



Memorandum

June 20, 2008

TO: House Committee on Natural Resources
Attention: Lisa Pittman

FROM: Todd B. Tatelman
Legislative Attorney
American Law Division

SUBJECT: Constitutional Issues with §204(e) of the Federal Land Policy and Management Act of 1976, as amended

This memorandum responds to your request for an analysis of the constitutionality of § 204(e) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended. The relevant portion of the statute states that:

When the Secretary determines, *or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary*, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees....¹

According to information provided by your office, on June 25, 2008, the Committee on Natural Resources is scheduled to conduct a markup of a proposed resolution pursuant to this provision that would direct the Secretary of the Interior to “immediately withdraw the approximately 1,068,908 acres of Federal land generally depicted on the map entitled ‘Grand Canyon Watersheds Protection Act of 2008,’” Given that this provision of FLPMA appears to provide authority for a single standing committee of either the House or Senate to mandate action by the Secretary of the Interior, an analysis of these provisions in light of the Supreme Court’s decision in *INS v. Chadha*² appears relevant in evaluating the legal impact that enactment of such a resolution might have.

In *Chadha*, the Supreme Court analyzed § 244(c)(2) of the Immigration and Nationality Act, which granted to Congress the power to exercise a legislative veto over decisions made

¹ Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 204(e), 90 Stat. 2751 (1976) (codified as amended at 43 U.S.C. § 1714(e) (2000)) (emphasis added).

² 462 U.S. 919 (1983).

by the Attorney General under the Act. Specifically, § 244(c)(2) enabled Congress to overrule deportation decisions by the passage of an appropriate resolution by one House of Congress.³ The Court noted that a legislative veto constituted an exercise of legislative power, as its use has “the purpose and effect of altering the legal rights, duties, and relations of persons...outside the legislative branch.”⁴ As such, the Court concluded that a legislative veto could only be exercised in comportment with the bicameralism and presentment requirements of Article I.⁵ Given that the statute authorized either House of Congress to execute a legislative veto, the Court determined that the provision was an unconstitutional violation of the separation of powers doctrine.⁶ With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only “in accord with a single, finely wrought and exhaustively considered procedure,” namely bicameral passage and presentment to the President.⁷

The maxims delineated in *Chadha* are fully applicable to the provision of FLPMA at issue here. For there to be a legal obligation to withdraw land imposed on the Secretary of the Interior pursuant to § 204(e), the *Chadha* decision requires that actions of Congress comply with both the bicameralism and presentment clauses of the Constitution. The single committee resolution contemplated by § 204(e) does not satisfy these requirements and, therefore, cannot be said to impose any legal obligation on the Secretary to withdraw land. Accordingly, should such a resolution be adopted it appears likely that the Secretary would be well within his authority to interpret it as informational and/or advisory in nature and, thus, will be able to avoid taking the actions contemplated under the statute. Should Congress wish to impose a binding legal obligation on the Secretary it could opt either to pass a joint resolution or a bill, both of which satisfy the bicameralism and presentment requirements of Article I, as they would need to be presented to the President for his signature or veto (and in the case of a veto be overridden) to have the necessary effect of mandating that the Secretary withdraw land.

It should be noted that the Committee appears to have taken similar actions on two separate occasions. In 1981, before the Supreme Court’s decision in *INS v. Chadha*,⁸ and again in 1983, after the Court’s decision in *Chadha*.⁹ Both resolutions resulted in litigation with the Executive Branch asserting that the provision was unconstitutional. However, in neither instance did the reviewing courts definitively reach the constitutional question about

³ *See id.* at 923

⁴ *Id.* at 952.

⁵ *Id.* at 954-955. The Constitution at Article I, § 7 states that “Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President ... according to the Rules and Limitations prescribed in the Case of a Bill.”

⁶ *Id.* at 954-955. Shortly after its decision in *Chadha*, the Court without opinion and with one dissent summarily affirmed lower court opinions that had struck down a two-House legislative veto provision of the Federal Trade Commission Improvements Act, 15 U.S.C. § 57a-1. *See United States Senate v. Federal Trade Commission*, 463 U.S. 1216 (1983); *United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1983).

⁷ *Id.* at 951.

⁸ *See Pacific Legal Foundation v. Watt*, 529 F.Supp. 982 (D. Mont. 1981), *supp.* 539 F.Supp. 1194 (D. Mont. 1981).

⁹ *See National Wildlife Federation v. Clark*, 577 F.Supp. 825. (D.D.C. 1984).

whether the Committee's action was legally binding on the Secretary. In the 1981 case *Pacific Legal Foundation v. Watt*, the District Court for the District of Montana avoided the constitutional question by interpreting the language of § 204(e) as providing the Secretary with the implicit authority to "to revoke, after a reasonable time, an emergency withdrawal initiated by either congressional committee."¹⁰ The court did, however, in *dicta*, indicate that if § 204(e) "were interpreted to authorize the Committee to dictate the scope and duration of an emergency withdrawal, [the court] would be compelled by [the Ninth Circuit Court of Appeals' decision in] *Chadha* to declare it unconstitutional."¹¹

Three years later and after the *Chadha* decision, the District Court for the District of Columbia had the opportunity to address § 204(e) in *National Wildlife Federation v. Clark*.¹² Again the government argued that the resolution adopted by the House Committee was unconstitutional as a violation of the principles articulated by the Supreme Court in *Chadha*. Like the Montana court, the D.C. court declined to rule on the constitutional question instead opting to decide the case on administrative law grounds. The government had argued that it was not required to conduct a formal rulemaking before deciding whether the *Chadha* decision invalidated § 204(e) and its implementing regulations.¹³ The court held that the government had not, pursuant to the Administrative Procedure Act, properly rescinded its regulations adopted to implement § 204(e). Specifically, according to the court, the agency had not engaged in public notice and comment or any other judicially-reviewable procedure, but rather had simply made an *ad hoc* determination on the constitutional question.¹⁴ As a result of this narrow ruling, the court avoided any merits discussion on the constitutional question of whether the resolution adopted by the Committee was legally binding on the Secretary.

In sum, there appears to be little doubt that a mere single Committee resolution cannot, as a matter of law, require the Secretary to withdraw the land. This conclusion, of course, does not prevent the Committee from marking up, voting, and ultimately adopting the resolution; nor does it appear to prohibit the Secretary from exercising his discretion and complying with the Committee's directive. However, the resolution does not appear to be enforceable as a matter of law until it is adopted in a form that satisfies the bicameralism and presentment requirements of Article I. As a result, it would appear that the Secretary remains free to decline to implement the resolution.

¹⁰ *Watt*, 529 F.Supp at 1000.

¹¹ *Id.* at 1002.

¹² 577 F.Supp 825 (D.D.C. 1984).

¹³ *Id.* at 828 (citing *INS v. Chadha*, 462 U.S. 919 (1983) & *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-93 (1974)).

¹⁴ *Id.* at 828-29.