1958; 599 U.N.T.S. 285 [in force Mar. 20, 1966]. Art. 1(2) states that "[A]ll States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."
4. P. BIRNIE, LEGAL MEASURES FOR THE PREVENTION OF "PIRATE" WHALING 6 [International Union for the Conservation of Nature and Natural Resources, Gland, Switzerland].
5. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 [hereinafter ICRW].
6. *Id.* at Art. I, 62 Stat. 1717, 1723-27.
7. *Id.* at Art. III, 62 Stat. 1717-18; *Id.* at Art. V, 62 Stat. 1718-19.
8. *Id.* at Art. IX, 62 Stat. 1720.

Because of the IWC's inability to enforce its own quota, Congress passed two amendments, the Pelly and Packwood-Magnuson Amendments,[9] designed to improve compliance with international conservation programs such as the IWC. Both amendments direct 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. . . ."[10] The Pelly Amendment gave the President discretion to impose sanctions on an offending nation, while the Packwood-Magnuson Amendment requires the Executive Branch to impose economic sanctions against offending nations.[11] While both amendments are designed to improve compliance with international conservation programs, the Packwood-Magnuson Amendment reflects Congress' frustration with the President's power to refuse to impose sanctions on offending nations.

This casenote will discuss the recent Supreme Court decision of *Japan Whaling Association v. American Cetacean Society*,[12] which effectively strips the Pelly and Packwood-Magnuson Amendments of their enforcement power. In this case, the American Cetacean Society argued that the Secretary of Commerce had a mandatory duty to certify offending nations to the President. They also argued that a finding that a nation was "diminishing the effectiveness" of the IWC was automatic once that nation violated international quotas.[13] The Court held that the Secretary has the discretion to determine whether a foreign nation's violation of whaling quotas diminishes the effectiveness of the IWC.[14] This note will focus on legislative history regarding the Secretary's discretion to certify nations which exceed whaling quotas and the Supreme Court's interpretation of that history.

FACTS

In mid-October of 1984, several Japanese whalers departed from port.[15] On November 11, 1984, the whaling vessels returned to Japan carrying two sperm whales, despite an international moratorium which prohibited

9. Pelly Amendment of 1954, 22 U.S.C.§ 1978 (1982); Packwood-Magnuson Amendment of 1976, 16 U.S.C.§ 1821 (1982).

10. 22 U.S.C.§ 1978(a)(1); 16 U.S.C.§ 1821.

11. 22 U.S.C.§ 1978(a)(3); 16 U.S.C.§ 1821(e)(2).

12. Japan Whaling Association v. American Cetacean Society, 474 U.S. 4929 (1986) [hereinafter *American Cetacean Society III*].

13. The term "diminish the effectiveness" is not defined in the statute. Because of this failure, the heart of the controversy at hand centers around the interpretation of the term.

14. *American Cetacean Society III*, 106 S.Ct. at 2872.

15. Plaintiff's Amended Complaint at 12-13, American Cetacean Society v. Baldridge, 604 F.Supp. 1398 (D.D.C. 1985) [hereinafter *American Cetacean Society I*)

the harvesting of sperm whales.[16] Japan was not bound by the moratorium for several reasons. Although a member nation of the ICRW, Japan had filed objections to the limitations set by the ICRW. By the terms of the moratorium, Japan was therefore not bound to comply with the limits established.[17] Further, Japan, aware of potential sanctions from the United States under the Pelly and Packwood-Magnuson Amendments, had entered into an executive agreement with the United States. This agreement allowed Japan to exceed limits set on whaling in exchange for Japan's agreement to cease commercial whaling by 1988.[18]

Just prior to the consummation of the executive agreement, ten environmental groups [19] led by Greenpeace U.S.A. filed suit in the United States District Court for the District of Columbia.[20] The groups sought a writ of mandamus to compel the Secretary of Commerce to certify to the President that Japan was in violation of an established sperm whale quota. The groups wanted a determination that violating an established whaling quota necessarily "diminished the effectiveness" of international programs designed to preserve whale species. Through the writ the groups sought implicit verification that Japan was diminishing the effectiveness of the IWC program. If Japan was diminishing the effectiveness of the program, the American Cetacean Society argued that the Secretary had a non-discretionary duty to certify Japan to the President. The President then, in turn, had a non-discretionary duty to impose sanctions on Japan.[21]

The District Court granted summary judgment for the plaintiffs and ordered certification by the Secretary.[22] The court held that the Secretary had a "clear, non-discretionary duty"[23] to certify to the President that Japanese nationals had violated the quota, in effect "diminishing the effectiveness" of the IWC program. Additionally, the court held that *any*

16. The International Convention for the Regulation of Whaling, adopted a zero quota for North Pacific sperm whales in 1981 and voted in 1982 to implement a commercial whaling moratorium beginning in 1986, *see supra* note 5. *American Cetacean Society I*, 604 F.Supp. at 1403.

17. Japan was not bound under international law to comply with these quotas because it filed timely objections to ICRW amendments pursuant to Article V, para. 3(c) of the ICRW. *Id.* Japan's objection to the Schedule provisions was that the amendments were not based on scientific data and therefore improperly approved.

18. The Secretary of Commerce concluded the executive agreement five days after this suit was filed. *American Cetacean Society I*, 604 F.Supp. at 1404. Note: In Nov. 1986, Japan agreed to cease all commercial whaling by 1988.

19. The plaintiffs were the 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, and Thomas Garrett. On Dec. 13, 1984, the Connecticut Cetacean Society, Defenders of Wildlife, and Friends of the Earth joined the plaintiffs in the district court action.

20. *American Cetacean Society I*, 604 F.Supp. at 1398.

21. *Id.* at 1405.

22. *Id.* at 1411.

23. *Id.*

taking of whales in excess of established quotas diminished the effectiveness of an international fishery conservation program.[24] The effect of this decision was to require the Secretary to certify to the President any nation which exceeded whaling quotas.

A divided Court of Appeals affirmed.[25] Circuit Judge J. Skelley Wright held that the Secretary had a non-discretionary duty to certify any member nation which exceeded whaling quotas.[26] The Circuit Court based its decision on the extensive legislative history of the Pelly and Packwood-Magnuson Amendments which provided for the enforcement of quotas set by the international fishery conservation programs.[27] The court found Congress' intent unambiguous and clear. The court held that "where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program."[28]

The United States Supreme Court, in a five-to-four decision, granted certiorari and reversed. Justice White, writing for the Court, held that there was nothing in either the statutory amendments or the legislative history which required the Secretary to certify Japan for refusing to abide by the whaling quotas set by the IWC.[29]

BACKGROUND

The ICRW and IWC

On December 2, 1946, fifteen whaling nations, including the United States, convened in Washington D.C. for the International Convention for the Regulation of Whaling (ICRW).[30] A major purpose behind the ICRW was to establish a system of international regulation for whale fisheries. The preamble to the ICRW states that it "[r]ecognizes specifically the interest of all the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks."[31] One outcome of the Convention was a schedule regulating whale harvesting practices of member nations and setting harvest limits for various whale species.[32]

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24. *Id.* The court also found that the amendments providing for the imposition of sanctions were designed to "put teeth into the certification process by eliminating the discretion given. . . ." *Id.*

25. American Cetacean Society v. Baldridge, 768 F.2d 426 (D.C. Cir.1985), *cert. granted*, 106 S.Ct. 787 (1986) [hereinafter *American Cetacean Society II*].

26. *Id.* at 444.

27. *Id.* at 435-37.

28. *Id.* at 444.

29. *American Cetacean Society III*, 474 U.S. at 4934.

30. P. BIRNIE, *supra* note 4, at 6.

31. *See supra* note 5.

32. *See supra* note 30, at 12.

Along with establishing a schedule for whale harvesting, the ICRW also established the International Whaling Commission (IWC).[33] The IWC was authorized to amend the ICRW Schedule by setting harvest quotas based on scientific data and the effects on the whaling industry.[34] However, the IWC was not empowered to impose sanctions for quota violations.[35] Further, the IWC contained a major loophole. Any member nation who filed a timely objection to an IWC amendment exempted itself from any obligation to comply with the limit set.[36]

In 1981, the IWC established a zero quota for the harvesting of sperm whales. Japan filed timely objections to the quota, as well as to a 1982 commercial whaling moratorium. Under the terms of the ICRW "loophole" which exempted any member nation who filed a timely objection, Japan was not bound to comply with either limitation.

The Pelly and Packwood Amendments

Because of the IWC's inability to enforce its own quotas, Congress enacted the Pelly Amendment to the Fisherman's Protective Act in 1971.[37] The Pelly Amendment provided an enforcement power that the international regulations did not have. Under the Pelly Amendment, the United States could impose economic sanctions against foreign states which undermine fishery conservation programs.[38]

The Amendment directs the Secretary of Commerce to certify to the President if nationals of a foreign country are conducting fishing operations in such a way that would "diminish the effectiveness" of an inter-

33. ICRW, Art. I, para. 1, 62 Stat. 1716-17.

34. *Id.* at Art. IV, para. 1, 62 Stat. 1718. Art. IV, para. 1 provided that the IWC be composed of one representative from each member nation. Article IV requires the Commission to

(a) encourage, recommend, or if necessary, organize studies relating to whales and whaling;

(b) collect and analyze statistical information concerning current condition and trend of the whale stocks and the effects of whaling activities thereon;

(c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.

35. *Id.* at Art. IX, 62 Stat. 1716, 1720.

36. Art. V of the ICRW states that "the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn." *Id.* at Art. V, para. 3(c), 62 Stat. 1716, 1719.

37. Pelly Amendment of 1954, 22 U.S.C. § 1978 (1982). Named for Representative Pelly, the Pelly Amendment applies to activities that "diminish the effectiveness" of an international fishery conservation program, which is defined as "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." 22 U.S.C. § 1978(h)(3).

38. Packwood-Magnuson Amendment of 1978, 16 U.S.C. § 1821(a)(4). The pertinent language states: "Upon receipt of any certification . . . the President *may* direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products . . . or wildlife products. . . ." (emphasis added). *Id.*

national fishery program.[39] Once a country is certified, the President has the discretion whether to direct the imposition of sanctions against the offending nation.[40] These sanctions include prohibiting offending nations from importing fish products.[41]

Because the President's duty to impose sanctions on a certified nation was discretionary, Congress acted to strengthen the IWC's ability to enforce its quotas. The Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act[42] required expedition of the certification process and mandated the imposition of economic sanctions by the Executive Branch on a certified nation.[43] However, the scope of the Secretary's duty concerning the requirements for certifying a nation to the President for sanctions remained unclear. Of central importance to the present case is whether, under these amendments, the Secretary of Commerce has a duty to certify a nation which exceeds quotas imposed by the IWC or whether this power is merely discretionary.

ANALYSIS

Under the Pelly and Packwood-Magnuson Amendments, certification is required when the Secretary determines that a foreign nation is conducting fishing operations which diminish the effectiveness of the ICRW.[44] Yet neither amendment clearly defines when a foreign country is conducting fishing operations in such a manner as to "diminish the effectiveness" of the ICRW or the IWC.[45] The Supreme Court's recent decision in *American Cetacean Society III* does not help to clarify the issue. Rather, it avoids a potentially political situation with Congress and the Executive Branch by interpreting the amendments as granting broad discretionary power in the Secretary of Commerce.

39. *Id.* at § 1821 (a)(2). The pertinent language states: "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." (emphasis added). *Id.*

40. *See supra* note 38.

41. *Id.*

42. Packwood-Magnuson Amendment of 1976, 16 U.S.C. § 1821 (1982).

43. *Id.* [named for Senator Packwood]. *See* 125 CONG. REC. 22,081 (1979). Rep. Murphy commented that the certification process was "taking entirely too much time" and that "it is the intent of [the Packwood-Magnuson Amendment] to make it clear that the Congress expects [the Secretaries of Commerce and Interior] to act swiftly and promptly in making such investigations . . . in the future."

44. 22 U.S.C. § 1978(a)(1); 16 U.S.C. § 1821.

45. Section (e)(2)(A) of the Packwood-Magnuson Amendment states that "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." Section (a)(1) of the Pelly Amendment is virtually identical.

The visible question in *American Cetacean Society III* is whether the Secretary of Commerce has a nondiscretionary duty to certify to the President nations which violate established whaling quotas. The underlying issue is whether the violation of whaling quotas necessarily "diminishes the effectiveness" of international fishery conservation programs, or whether the Secretary has the discretion to determine what conduct diminishes the effectiveness.

Legislative History

In its analysis, the Court focused exclusively on statutory interpretation, rather than treading onto the less traditional ground of policymaking. Thus, the Court relied heavily on the legislative history of the Pelly and Packwood Amendments. Because Congress did not clearly define the term "diminish the effectiveness," the term was left open to judicial interpretation. Unfortunately, the legislative history of the Pelly and Packwood Amendments does not clearly indicate whether a violation of an IWC regulation requires certification by the Secretary to the President.

To determine congressional intent, the Supreme Court utilized the principles of statutory construction.[46] For example, the motive underlying enactment of a statute should be carefully considered in determining the true congressional intent of the statute.[47] The Supreme Court in this case recognized this principle when it stated that "[i]f Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter."[48] Thus, sponsoring legislation, while not conclusive, should be accorded great weight in determining legislative intent.[49]

The Court relied on select legislative history to support its holding. Representative Pelly, sponsor of the Pelly Amendment, stated that a primary purpose of his bill was to enforce compliance with international fishery conservation measures which lacked any real enforcement power of their own.[50] The Supreme Court did not rely on this statement. Rather, it focused on Senate Hearing statements by Representative Pelly that the Pelly Amendment sanctions were to be applied only "in the case of *flagrant* violation of any international fishery conservation program to which the United States has committed itself."[51] The Supreme Court determined that because it was unclear what constitutes a "flagrant"

46. The construction of a statute is a question for the court. However, courts are bound by certain principles of statutory construction. *See* Armstrong Paint and Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938), *reh'g denied*, 305 U.S. 675 (1939).

47. *See* U.S. v. Henning, 344 U.S. 66 (1952), *reh'g denied*, 344 U.S. 910 (1952).

48. *American Cetacean Society III*, 106 S.Ct. at 2867.

49. *See* U.S. v. Henning, 344 U.S. 66 (1952).

50. 117 CONG. REC. 34,752 (1971) (Statement of Rep. Pelly).

51. *Id.*

violation, Congress intended to give the Secretary discretion in determining what violated the standard.[52]

The dissent argues that Senator Packwood clearly understood the ramifications of his Amendment.[53] In a letter to the Secretary of Commerce, Senator Packwood stated, "I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC."[54] The Secretary agreed in a subsequent letter that "any such whaling . . . would clearly diminish the effectiveness of the IWC."[55] The Secretary of Commerce made other comments which support the position of the *American Cetacean Society* that any violation of an IWC regulation required certification and sanctions. In a letter concerning the complete moratorium on commercial whaling to go into effect in 1985, the Secretary stated that "[a]ny government that chooses to ignore the commercial whaling moratorium implemented by the IWC and thereby *diminishes the effectiveness* of the IWC should be prepared to accept the consequences of this noncompliance."[56] While the district court chose to rely heavily on this statement,[57] the Supreme Court ignored it.

Additional support for the dissent's position that the Secretary had a non-discretionary duty is found in a Senate report which expressly laid out the purpose of the Pelly Amendment.[58] The statement supported a nondiscretionary duty in the Secretary to certify nations which exceeded whaling quotas.[59] The majority glossed over the statement by asserting that it contained "not the words of a ministerial duty, but the imposition of a duty to make an informed judgment."[60]

In isolation, the Court's interpretation of this statement may be plausible. However, in the context of other legislative history, the existence of a nondiscretionary duty in the Secretary is evident. For example, exchanges between members of Congress and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, demonstrate that Congress believed that when a nation violated IWC

52. *American Cetacean Society III*, 106 S.Ct. at 2869.

53. *Id.* at 2873-74. (Marshall, J., dissenting.) Brennan, Blackmun, and Rehnquist joined in the dissent.

54. Letter from Senator Packwood to Secretary Baldridge, June 28, 1984.

55. Letter from Secretary Baldridge to Senator Packwood, July 24, 1984.

56. *Hearings on § 1242 et al. Before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce*, 92d Cong., 1st Sess. 47 (1971) (emphasis added).

57. *American Cetacean Society I*, 604 F.Supp. at 1408.

58. S. REP. NO. 582, 92d Cong., 1st Sess., 2 (1971).

59. S. REP. NO. 582 stated that the purpose of the Pelly 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." *Id.*

60. *American Cetacean Society III*, 106 S.Ct. at 2869.

quotas, the only discretion the President had was in his choice of sanction.[61] Representative Breaux summarized Mr. Frank's remarks to Congress by stating that "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."[62]

Based on overwhelming legislative history of this sort, it seems clear that Congress understood that the Secretary had a nondiscretionary duty to certify a nation which violated IWC quotas. However, the Court may have disregarded much of the legislative history for political reasons.

The Political Arena

Although conflicting and ambiguous legislative history allowed the Court an "out" in this case, it is clear that the Court's position avoided a political battlefield.[63] If the Court had affirmed the court of appeals by ruling that the Secretary of Commerce had a nondiscretionary duty to certify any member nation which violated a whaling limitation, the Court would have derogated the Executive Agreement between the United States and Japan. The effect of this derogation may have been to threaten an otherwise harmonious working relationship between the United States and Japan. Further, an affirmance by the Court could have made other countries less willing to enter into executive agreements with the United States for fear that the agreements could become empty-handed promises at the whim of Congress.

The Court was aware of its potential intrusion into the political arena. Justice White stated that "[w]e 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."[64] By focusing its analysis exclusively on legislative history, the Court was able to avoid intrusion.[65] However, the Court's analysis focused too narrowly on select legislative history, and thus derogated the effectiveness of the Pelly and Packwood-Magnuson Amendments.

61. *Hearings on Whaling Policy and International Whaling Commission Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 301, 322-23 (1979).

62. *Id.* at 359 (remarks of Rep. Breaux).

63. It is interesting to note, however, that the Court concluded that the present case presented a justiciable controversy. The Court stated: "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." *American Cetacean Society III*, 106 S.Ct. at 2866.

64. *Id.*

65. *Id.*

CONCLUSION

This Court's decision itself effectively diminishes international fishery conservation programs by putting broad discretion in the Secretary of Commerce to determine when a violation has occurred. In its interpretation of the Pelly and Packwood-Magnuson Amendments, the Court relied upon select legislative history. The Court disregarded a large part of the legislative history which would have supported a finding that the Secretary had a nondiscretionary duty to certify any nation which exceeded whaling limits set by the IWC.

However, Congress is equally to blame for this problem as it left both the Packwood and Pelly Amendments open to interpretation. Congress easily could have stated that the Secretary must certify *every* violation of IWC quotas.[66] While legislative history can be a valuable and useful tool in interpreting statutory provisions, in this instance it proved to be confusing and, at times, contradictory, though a majority belief was certainly discernable. Congress now must act again if it wishes to make clear its meaning behind the Pelly and Packwood-Magnuson Amendments.

The Court seems to have been forced into its position because of its fear of encroaching on the Executive Branch. While this is certainly a legitimate fear, given our system of "separate but equal" branches of government, the Court, in a conservative political climate, used this excuse to sidestep the fundamental issue in *American Cetacean Society III*—the protection of our diminishing environmental resources.

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66. The Court itself stated that "[h]ad 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." *Id.* at 2867.