

September 1986

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Recommended Citation

Virginia A. Curry, *Japan Whaling Association v. American Cetacean Society: The Great Whales Become Casualties of the Trade Wars*, 4 Pace Envtl. L. Rev. 277 (1986)

DOI: <https://doi.org/10.58948/0738-6206.1218>

Available at: <https://digitalcommons.pace.edu/pelr/vol4/iss1/9>

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Japan Whaling Association v. American Cetacean Society: The Great Whales Become Casualties of the Trade Wars

I. Introduction

The United States, encouraged by environmental and animal protection organizations, has been the major proponent of effective measures to conserve whales.¹ Japan, on the other hand, has been the most outspoken defender of whaling.² A major confrontation between the two countries occurred in *Japan Whaling Association v. American Cetacean Society*.³ The United States blinked.⁴ This pro-whaling decision by the United States Supreme Court had two significant political and legal implications. It intensified the conflict between conservationists and whalers.⁵ It also demonstrated the Court's preference for deferring to the Executive Branch's interpretation of its congressional mandate.

Japan Whaling asked the Supreme Court to determine whether the Secretary of Commerce has discretion under the Pelly⁶ and Packwood Amendments⁷ to negotiate with Japan

1. Note, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. Int'l L. & Pol. 211, 212 (1975).

2. *Id.* at 212 n.8. See also, Note, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 Geo. Wash. J. Int'l L. & Econ. 577, 585 (1986)(authored by Andrew J. Siegal).

3. 106 S. Ct. 2860 (1986). This case (No. 85-954) was consolidated with *Baldrige v. American Cetacean Soc'y* (No. 85-955).

4. See Burgess, *Japan Links Whaling Ban to Court Case*, Wash. Post, Apr. 6, 1985, at A1, col. 6. See also Note, *supra* note 2, at 577 n.5.

5. See, e.g., Letter from Douglas Falkner of Greenpeace International requesting public support (Feb. 1987). See also, Haberman, *Japanese Whalers Face Heavy Seas*, N.Y. Times, Apr. 12, 1987, at 3, col. 1.

6. Pelly Amendment to the Fisherman's Protection Act of 1967, 22 U.S.C. § 1978 (1982). The Pelly Amendment provides that "when the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify

over its whaling practices. The lower courts had held that the Secretary did *not* have this discretion and *must* certify Japan for its violations of the International Whaling Commission's quotas.⁸ The courts had concluded that these violations "diminish[ed] the effectiveness" of international conservation treaties and thus triggered the sanctioning process.⁹ The Supreme Court reversed.¹⁰

This Note will describe and analyze the conflicting arguments presented in *Japan Whaling* over interpretations of the Pelly and Packwood Amendments. The Supreme Court, reversing the lower courts, held that these amendments give the Secretary of Commerce discretion to negotiate with Japan over its future whaling practices, rather than certify it for its past and present practices.¹¹ The Note concludes that although the Supreme Court claims to have decided this case on pure statutory interpretation grounds, the 5-4 decision reflected a major policy choice. The Court recognized that, when it comes to whaling, the Secretary of Commerce has an inherent conflict of interest between his responsibility for the health of United States commerce and his statutory mandate to protect whales. He was given discretion to resolve the conflicts in his position. This Note recommends that, in light of this deference to the Secretary, those citizens who believe that the conservation of whales and other endangered species is as important as concerns over international trade must convince Congress to act to remove the Secretary's discretion.

such fact to the President." *Id.* § 1978(a)(1).

7. Packwood Amendment to the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821 (1982 & Supp. III 1985). The Packwood Amendment provides that "the term 'certification' means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." *Id.* § 1821(e)(2)(A)(i).

8. *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985).

9. *American Cetacean Soc'y*, 604 F. Supp. at 1410, *aff'd*, 768 F.2d at 428. See also *infra* note 40 for an explanation of the certification and sanctioning process.

10. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986).

11. *Id.* at 2862.

II. Background

A. Whaling

"There is probably no one group of animals which has the significance of whales to world conservation."¹² The rapid decline of whale populations during this century is dramatic evidence of the power of human technology to affect the environment on a global scale.¹³ During the nineteenth century, those species of whales which could be killed by the slow whaling boats were nearly wiped out. The whaling industry appeared to be as close to extinction as the whales that supported it. Yet, in the first four decades of the twentieth century more whales were killed than in the previous four hundred years.¹⁴

Technological advances available to whalers were responsible for this incredible killing efficiency. Steam-powered catcher boats, gun-fired harpoons with explosive heads, compressed air pumps to keep dead whales from sinking, and the modern factory ship to process the catch at sea revitalized the twentieth century whaling industry.¹⁵ Today, Russia and Japan are the only countries actively engaged in large-scale whaling.¹⁶

The whaling process has decimated the whale population. Estimates place the pre-whaling population at 3.9 million whales.¹⁷ By 1975, the population was reduced to 2.1 million.¹⁸ Only 1.2 million of these were mature whales.¹⁹ However, these figures underestimate the devastation. While the overall

12. Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L.Q. 326 (1977) (part 1) (quoting Talbot, *Remarks at the Presentation of the Albert Schweitzer Medal*, Animal Welfare Inst. Rep. 2 (Jan.-Mar. 1974)).

13. Hill, *Vanishing Giants*, 77 Audubon 56 (1975).

14. Scarff, *supra* note 12, at 346.

15. *Id.*

16. Together, Japan and Russia account for eighty percent of the captured whales. Christol, Schmidhauser & Totten, *The Law and the Whale: Current Developments in the International Whaling Controversy*, 8 Case W. Res. J. Int'l L. 149, 163 (1976).

17. Scarff, *supra* note 12, at 332.

18. *Id.*

19. *Id.*

decline is forty-six percent,²⁰ some baleen whale species such as the bowhead and right whales have been reduced by over ninety percent.²¹ The blue whale, the largest animal on earth, has been reduced by ninety-nine percent.²²

B. *The International Convention for the Regulation of Whaling*

On November 20, 1946, representatives of fifteen major whaling nations²³ signed the International Convention for the Regulation of Whaling (ICRW)²⁴ and created the International Whaling Commission (IWC).²⁵ Since the treaty became effective in 1948,²⁶ the IWC has dictated the "rules" of international whaling management and conservation.²⁷ The United States, a founding member of the ICRW, and Japan are both signatories to this treaty.²⁸

The signatories hoped that the IWC could effectively regulate whaling so that the whale stock could be maintained at a productive level and the whaling industry could prosper.²⁹ From the first, however, the whaling states favored short-term economic gain and secured the approval of very high annual quotas.³⁰ The results are evident. The most valuable species

20. *Id.*

21. *Id.* at 330-31.

22. Levin, *Toward Effective Cetacean Protection*, 12 Nat. Resource Law. 549, 550 (1979)(citation omitted).

23. Signatory governments were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, USSR, United Kingdom and the United States. International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter ICRW] (proclamation). (Publication of the T.I.A.S. series was begun in 1950, two years after the United States signed this treaty.)

24. *Id.*

25. *Id.* at 1717, T.I.A.S. No. 18____, 161 U.N.T.S. 76.

26. *Id.* at 1717, T.I.A.S. No. 18____, 161 U.N.T.S. 74.

27. Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law, 543, 547 (1984).

28. ICRW, *supra* note 23. See also, Letter from Yasuchi Murazumi, Charge d'Affaires ad interim of Japan, to Malcolm Baldrige, United States Secretary of Commerce (Nov. 13, 1984). For source information see *infra* note 61.

29. ICRW, *supra* note 23, preamble.

30. J.L. McHugh, the former chairman of the IWC, described the IWC's inability

became commercially extinct.³¹ When the IWC finally approved lower quotas, it was unable to enforce them effectively because the ICRW provides that a country which files an objection to a regulation or quota established by the IWC is not bound by that regulation or quota.³² In 1983, the IWC imposed a five-year moratorium on all commercial whaling beginning with the 1985-1986 season to facilitate both the regeneration of whale stocks and scientific study.³³ Only Japan, Norway and the USSR filed objections to this moratorium. However, under its rules, the ICW cannot require Japan and the other objecting nations to honor the ICW's decision.³⁴

C. *United States Enforcement Legislation for Marine Conservation*

The IWC's inability to promote conservation or even to enforce its own quotas inspired a coalition of conservation organizations and aroused members of the public who lobbied Congress to pass legislation that would protect marine ani-

to achieve the desired maintenance of whale stocks.

From the time of the first meeting of the commission established under the International Convention for the Regulation of Whaling (1946) in 1949 to the disastrous meeting of 1964, almost all major actions or failures to act were governed by short-range economic considerations rather than by the requirements of conservation.

Christol, Schmidhauser & Totten, *supra* note 16, at 155 (quoting McHugh, *The Role and History of the International Whaling Commission*, in *The Whale Problem: A Status Report* 303, 306-07 (W. Schevill ed. 1974)).

31. "'Commercial extinction' is a term of art used to describe a resource which has been depleted to such an extent that it would be unprofitable to further exploit it." Note, *supra* note 2, at 582.

32. Note, *supra* note 1, at 218. See ICRW, *supra* note 23, art. V., para. 3.

33. Note, *supra* note 2, at 582.

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

Id.

34. *Id.* See ICRW, *supra* note 23, art. V, para. 3.

mals.³⁵ Congress' first effort toward this goal of protection was the enactment of the Marine Mammal Protection Act of 1972.³⁶ Congress provided more effective enforcement provisions in the Endangered Species Act of 1973,³⁷ which protected the major commercial whale species on the endangered list.³⁸ The protective legislation and listing effectively ended commercial whaling by the United States and dried up the United States market for whale products.³⁹

However, these conservation acts did not halt foreign whaling because the Japanese and Russian domestic markets consume most of their whaling products.⁴⁰ To strengthen the United States' conservation position, Congress passed the 1971 Pelly Amendment to the Fisherman's Protection Act of 1967.⁴¹ The Pelly Amendment authorizes the Secretary of

35. See Smith, *supra* note 27, at 554.

36. 16 U.S.C.A. §§ 1361-1407 (West 1985 & Supp. 1987). This Act prohibits the harassment, hunting, capture and killing of all marine mammals. However, there are exceptions. The Secretary of Commerce is authorized to issue permits allowing the importation or taking of marine mammals for scientific research, public display and incidentally during commercial fishing operations. *Id.* § 1371(a)(2). Alaskan Indians are also given certain exemptions. *Id.* § 1371(b).

37. 16 U.S.C.A. §§ 1531-1543 (West 1985 & Supp. 1987). This Act authorized the Secretary of the Interior to develop a list of animal and plant species that are threatened with worldwide extinction. Once the list has been published in the Federal Register and the hearing process has been exhausted, the Act proscribes any interstate or international trade in a listed species. *Id.* § 1538.

38. 35 Fed. Reg. 18,320 (1970). See Smith, *supra* note 27, at 565 n.148. By 1978, all major large whale species had been placed on the Endangered Species list. 43 Fed. Reg. 58,030, 58,036 (1978). The Endangered Species list is now codified at 47 C.F.R. § 222.23 (1986).

39. Levin, *supra* note 22, at 570. Levin points out that while this listing has placed the United States in a strong position to advocate international whale conservation, it has placed greater survival pressure on the smaller, unlisted Cetaceans. *Id.* (The order of Cetaceans includes all whales, dolphins and porpoises. *Id.* at 553). See also Smith, *supra* note 27, at 565.

40. See Levin, *supra* note 22, at 550-51; Note, *supra* note 1, at 213-14.

41. 22 U.S.C. § 1978 (1982). The Pelly Amendment was passed as a result of a dispute with Denmark over alleged overfishing of Atlantic salmon. See H.R. Rep. No. 468, 92d Cong., 1st Sess. 2 (1971), reprinted in 1971 U.S. Code Cong. & Admin. News 2409, 2411-12. However, the Pelly Amendment protected whales as well as salmon. As Representative Pelly said when he introduced the bill:

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

Commerce (Secretary) to investigate the fishing operations of foreign nationals, and to "certify"⁴² a country if he determines that its nationals are conducting fishing operations in a manner that "diminishes the effectiveness of an[y] international fishery conservation program."⁴³ Once a foreign country has been certified, the President may direct the Secretary of the Treasury to prohibit importation of fish products from the offending nation.⁴⁴ The Pelly Amendment allows the President discretion in determining whether to sanction the offender.⁴⁵

After passage of the Pelly Amendment, the Secretary of Commerce had, by 1978, certified different countries on four occasions for engaging in fishing operations which "diminish[ed] the effectiveness" of IWC programs.⁴⁶ Two of these certifications involved violations of ICW whaling quotas.⁴⁷ Not

most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proven to be a cloak for over-exploitation on a grand scale.

117 Cong. Rec. 34,752 (1971) (statement of Rep. Pelly.) See also H.R. Rep. No. 468, 92d Cong., 1st Sess. 6, *reprinted in* 1971 U.S. Cong. & Admin. News 2409, 2412 (which reported that the bill "should not be geared exclusively to conservation of the North Atlantic salmon, but should be applied generally to international fishery conservation programs").

42. Certification is the first step in a process designed to protect marine resources. When the Secretary determines that foreign nationals are diminishing the effectiveness of an international fishery or endangered species conservation program, he "certifies" that fact by letter to the President. 22 U.S.C. § 1978(a)(1),(2) (1982). Upon receipt of the certification, the President may authorize the Secretary of the Treasury to prohibit the importation of fish or wildlife products from the offending country. *Id.* § 1978(a)(4).

43. "International fishery conservation program" means "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." *Id.* § 1978(h)(3).

44. *Id.* § 1978(a)(4). Furthermore, the definition of the "fish products", whose import can be banned under this section, specifically includes marine mammals and their byproducts. *Id.* § 1978(h)(4).

45. *Id.* § 1978(b).

46. H.R. Rep. No. 1029, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S. Cong. & Admin. News 1768, 1773.

47. Both Japan and Russia were certified under the Pelly Amendment on Nov. 12, 1974. Both took Antarctic minke whales in violation of the ICW quota. President Ford withheld the sanctions when both countries agreed to accept the quotas in the future. See Note, *supra* note 4, at 583-84 n.47.

On December 14, 1978, the Secretary of Commerce certified Chile, Peru and

one of the certifications was followed by the imposition of presidential sanctions. Instead, the President used the threat of sanction to obtain promises of future compliance by offending nations.⁴⁸

Congress responded to these Presidential actions by passing the Packwood Amendment⁴⁹ to the Magnuson Fishery Conservation and Management Act of 1976.⁵⁰ This Amendment removed the President's discretion to impose sanctions once a country had been certified by the Secretary of Commerce.⁵¹ The Packwood Amendment sets the same statutory terms for certification as the Pelly Amendment.⁵² Unlike the Pelly Amendment, the Packwood Amendment mandates that upon such certification sanctions will be applied. The Secretary of State, in consultation with the Secretary of Commerce, *must* reduce the fishing rights allocations within the United States' two hundred mile fishery conservation zone (established by the Magnuson Act)⁵³ by at least fifty percent.⁵⁴ Thomas Garrett, a former United States representative to the IWC, stated that the existence of automatic sanctions has been so effective that it is fundamental to the current system of whaling controls.⁵⁵

Korea for exceeding an ICW quota. These nonmember nations agreed to join the ICW and abide by its quotas. Therefore, President Carter declined to sanction them. *Id.*

48. See *Preparations for the 34th International Whaling Commission Meeting: Hearings Before the Subcomm. on Human Rights and International Organizations of the House of Representatives Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 11 (1982).

49. 16 U.S.C. § 1821(e)(2)(A)(i) (1982) (also known as Packwood-Magnuson).

50. 16 U.S.C.A. §§ 1801-1882 (West 1985 & Supp. 1987).

51. See 125 Cong. Rec. 22,084 (1979) (statement of Rep. Oberstar) ("In order to improve the effectiveness of the Pelly amendment, [the Packwood amendment] will provide for a specific penalty to result from certification.").

52. 16 U.S.C. §§ 1821(e)(2)(A)-(D) (1982).

53. 16 U.S.C.A. § 1811 (West 1985 & Supp. 1987).

54. 16 U.S.C. § 1821(e)(2)(B) (1982).

55. *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398, 1403 (1985) (quoting Garrett Affidavit at 3).

III. The Japan Whaling Association Case

A. Facts

In 1981, the IWC voted 25-1 to establish a zero quota for certain Northern Pacific sperm whales. Japan cast the sole opposing vote.⁵⁶ In 1982, the IWC ordered a five-year moratorium on all commercial whaling to begin with the 1985-1986 season.⁵⁷ Japan filed an objection to the regulation and, under IWC rules, was not legally bound to observe them.⁵⁸ However, the Japanese apparently recognized that exceeding the whaling quotas could lead to United States sanctions under either the Pelly or Packwood Amendments.⁵⁹ Such sanctions would cost Japan an estimated two hundred thirty million dollars in fishing revenue.⁶⁰

Through its Charge d'Affaires in Washington, Japan approached Secretary of Commerce Baldrige in October 1984 with its concerns.⁶¹ After intense negotiations, Japan and the United States concluded an executive agreement through an exchange of letters between the Japanese Charge d'Affaires and Secretary Baldrige.⁶² Japan pledged to limit its catch of

56. *Review of the 33d Int'l Whaling Comm. Meeting: Hearing Before the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs*, 97th Cong. 1st Sess. 11 (1981) (Prepared Statement of Thomas Garrett, Deputy U.S. IWC Commissioner).

57. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860, 2864 (1986).

58. *Id.*

59. *Id.*

60. Japan's fishing harvest in U.S. waters has been estimated to be worth nearly five hundred million dollars. *Japan Agrees to End Whaling*, N.Y. Times, Apr. 6, 1985, at 2, col. 4. Thus, a fifty percent reduction in Japan's quota would cost it almost two hundred fifty million dollars.

61. Letter from Yasushi Murazumi, Charge d' Affaires ad interim of Japan to Malcolm Baldrige, U.S. Secretary of Commerce (November 13, 1984) (discussing the Japanese concern with the Pelly and Packwood Amendments). A copy of the letter can be obtained either by contacting the United States Department of Commerce, 14th Street and Constitution Ave., N.W., Washington, D.C. 20230 or by reviewing *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985) *petition for cert. filed* 54 U.S.L.W. 3312 (U.S. Dec. 4, 1985) (No. 85-955) (App. K at 102a-03a). See also Wash. Post, Oct. 18, 1984, at A19, col. 1.

62. Letter from Malcolm Baldrige, U.S. Secretary of Commerce to Yasushi Murazumi, Charge d'Affaires ad interim of Japan (Nov. 13, 1984) (discussing Japanese harvest of sperm whales and acceptable catch limits); Letter from Yoshio

sperm whales and other whale species, and to cease commercial whaling by 1988.⁶³

In return, and after consulting with the United States Commissioner to the IWC, the Secretary determined that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to discontinue all commercial whaling by 1988, "would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program."⁶⁴

Therefore, the Secretary agreed that he would not certify Japan under either amendment so long as Japan complied with

Okauara, Ambassador of Japan to Malcolm Baldrige, U.S. Secretary of Commerce (Dec. 11, 1984) (stating catch limit for Japanese nationals and notifying that Japan would withdraw its objection, filed on Nov. 9, 1981, to the quota imposed by the International Convention for the Regulation of Whaling); Letter from Malcolm Baldrige, U.S. Secretary of Commerce to Yoshio Okauara, Ambassador of Japan (Dec. 11, 1984) (acknowledging receipt of Ambassador Okauara's Dec. 11, 1984 letter and stating that Secretary Baldrige has decided not to certify Japan pursuant to the Pelly or Packwood Amendments). These letters can be obtained from the Department of Commerce, see *supra* note 60, or by reviewing *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985) *petition for cert. filed* 54 U.S.L.W. 3812 (U.S. Dec. 4, 1985) (No. 85- 955) (Apps. L at 107a-09a, M at 110a, N at 111a).

The details of the agreement were contained in a summary attached to the correspondence between the Charge d'Affaires and the Secretary.

First, the countries agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective April 1, 1988 . . . Japan fulfilled this portion of the agreement on December 11, 1984.

Second, the two nations agreed that if Japan would end all commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Japan agreed to harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whale species- under limits acceptable to the United States after consultation with Japan - through the end of the 1986-1987 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate commercial whaling operations by withdrawing its objection to the 1982 IWC moratorium on or before April 1, 1985, effective April 1, 1988.

Japan Whaling, 106 S. Ct. at 2864 n.1.

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

64. *Id.*

its promises.⁶⁵

During the negotiations, a consortium of conservation organizations opposed to whaling filed suit in district court seeking a writ of mandamus compelling the Secretary to certify Japan.⁶⁶ The district court granted the Japan Whaling Association and the Japan Fishing Association the right to intervene,⁶⁷ but then granted the writ of mandamus.⁶⁸ Thereupon, Japan notified the Secretary of Commerce that Japan would not withdraw its objection to the IWC moratorium, as it had previously agreed, unless the United States obtained a reversal of the district court's order.⁶⁹

B. *The Lower Court Opinions Uphold the Conservationist Position*

1. *The District Court Opinion*

Judge Charles R. Richey of the District Court for the District of Columbia ordered the Secretary to certify Japan.⁷⁰ He reasoned that the "case is a simple issue of statutory interpretation."⁷¹ Since he found the language of the key statutory provisions to be ambiguous,⁷² he turned to the legislative history of the Packwood and Pelly Amendments. He determined that Congress intended the Secretary to certify any nation

65. Letter from Malcolm Baldrige to Yasuhi Murazumi (Dec. 11, 1984). For source information see *supra* note 61.

66. *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398 (1985). The original plaintiffs to the action were: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former U.S. Representative to the I.W.C. *Japan Whaling*, 106 S. Ct. at 2865 n.2.

67. The Japan Whaling Association and the Japan Fishing Association, trade groups representing private Japanese interests, were allowed to intervene. *Japan Whaling*, 106 S. Ct. at 2865 n.3.

68. *American Cetacean Soc'y*, 604 F. Supp. at 1411.

69. Letter from Shintaro Abe, Minister of Foreign Affairs of Japan, to Malcolm Baldrige, U.S. Secretary of Commerce, (Apr. 5, 1985). For source information see *supra* note 61.

70. *American Cetacean Soc'y*, 604 F. Supp. at 1411.

71. *Id.* at 1410.

72. *Id.* at 1404-05.

that violated an IWC quota.⁷³ He also asserted that allowing one thousand two hundred sperm whales to be killed over the next four years would be a complete reversal of United States policy.⁷⁴

Judge Richey found that prior to this matter, the Executive Branch had clearly and consistently taken the position that violations of international fishing quotas necessarily diminished the effectiveness of fishery conservation programs.⁷⁵ In support of his position, he cited *Adams v. Vance*,⁷⁶ the only other case involving the Pelly Amendment. In that case, the Secretary of State had argued that if the United States filed an objection to an IWC quota (to allow the taking of a small number of bowhead whales by Alaskan natives), they would be imposing a serious threat to the effectiveness of the IWC.⁷⁷ Judge Richey found that the Secretary lacked discretion to avoid certification through negotiation or separate agreement.⁷⁸ Both the defendants and intervenors appealed the decision.⁷⁹

73. *Id.* at 1407. Judge Richey stated that "[t]he legislative history and consistent agency interpretation shows that any nation which exceeds the IWC quotas will be viewed as acting to diminish the effectiveness of the IWC and will be certified, regardless of the nations own view of the propriety of the quotas themselves." *Id.* at 1408-09.

74. *Id.* at 1407.

75. *Id.*

76. 570 F.2d 950 (1978). That case began when the ICW notified the United States that to protect the bowhead whale from extinction, it planned to withdraw the exemption by which the Alaskan Eskimos had been allowed to hunt these whales. The Secretary of State announced he would not file an objection to the action on behalf of the United States. The Eskimos sued to compel the Secretary to object formally. The court held that such an order would substantially harm the United States' efforts to promote conservation of marine mammals. Therefore, it would not intrude into the "core concerns" of the executive branch. *Id.* at 954-55.

77. *Id.* at 956 n.13.

78. *American Cetacean Soc'y*, 604 F. Supp. at 1410.

79. After the District Court's decision, Secretary Baldrige certified the Soviet Union for exceeding its ICW quota of minke whales in spite of warning from the United States. He said that their violation triggered the Packwood Amendment's certification process. President Reagan decided not to enforce the sanctions. Note, *supra* note 2, at 601 n.177.

2. *The Circuit Court Opinion*

In a 2-1 decision written by Judge J. Skelly Wright, the Court of Appeals for the District of Columbia Circuit affirmed the district court's decision.⁸⁰ The court agreed that the Pelly and Packwood Amendments did not define which activities would "diminish the effectiveness" of the ICRW's program and so it must look to the legislative history of the amendments to ascertain congressional intent.⁸¹ It found that any violation of an IWC quota would automatically trigger certification.⁸² Furthermore, the court held that no Secretarial discretion exists when an IWC quota has been violated.⁸³ It stated, "we see no indication that Congress was either aware of or acquiesced in such a practice."⁸⁴ The court also held that the Packwood Amendment had not changed the Pelly certification process but only provided mandatory sanctions.⁸⁵

C. *The Supreme Court Reverses*

1. *The Majority Opinion*

Justice Byron White, writing for the majority of a sharply divided Court, reversed the lower courts.⁸⁶ First, he addressed the Japanese petitioners' contention that a federal court lacks the judicial power to order the Secretary of Commerce, an Executive Branch officer, to dishonor an international agreement.⁸⁷ Justice White noted that the Court had previously pointed out in *Baker v. Carr*⁸⁸ that "it is error to suppose that every case or controversy which touches foreign relations lies

80. *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (1985).

81. *Id.* at 436.

82. *Id.* at 442.

83. *Id.* at 440, 442.

84. *Id.* at 440.

85. *Id.* at 435.

86. *Japanese Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860 (1986). The Court reached a 5-4 decision for the petitioners on June 30, 1986. Justices O'Connor, Powell, Burger and Stevens joined the majority opinion of J. White. Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun and Rehnquist joined.

87. *Id.* at 2865.

88. 369 U.S. 186 (1985).

beyond judicial cognizance.”⁸⁹ Furthermore, *Baker* had plainly held that courts have the authority to construe treaties and executive agreements.⁹⁰ He found that the challenge to the Secretary’s decision not to certify Japan for exceeding the IWC quotas involved a purely legal question of statutory interpretation.⁹¹

The Court’s majority saw the issue in this case as “whether, in the circumstances of these cases, either the Pelly or Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas.”⁹² It noted that the Packwood Amendment requires that, before certification, the Secretary must determine that foreign nationals “‘are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness’ of the IWC.”⁹³ However, “the statute does not define the words ‘diminish the effectiveness of’ or specify the factors that the Secretary should consider in making the [certification] decision entrusted to him alone.”⁹⁴ The Court notes that before he made a decision in this matter, the Secretary consulted with the United States Commissioner to the IWC and reviewed the IWC Committee opinions.⁹⁵ He then determined that the limited taking of whales in the 1984 and 1985 coastal seasons would not diminish the effectiveness of the ICRW or its conservation program.⁹⁶ Therefore, he did not certify Japan.

89. *Id.* at 211.

90. *Japan Whaling*, 106 S. Ct. at 2866. *See also Baker*, 369 U.S. at 212-13.

91. *Japan Whaling*, 106 S. Ct. at 2866.

92. *Id.* at 2867. The Court points out that the “circumstances” in this case include the fact that Japan had filed a formal objection to the ICW quotas and moratorium. Therefore, under the ICRW’s “opt-out” rules, it was not breaching its obligations under the Convention. *Id.*

93. *Id.*

94. *Id.* “Specifically, it does not state that certification must be forthcoming whenever a country does not abide by IWC schedules.” *Id.*

95. Appellant’s Reply Brief, *Baldrige v. American Cetacean Soc’y*, 106 S. Ct. 2860 (No. 86-955) (1986) (Affidavit of Malcolm Baldrige, App. III, Jan. 14, 1985).

96. *Id.* The Secretary determined that accepting Japan’s pledge to limit its sperm whaling and to cease all commercial whaling by 1988 would better serve the ICRW’s conservation ends than imposing sanctions and risk continued whaling by the Japanese. *Id.* Furthermore, the Court points out that the Secretary is not urging that he has *carte blanche* discretion to ignore violations of the ICW’s quotas. *Japan*

In considering whether the relevant statutory language clearly directed the Secretary to certify automatically any nation that violates an IWC whaling schedule, the respondents and the courts below conceded that it did not.⁹⁷ This Court found that while the Pelly and Packwood Amendments might be construed in this manner, the Secretary's view that these amendments gave him discretion in these circumstances was also a reasonable construction of the language in the statutes.⁹⁸ The Court noted that its longstanding practice was to defer to "the executive department's construction of a statutory scheme it is entrusted to administer"⁹⁹ whenever the statute is silent or ambiguous on the issue in question.¹⁰⁰ However, it will not defer if the legislative history of the statute clearly shows that the agency construction is contrary to congressional intent.¹⁰¹

The Court reviewed the legislative history of both amendments. It found that there may be "scattered statements hinting at the *per se* rule advocated by respondents, but read as a whole, we are quite unconvinced that this history clearly indi-

Whaling, 106 S. Ct. at 2867.

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

98. *Id.* The Court rebutted the finding of the court of appeals that S. Rep. No. 95-582 provided the necessary direction. *Id.* at 2868 n.5. That report stated that the purpose of the Pelly Amendment was

to prohibit the importation of fishery products from nations that do not conduct their fishing operations in a manner that is consistent with international conservation programs. It would accomplish this by providing that whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he must certify such fact to the President.

S. Rep. No. 582, 95th Cong., 2d Sess. 2 (1978).

The Court said that although this is an explicit statement of purpose, it is not the operative language in the statute. That same report says that the operative section directs the Secretary to certify to the President that nationals of a foreign country are conducting operations under circumstances that "diminish the effectiveness of an international conservation program *whenever he determines the existence of such operations . . . These are not the words of a ministerial duty, but the imposition of a duty to make an informed judgment.*" *Japan Whaling*, 106 S. Ct. at 2868 n.5 (emphasis added).

99. *Japan Whaling*, 106 S. Ct. at 2868 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

100. *Id.*

101. *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985)).

cates . . . that all departures from IWC schedules, regardless of the circumstances, call for immediate certification."¹⁰² Therefore, the Court concluded, the Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through executive agreement, rather than rely on the hope that certification and sanction would produce the desired result, was a reasonable construction of the Pelly and Packwood Amendments.¹⁰³ Having found that Congress had given the Secretary the authority to determine whether foreign nationals' whaling practices are diminishing the effectiveness of the IWC, the Court would not impose a mandatory obligation on the Secretary to certify every violation of IWC quotas.¹⁰⁴

2. *The Dissent*

Justice Thurgood Marshall dissented vigorously from the majority opinion. He argued that the majority had found "permissible exactly the result that Congress sought to prevent in the Packwood Amendment: executive compromise of a national policy of whale conservation."¹⁰⁵

Marshall says that the question here is not whether the Secretary's decision to negotiate rather than certify was wise or effective, but whether it was authorized.¹⁰⁶ He finds that the legislative history clearly establishes Congress' expectation that substantial violations of whaling quotas would always result in certification.¹⁰⁷ Therefore, the Secretary has flouted the express will of Congress and exceeded his own authority.¹⁰⁸

IV. Analysis

The Court in *Japan Whaling* first asserted that this case "present[ed] a purely legal question of statutory interpreta-

102. *Id.* at 2871.

103. *Id.* at 2872.

104. *Id.*

105. *Id.* at 2873.

106. *Id.* at 2874.

107. *Id.* at 2875.

108. *Id.* at 2874.

tion."¹⁰⁹ Next, the Court reaffirmed its longstanding position: deference to an agency's interpretation of its statutory mandate absent clear evidence that the agency was acting in a manner contrary to the will of Congress in carrying out its statutory mandate.¹¹⁰ The Court said that this clear evidence must be found in either the statutory language itself or in the legislative history.¹¹¹ Then the majority demonstrated its proclivity for deference by ignoring the substantial evidence provided by the legislative history that the Secretary's actions were contrary to congressional will.

Recent decisions of the Supreme Court have strongly supported a policy of "agency deference."¹¹² However, the Court stated that a member of the Executive Branch may not act contrary to the will of Congress in carrying out a statutory mandate.¹¹³ "If the intent of Congress is clear, that is the end of the matter."¹¹⁴ The Court found that the legislative history of the Pelly and Packwood Amendments gave the Secretary of Commerce discretion in deciding whether to certify a nation. The Court cites Representative Pelly's testimony at the Senate hearings that sanctions were to be applied "in the case of

109. *Id.* at 2866.

110. *Id.* at 2868. It said, "if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer.'" *Id. construing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1985).

111. *Japan Whaling*, 106 S. Ct. at 2868.

112. See, e.g., *Young v. Community Nutrition Inst.*, 106 S. Ct. 565 (1986) (FDA Commissioner's interpretation of statutory language is sufficiently rational so Court will defer to it); *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1985) (deference to Army Corps of Engineers' interpretation of Clean Water Act); *Heckler v. Day*, 467 U.S. 104 (1984) (courts should not interfere with discretion of Secretary of Health and Human Services to determine how she should comply with her statutory obligations).

See also *Steuer, Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation - Thoughts on Varying Judicial Application of the Rule*, 6 W. New Eng. L. Rev. 35 (1983). The author, a former Justice Department attorney, contends that virtually every brief filed on behalf of a government agency whose action is being challenged contains the assertion that reviewing courts owe deference to the agency. *Id.*

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

114. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1985)).

flagrant violation of any international fishery conservation program to which the United States has committed itself.”¹¹⁵ It quotes the House Report on hearings for the Packwood Amendment in support of its position and points out that the Merchant Marine and Fisheries Committee recognized the Secretary’s discretion in making the initial certification decision.¹¹⁶ This committee reported, “the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.”¹¹⁷

The majority approach presents a logical inconsistency. As Justice Marshall noted in his dissent, the most significant aspect of this case was that even the Secretary himself never concluded “that the intentional taking of large numbers of sperm whales does *not* diminish the effectiveness of the IWC program.”¹¹⁸ In fact, several months prior to his action in this matter, the Secretary had stated that the Japanese taking of whales does diminish the effectiveness of the program.¹¹⁹ Furthermore, Secretary Baldrige stated that his decision to reach an accord was based on his belief that United States policy in support of the IWC Convention would be better served by this accord than by Japanese actions if there were

115. *Fishery Legislation : Hearings on S. 1242 before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 47 (1971) (statement of Rep. Pelly), *quoted in Japan Whaling Ass’n v. American Cetacean Soc’y*, 106 S. Ct. 2860, 2869 (1986).

116. *Japan Whaling*, 106 S. Ct. at 2869.

117. *Id.* H.R. Rep. No. 1029, 95th Cong. 2d Sess. at 8 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 1768, 1772, *construed in Japan Whaling Ass’n v. American Cetacean Soc’y*, 106 S. Ct. 2860, 2869 (1986).

118. *Japan Whaling*, 106 S. Ct. at 2873 (Marshall, J., dissenting).

119. *Id.* Four months before the executive agreement that inspired this suit, Senator Packwood wrote to Secretary Baldrige asking for assurance that “any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson.” *Id.* (quoting Letter from Sen. Packwood to Malcolm Baldrige, Secretary of Commerce (June 28, 1984)).

Baldrige replied, “[y]ou noted in your letter the widespread view that any continued whaling after the . . . (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 ICW.” *Id.* (quoting Letter from Malcolm Baldrige, Secretary of Commerce to Sen. Packwood (July 24, 1984)).

no accord.¹²⁰ Apparently, the Secretary did not believe that certification alone would necessarily deter the Japanese from whaling for maximum yield. However, the legislative history of the Packwood Amendment shows that Congress believed that certification under the Pelly Amendment was mandatory when serious violations of international treaties occurred.¹²¹ But the Court held that since Congress had not *specifically* mandated certification for the deliberate taking of whales in excess of the IWC quota, certification was discretionary.¹²² Clearly, the Court will not find an implied congressional intent sufficient to override a conflicting interpretation by the Executive Branch.

This case presented the Court with a difficult problem. Congress has assigned the Secretary of Commerce the task of protecting whales and other marine animals.¹²³ Congress has

120. Appellant's Reply Brief, *Baldrige v. American Cetacean Soc'y*, 106 S. Ct. 2860 (No. 85-955) (1986) (Affidavit of Malcolm Baldrige, App. III, Jan. 14, 1985). The legislative history of the Packwood Amendment shows that Congress believed that certification under the Pelly Amendment was mandatory when serious violations of international treaties occurred.

121. See, for example, an exchange between members of Congress and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration at hearings prior to the passage of the Packwood Amendment. They were discussing the meaning of the Pelly Amendment.

Mr. McCLOSKEY. [T]he certification is a mandatory act under the law. It is not a discretionary act.

Mr. FRANK. This is correct.

Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing. But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas. . . .

Mr. FRANK. That is correct. The first one is mandatory on the Secretary of Commerce. The second is discretionary on the part of the President.

Fish and Wildlife Miscellaneous, Part 1: 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).

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

123. See Marine Mammal Protection Act of 1972, 16 U.S.C.A. §§ 1361-1407 (West 1985 & Supp. 1987); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (West 1985 & Supp. 1987); Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1801-1882 (West 1985 & Supp. 1987); Fisherman's Protection Act of 1967, 22

also assigned this same Secretary the larger responsibility for promoting and protecting the health of all United States commercial trade.¹²⁴ When another country's violation of IWC's quotas becomes an issue in our trade negotiations with that country (as it did with Japan),¹²⁵ the Secretary's inherent conflict of interest becomes apparent.

The Secretary cannot resolve this conflict to the satisfaction of both conservationists and whalers.¹²⁶ The imposition of sanctions against the world's major proponent of whaling would be a major victory for the conservation movement. On the other hand, Japan is culturally and economically committed to whaling at this time.¹²⁷ Furthermore, Japan has substantial economic and political leverage in trade matters because of its fifty-eight billion dollar trade surplus with the United States.¹²⁸ If the Secretary were to impose Pelly and

U.S.C. § 1971-1980 (West 1985 & Supp. 1987) (this Act is found under chapter 25, entitled Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries).

124. See 15 U.S.C. § 1512 (1983).

125. See Burgess, *supra* note 4, at A1, col. 6 (stating that although the Japanese agreement to end whaling in 1988 "was not formally linked to tense negotiations over bilateral trade . . . underway between the [United States and Japan] . . . Japanese officials see it as a major concession in the total picture of ties with the United States"); *Whale-Savers Challenged by Japanese*, Wash. Post., Oct. 18, 1984, at A19, col. 1 (maintaining that confrontation over whaling "could escalate into a serious trade war between the United States and one of its best trading partners [Japan]").

126. Conservationists have not accepted the Secretary's assertion that Japan's agreement to abide by the moratorium after 1988 would be more beneficial to the conservation cause in the long run. They point to the fact that Russian and Japanese whaling ships are old and too expensive to replace. See Hill, *supra* note 13, at 56. Even the whalers admit that they have no plans to replace their soon to be retired whaling fleets. See Rosa, *What is Leviathan's Future?* 7 Oceans, May-June 1974 at 49.

Therefore, the Japanese are eager to do as much whaling as possible while their ships are still operable. Japan's whaling industry earns fifty million dollars per year. Note, *supra* note 2, at 595 n.129. Amortization is an important factor in the Japanese position. In addition, whaling is a matter of national pride to the Japanese and such matters are significant to them in determining international positions. However, the Japanese argument that the moratorium will deprive them of an important food source is belied in this case by the fact that sperm whales, the key animals here, are inedible. Rosa, *supra*, at 50.

127. See Note, *supra* note 2, at 585 n.57 and accompanying text.

128. Farnsworth, *Mounting Conflict Over Trade Looms For U.S. and Japan*, N.Y. Times, Mar. 9, 1987 at A1, col. 4.

Packwood sanctions on Japan, Japan has the power and the will to retaliate.¹²⁹

If the Court does not defer to the Secretary's interpretation of his statutory mandate, it severely restricts the flexibility he needs to do an admittedly complex job. Yet, the Court must review his decisions to determine whether he has complied with the will of Congress. The underlying policy decision here lies with Congress, not the Court. This case plainly indicates that marine mammal conservation programs are vulnerable to destruction by powerful economic interests.

If Congress still believes that preservation of whales and other marine animals is as important as trade concerns, it must make that clear in the statutory language. If Congress wishes to leave discretion with the Secretary, it need do nothing. This difference in priorities is clearly reflected in the disparate majority and minority interpretations of the same legislative history.

The Court has said, "deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."¹³⁰ Therefore, Congress must act to amend the Pelly and Packwood Amendments if it wishes to protect the whale from devastation in trade wars. It must specify that violations of IWC quotas will result in mandatory certification and sanctions. As Justice Marshall said, "[s]ince 1971, Congress has sought to lead the world, through the repeated exercise of its power over foreign commerce, in preventing the extermination of whales and other threatened species of marine animals. I deeply regret that it will now have to act again before the Ex-

129. Japan has threatened to stop United States fish exports to Japan. Note, *Enforcement Questions of the International Commission on Whaling: Are Exclusive Economic Zones the Solution?* 14 Cal. W. Int'l L. J. 114, 140 (1984). This action would destroy the market for two-thirds of the output of the Alaskan fish processing industry. Some believe that Japan might also revoke its salmon fishing treaties with the United States. *Id.* This would cost the United States one hundred million dollars in trade. *Id.*

130. *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

ecutive Branch will finally be compelled to obey the law.”¹³¹

V. Conclusion

Although the Court claims to have decided this case purely on the grounds of statutory interpretation, this 5-4 decision reflected a major Court policy — deference to the Executive Branch. It reflected a determination that the Secretary of Commerce needs flexibility to deal with his conflicting responsibilities. Since Congress did not specifically restrict this flexibility by mandating certification of IWC quota violations, the Court would not intervene. The minority shows greater concern for the impact of the Secretary's actions on the conservation of whales.

In light of the continuing Court deference to the Executive Branch, conservation-minded citizens must turn to Congress. Once more they must amend the statutes and provide precise protective measures for the whale. As Justice Marshall said in dissent, the question here has been long pondered: “whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff.”¹³²

Virginia A. Curry

131. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 106 S. Ct. 2860, 2872 (1986) (Marshall, J., dissenting).

132. *Id.* at 2872 (quoting H. Melville, *Moby Dick* 423 (Bantam Classic ed. 1981)).