ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners

v.

ENERGY ACTION EDUCATIONAL FOUNDATION ET AL.

No. 80-1464

Washington, D.C.

Monday, October 5, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in number 1464, James G. Watt, Secretary of the Interior against the Energy Action Educational Foundation.

Mr. Claiborne, you may proceed when you're ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF PETITIONERS

MR. CLAIBORNE: Mr. Chief Justice, may it please the Court:

At issue in this case is the federal oil and gas leasing program on the Outer Continental Shelf; that is to say, the zone of the seabed offshore more than three or nine miles of that belt which was conceded to the coastal states in 1953.

As the Court knows, beyond that state belt the United States has the exclusive right to exploit the mineral resources of the Shelf. And since the enactment of the Outer Continental Shelfs Act in 1953 it has done this by granting leases to private oil companies.

Those leases are granted, or sold as the term is, at auction on the basis of sealed bids submitted simultaneously for specified tracts within a defined area of the Shelf. No one knows in advance how many bidders there will be on any particular tract. In normal course the

highest bidder wins that lease.

Now, traditionally federal oil and gas leases have resulted in three forms of revenue to the federal government quite beside taxes: first, the so-called cash bonus, which is paid at the outset for the privilege of the lease; secondly, an annual rental paid for the primary term; and finally, if there is production, a so-called royalty or percentage of the value, the gross value of the minerals actually extracted.

Until 1978 the law permitted only two forms of bidding systems for federal lands on the Shelf. The first was bidding on the amount of the initial bonus, the rental and the royalty being fixed in advance. The second system was bidding on the royalty rate, in this case the amount of the bonus and the annual rental being fixed in advance.

The choice which of these two systems to use was entirely left to the Secretary of the Interior, and for the first 20 years, between 1954 and 1974, leases were invariably granted or offered on the basis of the so-called cash bonus system with a fixed royalty of one-sixth. That is what we refer to as the traditional bidding system; indeed, as I say, it had lasted invariably for 20 years.

Beginning in 1974 and for the four ensuing years there were a substantial number of tracts offered under variants of that system. The royalty was sometimes fixed at

one-third instead of one-sixth; or it was fixed on a sliding scale, varying between one-sixth and one-half depending on the volume and value of oil or gas extracted during a given quarter; or finally, in a few cases, the leases were offered on the basis of royalty bidding with a fixed bonus per acre. But the traditional formula, that is, the cash bonus with the one-sixth royalty, remained the norm.

However, in 1978, effective in mid-September of that year, the Congress enacted amendments to the Outer Continental Shelf Lands Act, and that is what provoked the present lawsuit. Most relevantly, the Congress provided for new bidding systems not previously authorized.

The question in this case is whether the Secretary of Energy is required under these amendments to promulgate regulations for each of those new authorized bidding systems, and whether the Secretary of the Interior is required to actually use each of those new bidding systems, notwithstanding that both Secretaries may have determined that one or more of those systems is not in the public interest or does not further the statutory objectives.

There is also a threshold question.

QUESTION: What were the statutory objections?

MR. CLAIBORNE: The statutory objections were listed as several, Mr. Justice Brennan, but primarily to maximize the revenue to the federal government and to assure

that production was at its highest level consistent with --

QUESTION: Was there also an objective to increase the number of bids per lease?

MR. CLAIBORNE: There was an objective to increase competition.

QUESTION: There was?

MR. CLAIBORNE: There was.

QUESTION: And also to decrease the concentration of the leasing?

MR. CLAIBORNE: There was, Mr. Justice Brennan. We suppose that those objectives were intended to further the ultimate objectives of increasing revenues and increasing production consistent with efficient operations, consistent also with environmental concerns which are specified in the law as among the objectives.

As I say, there is also a threshold question which is whether the particular plaintiffs in this suit, the respondents before this Court, have standing to complain about the action or nonaction of the two Secretaries, those plaintiffs being the California Lands Commission, which has charge of state leasing on the Shelf, the City of Long Beach, which as a matter of California law has certain privileges with respect to the area adjacent to that city; and secondly, a group of consumer groups and others who claim standing because they're affected by the bidding

systems insofar as they affect price and supply of oil.

Now, as cases go this one has proceeded fairly swiftly to this Court, but the procedural history is nevertheless too complex to detail in the time available.

QUESTION: Well, does the Government have any doubt that the Court of Appeals, to get by the standing question the Court of Appeals properly reached the matter. Wasn't the only issue there the propriety of issuing that preliminary injunction or not issuing it?

MR. CLAIBORNE: The Government sides with the Court of Appeal in this respect: the court took the view that since it was reviewing the denial of a preliminary injunction, it plainly had jurisdiction of the case, and that since the issues were pure issues of law, notwithstanding the finding of the District Judge that they were disputed issues of fact, the court could, while entertaining the case on the review of the denial of preliminary injunction, reach the other issues in the case, as it did.

QUESTION: The other issues remain whether the District Court should have issued a summary judgment in favor of the plaintiffs?

MR. CLAIBORNE: In effect, yes.

QUESTION: Which still has an appeal.

MR. CLAIBORNE: Indeed. Having the case, having,

in our view, correctly determined that there were no outstanding issues of fact, considering the statutory injunction to the courts to resolve these controversies without undue delay, the court concluded, it seemed to us fairly, that it ought not remand, direct the entry of one or the other motion and then take an appeal from a final judgment.

Now, I couldn't possibly do justice to the complaint in this case. It is printed in the Appendix and takes some 82 pages, not to mention 45 pages of appendices attached to it.

Mr. Justice White has already indicated that the case arises on the second appeal on the denial of cross motions for summary judgment and on the denial of a motion for preliminary injunction.

There had been a previous appeal from the denial of another motion for preliminary injunction. The suit was originally aimed at a particular lease sale. Efforts were made to abort that sale. When the sale nevertheless took place because the District Judge declined to enjoin it, an appeal was taken.

That first appeal, resulting in an opinion by the late Judge Leventhal, pointed out, among other things, in denying the appeal that Congress had in this instance imposed a degree of legislative oversight that was perhaps

sufficient to protect the public interest without a need for the court to intervene.

On this final appeal from which our petition for certiorari is taken, the Court of Appeal first denied the preliminary injunction but then in most respects held in favor of the respondents before this Court. At least this much can be said for that decision, which is not in all respects unambiguous: it directed the Secretary of Energy on a schedule set out by the court to promulgate regulations for at least two of the optional bidding systems now provided under the amendments.

QUESTION: There being how many altogether?

MR. CLAIBORNE: As we compute it, there are ten new systems, not to mention those which could be invented.

QUESTION: In addition to the two originally?

MR. CLAIBORNE: No. Ten altogether.

QUESTION: Ten altogether. Nine new ones and plus a catch-all provision which authorizes the Secretaries to devise further permutations, combinations and indeed brand-new systems.

The court also directed the Secretary of the Interior to experiment with at least these two systems. The entire purpose of requiring the Secretary of Energy to promulgate the regulations was that under the statute that is a necessary first step. The basic holding is that the

Secretary of the Interior must actually experiment with these two systems which do not involve a bidding on the front-end bonus.

Now, I will turn directly to the merits of the case, if I may, and draw the Court's attention to the statutory provisions. The relevant provisions are set out in the Appendix to our brief beginning at page 101a.

If one looks --

QUESTION: Are you still persisting in your view of standing?

MR. CLAIBORNE: We are, Mr. Justice Stevens.

QUESTION: But you're not going to argue that one.

MR. CLAIBORNE: Having to choose between the time available and the arguments that seem most important to make, I would rely on our brief which I think fully covers the question of standing.

QUESTION: Your position on standing is that the plaintiffs' interest is sufficiently tenuous that it doesn't fall within the Arlington Heights or Warth v. Seldin.

MR. CLAIBORNE: Exactly so, Justice Rehnquist, though I would carry it one step further. It's hard to see where their interest lies. The state and the city, so far as we're aware, are not and have not been leasing their own areas since 1968 at the most recent. There is no indication that they're about to do so now, so that as competitors it's

not easy to see their advantage or their disadvantage from any bidding system the United States may use further offshore.

QUESTION: I take it, Mr. Claiborne, that we disagree with you as to the standing of the state and the city. We don't have to be concerned with the standing of consumer groups.

MR. CLAIBORNE: I quite agree, Justice Brennan, that if either group has standing, one needn't be concerned about the other group.

One more word about California and the city, the thrust of this case is that the federal bidding system discourages most potential bidders because the front-end bonus allows only the largest companies to participate. Logically that should leave a great number of potential bidders who are ready and willing to engage in leasing on the Shelf who therefore could take up state leases if any were offered. None have been offered for more than a decade.

Turning to the merits, if I may, and focusing on the provision of Section 1337 as it's shown at the bottom of page 101a, which is in the statute; it's an amendment to Section 8(a)(1)(1) of the Outer Continental Shelfs Act.

It reads, "The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in

advance, any oil and gas on submerged lands of the outer Continental Shelf which are not covered by, in effect, outstanding leases.

When we turn the page and look at the last sentence of that paragraph we see the following language: "The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of."

There follow seven lettered paragraphs describing variant bidding systems; in fact, those seven paragraphs, as we read them, include ten separate bidding systems. And that, ending with paragraph (G) on the following page, is followed by the word "or." And then we have subparagraph (H) which is a provision, a catch-all provision allowing the two Secretaries to devise permutations, combinations or new systems.

Now, if the matter ended there it would be indeed very strained to argue that "authorized" meant directed, that "at the discretion of the Secretary" meant that he had no choice which system to use, and that the connective "or" should be read as "and."

Unfortunately, we know that resourceful lawyers and resourceful courts sometimes read language not quite so literally as I've suggested, and it is conceivable that if the statute ended there a court might reasonably take the view that if the Secretaries declined to experiment with any

of the new systems included in these amendments, that would amount to an abuse of discretion.

Even then we would argue that Congress had merely widened the choice available to the Secretaries, had removed the shackles of the original statute, had nudged, goaded the Secretaries to experiment, but that at the end of the day they would remain free, if they concluded after investigation that the public interest would not be served, not to use such systems.

Congress might have been disappointed, but it would have been free, as it is now, to issue a clearer mandate to the administrators. But in fact, the amendments themselves resolved this matter.

When we look at the critical section on page 104a, which is Section (5)(B), we see that the statute has put a limit on the exercise of the discretion the two Secretaries enjoy. It has told them that for the next five years at least 20 percent but not more than 60 percent of the acreage offered must be offered under bidding systems other than the traditional one, the traditional one being (A) in this list.

Even then there's an escape hatch which allows the Secretary to conclude that following that requirement is not furthering the statutory policies and objectives, but that is no doubt a matter which requires a heavy justification. In any event, it's a provision which the Secretary has not

invoked.

So in principle the limits on the discretion of the administrators of the program has been defined. It has been defined as follows. For at least 40 percent and up to 80 percent of the acreage offered each year the traditional bidding system must be used. And on the other hand, for at least 20 percent and up to 60 percent of the acreage the alternative systems must be invoked.

Now, the natural inference from this specific provision qualifying the Secretary's discretion is that in all other respects they are free to do as they think best.

Now, it seems to be argued, notwithstanding this, that the provision which I have just adverted to, (5)(B), because it says "The bidding systems authorized shall be used in the following percentages," that this means each and every one of them.

Now, respondents don't seem to have the courage of their convictions, nor did the Court of Appeal. They seem to be ready to excuse the Secretaries from using some of the bidding systems that have been newly authorized. That's no doubt because it would be extreme indeed to say that each year the Secretary must resort to ten different systems, each with many variations possible, not to mention devising new systems under paragraph (H).

QUESTION: Do you still say, Mr. Claiborne, that

even if the systems now being employed didn't appreciably increase the number of bids per lease and decrease the concentration of the leasing market that nevertheless the Secretaries would have no obligation under the 1978 provision to employ other systems?

MR. CLAIBORNE: Mr. Justice Brennan, they certainly have an obligation to consider whether resorting to systems not yet used would have such an effect; but if they should conclude that that statutory objective of furthering competition --

QUESTION: Well, are you suggesting then that at least if that condition obtained they would have to consider whether or not other alternatives should be used?

MR. CLAIBORNE: But, Justice Brennan, they have considered. They have considered fully, and they have stated their reasons to the Congress for concluding that two of these systems would not produce the desired effect and would carry substantial disadvantages. It is not a back of the hand approach to we will not look at these new systems. Indeed, the Secretary of Energy under compulsion of court order has issued regulations for these two systems mostly in dispute, but he has done so with reservations, and the Secretary of the Interior has concluded after study and after consulting with his best experts, and after experimenting with those ingredients in other ways that they

will not produce the desired results.

QUESTION: Which of the Secretaries has concluded this?

MR. CLAIBORNE: The Secretary of the Interior. But the Secretary of Energy in promulgating the regulations has also indicated his grave misgivings about the beneficial consequences of resorting to net profit share.

QUESTION: Well, has either concluded that the alternatives now being used sufficiently deconcentrate the leasing market without resort to others?

MR. CLAIBORNE: I think the fair statement is that the Secretary of the Interior has concluded that very little can be done by way of changing bidding systems that will have much of an effect on the concentration.

Concentration may be slightly overstated because there is the possibility and there is a reality of joint ventures where smaller firms can join together; the larger ones may not. But what deters the smaller firms is the enormous costs quite outside of any bonus, and the enormous risks, especially now that we are dealing with frontier areas. And in those circumstances smaller companies are simply -- are unlikely to be in a position to actively participate in this offshore leasing.

The Secretary has taken the view that by enlarging the areas available he may make it more possible for other

firms not presently engaged to have their opportunity to participate.

But this question of whether the Secretaries must test each alternative is in fact resolved by the statute itself. When we look at Section 8(a)(9), which is on the same page, we notice a reporting requirement which requires the Secretary of Energy in consultation with the Secretary of the Interior to report annually to Congress, in the words of the statute, "the reason why a particular bidding system has not been or will not be utilized," suggesting obviously that that may be the case and that the Secretaries are entitled to come to that conclusion. Congress may look again at their reasons and determine that they're not satisfactory and amend the statute further.

There is a similar provision which appears on the last page of the brief, another report which again requires the Secretary of the Interior this time to explain the reasons why a particular bidding system has not been utilized.

QUESTION: I gather your reliance on 9(D) suggests that if we accept it, that's the end of the case, isn't it?

MR. CLAIBORNE: I would say so, Mr. Justice Brennan.

In our view the text is perfectly clear. It resolves any ambiguity there may be in the legislative

history. What it seems to come to is this: that some members of the Congress were probably persuaded or at least half persuaded, perhaps by the respondents who were very active in the legislative process, that net profit share was a promising alternative. Others may have been persuaded that work commitment was a promising alternative. Others preferred a different formula. Some members may have been in favor of compelling the Secretary to adopt their pet system, though surprisingly there is no one who unambiguously says so during the legislative debates. Many were in favor of widening the options but leaving the Secretaries free to make their own decision.

Not unusually, these extreme views were either compromised or merged in a wider consensus, a middle position which is reflected in the enacted statute; that is, that some experimentation was indeed mandated, short of a very strong finding by the Secretaries that that would not be in the public interest. But which new alternatives should be tested for those experiments was a matter left to the administrators of the program.

Now, that's hardly a surprising conclusion. The advantages and disadvantages of each bidding system are not easily appraised by laymen or by lawyers or by judges. When one reads the joint appendix in this case, it seems more addressed to a specialized tribunal of experts than it does

an ordinary court of law.

Economists on both sides have exhausted themselves in arguing the merits and demerits of each system. Congress itself was reluctant to resolve that technical debate. Much less, as it seems to us, did Congress invite the courts to resolve it.

Congress has monitored this program. There have been at least three legislative oversight hearings since the program began. The Secretary has fully advised the Congress of his actions. The Congress so far has been content to leave well enough alone. In our view the Court of Appeal ought not have interfered.

QUESTION: How often are the reports required? At the end of each fiscal year, Mr. Claiborne?

MR. CLAIBORNE: At the end of each fiscal year. Several reports.

QUESTION: And do they go directly to committees or do they go generally to the Congress?

MR. CLAIBORNE: I think they're addressed to the Speaker of the House and the President of the Senate, but they no doubt are referred to committees.

If I may reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Silard.

ORAL ARGUMENT OF JOHN SILARD, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SILARD: Mr. Chief Justice, and may it please the Court:

I'm glad the Government now concedes that the general section giving discretion to the Secretary in the matter of choosing which system to use, which he read, is not going to be applicable for two more years, because we are now in the five-year period where it is Section 8(a)(5)(B) which controls, not the general discussion.

When this full and fair experimentation required by this section is completed after five years, the Secretary in his informed discretion will be able to choose which systems to use where. But the point is that in Section 8(a)(5)(B) in each of the five years in which we are now, the Secretary was commanded to use these systems; it says, "The systems herein shall be applied." Now, I'm not a zealot for plain meaning, but it says, "The systems shall be applied," and it doesn't say some of them, or one of them, or two of them.

So I start with the language of the statute, and I insist that it does not at all clearly repel the contention which is before this Court, which is essentially this --

QUESTION: Well, Mr. Silard, what do you do with 9(D)?

MR. SILARD: I will come to it in a moment, Your

Honor. That's an annual provision. It doesn't imply --

QUESTION: No, but doesn't this have some interconnection with 5(B)?

MR. SILARD: It does, but I think that's an annual -- there's no implication there that the Secretary can cast out completely for the whole five-year period not only one system but all three of the nonbonus systems.

QUESTION: Well, it does say, though, "if applicable, the reason why a particular bidding system has not been or will not be utilized." There's no suggestion that there's any exception for those within the five years.

MR. SILARD: The reporting of that on an annual basis is the one best inference the Government has, but I think the material I'm going to give you will show you to be erroneous.

There are eight separate times in the legislative history where three times the Senate, three times the House, and twice the conference committee said these systems shall be used, which is consonant with the language "will be used." I'm going to touch on them very briefly, because they are in our opinion dispositive, before we get to the purpose of the statute which is being totally frustrated here by the use of the systems that are least likely to advance competition and revenues.

First of all, the Senate committee said -- and

this is on page 15 in our brief -- that the bill "authorizes" --

QUESTION: What page did you say, Mr. Silard?

MR. SILARD: Page 15.

QUESTION: Thank you.

MR. SILARD: The bill "authorizes new leasing systems and requires their use on an experimental basis." Later on in the same page it says that "In order to assure that these alternatives will be used," -- assure that they will be used -- the parameters are placed in the statute.

On page 16 the committee concludes again with respect to those parameters that these limitations are included to assure that the new leasing systems would be tried.

So the Senate was perfectly clear, but the House --

QUESTION: Mr. Silard, that's just as clear as the statute in the sense that the words "the bidding systems" as you read them mean all of the bidding systems or each of the bidding systems.

MR. SILARD: Right. Well, we come --

QUESTION: You do in effect say "the bidding systems" means all of them.

MR. SILARD: Well, it's clear at least it includes some of the nonbonus systems. That becomes clear from the next three citations.

QUESTION: But just those that you've read so far in the statutory language doesn't distinguish between bonus and nonbonus.

MR. SILARD: Perhaps it implies not all, but now take a look at what --

QUESTION: Well, what is your view? Is it all or less than all?

MR. SILARD: Well, I would say the fairest reading is it's all, but the case doesn't turn on that. The case turns on this issue: can he totally reject the nonbonus alternatives? And that's what it makes clear.

QUESTION: Well, do you read the statute as requiring that all of them be used?

MR. SILARD: I have two arguments. One, I think yes.

QUESTION: Well, I'm just interested in your position.

MR. SILARD: Yes. I would say initially yes, but if no, as an alternative at least some of the nonbonus systems have to be used because the committees expressly said so, if I may read the citation, Your Honor, addressing this.

On page 18, "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."

And by that they meant that he had to use some of the non-cash bonus systems, because two paragraphs later, still on page 18, they say by random selection "of those areas to be offered under a bonus bid system and those which would be offered under a nonbonus bid system," the purpose would be advanced. And they finish up again saying this is a "mandating use of new systems, to insure they are tested and studied."

I want to make an apology. On page 19 I forgot to give a very important additional reference from the Conference Report. There are so many of these that it dropped out, although it was in my opposition to cert.

On page 92 of the Conference Report under the heading "Mandate on Use of Bidding Systems," the Conference Report says "Bidding systems other than bonus bidding are to be utilized." That's the language. And then it goes on --

QUESTION: Of course, then you have to agree on what bonus bidding means in that particular sentence.

MR. SILARD: Well, that's clear from the rest of the text on page 19, Your Honor, if you will look at it. Here's what they say. In the same paragraph the Conference Committee says this -- and I will rest my case on this conference extract on the legislative history, if nothing else. It says the following: "Although there is no

requirement for random selection" -- this is page 19 of our brief -- "the Secretary, in setting forth systems for use ...shall seek to secure a fair selection of different methods on different tracts. The purpose of such a selection is to assure that adequate information is obtained as to relative advantages and disadvantages of the various bidding systems, including the front-end bonus bid systems."

Now, the way the Government reads this, Congress might just as well have put the word "only" in here, including only the front-end bonus bid systems, because that's how they are reading this statute. And yet to insert the word "only" including the front-end bonus bid systems is to invert the meaning of this completely. The very point that Congress is making and the House committee was making was we want to compare the benefits of the nonbonus bidding systems where this big cash barrier which has prevented competition and returns to the United States for 25 years has become the problem. Let's see how those work which continued to use that in some fashion, and compare them to those that don't use that in any fashion.

That was the whole point, and it's been totally destroyed by the reluctance of the Secretary.

QUESTION: Mr. Silard, I want to be sure about your position. Did I understand you to say that you rest your entire case on the selection on page 19 of your brief?

MR. SILARD: No. I rest my entire reading of the legislative references on the mandate to experiment on this. My entire case, Your Honor, rests on a completely different proposition which was invoked against this very agency this year earlier in this Court's decision written by Powell.

This Court has never consciously construed a statute in a way as it's being asked to be construed by the Government here which totally frustrates its central purpose. That frustration of its central purpose is clear.

On page 16 of our brief and on page 17 of our brief and on page 15 we quote the central purpose from the legislative reports. The Senate said the new systems are designed to reduce the front-end cash bonus --

QUESTION: Where are you reading, Mr. Silard?

MR. SILARD: Middle of page 15.

The Senate report said that the experiment is designed to reduce the front-end cash bonus and increase the Government's return on actual production.

The House, on page 17, said almost exactly the same thing: "To increase competition for offshore leases and secure higher returns to the public Treasury," the section has been amended, et cetera.

So the whole point of the experiment was can we use systems where there will be more competition.

Now, there are five GAO reports that are in the Appendix to our brief, all issued between '73 and '78.

QUESTION: Now, the language you just relied upon is followed by language, "has been amended to allow," "to allow the Secretary." Does that mean to compel the Secretary?

MR. SILARD: Well, the following sentence says, "The Secretary is required to choose the new bidding system."

So I don't think the language is the answer. The answer is the purpose of the statute is controlling here.

QUESTION: But this is legislative history, not statutory language, as I understand it.

MR. SILARD: I'm saying that the purpose of the Congress has never been clearer than in these amendments. Over and over again the reports say that front-end cash bonus prevents adequate competition. The five GAO reports which are in the record and which are cited by the Congressional committees all said we have too few bids under these cash bonuses -- we have like two and three bids per tract over the last 25 years -- to know that we're getting a fair return.

No one knows how much this gas and oil is worth; so unless we have active competition for the bids, we have no assurance at all the government is getting anything like their fair return.

That was the central purpose here: more bidding

by our system which will guarantee better return if it's a cash bonus system, or better returns through high royalties and profit shares such as California gets if we use that other system.

Now, it's totally frustrated by what's happened. Appendix A to our brief shows that in the last three years the exclusive use of variance of bonus bidding has produced no advance whatever in the competition and revenue objectives of the statute.

But you need not take it from me. I have lodged with the Clerk of this Court the answer to three Congressional questions given by the Secretary three weeks ago. And in his answers to Jones and Hubbard question 7 -- those are Congressmen -- and Lent and Forsythe question 14, and his answer to Lent and Forsythe question 15, the Secretary three times says the new systems we tried are a failure. They have not promoted competition. There is no reduction of the bonuses. We've had no gain at all.

So I think a more candid answer that the Solictor General may have made is that the Secretary now says we have gotten nowhere, which is also clear from Appendix A, over the last three years by using the bonus bidding varieties. And that's obvious.

The whole problem that Congress was addressing was these big bonuses prevent an adequate number of bidders, and

with so few bids we don't know that we're getting a market in which we're getting a fair return.

When you continue to reject the nonbonus three options that Congress specified and use only the bonus options Congress specified, you have debilitated yourself from the fair experiment which was intended to compare one system against the other. You get no results, as the Secretary now concedes, you get no gain whatever, and you won't use a system which California has used for 30 years with good effect and seems to do exactly what Congress wanted to do, and it was one of the systems in here.

Now --

QUESTION: Do you plan to rest your standing contentions as to Warth and Simon v. Eastern Kentucky on your brief, as did the Government?

MR. SILARD: Yes, Your Honor, except I wish to say this. If there is one issue that is not before you with any problem in it it's the standing issue. Congress said the principal problem with what we're doing now is it doesn't get enough bids and enough revenue. Let's try new systems, must try new systems, in our view, which give a promise of more bids, more competition and more revenue.

Those are the goals I just read from the statute. No question about it.

Now, in the frustration of that goal by the

refusal to test the more promising systems that could do this job, California is losing millions of dollars. California is a participant in federal revenues and in leases right off its shore that take place almost every year. There was one a month after the suit was filed, there was one this summer, another one scheduled for next year. And when the five-year experimental period ends, and this is supposed to give us information down the road ahead, they're going to be lots more leases in which California under this statute has a legal interest in the federal revenues. It's an involuntary partner, in effect, in drainage situations. It owns one side of the drainage pool of gas and oil which is pumped out on the federal land by the federal lessee. So the statute says you, Mr. California, will get your share by a division of these revenues.

Now, how could California have a more intimate stake in compliance with this statute which sought to increase revenues. The Solicitor General said the first purpose of the statute, he said to you this morning, is to increase revenues by these experiments. So how could California not have an intimate stake in carrying out that purpose through good faith experimentation?

It clearly has. It stands to gain millions of dollars with the federal government on every sale, billons perhaps, if the government complies with what Congress

intended. In other words --

QUESTION: Mr. Silard, may I ask you --

MR. SILARD: May I just finish the thought?

The Congressional objective, Your Honor, the principle Congressional objective to increase leasing revenues is one in which California as a co-partner has a most obvious stake which gives it standing.

QUESTION: It isn't clear, is it, whether even if California were to win here that the Secretary would be likely to use the bidding systems that California prefers on the pools that California shares with the federal government? In other words, since the Secretary would still be free to have other experiments, how is it clear that California in that way would have standing?

MR. SILARD: That argument, Your Honor, is essentially a refusal to accept the premise on which Congress enacted the statute. The Congress said let's test these systems to find the one that will give us the best revenue, the assumption being that we have good faith experimentation that gives us the answer to that; a sane Secretary of the Interior not dominated by oil company considerations will use the systems that maximize revenue. That's the whole point.

So I think to say that an ornery Secretary could do this experimentation, discover, as California has

discovered, that profit-sharing gets much better results than the cash bonus system, but then just quixotically say well, in the next 30 years I don't like that system; I'm not going to use it.

I cannot say that it is impossible that if this experiment were conducted and succeeded a Secretary might still kick it in the garbage can. That might be an interesting next litigation. But the premise on which the Government is arguing is essentially a recitation of the whole premise for the experimental program, that we have Secretaries who are intelligent men who will use a successful experiment and then use the best of the systems that yield the best revenue.

So Congress is assuming that the function of this five-year experimentation is to give the Secretary an informed discretion at the end of the five years to use the best system. And I think we have to assume a very high likelihood that if he does what Congress mandated and clearly wanted to do here, and the California system proves as effective in use here as it does for California, that in all likelihood he will then use that system then, perhaps not on every sale but on a substantial number of sales.

I might say one other thing, Your Honor. There is not just injury here; there is insult. This is California's own oil which is being pumped out by a federal lessee.

California is helpless here. It would love to have the federal government use the more lucrative, more beneficial system it's been using for 40 years on this oil.

QUESTION: Mr. Silard, may I interrupt you right there? When was the last time California engaged in co-leasing?

MR. SILARD: This co-leasing, Your Honor, took place this summer, and two years ago, and next year. It's an involuntary co-leasing. Under the statute where there's a drainage situation and the federal government owns one side of the pool on one side of the three-mile line and California on the other, California must accept a portion of the federal lease revenues as its share for its own oil which is being pumped out.

Now, if it cannot agree on how much it should get, then the federal district court is to decide what the fair share is. But the point is the pie which is being split could be, as Congress anticipated, a much better pie, not only for the federal government and the state of California, if, as Congress anticipated, we would use the systems which give promise of more competition and more returns.

QUESTION: Did I understand Mr. Claiborne to say that California had not participated since 1968?

MR. SILARD: No. He said California has not gone heavily into leasing its own new leases. It's pumping oil

now from leases in '48, '50 and '68.

QUESTION: But it has participated in revenues as a co-leaser in the past.

MR. SILARD: Oh, under this federal statute it has a legal interest in the federal revenues because it's an involuntary participant and shares in them. If that's not a legal interest that entitles it to say Mr. Secretary, you must carry through the experimentation which Congress hoped would increase these revenues both for the federal government and for us, I don't know what it is. And I may say it's not small potatoes.

QUESTION: May I interrupt just to --

MR. SILARD: There's a billion dollars on deposit for California from just these last two drainage sales. I found that in a collection of responses that the Solictor General lodged with the Clerk of this Court made three weeks ago by the Secretary to the Congress.

QUESTION: In these situations where a joint pool, California and the federal pool, is leased, does California participate in the division of the front-end bonus?

MR. SILARD: Whatever the revenues are, whatever comes in, California divides.

QUESTION: At the time the bonus is paid, say the drilling is unsuccessful and they don't produce anything, does California still get a share of this?

MR. SILARD: Certainly, but that's exactly the kind of penny-wise, pound-foolish policy that Congress found that after 25 years was minimizing real federal revenues, because when there's a big discovery and the federal government gets 12 percent or 16 percent of the revenue, whereas California, for instance, gets 48 percent net share of the revenue, it's just a terrible deal.

Of course, every administration wants that cash up front to balance this year's or last year's budget. I understand why administration after administration has refused to do what Congress wants, made very clear. Let's get the total revenue in here, even if it's down the line; then it's a fair share. They want the cash up front, some other administration they don't care much about. But Congress was --

QUESTION: If it's so clear, why do you suppose no disappointed bidders have joined your litigation?

MR. SILARD: I suppose, one, because they have confidence that our litigation would succeed without their presence.

(Laughter.)

There's a certain immodesty in that, but I will say that --

(Laughter.)

I will say that a unanimous Court of Appeals found

what I am arguing, that the central purpose of this statute is being frustrated by the refusal to use any of the three nonbonus bid systems.

QUESTION: It is surprising that there are no oil companies that share your view.

MR. SILARD: Oh, there are. We've had letters from oil companies.

QUESTION: No. I mean as far as the record discloses.

MR. SILARD: Well, there are oil companies, certainly gas companies. A lot of them testified in the Congressional hearings that this front-end bonus is the whole problem, and Congress accepted it; that if we had a looser system -- and by the way, the gas companies do get into the bidding when they're not precluded by the cash bonus. Alaska tried profit share bidding only last year, and the gas companies were there and there were good results in Alaska. So this is a system that can work.

QUESTION: Does the record tell us the relative front-end cost of, a) the bonus -- I don't know how big these bonuses -- say you had a million dollar bonus. What would the front-end cost in exploration and drilling be to find out whether there is oil really there?

MR. SILARD: No one --

QUESTION: Do we know the relative significance of

the two factors?

MR. SILARD: On the drilling costs and exploration costs no one has factors, but we do have in the record I think what is partially the answer to your question, Mr. Justice Stevens.

What happened was that in the sixties few leases were let, prices were stable, and the property that was being let was relatively known or there was a pretty good hunch as to what was there. The result was that the Government realized about 35 percent -- this is all in the record -- 35 percent net of the gas and oil that was discovered with a combination of the cash bonus and the 16 percent royalty. In other words, the 16 percent royalty represented about half of the income and the cash bonus about the other half.

What happened since is in the seventies we started going into less known properties, we started selling a lot more of it, and the result was that the competition level went down further; but the really important result was that the cash bonuses, while they kept going up with inflation and all, started losing significance vis-a-vis the net result in a radical way. So that as of the last three years in the seventies, the cash bonus was adding only 6 percent to the 16 percent royalty. We were now getting -- the federal government has been getting 22 percent --

QUESTION: Mr. Silard, I don't think you really get the thrust of my question. My question goes to the relative importance of the cash bonus as opposed to other costs of drilling a well. For example, if it costs a million dollars to get the lease and a hundred billion dollars to drill the well, the million dollar front-end money really wouldn't be that significant.

MR. SILARD: No. It may vary greatly depending upon the --

QUESTION: But the record doesn't tell us is really what I'm asking.

MR. SILARD: Not only doesn't tell us, it would vary greatly with the tract depending on difficulty, number of drills, or results.

But what Congress was persuaded of, and this is the core of the Congressional purpose here, Congress was persuaded that the cash bonus -- said so over and over again -- the upfront cash bonus is anticompetitive. Senator Jackson said so, the House chairman said so. It's preventing us from getting an adequate competition level; it's squeezing out all but the biggest bidders in the acquisition of the properties; and worst of all it leaves us with no assurance that the government's getting a fair share.

Here are high stake gamblers gambling for unknown property values, and only two or three of them get into the

gamble, and who knows what the government really should get.

QUESTION: But, Mr. Silard, doesn't that go back to the standing question, that there are so many independent acts following between the bidding and the production that you, like in Simon, you simply can't trace accurately one to the other?

MR. SILARD: No, Your Honor, I hope not for this reason. The issue here isn't what the oil companies are doing or not doing. The issue is this: the Secretary was commanded to experiment with a system that would maximize revenue, and he's not doing so. They concede that was the purpose.

The state of California has an intimate legal interest in the success of that mandated experiment, because its revenues, if the government now uses a different leasing system which does show a better result -- for instance, California's own system -- its stake is in a vast increase in its share of the federal revenues by the use of the new system. That doesn't depend on what oil companies do.

The hundred dollar question is simply this: when you have a substance of almost unknown but potentially vast riches, gas and oil under the ocean, isn't it sensible to relate the government's and California's stake in what comes out of there fairly directly to the gas and oil that's discovered, instead of putting everything in an upfront,

blind man's gamble upfront where very few high bidders, high rollers can play the game, very few play the game, and the net result is a devastating loss in competition and in revenues.

I would like to conclude on this score, Your Honor.

QUESTION: Mr. Silard, I take it that absent the legislative history to which you have referred that you would agree that the statute on its face doesn't require the Secretary to use each one of those alternatives.

MR. SILARD: Not at all, Your Honor. I would argue that the words "shall be applied" are words of common English meaning.

QUESTION: So you're position is that the statute on its face requires.

MR. SILARD: Absolutely. The words "shall be applied" should be read, but we don't have to --

QUESTION: And that the legislative history doesn't relieve the Secretary from any duty to use all of them.

MR. SILARD: Well, certainly the legislative history doesn't relieve him of the duty to reject all the nonbonus ones because that was the history --

QUESTION: Now, just stick to my question.

MR. SILARD: Yes, I would say first the legislative history says this is a five-year limited

experiment. There are lots of leases each year. You've got to make some test of each of these six systems.

QUESTION: So you're saying your front-end argument is --

MR. SILARD: Right. If I lose -- I don't have to win --

QUESTION: The statute on its face means use every one of them; the legislative history means use every one of them.

MR. SILARD: Yes. Alternatively. The legislative history makes clear that at the very least he must use some of the nonbonus systems, because otherwise the whole purpose they stated, to compare one against the other, can't be met.

QUESTION: Well, I know, but I'm not sure you can have it both ways. Suppose the statute doesn't mean on its face that the Secretary has to use each one of them.

MR. SILARD: Yes, I'm willing to concede that it doesn't mean that, but it would still mean that since the ultimate purpose was to test the systems that can promote competition and revenue, and it is even conceded by the Secretary that all these variants of bonus bidding haven't achieved that --

QUESTION: So you would say that the statute must be construed or applied just as though it said on its face "but remember, Mr. Secretary, you must use some of the

non-cash bonus systems."

MR. SILARD: Well, if I were Your Honor addressed by this question, I would find it unnecessary to address the question whether the Secretary in the five years must use all six systems, because it's enough -- and that's what our complaint is about here, Your Honor -- that he won't use any of the non-bonus bidding systems. And this legislative history and the purpose of the statute are both so clear that against that kind of a result, this Court -- I won't read it, partly because I've lost it and partly because my eyesight is bad -- but the most wonderful sentence from Judge Learned Hand which was quoted against this very agency by this Court in its decision earlier this year bears recollection.

I think I did find it and my eyeglasses notwithstanding, I will read just one sentence that Justice Powell quoted against this department in Watt against Alaska this year when he said, "It must be remembered that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

Now, I think the object of this statute is crystal clear from the history: test the systems that will give us more competition and more revenue. The frustration of that object is clear from Appendix A to our brief and from the

three quotations which I've left with the Clerk to be lodged with the Court, make clear that it's just been knocked into the wastebasket and we're getting no progress.

QUESTION: Do you suggest that Congress is unaware of all these problems?

MR. SILARD: No, but Congress has been also watching this lawsuit and knew as of last fall that the Court of Appeals had ruled that we are right, and I think hopes, as I hope, that this Court will agree with the Court of Appeals that the frustration of the underlying purpose of the statute is so clear here, never mind the specific history which I've read, that the Secretary should be required in the remaining two years -- and this is an emergent matter -- to make some, some experimental resort to some of the nonbonus systems. That's the only way to carry through the underlying objective of this statute, because the ridiculous situation is that Congress identified the cash bonus as a problem, said you shall experiment with three cash bonus and three non-cash bonus systems. The Secretary in an ornery fashion insists on trying those systems least likely to solve the problem, because they still use the cash bonus, and all of a sudden suggests that the other one is somehow a terrible system that cannot be used.

The one rationale he gives for not using the

California system which has been so successful in effect is that there may be underproduction. But in Section 8(a)(3) Congress already addressed that very point, and on page 35 of our brief we quote the legislative history where it says to solve the problem of possible underproduction on the very high profit share bids as the lease starts yielding less oil and gas, the Secretary can reduce or remove the profit share completely. So Congress actually already addressed the complaint the Secretary is making about using or testing the California leasing system.

We live in a world where there are theories and realities. The reality is that almost the biggest state of this union for 30 years has had successful resort to the profit share system, which is the one Congress most hoped would turn the trick for the federal government, which is the one that the Secretary absolutely refuses to test, and by so doing, in our opinion, if we may submit, it is frustrating not only the great public policy which was achieved at great agony in the Congress after two successive efforts and after 25 years of patience, after 25 years Congress said all this discretion has to end; we're going to test for five years in a meaningful way to compare this system with that system. Well, the Secretary is comparing apples with apples, whereas Congress said compare the apples with the oranges.

And it's not surprising but it's sad, and both because of the public interest and the consumer interest and California's direct financial stake in this controversy, we suggest, Your Honors, that the Court's decision be that the law should be affirmed.

And unless the Court has any further questions of me, I think I will probably rest on Judge Learned Hand and hope that this Court will give a reading to this statute which gives vitality to what Congress wanted and made clear, rather than one which defeats the obvious intent of the Congress to give a new lice on leafing -- a new life to leasing -- that pays me back for trying puns at the end of an argument -- but it was to be new life to leasing that was to be given, and it is being killed by the Secretary's absolute refusal to test the nonbonus bidding system.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Claiborne?

ORAL ARGUMENT BY LOUIS F. CLAIBORNE, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. CLAIBORNE: Mr. Chief Justice, in answer to Justice Stevens' question concerning the relative importance of the bonus as compared to the development cost, I draw the Court's attention to one of the responses filed, lodged with the Court. It's a document which represents the responses

of Secretary Watt to questions asked at the most recent oversight hearings in June. That response is dated September 14 of this year. And particularly on page 38 and on page 39 of that document there are two answers to questions by Congressman Lowry specifically addressed to the deterrent effect of the cash bonus as compared to the deterrent effect of the development cost. The Secretary there recites that the development cost can exceed one billion dollars; no bonus has ever reached anywhere near that amount.

Turning to the question that was focused on by Justice White, if our opponents concede that the statute does not require testing each and every one of the various alternatives -- and there are at least ten of them -- then there is no basis in the statute to prefer one over another. Congress treated these alternative bonus systems as true alternatives, and it's no good saying that Congress really meant that net profit was the only true alternative. Congress simply did not view it that way.

One last thought. The talk of experimenting is a little lighthearted when one appreciates that it isn't an experiment which is subject to repeal. Once lease is granted, if it turns into an unprofitable operation either in terms of the revenues engendered or perhaps more important in terms of the oil extracted -- and that is one

of the prime legislative objectives -- there is no repeal. The Secretary has made a very serious mistake which he cannot undo. It would be irresponsible.

QUESTION: What reason has the Secretary given Congress for not using non-cash bonus systems?

MR. CLAIBORNE: He has, if I may read his most recent answer to Secretary Lowry, the Congressman refers to an affidavit which is filed here in which the Secretary indicates that he has no intention for the present of using the net profit system. And the Secretary responds as follows: "We do not believe that the" --

QUESTION: Is this in the record?

MR. CLAIBORNE: This is lodged, the complete document is lodged. My learned friend lodged a portion of it. In turn I thought the Court should have the benefit of the entire document, and these are now lodged with the Clerk of the Court. It's a document only dated September 14th and therefore couldn't be in the record.

The Secretary first makes a legal argument to the effect that he's not compelled to do so, but then he goes on to say, "We do not believe the variable net profit share bidding or work commitment bidding warrant testing because of the strong likelihood that such systems would severely damage our efforts to promote exploration and development of the Outer Continental Shelf oil and gas that is both

expeditious and efficient. A substantial body of analysis," if I may interpolate, indicating that he has considered and researched the matter -- "A substantial body of analysis of bidding system performance has been developed over the past five years. It can now be used to identify the effects of such systems as profit share bidding. Unfortunately, the effects of profit share bidding that we have identified include dampening of exploration and ineffecient development and production. The effect of work commitment in this analysis is substantial overinvestment in exploration. In addition, tests of other systems" --

QUESTION: Well, Mr. Claiborne, there are formal reports required by the Secretary to Congress on the effects of the experiments?

MR. CLAIBORNE: There are indeed.

QUESTION: Has he explained in those reports why he has not used profit sharing?

MR. CLAIBORNE: The Secretary of Energy has filed his annual reports, and indeed in his recently promulgated regulations, the preambles to which are reproduced in the back of our brief, he, the Secretary of Energy, indicates his reservations about these systems.

The Secretary of the Interior I regret to say is somewhat delinquent in filing his report. That report has been prepared. It is now under review and will shortly be

filed with the Congress.

QUESTION: Well, was that due the first of October, is that it?

MR. CLAIBORNE: I think it was. No. Well, I think it's substantially overdue.

QUESTION: The statute speaks in terms of reports each fiscal year.

MR. CLAIBORNE: Six months after the end of the fiscal year, I think it is.

QUESTION: I see.

MR. CLAIBORNE: And I think therefore this one is six months out of date.

QUESTION: I see.

QUESTION: Mr. Claiborne, do you suggest we do what you have done and ignore this last entry we've had, this late entry which appears to be letters from Mr. Watt, that Mr. Silard just gave us a minute ago?

MR. CLAIBORNE: No, Mr. Justice. I suggest that you do, as I've indicated, concentrate on not the excerpts which my friend opposite has submitted, but on those portions of that same document to which I've referred the Court, specifically pages 38 and 39, which do contain the Secretary's most current evaluation of the reason why in his view it would be irresponsible to --

QUESTION: Well, when we start with a complaint of

60 some pages and we keep getting stuff entered into the record until this morning, we've got a real problem, haven't we?

MR. CLAIBORNE: Well, we're only trying to indicate to the Court that the Congress is fully abreast of the Secretary's action, and in our submission it is for the Congress if it thinks there has been a default to take corrective action. It is wholly inappropriate in our view to ask a court to arbitrate this very technical debate between experts, I submit.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JAMES G. WATT, SECRETARY OF THE INTERIOR, et al., Vs. ENERY ACTION ~~EDUCATION FOUNDATION, et al.~~

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BY Sharon Connelly