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Watt v. Energy Action Educational Foundation

Lewis F. Powell Jr

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2. FACTS AND DECISION BELOW: The outer continental shelf is owned by the federal government and leased to oil companies for oil drilling. Until 1978 federal law gave the Secretary of the Interior a choice between two bidding systems for allocating leases: (1) bidding over the cash bonus, with a fixed royalty to the federal of government of not less than 12.5% of the value of oil removed, or (2) bidding over the royalty rate, with a fixed cash bonus up front. Almost all leases were done on the basis of a cash bonus bid and a fixed royalty of 16.67%.

In 1978, Congress enacted comprehensive amendments to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. It expressed concerns over the almost exclusive use of cash bonus bids, based on the view that such bids prevented all but the largest oil companies from participating, thus lessening competition for leases and leading to a too low return to the federal government. The statute provides for a five-year period of experimentation with various leasing systems, beginning September 18, 1978, id., § 1337(a)(5), and lists seven alternative bidding schemes that may be used "at the discretion of the Secretary," id., § 1337(a)(1). These seven include four variations on the traditional cash-bonus bidding. Id., § 1337(a)(1)(A), (C), (D), (F) (cash-bonus, fixed royalty; cash-bonus, sliding-scale royalty; cash-bonus, fixed share of net profits; cash-bonus, fixed royalty and share of net profits). The other three options, id., § 1337(a)(1)(B), (E), (G), all involve fixed cash bonuses and bidding on the rate of subsequent payments, through royalties or percentages of net profits or expenditures made. Finally, § 1337(a)(1)(H) authorizes the Secretary to employ

any additional system, with the approval of Congress. During the five-year period of experimentation, the Secretary is required to employ the first option, the traditional cash-bonus bidding with a fixed royalty rate, to between 40% and 80% of the leases given out, while applying other methods to the remaining 20% to 60%.

This litigation began in 1979, with its purpose being to force the Secretary to employ some methods that do not use cash bonuses as the bidding component. From the effective date of the act, September 18, 1978 until mid-1979, the Secretary had used only two methods--the traditional cash-bonus, fixed royalty method and a variation involving a sliding-scale royalty. Resps--seven consumer groups, three private citizens, two labor organizations, and two California governmental entities--brought suit seeking to force use of different methods for the leases to be auctioned off in late 1979. The District Court refused to grant preliminary injunctive relief, and the CADC affirmed (Leventhal, J.). The Court of Appeals held that the use of only two of the options during the first year and the failure of Interior to promulgate regulations covering the other options did not constitute a violation of the Act. But it left open the possibility that the DC could find a violation of the Act if Interior continued to refuse to "experiment among alternative bidding systems more widely."

After the initial CADC decision, regulations were issued concerning four of the bidding options, but only one of these four involved non-cash-bonus bidding, and it was clear that Interior did not intend to try out this option. With respect to other non-cash-bonus options, there were no tangible signs of progress toward

promulgation of regulations. In the DC, resps sought another preliminary injunction of pending 1980 leases, as well as summary judgment. The government also sought summary judgment, arguing that it had no obligation to promulgate regulations concerning all of the options, and that, even if such an obligation exists, it was proceeding at a proper pace. All motions were denied. Resps appealed the refusal of the DC to enjoin lease sales in 1980 and 1981.

In an initial order the CADC affirmed the denial of a preliminary injunction for lease sales last fall. In a subsequent opinion, the CADC chose to decide the merits of the dispute, finding them to be closely related to the question of a preliminary injunction for 1981 leases, and sufficiently illuminated by the record below. The court then held that the purpose of the 1978 amendments was to require experimentation with non-cash-bonus bidding, citing various passages from the legislative history. It rejected the argument that the discretion granted to the Secretary includes the discretion to decide not to try out any of the options involving bidding on subsequent royalties or subsequent percentages of net profit. It also referred to the rejection of an amendment on the House floor that would have allowed the Secretary "complete flexibility" in this area. In particular the court emphasized the importance of experimentation with the variable net profit share option. As relief, the court ordered promulgation of regulations covering non-cash-bonus bidding options by mid-1981, prior to the next round of lease sales. In a footnote, it rejected the government's argument in a post-submission filing that resps lack

standing to sue under the citizens' suit provision of the act, 43 U.S.C. § 1349(a).

On remand, the parties agreed to an order requiring promulgation of regulations covering non-cash-bonus alternatives before mid-year. They also stipulated that the Secretary would experiment with these options, although this latter stipulation became ineffective because it was conditioned on the government's decision not to seek cert in this case.

3. CONTENTIONS: The SG argues that the decision of the CADC disregards the plain language of the statute, which vests discretion in the Secretary to decide whether to experiment with any particular bidding option. The decision imposes unjustified burdens on the government, and does so in such an ill-defined way that the inevitable uncertainty will lead to further litigation--impeding the development of our ocean oil reserves. The Secretary's discretion is made explicit by the statute, and the sole exception is the requirement that at least 20% of the leasing over a five-year period be done on a basis other than the traditional cash-bonus, fixed royalty method. Moreover, the statute even authorizes the Secretary to ignore this requirement if he finds that it is inconsistent with the purposes and policies of the Act. 43 U.S.C. § 1337(a)(5)(B). The court below ignored the plain language of the act in its reliance on legislative history. Finally, resps lack standing. The consumers among them can allege only a speculative benefit in terms of lower prices resulting from increased competition. And the California governmental entities have failed to show how they are harmed by the present federal program.

Resps argue against a grant, stating that the standing issue is totally insubstantial, and that the decision below on the merits is clearly in line with congressional intent. The standing of consumers in this case is supported by the Court's ruling in Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (consumer standing in the antitrust context). And the California governmental entities have standing based on the fact that it is more difficult for them to lease their oil tracts on favorable terms as a result of the fact that the federal government is offering such lucrative terms to producers.

Because of the consent order below requiring promulgation of non-cash-bonus regulations before mid-year, there is very little left for this Court to review. The only conceivable issue is whether the CADC was correct in requiring some good-faith experimentation with such options at some point. This determination was very limited and clearly correct, since it left to the Secretary the discretion to decide when and how to undertake such experimentation. All that the court sought to do was to vindicate the clear purpose of the 1978 amendments.

4. DISCUSSION: It is difficult to determine from these papers whether the standing argument has any merit, since that question turns on the likelihood that resps have been harmed indirectly by the government's leasing policies. On the merits, the plain language of the statute does appear to vest complete discretion in the Secretary, but there is much to be said for the CADC's view that it is an abuse of discretion to refuse altogether to experiment with non-cash-bonus options. There are numerous

references in the legislative history to the need to try out exactly these options. Because the government has now acceded to the only specific relief ordered by the CADC--promulgating regulations covering these options--there is a serious question concerning whether review is warranted at this time. There will only be further litigation in this area if the Secretary refuses to apply these regulations to any sales at all, thus bringing into question the statements in the opinion below referring to the duty of the Secretary to do at least some experimentation with these options. But this problem may not arise.

On balance I would probably deny.

There is a response.

03/24/81

Smith

Op. in petn.

issue will come back through the courts.
I would deny.

PS

The SG argues in a reply brief that the government is only promulgating regulations covering alternative biddings systems because it is required to do so by the opinion below. The issue of the government's duty to promulgate these regs may be presented here.

PS

WATT, SECRETARY, ETC.

vs.

ENERGY ACTION EDUCATIONAL FOUNDATION

Secretary
has come out
with Regulations,
but he is here &
case is important.
Brown & Patten
persuaded me that case is
important, ~~but~~ I Wald's opinion
(90 pages) is "dead wrong" & is
a miserably written opinion.
Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓	✓										
Stewart, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.													
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.													

Join 3

Would Revere but doesn't want
to hear.

those ~~can~~ regs. to any leaves, this
issue will come back through the courts.
I would deny.

PS

The SG argues in a reply brief that the government
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biddings systems because it is required to do so
by the opinion below. The issue of the government's
duty to promulgate these regs may be presented
here.

PS

Revised 9/29

File

Controversy between two state ~~entities~~ entities (Calif. & City of Long Beach) & ~~some~~ consumer groups (Resps), and Sec. of Interior as to bidding systems for leases under the Outer Continental Shelf Act, as amended, 1978, authorizing several bidding systems.

The traditional system ~~was~~ includes a fixed 70 royalty (16 2/3 %) plus competitive bids as to amount of "cash bonus" to Govt.

1978 Amendment authorized seven types of bidding.

Resps sued because ^{x x x} the fixed bonus system was not used. Secretary's Reqs. did not require experimentation with this.
x x x

Standing: Averred on several grounds, principally as "consumers", & by Calif. & City as co-lessees of some of the areas leased. ~~David~~ David is contending that "consumers" do not show either (1) injury in fact, or BENCH MEMORANDUM (2) causation. Thus neither Art III nor prudential standing. The "co-lessees" claim is

To: Mr. Justice Powell close - September 29, 1981 though under my decision ~~their~~ their claim is highly speculative.
From: David Levi

Merits: CADC relied on the elaborate No. 80-1464: Watt v. Energy Action Educational Foundation CADC (whole case) leg. history. Actho ambiguous, much of it supports Resps view that Congress intended experimentation.

Questions Presented
But plain language of Act vests discretion in Secretary to choose the bidding systems, subject to exceptions not relevant.
Whether the Secretary of Energy must issue, and the Secretary of the Interior then use, regulations for all of the bidding systems enumerated in section 8(a) of the Outer Continental Shelf Lands Act.

Whether consumers of oil and gas, and state governmental entities owning off-shore oil and gas lands have

standing to challenge the Secretary of the Interior's selection of bidding systems?

I. Background

In 1953 Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., authorizing the Secretary of the Interior to lease tracts outside of the three mile coastal limit to private industry for exploration and development. The 1953 OCS Lands Act required that leases be let out under either of two bidding systems: (1) a fixed royalty of at least 12% with bidding on a cash bonus to be paid at the time of the lease award or (2) a fixed cash bonus with bidding on the size of the royalty. Prior to the 1978 Amendments almost all tracts were leased on the basis of a cash bonus bid with a 16 2/3% fixed royalty.

Two systems authorized originally

Fixed royalty (16 2/3%)

plus "bidding" on the "cash bonus" has been used

In 1978 Congress passed extensive amendments to the 1953 Act which authorized the use of new bidding systems.

Section 205(a) of the 1978 Act, amending Section 8(a)(1) of the 1953 Act, provides that the Interior Secretary may use any of the following bidding systems: (1) the traditional cash bonus bid with a fixed royalty of not less than 12% (§8(a)(1)(A)); (2) cash bonus bid with a fixed royalty and a fixed share of net profits (§8(a)(1)(F)); (3) cash bonus bid with a "sliding scale royalty" (§8(a)(1)(C)); (4) a royalty bid with a fixed cash bonus and/or a fixed work commitment (§8(a)(1)(B)); (5) a profit share bid with a fixed cash bonus (§8(a)(1)(E)); (6) a work commitment bid with a fixed cash

new systems also authorized in 1978

*Sec of Energy adopts Reqs
& Interior must follow them³*

bonus and a fixed royalty (§8(a)(1)(G)); and (7) a work commitment bid with a fixed cash bonus and a sliding scale royalty (§8(a)(1)(C)). In addition to these bidding systems, the Act also authorizes the Secretary of Energy to develop other new bidding systems subject to disapproval by Congress. §8(a)(1)(H).

The statute requires that regulations implementing the bidding systems be promulgated by the Secretary of Energy in advance of their use by the Interior Secretary. The amended section 8(a)(1) provides that the selection among the *Selected* enumerated bidding systems is to be *"at discretion"* "at the discretion of the *of Secretary,* Secretary" of the Interior. *subject to* However, the Act does set limits to this discretion. Section 8(a)(5)(B) directs the Secretary to use systems other than the traditional cash bonus bid-fixed royalty system in "not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year." If the Secretary of the Interior concludes that these percentage requirements are "inconsistent with the purposes and policies" of the Act he may disregard them, although he must explain his reasons to Congress in the annual report on the bidding system required in §8(a)(9)(E). The Secretaries of the Interior and of Energy are also required in their annual reports on the OCS leasing program to explain why certain of the bidding systems have not or will not be used. 43 U.S.C. §§ 1337(a)(9)(D), 1343(2)(A).

Between September 18, 1978, when the 1978 Act

Only 3 sales after 1978 before this suit was filed. In each the Sec. used "traditional" method for half of tracts + ~~cash bonus~~ ~~sliding scale royalty~~ ~~royalty with~~ ~~plus competitive cash bonus~~

became effective, and June 22, 1979, when suit was first filed, the Secretary held three lease sales. In each sale the Secretary used the traditional cash bonus-fixed royalty system for half of the tracts and the newly authorized cash bonus-sliding scale royalty method for the other half. In no instance did he use one of the fixed cash bonus systems. The Secretary planned to use the same two cash bonus bid systems in four more lease sales scheduled between June and November, 1979.

Systems used since 1978

Did not use one of "fixed cash bonus systems"

Respondents brought suit in district court charging that the Secretary's continued use of the cash bonus bid-fixed royalty system and his failure to issue regulations for the fixed cash bonus bidding methods violated the Act. Respondents asked for declaratory and injunctive relief leading to the suspension of all leasing until promulgation of regulations for the alternate bidding systems. Respondents also sought an injunction against any further leasing under the cash bonus-fixed royalty method.

Four days before the scheduled June 25, 1979, lease sale, respondents filed a motion for a preliminary injunction seeking to prevent further lease sales until regulations were issued for all of the bidding systems. The district court denied the motion, and the CADC (Leventhal) affirmed. The CA found that the 1978 Amendments continued to authorize the use of the cash bonus bid-fixed royalty system and that since 50% of the tracts had been offered under a cash bonus-sliding

CADC's first decision. Refused to enjoin 1979 sale

scale royalty the Secretary was well within the percentage requirements of §8(a)(5)(B). The CA noted, however, that although the preliminary injunction would not be granted, on a trial of the merits in the underlying action the district court would be free to consider whether "the Secretary's delay in issuing profit-sharing regulations and in failing to experiment among alternative bidding systems more widely may constitute a violation of the OCS Act amendments." (App'x at 97a). The case was remanded for further proceedings.

*But
first
decision
left
open*

On remand both parties moved for summary judgment and respondents again sought a preliminary injunction to prevent imminent lease sales until additional bidding system regulations had been issued. The district court denied all motions and set the matter for trial. Respondents again appealed from the denial of their motion for a preliminary injunction. In an extraordinarily ambiguous opinion, the CADC (Wald) affirmed the district court's denial of preliminary relief but went on to hold that the Secretary of Energy has a statutory obligation to promulgate regulations on the major alternatives to cash bonus bidding and that the Secretary of the Interior has an obligation to experiment with these alternatives. Judge Wald argued that since one of the major goals of the Act was to open up leasing to companies ^{that} could not afford a large front end payment--i.e. the cash bonus-- it was not good enough for the Secretary to experiment with varieties of the cash bonus bid, he must also

6.

*Resps want ~~fixed~~ cash bonus ~~into~~ plus
70% of net profits.*

experiment with those bidding systems--in particular the fixed cash bonus /net profit share bid--that do not include the cash bonus as the bid variable. The CA directed the district court on remand to insure that regulations for the non-cash bonus variable bidding option were promulgated before further lease sales.¹ In a long footnote at the end of the opinion, the CA also held that respondents had standing to bring this action.

The Secretaries of the Interior and of Energy now *Both Secretaries* argue before this Court that the CA erred in finding that respondents had standing to challenge their administration of the Act and that the CA erred in ordering them to issue and then to use regulations for the major fixed cash bonus bid alternatives. Of these two arguments, the question of standing is the more difficult.

II. Standing

Respondents are two California governmental entities--the State of California and the City of Long Beach--

¹Prior to the appeal the Secretary of Energy had issued bidding system regulations for the cash bonus-fixed royalty system, for the royalty bid-fixed cash bonus system, for the cash bonus-sliding scale royalty system, and for the cash bonus bid-fixed net profit share system. Following the appeal, the government agreed to an order requiring the Department of Energy to issue regulations for a net profit share bid-fixed cash bonus bidding system and for a work commitment bid-fixed cash bonus and fixed royalty bidding system. Regulations have not been proposed for the cash bonus bid-fixed royalty and fixed net profit share, for the work commitment bid-fixed cash bonus and fixed sliding scale royalty system, or for the royalty bid-fixed work commitment bidding system.

nine consumer and labor organizations, and three private citizen-taxpayers. Their standing to bring this action has received surprisingly little attention from the courts below. Judge Wald disposed of the matter in a long footnote to her opinion; Judge Leventhal made no mention at all of the problem in the CADC's first opinion in this litigation. Nonetheless the standing question here is substantial and difficult, particularly in light of your opinions in Warth v. Seldin, 422 U.S. 490 (1975) and Simon v. Eastern Ky. Welfare Rights Org. (EKWRO), 426 U.S. 26 (1976).

Courts below largely ignored "standing" issue - but it is a serious question

On appeal and in their briefs before this court, respondents lay three claims to standing: (1) the consumer and labor organizations and the three private citizens argue that they have standing as "consumers" of oil and gas; (2) California and the City of Long Beach argue that as owners of off-shore property that is leased in competition with federal leases, they have standing as "competitors" of the federal government, and (3) California argues that as a co-owner with the federal government of oil and gas pools that straddle the three mile limit, it has standing as a "co-lessor".

Respect arguments: is "consumers", "competitors", & "co-lessor".

In this section I look closely at these three standing claims and reach the very tentative conclusion that these parties do not have standing to sue. I first summarize the current law of standing; I do so only briefly given your knowledge of this area.

A. The Law of Standing

You have stated the principles governing standing in Warth v. Seldin. Standing has both a constitutional and a prudential dimension. As a constitutional matter, standing is part of the the Article III requirement of a "case or controversy." To establish standing under Article III, the plaintiff must allege actual or threatened injury to himself-- "a distinct and palpable injury"--and must allege causation: the injury must be one that "fairly can be traced to the challenged action of the defendant," such "that the exercise of the Court's remedial powers would redress the claimed injuries." Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 74 (1978).

must allege "injury" & "causation". Exercise of Court's powers should redress the injury

The requirements of injury and causation are irreducible constitutional minima that must be met in every case. As you stated in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), although Congress may expand the courts' jurisdiction to the limits of Article III, and may overcome prudential barriers to standing, it may not waive the Article III minima of injury in fact and causation. Yet Congress may have some control over standing even at the constitutional level. By its power to create a legal interest, and thus an "injury" to that interest, Congress may in effect create standing. Moreover, the questions of injury and causation are questions of fact on which Congress may hold an opinion. Where Congress has found that certain persons are injured and that the cause of their injury may be attributed

to the actions of the defendant they attack, the Court may hesitate to disagree.

As to the prudential limits on standing, the Court is wary of litigants who, although meeting the requisites of Article III, assert an injury that is "shared in substantially equal measure by all or a large class of citizens." Warth, 422 U.S. at 499. See Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). The Court looks with disfavor as well upon litigants who rest their claim for relief on the legal rights of third parties. Finally, the Court demands that litigants seeking to assert a claim based upon a statutory framework, show that their interest is indeed "within the zone of interests to be protected or regulated" by the statute. Data Processing Service v. Camp, 397 U.S. 150 (1969); EKWRO, 426 U.S. at 39 n.19. All three of these prudential limitations reflect the Court's desire not to be drawn into controversies that are best handled by one of the other branches of government.

Although the above principles are clear, the Court appears to apply them with varying degrees of stringency. Generally, the Court is much more generous in finding standing in environmental cases than elsewhere. Thus, in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), the Court found that an environmental group had standing to challenge the constitutionality of the Price

Taxpayer challenged validity of CIA Act

?

yes

Anderson Act although its claims of injury were somewhat insubstantial and although the chain of causation from passage of the Price Anderson Act to the construction of the two nuclear power plants supposed to have caused them injury was attenuated at best. Moreover, the Court found standing despite the generality of the harm and, more significantly, despite the admonition against permitting litigants to raise the claims of third parties. By permitting this plaintiff to attack the Act's limitation on liability for nuclear accidents, even though its injuries were in no way related to such an accident, the Court, in effect, permitted the plaintiff to argue on behalf of potential tort victims. In other environmental cases the Court has taken a similarly generous view of both the Article III and prudential limits on standing. See United States v. SCRAP, 412 U.S. 669 (1973) (Court finds standing despite "attenuated line of causation," id at 688, and despite universal nature of the injury); Sierra Club v. Morton, 405 U.S. 727 (1972) (widely shared noneconomic harm may amount to "injury in fact").

By contrast, your decisions in Warth and EKWRO were far more exacting, particularly in their insistence that a more than "speculative" causal link be alleged between the injury suffered and the action of the defendant subject to attack. See Linda R.S. v. Richard D., 410 U.S. 614 (1973). You were perhaps not quite so demanding in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), in which the Court

*Duke
Power*

East Ky

you

found that the allegation in the complaint that racial steering was causing economic and social injury to the plaintiffs sufficed to establish standing. See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). Yet although Gladstone and Arlington Heights may indicate something of a retreat from EKWRO and Warth, all four of these cases indicate the Court's determination that particularly causation may not be shown by "unadorned speculation." In this insistence, these cases differ from the environmental cases.²

B. Standing of the Parties

The standing of the parties in this litigation must be determined on a rather inadequate record. The trial court made no factfindings with respect to standing, and thus the Court does not have the luxury of deferring to its findings. See Duke Power. The allegations of injury in the complaint are brief and conclusory. Indeed, one of the asserted bases for standing in the complaint--that the citizen respondents

No fact findings

²Whether the distinction drawn between standing in environmental cases and standing elsewhere can be defended theoretically is less clear. Perhaps the environmental cases are--as Justice Douglas argued--in the nature of in rem actions. Perhaps the Court believes that unlike other cases in which it may be expected that better litigants will appear--litigants who are more clearly and more directly injured--such cannot be expected in environmental suits in which the injury is aesthetic, abstract, and general. Thus the Court in Warth may have been waiting for the better plaintiffs who appeared in Arlington Heights.

Calif's claim of standing as a "co-lessor" not made in Complaint, & apparently raised here for first time.

have standing as taxpayers--is no longer urged³, while the claim that California has standing as a "co-lessor", perhaps the strongest of all of the standing claims, is nowhere made in the complaint but was apparently developed for the first time on appeal. Nor is the Court required to accept such bare assertions of injury and causation. Although it is a general rule of standing that the "reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party," Warth, 422 U.S. at 501, this rule of construction does not absolve a complainant of "the responsibility . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." Warth, 422 U.S. at 518.

Perhaps the standing issue was not litigated more vigorously below because of the Act's explicit provision for citizen suits. Section 208(a) of the Act, 43 U.S.C. § 1349 provides:

Act authorizes "citizen suits"

. . . any person having a "valid legal interest" which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency . . . for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

³The claim of standing as taxpayers was not addressed by the CADC.

Yet, as we have seen above, the provision for citizen suits cannot give the Court jurisdiction where Article III injury in fact and causation are missing. Nor is it necessarily certain that a challenge to the Secretary's bidding regulations is the sort of citizen suit envisioned by the Congress, although quite clearly the provision for citizen suits is of great significance in considering whether Congress has removed the prudential limits to standing.

But Congress can't provide "standing" of Art III injury is + causation are absent

One final point to note before turning to the particular claims to standing here is that the Court need not determine that all of the plaintiff's have standing to assert jurisdiction. It is enough to establish the Court's jurisdiction if at least one of the plaintiffs has standing. *Yes*

Buckley v. Valeo, 424 U.S. 1, 12 (1976). But see Gladstone, supra (having found that the village of Bellwood had standing, the Court went on to consider whether individual homeowners had standing as well).

1. Consumers

Judge Wald found that it was "readily apparent" that the consumer plaintiffs had standing to sue for violation of an Act "designed to increase competition and to step up utilization of energy resources on the" outer continental shelf: "Consumers are the ultimate beneficiaries of both vigorous competition and greater availability of domestic fuel." And indeed, the complaint does allege in some detail that the effect of the Secretary's reliance on the cash-bonus

What?!

~~Consumers might~~

14.

suffer if bidding reqs. encourage independent cos to compete. The Gov't might receive larger royalties

bidding system is to restrict bidding to the large oil & companies and that these companies have counterincentives to rapid development of the leases. Jt. Appx. 39-49. Yet even if it were true, as alleged, that the use of the cash-bonus bidding system has these effects, it does not necessarily follow that consumers are thereby injured.

cash bonus.

This could increase cost to

To begin with, if smaller, independent companies were to bid in competition with the big companies, it might well be that the increased competition among bidders would result in lease terms more favorable to the lessor--the government. But more favorable terms to the government mean higher costs to the producer and thus well may lead to higher--not lower--prices to the consumer. In order to establish their injury, the consumer's would have to argue

consumer

that whatever the increase in costs to lessees, these costs would be so outmatched by the increase in supply that prices would decline. Yet the supply side of their argument is no less speculative. It is unclear that shifting to different bidding systems will yield an overall increase in supply, even if it is true that smaller companies are more anxious to develop their leases than are the large companies. As the government notes, the cash-bonus method discourages the oil companies from stockpiling, rather than developing their leases. Thus, whatever the gain in supply from small companies that may result from adopting other bidding systems may be balanced by a possible decrease in incentives to

But Congress thought consumer would benefit (see p 16)

develop for the larger companies.

Moreover, even were it true that the use of different bidding systems would lead to an increase in supply, it is most unclear that this increase would translate into a lower price or even into greater retail supply. The cost of oil to the consumer is determined by a multitude of factors in addition to the price of crude oil including the costs of transportation, refining and marketing. And even were it true in a free market that increases in supplies of crude should ultimately translate into lower prices at the pump, it is obvious that the world oil market is not free but is controlled by a cartel. Given this control and the country's dependence on imported oil, it is most unclear that any incremental increase in supply from the outer continental shelf will have any effect on overall price or supply to the consumer. In short if there is injury it is as much the result of an oil cartel as the choice of bidding systems and whether an order by this Court would redress the injury may be doubted.

Finally, all of the above uncertainties exist even accepting the consumers' basic premise that different leasing systems will increase competition and will increase the participation of the small companies. But this premise is itself subject to considerable doubt--a doubt which is not alleviated by the absence of any small producers among the plaintiffs to this suit.

Certainly both injury and causation here are far more speculative than in the typical consumer suit. Thus, in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), without addressing the question as a matter of standing, the Court held that consumers could be injured by antitrust violations within the meaning of §4 of the Clayton Act. The Court silently assumed that such consumers had standing for purposes of Article III. But the allegation of injury to a limited class of purchasers resulting from specific antitrust violations would appear to be far less attenuated than the claims here. Similarly, a challenge to agency action directly permitting price increases of oil and gas again lays claim to an injury and a source of injury far more certain than here. See Consumers Union of United States, Inc. v. Sawhill, 525 F.2d 1068 (TECA 1975).

yes

In short, the consumers' claim to standing under Article III may appear to be little more than "an ingenious exercise in the conceivable." SCRAP, 412 U.S. at 688. On the other hand, it may be argued that if, after hearings and consultation with the industry and the agency, Congress itself was prepared to believe the "ingenious exercise," then, so, too, should the Court. Certainly the legislation reflects Congress' view that other bidding systems may prove to be better suited than the cash bonus system in "assuring supply," competition, and fair return to the government. And one may argue with Judge Wald that the consumers' inability to be more

no
consumer
standing

Congress' view

specific as to their injury is in part due to the agency's own failure to test all of the bidding systems.

I think that there is considerable strength to this reply. Although the Court retains the responsibility to determine whether it has jurisdiction under Article III, to the extent that the question of Article III standing--injury and causation--is one of fact, Congress may well be in a better position than the Court to find the facts in a complicated situation such as the one here. At the least, Congress' position may be persuasive although not controlling.

Yet the strength of this argument is tempered by several considerations. First, the argument tends to merge with the merits. Thus, Judge Wald argues that "by mandating use of non-cash bidding systems Congress has recognized a causal nexus between government [outer continental shelf] activities and competition and energy production." If the Court concludes, however, that the CA was wrong as to the merits and that Congress did not "mandate" the use of all of the bidding systems, then the Court is left with a somewhat more tentative congressional conclusion that there may be a causal nexus between bidding systems and competition and energy production.

Nor is it clear that Congress believed that consumers would necessarily be the beneficiaries of such experimentation. Although Congress may have believed that some of the new bidding systems might better accommodate the

aims of increased production, increased federal revenue, and increased competition in the oil industry, the legislative history does not show that Congress believed that any of these goals would benefit the consumer as opposed to the industry, the government qua lessor, and the defense and foreign policy posture of the nation. Perhaps it may be assumed that Congress had the consuming public in mind in seeking to maintain supply--and 'the citizen suit provision may support this assumption--yet respondents and the opinion below fail to cite to specific instances in the legislative history where this concern for the consumer is evinced.

If we assume that Congress intended consumers to be benefitted by §8(a)(1) and if the Court is willing to accept this judgment perhaps injury and causation may be shown. But even if it is conceded that consumers can show injury and causation under Article III, there are still weighty prudential considerations against their claim to standing.⁴ To begin with, consumers assert an injury which is widely shared, indeed which is shared by the entire public. As a prudential matter the Court prefers litigants with more definite claims of injury. Such claims assure adversariness

⁴Because we are assuming that Congress beleived consumers would be benefitted by other leasing systems, we are assuming as well that consumers are within the zone of interests of the statute.

and they keep the Court from being drawn into disputes which may best be settled in the legislative or political forum. When the entire public may be said to be injured, the Court properly questions whether the dispute should not be resolved through the ballot rather than the brief. Although in the environmental context, the Court has accepted such generalized claims of injury it may do so in that context by default--no better plaintiffs may be thought to exist. But better plaintiffs do exist in this affair. Whether or not Congress sought to benefit consumers by increasing competition in bidding and by decreasing the position of the big oil companies, it certainly sought to benefit smaller oil producers. These are the logical plaintiffs to challenge the Secretary's choice of bidding systems, not consumers. And yet plaintiffs include no small oil producers among their numbers.

Congress may be thought to have removed the prudential considerations by virtue of the citizen suit provision. Yet it is unlikely that Congress intended for citizens to bring a lawsuit such as this. The House report suggests that the citizen suit provision was designed to permit suits by environmental groups:

the scope of persons who can sue are those who can show an "actual interest" that is being negatively affected . . . the interest must be discernible and ascertainable. Standing to sue includes not only those who have an economic interest . . . but also those who may have a definable aesthetic or environmental interest. Specifically, the Committee intends tht this includes persons who meet the requirement for standing to sue set out by the

*House
Report on
"Citizen
suits"*

Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972).

The Act is replete with environmental requirements and the legislative history suggests that pressure from environmental groups was a significant factor in the shaping of the legislation.

Had Congress intended suits by consumers it certainly knew how to state this intent explicitly. See §18(e)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. §57(a)(e)(1)(A) ("any interested person (including a consumer or consumer organization) may file a petition" in the court of appeals). Moreover, that Congress did not intend for consumer actions to oversee the Secretary's adherence to §8(a)(1) is further suggested by the Act's careful provision for congressional oversight of the bidding process. Thus, §207 requires the Secretary in an annual report to provide the Congress with "an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized." 43 U.S.C. § 1343(2)(A). See also 43 U.S.C. § 1337(a)(9) (secretary of energy to make a similar report); 43 U.S.C. § 1337(a)(8) ("Not later than thirty days before any lease sale, the Secretary shall submit to the Congress and publish in the Federal Register a notice--(A) identifying any bidding system which

will be utilized for such lease sale and the reasons for the utilization of such bidding system.") Congress assigned to itself the task of supervising the Secretary's use of bidding systems. The consumers would ask the Court to join them in usurping Congress's role. This is precisely the sort of overreaching that the standing doctrine is designed to control. Certainly the Court may require a clearer congressional intent to waive prudential barriers to standing before doing so here.

In sum, the consumers' claim to standing is tenuous at best under Article III and is even less convincing in light of the prudential limitation on standing. Thus, even if the Article III claim could be made more convincing by more detailed allegations or perhaps through recasting the claim of injury,⁵ the prudential limitations would still stand as a

*Tenuous
claim*

⁵If we continue to assume that Congress intended consumers to be benefitted by the Act and the provision for experimentation among bidding systems, then one might construct an even more powerful argument for injury and causation--albeit an argument respondents do not put forward. It might be argued that the statute gives to consumers the right to learn whether other bidding systems would better serve them. Even if the answer is no or even if the answer is inconclusive, consumers are injured simply by the Secretary's failure to use the different bidding systems. The complexities of the world oil market and the economics of lease bidding become irrelevant to this claim of standing. Whether or not consumers can show that they are harmed in the pocket by the use of one bidding system or another, they have lost the chance to learn and that is enough.

But this claim of standing, if more convincing as a matter of Article III, is even less able to satisfy the prudential limitations. It may be doubted that Congress had such

Footnote continued on next page.

barrier.

(2) Competing Lessors

(*frivolous*)

The competitors' claim to standing is by far the weakest claim of the three and can be disposed of briefly. Judge Wald found that California and Long Beach as competing lessors had standing to challenge the Secretary's failure to use all of the bidding systems: "These two appellants posit a present and future disadvantage to their own [outer continental shelf] activity by their inability to compete for bidders who are attracted to the significantly higher returns to private investment available through federal lease." As the government is quick to point out, however, this claim of standing conflicts with that of the consumers'. The consumers argue that the use of different bidding systems will increase interest in federal leases and lead to lower prices; the competitors argue that the different bidding systems will decrease interest in federal leases and end the ability of federal leaseholders to "market their oil and gas at far lower rates" than California leaseholders. (Red brief at 42)

This conflict is a symptom of the tenuousness of both sets of claims. Certainly the competitors' claim to injury and causation is no less speculative than that of the

an abstract interest in mind when providing a citizen suit for persons who could show "an actual" "discernible and ascertainable" interest that was negatively affected.

consumers': it is unclear that competition for state leases is in any way affected by the availability or terms of the federal leases. Nor is there any indication that Congress thought that state competitors would be benefitted by the experimentation among bidding systems. Thus, the competitors are unable to enlist congressional belief in support of their claims of injury and causation, while, as a prudential matter, it appears that competitors of the federal government were not within the legislation's "zone of interests."

3. Co-Lessors

California apparently claimed for the first time on appeal that it had standing as a co-lessor. Judge Wald found that the state "could obtain a higher return in so-called 'drainage' situations if appellees would utilize higher return bidding systems. In drainage situations the state is part owner with the federal government of an [outer continental shelf] site and shares in royalties guaranteed by a lease on the site." The state argues that if the federal government used other bidding systems less generous to the oil companies a better return would be provided to both the federal and state governments in co-leasing situations.

Again this claim of injury is subject to the same uncertainties as a matter of economics that plague the other claims of standing as well. It is uncertain that the other bidding systems provide any greater return to the lessor. Again, one may argue that if Congress believed tht there was a

(David Ninkler has a best chance of standing but that raised the issue of appeal)

likelihood that other bidding systems would yield a higher return, that should be good enough for the Court. But even accepting that argument, this claim of standing is subject to additional uncertainties. First, there is no requirement in the Act that the Secretary use the experimental bidding systems on any particular tract. The Act requires only that he use the experimental bidding methods in at least 20% and no more than 60% of leases. It is likely that in any particular lease, the Secretary will use a variant of the traditional cash bonus bid if not the cash bonus bid-fixed royalty method itself. The relief requested by the competitors--that the Secretary be ordered to experiment with noncash bonus bids--is by no means likely to redress the injury alleged.⁶

Second, even assuming that cash bonus bidding may yield a lower rate of return to the lessor, it is unclear that the state as a co-lessor would suffer even if the federal government decided to use the cash bonus method in co-leasing situations. The Act includes a provision under which the

⁶In Arlington Heights, 429 U.S. 252 (1977) the Court found standing although there was some uncertainty that the housing project would be built even if the Court held the zoning restriction unconstitutional. But there it was much more certain that the project would go forward than it is here that the Secretary will use an experimental bidding system in co-leasing situations. Moreover, it was at least clear in Arlington Heights that a Court order would stop any attempt to block the project through zoning whatever other uncertainties may have remained. Here a Court order will not even stop the one injury complained of--the use of cash bonus bidding.

*Not at all clear
that co-lessors would
benefit. Secretary,
in experimentation,
may treat the bidding
differently*

state as a co-lessor can go into federal district court in order to assure itself a "fair and equitable" return on a joint lease. 43 U.S.C. § 1337(g)(2)-(4). Presumably the state could argue that the federal lease uses a bidding system that favors certain federal goals--e.g. quick production--over maximum revenue to the lessors and that therefore the state should receive more than a pro rata share. And if the state's injury becomes less certain on account of this provision, it also becomes less clear as a prudential matter that Congress intended for co-lessors to have the benefit of the citizen suit provision for purposes of challenging the Secretary's choice of bidding methods. Since Congress provided an explicit remedy for co-lessors who were disappointed with their take under a co-leasing arrangement, it seems unlikely that Congress also intended that these same co-lessors could challenge the Secretary's administration of the Act in advance of any specific grievance as to any specific lease.

Summary and Conclusion: I think that a strong case can be made on both Article III and prudential grounds that none of the respondents in this action have standing. But I am not at all sure that I have reached the right conclusion. If standing is to be found, the best standardbearers are the co-lessors. By finding standing in the co-lessors the Court may avoid holding that consumers have standing under the Act, which would be a holding of grave significance to future litigation under this Act and as a precedent in other areas of

Strong
case
for
no
standing

economic regulation.

III. Merits

By contrast to the standing question, the question on the merits seems quite a bit simpler. Judge Wald found ample evidence in the legislative history that Congress intended to require the Secretary to experiment with different leasing methods. The House Committee Report states that "[o]ne purpose of H.R. 1614 is to authorize alternative leasing arrangements and require experimentation with them." The purpose of providing the Secretary with alternative bidding methods, the House explained, was "to determine what system or systems in what situations, provide the best means to lease our federal resources in the Outer Continental Shelf. Subsection (a) is intended to provide procedures to answer this question . . . to mandat[e] use of new systems, to insure they are tested and studied, and to provide for random selection, to insure fair tests and studies." The Conference Committee report similarly emphasizes that the Secretary is to experiment with the new leasing systems "to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems."

Moreover, Judge Wald found in the legislative history the particular determination on the part of Congress that the non-cash bonus variable bidding systems be tried during the five year period of experimentation. The Congress was especially interested to see if smaller oil companies

could be induced to enter the bidding if systems were used that did not require large front end payments. Thus, the Senate Report stated that the new bidding systems were "designed to reduce the front end cash bonus, increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration." Similarly, the House Report states that "[i]t was the intention of the Committee that there be a clear mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid." The Conference Report emphasizes that "Bidding systems other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years."

In view of these statements in the legislative history, Judge Wald concluded that the Secretary had an obligation certainly to test the noncash bonus bidding alternatives if not to test all of the experimental bidding systems. By rejecting the non-bonus bidding systems, the Secretary was rejecting the systems that Congress thought might increase competition and access for smaller companies--one of the chief goals of the legislation. By refusing to use the major non-bonus bidding systems, the Secretary defeats the Act's goal of experimentation. To these two arguments,

respondents add that the Act requires leasing activities to be conducted so as "to assure receipt of fair market value for the lands leased." 43 U.S.C. §1344(a)(4). The Secretary cannot assure fair value until he tests the profit share bidding system which has worked so well in California. It was because Congress doubted that the cash bonus bidding system was yielding the government a proper return that it passed the fair market value provision and required the Secretary to experiment with other leasing systems.

On the other side is the specific language of the statute. Section 8(a)(1) of the Act states that the choice of the bidding systems shall be "at the discretion of the Secretary." Although that discretion is limited, the explicit limitation states only that the Secretary is not to use alternative (A)--the traditional cash bonus/fixed royalty bid--in more than 60% or less than 20% of the leases in each year for the coming five years. The limitation nowhere indicates that the Secretary must use any particular alternative to the cash bonus/fixed royalty bid. Moreover, the Act permits the Secretary to disregard even these percentage limitations if he determines that they are inconsistent with the purposes and policies of the Act. In light of this provision, the government suggests that it would be inappropriate to imply a requirement that the Secretary use leasing alternatives he has found to be less suitable than others. Finally, the statute explicitly contemplates that the Secretary may not use certain

of the bidding systems in any particular year. Thus, 43 U.S.C. §§ 1337(a)(9) and 1343(2)(A) provide that the Secretaries of Energy and Interior shall report, if applicable, "the reasons why a particular bidding system has not been or will not be utilized."

I find that the statutory language settles the question on the merits. As you have stated so often, "the starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). The statute clearly contemplates that the Secretary may not use all of the bidding systems in any year while to the extent that the Secretary's discretion is limited, it is not limited in a way that requires him to use any one or all of the various alternative bidding systems. The Secretary may be defeating the congressional hope that he would experiment broadly; but it would seem from the language of the statute that he is not defeating any congressional command.

Nor is the legislative history so clear that the Secretary was to be required to test all of the bidding alternatives. Much of the mandatory language in the Reports refers only to the Secretary's general duty to try out some systems in addition to the traditional cash bonus bid. The language need not be read to require the Secretary to try each of the different alternatives. See e.g. House Report, at 139 ("It was the intention of the Committee that there be a clear

mandate given to the Secretary to require him to use bidding systems other than the cash bonus bid.") Moreover, as the government argues, the phrase "cash bonus system" or "bonus bidding" was used in the legislative history to refer specifically to the traditional cash bonus-fixed royalty--not collectively to all of the alternative using a cash bonus bid. With this in mind, various statements in the Reports to the effect that the Secretary must use bidding systems in addition to "cash bonus bidding" can be understood to refer not simply to the systems which include a fixed or no cash bonus but to all of the suggested systems including those using a cash bonus bid. Indeed, such an interpretation is consistent with Congress's desire to reduce the size of the initial cash payment, for certain of the new cash bonus bidding systems also promise to reduce the size of the cash bonus. As the size of the payments to be made during the life of the lease is increased--as with the cash bonus bid-fixed net profit share bidding system--the less bidders will be willing to pay (and bid) up front.

IV. Conclusion

In sum, the language of the statute rather strongly indicates that the Secretary was neither "ordered" to promulgate nor to use any one of the alternatives to the traditional cash bonus bid. He was required to experiment, but it was left to his discretion as to which of the bidding alternatives he would chose to test. The legislative history does not compel

a different reading of the statute although certain statements might indicate a duty by the Secretary to try out all of the alternatives. Perhaps in the end the question comes down to which is a better indication of congressional intent: the language of the statute or the legislative history? I do not think that you have any difficulty answering this question.

But if the merits are rather easy, the standing issue is quite troubling. All of the standing claims suffer from an inability to show causation with any certainty. And even if the Article III question is resolved in respondents' favor on the basis that Congress believed that consumers, competitors, and co-lessors might be benefitted by the Secretary's use of different bidding systems, weighty prudential considerations remain to challenge the claim of standing. As to the consumers, the Court may hesitate to credit such a generalized claim of injury particularly when Congress has assigned itself the task of overseeing the bidding systems. As to the competitors, there is simply no indication that Congress intended these plaintiff/respondents to be within the zone of interests of the Act. Finally, the Act provides disappointed co-lessors with a specific means to litigate when and if they are dissatisfied with their return from a federal lease in a drainage situation. In suggesting such a specific remedy after a dispute develops between the state and the federal government, the statute suggests that the co-lessor's bringing of this suit is premature. But

*no
causation
shown
by any
claim to
standing*

although I do not think that there is standing here, nor do I think that any great harm will be done if the Court finds that co-lessors have standing and goes on to reach the merits.

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202-381-1795

fil

September 30, 1981

The Honorable Alexander L. Stevas
Chief Clerk of the Supreme Court
of the United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Stevas:

On Monday, October 5, I will be presenting the argument for respondents in No. 80-1464, James G. Watt v. Energy Action. During the argument I may want to refer to a recent communication of September 14, 1981 from petitioner James G. Watt to the Congress of the United States in response to certain written congressional questions. Enclosed is a copy of that communication and some of the attachments thereto.

I am lodging this material with you so that it will be available to the Justices at the argument if they desire copies of the communication by Secretary Watt.

Sincerely,

John Silard
John Silard

JS:cm

Enclosures

cc: Louis F. Claiborne
Deputy Solicitor General

*We should refer to entire
Reports - not these excerpts.*



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 14 1981

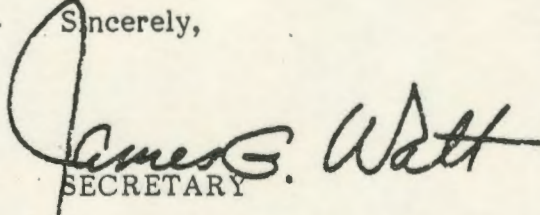
Honorable Carroll Hubbard
Chairman, Subcommittee on Panama Canal/
Outer Continental Shelf
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Hubbard:

Enclosed are responses to the written questions you forwarded subsequent to the testimony before your Subcommittee on June 2, 1981.

We appreciate the Subcommittee's interest in the Outer Continental Shelf oil and gas leasing program and look forward to working with you and the members of this and other programs.

Sincerely,


SECRETARY

Enclosures

Jones and Hubbard

Question #7. In a recent newspaper article, you were reported to state that more OCS acreage should be leased because prices have risen so high under the bonus bid system that "unless you are a huge international company, you don't have the opportunity to bid." Would not the implementation of alternative bidding systems help alleviate this problem?

Answer. Constraints on participation of medium and smaller companies arise not only from the high cash bonuses on the better prospects but also from the high costs of exploration and development on all prospects. Alternative bidding systems reduce the level of cash bonus and may allow more medium and smaller firms to participate. However, tests of alternative systems to date do not show any strong effect of this type. On the other hand, some systems tend to decrease the attractiveness of OCS prospects for investment in exploration and to cause inefficient and sometimes reduced development and production. For instance, a bidding system based upon a royalty, or a variable profit share, can result in reduced development and production in a given area because the reduced margins of producers may mean that it is not profitable to produce.

Lent and Forsythe

Question #14. The 1978 Amendments contained new bidding systems that the Federal Government must use in leasing on the Outer Continental Shelf. These so-called alternative bidding systems were established because it was believed that there was a lack of "competition" on the Outer Continental Shelf. To be honest with you, it doesn't appear to be clear if competition meant higher bidding by firms active in OCS oil and gas operations, or the bringing on of new firms, or small firms, or whatever. Would you please describe the benefit of these bidding systems, if any, and under what conditions they may be beneficial?

Answer. I agree with your observation about the ambiguity in the use of the term competition in discussing the OCS program. It appears that at least some members of Congress believed that the alternative bidding systems included in the 1978 Amendments would increase the number of firms participating by bringing in smaller firms, would increase the average number of bids submitted per tract, and would increase the level of the lease revenues collected by the Department. These potential benefits, it was hypothesized, would result from shifting at least some of the Federal lease revenues from upfront bonus payments to downstream payments such as royalties or profit shares.

In the tests of alternative systems to date, it does not appear that significant benefits of the kinds expected are being achieved. This may be explained by the fact that the costs of exploration and development rather than just the level of the cash bonus, are the major capital requirements of participating in OCS leasing. These costs are not significantly affected by the alternative bidding systems. In addition, there is clear evidence that the primary determinant of the number of bids on a tract is the potential profit from successful development. Almost all alternative systems that reduce up front bonus payments also reduce the portion of the profits from successful development that are retained by the lessee. The resulting dampening of the number of bidders may offset any gains from firms attracted to bid because of the lower capital required for the bonuses.

Lent and Forsythe

Question #15. What do you feel is the benefit of being required to utilize these alternative bidding systems which, of course, is mandatory under Title II of the 1978 Amendments?

Answer. The testing of alternative systems on at least 20% of the acreage offered is mandatory through the five year experimentation period ending in September, 1983 unless the Secretary determines that further testing is not consistent with the OCS Lands Act Amendments. The primary benefit of this requirement is to provide data that will hopefully resolve the question concerning the performance of different bidding systems. Reviews to date indicate several of the alternative bidding systems are not attractive to bidders nor are they particularly helpful in promoting competition. When sufficient data are gathered to offer statistically meaningful conclusions about the effectiveness of these bidding systems, we will be able to choose those systems for future use which are indeed the best for achieving the objectives of the OCS program.

Lowry

Question #1. With the passage of the OCS Lands Act Amendments of 1978, it was Congress' intention to reduce the use of the front end cash bonus bidding system in favor of alternatives which would increase competition and fair market value. In your new proposal to offer some 200 million acres of offshore lands per year, do you intend to employ bidding systems other than the cash bonus bidding system?

Answer. The Department intends to continue testing of the most promising alternative bidding systems to determine whether they have beneficial effects that would warrant their continued use. It is possible that the analysis of these test results will identify alternative bidding systems that are more suitable under the conditions that will result from expanded leasing. At this point, however, the tests do not indicate any strong beneficial results.

10/4

I Standing:Worth
East
Ky

Art III requires (1) actual or probable injury in fact, & (2) causation - i.e. the injury results from the challenged action - & court can ^{correct}.

Congress can eliminate grounds for prudential standing, but not Art III requirement.

CADC held there is standing - competition benefits consumers

A. Consumer & labor groups: No standing - claims are indistinguishable from public at large. Must be more than speculative ^{link}.

Ask - Does Reg. history support view that Congress thought broader competitive bidding would reduce cost to consumers?

Contrary to CADC view, it is not at all clear that "consumers" would benefit. Might suffer if increased bidding competition resulted in Govt receiving higher bids (cash or %o) - then increasing ^{supply} cost to public. Might increase.

Provision for "Citizen Suits" (§1349) - "any person (with) valid legal interest" may sue. But House Report says there must be an "actual interest" - citing Sierra Club. No mention of "consumer suits".

B. Co-tenants. (Calif & Long Beach are co-owners of tracts that straddle 3 mi limit).

CADC said more competitive bids would increase revenue of these tracts (what about consumers?).

Co-tenants probably do have standing.

II Merits (did Congress require "fixed bonus" plus % of profits experimentation?)

8(a)(1)

Plain language of § 8(a)(1): the choice of bedding systems shall be "at the discretion of the Secretary".

Leg. hist. is replete with evidence that Congress was interested in helping ~~small~~ small companies + 1978 Act ~~identified~~ a number of bedding schemes.

But history is ambiguous, & does not negate the force of plain language of § 8(a)(1).

dfL October 5, 1981

*Excellent memo
with which I agree*

July

To: Justice Powell

From: David

Re: Watt v. Energy Action Educational Foundation--No. 80-1464

The following statutory sections indicate that the Secretary of the Interior is not required either to use all of the bidding systems enumerated in the statute or to use any particular bidding system or systems in addition to the traditional cash bonus bid with a fixed royalty:

1. Congress specifically addressed the nature of the Secretary's discretion during the 5 year period of experimentation commencing on September 18, 1978. The Congress required the Secretary to use alternatives to the traditional cash bonus bid/fixed royalty in not less than 20% and not more than 60% of the total area offered for leasing each year. But the section does not suggest that the Secretary may only fulfill this requirement by using alternatives other than those using a cash bonus bid--e.g. cash bonus bid/sliding scale royalty. If Congress meant to place any further limit on the Secretary's discretion why didn't it do so here?

"The biddings systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A) [the traditional cash bonus/fixed royalty], shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter." 43 U.S.C. § 1337(a) (5) (B).

2. Note that in the above quotation the Congress provides that the Secretary may even avoid the 20-60% limits on his discretion if he determines that the requirement is "inconsistent with the purposes and policies of this subchapter." This language suggests that Congress did not wish to require the Secretary absolutely to use bidding systems other than the traditional cash bonus bid/fixed royalty.

3. 43 U.S.C. § 1337(a)(9)(e) and 43 U.S.C. § 1343(2)(A) provide that the Secretary of Energy and the Secretary of the Interior shall report to Congress after every fiscal year why a particular bidding system has not been used. Certainly this indicates Congress' belief that not all of the bidding systems will necessarily be used in any one year. And, if not all, why should the Secretary be required to use the two systems respondents are so fond of? There is no support for such a view in the statutory language. This statutory language supports the view that the only limit on the Secretary's discretion is the 20-60% requirement and even this requirement can be waived.

43 U.S.C. § 1337(a)(9)(D) & (E) provide:

"Within six months after the end of each fiscal year, the Secretary of Energy, in consultation with the Secretary of the Interior, shall report to the Congress with respect to the use of various bidding options provided for in this subsection. Such report shall include--

(D) if applicable, the reasons why a particular bidding system has not been or will not be utilized; and

(E) if applicable, the reasons why more than 60 per centum or less than 20 per centum of the area leased in the past year, or to be offered for lease in

the upcoming year, was or is to be leased under the bidding system authorized by subparagraph (A) of paragraph (1) of this subsection."

43 U.S.C. 1343(2)(A) provides:

"Within six months after the end of each fiscal year, the [Interior] Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

. . .

(2) A report prepared after consultation with the Attorney General . . . which shall contain--

(A) an evaluation of the competitive bidding systems permitted under the provisions of section 1337 of this title, and, if applicable, the reasons why a particular bidding system has not been utilized."

4. 43 U.S.C. § 1337, which authorizes the Secretary's use of the different bidding systems, states that: "The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of . . . [the 8 different bidding alternatives]." There is no indication in the statute that this reference to "discretion" is only meant to refer to the period after the 5 year period of experimentation. I wouldn't rest too heavily on the use of the word "discretion" here, but it is some further indication that the statute does not seek to closely confine the Secretary's freedom to pick and choose among the different bidding alternatives.

80-1464 WATT v. ENERGY ACTION

(EADC - Wald) - *Perma appealed from denial of summary judgment.*

Argued 10/5/81

(Bidding ~~methods~~ - Outer Continental Shelf Act)

Clabome (SG)

Objectives: maximize revenue & increase production

2? Standard Standing: Rely on Brief. Neither State or City has leased since 1968, & no indication of any present intent.

Merits: Congress widened the choice of Secretary.

There is a limit of discretion of Sec (see Pet. p 104a)

~~at~~ Smaller firms deterred by high risk & enormous expense.

Silard

§ 8(a)(5)(b) applies - it says all methods must be applied.

Q - may Sec. reject all non-bonus system

Rely on p 92 of Conference System.

Silard (cont.)

What
about
standing

"Secure higher returns to Govt"
is principal purpose of Congress.

"Govt not getting fair return"

Calif. has participated in co-leasing
in every year.

John asked why no small co.
has joined in this litigation

Govt not getting "fair share":

WHR notes the number of
"variables" that make "injury" to
any of TT's highly speculative.

BRW noted that statute on its
face does not require use of all
of methods. Mr. Silard
disagreed. He says statute
must experiment with each
of 10 systems. But unnecessary
for us to address this "all quest."
Resps. wins ~~that~~ if we hold that
Sec. must experiment with some
~~of the~~ ~~systems~~ "non-bonne"
systems

Clairborne (Reply)

Exactly { Unless statute requires ^{use of} all ten systems, there is nothing in statute that gives Sec. any guidance as to which he may select.

Tre. Lateral: Cash bonus^{bid} / $\frac{1}{3}$ royalty

Respr: Fixed cash bonus / 7% net profits
(Highest bid wins) bidding.

CADC held: Major goal of Act
was to "open up leasing" to cos. that
can't afford a large "front end cash
payment".

Standing:

1. DC made no "fact findings"
on standing. Allegations
in Complaint - brief/conclusions
(Abandoned "taxpayer"
standing)

We need not accept
'bare allegations' of standing.
Art III requires more. Worth
("injury in fact & causation").

2. Did Congress think
consumer - rather than small
oil cos - would benefit ~~to~~?

3. Co-Owners - Higher profits
from more competitive bids

The Chief Justice Reverse on Ments
Not at rest on standing.

As to ments, no mandate from Congress
to experiment with any particular system.
Structure of Act contemplates wide discretion.
Then Report to Congress requirement supports
this view.
Congress can change if it desires

Justice Brennan Reverse on Ments
Standing: Co-tenants have
Ments: ^{Act} ~~Act~~ does not require use
of all or any specific system

Justice White Rev. ~~on~~ Ments

Agree with ~~W~~ WQB

Justice Marshall Reverse

Agree with WGB

Justice Blackmun Reverse

Consumers also have standing
8(a)(9)(A) is permissive as to
discretion.

Justice Powell Reverse

I Standing - close Q, but inclined to agree as
to - Co-Lessons: Calif. & Long Beach

II Merits - I am persuaded by statutory language
that Secretary is not required (during 5 yr period
or thereafter) to use all of 10 bidding systems, or
to use any particular system.

alternatives to § 1337(a)(5)B requires ~~that~~ (for 5 yr period)
that traditional system (cash bonus bid/fixed royalty)
be used in not less than 20% of area leased
annually, & not more than 60%. (Even then not mandatory)
Secretaries § 1337(a)(9)(E) & 1343(2)(A) require ~~that~~
to report each year why particular systems not used.
(over)

Justice Rehnquist

Reverse

Agrees with ~~the~~ LFP

Justice Stevens

Reverse

Agrees with LFP that "standing" is
in close.

Need not look to leg. hist.

Act is plain

B

Justice O'Connor

Reverse

Standing is close

Agrees as to discretion under
Act.

Continued: Perfectly clear Congress
did not expect all 10 systems to be
used. Otherwise ~~why~~ why report
"which" had been used.

If Congress did not
mandate use of all 10, how can
we say it did require use of
the two "fixed cash bonus" systems?

I recommend
you join
DL
standing discussion at 9-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
✓ Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: NOV 12 '81

Recirculated: _____

Reviewed

L.F.P.

11/13

Join

(TYPED DRAFT)

No. 80-1464 Watt v. Energy Action Educational
Foundation

JUSTICE O'CONNOR delivered the opinion of the Court.

Sandra's first! Fine opinion.

We are asked to review a decision of the United States Court of Appeals for the District of Columbia Circuit compelling the Secretary of the Interior to experiment with the use of certain statutorily defined bidding systems in awarding leases for oil and gas exploration and development on the Outer Continental Shelf. Because the

decision below incorrectly construes the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §1331 et seq. (1976 ed., Supp. III), we reverse.

I

The Outer Continental Shelf Lands Act of 1953 ("OCS Lands Act"), 43 U.S.C. §1331 et seq. (1976 ed., Supp. III), authorizes the Secretary of the Interior to lease tracts of the Outer Continental Shelf (OCS)¹ for the exploration and development of mineral resources, including oil and gas. As originally passed, the OCS Lands Act authorized the Secretary to solicit sealed bids either by fixing a royalty rate of not less than 12-1/2%, and requiring bids on the amount of an initial "cash bonus" to be paid at the time the lease was awarded, or by fixing the amount of the cash bonus, and requiring bids on the royalty rate. 43 U.S.C. §1337 (a) (1976 ed.). The OCS Lands Act vested complete discretion in the Secretary to choose between these two bidding systems. In practice, prior to 1978 virtually all tracts were leased on the basis of a fixed royalty of 16-2/3% of the gross value of production, with bidding on the amount of the cash bonus. See H.R. Rep. No. 95-590, p. 138 (1977); S. Rep. No. 95-284, p. 72 (1977).

During the mid-1970s, the nation's increasing dependence on imported oil focused public attention on the OCS as a potential source of domestic petroleum and natural gas. See H.R. Rep. No. 95-590, p. 53-54 (1977). At the same time, the traditional OCS bidding procedures came under close scrutiny because dramatic increases in petroleum prices made existing cash bonuses seem miserly relative to the revenues generated from wells on OCS leaseholds. Members of Congress began to express reservations about the ability of the traditional cash bonus, fixed royalty system to assure a fair return to the government, principally because it appeared that only the major oil companies could risk paying a large cash bonus to lease a tract of unknown value. Because the number of bidders was often limited to a handful of giant concerns, competition for the leases seemed tepid, and there was no assurance that the ultimate return to the government was adequate. See, e. g., H.R. Rep. No. 95-590, pp. 47, 54 (1977).

Responding to these and other pressures for modernization of the OCS Lands Act, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978 ("1978 Amendments"), Pub. L. No. 95-372, 92 Stat. 629.² Through the 1978 Amendments, Congress sought to experiment with

alternatives to the traditional bidding system. To this end, it increased the number of authorized bidding systems from two to ten, 43 U.S.C. §1337 (a)(1) (1976 ed., Supp. III), and directed the Secretary of the Interior to develop a five-year plan of experimentation with the new systems. §1344. Four of the newly authorized systems use a cash bonus bid (including the cash bonus, fixed royalty system, which was specifically retained in §1337 (a)(1)(A)),³ three use a royalty rate bid,⁴ one uses a "profit share" bid,⁵ and two use a "work commitment" bid.⁶

Although the 1978 Amendments, like the original OCS Lands Act, give the Secretary of the Interior the discretion to select among the various authorized bidding systems, that discretion is no longer total. The statute now requires the Secretary to experiment with the nine non-traditional systems in "not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year," §1337 (a)(5)(B), unless he determines that those percentage requirements are "inconsistent with the purposes and policies" of the 1978 Amendments.⁷

The 1978 Amendments assure ongoing congressional oversight of the Secretary of the Interior's leasing activities by requiring frequent reports to Congress on the

operation of the bidding systems. For example, the Secretary of Energy, who has responsibility for issuing regulations governing OCS bidding,⁸ must report within six months of the end of each fiscal year "with respect to the use of [the] various bidding options," including "if applicable, the reasons why a particular bidding system has not been or will not be utilized." §1337 (a)(9)(D). In addition, the Secretary of the Interior must submit each fiscal year a report that includes "an evaluation of the competitive bidding systems permitted under [the 1978 Amendments], and, if applicable, the reasons why a particular bidding system has not been utilized," as well as "an evaluation of alternative bidding systems not permitted under [the 1978 Amendments], and why such system or systems should or should not be utilized." §1343(2).

To date, the Secretary of Energy has issued regulations for a number of the bidding systems, including three of the four systems using cash bonus bidding, 45 Fed. Reg. 9536 (1980) (the cash bonus bid, fixed royalty system and the cash bonus bid, fixed sliding-scale royalty system); 45 Fed. Reg. 36784 (1980) (the cash bonus bid, fixed net profit-share system), as well as the royalty bid, fixed cash bonus system, 45 Fed. Reg. 9536 (1980), the net

profit-share bid, fixed cash bonus system, 46 Fed. Reg. 29680 (1981), and the work-commitment bid, fixed cash bonus and fixed royalty system, 46 Fed. Reg. 35614 (1981). For his part, the Secretary of the Interior has prepared a five-year program for the period from June 1980 to May 1985, calling for thirty-six sales, each involving a number of tracts. Brief for Petitioners 7. The Secretary of the Interior has so far used the non-traditional bidding systems in leases covering forty-nine percent of the total area offered, but has experimented with only two of the nine authorized alternative bidding systems: the cash-bonus bid, fixed profit-share system, and the cash bonus bid, fixed sliding-scale royalty system. Id., at 8 & n.12. The Secretary of the Interior has not experimented, however, with any of the systems using a factor other than the size of a cash bonus as the bidding variable.⁹

II

This litigation grows out of the Secretary of the Interior's continued reliance on cash bonus bidding systems. The respondents here, nine consumer groups, two state governmental entities, and three private citizens, brought suit against the United States, the Secretary of the Interior and the Secretary of Energy alleging that the

Secretaries had abused their discretion by failing to experiment with bidding systems that do not use the size of a cash bonus as the bidding variable. In essence, they complained that bonus bidding cannot generate adequate competition to yield a fair market return for OCS oil and gas as required by the 1978 Amendments. They sought declaratory and injunctive relief prohibiting further lease sales until the Secretary of Energy promulgated regulations for each of the alternative bidding systems, and prohibiting the further use of the cash bonus, low royalty bidding systems.

Three days after they filed suit and four days before a planned lease sale, the respondents filed a motion for a preliminary injunction barring all further lease sales until regulations had been promulgated for each of the bidding options contained in the 1978 Amendments. The District Court denied the motion because the respondents had not shown a likelihood of prevailing on the merits, and because the pace at which the Secretary of Energy was issuing regulations was not unlawfully slow in light of the complexity involved in preparing such regulations.¹⁰ The Court of Appeals affirmed the District Court's ruling

and remanded the case for further proceedings. 203 U. S. App. D. C. 169, 631 F. 2d 751 (CADC 1979).

On remand, both parties moved for summary judgment, and the respondents renewed their motion for a preliminary injunction barring future lease sales until additional bidding system regulations had been issued. The District Court denied all motions for summary judgment as well as the respondents' motion for a preliminary injunction, and the respondents once more appealed.

This time, the Court of Appeals affirmed the District Court only to the extent that it refused to enjoin lease sales scheduled for September, October and November 1980. Turning to the underlying dispute, the Court concluded both that the 1978 Amendments require the Secretary of the Interior to experiment with at least some of the bidding systems that do not use the size of a cash bonus as the bidding variable, and that the Secretary of Energy must issue appropriate regulations for the alternative bidding systems.¹¹

We granted the Government's petition for certiorari to review this construction of the 1978 Amendments.

III

Before examining the merits, we must consider the Government's contention that the respondents do not have standing to challenge the Secretary of the Interior's choice of bidding systems.

There are three groups of plaintiffs in this litigation: (1) the State of California, which claims standing as an involuntary "partner" with the Federal Government in the leasing of OCS tracts in which the underlying pool of gas and oil lies under both the OCS and the three-mile coastal belt controlled by California; (2) California and the City of Long Beach, which compete with the Federal Government in the leasing of off-shore oil and gas properties; and (3) consumers of oil and gas and of oil- and gas-derived products.¹² Because we find California has standing, we do not consider the standing of the other plaintiffs. See Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264 & n.9 (1977); Buckley v. Valeo, 424 U.S. 1, 12 (1976) (per curiam).

The 1978 Amendments require the Federal Government to turn over a fair share of the revenues of an OCS lease to the neighboring coastal State whenever the Federal Government and the State own adjoining portions of an OCS oil and gas pool. See 43 U.S.C. §1337 (g)(4) (1976 ed.,

Supp. III). California thus has a direct financial stake in federal OCS leasing off the California coast. In alleging that the bidding systems currently used by the Secretary of the Interior are incapable of producing a fair market return, California clearly asserts the kind of "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975), that is required for standing.

To demonstrate that it has standing, however, California must also show that there is a "fairly traceable" causal connection between the injury it claims and the conduct it challenges, Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977), so that if the relief sought is granted, the injury will be redressed, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-46 (1976). The Government argues that the relief California seeks--experimental use on some OCS lease tracts of non-cash-bonus bidding systems--will not ensure that the Secretary will try these systems on parcels leased off the California coast. According to the Government, even if California were to win its suit, cash bonus systems might nevertheless still be used to lease tracts overlying California's pools. The Government asserts that California therefore lacks standing because it

has failed to show that the relief requested would cause the Secretary of the Interior to use non-cash-bonus bidding systems on California's parcels.

The essence of California's complaint, however, is that the Secretary of the Interior, by failing to test non-cash-bonus systems, has breached a statutory obligation to determine through experiment which bidding system works best. According to California, only by testing non-cash-bonus systems can the Secretary of the Interior carry out his duty to use the best bidding systems and thereby assure California a fair return for its resources. The Government's argument, California contends, improperly assumes that the Secretary of the Interior would perversely refuse to adopt a non-cash-bonus bidding system proven by experiment to be superior to the cash bonus alternatives.

We share California's confidence that, after experimentation, the Secretary would use the most successful bidding system on all suitable OCS lease tracts, including those off the California coast. For this reason, we agree with California that it has standing to challenge the Secretary of the Interior's refusal to experiment with non-

cash-bonus bidding systems. Therefore, we proceed to the merits.

IV

In passing the 1978 Amendments, Congress committed the Government to the goal of obtaining fair market value for OCS oil and gas resources. The 1978 Amendments themselves proclaim this intention,¹³ and the legislative history is replete with references to this purpose.¹⁴ The respondents urge that non-cash-bonus bidding systems are more likely to achieve the statutory objectives than the cash bonus systems used to date, so that the Secretary of the Interior's continued reliance on cash bonus bidding violates the statutory scheme.

A

We begin, as always in a case where the meaning of a statute is at issue, by examining Congress' language. If Congress meant to restrain the Secretary of the Interior's discretion in experimenting with the various alternative bidding systems, we can expect the statute to reflect that intent. But it does not.

Despite the various reservations concerning the traditional cash bonus bidding system recorded in the legislative history of the 1978 Amendments, Congress not only

failed to repudiate the traditional cash bonus, fixed-royalty system specified in §1337 (a)(1)(A), but affirmatively directed that the Secretary of the Interior use that system in the bidding for tracts covering at least forty percent of the total area leased in each year of the five-year plan. §1337 (a)(5)(B). The only express limitation Congress put on the use of the traditional system was that it not be used on more than eighty percent of the total area offered each year. Id. In short, Congress can hardly be said to have rejected even the traditional cash-bonus system. Moreover, among the experimental bidding alternatives listed in the 1978 Amendments, Congress expressly specified cash bonus as the bid variable in three systems.¹⁵ Most significantly, Congress left to "the discretion of the Secretary," §1337 (a)(1), the choice among the various nontraditional alternatives, evidently leaving to his expert administrative determination the complex, technical problem of deciding which alternative bidding systems are more likely to further the statute's objectives. In addition, Congress granted the Secretary further discretion to abandon the statutory requirements for the percentage use of the non-traditional alternatives, should he determine that those requirements are inconsis-

tent with the statutory purposes and policies. §1337 (a) (5) (B).

The respondents argue that the Secretary's discretion is limited by §1344 (a) (4), which directs that "[l]easing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." According to the respondents, the Secretary is violating §1344 (a) (4) by refusing to try non-cash-bonus bidding, because cash bonus bidding allegedly does not assure that fair market value is received for the Government's resources.

Section 1344 (a) (4) cannot support the weight the respondents attach to it. Section 1344 directs the Secretary of the Interior to "prepare and periodically revise, and maintain an oil and gas leasing program" consistent with the "principles" enumerated in §1344 (a) (1)-(4). The receipt of fair market value, the fourth listed principle, is only one of many general considerations commended to the Secretary's attention.¹⁶ The section directs that the Secretary's entire leasing program be consistent with the principles enumerated. Yet elsewhere the statute requires the Secretary's program to use the traditional cash bonus, fixed royalty system on as much as eighty percent, and on

no less than forty percent, of the acreage leased. §1337 (a) (5) (B). So Congress cannot have considered the traditional cash bonus system incapable of providing a fair market return, for that is the one system Congress required the Secretary to use. We therefore conclude that §1344 (a) (4) cannot fairly be read to constrain indirectly the Secretary's discretion in choosing to use the alternative cash bonus bidding systems.

The only express statutory check on the Secretary of the Interior's discretion is the requirement that he periodically report to the Congress his reasons for failing to use any of the alternative bidding systems.¹⁷ The statute thus recognizes that, in appropriate circumstances, some of the alternative bidding systems may not be used. Plainly, Congress considered close congressional scrutiny to be sufficient restraint on the Secretary's discretion to choose among the statutory options.

In short, nothing in the statute suggests that Congress intended to channel the Secretary of the Interior's discretion in choosing among the alternative bidding systems, and nothing in the statute singles out the non-cash-bonus systems for special consideration. Therefore, we conclude that the language of the 1978 Amendments requires

experimentation with at least some of the new bidding systems, but leaves the details to the Secretary's discretion.

B

According to the respondents, however, the legislative history of the 1978 Amendments mandates constraints on the Secretary of the Interior's discretion not expressly stated in the statute. In particular, the respondents cite the repeated, unfavorable references to "cash bonus" bidding found throughout the legislative history to support their contention that Congress intended to direct the Secretary of the Interior to experiment with bidding systems in which the bidding variable is not the size of a cash bonus.

What clearly emerges from the legislative history, however, is not congressional dissatisfaction with all forms of cash bonus bidding, but rather with large front-end payments. Plainly, Congress intended to encourage more competitive bidding by requiring experimentation with bidding alternatives, regardless of the bid variable involved, that would reduce the size of the front-end payments associated with the traditional cash bonus bid, fixed royalty system.¹⁸ Such a reduction of the front-end payments can be achieved, however, with any bidding system

that increases the amount of the payments made throughout the life of a lease, since a bidder will be willing to pay less "up front" if he expects to pay more "downstream." This inverse relationship between the size of up front and downstream payments holds true, of course, regardless of which factor is used as a bidding variable. Congress plainly understood this relationship, because it expressly included three new cash bonus bid systems among the experimental alternatives intended to reduce large front-end payments.

Contrary to the respondents' suggestions, Congress' references to "bonus bidding" and the "cash bonus system," when seen in context, are merely a shorthand description of the traditional cash bonus bid, fixed royalty system that was the only system that had been extensively used at the time the 1978 Amendments were under consideration. That the term "bonus bidding" in context refers only to the traditional system is evident because Congress pointedly and repeatedly contrasted the perceived disadvantages of "bonus bidding" with its hopes for the alternatives listed in §1337 (a)(1)(B)-(G), although three of those enumerated alternatives retain the size of a cash bonus as the bidding variable. Congressional references to the

"cash-bonus system" thus implicate only the traditional system described in §1337 (a) (1) (A).¹⁹

V

In sum, we are unable to find anything, either in the legislative history or in the 1978 Amendments themselves, that compels the conclusion that the Congress as a whole intended to limit the Secretary of the Interior's discretion to choose among the various experimental bidding systems. It is not for us, or for the Court of Appeals, to decide whether the Secretary of the Interior is well-advised to forgo experimentation with the non-cash-bonus alternatives. That question is for Congress alone to answer in the exercise of its oversight powers.

For these reasons, the judgment of the Court of Appeals compelling the use of non-cash-bonus bidding systems is hereby reversed.

¹The Outer Continental Shelf is defined by statute to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters ... and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. §1331 (a). The term "lands beneath navigable waters" is itself given an extensive definition in 43 U.S.C. §1301, but generally means the undersea lands within three miles of the coast line.

²The "basic purpose" of the 1978 Amendments was to "promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf," H.R. Rep. No. 95-590, p. 53 (1977), and the Amendments were broadly designed to achieve that aim. We are concerned here, however, only with those provisions of the 1978 Amendments having to do with bidding systems for OCS leases.

³43 U.S.C. §1337 (a)(1) (1976 ed., Supp. III) authorizes: (1) a "cash bonus bid with a royalty at not less than 12-1/2 per centum fixed by the Secretary in amount or value of the production saved, removed, or sold," §1337 (a)(1)(A); (2) a "cash bonus bid ... and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12-1/2 per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold," §1337 (a)(1)(C); (3) a "cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area," §1337 (a)(1)(D); and (4) a "cash bonus bid with a royalty at no less than 12-1/2 per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area," §1337 (a)(1)(F).

⁴Section 1337 (a)(1)(B) authorizes: a "variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either [1] a fixed work commitment based on dollar amount for exploration or [2] a fixed cash bonus as determined by the Secretary, or [3] both."

⁵Section 1337 (a)(1)(E) authorizes a "fixed cash bonus with the net profit share reserved as the bid variable."

⁶Section 1337 (a)(1) authorizes: (1) a "work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding scale royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12-1/2 per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold," §1337 (a)(1)(C); and (2) a "work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold," §1337 (a)(1)(G).

⁷Section 1337 (a)(9)(E) requires that his determination be explained to Congress.

⁸Under the 1978 Amendments, the Secretaries of the Interior and of Energy work together on the OCS leasing program. Competitive bidding for OCS leases is to be carried out pursuant to "regulations promulgated in advance," §1337 (a)(1), and the Department of Energy Organization Act, 42 U.S.C. §§7152 (b), 7153 (1976 ed., Supp. III), gives the Secretary of Energy the responsibility for issuing such regulations in consultation with the Secretary of Interior. The Secretary of Energy also has authority to develop bidding systems other than the ten specifically enumerated in §1337 (a)(1), provided any new system has no more than one bidding variable and is not disapproved by Congress. §1337 (a)(1)(H).

⁹During the course of the present litigation, the Secretary of the Interior filed an affidavit with the District Court stating that he does not intend to use either profit-share or work-commitment bidding because he does "not believe the purposes of the OCS Lands Act or the best interests of the nation would be served by the use" of either system. Affidavit of James G. Watt, Secretary of the Interior, Energy Action Educational Foundation v. Watt, No. 79-1633 (D.C.) (sworn May 8, 1981), reprinted in App. to Brief for Respondents 2a-3a. The Department of the Interior is on record as disfavoring royalty-share bidding as well. See Energy Action Educational Foundation v. Andrus, 654 F. 2d 735, 743 n.44 (CA DC 1980).

As reported to Congress, the bidding systems used during fiscal years 1978 through 1980 were as follows. In fiscal year 1978, three lease sales were held, with 218 tracts leased. Of those, 30 tracts were leased under the fixed cash bonus, royalty bid system, 41 under the cash-bonus bid, sliding scale royalty system, and the remainder under the traditional cash bonus bid, fixed 16-2/3% royalty system. Department of the Interior, Outer Continental

Shelf Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1978. In fiscal year 1979, five lease sales were held, with 290 tracts leased. Of those, 161 were leased under the traditional cash bonus bid, 16-2/3% royalty system, and 129 under the cash bonus bid, sliding scale royalty system. Department of the Interior, Outer Continental Shelf Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1979. In fiscal year 1980, four lease sales were held, with 293 tracts leased. Of those, 136 tracts were leased under the traditional cash bonus bid, 16-2/3% royalty system, 120 under the cash bonus bid, sliding scale royalty system, 23 under the cash bonus bid, fixed net profit-share system, and 14 under a cash bonus bid, fixed 33-1/3% royalty system. Department of the Interior, Outer Continental Shelf Oil and Gas Leasing Production Program: Annual Report, Fiscal year 1980.

¹⁰479 F. Supp. 62 (DC 1979).

¹¹-- U. S. App. D. C. --, 654 F. 2d 735 (CADC 1980).

On remand to the District Court, the parties stipulated to the entry of an order requiring the Department of Energy to issue final regulations for the net profit-share bid, fixed cash bonus system and the work-commitment bid, fixed cash bonus and fixed royalty system. Brief for Petitioner 9; Brief for Respondent 5 n.1; see also 46 Fed. Reg. 35614, 35615 (1981). Thus, no question is now presented concerning the Secretary of Energy's duty to issue these regulations. The Court of Appeals and the respondents based their conclusion that the Secretary of Energy must issue regulations for the alternative systems on the theory that the Secretary of the Interior must use them, the issue under consideration here.

¹²In their initial complaint, the respondents also claimed standing as taxpayers, but have not pressed that claim here. The 1978 Amendments contain a provision which permits suit by those having "a valid legal interest." §1349 (a) (1).

¹³Section 1344 (a) (4) states that: "Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government."

¹⁴See, e. g., H.R. Rep. No. 95-590, pp. 47, 54 (1977); S. Rep. No. 95-284, pp. 46, 73 (1977).

¹⁵These three systems are the cash bonus bid, and a diminishing or sliding-scale royalty, §1337 (a)(1)(C), the cash bonus bid, fixed net profit-share, §1337 (a)(1)(D), and the cash bonus bid, fixed royalty and fixed net profit-share, §1337 (a)(1)(F).

¹⁶Also included, for example, are the "economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf." §1344 (a)(1). In addition, the Conference Report indicates that providing a fair return to the Federal Government is only one of many considerations the Secretary of the Interior is to weigh:

The conferees intend that in utilizing the new bidding alternatives, a variety of considerations should be taken into account, including but not limited to: (i) Providing a fair return to the Federal Government; (ii) increasing competition; (iii) assuring competent and safe operations; (iv) avoiding undue speculation; (v) avoiding unnecessary delays in exploration, development, and production; (vi) discovering and recovering oil and gas; (vii) developing new oil and gas resources in an efficient and timely manner; and (viii) limiting administrative burdens on government and industry.

H.R. Conf. Rep. No. 95-1474, p. 92 (1978).

The House Report reiterates the point, emphasizing that striking the proper balance among the factors is up to the Secretary of the Interior:

One purpose of [the 1978 Amendments] is to authorize alternative leasing arrangements and require experimentation with them. It will enable the Secretary of the Interior, who administers the federal leasing program, to strike a proper balance between securing a fair return to the Federal Government for the lease of its lands, increasing competition in exploitation of resources, and providing the incentive of a fair profit to the oil companies, which must risk their investment capital.

H.R. Rep. No. 95-590, p. 54 (1977).

¹⁷Section 1337 (a)(9)(D) requires the Secretary of Energy, in consultation with the Secretary of the Interior, to report to Congress "why a particular bidding system has not been or will not be utilized." Section 1343 (2)(A) requires the Secretary of the Interior to report to

Congress "the reasons why a particular bidding system has not been utilized."

¹⁸The Senate Report, S. Rep. No. 95-284, pp. 46-47, 73 (1977), put it this way:

S.9 authorizes a wide variety of new bidding systems. These are designed to reduce the front end cash bonus, increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration.

...
In order to assure that these alternatives will be used, the bill limits the Secretary's authority to use the cash bonus-fixed royalty system which has been the historical method of OCS bidding

...
The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that net profits share and other arrangements can be effective in shifting Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas.

The House Report, H. Rep. No. 95-590, pp. 47, 138-139 (1977), echoes the Senate's conclusions:

At present, the cash bonus system is used almost exclusively. Under that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for offshore leases to the major oil companies and reduce the public return for resources. To increase competition for off-shore leases and secure higher returns to the public Treasury, section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary to use other bidding methods based on net profits; royalty; or work commitments stated in dollar amounts.

...
Witnesses before the committee indicated that the high front-end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters, to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

... the 1977 amendments authorizes [sic] new bidding options. The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. ...

In order to assure that these new bidding alternatives are used, the 1977 amendments limit the Secretary's authority to use the cash bonus-fixed royalty system, which has been the historical method of OCS bidding. ...

¹⁹Of many possible, a single example drawn from the Conference Report, H.R. Conf. Rep. No. 95-1474, p. 92 (1978), suffices to demonstrate this point. The Conference Report summarizes the statutory requirement in §1337(a)(5)(B) that the Secretary of Interior experiment with the enumerated alternative bidding systems as follows:

Bidding systems other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems, are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in all OCS areas during each of the next 5 years. [Emphasis original.]

Plainly, the reference to "bonus bidding" is to the traditional system specified in §1337 (a)(1)(A). Otherwise, the summary is simply wrong, because three of the enumerated alternatives retain the size of a cash bonus as the bidding variable. Similar examples are found throughout the legislative history. See H.R. Rep. No. 95-590, pp. 47, 138-139, 141 (1977); S. Rep. No. 95-284, pp. 46-47 (1977); H. R. Conf. Rep. No. 95-1474, p. 93 (1978).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 13, 1981

Re: 80-1464 - Watt v. Energy Action Educational
Foundation

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

November 13, 1981

80-1464 Watt v. Energy Action Educational Foundation

Dear Sandra:

I am happy to join your first opinion for the Court.

It is a fine opinion.

Sincerely,

Justice O'Connor

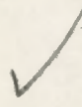
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cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 16, 1981



Re: No. 80-1464 -- Watt v.
Energy Action Educational Foundation

Dear Sandra,

Your first opinion is quite
satisfactory to me and I am happy to
join it.

Sincerely yours,

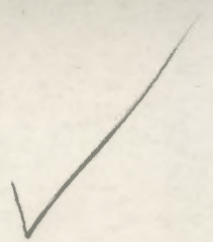
Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 16, 1981



RE: No. 80-1464 Watt v. Engery Action Educational
Foundation

Dear Sandra:

I agree.

Sincerely,

A handwritten signature, appearing to be "Bul", is written below the word "Sincerely,".

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

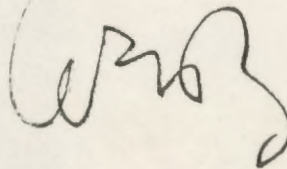
November 16, 1981

Re: 80-1464 - Watt v. Energy Action Educational Foundation

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 16, 1981

Re: No. 80-1464 Watt v. Energy Action Educational
Foundation

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1981

Re: No. 80-1464 - Watt v. Energy Action
Educational Foundation

Dear Sandra:

Please join me.

Sincerely,

TM.
T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

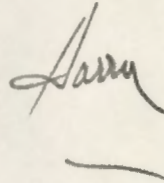
✓
November 19, 1981

Re: No. 80-1464 - Watt v. Energy Action
Educational Foundation

Dear Sandra:

I am glad to join your first opinion for the Court.

Sincerely,



Justice O'Connor

cc: The Conference

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[illegible]