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Narrow Grounds for a Complex Decision: The Supreme Court's Review of an Agency's Statutory Construction in *Japan Whaling Association v. American Cetacean Society*

Christopher S. Gibson*  

INTRODUCTION

During the Twentieth Century, commercial whaling has depleted whale populations to dangerously low levels.1 The increased killing capabilities of commercial whalers and the slow reproductive and growth rates of whales have combined to diminish many species to near extinction.2 Moved by concern for the survival of whales, the International Whaling Commission (IWC), the operating body of the International Convention for the Regulation of Whaling (ICRW),3 has adopted since the 1970s specific numerical quotas to limit the taking of various species and individual stocks of whales.4 Under the terms of the ICRW, how-

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ever, the IWC has no power to impose sanctions on its members for quota violations. Moreover, any member country may file a timely objection to an IWC amendment of the quotas and thereby exempt itself from any obligation to comply with the limit.

The United States Congress has recognized the importance of protecting whales. To promote enforcement of the quotas set by the IWC, Congress adopted the 1971 Pelly Amendment to the 1967 Fishermen’s Protective Act and the 1979 Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act. The Pelly Amendment provides that when the Secretary of Commerce determines that a country is “diminishing the effectiveness of an international fishery conservation program,” he must certify that fact to the President. The President, in his discretion, can decide whether or not to prohibit the importation of fish products into the United States from the offending country. In contrast to the Pelly Amendment, the Packwood-Magnuson Amendment removes the President's role. It provides that once the Secretary of Commerce certifies that a country is diminishing the effectiveness of the ICRW, the Secretary of State must impose a sanction against that country. The sanction is an immediate reduction, by not less than 50 percent, of that country’s fishing allocation in the United States’ 200-mile fishery conservation zone. The Packwood-Magnuson Amendment does not alter the Pelly Amendment’s provision regarding the Secretary of Commerce’s certification of a foreign country; the amendment simply provides for an additional mandatory sanction where certification occurs in the whaling context.

In Japan Whaling Association v. American Cetacean Society, the United States Supreme Court also made its mark on whales. The case began when wildlife conservationists filed suit in district court to obtain a writ of mandamus compelling the Secretary of Commerce to certify Japan for harvesting sperm whales in violation of an IWC zero quota.

5. See infra note 34.
6. See infra note 33.
10. See infra note 43 and accompanying text.
11. See infra notes 47 & 49 and accompanying text.
12. See infra note 48 and text accompanying note 49.
13. See infra notes 47-50 and accompanying text.
15. See infra note 59.
16. The IWC zero quota meant that no sperm whales could be harvested by whalers. See
Five days after the conservationists filed suit, Japan and the United States concluded an executive agreement in lieu of certification concerning Japan’s whaling activities. Nevertheless, the conservationists won favorable decisions before both the district court and, on appeal, the United States Court of Appeals for the District of Columbia Circuit. The Supreme Court, however, rejected the conservationists’ plea and held that the Pelly and Packwood-Magnuson Amendments do not require the Secretary to certify a country for harvesting whales in violation of an IWC quota. Instead, the Court held that the Secretary possesses a range of discretion that allows him to forego certification in light of an executive agreement that ostensibly furthers conservationist ends.

The five-to-four majority summarily dismissed the political question doctrine as a barrier to judicial resolution of the controversy. The majority instead relied on the deferential approach to an agency’s statutory interpretation set out in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* After reviewing the legislative history of the amendments, the majority concluded that the Secretary of Commerce’s construction of the statute was reasonable. The dissent also examined the legislative history of the amendments but concluded that the Secretary’s duty to certify was mandatory. The minority emphasized, however, not the legislative history of the amendments, but evidence that the Secretary exceeded his authority by not certifying Japan: the minority intimated that the Secretary knew his certification was required but nevertheless chose to impose an unauthorized penalty different from that prescribed by the Packwood-Magnuson Amendment.

The *American Cetacean Society* decision will have a more noticeable impact on the Pelly and Packwood-Magnuson Amendments and, therefore, on international whale conservation efforts, than it will on judicial review of statutory construction by administrative agencies. The decision nullified the additional enforcement effect that the Packwood-Magnuson Amendment might have added to the Pelly Amendment for

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17. See infra note 61.
19. 106 S. Ct. at 2871-72; see infra text accompanying notes 93-94.
20. 106 S. Ct. at 2866; see infra notes 95-102 and accompanying text.
21. 467 U.S. 837 (1984); see infra note 104 and text accompanying notes 104-08.
22. 106 S. Ct. at 2867-68.
23. *Id.* at 2872-75 (Marshall, J., dissenting).
securing compliance with international whale conservation programs. The decision impaired the operation of the Pelly Amendment as well. In the process of weakening the amendments, American Cetacean Society also undermined the effectiveness of the IWC as an organization for protecting whales. On its face, the decision seems to extend the deferential standard set forth in *Chevron* for review of an agency's statutory construction. As a result, the decision raises questions about what degree of specificity is required of Congress in enacting statutes before a court justifiably can find that an agency is acting outside its statutory authority. This Note, however, suggests that the Court's decision was influenced heavily by the international and political circumstances of the controversy. Although the Court may have decided properly that the political question doctrine presented no barrier to the judicial resolution of the controversy, it was remiss in failing to acknowledge and weigh openly the international and political factors that framed and pressured its decision.

Sections I and II of this Note consider the Supreme Court's decision in *American Cetacean Society* against the backdrop of the development of the ICRW, the relevant portions of the Pelly and Packwood-Magnuson Amendments, and the lower court proceedings. Section III examines the majority and dissenting opinions. Finally, Section IV discusses the potential significance of *American Cetacean Society*.

I
BACKGROUND

The ICRW was created in 1946 with twin objectives: conserving whale stocks and assisting in the orderly development of the whaling industry. Over time, these goals proved incompatible. With a growing membership of nonwhaling countries and a mounting concern over decreasing whale populations, the ICRW today has evolved into the princi-

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28. Brief for the Federal Petitioners at 3-4, 106 S. Ct. 2860 (Nos. 85-954, 85-955) (cites the growth of the IWC membership to 41 countries, with the majority either nonwhaling countries or those that have discontinued whaling practices).
pal international vehicle to promote whale conservation. The IWC, the
body authorized to carry out the ICRW's objectives, sets whaling quotas
and regulates whaling methods. The whaling quotas are binding on
IWC members if approved by a three-fourths majority vote. Despite
this arrangement, the enforcement power of the IWC is limited. The
IWC has jurisdiction only over contracting governments. The IWC's
regulations, quotas, and moratoriums also are subject to a member’s ob-
jection, which permits that IWC member to avoid the limit. In addi-
tion, under the terms of the ICRW, the IWC has no power to impose
sanctions for violations of a quota.

Given this lack of sanctions and the unenforceability of IWC limits,
the United States Congress has adopted legislation to promote compli-
ance with international whale conservation programs. In 1971, Congress
passed resolutions calling for an international whaling moratorium. In
the same year, Congress enacted the Pelly Amendment, which created
discretionary sanctions to be imposed by the President for the purpose of
enforcing international fishery conservation programs. In 1979, Con-
gress enacted the Packwood-Magnuson Amendment in an effort to add
a mandatory economic sanction when certification occurred and to
state explicitly the applicability to the ICRW of the Pelly and Packwood-
Magnuson Amendments.

Although Congress enacted the Pelly Amendment to stop nations

29. See Scarff, supra note 1, at 352-71. See generally Birnie, supra note 1 (chronicles the
shift over time in IWC policies toward conservation ends and examines, in particular, the role
of developing countries in this progression).
at 80. “The [IWC] may amend from time to time the provisions of the Schedule by adopting
regulations with respect to the conservation and utilization of whale resources ...” Id.
32. Whalers have contravened IWC restrictions by establishing “flags of convenience”
for their vessels in nonmember countries. For example, Panama, which had regularly attended
IWC meetings since 1951, allowed one of its whale factory ships to operate outside IWC regu-
lations by registering it under a Honduran flag. Birnie, supra note 1, at 943.
33. ICRW, supra note 3, art. V, para. 3, 62 Stat. at 1719, T.I.A.S. No. 1849 at 5, 161
U.N.T.S. at 80. The objection exempts a member country unless and until the objection is
withdrawn. Id.
34. Id. at art. IX, 62 Stat. at 1720, T.I.A.S. No. 1849 at 6, 161 U.N.T.S. at 84. Only the
contracting government having jurisdiction over the offense can punish infractions against or
contraventions of the ICRW. Id.
36. See supra note 7.
37. See supra note 8.
by the Secretary of Commerce occurs when “nationals of a foreign country, directly or indi-
rectly, are conducting fishing operations or engaging in trade or taking which diminishes the
effectiveness of the International Convention for the Regulation of Whaling.”
39. Id.
from overfishing Atlantic salmon, the amendment protects whales as well. It provides 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." Upon certification, the President "may direct the Secretary of the Treasury to prohibit the bringing or importation into the United States of fish products . . . from the offending country for such duration as the President determines appropriate . . . ." Between 1971 and 1978, the Secretary of Commerce certified five nations pursuant to the Pelly Amendment for taking whales in excess of IWC quotas. In each case, the President

40. The House committee report confirms that the immediate purpose of the Pelly Amendment was to assure enforcement of the ban by the International Convention for the Northwest Atlantic Fisheries (ICNAF) on the fishing of Atlantic salmon. H.R. REP. NO. 468, 92d Cong., 1st Sess. 8, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 2409 [hereinafter PELLY HOUSE REPORT]. Denmark, West Germany, and Norway had frustrated ICNAF attempts to control high seas salmon fishing by using the treaty's "objection" procedure, one that is similar to the objection mechanism in the ICRW. Brief for Respondents at 19, 106 S. Ct. 2860 (Nos. 85-954, 85-955) [hereinafter Brief for Respondents]. See also supra note 33 and accompanying text for an explanation of the IWC objection procedure.

41. Representative Pelly noted that the Pelly Amendment was intended to support whaling quotas:

The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. . . . commercial pressure has virtually wiped out the largest and most awesome species of whale. . . . [T]he committee has defined the term "fish products" to include marine mammals. As I have just indicated, whales are the most notable example of an over-exploited living marine resource. 117 CONG. REC. 34,752 (1971); PELLY HOUSE REPORT, supra note 40, at 6.

42. 22 U.S.C. § 1978(a)(1) (1982). Note that the phrase "international fishery conservation program" 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." Id. § 1978(h)(3). The phrase "diminish the effectiveness" is not defined in the statute. It is also worth noting that the legislative history of the Pelly Amendment indicates that the statute authorizes certification of nonmembers or members acting under a valid objection to an IWC quota. PELLY HOUSE REPORT, supra note 40, at 5, 8-10 (explaining that Denmark, although it objected to the ICNAF ban and was therefore exempt under the convention, would be covered under the Pelly Amendment).

43. 22 U.S.C. § 1978(a)(3) (1982) (emphasis added). In addition, the President is required to notify Congress of any actions taken pursuant to certification within 60 days of that certification. If the President does not impose sanctions, he must supply reasons to Congress for his failure to do so. Id. § 1978(b). The idea behind the amendment was that an offending country would be forced to choose the less damaging economic alternative, which usually would be giving up the proscribed fishing rather than losing its export market for fish products in the United States. PELLY HOUSE REPORT, supra note 40, at 7. The Packwood-Magnuson Amendment was intended to create similar economic leverage to force an offending country to choose between continued whaling with the amendment's sanctions or cessation of whaling. See 125 CONG. REC. 21,742-43 (1979).

44. See Brief for Respondents, supra note 40, at 22-24. In 1974, the Secretary of Commerce certified Japan and the Soviet Union for violating an IWC quota for minke whales, even though both countries had objected to the quota as permitted by the ICRW. Id. at 22-23. In
exercised his statutory discretion to withhold economic sanctions.\textsuperscript{45}

The Packwood-Magnuson Amendment was enacted in response to the President's refusal to impose sanctions against countries that had violated the ICRW.\textsuperscript{46} Like the Pelly Amendment, the Packwood-Magnuson Amendment vests responsibility in the Secretary of Commerce to ascertain and certify whether "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."\textsuperscript{47} Upon certification by the Secretary of Commerce, however, the amendment mandates that the fishing allocation\textsuperscript{48} of the offending country "shall be reduced by the Secretary of State . . . by not less than 50 percent."\textsuperscript{49} Thus, the President's discretion to impose or withhold sanctions is supplanted by a mandatory duty on the Secretary of State to impose sanctions. The amendment also preserves the option of imposing the discretionary Pelly Amendment sanctions in addition to the Packwood-Magnuson sanctions.\textsuperscript{50}

Although the Packwood-Magnuson Amendment added the requirement that sanctions be imposed when a country is certified, it left ambiguous the standards guiding the Secretary in the initial certification process, except to require expedition.\textsuperscript{51} This question of when the Secretary must certify a nation lay at the center of the conflict in American Cetacean Society. In the fall of 1984, with Japan whaling in violation of

\begin{footnotesize}
\begin{itemize}
\item 45. In all five certification cases, the President decided not to impose sanctions because he was satisfied by assurances of immediate compliance. \textit{Id.} at 24.
\item 46. 106 S. Ct. at 2864; Brief for Respondents, \textit{supra} note 40, at 24-25. Congress' intent to remove the President's discretion for imposing sanctions is clear: Mr. Speaker, to date, the Pelly Amendment has been somewhat effective in encouraging compliance with fishery agreements. The major weakness has been that certification does not necessarily impose any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty.
\item 48. Since 1976, the Magnuson Fishery Conservation and Management Act has regulated commercial fishing within the 200-mile fishery conservation zone of the United States. It authorizes the Secretary of State to grant foreign nations annual allocations of allowable levels of fishing within the 200-mile zone. \textit{Id.} \textsection 1821.
\item 49. \textit{Id.} \textsection 1821(e)(2)(B). The amendment also remedied the prior lags in monitoring and investigation under the Pelly Amendment by adding language to the Fishermen's Protective Act of 1967 requiring that the Secretary "promptly investigate any activity by foreign nationals that . . . may be cause for certification" and "promptly conclude . . . and reach a decision with respect to" any such investigation. 22 U.S.C. \textsection 1978(a)(3) (1982).
\item 50. The Packwood-Magnuson Amendment provides that a certification under the Packwood-Magnuson Amendment also serves as a certification for the purposes of the Pelly Amendment. 16 U.S.C. \textsection 1821(e)(2)(A)\textit{(i)} (1982 & Supp. III 1985).
\item 51. See \textit{supra} note 49.
\end{itemize}
\end{footnotesize}
an IWC zero quota for sperm whales, the Secretary withheld certification in light of an executive agreement made with Japan. At the same time, wildlife conservationist groups filed suit to compel the Secretary to certify Japan. Both the Pelly and Packwood-Magnuson Amendments provide that the Secretary must certify to the President when a country is acting so as to diminish the effectiveness of an international fishery program or the ICRW. Neither amendment, however, provides a definition of the key statutory phrase "diminish the effectiveness." Hence, the issue as defined by the Supreme Court majority in *American Cetacean Society* was whether the Secretary had discretion, under the language of the Amendments, to refuse to certify Japan by determining that Japan's violation of an IWC quota did not diminish the effectiveness of the ICRW.

II

LOWER COURT PROCEEDINGS

In 1981, the IWC voted to set a zero quota for North Pacific sperm whales. Japan filed a timely objection to this quota, and in 1982 was granted two additional years of sperm whaling through the 1983-84 season. The IWC in 1982 also voted to impose a five-year moratorium, effective in 1986, on all whaling, a moratorium to which Japan, Norway, Iceland, Brazil, and the Soviet Union objected. Because Japan filed timely objections to both the quota and the moratorium, under the terms of the ICRW it was not bound to comply with either limitation. Thus, in the fall of 1984, Japanese whalers continued to harvest whales in excess of IWC quotas.

In response to continued whaling by Japan, wildlife conservationist groups filed suit in the United States District Court for the District of
Columbia seeking a writ of mandamus compelling the Secretary to certify Japan.60 Five days after the suit was filed, and aware of the threat of Packwood-Magnuson Amendment sanctions, the United States and Japan reached an executive agreement on the matter through an exchange of letters in which the Secretary of Commerce pledged not to certify Japan.61 The district court nevertheless granted summary judgment for the conservationists and ordered the Secretary of Commerce immediately to certify to the President that Japan had violated the IWC sperm whaling quota.62 The court held that the Secretary of Commerce had a clear and nondiscretionary duty under the Pelly and Packwood-Magnuson Amendments to certify any nation whaling in violation of IWC quotas.63

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60. Id. at 1410-11. Plaintiffs also sought (1) a declaratory judgment that the Secretary's failure to certify violated both the Pelly and Packwood-Magnuson Amendments because any whaling activity in excess of IWC quotas necessarily "diminish[es] the effectiveness" of the ICRW; and (2) a permanent injunction prohibiting any executive agreement that would violate the certification and sanction requirements of the amendments. Id. at 1401.

61. 768 F.2d at 431. On November 13, 1984, Japan and the United States concluded an agreement through correspondence between Yasushi Marazumi, Japanese Charge d'Affaires in Washington, D.C., and Secretary of Commerce Malcolm Baldrige. Id. The Secretary pledged not to certify Japan for additional sperm whaling if Japan pledged to adhere to certain harvest limits and cease all commercial whaling by April 1, 1988. Specifically, the first part of the agreement allowed the Japanese whaling fleet to take up to 400 sperm whales during each of the 1984 and 1985 seasons on the condition that Japan agree to withdraw its objection to the IWC zero quota no later than December 13, 1984. Japan complied with this pledge on December 11, 1984.

The second part of the agreement allowed Japan to take up to 200 sperm whales in each of the 1986 and 1987 seasons, and to take other species subject to limits acceptable to the United States. In return, Japan agreed to cease all commercial whaling by April 1, 1988, and to withdraw its objection to the 1982 IWC moratorium by April 1, 1985. 604 F. Supp. at 1404. On April 5, 1985, Japan informed the Secretary of Commerce that it would withdraw its objection to the moratorium within five days of a decision by the United States Court of Appeals for the District of Columbia Circuit in favor of the United States. 768 F.2d at 447.

62. 604 F. Supp at 1411.

63. Id. In support of its decision, the district court looked first to the legislative history of the amendments to determine the "meaning and purpose" of the phrase "diminish the effectiveness." Id. at 1405-06. It concluded that Congress intended that any nation that exceeds the IWC quotas would be viewed as acting to diminish the effectiveness of the IWC and would be certified. Id. at 1409.

Second, the court noted that the consistent agency practice and interpretation of the amendments between 1971 and 1984 supported its conclusion. Id. at 1407. The court stressed that the Executive's position in this regard had been clear and consistent. Id. The court also reviewed Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1977) (per curiam). In Vance, Alaskan natives filed suit to compel the Secretary of State to file an objection to a 1977 IWC zero quota for bowhead whales so that they could continue to take 15 to 20 whales each year. The United States, however, stated that the filing of an objection would have a devastating effect on the IWC and harm the United States' leadership position in the protection of whales. Id. at 952.
On appeal, the United States Court of Appeals for the District of Columbia Circuit determined that the issue before it was a purely legal question of statutory interpretation. Arriving at the same conclusion as the district court and affirming the lower court's order, the District of Columbia Circuit held that Congress clearly intended that whaling in excess of internationally set quotas would per se “diminish the effectiveness” of the international fishery conservation program. The court of appeals concluded, therefore, that certification by the Secretary of Commerce is mandatory and nondiscretionary.

In support of its holding, the court emphasized that its approach to statutory interpretation was consistent with the deferential standard of review of agency decisionmaking announced in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* As to any statutory question, the Court noted, the first step is to determine the intent of Congress. Specifically, if the intent of Congress is clear, then “that intention is the law and must be given effect.” However, if the statute is silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's construction of the statute is reasonable. Applying the *Chevron* analysis, the District of Columbia Circuit decided that Congress had expressed a specific intent for certification under the Pelly Amendment: the Secretary of Commerce has a mandatory, nondiscretionary duty to certify a foreign country that allows its nationals to harvest whales in excess of IWC quotas. The court conceded that Con-

Given the Executive's concern in *Vance* about the filing of an objection to allow 15 to 20 bowhead whales to be taken by Alaskan natives each year, the district court in *American Cetacean Society* found the Secretary's refusal to certify Japan to be a complete reversal of his prior position. 604 F. Supp. at 1407.

Finally, the court relied on evidence that the Secretary's own interpretation of the law, six months prior to the controversy with Japan, was consistent with the court's view and inconsistent with the Secretary's subsequent decision not to certify Japan. *Id.* at 1408.

64. The District of Columbia Circuit framed the issue as whether the statutory requirement of the amendments imposed on the Secretary a nondiscretionary duty to certify a foreign country when he determines that nationals of that country are harvesting whales in excess of an IWC quota. 768 F.2d at 434. Because this is a legal question of statutory interpretation, the court of appeals reviewed the district court's decision de novo. *Id.* at 432.

65. *Id.* at 444-45.

66. *Id.*


68. 768 F.2d at 433-34 (citing *Chevron*).


70. *Id.* at 843 n.9.

71. 768 F.2d at 444. The District of Columbia Circuit, like the district court before it, defined the central question as one of congressional intent behind the key statutory phrase, “diminish the effectiveness.” *Id.* at 434. The court of appeals identified the Pelly Amendment as the statute governing the Secretary of Commerce's certification determination. *Id.* at 434-35. The court noted, however, that the phrase “diminish the effectiveness” is not defined in the Pelly Amendment and that the language does not indicate the boundaries of administrative discretion. *Id.* at 436. The court thus turned to a thorough examination of the legislative history of the Pelly Amendment. House and Senate committee reports and statements gave
gress may have intended that the Secretary of Commerce have some discretion in making determinations as to what actions "diminish the effectiveness" of international programs. In the face of Japan's clear violation of a specific international fishing quota, however, the court remained steadfast in its position that such action was intended by Congress to trigger automatic certification.

The weakest segment of the court of appeals' analysis was its attempt to distinguish between the degree of discretion possessed by the Secretary of Commerce under the Pelly and Packwood-Magnuson Amendments applicable to whales, on the one hand, and under a 1978 amendment to the Pelly Amendment applicable to endangered species, on the other. The 1978 amendment expanded coverage of the Pelly Amendment to international programs designed for the conservation of endangered and threatened species, such as the Convention on Interna-

"clear indications of Congressional intent with respect to the critical language." Id. For example, the Senate report states 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. Id. (quoting S. REP. No. 582, 92d Cong., 1st Sess. 2 (1971) (emphasis added)).

The court concluded that the House and Senate reports and statements "indicate quite plainly that fishing in excess of internationally set quotas was considered an automatic trigger of certification." 768 F.2d at 436 (emphasis added). Moreover, the court noted that "there was no hint of some intermediate exercise of discretion" between a violation and the President's discretionary power to impose sanctions. Id. at 437.

In support of its decision, the District of Columbia Circuit also looked to the use of the key Pelly Amendment phrase in a similar context. Id. A 1962 amendment to the Tuna Convention Act of 1950 required, while international tuna conservation recommendations were in force, that the Secretary of Commerce prohibit the importation of tuna whenever fishing was being conducted that would tend to "diminish the effectiveness" of the international recommendations. 16 U.S.C. § 955(c) (1982). The court of appeals in American Cetacean Society found that Congress intended that under the 1962 amendment quota violations would per se diminish the effectiveness of the international program and would automatically result in sanctions against the foreign country. 768 F.2d at 437-38. Given the similarities between the tuna amendment and the Pelly Amendment, the congressional intent with respect to the tuna amendment confirmed the court's view that Congress believed that a violation of IWC whaling quotas would diminish the effectiveness of the ICRW, thereby requiring certification of the offending country under the Pelly Amendment. Id. at 438.

In addition, the court examined the legislative history of the Packwood-Magnuson Amendment. The court noted the possibility that this amendment may have altered the certification process as Congress had envisioned it under the Pelly Amendment. Id. at 439. After a review of statements by the Packwood-Magnuson Amendment's sponsors on the floor of Congress, however, the District of Columbia Circuit rejected this possibility. The court stated that the legislative history of the amendment indicated the same understanding of the certification process as that found in the Pelly Amendment: intentional whaling in excess of IWC quotas automatically triggers certification. Id. at 440-42.

72. 768 F.2d at 439.
73. Id. at 439, 444.
74. Id. at 442-43.
75. The amendment added a new certification section to the Pelly Amendment:
tional Trade in Endangered Species of Wild Fauna and Flora (CITES)\textsuperscript{76}. A statement in the House report for this amendment raised questions about whether the Secretary of Commerce has a significant degree of discretion in making certification determinations:

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 will not ordinarily warrant certification under this section.\textsuperscript{77}

The District of Columbia Circuit stated that in the CITES context the Secretary of Commerce will almost always have discretion in making the relevant certification determination because CITES creates essentially no nondiscretionary standards.\textsuperscript{78} CITES by its very nature allows for significant discretion on the part of member nations that implement it because there are no generally applicable trade or taking quotas set under it.\textsuperscript{79} In contrast, the court explained that in the fishery programs such as the ICRW covered by the original Pelly Amendment, the international body provides concrete recommendations or actual quotas that apply to all members. Discretion thus is vested in the international body rather than in the member nations. The court concluded that the Secretary of Commerce can exercise discretion in making some certification determinations, as under the 1978 amendment, but not in the present context where specific IWC quotas and regulations apply to ICRW members.\textsuperscript{80} The court of appeals' distinction imputed a high degree of subtlety to congressional intent in this area: the distinction assumes that Congress intended the same phrase—diminish the effectiveness—to have significantly different meanings in two adjoining paragraphs of the same subsection.\textsuperscript{81}


\textsuperscript{78} 768 F.2d at 443.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} The Supreme Court majority reached the opposite conclusion. 106 S. Ct. at 2869-70. The Supreme Court concluded that Congress' explanation of the scope of the Secretary's certi-
The court of appeals turned last to consider whether the relief granted by the lower court, the order to compel the Secretary of Commerce to certify Japan, was an abuse of that court's equitable powers inasmuch as the order effectively would abrogate an agreement entered into by the Executive Branch with a foreign country. While the court of appeals noted the argument that deference to the Executive is particularly appropriate in the area of foreign affairs, it nevertheless summarily concluded that the judiciary must uphold congressional intent, even in such a delicate context.82

Judge Oberdorfer, in dissent, examined more thoroughly than the majority the international repercussions of the case and their bearing on the proper degree of judicial deference.83 He agreed with the majority that concerns of justiciability did not prevent judicial review of the case.84 He emphasized, however, that "these concerns heighten the need for forbearance by courts in the absence of a clear command from Congress."85 He conceded that if the statute in question had involved domestic affairs only, he might have been able to endorse the majority's decision, based as it was on secondary evidence of congressional intent.86 The court order in question, however, would have required the Secretary of Commerce to dishonor a United States commitment made to Japan.87 Under these circumstances, he noted, Adams v. Vance confirmed that the judiciary "should be particularly hesitant to contradict the Executive's interpretation of a statute relied upon to form an international agreement, unless that interpretation is clearly erroneous."88

III
THE SUPREME COURT DECISION

The United States Supreme Court confronted two issues on appeal. First, the Court considered whether the political question doctrine89 precluded judicial review because the case involved foreign relations.90 The
majority summarily concluded that the case was justiciable despite its foreign relations aspect.91 Second, the Court devoted the bulk of its inquiry to determining whether either the Pelly or the Packwood-Magnuson Amendments required the Secretary of Commerce to certify that Japan's refusal to abide by IWC whaling quotas "diminish[ed] the effectiveness" of the ICRW.92 In answer to this issue, the Court, in a narrow five-to-four decision, held that under the Pelly and Packwood-Magnuson Amendments the Secretary of Commerce possesses the necessary discretion to secure Japan's compliance with the IWC program through an executive agreement, and therefore was not required to certify Japan.93 The dissent, on the other hand, concluded that whatever the degree of certification discretion possessed by the Secretary, in this case the standard for certification nevertheless was met because Japan's taking of whales was flagrant, consistent, and substantial.94

A. The Majority Opinion

Justice White, writing for the Court, first addressed the Japanese petitioners'95 contention that the case was unsuitable for judicial review. The Japanese petitioners relied on the political question doctrine articulated in Baker v. Carr96 to argue that "the danger of 'embarrassment from multifarious pronouncements by various departments on one ques-

91. 106 S. Ct. at 2866.
92. Id. at 2862, 2867-72.
93. Id. at 2871-72.
94. Id. at 2876 (Marshall, J., dissenting).
96. 369 U.S. 186 (1961). In Baker, Justice Brennan articulated the boundaries of the political question doctrine. Under the doctrine, primarily a function of the separation-of-powers concern central to the American system of government, a case involving a "political question" may be nonjusticiable. Id. at 210. The Baker court emphasized that the precise facts and posture of each case must be examined to determine whether the political question doctrine applies. Id. at 217. The court listed several factors for consideration:

- a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- a lack of judicially discoverable and manageable standards for resolving [the case]; or
- the impossibility of deciding [a case] without an initial policy determination . . . ; or
- the impossibility of a court's undertaking independent resolution [of the controversy] without expressing lack of the respect due coordinate branches of the government; or
- an unusual need for unquestioning adherence to a political decision already made; or
- the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

Addressing foreign relations, Baker states that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at 211. Here, too, the court emphasized that discriminating analysis of the facts, issue, and posture of each case is needed, along with consideration of the consequences of judicial action. Id. at 211-12.
tion' bars any judicial resolution of the instant controversy." The Court flatly disagreed with this contention. The Court noted that the political question doctrine restricts judicial review when a case involves policy choices and value determinations that are constitutionally committed to resolution by Congress or the Executive. Despite "political overtones" in the present case, the Court defined its task narrowly as one of reviewing an agency's statutory construction. The Court concluded that the political question doctrine had no bearing on the case because the decision by the Secretary of Commerce not to certify Japan presented "a purely legal question of statutory interpretation."

The Court next considered whether the Secretary of Commerce was required to certify Japan for whaling in excess of an IWC quota. Justice White's analysis discussed the language and legislative history of the Pelly and Packwood-Magnuson Amendments. He sought first to determine the nature and scope of the Secretary's duty under the amendments and then to apply this statutory analysis to the particular facts of the case. To support his analysis, he recited the standards for judicial review of agency decisionmaking formulated in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*

Following *Chevron*, the Court stated that "[i]f Congress has directly spoken to the precise issue in question, if the intent of Congress is clear,

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98. 106 S. Ct. at 2866.
99. *Id.*
100. *Id.* See *supra* note 61 for background on the executive agreement between the United States and Japan; see *supra* text accompanying notes 82-88 for the court of appeals' discussion of the political issues involved in the case.
101. 106 S. Ct. at 2866.
102. *Id.*
103. *Id.*
104. 467 U.S. 837 (1984). In *Chevron*, the NRDC filed a petition to challenge EPA regulations, promulgated pursuant to the 1977 Clean Air Act Amendments, that allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased in a single "bubble." Under these regulations, a plant that contains pollution-emitting devices can install or modify one piece of equipment without meeting permit conditions if the change will not increase the plant's total emissions. The Supreme Court upheld the EPA regulations and concluded that the EPA's interpretation of the term "stationary source" in the amendments was reasonable. *Id.* at 845, 866. To reach its conclusion, the Court announced a two-step approach for judicial review of an agency's statutory construction. First, a court must inquire whether Congress has directly spoken to the precise question at issue. If the court, using traditional tools of statutory interpretation, finds that the intent of Congress is clear, both the court and the agency must effectuate that "unambiguously expressed intent." *Id.* at 842-43. If, on the other hand, the statute is silent or ambiguous with respect to the specific issue, the court must uphold the agency's interpretation if it is based on a reasonable construction of the statute. *Id.* at 843-45. If the construction is reasonable, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Id.* at 844. See *supra* text accompanying notes 67-70 for the District of Columbia Circuit's analysis under *Chevron*. 
that is the end of the matter."\textsuperscript{105} However, if a statute is silent or ambiguous with respect to the question at issue—as the Court intimated that the Pelly and Packwood-Magnuson Amendments are\textsuperscript{106}—then the court must defer to an executive agency's reasonable construction of the statute.\textsuperscript{107} In other words, the court is to defer to a reasonable statutory construction unless the legislative history of the statute shows with sufficient clarity that the agency construction is contrary to congressional intent.\textsuperscript{108}

The language of the amendments, the Court concluded, does not direct the Secretary to certify automatically a nation that fails to conform to the IWC whaling schedule.\textsuperscript{109} Focusing narrowly on the language of the Packwood-Magnuson Amendment, the Court observed that the amendment "does not define the words 'diminish the effectiveness of' or specify the factors that the Secretary should consider in making the [certification] decision . . . ."\textsuperscript{110} Moreover, the Court noted that the amendment does not specifically require certification whenever a country fails to abide by IWC schedules.\textsuperscript{111} Based on these observations, the Court dismissed the possibility that the language required automatic certification, asserting 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."\textsuperscript{112}

In addition, the Court stressed both the circumstances surrounding the Secretary's construction of the language of the amendments and his decision to forego certification.\textsuperscript{113} The Secretary had consulted with the United States Commission to the IWC, reviewed IWC Scientific Commission opinions, and negotiated with Japan before determining that conservation ends would be served better by entering into an executive agreement with Japan than by certifying Japan.\textsuperscript{114} The Court emphasized that the Secretary was not claiming that he had carte blanche under

\textsuperscript{105} 106 S. Ct. at 2867.
\textsuperscript{106} The Supreme Court earlier in the same paragraph clearly intimated that the language of the amendments is ambiguous. It noted that the Pelly and Packwood-Magnuson Amendments might reasonably be construed to require the Secretary automatically and regardless of the circumstances to certify a country that does not conform to the IWC whaling schedule. \textit{Id.} On the other hand, the Court added that the Secretary's construction—that there are circumstances in which certification may be withheld, despite IWC quota violations—is also a reasonable construction of the language of the amendments. \textit{Id.}
\textsuperscript{107} \textit{Id.} at 2868.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 2867.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} This is the closest the majority came to acknowledging the international and political factors influencing its decision. See \textit{infra} notes 206-17 and accompanying text for a discussion of the international factors that influenced the Court's decision.
\textsuperscript{114} 106 S. Ct. at 2867.
the amendments to ignore and do nothing about Japan's excess whaling.\textsuperscript{115} Rather, the Court posited, the Secretary made the determination assigned to him by the Packwood-Magnuson Amendment and concluded that Japan's limited taking of whales in 1984 and 1985 would not diminish the effectiveness of the ICRW or its conservation program.\textsuperscript{116} In light of these circumstances, and because the intent of Congress was not, under the \textit{Chevron} analysis, "unambiguously expressed,"\textsuperscript{117} the Court concluded that the Secretary's construction of the language of the amendments was reasonable and that he therefore was not required to certify Japan.\textsuperscript{118}

Turning from the language to the legislative history of the amendments, the Court bolstered its conclusion that the Secretary of Commerce need not certify Japan for violating IWC whaling quotas. Maintaining a narrow focus, the Court noted that nothing in the legislative history of either amendment addressed specifically the Secretary's duty to certify every departure from IWC limits on whaling.\textsuperscript{119} The Court concentrated first on the legislative history of the Pelly Amendment and emphasized that the amendment was introduced in 1971 to protect Atlantic salmon from possible extinction.\textsuperscript{120} Citing congressional concern over the "eventual destruction of this valuable sports fish,"\textsuperscript{121} the Court concluded that Congress viewed Denmark's excessive fishing operations as diminishing the effectiveness of quotas of the International Convention for the Northwest Atlantic Fisheries (ICNAF) and envisioned that the Secretary would certify Denmark under the Pelly Amendment.\textsuperscript{122} By characterizing the Pelly Amendment as a response to the Atlantic salmon crisis, however, the court deemphasized the relevance of the amendment's legislative history for supporting the view that Congress intended the Secretary to have a mandatory duty to certify a country for violating an IWC whaling quota.

The Court's review of the legislative history moved quickly to the 1978 amendment that expanded the Pelly Amendment's coverage to international programs for the conservation of endangered species.\textsuperscript{123} The

\begin{itemize}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} \textit{Chevron}, 467 U.S. at 843; see supra note 104.
\item \textsuperscript{118} 106 S. Ct. at 2868.
\item \textsuperscript{119} Id. The Court emphasized repeatedly that the language and history of the Pelly and Packwood-Magnuson Amendments does not require the Secretary to certify every departure from international conservation quotas. By implication, the Secretary was free to withhold certification against Japan and abide, instead, by an executive agreement.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. (quoting S. REP. No. 582, 92d Cong., 1st Sess. 4; H.R. REP. No. 468, 92d Cong., 1st Sess. 5, \textit{reprinted in} 1971 U.S. CODE CONG. \& ADMIN. NEWS 2409, 2411).
\item \textsuperscript{122} Id. See supra note 40 for background on enactment of the Pelly Amendment in response to overfishing of North Atlantic salmon.
\item \textsuperscript{123} 106 S. Ct. at 2869-70; see supra note 76 and accompanying text.
\end{itemize}
Court concluded that the statement in the House report for the 1978 amendment demonstrated that Congress used the phrase "diminish the effectiveness" to give the Secretary a range of certification discretion under the Pelly Amendment provisions. The Court noted that the District of Columbia Circuit had applied this statement only to the 1978 addition to the Pelly Amendment, designed as it was to enforce CITES, and not to other provisions of the Pelly Amendment pertaining to fishery conservation programs such as the ICRW. The Supreme Court rejected the lower court's restrictive reading of the statement in the House report. The Court emphasized that both CITES and the ICRW served the same objective: conserving endangered or threatened species. Moreover, both CITES and the ICRW operate in a similar, often parallel, manner. Thus, given the lack of evidence to the contrary in the legislative history of the 1978 amendment, the Court expressed its doubt that Congress intended the same phrase in two adjoining paragraphs of the same subsection to have different meanings.

124. See supra note 77 and accompanying text.

125. 106 S. Ct. at 2869. The Court reasoned as follows to conclude that the scope of the Secretary's certification discretion, as enunciated in the House report, applies to both the original Pelly Amendment and the 1978 amendment: Congress premised the 1978 amendment to the Pelly Amendment on the success by the United States in using the Pelly Amendment to convince other nations to adhere to IWC whaling quotas. Id. Thus, because the 1978 amendment to the Pelly Amendment was based on the Pelly's success, the Secretary's degree of discretion under the 1978 amendment—as stated in the House report for that amendment, see supra note 77—must reflect the degree of discretion that Congress intended the Secretary to have under the original provisions of the Pelly Amendment where the phrase "diminish the effectiveness" is used. 106 S. Ct. at 2869-70.

The Court's reasoning here is tenuous at best. The majority notes 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 2870 (quoting H.R. REP. No. 1029, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1768, 1773). It is a large jump in reasoning, however, to conclude from this enthusiastic statement in support of the 1978 amendment that the Secretary's discretion under that amendment—clearly stated in the House report for the amendment—reflects the degree of discretion that Congress intended the Secretary to have under the original Pelly Amendment. Furthermore, the Court ignored relevant history, cited by the dissent, which discussed the meaning of the Pelly Amendment in preparation for the enactment of the Packwood-Magnuson Amendment. See infra note 157.

126. See supra note 76 and accompanying text.

127. 106 S. Ct. at 2870.

128. Id.

129. Id. at 2870 n.8. The Court noted that CITES regulates trade in endangered species through inclusion of those species in one of three appendices while the ICRW regulates whaling through the use of a schedule that sets harvest limits for whale species. Id. Further, CITES requires a two-thirds majority vote to amend the appendices while the ICRW requires a three-fourths majority vote to amend its Schedule. Id. In addition, both conventions contain analogous procedures for members to file timely objections to limitations imposed by the convention. Id. See supra text accompanying notes 78-81 for the court of appeals' discussion of the differences between the structure and operation of CITES and the ICRW.

130. 106 S. Ct. at 2870.
Finally, the Court turned to the 1979 Packwood-Magnuson Amendment, the most recent congressional enactment by Congress that could have shed light on the scope of the Secretary of Commerce's certification discretion. In summary fashion, the Court concluded that the amendment did not change the Court's view that the Secretary need not certify each and every departure from IWC whaling quotas. The Court noted that the amendment was enacted "to put real economic teeth into our whale conservation efforts . . ." The Court observed, however, that Congress specifically retained in the Packwood-Magnuson Amendment a certification standard identical to that of the Pelly Amendment. The Court already had established that this standard leaves the Secretary with a range of discretion to determine whether the whaling operations at issue diminish the effectiveness of the ICRW.

As to "scattered statements" in the legislative history of either the Packwood-Magnuson or the Pelly Amendment hinting at a mandatory certification duty imposed on the Secretary, the Court dismissed this evidence by asserting that the legislative history "read as a whole" does not clearly indicate that all departures from IWC schedules, regardless of the circumstances, call for immediate certification. The Court had determined, in Chevron terms, that Congress had not spoken to the precise issue or expressed sufficiently clear intent. The Court thus remained committed to its conclusion that the Secretary's decision to refuse certification and to enter instead into an executive agreement with Japan was a reasonable construction of both the Pelly and Packwood-Magnuson Amendments.

B. The Dissenting Opinion

Justice Marshall responded to the majority in American Cetacean Society with a strong dissent. Criticizing the majority's decision, the dissent asserted that the majority rendered illusory the clear mandate of the amendments and permitted exactly the result that Congress sought to prevent by enacting the Packwood-Magnuson Amendment: "executive compromise of a national policy of whale conservation." The dissent agreed with the conclusion of the lower courts that the Secretary of Com-

131. Id. at 2871.
132. Id. (quoting 125 CONG. REC. 21,742 (1979) (statement of Sen. Packwood)).
133. Id.
134. Id. at 2868-69.
135. Id. at 2871.
136. See supra note 71 and infra notes 157-158 and accompanying text.
137. 106 S. Ct. at 2871.
138. Id. at 2871-72.
140. Id. at 2873 (Marshall, J., dissenting).
merce had a nondiscretionary duty to certify substantial violations of whaling quotas. Furthermore, the dissent found that the Secretary in this case had exceeded his authority by manipulating his powers of certification in order to avoid imposing the sanctions of the Packwood-Magnuson Amendment. The dissent emphasized that the Packwood-Magnuson Amendment was enacted in response to congressional dissatisfaction with executive discretion under the Pelly Amendment. Against this background, the dissent raised two separate lines of analysis. First, the dissent stressed that both the facts of the case and the evidence of the Secretary’s own view showed that the “factual predicate” for certification existed. Second, the dissent reproved the majority for ignoring the legislative history, amply cited by the court of appeals and respondents, which made clear Congress’ intent that the Secretary always certify a country for substantial violations of whaling quotas.

Justice Marshall observed that both the majority and the court of appeals had focused on the language of the amendments to determine the degree of certification discretion possessed by the Secretary of Commerce. A more direct approach, he argued, recognizes that in this case the “diminish the effectiveness” standard had been met. The dissent suggested that whatever the degree of certification discretion possessed by the Secretary, given the facts of the case the Secretary had to conclude that Japan’s activities diminished the effectiveness of the whale conservation programs. “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.”

The dissent also supported its position with evidence that the Secretary himself believed the circumstances for certification existed. In a letter to Senator Packwood regarding the IWC’s 1986 general whaling moratorium, the Secretary stated his view that any whaling exceeding the IWC

141. Id. at 2875 (Marshall, J., dissenting).
142. Id. at 2874, 2876 (Marshall, J., dissenting). The dissent noted that the Secretary of Commerce used his power of certification as a threat to extract promises from Japan regarding its future whaling practices. Id. at 2874 (Marshall, J., dissenting).
143. Id. at 2872-73 (Marshall, J., dissenting). The Packwood Magnuson Amendment supplied “certain time limits within which the Executive Branch must act in imposing the mandatory sanctions.” Id. (Marshall, J., dissenting). See 22 U.S.C. § 1978(a)(3) (1982). In addition, the dissent noted that the automatic sanction was thought to “improve the effectiveness of the Pelly Amendment by providing a definite consequence for any nation disregarding whaling limits.” 106 S. Ct. at 2873 (Marshall, J., dissenting) (citing 125 CONG. REc. 22,084 (1979) (statement of Rep. Oberstar)).
144. 106 S. Ct. at 2873-74 (Marshall, J., dissenting).
145. See supra note 71.
146. See Brief for Respondents, supra note 40, at 18-36.
147. 106 S. Ct. at 2874-76 (Marshall, J., dissenting).
148. Id. at 2873 (Marshall, J., dissenting).
149. Id. (Marshall, J., dissenting).
quota would diminish the effectiveness of the IWC and thereby would trigger certification. The dissent concluded that the Secretary knew that Japan's violations triggered certification but that he nevertheless chose to impose an unauthorized "penalty" different from that prescribed by the Packwood-Magnuson Amendment.

The dissenters dismissed as irrelevant arguments by the Secretary of Commerce that the executive agreement negotiated with Japan would in the future lead to more whale protection than immediate imposition of the Packwood-Magnuson Amendment sanctions. "The important issue," the dissent noted, "is not whether the Secretary's choice of sanctions was wise or effective, but whether it was authorized." Looking back over the events leading up to the passage of the Packwood-Magnuson Amendment, the dissent likened the Secretary's compromise in this case to the type of action previously taken by the President under the Pelly Amendment. Before enactment of the Packwood-Magnuson Amendment, the President had on five occasions withheld certification against a foreign country with whaling quota violations. The mandatory sanctions of the Packwood-Magnuson Amendment were intended to remedy that reluctance by the executive to take action. The dissent concluded that the Secretary had not made a genuine determination that Japan's actions had not diminished the effectiveness of the IWC quotas. Rather, the Secretary had "flouted the express will of Congress and exceeded his own authority" by substituting his judgment for that of

150. Id. (Marshall, J., dissenting). The Secretary stated:

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 certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC.

Any 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 non-compliance.


In addition, the dissent asserted that [the Secretary's] view [was] borne out by his apparent belief... that he held sufficient power under domestic law to threaten certification [against Japan] 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.

106 S. Ct. at 2874 (Marshall, J., dissenting).

151. Id. (Marshall, J., dissenting).

152. Id. (Marshall, J., dissenting).

153. Id. (Marshall, J., dissenting).

154. See supra notes 44-45 and accompanying text.

Congress on the issue of how best to respond to a foreign country's intentional violations of whaling quotas. The dissent stated that it would affirm the court of appeals on the basis of this conclusion.156

The dissent, however, also criticized the majority's reading of the legislative history. The majority had not addressed the many excerpts of legislative history to which the court of appeals had devoted "voluminous portions of its opinion."157 Convinced by the court of appeals' examination of the legislative history, the dissent concluded that that history demonstrated Congress' expectation that clear violations of IWC quotas would always result in certification.158 Further, the dissent responded to the majority's comment, regarding the Packwood-Magnuson Amendment, that "it would have been a simple matter [for Congress] to say that the Secretary must certify deliberate taking of whales in excess of IWC limits."159 The dissent noted that there was no need to include such language in the amendment, for "everyone in the Congress and the Executive Branch [already] share[d] 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 . . . ."160

The dissent turned last to rebut the majority's reliance on the House report for the 1978 amendment to the Pelly Amendment, which had expanded the Pelly Amendment's coverage to programs such as CITES.161 The dissenters did not rely on the distinction, made by the court of appeals, that the Secretary's degree of discretion to certify under the 1978 amendment was greater than that provided for under the original Pelly Amendment provisions.162 Rather, the dissent perceived that the Secre-

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156. 106 S. Ct. at 2874 (Marshall, J., dissenting).
157. Id. at 2874-75 (Marshall, J., dissenting).
158. Id. at 2875 (Marshall, J., dissenting). The dissent cited for support the following exchange between a member of Congress and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, discussing the meaning of certification under the Pelly Amendment in preparation for the passage of the 1979 Packwood-Magnuson Amendment:

Mr. McCLOSKEY.... If you have determined ... 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 you 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.

Id. at 2875 (Marshall, J., dissenting) (quoting 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) (emphasis supplied by the dissent)).
159. 106 S. Ct. at 2867.
160. Id. (Marshall, J., dissenting).
161. Id. at 2875-76 (Marshall, J., dissenting); see supra notes 123-30 and accompanying text.
162. See supra text accompanying notes 74-81.
tary has some discretion to ignore violations of a de minimis nature.163 Still, the dissent dismissed this limited discretion as irrelevant to the present case where "Japan's taking of whales [was] flagrant, consistent and substantial."164 The dissent thus concluded that the majority's decision, based as it was on an examination of the language and legislative history of the amendments, was "utterly unsupported."165

IV
DISCUSSION

By allowing the Secretary of Commerce discretion to withhold certification under the Packwood-Magnuson Amendment, the American Cetacean Society decision nullified the enforcement effect that the Packwood-Magnuson Amendment might have added to the Pelly Amendment. As one commentator explained, the Secretary in effect compensated for the power expressly removed by the Packwood-Magnuson Amendment—the ability to negotiate and compromise after certification—by establishing discretion to negotiate and compromise in the pre-certification stage.166 The Secretary with the Court's help thus created a loophole that effectively emasculated the Packwood-Magnuson Amendment's self-executing sanctions. The result is that the Packwood-Magnuson Amendment will now operate in the same discretionary manner as the Pelly Amendment did even before the Packwood-Magnuson Amendment attempted to limit the Executive Branch's discretion under the Pelly Amendment.167 The only difference between the two is that discretion occurs prior to certification under the Packwood-Magnuson Amendment and after certification under the Pelly Amendment. The Packwood-Magnuson Amendment's total effect is reduced simply to pro-

163. 106 S. Ct. at 2875-76 (Marshall, J., dissenting). The dissent quoted the House report view that an isolated, individual violation of the ICRW will not ordinarily warrant certification.
164. Id. at 2876 (Marshall, J., dissenting).
165. Id. (Marshall, J., dissenting).
166. Note, supra note 150, at 608-09. That commentator explained what the Secretary of Commerce had in mind and eventually gained through the Supreme Court's decision: discretionary power to withhold certification under the Packwood-Magnuson Amendment. However, the commentator's supposition is that the Secretary possessed this "power" even before the Supreme Court's decision. This is precisely the main issue of American Cetacean Society as framed by the Supreme Court majority and the lower courts. See supra note 64 and text accompanying note 92. The Supreme Court dissent noted that it was not until certification was imminent in 1984 that the Secretary, for the first time, declined to certify a case of intentional whaling in excess of established quotas. 106 S. Ct. at 2873 (Marshall, J., dissenting). Furthermore, the dissent pointed out that "[i]t was only when [the Secretary] became dissatisfied with the Packwood Amendment sanctions that the certification obligation was ever questioned." Id. at 2875 (Marshall, J., dissenting). These fragments, although not conclusive, show that if the Secretary possessed a "power" to withhold certification, that power was not recognized or used by the Secretary prior to the present controversy.
167. See supra note 46 and text accompanying notes 42-50.
viding the Secretary, rather than just the President, with the power and
discretion to impose sanctions. 168

The Supreme Court's decision not only undercut the effectiveness of
the Packwood-Magnuson Amendment, but it impaired the operation of
the Pelly Amendment as well. As a result of the Court's decision, the
Secretary of Commerce now lacks an affirmative duty to impose certifica-
tion under either amendment. Before American Cetacean Society, the
Secretary would have certified a country under the Pelly Amendment,
putting that country on notice and leaving a decision to the President on
whether to impose the Pelly Amendment's sanctions. The Secretary now
may refuse even to certify a nation under the Pelly Amendment because
that certification will invoke certification under the Packwood-Magnuson
Amendment 169 and impose the latter's mandatory post-certification san-
cctions. Thus, what is left is the all-or-nothing threat of the Packwood-
Magnuson Amendment. The Pelly Amendment will not be used against
a country until bargaining with that country has failed, certification
under the Packwood-Magnuson Amendment has occurred—which
serves as certification under the Pelly Amendment as well—and the Pres-
ident then decides to impose the Pelly Amendment's sanctions in addi-
tion to the sanctions under the Packwood-Magnuson Amendment. The
Court's decision upholding the Secretary's refusal to certify Japan—a fla-
grant violator of the IWC whaling quotas—will in all likelihood lead to
no future certifications under either amendment unless all other efforts to
reach a compromise have failed. This seems very far from what Con-
gress intended by the "diminish the effectiveness" language. The result
of this weakening of the amendments may be further depletion of whales
and endangered fish species that the amendments were intended to
protect.

In the process of weakening the Pelly and Packwood-Magnuson
Amendments, the Supreme Court's decision also undermined the IWC's
effectiveness in protecting whales. The Court majority deemed reason-
able the Secretary's position that a refusal to certify Japan, under the

168. The Secretary can now choose between certifying a country under the Pelly Amend-
ment, which allows the President to impose its discretionary sanctions, see supra note 43 and
accompanying text, or under the Packwood-Magnuson Amendment with its mandatory sanc-
tions, see supra text accompanying notes 49-50. The Packwood-Magnuson Amendment also
requires that the Secretary act promptly. See supra note 49.

169. The Supreme Court decision established that the "diminish the effectiveness" stan-
dard is the same under the Pelly and Packwood-Magnuson Amendments. 106 S. Ct. at 2864,
2871. The Court stated that in the Packwood-Magnuson Amendment, Congress specifically
retained the identical certification standard of the Pelly Amendment, which requires the Secre-
tary of Commerce to determine when the whaling operations at issue diminish the effectiveness
of the ICRW. Id. at 2871. Therefore, it would be impossible for the Secretary to certify a
nation under the Pelly Amendment with its discretionary sanctions, without also invoking
certification under the Packwood-Magnuson Amendment with its automatic sanctions.
The practical consequences of the Court’s decision, however, indicate that the opposite is true. Most immediately, the Supreme Court’s decision in *American Cetacean Society* undermined the IWC by allowing Japan to take up to 1200 whales between 1984 and 1988; surely such a violation of IWC quotas without fear of penalty diminishes the IWC’s effectiveness. In contrast, imposition of a penalty on Japan under the Packwood-Magnuson Amendment, estimated at a cost of at least $230 million, likely would have caused Japan to comply with the IWC’s zero quota on sperm whales and its 1986 general moratorium on all commercial whaling.

The Court’s decision also damaged the IWC in a deeper structural sense. From the outset, the heart of the IWC’s work has been the establishment of limits on the harvest of whales. However, the IWC itself has never had any sanctions available to enforce its quotas. The United States has provided enforcement leverage for IWC quotas through the Pelly and Packwood-Magnuson Amendments. Most whaling nations, therefore, have based—or will base—their decisions on whether or not to observe an IWC quota on their assessment of the United States’ intentions. They will watch to see whether the United

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170. The circumstances of the case include the Secretary’s decision to enter into an executive agreement with Japan in lieu of certification. *Id.* at 2867.

171. *Id.*

172. *Id.* at 2864 n.1 (provides description of the agreement between the United States and Japan, which allowed Japan to harvest up to 1200 sperm whales between 1984 and 1988 without facing certification by the United States). *See also supra* note 61.

173. *See supra* note 60.


175. *See generally* Birnie, *supra* note 1; Scarf, *supra* note 1 (both articles discuss at length the importance of whaling quotas to the function of the IWC).

176. *See supra* notes 32-34 and accompanying text.

177. In 1979, the Republic of Korea, Peru, and Chile were certified under the Pelly Amendment. After being certified, all three promptly joined the IWC and sanctions were not imposed by the President. Garrett Affidavit, *supra* note 174, at 4-5. Spain, which was under investigation for possible certification at that time, joined the IWC as well. *Id.* at 5. The threat of automatic sanctions under the Packwood-Magnuson Amendment also has proved to be an effective incentive in the enforcement of IWC regulations and quotas. Thomas Garrett, former United States Representative to the IWC, states emphatically that without the Packwood-Magnuson Amendment, the highly significant conservation progress made by the IWC in recent years would not have been possible. *Id.* at 6. He also states that without the Packwood-Magnuson Amendment, the moratorium on the taking of sperm whales, passed in 1979, could not have been sustained, Japan would not have ceased buying products derived from non-IWC whaling conducted in Taiwan, and Spanish whaling could not have been halted. *Id.* Furthermore, in 1980 both the Republic of Korea and Taiwan agreed to adhere to IWC regulations not directly involving whaling quotas when faced with the possibility of Packwood-Magnuson sanctions. *American Cetacean Soc’y*, 604 F. Supp. at 1403.
States actually imposes the sanctions written in its laws.\textsuperscript{178}

The Supreme Court's decision, admittedly centered around a narrow statutory question, allowed the Secretary of Commerce to withhold the economic sanctions of the Pelly and Packwood-Magnuson Amendments at a time when they were needed to enforce the IWC whaling quotas. Of course, the Secretary used the threat of the Amendments' sanctions to extract promises regarding Japan's future whaling practices.\textsuperscript{179} However, the United States' hesitation to employ its sanctions sends a signal to other members of the IWC that the United States is willing to act outside the IWC framework and to reach its own judgment about commercial whaling practices, independent of the vote of the IWC membership. Now that the United States has entered into a bilateral agreement with Japan that circumvents the IWC limits, under which Japan may whale "under objection" without being certified, other whaling nations—even ones that have already agreed to cessation—may demand similar concessions.\textsuperscript{180} Further, the \textit{American Cetacean Society} decision may encourage other IWC members not to take seriously any longer the threat of the Pelly and Packwood-Magnuson Amendment sanctions.\textsuperscript{181}

Thomas Garrett, former United States Representative to the IWC, has noted that the Packwood-Magnuson Amendment is the foundation upon which the system of international whaling controls has been built.\textsuperscript{182} He has cautioned that an erosion in the credibility of the Packwood-Magnuson sanctions, through special agreements such as that between the United States and Japan, will lead to a discredited and impotent IWC and to a return to anarchy in commercial whaling.\textsuperscript{183} At the very least, the \textit{American Cetacean Society} decision has an unsettling effect on the internal dynamics of the IWC. The United States' reluctance to employ sanctions is especially telling in light of the fact that the moratorium was the most thoroughly debated decision in the IWC's history and was approved only after an intense, decade-long worldwide effort.\textsuperscript{184} The Court's decision thus creates uncertainty regarding the commitment to enforce international whaling controls.

\textsuperscript{178} Garrett Affidavit, \textit{supra} note 174, at 8.
\textsuperscript{179} 106 S. Ct. at 2864 n.1. \textit{See also supra} note 61.
\textsuperscript{180} Garrett Affidavit, \textit{supra} note 174, at 8.
\textsuperscript{181} Nations are now evading the international ban on commercial whaling by whaling under the guise of scientific research. \textit{Washington's War of the Whales}, \textit{Newsweek}, Apr. 20, 1987, at 10. Iceland and South Korea, for example, have used this excuse to continue extensive whaling. \textit{Id.} In addition, Japan is planning to kill 875 whales over the course of 1988—ostensibly as part of a study to determine whether whales are actually endangered, though the remains will then be sold commercially. \textit{Id.} The United States in response is about to unveil a new plan to prevent nations from evading the whaling ban. \textit{Id.}
\textsuperscript{182} Garrett Affidavit, \textit{supra} note 174, at 3-7.
\textsuperscript{183} \textit{Id.} at 8-9. Mr. Garrett added that this is precisely the fate that has befallen a number of other fishery commissions. \textit{Id.} at 9.
\textsuperscript{184} \textit{See Respondents' Brief in Opposition to Petitions for Writs of Certiorari} at 7, 106 S. Ct. 2860 (Nos. 85-954, 85-955); Garrett Affidavit, \textit{supra} note 174, at 2-3.
of the United States to support whale conservation efforts with economic sanctions.

While the Supreme Court's decision in American Cetacean Society is significant in its effect on international whale conservation efforts, the decision should not be considered significant in its application of Chevron. Although the Supreme Court majority routinely recited the Chevron standards, the majority's analysis was superficial and conclusory in nature. The Court concluded cursorily that Congress had not spoken directly to the question at issue and that the Secretary's construction of the amendments was reasonable. Regarding the language of the amendments, the Court concluded that had Congress intended certification for deliberate violations of IWC limits, it would have been a simple matter for Congress to have said so.

In his dissenting opinion, Justice Marshall responded convincingly to this last assertion. He explained that the shared understanding of Congress and the Executive Branch, as informed by the consistent interpretations of past Secretaries of Commerce, was that quota violations would always be considered to diminish the effectiveness of the IWC and lead to certification. There was, therefore, no perceived need to amend the language of the statute. Furthermore, the court of appeals cited legislative history in its opinion to support this understanding of how certification was to work. Thus, while some ambiguity exists in the "diminish the effectiveness" language in the amendments, Justice Marshall effectively refuted the majority's view by showing that congressional intent was quite clear on the understanding of the certification process.

The Supreme Court majority also reviewed selectively the Pelly Amendment's legislative history, emphasizing that the Pelly Amendment was enacted in response to a fishing crisis over Atlantic salmon. The majority, however, avoided discussing the background that led to the enactment of the Packwood-Magnuson Amendment and ignored most of the amendment's history. Rather than parse through that leg-

185. 106 S. Ct. at 2867-68.
186. Id. at 2867.
187. Id. See supra text accompanying note 112. Note that it also would have been easy for Congress explicitly to have given the Secretary the discretion to negotiate compromise agreements with nations violating IWC limits.
188. 106 S. Ct. at 2875 (Marshall, J., dissenting).
189. 768 F.2d at 440-41.
190. 106 S. Ct. at 2867.
191. See supra text accompanying notes 120-30.
192. 106 S. Ct. at 2868.
193. The Supreme Court majority noted only that the Packwood-Magnuson Amendment was enacted to rectify "the past failure of the President to impose sanctions authorized—but not required—under the Pelly Amendment . . . ." Id. at 2864.
194. See supra text accompanying notes 131-33.
islative history to find firm support for its conclusions, the Court merely stated that “[w]e 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 [sic] whaling Schedules.”\textsuperscript{195} Again, the Court did not engage in an analysis that even the deferential \textit{Chevron} approach would acknowledge as sufficient. Instead, the Court simply asserted its conclusion that “read as a whole” the legislative history of the amendments does not indicate clear congressional intent to require certification whenever the IWC whaling quotas are violated.\textsuperscript{196}

It is, therefore, not surprising that the court of appeals and the Supreme Court minority reached the opposite conclusion based on their own examination of the legislative history. The District of Columbia Circuit, unlike the Supreme Court majority, reviewed the legislative history of the amendments in a comprehensive and systematic fashion. It examined the Pelly Amendment’s history to conclude that the amendment expressly mandates the certification of any fishing or harvesting that is inconsistent with internationally set quotas.\textsuperscript{197} The Supreme Court majority’s narrow emphasis on one aspect of the Pelly Amendment’s history, the Atlantic salmon crisis, was therefore misleading. The court of appeals likewise provided an extensive treatment of the legislative history of the Packwood-Magnuson Amendment, concluding as it did with the Pelly Amendment that intentional whaling in excess of IWC quotas was intended automatically to trigger certification.\textsuperscript{198} Given the court of appeals’ careful examination of the legislative history, the Supreme Court minority had ample support for its own conclusion that the history of the amendments demonstrated that the Packwood-Magnuson Amendment removed any discretion over certification that existed in the Executive Branch.\textsuperscript{199}

The one issue on which the court of appeals failed to focus adequately was a statement in the House report for the 1978 amendment to the Pelly Amendment, implying that the Secretary of Commerce had different levels of certification discretion.\textsuperscript{200} Not surprisingly, the Supreme Court majority’s opinion relied heavily on that statement to conclude that Congress intended the Secretary to have discretion in his certification determinations.\textsuperscript{201} The dissenting opinion, however, was forceful in its rebuttal of the Court’s reliance on this single piece of legislative history. First, the dissent noted that this “unobjectionable proposition” in

\textsuperscript{195} 106 S. Ct. at 2871.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} 768 F.2d at 436.
\textsuperscript{198} \textit{Id.} at 440.
\textsuperscript{199} 106 S. Ct. at 2875 (Marshall, J., dissenting).
\textsuperscript{200} \textit{See supra} text accompanying note 77.
\textsuperscript{201} 106 S. Ct. at 2870.
the House Report had no relevance to the case. While the statement may confer discretion on the Secretary to ignore violations of a de minimis nature, the dissent noted correctly that it does not apply where Japan's taking of whales has been "flagrant, consistent and substantial." Second, and more generally, the dissent concluded that, whether or not the Secretary possesses certification discretion under the amendments as the House report statement suggests, in this case there was strong evidence that the standard of certification nevertheless was met. The dissent correctly framed the issue to be not whether certification discretion existed, but whether the Secretary, knowing that the "factual predicate" for certification existed, exceeded his statutory authority by refusing to certify Japan.

The dissent was correct in concluding that under the deferential standard of review set forth in *Chevron* the majority's decision was "utterly unsupported." There was a clear congressional intent that the Secretary must certify a nation when it deliberately violates IWC quotas. Because Congress had spoken directly to the precise issue in question, the majority never should have reached the second step of the *Chevron* analysis concerning the reasonableness of the Secretary's construction of the amendments. The Court's holding that the Secretary's construction of the amendments was reasonable was, therefore, both inappropriate and incorrect.

The Court's strained application of *Chevron* suggests that it was moved by other considerations. Although the Supreme Court held that the political question doctrine was not a bar to judicial resolution of the case and framed the issue before it as "a purely legal question of statutory interpretation," the Court was well aware of the international repercussions of its decision. One commentator argued openly and directly that the foreign policy implications of the case necessitated Secretarial discretion in order "to effectuate international trade objectives."

202. *Id.* at 2875-76 (Marshall, J., dissenting).
203. *Id.* at 2876 (Marshall, J., dissenting).
204. *Id.* at 2873-74 (Marshall, J., dissenting).
205. *Id.* at 2876 (Marshall, J., dissenting).
206. *Id.* at 2866.
207. Note, *supra* note 150, at 606. For example, the commentator noted that the United States could use the whaling issue as leverage in trade negotiations with Japan. *Id.* at 610. He also commented that the Secretary's efforts in the present case arguably prevented the Japanese from imposing economic penalties in retaliation for United States whaling sanctions and, furthermore, avoided complicating ongoing trade negotiations between the United States and Japan. *Id.*

The commentator, it seems, notes all of these policy concerns quite apart from considering whether the Secretary has such statutory discretion under the amendments. The minority concluded in this regard, however, that the Secretary had substituted his judgment for that of Congress. 106 S. Ct. at 2874 (Marshall, J., dissenting). Given the legislative history and the evidence that the certification standard was met in this case, the dissent concluded that such actions as the commentator suggested exceeded the Secretary's authority. The commentator's well-intentioned advocacy of a position that would grant the Executive Branch flexibil-
Other evidence of the international ramifications of the case was presented to the Court. The Executive Branch argued that this is a “delicate matter” which “could have repercussions,” and so the Court “should hesitate” rather than “inject” itself. The Solicitor General emphasized the severity of imposing economic sanctions against a “foreign ally” and urged recognition of the international consequences of the Supreme Court’s decision. The Japanese petitioners objected to the “massive sanctions” of the Packwood-Magnuson Amendment and warned that imposition of those sanctions threatened to disrupt relations between the United States and Japan. They argued, in addition, that if the Supreme Court affirmed the lower court, it would cause “embarrassment” because a “high official” would be compelled “to act in breach of an international agreement that [was] . . . concluded with a friendly nation . . . .”

The presentation of this evidence to the Court, combined with the Court’s misapplication of Chevron, suggests that the Court was influenced by international considerations. Courts often have been reluctant to interfere in foreign policy determinations and affairs. The Court’s decision in American Cetacean Society can be viewed as a special example of this reluctance. Although congressional intent was clear on the Secretary of Commerce’s duty to certify under the amendments, the Court nevertheless avoided giving effect to that intent. Rather than properly apply the Chevron test, the Court imposed a de facto version of the principle Judge Oberdorfer suggested in dissent at the court of appeals level: unless a statutory construction is clearly erroneous, the judiciary should be particularly hesitant to contradict an executive interpretation of a statute relied on to form an international agreement.

Nonetheless, the language in Chevron provided a perfect vehicle for

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211. Id. at 27.
212. Id. at 17, 20-21, 43.
213. The Supreme Court in Baker v. Carr noted that the political question doctrine requires a “discriminating analysis” to determine whether a particular request for relief in a particular case presents a nonjusticiable political question. 369 U.S. 186, 211 (1962). Furthermore, in Adams v. Vance the court noted that courts are not in a position to exercise judgment that is fully sensitive to matters of international diplomacy and negotiations. 570 F.2d 950, 955 (D.C. Cir. 1977) (per curiam). In addition, the Vance court remarked that “[c]ourts must beware ‘ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President’ . . . .” Id. at 954 (quoting Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973)).
214. 768 F.2d at 448 (Oberdorfer, J., dissenting).
the Court to camouflage the difficult international issues behind narrow statutory grounds. It enabled the Court to reach a decision that it found desirable and to avoid the disagreeable result of ordering the Secretary of Commerce to dishonor an executive agreement reached with Japan.\footnote{215} The Court sought and found a statutory loophole by looking to the language of the amendments and determining that the phrase "diminish the effectiveness" was undefined. By focusing on this undefined phrase, the Court found a statutory gap that might, under the \textit{Chevron} methodology, be construed to allow for discretion on the part of the Secretary, discretion to which the Court could defer. Once the Court found some trace of support in the legislative history for the proposition that the Secretary has \textit{some} certification discretion, the loophole was complete: the Court could conclude under the \textit{Chevron} methodology that the Secretary of Commerce, given the circumstances of the case, reasonably construed the statutes in deciding to withhold certification and to enter instead into an executive agreement with Japan.

The majority could have taken a more honest stance by acknowledging, as Judge Oberdorfer did in dissent at the court of appeals level, that the international posture of the case weighed heavily in its resolution. Judge Oberdorfer conceded that he might have been able to endorse the District of Columbia Circuit's decision if the statute in question had involved domestic affairs only.\footnote{216} He explained, however, that the district court's order would have required the Secretary of Commerce to dishonor a United States commitment to Japan. In the end, the Supreme Court was influenced, no doubt, by Judge Oberdorfer's closing remark in his dissent: "great nations, like great men, should keep their word."\footnote{217}

By relying on a narrow statutory interpretation, the Court avoided giving explicit weight to the international factors that were implicated. Of course, it was argued before the court that the judiciary should not depart from traditional standards of statutory construction when reviewing a statute that touches upon foreign affairs.\footnote{218} However, by deciding

\footnote{215. The Court may have had other reasons as well for finding disagreeable a decision ordering the Secretary to dishonor an executive agreement reached with Japan. Perhaps the Court did not want to allow Congress to interject itself into foreign affairs through a set of statutory sanctions that effectively would short-circuit any flexibility built into the executive agreement process. Alternatively, the Court may have viewed the Packwood-Magnuson Amendment as a rather blunt instrument for dealing with such a delicate situation, even if, in principle, the Court had little objection to Congress interjecting itself into foreign affairs.}

\footnote{216. \textit{See supra} text accompanying note 86.}

\footnote{217. 768 F.2d at 449 (Oberdorfer, J., dissenting).}

\footnote{218. Brief for the Speaker and Bipartisan Leadership Group of the House of Representatives as Amici Curiae at 16-17, 106 S. Ct. 2860 (Nos. 85-954, 85-955). The Speaker and Bipartisan Leadership Group of the House of Representatives observed that Judge Oberdorfer's dissent suggested a double standard in the construction of statutes, with a different set of rules for any statute touching on foreign affairs. \textit{Id.} at 16. These separate rules, the Group noted, would bar reliance on the secondary evidence of legislative history as an aid in determining the meaning of the statute. \textit{Id.} To this, the Group responded that "[t]here is no basis in precedent
American Cetacean Society as it did, the Court has left itself with an unsatisfactory analytic framework for addressing similar questions in the future. The Court's failure to recognize the international factors that were important in this decision seems to admit of no middle ground. Either a case is not justiciable under the political question doctrine or it is justiciable and the Court must operate, as if in a vacuum, to decide on narrow statutory grounds an issue that in reality touches on foreign relations. This lack of middle ground will lead, as it did in this case, to decisions based on formalistic and conclusory reasoning.

CONCLUSION

While the Supreme Court's decision in American Cetacean Society will have a harmful impact on international whale conservation efforts, the decision should not be considered significant for its application of Chevron. The decision clearly undermined the Pelly and Packwood-Magnuson Amendments and undercut the effectiveness of the IWC as an organization for protecting whales. The Court's application of Chevron, however, was conclusory in nature and should not be viewed as extending Chevron's deferential standard for review of an agency's statutory construction. The decision can be seen more accurately as one influenced by the international posture and repercussions of the case. American Cetacean Society is an example of the Court using the Chevron analysis to reach a result the Court found agreeable on other grounds. In the future, the Court should choose between applying the Chevron analysis in an honest and rigorous fashion or using some other standard that would assign specific weight to the international factors that may influence the Court's decision.

or reason for such a distinction. . . . [T]he Court should recognize that any purported distinction between 'foreign affairs' statutes and 'domestic' ones would, in the long run, be wholly untenable.” Id. at 17.

The Speaker and Bipartisan Leadership Group of the House of Representatives noted that in previous cases where the construction of statutes touching on foreign affairs was involved, the Court has looked to the intent of Congress for its answer. Id. This approach by itself, however, does not allow the Court to give recognition to the difficult international factors that may weigh heavily in the resolution of a case. It understandably is difficult for the Court to ignore the repercussions of its decisions and it would not be a good thing for the Court to try to do so. However, unless the Court can truly ignore these factors and return a decision that is based on pure and simple statutory analysis applied in a rigorous fashion, the Court must find some framework that will allow it to weigh explicitly the international factors that inevitably influence its decisions.