SUPREME COURT OF THE UNITED STATES

No. 97–1337

MINNESOTA, ET AL., PETITIONERS *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 24, 1999]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court holds that the various Bands of Chippewa Indians retain a usufructuary right granted to them in an 1837 Treaty. To reach this result, the Court must successively conclude that: (1) an 1850 Executive Order explicitly revoking the privilege as authorized by the 1837 Treaty was unlawful; (2) an 1855 Treaty under which certain Chippewa Bands ceded "all" interests to the land does not include the treaty right to come onto the land and hunt; and (3) the admission of Minnesota into the Union in 1858 did not terminate the discretionary hunting privilege, despite established precedent of this Court to the contrary. Because I believe that each one of these three conclusions is demonstrably wrong, I dissent.

I

I begin with the text of the Treaty negotiated in 1837. In that Treaty, the Chippewa ceded land to the United States in exchange for specified consideration. Article 1 of the Treaty describes the land ceded by the Chippewa to the United States. Article 2 of the 1837 Treaty provides:

> "In consideration of the cession aforesaid, the United States agree to make to the Chippewa nation, annually, for the term of twenty years, from the date of the ratifi-

> cation of this treaty, the following payments.
>
> "1. Nine thousand five hundred dollars, to be paid in money.
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> "2. Nineteen thousand dollars, to be delivered in goods.
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> "3. Three thousand dollars for establishing three blacksmiths shops, supporting the blacksmiths, and furnishing them with iron and steel.
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> "4. One thousand dollars for farmers, and for supplying them and the Indians, with implements of labor, with grain or seed; and whatever else may be necessary to enable them to carry on their agricultural pursuits.
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> "5. Two thousand dollars in provisions.
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> "6. Five hundred dollars in tobacco.
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> "The provisions and tobacco to be delivered at the same time with the goods, and the money to be paid; which time or times, as well as the place or places where they are to be delivered, shall be fixed upon under the direction of the President of the United States.
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> "The blacksmiths shops to be placed at such points in the Chippewa country as shall be designated by the Superintendent of Indian Affairs, or under his direction.
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> "If at the expiration of one or more years the Indians should prefer to receive goods, instead of the nine thousand dollars agreed to be paid to them in money, they shall be at liberty to do so. Or, should they conclude to appropriate a portion of that annuity to the establishment and support of a school or schools among them, this shall be granted them." 7 Stat. 536–537.

Thus, in exchange for the land cessions, the Chippewa agreed to receive an annuity payment of money, goods, and the implements necessary for creating blacksmith's shops and farms, for a limited duration of 20 years.

Articles 3 and 4 of the Treaty deal with cash payments to persons not parties to this suit, but Article 5 is involved

here. As the Court notes, there was some discussion during the treaty negotiations that the Chippewa wished to preserve some right to hunt in the ceded territory. See *Ante*, at 2. The United States agreed to this request to some extent, and the agreement of the parties was embodied in Article 5 of the Treaty, which provides that:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." 7 Stat. 537.

As the Court also notes, the Chippewa were aware that their right to come onto the ceded land was not absolute– the Court quotes the statement of Governor Dodge to the Chippewa that he would "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them." *Ante*, at 2; App. 46 (1837 Journal of Treaty Negotiations).

Thus, the Treaty by its own plain terms provided for a *quid pro quo*: Land was ceded in exchange for a 20-year annuity of money and goods. Additionally, the United States granted the Chippewa a quite limited "privilege" to hunt and fish, "guarantied . . . during the pleasure of the President." Art. 5, 7 Stat. 537.

II

In 1850, President Taylor expressly terminated the 1837 Treaty privilege by Executive Order. The Executive Order provides that:

> "The privileges granted temporarily to the Chippewa Indians of Mississippi by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by

> that treaty to the United States . . . are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands. App. to Pet. for Cert. 565.

In deciding that this seemingly ironclad revocation was not effective as a matter of law, the Court rests its analysis on four findings. First, the Court notes that the President's power to issue the order must stem either from an Act of Congress or the Constitution itself. Second, the Court determines that the Executive Order was a "removal order." Third, the Court finds no authority for the President to order the Chippewa to remove from the ceded lands. And fourth, the Court holds that the portion of the Executive Order extinguishing the hunting and fishing rights is not severable from the "removal order" and thus also was illegal. I shall address each of these dubious findings in turn.

The Court's first proposition is the seemingly innocuous statement that a President's Executive Order must be authorized by law in order to have any legal effect. In so doing, the Court quotes our decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952), which held that President Truman's seizure of the steel mills by Executive Order during the Korean War was unlawful. However, the Court neglects to note that treaties, every bit as much as statutes, are sources of law and may also authorize Executive actions. See *Dames & Moore* v. *Regan*, 453 U. S. 654, 680 (1981). In *Dames & Moore*, we noted that where the President acts with the implied consent of Congress in his Executive actions, "he exercises not only his own powers but also those delegated by Congress," and that such an action was entitled to high deference as to its legality. *Id.*, at 668. This case involves an even stronger case for deference to Executive power than *Dames & Moore*, in which Presidential power under an Executive agreement was impliedly authorized by Congress, because the Execu-

tive Order in this case was issued pursuant to a Treaty ratified by the advice and consent of the Senate, and thus became the supreme law of the land. See U. S. Const., Art. VI; *United States* v. *Belmont*, 301 U. S. 324 (1937). The Court's contrary conclusion is simply wrong.

The Court's second assumption is that the Executive Order was a "removal order"– that its primary purpose was the removal of the Chippewa. This assumption rests upon scattered historical evidence that, in the Court's view, "[t]he officials charged with implementing this order understood it primarily as a removal order, and they moved to implement it accordingly." Ante, at 5. Regardless of what the President's remote frontier agents may have thought, the plain meaning of the *text* of President Taylor's order can only support the opposite conclusion. The structure of the Executive Order is not that of a removal order, with the revocation of the hunting privileges added merely as an afterthought. Instead, the first part of the order (not to mention the bulk of its text) deals with the extinguishment of the Indians' privilege to enter onto the lands ceded to the United States and hunt. Only then (and then only in its final five words) does the Executive Order require the Indians to "remove to their unceded lands." App. to Pet. for Cert. 565 (Executive Order Feb. 6, 1850).

If the structure and apparent plain meaning of the Executive Order reveal that the order was primarily a revocation of the privilege to hunt during the President's pleasure, what then should we make of the fact that the officials charged with "implementing" the order viewed their task as primarily effecting removal? The answer is simple. First, the bulk of the Executive Order that terminates the hunting privilege was self-executing. Second, while the President could terminate the legal right (*i.e.*, the privilege to enter onto the ceded lands and hunt) without taking enforcement action, a removal order *would* require actual implementation. The historical evidence cited by the Court

is best understood thus as an implementation of President Taylor's unequivocal (and legally effective) termination of the usufructuary privileges. But while the removal portion may have required implementation to be effective, this cannot turn the Executive Order into a "removal order." And even if the President's agents viewed the order as a removal order (a proposition for which the historical evidence is far more ambiguous than the Court admits), their interpretation is not binding on this Court; nor should it be, since the agents had nothing to do with the bulk of the order which terminated the Treaty privileges.

The Court's third finding is that the removal portion of the order is invalid because President Taylor had no authority to order removal. Although the Court sensibly concludes that the Removal Act of 1830 is inapplicable to this case, it then curiously rejects the notion that the 1837 Treaty authorizes removal, largely on the grounds that "[t]he Treaty makes no mention of removal." *Ante*, at 16. The Court is correct that the Treaty does not *mention* removal, but this is because the Treaty was essentially a deed of conveyance— it transferred land to the United States in exchange for goods and money. After the Treaty was executed and ratified, the ceded lands belonged to the United States, and the only real property interest in the land remaining to the Indians was the privilege to come onto it and hunt during the pleasure of the President. When the President terminated that privilege (a legal act that the Court appears to concede he had a right to make, *ante*, at 20), he terminated the Indians' right to come onto the ceded lands and hunt. The Indians had no legal right to remain on the ceded lands for that purpose, and the removal portion of the order should be viewed in this context. Indeed, the Indians then had no legal rights at all with respect to the ceded lands, in which all title was vested in the United States. And this Court has long held that the President has the implied power to administer the public lands. See, *e.g., United States* v. *Midwest Oil Co.*, 236 U. S.

459 (1915). Dealing with persons whose legal right to come onto the lands and hunt had been extinguished would appear to fall squarely under this power. Whether the President chose to enforce his revocation through an order to leave the land or the ambiguous lesser "measures to ensure that the Chippewa were not hunting, fishing, or gathering" proposed by the Court, *ante*, at 20 n. 5, is not ours to second-guess a century and a half later. Indeed, although the Court appears to concede that the President had the power to enforce the revocation order, it is difficult to imagine what steps he could have taken to prevent hunting other than ordering the Chippewa not to come onto the land for that purpose. The ceded lands were not a national park, nor did the President have an army of park rangers available to guard Minnesota's wildlife from Chippewa poachers. Removal was the only viable option in enforcing his power under the Treaty to terminate the hunting privilege. Thus, in my view, the final part of the Executive Order discussing removal was lawful.[1]

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[1]The Court's assumption that "any general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians" illogically confuses the difference between executive authority and a principle of treaty construction. The principle of *Winters* v. *United States*, 207 U. S. 564, 567-577 (1908), and *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269 (1992), that ambiguities in treaties are to be resolved in favor of the Indians, is only relevant to determining the intent of the *parties to a treaty* (that is the United States and the Indian tribe), and stems from the idea that in determining the intent of the parties, Indian tribes should be given the benefit of the doubt as against the United States in cases of ambiguous treaty provisions because of the United States was presumptively a more sophisticated bargainer. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn*, 443 U. S., at 675-676. But the determination of whether the President has power to enforce his revocation by removal is irrelevant to the intent of the parties to the treaty (the United States and the Chippewa in this case) and presents instead an issue of separation of powers

The fourth element essential to today's holding is the conclusion that if the final part of the Executive Order requiring removal were not authorized, the bulk of the order would fail as not severable. Because this is the first time we have had occasion to consider the severability of Executive Orders, the Court first assumes that the standards for severability of statutes also apply to the severability of Executive Orders. Next, the Court determines to seek the "legislative intent" of President Taylor in issuing the order. *Ante*, at 17. And finally, the Court concludes that President Taylor would not have issued the Executive order in the absence of a removal provision, because the 1850 order embodied a coherent policy of Indian removal. As noted above, this approach to the Executive Order stands it on its head– the order *first* extinguishes the hunting privilege and only then– in its last five words– orders removal.

But even if I were to assume that the President were without authority to order removal, I would conclude that the removal provision is severable from that terminating the Treaty privileges. There is no dispute that the President had authority under the 1837 Treaty to terminate the Treaty privileges. We have long held that "[w]hen the President acts pursuant to an express or implied authorization from Congress, . . . the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U. S., at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S., at 637 (Jackson, J., concurring)). Against this deferential standard, the Court musters little more than conjecture and inference, reinforced by its upside-down reading of the Executive Order's plain text. Not only does the Court invert the plain meaning of the

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(between the President and the Congress).

Executive Order, it inverts the proper standard of review. Given the deference we are to accord this valid action made pursuant to a treaty, the order's termination of the Treaty privileges should be sustained unless the Chippewa are able to clearly demonstrate that President Taylor would *not* have terminated them without a removal order. But there is no such evidence, and in the absence of evidence challenging the "strongest of presumptions and the widest latitude of judicial interpretation" that we are required to afford President Taylor's actions, we have only the Court's misguided excursion into historiographical clairvoyance. Accordingly, I would conclude, if necessary, that the termination portion of the Executive Order is severable.

Rather than engage in the flawed analysis put forward by the Court, I would instead hold that the Executive Order constituted a valid revocation of the Chippewa's hunting and fishing privileges. Pursuant to a Treaty, the President terminated the Indians' hunting and fishing privileges in an Executive Order which stated, in effect, that the privilege to come onto federal lands and hunt was terminated, and that the Indians move themselves from those lands.

No party has questioned the President's power to terminate the hunting privilege; indeed, the only other evidence in the record of a President's intent regarding the Executive Order is a 1938 letter from President Franklin Roosevelt to one of the Chippewa, in which he stated his understanding that the Indians had "temporarily" enjoyed "the right to hunt and fish on the area ceded by them until such right was revoked by the President" in the 1850 Executive Order. App. to Pet. for Cert. 575 (letter from President Roosevelt to Whitebird, Mar. 1, 1938). President Roosevelt went on to add that since the right to hunt and fish was terminated in 1850, the Chippewa "now have no greater right to hunt or fish on the ceded area . . . than do the other citizens of the State. Therefore, the Indians who hunt or fish . . . are amenable to the State game laws and are subject to arrest

and conviction [f]or violation thereof." *Id.*, at 576.

President Roosevelt's letter reflects the settled expectations of the President, in whose office the discretion to terminate the privilege granted in Article 5 of the 1837 Treaty was vested, that the 1850 Executive Order was a valid termination of the Treaty privileges. And because the 1837 Treaty, in conjunction with the Presidential power over public lands gave the President the power to order removal in conjunction with his termination of the hunting rights, the Court's severability analysis is unnecessary. In sum, there is simply no principled reason to invalidate the 150-year-old Executive Order, particularly in view of the heightened deference and wide latitude that we are required to give orders of this sort.

III

Although I believe that the clear meaning of the Executive Order is sufficient to resolve this case, and that it is unnecessary to address the Court's treatment of the 1855 Treaty and the 1858 admission of Minnesota to the Union, I shall briefly express my strong disagreement with the Court's analysis on these issues also.

As the Court notes, in 1855, several of the Chippewa Bands agreed, in exchange for further annuity payments of money and goods, to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to any other lands in the Territory of Minnesota or elsewhere." 10 Stat. 1166. The plain meaning of this provision is a relinquishment of the Indians of "all" rights to the land. The Court, however, interprets this provision in a manner contrary to its plain meaning by first noting that the provision does not mention "usufructuary" rights. It argues, citing examples, that since the United States "had the sophistication and experience to use express language for the abrogation of treaty rights," but did not

mention the 1837 Treaty rights in drafting this language,[2] it perhaps did not intend to extinguish those rights, thus creating an interpretation at odds with the Treaty's language. Then, using our canons of construction that ambiguities in treaties are often resolved in favor of the Indians, it concludes that the Treaty did not apply to the hunting rights.

I think this conclusion strained, indeed. First, the language of the Treaty is so broad as to encompass *"all"* interests in land possessed or claimed by the Indians. Second, while it is important to the Court that the Treaty "is devoid of any language expressly mentioning– much less abrogating– usufructuary rights," *ante*, at 21, the definition of "usufructuary rights" explains further why this is so. Usufructuary rights are "a real right of limited duration on the property of another." See Black's Law Dictionary 1544 (6th ed. 1990). It seems to me that such a right would fall clearly under the sweeping language of the Treaty under any reasonable interpretation, and that this is not a case where "even 'learned lawyers' of the day would probably have offered differing interpretations of the [treaty language]." Cf. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677 (1979). And third, although the Court notes that in other treaties the United States sometimes expressly mentioned cessions of usufructuary rights, there was no need to do so in this case, because the settled expectation of the United States was that the 1850 Executive Order had terminated the hunting rights of the Chippewa. Thus, rather than applying the plain and unequivocal language of the 1855 Treaty, the Court holds that "all" does not in fact mean "all."

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[2] One notices the irony that where the President chose to explicitly eliminate the 1837 Treaty rights, the Court finds this specificity subsumed in the "removal order," and invalidates it as well.

IV

Finally, I note my disagreement with the Court's treatment of the equal footing doctrine, and its apparent overruling *sub silentio* of a precedent of 103 years' vintage. In *Ward* v. *Race Horse*, 163 U. S. 504 (1896), we held that a Treaty granting the Indians "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts" did not survive the admission of Wyoming to the Union since the Treaty right was "temporary and precarious." *Id.*, at 515.

But the Court, in a feat of jurisprudential legerdemain, effectively overrules *Ward sub silentio*. First, the Court notes that Congress may only abrogate Indian treaty rights if it clearly expresses its intent to do so. Next, it asserts that Indian hunting rights are not irreconcilable with state sovereignty, and determines that "because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Ante*, at 31. And finally, the Court hints that *Ward* rested on an incorrect premise– that Indian rights were inconsistent with state sovereignty.

Without saying so, this jurisprudential bait-and-switch effectively overrules *Ward*, a case which we reaffirmed as recently as 1985 in *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753 (1985). *Ward* held merely that treaty rights which were only "temporary and precarious," as opposed to those which were "of such a nature as to imply their perpetuity," do not survive statehood.[3] 163 U. S., at

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[3] The Court maintains that this reading of *Ward* is overbroad and would render any right created by operation of federal law "temporary and precarious." *Ante*, at 33. Nothing could be further from the truth. The

515. Here, the hunting privileges were clearly, like those invalidated in *Ward*, temporary and precarious: The privilege was only guaranteed "during the pleasure of the President"; the legally enforceable annuity payments themselves were to terminate after 20 years; and the Indians were on actual notice that the President might end the rights in the future, App. 78 (1837 Journal of Treaty Negotiations).

Perhaps the strongest indication of the temporary nature of the Treaty rights is presented unwittingly by the Court in its repeated (and correct) characterizations of the rights as "usufructuary." As noted *supra*, at 10, usufructuary rights are *by definition* "of limited duration." Black's Law Dictionary 1544 (6th ed. 1991). Thus, even if the Executive Order is invalid; and even if the 1855 Treaty did not cover the usufructuary rights: Under *Ward*, the temporary and precarious Treaty privileges were eliminated by the admission of Minnesota to the Union on an equal footing in 1858. Today the Court appears to invalidate (or at least substantially limit) *Ward*, without offering any principled reason to do so.

V

The Court today invalidates for no principled reason a 149-year-old Executive Order, ignores the plain meaning of a 144-year-old treaty provision, and overrules *sub silentio* a 103-year-old precedent of this Court. I dissent.

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outer limit of what constitutes a "temporary and precarious" right is not before the Court (nor, since *Ward* is apparently overruled, will it ever be), but the hunting privileges granted in *Ward* and by the 1837 Treaty in this case reveal themselves to be "temporary and precarious" by their plain text: the privilege in *Ward* ended upon occupation of the hunting districts or the outbreak of hostilities, while the privilege in this case lasted only during the pleasure of the President. Both rights were temporary and precarious, as neither was guaranteed, either expressly or impliedly, in perpetuity.