

**ORIGINAL**

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** No. 83-1660 and No. 83-6381

**TITLE** CHARLES M. ATKINS, COMM., OF MASSACHUSETTS, DEPT.  
OF PUBLIC WELFARE. Petitioner. v.  
GILL PARKER, ET AL.: AND GILL PARKER, ET AL.,  
Petitioners, v. JOHN R. BLOCK, SECRETARY, DEPT.  
OF AGRICULTURE, ET AL.

**PLACE** Washington, D. C.

**DATE** Tuesday, November 27 ,1984

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES M. ATKINS, COMMR., :  
OF MASSACHUSETTS, DEPT. OF :  
PUELIC WELFARE. :

Petitioner, :

V. : No. 83-1660

GILI PARKER, ET AL.; and :  
GILL PARKER, ET AL., :  
Petitioners, :

V. : No. 83-6381

JOHN R. BLOCK, SECRETARY, DEPT. :  
OF AGRICULTURE, ET AL. :

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Washington, D.C.

Tuesday, November 27, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 12:58 o'clock p.m.

1 APPEARANCES:

2 SAMUEL A. ALITO, ESQ., Assistant to the Solicitor  
3 General, Department of Justice, Washington, D.C.;  
4 on behalf of the federal respondents in No. 83-6381  
5 and in support of the petitioner in No. 83-1660.

6 ELLEN L. JANOS, ESQ., Assistant Attorney General of  
7 Massachusetts, Springfield, Massachusetts; on  
8 behalf of the petitioner in No. 83-1660.

9 STEVEN A. HITOV, ESQ., Springfield, Massachusetts; on  
10 behalf of Parker, et al.

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Atkins against Parker and the consolidated case.

4                    Mr. Alito, you may proceed whenever you are  
5 ready.

6                    ORAL ARGUMENT OF SAMUEL A. ALITO, ESQ.,  
7 ON BEHALF OF THE FEDERAL RESPONDENTS IN  
8 NO. 83-6381 AND IN SUPPORT OF  
9 PETITIONER IN NO. 83-1660

10                   MR. ALITO: Mr. Chief Justice, and may it  
11 please the Court, this case concerns a 1981 amendment to  
12 the Food Stamp Act that slightly reduces benefits for  
13 households with earned income.

14                   In order to implement this change in the law,  
15 it was not necessary for a state to gather any new  
16 information about any recipient or to make any new  
17 factual determinations. Instead, the state merely had  
18 to make a small mathematical change in the formula used  
19 for computing benefits.

20                   Before the amendment, 20 percent of earned  
21 income was disregarded in calculating benefits, and  
22 after the amendment 18 percent of earned income was  
23 disregarded. Both of the lower courts below in this  
24 case held that the due process clause prohibited  
25 Massachusetts from implementing this simple mathematical

1 charge without providing advanced notice to all affected  
2 recipients explaining to them exactly how their new  
3 benefit amounts had been calculated.

4 QUESTION: Mr. Alito, did the Court of Appeals  
5 make this constitutional decision before it had treated  
6 whether the regulations or the statute might require  
7 it?

8 MR. ALITO: The Court of Appeals also found  
9 that the statute was violated, but it did so only  
10 because it believed that Congress would not have  
11 required the provision of a constitutionally defective  
12 form of notice. It did not devote any independent  
13 analysis to the language of the statute or to the  
14 legislative history, and so we believe that the  
15 statutory issue is before this Court, and is fairly  
16 subsumed by the constitutional question that was raised  
17 in the state's petition.

18 QUESTION: And you think we should address it,  
19 Mr. Alito?

20 MR. ALITO: It is an alternative ground --

21 QUESTION: We shouldn't send it back to them?

22 MR. ALITO: You may send it back for them to  
23 decide the statutory issue.

24 QUESTION: I am suggesting, do you think we  
25 ought to do that?

1 MR. ALITO: No, I believe this Court ought to  
2 decide it.

3 QUESTION: Ought to decide it.

4 MR. ALITO: I don't think the issue has any  
5 merit. In the brief time that --

6 QUESTION: The court's has already decided it,  
7 hasn't it, below?

8 MR. ALITO: That's correct. It has, but in  
9 our view it based its holding --

10 QUESTION: Yes.

11 MR. ALITO: -- purely on the constitutional  
12 question, on which we believe it was wrong.

13 QUESTION: Well, if you send it back now  
14 without saying anything, they couldn't say anything but  
15 what they have already said.

16 MR. ALITO: I assume they would adhere to  
17 their decision based on their erroneous view of what the  
18 due process clause requires, and in the brief time that  
19 is allotted to me this afternoon, I want to argue that  
20 in the situation involved in this case, advance notice  
21 is not constitutionally necessary.

22 Counsel for Massachusetts will then assume for  
23 the sake of argument that some form of notice is  
24 necessary, and will argue that the notice furnished in  
25 this case satisfied statutory and regulatory

1 requirements.

2 Let me make clear at the outset exactly what  
3 our submission is. We acknowledge that the due process  
4 clause requires notice and a hearing when a state  
5 terminates or reduces benefits based on a factual  
6 determination about the recipient. That is the  
7 situation in Goldberg versus Kelly.

8 But we don't think the same rule applies here,  
9 where there is no new factual determination, where the  
10 only thing that had to occur was a new computation using  
11 data that was already in the file and already in use.  
12 Why is this so?

13 First of all, I think it is quite clear that  
14 the due process clause does not restrict Congress's  
15 authority to change the level of food stamp benefits. A  
16 food stamp recipient has a property interest in  
17 receiving the level of benefits specified by law at any  
18 particular time.

19 The recipient doesn't have a property interest  
20 in getting any greater benefits, and the recipient  
21 doesn't have a vested interest in getting future  
22 benefits. So, if Congress amends the law and reduces  
23 benefits, as it did in 1981, it does not deprive the  
24 recipient of property. It merely redefines the  
25 recipient's property interest.



1           Now, since the plaintiffs in this case, who  
2           were food stamp recipients, had no vested interest in  
3           continuing to receive benefits at the pre-1981 level,  
4           one may well ask on what theory they claimed that  
5           implementation of the 1981 reduction deprived them of  
6           property and triggered the due process clause.

7           And their theory, as I understand it, is as  
8           follows. First, they correctly note that they have a  
9           property interest in getting the right amount of  
10          benefits. Then they say this interest is threatened  
11          when the law is changed, because the risk of  
12          administrative accident in calculating benefits  
13          increases at this time of confusion, and therefore they  
14          say we are entitled to advance notice explaining to us  
15          how our new benefit level was calculated so that we can  
16          double check the state's computation.

17          Now, the first thing that is wrong with this  
18          theory in our view is the premise that a great risk of  
19          administrative error occurs when a simple mathematical  
20          change like that enacted in 1981 is implemented. This  
21          premise is devoid of empirical support, and it is  
22          intuitively incorrect.

23          This is a simple mathematical operation, and  
24          it does not give rise to a great risk of error, but  
25          assuming that it is correct for the sake of argument,

1 let me briefly explore some of the implications of this  
2 theory.

3 First of all, for all the talk about  
4 reductions in food stamp benefits, it turns out that it  
5 doesn't matter under this theory that benefits were  
6 reduced in 1981. All that matters is that the law was  
7 changed, and therefore plaintiffs claimed the risk of  
8 error increased, so the theory would logically apply  
9 just as well if Congress had increased benefits in 1981  
10 or if it had simply made some other alteration in the  
11 formula for computing benefits.

12 Second, it is clear that this theory extends  
13 far beyond food stamps, and let me give just two  
14 examples. A state decides to increase the salaries of  
15 its employees to reflect an increase in the cost of  
16 living. State employees have a property interest in  
17 getting the salaries specified by law.

18 A Change in the pay scale is a mass change in  
19 the law, so according to the plaintiffs that increases  
20 the risk of administrative error. So under their theory  
21 state employees are entitled to advanced notice as a  
22 constitutional requirement explaining how their new  
23 salaries were calculated.

24 Another example. Tax rates have been charged  
25 several times in recent years. This has affected the

1 amount withheld from wages. Wage earners have a  
2 property interest in their wages. Changing the tax  
3 rates is a mass change in the law, so under the  
4 plaintiff's theory, wage earners were entitled to  
5 advanced notice specifying how their new wage levels  
6 were calculated.

7 And I think plaintiffs' theory goes further  
8 still, because what really triggers, what directly  
9 triggers the due process clause under that theory is not  
10 the change in the law but the increase in the risk of  
11 administrative error.

12 So what if the risk increases for some other  
13 reason? The state gets a new computer program, gets a  
14 new computer. There is a fire at the computer center.  
15 Logically the theory should apply there as well, but  
16 then I am not even sure why an increase in the risk of  
17 error should matter.

18 What if the normal, everyday error rate in a  
19 noncomputerized state is higher than even the increased  
20 error rate in a state like Massachusetts when it  
21 implements a change in the law? Is the noncomputerized  
22 state then under some kind of perpetual duty to give out  
23 notice every time it issues a check?

24 All of this, of course, is absurd. The due  
25 process clause requires notice and a hearing when there

1 is a real and imminent threat to a property or liberty  
2 interest.

3 Now, there is such a threat in the Goldberg  
4 versus Kelly situation. The state makes a factual  
5 finding about the individual and concludes that the  
6 individual is ineligible for benefits, but there is no  
7 such threat here.

8 The only threat is the statistical chance that  
9 an accident is going to happen, but for all of us there  
10 is always the chance that the government is going to  
11 accidentally deprive us of life, liberty, or property.  
12 The elevator in this building may crash, but that does  
13 not mean that we all have a due process right to advance  
14 notice and a hearing on the issue of elevator  
15 maintenance.

16 Respondents -- the plaintiffs in this case  
17 have the last word on this constitutional question in  
18 their reply brief, and it seems to me that they ended up  
19 by conceding virtually everything that I have just  
20 said.

21 On Page 11 of their reply brief, they write,  
22 "By definition, accidental deprivations of property by  
23 the government cannot be predicted, and therefore  
24 advanced notice of them is not possible, much less  
25 required. This reality, however, does not lead to the



1 conclusion that no notice is due when the government  
2 intends to deprive one of property and will predictably  
3 make mistakes in doing so."

4 But here, neither Massachusetts nor the  
5 federal government intended to deprive anybody of  
6 property. What they intended to do was to see that  
7 every recipient got exactly the level of benefits voted  
8 by Congress in 1981, no more and no less.

9 The plaintiffs in this case are worried only  
10 about accidental deprivation of property, but in the  
11 case of such accidental occurrences, advanced notice in  
12 a hearing is not necessary. Post-deprivation  
13 proceedings are fully sufficient, as this Court held in  
14 Parrott versus Taylor.

15 QUESTION: Mr. Alito, focusing on that  
16 language, your disagreement is, they say when they  
17 intend to deprive, and you are saying the correct  
18 statement would be, they intend to change the property.

19 MR. ALITO: That's right.

20 QUESTION: Which is not a deprivation.

21 MR. ALITO: The Congress is not depriving.  
22 They flip back and forth in their argument between  
23 different definitions of what their property interest  
24 is. But it is quite clear, and I believe they conceded  
25 it in their opening brief, that they have no property

1 interest in continuing to receive benefits at the 1981  
2 level.

3 Congress is free to change the level of  
4 benefits at any time, as this Court held in United  
5 States Railroad Board versus Fritz, and in Fleming  
6 versus Nestor, the Court went so far as to say that  
7 under the Social Security system, where people do make  
8 payments, there is no vested right to future payments,  
9 to future benefits.

10 So, it must follow that under the food stamp  
11 program recipients do not have a vested right in  
12 continuing to receive benefits at any particular level.  
13 The only thing they are worried about here is an  
14 accidental deprivation of property, and as to that they  
15 don't have a constitutional right to advanced notice or  
16 a hearing.

17 CHIEF JUSTICE BURGER: Ms. Janos.

18 ORAL ARGUMENT OF ELLEN L. JANOS, ESQ.,

19 ON BEHALF OF THE PETITIONER

20 IN NO. 83-1660

21 MS. JANOS: Mr. Chief Justice, and may it  
22 please the Court, my argument is premised on the  
23 assumption that the Constitution requires some form of  
24 notice, and our argument is essentially that the notice  
25 that the Department of Public Welfare sent out in

1 December, 1981, in fact met and exceeded the  
2 constitutional requirement of due process.

3 QUESTION: Ms. Janos, may I ask, there is a  
4 regulation, isn't there, that requires you to give some  
5 notice?

6 MS. JANOS: Yes, there is, Your Honor.

7 QUESTION: And also I gather that same  
8 regulation makes provision for continuing benefits in  
9 certain circumstances.

10 MS. JANOS: That's correct, Your Honor.

11 QUESTION: Are those provisions going to have  
12 any relevance to your argument?

13 MS. JANOS: Only insofar as Massachusetts  
14 exceeded those regulatory requirements and we allowed,  
15 if someone appealed, we continued their benefits, if  
16 they appealed for any reason. The regulation is a  
17 little bit more restrictive, but in this case if anyone  
18 filed an appeal from this notice, their benefits were  
19 continued pending that appeal and pending the final  
20 decision.

21 QUESTION: They were continued in all  
22 instances?

23 MS. JANOS: Yes. That's correct, Your Honor.

24 QUESTION: I see.

25 MS. JANOS: In December, 1981, the

1 Massachusetts Department of Public Welfare mailed a  
2 notice to 16,000 food stamp recipients that were  
3 affected by the change in federal law. The lower courts  
4 found this notice unconstitutional because of its  
5 vocabulary, because of its print size, because of its  
6 ink quality, and because it did not contain  
7 individualized financial information for each particular  
8 household.

9 The courts used this notice to set forth  
10 unworkable and burdensome standards to govern future  
11 notices of legislative change which are not rooted in  
12 the due process clause.

13 First, the notice was accurate, and it  
14 conveyed the information about the change in federal law  
15 in a correct manner and in a manner that was in  
16 accordance with the Secretary's regulatory  
17 requirements.

18 Secondly, the notice used language that is  
19 commonly on food stamp forms and notices, and most  
20 important, language that was understood by the three  
21 class representatives in this particular case.

22 Third, there was no finding that any  
23 particular recipient did not ultimately receive all the  
24 benefits to which they were entitled.

25 QUESTION: I am scrry, Ms. Janos. Looking at



1       that regulation, I just want to be clear. You have told  
2       me benefits continued in the case of all appellants --

3               MS. JANOS: Yes.

4               QUESTION: -- until their appeals had been  
5       resolved. But the regulation seems to require  
6       continuation of benefits, does it not, only if the issue  
7       being appealed is that food stamp eligibility or  
8       benefits were improperly computed, but I gather you  
9       didn't limit it to such appeals, did you?

10              MS. JANOS: We did not.

11              QUESTION: I see.

12              MS. JANOS: We did not.

13              QUESTION: Thank you.

14              MS. JANOS: Finally, even if -- if someone had  
15       a question or wanted to challenge the application of  
16       this legislative action to their particular case, the  
17       procedural safeguards that were afforded to all of the  
18       people that received this notice were extensive.

19              Page 2 of the notice, which is at Page 5 of  
20       your joint appendix, is entitled "Important Notice, Read  
21       Carefully." It explains that the federal law had  
22       lowered the earned income deduction from 20 percent to  
23       18 percent. It explained the effect of the law on the  
24       household's benefits. It then explained in detail the  
25       simple procedure by which an appeal could be claimed.

1           Although the class representatives understood  
2           the language of this notice, the District Court applied  
3           a mechanical reading test, a formula to this notice to  
4           see whether it met the requirements of the due process  
5           clause. That reading --

6           QUESTION: Ms. Janos, are the reproductions of  
7           the notices in the appendix substantially as the notice  
8           is actually worded?

9           MS. JANOS: They are the size and the exact  
10          format, Your Honor. Of course, that was on a card, and  
11          it was on a colored card, but the size of the print and  
12          the style is an exact reproduction.

13          QUESTION: Is identical. It isn't the easiest  
14          thing to read, of course, is it?

15          MS. JANOS: There may have been some people  
16          that had difficulty reading it, Your Honor, but it was  
17          clearly written. It was on a brightly colored card. It  
18          was entitled "Important Notice, Read Carefully," and  
19          then it --

20          QUESTION: It is like reading income tax  
21          instructions.

22          MS. JANOS: It was easier than that, we  
23          submit, Your Honor. The language in there, which may  
24          not be familiar to the average lay person, is language  
25          that is commonly used on food stamp forms and

1 applications, and commonly part of the interview process  
2 that households go through on a periodic basis.

3 The District Court found that the notice was  
4 unconstitutional because it contained words such as  
5 "household," "appeal," "eligible," and "benefits."

6 QUESTION: What was the theory of the District  
7 Court's ruling that unconstitutional?

8 MS. JANOS: The District Court applied a  
9 mechanical reading test to this notice. That reading  
10 test is based on a list of 3,000 words, so-called  
11 familiar words. Those are 3,000 words that were  
12 familiar to fourth graders in 1948. Any word that  
13 doesn't appear -- any word that is on the notice that is  
14 not on that list is considered an unfamiliar word.

15 QUESTION: Where did the District Court get  
16 the idea of a 1948 3,000-word test?

17 MS. JANOS: That is a reading test that is  
18 used routinely to examine the readability levels of  
19 textbooks used by educators. It is a common reading  
20 test when you just want to examine objectively the grade  
21 level of a particular passage. It is --

22 QUESTION: Is that the Dale-Chall test?

23 MS. JANOS: That is the Dale-Chall test, and  
24 it is based on a list of 3,000 words.

25 QUESTION: What was the reason for a second

1 notice as distinguished from the first?

2 MS. JANOS: The second notice in this case was  
3 issued, Your Honor, in response to the District Court's  
4 temporary restraining order. The first notice that went  
5 out was dated 11/81, and the second notice --

6 QUESTION: December 26th.

7 MS. JANOS: -- was dated December 26th.

8 QUESTION: Do you feel it was an improvement  
9 on the first?

10 MS. JANOS: The critical part of the notice,  
11 Your Honor, was identical to the first notice. Page 2  
12 was virtually identical to the November notice except  
13 for the fact that it now had a specific date on it. The  
14 first page of that notice was an attempt to explain why  
15 they were in fact receiving a second notice on the  
16 effect of the temporary restraining order.

17 In addition to everyday food stamp words, the  
18 other kinds of words that contributed to the  
19 unconstitutionality of this notice were such words as  
20 "recent," "within," "enclosed." The list of those words  
21 appear in your appendix, and we submit that they have no  
22 application to the determination of whether a notice  
23 informs someone of a pending action.

24 The due process clause does not incorporate a  
25 statistical reading test. It merely requires that a



1 notice be reasonably designed to convey the required  
2 information. The logical extent of this rule, of  
3 course, would require states to match the reading  
4 abilities of the intended readers of a particular notice  
5 with the notice itself.

6 It imposes burdensome and unworkable  
7 requirements on states, and most importantly, those are  
8 decisions for state administrators to make, for Congress  
9 to make. They are not decisions that are to be made by  
10 federal courts, and they are not decisions that are  
11 related to the construction of the due process clause.

12 The District Court found a second basis for  
13 holding this notice unconstitutional. The District  
14 Court found that there was a risk of erroneous  
15 deprivation inherent in this notice.

16 As Mr. Alito pointed out, the risk of error in  
17 the implementation of this across-the-board statutory  
18 reduction was minimal. It was a simple recalculation  
19 using existing factual data. There were no disputed  
20 factual issues that came into play in the implementation  
21 of this particular change.

22 And more importantly, if someone believed that  
23 the legislative action should not be applied to them,  
24 they were afforded extensive procedural safeguards. The  
25 notice stated that they could call their local welfare

1 office if they had any questions. All they had to do  
2 was send back into the department a slip of paper that  
3 accompanied the notice, and thereby claiming an appeal.

4 As I stated, if they sent in that slip of  
5 paper, their benefits were restored pending the appeal.  
6 The appeal was an evidentiary hearing. The appeal was  
7 subject to judicial review. So that the procedural  
8 safeguards went far beyond the regulatory requirements  
9 for one, and certainly went far beyond the  
10 constitutional requirements.

11 QUESTION: And I take it the government  
12 wouldn't seek to get back the payments that were made  
13 pending resolution of the appeal even if the government  
14 prevailed.

15 MS. JANOS: The regulation requires that we do  
16 in fact, if the recipient does not prevail on appeal,  
17 and the recipient is so notified and was so notified in  
18 this notice, that they will attempt to collect that  
19 money back.

20 QUESTION: Have you done that?

21 MS. JANOS: I don't believe we have, Your  
22 Honor, and I don't know. Sometimes it is -- the  
23 administrative difficulties of trying to collect \$5  
24 outweigh the need to get that.

25 The rule announced below is essentially this.

1 When announcing a change in the law, a recipient must be  
2 able to determine on the face of the notice whether  
3 there has been a calculation error. As Mr. Alito  
4 pointed out, this rule is not restricted to the food  
5 stamp program. It is not even restricted to public  
6 assistance programs generally, but could be applied  
7 whenever the government takes any action where the  
8 property interest is implicated.

9 There is -- the due process clause simply  
10 requires that someone be on notice that something is  
11 happening to them, and not be given their entire case  
12 file so that they can check the computations and  
13 calculations of the state agency.

14 I just want to turn for a moment, Your Honor,  
15 to the -- and just to back up for a minute on the risk  
16 of error, as I stated earlier, and as the Court of  
17 Appeals recognized, there was no showing that anyone  
18 ultimately received less benefits than they were  
19 entitled to.

20 QUESTION: Ms. Janos, suppose the appeal was  
21 on the ground that the benefits were improperly  
22 computed. Suppose that is the appeal that is made by a  
23 given appellant. How does that appellant ever learn, or  
24 when does the appellant first learn how in fact the  
25 benefits were computed?

1 MS. JANOS: As soon as a party files an  
2 appeal, or even before they file an appeal, they have a  
3 right under the regulations to review their entire case  
4 file. The department is required to make available to  
5 them all of the records in their case file so that they  
6 can in fact see what is in there and whether there are --

7 QUESTION: I mean, may one go in and say,  
8 look, this is what you tell me I am now to get, how did  
9 you arrive at that figure?

10 MS. JANOS: Absolutely, Your Honor.

11 QUESTION: He may?

12 MS. JANOS: And that is available to  
13 everybody. They can call. They don't even have to go  
14 in, or certainly they can go in and examine it  
15 themselves, before a hearing, or if they want to make a  
16 decision as to whether a hearing is even necessary.

17 In the food stamp program, people are  
18 recertified periodically, and at the recertification it  
19 is equivalent to a new application. For some households  
20 it is three months. For some households it is six  
21 months. And for a very few, it is a year. And at that  
22 recertification period, they sit down with a  
23 face-to-face interview with the social worker, and they  
24 go through their entire case file, so it is not as if  
25 they don't have contact or are not used to having



1 contact with particular workers.

2 QUESTION: Ms. Janos, do you know how many  
3 families in Massachusetts are on the food stamp  
4 program?

5 MS. JANOS: At the time of this trial, Your  
6 Honor, there were approximately 190,000. There were  
7 16,000 people that had earned income, that is, people  
8 that were employed that were affected by this particular  
9 change.

10 QUESTION: Most of them in Boston, or all over  
11 the state?

12 MS. JANOS: They are all over the state, and  
13 there are local offices all over the state.

14 QUESTION: I should say commonwealth, not  
15 state.

16 MS. JANOS: That's right. So that someone was  
17 not required from the western part of the state --

18 QUESTION: Did you say 190,000 families,  
19 households?

20 MS. JANOS: Families. Families.

21 QUESTION: What is the 16,000 figure? I  
22 thought there were only 16,000 people involved.

23 MS. JANOS: No, 16,000 people received the  
24 notice in this case and were part of the class action  
25 that brought this lawsuit. Those 16,000 people were

1 people that had earned income, that had someone in the  
2 household that was employed, and this particular change  
3 affected only those households, and this notice went to  
4 only households with earned income.

5 QUESTION: May I ask on the question of the  
6 adequacy of the notice? Assume we get there, and I  
7 understand your first argument agrees with the Solicitor  
8 General, but if we do review the standard -- the notice,  
9 what standard of review? Is it just a clearly erroneous  
10 standard, or what --

11 MS. JANOS: We don't believe so, Your Honor.  
12 We don't believe that the kinds of facts that are  
13 involved in a case like this are the types of facts that  
14 require deference. They are not factual determinations  
15 based on credibility, which is normally the province of  
16 the trial judge. They are predictive kinds of facts.

17 QUESTION: The First Circuit applied the  
18 clearly erroneous.

19 MS. JANOS: The First Circuit felt very bound  
20 by that clearly erroneous standard, and at times  
21 throughout the opinion appeared to want to examine it  
22 more closely, but stated that they had in the past  
23 followed that, and continued to follow that. We don't  
24 believe that that is the appropriate standard when  
25 reviewing this type of case.

1 I will reserve my remaining time for  
2 rebuttal. Thank you.

3 CHIEF JUSTICE BURGER: Very well.

4 Mr. Hitov.

5 ORAL ARGUMENT OF STEVEN A. HITOV, ESQ.,  
6 ON BEHALF OF PARKER, ET AL.

7 MR. HITOV: Mr. Chief Justice, and may it  
8 please the Court, there are three major points that the  
9 plaintiffs would like to make in their presentation  
10 today. The first is that the Food Stamp Act does indeed  
11 require the type of individual notice of reduction or  
12 termination in benefits ordered below, and that is for  
13 two reasons.

14 The first reason is so that families who are  
15 about to experience a correct reduction in their  
16 benefits can plan for that. That has always been the  
17 structure of the food stamp program as expressed in the  
18 Secretary's own regulations.

19 The second reason for this informative notice  
20 is so that families who are about to be incorrectly  
21 reduced, or who believe from what they have been told  
22 that they are about to be incorrectly reduced, can  
23 challenge that reduction and prevent those benefits from  
24 being reduced while they are going through a hearing on  
25 that issue.

1 QUESTION: Well, is this what the court below  
2 held?

3 MR. HITOV: That is correct, Your Honor.

4 QUESTION: Did they articulate those very  
5 grounds?

6 MR. HITOV: They did not articulate the first  
7 ground, Your Honor. They specifically said that it  
8 cannot be the case that a person is entitled to a  
9 hearing and given notice that they are entitled to a  
10 hearing but not be given enough information to determine  
11 whether or not they should request a hearing. That was  
12 in the First Circuit's opinion.

13 QUESTION: Mr. Hitov, do you agree with  
14 respondents that as they administer this program, the  
15 filing of an appeal automatically results in the  
16 resumption of the payments at whatever they have been  
17 until the appeal has been decided?

18 MR. HITOV: I can't say for certain, Your  
19 Honor, in each case of the record, but it is the common  
20 law stated policy that they will, as Ms. Janos stressed,  
21 reinstate, not continue --

22 QUESTION: Reinstate.

23 MR. HITOV: -- but reinstate benefits if they  
24 have already terminated them and then somebody requests  
25 an appeal, within a specified -- within a very short



1 specified time, within ten days of whatever date is on  
2 the notice.

3 QUESTION: But if you do, the payments are  
4 reinstated, and then the end result is a reduction of  
5 the -- I think Ms. Janos told us there may be an effort  
6 to recoup benefits.

7 MR. HITOV: That's right. The regulations  
8 call for an effort to recoup the money paid between the  
9 date when the notice and the reduction, and reduction  
10 was to take effect.

11 QUESTION: I gather the effort to recoup is  
12 rare.

13 MR. HITOV: I am sorry, Your Honor. I am not  
14 going to answer that question. The state recently at  
15 least has not confided in me as to their recoupment  
16 procedures.

17 The second major point that we wish to stress  
18 here is the prospective injunctive relief issued by the  
19 District Court --

20 MR. HITOV: May I, before you leave the first  
21 point, you said the statute required the notice to help  
22 in planning and to correct errors. Is that -- what  
23 section of the statute?

24 MR. HITOV: I am sorry, Your Honor. That is 7  
25 USC Section 2020(e)(10).

1 QUESTION: That is on Page 1A of the  
2 government's brief. It provides the granting of --

3 MR. HITOV: I know for certain that it is  
4 included on Page 1A of our brief, the red covered brief,  
5 of the appendix.

6 QUESTION: Do you think there is language in  
7 there that explains all that?

8 MR. HITOV: Yes, I do, Your Honor. If I  
9 might, I would be happy to address that either now, Your  
10 Honor, or I might just finish my synopsis and then that  
11 would be my first point.

12 QUESTION: All right.

13 MR. HITOV: So our second point in the overall  
14 presentation is its prospective injunctive relief,  
15 Number One, was quite conservative, and Number Two, was  
16 entirely justified. As to the contents of future  
17 notices, each of the families in this lawsuit received a  
18 notice of reduction or termination of their grants based  
19 upon the specific facts of their case.

20 That was the type of notice that was sent  
21 here, and the District Court merely ordered the  
22 defendant, the Department of Public Welfare, in the  
23 future to issue notices of reduction or termination that  
24 comported with the language of the statute itself as  
25 that language was determined by the First Circuit.

1 QUESTION: Well, Mr. Hitov, how much of that  
2 prospective injunctive relief remains after the opinion  
3 of the First Circuit?

4 MR. HITOV: None, Your Honor, absolutely  
5 none. The First Circuit left intact in terms of remedy  
6 only the declarations of the District Court.

7 QUESTION: Which were the declarations that  
8 this would be -- this was required by law?

9 MR. HITOV: That's correct, Your Honor, that  
10 Section 2020(e)(10) of the Food Stamp Act requires  
11 advanced notice of any reduction or termination except  
12 in the one specified exception right there in the  
13 statute.

14 QUESTION: So that the governments are subject  
15 to a declaratory judgment but not to an injunction.

16 MR. HITOV: That is correct, Your Honor, and  
17 since that point, without a stay of the First Circuit's  
18 mandate, the Department of Public Welfare has issued  
19 another notice under exactly the same circumstances  
20 which did not comply with that mandate, but I will get  
21 to that also in the main body of my argument.

22 Second, as to the form of future notices, when  
23 the Court examines the record, you will notice that no  
24 form has been dictated. What the District Court did was  
25 tell the Department of Public Welfare to develop some

1 mechanism to ensure that future notices would be  
2 understandable to the people that they were sent to.

3 Finally, the third aspect of the relief  
4 afforded by the District Court was the return of the  
5 benefits withheld in violation of Section 2020(e)(10) of  
6 the Act, and the plaintiffs will demonstrate that the  
7 return of these benefits is in fact mandated by another  
8 section of the Act, 7 USC Section 2023(b), not only as a  
9 matter of statutory construction, but also for sound  
10 policy reasons as well.

11 QUESTION: Well, sound policy reasons based on  
12 something other than the statute?

13 MR. HITOV: No, Your Honor, sound policy  
14 reasons that derive directly from the statute. Justice  
15 Stevens, if I might now return to your question as to  
16 the language of the statute, if you would bear with me  
17 for just one second, I would like to present to the  
18 Court what the notice did say, what it didn't say that  
19 the lower courts found it should have said, and then  
20 discuss where they derived that -- from where they  
21 derived that conclusion.

22 Despite the fact that 16,500 families in this  
23 case each suffered a reduction or a termination -- they  
24 weren't told which in advance -- based upon the  
25 individual facts of their case unique to each one of



1 those families, the department sent them not an  
2 individual notice but a general notice which, if one  
3 were able to fight through the language of the notice,  
4 and if one were able to read it, and as I will discuss  
5 later, at least three people who testified, including an  
6 expert witness, had to use a magnifying glass to do so --

7 QUESTION: You say that 16,000 people received  
8 determinations based on facts unique to their case.

9 MR. HITOV: Exactly.

10 QUESTION: What sort of factual determinations  
11 were these? That their income was between 18 and 20  
12 percent?

13 MR. HITOV: No, Your Honor. Actually, that  
14 was not the issue here. The two facts subset, the two  
15 facts at issue for each of the families in this case,  
16 and which were unique to each of those families in this  
17 case, first -- there were two determinations made here  
18 by the Department of Public Welfare.

19 The first was that each of the families  
20 receiving this notice -- as Ms. Janos pointed out, it  
21 was less than 10 percent of the general population.  
22 Each of the families receiving the notice had earned  
23 income. That in fact was often incorrect. One of the  
24 named plaintiffs didn't have earned income and yet  
25 received this notice, and was told that she would either

1 be reduced or terminated.

2 The second determination that was made was  
3 that assuming a person had earned income, how much  
4 earned income, because if the amount of that earned  
5 income was incorrect, the department was working with  
6 the wrong figure, not only the resulting grant would be  
7 incorrect, but the amount of the reduction as a result  
8 of this change would be incorrect.

9 In other words, if there were an underlying  
10 data base error, the amount would have been magnified  
11 for those people for whom the department had an  
12 incorrect amount.

13 QUESTION: And it is those two determinations  
14 that you say were unique to each individual?

15 MR. HITOV: Absolutely, Your Honor, each -- I  
16 mean, that is not to say that two members of the class  
17 didn't have the same income, but that is, of course, a  
18 coincidence, and nothing specific to this change. These  
19 were the type of normal reductions --

20 QUESTION: But is it not true that if those  
21 two errors existed or either of them existed, that even  
22 without the statutory change, they would have been  
23 receiving an incorrect amount?

24 MR. HITOV: A different incorrect amount, Your  
25 Honor.

1 QUESTION: Yes, but an incorrect amount.

2 MR. HITOV: Absolutely, Your Honor, and that  
3 is not -- that is absolutely correct.

4 QUESTION: Had there been no statute, would  
5 that error have given rise to any statutory or  
6 constitutional right?

7 MR. HITOV: No, Your Honor, not under the  
8 statute. The statute specifically says that when the  
9 department intends to reduce or terminate benefits. I  
10 assume that Congress could have said every time the  
11 Department of Public Welfare wishes to speak to a  
12 household they should give notice, but I think that  
13 Congress wisely decided that that was --

14 QUESTION: But the individual determination  
15 that you talk about is a preexisting error that causes  
16 this effect on the statute is put into effect, or a  
17 preexisting inaccuracy in the records as to certain  
18 individuals?

19 MR. HITOV: That's correct, Your Honor. Any  
20 time the welfare department works with a person's grant  
21 they are making certain assumptions about that person's  
22 grant, but here they were proposing -- they weren't  
23 proposing to send the person a check. They weren't  
24 proposing to send them more money. They were proposing  
25 to take money away from them.

1           They were saying, we have been told to change  
2 the way we work with your grant. We are going to take  
3 some of what we are now giving you away from you, and we  
4 are doing it based on two assumptions.

5           QUESTION: There are two things that worry  
6 me. One is, when you got the notice of your money, you  
7 knew something had happened to it. You had lost \$5.

8           MR. HITOV: I am sorry, Your Honor. You only  
9 knew that if you knew that. It is not -- some people  
10 never knew that.

11          QUESTION: You mean some people never knew  
12 that they got \$5 less than they got the month before?

13          MR. HITOV: No, Your Honor. They certainly  
14 knew that when their food stamps showed up, not at the  
15 point when they received notice, but when their food  
16 stamps actually showed up, they could tell that they got  
17 less, assuming that they were getting what they got last  
18 month.

19          QUESTION: They go to the office, and it would  
20 have been explained to them.

21          MR. HITOV: In this case, Your Honor, that did  
22 not happen. The record indicates -- the record is  
23 devoid of an instance in which a person was able to get  
24 any useful information from the Department of Public  
25 Welfare.



1 Numerous witnesses testified that they called  
2 their workers, and the response was, we know nothing  
3 about this, it was done in Boston, you know more about  
4 it than we do.

5 QUESTION: Well, then you get to my second  
6 point. How can the average food stamp recipient find  
7 the difference between 18 percent and 20 percent of  
8 \$685?

9 MR. HITOV: I am not certain if I am  
10 following --

11 QUESTION: I just want to know that the  
12 average recipient understands percentages.

13 MR. HITOV: I can't answer that, Your Honor.  
14 My assumption is that --

15 QUESTION: You can't?

16 MR. HITOV: There was no evidence in the  
17 record as to people's mathematical --

18 QUESTION: It is not in the record.

19 MR. HITOV: Outside of the record, I would  
20 assume that some people are proficient at math and other  
21 people are not proficient at math. The expert witness  
22 who testified in this case, Dr. Mark Bendick, who works  
23 for the American Association of Welfare Administrators  
24 -- he is a person whose expertise is in the prevention  
25 of fraud and abuse -- testified for the plaintiffs in

1 this case and said it was to the department's benefit to  
2 provide exact notice, and this is where I hope to  
3 respond to Your Honor's question, he said in fact that  
4 the department should provide exact calculations, that  
5 they should tell people exactly what they are doing with  
6 their grant, and that that helps the department. The  
7 District Court did not go that far.

8 QUESTION: Well, I don't understand yet how an  
9 average recipient can tell the difference between 18 and  
10 20 percent.

11 MR. HITOV: I am not certain that that is  
12 necessary --

13 QUESTION: To the dollar. To the nickel.

14 MR. HITOV: Your Honor, I am not certain that  
15 that is necessary in this case. What the District Court  
16 ordered in this case, what the District Court found  
17 would help the recipients in this case was to be told  
18 that their benefit used to be a certain amount, and it  
19 is going to be a new amount, in other words, the amount  
20 that the department proposed to take away, and the  
21 salient factor for the recipient, the thing that they do  
22 know, whether they know how to do math, whatever their  
23 reading level is, we propose to take away \$4 or \$10 of  
24 your benefits because we believe you have \$685 in earned  
25 income. Now --

1 QUESTION: Mr. Hitov, would you be satisfied  
2 -- well, with what in the notice would you be  
3 satisfied?

4 MR. HITOV: Thank you, Your Honor. The  
5 notice, in addition to saying that Congress has changed  
6 the law and we are going to -- the earned income  
7 disregard has been lowered, which is what the notice  
8 said when one thought through it, and then said, we are  
9 either going to reduce you or terminate you, without  
10 specifying which, and then said, you can appeal if you  
11 disagree with this decision.

12 What it should have said in addition to that,  
13 Your Honor, that would have made it the type of notice  
14 that Congress envisions in Section 2020(e)(10), is, we  
15 plan to take away X amount of dollars, and we intend to  
16 do it because we think you have X amount of earned  
17 income, since that is what was at issue here, was a  
18 reduction based upon each recipient's earned income.

19 I should stress that to do so according to the  
20 department's own expert witness was free. It cost not a  
21 nickel to provide informative notice as opposed to  
22 uninformative notice, to --

23 QUESTION: Mr. Hitov, would it affect the  
24 timing of the notice?

25 MR. HITOV: Absolutely not, Your Honor.

1 QUESTION: You couldn't get out a simple  
2 notice saying the statute has changed more quickly than  
3 making all the individual determinations?

4 MR. HITOV: No, Your Honor. I think it is  
5 important to stress here that this notice is not  
6 floating ephemerally in space. It is attached to an  
7 action. It is a notice of something.

8 QUESTION: I take it it is all a computerized  
9 operation, isn't it?

10 MR. HITOV: In Massachusetts it sometimes is  
11 and sometimes isn't.

12 QUESTION: In some states it is not, is it?

13 MR. HITOV: That's correct, Your Honor. That  
14 does not affect --

15 QUESTION: In states where it is not, it might  
16 take a little longer, might it not?

17 MR. HITOV: It shouldn't. Your Honor, of  
18 course, it could be made to take longer, but there is no  
19 reason for it to take longer, and this is --

20 QUESTION: Well, I mean, the notice you got  
21 out, if you have a computer, you can put this additional  
22 information on, I gather, without taking much time.

23 MR. HITOV: As long as it takes the printer.

24 QUESTION: But if it is not on there, and you  
25 have to go through records and put it on in ink or



1 something, that may take a little longer, may it not?

2 MR. HITOV: There, Your Honor, again, only as  
3 long -- the difference in time would be the difference  
4 in time that it take a printer to print it and the time  
5 it takes a person to write it, like it used to be done  
6 before. We have progressed to computers. Because, and  
7 this is the critical issue, something is happening here  
8 to these people's grants.

9 These were not, hopefully, and I believe in  
10 this case they weren't, random reductions in people's  
11 grants where they pick out every fourth person and said,  
12 we are going to reduce your grant. They reduced  
13 people's grants pursuant to figures that they had worked  
14 with.

15 Somebody made those calculations, and the  
16 notice was to tell them about it. If the calculations  
17 were made, the person couldn't have been paid their food  
18 stamps.

19 So what we are talking about here, and this is  
20 not counsel's opinion, this is in the record and  
21 unrefuted by the department, this is what an expert in  
22 the administration of welfare programs testified, that  
23 this -- the time involved here is the time it takes to  
24 write what you are doing anyhow, and in Massachusetts  
25 that, of course, was miniscule.

1           The computer expert said, if there is enough  
2 room on the paper, we can do it. When asked --

3           QUESTION: How much are we talking about with  
4 the individual family with which you are concerned, \$5 a  
5 month?

6           MR. HITOV: Excuse me, Your Honor?

7           QUESTION: How much in actual benefit are we  
8 talking about for the average family with whom you are  
9 concerned?

10          MR. HITOV: The average monthly benefit, which  
11 is all I can speak to, because different families have  
12 different certification periods, the average monthly  
13 benefit was reduced anywhere between apparently \$1 and  
14 \$10, and that could have been for a certification period  
15 of either one month or up to 12 months, although the  
16 vast majority were approximately --

17          QUESTION: Ten dollars is the maximum?

18          MR. HITOV: That's the maximum that can be  
19 established from the record, Your Honor. There is no --  
20 a range was given in the record, and the maximum in that  
21 range was \$10.

22          QUESTION: Ten dollars a month.

23          MR. HITOV: A month, Your Honor, and I should  
24 point out that we are talking about a 2 percent  
25 reduction in the earned income disregard, which I

1 suspect Your Honors have already discovered is not the  
2 easiest concept to apply to the actual outcome of the  
3 food stamp grant.

4 What this meant in terms of reductions, if the  
5 Court looks at Joint Appendix Page 44, where a sample  
6 page from the department's computer printout is listed,  
7 the average grant reduction is just about 5 percent, it  
8 is 4.78 percent, as I recall, in a family's grant. That  
9 is a -- in terms -- we are talking small dollar amounts,  
10 but we are also talking about people living on a very --

11 QUESTION: Is \$10 a substantial percentage of  
12 the food stamps a given household may receive?

13 MR. HITOV: From the sheet in the record, Your  
14 Honor, \$10 would be a very substantial percentage. This  
15 is -- I am doing an extrapolation in my head right now,  
16 but I would guess 15 to 20 percent.

17 QUESTION: Fifteen to 20 percent.

18 MR. HITOV: But there were, of course,  
19 reductions of all sizes and the average for that page  
20 comes out to 4.78 percent, so the average family on that  
21 page lost 5 percent of their benefits.

22 When one takes it in terms of percentages and  
23 thinks perhaps of our salaries or what have you, it is a  
24 more substantial loss. It is not how many dollars you  
25 are losing, it is what percentage of what you have, of

1 course.

2 This was not an insignificant reduction, nor  
3 was it an insignificant change. The defendants have  
4 attempted to paint this as -- we have just added a  
5 couple of numbers. They are --

6 QUESTION: But it is a statutory change.

7 MR. HITOV: Your Honor, Congress changed the  
8 provision about the earned income disregard. There is  
9 no dispute about that. Congress also provided the  
10 mechanism through which they wished to have that  
11 implemented, and that finally, Your Honor, brings me  
12 back to your question, which is the language of the  
13 statute.

14 Where did the First Circuit find in Section  
15 2020(e)(10) the requirements for this notice? The First  
16 Circuit first looked at -- and the Court is, of course,  
17 invited to look at their opinion to see that I am not  
18 misrepresenting it.

19 They first said, advance notice of any  
20 reduction or termination is required here. Why?

21 QUESTION: Didn't the First Circuit first look  
22 at the Constitution?

23 MR. HITOV: Absolutely, Your Honor.

24 QUESTION: Do you defend their doing that?

25 MR. HITOV: No, in our briefs, we specifically



1 said that we believe that was a mistake, that they were  
2 presented -- of course, as counsel, we presented them  
3 with both, because we couldn't be certain that they  
4 would agree on the statutory interpretation.

5 They unfortunately looked at the  
6 constitutional issue first and then the statutory. My  
7 suspicion, without attempting to defend them, but my  
8 guess as to why that happened is that there was a full  
9 blown trial in this case in the District Court that drew  
10 in all these constitutional issues.

11 And so the court, I think, just went along  
12 with that without stopping to say, wait a minute, if we  
13 are deciding this on a statutory ground, there is no  
14 reason to have done that.

15 QUESTION: But your answer to my question is  
16 going to be based on the statute, as I understand it.

17 MR. HITOV: Word for word on the statute, Your  
18 Honor. The statute says that whenever a person receives  
19 an individual notice of agency action reducing or  
20 terminating benefits is --

21 QUESTION: Where do you find that?

22 MR. HITOV: That is the second clause of  
23 Section 2020(e)(10), Your Honor. Provided whenever a  
24 household requests such a hearing --

25 QUESTION: Such a hearing, but the hearing

1 then takes you back to the first clause, which is, a  
2 state plan of operation shall provide for the granting  
3 of a fair hearing and a prompt determination to any  
4 household aggrieved by the action of the state agency,  
5 right?

6 MR. HITOV: That's correct, Your Honor, and  
7 what that says --

8 QUESTION: But isn't the -- the government's  
9 argument is that the action which caused the change was  
10 the action of the United States.

11 MR. HITOV: The statute, though, Your Honor,  
12 if Your Honor reads the statute through, does not speak  
13 to the cause of the state --

14 QUESTION: It says by the action of the state  
15 agency.

16 MR. HITOV: Right, the action of the state  
17 agency here was to reduce a person's grant. They could  
18 have done that because they ran out of money, which I am  
19 just taking as a hypothetical, because it ran out of  
20 money, because Congress told them to, because they had a  
21 misperception of the facts in a person's case, because  
22 somebody reported some information that either was or  
23 wasn't true.

24 Those are all things that would trigger the  
25 agency taking action --

1 QUESTION: But it says, by the action of the  
2 state agency under any provision of its plan of  
3 operation.

4 MR. HITOV: That's correct, Your Honor.

5 QUESTION: Well, doesn't that limit the  
6 generality?

7 MR. HITOV: No, Your Honor. The statute under  
8 a state agency plan, they specifically agreed to follow  
9 the statute. When the statute is amended, that becomes  
10 part of the state agency plan. The state agency plan  
11 could not be out of conformance with that.

12 QUESTION: Well, that sounds very circular to  
13 me.

14 QUESTION: Not only that, but the provision  
15 says, the plan shall provide for the granting of a fair  
16 hearing.

17 MR. HITOV: That's correct, Your Honor.

18 QUESTION: It doesn't say that you must give  
19 advance notice saying you must give a fair hearing, does  
20 it?

21 MR. HITOV: If I might, Your Honor, it says,  
22 any household which timely requests such a fair hearing  
23 after receiving individual notice of agency action  
24 reducing or terminating its benefits.

25 QUESTION: Oh, I see your point. So you are

1 saying --

2 MR. HITOV: Within the household certification  
3 period, shall --

4 QUESTION: You are saying after receiving  
5 individual notice assumes that there is a notice  
6 requirement.

7 MR. HITOV: It explicitly assumes. This is  
8 not an implicit assumption. It explicitly assumes  
9 notice, and it explicitly assumes individual notice.  
10 Now, individual notice can mean two things. The parties  
11 -- I think this is one of the few things the parties  
12 seem to agree on here, is that can either mean send the  
13 same piece of paper to each house, or it can mean send a  
14 notice that is specific to that household to that house.

15 And we would suggest that only the second is  
16 consistent with the statute and the Secretary's own  
17 interpretation. The Secretary for years has had two  
18 types of notices listed in his regulations, three types  
19 actually, but two that are relevant here.

20 One is called a general notice, and that is  
21 exactly what was sent out here. It is a notice, it is  
22 the same notice, the same piece of paper, and it is sent  
23 to each individual household.

24 QUESTION: Yes, but it seems to me if you say  
25 after receiving individual notice of agency action, and



1 so forth and so on, that that implies that there must be  
2 notice because there is a hearing, and it also implies  
3 there must be a hearing for every one of these cases, if  
4 you read it literally.

5 MR. HITOV: I don't believe so, Your Honor,  
6 because it starts with, for any household that timely  
7 requests it. That is exactly Congress's --

8 QUESTION: But timely requests a hearing after  
9 receiving individual notice.

10 MR. HITOV: Right, so that presupposes  
11 individual notice --

12 QUESTION: It is after he requests such a fair  
13 hearing, which takes you back to the first, which would  
14 make the hearing requirement apply to every family.  
15 Well, anyway, I --

16 MR. HITOV: I am sorry. No, Your Honor, I do  
17 believe this is important, because it is the crux of the  
18 statute. The hearing is a requirement in every case if  
19 a recipient asks for it. That is the first clause.  
20 That does not trigger the continuation of benefits,  
21 which is the second clause.

22 The second clause says that after receiving --  
23 if a person requests a hearing, after receiving  
24 individual notice of reduction or termination, that  
25 person shall continue to participate and receive

1 benefits at the level prior to the notice.

2 So Your Honor is entirely correct that the  
3 purpose of this individual notice is in fact tied to the  
4 hearing that a person is going to request. It could not  
5 have been Congress's intent to require a notice, tie it  
6 to the potential request for a hearing, and as both the  
7 First Circuit and the District Court found, expect that  
8 notice to be such that people had to guess whether or  
9 not to ask for that hearing.

10 Congress said specifically in the statute,  
11 continue to pay benefits if they ask for a hearing. It  
12 is neither sound fiscal management, and it is not a  
13 rational interpretation of the statute to say we just  
14 intend to pay benefits at random to people when they  
15 guess whether or not a proposed action might or might  
16 not hurt them.

17 That could not have been Congress's intent.  
18 They exactly did require individual notice for that  
19 purpose. That is entirely consistent with the overall  
20 scheme of the foodstamp program, which, as all the  
21 parties agree also, primarily uses households as the  
22 source of information.

23 They are the ones who tell the department,  
24 here are my individual circumstances. The department  
25 then calculates their grant for a given certification

1 period. Those same households under the statute are  
2 used as the primary source of error protection, because  
3 the one thing they know for certain, or believe they  
4 know for certain, is the individual facts of their  
5 cases.

6 The department says to them, we did this  
7 formula, this formula, and this formula. They may not  
8 be able to follow that. But the department says to  
9 them, we think you have \$685 for an income, they know if  
10 they only have \$485, and that is when they are going to  
11 say, I have a reason to appeal this, because they are  
12 working on the wrong facts.

13 QUESTION: Well, how do you define when notice  
14 is required?

15 MR. HITOV: Notice is required by the Food  
16 Stamp Act whenever the agency proposes to reduce or  
17 terminate a person's food stamp benefits.

18 QUESTION: And where is that in the statute?

19 MR. HITOV: That is in Section 2020(e)(10).

20 QUESTION: What does it say?

21 MR. HITOV: It says that any household which  
22 timely requests a fair hearing after receiving an  
23 individual notice --

24 QUESTION: I know. It doesn't say when they  
25 are supposed to have notice.

1 MR. HITOV: Your Honor, it presupposes notice  
2 whenever --

3 QUESTION: Well, you imply it. Suppose  
4 Congress passes a law and said food stamps can't be used  
5 to buy pig shanks, and so do you think you would have to  
6 send everybody a notice of that?

7 MR. HITOV: No, Your Honor. That would  
8 neither reduce nor terminate their grant.

9 QUESTION: Well, it may not, but certainly  
10 they couldn't buy pig shanks with it.

11 MR. HITOV: That's correct, Your Honor, but  
12 that would not --

13 QUESTION: So there are some kinds of limits,  
14 new limits that can be imposed that you wouldn't have to  
15 send a notice for.

16 MR. HITOV: Absolutely, Your Honor. It has  
17 never been plaintiff's contention.

18 QUESTION: Well, the government's contention  
19 is that why should you have to send a notice just to  
20 carry out a mathematical calculation.

21 MR. HITOV: Your Honor, that --

22 QUESTION: That is their position.

23 MR. HITOV: I understand that.

24 QUESTION: Let's assume that that's all that  
25 was going to happen. That was a perfectly obvious



1 mathematical computation that nobody could make a  
2 mistake on. Would you think you would have to have a  
3 notice?

4 MR. HITOV: Under the statute, Your Honor? If  
5 I can't answer that without saying it doesn't reduce a  
6 person's benefit or --

7 QUESTION: It does.

8 MR. HITOV: If it does, you need notice.

9 QUESTION: Even though it absolutely could not  
10 possibly be a mistake?

11 MR. HITOV: That is what the statute says,  
12 Your Honor.

13 QUESTION: Well, it isn't what it says.

14 QUESTION: It isn't what the statute says.

15 QUESTION: That isn't what the statute says.  
16 It doesn't tell you when you have to have notice. It  
17 just says that there is a hearing after a notice, but  
18 you can't get that circular -- you can't say that every  
19 -- rely on that section to tell you when a notice should  
20 be sent.

21 MR. HITOV: Your Honor, I do not believe it  
22 can be gainsaid that it presupposes notice, that it  
23 doesn't say, you shall send notice. That is correct. I  
24 agree with that statement. What it does is, it says  
25 that when --

1 QUESTION: It certainly assumes that in some  
2 cases there is going to be notice sent, but it doesn't  
3 tell you which cases are those.

4 MR. HITOV: That's correct, Your Honor, but  
5 then if you move to the last clause of Section  
6 2020(e)(10), it lists a specific exception. It says,  
7 however, a state agency may act immediately to reduce or  
8 terminate a household's benefits and may provide notice  
9 of its action to the household as late as the date on  
10 which the action becomes effective in those  
11 circumstances where they are acting on a direct  
12 statement from the recipient. That is the final clause,  
13 and that is exactly what the First Circuit determined in  
14 this case.

15 QUESTION: It still doesn't tell you -- you  
16 disagreed a while ago that there are some cases that  
17 imposes some limit on -- that didn't exist before in  
18 which there wouldn't have to be a notice.

19 MR. HITOV: Yes, Your Honor. As I said, based  
20 upon -- if it did not entail a reduction or termination  
21 of benefits, then it would not be covered by  
22 2020(e)(10).

23 QUESTION: The however language that you just  
24 read it seems to me is quite consistent with limiting  
25 the notice to an individual action type of thing where

1 information is proposed that this particular recipient  
2 may no longer be qualified, rather than a very  
3 generalized situation where, say, Congress says all food  
4 stamp recipients shall be cut 10 percent.

5 Now, there your theory is that they still have  
6 to give notice to everybody, even though everyone is  
7 getting exactly the same treatment.

8 MR. HITOV: That would go more to what would  
9 be necessary in that notice, Your Honor, to allow  
10 somebody to know whether or not they should request a  
11 hearing.

12 QUESTION: What on earth would they request a  
13 hearing about when their benefits have been cut 10  
14 percent?

15 MR. HITOV: They almost definitely would not,  
16 Your Honor. That is exactly the point.

17 QUESTION: So what is the point of the  
18 notice?

19 MR. HITOV: If there are no factual issues in  
20 dispute as a constitutional matter -- I believe that  
21 what we are looking at is constitutional underpinnings  
22 here. The statute, of course, can require what the  
23 statute wishes to require.

24 QUESTION: Certainly, but we don't ordinarily  
25 think of Congress as having imposed a perfectly

1 irrational requirement.

2 MR. HITOV: No. Exactly, Your Honor.

3 QUESTION: What would be the point of  
4 requiring a notice in a situation where Congress says  
5 every single food stamp recipient shall be cut by 10  
6 percent?

7 MR. HITOV: For example, Your Honor, 10  
8 percent presumably of their preexisting grant.

9 QUESTION: Yes.

10 MR. HITOV: If the preexisting grant -- if  
11 ther department then cut somebody 50 percent, or if they  
12 took their preexisting grant which was \$50, let's say,  
13 and assumed it was \$75, both of which are entirely  
14 possible, the person would in fact be cut a wrong amount  
15 of benefits. It would be an error that they would want  
16 to challenge.

17 What we are saying is not that the department  
18 can't go and --

19 QUESTION: They can challenge that, I would  
20 think, after they receive the amount of their benefit.  
21 The only purpose of challenging it before it seems to me  
22 is to challenge a deliberate action, that we intend to  
23 cut your payments because this new evidence is coming  
24 in --

25 MR. HITOV: And that is what we have here.



1 QUESTION: -- not because we intend to cut  
2 your payments because Congress told us to cut everybody  
3 10 percent.

4 MR. HITOV: Your Honor, what we have here is  
5 an individual action in each one of these cases. We  
6 have the department looking at each person's file after  
7 receiving instructions from Congress and saying they  
8 have X amount of income and therefore we are going to  
9 cut them X amount of dollars, and they never told the  
10 people that.

11 QUESTION: Well, but as Justice Stevens  
12 pointed out, one of the factors of what you say are the  
13 two factors involved is preexisting determination. It  
14 is not a new determination at the time Congress acts.

15 MR. HITOV: Your Honor, Congress itself  
16 recognized that exactly those times were the times of  
17 greatest error. The Food Stamp Act --

18 QUESTION: Well, when you say Congress itself  
19 recognized that, are you relying on the language we have  
20 already talked about?

21 MR. HITOV: No, Your Honor, we are relying on  
22 legislative history, the statements of Senator Dole, who  
23 you probably know is very active in the food stamp  
24 program, and Representative Foley, who at that time was  
25 very active in the food stamp program.

1 QUESTION: But the closest thing in point so  
2 far as actual law as opposed to legislative history is  
3 the language we have discussed in 2010(e)?

4 MR. HITOV: There is one other, Your Honor,  
5 which I would like to get to, which is 7 CFR of the  
6 Secretary's own regulation, the one that --

7 QUESTION: I was talking about the statute.

8 MR. HITOV: In the statute, Your Honor,  
9 2020(e)(10) is the section. In the regulation it is 7  
10 CFR Section 273.12(e)(2).

11 QUESTION: The statute also does not attempt  
12 to spell out what must be contained in an individual  
13 notice, does it --

14 MR. HITOV: No, it does not, Your Honor.

15 QUESTION: -- even if that is required?

16 MR. HITOV: That is correct, Your Honor. That  
17 is where the First Circuit found that if the notice --  
18 that Congress would not have intended notice so that you  
19 could request a hearing, and then not intended that you  
20 had enough information to decide whether or not to  
21 request a hearing. That is where we take exception with  
22 what the solicitor has argued.

23 The First Circuit did not simply say because  
24 it violated the Constitution it also violated --

25 QUESTION: Well, but the Committee report in

1 1977 of the House Committee said hearings would, of  
2 course, be unnecessary in the absence of claims of  
3 factual error and individual benefit computation and  
4 calculation.

5 MR. HITOV: That's right. That's correct,  
6 Your Honor.

7 QUESTION: And you are saying and the court  
8 below said the only way they would ever know that is if  
9 they had these figures in front of them, the  
10 recipients.

11 MR. HITOV: That legislative history, Your  
12 Honor --

13 QUESTION: That is the crux of it, I gather.

14 MR. HITOV: That legislative history, Your  
15 Honor, was in fact written in 1976, not in 1977 when the  
16 language at issue here was not in the statute, was not  
17 even proposed for the statute, and that following that  
18 -- the insertion of that language in the statute is when  
19 the Secretary then issued his regulation, his individual  
20 notice regulation that said you can only appeal if you  
21 are challenging the calculation, and that is language  
22 that requires, that you have information to challenge  
23 that calculation.

24 Thank you very much.

25 CHIEF JUSTICE BURGER: Do you have anything

1 further?

2 MS. JANOS: No, Your Honor.

3 CHIEF JUSTICE BURGER: Thank you, counsel.  
4 The case is submitted.

5 (Whereupon, at 1:55 p.m., the case in the  
6 above-entitled matter was submitted.)  
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# No. 83-1660 - CHARLES M. ATKINS, COMM., OF MASSACHUSETTS, DEPT. OF

PUBLIC WELFARE. Petitioner, v GILL PARKER, ET AL. Pet. v JOHN R. BLOCK, SECR

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