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# *National Wildlife Federation v. Watt: The Property Clause and the Legislative Veto*

## I. Introduction

In *Immigration & Naturalization Service v. Chadha*<sup>1</sup> the Supreme Court declared unconstitutional a section<sup>2</sup> of the Immigration and Nationality Act<sup>3</sup> under which Congress directly intervened in executive administrative activity. Some months later Congress issued a directive to the Secretary of the Interior (the Secretary) pursuant to a similar section<sup>4</sup> in the Federal Land Policy and Management Act (FLPMA).<sup>5</sup> The directive forbade the Secretary's planned leasing of coal rights on federally owned lands, known as the Fort Union Federal Coal Production Region, in eastern Montana and western North Dakota. The Secretary refused to obey the directive, taking the position that *Chadha*<sup>6</sup> had rendered all congressional veto clauses void and unconstitutional.

In *National Wildlife Federation v. Watt*,<sup>7</sup> the litigation which followed, the District Court for the District of Columbia suggested that the FLPMA clause was distinguishable from the clause struck down in *Chadha*<sup>8</sup> on the basis of its Constitutional power source. The court stated that congressional power over public lands, stemming from the Property Clause of the Constitution,<sup>9</sup> was greater than its legislative

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1. 103 S. Ct. 2764 (1983).

2. 8 U.S.C. § 1254(c)(2) (1982).

3. 8 U.S.C. §§ 1101-1525 (1982).

4. 43 U.S.C. § 1714(e) (1982).

5. 43 U.S.C. §§ 1701-84 (1982).

6. 103 S. Ct. 2764 (1983).

7. 571 F. Supp. 1145 (D.D.C. 1983).

8. 103 S. Ct. 2764 (1983).

9. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States or of any particular State.")

power, and that a congressional veto grounded in the Property Clause might pass Constitutional muster where an article I "legislative veto" could not.

In the end the district court did not decide the Constitutional question which it raised in *National Wildlife Federation v. Watt*.<sup>10</sup> This Note will examine that question and review the circumstances surrounding the creation and evolution of the Property Clause, illustrating how the court's reasoning is supported by the history of the clause.

## II. Fort Union

Investigation and development of the Fort Union region's possibilities for coal production began in the late 1970s under the auspices of the Federal Coal Management Program. On February 14, 1983 a Final Environmental Impact Statement with regard to Fort Union was published. After balancing the substantial negative environmental effects predicted by that statement against the economic considerations involved, the Secretary approved the leasing of rights to 790.2 million tons of coal to be extracted from the region. The sale of the leases was scheduled for September 14, 1983.<sup>11</sup>

On May 11, 1983, however, the federal government's General Accounting Office (GAO) informed Congress that during the previous year the Department of the Interior (DOI) had auctioned off leases for over a billion tons of coal, on tracts covering more than 30,000 acres of public land in Montana and Wyoming, and had accepted in return 100 million dollars less than GAO's estimate of the fair market value of the leases involved.<sup>12</sup>

In response to this report Congress enacted legislation,<sup>13</sup> subsequently signed into law by President Reagan, which cre-

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10. *National Wildlife Fed'n v. Clark*, 577 F. Supp. 825 (D.D.C. 1984).

11. *National Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1149-52 (D.D.C. 1983).

12. *Id.* at 1152 (citing Comptroller General, Report to the Congress: Analysis of the Powder River Basin Federal Coal Lease Sale: Economic Valuation Improvements and Legislative Changes Needed (May 11, 1983)).

13. Act of July 30, 1983, Pub. L. No. 98-63, 97 Stat. 328 (1983).

ated a commission to review DOI's coal leasing procedures.<sup>14</sup> This commission was to report to Congress in early 1984.<sup>15</sup>

Within days of this congressional action the Secretary informed Congress that the sale of the Fort Union leases, scheduled for mid-September, would not be delayed. Congress had requested that the sales be postponed until the commission made its report.<sup>16</sup>

On August 3, 1983, the House Committee on Interior and Insular Affairs directed its chairman, Representative Morris K. Udall, to notify the Secretary that an "emergency situation existed, and that the Fort Union tracts 'are to be immediately withdrawn' from availability for coal leasing."<sup>17</sup> Pursuant to FLPMA<sup>18</sup> section 204(e)<sup>19</sup> and DOI's own regulation,<sup>20</sup> promulgated to implement the statute, the Secretary was required to effect the withdrawal upon receipt of Representative Udall's notification. The Secretary, however, informed the House committee that he declined to follow their directive since the Supreme Court's decision in *Immigration & Natu-*

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14. During the same period Congress began slowly moving toward the enactment of legislation which would declare a moratorium on all coal leasing pending the commission's report. This legislation was subsequently enacted. See Act of November 4, 1983, Pub. L. No. 98-146, § 108, 97 Stat. 934 (1983).

15. See Off. of Technology Assessment, *Environmental Protection in the Federal Coal Leasing Program* 4 (May 24, 1984) (official analysis released subsequent to the commission's first report to the Congress on February 17, 1984).

16. *National Wildlife Fed'n v. Watt*, 571 F. Supp. at 1152.

17. *Id.*

18. 43 U.S.C. §§ 1701-84 (1982).

19. 43 U.S.C. § 1714(e) (1982):

When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or 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 the Committees on Interior and Insular Affairs of the Senate and the House of Representatives. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

20. 43 C.F.R. § 2310.5 (1983).

*ralization Service v. Chadha*<sup>21</sup> rendered both the statutory provision and DOI's regulation void.<sup>22</sup>

In *Chadha*<sup>23</sup> the Supreme Court had declared section 244(c)(2) of the Immigration and Nationality Act<sup>24</sup> unconstitutional. Section 244(c)(2), like FLPMA 204(e), had permitted one house of Congress to intervene, by resolution, in administrative activity. Under both sections Congress could require the reversal of the decision of the head of an executive department acting within the scope of his delegated authority.<sup>25</sup>

On September 8, 1983, the day before the Secretary made his position officially known to the House committee, two environmental organizations, the National Wildlife Federation and the Wilderness Society, initiated the law suit which is the subject of this Note. They demanded a declaratory judgment establishing the illegality of the Secretary's plan to lease Fort Union coal rights in defiance of the committee's directive. They also sought injunctive relief. Representative Udall, as chairman of the committee whose resolution was to be disregarded, was permitted to intervene in the action.<sup>26</sup>

On September 16, 1983 the District Court for the District of Columbia issued a temporary restraining order, preventing the issuance of the contested leases. Subsequently, in granting the petition for a preliminary injunction,<sup>27</sup> the court found that the plaintiffs were likely to prevail on the merits of the case, either on the basis of the Constitutional issue involved or because of the Secretary's improper abandonment of DOI's

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21. 103 S. Ct. 2764 (1983).

22. 571 F. Supp. at 1153 (citing Letter from Secretary James Watt to House Committee on Interior and Insular Affairs Chairman Morris K. Udall (Sept. 9, 1983)).

23. 103 S. Ct. 2764 (1983). See generally McGuinn, *The Demise of the Legislative Veto: The Struggle for Political Accountability: Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983), 17 Creighton L. Rev. 915 (1983).

24. 8 U.S.C. § 1254(c)(2) (1982).

25. If . . . either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. . . . *Id.*

26. See Fed. R. Civ. P. 24(b).

27. 571 F. Supp. at 1148.

implementing regulation.<sup>28</sup>

By the court's own admission this initial litigation was conducted in a deliberately hasty manner for economic reasons, so that the Secretary might seek emergency appellate review of the injunction prior to the end of the fiscal year.<sup>29</sup> Contemplating this appellate consideration, the court's opinion discussed the "delicate and original"<sup>30</sup> question raised by the impact of *Chadha*<sup>31</sup> on the traditionally extensive power of Congress under the Property Clause of the United States Constitution.<sup>32</sup> The Secretary, however, failed to seek appellate review, and in December of 1983 the parties moved for summary judgment in the district court.<sup>33</sup> Faced with the task of making its own decision on the merits, the court opted for the narrower ground of decision. It held that the Secretary was bound to follow the DOI implementing regulation until such time as the House committee withdrew its resolution or the regulation had been properly rescinded<sup>34</sup> in accordance with the requirements of the Administrative Procedure Act.<sup>35</sup>

The court granted plaintiffs' motion for summary judgment without resolving the Constitutional issue suggested by

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28. *Id.* at 1158. See generally *Pacific Legal Found. v. Watt*, 529 F. Supp. 982 (D. Mont. 1982). The present case was not the first time the Secretary and the House Committee on Interior and Insular Affairs had been involved in litigation testing the constitutionality of FLPMA 204(e). In *Pacific Legal Foundation* the Secretary had withdrawn lands pursuant to committee resolution, and his action was challenged by those interested in leasing the lands withdrawn. Although the Secretary's sympathies were basically with the would-be lessees, the matter was fully litigated and FLPMA 204(e) was upheld as constitutional under a construction of the clause which gave the Secretary final say on the duration of the withdrawal. In *National Wildlife Fed'n v. Watt* the Secretary's position was that the construction of section 204(e) in *Pacific Legal Foundation* was initially tortuous, and in any case obviated by the Supreme Court decision in *Chadha*.

29. 571 F. Supp. at 1149 n.1.

30. *Id.* at 1158.

31. 103 S. Ct. 2764 (1983).

32. U.S. Const. art. IV, § 3, cl. 2.

33. *National Wildlife Fed'n v. Clark*, 577 F. Supp. 825, 827 (D.D.C. 1984).

34. *Id.* at 829.

35. 5 U.S.C. §§ 500-76 (1982). Section 553(b) of the Act provides the minimum notice and comment requirements for the enactment or amendment of administrative regulations.

its earlier opinion in the case:<sup>36</sup> will the traditionally extensive article IV power of Congress sustain the constitutionality of FLPMA 204(e)<sup>37</sup> when congressional power under article I could not sustain a similar statutory provision in *Chadha*?<sup>38</sup>

### III. FLPMA and the Legislative Veto

The Federal Land Policy and Management Act<sup>39</sup> is a comprehensive statement of congressional intentions and directives governing the maintenance, use, and disposal of the public lands of the United States. While acknowledging the need to make use of natural resources found on and under publicly owned property,<sup>40</sup> the act, as part of its declaration of policy, provides that:

. . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historic, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. . . .<sup>41</sup>

Significantly, in light of the GAO report of May 11, 1983,<sup>42</sup> the very next clause in the act demands that "the United States receive fair market value of the use of public lands and their resources unless otherwise provided for by statute. . . ."<sup>43</sup>

In an effort to assure itself and the country at large that these and other declared policies are adhered to by the administrative officials of the executive branch, Congress re-

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36. 577 F. Supp. at 827.

37. 43 U.S.C. § 1714(e) (1982).

38. 103 S. Ct. 2764 (1983).

39. 43 U.S.C. §§ 1701-1784 (1982).

40. 43 U.S.C. § 1701(a)(12) (1982).

41. 43 U.S.C. § 1701(a)(8) (1982).

42. See *supra* note 11 and accompanying text.

43. 43 U.S.C. § 1701(a)(9) (1982).

tained for itself the option of direct intervention in the implementation of its policies. Congress directly exercises its power to intervene under section 204(e), which states:

When the Secretary determines, or when the Committee on Interior Affairs of either the House of Representatives or 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. . . shall immediately make a withdrawal. . . .<sup>44</sup>

Direct intervention clauses are commonly referred to as legislative veto clauses. They have become familiar features in congressional legislation over the past decade.<sup>45</sup>

In environmental and energy-related areas of legislation this device has been seized upon as a tool for opposing executive willingness to cooperate with financial interests which are often at odds with naturalist concerns. Congress has used the device in monitoring oil and gas lease bidding systems for offshore drilling rights.<sup>46</sup> It has also retained the power to disapprove of rules promulgated by the Secretary of Commerce for the management and exploitation of the nation's coastal areas.<sup>47</sup> Similarly, Congress has enacted statutory provisions which allow it to oversee the activities of the Environmental Protection Agency.<sup>48</sup>

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44. 43 U.S.C. § 1714(e) (1982).

45. See Javits and Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455 (1977); Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

46. Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1337(a)(4)(a) (authorizing congressional disapproval of oil and gas lease bidding systems adopted by the Secretary of the Interior); 43 U.S.C. § 1354 (c) (allowing Congress, by concurrent resolution, to contradict Presidential findings as to national interest and to cause the cessation of oil and gas exports).

47. Coastal Zone Management Improvement Act of 1980, 16 U.S.C. § 1463(a) (1982).

48. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9655 (1982).



In *Immigration & Naturalization Service v. Chadha*,<sup>49</sup> however, congressional activity pursuant to a similar statutory provision<sup>50</sup> was overturned and the statutory section itself declared unconstitutional. In that case the Immigration and Naturalization Service had sought to deport Jagdish Chadha. Conceding his deportable status, Chadha filed for a suspension of his deportation. This was granted by the Attorney General pursuant to section 244(a) of the Immigration and Nationality Act.<sup>51</sup> Congress overruled the Attorney General's decision on the basis of section 244(c)(2) of the Act.<sup>52</sup> Chadha challenged the constitutionality of that action before his Immigration Judge and the Board of Immigration Appeals, both of whom declined to rule on the constitutional question. Pursuant to section 106(a) of the Act<sup>53</sup> Chadha next brought his case to the Court of Appeals for the Ninth Circuit which pronounced the section unconstitutional.<sup>54</sup> The Supreme Court granted certiorari and affirmed.<sup>55</sup>

In deciding the case the Supreme Court acknowledged the utility of the congressional veto but stated that mere utility was not enough to save a statutory clause which violated the constitutional doctrine of the separation of powers.<sup>56</sup> It held, therefore, that Congress could not avail itself of section 244(c)(2) of the Immigration and Nationality Act.<sup>57</sup> It stated that Congress, when acting in its legislative capacity, had to comply with the Constitutional requirements of bicameral action and presidential presentation.<sup>58</sup>

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49. 103 S. Ct. 2764 (1983).

50. 8 U.S.C. § 1254(c)(2) (1982).

51. 8 U.S.C. § 1254(a) (1982).

52. 8 U.S.C. § 1254(c)(2) (1982).

53. 8 U.S.C. § 1105a (1982).

54. 634 F.2d 408 (9th Cir. 1980).

55. 103 S. Ct. 2764, 2772 (1983).

56. *Id.* at 2781. The Supreme Court stressed the limitations on congressional legislative power, stating "explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."

57. Congressional power in the field of immigration is a legislative power, derived from art. I, § 8, cl. 4 of the Constitution.

58. 103 S. Ct. at 2787.

This was the rationale on which the Secretary relied<sup>59</sup> when he decided that it was permissible for him to ignore a congressional directive pursuant to section 204(e) of the Federal Land Policy and Management Act.<sup>60</sup> It was the district court's suggestion in *National Wildlife Federation v. Watt*, however, that such reliance by the Secretary was misplaced since *Chadha* dealt expressly with limitations on the legislative power of Congress under article I of the Constitution, while congressional power over the management and disposal of public lands is part of its article IV proprietary power.<sup>61</sup> This proprietary power has historically been viewed as more extensive and less easily circumscribed than congressional power under article I.

#### IV. History and Development of the Proprietary Power

##### A. Creation

The central government of the United States, as it existed in early 1787, consisted solely of a congress,<sup>62</sup> in which each state had one vote.<sup>63</sup> This congress had been attempting, with limited success, to provide for the common needs of the several states since the early Revolutionary years. Most real law-making, however, was carried on at the state level. Laws enacted by state legislatures, affecting their relationships with other states, were often contradictory and mutually destructive. Federal power to unify and harmonize these interrelationships was virtually non-existent.<sup>64</sup> The states, to a large extent, acted as they wished, with or without the approval of the national congress.

One extra-congressional state activity during that period was the calling of interstate conventions to deal with common problems. Such a convention was called for the summer of 1787. Its purpose was to discuss amendments to the Articles

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59. *National Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1153 (D.D.C. 1983).

60. 43 U.S.C. § 1714(e) (1982).

61. 571 F. Supp. at 1157.

62. U.S. Articles of Confederation, art. V.

63. M. Farrand, *The Framing of the Constitution* 3, 4 (1913).

64. S. Padover, *To Secure These Blessings* 15, 16 (1970).

of Confederation and to deal broadly with the problems of the Union.<sup>65</sup>

When this gathering, which we now know as the Constitutional Convention, met in Philadelphia its most memorable debates concerned the allocation of powers between the already existing (but soon to be restructured) congress and the newly proposed executive and judicial branches.<sup>66</sup> Also on the agenda, however, was the question of how to balance the needs and interests of the various states under the new system.

At that time certain states were relinquishing previously claimed western lands to federal control in return for federal assumption of state war debts.<sup>67</sup> Other states desired specific assurances that once the ceding of those lands was completed all would share equally in the fruits of their development. Further, even while the convention was in session the congress was considering a plan to eventually divide those newly acquired lands, known as the Northwest Territory, into new states.<sup>68</sup>

In light of this, the Philadelphia convention sought to define interstate and federal-state relationships in article IV of its proposed constitution. It was deemed expedient, in this regard, to provide the congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>69</sup> Federal supremacy in this area was intended to assure all states that lands and property not belonging to any individual state would be administered even-handedly, for the good of all. In

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65. Farrand, *supra* note 63 at 8-10. One of the earliest of these conventions involved Virginia, Maryland, and later Pennsylvania, and produced an agreement concerning the navigation of the Chesapeake Bay. This led to the Annapolis Convention of 1786, called to discuss commercial problems. All states were invited but only five attended. The Philadelphia Convention of 1787 was planned and announced at Annapolis.

66. *Id.* at 68-112. The Virginia and New Jersey proposals, which formed the center of the largest debate at the Constitutional convention, were chiefly concerned with what were to become the first three articles of the Constitution.

67. 3 J. Story, *Commentaries on the Constitution* 185-86 (1833).

68. *Id.* at 187.

69. U.S. Const. art. IV, § 3, cl. 2.

further assurance of equal treatment the following words were added to the clause: "and nothing in this Constitution shall be so construed as to Prejudice any Claim of the United States, or of any particular State."<sup>70</sup>

The Property Clause was originally intended to define the relationship between the central government and the individual states. The division of power among the various branches of that central authority was defined elsewhere.<sup>71</sup> As with the rest of the Constitution, however, the applicability of the Property Clause was not to be forever limited by the vision of the framers. As time went on the power of Congress under this clause began to impact on the authority of the other branches of the federal government.

### B. *Evolution*

By 1828 the Constitution was the long-time law of the land, the acquisition and management of territory was one of the chief concerns of the nation, and the singularly congressional government of the Articles of Confederation was merely a memory. *American Insurance Company v. Canter*,<sup>72</sup> decided in that year, revealed, however, that the Property Clause continued to afford Congress large and somewhat exclusive power with regard to federal territory. In this case the Supreme Court declined to overturn a decision by a Florida territorial court. It held that territorial courts, established through congressional power under the Property Clause of article IV, could not be contradicted by the highest federal court.<sup>73</sup>

The same enhanced congressional authority was recognized with regard to real property, as opposed to territorial government, in *United States v. Gratiot*.<sup>74</sup> In that decision, which upheld the broad discretion of Congress with regard to the leasing of public lands, the Supreme Court again acknowl-

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70. *Id.*

71. U.S. Const. art. I (legislative), art. II (executive), art. III (judicial).

72. 26 U.S.(1 Pet.) 511 (1828).

73. *Id.* at 546.

74. 39 U.S. (14 Pet.) 526 (1840).

edged the magnitude of the article IV power with the statement that power over public lands "is vested in Congress without limitation."<sup>75</sup>

Congressional proprietary power received little further judicial exposition while the western United States was being settled. During that time Congress used its power under the Property Clause primarily to organize and govern territories and to facilitate the opening of public lands for inexpensive development and exploitation.<sup>76</sup>

With the closing of the frontier, however, issues involving the Property Clause shifted focus, and cases construing the clause began to deal more with the government's administration of public lands within existing state boundaries.

In the late 1800s congressional power under the Property Clause acquired the name by which it is commonly called today. In *Camfield v. United States*,<sup>77</sup> Congress was defined as the "proprietor" of the public lands, whose powers under the clause included not only those of a legislative body, but also those of a common law owner, entitled to full judgment and control over the use of its lands.<sup>78</sup> Expanding on this theory, *United States v. City & County of San Francisco*,<sup>79</sup> in language which recalled the original responsibility of Congress under the clause - that of administering the public lands for the common good - defined Congress as the "trustee" of the public interest.<sup>80</sup> Judicial review was held to be limited with regard to the administration of that trust, and Congress was said to have the power to "limit the disposition of the public domain to a manner consistent with its views of public pol-

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75. *Id.* at 537.

76. *But see* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432-52 (1857). In *Dred Scott* Chief Justice Roger Taney rejected the expansive view of congressional power under the Property Clause. He described the clause as pertaining only to the territory and property owned by the states in common at the time of their adoption of the Constitution, and stated that congressional power over subsequently acquired territory was implied by other sections of the Constitution.

77. 167 U.S. 518 (1897).

78. *Id.* at 524. *See also* *Light v. United States*, 220 U.S. 523, 536 (1911); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

79. 310 U.S. 16 (1940).

80. *Id.* at 28.

icy.”<sup>81</sup> In *United States v. California*<sup>82</sup> the Supreme Court stated, “We have said that the constitutional power of Congress in this respect is without limitation. . . . Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power.”<sup>83</sup>

More recently in *Alabama v. Texas*<sup>84</sup> the Court again described the proprietary power as being possessed by Congress in addition to its legislative power.<sup>85</sup> In its most recent major pronouncement on the Property Clause, *Kleppe v. New Mexico*,<sup>86</sup> the Supreme Court suggested the possibility of further permutations of congressional power in the area of public land management by stating “And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that ‘[t]he power over the public land thus entrusted to Congress is without limitations.’”<sup>87</sup> In *Kleppe* the Supreme Court again affirmed the expansive and dynamic nature of the proprietary power.<sup>88</sup>

### C. Discussion

The congressional power circumscribed in *Immigration & Naturalization Service v. Chadha*<sup>89</sup> is defined by the Supreme

81. *Id.* at 30. The Federal Land Policy and Management Act makes present congressional policy with regard to public lands abundantly clear. See *supra* note 31 and accompanying text.

82. 332 U.S. 19 (1947).

83. *Id.* at 27.

84. 347 U.S. 272 (1954).

85. *Id.* at 273 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

86. 426 U.S. 529 (1976).

87. *Id.* at 539 (quoting *United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940)).

88. See also *Ashwander v. TVA*, 297 U.S. 288, 330-40 (1936) (holding that the definition of “property” under the clause included electrical energy as well as the real property on which it was produced, and that congressional power extended to the sale of that energy); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1083-84 (9th Cir. 1979) (holding that congressional acts under the Property Clause may preempt local laws, and describing attempts to limit the proprietary power as “frivolous” in light of *Kleppe v. New Mexico*).

89. 103 S. Ct. 2764 (1983).

Court as the article I legislative power.<sup>90</sup> In *National Wildlife Federation v. Watt*<sup>91</sup> the district court suggested, without deciding, that the article IV proprietary power was large and distinct enough to sustain a congressional veto clause in the Federal Land Policy and Management Act, even in the wake of the Supreme Court's decision in *Chadha*. The evolution of the Property Clause demonstrates that there is ample support for the court's theory.

It is true that the clause was created primarily for the purpose of establishing the power of the federal government over local authorities in the management of public lands and territories, and that it has continued to perform that function throughout its history. The Property Clause has exhibited, however, a dynamic quality since its creation. It has demonstrated an ability to sustain congressional activity whenever such activity has been challenged. Reflecting this dynamism, language in major twentieth century Supreme Court decisions on the reach of the clause suggests a willingness to further extend the power of Congress under the clause should congressional policy so require.

The concept of the separation of powers upon which the Supreme Court rested its decision in *Chadha* does not divide the government of the United States into air-tight compartments.<sup>92</sup> In certain areas one branch has taken on the aspects and activities of another. The executive branch, for example, has developed an expanded role in international and military affairs. Here it exercises powers and makes decisions which would normally be left to the legislature if strict separation of powers principles were applied. The Supreme Court, for reasons of policy and tradition, has not chosen to enforce these principles strictly, and has often held itself to a limited review of executive actions in this area.<sup>93</sup>

Similarly, the Supreme Court has shown a consistent un-

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90. See *supra*, notes 55-57 and accompanying text.

91. 571 F. Supp. 1145, 1156-57 (D.D.C. 1983).

92. See *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1975); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson J., concurring); *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

93. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936).

willingness to prohibit Congress from enabling and enforcing its land management policies through legislation. As a result, congressional activity under the Property Clause has also been accorded a large measure of judicial deference. The concept of limited review of congressional activity saw an early manifestation in *American Insurance Company v. Canter*.<sup>94</sup> Respect for congressional power has continued to guide the Supreme Court's determination of cases arising under the clause as the circumstances involved in those cases changed,<sup>95</sup> and it remains an important aspect of the proprietary power today.<sup>96</sup>

Historic deference to the executive branch in international affairs supports the Supreme Court's decision in *Chadha*,<sup>97</sup> because decisions on immigration and deportation often have international ramifications and effects. They are, therefore, the appropriate province of an unimpeded executive. Such considerations are not present in the area of public land management. Decisions in this sphere have been left to Congress and its policies have traditionally governed the disposition of public lands.<sup>98</sup> The statutory section at issue in *National Wildlife Federation v. Watt* is part of the Federal Land Policy and Management Act. The title of that legislation and its substantive sections leave little doubt as to the existence and content of congressional policies.

Finally, the need for enforceable congressional control in this area is made clear by the circumstances which led to the litigation in *National Wildlife Federation v. Watt*. The concentration of total administrative power in the hands of solitary executive officials allows those officials to easily undermine the stated policies and programs of Congress. In the area of public land management such a frustration of congressional

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94. 26 U.S. (1 Pet.) 511, 546 (1828).

95. See *Downes v. Bidwell*, 182 U.S. 244, 263-71 (1901).

96. See *United States v. Husband R.*, 453 F.2d 1054, 1059 (5th Cir. 1971) (holding that a territorial governor to whom Congress delegated its proprietary power was not limited by Commerce Clause restrictions as a state government would be in enacting local legislation); *Guam v. Okada*, 694 F.2d 565, 568-69 (9th Cir. 1982) (holding that all judicial authority in the Territory of Guam derives from its congressional enabling act under the Property Clause).

97. 103 S. Ct. 2764 (1983).

98. See *supra* notes 81-82 and accompanying text.



authority is without precedent and contrary to the traditional construction of the Property Clause.

### V. Conclusion

The anticipated clash between the congressional proprietary power and the Supreme Court's condemnation of the legislative veto was avoided in *National Wildlife Federation v. Watt*. The potential for such a confrontation, however, remains. It is difficult to predict the course of future decisions in the land use area during times of economic upheaval and dwindling resources. History, however, supports the theory enunciated by the district court in its initial opinion in this litigation. The largely uninterrupted judicial elevation of the article IV proprietary power indicates that when the Constitutional issue discussed in *National Wildlife Federation v. Watt* becomes a reality, federal courts should and will continue their historic deference to Congress in this area, and afford that body the tools it deems appropriate for the maintenance of public property. Deriving its authority from a distinct and traditionally more potent power source in the Constitution, Congress should see its "proprietary veto" survive where its legislative veto could not.

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