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LEGAL AND POLICY IMPLICATIONS OF *PACIFIC LEGAL FOUNDATION v. JAMES WATT*

Marc Zafferano

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I. INTRODUCTION

A. *Approach*

This article attempts to weave together two themes: the policy significance of James Watt's continuing war with the environmentalists, and the legal ammunition which both sides are using in the battles. Since President Reagan appointed Watt as Secretary of the Interior, Watt has been surrounded by a storm of controversy generated by both liberals and conservatives. Many liberals think he could permanently sacrifice environmental values for the sake of increasing energy and mineral production. On the other hand, some conservatives find that

his tactics do not necessarily advance the interests of their political party or some of their important constituents. Both sides, ever vigilant, have armed themselves with a veritable stockpile of legal weapons, ready to pounce on the enemy at the first sign of weakness. Some of these weapons include the old standbys of the environmental law arena—standing and other case or controversy challenges, those tried and tested theories which signal only the prelude to the real war. But the strategists are also clearing the cobwebs from some older theories, which had seemingly lost their applicability and vitality in the modern political arena, and are deploying them in a different type of environmental litigation.

Perhaps as a result of the recent decision in *Pacific Legal Foundation (PLF) v. James Watt*¹, the focus of future environmental disputes will change. Traditionally, opponents of environmentally-related administrative decisions would concentrate on defects in the Environmental Impact Statement's (EIS) findings and conclusions. Or, they would scrutinize the EIS process to insure that the agency had followed all of the procedural rules. In contrast, the court in *PLF v. Watt* went beyond the EIS by defining the broader statutory and constitutional responsibilities which the co-equal branches of the federal government ought to assume in balancing environmental values and increased production of material commodities.

The remainder of this article will examine the most important arguments advanced by the parties in their briefs and discuss the federal district court's approach to each. The article concludes by suggesting possible links between the legal theories used in the suit, the policy alternatives they imply, and the economic and political realities which ultimately underlie our resource decisions.

B. *Statutory and Factual Background*

Between 1970 and June 6, 1981, various individuals (including members and supporters of PLF) filed over 340 noncompetitive oil and gas lease applications with the Bureau of Land Management (BLM). These lease applications involved the Bob Marshall, Great Bear, and Scapegoat wilderness areas in Montana, which were created by the National Wilderness Act of 1964.² The Act gives the Secretary of the Interior discretion to allow mineral leasing and exploration of these wilderness areas until midnight December 31, 1983, after which all exploration and new leasing will cease.³ People who file noncompetitive

1. *Pacific Legal Foundation v. James Watt*, 529 F. Supp. 982 (D. Mont. 1981). PLF is a conservative public interest law firm in Sacramento, Calif.

2. National Wilderness Act of 1964, 16 U.S.C. § 1131 *et. seq.* (1976).

3. *Id.*, § 4(d)(3), 16 U.S.C. 1133(d)(3) (1976).

lease applications are generally speculators who hope that future geologic evidence will indicate large oil and gas reserves in the lease area, thus creating an enhanced market for the leases. A few intend to explore the areas with their own equipment. Preliminary studies indicate that the three wilderness areas in question could indeed harbor some oil and gas reserves. As a result, more individuals than there were lease tracts filed applications, so the BLM held a "lottery", and qualified applicants were assigned a certain "priority" based on the number of applications they had filed previously. Once the Secretary of the Interior actually decides to grant the leases (which he is authorized to do under § 4(d)(3) of the Wilderness Act), the Forest Service must either conduct an environmental assessment or file an environmental impact statement before any exploration begins.

Recently, Secretary Watt determined that oil and gas exploration leasing in the wilderness areas would be desirable, so the Forest Service started preparing an EIS on May 21, 1981.⁴ On the same day, the House Interior and Insular Affairs Committee, believing that the leasing decision was unsound policy, convened. Following a hearing,⁵ the Committee passed a resolution under § 204(e) of the Federal Land Policy and Management Act (FLPMA)⁶. This section provides that:

When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate notifies the Secretary, that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary, notwithstanding the provisions of subsection (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such withdrawal with the Committee on Interior and Insular Affairs of the Senate and the House of Representatives. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished [to] the committees within three months after filing such notice.

The Committee found that an emergency existed in the Bob Marshall, Scapegoat, and Great Bear wilderness areas, and ordered Watt to immediately withdraw under all laws pertaining to mineral leasing and all amendments thereto, "subject to valid existing rights." In effect, the

4. 46 Fed. Reg. 27735 (May 21, 1981).

5. The hearing consisted of a debate among the members of the Committee. No testimony or documentary evidence was presented to the Committee.

6. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(e) (1976).

Committee prevented Watt from exercising his discretionary authority under § 4(d)(3) of the Wilderness Act to issue leases in these wilderness areas.

On June 1, 1981, Watt decided to acquiesce to the Committee, and issued Public Land Order #5952, which withdrew all the areas in question for the period indicated by the Committee. In a letter of transmittal which accompanied the order, Watt told Representative Morris Udall, the Committee's chairperson, that he questioned the statutory authority of the Committee to direct a withdrawal and the constitutionality of the Committee's action. Nevertheless, "in the interest of maintaining harmony between Congress and the Executive", he issued the order "in keeping with the directive of the House Interior and Insular Affairs Committee."

Thus, the stage was set for a classic confrontation between Secretary Watt, representing the Executive Branch's interest in executing the 1964 Wilderness Act, and the Committee, representing a Congressional attempt to use § 204(e) of FLPMA to curtail Watt's discretionary authority. The Committee had exposed an apparent conflict between two acts of Congress.

C. Parties in the Lawsuit

Watt's former law firm, the Mountain States Legal Foundation (MSLF) immediately seized upon a golden opportunity to tie all of its interests together in one lawsuit. Two days after Watt issued his order, the firm filed suit in Colorado District Court against James Watt, seeking an injunction of compel Watt to revoke his Public Land Order #5952 and to start issuing leases again in the wilderness areas. MSLF also sought a declaratory judgment that § 204(e) constituted an unlawful delegation of power to the Committee, that § 204(e) could not be used to limit the application of § 4(d)(3) of the Wilderness Act, and that the Committee's action and § 204(e) violated the separation of powers. MSLF saw the Committee's resolution under § 204(e) as Congress creating "a fifth branch of government by empowering a committee composed of its own members to administer a statute."⁷ What better way to support Watt's view of a free-market approach to mining and exploration than to base it on constitutional grounds? If the Court agreed with MSLF, the Democratic House's power over Reagan's Republican administrators would decrease; Congress would then be forced to accept as a political liability its prior broad delegations of authority to the Executive Branch. A single Committee could certainly

7. See, MSLF v. James Watt, Amended Complaint for Injunctive and Declaratory Relief, p. 1.

not revoke or modify § 4(d)(3) of the Wilderness Act, which the whole Congress had enacted in 1964.

The next day, another conservative public interest law firm, Pacific Legal Foundation (PLF), in Sacramento, California, filed suit against Watt. To MSLF's barrage, PLF added a new theory that Watt's action in issuing the land order was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act.⁸ PLF's strategy, by focusing on Watt's action instead of the Committee's action, rendered PLF's complaint immune to a possible motion to strike those portions which did not attack the named defendant, Watt. Both PLF and MSLF included as plaintiffs individuals who were members or supporters of their organizations and who also had filed these applications for the wilderness areas. To support their organizational standing as well as their members' standing, both PLF and MSLF alleged that the Fifth Amendment Due process rights of lease applicants had been violated because they had no notice or opportunity to be heard before valuable rights in the applications were extinguished by withdrawal of the wilderness areas.

Eventually, the MSLF suit was transferred to Montana and consolidated with the PLF action. John Block, the Secretary of the Agriculture Department, was added as a defendant, since the Wilderness Act makes him responsible for the conditions under which leasing takes place in wilderness areas.⁹ The Court invited the Senate and the House Committee to participate as *amici* and allowed the Sierra Club, the Bob Marshall Alliance, and the Wilderness Society to intervene as defendants. PLF and Watt then stipulated that it was "in the highest national interest to resolve the legal issues . . . as soon as possible", and "that there are no genuine issues of material fact in dispute and that the pivotal issues involved in this case are issues of law subject to resolution on summary judgment . . ." The Court held that 1) the Committee's resolution, by specifying the scope (all of the three wilderness areas) and duration (until January 1, 1984) of the withdrawal, indeed conflicted with § 4(d)(3) of the Wilderness Act; 2) Section 204(e) is constitutional as long as it does not authorize the Committee to specify the scope and duration of the withdrawal; and 3) Watt alone has discretion to set the scope and duration of any § 204(e) withdrawal, and he can revoke, after a reasonable time, any such withdrawal order.

D. *Recent Developments*

The controversy surrounding the legal and policy issues involved

8. 5 U.S.C. § 700 *et. seq.* (1976).

9. 16 U.S.C. § 1133(d)(3) (1976).

in Watt's leasing decisions has not abated since the Court's decision. The legal issues are far from conclusively resolved. For example, the Court's construction of § 204(e) as not authorizing the Committee to order the scope and duration of the withdrawal supposedly eliminated the need to decide if § 204(e) violated the separation of powers doctrine by vesting executive power in a legislative body. But since both MSLF and the Attorney General (defending Watt in the suit) disagreed with the Court's interpretation of the section, Judge Jameson called the statutory interpretation issue a "close question" and continued, in dicta, to address the constitutional issues.¹⁰ He relied primarily on a recent 9th Circuit case, *Chadha v. Immigration and Naturalization Service (INS)*¹¹, which struck down § 244(c)(2) of the Immigration and Naturalization Act (INA) as violating the separation of powers. This section empowered one House of Congress to veto an INS administrative decision regarding whether an alien should be deported. This case is presently on *certiorari* to the United States Supreme Court¹². Another case, *Consumer Energy Council of America v. FERC*¹³, recently invalidated a legislative review provision concerning rules for natural gas pricing. Behind these two cases is a line of opinions dating from the 19th Century which deal (with varying degrees of specificity and logic) with the question of how far Congress can go in disapproving executive actions. The time has come for the Supreme Court to articulate a modern, generally applicable test which tells us when Congress can invalidate agency actions and when it cannot. In the meantime, we do not know if *PFL v. Watt* will be appealed, or how Supreme Court resolution of the separation of powers issues in *Chadha* would affect an appellate decision in *PLF v. Watt*.

Watt and Congress have done little to stabilize the resolution of the policy issues. On October 26, 1981, Senator Max Baucus introduced S. 1774 to amend § 4(d)(3) of the Wilderness Act¹⁴ by declaring that "[e]ffective May 21, 1981, the Bob Marshall, Scapegoat, and Great Bear wilderness areas in Montana are withdrawn from all forms of appropriation under the mining laws . . ." On November 19, 1981, Watt wrote a letter to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs regarding changes he had just approved "[w]hich affect the procedures for handling oil and gas lease applications on lands within the nation's 158 congressionally-designated wilderness areas." In short, Secretary

10. PLF, *supra* note 1 at 33.

11. 634 F.2d 408 (9th Cir. 1980).

12. *Cert. granted*, — U.S. — (U.S. No. 80-2170 *et. al.*, Oct. 5, 1981).

13. Nos. 80-2184 and 80-2312 (D.C. Cir. Jan. 29, 1982).

14. See text accompanying notes 2 and 3.

Watt instructed the "[a]ppropriate agencies within the Department of the Interior to conform their procedures and actions to the following policies:" 1) lease applications affecting lands in wilderness areas must be subjected to an environmental assessment or EIS before they can be processed; and 2) the Department of the Interior will provide at least 30-day written notice to Congress before taking any action to grant leases in wilderness areas."

The next day, the House Committee on Interior and Insular Affairs adopted a resolution which called upon the President and Secretaries of Interior and Agriculture to refrain from issuing any leases in wilderness areas until June 1, 1982, so the Committee could study and evaluate Watt's recent policy announcements. Watt agreed to comply with this request.

In fact, Watt went further by deciding on January 22, 1982 to "[p]ostpone the consideration of the issuance of any leases under the Mineral Leasing Act of 1920, in those designated wilderness areas until the end of the current session of Congress." Then, following the Court's holding that he could revoke any withdrawal order within a reasonable time, Watt on January 29, 1982 revoked his prior order #5952. Of course, even though the revocation returned the wilderness areas to leasing-susceptible status, Watt's decision to wait until the end of this Congressional session means no leasing will occur in the wilderness areas, at least until that time.

On February 21, 1982, Watt dealt the environmentalists a surprise counter-attack: on the nationally-televised "Meet the Press" broadcast, he stated that "[t]his week I will ask the Congress . . . to quickly adopt new legislation that would prohibit the drilling or mining in the wilderness till the end of the century." The bill, HR 5603, is reprinted and discussed in Appendix A. But in spite of the uncertainty surrounding both the legal and policy issues, the decision in *PLF v. Watt* may be significant because it acknowledges and addresses several important issues regarding how our public land resources should be managed.

II. THRESHOLD ARGUMENTS

Most environmental suits involve standing challenges and other case or controversy requirements. *PLF v. Watt* was no exception: both sides launched an initial attack to keep the number of parties in the suit to a minimum. In the end, the court allowed everyone to participate, and in doing so, set several important precedents.

A. *Standing*

Defendants first challenged plaintiff's standing to maintain the ac-

tion. The court had no trouble holding that *individual* lease applicants had standing. Individual standing was based on three alternative grounds: that public land order #5952 (1) deprived applicants of their due process right of notice and opportunity to be heard, (2) deprived them of their due process right to have their applications processed and decided by Watt, and (3) diminished the market value of their lease applications. Rejecting the first argument, the court found that neither FLPMA nor § 204(e) established a right to notice and opportunity to be heard. However, the court held that "case law" established a right to have lease applications properly processed. The court relied mainly on *Arnold v. Morton*: "A mere application for a lease vests no right in the applicant [citation omitted], except the right to have the application fairly considered under applicable statutory criteria."¹⁵ Since the plaintiffs alleged not that they had a vested property interest in their lease applications, but instead that Watt's withdrawal order had the effect of summarily rejecting them, plaintiffs had demonstrated "injury in fact".¹⁶ The court held that the right of lease applicants to have their applications fairly considered was within the "zone of interests" protected by the Mineral Leasing Act of 1920¹⁷ and the Mining and Minerals Policy Act of 1970.¹⁸ The court agreed that the relief requested by the plaintiffs would redress the injury.¹⁹ Finally, the court disposed of

15. 529 F.2d 1101, 1106 (9th Cir. 1976).

16. *See*, United States v. Scrap, 412 U.S. 669, 686 (1973). In fact, the BLM notified at least one individual plaintiff that her lease application had been "suspended" as a result of Watt's withdrawal order. *See*, PLF v. Watt, *supra*, at p. 990 n.13. The court also cited with approval Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976) for the proposition that a lease applicant did "have the right to avail himself of the application route in an effort to perfect an interest to the extent that this was not precluded by law or by some valid exercise of the agency's discretion." Therefore, when the court decided the individual standing issue, it must have tacitly decided either (1) that the operation of § 204(e) did not "preclude" plaintiff's simultaneous interest in "fair consideration", or (2) that Watt's withdrawal order was an invalid exercise of his discretion. PLF made the second argument in its brief, but the court never addressed it. *See* Part IV of this article. If the court based its standing holding on the first argument, it must have decided that a Committee finding of emergency to justify a withdrawal was not enough "fair consideration" of lease applications. It is unclear if this conclusion rests on the adequacy of factual support for the Committee's findings, something the court never discussed. Or, perhaps plaintiffs were denied "fair consideration" by Watt because the Committee usurped his discretion to set the scope and duration of the withdrawal. In any event, both of these conclusions, which logically follow from the court's standing analysis, address the merits of the case.

17. 30 U.S.C. § 226 (1976).

18. 30 U.S.C. § 21a (1976).

19. PLF v. Watt, *supra*, at p. 992. At the most basic level, MSLF and PLF assumed that if Watt could decide the lease applications' fate, he would grant them. In their view, the committee "took away" this decision from Watt. Plaintiffs may not have really cared if Watt "fairly considered" the leases, as long as he granted them. The relief requested was to give Watt the *opportunity* to fairly consider the applications, an opportunity the Committee had usurped.

the prudential considerations by noting that "the fact that other lease applicants were affected by public land order #5952 does not detract from the fact that plaintiffs present 'a specific instance of injury flowing directly from the statute's operation.' [citation omitted]"²⁰ Thus, plaintiffs' claims were not "generalized grievances" shared in substantially equal measure by all of a large class of citizens. As a result, the court did not reach the third basis for standing: the decrease in market value of the leases.

A second standing challenge was directed at MSLF and PLF as organizations. It is well settled that organizations have standing to represent their injured members if the members themselves have standing.²¹ Since the eight members of MSLF who held lease applications in the wilderness areas in question had standing, so did MSLF.

However, PLF is not such a membership organization. PLF contended that it had standing to sue on behalf of its "supporters" and organizational standing as well based on its own institutional injuries. The court rejected PLF's reliance on *Hunt v. Washington State Apple Advertising Commission*²² and *Legal Aid Society of Alameda County v. Brennan*²³ in holding that PLF and its "supporters" were not sufficiently like the organizations and individuals in those cases, and the court declined to extend standing to PLF on behalf of such "supporters".²⁴ The court likewise rejected PLF's argument that its activities were similar to those of the nonprofit corporation in *Coles v. Havens Realty Corp.*,²⁵ which was granted standing. In *Coles*, the court noted, the corporation was created to eliminate discriminatory housing practices, and all of its legal activities were directed toward this specific goal. In contrast, PLF's goals are not "[f]unctional, requiring identifiable action . . ."²⁶ nor do its projects provide "that 'essential dimension of specificity' that informs judicial decision-making."²⁷

20. PLF v. Watt, *supra*, at p. 993.

21. Warth v. Seldin, 422 U.S. 490, 511 (1975).

22. 432 U.S. 333 (1977).

23. 608 F.2d 1319 (9th Cir. 1979), *cert. den.*, 447 U.S. 921 (1980).

24. PLF v. Watt, *supra*, at p. 993. PLF is a non-profit corporation governed by a 18-person board of trustees. The board votes on which cases PLF should pursue. PLF's attorneys manage the day-to-day course of the lawsuits. PLF's supporters are individuals who agree with PLF's political and economic philosophies and who make monetary contributions to the organization. They have no formal control over any of PLF's policies or positions in specific lawsuits. In contrast, the individuals who supported the organizations in *Hunt* and *Brennan* acted as if they were members by electing, completely financing, and serving on the organization's governing body. In addition, those organizations had a direct financial stake in the outcome of the litigation, unlike PLF.

25. 633 F.2d 384 (4th Cir. 1980).

26. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 427 U.S. 52, 391 (1977).

27. *Id.*, at 263. The court's decision here gives us no criteria for distinguishing organi-

B. *Political Question*

After the court resolved the standing question, it went on to consider another threshold argument: whether the issues were nonjusticiable political questions. Of course, cases resolved on statutory grounds do not raise a political questions issue. But the court did address the constitutional arguments, if only in dicta, by inserting a footnote saying that it would follow *Chadha* in holding that no political question was presented.²⁸ In *Chadha*, Judge Kennedy held that even though Article I, Section 8, Clause 4 and the Necessary and Proper Clause gave Congress considerable power over aliens, the question whether § 244(c)(2) of the Immigration and Naturalization Act violated the separation of powers was not a political one: "It is the judiciary's prerogative, after a showing that the source of a claimant's appeal is not textually committed to another branch, to adjudicate a claimed excess by a coordinate branch of its constitutional powers."²⁹ The court found that the real source of plaintiff *Chadha's* appeal was the separation of powers doctrine, a doctrine not textually committed to any branch of government.

Similarly, the *PLF* court decided that the basis of plaintiff's constitutional arguments was the separation of powers principle, even though some defendants and *amici* argued that the Property Clause of the constitution textually committed the issues to the Congress. Morris Udall, *amicus* for the House Committee, argued that *Chadha* was distinguishable, since there a court ruling on § 244(c)(2)'s constitutionality would mean the difference between *Chadha's* deportation and his remaining in the U.S.. Here, Udall observed, lease applicants whose applications had been extinguished by Watt's withdrawal order still had no guarantee that Watt would grant their applications if the court said § 204(e) was unconstitutional. Judge Jameson failed to discuss this argument, but it appears unpersuasive. The argument hinges on deciding that an interest of the plaintiff's is being violated, rather than substantive separation issues.

The individual plaintiffs ultimately wanted their lease applications to be granted. They assumed Watt would do this if the Committee

zational goals which are specific enough to support standing and those goals which are not. For example, PLF filed an affidavit outlining its numerous activities and lawsuits in the public land use area. These activities are one way that PLF advances its goals of promoting the free enterprise system and "balanced, responsible decision-making". Should PLF be denied standing simply because it chooses to characterize its activities as having broader social impacts than an organization committed to ending housing discrimination? Ultimately, both organizations use the same legal tools to achieve their goals, and the organizations seem indistinguishable if we look at the policies favoring public interest participation in lawsuits.

28. *PLF v. Watt*, *supra*, note 1 at 994 n.20.

29. *Chadha v. INS*, *supra*, note 11 at 419.

hadn't prevented him from exercising his discretion. Now, their applications were worthless on the market. However, recall that the court supported the individual plaintiffs' standing *not* by deciding that Watt's action injured them by destroying the market value of their leases, but by saying their due process right to fair consideration was violated. The court said that the real interest was not whether the applications were granted or denied, but in making sure that the proper branch of government decided whether to grant or deny. If this latter interest is important enough to confer standing, then the significance of the distinction between this case and *Chadha* is diminished.³⁰ Therefore, *Chadha* properly controlled the disposition of the political question issue.

C. Adverseness

Another threshold issue was whether the parties were really adverse. A bit of background will help put this issue in perspective. In essence, Watt's acquiescence to the Committee's resolution was politically the only intelligent thing to do. It initially demonstrated a "cooperative" attitude, a gesture which would help Watt's relations with Congress in the future. Watt knew his former law firm would immediately sue him, but it would look like he had been dragged into court after his efforts at maintaining harmony with Congress. If the plaintiffs won, and the court declared that either the Committee resolution or his withdrawal order was unlawful, what else could Watt do by comply with the court's decision and decide to start granting leases in wilderness areas? On the other hand, if Watt had initially resisted the Committee's resolution, he and the Justice Department would have had to aggressively attack the Committee in a suit which would no doubt have exacerbated the rift between Watt and Congress. In addition, such a suit may have relegated MSLF and PLF to *amici* status in the case instead of party status. Watt's strategy to acquiesce and let others take the initiative was well-considered. In fact, recent developments³¹ sug-

30. Chadha wanted the proper branch of government to decide his fate; so did the lease applicants. It would be difficult to argue that the interest in allowing the INS to decide Chadha's deportation is more important than the applicants' interest in allowing the Department of Interior to fairly consider their lease applications. Leases in wilderness areas could become extremely valuable if large reserves were found.

Suppose the court had reached the "market value of lease applications" argument in deciding the standing issue. Then, Udall's argument that *Chadha* could be distinguished is still unpersuasive. Now, the only tenable distinction between *Chadha* and *PLF* is this: Chadha's fate was a set of two discrete alternatives (deportation or staying in the U.S.), while the lease applicants' fates were a continuous function (the more oil was discovered, the more the leases were worth.) This difference hardly seems relevant in deciding either the standing or political question issue.

31. See the discussion in Section I(D) and Appendix A.

gest that both Watt and Congress are cooperating more now than before on the wilderness area leasing issue.

In any event, MSLF, PLF, and Watt knew that they agreed on the unconstitutionality of § 204(e) and the general desirability of allowing leasing in wilderness areas. On the surface, it seemed as if the collusion allegations of the intervening defendants Bob Marshall Alliance and The Wilderness Society were well-founded. If proven, such collusion would be a basis for dismissing the suit for lack of adverseness.³² But events behind the scenes demonstrated the ignorance of such allegations. First of all, although PLF and MSLF espouse the same philosophy, they seldom agree on a litigation strategy, and as a result they tend to pursue their own directions independently in suits where they have similar interests. There was no united attack on the enemy by PLF and MSLF in this case. Secondly, PLF and the Department of Justice rarely see eye-to-eye, and this case was no exception. It is common knowledge that the Department of Justice has thought for years that legislative disapproval mechanisms were unconstitutional.³³ The Justice Department also refused to cooperate with PLF's request for assistance in framing interrogatories which PLF had hoped would help Watt create an administrative record.³⁴ Partly as a result of this refusal, PLF decided to launch a full-fledged attack on Watt by arguing that he abused his discretion when he issued the withdrawal order without an adequate administrative record.³⁵ Finally, the court noted that "The necessary adverseness is further manifested by the Justice Department's concerted efforts to defend the Secretary and avoid the constitutional issues on both procedural and statutory grounds."³⁶ With several defendants intervening (including the Sierra Club), in addition

32. Tribe, *American Constitutional Law*, 1978 p. 69.

33. See, Memorandum of Federal Defendants, in Response to Memoranda of Intervening Defendants and Amici Curiae and in Reply to Memoranda of Plaintiffs, p. 13 n.10.

34. See, Letter of Ronald Zumbrun to Deputy Assistant Attorney General Alfred Regnery, July 22, 1981: "To compensate for lack of a record, we will be preparing some discovery requests which will be designed to enable the Secretary to demonstrate by his answers that he fully considered the relevant factual matters and made reasoned decisions resulting in open but honest and well supported disagreement with the Committee. We had hoped that an attorney for the Secretary would assist in the drafting of these questions to ensure that they were worded appropriately so that the Secretary would feel comfortable in answering them. I deeply regret that we are being forced to draft this discovery in the blind without access to the facts available to the Secretary or to his opinions. It is important that appropriate action be taken by the Justice Department to ensure that the purpose of this discovery is fully understood and accepted and that the answers take full advantage of this opportunity. It is now the only chance for the Secretary to display his knowledge and understanding of the problems in issue and to demonstrate an adequate basis for his decision that action contrary to that demanded by the Committee is appropriate."

35. See the arguments in Part IV of this article.

36. PLF v. Watt, *supra*, note 1 at 994.

to the Bob Marshall Alliance and The Wilderness Society, and both houses of Congress participating as *amici*, the court was sure that all the issues would be present and fully litigated.

D. *Ripeness*

The final threshold argument the court considered was whether the dispute was ripe for adjudication.³⁷ The intervening defendants and *amici* argued that several stages in the administrative process remained to be completed.³⁸ The court easily disposed of this issue by noting that all the agencies involved had agreed that the administrative process terminated when Watt issued his withdrawal order. For example, the Forest Service stopped preparing its EIS and said that it would not consider lease applications "[u]ntil such time, if ever, as the mineral withdrawal is no longer in effect."³⁹ The court said:

The administrative process which must allegedly be completed has already been terminated by the agencies responsible for its completion. There is no reason to believe that absent a compelling court order the present impediments will be removed and the process continued. The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors [citation omitted]. The agencies themselves say there is nothing left for them to do. Resort to administrative remedies is not required where the process would be futile or serve no purpose. *Pence v. Kleppe*, 529 F.2d 135, 143 (9th Cir. 1976). This case is therefore ripe for review.⁴⁰

After the preliminary skirmishes on the front lines were fought and won by the plaintiffs, the court could adjudicate the real issues: the statutory and constitutional bases of § 204(e).

III. STATUTORY INTERPRETATION ISSUES

Although § 204(e) seemed self-explanatory on its face, several parties pointed out that it was unclear exactly how much power the Com-

37. See the discussion of mootness with regard to recent developments in Part VI(c).

38. Specifically, they argued that: (1) the Forest Service had to complete its EIS; (2) the Forest Service had to decide whether to recommend leasing in the wilderness areas, a decision subject to review by the Secretary of Agriculture; (3) if the Forest Service approved leasing, the BLM must decide whether to grant the lease applications; (4) if Watt revoked his withdrawal order so the BLM could grant the applications, the applicants or their challengers could appear administratively as of right to the Department of Interior's Board of Land Appeals; (5) From there, the decision could be appealed to the Secretary if he so chooses. 43 CFR §§ 4.5, 4.410 (1980).

39. *PLF v. Watt*, *Supra*, note 1 at 995.

40. *Ibid.*

mittee and Watt had under the section. If the court could read § 204(e) to find that either Watt or the Committee had acted beyond the scope of their authority, the constitutional arguments could be avoided.

A. *The Meaning of "Withdrawal"*

In his brief, Secretary Watt argued that the word "withdrawal" as used in § 204(e) did not encompass withdrawal from "settlement, location, sale, or entry". Recall that the Committee, purporting to act under § 204(e)'s authority, specifically ordered Watt to withdraw the lands "[f]rom all forms of disposition under all laws pertaining to mineral leasing. . . ." If § 204(e) did not truly empower either the Committee or Watt to withdraw land from the operation of the mining and leasing laws, both had acted *ultra vires*.

Watt supported his interpretation by noting that in the past, both the Department of Interior and the courts used the "traditional" meaning of "withdrawal", which excluded withdrawal from mining and leasing laws.⁴¹ There was also some legislative history which inconclusively supported Watt's position. However, the court rejected these arguments, holding that it would be unreasonable to adopt the Secretary's interpretation in light of the obvious connection between the effects of mineral exploration and development, and the purpose of § 204(e)—to protect "scenic, historical ecological, environmental, air and atmospheric, water resource and archeological values. . . ."⁴² The court also cited two lower federal court decisions,⁴³ the most recent of which specifically considered the FLPMA definition of withdrawal, which held that the "plain meaning of Congress' definition of 'withdrawal' " was to "effectively remove large areas of federal land from oil and gas leasing . . . in order to maintain other public values in the area, namely those of wilderness preservation."^{44,45} This interpretation

41. Watt was referring to the House Report on FLPMA, H. Rep. No. 94-1163, 94th Cong. 2nd Sess. 1 (1976), reprinted in U.S. Code Cong. and Admin. News 6175, 6179 (1976) and *Udall v. Tallman*, 380 U.S. 1 (1965).

42. 43 U.S.C. § 1701(8) (1976).

43. *Mecham v. Udall*, 369 F.2d 1 (10th Cir. 1966); *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

44. *MSLF v. Andrus*, *Supra*, at 391. The Secretary did not appeal the decision, although Watt's brief, at p. 43, n.45, quotes a passage from a letter reprinted in GAO, *Actions Needed to Increase Federal Onshore Oil and Gas exploration and Development*, 26-27, 194-5 (1981) (GAO report B-201799): "We disagree with the court's holding [in *MSLF v. Andrus*]. . . . The department continues to maintain its position that . . . the discretion to issue or not issue oil and gas leases is separate and apart from FLPMA withdrawals."

45. Intervening defendants, the Bob Marshall Alliance and The Wilderness Society, also argued that Watt was collaterally estopped from reasserting the FLPMA withdrawal definition argument. In *MSLF v. Andrus*, they argued, the court necessarily and actually decided this very issue, and therefore Watt, the current Secretary of Interior, was bound by that court's determination. The court did not address this interesting argument, probably

seems reasonable because it recognizes the importance of § 204(e) as a land-withdrawal tool when wilderness values are threatened by excessive mining activities. In other words, the intent of § 204(e)—to allow either a congressional committee or the Secretary of the Interior to protect both wilderness and mining values—was preserved.

B. *Watt's Power to Revoke a Withdrawal Order*

The Senate, supported by the House Committee and PLF, argued that § 204(e) implicitly permits the Secretary to revoke a withdrawal order after a reasonable time. In a well-supported and persuasive brief, the Senate first noted that prior to FLPMA, the Secretary could revoke temporary withdrawals in aid of legislation under either the Pickett Act⁴⁶ or implied executive authority. But the Secretary could not revoke withdrawals ordered by an Act of Congress. The Senate then observed that FLPMA continued this traditional law.⁴⁷ In fact, the Senate deduced from two sections of FLPMA [§§ 204(a),(j)] that the secretary could revoke withdrawals unless they were created by an Act of Congress. Since a committee resolution under § 204(e) is not an Act of Congress, Watt could revoke it.

The court accepted this conclusion, buttressing it with two related additional observations. First, the court found that nothing in § 204(e) or FLPMA authorized the Committee to set the scope and duration of an emergency withdrawal. The Secretary of Interior alone had this discretion. Second, the court reviewed the two previous emergency withdrawals under § 204(e) and found that in neither did the Committee order the scope or duration of the withdrawal.⁴⁸ These factors support

because the defendants launched the argument in their reply brief and not in their opening brief.

46. 43 U.S.C. § 141 (1910). This act authorized the President to withdraw public lands from settlement, location, sale, or entry.

47. Under § 204(a) of FLPMA, 43 U.S.C. § 1714(a) (1976), "[o]n or after the effective date of this act the Secretary is authorized to make, modify, extend, or *revoke* withdrawals but *only* in accordance with the provisions and limitations of this section. [emphasis added]." The explicit "limitations of this section" apart from any implicit in 204(e) itself, are stated in § 204(j), 43 U.S.C. § 1714(j) (1976): "[T]he Secretary shall not make, modify, or revoke any withdrawal created by act of Congress." The Senate interpreted "created by Act of Congress" to mean specific statutes authorizing a permanent withdrawal. An example would be an Act creating a national park. In contrast, a § 204(e) *temporary* withdrawal, created by administrative order pursuant to a committee resolution, is not created by an "Act of Congress" as intended in § 204(j).

48. In 1978, the Committee *urged* the Secretary of Interior to withdraw some lands in Alaska to preserve them until the next session of Congress could determine their fate. The Secretary complied. Six months later, the Committee decided that exploratory drilling on public lands for uranium in the Casitas Reservoir watershed would endanger the water supplies of nearby cities. The Committee *requested* the Secretary to withdraw these lands, which he did. In both instances, the Secretary exercised his discretion to set the scope and duration to the withdrawal. Note also the difference in language—"request" and "urge"—

the court's interpretation that a § 204(e) committee withdrawal is not an "Act of Congress", since most such Acts relating to withdrawals specify the area to be withdrawn and do not allow the Secretary any discretion.

The court's conclusion on this issue is significant. If the court had rejected the Senate's revocation analysis, the court would have had a more difficult time avoiding the constitutional issues. In addition, the court implicitly seemed to allow the Committee to *order* the Secretary to withdraw, despite the more permissive language of prior § 204(e) withdrawal resolutions.⁴⁹ We can therefore infer that the Committee can constitutionally order the Secretary to withdraw land under § 204(e), but it cannot order the scope and duration of the withdrawal. This inference is consistent with the court's holding that § 204(e), as applied by the Committee, conflicted with Watt's discretion under the 1964 Wilderness Act. From a policy perspective, allowing the Secretary of Interior to set the scope and duration of a withdrawal takes advantage of the agency's special expertise in land management; perhaps the Committee's members would be too motivated by local interests to make a wise decision. The Secretary can also revoke a withdrawal after a reasonable time⁵⁰, thus preserving a measure of agency control over public land decisions. And although the court's interpretation allows the Secretary much discretion, it also empowers a single committee to order the Secretary to withdraw land. In the final analysis, the Secretary's two discretionary decisions (scope/duration and revocation) can be reviewed under the Administrative Procedure Act (APA); in contrast, no review would have been possible if the Committee were empowered to set the scope and duration of a withdrawal, since the APA does not apply to Congress.⁵¹ Interestingly enough, PLF attempted an argument based on the APA in its opening brief. This argument is considered next.

IV. ADMINISTRATIVE PROCEDURE ACT ARGUMENTS

There was a fair amount of confusion over PLF's argument, which may explain the court's failure to address it explicitly. PLF initially contended as follows: (1) Watt's discretionary decision to issue the withdrawal order was reviewable under the APA; (2) Watt's decision

as opposed to the mandatory language ("directed", "required") in the Committee's letter to Watt.

49. See note 48.

50. The court found it unnecessary to decide the duration of "reasonable time", but said that "It does seem reasonable, however, that the withdrawal remain in effect at least until the reports required by § 204(e) are filed with the committees." PLF v. Watt, *supra*, at p.1000, n.36.

51. 5 U.S.C. § 551(1)(A). (1976).

was arbitrary, capricious, and an abuse of discretion because he failed to exercise his discretion to set the scope and duration of the withdrawal; (3) Watt failed to exercise his discretion because § 204(e) authorized improper influence by members of Congress over an administrative officer. Apart from these contentions, PLF argued that neither the Committee nor Watt had made a proper factual foundation to support a finding of "emergency" in the wilderness areas. By examining each of these arguments retrospectively, we can assess their probable significance for future environmental litigation based on a hypothetical conflict between the legislative and executive branches.

A. *Review Under the APA*

The first question was whether Watt's action in issuing public land order #5952 was subject to review under the APA. 5 U.S.C. § 704 provides that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Section 551 (13) defines "agency action" as "the whole or a part of an agency . . . order . . . or the equivalent or denial thereof, or failure to act." Subpart (g) of the same section defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking." Secretary Watt's public land order seemed to fit the definition of "order", and issuing it appeared to be "agency action". Moreover, the order constituted a final disposition of the wilderness areas, and the court had already held that no administrative remedies needed to be exhausted.

Of course, this whole argument assumes that Watt's decision to issue the withdrawal order was discretionary rather than ministerial.⁵² Here it is necessary to isolate the two "decisions" Watt had to make: the decision to "go along" with the committee's resolution in general, and the decision not to set the scope and duration of the withdrawal. Essentially, PLF argued in its initial brief that § 204(e) gave Watt discretion to ignore the Committee's resolution and fashion his own solution to the problem. Strictly read, this argument is shallow, since there are three things the Committee did in its resolution: it found an emergency, it ordered Watt to withdraw land, and it set the scope and duration of the withdrawal. It was never clear which one or combination PLF thought Watt could ignore.⁵³ But in its reply brief, PLF managed

52. See, Sierra Club Memorandum at p. 12.

53. For example, PLF argued that the "arbitrary and capricious" standard applied to situations where an administrative officer declared an emergency. See, *Dow Chemical Company v. Blum*, 469 F. Supp. 892 (E.D. Mich. 1979); *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 24 (D.C. Cir. 1976); *Nevada Airlines, Inc. v. Boyd*, 622 F.2d

to tie the loose ends together. It seized on the Senate's argument that Watt had discretion to revoke his withdrawal order within a reasonable time: now, it was unnecessary to specify the breadth of Watt's discretion in terms of the three elements of the Committee's resolution. PLF then emphasized that § 204(e) and prior withdrawals under that section gave the Secretary scope and duration discretion. PLF concluded that Watt had not realized that he had such discretion under § 204(e), or if he had, § 204(e) authorized improper committee influence and pressure on his decision.

By holding that Watt could indeed revoke his withdrawal order after a reasonable time, the court went just far enough to give Watt the discretion PLF said he had, without having to reach the issue of whether Watt's decision to issue the withdrawal order was arbitrary and capricious. Similarly, the court held that Watt had scope and duration discretion without deciding whether Watt perceived his duty to be ministerial or discretionary in light of the Committee's resolution.

B. *Improper Influence by Congressional Committee*

Its holding on the issue of administrative review made it unnecessary for the court to consider PLF's other interesting argument in this area: whether § 204(e) authorizes improper influence by a congressional committee in the Secretary's discretionary withdrawal decisions.⁵⁴ This issue is worth exploring because it offers a potentially new approach to the statutory balance of duties between Congress and administrative agencies.

Starting with *Pullsbury Company v. Federal Trade Commission*⁵⁵, a

1017 (9th Cir. 1980). This argument implies that perhaps Watt had discretion to ignore the Committee's finding of emergency if he thought there was no factual support for it. PLF argued this very point in a separate section of its brief. Section 204(e) empowers either Watt or the Committee to find an emergency. If Watt had initially found the emergency in the wilderness areas, his finding would have been reviewable under the arbitrary and capricious standard for adequacy of factual support. On logical and policy grounds, why should the Committee's finding of emergency, authorized by the very same phrase of § 204(e) that gives Watt the authority to find an emergency, not be subject to the same standard? MSLF made this argument in its reply brief in a somewhat different context: MSLF argued that since the Committee's finding of an emergency was a discretionary decision, it arguably fell within the APA standard of review. If the court decided that the APA did apply to the Committee, it would be saying that the Committee was acting as an executive agency, since the APA does not apply to subdivisions of Congress. Therefore, the Committee action must have violated the Appointments and Disability clauses of the Constitution, since Congress was empowering a subdivision of itself to appoint "officers of the United States", an executive function. See the arguments in Part V(c) and note 91.

54. Actually, PLF's argument focused on the circumstances surrounding the Committee's decision to issue the resolution and the substance of the resolution itself, instead of § 204(e)'s statutory language. This was probably wise litigation strategy, since the parties disagreed about what § 204(e) really meant.

55. 354 F.2d 952 (5th Cir. 1966).

line of significant cases establish that exertion of influence by members of Congress and congressional committees may invalidate an administrative decision. In *D.C. Federation of Civic Associations v. Volpe*⁵⁶, Judge Bazelon wrote:

"If, in the course of reaching his decision, Secretary Volpe took into account 'consideration that Congress could not have intended to make relevant' [citation omitted], his action proceeded from an erroneous premise [citation omitted] and his decision cannot stand. [citation omitted] . . . [t]he action of a small group of men with strongly held views on the desirability of the bridge . . . cannot usurp the function vested by act of Congress in the Secretary of Transportation."⁵⁷

Two federal district courts applied this rule to discretionary actions by the Secretary of Interior. In *Koniag, Inc. v. Kleppe*⁵⁸, the court held that Congressional hearings conducted while the Secretary was considering claims to federal money under the Alaska Native Claims Settlement Act improperly biased his decision. In a case closely analogous to *PLF v. Watt*, the same court applied this rule to the Secretary's discretionary decisions to issue oil and gas leases, although it held that letters written by senators to the Secretary were not "improper enough" to warrant a finding of improper influence.⁵⁹

PLF focused on two ways the Committee exerted improper influence on Watt. From a procedural point of view,

[t]he Committee's chairman scheduled the Committee hearing so that those who opposed the Committee's action under § 204(e) could not protect the interests of the lease applicants or the public interest in balanced, responsible decision making. . . . A decision, which should have been made in a reasoned and timely way, was made in a manner calculated to put direct pressure on the Secretary so as to foreclose other administrative options. . . . As a result of this pressure, the Secretary did not rationally exercise his discretion.⁶⁰

PLF then noted that from a substantive point of view, the Committee exceeded its statutory authority by ordering the scope and duration of the withdrawal in its resolution. Since the court held that the Committee could not constitutionally set the scope and duration of the withdrawal, and that § 204(e), *was* constitutional, the Committee must have exceeded its statutory authority. It is an open question whether a

56. 459 F.2d 1231 (D.C. Cir. 1971).

57. *Id.*, at 1247-8.

58. 405 F. Supp. 1360 (D.D.C. 1975).

59. *Texas Oil and Gas Company v. Andrus*, 498 F. Supp. 668 (D.D.C. 1980).

60. *See*, PLF's Memorandum of Points and Authorities in Support of Motion for Summary Judgement, at p.11.

congressional committee exceeding its statutory authority is exerting improper influence. Certainly, this seems more objectionable than senators writing letters to the Secretary, the situation in *Texas Oil and Gas Company v. Andrus*⁶¹. In fact, it is arguable that a committee exceeding its statutory authority is more improper than congressional hearings held to influence the Secretary, since presumably such hearings are statutorily authorized. In any event, these issues must await adjudication before we can knowledgeably assess their strengths and weaknesses.

V. CONSTITUTIONAL ISSUES

PLF v. Watt, in conjunction with a Supreme Court decision in the *Chadha* case, may well provide some important new case law in the separation of powers area. Even if *PLF* is not appealed, Judge Jameson's discussion of the constitutionality of § 204(e), if only dicta, is a tantalizingly partial attempt to draw a line between permissible and impermissible congressional oversight of discretionary administrative decisions. Recall that Judge Jameson found that § 204(e) is constitutional only if interpreted to leave Watt discretion to set the scope and duration of any withdrawal. In addition, § 204(e) impliedly allows Watt to revoke a withdrawal after a reasonable time. On the other hand, a committee of Congress can constitutionally find an emergency and order the Secretary to make a withdrawal of unspecified scope and duration. As a result of this interpretation of § 204(e), did the court implicitly decide its constitutionality? If the court's interpretation is correct, do *Chadha* and *Consumer Energy Council v. FERC*⁶² control *PLF*, or were the Committee's action and its statutory and constitutional bases somehow different from the congressional disapproval devices in those cases? If not, is the delicate balance the court fashioned in *PLF* the correct one in light of those cases? This part will discuss the first two questions briefly and then move to a detailed discussion of the substantive constitutional issues.

A. *Implicit Resolution of Constitutional Issues*

In its reply brief, MSLF argued that the court could not decide any of the statutory issues without implicitly deciding the constitutional issues. For example, recall that one statutory issue was whether "withdrawal" included withdrawal from the operation of mining and leasing laws. MSLF posited that the court could not begin to decide this issue until it had first decided whether interpretation of § 204(e) by the entity

61. See text accompanying Note 59.

62. See Note 13.

charged with its administration (the Committee, in this case) was entitled to deference.⁶³ To determine this, the court must necessarily decide if the Committee was indeed the "agency, officer, or entity" charged with the section's administration. Once the court decides *this* issue, it has held whether § 204(e) violates the incompatibility⁶⁴ and appointments⁶⁵ clauses of the Constitution. MSLF made a similar argument to show that resolution of the separation of powers issue was implicit in a holding on whether § 204(e) operated to repeal § 4(d)(3) of the Wilderness Act.

The court addressed neither of these arguments. Nevertheless, they are flawed for several reasons. First, the "withdrawal" definition argument assumes that deciding whether the Committee's interpretation is entitled to deference is a logically necessary link in the chain of reasoning. The Court certainly could, and did, decide that the proffered definition of "withdrawal" as not including withdrawal from mining and leasing laws was wrong, regardless of who administers the section and how much weight should be given to the entity's interpretation.⁶⁶ Similarly, the "repeal of § 4(d)(3) of the Wilderness Act" argument assumes that § 204(e) can only be interpreted to *fully* conflict with the Wilderness Act. The Court wisely noted that there is no conflict between general leasing in wilderness areas under § 4(d)(3) and § 204(e), a temporary withdrawal device to be used in emergencies, when the Secretary sets the scope and duration of the withdrawal. In sum, MSLF's arguments were based on assumptions the Court did not reasonably have to accept.

Aside from legal arguments about when something must be implicitly decided, there is at least one way to suggest, on policy grounds, that the Court *should* have addressed the constitutional issues as part of its holding. First "[t]he legitimacy of a particular exercise of power cannot be decided in the abstract."⁶⁷ More specifically, "In addition to determining the present observable effect of a statute, its potential effect on congressional power must be predicted For a procedure to be validated as used in one context, the impact of its use in other contexts which are not differentiated by any clear, logical separation from the

63. *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).

64. U.S. CONST. art. I, Sec. 6, Clause 2.

65. U.S. CONST. art. II, Sec. Clause 2.

66. In fact, no deference is required when there are compelling indications that the interpretation is wrong. *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Patagonia Company v. Board of Governors of the Federal Reserve System*, 517 F.2d 803 (9th Cir. 1975).

67. *Chadha v. INS*, *supra*, Note 11 at 434.

use in question must be considered.”⁶⁸ Although these passages refer to how broadly one should frame an analysis once it is already decided that reaching the constitutional issues is appropriate, they are relevant in a general sense. The question a court should ask itself in a potential separation of powers case is this: “If we uphold or strike down this statute solely on statutory grounds, could Congress enact similar statutes which avoid constitutional infirmity under our holding, but which have the same effect on the distribution of power between the coordinate branches of government?”

This test has several advantages over the present approach, which simply admonishes courts not to resolve disputes on constitutional grounds if they can avoid it. First, the test allows comparing the advantages and disadvantages of resolution on constitutional grounds. For example, in some cases a court must give an extremely strained interpretation to a statute to avoid reaching the constitutional questions. Perhaps this interpretation utterly frustrates the intent of Congress; it would be better to say the statute was unconstitutional and give Congress another try at drafting it. In other cases, strained statutory interpretation gives Congress incentive to take advantage of that interpretation in other subsequently enacted statutes which, taken together, could significantly affect the balance of power between the coordinate branches. In the wake of *PLF v. Watt*, it is conceivable that Congress could now pass statutes empowering single committees to order administrative officials to act in a way which forces them to relinquish some of their statutory discretion. Such a statute would be constitutional, as long as the administrative official retained some unspecified amount of discretion roughly equal to the amount Secretary Watt now has, namely to revoke a withdrawal after a reasonable time and set the scope and duration of a committee-ordered withdrawal. Using the proposed test, a court could forego strained statutory interpretation if it thought the potential for future “abuse” of its holding outweighed the advantages of deferring resolution of the constitutional issues.

A second advantage of this approach is that it gives the court an incentive to explicitly articulate its reasons for reaching or not reaching the constitutional issues. Under the proposed approach, the court would also have an incentive to examine the real-world effects of its holding on the distribution of power between the coordinate branches, which is ultimately the whole rationale behind the separation of powers doctrine.⁶⁹ Unfortunately, courts may not be well-equipped to conduct

68. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983, 1050 (1975).

69. Davis notes that “all three kinds of powers, along with other powers that cannot be classified with separation of powers labels, are often poured together, and the resulting vari-

this aggressive, prospective inquiry. But to the extent that they already do it implicitly, explicit articulation should be encouraged.

B. *Controlling Nature of Chadha*

Several parties contended that even if the court reached the constitutional issues, *Chadha* should not be controlling. Recall that in *Chadha*, § 244(c)(2) of the INA empowered one house of Congress to overturn an INS decision about whether an alien should be deported.⁷⁰ Some of the following arguments from the briefs appear to be persuasive, and the *PLF* court should have addressed them. This is especially true in light of *Chadha*. These three recent cases indicate that the time is ripe for some intelligible law in the separation of powers area. Some new case law could have enormous repercussions on the distribution of power between the branches of the Federal Government, and more specifically on congressional control over delegations of power to administrative agencies. If this is true, courts should be doubly sure that the precedents really apply to cases before them. There are several crucial aspects of *Chadha* which distinguished it from *PLF*. These aspects also serve to preview the substantive constitutional arguments on both sides.

1. In *Chadha*, legislative disapproval operated as a final, permanent disposition of Chadha's fate: he would go back to Iran, with no possibility of challenging the disapproval of his suspension of deportation again. In *PLF*, § 204(e) was merely a temporary emergency withdrawal power, according to the Senate and Committee briefs, which gave Congress a chance to take further legislative action. The problem with this argument is that the *resolution* (as opposed to § 204(e)) ordered Watt to withdraw the lands for three years, at which time the Wilderness Act expired, thus closing off the wilderness areas permanently. But the court read § 204(e) as allowing Watt to decide the scope and duration of the withdrawal; therefore, the lands were perhaps not permanently disposed of. Thus, the Court's statutory inter-

able mixtures can be found in each of the three branches of government, as well as in the independent agencies. . . . this is not a violation of the theory of the separation of powers but is in conformity with the portion of the theory that is called checks and balances." 1 Davis, *Administrative Law Treatise*, § 2.2 (1978). A court cannot be sure the proper checks and balances are in effect unless it evaluates the effects (both actual and potential) of a statute in the real world.

70. 8 U.S.C. § 1254(c)(12) (1976). Under this section, when an alien who is subject to deportation meets certain criteria, the Attorney General may suspend his deportation. The INS decides if the alien has met the criteria after a hearing. If the Senate or House "Passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . ."

pretation supports the argument that § 204(e) is distinguishable from § 244(c)(2) on this ground.

2. The Senate and Committee briefs argued that a § 204(e) withdrawal was "in aid of legislation", because it preserved the "status quo" of the lands in their non-leased states until Congress could act. In contrast, the House disapproval in *Chadha* changed the "status quo" from non-deportation to deportation. This difference made § 244(c)(2) more objectionable than § 204(e). However, this argument loses some of its persuasive appeal if one defines "status quo" as the balance of power between the Executive and Congress: before the resolution, Watt could exercise his discretionary authority under the Wilderness Act to grant leases; after the resolution ordering him to withdraw those areas, he could not. Of course, § 204(e) has existed for many years. When did the "status quo" change: when § 204(e) was enacted, or when the Committee passed its resolution? The Court, in *PLF*, said that a committee acting under § 204(e) can still force the Secretary of Interior to make a withdrawal. Theoretically, then, the "status quo" balance of power has remained the same since § 204(e) was enacted. The only plausible argument left is that the resolution, by ordering the scope and duration of the withdrawal, changed the "status quo" distribution of power between Watt and the Committee.

3. In a similar argument, the Sierra Club argued that the § 244(c)(2) disapproval mechanism operated retroactively: that is, it existed to invalidate a prior administrative decision. Section § 204(e), they said, was prospective in nature because it prevented action that Secretary Watt was about to take. In his brief, Watt disagreed; he argued that he had already made an administrative decision to allow leasing, contingent on the results of the EIS. Section § 204(e) allowed retroactive reversal of this decision.

4. There was also debate over whether § 204(e) was "positive law"; in *Chadha*, Judge Kennedy wrote that "[b]oth houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights." This previews a bicameralism argument to be discussed below. Was the Committee resolution "positive law" like the House disapproval in *Chadha*? Given that lease applications vested no property rights in the applicants, did the resolution affect anyone's substantive rights? The Court answered the latter question "yes" when it held that applicants were entitled to "fair consideration". The Court did not discuss the bicameralism argument, because interpreting § 204(e) as giving the Secretary power to revoke a withdrawal after a reasonable time meant that both houses of Congress did not have to concur in the withdrawal order. Evidently, under this interpretation, a § 204(e) resolution is not "positive law." As a result, *Chadha* may not control the

disposition of the bicameralism argument on appeal if the appellate court accepts this interpretation of § 204(e).

5. The Senate persuasively argued that § 204(e) was like a constitutionally sound "report and wait" provision. Such a provision directs an administrative officer to wait for a certain period of time before implementing a proposed course of action. Section 204(e) indeed refers to other sections of FLPMA which required Watt to file certain reports with the Committee in case of a § 204(e) withdrawal. In contrast, argued the Senate, § 244(c)(2) gave one house of Congress blanket disapproval power without such requirements. To buttress this argument, the Senate suggested that the Committee was really exercising its broad investigatory powers under the § 204(e) withdrawal and report provisions. The House's disapproval under § 244(c)(2) certainly performed no such investigatory function. This argument has some merit if § 204(e) is read without the Committee's accompanying resolution. The resolution and letter of transmittal from Udall to Watt clearly indicate that the Committee was interested in disapproving Watt's actions, not in obtaining reports and considering them for future legislation during the "wait" period. Still, the history of prior § 204(e) withdrawals⁷¹ indicates that § 204(e) does not mandate the Committee to usurp so much of the Secretary's power. Thus, § 204(e) may be distinguishable from § 244(c)(2), which the *Chadha* court struck down.

6. The Senate also contended that *Chadha* did not control the constitutional issues because the Property Clause of the Constitution⁷² gives Congress virtually unlimited power over federal lands, while no part of the Constitution so completely entrusts Congress with power over aliens. Though *Chadha* resolved the constitutional issues against the Congress, here Congress has much more power, making a violation of the separation of powers less likely. On the surface, this argument suggests a persuasive distinction between *Chadha* and *PLF* that goes to the fundamental sources of congressional power, powers of a different nature and degree in the public land area than with respect to aliens. But the Senate failed to note that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."⁷³ It is unclear, then, how Congress' power over public lands could be greater than its power over aliens.

7. A final possible distinction between § 204(e) and § 244(c)(2) is that in *Chadha*, the House overturned a *quasi-judicial* hearing of the INS,

71. See text accompanying Note 48.

72. Article IV, Section 3, Clause 2: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belong to the United States."

73. *Fiallo v. Bell*, 97 S. Ct. 1473, 1478 (1977), Quoting from *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

while in *PLF* the Committee ordered Watt to reverse his prior *quasi-legislative* course of conduct. The INS conducted a thorough hearing on Chadha's deportation which embodied all the elements of fairness and procedural due process to insure that a just decision was reached. Based on this hearing, the INS determined that Chadha would suffer extreme hardship if he were deported. The House, possibly motivated by political tensions with Iran, decided to nullify this hearing by deporting him. Judge Kennedy emphasized these "individual liberties" themes in his decision. In contrast, lease applications are only entitled to "fair consideration", not constitutionally-protected procedural due process. Watt made a quasi-legislative discretionary decision to start granting the leases, a decision with which the Committee disagreed. A strong argument could be made that Congressional disapproval of administrative agency actions is more objectionable when Congress overturns a quasi-judicial determination than a quasi-legislative one.⁷⁴

Even if these distinctions are valid, their existence does not necessarily mean that the *Chadha* reasoning should be ignored. *Chadha* articulates the limits of shared powers between the Executive, Legislative, and Judicial branches of government. To say that *Chadha* may not control *PLF v. Watt* is not to say that *Chadha* tells us nothing useful about the constitutional issues in *PLF*.

C. Substantive Constitutional Arguments

The real battle in the briefs turned out to be whether § 204(e) and/or the Committee's resolution violated various constitutional provisions. The court managed to avoid a deluge of paper by construing § 204(e) as authorizing Secretary Watt to establish the scope and duration of an emergency withdrawal, while also allowing him to revoke his withdrawal order after a reasonable time. But since the court called the statutory interpretation issues "close question[s]", it went on to address one of the many constitutional arguments made by the parties: whether § 204(e) violated the separation of powers doctrine by vesting executive authority to enforce the laws in a legislative body (the Committee).

The Court's reluctance to render an advisory opinion was certainly understandable; by resolving the statutory issues as it did, the court limited the potential scope of any constitutional analysis. But in many

74. One obvious difference between § 204(e) and § 244(c)(2) is that § 204(e) allows a committee to exert control over administrative agencies, while § 244(c)(2) allows one house of Congress to disapprove agency acts. In general, if a house of Congress cannot exert some particular power, then neither can a subdivision of Congress (like a committee). Therefore, if the facts of *PLF* are similar enough to *Chadha's* for the *Chadha* analysis to apply, § 204(e) would be more objectionable than § 244(c)(2).

ways, the court's approach left open more questions than it resolved. These questions are still open in light of a possible appeal of *PLF* and *Consumer Energy Council*, and after the Supreme Court's adjudication of *Chadha*. And perhaps there is even greater doubt as a result of Watt's recent proposals to close the wilderness areas to leasing until the year 2000. Here, the court's analysis of *Chadha* as applied to the § 204(e) separation of powers issue will be examined. Given the uncertainty about the legal and policy significance of the other constitutional issues, an outline of the possible directions a court or practitioner could take if confronted with a similar statutory situation will be presented.

The *PLF* court's approach to the separation of powers issue paralleled *Chadha's*. *Chadha* articulated a three-part test to decide if the separation of powers doctrine had been violated:⁷⁵

1. Is there an assumption by one branch of government of powers that are central or essential to the operation of a coordinate branch?
2. If so, does that assumption of power disrupt the coordinate branch in the performance of its duties?
3. If so, is the assumption of power unnecessary to implement a legitimate government policy?

In connection with the second question, Judge Kennedy postulated two possible disruptive effects: horizontal (disruptions among the three coordinate branches of federal government) and vertical (disruptions between individuals affected by government decisions and the branch of government responsible for making those decisions)⁷⁶. He then identified three possible ways that such potentially disruptive power could be exercised by the Legislative Branch: as a way of correcting executive misapplication of a statute, as a means of sharing the administration of a statute, or as the exercise of residual legislative power that falls short of statutory amendment.⁷⁷ In short, to decide if an assumption of power is disruptive one first must fit it into one of these three categories, and then evaluate the magnitude of horizontal and vertical disruption.

Apparently, Judge Jameson in *PLF* focused only on the second part of *Chadha's* three-part test. He did not ask if § 204(e) authorized the Legislative Branch (the Committee) to assume powers which were *central* or *essential* to the operation of the Interior Department's management of public lands.⁷⁸ Nor did he respond to the Sierra Club's

75. *Chadha v. INS*, *supra*, Note 11 at 429.

76. *Id.*, at 430-431.

77. *Id.*, at 429.

78. In fact, several parties pointed out that even though the 1964 Wilderness Act gave Watt discretion to issue leases in wilderness areas, that power was not "central or essential" to the Interior Department because of the virtually limitless power the Property Clause of

and other intervening defendants' arguments that § 204(e) was necessary to implement a legitimate policy of government: namely, Congress' interest as guardian of our public lands in protecting pristine wilderness areas from potential environmental degradation.

Judge Jameson did discuss the second part of *Chadha's* test. He said that if § 204(e) were interpreted as authorizing the Committee to dictate the scope and duration of a withdrawal, the horizontal and vertical disruptions would be too large to uphold the section's constitutionality. This conclusion must be reached regardless of how power under § 204(e) was classified.

If § 204(e) was a device for correcting Secretary Watt's application of the 1964 Wilderness Act, the Committee could disrupt the vertical relationship between the judicial branch and people who could depend on it to review agency decisions. The individual lease applicants would be deprived of review under the arbitrary and capricious standard if the Committee set the scope and duration of the withdrawal. Moreover, the Committee would have no procedural checks on its decision.⁸⁰ This would disrupt the horizontal relationship between the judiciary and its review of executive actions under FLPMA. By allowing the Secretary to revoke a withdrawal, these disruptions could be minimized to a constitutional level. The court could review both aspects of Watt's discretion and thereby protect the interests of the lease applicants.

If § 204(e) was a means for the Committee to share the administration of wilderness and public lands statutes with Watt, its power could then supplement the executive's implementation of the statute on a case-by-case basis: in short, law enforcement.⁸¹

The court noted:

[The proper development and execution of the administrative] process can be thwarted if legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially

the Constitution confers on Congress. Judge Jameson noted in another section of his opinion, at p.36, that even though the Property Clause power is broad, it must be exercised constitutionally. This response begs the question, since to decide if powers are "central or essential", one factor to consider is the scope of the authority which confers that power.

79. In *Chadha*, Judge Kennedy emphasized that "necessity" should be determined in the abstract, not with regard to the specific facts of the case. *Chadha v. INS, supra*, at p.431. In other words, even if plaintiffs could show that the Committee did not really need to use § 204(e) to declare an emergency and order Watt to withdraw lands to preserve wilderness values. § 204(e) could still be "necessary" in the abstract. Perhaps § 204(e) operates as a kind of early warning device so Congress can effectively oversee potentially dangerous administrative actions. This broad definition of necessity actually makes it harder to find a violation of the separation of powers.

80. See Note 53.

81. *Chadha v. INS, supra*, Note 11 at 431.

decreed.⁸²

Section 204(e) thus authorizes a horizontal disruption between the legislative and executive branches since a legislative committee could decide the scope and duration of emergency withdrawals, a power which infringes on the Secretary's duty to execute the law. There is also a vertical disruption because an administrative leasing process, evolving since 1964, could be summarily overridden, thereby frustrating the expectations of individual lease applicants. In contrast, Watt could efficiently execute the law and protect the interests of lease applicants by exercising his discretion to order the scope and duration of a withdrawal, or revoke one if he deemed it inappropriate.⁸³

Finally, if § 204(e) was an exercise of a residual legislative power, perhaps some power not delegated to the Secretary of Interior by the Wilderness Act, its exercise must comply with the principle of bicameralism. The court pointed out that a single committee should not use § 204(e) to frustrate the compromises between mining and environmental values made in both the Wilderness Act and FLPMA.⁸⁴ As long as Watt can revoke a committee withdrawal order, "[t]he Committee's action does not amount to a statutory amendment."⁸⁵

Taken as a whole, the *PLF* court's position focuses on the procedural safeguards of administrative and legislative decisions. From a policy perspective, this position makes sense. Regardless of whether one favors oil and gas exploration in wilderness areas, most people agree that they would rather have such decisions made by entities which are somehow legally accountable. In this case, it could easily have been the Secretary of the Interior who favored no leasing, while the Committee might have been in favor of it. Administrative officials are accountable for their actions through the court system, while actions of a committee are difficult to attack because of traditional deference to legislative findings and lack of review under the APA. It might also be noted that because members of congressional committees are

82. *Id.*, at p. 432.

83. This argument does not seem persuasive. If a committee determining the scope and duration of a withdrawal is so disruptive of Watt's duty to execute the Wilderness Act, it would seem that so is a committee ordering Watt to withdraw land. The court gives us no criteria to determine the magnitude of disruptive effects or to compare the disruptions inherent in the exercise of different types of power. As a result, the "disruption" analysis becomes a catchy way to rationalize a result already decided upon instead of an analytical tool for deciding if major disruptions indeed exist.

84. *PLF v. Watt*, *supra*, Note 1 at 1003. Recall the argument in section B of this part that the bicameralism requirement does not apply to Congressional actions that do not amount to positive law.

85. *Id.*, at 1004. Of course, Watt's decision to revoke a withdrawal is not subject to a bicameralism requirement, but it *is* subject to judicial review. The lack of such review causes the horizontal and vertical disruptions discussed earlier.

elected does not mean they are accountable for actions taken under § 204(e); few people follow the legislative process so closely, and even fewer would refuse to vote in the future for an individual who cast one "wrong" vote in a committee hearing. In contrast, the court system allows for at least cursory review of specific administrative decisions; potential plaintiffs, regardless of the value they place on mining and wilderness values, can all rely on the courts to protect their interests instead of relying on the whims of the current political climate. All of the parties in *PLF* delved into other constitutional issues which the court found unnecessary to address because of its interpretation of § 204(e).⁸⁶ A brief summary of these issues will conclude our discussion.

1. *PLF* argued that the committee withdrawal authority under § 204(e) constituted an unconstitutional delegation of power. *PLF* first noted that if the power to order a withdrawal was executive, it violated the Incompatibility Clause of the Constitution.⁸⁷ The primary purpose of this clause was to prevent conflicts of interest between the executive and legislative branches.⁸⁸ In addition, committee members exercising executive powers violate the Appointments Clause.⁸⁹ If committee members are officers as defined in the Incompatibility Clause when they perform executive functions, then delegating such power to them

86. It was not clear why, if the court's interpretation of § 204(e) was incorrect, it would be forced to address the separation of powers issue but not any other constitutional issues. The court said: "with a close question with regard to the proper interpretation of § 204(e) . . . I will address briefly the constitutional issues . . .", and "If § 204(e) were interpreted to authorize the Committee to dictate the scope and duration of an emergency withdrawal, I would be compelled by *Chadha* to declare it unconstitutional as a violation of the separation of powers doctrine." *PLF v. Watt*, *supra*, at 1002. The court went on in footnote 37 to say, "If I am wrong about the interpretation of § 204(e) and *Mountain States* and the federal defendants have correctly interpreted the section, it would be necessary to resolve the constitutional issues." But in footnote 43, the court contended that even though the other constitutional "arguments have merit, it is unnecessary to discuss them because of the interpretation given to the statute."

I would suggest that the court really meant to say that resolution of the other constitutional issues was not necessary because having found one sufficient constitutional ground on which to void the section, discussion of the other constitutional issues was unnecessary.

87. Article I, Section 6, Clause 2: "No person holding any office under the United States, shall be a member of either house during his continuance in office." "Officers" of the U.S. can generally be defined operationally as employees of administrative agencies. Mechem defines "office" as "the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creative power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, *Public Offices and Public Officers*, § 1 (1890).

88. *Reservists Committee to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971), *aff'd*, 495 F.2d 1075 D.C. Cir. 1972), *rev'd on other grounds*, 418 U.S. 208 (1974).

89. U.S. CONST., *supra* note 65: "The executive shall appoint . . . public ministers and counsels . . . and all other officers of the United States."

also violates the Appointments Clause. From a policy perspective, delegation of executive powers to committees is not accompanied by any statutory procedural safeguards, such as notice, comment, hearing, or judicial review, which are available to check discretionary agency actions. Furthermore, Congress delegates power to execute the laws to administrative agencies because it thinks that expert administrators can do a better job than Congress in applying the law to a myriad of situations.⁹⁰ In contrast, § 204(e) provides for no checks on the Committee's withdrawal power, since simply calling a situation an "emergency" triggers the power.⁹¹

PLF's second argument in this area was that even if the Committee's powers are legislative, delegation from Congress to the Committee violates the bicameralism principle and the Presentment Clause.⁹² The crucial question here was whether the Committee's powers amount to legislation, or are merely "in aid of legislation." It is well known that "Congressional committees can and do exercise power ancillary to legislation within the sphere of activity committed to them by Congress."⁹³ On the other hand, legislative action results in an edict having "the force of law."⁹⁴ Several parties, including the Senate *amicus*, tried to characterize § 204(e) as a "report and wait" provision which would help the Committee and Congress formulate legislation.⁹⁵ PLF responded that "The committee action caused over 1.5 million acres of land to be withdrawn from mineral exploration and leasing and numerous legal applications to be rejected. This action is legislative because no further action was required to give it the force of law."⁹⁶ Therefore, *PLF* concluded, § 204(e) violates the bicameralism principle.

Chadha stood for the proposition that one House cannot unilaterally enact a "positive law that alters individuals' substantive rights."⁹⁷ Since legislative acts are "positive law", the only further inquiry was

90. 1 Davis, *Administrative Law Treatise*, § 3.3 (1978).

91. Several Committee members (Mr. Lujan, Mr. Santini, Mr. Marlenee) recognized the non-informed basis of their withdrawal action. But challenging the action under the rational basis test would probably have been fruitless given the anemic version of the test currently applied by the courts.

92. U.S. Const. art I, Sec. 7: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives."

93. *Atkins v. United States*, 556 F.2d 1028, 1062 (Ct. C. 1977), *cert. denied*, 434 U.S. 1000.

94. *Id.*, at 1080.

95. See Note 71 and accompanying text.

96. PLF's memorandum of Points and Authorities, p. 30.

97. *Chadha v. INS*, *supra*, note 11 at 434. See also, note 84.

whether § 204(e) allows the Committee to alter individual's substantive rights. *PLF* said that the lease applicants had their lease priorities extinguished; the court held that applicants were entitled to "fair consideration." *Chadha* did not define a "substantive right", but if it is defined as a right entitled to some degree of protection by a court, the bicameralism argument appears to be valid. One committee of Congress certainly could not do something that one house of Congress could not do.

Once *PLF* had reached this conclusion, it was easy to demonstrate that § 204(e) violated the Presentment Clause. Having determined that the Committee resolution enacted positive law that affected individual's substantive rights. *PLF* concluded that the resolution was subject to the President's veto power.⁹⁸ It is interesting that all of *PLF*'s arguments relating to delegation apply even if you accept the court's interpretation that § 204(e) does not authorize the Committee to order the scope and duration of a withdrawal. Apparently, the only thing that saves the section (and the court's refusal to address these constitutional arguments) is the court's holding that the Secretary can revoke a withdrawal order: this additional degree of administrative control over the Committee's action under § 204(e) prevents the section from violating the nondelegation doctrine, the Appointments, Disability and Incompatibility, and Presentment clauses, and the bicameralism principle. Perhaps an appeal will shed some light on the lower court's failure to deal with these arguments.

2. The Sierra Club and other intervening defendants argued that the Property Clause, combined with the Necessary and Proper Clause, conferred virtually limitless power on Congress to retain or regain control over its delegates to administrative agencies and congressional committees.⁹⁹ One commentator has suggested that the second phrase of the Necessary and Proper clause allows Congress alone to decide what authority to vest in administrative agencies and how to condition its delegations.¹⁰⁰ But this argument overlooks the fact that a court can still find that the means used to reach a constitutional end violate other provisions of the Constitution.¹⁰¹ However, the *PLF* court did not sug-

98. See, *State of Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Al. 1980).

99. U.S. Const. art I. Sec 8: "(The Congress shall have the power) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

100. Van Allstyn, *The Role of Congress in Determining the Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause"*, 36 Ohio State L.J. 788 (1975).

101. See *Buckley v. Valeo*, 424 U.S. 1, 135 (1976); *Chadha v. INS*, *supra*, at 433: "That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power."

gest reason why a committee ordering a withdrawal is more "necessary and proper" to carry out its authority under the Property Clause than a committee setting the scope and duration of a withdrawal. Ultimately, "[t]he problem is one of limits"¹⁰², and courts should at least offer some criteria for determining what those limits are or should be. *PLF v. Watt* requires us to infer such criteria from the specific facts of the case, and so the decision is but a judicial gloss on the reasoning in the *Chadha* case, which applies to *PLF*.

IV. POLICY IMPLICATIONS

In wars between nations, each side inevitably thinks the other caused the whole thing, while "we" certainly were not to blame. Each side imputes to the other evil qualities and motives which perhaps it shares itself. In environmental disputes, the same analogy holds: the capitalistic "bad guys" are out to wipe out the environment in pursuit of short-term profits, or the environmentalists relentlessly try to impose their "no growth" philosophy on the masses who really care more about heating their homes than enjoying the scenic wonders of the world. In many ways, the court system intensifies the perceived battles by forcing the sides to polarize. The judge then must fashion a compromise by trying to find a midway point between extremes. Such a compromise emerged from the legal analysis in the court's decision in *PLF v. Watt*. But we should not ignore the economic and political influences on such legal analysis, and the *PLF* case provides a good example of the competing policy points of view.

A. *The Oil Company View*

Whenever Secretary Watt does something that favors oil companies, many people say, "Aha! The oil companies must be behind it." Thus, at first glance, it seemed that oil company pressure was behind Watt's decision to start granting leases in wilderness areas. In fact, the situation was more complex than most people realized.

Most exploration in unproven wilderness areas is not done by big oil companies. It is done by small independents. The oil industry plans 990 exploratory wells in Montana this year, 787 of them by small operators such as the individual plaintiff in *PLF v. Watt*.¹⁰³ For example, Mr. A. William Rutter, Jr. filed a declaration on behalf of PLF essentially confirming the fact that most exploration is done by specula-

102. *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971).

103. *Oil and Gas Journal*, Oct. 19, 1981 p. 204.

tors like himself who file for non-competitive lease applications.¹⁰⁴ Of course, these people perform a valuable service for the major oil companies, because they provide much of the preliminary data which those companies use in deciding whether to launch full-scale operations. As a result, small independents can reap large financial rewards if they come across large deposits of oil or gas. This is why the priorities in the lease applications, as well as the applications themselves, can be so valuable.

If oil or gas is found, it is no secret that "[t]he industry still feels that looking for oil and gas in Western Montana and its environs [where the Bob Marshall Wilderness Area is located] is still worthy of time and effort."¹⁰⁵ However, major oil companies were wary of pressuring Watt to open up the wilderness areas. They initially feared that the public would blame them for destroying the wilderness, a reaction that would negate the millions of dollars oil companies had spent to improve their image as being concerned about the environment.¹⁰⁶ Moreover, the major oil producers were not ready to start producing in the Montana wilderness areas. Only a few (Conoco, Amoco, Trans-Texas-Sun) had even begun explorations, and entry of more firms was sure to be hampered by cost and time uncertainties.

The terrain in these areas is "remote, primitive . . . [and] characterized by high mountains, large streams, and dense forests. Erosion has worn away thousands of feet of sedimentary section, and Precambrian and batholithic rocks are exposed in 75% of the region."¹⁰⁷ Because of this inhospitable environment, exploration is both costly and risky, and most firms would prefer to invest in relatively certain secondary and enhanced oil recovery techniques applied to existing wells.

A second consideration related to the high cost of exploring and producing in wilderness areas is the current market price of the oil or gas. When prices rise, there is more capital to invest in exploring and developing wilderness areas; but oil companies say the recent price decline is an indicator of future price uncertainty. Before developing wilderness areas, companies must be sure that the prices on which they

104. Declaration of A. William Rutter, Jr. p. 3-4; *See also*, Oil and Gas Journal, Mar. 10, 1980 p. 61.

105. Oil and Gas Journal, Nov. 16, 1981 p. 121.

106. *Ibid.*, Oct. 19, 1981 pp. 144-5: "Senator Malcolm Wallop (R-Wyo) warned Rocky Mountain Oil and Gas operators not to push for oil and gas development in wilderness areas (because) the public doesn't want wilderness development, so industry will hurt its image by pressing the issue The oil and gas industry doesn't need to be viewed as the spoilers of the American wilderness. . . ."

107. J.L. Cannon, *Petroleum Potential of Western Montana and Northern Idaho*, 1971.

base their cost and recovery projections will remain relatively stable.¹⁰⁸

All companies experience time lags between exploration and development. For instance, companies in the Rocky Mountain Areas have found it difficult to find, hire, and train the personnel for new exploratory ventures.¹⁰⁹ These shortages are most acute in the initial exploratory phases of a project, and there can be a substantial lead time for getting the projects off the ground. Other time lags include delivery time for equipment (one year)¹¹⁰, the myriad government regulation with which the oil companies must comply (five years)¹¹¹, and the U.S. Department of Interior's backlog of leases (for a total of six to ten years).¹¹²

Taken together, these image, cost, and time uncertainties suggest that the major oil companies were not behind Watt's decision to open up wilderness areas. In fact, it is likely that they *were* behind his recent decision to *close* them until the year 2000.¹¹³ When Watt moved from MSLF to Washington, he saw himself as having a mandate to implement policies that would free the overregulated oil companies from restrictions which hampered production. The invisible hand of the free market, not government regulators, should decide if wilderness areas should be developed.

But oil companies are not so idealistic. They are more likely to favor "free enterprise" when they already have control over a large portion of the market.¹¹⁴ And they favor government regulation when it gives them advantages which other companies or industries do not enjoy.¹¹⁵ Oil companies added together their present inability to develop wilderness areas competitively with their possible loss of public image, and concluded that the costs of wilderness development outweighed the benefits.

As a result, Watt shifted his emphasis from advocating all-out development to suggesting careful study of the potential reserves within the areas. This shift made Watt look more sensitive to environmental values when his own image was deteriorating, while at the same time he could cater to the oil companies' wishes that he not open up the areas until they were ready. Perhaps in affirmation of this change in policy, the Wilderness Society recently released a study claiming that

108. See the editorial of a Conoco Executive Vice-President for Petroleum Exploration in *Oil and Gas Journal*, April 13, 1981 p. 41.

109. *Oil and Gas Journal*, Oct. 20, 1980 p. 97.

110. *Ibid.*, April 21, 1980 p. 43.

111. Estimate of Sohio executive in Exploration Division, May 3, 1981.

112. *Oil and Gas Journal*, Mar. 1, 1982 p. 63.

113. See the discussion in Part VI(C).

114. Lester Thurow, *The Zero-Sum Society*, 1980 p. 15.

115. *Ibid.*

designated wilderness areas contain 1.4% of potential oil and 1.0% of potential gas reserves in the U.S..¹¹⁶ In retrospect, both large and small companies have *something* to gain by exploring and developing the Bob Marshall Wilderness, but perhaps not as much as Watt thought.

B. *The Environmentalist View*

Most environmentalists are against drilling for oil and gas in wilderness areas. But more people take for granted the "necessities" which living in a resource-rich country has conferred: plenty of cheap gas for their two cars, electricity to heat their homes and hot tubs. In an era of relative resource scarcity, it is clear that environmental and resource needs must be balanced, because our society demands both. But behind the call for a "proper" balance of production and environmental values lurks the same motivation which grips the oil companies: economics. Lester Thurow notes:

Environmentalism is the product of a distribution of income that has reached the point where many individuals find that a 'clean' environment is important to their real standard of living. . . . Lower-income groups simply have not reached income levels where a cleaner environment is high on their list of demands, and it often threatens their income-earning opportunities. Very high income groups can, to a great extent, buy their way out of the environmental problem, and they see environmentalism primarily as frustrating their efforts to earn even higher incomes.¹¹⁷

Environmentalists also complain that as our society becomes more technologically advanced, the public tends to lose control over important decisions; most of the time, a handful of people (usually government officials) decides how much defense, clean air, and wilderness areas we can enjoy. Perhaps basic resource production and consumption decisions could be decentralized, so everyone would have appropriate incentives to localize their own externalities instead of making the government pay for them.¹¹⁸ If one stops to consider it, one does not want decisions which allocate resources (and therefore income) among himself and others to be made by a third party. Optimally, we all would like to decide for ourselves how much of which resources (including wilderness areas) to enjoy. Looking at the environment from an economic perspective illustrates the tradeoffs government must make and exposes the distinct groups affected by any decision. If a court were to decide these issues conclusively, it would be doing the

116. Oil and Gas Journal, Aug. 24, 1981 p. 48.

117. Thurow, *supra*, at p. 105.

118. E.F. Schumacher, *Small is Beautiful*, 1973, p. 242.

very thing which both sides do not want: somebody else making the ultimate decision. The result in *PLF v. Watt*, in this context, was not a defeat for either the environmentalists or the oil companies, because what both sides really want is a decision-making process they can influence. Of course, it also turns out that neither side wants the other to participate, but participation by both is the only way to insure one side's participation. *PLF* insured that the administrative wilderness area leasing process remained open to judicial review instead of being conducted in committee hearings. Only the whole Congress can modify the role which the Department of the Interior plays in the process. This result is generally desirable because both sides are assured present and future influence in the leasing process. The court in *PLF* fashioned this balance by the interpretation it gave § 204(e). Although this article has focused on some of the unanswered questions raised by the court's opinion, the decision at least allows both sides to participate in formulating answers.

C. *PLF v. Watt and Recent Legislation: A Compromise?*

In general, the court's resolution of the statutory issues and its avoidance of most of the constitutional issues was a compromise between the polar positions of the parties. The court looked behind the parties' arguments and found that the real concern, as in *Chadha*, was preserving meaningful substantive and procedural safeguards in legislative and administrative applications of § 204(e).

Judged against these goals, H.R. 5603, reprinted in Appendix A, is a dubious compromise. Extensive analysis now would be premature, since the bill's amended fate is uncertain. But several aspects of the bill deserve mention. The bill withdraws currently designated wilderness areas from all forms of disposition under oil, gas, and mineral leasing laws until the year 2000. The catch is that slant drilling is allowed: it is permissible to erect structures a foot outside a wilderness area which extract oil and gas from beneath the wilderness area, regardless of the activity's effect on the wilderness values of the area. However, other provisions of the bill authorize the Secretaries of Agriculture and Interior to draft reasonable regulations with respect to such activities.

The bill also puts the ball in Congress' court to actively designate areas *recommended* for wilderness status as bona fide wilderness areas, or else they would be subject to oil and gas exploration. Also, lands designated as national forests under various public laws are exempted from withdrawal. Similarly, potential wilderness areas designated in the RARE II (Roadless Area Review and Evaluation Program) EIS will not be withdrawn unless Congress includes them in the National Wilderness Preservation System by 1985. In sum, H.R. 5603 vests sub-

stantial responsibility in Congress to manage our wilderness areas, a significant affirmative power which Congress has under the Property Clause but had delegated in large part to the Department of Interior.

Another portion of the bill allows the President to open withdrawn areas if he finds that an urgent national need for the resources exists and that need outweighs the wilderness value of the land. There is no definition of "urgent national need", and it is unclear who is to perform the cost-benefit analysis. Perhaps some *PLF v. Watt*-type safeguards would be appropriate here. Based on these selected provisions of the bill, it is certain that most wilderness areas would be withdrawn, but it would be up to Congress to protect the wilderness values of potential wilderness areas by taking formal action. The environmental values involved in nearby non-wilderness areas must be left to future environmental impact statements to assess.

H.R. 5603 is a compromise of a different sort than that created in *PLF v. Watt*, but that is not necessarily bad. As a result of this recent legislative development, the federal defendants in the case filed a memorandum arguing that the case was moot. But even though H.R. 5603 was introduced, the lease applicants may still have a current, judicially recognizeable interest in their applications. The court has not yet ruled on the motion for dismissal, but it would be unfortunate to deny an appellate court the opportunity to tie together the legal theories in *Chadha*, *PLF*, and *Consumer Energy Council*. In terms of policy, the oil companies probably could not explore the wilderness areas for the next ten or fifteen years anyway, so the ultimate balance of resource and environmental values may be struck by a combination of market and institutional forces, and not by the conscious decisions of either side.

PLF v. Watt may signal a truce in the war: this particular battle may have laid the groundwork and provided incentives to both sides to fashion constructive statutory and constitutional bases for important environmental decisions that affect our future survival.

APPENDIX A

1

97TH CONGRESS
2D SESSION

H.R.5603

To withdraw the National Wilderness Preservation System and other lands from operation of the general mining and mineral leasing laws, to insure adequate inventories of resource values in such areas, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1982

Mr. LUJAN (for himself, Mr. YOUNG of Alaska, Mr. MARLENEE, Mr. CHENEY, Mr. PASHAYAN, Mr. MARTIN of New York, Mr. HANSEN of Utah, and Mr. EMERSON) introduced the following bill; which was referred jointly to the Committees on Agriculture and Interior and Insular Affairs

A BILL

To withdraw the National Wilderness Preservation System and other lands from operation of the general mining and mineral leasing laws, to insure adequate inventories of resource values in such areas, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.—This Act may be cited as the “Wilderness Protection Act of 1982”.

SEC. 2 PURPOSES.—It is the intent of Congress that—

(a) the Nation’s wilderness and wilderness study areas be fully protected;

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(b) resource values in wilderness and wilderness study areas be properly inventoried, in order that informed land use and resource allocation decisions will be fostered, the overall national interest will be addressed, and the Nation’s many varied needs can be met in a timely and environmentally sound manner; and

(c) wilderness study lands judged not suitable for designation as wilderness be made available for other uses, in accordance with the Nation’s land use and environmental laws, and not be retained in indefinite or repetitious wilderness study processes.

SEC. 3. (a) WITHDRAWALS.—Except as specifically provided in this Act, notwithstanding any other provision of law, until January 1, 2000—

(1) lands designated by Congress as components

17 of the National Wilderness Preservation System;
18 (2) congressionally designated wilderness study
19 areas, as of the date of enactment of this Act, includ-
20 ing wilderness study areas formally identified by the
21 Secretary of the Interior in accordance with section
22 603(a) of the Federal Land Policy and Management
23 Act of 1976 (Public Law 94-579; 43 U.S.C. 1782(a));

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1 (3) lands recommended for wilderness designation
2 by the Forest Service in the second roadless area
3 review and evaluation program (RARE II); and
4 (4) lands identified as wilderness study areas by the
5 Bureau of Land Management, pursuant to section 603 of the
6 Federal Land Policy and Management Act of 1976,
7 are hereby withdrawn from all forms of appropriation under
8 the mining laws; from disposition under all laws pertaining to
9 oil and gas, mineral and geothermal leasing, and all amend-
10 ments thereto; and from energy and mineral exploration and
11 development activities requiring occupancy of the surface of
12 such land.

13 (b) NATIONAL NEED FOR MINERAL ACTIVITIES.—
14 Notwithstanding subsection (a) of this Act or any other provi-

15 sion of law, upon a finding by the President that, based on
16 the information available to him—

17 (1) there is an urgent national need for specified
18 mineral resources or for leasing, exploration, develop-
19 ment and production in areas withdrawn under subsec-
20 tion (a), and

21 (2) such national need outweighs the other public
22 values of the public lands involved and the potential
23 adverse environmental impacts which are likely to
24 result from the activity,

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1 the President shall submit to the Committee on Energy and
2 Natural Resources of the United States Senate and the Com-
3 mittee on Interior and Insular Affairs of the United States
4 House of Representatives, on the same date and while Con-
5 gress is in session, an order opening such lands withdrawn by
6 this Act as he deems necessary or appropriate, and no such
7 order may take effect before the expiration of a period of
8 sixty calendar days following the date of its submission to
9 such committees.

10 (c)(1) INVENTORIES.—Nothing in this Act shall pre-
11 vent, in any area withdrawn pursuant to subsection (a), pros-

12 pecting, seismic surveys, and core sampling conducted by
13 helicopter or other means not requiring construction of roads
14 or improvement of existing roads or ways, or any other activ-
15 ity not including exploratory drilling of oil and gas test wells,
16 for the purpose of gathering information about and inventory-
17 ing energy, mineral and other resource values of such area, if
18 such activity is carried out in a manner compatible with pres-
19 ervation of the wilderness environment, according to such
20 terms and conditions as the Secretaries of Interior and Agri-
21 culture may by regulation prescribe.

22 (2) The Secretary of the Interior may prescribe such
23 regulations, as he deems necessary, to insure that confiden-
24 tial, privileged, or proprietary information obtained by him or

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1 any officer or employee of the United States under this Act is
2 not disclosed.

3 (d) EXCEPTED LANDS.—The terms of subsection (a),
4 withdrawing certain public lands from energy and mineral
5 leasing, appropriation, exploration and development, shall not
6 apply to—

7 (1) any national forest system or Bureau of Land
8 Management wilderness study lands released to man-

agement for uses other than wilderness by any statewide or other Act of Congress designating components of the National Wilderness Preservation System, now in effect or hereafter enacted;

(2) national forest system lands designated as congressional wilderness study areas by sections 105 and 106 of the Act of December 22, 1980 (Public Law 96-560, 94 Stat. 3265, 3270), or section 4(d)(1) of the Act of July 23, 1980 (Public Law 96-312, 94 Stat. 948, 954);

(3) any national forest system or Bureau of Land Management lands released from wilderness study and returned to management for uses other than wilderness in accordance with section 4 or 5 of this Act; or

(4) any land designated as a conservation unit under the terms of the Alaska National Interests Lands Conservation Act (Public Law 96-487), where the pro-

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visions of that Act are inconsistent with the terms of this Act.

(e) EXCEPTED ACTIVITIES.—Notwithstanding any other provision of this Act or the provisions of section 4(d)(3)

5 of the Wilderness Act of 1964 (16 U.S.C. 1133(d)(3)), until
6 Congress determines otherwise, all lands withdrawn pursuant
7 to this Act or the Wilderness Act shall remain subject to the
8 mining laws and the oil and gas, mineral and geothermal
9 leasing laws of the United States, to the extent that drilling,
10 exploration, development and resource extraction activities
11 can be conducted without occupancy of the surface of such
12 withdrawn lands. All drilling, exploration, development and
13 resource extraction activities conducted under this subsection
14 in areas adjacent to lands withdrawn under subsection (a)
15 shall be subject to such reasonable regulations and stipula-
16 tions as the Secretaries of Agriculture and Interior may pre-
17 scribe.

18 (f) VALID EXISTING RIGHTS.—All provisions of this
19 Act shall be subject to valid existing rights, including mining
20 claims located prior to the date of this Act under the require-
21 ments of the general mining laws, as amended, and leases
22 and permits issued prior to the date of this Act in accordance
23 with the mineral leasing laws of the United States, as amend-
24 ed: *Provided*, That mining claims located prior to the date of

1 this Act may be perfected to comply with any requirements

2 of the mining laws of the United States, as amended.

3 SEC. 4 RELEASE OF UNSUITABLE BLM AREAS.—(a)

4 Section 603 of the Federal Land Policy and Management Act
5 of 1976 (43 U.S.C. 1782) is amended as follows:

6 (1) in subsection (c), by deleting the phrase “until
7 Congress has determined otherwise” and substituting
8 in lieu thereof “until Congress designates such areas as
9 wilderness or the President releases such areas from
10 wilderness study status, as provided in subsection (d) of
11 this section.”

12 (2) by adding the following new subsections at the
13 end thereof:

14 “(d) Upon a recommendation by the President to the
15 President of the Senate and Speaker of the House of Repre-
16 sentatives pursuant to subsection (b) that an area is unsuit-
17 able for preservation as wilderness, such area shall be re-
18 leased for management by the Secretary for uses other than
19 wilderness.

20 “(e) Areas recommended for wilderness in accordance
21 with this section but not placed into the National Wilderness
22 Preservation System by Act of Congress within two years
23 following the date of submission of the President’s recom-
24 mendation to Congress shall no longer be considered as rec-

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1 ommended for wilderness and shall be released for manage-
2 ment by the Secretary for uses other than wilderness.”.

3 (b) The provisions of section 3 of this Act shall cease to
4 apply to any lands determined to be unsuitable for preserva-
5 tion as wilderness and released pursuant to this section, and
6 such lands shall be managed for uses other than wilderness

7 SEC. 5. RELEASE OF RARE II AREAS.—(a) Notwith-
8 standing cases or controversies commenced prior to or after
9 the date of this Act, no justice, judge, court, department or
10 agency of the United States shall have jurisdiction to hear,
11 determine or review, or to issue any writ, process, order
12 (except orders of dismissal for any pending cases), rule,
13 decree or comment with respect to, the legal or factual suffi-
14 ciency of the RARE II final environmental statement, dated
15 January 4, 1979.

16 (b) National forest system lands reviewed under the
17 RARE II program and not recommended for wilderness or
18 identified for further planning in the January 4, 1979, final
19 environmental statement, and not heretofore designated as
20 wilderness by Act of Congress, shall be released for manage-
21 ment by the Secretary of Agriculture for uses other than wil-
22 derness.

23 (c) National forest system lands recommended for wil-
24 derness in the RARE II final environmental statement but
25 not placed into the National Wilderness Preservation System

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1 by Act of Congress before January 1, 1985, shall after that
2 date no longer be considered as recommended for wilderness
3 and shall be released for management by the Secretary of
4 Agriculture for uses other than wilderness.

5 (d) National forest system lands remaining in the RARE
6 II further planning classification upon enactment of this Act
7 and (A) not recommended for wilderness by September 30,
8 1985, or (B) recommended for wilderness by September 30,
9 1985, but not placed in the National Wilderness Preservation
10 System by Act of Congress before January 1, 1988, shall
11 after these respective dates no longer be considered as re-
12 maining in further planning or as recommended for wilder-
13 ness and shall be released for management by the Secretary
14 of Agriculture for uses other than wilderness. Further plan-
15 ning areas determined by the Secretary of Agriculture not to
16 be suited for preservation as wilderness shall no longer be
17 considered as remaining in further planning and shall be re-
18 leased for management by the Secretary for uses other than

19 wilderness.

20 (e) Except as provided by this section, and unless ex-
21 pressly authorized and directed by Act of Congress adopted
22 after the effective date of this Act, the Secretary of Agricul-
23 ture shall not conduct any further statewide, regional, or na-
24 tional roadless area review and evaluation of national forest
25 system lands for the purpose of determining their suitability

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1 for inclusion in the National Wilderness Preservation
2 System.

3 (f) Any national forest system lands released under the
4 terms of this section for uses other than wilderness, unless
5 otherwise directed by Act of Congress, shall be deemed, for
6 purposes of all present and future land management plans
7 and associated environmental statements required for such
8 lands by the Forest and Rangeland Renewable Resources
9 Planning Act of 1974, as amended by the National Forest
10 Management Act of 1976, to have been given adequate con-
11 sideration for the suitability of such lands for inclusion in the
12 National Wilderness Preservation System. The provisions of
13 this section shall also supersede and replace related provi-
14 sions contained in section 104 of the Act of December 19,

15 1980 (94 Stat. 3221, 3224), and section 107 of the Act of
16 December 22, 1980 (94 Stat. 3265, 3270).

17 (g) The provisions of section 3 of this Act shall cease to
18 apply to any lands released under the terms of this section for
19 uses other than wilderness.

20 SEC. 6 BUFFER ZONES.— The designation of any wil-
21 derness area shall not lead to the creation of protective pe-
22 rimeters or buffer zones around any such wilderness area.
23 The fact that nonwilderness activities or uses can be seen,
24 heard or otherwise perceived from areas within a wilderness

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1 shall not preclude such activities or uses up to the boundary
2 of the wilderness area.

3 SEC. 7. REPORT TO CONGRESS.—In addition to, or in
4 conjunction with, the report required by section 7 of the Wil-
5 derness Act of 1964 (16 U.S.C. 1136) on the status of the
6 wilderness system, on or before January 1, 1984, and every
7 fifth year thereafter, the Secretaries of Agriculture and Inte-
8 rior shall jointly report to the President pertinent public in-
9 formation relating to the energy and mineral potential of
10 areas withdrawn pursuant to section (3) of this Act, together
11 with any recommendations concerning resource inventory

12 programs, the need for more extensive exploration programs,
13 and related matters, and the President shall transmit to the
14 Congress a report containing such public information as he
15 deems appropriate. Such report may include, but shall not be
16 limited to, maps, quantified estimates of oil, gas, and other
17 minerals in such areas, and the results of resource inventory
18 programs ongoing or completed, pursuant to section 3(c) of
19 this Act, since submission of the previous report.



