

The Constitutional Crisis with the Legislative Veto: A closer look into Immigration and Naturalization Service v. Chadha and its relationship to Section 204(e) of the Federal Land Policy and Management Act of 1976

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- I. Federal Land Policy and Management Act of 1976 and the Department of Interiors 2008 rule removing from its regulations the legislative veto in section 204(e).

The Federal Land Policy and Management Act of 1976ⁱ(hereinafter FLPMA) governs the way in which the public lands are administered by the Department of Interior's Bureau of Land Management (hereinafter Bureau). In the FLPMA, Congress recognized the value of the public lands and declared that the public lands would remain in public ownership. In the FLPMA, Congress wanted the public lands and their various resources to be used in a combination that would best meet the needs of the present and future needs of the American people.

Section 204(e) of FLPMA provides that the Secretary of the Interior shall withdraw lands immediately upon a determination, either by the Secretary or by either of two committees of the Congress, that an emergency exists and that extraordinary measures need to be taken to protect natural resources or resource values that otherwise would be lost. The congressional notification authority may be exercised by the Committee on Natural Resources of the House of Representatives or by the Committee on Energy and Natural Resources of the Senate.ⁱⁱ The Bureau's regulations at 43 CFR 2310.5 state that the Secretary shall immediately withdraw lands when the Secretary determines, or when the Secretary is notified by a Committee, that an emergency exists and that extraordinary measures must be taken to protect natural resources or resource values that would otherwise be lost.ⁱⁱⁱ

The Department of Interior, Bureau of Land Management in October 2008 proposed a revision to rule 43 CFR 2310.5.^{iv} The preamble to the proposed rule raised the issue of the constitutionality of section 204(e) of the FLPMA which directs the Secretary to withdraw lands when the congressional committee-directed withdrawal provision is invoked by Congress. The proposed rule had a 15 day public comment period. The Bureau received approximately 800 comments and the final rule, dated December 5, 2008 and took effect in January of 2009, removed the committee-directed emergency withdrawal provision while keeping the Secretary's emergency withdrawal provision powers that were previously in place in the regulation. The rule seems intended to speed-up a judicial confrontation on the constitutionality of section 204(e). Environmentalists believe that the new rule is part of a power play that is meant to challenge a June 25, 2008 communication from the House Committee on Natural Resources that, using the committee-directed emergency provision of section 204(e) and citing the corresponding regulation at 43 CFR 2310.5, directed the Secretary not to leave public land near Grand Canyon National Park in northern Arizona open for mineral development.

Two previous congressional committee notices led to litigation regarding the constitutionality of section 204(e).^v In all of these challenges to section 204(e) the Supreme Court Decision, Immigration and Naturalization Service v. Chadha^{vi} (hereinafter Chadha) was discussed and the implications that decision had on the constitutionality of section 204(e). The effect of Chadha on the new rule and section 204(e) will be examined below.

II. A brief history of Immigration and Naturalization Service v. Chadha.

In the landmark decision Chadha, the United States Supreme Court held that a "one-house veto" scheme was inconsistent with bicameralism principles and the Presentment Clause of the Constitution.^{vii} In Chadha, under the Immigration and Nationality Act, a decision by the

Attorney General suspending deportation could be nullified by a vote of either the House of Representatives or the Senate, what is known as a so-called legislative veto. This legislative veto (or one-house veto) was challenged when the House of Representatives exercised this power and nullified the Attorney General's suspension of the deportation of Jagdish Rai Chadha. The Supreme Court was faced with a difficult decision. If Chadha was to be decided broadly, over 200 statutory provisions that contained the legislative veto would be annulled.^{viii} The increased use of the legislative veto in the 1970s was a technique that was used in an effort to control Presidential power. Some examples of statutes passed in the 1970s that provided annulment of Executive action were statutes dealing with foreign arms sales, export of nuclear technology, and declarations of national emergencies.^{ix} This relationship between the use of the legislative-veto as a means of legislative supervision over agency activity was recognized by Chief Justice Burger, the drafter of the majority opinion in Chadha, as being a tool used for decades by the Legislative branch that the Executive has lived with; although "uncomfortably" at times. He went on to say if there were a "principled way to avoid the issue", he would welcome it.^x

Although eventually joining with the majority, Justice O'Connor urged that the case be decided narrowly. She believed that the particular legislative veto used in Chadha could be different from other types of legislative vetoes used in other statutes.^{xi} Therefore, the decision could have been narrowed to its facts, i.e. congressional power to disapprove agency decisions in a particular case. In fact, Justice Powell's concurrence characterized the houses use of the legislative-veto used in Chadha as being "clearly adjudicatory" and so the court could have held that "Congress impermissibly assumed a judicial function".^{xii} Deciding the case in this way would have avoided a broader holding that would declare all legislative vetoes unconstitutional.

However, the majority believed that a narrow decision would not settle the controversy between the Executive and Congress concerning the constitutionality of the legislative veto.

Chief Justice Burger stated that Congressional use of the legislative veto to annul executive or administration action by resolution of one or both houses was a violation of the separation of powers. The court discussed that when the Constitution provides express procedures those procedures must be followed. In order for there to be a valid exercise of “legislative” action the Presentment Clause (particularly, the President’s veto power) and bicameralism principles (that no law could take effect without the concurrence of the majority of the House and Senate) need to be strictly observed. The court characterized the action by the House in Chadha and the legislative veto itself as legislative in nature. The court defined the ambiguous phrase “legislative in nature”^{xiii} by stating: that the House modified the rights and duties of individuals outside the legislative branch; the action by the House would have otherwise required a private law, which is legislative; and the nature of the action is “inherently legislative”.^{xiv} Therefore, the constitutionally prescribed procedures of presentment to the President and bicameralism had to be followed in order for the action to be deemed in accordance with the Constitution. Since, these constitutionally prescribed procedures were not followed in Chadha or in any other statute that had a legislative-veto, all legislative vetoes were declared unconstitutional by the court.

Chadha remains a controversial decision. The debate about Chadha has been and continues to be focused on whether Congress should use the legislative veto to “control” broad delegations of lawmaking power given to administrative agencies. Even further, the case has been criticized as being too formalistic and categorical. Particularly, the court attempting to

categorize “activity” by the branches as being solely adjudicative, legislative, or executive and using those categories to dictate whether such “activity” is permissible in the Constitution.

III. Immigration and Naturalization Service v. Chadha and its affect on previous challenges to the constitutionality of the legislative veto in Section 204(e).

In Pacific Legal Foundation, the Secretary argued that FLMPA Section 204(e) was unconstitutional because its application through unilateral action by the committee: (a) violated the separation of powers doctrine; (b) delegated executive power to the committee; (c) violated the bicameralism principles; and (d) deprived the President of his veto power. At the time the court was deciding these issues in Pacific, Chadha had been decided in the Ninth Circuit. Relying in part on that decision the court in Pacific held that the ruling in Chadha would have compelled them to declare Section 204(e) unconstitutional but instead distinguished Section 204(e) from Chadha by stating the saving feature was the Secretarial discretion to determine the scope and duration of the emergency withdrawal.^{xv} After the Pacific court’s decision Chadha was affirmed by the United States Supreme Court. This subsequent affirmation of Chadha casts doubt on the validity of the Pacific court’s decision.

The next case to challenge the constitutionality of Section 204(e) was National Wildlife Federation v. Watt. In National Wildlife Federation, suit was brought against the Secretary when the Secretary attempted to receive and accept bids for the sale of coal leases even after the Interior and Insular Affairs Committee of the House directed the Secretary to withdraw certain lands from coal leasing temporarily. The court held that a forced withdrawal would most likely be held “legislative in character” like in Chadha since it alters the legal rights and duties of the Secretary of the Interior. The court also found that even though the withdrawal in this case was temporary that was not enough to distinguish the withdrawal provision from the legislative veto

in Chadha since the withdrawal provision was still deemed “legislative in character”.^{xvi} Despite these holdings the court found that emergency withdrawal provision would still be binding on the Secretary irrespective of the validity of Section 204(e) since no action had been taken by the Secretary to remove the regulation that supported the legislative veto in Section 204(e) through notice-and-comment procedures. Therefore, the court found that Secretary needed to honor his own regulation unless and until it was amended or rescinded after an appropriate rulemaking procedure.^{xvii} The court declined to decide the constitutional issue regarding the validity of Section 204(e) in light of Chadha.

In response to the court’s holding in National Wildlife Federation, the Secretary of the Interior initiated the rulemaking proceeding to remove the committee-directed withdrawal provision from the regulations. The Secretary states that committee-directed emergency withdrawal provision may be an impediment to resolving the constitutional issues that Section 204(e) present and removal of that provision is necessary by proper rulemaking in order to solve the issue. In so doing, the Secretary took great pains to point out that the rule-making process to remove the legislative-veto portions was not in response to the June 25, 2008 communication from the House Committee on Natural Resources, citing the committee directed provision in the Section 204(e) as corresponding regulation 43 CFR 2310.5 as authority to have the Secretary withdraw one million acres of public lands around Grand Canyon National Park from mineral entry.^{xviii} Rather, the Secretary states that the rule was only prospective and only affected the regulation, not the statute.

The final rule states the committee-directed withdrawal provision of the regulation implements a portion of the FLPMA Section 204(e) that is of “questionable constitutionality” under Chadha because it arguably alters the legal rights and duties of the Secretary of the

Interior.^{xix} The Secretary points out that the rulemaking is not a forum to resolve that issue since that is a decision for the courts but that under the National Wildlife Federation decision the regulation itself is a potential impediment to judicial resolution of that issue.

The comments that opposed the rule because of environmental concerns involving the potential uranium mining on public land near the Grand Canyon were dismissed by the Secretary. The Secretary asserted that the rule itself did not open up lands to mining and the rule was prospective only and did not have any effect on the June 25, 2008 communication relating to the lands surrounding the Grand Canyon. The Secretary also points out that the rule does not eliminate the Secretary's emergency withdrawal powers. Therefore, the Secretary still has the ability to protect lands, including park lands, on an emergency basis through an emergency withdrawal or through the conventional withdrawal process.

Accordingly, the Secretary issued the new rule that eliminated the committee-directed withdrawal provision from the regulation pertaining to Section 204(e). The new regulation raises the issue, what would happen if the Section 204(e) were challenged in court again?

IV. What are the implications the new rule could have on the constitutionality of Section 204(e)?

It seems that the courts are reluctant to declare legislative vetoes unconstitutional even with Chadha as judicial support. In Pacific, the court went as far as to say that in light of Chadha they would have been compelled to declare Section 204(e) but for the fact that the Secretary had the discretion to determine the scope and duration of the congressionally mandated withdrawal. The court chose to characterize this Secretarial discretion as being saving grace of Section 204(e). The court went on to infer that although nothing in Section 204(e) gave the Secretary the express authority to revoke a committee initiated emergency withdrawal, both the language and

the history of the FLPMA implied that authority.^{xx} The court stated that by interpreting Section 204(e) as authorizing the Secretary to establish the scope and duration of the emergency withdrawal provisions the constitutional dilemmas in Chadha are avoided. Essentially, the congressional committee's actions would not be considered "legislative in nature" and would not amount to a statutory amendment (in violation of the Presentment Clause and bicameralism principles) since the Secretary may revoke the emergency withdrawal by determining the scope and duration of the withdrawal. Also, the court points out that since the Secretary is allowed exercise his discretion in implementing the congressional request, the Committee's authority is sufficiently similar to traditional committee powers.^{xxi} Clearly, the court didn't want to declare Section 204(e) unconstitutional, and the court avoided such a decision by "implying" that the Secretary had authority to determine the scope and duration of the Congressional Committee's emergency withdrawal provision.

The court in National Wildlife Federation was just as reluctant to declare Section 204(e) unconstitutional, even in light of Chadha. The court decided to avoid the constitutional question all together and hold that the Congressional Committee emergency withdrawal provision had to be followed by the Secretary simply because the Secretary had approval of the provision in the Department's regulations. It seemed as though the court was looking for an "out". After National Wildlife Federation, the Department of the Interior removed that "out" from its regulations. Now that the court is no longer able to rely on the Secretary's own regulations as support for avoiding the constitutional question. It begs the question, will the courts finally have to decide if Section 204(e) should be declared unconstitutional in light of Chadha?

In short answer, the reasoning behind Pacific still has possible precedential value. After all, the court could still imply that the Secretary has the power to determine the scope and

duration of the Congressional Committee withdrawal provision and because of this power Section 204(e) is more akin to traditional committee powers rather than excessive legislative power like that used in Chadha. I submit that this new rule will speed up the judicial confrontation between the constitutionality of Section 204(e) and its relationship to Chadha but that the court will find a way to avoid the issue. The reasoning behind Pacific is arguably good law, even though it was decided before Chadha was affirmed by the United States Supreme Court, and could provide another “out” for the courts when deciding whether Section 204(e) is unconstitutional.

ⁱ 43 U.S.C. 1701

ⁱⁱ 43 U.S.C. 1714(e).

ⁱⁱⁱ See Federal Register: December 5, 2008 (Volume 73, Number 235).

^{iv} In 1991, the Bureau proposed a similar revision to 43 CFR 2310.5 to remove all regulations that relate to the emergency withdrawal provision. The preamble to the proposed rule cited constitutional issues and that the emergency withdrawal provision is redundant since public lands could be protected from the general withdrawal authority under section 204. The proposed rule was never finalized and was withdrawn in 1993. See Federal Register: December 5, 2008 (Volume 73, Number 235).

^v See, Pacific Legal Foundation v. Watt, 529 F. Supp. 982 (D. Montana 1981); National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983).

^{vi} 462 U.S. 919 (1983).

^{vii} Art. I, § 7 cl. 2, 3 and Art. I, § 1.

^{viii} Chadha, 462 US at 1003-13 (Appendix to White, J., dissenting).

^{ix} See International Security Assistance Act of 1977, Pub. L. No. 95-92, 91 Stat. 614 (1977); Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978); National Emergencies Act, Pub. L. No. 94-912, 90 Stat. 1255 (1976). Cited in, CURIUSER AND CURIUSER: THE SUPREME COURT'S SEPARATION OF POWERS WONDERLAND 1990, 65 NTDLR 587.

^x Id at 599. See, Letter from Lewis F. Powell to Warren E. Burger (Feb. 25, 1982) (discussing Chadha) (on file with author).

^{xi} Id at 599. Letter from Sandra Day O'Connor to Warren E. Burger (March 11, 1982) (discussing Chadha) (on file with author).

^{xii} Chadha, 462 U.S. 919, 964, 960 (1983) (Powell, J., concurring).

^{xiii} Defined as having, “the purpose and effect of altering legal rights, duties, and relations of persons”. Id at 952.

^{xiv} Id at 953-954.

^{xv} Pacific Legal Foundation at 1000.

^{xvi} National Wildlife Federation at 1145, 1155.

^{xvii} Id at 1158.

^{xviii} See Federal Register: December 5, 2008 (Volume 73, Number 235) at 5.

^{xix} Id at 19.

^{xx} Pacific Legal Foundation at 1000.

^{xxi} Id at 1001.