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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-954 & 85-955

TITLE JAPAN WHALING ASSOCIATION AND FISHERIES ASSOCIATION, Petitioners
V. AMERICAN CETACEAN SOCIETY, ET AL.; and MALCOLM BALDRIGE,
SECRETARY OF COMMERCE, ET AL., Petitioners V. AMERICAN CETACEAN
SOCIETY, ET AL.

PLACE Washington, D. C.

DATE April 30, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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JAPAN WHALING ASSOCIATION AND :
FISHERIES ASSOCIATION, :
Petitioners :

V. : No. 85-954

AMERICAN CETACEAN SOCIETY, ET AL. :
and :
MALCOLM BALDRIGE, SECRETARY OF :
COMMERCE, ET AL., :
Petitioners :

V. : No. 85-955

AMERICAN CETACEAN SOCIETY, ET AL. :
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Washington, D.C.
Wednesday, April 30, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:01 o'clock p.m.

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APPEARANCES:

ARNOLD I. BURNS, ESQ., Associate Attorney General,
Department of Justice, Washington, D.C.; on behalf
of Petitioners in No. 85-955.

SCOTT C. WHITNEY, ESQ., Washington, D.C.; on behalf
of Petitioners in No. 85-954.

WILLIAM D. ROGERS, ESQ., Washington, D.C.; on behalf
of Respondents.

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1 implement and to execute the law, and I think that
2 you'll find that as the argument progresses, Justice
3 White, there's been a very happy collaboration between
4 the Congress and the Executive Branch which has together
5 made tremendous strides over the years in the
6 conservation and protection of whales.

7 QUESTION: You wouldn't know that from the
8 brief that the Congress has filed in this case.

9 MR. BURNS: No, you wouldn't, but I shall try
10 to embellish that point as we proceed.

11 The Telly Amendment, the principal statute,
12 provides, and I should like to quote it: "When the
13 Secretary of Commerce determines that nationals of a
14 foreign country, directly or indirectly, are conducting
15 fishing operations in a manner or under circumstances
16 which diminish the effectiveness of an international
17 fishery conservation program, the Secretary of Commerce
18 shall certify such fact to the President."

19 Now, if there is a certification, then the
20 statute goes on to provide that the President may direct
21 the Secretary of the Treasury to prohibit the bringing
22 or importation of fish from the offending country into
23 the United States.

24 Now, there is no issue in this case, we all
25 agree, that that portion of the statute dealing with the

1 President's authority is purely discretionary. The
2 Packwood Amendment, enacted in 1979, eight years after
3 the Pelly Amendment was enacted, contains a similar
4 certification provision.

5 Under the Packwood Amendment, if there is
6 indeed a certification, then the Secretary of Commerce,
7 working with the Secretary of State, must -- must reduce
8 the amount of fish by at least 50 percent that the
9 offending country can take from United States fishery
10 waters.

11 There is no issue in this case --

12 QUESTION: That's the statute that we're
13 dealing with, or we're dealing with the two of them
14 together?

15 MR. BURNS: Yes, but as the court below found
16 and as I think we all agree, the language which I quoted
17 in the Pelly Amendment is the language which the Court
18 must address in this case. There is no issue but that
19 the sanction in the Packwood Amendment is a mandatory
20 sanction. We all agree.

21 The National Whaling Commission, created by
22 the International Convention for the regulation of
23 whaling, by the adoption of schedules among other things
24 imposed a zero quota for the harvesting of sperm whales
25 effective in April of 1984, and adopted a complete

1 moratorium on all commercial whaling to be effective in
2 April of 1986, this very month.

3 Japan filed timely objections to these
4 schedules, and as a consequence under international law
5 is not bound to abide by them. There is no dispute in
6 the case about that.

7 On November 13th, 1984, following extensive
8 negotiations in which the United States made it very
9 clear to Japan that sanctions under these amendments
10 were definitely in the cards, the United States and
11 Japan struck a deal. In exchange for Japan's pledge to
12 assiduously adhere to new quotas that were established
13 in respect of sperm whales, minke whales and Bryde's
14 whales, in the interim, Japan would definitely give up
15 all commercial whaling by April of 1988.

16 QUESTION: Mr. Eurns, I'm not an expert in
17 whales. What is the second type that you mentioned,
18 minke, is it?

19 MR. EURNS: Minke whale. It is a smaller
20 whale, Your Honor. There are in the world today one
21 million, roughly, sperm whales, roughly 300,000 minke
22 whales, and roughly 30,000 Bryde's whales.

23 QUESTION: How do we know that? Do we go out
24 and count them?

25 MR. EURNS: Well, they -- believe it or not,

1 Justice Blackmun, there is methodology for determining
2 that. It's not precise, but it's fairly good. And
3 those statistics I gave you come from the Department of
4 Commerce.

5 QUESTION: But only 300,000 minke whales?

6 MR. BURNS: Right. Now, Japan -- the United
7 States in exchange for Japan's commitment promised that
8 it would not certify Japan. Respondents, a coalition of
9 private --

10 QUESTION: How do you classify that agreement?

11 MR. BURNS: I classify it as an executive
12 agreement between two sovereign nations, Justice White,
13 binding on both.

14 QUESTION: And it was negotiated and signed by
15 the Secretary of Commerce?

16 MR. BURNS: No, it was negotiated and signed
17 by the Secretary of Commerce on the one hand, with the
18 approval of the Secretary of State, and a diplomat, an
19 authorized diplomat of the Japanese government.

20 QUESTION: Cabinet level?

21 MR. BURNS: Oh, yes.

22 The court of appeals in this case, one judge
23 dissenting, affirmed the issuance of a writ of mandamus
24 compelling the Secretary of Commerce to certify Japan,
25 thus triggering the discretionary sanctions of Pelly and

1 the mandatory sanctions of Packwood, a square holding
2 that the Secretary of Commerce in these circumstances
3 had absolutely no discretion in the certification
4 procedure, and that any departure from the harvest
5 quotas adopted by the International Whaling Commission
6 in any circumstances would per se constitute a
7 diminishment of the effectiveness of this international
8 arrangement requiring this mandatory sanction in the
9 Packwood amendment.

10 QUESTION: Did the court of appeals majority,
11 General Burns, hold out in so many words that last --
12 that any violation of the harvest quotas would be a
13 diminishment?

14 MR. BURNS: In so many words. They held that
15 it was a per se violation. Now, if the decision --

16 QUESTION: May I ask one question about the
17 litigation. Does your side concede that there's a
18 private cause of action under this statute?

19 MR. BURNS: We have difficulty, jurisdictional
20 difficulty, which we argue in our reply brief after the
21 issue was raised by respondents on the issue of standing
22 in the case to begin with.

23 QUESTION: I understand. I am not asking
24 about standing. I am asking if -- do you think this
25 statute includes a private cause of action for the -- for

1 a private citizen, enforceable by private cause of
2 action?

3 MR. BURNS: I think under appropriate
4 circumstances, it would, yes, Your Honor.

5 QUESTION: You do agree with that?

6 MR. BURNS: If the decision below is reversed
7 and the international agreement between the United
8 States and Japan, which is the single most important
9 whaling nation in the world, if that decision below is
10 reversed all whaling by Japanese nationals will surely
11 end by April 1, 1988.

12 If the decision below is affirmed, the
13 international agreement will be nullified. Severe
14 economic sanctions will be issued against Japan. And,
15 importantly, the taking of whales will be exactly where
16 it was before this all started, namely, completely and
17 totally up in the air.

18 QUESTION: Would those sanctions be the
19 sanctions that were in the wind, in the offing, two
20 years ago when the bargain was struck?

21 MR. BURNS: Oh, yes, and Mr. Chief Justice,
22 you will find as one goes through this record that there
23 have been six instances in which certifications have
24 taken place, five of them under the Pelly amendment, and
25 in each of those five instances involving Japan and the

1 Soviet Union, Korea, Chile and Peru, sanctions that were
2 issued because when we brought them to the bargaining
3 table the countries involved fell into line and in each
4 instance joined the International Whaling Commission.

5 QUESTION: Has there been any instance where
6 the certification has not taken place?

7 MR. BURNS: Justice Blackmun, there are three
8 instances in which certification has not taken place,
9 one in 1979 involving Spain, one in 1980 involving
10 Taiwan, and one I believe in 1982 involving Chile.

11 In two of those instances there was not a
12 clear and definite showing that there had been a harvest
13 quota violation, but there was clear evidence that they
14 were heading for it. But the issue was averted by
15 negotiation and diplomacy.

16 In the third case involving Chile, there's no
17 doubt that there was a violation of the harvest quota,
18 and there was no certification. To date there has been
19 only one certification involving mandatory sanctions and
20 that involved a certification of the Soviet Union just a
21 year ago, in April of 1985.

22 The principal point that I wish to make --

23 QUESTION: I can understand your policy
24 argument all right. I think the hurdle you have to get
25 over is, what Congress intended.

1 MR. EURNS: And with specific reference to
2 that, we need not speculate and we need not conjecture,
3 Justice Blackmun. We know the answer to that.

4 First of all, respondents argue that this
5 language, despite the fact that it drips with words of
6 discretion, really is clear-cut and mandatory. The
7 problem is that they do not really say that.

8 They say that the language of this statute
9 sometimes is mandatory and ministerial and wholly
10 lacking in discretion, and at other times it is fully
11 discretionary and they do not tell us or enlighten us
12 where the metaphysical distinction is.

13 Let me explain. There are many matters which
14 are the subject of the adoption of schedules. In
15 addition to harvest quotas you have proscriptions
16 against taking female whales, taking suckling whales,
17 taking -- there are proscriptions against taking
18 calves. There are proscriptions against taking whales
19 in certain geographical areas. There are proscriptions
20 against using certain kinds of harpoons.

21 In all of those instances, as I understand
22 respondent's argument and there is a concession to this
23 effect in the brief, and the court below has conceded
24 that in those circumstances under this very same language
25 you would have discretion, and the Secretary of Commerce

1 felt that under the same language where you have a
2 harvest quota violation, there would be no such
3 discretion.

4 QUESTION: Mr. Burns, may I ask, is there some
5 kind of agreement which provides a five-year moratorium
6 on whaling ending in 1990?

7 MR. BURNS: There is a, today a moratorium in
8 force without any termination date. It is not finite.
9 There is today --

10 QUESTION: Well, what's the Japanese
11 agreement, if there is a reversal -- you have said that
12 Japan would be out of the whaling business in 1988?

13 MR. BURNS: That's correct.

14 QUESTION: Well, is it that, or are they
15 simply going to abide by the moratorium which as I
16 understood it, by its terms ends in 1990?

17 MR. BURNS: They will abide by the moratorium,
18 but there are 41 nations in the International Whaling
19 Commission, Justice Brennan, only eight of whom are
20 whaling nations.

21 There is practically no chance whatsoever that
22 that moratorium will be changed. As a practical matter--

23 QUESTION: No, my question was, what is it
24 Japan has agreed to do in 1988, get out of whaling
25 entirely, or simply to abide by the moratorium until its

1 termination?

2 MR. BURNS: They have agreed to abide by the
3 moratorium and as a practical matter, we say, the
4 Secretary of Commerce says, the Secretary of State says,
5 that this amounts to a cessation of commercial whaling.

6 QUESTION: In 1988?

7 MR. BURNS: Yes, in 1988.

8 QUESTION: Not in 1990, or whatever the
9 termination --

10 MR. BURNS: April of 1988, at the end of the
11 coastal whaling season which ends April of 1988.

12 QUESTION: This agreement between the
13 Secretary of Commerce and Secretary of State, was
14 Congress involved in that in any way, shape or fashion?

15 MR. BURNS: No, it was not, Justice Marshall.

16 QUESTION: So, you don't know what their
17 position is?

18 MR. BURNS: Well, I do know what --

19 QUESTION: Except what they said in the
20 statute?

21 MR. BURNS: No, I know more than that, and I'd
22 like to share it with you if I may, Justice Marshall.

23 QUESTION: Is it in the record?

24 MR. BURNS: Yes, it is. You'll find this at
25 footnote 46 at pages 37 and 38 of our principal brief.

1 At the time, in 1979, this is what was said concerning
2 the Pelly Amendment.

3 Now, the question must be asked, what did
4 Congress have in mind when they adopted the Packwood
5 Amendment. They may -- they provided for mandatory
6 sanctions at that time. What did Congress have in mind?

7 And the answer to the question is very clear.
8 What Congress had in mind was, in adding teeth and
9 giving the Executive Branch additional negotiating chips
10 at the bargaining table, and the idea was that after the
11 Packwood Amendment took place, that offending nations or
12 nations that might become offending nations would no
13 longer have two bites of the apple. They would only
14 have one bite at the negotiating apple.

15 And, that is not conjecture on my part,
16 because Representative Brow said, "I understand under
17 the Pelly Amendment as it exists there are really two
18 areas in which there are optional actions that can be
19 taken by the Administration. First, in certifying that
20 a country is in violation of some international
21 agreement, and there is a lot of flexibility in that
22 certification. And second, after a nation is certified,
23 there is still discretion in determining whether a ban
24 on imports of that country's products will be in fact
25 imposed against that country."

1 Therefore, under Pelly we have two
2 discretionary features, whereas in the Packwood
3 Amendment you are really taking all of the discretionary
4 features and putting them into their first category
5 which is the certification of a nation being in
6 violation of an international agreement. That tells us
7 precisely what they had in mind.

8 QUESTION: Mr. Burns --

9 QUESTION: It's not precise to me.

10 QUESTION: Mr. Burns, may I inquire what the
11 effect is of the fact that Japan objected to the quotas,
12 and therefore under the terms of the Act is not bound by
13 them? Does that mean that Japan is not in violation at
14 all?

15 MR. BURNS: It means that Japan has the right
16 under international law, under the international compact
17 originally entered into once they filed the objection to
18 ignore the compact.

19 QUESTION: But that fact has nothing to do
20 with the imposition or determination to impose sanctions?

21 MR. BURNS: Well, the point is that Japan in
22 this case clearly would have been violating and
23 departing from the schedules adopted, but was persuaded
24 not to follow that course and an agreement was struck
25 whereby they would take, starting now, for example, 1986

1 through 1988, 200 sperm whales in each of those two
2 years.

3 They have taken 400 sperm whales in this last
4 year.

5 QUESTION: Yes, but is there any effect at all
6 by virtue of the fact that Japan objected to the quotas
7 and therefore supposedly wasn't bound by them?

8 MR. BURNS: The effect of that would be that
9 absent the negotiation, absent sitting down at a table,
10 absent an agreement, Japan would be whaling and continue
11 to take whales without limitation, subject solely to its
12 own determination, subject only to its own discretion.

13 QUESTION: But subject to sanction?

14 MR. BURNS: And subject to the availability of
15 sanctions under both the Pelly Amendment and the
16 Packwood Amendment.

17 QUESTION: Which some might think were serious?

18 MR. BURNS: There's no doubt that they thought
19 they were serious. It was the threat and the fact that
20 sanctions were clearly in the cards. The record shows
21 that they were told that, that persuaded Japan not to
22 follow that course but to join in the community of
23 nations and to leave seven whaling nations instead of
24 eight.

25 QUESTION: Well, the basic agreement doesn't

1 seem to have much binding effect to it; at least, it
2 permits a great deal of dilatory tactics here, doesn't
3 it?

4 MR. BURNS: The answer to that is twofold.
5 One, Mr. Chief Justice, is that you can, we think, rely
6 on Japan's good faith, and second, you always have the
7 clout which can be reimposed at any time, and that, I
8 think, is the enforcement methodology.

9 QUESTION: Meanwhile, two or three years of
10 crops of whales are taken contrary to the intent, at
11 least the basic intent of the original agreement?

12 MR. BURNS: The original agreement between the
13 two sovereign nations, yes. I mean, there isn't a
14 lawyer who has been trained or born who can draw an
15 agreement that will protect against bad faith. We do
16 not think that is in this case.

17 CHIEF JUSTICE BURGER: Mr. Whitney.

18 ORAL ARGUMENT OF SCOTT C. WHITNEY, ESQ.

19 ON BEHALF OF PETITIONERS IN NO. 85-955

20 MR. WHITNEY: Thank you, Mr. Chief Justice,
21 and may it please the Court:

22 The Japanese petitioners agree essentially
23 with the argument you have just heard. However, we
24 diverge from the federal petitioners and the respondents
25 on two issues that I'd like to --

1 QUESTION: Would you like to raise the
2 lectern. We aren't -- the other way might make it --
3 then you'd get the benefit of those microphones.

4 MR. WHITNEY: The Japanese petitioners agree
5 with the presentation, essentially with the presentation
6 we've just heard by the federal petitioners. However,
7 we diverge from both the federal petitioners and the
8 respondents on two issues which I would like to devote
9 my time to discussing.

10 Before doing so, I'd like to clarify a couple
11 of matters. Justice Brennan, you asked about the
12 moratorium. The moratorium that was established will
13 continue indefinitely unless the International Whaling
14 Commission in 1990, based upon scientific evidence,
15 decides that whale stocks are at a sufficiently high
16 level to permit the resumption of whaling.

17 And it is partly a reflection of that fact,
18 why the Murazumi-Baldrige agreement was to the
19 advantage of the preservation of whales, because the
20 Japanese would cease whaling, will cease whaling, if the
21 agreement is not stricken down, as of April 1, 1988.

22 QUESTION: But may resume after 1990?

23 MR. WHITNEY: Only if the International
24 Whaling Commission dissolves the moratorium, a point
25 which my predecessor pointed out, is highly unlikely

1 since the International Whaling Commission normally
2 votes 37 or something to one on the subject. So, the
3 moratorium for practical purposes will continue
4 indefinitely.

5 The other point that I'd like to clarify,
6 Justice Blackmun, is the matter of the whaling
7 populations. Those figures are given in the first
8 portion, pages 3, 4 and 5 of the Japanese petitioner's
9 reply brief, and they give you two sets of figures.

10 The figures which are espoused by the
11 preservationist ultras, which naturally tend to be
12 somewhat lower than the figures which have been adduced
13 and compiled by the United States government pursuant to
14 the Marine Mammal Act, which are substantially larger,
15 but you will find the particulars there and the citation
16 of authority.

17 The bottom line is, as to the whales, the
18 species of whales which are involved in the
19 Murazumi-Baldrige Agreement, all three species are
20 robust populations. There is a good deal of apocalyptic
21 discussion in the respondent's brief about Moby Dick and
22 blue whales and white whales, but they are irrelevant to
23 this proceeding. They are not encompassed in the
24 Murazumi-Baldrige Agreement.

25 The first issue --

1 QUESTION: Well, what are they involved in?

2 MR. WHITNEY: I'm sorry?

3 QUESTION: Are they involved at all in this
4 litigation?

5 MR. WHITNEY: No, sir.

6 QUESTION: Are there any limits on them?

7 MR. WHITNEY: They are the subject of
8 independent protection, protective measures, and there
9 have been -- there has been no taking of those species
10 of whales for a very long time.

11 QUESTION: Yes.

12 MR. WHITNEY: Indeed, this is only indirect
13 but one of the concerns is the rapid increase in the
14 minke whale population which is a species involved in
15 this agreement, is endangering the survival of the blue
16 whale by encroaching on their feeding.

17 Now, we have a major difference concerning the
18 relationship between the treaty, the International
19 Convention for the Regulation of Whaling, and these two
20 statutes. We -- there is no dispute that whenever a
21 signatory to the convention exercises its rights under
22 Article 53, that has the legal effect of exempting the
23 party from any -- from whatever act the IWC has taken to
24 which they object.

25 The question then becomes, having exempted

1 themselves under the treaty by an exercise of an
2 absolute and unqualified treaty right, can that act of
3 objection be treated as an act which diminishes the
4 effectiveness of the treaty? Because, only if the
5 exercise of this unqualified right can be shown to
6 diminish the effectiveness of the treaty, are the
7 statutes --

8 QUESTION: Absent any treaty at all, I suppose
9 Congress could limit -- could impose some limits on the
10 taking of whales in certain waters?

11 MR. WHITNEY: I'm not terribly sure they could
12 do that as to foreign nationals. But the point is that
13 they have taken a position, actually it was the United
14 States government that continually insists on such an
15 objection mechanism in all multilateral treaties in
16 which they participate.

17 We cite the example that the nonparticipation
18 of the United States in the Law of the Seas Treaty came
19 about because there was not an escape clause provision
20 in it. The theory behind it, it sounds --

21 QUESTION: Is this -- was this presented below?

22 MR. WHITNEY: Yes, sir.

23 QUESTION: Was it rejected?

24 MR. WHITNEY: It was, I think fair to say, not
25 even considered.

1 QUESTION: Is it among the questions presented
2 in this case?

3 MR. WHITNEY: Only indirectly. It comes about
4 in response to the problem of whether or not the
5 moratorium and the zero quota, which were enacted, were
6 in fact enacted in violation of the provisions of the
7 treaty itself, and that is the other portion of the
8 treaty.

9 Article 52 requires that the IWC meet four
10 specific requirements. The language is mandatory.
11 Nobody has contested the fact that this is mandatory.
12 And no one has also contested that the particular
13 moratorium of the zero quota that are in issue here were
14 in fact adopted in violation of Article 52, particularly
15 adopted in violation of the provision that requires that
16 the quota, the zero quota, be based upon scientific
17 evidence.

18 QUESTION: But, Mr. Whitney, the Pelly
19 Amendment, as I read that Section 1, doesn't talk about
20 violation of a treaty. It says, diminish the
21 effectiveness of an international fishery conservation
22 program.

23 MR. WHITNEY: Yes, that's the point I am
24 striving to make, is that it is inherently paradoxical
25 and self-contradictory to conclude, we submit, that the

1 exercise of an unqualified treaty right to object
2 somehow diminishes the effectiveness of the treaty which
3 proclaims and endows that unqualified right.

4 QUESTION: But the Pelly Amendment doesn't say
5 "treaty." It says, International Fishery Conservation
6 Program.

7 MR. WHITNEY: Well, that's -- I take it that
8 does embrace the convention that we're talking about.
9 No one, at least, has challenged that point up to this
10 time.

11 QUESTION: Now, you challenge the amendment
12 itself?

13 MR. WHITNEY: I'm sorry?

14 QUESTION: Are you bringing the validity of
15 the Pelly Amendment itself --

16 MR. WHITNEY: No, sir. What I was indicating
17 was that the zero quota and the moratorium adopted by
18 the IWC was without dispute adopted in violation of
19 Article 52. It was indeed one of the reasons why the
20 objection was lodged.

21 Now, the court below does not dispute this,
22 the fact that -- the point is that in this language the
23 court below, or I take it the respondents, do not
24 contend that Congress ever explicitly stated that if you
25 exercise this right that you will diminish the

1 effectiveness of the treaty because to do so abrogates
2 that provision of the treaty.

3 The court below instead adopted a position
4 which we call the coercion theory of treaty
5 enforcement. Under this theory the court below held
6 that there -- that the domestic statutes provide
7 enforcement leverage to coerce parties to the treaty not
8 to exercise their right to object, and they make the
9 corollary point that there's nothing in the treaty that
10 prohibits the United States from using the threat of
11 economic force to coerce a signatory not to exercise its
12 rights to become exempt.

13 We suggest that this is -- merely to state
14 that proposition is to show that it's an essentially
15 unsound and I think immoral concept, that the United
16 States who is the author and who insists on having this
17 kind of a provision, and frequently has used it -- in
18 fact, has not gone into treaties when that provision was
19 not there, can selectively use the threat of economic
20 force to coerce another nation not to exercise its
21 rights and thereby exempt itself accordingly.

22 CHIEF JUSTICE BURGER: Your time has expired.

23 MR. WHITNEY: Thank you, sir.

24 CHIEF JUSTICE BURGER: Mr. Rogers.

25 ORAL ARGUMENT OF WILLIAM D. ROGERS, ESQ.

1 ON BEHALF OF RESPONDENTS

2 MR. ROGERS: Mr. Chief Justice, and may it
3 please the Court:

4 In our judgment there is one issue properly
5 before the Court in this case, and that is, what the law
6 is, what Congress said. There has been considerable
7 discussion about a number of other interesting issues
8 which are not, I think, except by the most attenuated
9 notions strictly legal, such as world populations.

10 Mr. Whitney has cited gross numbers for global
11 populations but has not suggested to the Court that they
12 may be misleading with respect to the capacity of whale
13 populations in subgroups to maintain their levels.
14 There is considerable dispute amongst scientists about
15 that question.

16 There is also the question Mr. Whitney has
17 brought forward, whether the Commission violated its own
18 conventions, which I am not sure is properly before the
19 Court. The issue of whether Japan has committed itself
20 to stop whaling, I'd remind the Court that in the
21 Baldrige-Murazumi Agreement the sole commitment Japan
22 made was to withdraw its objections to the moratorium
23 and quotas established by the Commission.

24 But that leaves before Japan the possibility
25 of scientific whaling, aboriginal whaling and in the

1 end, if it chooses' to, the withdrawal from the
2 convention, by which time the lever now exercised by
3 the United States under the Packwood-Magnuson Amendment
4 of exclusion from the U.S. fishing zone will, as the
5 Baldrige affidavit in this very case points out, be
6 considerably less significant to Japan because of the
7 fact that American fishermen will have occupied the
8 available take in the 200-mile limit toward the close of
9 this decade.

10 In any event, we have suggested these are not
11 the central issues before the Court. The central issue
12 before the Court is whether or not the Secretary had the
13 discretion he purported to exercise here to agree not to
14 impose the sanction under Packwood-Magnuson which all
15 sides agree is mandatory when there is a certification.

16 The issue, whether or not sanctions should be
17 mandatory or should be the subject of extensive
18 negotiation and diplomatic accommodation has been an
19 issue present in the debates over congressional
20 regulation of whaling from the very beginning. In 1971,
21 as has been pointed out, the Pelly Amendment was passed
22 providing for a discretionary sanction of banning
23 imports when the Secretary determined that there was an
24 action diminishing the effectiveness of the
25 international whaling system.

1 In that year, I might point out, Congress also
2 enacted resolutions for the first time favoring a
3 worldwide moratorium on whaling. In our judgment, the
4 language of Pelly is quite persuasive to the proposition
5 that the Secretary of Commerce had no discretion with
6 respect to the first stage of the process; that is to
7 say, the stage with respect to certification, and that
8 Congress clearly incorporated what it thought then to be
9 appropriate discretion with respect to the second stage
10 of the process, that is, whether or not to impose
11 sanctions.

12 But if there is any doubt about the
13 appropriateness of that interpretation of Pelly, that is
14 to say mandatory on stage one with respect to
15 certification, optional or discretionary with respect to
16 sanctions in stage two, in our judgment that doubt is
17 entirely removed by first the eight-year history of
18 administrative implementation of the statute because, as
19 Mr. Burns has pointed out, there were five
20 certifications which occurred between the time Pelly was
21 enacted and the time Congress considered the
22 Packwood-Magnuson Amendment.

23 During that eight-year period in every
24 instance, as far as Congress was aware in 1979, in every
25 instance in which a nation had violated a numerical

1 quota on taking, the Secretary acted quickly and
2 automatically and certified to the President that a
3 taking had occurred which diminished the effectiveness
4 of the Convention.

5 And indeed, President Ford made the point
6 crystal-clear in his explanation of the certification of
7 Japan and the Soviet Union in 1974 when he said, whether
8 or not the objection by the violating nation to the
9 quota is legal does not alter the fact that exceeding
10 quotas will diminish the effectiveness of the convention.

11 It constitutes, then, he said, a prima facie
12 case; that is to say, a case which should suggest to the
13 President the exercise of his discretionary authority to
14 impose the sanction.

15 QUESTION: Mr. Rogers, a couple times you
16 referred to diminishing the effectiveness of the
17 convention, which I realize is the language of the
18 Packwood Amendment, but the Pelly Amendment says,
19 diminish the effectiveness of an international fishery
20 conservation program.

21 Is that of any significance?

22 MR. ROGERS: The reason for -- the reason, Mr.
23 Justice Rehnquist for the distinction in language was
24 that the Pelly Amendment was first drafted to include,
25 most importantly, the North Atlantic salmon regulatory

1 system so that the broader term, "international fishery
2 system," was used, but it's clear that Congress meant to
3 include in Pelly the whaling convention system as well,
4 for the legislative history. But Packwood-Magnuson, as
5 you can see, was specifically targeted on whaling.

6 So too in 1978, if it please the Court, the
7 compliance had already begun to occur by Chile, Peru and
8 South Korea, and yet because of their violations the
9 Secretary automatically issued the certification. In
10 all five cases, however, the Executive Branch stayed its
11 hand, it did not impose the Pelly sanctions. It did not
12 intrude on imports of fish products into the United
13 States as it was authorized to do under Pelly. And,
14 this is precisely what led to the 1979 Packwood-Magnuson
15 Amendment.

16 I should add that --

17 QUESTION: To remove the discretion of the
18 President?

19 MR. ROGERS: I's sorry?

20 QUESTION: To remove the discretion of the
21 President?

22 MR. ROGERS: Precisely. The discretion that
23 the President had consistently exercised at phase two of
24 the process, that is to say, the imposition of sanctions.

25 The Congressional consideration of the matter

1 is crystal-clear in my judgment. I draw the Court's
2 attention to the two very extensive hearings held by the
3 Fisheries Subcommittee of the Merchant Marine and
4 Fisheries Committee in the House, at which there was
5 ample testimony both with respect to the eight years of
6 practice of automatic certification and the fact that
7 there is not one hint of any suggestion that anyone
8 conceived that there was any discretion buried in the
9 "diminish the effectiveness" language, in stage one of
10 the certification process, and the fact that Congress
11 relied explicitly on the representations of the
12 Executive Branch spokesman that the Packwood-Magnuson
13 Amendment then pending before the Congress would remove
14 all discussion from the process and automatically impose
15 the sanction that Packwood-Magnuson was proposing, an
16 additional sanction to Pelly, that is to say, in this
17 instance the elimination of the privilege of fishing
18 within the 200-mile zone.

19 Let me mention that this was a particularly
20 appropriate exercise of Congressional authority. It
21 seems there can be no question, and indeed I doubt -- I
22 gather that the other parties to the case do not
23 question the authority of the Congress to enact a
24 statute saying exactly what we suggest it says, and that
25 is to say, a statute which provides on the one hand that

1 foreigners may fish in the 200-mile economic zone off
2 the shores of the United States, a privilege which
3 Congress granted in 1976, but at the same time
4 conditioning that congressionally granted privilege upon
5 compliance with the congressional standard that
6 countries do not diminish the effectiveness of the
7 whaling convention system.

8 QUESTION: Mr. Rogers, all I have before me is
9 the language of the Pelly and Packwood Amendments set
10 forth in Addendum 1 to the Brief for the Federal
11 Petitioner. But looking at the small -- this is about
12 the Packwood Amendment -- A, small Roman -- no, I guess
13 B, I'm sorry.

14 It says, "If the Secretary issues a
15 certification with respect to any foreign country then
16 each allocation under paragraph" -- what does the word
17 "allocation" refer to?

18 MR. ROGERS: That is the privilege to fish --
19 excuse me, Justice Rehnquist. It is the privilege to
20 fish within the 200-mile economic zone.

21 QUESTION: So, we're not talking about imports?

22 MR. ROGERS: No, no.

23 QUESTION: But we're talking --

24 MR. ROGERS: Not under Packwood-Magnuson. I
25 should make clear there are now two sanctions, one under

1 Pelly which is still discretionary on the part of the
2 President to ban imports of fish products. That was
3 1971.

4 The second, under the 1979 Packwood-Magnuson
5 Amendment to the 1976 Fisheries Act -- the 1976
6 Fisheries Act permitted foreigners to fish within our
7 200-mile economic zone. The 1979 Packwood-Magnuson
8 Amendment conditioned that on compliance with
9 non-diminishment of the effectiveness of the Convention.

10 That is to say, what is automatically lost in
11 the event now of a violation is the right to fish within
12 the 200-mile zone.

13 QUESTION: And what was the alleged failure to
14 comply this time? Was it whaling at all? Was it
15 violating the moratorium or --

16 MR. ROGERS: Yes. There's no question but
17 that --

18 QUESTION: This wasn't, for example, you took
19 51 whales rather than your quota of 50, it was taking
20 any whales?

21 MR. ROGERS: This was, and it is admitted by
22 all parties to have been an intentional violation.

23 QUESTION: Of the moratorium?

24 MR. ROGERS: Of the moratorium.

25 QUESTION: No one should have taken any whales?

1 MR. ROGERS: First on sperm whales, and indeed
2 it should be understood, Mr. Justice, that the sperm
3 whale ban went into effect, we sued, and then the
4 agreement occurred.

5 This was the precise sequence of events. But
6 Japan continued to hunt sperm whales on the assumption
7 that they were going to get the agreement of the
8 Executive Branch even after the ban on sperm whales went
9 into effect.

10 Now, there's not only a ban on sperm whaling
11 by the Commission but also a worldwide global
12 moratorium. They are continuing to fish and have not
13 been sanctioned, precisely because of the
14 Baldrige-Murazumi Amendment.

15 We admit that an inadvertent or unintentional
16 violation would be a different story, but an intentional
17 violation of this magnitude clearly in our judgment
18 diminishes the effectiveness of the convention system.

19 Let me go back, if I may, to a few more points
20 with respect to the legislative history which as I have
21 indicated in our view is crystal-clear.

22 QUESTION: What about the legislative history
23 at the time of the adoption of the Pelly Amendment
24 rather than later? Your comments have really been
25 directed to hearings conducted, as I understand them,

1 before adoption of the Packwood Amendment?

2 MR. ROGERS: That's correct, Justice
3 O'Connor. The reason I have directed my attention to
4 that is that in our judgment, which may be somewhat
5 different from that of the Court of Appeals below, since
6 we are proceeding under Packwood-Magnuson, it is
7 Packwood-Magnuson that we intend to invoke and it is
8 Packwood-Magnuson that we think implies no discretion
9 with respect to sanctions. We have focused on that.

10 The second reason we have focused on it is
11 that in our judgment if there's any question about the
12 diminished effectiveness formula in Pelly in '71, it
13 acquired a hard, fixed meaning in the intervening eight
14 years by, A, Executive Branch behavior; B,
15 representations by the Executive Branch to the Congress
16 in 1979 as to what the language meant; and C, Congress's
17 explicit statement, we now want to exclude our
18 discretion.

19 But to go back to your point, Justice
20 O'Connor, there is good legislative history in our
21 judgment, most particularly in the report with respect
22 to the legislation to the Senate, which indicated that
23 diminished effectiveness with respect to a quota
24 violation should be certified.

25 QUESTION: Well, I think the language that one

1 would have to look at is the language that says, when
2 the Secretary of Commerce determines that the fishing
3 operations are being conducted in a manner or under
4 circumstances which diminish, all that language --

5 MR. ROGERS: Yes.

6 QUESTION: -- which is perhaps not necessarily
7 definitive, doesn't admit of the certainty that you
8 speak of --

9 MR. ROGERS: In the abstract, you are right,
10 but in the context first of the fact that this Pelly
11 Amendment in connection with whaling was directed to
12 reinforce Congress's effort to strengthen the
13 International Whaling Convention system, and the fact
14 that as Congress saw it numerical quotas were the very
15 heart of that system.

16 In our judgment, therefore, a violation of
17 quotas as posed to the other marginal violations that
18 Mr. Burns mentioned earlier on, violation of that quota
19 was understood at that time to be something which
20 inescapably would diminish the effectiveness of the
21 convention system because it was the maintenance of
22 rigid ceilings on takes, and in Congress's view
23 hopefully, eventually a total moratorium on any taking
24 whatsoever would inevitably constitute a diminishment of
25 the effectiveness of the Convention.

1 To put it the other way, it is in our judgment
2 very hard to comprehend how the intentional violation,
3 the wholesale substantial violation of the supreme act
4 of the International Whaling Commission, that is to say
5 the establishment finally, after a decade of pressure
6 from the United States, the establishment by the
7 International Whaling Commission of a firm worldwide
8 global moratorium on any further taking of any kind of
9 whales.

10 The flouting of such a supreme act by the
11 Commission could enhance the prestige, maintain the
12 dignity, preserve the integrity of the Convention system.

13 QUESTION: Well, I know it's not this case,
14 but suppose that it were determined or alleged that a
15 nation had taken a single whale by mistake.

16 MR. ROGERS: By mistake?

17 QUESTION: After that moratorium.

18 MR. ROGERS: We would not be here, and we
19 would not contend that it would diminish the effect. We
20 would not contend that the taking accidentally of a
21 lactating whale, which is prohibited under the
22 Convention system, where non-intentional flouting -- if
23 it were not an intentional flouting would diminish the
24 effectiveness of the Convention.

25 It's the Convention system that really is the

1 center of the scheme and the very reason why we're here.

2 QUESTION: Are you going to deal with the
3 availability of mandamus in your oral argument?

4 MR. ROGERS: Yes, I'll say a word about that,
5 if I may, Justice Rehnquist, as soon as I finish up with
6 respect to the legislative history point.

7 I would suggest, with all due respect, that so
8 palpable is it that Congress was intending to close what
9 it saw as the loophole in the Pelly Amendment by
10 enacting the Packwood-Magnuson Amendment, that there
11 can't be any doubt about the appropriate interpretation
12 of the Packwood-Magnuson Amendment upon which we rely.

13 The idea that there is discretion with respect
14 to intentional quota violations lurking in the
15 certification stage is advanced really in this case for
16 the first time in history of the entire consideration of
17 these statutes, and it would in our judgment bring in by
18 the back door the very discretion that Congress intended
19 to eliminate from the Packwood-Magnuson statutory scheme
20 relating to the privilege of foreigners to fish in our
21 waters.

22 This is a view, incidentally, which was
23 embraced by the defendant, Mr. Baldrige, himself when
24 he communicated with the author of the amendment, Mr.
25 Packwood, just a few weeks before he made the bilateral

1 arrangement with him when he said, in response to Mr.
2 Packwood's statement, "I see no way around the logical
3 conclusion that a nation which ignores the moratorium is
4 diminishing the effectiveness of the IWC."

5 Mr. Baldrige said, "I agree." Quote, "Since
6 any such whaling," that is to say, in violation of the
7 quotas, "any such whaling attributable to the policies
8 of a foreign government would clearly diminish the
9 effectiveness of the IWC."

10 Now, we don't contend that this subsequent
11 exchange bears on the congressional intent in 1979. You
12 have heard a good deal about deference to Executive
13 Branch officials. In our judgment, if any deference is
14 due to any Executive Branch official it's due to the
15 views and representations upon which Congress relied of
16 the senior officials who testified to the House in
17 connection with this Packwood-Magnuson Amendment at the
18 time it was under consideration, Mr. Frank and Augusto
19 Negroponte.

20 And in our judgment we are persuaded that the
21 Court will on its own examination of the legislative
22 history be similarly convinced that their testimony is
23 decisive as to the appropriate interpretation of the
24 Packwood-Magnuson Amendment.

25 QUESTION: You still haven't mentioned

1 anything about the legislative history of the Pelly
2 Amendment, I noticed.

3 MR. ROGERS: Well, I meant to say, and I will
4 mention again if I may, Justice O'Connor, in our view
5 the legislative history of Pelly is as good, although of
6 course not enlightened by the eight years experience
7 thereafter with respect to the legislative intent of the
8 Congress at that time.

9 I draw your attention, if I may, to our brief
10 at page 4 in which we point out the legislative history
11 of the Pelly Amendment, and in addition, Your Honor, on
12 page 18 and 19 of -- and specifically with respect to
13 the statement of Representative Pelly at the bottom of
14 page 19 in our brief, in which he explains that whales
15 are a notable example of overfished resources.

16 And then, the legislative history goes on to
17 point out through Representative Dingell that in Section
18 8, explaining Pelly, "Whenever the Secretary of Commerce
19 determines foreign nationals are conducting fishing
20 operations," et cetera, "he must certify this fact to
21 the President of the United States."

22 Also, Senator Stevens said, "Section 8 directs
23 the Secretary of Commerce to certify to the President
24 the fact that nationals are conducting fishing
25 operations in a manner which diminishes the

1 effectiveness of the program."

2 QUESTION: May I ask a question about the
3 language of the statute that troubles me a little.
4 There are in fact two parts, one, he must determine; and
5 if he determines, he must certify. And the language,
6 "to certify," is mandatory.

7 Is it your position that the order should
8 compel him to make a determination he has not yet made,
9 or that he should certify a determination that he has
10 already made?

11 MR. ROGERS: It's an issue that we hadn't
12 focused on, Justice Stevens, because the order as it
13 came out of the district court was an order enjoining
14 the agreement, but I would suggest that the order
15 appropriately, if it's expressed in affirmative,
16 mandatory terms, would be that he certifies, that he has
17 no discretion not to certify.

18 QUESTION: But that is if he has made a
19 determination, but we treat it as though it is so clear,
20 that the facts are there, that he must certify that he
21 has made a determination even if he hasn't? Apparently
22 he hasn't made a determination --

23 MR. ROGERS: He hasn't made a determination,
24 but our position is, on that, that an intentional
25 wholesale violation of a numerical quota, and most

1 dramatically and particularly a wholesale violation of
2 the supreme act of the Commission, the global
3 moratorium, is inevitably, must by any standard be
4 determined to be a diminishment of the effectiveness.

5 QUESTION: Well, he can't be -- he has no
6 authority to certify unless he makes that determination,
7 so if he certifies he has to say there is a diminishment
8 of the fishery?

9 MR. ROGERS: That's correct, yes, Your Honor.

10 QUESTION: He has to say, "I have determined
11 that" --

12 MR. ROGERS: "I have determined, and I
13 therefore certify," that's right. And he should be
14 ordered to do both, in essence, in our judgment.

15 With respect to remedies and a variety of
16 other aspects that have been raised here, in our
17 judgment the courts below were correct in determining
18 that Secretary Baldrige had exceeded his authority in
19 entering into the agreement that he did.

20 QUESTION: Well, the mandamus doesn't issue in
21 a case where someone has exceeded their authority. It's
22 issues in a case where they have no choice but to follow
23 a particular course of action.

24 MR. ROGERS: Yes. Our point is, Justice
25 Rehnquist, that there was no discretion.

1 QUESTION: Well, but you know, we don't have
2 many cases where a writ of mandamus has been issued to a
3 Cabinet officer, and in the area of foreign affairs.

4 MR. ROGERS: You have not had many cases
5 either where his authority is so clearly limited as it
6 was here. Congress granted the privilege of fishing in
7 U.S. waters but conditioned that privilege on, as we say
8 under the statute, an avoidance of a violation of a
9 numerical quota by the Whaling Commission.

10 QUESTION: Wouldn't a declaratory judgment
11 give you all the relief you need?

12 MR. ROGERS: Beg pardon?

13 QUESTION: Wouldn't a declaratory judgment
14 give you all the relief you need?

15 MR. ROGERS: I think the declaratory judgment
16 would give us relief. I think also, the injunction
17 which was issued by the court below also would give us
18 the relief we need.

19 The relief issued by the court, the district
20 court, was in fact a declaratory judgment and an
21 injunction. There's been a good deal of talk here about
22 mandamus, but although we contend that we are well
23 within traditional concepts of mandamus, that is to say
24 that there was no discretion here, and mandamus is
25 classically available with respect to an act as to which

1 the federal official has no discretion, we also believe
2 we are fully entitled to a declaratory judgment and
3 injunction.

4 QUESTION: You say the Secretary should not
5 have purported to permit another country to take a
6 certain number of whales contrary to the moratorium?

7 MR. ROGERS: Correct. He had no authority,
8 and he was exercising a particularly clearly delegated
9 responsibility from the Congress. The responsibility
10 that he was exercising was the responsibility to
11 administer the 200-mile fishing zone.

12 One law in 1976 told the Secretary, issue
13 licenses for foreigners, issue allocations to
14 foreigners. The other law in 1979, Packwood-Magnuson,
15 told him, take those allocations back if anybody
16 violates a numerical quota from the Whaling Commission.

17 Congress had the authority to give that power,
18 to give that responsibility. It had the authority to
19 take it away. This is not, if you will, the usual
20 foreign policy case. It's not like Dames and Moore, for
21 example, or Regan versus Wald, or the typical case in
22 which plaintiffs are here asking you to overrule a
23 cooperative Act between the Congress and the Executive
24 Branch with respect to foreign policy, as certainly was
25 the case in both of those two instances.

1 QUESTION: I take it you would not say that
2 it's wholly divergent from foreign policy
3 considerations, though?

4 MR. ROGERS: No. I certainly wouldn't, Mr.
5 Chief Justice, and I also would not say that merely
6 because a case happens to affect foreign policy, or
7 political questions in general, this Court should stay
8 its hand.

9 This Court's responsibility, as Justice
10 Marshall has told all of us so often, is emphatically to
11 declare what the law is. We are only here asking you to
12 declare what the law is.

13 The mere fact that your declaration will have
14 international consequences, the mere fact that your
15 declaration in other cases will have political
16 consequences, is no reason to avoid what is the very
17 essence of this Court's responsibility. If it is, it's
18 a new canon of statutory interpretation.

19 Thank you.

20 CHIEF JUSTICE BURGER: Mr. Burns, you have
21 three minutes remaining.

22 ORAL ARGUMENT OF ARNOLD I. BURNS, ESQ.

23 ON BEHALF OF PETITIONERS IN NO. 85-955 - REBUTTAL

24 MR. BURNS: Thank you, Chief Justice.

25 The Secretary in this case did indeed make a

1 finding and did indeed make a determination. He said
2 after consulting with reputable scientists, after
3 consulting with our United States representative to the
4 International Whaling Commission, and after consulting
5 with the Secretary of State on some delicate foreign
6 policy considerations, he said, and this is in our
7 Addendum 3 at page 6-A, and I quote, "I believe that a
8 cessation of all Japanese commercial whaling activities
9 would contribute more to the effectiveness of the
10 International Whaling Commission and its conservation
11 program than any other single development."

12 We rely on plain language which clearly gives
13 him discretion. The Congress had three opportunities to
14 tell us that he was not to have that discretion.

15 In 1971 when they passed the Pelly Amendment,
16 and we too have challenged our adversaries to show us
17 legislative history, language to the contrary, they have
18 not done so.

19 In 1978 the Pelly Amendment itself was amended
20 and it is very clear that the Congress, and our papers
21 demonstrate, regarded this as a discretionary matter.

22 In 1979 when the Packwood Amendment came up,
23 Congress had the perfect opportunity to take the middle
24 man out of the process. There was no need to have the
25 Secretary of Commerce.

1 They could have written the law to say very
2 clearly that where there is a violation of international
3 harvest quotas under the International Whaling
4 Commission, that is ipso facto a violation. Senator
5 Packwood introduced such a bill. It did not pass.

6 So that, we have a very clear legislative
7 history showing that Congress never did restrict the
8 Secretary in implementing its, Congress's, statute in
9 areas involving enormous expertise, environmental law,
10 conservation dynamics, and foreign policy.

11 Thank you so much.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.
13 The case is submitted.

14 [Whereupon, at 3:01 o'clock p.m., the case in
15 the above-entitled matter was submitted.]

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

5-954 - JAPAN WHALING ASSOCIATION AND FISHERIES ASSOCIATION, Petitioners V. AMERICAN CETACEAN SOCIETY, ET AL.; and

5-955 - MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL., Petitioners V. AMERICAN CETACEAN SOCIETY, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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