Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

Docket No. 249

CLEMON BARLOW, ET AL.

Petitioners,

vs.

B. L. COLLINS, ET AL.

Respondents.

Place Washinton, D. C.

Date November 19, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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The above-entitled matter came on for argument at 10:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Case No. 249, Barlow against Collins.

Mr. Edgar, you may proceed.

ARGUMENT OF HAROLD EDGAR, ESQ.

ON BEHALF OF PETITIONERS

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

This case concerns the very limited purposes for which assignments may be made of benefits payable under the Upland Cotton Program. More particularly, it concerns whether the Secretary of Agriculture may disregard the considerable legislative and administrative construction of the statutory phrase "making a crop" and redefine it to authorize assignments for the purpose of paying rent for land.

Prior to his change in regulations such assignments were prohibited.

Petitioners, tenant farmers, who were hurt by this change in regulation brought suit in the Middle District of Alabama, seeking a declaration that the changed regulation was invalid.

The District Judge held that they had no standing to raise the claim, and that in any event it was not meritorious. The Fifth Circuit affirmed on grounds of standing alone. This Court granted certiorari last June.

I would like to begin by showing how the changed regulation harms petitioners, tenant farmers. They farm the land in the traditional pattern of Southern cotton farming. They stay on the same land year in and year out, and some have been on the farm all their lives, some 61 years, and the shortest-named petitioner has been there for over ten years.

What they do is at the beginning of the year they make a rent note with the landowner. That rent note gives them the right to use the land. It also normally provides for the landowner paying them small advances to pay for food and clothing while the crop is being grown.

The landlord for this gets both the right to rent at settlement date, which is after the crop is in, and at that time the advances are repayable with interest. However, since the tenant farmers do not have any credit standing with the community, typically they are forced to buy all the seed and tools that they need to make this crop from the landowner, who extends them credit and charges prices far higher than the prices charged in the community-at-large.

Moreover, interest is payable on that amount. So it turns out that at the end of the year they have to pay their rent for all their purchases in the interim and typically they have nothing much, and this goes on year in and year out.

Now, the Upland Cotton Program promised a somewhat better deal for petitioners in this position. What it was was,

it authorized in Section (d)(13) that payments made under the program could be assigned. Now, the assignment is the right to get credit. If you can assignment, you can get credit. People know in the community that you have a definite amount of Federal funds coming in.

You can avoid the necessity of buying all your goods at the stores maintained by landowners and you can thereby perhaps save some of the money, so at the end of the crop season you will have some money left.

Q You say, Mr. Edgar, the people know in the community you have a definite amount of funds coming in? Is it known in advance just what the figure will be?

A It is not known exactly in advance what the figure will be. It depends on the amount of the cotton that is grown and the amount of land that is diverted. The land diverted is a fixed payment and you are not growing any crop on the land vierted, therefore, for that amount to be fixed. The actual price support is predictable by knowing the typical yield rate in the area, but it is not by any manner or means ---

Q Exactly predictable?

A No.

Now, if they also, Your Honors, what they can do is that they can start cooperatives, as they have done in this case. Tenant farmers can get together and by pooling their credit resources they can purchase at far less than the costs they are

now paying.

If the landlord, if they can assign these payments to the landowner from whom they rent, they in effect lose the right, the credit that Congress intended for them. The landowner simply insists that the assignment be made as an additional security for renting the land.

In that case he cannot use any of the credit that Congress had provided for his benefit, and so far as he is concerned, Congress might as well not have passed Section (d)(13), which did grant farmers this right of assignment for the purpose of creating credit for small farmers.

The Government doesn't deny that this is going on. What happened in this case is that the landowner told the petitioners that either they make the assignment or get off the land. Two or three of them refused to make the assignment. They were thrown off the land, they were deprived of their allotments and left without any source of income.

The others made the assignment and then were deprived of the credit which Congress provided.

The respondents challenge that this is what happened. They say the fact that this happened does not suffice to warrant granting relief.

The question is whether Congress permitted this result. The relevant statutory language is found in Section 8(g) of the Soil Conservation and Domestic Allotment Act, which provides for

assignments for the purpose of making a crop. There are three considerations, we think, that preclude interpretation of this language to encompass assignments for the purpose of paying rent for land.

First, the structure of the statute itself; second, its legislative history, demonstrating a congressional intent to use the phrase as a limitation on assignment rights; and finally, administrative construction given the term, which from the moment of enactment in 1937 has been included until the changed regulation challenged, any assignments for the purpose of paying rent.

First, the construction of the statute. It provides for assignments to secure cash and advances for the purpose of making a crop. Only in the theoretical economists' view is securing use of land an advance. Normally advances mean goods that are supplied to you on credit, so the language of the statute does not seem to be looking to assignments for the purpose of paying rent.

Secondly, the legislative history recently suggests that the Soil Conservation and Domestic Allotment Act confirms that approach.

The Act was passed as a compromise provision as an amendment put to work by a conference committee. The House bill permitted assignments for all purposes, but only to landowners.

The bill was twice introduced in the Senate, a broader assignment bill permitting assignments to anyone, and the Senate

refused to pass it because it provided insufficient protection for tenant farmers from being forced or from being either by their economic circumstances or their own lack of prudence from making inadvisable assignments.

So the Senate rejected the bill twice. In conference the bill came forth, but it came forth limited by these provisions that are designed to protect. One of those protections is the limitation of the purpose of assignments to making a crop.

Now, making a crop is not a term of common usage. It is also a technical agricultural term, and we believe ---

Q Could I ask you a question? Isn't the only question here now at this stage the question of standing to raise these questions?

A Well, Your Honor, I had planned to deal with the standing question at the end of my argument.

Q Isn't that what was decided by the lower court, that there was no standing?

A Well, the lower court also intimated its views on the merits, yes, but its specific view was ---

Q It was not as to the merits?

A No, Your Honor, not expressly.

I would turn, then, to the standing question.

Q The point is, is that all that is required?

A Well, Your Honor, we believe a decision on the entire case is appropriate in this Court. The standing question

and the question on the merits is closely linked.

Q You would like to have it, but I still ask you if the only question we are to decide is what was standing?

A Yes, Your Honor.

Q Therefore, I would assume that you disagree with the lower court that there was no standing?

A Mr. Justice Harlan, ---

Q If the Court decided ---

A I think it is fair to say that the Court of Appeals strongly indicated its view on the merits, as respondent noted, and in our view that the questions are so close that it doesn't warrant remanding for the purpose of the Court of Appeals decision.

Q We don't review intimations. We only review holdings, counsel, so you had better address yourself to the standing question.

A Yes, Your Honor.

We believe that the Fifth Circuit decision was erroneous in denying standing in this case. The source of confusion there was that they analogized this case to the case of the competitive interloper. Most of the cases which have raised severe standing problems in this Court are those in which a person whose conduct is in no way described by the statute challenges the action of someone else who is under some form of statutory limitation and urges that the statutory limitations that govern

the other person's conduct are not being carried out.

This is not such a case at all. For example, if the Secretary of Agriculture had, instead of expanding the purpose for which assignments might be made -- if he had simply said, "No assignments shall be made at all," it seems the petitioners are surely entitled to come to Court and challenge his construction of his duties under the statute in simply saying that the statute will not be given effect.

There is no, from the point of view of standing -- it doesn't seem to us that there is any difference if he is cutting back power to assign or expanding it, where it is clear that the purposes that the congressional reasons which underlay the imposition of the restrictions on standing were precisely to benefit tenant farmers in the same way that a settler of the spendthrift trust imposes limits on the spendthrift trust to protect the beneficiary against his unwise judgment.

Just as a matter of common law, the analogue to the common law and interest protected at common law, the strictest standard this Court has ever used in the standing cases, any trustee who informed a beneficiary of a spendthrift clause that he was going to disregard the terms of the trust, the beneficiary would have standing to seek removal of the trust, and we suggest that even under the common law analogue there is standing in this case.

There is also clearly standing in this Court's decision

in Hardin two terms ago. There, the Court said that there was standing, standing did exist when a person was a member of a class whose interests Congress had sought to protect.

Now, as we say, the legislative history of Section 18 is clear. It emerges as a broad assignment provision. The Senate rejects it precisely because it is too broad, and it manages to get approved with narrow limitations on the purposes for which assignments may be made. That is the only ground upon which the approval, the congressional approval, was granted, so we think in light of that, it is clear that these tenant farmers are within the class that Congress hadintended to protect.

Furthermore, that conclusion is particularly strong, seems particularly mandated, insofar as this Court has often said that there ought to be a presumption that administrative action is judicially reviewable.

Now, no one else can have standing in this case but petitioners. In other words, a landowner who is harmed, who thought himself harmed, would have no standing to raise the claim pressed herein. These plaintiffs are the only ones who do, and it is proper in the light of assumption of judicial review that standing be conferred on those who are adversely affected in fact, and that is, of course,the constitutional minimum. But there is no question here that these parties, or these petitioners are adversely affected in fact.

Some of them have been thrown off the land that they

have been working all their lives, and that, we think, holds the conclusion that standing is present.

Q Were you in the Court yesterday?

A No, Your Honor. I have read the Government's brief, but I was not here yesterday.

Your Honors, I would like to return to the question of making a profit, what it may permissibly mean. The term is not one of broad, general usage. It is not, as respondent suggests, a synonym for current farming costs. It has a long meaning, confirmed by agricultural dictionaries, that it refers to producing crops. It refers to harvesting, to sowing the need. It does not refer to the rental of land.

This interpretation, we think, is confirmed by the fact that within nine days after the Act was passed the Secretary of Agriculture issued regulations expressly for bidding by assignments for the purpose of paying rent for land. This was immediately after the enactment of the statute.

Now, he was undoubtedly informed as to what Congress' purpose had been. He saw the potential risk in permitting landowners to simply usurp the credit that had been provided for t tenant farmers by forcing them to assign, and he said it could not be done.

Now, the same risk is present today, and as we say, respondent does not challenge the fact that the effect of permitting assignments to pay rent is to take the credit that Congress

provided a way for the tenant farmer.

Now, the question becomes what effect this has under the new Act, Section (d)(13) which, as we say, is the provision enacted in 1965, which incorporates by reference the prior law.

Now, that new Act is also pervaded -- it has several protections for small farmers in it. Section (d)(10) of the Act expressly authorizes and commands the Secretary to issue regulations to protect the interests of small tenant farmers and sharecroppers.

So it can't be said that this purpose which underlay the 1937 Act has somehow, that Congress is of the view that it is no longer important. It is important.

Q You say the Act instructs the Secretary to issue regulations to protect the farmer?

A Yes, Your Honor.

Q Where is that? Is that 10, Section 1?

A It is Section 7 USC 144(d)(10), Your Honor, which is Section 103(d)(10) of the 1949 Agricultural Act.

Q I take it, then, we have the Secretary responding by issuign what he thought was a regulation to protect the interests of the tenant farmer, and that in his judgment it was necessary to, in order to help the farmer make a crop, to permit assignments for cash rent as well as other costs?

A Justice White, we don't think that that construction of what has happened is a likely one. The reason is that ---

Q You think he would disobey his duty? He thought, at least, it was to help the tenant farmer, I take it. Is that right, or not?

A We would not accept that, Your Honor, for this reason. First of all, for most farmers it does not ---

Q So he disobeyed his duty and he issued a regulation that hurt them?

A No. This regulation, Your Honor, is not issued -- the regulations we are challenging are not issued pursuant to Section (d)(10). These are not part of those regulations. They, rather, are regulations that are issued under Section (d)(13).

What the Secretary has done in our view, he has issued regulations in part protective of tenant farmers under (d)(10). He has redefined the term "making a crop" in a way which prejudices severely tenant farmers for the benefit of landowners and does very little good for the rest of the farming population.

Now, the people who simply own land obviously do not have to assign for the purpose of paying rent. The average rental value of the cotton land is between one-third -- at least in Alabama -- between one-third and one-half the value of the crop.

So, even those farmers who do rent land are in no need of the right to assign for the purpose of paying rent. What they can do is, they can use the assignment to purchase the seed, the tools, the other things that they need, which are as large -- in fact, a larger portion of the ultimate crop value, and use

whatever resources they are now expending to get those goods for the purpose of paying their rent if they are dealing with a landowner who will simply refuse to accept -- refuse to rent except on a "pay now" basis.

Now, if the Secretary's purpose were merely to help other farmers, he could have prevented the harm that is done here simply by issuing the regulation under Section (d)(10), which would say that even though assignments can be made for the purpose of paying cash rent, no landowner can remove a tenant from the farmer who refuses to make the assignment.

If the only purpose which underlay the changed definition of making a crop was to facilitate financing for farmers as a whole, this particular lawsuit could have been avoided by a protective regulation issued pursuant to Section (d)(10).

Q I take it the Secretary probably thought he was aiding tenant farmers?

A Your Honor, we do not know what the reasons underlying the Secretary's change of regulations were. They are not issues after any formal proceeding, or issued with any explanation. In part, it may be that landowners have been hurt somewhat by the new Act to the extent that the tenant farmers can avoid the whole structure of rent notes, advances, credit from the landowner. They are going to be losing income, and we simply do not know whether that was the motivating factor behind the Secretary's action, whether it was his view, a view which we

don't think can be supported ---

Q One of the purposes of the Act was to take land out of cultivation?

A Yes, it was.

Q I suppose the landowners followed the principle that they would like to take the land out of cultivation?

A They would like to -- at the moment they are not encouraging us, because the cotton years have been very bad in the last few years, so they are not insisting upon conversion for the 1969 crop. I assume they will again. But this does not affect the question of assignments, we don't believe, Your Honor.

Whether or not they are encouraging people to take land out of production is not -- out of cotton production -- does not affect the question of whether assignments ought to be made, ought to be authorized for the purpose of paying rent.

Q One of the reasons the Secretary ---

A Right. We think there are two possible ---

Q Yes, but ---

A There are two possible -- it is possible, we think that he did it to facilitate financing for farmers across the board, all farmers. It makes it easier, I suppose, for all farmers to finance their total farming expenditures. It makes it easy in a limited sense, rather than juggling their use of credit..

Q This particular part of the regulation just affects people who are renting land, doesn't it?

A Yes, Your Honor.

Q And no one is permitted to assign these payments for the purpose of securing the purchase price of the land?

A No, Your Honor. It would only facilitate those ---

Q What reason would he have for including cash rents?

A We can suppose only two. One is that he was attempting to facilitate the financing of farmers who own land and rent land. It makes it easier for them if they assign their payments to secure cash to pay the rent. This is not in a tenant farm content.

The reason we don't think that was his motivation is, if that is all he wanted to do, he could have protec ted against this particular abuse, from which he was aware -- I mean from Alabama -- tenant farmers, organized, presented their claim, and he could have protected against this abuse by issuing a regulation precluding the landowner from removing the tenant from his farm if the tenant refused to make the assignment.

If the only purpose behind the Secretary's action was a facilitative one, then the harm here alleged, which is a real harm, could have been taken away, could have been removed very simply, so it is for that reason we do not think this was what underlay the Secretary's action, particularly insofar as even those farmers who rent land who both own land and rent land can normally juggle their use of assignment to pay for their crops with their cash and pay for their land with their cash and their

seed, livestock, tools and those matters with their assignment money.

If the Court please, I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Strauss?

ARGUMENT OF PETER L. STRAUSS, ESQ.

ON BEHALF OF RESPONDENTS

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

I would like to start, if I may, with something in the nature of a statement of certain factual propositions which bear on this case and which I think put it in something of a perspective.

First, although I think it was clearer from petitioners' oral presentation than perhaps it has been in their briefs, it should be clear that what we are talking about is a new program, a 1965 program, and not a program which has been running since 1938.

Petitioners have no right to make assignments of their cotton payments except under the 1965 Act. The right of assignment was new. They have never used it except under circumstances in which they were permitted to make assignments to pay for cash rent, to the regulation that permitted them to make those assignments for thatpurpose was adopted prior to the first crop

year of 1966, to which the Upland Cotton Program of 1965 applies.

They had not been able to make assignments at least since commodity payments ceased under the 1938 Act in the very early 1940's, and now they can do so.

Now, they can do so, and the terms under which they can do so have not been materially changed since that program began.

The second, and really part of that first observation, is that there has been no continuity in the administration of assignments generally. Section 8(g) was passed in 1938. Through 1941 literally hundreds of thousands of assignments were made every year. In that year, the war began. It was no longer necessary to make commodity payments in order to secure agricultural prosperity, and Congress ceased to do so.

Assignments feel dramatically, and by 1952, when statistics ceased to be kept, and when the Secretary of Agriculture went to the Congress and said, "I don't need the statute any more, wipe it off the books" -- by 1952 only 2100 assignments were made under that Act in that year.

So that there was, in effect, a 20-year hiatus between the end of practical importance for Section 8(g) and the enactment of the 1965 Act, which the Government's position is is the only Act at issue in this case, and we think that has some substantial bearing on the issues before the Court.

The third thing, and I think this gets to some extent, Mr. Justice White, to the questions you were asking, is that

there had been a radical shift in tenure pattern even among those who rent the land they farm since 1938.

We pointed out in a footnote to our brief, on page 32, footnote 22, that in 1935 42 percent of all farmers were tenants and they farmed 32 percent of this nation's land.

By 1964 their place had been taken by part-owners. Part-owners are farmers who own some land and rent other land, typically for cash.

In 1964 part-owners outnumbered tenants, and they farmed almost four times as much land.

Now, at the time we wrote the brief, I had not been able to find statistics relating to cotton farming, and the footnote notes that fact. Since that time, I have been able to find such statistics on a statewide basis, and if the Court please, I should like briefly just to mention theones which strike me as being significant. They are from the Census figures which are compiled on a statewide basis by the Department of Commerce in something called the "United States Census of Agriculture."

In 1964 the Census of Agriculture for Alabama shows that 33 percent of the commercial farms in that state raising cotton were operated by part-owners. These cotton farms, this 33 percent of Alabama, as cotton farmers who have rent obligations, these cotton farmers held 53 percent of the state's cotton land. That is over half.

On the other hand, cash tenants, the only other major

group with a cash rent obligation, were only 11 percent of the state's commercial cotton farmers, and they farmed only 7 percent of its land. The figures I am referring to are derived from numerical figures that appear on pages 64 and 65 of this volume, and if the Court pleases, I have xeroxed copies of these pages, which I have already given to counsel, and which I will leave with the Clerk.

The point is that there were over twice as many part-owners as cash tenants in 1965, and they farmed over seven times as much cotton land.

One can go on at considerable length, but the point is a simple one, that petitioners are not facing a changed interpretation of an established program under an old statute in which they have long participated.

They are complaining of the initial interpretation of a new program which was passed and which applies in conditions very different from those which existed when the now moribund statute on which it happens to draw was passed. The assignment statute of 1965 was not a tenant statute, and its interpretation as respects assignments to finance the farming costs of cash rent, primarily affects part-owners and not cash tenants.

To get back to the other point of the questions you were asking, Justice White, regarding, well, why has the Secretary done this, what about the protection of tenants? Petitioners were complaining in the course of their colloquy with you

that he had adopted no regulation to provide for the protection of tenants, that this was meant to apply to all farmers with cash rent obligations as a whole.

Of course, there were regulations which were adopted for the Upland Cotton Program at precisely the same day and the same volume of the Federal Register on the same page, or perhaps one or two pages before the assignment provision. They are set out on page 46 of our brief, and they provide that diversion and price support assignments, or payments, rather, shall not be approved for payment by county committees, if the county committee determines among other things that there exists between the landlord and any tenant or sharecropper any lease, contract, agreement or understanding unfairly exacted or required by the landlord, which was entered into in anticipation of participating in the program, the effect of which is to force the tenant or sharecropper to pay over to the landlord any payment earned by him under the program, to change the status of any tenant or sharecropper so as to deprive him of any payment or right he would otherwise have had under the program, to decrease the rents to be made by the tenant -- to increase, rather -- the rent to be paid by the tenant or decrease the share of the crop or its proceeds to be received by the sharecropper.

Now, of course, disagreements could exist that are not present in the allegations and legal contentions in this case. Disagreements could exist as to whether those regulations

are sufficient, whether they are properly enforced. Obviously, I don't believe that that is the case. Petitioners do, and I am sure that there could be reasonable arguments about the question.

But what strikes me as being significant to this case is that petitioners will have no part of authority's regulations and petitioners will have no part of the section under which they were adopted, 7 USC 1444(d)(10), which does specifically provide that the Secretary of Agriculture must provide adequate safeguards to protect theinterests of tenants and sharecroppers.

They don't argue for standing under that provision, for example. Their argument -- here is a provision that says the Secretary must protect the tenants. Therefore, we have standards. That is not their argument, nor do they argue that way on the merits.

The Secretary has failed to protect them. Of course, it may be significant that that provision only requires adequate safeguards. There is a little bit of legislative history which petitioners cite in part, or quote in part in their brief. I believe it is at pages 20 and 21 of their brief.

Petitioners quote in part a House report from the Soil Bank Program at page 39 of that report. They quote the sentence that says, "No single problem connected with the proposed Soil Bank has caused the committee more concern than that of providing adequate protection of tenants and sharecroppers under the program."

The next following sentence in the report is as follows: "Several provisions referring to tenants and sharecroppers and intended to protect their interests, while at the same time safeguarding the interests of landlords, were scattered throughout the Soil Bank provisions of the Senate bill," and then several other sentences purport to carry out the same theme.

Congress is not interested simply and only in safeguarding the interests of tenants. They realize that landlords have interests, too, and therefore they provide for adequate protection. The Secretary has a responsibility adequately to protect the interests of tenants and sharecroppers.

Q Are you here defending the decision below on standing?

A Yes, I am.

Q On the grounds used by the Court of Appeals?

A No, to the extent that I think it was made clear from the beginning to this Court in our opposition to the petition for writ of certiorari, and in our brief we defend the position below on Hardin and Brown. We don't think this case falls within Hardin.

Q You don't think there is a statutory intention of any desire to protect tenants?

A Well, Section (d)(10) does say that there has to be adequate protection for tenants. Petitioners, though, do not invo that section, and I think they don't do so advisedly, and

I would hardly wish -- let me put it this way. If that were the section they invoked, the question on the merits would be very different. Petitioners' case on the merits, their actual complaint, depends on their being able to characterize a section that was passed in 1965.

Q What section do you think the assignment regulation was issued under?

A The assignment regulation was issued under Section d(13), of course.

Q And d(13) says what, it says that the provisions of a certain section shall apply?

A That's right, which are Sections 390, which is Section 590(g) or 8(g) of the 1938 Act.

Q And the Secretary, however, has issued a reglation which interprets that section or which applies it in a way that it hasn't been applied before?

A Well, I would have to disagree. I think in a formal sense, what you say is true, but since that statute went out of -- lost practical meaning in 1932 and was, in effect, abandoned by the Secretary in 1952, since these regulations were adopted in 1965 immediately following the enactment of the Upland Cotton Program in that year -- excuse me, in February of 1966, immediately following the adoption of the Upland Cotton Program -- we view this as interpretations of the Upland Cotton Act.

Q Let me ask you, why was the statute passed permitting

exceptions from the normal anti-assignment policy?

A The statute was passed in order to facilitate the attitude of the farmers in financing their expenses.

Q I suppose the purpose of that statute is to aid farmers financing their operations?

A In 1965, particularly, I think Congress was well aware that it was cutting by almost 30 percent the level of support that farmers were receiving under the Act and they were going to need new financing.

Q Why would you suggest, then, that these farmers involved in this case aren't within the group which this section was intended to benefit?

A In 1965? Oh, I fully admit that they are within the group that this section was intended to benefit, but I have not understood Hardin ---

Q Being in that group, they come in and say that this section was intended to benefit the farmers, this section which d(13) applies to this statutory scheme?

A Right.

Q And we think that the regulations issued under that ---

A Fail to benefit them.

Q --- fail to benefit them, or benefit them badly, or frustrate the purposes of the Act.

Now, why doesn't that satisfy Hardin?

A My understanding of Hardin was that it referred rather specifically -- and for that matter, the Court's prior cases -- it referred rather specifically not to a simple matter of benefits, but rather an issue of protecting. The language which this case used in Hardin, and I am quoting from page 6 of the opinion as it appears in Volume 390, is that when the particular statutory -- and the particular statutory provision invoked does reflect the legislative purpose to protect a competitive interest, the injured competitor has standing.

Q This isn't a competition case.

A No, this is not a competition case, nor do we contend that Hardin is restricted to competition cases. We do think, however, that there is some function to be served, and we think we observe that function being served by a limitation in those terms, in protection terms, in keeping people from injury rather than perhaps in failing to do for them everything that they think ought to be done for them under a beneficial Federal program.

Q Do you think there is a case of controversy here?

A Yes, I do.

Q How about the question of standing that we are talking about, a Hardin-type of question?

A I think we are talking about a Hardin-type of question. I think what this Court, having heard the argument yesterday, and having heard the argument yesterday in the ADAPSO

case, I went back and did a little homework that perhaps I should have done before.

What the Court said in Stark and Wickard is rather to the point in this regard. There, it had to deal rather expressly with what seems to me just this problem. It is part of the same problem that came up in Abbott, what is the relationship between what this Court has frequently said was an assumption of judicial review, on one hand, and standing, on the other hand, and the Court was quite careful in this case, as it was, I think, in Abbott itself to distinguish between the two situations, to say before we get to the question of review or reviewability, we have to resolve standing.

And then it went on to say that the Court was very far from assuming that the Courts are charged more than administrators or legislatures with the protection of the rights of the people.

Under Article III, Congress established Courts to adjudicate cases and controversies on claims as to infringement of individual rights. That is, there must be some special claim, some nexus, as the Court has put it, in Jenkins vs. McKevin, just last term.

I have that here someplace. The Court said that something more than an adversary interest is necessary to confer standing. There must be some connection between the official action challenged and some legally protected interest of the party

challenging that action. Again, protection.

I can't imagine that those words were casually used. In every one of this Court's opinions, there has also been an interest in specificity, and I can't imagine that that, either, was inadvertent. It seems to me that the Court has also restrained itself from a position of appearing to be a general overseer of the conduct of Government and business, really.

Q (inaudible)

A No, that is certainly true.

Q (inaudible)

A Well, maybe I should start with another -- if I may, this is in response to your question, I think. It is quite clear, isn't it, that if petitioners, or rather if you are right, in the direction your questions are leading, it won't be only petitioners that have standing. It will be every farmer in the country, or every cotton farmer in the country who is displeased by something the Secretary of Agriculture has done, who thinks that he ought to have got more, that the level of benefits ought to have been a little higher, who will have standing to come in, because it is quite clear that in a benefit content this statute is meant to benefit not just tenants, but people principally other than tenants, even those among those who pay cash rents.

So we are not talking about just tenants versus nobody.

Q Assume the Secretary had left the regulations just

like they were before.

A Right.

Q And a tenant came in and said, "Gee, Mr. Secretary, I just can't stay on my land, because the landlord wants security, and I want to give it to him, but you say I can't have it. I can't assign it."

A Yes.

Q "Now, I would like to challenge your interpretation of this section."

A Well, if that had happened, I assume that the much more numerous part-owners would have been arguing that way.

Q But how about standing?

A I think they would have no standing.

Q You would go both ways on this?

A Certainly.

Q You would have to.

A We certainly do. It is either all farmers or none, and we think in that situation the choice is known. This Court's cases have traditionally and consistently limited standing to the area of protection, not simple benefits, and indeed we don't understand petitioners, who argue differently, because they seem to be arguing that either tenants will be able to get review or not.

Q (inaudible)

A I think ---

Q (inaudible)

A The Court did grant certiorari on the question of merit when it was granted in the petition, and I don't think I would suggest that it was improper for it to do so.

Q (inaudible)

A I don't think so, although again I would have to agree with petitioners that it certainly give some very broad hint about where its views were.

Q (inaudible)

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iculty)

A No, he did go on to reach the merits. But the majority did decide -- in terms of the decision, it did decide the standing issues. Indeed, in Abbott Laboratories, for example, the Court remanded in addition to the ---

Q Well, Abbott Laboratories was not a ---

A Excuse me?

Q Abbott Laboratories was not a standing question.

A No, but it was a similar kind of situation.

Q Well, it was a question of rights that it is not standing.

A That's right. But at the conclusion of its opinion, it did then refuse to pass on the merits, although it had been ---

Q Well, there were two things standing in the merits. Of course they are always intertwined.

A That is certainly true.

Q Have both questions been argued by both parties.

A Both questions have been argued by both parties in this Court. I don't think that there is any jurisdictional objection to the Court passing on the merits, but we do think that the ordinary sound practice of the Court as to the Court of Appeals could present its view.

Q Yes, there is no jurisdictional question.

A If I may for a moment go back to this, because I think this matter is particularly revealing, that we have in

Section (d)(10) a section which says that the Secretary must protect the tenants. And yet petitioners aren't claiming standing under that section. They say their standing is under Section (d)(1), that Section (d)(13) was meant to protect the tenants.

Why do they do that? There is a reason for that, it seems to us. If they relied on the obligation of the Secretary instead of what they think is implicit in the assignment provision as the basis either of standing or merit, then they would have to face to the fact that the assignment provisions are not pertaining to cash tenants alone, but for all cotton farmers. And facing up to that fact the judgment whether assignments to finance the farming expense of cash rents are proper is much more difficult than it appears on petitioners' view of the statutes as meant for tenants alone.

Petitioners say in their reply brief that the issue here is whether landlords shall be allowed unrestricted access to the credit generated by Federal benefits. We do believe that the landlords are not to be allowed unrestricted access. Their access is restricted. The legal question here is "By how much?"

Perhaps the regulations which exist are inadequate. We don't think so and petitioners don't claim it. If they did, we would have to agree that they are properly here. Instead, they seek to block even properly restricted access by landlords

to assignments with the effect that not only tenants would be unable to make them, but also the much more numerous class of part owners who may need this financing tool equally.

They were not present on the scene in 1938 when Section 8(g) was passed in such numbers or such force.

Q These people do not have standing, then who in your judgment would?

A As I was explaining to Justice White, Mr. Justice Black, it seems to me that the choice which this Court faces is, in part, not a choice between these people and no one, but all farmers and no one. Unless this Court is able to find that there is a legally protected interest, the state will tend to benefit.

If this Court finds in the legislative history that Congress meant to protect the interest of tenants, the specific interests of tenants in the manner related, this statute as the Court has repeatedly said must be done in Jenkins vs. McKeithen and in Flast vs. Cohen and its other cases, if there is a legally protected interest which is related in that way, of course the petitioners have standing. That is the issue here.

If they had no legally protected interest, if all they have is a simple claim to benefits under the Act, then they have no more standing than any other farmer. It is either all farmers or none.

I think that in the nub is the Government's position

on the issues.

And I would also state, to go back to Abbott Laboratories vs. Gardner, it does seem to me that this question "Well, if these people can't challenge it, who can?" -- that question involves reviewability. And the issue of reviewability, it seems to us, in Abbott, in Stark this Court has very carefully distinguished from the issue of standing. It is a question you get when once you decide there is a legally protected interest.

Then, since the interest is there, it is protected. It is meant to be honored by Congress. Then of course there is some presumption that Congress would want those people to be able to go into court and enforce it. But you have to decide first that the interest is a protected one.

Q Is the second question on the merits?

A What I have just been speaking to?

Q Yes.

A No, I think it is part of this standing issue, that is, I am trying to persuade the Court that the language in Abbott is really not language which ought to be applied to the standing issue. It is not relevant to the question of standing.

Q Is it to protect them ---

A Excuse me?

Q The standing, it could depend upon whether the

Act was intended to protect them?

A That's right and was intended to protect them in a rather specific way.

Q Well, that's ---

A No, I think that is the issue on standing.

Q Well, to a certain extent isn't that a question -- or an issue on the merits also?

A Part of the issue on merits. Obviously these are closely intertwined. But as in Hardin, for example, the Court found that on the standing issue was the TVA Act intended to protect certain competitors and certainly it was, in the abstract, as a legal proposition.

Then on the facts of the case resolving disputed factual issues on the merits, it went ahead and it said, "Well, but nonetheless the treatment of this particular issues doesn't defend the statues."

Well, I don't think there is any necessity to argue the merits at length. I think our arguments are fairly adequately set forth in the brief and implicit in what I said before. I just want to make a couple of very quick points.

First, that we are dealing here with -- the Government insists we are dealing here with the 1965 statutes, not with the 1938 statutes. And in connection with that, this Court may decide that making a crop means this or that. We think for the reasons we set out in the brief that it very comfortably

accommodates what the Secretary has done. But, of course, the Court could disagree.

Q Your argument of merit, ---

A It is very brief, Mr. Justice Douglas.

Q We didn't allow the petitioner to argue the merits very briefly.

A Well, if you wish me to stop, I will.

Q You said the merits were here?

A I think the Court could reach the merits if it wished to, although its sound practice has been not to do so. I don't see any reason in this case to do so.

Q Well, I would prefer if you would say something about the merits myself. I won't argue.

A The point I wanted to make was only this: We think what the Secretary has done comes within the comfortable meaning of financing the expenses of making a crop, Expense of rent is an obvious expense of producing cotton or any other crop. Perhaps this Court will disagree that would do the Government and the law any particular disservice.

But the petitioners make an argument that seems to us to be quite dangerous. They said that could the Secretary interpret this obscure provision of the law in 1938 under another program which went out of practical existence in 1942 in a particular way, now we can't reinterpret that provision at all.

And we think that that proposition that Congress in

1965, despite legislative history which says absolutely nothing about the meaning of this statute, how it was applied, about whether it was meant to protect tenants or not, that if this Court were to say, "Nonetheless its reenactment of the statute in 1965 froze into law the prior administrative interpretation," that would be an extraordinarily harmful thing.

This Court remarked that, not particularly to our advantage as in the Leary case last term -- in connection with Leary there was an argument -- the Government made the argument that the interpretations of the Bureau of Narcotics, which had existed for so long, ought to be confirmed because there was legislative reenactment at a subsequent time, a much less sweeping proposition, since it didn't in any way foreclose the possibility of future change.

And this Court responded that the scanty legislative history accompanying the reenactment gave no hint that Congress knew of these particular regulations, much less the indirect impact now ascribed to them. That language is peculiarly applicable here and it seems to us to say on the basis of the very scanty legislative history that exists, prior interpretation was frozen into law and would have all kinds of untoward consequences for future administered law cases, bearing no resemblance at all to the facts in this case.

The Government submits that the judgment of the law should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strauss.

You have about six minutes left, Mr. Edgar.

REBUTTAL ARGUMENT OF HAROLD EDGAR

ON BEHALF OF PETITIONERS

MR. EDGAR: I think I can do it in that.

Your Honor, I would first like to speak a bit about the question of whether a remand would be appropriate in this case. Under both the Government's discussion of standing and in our discussion of standing the purpose of the assignor provision is put very much in question in order to decide whether the standing exists.

In view of the necessity of elucidating the purposes underlying the law that bears very closely on the scope of the discretion which the Secretary has in changing interpretations of the meaning of the statutory language that have been well settled -- it has been well settled.

In view of that fact, it would seem that to remand the question -- once that task had been done in this Court, to mand that question to the courts below would be inappropriate.

Q If you carry that as a factor, you might as well reach the merits in all these cases.

A No, Your Honor, I don't think - - excuse me, may I give an example. For example, suppose a landowner sued under Section 8(g); regardless of whether this deals with tenants,

with all farmers, it doesn't deal with the interests of landowners. Standing would be a very appropriate means of disposing of that case. The landowners simply lack standing to come in and sue under this particular Act.

It involves a consideration of the purposes underlying the Act, of course, but it does not require you to reach the scope of the discretion which the Secretary has to define the terms of the language at all.

Q Well, of course, that is a very easy case.

A Pardon me.

Q What about the cash tenant?

A I beg your pardon.

Q What about the cash tenant? The one who pays his rent in cash?

A Well, these petitioners, Your Honors, are cash tenants.

Q How about the tenant farmer?

A The tenant farmers, Your Honors, here are those who pay rent in cash. The Secretary has not, although taking the new view that land -- payments of land are all parts of making of crop, he does not permit such assignment to be made by sharecropers.

Q You have got both groups?

A No, we have the cash ones.

Q Well, what about the other tenants?

A They are not harmed by the change in the definition, although the inconsistency of the Secretary's approach is made manifest by the fact that he alters it for purposes of paying cash rent.

Q Well, that's my point. If it is inconsistent or in error, does that give you standing?

A I'm sorry.

Q If it is inconsistent or in error, does that give you standing?

A Mere error does not give me standing, no, Your Honor.

Q We don't need to get to the merits at all, do we?

A Well, my point is, Your Honor, that the merits, the question on the merits, is very closely inter-related to the purposes of the Act in the extent that the Act does have a purpose to protect. To that extent, the Secretary's interpretation of the statutory language which removes protection is less permissible, is impermissible as the plainness of the congressional intent becomes -- is found.

Q If that is true, what is the question on the merits?

A The question on the merits is whether the term "making a crop" has agricultural long legislative history that it does not mean paying rent for land. Whether the Secretary

can redefine it in order to permit tenant farmers to pay ---

Q Does that imply -- the determination of that form?

A No, Your Honor, it does not. It is purely a question ---

Q It is purely a question of statutory ---

A It is purely a question of statutory construction, Your Honor.

Q How long has this case been going on?

A Approximately two and a half years, Your Honor.

Q Two and a half years or three and a half years?

A I may be mistaken. I believe it is three years. In '66 it was brought ---

Q How long would it probably if it went back -- and wind its way back up here?

A Your Honor, it would probably go back to the Fifth Circuit, which has already intimated its views. I don't know what the timing is. I would think another year. At least it would be before the Fifth Circuit would rule on a remand and the case might be heard again, but I am not aware of the dockets --

Q That would be purely a legal decision ---

A Yes, Your Honor.

Q --- construing the language of the Act?

A Yes, Your Honor.

Q It requires no evidence.

A Yes, Your Honor, precisely.

Now on this we are aware the Secretary has issued regulation under Section (d)(10). The point is, however, that the Secretary, as the Government made clear in its opposition, has construed these regulations not to bar a landowner from removing a tenant from the land when he does not assign his credit over. That is the point at issue which is found in recent opposition, which says that the Secretary of Agriculture informs the Government that that is the way those regulations should be construed, that this farm can continued. That the problem of protecting tenant farmers ---

Q --- what he is permitted to assign for rent, for a cash rent. The landlord could remove them?

A No, Your Honor, he could not. This is the point I wish to develop. There is a network regulations excluding landowners from terminating tenancy of their tenants under the (d)(10) regulations. He is not permitted to go to his tenant and say, "I'm sorry if you can't pay your money any more, I don't want to rent to you any more. I am raising the rent."

He cannot raise the rent and he cannot alter the terms of the -- well, there are limitations on his ability to alter the terms -- the status.

Q Well, he can take him off for not paying.

A If he does not pay at settlement date, he can take him off, but only on that basis. And there is this long pattern of protecting Federal benefits against usurpation by

landowners. And this credit right, this right to assign, is another form of Federal benefit. The Secretary is permitting its usurpation by his impermissible redefinition of the term "making a crop."

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Edgar. Thank you for your submission. Thank you, Mr. Strauss.

The case is submitted.

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