1997

Brief of Lone Wolf, Principal Chief of the Kiowas, to the Supreme Court of the American Indian Nations

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Case No. 97-1

In the Supreme Court of the American Indian Nations

1997 Term

LONE WOLF, Principal Chief of the Kiowas, et al.,

Appellants

v.

ETHAN A. HITCHCOCK, Secretary of the Interior,

Respondent

On Reconsideration from the Supreme Court of the United States

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BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the United States Congress has plenary authority over Indian affairs such that it is capable of rendering void the obligations of the United States under the Medicine Lodge Treaty, a treaty with the Appellant Indian peoples.

2. Whether the United States Congress, by its legislation to allot and open to settlement the reservation that was established by the Medicine Lodge Treaty, deprived the Appellants of their lands in violation of the due process clause of the fifth amendment to the United States Constitution.

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STATEMENT OF THE CASE

This case involves an effort by Indian nations to defend rights to lands that were reserved to them under an 1867 treaty with the United States. *See* Treaty with the Kiowa and Comanche, Oct. 21, 1867, 13 Stat. 581 (reprinted in Record, appendix A). The United States concluded this treaty, known as the Medicine Lodge Treaty, with the Kiowa and Comanche nations or tribes, thereby ending hostilities with them and establishing a reservation for their "absolute and undisturbed use." *Id.* art. 2. By a separate treaty, concluded the same day, Apache people were joined in confederation with the Kiowa and Comanche, and became entitled to share in the benefits of the reservation. *See* Treaty with the Kiowa, Comanche, and Apache, Oct. 21, 1867, 15 Stat. 589 (reprinted in Record, appendix B).

The dispute in this case centers substantially on the alleged failure of the United States to comply with article 12 of the Medicine Lodge Treaty when the U.S. Congress legislated to transform the legal status of the reservation lands. Article 12 stipulates:

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same.

On October 6, 1892, three commissioners representing the United States obtained the signatures of 456 adult male members of the three confederated tribes, in connection with a purported agreement concerning the reservation. In a certificate appended to the signed document, the U.S. Indian agent repre-

sented that there were a total of 562 male adults in the three tribes. The document was in the form of proposed treaty, which provided for a surrender to the United States of the rights of the tribes in the reservation lands. It further provided for the allotment out of the surrendered lands to members of the tribes in severalty, with fee simple title to be conveyed to allottees or their heirs after twenty-five years; and for the payment of two million dollars as consideration for an estimated 2,150,000 acres of surrendered lands that would not be reconveyed by allotment. Record at 2.

Soon after the document was signed, the tribes asserted that the signatures had been obtained through fraudulent misrepresentations by government interpreters, particularly as to the price to be paid for the lands. *Id.* at 3, 6-7. They further contended that three fourths of the adult male members of the tribes had not assented to the proposed agreement, as required by article 12 of the Medicine Lodge Treaty, and that therefore no binding agreement existed. *Id.* at 3.

Nonetheless, various bills were introduced in the United States Congress that were intended to give effect to the terms embodied in the signed document. While Congress was considering such legislation, the Secretary of the Interior, responding to an inquiry from the Senate, concluded that the total number of adult male members of the tribes was in excess of the number that had been stipulated by the Indian agent in his certificate appended to the 1892 signed document; the Secretary concurred with the tribes that fewer than three fourths of the adult male tribal members had signed the document. *Id.* at 4. Around the same time of this communication, in 1899, the tribes convened a general council at which 571 adult male members were present. At the council, the tribes adopted a memorial to Congress protesting against execution of the terms of the 1892 document, and petitioning Congress not to give those terms any effect. The Secretary of Interior transmitted the memorial to Congress along with lengthy comments from the Commissioner of Indian Affairs explaining the Indians' assertions of fraud. *Id.* at 4-5. Representatives of the tribes traveled to Washington to meet with relevant legislative committees and with the U.S. President to further express opposition to the allotment scheme. *See* Ann Laquer Estin, *Lone Wolf v Hitchcock: The Long Shadow*, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880'S, 216-34 (S. Cadwalder and V. Deloria, Jr. eds., 1984).

Despite being confronted with these communications, Congress proceeded to enact legislation to implement the land transfer and allotment scheme embodied in the 1892 document, with certain modifications. Most notably, Congress amended the terms of the purported agreement to give back to the tribes, in addition to the allotment of lands in severalty, 480,000 acres of grazing lands. Record at 6. This modification coincided with concerns raised by the Indians in their memorial over the lack of sufficient agricultural lands that would result from allotment alone. *See id.* at 5. However, there is no indication that the tribes assented to this modification or that they saw it as sufficient to meet their concerns at any time prior to the time Congress enacted it.

The allotment scheme, as modified, was adopted by Congress by the act of June 6, 1900, ch. 813, 31 Stat. 672, which further stipulated that the surplus lands—that is, the lands not reconveyed as allotments or as common grazing land—were to be open to settlement by non-Indians. Congress enacted subsequent legislation in 1901 to facilitate the allotment program and the opening of the surplus lands for settlement, and executive officials moved to execute the legislation. *See* Record at 6-7.

Shortly after the above legislation was adopted, Lone Wolf, a Kiowa chief, filed a complaint in the

Supreme Court of the District of Columbia to enjoin its implementation. He filed the suit on his own behalf and on behalf of all other members of the confederated Kiowa, Comanche, and Apache tribes, alleging noncompliance with the terms of the Medicine Lodge Treaty, and a deprivation of property in violation of the United States Constitution. Additional parties joined as complainants, and the three tribes, at a general council held on June 7, 1901, endorsed the legal action. *Id.* at 6-7.

The Supreme Court of the District dismissed the complaint upon submission of a demurrer, and the dismissal was upheld by the Court of Appeals for the District of Columbia and by the United States Supreme Court. *Id.* at 8. This case is now before the Supreme Court of the American Indian Nations for reconsideration.

SUMMARY OF THE ARGUMENT

When the United States Congress and Executive acted to allot and open to settlement the reservation lands of the confederated Kiowa, Comanche, and Apache peoples, it did so in breach of the Medicine Lodge Treaty. The doctrine of congressional plenary power over Indian affairs cannot justify this breach or otherwise relieve the United States from its legal obligations under the Treaty.

The Medicine Lodge Treaty, like other treaties between the United States and Indian nations, is a legally binding instrument that includes an implied covenant of good faith compliance. In deciding this case, the U.S. Supreme Court defied the Treaty's obligatory character and held Congress to have the power to unilaterally abrogate treaties with Indian nations without suffering any legal consequence. The Court considered Congress to have plenary authority over Indians that is absolute, or near absolute. However, the Court's conception of a virtually limitless congressional power over Indians was based on a jurisprudence whose central elements included paternalistic and pejorative characterizations of Indians and their cultures and notions of conquest. Such jurisprudence is repugnant to contemporary values and hence should not be allowed to survive in contemporary doctrine.

The authority of Congress regarding Indians may be considered to be plenary in the sense that it broadly encompasses the field of Indian affairs to the exclusion of the states of the Union, but not in the sense that it is without legal constraints. Congress has no more power to relieve the United States from its legal responsibility under an Indian treaty than it has with regard to a treaty with a foreign independent state. Courts within the United States judicial system may refrain from applying, against a conflicting act of Congress, a treaty with a foreign state on the grounds that the conflict presents a nonjusticiable political question. But such judicial deference does not exonerate the United States from its obligations under the treaty, and the treaty will continue to be enforced in international proceedings which are outside of the U.S. judicial system and in which similar limits on justiciability do not apply.

Likewise, whatever the posture of U.S. courts on the justiciability of congressional infringement of the Medicine Lodge Treaty, the United States does not escape its legal responsibility under the Treaty. The present Supreme Court of the American Indian Nations is outside of the U.S. judicial system and not subject to the same policy or legal considerations that limit the justiciability of treaties in U.S. courts. Thus, this Court should simply apply the Medicine Lodge Treaty and hold the United States

responsible for its breach.

In addition to constituting a violation of the Medicine Lodge Treaty, the land transfer and allotment scheme violates the due process clause of the Fifth Amendment to the U.S. Constitution. When Congress exercises its general or plenary authority over Indian affairs and affects Indian land rights, due process requires that it act in a manner consistent with the United States trust responsibility toward Indians. This trust responsibility historically has been linked with international law in both its origins and its character. Accordingly, the nature and object of the modern trust responsibility should be held to conform with the relevant contemporary international norms, which require protection for the collective landholding, cultural integrity, and self-determination of indigenous peoples.

When Congress legislated to allot and open up for non-Indian settlement the reservation lands of the Indian parties, it failed to uphold the U.S. trust obligation, properly construed in light of relevant international norms. U.S. courts have held that congressional action affecting Indians need only bear a "rational relation" to the duty of trusteeship in order to be found constitutional under the due process clause. A more appropriate, and higher standard of review for cases involving Indian lands is one which requires a thoroughgoing and impartial assessment of the congressional action in order to ensure conformity with trusteeship norms. Under such a careful assessment, the legislation at issue in this case fails. The legislation diminished the collective landholding of the Indian parties, as part of a larger program of allotment aimed at undermining or destroying the integrity of Indian communities and their cultures. Moreover, the legislation was imposed on the Indian nations. Such legislation, which cannot be construed as even rationally related to legitimate trusteeship objectives, is in violation of constitutional due process.

ARGUMENT

I. Notwithstanding Congressional Power over Indian Affairs, The United States of America is in Violation of its Legal Obligations Under the Medicine Lodge Treaty

The United States of America breached the terms of the Medicine Lodge Treaty when it acted to compel the cession and allotment of lands that had been reserved by the Treaty. The unilateral exercise of congressional power cannot justify this breach or exonerate the United States from its obligation to honor the Treaty in good faith.

A. The United States Congress Violated the Medicine Lodge Treaty

By the act of June 6, ch. 813, 1900, 31 Stat. 672, and related supplementary acts, the Congress of the United States legislated to destroy the communal landholding of the confederated Kiowa, Comanche, and Apache tribes which had been guaranteed under the Medicine Lodge Treaty of 1867, 15 Stat. 581. The legislative scheme was to transform the tribally held lands of the reservation into allotments held in severalty by individual Indians and, in exchange for meager cash payment to the confederated tribes (approximately one dollar per acre), to open up the greater part of the remaining reser-

vation lands to settlement by non-Indians. *See* Record at 2-6. In adopting this legislation Congress purported to be confirming and ratifying an agreement negotiated by executive officials with certain Indians and signed on October 6, 1892. *See* Act of June 6, 1900, § 6, 31 Stat. 672. However, that agreement was not signed by the number of adult male Indians that is required by article 12 of the Medicine Lodge Treaty for a cession of reservation lands, a failing confirmed by the Secretary of Interior. See Record at 2. Moreover, as they became aware of the full implications of the land transfer and allotment scheme embodied in the 1892 agreement, the confederated tribes, backed by a substantial majority of the adult males of the reservation, protested that scheme in a memorial to Congress. See Record at 4.

Executive officials executed the land transfer and allotment scheme, immediately after Congress adopted it, *see* Record at 7-8, and thus consummated the United States breach of the Medicine Lodge Treaty. The United States effected a cession of the tribal communal lands, which had been guaranteed by the Treaty, without complying with the relevant Treaty provision for such a cession.[1] Thus, the pertinent question is not whether the United States breached the Medicine Lodge Treaty; it clearly did. Rather, the question is by what legitimate authority or legal construction could the United States escape legal responsibility for its breach. The answer is none.

B. The Medicine Lodge Treaty is a Legal Instrument that Binds the United States

The Medicine Lodge Treaty has the force of law, and the United States is bound to comply with its terms in good faith. It is one of numerous treaties that the United States and European colonial powers entered into with the First Nations of North America prior to the latter part of the nineteenth century. Like the other Indian treaties, the Medicine Lodge Treaty was born of the same legal and diplomatic practice that more broadly gave validity to treaties among sovereign nations of the world. Early in the history of the United States, Justice John Marshall, writing for the U.S. Supreme Court, provided the following assessment of the status of Indian nations and the treaties with them:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial ... The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 518 (1832).

Justice Marshall thus recognized the legal status of Indian treaties both under the law of nations, or international law, and under U.S. constitutional law.[2] The international legal status of the treaties negotiated with Indian nations was also upheld by the writings of major international legal theorists who lived during the historical treaty-making period, including Hugo Grotius and Emerich de Vattel. *See* HUGO GROTIUS, THE LAW OF WAR AND PEACE 397 (Classics of International Law ed., 1925 Francis

W. Kelsey trans. of 1646 ed.); EMERICH DE VATTEL, THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW 116 (Classics of International Law Series, 1916, Charles G. Fenwick trans. of 1758 ed.).[3] Further, within the legal systems of the Indian nations that treated with the United States and its colonial precursors, the treaties were typically regarded as foundational texts of lasting juridicial significance for ongoing relations among diverse peoples, and they continue to be regarded as such. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997) (discussing American Indian conceptions of treaties as sacred texts, as connections, and a constitutions).

Apart from its status within the international, U.S., and Indian legal systems, the Medicine Lodge Treaty generated and embodied its own legal system, which in its own right gives legal force to the Treaty terms. Like other treaties with Indian nations, the Medicine Lodge Treaty is a constitutional instrument enacted to establish the terms of peaceful coexistence and relations among diverse peoples. The legal universe established by the Treaty is one that exists at the intersection of the political life of the Treaty subjects, on the basis of their mutual consent and commitment. In the sphere of relations among the Treaty parties, the Treaty is a matter of mutually binding legal obligation and entitlement—in addition to its status in international law and the law internal to the United States system of governance. *See* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 567-68 (1995) (stating that the principle of mutual obligation between treaty parties "predates, and transcends, modern international law").

At the time Congress legislated contrary to the Medicine Lodge Treaty in 1900, the Treaty retained its character as law arising from an act of mutual commitment. Under the doctrine of intertemporality, the legal import of historical events or enactments ordinarily is to be determined according to the relevant principles and understandings that governed at the time of the past acts. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 179 (R. Tucker ed. 1966). It follows that, at any given time, the Medicine Lodge Treaty is to be presumed to retain the legal status and character that it possessed at the time it was made.[4] Further, it is more than evident from the record in this case that the Kiowa, Comanche, and Apache peoples continued to regard the Treaty as a living legal text.

Principal among the attributes of treaties, both historically and today, is their binding character, which eschews unilateral deviance from material treaty terms. Implicit in the concept of a treaty is the maxim *pacta sunt servanda*, the idea that it will be faithfully followed by the treaty parties. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 616 (4th ed. 1990); MCNAIR, LAW OF TREATIES 494-505 (1961). The idea that the parties to an agreement will keep their word and adhere to the agreement in good faith is embedded in international law, and it is found throughout diverse legal systems in relation to both public and private agreements. *See* E. A. FARNSWORTH, CONTRACTS § 7.17, at 550-551 (2d ed. 1990) (describing the duty of good faith as found in the Restatement 2d of Contracts and the Uniform Commercial Code); Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645, 1650-57 (1997) (discussion on the widespread adherence to the Roman Law-based concept of good faith in the civil codes of Germany, Switzerland, the Netherlands, Turkey, and France, and in the common law). This fundamental tenet of human relations was undoubtedly a basic assumption in the minds of the numerous

Indian leaders who, on behalf of their respective nations, signed treaties with the United States; and it was undoubtedly foremost in the minds of the Kiowa, Comanche, and Apache chiefs when they agreed to the terms of peace with the United States and signed the Medicine Lodge Treaty in 1867. *Pacta sunt servanda* is an implied legal covenant in all treaties, including the Medicine Lodge Treaty. The United States is bound to uphold that Treaty in good faith; however, it has failed to do so.

C. The Plenary Power Doctrine Does Not Justify the United States' Violation of the Medicine Lodge Treaty

Despite the binding character of Indian treaties, courts within the United States federal system have invoked the doctrine of plenary congressional power over Indian affairs to refrain from enforcing treaty terms against conflicting acts of Congress. It was the application of this doctrine that prevailed in the U.S. Supreme Court's decision upholding the dismissal of this case. But stripped of its foundations in a philosophy that is repugnant to contemporary values, Congress' power over Indian affairs cannot exist as a power capable of ridding the United States of its Indian treaty obligations. At most, the exercise of congressional authority in conflict with an Indian treaty results in a nonjusticiable political question for the courts within the U.S. legal system, but it does not impede enforcement of the treaty by the present judicial forum.

1. The Plenary Power Doctrine Cannot Survive as a Basis of Absolute Congressional Authority Over Indians

The U.S. Supreme Court's 1902 ruling in the present case propounded a version of congressional power that should be dismissed altogether for its incorrect and outdated implicit philosophy toward indigenous peoples. In its dominant strain of reasoning in this case, the Court drew from its previous decision in *United States v. Kagama*, 188 U.S. 375 (1886), and considered Congress to have absolute, or near absolute, authority over Indian tribes which is not constrained by any prior treaty obligation with them nor otherwise subject to judicial scrutiny. The conception of congressional power advanced by the Court in the present case, *Kagama* and subsequent U.S. federal court cases, is one in which Congress is deemed capable of unilaterally diminishing or extinguishing Indian rights without suffering legal consequences. This absolutist version of the doctrine of congressional plenary power over Indians is invalid for its illegitimate foundations, and should not be followed by the Supreme Court of the American Indian Nations.

The U.S. Supreme Court in the present case, as in *Kagama*, considered Congress to have extreme power over Indians as a corollary to its presumed duties of trusteeship toward them. The Court stated that the circumstances of the Indians give rise "to a duty of protection, and with it the power." 187 U.S. at 567 (quoting Kagama, 118 U.S. at 384). The idea of a guardianship or trusteeship relationship between the U.S. federal government and Indian nations is not itself objectionable, if the sources and objects of that relationship are adjusted to contemporary values of Indian self-determination and cultural integrity. *See infra* part II.B. However, the version of a guardian-ward relationship articulated by the Supreme Court to justify broad congressional authority is entirely contrary to such values. Under the Supreme Court's rendition, the trusteeship duty could be discharged by acting contrary to the

express wishes of Indian peoples and in detriment of their cultural integrity, as Congress acted in the present case.

In effect, the Supreme Court adopted a philosophy—prevalent in western political and legal thought at the time—that considered Indian peoples and their cultures to be inferior to peoples and cultures of European origin. *See* Nell J. Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195, 218 (1984). Within this frame of thinking, as often expressed by U.S. federal officials in the late nineteenth century, trusteeship arises and is guided by the duty of a "superior" and "civilized" race to protect the Indians, from themselves as well as from others, and to bring to them the "blessings of civilization."[5] The Court had earlier made clear its embrace of this philosophy in *Beecher v. Wetherby*, 95 U.S. 517 (1877). In that case the Court expressed its assumption that, in disrupting Indian landholding that had been reserved by treaty, "the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." *Id.* at 525. In its decision in the present case the Supreme Court invoked and quoted this passage from *Beecher*. *See* 187 U.S. at 565. While the Supreme Court's rendition of federal trusteeship and derivative powers may square with antiquated turn-of-the century notions of dominant American society, it stands as an embarrassment today.

Weaved into the Supreme Court's characterization of trusteeship as a basis for extreme congressional power over Indians was the suggestion of a second, related basis for such power, a basis which is equally invalid. Implicit in the following passage is the notion that trusteeship and congressional power flows partly from the conquest of Indian peoples, along with the perverse idea that treaty-making was part of that process of subjugation.

> These Indian tribes are . . . communities dependent on the United States-dependent largely for their daily food . . . their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised . . .
>
> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. *Id.* at 567 (quoting Kagama, 118 U.S. at 383-84).

In a later case the Supreme Court was more explicit in invoking conquest as a basis for unrestrained congressional power over Indians. In *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955), the Court held that Congress could unilaterally take Indian lands, without any consequence arising from the U.S. constitutional requirement of just compensation for the taking of property. In a now infamous passage, the Court in *Tee-Hit-Ton* stated, "Every schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." Id. at 289-90. A number of scholars have pointed out that this passage from *Tee-Hit-Ton* is both descriptively inaccurate and normatively flawed. *See, e.g.,* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 . ARK. L. REV. 77, 82 (1993); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 32 (1996). Nonetheless, *Tee-Hit-Ton* reflects a jurisprudence of power by conquest that had taken hold

early in the Supreme Court's explanations of United States - Indian relations. *See, e.g,* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823) (stating that "[c]onquest gives a title which the courts of the conqueror cannot deny," in rationalizing imposed limitations on Indian land rights). *See also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312-317 (1990) (relating conquest theory to early U.S. Supreme Court jurisprudence).

It may correctly be pointed out that the jurisprudential foundations of the Supreme Court's conception of plenary congressional power in the present case were in some measure consistent with the international law of the same period. International law did not go as far as to sanction the abrogation of treaties with non-European indigenous peoples. *See* MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 45-46 (1926) (considering treaties with indigenous peoples on a par with treaties among the acknowledged members of the "International Family" of independent states).[6] However, international legal theory and practice in the late nineteenth-early twentieth centuries did tend strongly to embrace the notion that colonizing states and their offspring had both the power and the duty to break down indigenous cultural and political matrixes, considered backward and inferior, and to "civilize" indigenous peoples according to Western values of the time. *See, e.g., id.* at 324-36 (discussing and advocating such notions as a matter of international law). *See also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 23-26 (1996) (describing international legal theory and practice in this respect around the turn of the century).

Today such colonial era notions are firmly rejected by the international legal order, such that the United States risks international condemnation if it continues to include them as building blocks for its edifice of law regarding Indians. Within the last several decades international law has rejected the theory of indigenous cultural inferiority as racist and the doctrine of conquest as patently unjust. Now that the undergird of past legal rationalizations for colonial patterns has been rejected, international law upholds the principles of equal rights and self-determination of peoples whose implementation has given way to the progressive dismantling of colonial structures. *See id.* at 39-44 (discussing the contemporary international legal system and its anti-colonial regime). In the specific context of indigenous peoples such as Americans Indians, developments internationally have led to a new system of norms and procedures, founded on fundamental human rights principles, which uphold the integrity and value of native peoples and their cultures. *See infra* part II.B (discussing international developments concerning indigenous peoples and the content of new and emergent international norms).

The operative law in the United States should not be allowed to be infected by doctrine or theory that is contrary to modern values, as reflected in contemporary international law. Instructive in this regard is the Australian High Court's decision in *Mabo v. Queensland* (1992), 175 C.L.R. 1, in which the Court denied the continuing effect of earlier legal theory that had negated aboriginal land rights. In expressing the view of the majority in the case, High Court Justice Brennan held that

> [u]njust and discriminatory doctrine of that kind can no longer be accepted. . . . If it were permissible in past centuries to keep the common law [regarding aboriginal peoples] in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . The common law does not necessarily conform with international law, but international law is a legitimate and important influence on

the development of the common law, especially when international law declares the existence of universal human rights. *Id.* at 41-42.

To its credit, the U.S. Supreme Court has in recent years stepped back from the absolutist conception of the plenary power doctrine articulated in its earlier decision in the present case and in *Kagama.* The Court has subjected congressional action in the field of Indian affairs to judicial review—albeit through a somewhat deferential standard—under constitutional norms that restrict the exercise of official power, and lower federal courts have followed suit. *See, e.g.,* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980); Littlewolf v. Lujan, 877 F.2d 1058, 1063-64 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1043 (1990). Additionally, the federal courts have rearticulated the doctrine of trusteeship to see it as imposing judicially enforceable constraints on federal action toward Indians. *See, e.g.,* United States v. Mitchell, 445 U.S. 535 (1980), *on remand,* 664 F.2d 265 (Ct.Cl. 1981), *aff'd,* 463 U.S. 206 (1983); U.S. v. Sioux Nation, 448 U.S. at 415; Red Lake Band of Chippewa Indians v. Swimmer, 740 F.Supp. 9, 12-13 (D.D.C. 1990).

While federal power is now considered constrained by constitutional and trusteeship standards, U.S. courts have continued to hold that Indian treaties, and aboriginal rights more generally, do not by themselves make for any judicially cognizable restriction on what Congress may do in its dealings with Indian nations. *See, e.g., id.* at 11-12. Thus, the courts have continued to hold that Congress has the power to abrogate Indian treaties. *See, e.g.* United States v. Dion, 476 U.S. 734 (1986) (finding and upholding congressional abrogation of treaty hunting right). Insofar as such notions of congressional power vis-a-vis Indian rights are the remnants of theory or philosophy that is today invalid, they too must be purged from the judicial landscape.

2. Whatever the Continuing Scope of Congressional Plenary Power or its Effect in Proceedings Internal to the United States Legal System, the Exercise of that Power is not Capable of Releasing the United States from its Legal Responsibility under the Treaty

Today, Congress may be said to hold plenary power over Indian affairs in the sense that it has authority to legislate in substantially all aspects of the field, but not in the sense that such authority is entirely free from constitutional or other legal constraints. Sufficient constitutional text and theory about non-textual sources exist to support such broad congressional authority.[7] Congressional power in the field of Indian affairs is analogous to the broad, or plenary, power of the federal government in the field of foreign relations. Both the Indian and foreign affairs powers are based on sources in the text of the Constitution as well as on non-textual sources linked with history and tradition, both are complete in their scope, and both exist in the national government to the exclusion of the states of the Union. *See* Frickey, Minn. L. Rev. 31, 52-73. Professor Frickey further argues that both the foreign and Indian affairs powers are inherent in the sovereignty of the national government on the basis of international law. To admit to such broad or inherent authority in the field of Indian affairs, however, is not to hold that authority limitless or capable of rendering the Medicine Lodge Treaty a legal nullity such that the United States escapes responsibility under the Treaty.

In its decision in this case, the Supreme Court likened Indian treaties to treaties with foreign states,

and it applied the Court's earlier holding on the effect of an act of Congress that conflicts with a prior treaty. Lonewolf v. Hitchcock, 187 U.S. 553, 566 (1903) (citing Chinese Exclusion Case, 130 U.S. 581 (1889)). *See also* The Cherokee Tobacco, 78 U.S. 616 (1870) (a previous case in which the Court had similarly likened Indian treaties to treaties with foreign states). As already discussed, the notion of a substantive power on the part of Congress to unilaterally override treaties with Indian nations was based substantially on precepts that are repugnant to contemporary values and that should not be allowed to survive in contemporary doctrine. However, the U.S. Supreme Court's decision in this case also embodied a distinct strain of reasoning, linking Indian treaties to treaties with foreign states, which commends itself to an alternative, less normatively suspect interpretation of the status of Indian treaties in the face of congressional power.

In short, this alternative interpretation is that, like treaties with foreign states, Indian treaties are regarded by courts within the U.S. system as presenting nonjusticiable political questions when they are in conflict with an act of Congress; but such judicial deference on nonjusticiability grounds does not amount to a substantive determination that the treaties are left without any legal force. Indian treaties, like treaties with foreign states, retain their legally binding character, which may be invoked in proceedings outside the U.S. court system—such as the present proceeding before the Supreme Court of the American Indian Nations—despite any conflicts with U.S. internal law.

Since well before its decision in this case, the Supreme Court consistently has refrained from enforcing, against conflicting acts of Congress, treaties concluded by the United States with foreign powers. The Court has invoked rhetoric that places treaties at the same level of hierarchy within the U.S. federal system as laws emanating from acts of Congress. *See, e.g.,* Head Money Cases, 112 U.S. 580, 599 (1884); Whitney v. Robertson, 124 U.S. 190, 194 (1888). Hence, within the logic of this rhetoric, just as an act of Congress may override a prior federal statute, a treaty may be abrogated by a subsequent act of Congress for the purposes of internal U.S. law.[8]

Despite such rhetoric, it is abundantly clear that the United States remains legally obligated under a treaty in its relations with the treaty partner or partners, notwithstanding any conflicting legislation enacted through the United States' own internal procedures and notwithstanding the failure of the U.S. federal courts to enforce the treaty when confronted with such inconsistency. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 81 (1996); BROWNLIE, Principles of Public International Law 449-50. *See also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 46, 1155 U.N.T.S. 331, (a state may not invoke its domestic law to invalidate a treaty) (reflecting customary international law in this respect). It is only within proceedings *internal to* the U.S. legal system that a treaty may be considered supplanted by a unilateral act of Congress. In proceedings *outside of* the U.S. system—such as international negotiation, arbitration, or adjudication—the treaty remains law.

Thus, rather than emphasize a problematic conception of the place of treaties within the hierarchy of the law internal to the United States system, courts frequently have based their deference to congressional action primarily on nonjusticiability grounds within the framework of the political question doctrine. *See, e.g.,* Diggs v. Schutz, 470 F.2d 461, 466-67 (D.C. Cir. 1972) (congressional act left operative on political question grounds, even though it violated U.S. obligations under U.N. Charter);

Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (funding legislation held not subject to judicial review under U.N. Charter and other provisions of international law). Under the political question doctrine, federal courts refrain from reviewing actions by the executive or legislative branches of government when those actions involve matters that are considered inapt for resolution by the federal judiciary, despite the existence of constitutional or other legal restraints. *See* Baker v. Carr, 369 U.S. 186, 211-12 (1962). *See also* CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 14, at 84 (5th ed. 1994). In the context of a treaty and a subsequent conflicting act of congress, judicial deference to the congressional action on political question grounds is not necessarily a matter of pronouncing the lexical superiority of the congressional act over the prior treaty, and it certainly does not by its own force render the treaty, or any portion of it, legally void. Rather, it is a matter of judicial restraint in the face of practical or policy considerations that are considered to counsel against the judicial branch of the federal government placing itself at odds with the legislative branch where relations with other sovereigns are concerned.

The traditional judicial deference to congressional action in the area of Indian affairs, which often has been associated with the rhetoric of congressional plenary power, can similarly be seen as an application of the political question doctrine and related separation of powers considerations. In its decision in the present case, the U.S. Supreme Court characterized the issue at hand as a nonjusticiable political question, in association with its likening of Indian treaties to treaties with foreign states, and that characterization—apart from its outdated conception of a virtually limitless federal power over Indians—can be seen as the basis for the Court to refuse to uphold the Medicine Lodge Treaty against conflicting congressional acts. *See* 187 U.S. at 565-66. *Cf.* The Cherokee Tobacco, 78 U.S. at 621 (conflict between congressional legislation and Indian treaty gives "rise to questions which must be met by the political department of government [and which] are beyond the sphere of judicial cognizance").

If Indian treaties are regarded as treaties with foreign states, in the manner suggested by the Supreme Court in the present case, the result of nonenforcement of the Medicine Lodge Treaty is understandable in terms other than a normatively suspect conception of an extreme federal power to unilaterally dispose of Indian rights. Like treaties with foreign states, Indian treaties may be subject to conflicting congressional legislation, and that legislation ordinarily will be upheld by the courts that owe their existence to the United States legal system.[9] However, just as the United States does not escape legal responsibility under a treaty with a foreign state when Congress legislates against that treaty, the United States does not avoid its legal responsibility for the congressionally authored breach of the Medicine Lodge Treaty.

The Supreme Court of the American Indian Nations should apply the Treaty and hold the United States responsible under it. This Court is outside the United States legal system, and it should not hold itself subject to the political question doctrine that governs courts within that system. Its jurisdiction does not originate in the U.S. legal system, nor are its decisions subject to review or nullification by any authority within that system. The separation of powers rationale that counsels in favor of judicial deference by the federal courts in cases such as the present simply does not apply here, just as it does not apply in international proceedings. The present Court may or may not be, in a strict sense, an interna-

tional forum. However, it is *like* international tribunals and other deliberative bodies that exist outside the U.S. judiciary, for which legal responsibility under a treaty obligation is not avoided by U.S. internal law or rules of justiciability. This Court should consider itself jurisdictionally equipped to simply apply the Medicine Lodge Treaty and find the United States in violation of it, notwithstanding the plenary power doctrine or the numbing impact of justiciability considerations in United States courts.

II. The Legislative Scheme Adopted by Congress Deprives the Confederated Kiowa, Comanche and Apache Peoples of Their Lands In Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution

The legislative scheme enacted by Congress, which violates the Medicine Lodge Treaty, also violates the due process clause of the fifth amendment to the United States constitution. In order for the congressional action in this case to survive scrutiny under the constitutional norm, it must be held to promote the welfare of the Indian people concerned in keeping with the United States trust obligation toward them. However, the legislation in question, which broke up tribal collective landholding in defiance of the wishes of the Indian nations, is manifestly at odds with the welfare of the Indian people concerned, especially in light of contemporary international standards.

A. The Due Process Clause of the Fifth Amendment Protects Indian Rights from Congressional Action that is at Odds with the United States' Trust Obligation to Promote the Welfare of Indian People

The due process clause of the Fifth Amendment guards against government action that is unreasonable or arbitrary. At a minimum, government action must be rationally related to a legitimate object of public concern. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3, at 300-305 (2d ed. 1988). Government action that adversely affects rights that are deemed fundamental is subject to a higher standard of scrutiny. *See, e.g.,* Moore v. East Cleveland, 431 U.S. 494 (1977) (right to determine family living arrangements); Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (marital privacy rights). It is now beyond dispute that the due process clause extends to Native American peoples and accordingly constrains the exercise of congressional plenary power in the field of Indian affairs. When Congress exercises its general or plenary authority in this field, the presumed government objective is the promotion of the welfare of Indian people in fulfillment of the United States' trust responsibility toward them. Thus, plenary power-based government action that affects Indian land or property rights, in order to pass constitutional muster, must in some measure be consistent with the U.S. duty of trusteeship toward Indians. *See* Delaware v. Weeks, 430 U.S. at 84-85; *see generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-21 (Rennard Strickland et al. eds, 1982). In this context, the values inherent in the trust relationship effectively merge with the values protected by the due process clause.

The United States, in the exercise of its plenary authority regarding Indians, violated the Medicine Lodge Treaty and in doing so undermined the land rights of the Indian people concerned. *See supra* part I.A. Applying its extreme version of the plenary power doctrine, the Supreme Court declined to question the presumption that Congress acted in good faith compliance with the U.S. trust responsibil-

ity and effectively rendered nonjusticiable the due process challenge to the legislative scheme. Lonewolf v. Hitchcock, 187 U.S. 553 (1903). In later cases the Supreme Court has expressly rejected that aspect of its decision in this case, holding that Congress' plenary power over Indian Affairs is subject to judicially monitored "limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." United States v. Sioux Nation, 448 U.S. at 415 (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935); *accord* Delaware v. Weeks, 430 U.S. at 84-85. The question of whether the legislative scheme in question is in furtherance of the U.S. trust responsibly, and hence in conformity with the constitutional due process, is now undeniably the subject of judicial inquiry.

A view that answers this question in the affirmative, holding that the legislative scheme in question is consistent with the federal trusteeship toward Indians, can only be sustained under an outdated, paternalistic construction of the trusteeship obligation, a view that has no place in contemporary life. A modern conception of the trusteeship obligation is informed by contemporary international law and requires a finding that Congress acted beyond constitutional bounds.

B. The United States' Trust Responsibility Requires Congress to Safeguard the Collective Land Rights, Self-Determination, and Cultural Integrity of Indian Peoples, in Accordance with Contemporary International Norms

The United States' trust responsibility toward Native Americans derives from an exegesis of the course of U.S. - Indian relations and international law. The process of non-indigenous encounter with the indigenous peoples of the Americas has been regulated from the start by international law. Thus the earliest U.S. Supreme Court decisions drew on the international law of the period to establish the foundational tenets of what is today known as federal Indian law. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Among these foundational principles was the notion of a special duty of care toward indigenous peoples, which variously has been associated with the terminology of guardianship, trusteeship and fiduciary obligation. *See* Worcester, 31 U.S. at 551; Cherokee Nation, 30 U.S. at 16-17. While the doctrine of a special duty to ensure the just treatment of indigenous peoples has continued internationally up to the present, its normative elements have changed as dominant thinking about the substantive content of indigenous peoples' rights and well-being have changed over time.

At the time of the Supreme Court's decision in this case, the doctrinal parameters of the federal trusteeship obligation toward Native Americans were rooted in a body of theory and official practice, extending into the international arena, that regarded indigenous peoples and their cultures as inferior and in need of "civilization." *See supra* part I.C.1. Today, however, international norms regarding indigenous peoples are grounded in an unprecedented measure of respect for the dignity of indigenous peoples and their cultures. The parameters of U.S. trusteeship doctrine, which historically has conformed to international law, should today be construed in conformity with the contemporary international norms. *Cf.* Frickey, 81 Minn. L. Rev. 31, 53-79 (arguing that the limits of congressional plenary power over Indian affairs should be determined by reference to international law, since the power originates in part in international law).

The International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention

No. 169 of 1989 (entered into force September 5, 1991), is contemporary international law's most concrete statement of indigenous peoples' rights and corresponding state obligations. The Convention places affirmative duties on states to advance indigenous cultural integrity, *see, e.g., id.* arts. 5, 13; uphold land and resource rights, *see id.* part II, and secure non-discrimination in social welfare spheres, *see id.* part III; and the Convention generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them, *see, e.g., id.* art 7. *See generally* Russel Lawrence Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990). The United States is not a party to this important multilateral treaty. However, the Convention reflects new and emergent customary international law, which is generally binding upon the constituent units of the world community regardless of any formal act assenting to it.

Convention No. 169 is part of a larger body of developments giving rise to and manifesting new international standards specifically concerning indigenous peoples. These standards build upon a matrix of longstanding human rights principles of general applicability. Since the 1970s, the demands of indigenous peoples have been addressed continuously in one way or another within the United Nations, the Organization of American States, and other authoritative international venues of deliberation and decision. *See* ANAYA, 45-58; Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994). Procedures within the U.N. and the OAS involve the development of declarations on the rights of indigenous peoples.[10] Already adopted resolutions and policy statements developed at U.N. conferences and by other international institutions include provisions specifically concerning indigenous peoples.[11] The extended multilateral discussion promoted through the international system in regard to indigenous peoples has given way to a certain new common ground about the minimum standards that should govern behavior toward indigenous peoples. It is further evident that the standards already are in fact guiding both international and domestic decision processes that affect indigenous peoples.[12] Under modern theory, such a controlling consensus, following as it does from widely share values of human dignity, constitutes customary international law.[13]

The specific contours of a new generation of international norms concerning indigenous peoples are still evolving and, beyond their expressions in already adopted instruments, remain somewhat ambiguous at the margins. Yet the norms' core elements repeatedly are confirmed and reflected in the extensive multilateral dialogue and decision processes focused on indigenous peoples and their rights.[14] The core elements of the norms that are most relevant to the present case—identifiable by any objective observation of the totality of pronouncements by government representatives and other authoritative actors in international settings—can be summarized as follows:

1. Lands and Resources. In general, indigenous peoples are acknowledged to be entitled to collective ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where indigenous peoples have been dispossessed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices, and in appro-

priate circumstances to receive compensation.

2. Cultural Integrity. There is today little controversy that indigenous peoples are entitled to maintain and freely develop their distinct cultural identities, within the framework of generally accepted, otherwise applicable human rights principles. Culture is generally understood to include kinship patterns, language, religion, ritual, art and philosophy; additionally, it increasingly is held to encompass land use patterns and other institutions that may extend into political and economic spheres.

3. Self-determination. Although several countries have resisted express usage of the term self-determination in association with indigenous peoples, it is important to look beyond the rhetorical sensitivities to a widely shared consensus of opinion. That consensus is in the view that indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of equality. This principle has implications for any decision that may affect the interests of an indigenous group, and it bears generally upon the contours of related norms.

Full implementation of the foregoing norms, and the safeguarding of indigenous peoples' enjoyment of all generally accepted human rights and fundamental freedoms, are the objective of a continuing special duty of care, or trusteeship obligation, toward indigenous peoples. Today, the principle of a special duty of care is devoid of the paternalism and negative regard for non-European cultures previously linked to trusteeship rhetoric. Instead, the principle rests on widespread acknowledgment, in light of contemporary values, of indigenous peoples' relatively disadvantaged condition resulting from centuries of oppression, and in many cases trusteeship is grounded in treaty commitments. Further, in keeping with the principle of self-determination, the duty of care toward indigenous peoples, or trusteeship obligation, is to be exercised in accordance with their own collectively formulated aspirations.

The terms "trust" or "trusteeship" are not commonly used in contemporary international discourse concerning indigenous peoples, but the underlying concept remains the same. It is ever more evident that authoritative international actors expect countries to act affirmatively to safeguard the rights and interests of the indigenous groups within their borders. Any state that fails to uphold a duty of care toward indigenous peoples and allows for the flagrant or systematic breach of the standards summarized above risks international condemnation.

C. In Depriving the Indian Parties of their lands, Congress Acted Contrary to its Trust Responsibility, in violation of Fifth Amendment Due Process

The legislative scheme at issue in this case parcels out to individual ownership and opens to white settlement the collective landholding of the Kiowa, Comanche, and Apache peoples, against their express wishes. The legislation is manifestly contrary to the duty of trusteeship, which, properly construed, requires the United States to uphold and promote the collective land rights, cultural integrity, and self-determination of indigenous peoples. Lacking a sufficient foundation in the fulfillment of the trust responsibility, the congressional action is in violation of the due process clause of the fifth amendment.

Courts have applied a "rational relation" standard of review for judging the constitutionality under the due process clause of legislation affecting Indian land or property rights. Under that standard, such legislation will be upheld if it bears a rational or reasonable relation to the fulfillment of the United

States trust responsibility toward Indians. *See* Delaware v. Weeks, 430 U.S. at 84-85; Littlewolf v. Lujan, 877 F.2d 1058, 1064-65 (D.C. Cir. 1989), cert. denied, 493 U.S. 1043 (1990); *see also* Red Lake Band of Chippewa Indians v. Swimmer, 740 F.Supp. 9, 14 (D.D.C. 1990) (applying the same "rational relation" standard to a claim of violation of self-determination rights). This deferential standard corresponds with the broad, albeit not limitless, legislative discretion that courts have ascribed to Congress when it exercise its plenary authority in the field of Indian affairs. A higher level of scrutiny, however, is called for, in cases such as the present in which at stake are indigenous lands, because of the centrality of land to the survival of indigenous peoples. *See* Nell Jessup Newton, *Federal Power over Indians: Its Scope, Sources, and Limitations*, 132 PA. L. REV. 195, 252 (1984).

The appropriate standard of review to be applied here was suggested by the U.S. Supreme Court in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In that case the Court held that courts should "engage in a thoroughgoing and impartial examination" to determine congressional adherence to the trusteeship role. *Id.* at 416. The Court in *Sioux Nation* applied this standard to determine whether Congress was acting in its capacity of trustee, or whether it was acting in another capacity, when it took the Black Hills from the Lakota people. This standard of review should also apply in contexts such as the present where it is not disputed that Congress acted in its capacity of trustee. Implicit in the *Sioux Nation* standard, when adapted to the present context, is both a careful assessment of legitimate trusteeship objectives and a finding of a reasonable nexus between such legitimate objectives and the congressional action at issue.

The "thoroughgoing examination" standard provides an important and needed judicial check on the exercise of congressional power for the benefit of groups the are vulnerable to defeat in the political process. *See generally* Jesse H. Choper, *On the Warren Court and Judicial Review*, 17 CATH. U. L. REV. 20, 38-41 (1967) (justifying judicial review of congressional action where "politically impotent minorities" are involved). Further, it provides the courts with an appropriate role in articulating and shaping trusteeship values. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, The Supreme Court at the Bar of Politics 258 (1962) (characterizing the judiciary as the most competent branch of government to pronounce on important values). At the same time, this standard of review continues to afford Congress substantial discretion in legislating with regard to Native Americans, consistent with the desirability of legislative innovation based on cooperative U.S.-Indian relations. Within the framework of rigorously defended trusteeship values, Congress remains free to negotiate and consult with Indian nations to develop legislation from a range of possible options.

A close examination of the legislative scheme in question, coupled with a careful assessment of the nature of the trusteeship obligation, leads to the conclusion that the scheme does not pass constitutional muster: it utterly fails to approximate legitimate trusteeship objectives. The contemporary trusteeship obligation, as appropriately discerned in light of international law, entails a duty on the part of the United States to safeguard the collective landholding of indigenous peoples and to promote their cultural integrity and self-determination. *See supra* part II.B. Rather than promote security for collectively held reservation lands, the legislative scheme is purposefully aimed at doing away with the collective land base. Part of the reservation is taken from the tribes and reconveyed to individual Indians; another part is open to settlement by non-Indians, in exchange for a roughly one dollar an acre payment

to the tribes.[15] This land transfer exemplifies part of a broader allotment program that has had devastating effects for Indian peoples across the United States. *See* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8-32 (1973).

Rather than nurture the cultural integrity of the Indian peoples, the allotment program is consciously aimed at obliterating indigenous cultures. From its very inception the express purpose of allotment was to assimilate individual Indians into the dominant culture by breaking up the tribal land base and promoting individual land ownership among Indians. *See id.* Finally, rather than uphold or even minimally respect indigenous self-determination, the legislation scheme openly defies it by standing in opposition to the express aspirations of the Indian people concerned. The legislation was imposed through a process that at best paid insufficient attention to Indian concerns and that more likely was poisoned by fraud on the part of U.S. agents.

In sum, the congressional action at issue, which upsets Indian land rights, cannot be seen as faithful to the U.S. trust obligation to promote the welfare and interests of Indian people. Moreover, it does not appear to have even a rational relation to legitimate trusteeship objectives. The absence of any consistency with the trust obligation renders the legislation a violation of constitutional due process.

CONCLUSION

For the foregoing reasons, the Supreme Court of the American Indian Nations should hold that Congress, notwithstanding its authority over Indian affairs, is legally incapable of releasing the United States from its obligations under the Medicine Lodge Treaty, and the Court should find that the United States has violated the Treaty. The Court should also find that Congress deprived the confederated Kiowa, Comanche and Apache peoples of their lands in violation of the due process clause of the fifth amendment to the United States Constitution. On the basis of these findings the Court should order such relief as it deems just and proper.

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Notes

1. That Congress breached the Treaty follows especially in light of the cannons of interpretation, which are found repeatedly in U.S. federal courts decisions, regarding treaties between the United States and Indian nations. Under these cannons, treaties with Indian peoples are to be interpreted as the Indian signatories would have understood them, and any ambiguities in treaty terms are to be resolved in favor of the Indian parties. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970), *reh'g denied*, 398 U.S. 945 (1970); Jones v. Meehan, 175 U.S. 1, 11 (1899). These cannons should be followed by the present Supreme Court of the American Indian Nations. They are justified by the relatively weaker position of the Indian parties in the negotiations leading up to the treaties, and by the fact that the wording of the treaties was drafted by U.S. agents in a language foreign to the Indians. *See generally* McClanahan v. State Tax Comm., 411 U.S. 164, 174 (1973); Jones v. Meehan, 175 U.S. at 11 (1899). Especially with the application of theses cannons of interpretation, it can hardly be disputed that the Medicine Lodge Treaty guarantees against the very kind of imposed land transfer scheme that Congress legislated.

2. The U.S. constitutional provision referenced in the Marshall quote is article VI, clause 2, which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land."

3. Contemporary developments confirm the force of the Medicine Lodge Treaty within the international arena. In recent years Indian treaties have been reestablished as matters of international concern through various United Nations and other forums that have focused on indigenous peoples. *See, e.g.*, ECOSOC Res. 1989/77, May 24, 1989 (U.N. Economic and Social Council Resolution mandating a study on treaties between states and indigenous peoples); *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Second Progress Report Submitted by Miguel Alfonso Martinez, special rapporteur*, U.N. Doc. E/CN.4/Sub.2/1995/27 (1995); Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Feb. 9, 1994, EUR. PARL. DOC. PV 58(II), para. 10, at 4 (1994) (calling on states "in the strongest terms" to honor treaties with indigenous peoples). Historical Indian treaties, as well as more recent agreements between indigenous peoples and states, are invoked in international proceedings and regarded as important texts that mark the parameters of mutual obligation and entitlement. *See, e.g., Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., Supp.No. 40, U.N. Doc. A/46/40, at 22-25 (1991) (inquiring about Canadian compliance with Indian treaty rights); Miranda Evans, *Representative of the Observer Delegation of New Zealand to the U.N. Working Group on Indigenous Populations*, Statement on Recent Developments, 11th Sess. (July 27, 1993) (describing Maori Fisheries Settlement of 1992 resulting from claims under the 1

4. In the *Western Sahara case*, 1975 I.C.J. 12, the International Court of Justice addressed the significance of late nineteenth century agreements between Spain and local indigenous authorities in the Western Saharan territory. The Court interpreted the agreements according to the relevant historical understandings and legal practices and found the agreements to constitute legal sources of Spain's colonial authority over the territory. *See id.* at 38-40. *See generally* Wiessner, *American Indian Treaties and Modern International Law*, 7 St. Thomas L. Rev. 567 (1995) (arguing that straightforward application of traditional principles of international law leads to the conclusion that historical Indian treaties retain their full international legal status today).

5. For example, in 1868 the Indian Commissioner wrote of his task:

> What, then, is our duty as the guardian of all the Indians under our jurisdiction? To outlaw, to pursue, to hunt down like wolves, and slay? Must we drive and exterminate them as if void of reason, and without souls. Surely, no. It is beyond question our most solemn duty to protect and care for, to elevate and civilize them.

Indian Commissioner Nathaniel G. Taylor writing on the question "Shall our Indians be civilized?" in the ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, Nov. 23, 1868, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 123, 126 (Francis Paul Prucha, ed., 1990).

6. Even the influential international legal theorist John Westlake, for whom non-European indigenous peoples had no standing in international law, counseled in favor of honoring treaties with indigenous peoples as the best course of action in the colonizing process. *See* JOHN WESTLAKE, CHAPTERS ON THE PRINCIPALS OF INTERNATIONAL LAW 149-55 (1894).

7. The express constitutional provisions that are most relied upon to support congressional or federal authority in the field of Indian affairs are those specifying the treaty-making power, *see* U.S. Const. art. II, § 2, cl. 2, and the power of Congress to

regulate commerce with Indian tribes, *see id.* art. I, § 8, cl. 3. For a discussion of nontextual sources of congressional authority in this field, including sources emanating from the structure of the constitution, the nature and necessity of the national government, and from international law, *see* Phillip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 59-70 (1996).

8. Thus, in *Whitney*, 124 U.S. at 194, the Court stated:

> By the Constitution a treaty is placed on the same footing, and made of like obligation , with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superiority efficacy is given to either over the other. . . .[I]f the two are inconsistent, the one last in date will control the other.

9. Strong arguments exist for not applying the political question doctrine in regard to legislative conflicts with Indian treaties in the same manner as it is applies to such conflicts with foreign treaties. Indian nations that find their treaties violated by U.S. legislation do not have available to them the same array of international procedures and institutions that are available to independent states that find themselves similarly aggrieved. This provides a rationale for judicial intervention in the case of Indian treaties that does not exist with regard to treaties with independent states. However, such arguments for federal judicial intervention need not be considered here because the judicial forum at hand is not within the U.S. legal system and hence should not in any event be considered subject to the political question doctrine and its underlying separation of powers rationale.

10. After years of discussion involving indigenous peoples, the U.N. Working Group on Indigenous Populations, in 1993, finalized its Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I (1993). The following year, the draft declaration was adopted by the Working Group's parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and it is now under consideration by the U.N. Commission on Human Rights.

Within the Organization of American States, the Inter-American Commission on Human Rights, at the request of the OAS General Assembly developed and, in 1995, approved a Draft of the American Declaration on the Rights of Indigenous Peoples, OEA/Ser/L/II.90, Doc.9 rev. 1 (1995). The Inter-American Commission revised the draft in 1996. *See* Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights at its 1333rd Sess., Feb. 26, 1997, OEA/Ser/L/11.95, doc. 6 (1997).

11. *See, e.g,* Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992); Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, chapter 26, U.N. Doc. A/CONF.151/26 (vols. 1,2 & 3), Annex 2 (1992); Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 25, 1993, pt. 1, para. 20; pt. 2, paras. 28-32, U.N. Doc.A/CONF.157/23 (1993); Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Feb. 9, 1994, Eur. Parl, Doc. PV 58(II) (1994); *World Bank Operational Manual,* Operational Directive 4.20 (1991).

12. The impact of such new standards can be seen in the adjudication of indigenous peoples specific claims against states within human rights bodies of the U.N. and the OAS, *see* ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 158-70. Additionally, the norms are reflected in legislative and constitutional reforms worldwide, *see id.* at 134-36 and notes.

13. Norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms. Professors McDougal, Laswell and Chen describe customary law as "generally observed to included two key elements: a 'material' element in certain past uniformities in behavior and a 'psychological' element, or *opinio juris*, in certain subjectivities of 'oughtness' attending such uniformities in behavior." MEYERS MCDOUGAL ET. AL, HUMAN RIGHTS AND WORLD PUBLIC ORDER 269 (1980) (footnote omitted). *Cf.* article 38(1)(a) of the Statute of the International Court of Justice describing "international custom, as evidence of a general practice accepted as law."

The theoretical grounding for identifying new customary international law concerning indigenous peoples is described more fully in ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 49-58.

14. A discussion of the content and general contours of contemporary international norms concerning indigenous peoples is in Anaya, *supra*, at 75-125.

15. The Supreme Court considered this scheme to be a mere "change in the form of investment of Indian tribal property, the property of those who were ...wards of the government." 187 U.S. at 568. This view, which assumes that for Indians land is or should be fungible with capital, is contrary to reality and contemporary norms. *See* International Labor Organization Convention on Indigeous and Tribal Peoples, Convention No. 169 of 1989, art. 13(1) (requiring that governments respect special importance of lands for the cultural and spiritual values of indigenous peoples).