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Notes

Social Security Netting Regulations: Balancing Administrative Convenience With the Rights of Beneficiaries

INTRODUCTION

Social Security is the largest benefit program in the United States social welfare system. The vast number of individuals receiving Social Security benefits inevitably results in a substantial number of payment errors. The Social Security Act ("the Act") provides guidelines for dealing with these erroneous payments, including provisions allowing the Social Security Administration ("the Agency") to recover overpayments. The Act allows the Agency to recover overpayments, however, only if the recovery spares blameless recipients from harsh consequences. In order to avoid such harsh consequences for recipients, the Agency must offer the recipient an opportunity for a hearing to determine whether the Agency should waive its right to recover.

The Agency, in its regulations, has interpreted the Act's payment error provisions to authorize the offsetting of overpayments and underpayments. The Agency converts separate

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3. 42 U.S.C. § 404(a) (Supp. IV 1986); 42 U.S.C. § 1383(b)(1)(A) (Supp. IV 1986); see also infra notes 22-25, 30-36 and accompanying text (quoting and explaining statutory provisions).
5. 20 C.F.R. § 404.504 (1988); 20 C.F.R. § 416.538 (1988); see also infra notes 65-72 and accompanying text (explaining regulations).
overpayments and underpayments to the same recipient into a single net payment error. This "netting" procedure deprives recipients of their waiver rights.6

This Note examines the Agency's netting procedure in light of the language and purpose of the Act. Part I examines the general statutory and regulatory provisions concerning payment errors and the Supreme Court's interpretation of those provisions. Part II discusses the Agency's netting regulations and analyzes circuit court cases that disagree on the statutory validity of the netting procedure. This Note argues that courts upholding the netting procedure have misconstrued the language and purpose of the Act. The Note also contends that all of the circuit court decisions have ignored important distinctions in the language governing different Social Security programs. In Part III, the Note proposes a restricted netting regulation that would best serve the disparate goals of equitable treatment of recipients and efficient management of the program.

I. SOCIAL SECURITY BENEFITS: OVERPAYMENTS, UNDERPAYMENTS, AND NETTING REGULATIONS

Congress designed the Social Security Act of 1935 to elimi-

6. A hypothetical scenario will demonstrate the inequity of the netting procedures. Amy S., Darryl D., and Jane H. are all recipients of Social Security benefits. Amy and Darryl both live alone and depend on their benefits for daily living expenses. Jane has ample financial support and uses her benefits to enrich a trust fund for her grandchildren.

As a result of a clerical error, Amy and Darryl both received two checks in their first month of eligibility for benefits. In the mistaken belief that they had been eligible the prior month and assuming that the extra check was for that month, both spent the funds on living expenses. More than a year later, another error led to underpayment of benefits to Amy and Jane. Both Amy and Jane immediately notified the Agency of the error. The Agency paid Jane an amount equal to the underpayment.

In investigating the underpayment to Amy, the Agency discovered the original overpayment to her and to Darryl. The Agency determined that recovery of the overpaid amount from Darryl would be inequitable and thus the Agency made no attempt to recoup the overpayment from him. In Amy's case, however, the Agency used the netting procedure to offset the amount of the overpayment and underpayment. Because the overpayment and underpayment were for the same amount, the netting procedure resulted in a determination that Amy was neither overpaid nor underpaid. Amy, unlike Darryl, received no opportunity to seek waiver of recovery of the overpaid amount. Unlike Jane, Amy received no payment for the shortfall as a result of the underpayment.
nate economic insecurity among the elderly and blind. The Act's guarantee of a minimum standard of living for most citizens marked a radical change from prior United States social programs that had relied on private charity and the uncoordinated efforts of state governments. In its most significant provisions, the Act created Old-Age Insurance (OAI) benefits administered by the Social Security Administration and funded by a general payroll tax. Congress later replaced the OAI program with the Old Age, Survivors, and Disability Insurance (OASDI) program, extending benefit coverage to survivors of beneficiaries and incorporating disability insurance.

The Act also authorized federal grants to states to provide benefit programs for the blind and elderly poor and later amendments provided grants for state aid to the disabled. In 1972, Congress amended the Act to consolidate these state benefit projects into the Supplemental Security Income (SSI) program administered by the Agency. OASDI and SSI share the goal of ensuring that recipients receive sufficient income to

8. R. STEVENS, supra note 7, at 3-5.
11. Social Security Act Amendments of 1956, ch. 836, § 103, 70 Stat. 807, 815-24 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.). Revenue for OASDI benefits comes from either the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund. Id. at 819-23; see also R. STEVENS, supra note 7, at 4-12 (describing gradual expansion of eligibility for social security benefits). This Note is concerned only with direct cash benefit payments to individuals.
meet basic living needs. One important measure of the Agency's ability to fulfill this goal is the accuracy of benefit payments.

A. SOCIAL SECURITY BENEFIT PAYMENT ERRORS

The Agency disburses more than $200 billion annually in OASDI benefits, while SSI expenditures exceed $13 billion. Payment errors are an inevitable and substantial problem because of the staggering size of these programs. Although a


17. The Agency estimated that the 1988 OASDI disbursement would total $214 billion. Appropriations Hearings, supra note 2, at 288 (statement of Dorcas Hardy, Commissioner of Social Security). The estimated number of beneficiaries for 1988 is approximately 38.5 million, including 34.44 million recipients of old age and survivors insurance (OASI) benefits and 4.05 million recipients of disability insurance (DI) benefits. Id. at 622, 626. The average monthly OASDI benefit payment was $488 in 1986. Id. at 468.

18. The Agency estimated that the 1988 SSI disbursement would total $13.6 billion. Id. at 633. The Agency estimated that the number of SSI recipients for 1988 would be 4.4 million. Id. The average monthly SSI payment in 1986 was $244. Id. at 468. SSI recipients receive benefits based on need because the program "is intended to be the nation's income assistance program of last resort." The Forgotten Safety Net: The Supplemental Security Income (SSI) Program Hearing Before the House Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 100th Cong., 1st Sess. 22 (1987) (statement of Louis D. Enoff, Deputy Commissioner for Programs, Social Security Administration).

In December 1986, 47% of the SSI recipients were elderly and the remaining 53% were blind or disabled. Id. at 24. About 71% of the aged and more than 37% of the blind or disabled SSI recipients also received an average of $263 per month in OASDI during 1986. Id. at 25. Only 12% of the SSI recipients had other unearned income and 1.4% of the aged, 6.7% of the blind, and 5.1% of the disabled had earnings from employment in 1986. Id. at 25.

19. In fiscal year 1986, the Agency incorrectly underpaid or overpaid more than $1.1 billion in benefits to an estimated 4.2 million OASI recipients. GAO, supra note 16, at 3. The Agency thus incorrectly paid 12.7% of the 34.44 million recipients at least once in 1986. Id. at 4. For the period 1981 to 1986, approximately 60% of these payment errors were net underpayments. Id. at 27. The average yearly OASI underpayment for the period was $591.50 and the median yearly OASI underpayment was $194.55. Id. The average yearly OASI overpayment for the period was $1069.50 and the median yearly OASI overpayment was $251.40. Id. at 27-28. Approximately 30% of the cases involving payment errors had discrepancies of between $1 and $5 per month. Id. at 13. The incorrect payments continued for an average of 61.3 months with a median of 40 months. Id. at 28.

The Agency's estimates of payment accuracy rates for DI and SSI benefits indicate that payment errors are much more frequent for these programs. Ap-
majority of the errors stem from Agency mistakes, underpayments and overpayments occur in both programs for a variety of other reasons. Various sections of the Act, enforced by Agency regulations, establish the proper method of correcting these erroneous payments.

20. From 1981 to 1986 the Agency was responsible for a majority of OASI payment errors, ranging from a low of 69% of errors caused by the Agency in 1984 to a high of 87% of errors caused by the Agency in 1982. GAO, supra note 16, at 16. The Agency is almost always responsible for underpayments, but beneficiaries and others usually cause the overpayments. Id. at 15.

21. Payment errors happen for several reasons, including inaccurate reports of income by the recipient, computational errors by the agency, incorrect determinations of entitlement, and administrative delays. See Debt Collection Hearings, supra note 19, at 524-27; Brief for Appellant at 5 n.5, Everhart v. Bowen, 853 F.2d 1532 (10th Cir. 1988) (No. 87-1839); see also Note, Supplemental Security Income Overpayments: Judicial Response to Administrative Decisions Which Deny Waiver of Recovery, 18 New Eng. L. Rev. 899, 901-02 (1983) (discussing cause of SSI payment errors). Fraud by recipients is rarely the cause of overpayments. The Agency suspected fraud in only 2800 cases of the 3 million OASDI overpayments in 1981. Debt Collection Hearings, supra note 19, at 524.

The Agency's administrative difficulties exacerbate the payment error problem. A management review by the United States General Accounting Office (GAO) found that the Agency has "serious management problems that... have contributed to crisis situations in the past, and could interfere with its ability to effectively deliver services into the future." According to the GAO review, the problems resulted in "incorrect payments to certain beneficiaries." Staffing Reductions, Service Delivery, and Management of the Social Security Administration: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 100th Cong., 1st Sess. 171 (1987) (statement of Richard Fogel, Assistant Comptroller General for Human Resources Programs, United States General Accounting Office).

The present Social Security Act provides guidelines for the Agency to follow in rectifying underpayments and overpayments. The original Act did not address the problem, but amendments to the Act in 1939 allowed the Agency to increase or decrease future benefits to correct past payment errors.\textsuperscript{22} Congress further amended this provision in 1968.\textsuperscript{23} Section 404(a), the basic error-correcting provision, now provides for recovery of overpayments by reducing future payments or by direct repayments from recipients.\textsuperscript{24} The Agency corrects underpayments by paying the balance due to the recipient.\textsuperscript{25}

Section 404(b), a part of the Act since the 1939 amendments, limits the right of the government to recover OASDI benefit overpayments.\textsuperscript{26} Borrowing a concept from the veteran

\begin{itemize}
  \item \textsuperscript{22} The 1939 amendment provided: “Whenever an error has been made . . . proper adjustment shall be made . . . by increasing or decreasing subsequent payments to which such individual is entitled.” Social Security Act Amendments of 1939, ch. 656, § 204(a), 53 Stat. 1360, 1368 (current version at 42 U.S.C. § 404(a) (1982 & Supp. IV 1986)).
  \item \textsuperscript{23} Social Security Act Amendments of 1967, Pub. L. No. 90-248, § 152, 81 Stat. 824, 860-61 (1968) [hereinafter 1968 amendments] (current version at 42 U.S.C. § 404(a) (Supp. IV 1986)). The 1968 amendments altered the 1939 provision by separating the language on overpayments from the language on underpayments and by providing the Social Security Administration with greater authority to recoup overpayments from the beneficiary’s family. \textit{Id.} One of the 1968 amendments stated:
    \begin{enumerate}
      \item Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this title, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
        \begin{enumerate}
          \item With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this title to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this title payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person . . . .
          \item With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person . . . .
        \end{enumerate}
      \end{enumerate}

\textit{Id.}

\textsuperscript{24} \textit{See supra note 23.}
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} The 1939 amendment stated:

There shall be no adjustment or recovery by the United States in any case where incorrect payment has been made to an individual who is without fault . . . and where adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience.
benefits program, section 404(b) requires the Agency to waive the right to recover an overpayment if recovery would defeat the purpose of the Act or be "against equity and good conscience," and the recipient is without fault in the matter. Congress amended the Act in 1968 and again in 1986 to increase the number of individuals eligible to pursue waiver of overpayment recovery.

Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360, 1368 (current version at 42 U.S.C. § 404(b) (1982)).

The House Report on this provision stated as the amendment's purpose the waiver of "any right of the United States to recover by legal action or otherwise in any case of incorrect payment to an individual who meets the requirements of the statute." H.R. REP. No. 728, 76th Cong., 1st Sess. 42 (1939).


29. The 1968 amendment expanded the language of § 404(b) to allow individuals other than the intended beneficiary to seek waiver of recovery. 1968 Amendments, supra note 23, § 152, 81 Stat. at 860-61 (current version at 42 U.S.C. § 404(b) (1982)). The purpose of this amendment was to extend waiver rights to individuals newly subject to the Agency's overpayment recovery power as a result of the 1968 amendment to § 404(a). S. REP. No. 744, 90th Cong., 1st Sess., reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 2834, 3095-96. Section 404(b) has not been amended since 1968. It currently provides:

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.


A 1986 amendment altered the language of § 404(a) to extend the use of § 404(b) waiver rights. The amendment broadened the definition of overpayment to include benefits that are erroneously paid directly by the Agency to a deceased beneficiary's joint bank account with a family member. 42 U.S.C. § 404(a)(2) (Supp. IV 1986). The Agency had been defining these payment mistakes as "errors" rather than "overpayments." The Agency thereby could recoup the overpaid amount from the joint account co-owners without allowing these individuals a right to pursue waiver under § 404(b). 131 CONG. REC. S8727 (daily ed. June 25, 1985) (statement of Sen. Heinz). The sponsors of the amendment believed that the statutory language, legislative history, and overall purpose of the Act supported the redefining of these payment mistakes as overpayments with accompanying rights to seek waiver of recovery. Conflicting court decisions and Agency intransigence led to the introduction of this legislation. Id.; id. at E2994-95 (statement of Rep. Morrison); see also Breault v. Heckler, 763 F.2d 62, 63 (2d Cir. 1985) (holding that direct deposit benefit payments mistakenly credited to bank account of surviving spouse are
When Congress created the SSI program in 1972, it enacted a similar provision, section 1383(b), to rectify SSI payment errors. When section 1383(b), like section 404(a), provides the Agency with authority to adjust future payments, to recover overpaid benefits, and to issue additional payments to underpaid beneficiaries. Section 1383(b) employs far more general language than section 404(a), however, to establish the Agency's authority to correct payment errors. The SSI provision simply authorizes the Agency to make "appropriate adjustments" for errors, rather than following the OASDI language that distinguishes between overpayments and underpayments. In addition, the SSI provision limits monthly recovery of overpayments either to the amount of the SSI monthly benefit or to ten percent of the beneficiary's total monthly income, whichever is less.

Section 1383(b) also contains a provision authorizing the Agency to waive repayment of overpaid SSI benefits. The SSI waiver language provides greater authority to the Agency than does the OASDI provision, section 404(b), to determine whether waiver is appropriate. Whereas the OASDI provision erroneous payments and surviving spouse has no statutory right to seek waiver; see generally S. Rep. No. 146, 99th Cong., 1st Sess. 328-29 (1985) (discussing purpose of 1986 amendment).

31. See supra notes 22-29 and accompanying text.
32. 42 U.S.C. § 1383(b) (Supp. IV 1986). The SSI language provides:
Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from such individual or his eligible spouse... or by payment to such individual or his eligible spouse.

33. See infra notes 126-39 and accompanying text.
35. See supra note 23.
36. 42 U.S.C. § 1383(b)(1)(B)(i) (Supp. IV 1986). This provision states that the Secretary shall recover overpayments "in amounts which in the aggregate do not exceed (for any month) the lesser of (I) the amount of his or their benefit under this subchapter for that month or (II) an amount equal to 10 percent of his or their income for that month," unless the overpayment is the result of intentional misconduct by the recipient. Id.
38. See supra note 29. The waiver of recovery provision for SSI states: The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with
mandates that there shall be no recovery of the overpayment if the recipient satisfies the waiver requirements, the SSI language states that the Secretary "shall make such provision as he finds appropriate with a view to avoiding penalizing" overpaid recipients who meet the waiver requirements. The SSI provision also allows for waiver when recovery of a small overpayment amount impedes "efficient or effective administration."

2. Correction of Payment Errors: Agency Regulations

The Agency promulgates regulations supplementing the Act's statutory provisions and outlining procedures that the Agency should follow after discovery of an incorrect benefit payment. Under these regulations, the Agency either adds underpayments of SSI or OASDI benefits to one or more future payments or pays a single lump sum to the beneficiary. The Agency recovers overpayments under either program by decreasing future benefits or seeking direct recovery from the recipient. Although the SSI statutes require recovery of overpayments through partial withholding of future benefits in several instances, OASDI regulations mandate full recovery of overpayments except when full withholding deprives a beneficiary of basic living expenses.

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41. Id.

The Agency has "full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions." 42 U.S.C. § 405(a) (1982) (emphasis added).

45. See supra note 36 and accompanying text.
46. OASDI regulations require that the full amount of the monthly benefit be withheld. 20 C.F.R. § 404.502(a) (1988). If full withholding would defeat the purpose of the Act, however, the Agency may withhold a portion of the
In cases of overpayment, the Agency must notify the beneficiary of the right to seek waiver of recovery. If the recipient applies for waiver of recovery, the Agency renders its decision based on rules that mirror the outline of the statutory language. In making its waiver decision, the Agency must consider whether recovery would “defeat the purpose” of the program or be “against equity and good conscience.” Recovery by the agency defeats the purpose of both OASDI and SSI if the recipient needs the income the Agency seeks to recover for “ordinary and necessary living expenses.” The regulations define “against equity and good conscience” as reliance on overpayments to the extent that repayment requires recipients to surrender a “valuable right” or worsen their position. The additional SSI criteria of impeding “efficient or effective adminis-

monthly benefit, although not less than $10. 20 C.F.R. § 404.502(c)(1) (1988). The Agency may withhold a portion rather than the full amount of the monthly benefit even if the recipient is adjudged to be at fault, 20 C.F.R. § 404.502(c)(2) (1988), notwithstanding that waiver of recovery will not be granted if the recipient is at fault, see supra notes 27-29 and accompanying text. Partial withholding is not available, however, “if the overpayment was caused by the individual’s intentional false statement or representation, or willful concealment of, or deliberate failure to furnish, material information.” 20 C.F.R. § 404.502(c)(2) (1988).


48. Waiver is required for OASDI overpayments if the individual is without fault and recovery would defeat the purpose of the program or be against equity and good conscience. 20 C.F.R. § 404.506 (1988). SSI regulations reflect the difference in that program’s waiver requirements by providing for waiver when the individual is without fault and the amount of overpayment is so small that collection efforts would be inefficient. See 20 C.F.R. § 416.550 (1988).

49. See supra notes 26-29, 37-41 and accompanying text.


51. 20 C.F.R. §§ 404.509, 416.554 (1988). The regulations provide examples of recipient reliance on the overpayment that would make recoupment “against equity and good conscience.” For instance, the third OASDI example states:

X died without leaving an estate. Z, a friend, paid the burial expenses of $150 and filed a claim for a lump-sum death payment on X's earnings record. After receiving the lump-sum death payment of $150, Z used the payment to purchase a marker for the deceased's grave. Thereafter, it was discovered that X lacked the required insured status and thus the lump-sum was paid in error. Recovery of the $150 from Z is considered to be against equity and good conscience because in reliance on the payment he changed his position for the worse.

tration” is met if the amount of overpayment is less than or equal to the average administrative cost of adjustment or recovery.52

B. JUDICIAL INTERPRETATION OF PAYMENT ERROR PROVISIONS

The Supreme Court interpreted the OASDI error-correcting provisions in Califano v. Yamasaki,53 a class action suit brought on behalf of overpaid OASDI recipients. The Court held that the Agency has no discretion to deny waiver when the recipient meets the statutory waiver requirements.54 In support of this holding, the Court noted the contrast between the “imperative” language and mandatory nature of section 404(b)’s waiver provision and the permissive language used in other federal benefit programs’ waiver provisions, including the waiver provisions of the SSI program.55 According to the Court, the statutory language in section 404(a) limiting the Agency to “proper” recovery implies “that a recoupment from a person qualifying under [section 404(b)] would not be ‘proper.’”56 The Court further found that the language in sections 404(a) and 404(b) reflects congressional intent that the Agency determine waiver eligibility before taking an action to recover the overpayment.57

The Court also held that protection of the overpaid recipient’s rights requires an oral hearing on the waiver request prior to Agency action to recover overpaid benefits.58 The Court

54. Id. at 693-94. The Court declined to evaluate the plaintiff’s due process and equal protection claims to avoid “unnecessary constitutional adjudication” when there was a statutory basis for the decision. Id. at 692-93.
55. The Yamasaki Court cited five examples of permissive waiver requirements, including the SSI waiver language in § 1383(b). The Court stated that the mandatory waiver requirement in § 404(b) “resembles the ‘equity and good conscience’ waiver provisions found in only four other statutes,” including the veterans' benefits statute, 38 U.S.C. § 3102(a) (1982 & Supp. IV 1986), on which the OASDI provision is modeled. Yamasaki, 442 U.S. at 694 n.9; see supra note 27 and accompanying text. The Yamasaki opinion declared that “where the provision for recovery . . . and the provision for waiver . . . are phrased in equally mandatory terms, it is reasonable to infer that in this particular statute Congress did not intend to exalt recovery over waiver.” Yamasaki, 442 U.S. at 694 n.9.
56. Yamasaki, 442 U.S. at 694.
57. Id.
58. Id. at 695-97; cf. Mashaw, Conflict and Compromise Among Models of Administrative Justice, 1981 DUKE L.J. 181, 207-09 (arguing that Yamasaki's
noted that a request for waiver under section 404(b) necessitates determining whether the recipient was “without fault” for the overpayment. Such a determination requires an inquiry into the good faith and, therefore, the credibility of the petitioner, and in such cases personal contact is essential for evaluating credibility. Review based solely on requests therefore is inadequate to protect a recipient’s rights.

The Yamasaki Court contrasted the need to evaluate credibility in section 404(b) waiver decisions with the “relatively straightforward matters of computation” involved in reviewing the Agency’s determination of overpayment amounts under section 404(a). Accordingly, the Court held that a written review suffices to protect the rights of recipients who are challenging only the accuracy of the Agency’s error calculation under section 404(a).

Although the Yamasaki opinion set forth a method to analyze the right of an overpaid recipient to have a hearing, the Court failed to address the problems presented by netting the overpayments and underpayments, a problem that faced the named plaintiff, Nancy Yamasaki. The Agency offset her OASDI overpayment against a larger underpayment, thus reducing the size of her compensation. The Court ignored the issue of whether offsetting overpayments and underpayments violates the statutory right of recipients to seek waiver of recovery.

requirement of oral hearings should be based on grounds other than need to evaluate credibility).

The prerecoupment hearing requirement of § 404(b) waiver decisions was extended to cases involving waiver of SSI overpayments in Page v. Schweiker, 571 F. Supp. 872, 878-89 (M.D. Pa. 1983), aff’d, 786 F.2d 150 (3d Cir. 1986). Page invalidated Agency procedures that required SSI beneficiaries to file a special request to obtain an oral hearing after denial of a written waiver request. Id. The Ninth Circuit also rejected this two-step process for granting an oral hearing to OASDI recipients in Yamasaki v. Schweiker, 680 F.2d 588, 599 (9th Cir. 1982) (per curiam).

60. Id.
61. Id. at 695-97.
62. The Yamasaki Court found that appeals concerning the determination of the overpayment amount under § 404(a) are “relatively straightforward matters of computation” that do not justify “requir[ing] the Secretary to sift through all requests for reconsideration and grant a hearing to the few that involve credibility.” Yamasaki, 442 U.S. at 696.
63. Id.
II. STATUTORY ENTITLEMENTS AND NETTING REGULATIONS

A. NETTING REGULATIONS

Agency regulations require the use of a netting procedure for calculating the amount of incorrect payment when the same recipient receives both an underpayment and overpayment. For example, a smaller underpayment is subtracted from a larger overpayment to determine the net amount of the payment error. An important result of the netting process is that beneficiaries receiving both overpayments and underpayments do not have the opportunity to seek waiver of recovery for the total amount of their overpayment which the Agency offset against an underpayment. Beneficiaries with offsetting payment errors also lose the right to repay overpayments over time through partial withholding of future benefits.

The OASDI regulation authorizing the use of netting simply states that the amount of an overpayment or underpayment is the difference between the total amount paid and the total amount to which the beneficiary was entitled during the period in question. The comparable SSI regulation is similar but more detailed. The period used in determining the amount of an incorrect OASDI or SSI payment begins with the first


66. For instance, if a beneficiary receives a $1000 overpayment and a $600 underpayment, the Agency netting procedure determines that a $400 overpayment was made. The beneficiary can seek waiver of the $400, but $600 of the overpayment is not subject to the waiver process. If the beneficiary's underpayment exceeds the overpayment, the entire amount of the overpayment is offset and no waiver procedure is allowed.

67. Even when the Agency denies waiver of recovery in instances of overpayment alone, the economic loss to the beneficiary can be spread over time by the partial withholding recovery process. See supra notes 38, 46 and accompanying text. The netting regulations foreclose this result by recovering some or all of the overpayment in a lump-sum offset. Congress recognized this problem when it passed the 1986 amendment that expanded the scope of waiver rights. See S. Rep. No. 146, 99th Cong., 1st Sess. 328 (1985); supra note 29.

68. 20 C.F.R. § 404.504 (1988).

69. The SSI regulation specifies that an overpayment or underpayment begins with the first month the amount paid differs from the amount due and ends with the initial determination of incorrect payment. 20 C.F.R. § 416.538 (1988). Despite the difference in language between the netting regulations of the two programs, the Agency uses the same process for determining the
month in which the recipient receives an erroneous payment and ends with the month in which the Agency discovers the error.\textsuperscript{70} This definition allows the Agency to offset an overpayment and an underpayment occurring in different years or even different decades, as long as the Agency does not detect the initial erroneous payment before the later erroneous payment occurs.\textsuperscript{71}

The netting regulations allow the Agency to recoup more than would be possible if all overpayments were subject to the waiver provisions.\textsuperscript{72} The circuit courts differ on whether these regulations violate the statutes governing incorrect payments of Social Security benefits.

B. CIRCUIT COURT CASES ON NETTING REGULATIONS


In the first decision concerning netting regulations, \textit{Lugo v. Schweiker},\textsuperscript{73} the Third Circuit Court of Appeals upheld the regulations as a permissible exercise of the Agency's administrative discretion.\textsuperscript{74} The \textit{Lugo} majority relied heavily on the amount of erroneous payments under both programs. S.S.R. 81-19a (cum. ed. 1981).

\textsuperscript{70} 20 C.F.R. § 416.538 (1988).

\textsuperscript{71} If beneficiary \textit{X}, for example, is overpaid by $1000 in 1978 and then underpaid by $5000 in 1985, the amount offset due to netting depends on the date the Agency discovers the errors. If the Agency finds both errors in 1986, then the incorrect payment is $4000 and beneficiary \textit{X} has no opportunity to seek waiver of the $1000 overpayment. On the other hand, if the Agency discovers the $1000 overpayment in 1984, then the underpayment cannot offset the overpayment, resulting in a $1000 overpayment and a $5000 underpayment, and beneficiary \textit{X} retains the right to seek waiver of the overpayment. See, e.g., \textit{Lugo v. Schweiker}, 599 F. Supp. 948, 954 (E.D. Pa. 1984), vacated, 776 F.2d 1143 (3d Cir. 1985).

\textsuperscript{72} Beneficiaries presumably would request waiver in some instances where the netting process currently is used. The beneficiaries undoubtedly would obtain a waiver in some of these proceedings. The Agency therefore can recoup more money by avoiding waiver and immediately recovering overpaid amounts by netting.

\textsuperscript{73} 776 F.2d 1143 (3d Cir. 1985). \textit{Lugo} was brought in the district court as a class action by four Social Security beneficiaries. The Agency applied the netting procedure to three plaintiffs' SSI benefit payments and to the fourth plaintiff's OASDI payment. See \textit{Lugo v. Schweiker}, 599 F. Supp. 948, 953-54 (E.D. Pa. 1984), vacated, 776 F.2d 1143 (3d Cir. 1985).

\textsuperscript{74} \textit{Lugo}, 776 F.2d at 1151. The dissenting opinion in \textit{Lugo} argued that the netting regulations are a thinly disguised attempt to circumvent the waiver provisions of the statute and the holding of \textit{Yamasaki}. \textit{Id.} at 1153-56 (Gibbons, J., dissenting). In \textit{Everhart v. Bowen}, 853 F.2d 1532 (10th Cir. 1988), the Tenth Circuit Court of Appeals adopted the dissent's conclusion and much of its reasoning. See infra notes 96-103 and accompanying text.
Supreme Court's admonition that courts must defer to administrative regulations that are not "arbitrary, capricious, or manifestly contrary to the statute."\textsuperscript{75} Deference was proper in this instance, according to the court, because the statute is silent on the proper method of calculating the amount of payment errors.\textsuperscript{76}

The court accepted the Agency's characterization of the netting regulations as a reasonable exercise of its authority under section 404(a) to calculate the amount of incorrect benefit payments.\textsuperscript{77} The alternative to netting regulations—treating each month as a separate period for calculating and resolving payment errors—would result in an unmanageable number of notices and hearings, according to the Third Circuit.\textsuperscript{78} Rejecting the dissent's argument that the Act's requirement of monthly benefit payments indicates a congressional intent to require monthly calculation of payment errors, the majority noted that the statutory provisions governing payment errors do not refer to monthly periods.\textsuperscript{79}

\textit{Lugo} held that section 404(b) waiver rights pertain only to the amounts determined to be overpaid under section 404(a).\textsuperscript{80} Because \textit{Lugo} construed the netting regulations as a proper exercise of Agency authority in calculating the amount of the incorrect payment under section 404(a), the court considered the unavailability of waiver rights under section 404(b) irrelevant to the validity of the regulations.\textsuperscript{81} The court found support for this conclusion in the section 404 scheme of the Supreme Court's \textit{Yamasaki} decision.\textsuperscript{82} \textit{Yamasaki} distinguished sections

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\item \textsuperscript{75} \textit{Lugo}, 776 F.2d at 1147 (quoting \textit{Chevron U.S.A. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 844 (1984)).
\item \textsuperscript{76} \textit{Id.} at 1148.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 1147-48; see also infra notes 115-19 and accompanying text (analyzing the use of monthly periods to determine the amount of a payment error).
\item \textsuperscript{79} \textit{Lugo}, 776 F.2d at 1148. The dissent asserted that "because individuals are only eligible for a particular amount on a monthly basis, and payments are made on this same basis, it only makes sense that the Secretary's determination of whether an incorrect payment has been made also must be geared to this monthly basis." \textit{Id.} at 1155 n.5 (Gibbons, J., dissenting).
\item \textsuperscript{80} \textit{Id.} at 1149.
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.} The \textit{Lugo} majority dismissed the argument that \textit{Yamasaki} had implicitly ruled on the validity of the netting regulations because the netting regulations had been applied against one of the \textit{Yamasaki} plaintiffs. The \textit{Lugo} court "decline[d] to base a decision . . . upon the fact that the Supreme Court did not address a footnote in a party's brief." \textit{Id.}
\end{itemize}
}
404(a) and 404(b) and found that a prerecoupment hearing is not required when only the accuracy of section 404(a) calculations are at issue. The Lugo court approvingly cited Yamasaki’s concern that “leeway for practical administration must be allowed” in section 404(a) matters.

The Lugo majority found that the netting regulations are consistent with the overall purpose of the Act, including its waiver provisions. The court worried that overpaid beneficiaries would use the waiver provisions to receive undeserved windfalls. In the court’s view, offsetting overpayments and underpayments provided a logical means of restricting benefits to the amount of the statutory entitlement. Although “somewhat troubled” that netting regulations might place a recipient “in a worse position than all other claimants,” the court nonetheless held that “concern for a particularized situation” did not justify “voiding a regulation designed to deal with thousands of cases” and emphasized the need for judicial deference to the Agency’s authority. The court supported its decision by stating that most payment errors in situations of concurrent overpayments and underpayments are for small amounts and occur over short periods of time.

The Eighth Circuit found the Lugo reasoning persuasive when it considered the validity of the Agency’s netting regulations in Webb v. Bowen. The Webb court cited Lugo’s conclusions that the netting procedure reasonably interpreted the

83. See supra notes 61-63 and accompanying text.
84. Lugo, 776 F.2d at 1149 (quoting Califano v. Yamasaki, 442 U.S. 682, 696 (1979)).
85. Id. at 1149-51.
86. Id. at 1150.
87. Id.
88. Id.
89. Id. The “particularized situation” occurs when a beneficiary receives an overpayment and then receives an underpayment much later. The recipient probably has spent the overpayment by the time the underpayment occurs. The recipient then would accumulate debts because of the underpayment. After the netting procedure is applied, the beneficiary would receive no reimbursement for the underpayment and therefore no money would be available to reduce the debts. Id. at 1150 n.8.
90. Id.
91. Id. The Lugo majority offered no support for this assertion, but did refer to the three other named plaintiffs, two of whom had claims involving relatively small amounts and the third a claim involving a relatively short period of time. See id.
92. 851 F.2d 190, 192 (8th Cir. 1988). Webb involved a single plaintiff whose overpayment of OASDI benefits was offset by a smaller underpayment. Id. at 190-91.
Agency's section 404(a) authority\textsuperscript{93} and that Yamasaki supports the validity of the regulations.\textsuperscript{94} Both the Lugo and Webb courts limited their analyses to the language and history of the OASDI provisions and did not consider the counterpart SSI provisions.\textsuperscript{95}

2. \textit{Everhart v. Bowen}

\textit{Everhart v. Bowen},\textsuperscript{96} decided by the Tenth Circuit shortly after Webb, consciously created a split among the courts by invalidating the netting regulations as inconsistent with the Act.\textsuperscript{97} The \textit{Everhart} court refuted the Lugo court’s characterization of netting as a valid exercise of the Agency’s authority under section 404(a).\textsuperscript{98} The language of section 404(a), the

\textsuperscript{93} \textit{Id.} at 192. The Webb court accepted the corollary argument that section 404(b) is irrelevant to the netting regulation problem. The court stated that "[s]ince section 404(b) only grants an opportunity of waiver of the amount found to be overpaid under section 404(a), Webb has received all she was entitled to under section 404(a)." \textit{Id.}

\textsuperscript{94} \textit{Id.} Webb also summarily rejected the plaintiff’s due process and equal protection claims. \textit{Id.}

\textsuperscript{95} \textit{Lugo} noted, in passing, that "the analogous SSI provision, 42 U.S.C. § 1383(b)(1) (West Supp. 1985), contains similar language." \textit{Lugo}, 776 F.2d at 1147 (footnote omitted). Webb’s single plaintiff had only OASDI payment errors. See supra note 92.

\textsuperscript{96} 853 F.2d 1532 (10th Cir. 1988), \textit{petition for cert. filed sub nom. Newman v. Everhart}, 57 U.S.L.W. 3555 (U.S. Feb. 21, 1989) (No. 88-1323). \textit{Everhart} was a class action by three initial plaintiffs receiving SSI and OASDI benefits and two intervening plaintiffs receiving only OASDI payments. \textit{Id.} at 1533-34. The \textit{Everhart} court limited its consideration of the netting regulations to statutory grounds and ignored the plaintiffs’ constitutional claims. \textit{Id.} at 1533.

The court also ruled on class certification matters, \textit{Id.} at 1538-39, which are beyond the scope of this Note.

\textsuperscript{97} \textit{Id.} at 1537. The \textit{Everhart} court noted the "deferential approach" of the majority opinion in \textit{Lugo}, but argued that "administrative convenience cannot be countenanced when the netting regulations contravene the plain language of the statute." \textit{Id.} at 1536-37; see also infra notes 111-14 and accompanying text (discussing administrative convenience).

The \textit{Everhart} decision, of course, is not binding on Agency procedures outside the Tenth Circuit. See Maranville, \textit{Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism}, 39 VAND. L. REV. 471, 490 (1986) (noting that administrative agencies generally are not required to change policies invalidated by lower federal courts in other jurisdictions). In fact, the Agency routinely fails to alter its policies in response to unfavorable court rulings, even within the geographic areas of that court’s jurisdiction. \textit{Id.} at 486-80. Numerous courts and commentators have sharply criticized this policy of nonacquiescence. See generally Note, \textit{Social Security Administration in Crises: Non-acquiescence and Social Insecurity}, 52 BROOKLYN L. REV. 89 (1986) (criticizing Agency’s nonacquiescence to various federal circuit court decisions invalidating Agency policies).

\textsuperscript{98} \textit{Everhart}, 853 F.2d at 1537.
court stressed, provides different treatment for underpayments, which must be paid to the beneficiary, than for overpayments, which the Agency may not recover if the recipient meets the requirements for waiver. The court cited the distinction between the permissive waiver requirements in other entitlement programs and the mandatory nature of section 404(b), which also had been noted by the Supreme Court in Yamasaki, as further evidence that Congress intended all overpayments, whether or not accompanied by underpayments, to be subject to the waiver requirements.

The Everhart court also disagreed with the Lugo court's assertion that the netting regulations prevent undeserved windfall payments. The court noted that waiver of recovery can occur only when the recipients meet the statutory requirements. Because the statute entitles only those recipients who satisfy the waiver requirements to retain the overpayment, categorizing the excess benefits as a windfall is misleading.

C. NETTING REGULATIONS AND THE LANGUAGE OF THE SOCIAL SECURITY ACT

Both OASDI and SSI recipients have the right to seek waiver of recovery of overpaid benefits. This Note will demonstrate that the Everhart court correctly concluded that OASDI and SSI netting regulations constitute recovery of an overpayment within the language of the Act. The netting regulations therefore allow recovery of overpayments without providing for waiver rights, which is a violation of the Act.

The circuit court cases discussed the OASDI provisions exclusively and failed to distinguish between the statutory language governing SSI and OASDI, even though two of the cases—Lugo and Everhart—concerned beneficiaries of both programs. The SSI statute emphasizes the Agency's discretion to determine the disposition of erroneous payments, while the OASDI language is less deferential to the Agency's authority to apply netting procedures. Consequently, this Note will analyze

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99. Id.
100. Id.
101. Id. at 1538.
102. Id. For an explanation of the statutory requirements for waiver, see supra notes 26-39, 37-41 and accompanying text.
103. Everhart, 853 F.2d at 1538.
104. See supra notes 26-29, 37-41 and accompanying text.
105. See supra notes 73, 96.
separately the validity of each program's netting regulations.106

1. OASDI Statutory Language

The OASDI statute, when read in conjunction with the Yamasaki decision, supports a finding that the OASDI netting regulation is invalid. The OASDI waiver provision, section 404(b), covers "any case in which more than the correct amount of payment has been made."107 The Yamasaki decision underscores the recipient's absolute right to seek waiver under section 404(b), as well as the need for the waiver decision to precede recovery actions.108 The Agency's netting regulations attempt to circumvent this required waiver process by defining away some or all of the overpayment.109

As Everhart notes, section 404(a)'s separate treatment of overpayments and underpayments supports the position that the netting procedure constitutes recovery of an overpayment.110 Calculating benefit payment errors by netting conflicts with the statutory requirement that the Agency remedy overpayments and underpayments differently. Separate treatment of overpayments and underpayments in the OASDI statute mandates separate calculation of the amount of overpayments and underpayments.

The Lugo and Webb arguments that judicial deference and administrative convenience support the validity of the netting regulations is misplaced. Such judicial deference is proper only

108. See supra notes 54-58 and accompanying text.
109. See supra text accompanying note 99. A review of the legislation's development further supports the argument that § 404 mandates separate treatment of overpayments and underpayments, thereby prohibiting netting. The 1968 amendment to the Act changed the language of § 404(a) from a general reference to erroneous payments to two separate subdivisions specifying the Agency's authority to recover overpayments and to dispose of underpayments. See supra note 29 and accompanying text. Furthermore, Congress amended the language of § 404 in 1968 and again in 1986 to guarantee broader eligibility for waiver of recovery. Id. The sponsors of the 1986 amendments believed that the unaltered language of § 404 clearly indicated that the waiver provision should be broadly applied. Id. Thus, Congress twice has acted to clarify or expand the scope of the OASDI waiver provision, while never acting to restrict its use.
if the language of the statute is silent or ambiguous.\textsuperscript{111} The Lugo and Webb courts assumed, with little analysis, that the OASDI statute is silent with respect to netting.\textsuperscript{112} The statute does not specifically prohibit netting, but it does recognize a recipient’s right to seek waiver of recovery of overpayments and it does treat overpayments and underpayments separately. Lugo and Webb fail to address these aspects of the statute.

If these statutory barriers were absent, the Lugo and Webb courts correctly could assert that administrative convenience justifies the netting regulations. Netting allows the Agency to convert two administrative actions, recovery of an overpayment and compensation of an underpayment, into a single action,\textsuperscript{113} either government recovery of a net overpayment or refund of a net underpayment. Balancing this administrative efficiency against fairness to recipients is central to a proper solution of this problem. If the language and purpose of the statute prohibit the OASDI netting regulation, however, administrative convenience neither excuses the violation of the statute nor assists in construing the rights that the statute guarantees to recipients.\textsuperscript{114}

The only statutory language issue addressed in Lugo without reference to administrative convenience was the dissent’s argument that monthly benefit payments require monthly calculation of payment errors.\textsuperscript{115} This argument led both the Lugo majority and the Lugo dissent into a lengthy, confusing, and unproductive analysis. The Lugo majority and, later, the

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  \item \textsuperscript{112} Lugo, 776 F.2d at 1143; Webb, 851 F.2d at 192.
  \item \textsuperscript{113} Of course, if the underpayment and overpayment are for equal amounts, then no further administrative action is required and the administrative savings are even greater.
  \item \textsuperscript{114} See Phillips Petroleum Co. v. F.E.R.C., 792 F.2d 1165, 1169 (D.C. Cir. 1986) (holding that “[w]hen . . . the agency’s decision is based on an erroneous view of the law, its decision cannot stand”); Hopkins v. Merit Systems Protections Bd., 725 F.2d 1368, 1372 (Fed. Cir. 1984) (stating that “logic and administrative convenience” do not apply when administrative action conflicts with language of statute); Ellender v. Schweiker, 575 F. Supp. 590, 599 (S.D.N.Y. 1983) (holding that Agency is not entitled to deference when language and purpose of statute violate recipient’s rights to avoid cross-program recovery of overpayments), appeal dismissed, 781 F.2d 314 (2d Cir. 1986). Even if Lugo is correct in stating that only one in a thousand cases results in hardship because of netting, see 776 F.2d at 1150 n.8, the resulting convenience of netting does not warrant depriving recipients of statutorily granted rights.
  \item \textsuperscript{115} Lugo, 776 F.2d at 1155 n.5 (Gibbons, J., dissenting); see also supra notes 78-79 and accompanying text (explaining dissent’s position on monthly payment periods).
\end{itemize}
Webb court concluded that the Lugo dissent was arguing that each month should be treated as a separate period requiring separate notices, hearings, and recovery or repayment schedules.116 Nothing in the language and history of the statute, however, suggests that Congress intended to require such an incredibly cumbersome system.117 The obvious alternative to netting regulations is to treat periods of consecutive monthly overpayments separately from consecutive monthly underpayments. The Lugo majority and Webb attempted to validate the netting regulations using the absurd conclusion that each month represents a separate payment error,118 instead of confronting the Lugo dissent's important argument that the current netting regulations deny recipients the right to request waiver of recovery. The Everhart court sensibly avoided the issue of monthly calculation periods.119

116. See Lugo, 776 F.2d at 1148. The Lugo and Webb courts contended that abolishing the netting procedure would result in "a multitude of confused notices and hearings" and that netting is a "reasonable" means to avoid such a result. Id; see Webb, 851 F.2d at 192.

The Lugo majority's explanation of the dissent's argument is plausible given the undeveloped nature of the dissent's position. A more reasonable interpretation of the dissent's argument, however, is that the Agency must calculate errors on a monthly basis and may combine erroneous payments only if they are all underpayments or overpayments. This position, however, merely restates the basic problem of the netting regulations. The dissent must employ all the other arguments about netting regulations to reach the result that payment errors in separate months may be combined only if they are all underpayments or all overpayments.

At best, the Lugo dissent indicates that the failure of the netting regulations to use monthly benefit periods allows the Agency to ignore the statute's separate treatment of overpayments and underpayments. If payment errors are treated in an open-ended manner rather than monthly, the netting procedure reduces the payment errors to a single overpayment or underpayment rather than a net payment error resulting from offsetting several months of overpayments with several months of underpayments. The Lugo majority, however, concedes that netting regulations pose the problem of whether "the agency may 'net' the amounts to determine a single adjusted overpayment or underpayment" for "a beneficiary [who] was both underpaid and overpaid at various times in the past." Lugo, 776 F.2d at 1145 (emphasis added).

117. A beneficiary who receives a separate monthly notice and hearing for each incorrect payment could have dozens or perhaps hundreds of waiver hearings. For instance, the lead plaintiff in Lugo was underpaid for more than three years and overpaid for more than two years. Lugo v. Schweiker, 599 F. Supp. 948, 953 (E.D. Pa. 1984), vacated, 776 F.2d 1143 (3d Cir. 1985). He would be eligible to contest separately more than 60 months of incorrect payments. The statutory language, legislative history, and Yamasaki do not even vaguely suggest such an extraordinary result.

118. See supra note 116.

119. The Everhart court found it unnecessary "to determine the time frame to be utilized in calculating the amounts of overpayments or underpay-
The failure of Lugo and Webb to address directly whether the current netting regulations violate the Act's waiver provisions is apparent in their treatment of Yamasaki. The Yamasaki Court characterized section 404(a) problems as mathematical errors. Both Lugo and Webb relied on the mistaken premise that netting regulations are similarly "straightforward matters of computation" when they interpreted Yamasaki. Computational errors involve issues of incorrect mathematics or faulty transcription in individual cases. Netting regulations, on the other hand, amount to a systematic policy of preventing recipients from requesting that the Agency waive recovery of an overpayment. For instance, a mathematical mistake when subtracting a smaller underpayment from a larger overpayment is a computational error that may occur when applying netting procedures to an individual case, whereas routinely calculating payment error amounts using the netting procedure is a policy decision, not a computational error. The Yamasaki opinion offers no hint that it intended the distinction between section 404(a) and section 404(b) hearing rights to establish section 404(a) as authority for such a policy decision.

Furthermore, Yamasaki's holding on section 404(a) was limited to determining that the statute does not require an oral hearing. The validity of the netting regulations does not depend, however, on the availability of a particular form of administrative review. The netting regulations raise the separate issue of whether any statutory waiver right exists in cases of concurrent overpayment and underpayment. Both Lugo and Webb ignore this crucial distinction. Although netting regula-

121. Id.
122. Lugo, 776 F.2d at 1154 n.4 (Gibbons, J., dissenting). In a case not involving netting, Callary v. Secretary of Health & Human Servs., No. 84-C-10561, slip op. at 1 (N.D. Ill. Feb. 7, 1986) (WESTLAW, 1986 WL 1987 (N.D. Ill.)), the Agency tried to avoid waiver proceedings with a similar argument. The Agency contended that no § 404(a) determination of overpayment exists once an overpayment is recouped, even if the recipient never received proper notice of waiver rights. The court found that "this argument makes little sense." Id. The court noted that the purpose of § 404(b) "is to prevent economic hardship to claimants." Id. Because "full recoupment imposes a greater hardship . . . than partial recoupment," Callary held that a claimant is entitled to seek waiver if notice was defective. Id.
123. Yamasaki, 442 U.S. at 695-97.
tions are not inherently in conflict with the OASDI statute, the current OASDI netting procedure conflicts with the statutory language guaranteeing waiver rights to OASDI beneficiaries.

Neither the plain language of the Act nor Yamasaki's interpretation of section 404(a) support the validity of OASDI netting regulations. SSI netting regulations, however, rest on statutory language that is less hostile to the use of the netting procedure in resolving payment errors.

2. SSI Statutory Language

Although the SSI payment error provision, section 1383(b), is clearly more amenable to the Agency's netting regulations than the comparable OASDI provision in section 404, SSI beneficiaries also can make strong arguments that the netting regulations are invalid under section 1383(b). This Note will demonstrate that the SSI netting regulations, like the OASDI regulations, violate the statutory mandate that all overpayments are subject to waiver provisions. Because of the differences in statutory language, however, courts should analyze the OASDI and SSI provisions separately in future netting regulation cases.

In Yamasaki, the Supreme Court noted the most obvious difference between the two statutes: the SSI waiver provision, section 1383(b)(1)(B), contains more permissive language than the OASDI provision, section 404(b). While the OASDI provision mandates that "there shall be no adjustment . . . or recovery" when the recipient meets the criteria for waiver, the SSI provision states that "[t]he Secretary (i) shall make such provision as he finds appropriate with a view to avoiding penalizing" an overpaid individual.

By omitting a separate analysis of the SSI statutory language, both Lugo and Everhart offer an incomplete evaluation of the statutory validity of the SSI netting regulations. The

124. See infra notes 150-64 and accompanying text.
125. As the Everhart court observed: "A setoff such as that undertaken by the Secretary may be an acceptable practice in a business context; however, business entities are not constrained by mandatory statutory provisions." Everhart, 853 F.2d at 1537.
126. See supra note 55 and accompanying text.
129. Lugo and Everhart are not the only courts that have failed to note Yamasaki's distinction between OASDI and SSI waiver language. A federal
Lugo court could have made a more persuasive argument for the validity of SSI netting regulations by noting that the SSI waiver provision specifically calls for administrative discretion, which consequently is entitled to judicial deference.\footnote{See supra text accompanying note 128.} The Everhart court relied explicitly on the mandatory nature of OASDI's waiver provision as evidence of congressional intent to subject all overpayments to the waiver provision.\footnote{Everhart, 853 F.2d at 1557.} Everhart's failure to recognize the more permissive nature of the SSI waiver language undermines its finding that the SSI netting regulation is inconsistent with the language of the statute.

The more permissive language of section 1383(b)(1)(B), however, is not dispositive. The waiver provisions of the other federal benefit programs that the Yamasaki Court identified as permissive declare that an agency "may waive" recovery or "is not required" to waive recovery.\footnote{See supra note 55.} The SSI statute states that the Secretary "shall" make provision for waiver to avoid penalizing the overpaid individual.\footnote{42 U.S.C. § 1383(b)(1)(B) (Supp. IV 1986).} This language is at least as mandatory as the OASDI language.\footnote{See Page v. Schweiker, 571 F. Supp. 872, 878-79 (M.D. Pa. 1983) (holding that Yamasaki prerecoupment hearing requirement extends to SSI cases). \textit{But see supra} note 129 (citing Second Circuit opinion that Yamasaki does not control degree of fault determinations in SSI cases).} The permissive aspect of the SSI language is its grant of discretion to the Agency to determine which factors justify waiver.

A second area that distinguishes SSI statutory language from OASDI language is its determination and disposition of incorrect payments. The sharp distinction between overpayments and underpayments in section 404(a) is absent from the language of section 1383(b). Whereas section 404(a) treats overpayments and underpayments in separate subdivisions, section 1383(b)(1)(A) merely lists the possible remedies of adjusting future benefits, recovery from the beneficiary, or payment to the district court in Pennsylvania found Yamasaki especially persuasive on this issue because "the mandatory language in § 404(b) parallels that of § 1383(b)(1)." Page v. Schweiker, 571 F. Supp. 872, 878 (M.D. Pa. 1983).

In Schwingel \textit{v. Harris}, 631 F.2d 192 (2d Cir. 1980), the Second Circuit did recognize the Yamasaki distinction between the two programs' waiver provisions, but the court found that "[i]n view of the near identity" of the SSI and OASDI fault standards, the distinction drawn by Yamasaki was not controlling. \textit{Id.} at 196 n.6. The primary issue in \textit{Schwingel} was whether the Agency properly adjudicated the plaintiff's degree of fault in retaining the overpayment. \textit{Id.} at 197.
beneficiary when benefits are "incorrect." The more general language of the SSI provision supports the Agency's authority to combine all SSI mistakes into a single incorrect payment amount, rather than to treat concurrent overpayments and underpayments under separate subprovisions for each type of error.

Even though section 1383(b) gives the Agency greater authority than section 404(a) to determine the amount of payment errors, the SSI language is similar to section 404 in the aspects necessary to determine the validity of netting regulations. Section 1383(b) states that "proper" adjustment shall be made. Yamasaki held that the use of the same language in section 404 means that a decision on waiver of recovery must precede recovery. Furthermore, the SSI statutory provision qualifies the overpayment recovery language by stating that "adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate" means.

One of the succeeding provisions is the right to seek waiver of recovery.

Finally, the SSI statute requires consideration of the efficient and effective administration of rendering judgments on waiver of small overpayment amounts. Normally, when there is an overpayment without a concurrent underpayment, the statutory language works in favor of the beneficiary because a small recovery for the Agency would require an unwarranted expenditure of administrative resources. The policy underlying this principle works against beneficiaries when the netting regulations are applied. In those instances, the Agency already has recovered the overpayment, and separate treatment of overpayments and underpayments would expend an equal or greater amount of administrative resources; efficient administration therefore would deny recipients the right to waiver of overpayments. This provision is designed, however, to favor recipients and its use therefore probably should be limited to that purpose.

SSI netting regulations violate the program recipients' right to seek waiver of recovery of all overpayments. Although the language of the SSI statute guaranteeing that waiver right

136. Id.
137. Yamasaki, 442 U.S. at 694.
is not as strong as the corresponding OASDI statutory language, the meaning of the SSI provision is clearer when considered in light of the waiver provision's purpose.

D. WINDFALLS AND THE PURPOSE OF WAIVER RIGHTS

The Act's purpose\textsuperscript{140} and the waiver provisions' goal to prevent unjust recoveries\textsuperscript{141} strongly support the position that the netting regulations of both OASDI and SSI are invalid. Netting results in recovery of certain overpayments even when such recovery would deprive the recipient of income needed for subsistence or would be "against equity and good conscience."\textsuperscript{142} The netting procedure also prevents recipients from repaying overpayments gradually through future benefit adjustments.\textsuperscript{143}

The Lugo and Webb courts' concern that abolition of the netting regulations will lead to undeserved windfalls for recipients\textsuperscript{144} misconstrues the purpose and process of waiver. The Lugo court asserted that the netting regulations are fair because they provide the amount of benefits "that the law intended."\textsuperscript{145} In fact, the law intends for overpaid recipients eligible for waiver to receive more than they otherwise would have received had the Agency not made an error. The Lugo and Webb courts offered no reason to believe that recipients with concurrent overpayments and underpayments are less deserving of these additional benefits than are OASDI or SSI recipients who receive only overpayments.\textsuperscript{146} These courts

\textsuperscript{140} See supra note 7 and accompanying text.
\textsuperscript{141} See supra note 26 and accompanying text.
\textsuperscript{142} 42 U.S.C. § 404(b) (1982); see also supra text accompanying notes 49-51 (setting forth standards used by Agency to determine eligibility for waiver).
\textsuperscript{143} See supra notes 36, 46.
\textsuperscript{144} Lugo, 776 F.2d at 1150; Webb, 851 F.2d at 192.
\textsuperscript{145} Lugo, 776 F.2d at 1150.
\textsuperscript{146} Every case of waiver, by definition, results in the recipient obtaining benefits that exceed his or her original statutory entitlement. Recipients subjected to the netting procedure usually are in a worse economic position, and hence are more deserving. If overpaid recipients' right to money for past underpayments somehow makes them less deserving of an Agency waiver of overpayments, the Agency can consider the underpayments in evaluating these applications for waiver of recovery.

The Lugo court stated that netting regulations create hardship for the recipient "only where the overpayments and underpayments occur at widely different times . . . and where the overpayments occur first." Id. at 1150 n.8. Unfortunately, recipients who are subjected to netting regulations can suffer hardship in many situations. For instance, a recipient receiving an underpayment and then a later overpayment may rely on the overpayment to make the type of financial commitment described in the regulations interpreting the "equity and good conscience" grounds for waiver. See supra note 51. Also, if
substituted their view of which recipients deserve additional benefits for Congress's clear intention to waive overpayment recovery when the recipient meets the waiver criteria.\textsuperscript{147} As the \textit{Everhart} court noted, the statutory considerations of fault, need, and equity should determine whether waiver of recovery is appropriate.\textsuperscript{148}

The netting regulations therefore violate the intent of the Social Security Act to prevent harsh recovery actions against faultless OASDI and SSI recipients who receive overpayments. The \textit{Everhart} court properly invalidated the netting regulations, but offered no alternative procedure for resolving such payment errors.\textsuperscript{149} This Note proposes such a procedure in the form of new netting regulations. These regulations will allow the Agency to offset overpayments and underpayments without denying the statutory rights of recipients.

147. The \textit{Lugo} and \textit{Webb} courts argued that their conclusions were the result of judicial deference to the legislature. The \textit{Lugo} court stated that “[a]s federal judges, we must leave the determination of policy to those with legislative authority.” \textit{Id.} at 1150. Once again, the courts’ concern for administrative efficiency is misplaced given the clear congressional intent that each recipient have a right to seek waiver of recovery as provided in the statute. \textit{See supra} notes 111-14 and accompanying text.

The \textit{Lugo} court also contended that “erroneous payments are minor in amount and duration.” \textit{Lugo}, 776 F.2d at 1150. The court pointed to the two \textit{Lugo} plaintiffs who were underpaid by $215.90 and $126.30. \textit{Id.} at 1150 n.8. Obviously, the \textit{Lugo} beneficiaries may have differed with the court on the definition of minor payment errors. The $215.90 SSI underpayment occurred between 1978 and 1980. \textit{Lugo v. Schweiker}, 599 F. Supp. 948, 953-54 (E.D. Pa. 1984). The average SSI monthly payment in 1982 was only $174.72, so the underpayment may have represented more than one month of SSI benefits to that recipient. In 1984, the average old age and survivors insurance (OASI) underpayment equalled about 1.6 months of benefits and the average OASI overpayment equalled about 2.4 months of benefits. GAO, \textit{supra} note 16, at 27. These amounts are not “minor” relative to the total benefits.

148. \textit{See supra} note 102 and accompanying text.

149. The Tenth Circuit’s opinion simply affirmed the district court’s invalidation of the netting regulations. \textit{Everhart}, 853 F.2d at 1559. The district court enjoined the Agency from “applying the [netting] methodology” and further ordered that the “[p]laintiffs . . . be accorded whatever procedural rights they would otherwise be entitled to under the Social Security Act including notice and opportunity to request waiver of any overpayment.” \textit{Everhart v. Bowen}, No. 85-Z-2390, slip op. at 2 (D. Colo. Apr. 14, 1987) (order granting summary judgment).
III. AN ALTERNATIVE FORM OF NETTING REGULATIONS

The solution to the problem of concurrent overpayments and underpayments requires proper consideration of both equity and efficiency. A limited form of netting would be consistent with the purpose of the two programs, yet would recognize the Agency's administrative needs. Moreover, as long as the netting procedure protects the statutory rights of recipients, the procedure is valid within the language of the Act.

A. A PROPOSAL FOR LIMITED NETTING PROCEDURES

The Agency should adopt new regulations that restrict netting to cases in which recipients do not request waiver of recovery and the amount of the payment error is small. The Agency should adopt the following new regulation to partially replace the existing OASDI regulation, 20 C.F.R. § 404.504 (1988), and the existing SSI regulation, 20 C.F.R. § 416.538 (1988), dealing with the amount of a payment error:

The amount of an overpayment is the difference between the amount actually due to the individual and the amount paid to the individual that is greater than the amount due for each month of the overpayment period. The overpayment period begins with the first month in which the recipient is paid more than the amount actually due for that month. The period ends with the month the initial determination of overpayment occurs. The amount of an underpayment is the difference between the amount actually due to the individual and the amount paid to the individual that is less than the amount due for each month of the underpayment period. The underpayment period begins with the first month in which the recipient is paid less than the amount actually due for that month. The period ends with the month the initial determination of underpayment occurs.

The Agency also should add the following new regulation dealing with concurrent payment errors:

If an individual receives both an overpayment and underpayment, the overpayment and underpayment shall not be offset and the individual shall not be prevented from seeking waiver of recovery of the overpayment or denied any other right provided to an overpaid individual by this section. If the individual fails to seek waiver of recovery of the overpayment following proper notice, the overpayment and underpayment may be offset if the aggregate amount of either the overpayment or underpayment does not exceed $50 or 10% of the recipient's monthly benefit, whichever is less.

If the Agency fails to adopt new regulations, Congress should amend the OASDI and SSI portions of the Act to require separate treatment of overpayments and underpayments when determining the amount of a payment error. Congress could amend the Social Security Act to add the following language:

If the Secretary finds that an individual has been paid both more and less than the correct amount of payment, the overpayment and underpayment shall not be offset and the individual shall not be prevented from seeking waiver of recovery of the overpayment or denied
notice sent to recipients informing them of the payment error should indicate clearly their right to request separate treatment of the overpayment and the underpayment, including the right to request waiver of the amount overpaid. If the recipient fails to request waiver of recovery or to request gradual recovery of the overpayment, the Agency then could net the two amounts, but only if the amount of either the overpayment or underpayment is minor. The regulations should define a minor payment as fifty dollars or ten percent of the recipient's monthly benefit, whichever is less. For recipients with more significant errors, the Agency should treat overpayments and underpayments separately without any netting.

The regulations should limit netting to minor errors because netting recoups the overpayment in a lump-sum and thus prevents gradual recovery of overpayments through partial withholding of future payments. In cases involving minor errors, recovery over an extended period of time is unnecessary or less important. The need for gradual recovery through benefit adjustments can be an important factor, however, when larger payment errors occur.

any other right provided to an overpaid individual by this section. If the individual fails to seek waiver of recovery of the overpayment following proper notice, the Secretary may offset the overpayment and underpayment if the aggregate amount of either the overpayment or underpayment does not exceed $50 or 10% of the recipient's monthly benefit, whichever is less.

The amendment would create new subsections in section 404 of the OASDI provisions and section 1383(b) of the SSI provisions.

151. See supra note 47 and accompanying text.
153. See supra notes 36, 46 and accompanying text.
154. In cases of minor errors, see supra note 150, failure to offset the payment errors is likely to result in the recipient receiving a check for the underpayment and then receiving a reduced benefit in the same month or the following month equal to all or most of the amount of the underpayment refund. This approach is likely to be more confusing than helpful to the recipient.
155. The notice in concurrent payment error cases necessarily will be more complex and more confusing to the recipient. The recipient may fail to comprehend that recovery of the overpayment can occur gradually through partial withholding of future payments rather than in a lump-sum netting procedure.

Representative Stark introduced a bill in the United States House of Representatives in 1984 that would have ensured the recipient's right to seek waiver prior to offset of underpayments and overpayments by the Agency. See SSI Equitable Improvements and Reform Amendments of 1984: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong., 2d Sess. 23-24 (1984). The relevant provision of the bill stated:
This proposal for resolving concurrent payment errors provides the Agency with the administrative advantages of netting in those cases in which recovery of overpayment is least likely to impose economic harm on the recipient. Moreover, the proposal ensures the statutory right of all recipients to seek waiver of recovery. If the Lugo court was correct in its assertion that most payment errors are "minor in amount and duration," a limited netting procedure would be useful to the Agency. Such a procedure would spare the recipient subject to netting of minor amounts from the confusing process of receiving compensation for an underpayment and then immediately having the Agency recover the full amount of the compensation.

B. STATUTORY VALIDITY OF LIMITED NETTING PROCEDURES

The statutory language of both programs support the validity of the proposed limited form of netting. Under the proposed regulation, every recipient would have the right to seek waiver, so the proposed netting violates neither the section 404(b) or section 1383(b)(1)(B) waiver provisions. The proposal also would fulfill the Yamasaki requirement of a prerecoupment waiver hearing. Netting would occur under the proposed regulation only when the recipient does not request waiver review. If the recipient does seek waiver, the Agency would treat the payment errors separately and recoupment could not pro-

If at any time both an overpayment and an underpayment exist in the case of an individual without a final adjustment or recovery having yet been made with respect to either of them, no such adjustment shall be made with respect to the underpayment until the individual has had a reasonable opportunity to seek a waiver of the overpayment and the existence of the underpayment shall not preclude the granting of such a waiver of the overpayment or otherwise affect the disposition thereof.

H.R. 5341, 98th Cong., 2d Sess., § 505 (1984). This legislation would have protected only the right of recipients to seek waiver and thus failed to protect the right of recipients to obtain a gradual recovery of the overpayment when waiver is denied.

156. Lugo, 776 F.2d at 1150.

157. GAO defines a small error as "a case with below a $50 total accumulated error and below $5 a month average error." GAO, supra note 16, at 28 n.3. Approximately 22% of the payment mistakes in the GAO report were defined as small errors. Id. at 28. The Agency is allowed to offset the payment errors under the limited netting regulation proposed by this Note if either the underpayment or the overpayment is a small amount. See supra note 150. The number of concurrent payment error cases in which netting would be possible therefore would significantly exceed 22% using the GAO definition of small payment error.

158. See supra note 154 and accompanying text.
ceed prior to a waiver hearing. Requiring the recipient to request waiver is consistent with the language and intent of the Act. The current regulations force the recipient with only an overpayment to request waiver in order to begin the waiver review process.159

Although the OASDI provision's separate treatment of underpayments and overpayments is a potential barrier to any netting regulation,160 the restricted netting proposal would combine underpayments and overpayments only as an administrative convenience after all substantive rights of the recipient have been recognized. Administrative convenience does not justify violating the statute,161 but it is a relevant factor in determining the appropriate means of implementing statutory rights.162 The SSI language does not treat underpayments and overpayments separately163 and thus is more amenable than the OASDI language to the limited netting regulation.164

The limited netting regulations also would be consistent with the purpose of the OASDI and SSI statutes. Recipients are not likely to be deprived of basic necessities by offsetting a small amount of money rather than giving the recipient an underpayment refund and then immediately recouping the same amount of money. The proposed netting procedures thus would save administrative resources but would not prevent any recipient from the exercise of a statutory right.

159. Everhart, 853 F.2d at 1537-38 n.5. The two-step waiver review process that was disapproved in post-Yamasaki decisions, see supra note 58, is not employed in this limited netting regulation. Recipients subject to this form of netting receive the same process rights as any other recipient once they request waiver.

160. See supra note 110 and accompanying text.

161. See supra note 114 and accompanying text.


163. See supra note 135 and accompanying text.

164. The lack of clearly separate treatment of overpayments and underpayments of SSI benefits does not validate the Agency's current netting regulations, because the language of § 1333(b)(1)(A) indicates that all overpayments are subject to the SSI waiver provisions. See supra notes 136-38 and accompanying text. The limited netting regulations proposed in this Note would not exclude any individual from requesting waiver of recovery. Thus, the limited netting regulations would be valid under the SSI payment error provisions.
CONCLUSION

Each year millions of Social Security recipients receive incorrect benefit payments. Recipients of OASDI or SSI benefit overpayments have the right to request that the Agency waive recovery of the overpaid amount. The purpose and language of the OASDI and SSI statutes, along with the Supreme Court's decision in Yamasaki, provide this right in all cases of overpayment. Current Agency netting regulations effectively recoup overpayments to some beneficiaries by offsetting their underpayments. This netting procedure deprives recipients of their right to seek waiver of recovery for the portion of the overpaid amount that was offset by netting and thus violates the statutes. Although the statutes of both programs forbid use of the netting procedure, courts should analyze separately the differing language of the OASDI and SSI payment error provisions.

A limited form of netting, valid under the existing Social Security Act, would balance the competing goals of administrative efficiency and equitable treatment of recipients. Netting should be restricted to cases in which the recipient fails to request waiver and the amount of the payment error is small.

Prentiss Cox

165. See supra note 19.