ORIGINAL

In the

Supreme Court of the United States

JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH, EDUCATION,
AND WELFARE,

Petitioner,

v.

EVELYN ELLIOTT, ET AL.,

Respondents.

No. 77-1511

Washington, D. C.
March 19, 1979

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v.	No. 77-1511
EVELYN ELLIOTT, ET AL., Respondents.	

Washington, D. C.
Monday, March 19, 1979

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PETER BUSCEMI, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, on behalf of the Petitioner.

STANLEY E. LEVIN, ESQ., Legal Aid Society of Hawaii, 1164 Bishop Street, Suite 1100, Honolulu, Hawaii 96813, on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 1511, Califano against Elliott.

Mr. Buscemi, you may proceed.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.

ON BEHALF OF THE PETITIONER

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

This case involves a challenge to the procedures employed by the Secretary of Health, Education, and Welfare in recovering overpayments to the beneficiaries of Social Security or Old Age Survivors and Disability Insurance.

The principal question presented is whether a beneficiary is entitled to an evidentiary hearing before, rather than after, his monthly benefits are reduced to recover a previous overpayment.

The case is here for the second time on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. In 1976, in response to the Secretary's petition for review, this Court vacated the judgment of the Court of Appeals and remanded for reconsideration in light of the decision in Mathews v. Eldridge.

The Court of Appeals adhered to its initial result and the Secretary again sought certiorari.

There were two suits consolidated in the Court of

Appeals, one from the Western District of Washington, the Buffington case, and the other from the District of Hawaii, Elliott. Buffington is a nationwide class action on behalf of recipients of Old Age and Survivors benefits. Elliott is limited to persons living in Hawaii, but it includes disability beneficiaries, as well as old age beneficiaries.

The procedures attacked by Respondents begin with the Secretary's determination that an overpayment has occurred. In many cases, this determination is based on an annual earnings report filed by the beneficiaries themselves.

Other times, the initial determination is based on the Secretary's independent discovery of some administrative error or a fact or event that affects a recipient's continuing eligibility for benefits.

When the Secretary concludes that an overpayment has occurred, he notifies the beneficiary of his determination.

Respondents' complaints in the district courts challenged the adequacy of the notice provided, and the district courts ordered that the Secretary provide more detailed information about the reasons for the overpayment and the availability of administrative review.

The Court of Appeals affirmed and the Secretary did not seek further review of this aspect of the court's decision. Instead, he has developed more elaborate notice forms that the Social Security Administration is now using in notifying

beneficiaries that they have received overpayments.

There is, apparently, still some squabbling in the Court of Appeals over whether the new forms comply with the Court of Appeals' decision, but that question is not presented here.

QUESTION: What question, specifically, is presented?

MR. BUSCEMI: The question of the adequacy of the new notice form that the Secretary has developed in response to the Court of Appeals' decision.

QUESTION: Whether those forms comply with the Court of Appeals' decision?

MR. BUSCEMI: Exactly.

QUESTION: Is a matter for the Court of Appeals and now being controverted in the Court of Appeals?

MR. BUSCEMI: Right.

The Secretary's notice informs the beneficiary of the date and the amount of the overpayment and the way in which it occurred. Local Social Security offices are instructed to make sure that the explanation is kept in simple and non-technical terms. The notice also informs the beneficiary of the Secretary's proposed method of recovery, the amount of the reduction and the month in which full benefits will be resumed after the overpayment has been recovered.

In addition, the beneficiary is told of his right to request reconsideration of the overpayment determination or

waiver of recovery, or both. The standards for waiver are set forth in the notice, and the procedures for requesting reconsideration or waiver are described. The notice identifies the forms that must be completed in connection with an application for reconsideration or waiver, and volunteers the assistance of employees at local Social Security offices in filling out the forms.

Finally, the beneficiary is advised that, if he does request reconsideration or waiver within 30 days, his benefits will not be reduced until after the Secretary has acted on his request. Even if no request is made within 30 days of the notice, a reconsideration request made within two months, or a waiver request, whenever made, halts the reduction of benefits and results in the resumption of full benefits until after the Secretary has acted on the request.

The statutory provision that gives rise to all these procedures is Section 204 of the Social Security Act. Section 204(a) provides that whenever the Secretary finds that more than the correct amount of payment has been made, proper adjustment or recovery shall be made under regulations described by the Secretary. But Section 204(b) adds a qualification. It says that there shall be no recovery --

QUESTION: Where are the provisions set out in your papers?

MR. BUSCEMI: They are set out in the Appendix to

the cert petition at pages 155-A and 156-A.

The qualification in Section 204(b) provides that there shall be no recovery in any case where the overpaid person is without fault in receiving the overpayment, and where the recovery would defeat the purpose of the Social Security Insurance program, or would be against equity and good conscience.

QUESTION: What do you take to mean by that "without fault"? Suppose there is a $5.00 increase by a mistake and the recipient cashes the check. How does the "without fault" clause apply to that?

MR. BUSCEMI: Well, Mr. Chief Justice, I believe that the "without fault" language is described -- or is defined, I should say -- in the Secretary's regulations in 20 CFR 404.507, I believe. There the Secretary states that the critical consideration is whether the beneficiary should have known that he was receiving or had received an overpayment.

Now, in the case of a difference as small as the one you suggest, it may well be that the average beneficiary should not have known that he was receiving an overpayment. And, in any event, a difference of that size is not likely to be recovered by the Secretary because his own claims manual provisions require that there be at least a $10 a month reduction in benefits. Otherwise, recovery is simply waived.

QUESTION: But that's merely an internal instruction,

isn't it -- the $10 limit?

MR. BUSCEMI: Excuse me?

QUESTION: The $10 limit merely binds the staff of Social Security.

MR. BUSCEMI: Yes, that's included in the Claims Manual, it is not included in the Regulations. But the Regulations do include the definition, or the Secretary's view, of the meaning of the words "without fault" in the statute.

QUESTION: What is the practice as to the burden? In order to recoup, must the Secretary prove fault? I mean fault seems to be -- If the person is without fault, there can be no recovery.

MR. BUSCEMI: That's right.

QUESTION: What is the procedure for determining this issue; or do you know?

MR. BUSCEMI: The waiver procedure is that the beneficiary who believes that he was without fault and that recovery would defeat the purpose of the Social Security program, files a prepared form with the Secretary, Form Number SSA-632, and that is divided up into several parts, the first part of which addresses the question of "without fault." I think the question says to the beneficiary: "State why you believe you were not overpaid or why you believe you were not at fault in receiving the overpayment."

QUESTION: If the Secretary decided on recoupment,

there is review, I take it?

MR. BUSCEMI: Oh, definitely. If the Secretary --

QUESTION: Well, what if the reviewing court decided that the evidence was absolutely equally balanced; who wins?

MR. BUSCEMI: I don't know. I think --

QUESTION: That's what I asked you a while ago: Who's got the burden?

MR. BUSCEMI: -- in a close case like that, the Secretary would waive recovery.

QUESTION: So, he then undertakes to prove fault?

MR. BUSCEMI: Before the administrative review, I suppose that the Secretary would have to show that the beneficiary should have known --

QUESTION: In deciding whether to insist on recoupment, the Secretary then assumes -- that whatever procedures he uses must prove fault. He undertakes to prove fault.

MR. BUSCEMI: That's right. He undertakes to determine whether the beneficiary should have known that he was receiving an overpayment. And that's the standard that he uses in acting on the waiver application, and I assume that the same standard would apply in the later administrative review procedure.

QUESTION: So that, if the person from whom recoupment might be sought, if he's completely silent, the Secretary still must come forward with proof of fault; is that it?

MR. BUSCEMI: No, that's not so. I think that the Secretary's regulations are a perfectly reasonable implementation of the statutory scheme. If the person does not request waiver, if the person does not suggest that he was not at fault, I think the Secretary is justified in proceeding with recovery.

QUESTION: If a check normally was $152, and the recipient gets a check for $1152 because the computer has stripped its gears, or something, that would be a clear case, wouldn't it, that he was at fault in accepting it?

MR. BUSCEMI: That's precisely the case, and, as a matter of fact, there are a substantial number of cases that are exactly like that. I think, for example, the case of Mrs. Biner, one of the Respondents in the Buffington suit, is similar to that. It does not involve a computer error, but it involves a report to the local Social Security office that earnings would be discontinued and Social Security benefits were then begun. Earnings were continued at the same level and the Social Security benefit payments were accepted by Mrs. Biner. She had told the Social Security office that she would not be earning any money and therefore benefits should begin. When she did earn the same amount of money that she had been earning for the previous two years, she should have known that the benefits could not be paid at that level.

That's, in fact, what has been found, not only by

the Secretary on his initial review of the waiver application, but also by the Administrative Law Judge at the evidentiary hearing that was provided for her.

QUESTION: There are at least two different kinds of errors that can be made; are there not -- at least two, that is, one where there is a change in status and entitlement and the other where it is simply a mechanical error; is that right?

MR. BUSCEMI: That's right, there are many possibilities.

QUESTION: Mr. Buscemi, do I correctly understand that the mere fact that the beneficiary proves that he or she was without fault is not enough to establish the right to retain the money?

MR. BUSCEMI: That's absolutely right. The beneficiary must also -- The Secretary must also determine that recovery would defeat the purpose of the Social Security Insurance program or would be against equity and good conscience. And he has defined those phrases to include such factors as financial hardship or detrimental reliance. So that, even if there is no financial hardship, the regulations provide, 20 CFR 404.509, that if the beneficiary has relied to his detriment on an overpayment which he was without fault in receiving, then there is no recovery, even if it could be recovered without imposing any financial hardship.

QUESTION: Does this record show, or do we have to rely if we need it on Social Security, on HEW reports, as to how much a year, in each fiscal year, is overpaid for one reason or another, that is, how much is the area of recoupment?

MR. BUSCEMI: Well, the record does show the number of overpayments made in a year -- a rather extraordinary number, approximately 1¼ million overpayments a year. I don't believe that the record shows the average amount of those overpayments, although we have obtained the Social Security Administration's latest figures on that, and they suggest that the average amount of overpayment is in the vicinity of $500, so that we are talking about something like $600 million a year, the total amount that's overpaid.

QUESTION: You use the 1.25 million. Does that mean that many persons or that many checks?

MR. BUSCEMI: That's a little bit unclear, but I think it means that many persons.

Now, Respondents contend that Section 204(b) of the Social Security Act and the Due Process Clause of the Fifth Amendment require that they be afforded an opportunity for an evidentiary hearing before their benefits are reduced to recover an overpayment. They devoted little attention to the statutory argument in the courts below, and neither the Court of Appeals nor the District Court addressed it. Rather, the courts held that under this Court's decision in Goldberg v.

Kelly the Due Process Clause requires a pre-recoupment hearing. The Court of Appeals relied heavily on an earlier decision by the Third Circuit, Mattern v. Weinberger, that reached the same result.

The Secretary's Petition for Review of the Third Circuit's ruling, Number 78699, is now pending.

Five months after the Court of Appeals' decision, this Court decided Eldridge. Eldridge held that due process does not require a hearing before the Secretary may terminate Social Security disability benefits on the basis of a finding that disability has ceased.

When the Court remanded the present case for reconsideration in light of Eldridge, the Court of Appeals distinguished Eldridge and adhered to its earlier conclusion.

QUESTION: Eldridge involved, primarily, medical expert opinion evidence, didn't it?

MR. BUSCEMI: That's right. In the Court's opinion in Eldridge, the Court emphasized that the question of whether or not a disability continued could be resolved on the basis of written submissions because the bulk of the evidence would be medical. But the Court did note --

QUESTION: Expert medical opinion.

MR. BUSCEMI: That's right.

-- but the Court did note in Eldridge that credibility of the claimant might well be relevant in the ultimate

disability assessment. For example, where the question of disability turns on the extent of pain or discomfort in performing certain operations, the claimant's credibility might well be involved and the Court did recognize that in the Eldridge opinion.

QUESTION: Mr. Buscemi, I realize it's difficult, when you are peppered with questions from nine people, to know exactly what your oral argument will cover. Do you plan to cover in your oral argument the preclusive effect of 205(g) and the availability of mandamus, or do you intend to leave that to the briefs?

MR. BUSCEMI: Well, I did plan to say something about that. I can summarize it now, if you would like.

QUESTION: Use your own judgment. It is your case.

MR. BUSCEMI: Well, just to be very brief about it, the argument that the Secretary has made in his brief is that this Court in the Southby case held that 205(h) of the Social Security Act precludes other bases of district court jurisdiction and limits district court jurisdiction to that provided in Section 205(g) of the Act.

On the basis of the statute and this Court's interpretation in Southby, we've argued that there is no possibility for mandamus jurisdiction, under Section 1361.

That's the argument.

QUESTION: That would not prevent us from reaching,

in the Government's view, the constitutional questions raised by a couple of the named parties, but it would prevent the kind of nationwide class action designated in the Western District of Washington?

MR. BUSCEMI: That is our view of the matter. There is jurisdiction over the claims of the individual named Respondents because of this Court's interpretation of Section 205 (g) in the Eldridge case.

There has not been a final decision of the Secretary at the end of the full administrative review procedure, but this Court held in Eldridge that such a final decision was not necessary where there was a constitutional right asserted and the claim was collateral to the entitlement to benefits.

QUESTION: Your brief does not deal -- or at least it dealt very briefly with Section 204, the statutory issue inherent in this case. And neither the district court nor the Court of Appeals treated it. Do you care to suggest a hypothesis as to why neither of those courts undertook to treat the statutory question.

MR. BUSCEMI: Yes. I think the answer is quite clear. I think the answer is that Respondents made very little of the statutory issue in the Court of Appeals.

QUESTION: That doesn't give the court a license -- any court -- to ignore the statutory issue, though, does it?

MR. BUSCEMI: That's true, Mr. Chief Justice, but I

do think that the court's view of the case is inevitably colored by the briefs that are filed by the parties. And I think that where the claim of the Respondents was almost exclusively addressed to the constitutional point, it's not surprising that the court viewed the case in that light.

In any event, as we suggest in our reply brief, there is nothing to the statutory argument in the Secretary's view. Respondent contends that unless the Secretary undertakes a very "exacting inquiry," in his words, concerning fault and the equitable considerations involved in each case, he violates the statute. The idea is that the Secretary cannot recover any overpayment unless he determines that the criteria of Section 204(b) are not met. But the point of the Secretary's procedures is that he determines that the criteria of 204(b) are not met by asking the individual beneficiary whether he wishes to request reconsideration or waiver.

If the beneficiary does not wish to request either of those forms of administrative relief, but instead is willing to allow the overpayment to be recovered, then the Secretary goes ahead.

This seems to me a reasonable procedure to effect the purposes of the statute.

Now, Eldridge identified three considerations to guide the Court in determining what process is due in a particular situation. The Court of Appeals discussed these, but we

think reached the wrong result.

The first of the considerations is the private interest that would be affected by the deprivation. The Respondents attempt to analogize the interest in keeping overpayments to the interest in the continued payment of welfare benefits that was at issue in Goldberg v. Kelly. But there are important distinctions between the two.

Goldberg is the only case in which this Court has held that the Due Process Clause requires an evidentiary hearing before an interruption in Government payments.

The situation that prompted this application of the Due Process Clause was very different from that involved here. The disputed benefits there were granted on the basis of need, and by definition they were the only means by which the recipients could pay for food, clothing, shelter and medical care.

Here, Social Security benefits are not based on need. The average Social Security beneficiary may well have independent assets, he may well be able to earn money by working and he may well be eligible for welfare payments, if a reduction in Social Security payments renders him unable to meet his current expenses.

QUESTION: Mr. Buscemi, isn't it true that almost by hypothesis one who requests a waiver does so on the basis of need, a claim of need, at least?

MR. BUSCEMI: Well, not necessarily, Mr. Justice Stevens, as we mentioned in response to your previous question, the particular recipient may say, "I have relied on the overpayment. I was without fault in receiving it, therefore I am entitled to keep it, whether or not I need it."

QUESTION: Would the Secretary let that person keep it if he had a million dollars in the bank?

MR. BUSCEMI: That's a -- The regulations, apparently, say that he would. The regulations say that if there has been detrimental reliance -- Now, the Secretary might try to avoid allowing him to keep it by saying it has not been detrimental, but I think that he probably would, under the regulations properly construed.

In addition, the deprivation here is not as serious as the one in Goldberg, because it only involves a reduction in the amount of benefits, not complete termination. The only time in which benefits would be completely terminated, under the Secretary's overpayment recovery program, is when the beneficiary is at fault -- I mean when the overpayment was received as the result of fraud or when the beneficiary had sufficient income that his entire Social Security check can be withheld and he will still be able to meet current expenses.

In no other situation, under the Secretary's program will all of the benefits be withheld.

Finally, the third factor that the Eldridge court

addressed was the Government interest in the efficient functioning of its program and the administrative burden that additional procedures would entail.

It is difficult to make precise predictions about the amount of cost that would be involved in the kind of evidentiary hearing requested by Respondents. But the Court in Eldridge said that the additional costs were likely to be substantial any time the additional procedures were required, and I think that that is equally valid here.

We've cited in our brief several of the ways in which the requirements of the Court of Appeals' decision will affect the Social Security program, and I don't think it is necessary to go into further detail here.

The final thing that I would like to say is that the Secretary's procedures have been shown to be reliable on the basis of the experience, not only before the Court of Appeals decision but after. Out of the 1¼ million overpayments each year, there are only approximately 40,000 people who ask for reconsideration or waiver. And of those, approximately half are granted waiver on the basis of the written submission.

QUESTION: Could it be that the computers are becoming more accurate?

MR. BUSCEMI: Well, we hope so.

QUESTION: I mean that could be one of the reasons for this.

MR. BUSCEMI: That's right.

QUESTION: So what good is it to us, those figures?

MR. BUSCEMI: Well, I think the figures are relevant because they do indicate that the evidentiary hearing sought by Respondents is not required in order to make sure that payments are made to those people who deserve them, and that overpayments are not recovered from those people who are supposed to pay them back.

QUESTION: Mr. Buscemi, on those figures,are you giving us figures under the revised regulations or those that were in effect before the litigation began?

MR. BUSCEMI: Well, the 40,000 figure is a figure that comes from years more recent than those covered by the figures before the District Court. If you look in the Appendix of the petition at pages 99-A and 100-A, you will see the figures that were presented to the District Court and they are very incomplete. They have an accurate figure on the number of overpayments, but they have a much too small figure on the number of requests for reconsideration or waiver. They list only about 12,000 requests. It is not clear whether that 12,000 figure includes only requests for reconsideration or also requests for waiver.

The Secretary now reports that the number of times he gets a request for reconsideration that's not accompanied by a request for waiver is very small. Most beneficiaries do

not contest the fact that they have received an overpayment, or if they do they also ask for waiver. And that number is about 40,000.

QUESTION: A related question, I suppose: What do you perceive the issue to be, the constitutionality of the regulations before they were amended or the constitutionality of the regulations after the amendment? Which would mean, I guess that we don't have the views of the lower courts on the latter question. Which are we supposed to decide?

MR. BUSCEMI: Well, I think that the question is the constitutionality of the regulations before they were amended. But the only thing that's been amended is the Claims Manual which deals with the partial adjustment. That's what we've described in our brief. That has allowed the Secretary to defer recovery and extend it over a longer period of time. And it also means that the Secretary no longer proposes a complete termination of the benefits, he only proposes a 25% reduction of monthly benefits.

Now that particular provision of the Claims Manual was not before the courts below, but with respect to the remainder of these provisions --

QUESTION: That's quite a difference, in terms of the impact on the beneficiary. It is quite a difference whether they lose their entire benefits or just have a reduction.

MR. BUSCEMI: That's true, but in practical effect,

under the partial adjustment system that was in effect before the courts below, the Secretary, as a general rule did grant partial adjustments that were requested. The difference was more in the form of the initial notice to the beneficiary. It said, "We will stop your monthly benefits unless you request waiver or reconsideration, or unless you request some other adjustment."

QUESTION: But if the issue is the regulations that are no longer in effect, why should we really decide that, if the Government no longer has an interest in defending those regulations, if it's got amended regulations in effect now?

MR. BUSCEMI: The issue is whether the Respondents are entitled to an oral hearing before recoupment begins. That issue remains under the new regulations.

QUESTION: On the waiver issue, or the overpayment issue or on both? The Court of Appeals of the Ninth Circuit dealt with both.

MR. BUSCEMI: Yes, the Court of Appeals --

QUESTION: And according to at least one amicus brief here, it is the understanding of that amicus that Respondents aren't defending the Court of Appeals' decision on the overpayment issue.

MR. BUSCEMI: That's also a little bit unclear. I think Respondents are defending the decision on the overpayment issue, if a particular request for reconsideration raises

an issue of credibility. They are not saying that in the average case a request for reconsideration requires a private hearing. I may be wrong about that, but that's the way I read it.

QUESTION: Well, they can tell us, I guess.

But in other words, the Court of Appeals required a prior hearing for both, at least when credibility of witnesses was found in it.

MR. BUSCEMI: Exactly.

QUESTION: And the response of the Secretary was to say that that's an unrealistic dichotomy, and therefore for the time being we are providing hearings for everybody.

MR. BUSCEMI: That's right.

QUESTION: Does the Government concede that there is a constitutional entitlement to a hearing at some time, a post-reduction hearing?

MR. BUSCEMI: Yes, there is no dispute about that.

QUESTION: Would you explain to me, in the Government's view will there be a greater number of hearings if they come before the reduction takes effect than if it is postponed?

MR. BUSCEMI: Well, what's happening is that there have been personal conferences set up before the recoupment begins and then the full ALJ hearing has been kept at the time after the beginning of the hearing. So, in practical effect, the Court of Appeals' decision has resulted in the insertion of

a new layer of review before the beginning of recoupment.

QUESTION: Why, as a matter of discretion, would it cost the Government anything significant to just move up the hearing to a pre-reduction hearing instead of a post-reduction hearing?

MR. BUSCEMI: Well, the full ALJ hearing apparently does entail more expense and more delay than the personal conference procedure that's now being used.

QUESTION: But does it entail more expense if it comes later instead of earlier? I mean comes earlier instead of later.

MR. BUSCEMI: Well, it entails more expense in the sense that it will probably mean that there will be a longer period of time before recoupment begins, because it is more difficult -- The informal, personal conference procedure that the Secretary has developed to comply with the Court of Appeals' decision can be administered much more simply than the full ALJ hearing that he has been providing afterwards.

QUESTION: But didn't you tell us -- Maybe I got this confused -- Didn't you tell us that if there is a request for a waiver that you then do not -- that that automatically suspends things until there is a final decision?

MR. BUSCEMI: Until there is a decision on the basis of the written submission.

QUESTION: I see. But it does not suspend it until

after the ALJ's decision?

MR. BUSCEMI: That's right. Once a decision on the basis of the written submissions is made, then recoupment begins. And then, if there is a reversal after the AIJ hearing, then there is full restitution of any monies that have already been withheld.

QUESTION: And you can comply with the Court of Appeals' opinion without extending the full ALJ hearing?

MR. BUSCEMI: Yes, Mr. Justice White. The Court of Appeals listed a number of things that have to be provided at the personal conference and they are provided. The beneficiary is entitled to present evidence through witnesses and documents. He is entitled to cross-examine adverse witnesses and he is entitled to be represented by counsel.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Levin.

ORAL ARGUMENT OF STANLEY E. LEVIN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I think it is important at the outset to say what this case is really about.

Before you today are elderly, infirm and minor recipients of Social Security benefits who have been operating

under a system which the Secretary has had in operation for two and a half years, which has successfully and satisfactorily provided them with a very flexible administrative procedure which did not exist prior to this Court of Appeals' judgment, which allows them -- and meets their capabilities as elderly, inform and minor recipients -- to assert their right to waiver under the statute.

I'd like to go through for a minute what the system has been for two and one-half years, to show how flexible it has been and show the various choices.

QUESTION: Before you do, you confined the procedures to the right to waiver under the statute. How about the fact of overpayment. Have you, as the amicus American Federation of Labor and Congress of Industrial Organizations understands it -- do you no longer defend the portion of the Court of Appeals' judgment that relates to the hearings as to the fact of overpayment?

MR. LEVIN: That's correct, we do not defend the need for an opportunity to be heard on a personal confrontation basis, merely to contest the existence of overpayment.

QUESTION: Abber?

MR. LEVIN: Correct.

QUESTION: So this involves only a hearing on the question of whether or not recoupment should be waived under the statute 404(b)?

MR. LEVIN: It involves only the issues which are the highly subjective credibility issues under the Secretary's own regulations, under his Claims Manual and the other instructions of waiver.

QUESTION: Going exclusively to waiver?

MR. LEVIN: Only to waiver, yes, sir.

The system for two and one-half years, in answer to Mr. Justice Stevens' question, has been one which allows three choices: a) one of written submissions, which was the only choice under the earlier system. And, for the very small number of recipients who are before you today for whom that is a meaningful and effective means of asserting their waiver question, that is still retained.

The other two choices are informal and personal conferences. And these allow the recipient the vital and crucial element of a personal confrontation, an opportunity to be heard, not a full evidentiary hearing. The requirements are far less rigid than Goldberg, and the Court of Appeals recognized this and allowed for this imbalance.

So this system has been in operation for two and a half years satisfactorily. The Court of Appeals decision properly required this kind of system, and we believe it is consistent with both the statutory 204(b) rights and with the Constitution.

QUESTION: In the system that is now in operation

under the Court of Appeals decision, as you suggest, how does the Secretary proceed? Assume there is no request for reconsideration, only waiver. Is the first issue fault?

MR. LEVIN: Yes, sir. Contrary to counsel's statement, the burden the Secretary has placed is totally on the recipient to come forward and show that he is not at fault, and that either the recovery would be against equity and good conscience or contrary to the purposes of Title II.

So, in answer to Mr. Justice Stevens' question and some of the other questions regarding the $1 million situation, if you are not in need, if you are not poor, you are not entitled to waiver.

QUESTION: In order to deny recoupment, must the Secretary conclude that the person is without fault?

MR. LEVIN: Yes, sir.

QUESTION: And if the person asking for a waiver presents no evidence whatsoever, he just said, "I was without fault," must the Secretary undertake to prove that he was at fault, or what?

MR. LEVIN: That is what Congress says, Your Honor, under 204(b). The basic fundamental dispute in this case seems to be a continual ignoring by the Secretary of the exact wording of 204(b), and the mandatory language -- what Congress has said, "We are going to vest the right to a pre-recoupment waiver decision," on these very individualized and

subjective issues of waiver in the recipients. Only then if the Secretary meets the burden under 204(b) can he then take the money back from them. And this shifting of the burden which is so crucial to recipients who are incapable of --

QUESTION: But if there is fault, he is absolutely barred from -- he must recoup then, if there is fault.

MR. LEVIN: That's correct. That's why the case involves highly subjective, detailed, factual inquiries into what fault is in a given situation.

QUESTION: Could you give an example, put a little flesh on that?

MR. LEVIN: A very good example, Your Honor, would be one of the named Respondents, Mrs. Yamasaki. In Mrs. Yamasaki's situation, she received a notice saying that she had been overpaid, due to the Secretary's processing error, in the amount of approximately $200. She cashed the check, not knowing what the check was for and she put in her request for waiver that she had no idea that she was wrong to keep the money or accept the money. Obviously, for her the only way to effectively present her case, as to whether or not she was wrong to accept or retain that money, was for her to meet person to person with a decision-maker and for him or her to assess Mrs. Yamasaki's credibility.

QUESTION: What excuse could be offered for taking $200 more than the entitlement?

MR. LEVIN: There are many situations, Your Honor, where the Social Security system issues checks, supplemental checks, retroactive checks, adjustment checks, many situations where it can be appropriate to keep the money. In any event, Congress --

QUESTION: If the payment is $200 more than the recipient is entitled to, do you suggest there is any excuse for keeping it, any justification for keeping it?

MR. LEVIN: Your Honor, what I am saying is Congress has made that choice. Congress has said they are vested with this money until the Secretary comes forward and shows these grounds under 204(b) to take it away. Congress has made that choice, because Congress has reviewed the Social Security system and knows how difficult and chaotic it is.

QUESTION: Well, do you suggest that either of the courts below have made a determination or have exhibited any great interest in 204(b)?

MR. LEVIN: Well, they have to the extent that 204(b) is a crucial element in weighing the private interest in this case, and 204(b) is a crucial element in certain parts of the constitutional analysis.

We did present the argument at every stage of the appellate process, that the Secretary's recoupment procedures, as existed then, were absolutely barred by 204(b). The court did not rule on it.

QUESTION: If we took the figure -- and for the moment, for hypothetical purposes, at least, let's accept it that there are $600 million a year being paid out that should not be paid out.

Do you mean to suggest that Congress had any notion that there should not be recoupment for the vast part of that, the overwhelming portion of it?

MR. LEVIN: Congress said, Your Honor, in 1939, when it enacted this statute and in 1967 when it affirmed it again, that persons who are without fault and against whom recovery would cause a hardship, will be able to keep the money.

Now, that $600 million figure is consistent with other statistics which the Secretary has just revealed -- unveiled -- lately, and which were never probed at the district court level or the circuit court level, in terms of an evidentiary hearing.

If that is a correct figure, I think it's basically irrelevant to the disposition of this case today. You must look to the congressional intent and the congressional purpose and language in 204(b).

QUESTION: Are you suggesting then that tangentially, at least, Congress contemplated that they would waive $600 million, if that is the figure, or any such figure? Would they urge that on any grounds?

MR. LEVIN: Congress was clearly saying, because they

used the words, "shall be no recovery," Your Honor.

QUESTION: To the tune of $600 million -- you press it that far?

MR. LEVIN: That's what Congress said, Your Honor.

Obviously, it would not be to the tune of $600 million. It never has been, and it's guesstimates and speculation like that on the part of the Secretary --

QUESTION: I said this is purely hypothetical. We don't know whether that's the fact. We may or may not be able to notice it judicially, depending on what the records of the Department show.

MR. LEVIN: We don't know what the exact figure is, Your Honor. It could be only $100,000. The point is Congress said, "We are going to set up a unique statutory scheme, where this limited group of Social Security recipients will be protected, and that group will be people who are without fault and against whom recovery will cause a hardship or who detrimentally relied on this recovery or retention of the overpayment."

QUESTION: Is there any other governmental provision that allows people to keep money that doesn't belong to them?

MR. LEVIN: Absolutely, Your Honor. There are a number of waiver provisions in a number of civil rights retirement statutes. There are, approximately, I think, twelve of them.

QUESTION: Give me one statute that says that where you get money that you are not entitled to you shall keep it.

MR. LEVIN: Well, the Civil Service Retirement statute, the Railroad Retirement statute and other similar retirement-type statutes also provide for waiver provisions identical to the --

QUESTION: A waiver, but it is not automatic.

MR. LEVIN: No, sir, I am sorry I misled you.

QUESTION: I know it is not, because I am familiar with that, the statute you are talking about. And I tried one time to get a client some money and failed. That's the best way to learn what a statute means.

MR. LEVIN: They are not automatic, Your Honor. If you establish conditions of a waiver, is what I am trying to say.

QUESTION: This language, is that in any other statute?

MR. LEVIN: The waiver language, to the extent that it protects a limited group of people, as it did under 204, exists in other retirement statutes, yes, sir.

QUESTION: Name one.

MR. LEVIN: Civil Service Retirement statute and the Railroad Retirement statute, two examples I can think of.

QUESTION: The Railroad Retirement statute says if you are overpaid you keep it?

MR. LEVIN: If you are without fault and you are in need.

QUESTION: Oh, without fault. What does that mean, you didn't have a gun?

MR. LEVIN: No, Your Honor, what that means is that you did not know the acceptance of the overpayment was incorrect or erroneous.

QUESTION: This would depend to a certain extent on the amount of the overpayment. If your ordinary check is $200 and you get a check one month for $2,200, I suppose that a finding of fault could be inferred, where if it is a $10 or $20 difference, it couldn't be?

MR. LEVIN: Some of those factual situations do arise, Your Honor.

The Secretary does take certain steps to move recipients from various programs, from the disability program to the retirement program, from the survivors program to the retirement program. And when he does that, he sends out checks -- correctly sends out checks, so you often cannot presume that the mere sending out of a check which is large is automatically an error.

QUESTION: But if you are used to getting a check for, say, $200 a month, and supposing you get a check for $2,200 the following month. Would that support a finding of fault under the regulations?

MR. LEVIN: I think that would be one element to be considered at a personal confrontation. Of course, we would have to assess the credibility of that witness when the witness said, as in any credibility situation, that he or she did not know that what he or she was doing was incorrect.

What the Secretary's regulations require, Your Honor, in response to your question -- they require a very detailed assessment, not only of that fact that you just articulated, but also the recipient's age, intelligence, physical and mental condition and a range of other factors to determine whether the recipient knew, should have known, or could have known that the retention or acceptance of the overpayment was wrong.

QUESTION: It doesn't say without knowledge. It says, "without fault," and that would seem to imply some causative element. And if the overpayment of $2,000 was not directly or indirectly caused by the beneficiary, how could he have any fault about it?

MR. LEVIN: That has generally been our position, Your Honor. And we believe that the statute has made that determination, because of using the language, "fault." But all I am saying is that is one factor to be considered. We think it should be given very little if no weight.

QUESTION: If the overpayment is not the fault of the beneficiary, then it's not, whether or not he knew it was

an overpayment.

QUESTION: That's correct, Your Honor.

What is important to note, in response to your question, is that Congress knew that there would be many people overpaid and knew that most of the errors would be due to the Secretary's own errors and not recipient-generated errors.

QUESTION: Now, if the overpayment is the result of misrepresentations on the part of the beneficiary, that's clearly his fault.

MR. LEVIN: That's correct.

QUESTION: But if an overpayment is a computer error or a miscalculation on the part of the Agency, it is not his fault at all.

MR. LEVIN: And most of the recipients before you today have exactly that situation.

QUESTION: Do you suggest that there are any circumstances -- and if so suggest what the circumstances would be -- in which the $200 recipient received $2200 and recoupment should not be automatic, virtually automatic? No matter who is -- Let's assume, obviously, that this is the error of the Secretary. Are you telling us that's what the statute means, that a recipient can keep the $2200, even though for three or four years before the check had been $200 a month?

MR. LEVIN: If, through assessing the credibility of that individual, it is clear that individual was not at fault

in generating or accepting that overpayment.

QUESTION: But fault is only one of the criteria. He has to be without fault and the recoupment must defeat the purpose of this subchapter or would be against equity and good conscience. Even if he is faultless, he has to satisfy that criteria.

MR. LEVIN: That's correct, Your Honor. I was going to get to that. Not only must he satisfy that, but if he has the money to be recovered, then the fault criteria will fall by the wayside. He must either be not at fault and he must be poor. Under those two situations, you will get waiver. If you don't meet either of those criteria, you do not get waiver.

QUESTION: Suppose the showing before the response was that on receipt of the $2200, instead of $200, he went out and lost the $2000 gambling. So that when they come for the recoupment, he hasn't got it. Then, are you telling us, that under this statute it would be inequitable and defeat the purposes of the Act to make him pay back the $2000 over a period of time?

MR. LEVIN: Your Honor, are you presuming in your hypothetical that he is at fault?

QUESTION: Just the facts I suggested. He went out and gambled away the $2000.

MR. LEVIN: The gambling is actually irrelevant, Your Honor. The question becomes one again if he was at fault

or not at fault. And if he has the money. He may have other resources to recover from. The Secretary's regulations require an in-depth financial evaluation of all pertinent circumstances and assets and resources of that particular recipient. If that were the case, the fact whether he gambled it away or lost it or it was stolen or he was robbed is absolutely irrelevant. The question is whether he has these assets to satisfy the recoupment.

QUESTION: But if he squandered them away and has no other assets you say then, under the statute, it would be inequitable. The equity aspect of the statute, the second leg, would come into play, and he should not have to return that money?

MR. LEVIN: If he does not have any other assets or resources. The fact that he doesn't have the money, no matter how that occurred, is irrelevant, yes, sir.

QUESTION: Mr. Levin, could you help me. I am trying to figure out in my own mind what the constitutional issue is in this case.

The question presented is whether an oral hearing must precede the reduction in the recoupment. An oral hearing—I had thought that was just a hearing before the ALJ, but it has been made clear today that there are two different oral hearings that we are talking about, an informal hearing and then there is a later hearing before the ALJ. Under your view,

is the Constitution satisfied with the informal hearing?

MR. LEVIN: Absolutely, Your Honor.

QUESTION: Do you understand that the Government is asking to have that oral hearing dispensed with?

MR. LEVIN: Absolutely.

QUESTION: They don't want even the informal hearing?

MR. LEVIN: That's correct.

They do not want to continue what has been continued for the last two and a half years and worked satisfactorily. They want to, perhaps, have the authority to go back to the old, very limited, very telescoped written submission procedure, which is absolutely inconsistent with the needs and capabilities of these recipients.

QUESTION: They want a right to change the regulations back to where they used to be?

MR. LEVIN: Perhaps, Your Honor. We don't know.

QUESTION: Other than that, there is really no issue before us, isn't that right?

If they said they were satisfied to continue to provide the oral hearing, there would be no dispute.

MR. LEVIN: That's right, Your Honor.

QUESTION: They wouldn't have petitioned for certiorari, I presume.

MR. LEVIN: I don't know why they petitioned for certiorari, Your Honor.

QUESTION: I presume because they are dissatisfied with the Ninth Circuit's opinion.

MR. LEVIN: I assume so.

QUESTION: Suppose the named Plaintiffs here -- suppose we agree with you to the extent of the interest in the named Plaintiffs. What relief will they achieve? What will be -- What good will it do them?

MR. LEVIN: The named Plaintiffs, Your Honor, in the Elliott proceeding, have had their recoupments -- or action taken regarding their recoupment or their hearings halted pending the disposition of this litigation. So they still have a justiciable controversy. So if this Court were to rule that they had the right, as the two lower courts and the Court of Appeals ruled twice --

QUESTION: Then there would be a hearing before the recoupment?

MR. LEVIN: That's right, Your Honor, there must be.

QUESTION: I thought you said there had been recoupment hearings going on for two and a half years.

MR. LEVIN: As to other members of the class, ironically, not as to most of the named Plaintiffs.

QUESTION: So, suppose we agree with you, what else is involved in the case, with respect to the named Plaintiffs? What else do you need besides that?

MR. LEVIN: That's the extent of our relief, Your

Honor.

QUESTION: What about the class problem?

MR. LEVIN: Well, Your Honor, we believe that the Secretary has raised the class problem as a jurisdictional problem. We believe the Court of Appeals properly found that it could grant full relief under the mandamus statute or under 205(g), and we believe that's an appropriate disposition of the case.

QUESTION: Do you think the remedy the Court of Appeals ordered would be justified without finding that a class had been properly certified?

MR. LEVIN: Your Honor, this Court could.

QUESTION: Could you say the injunction, declaring the statute unconstitutional and enjoining it could be issued at the behest of just two named Plaintiffs?

MR. LEVIN: I think it could, Your Honor, normally. It is not a matter of ruling the statute unconstitutional. It is the Secretary's procedures pursuant to the statute. The problem is, Your Honor, that the reason the class action and the injunction relief are needed has been the Secretary's conduct and a series of other litigation that he has not, in fact, followed rulings of the Courts of Appeals. For example, in the decision of Califano v. White, where there have been a spate of lawsuits filed in the same issue that Court of Appeals in Califano v. White made its determination.

QUESTION: This is by no means peculiar to the Secretary of HEW. The Commissioner of the Internal Revenue struggles year after year to develop a conflict in the circuits, even though circuit after circuit will go against him. And the same is true of other administrative agencies. I don't think any agency has felt bound to take the opinion of one court of appeals out of eleven as the final arbiter of the Constitution.

MR. LEVIN: Your Honor, first of all, there are two courts of appeals involved here consistently, the Third Circuit in Mattern v. Califano and the Ninth Circuit.

QUESTION: Two out of eleven.

MR. LEVIN: Those are the only two courts in which the issue has been presented.

Secondly, the Secretary has only raised this issue about conflicts in the circuits as a means of claiming they would never be able to get review by this Court. We are very confident this Court can control its docket and its calendar and the matters which come before it and will see that if a matter is that pressing and important, under the Court's Rules, under Rule 19, this Court will, indeed, review that issue and take appropriate action.

I think setting a decision or authorizing -- or that there be no nationwide class actions in a situation like the case before you, or saying that the Secretary is correct in saying that the class actions under 1361 or under 205(b)

are inappropriate is an absolutely unworkable and unjust result to occur for this group of recipients.

It essentially makes Social Security recipients, Your Honor, second-class citizens. It essentially says that they cannot get full relief in federal court on constitutional challenges to illegal procedures of the Secretary.

QUESTION: Why doesn't the Commissioner of Internal Revenue's program of seeking conflict treat the taxpayers involved the same way?

MR. LEVIN: I have no knowledge of that, Your Honor. I am sorry.

QUESTION: Incidentally, is Respondent Elliott out of the case?

MR. LEVIN: Yes, Your Honor.

QUESTION: Are you going to substitute somebody for him?

MR. LEVIN: We will take appropriate action and do that, Your Honor, yes.

QUESTION: You have not cross-appealed?

MR. LEVIN: No, sir.

There are several more points which I would like to make in my remaining time.

As I was indicating earlier, the Secretary has made certain changes in his procedures, his Claims Manual procedures which are non-binding, they are not part of the administrative

regulations. And those procedures he claims are material to the distribution of the constitutional issue and balancing of the private interests in this case. We believe that those changes are absolutely regressive and do not enhance the situation whatsoever, because they actually affirmatively discourage persons and recipients from asserting their right to waiver.

I can explain that in a moment, but what is important to us, Your Honor, is that if this Court in any way believes these changes are material to the disposition of this case, we believe the case ought to be remanded back to the district courts which issued the injunctions in this case, for them to probe the effect, if any, of those procedural changes. We do not think that we should be discussing de novo these procedures in December of 1978, after six and a half years' litigation, based on a particular system of recoupment.

QUESTION: Do you think, Mr. Levin, that the changes change the issues in this case?

MR. LEVIN: They certainly do not provide the pre-recoupment opportunity to be heard -- not the evidentiary hearing, but the opportunity to be heard, as required by the Court of Appeals.

QUESTION: And that is the issue?

MR. LEVIN: That is the issue.

QUESTION: And that remains the same issue, even

after the changes?

MR. LEVIN: That is correct, Your Honor. That issue is still there. What these procedure changes do, Your Honor, unfortunately, is they discourage waiver assertions by clients, because they actually insure that clients who seek waiver will not get the maximum 25% partial adjustment protection. Recovery against them is open-ended. So, obviously, if I know I can get a 25% maximum recovery I'll do that and I'll forego my statutory and perhaps constitutional right to have the case decided. And that is a direct and affirmative discouragement to the statutory right to waiver. And it is because of that this certainly is a justiciable controversy. We think the effect of that should be litigated, if the Court thinks that's material, in the lower courts where this properly belongs. To that end, we made a motion to dismiss a remand in this case in January, but it was denied. We renew that request now, if the Court deems these procedures material.

QUESTION: If you say that everybody but the named Plaintiffs have been getting recoupment hearings, in accordance with the decision of the Court of Appeals for two and a half years, what's left of the class?

MR. LEVIN: Well, people who come forward on an on-going basis, Your Honor. If this Court were not to rule in our favor --

QUESTION: It's a constantly revolving class?

MR. LEVIN: Yes, sir, it is, because the Secretary issues these recoupment notices daily. He issues 1.25 million of them a year, most of which are his errors. In that vein, therefore, there are people who are regularly trying to assert their right to waiver.

I would like to make a point here, though, Mr. Justice White. The point is that the notice aspect of this case, which counsel indicated was not before this Court, is an important thing to keep in mind, because both the lower courts and the Ninth Circuit found that people were not properly informed of their right to waiver. Because of that, many of them do not exercise certain statutory and constitutional rights they would have certainly otherwise done.

The Secretary has not appealed that, and that's res judicata, and that is an essential difference between this case and certain other cases where you would require exhaustion of administrative remedies and be concerned about the class definition. Because in this case you have a fundamentally, constitutionally defective notice, where persons could not have exhausted, could not have asserted their rights because they didn't know what their rights were.

And I think the maneuver by the Secretary not to appeal that decision -- I do not want that to relieve this Court of --

QUESTION: But if we agreed with you and said that

on behalf of the named Plaintiffs -- the named Plaintiffs were entitled to a declaratory judgment, that whatever is attacked here was unconstitutional, do you need anything else than that?

MR. LEVIN: Your Honor, again, I go back to my answer to a question by Mr. Justice Rehnquist. The problem with that, to the extent that you authorize or approve of or acquiesce in the Secretary's position that Social Security recipients are not entitled to class actions in Federal court for procedural, constitutional attacks or statutory attacks, like Califano v. --

QUESTION: But that's sort of a generality that may not be involved in this case. If the very provision you are attacking here is declared to be unconstitutional, what more do you need or want?

MR. LEVIN: I assume the Secretary would abide by a decision of this Court, and if he did that we would not need anything further, Your Honor.

QUESTION: Of the million or more who receive checks every year -- several millions, perhaps -- how many send the check back? Does this record show how many people send the check back and say, "Dear Mr. Secretary, you've made a mistake, I'm not entitled to all this money"?

MR. LEVIN: I have no idea, Your Honor.

QUESTION: Do you have a copy of the Petitioners' reply brief?

MR. LEVIN: Yes, we did, Your Honor.

QUESTION: It was referred to this morning in oral argument, and until that reference was made I didn't know there was one. It was filed only last Friday.

MR. LEVIN: Yes, Your Honor, we got it the last minute also. And we reviewed it and we think it is the first occasion in which the Secretary --

QUESTION: Goes to the statutory.

MR. LEVIN: Absolutely, Your Honor. For six years -- and we raised it in the lower courts and the complaints and we raised it in the Appellate Court, we briefed it, and the Secretary has ignored it and treated it as though it did not exist.

QUESTION: Also the Court of Appeals?

MR. LEVIN: The Court of Appeals recognized it, Your Honor, for the importance of balancing the private interest in this case, recognizing that it was a congressional mandate that there shall be no recoupments, only in these certain situations.

QUESTION: The Court of Appeals ignored the claim that the statute itself requires a prior hearing, and instead said that the Constitution requires one.

MR. LEVIN: That's correct, Your Honor. We would take the position that we believe an affirmance is absolutely appropriate in this case, but that if the Court believed it

necessary, we could go back to the Court of Appeals and litigate the statutory issue, because we believe it is an essential issue in this case. And this Court has indicated on many occasions it is the first duty of any reviewing court to try to dispose of a constitutional issue without reaching the constitutional issue and first disposing of it on statutory grounds, which can be done in this case.

QUESTION: If we affirmed on the statute, would that change your relief?

MR. LEVIN: I don't think so, Your Honor.

QUESTION: So, I suppose, you could say you are entitled to urge the statutory ground now here.

MR. LEVIN: That's what we are doing, Your Honor, and we've briefed it thoroughly. Although if the Court believes that it's essential to have the thoughts and disposition of the lower court, we would be willing to go back and litigate that issue there at that time.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:06 o'clock, a.m., the case was submitted.)