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NOTE

GENERAL BIAS AND ADMINISTRATIVE LAW JUDGES: IS THERE A REMEDY FOR SOCIAL SECURITY DISABILITY CLAIMANTS?

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INTRODUCTION

For the millions of citizens who file Social Security disability claims each year,[1] the last concern should be whether their claims will

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[1] *See* SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS, chart 1 (Jan. 2001) [hereinafter SOCIAL SECURITY ADVISORY BOARD] (showing approximately 1.5 million SSDI and 1.2 million SSI claims filed in calendar year 1999),

be fairly adjudicated. Indeed, if discretion-removing rules were the key to fairness,[2] then a single look at the multitude of regulations governing Social Security disability claims would allay any such fear.[3] But claimants would be falsely placated. Despite the effort to make Social Security disability determinations mechanical, human administrators have ample opportunity to wield discretion—and introduce bias.

This fact is especially true for the significant number of claimants whose applications are examined by an Administrative Law Judge (ALJ). ALJs regularly must exercise discretion when interpreting reams of medical evidence and making innumerable credibility determinations.[4] But an unfortunate and unavoidable side-effect of this discretion is the opportunity for lawless decisionmaking.[5] Even though the regulations provide ALJs with standards by which to evaluate claims, few will deny that bias inevitably seeps into their decisionmaking process.

With some ALJs, however, bias more than seeps. It gushes. From racial, gender, and class prejudice to bias against disability claimants in general, ALJs might possess—and exhibit in their decisions—any viewpoint extant in the world. In some cases, the manifestations of such biases would dismay even the most ardent advocates of judicial discretion, prompting the question of how to remedy such bias. And in such a case, an aggrieved Social Security disability claimant may be greatly disappointed as his lawyers are confronted with a procedural and evidentiary nightmare.

Though the true extent of the general bias of Social Security Administration ALJs is unknowable, Part I of this Note introduces the concept of general bias and presents two extreme cases demonstrating the concept. Part II analyzes the deficiencies of the present system in addressing ALJ general bias, including the lack of adequate agency process, an inability to present the evidence necessary to prove a claim of bias, and the restrictions on reviewability in the federal courts. This Part demonstrates the need for a valid and effective means of addressing the problem of general bias. Part III suggests two yet-unexplored

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available at http://www.ssab.gov/NEW/Publications/Disability/chartbookA.pdf, http://www.ssab.gov/NEW/Publications/Disability/chartbookB.pdf (last visited Jan 8, 2005).

2 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("The trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well."); *see also* Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse.").

3 *See* 20 C.F.R. §§ 404.1501 *et seq.*, 416.901 *et seq* (2004).

4 *See, e.g.*, *id.* §§ 404.1527, 416.927 (discussing how opinion evidence is evaluated); *id.* §§ 404.1529, 416.929 (informing claimants how symptoms are evaluated).

5 *See* Scalia, *supra* note 2, at 1179–80 ("Only by announcing rules do we hedge [judges] in.").

methods: *Bivens* actions and writs of mandamus. Though uncertain and largely untested, these methods are presently available to Social Security disability claimants, without the need for modification of existing statutes or governing regulations.

I
GENERAL BIAS AND SOCIAL SECURITY DISABILITY CLAIMS

A. "Bias" Defined

The right to be heard by a fair and impartial adjudicator has long been considered a fundamental right in American courts.[6] Administrative agencies are likewise bound by the principle.[7] Although agency decisionmakers need not be impartial in every decision they make, agency adjudication normally cannot be, or appear to be, partial to one party.[8]

Bias can take more than one form, and it is worth clarifying the focus here before much more ink is spilt.[9] Most litigated cases involv-

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6 *See, e.g.*, Johnson v. Mississippi, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process."). This right is perhaps the only one that no one would argue is not enshrined in the Due Process Clause. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *see also* U.S. CONST. amend. XIV, § 1 (stating that no state shall do the same); *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair trihunal is a basic requirement of due process."). Courts have little trouble finding deep-rooted support for this proposition in English law. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523–26 (1927) (exploring England's procedures for ensuring that adjudicators had no pecuniary interest in the cases they decided); Spring Valley Water Works v. Schottler, 110 U.S. 347, 364 (1884) ("It need hardly be said that it is an elementary principle of natural justice that no man shall sit in judgment where he is interested, no matter how unimpeachable his personal integrity" (citing City of London v. Wood, 12 Modern 669 (K.B. 1701))). *See generally* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8, at 100 (3d ed. 1999) (noting that fairness, as embodied by a neutral decisionmaker, is contained in the Due Process Clause).

7 Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) (holding that the notion of a fair trial "applies to administrative agencies which adjudicate as well as to courts"); *see also* Gibson v. Barryhill, 411 U.S. 564, 579 (1973) (noting that much of the law on disqualification due to interest applies equally to administrative adjudications); Hummel v. Heckler, 736 F.2d 91, 93 (3d Cir. 1984) ("Indeed, the absence in the administrative process of procedural safeguards normally available in judicial proceedings has been recognized as a reason for even *stricter* application of the requirement that administrative adjudicators be impartial." (emphasis added)).

8 For an overview of the distinction between legislative and adjudicatory facts and the role the distinction plays in determining the acceptability of agency bias, see Bernard Schwartz, *A Decade of Administrative Law: 1987–1996*, 32 TULSA L.J. 493, 530–35 (1997).

9 Authors have various methods of classifying bias. *See, e.g.*, ROBERT D. KLIGMAN, BIAS (1998) (dividing bias into six groups: personal relational bias, non-personal relational bias, informational bias, attitudinal bias, institutional bias, and operational bias); ANAND SWARUP MISRA, THE LAW OF BIAS AND MALA FIDES 24–35 (1970) (detailing three categories: judging one's own cause, pecuniary interest, and non-pecuniary interest). This Note defines just two categories of bias: specific and general. Both Kligman's and Misra's categories can be reduced into these two categories. *See infra* notes 11, 13.

ing bias concern instances in which the adjudicator has an interest in the outcome of the particular case before him, whether it be monetary or personal.[10] This Note labels this type of bias "specific bias."[11] A second form of bias, commonly referred to as "prejudice," is a general predisposition on the part of the adjudicator, however formed or instigated, to decide certain issues in certain ways.[12] This Note labels this type of bias "general bias."[13] General bias can take legitimate forms (like a preference for textualism) or unacceptable forms (such as racial animus).[14] The major difference between specific and general bias is the focus: while specific bias is party- or case-oriented, general bias is issue-oriented.[15]

Significantly, the evidence needed to prove general bias is quite different from that needed to prove specific.[16] With specific bias, evidence particular to a case (such as business arrangements, family relationships, or prior history between the parties) is the most relevant in proving that such bias exists. The facts establishing a specific bias either exist or they do not: the judge either *is* or *is not* the claimant's

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10 *See, e.g.*, *Tumey*, 273 U.S. at 523–35 (proscribing a system in which the adjudicator was remunerated only for convictions); *Spring Valley Water Works*, 110 U.S. at 364 (Fields, J., dissenting) (describing *Wood*, 12 Modern at 669, which proscribed London's mayor and aldermen from holding court in judgment of a case in which the mayor and the city were parties); *see also* R.D.S. STEVENS, BIAS AND IMPARTIALITY IN MAGISTRATES' COURTS 3–32 (1982) (dividing bias into four categories, each of which can be fit into this definition).

11 *See* Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J.L. & PUB. POL'Y 523, 532–33 (2000). Kligman's categories of personal relational bias, non-personal relational bias, and informational bias can all be considered forms of "specific" bias, as defined here. *See* KLIGMAN, *supra* note 9, at 1–26. Misra's categories of judging one's own cause and pecuniary interest are also forms of "specific" bias. *See* MISRA, *supra* note 9, at 24–30.

12 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 1788 (1986) (defining "prejudice" as a "preconceived judgment or opinion").

13 de Villiers, *supra* note 11, at 532–33. Kligman's category of "attitudinal bias" fits within the definition of "general" bias. *See* KLIGMAN, *supra* note 9, at 27–31. Likewise, Misra's category of "non-pecuniary interest" is analogous to "general bias." *See* MISRA, *supra* note 9, at 30–35.

14 *See* de Villiers, *supra* note 11, at 532–33. Legitimate and acceptable forms of general bias are probably more accurately denominated as "persuasions." The "general biases" this Note seeks to remedy are only those properly considered "unacceptable."

15 *See id.*; *see also* Republican Party v. White, 536 U.S. 765, 775–80 (2002) (cataloguing the possible meanings of "impartiality" in a canon of judicial conduct); Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 433–34 (1995) (noting the difficulty and disadvantages of trying to obtain a "blank slate" jury free of general bias); Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 166–68 (discussing general and specific bias as it applies to the requirement of an impartial jury). *See generally* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) (arguing for a system of peremptory challenges that would enable parties to discharge potential jurors with specific biases without eliminating jurors on the basis of general bias).

16 The most salient examples of how courts treat bias come from equal protection cases. *See, e.g.*, *infra* cases cited note 18. The evidentiary issues discussed here and supported in those cases, however, are readily applicable to proving bias in all contexts.

brother; the judge either *does* or *does not* have a financial interest in the outcome of the case. This sort of evidence is usually contained in the record of a single case; testimony can be heard and documents can be submitted which prove the circumstances of a given relationship and, thus, lead to a conclusion that the adjudicator is biased.[17]

On the other hand, the evidence in the record of a single case rarely proves general bias.[18] Because general bias involves prejudgment, proving it from the record of a single case requires statements or overt actions on the part of the adjudicator that shed light on his internal decisionmaking.[19] Unless an adjudicator is reckless with his words or actions, such evidence is rarely available. A more practical method of proof is by examining multiple decisions[20]—either statistically[21] or in some other systematic manner.[22] Using this sort of analysis, one can "control for" legitimate factors that may animate the adjudicator's decisions (such as claimant age or health) and thereby establish whether a general bias is in fact significantly contributing to (if not actually determining) an adjudicator's decisions.[23]

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17 *See generally* KLIGMAN, *supra* note 9, at 1–26 (giving examples of specific bias, each depending on such things for proof as personal or business relationships and prior involvement in the case).

18 *See, e.g.*, Lovellette v. Barnhart, No. 1:02-CV-278, 2003 WL 21918642, at *13–14 (N.D. Ind. June 25, 2003) ("[R]ulings alone are almost never sufficient evidence of bias." (citing Liteky v. United States, 510 U.S. 540, 555 (1994); Marozsan v. United States, 90 F.3d 1284, 1290 (7th Cir. 1996))). *But see* Batson v. Kentucky, 476 U.S. 79, 92–97 (1986) (indicating that the removal of African-American jurors in a particular venire or a prosecutors' statements and questions *may* support a claim of general bias in some cases).

19 *See Liteky*, 510 U.S. at 555 ("[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, . . . will [support a bias challenge] if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."); Miller v. Poretsky, 595 F.2d 780, 796 (D.C. Cir. 1978) (Robinson, J. concurring) ("Absent something amounting well nigh to an open admission of discriminatory purpose, victims may find it virtually impossible to prove that fact unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others.").

20 *See generally* KLIGMAN, *supra* note 9, at 27–31 (citing cases of general bias, proof of which is mustered only after considering many cases).

21 *See, e.g.*, McClesky v. Kemp, 481 U.S. 279, 292–97 (1987) (detailing a statistical study used in an attempt to prove that administration of the death penalty was biased against African Americans).

22 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (allowing the use of "pattern" evidence to prove discriminatory intent).

23 *See id.* at 266 ("Sometimes a clear pattern, *unexplainable on grounds other than race*, emerges from the effect of the state action . . . ." (emphasis added)). Although it is certainly true that "correlation is not causation," statistical evidence is quite useful in proving what is *not* causing a certain result. Thus, if one were to control for variables such as claimant age and health, one might eliminate the possibility that such legitimate variables explain differences in approval rates among ALJs. The only explanation remaining would be general bias. The difficult task would be to discern whether it is simply judicial persuasion, *see supra* note 14, that explains differences among judges. Perhaps one could compare the approval rate of an ALJ accused of bias against judges of known philosophies to determine whether the rates are similar. Regardless, judicial persuasion should play a

Like most bias cases in other contexts, biases in Social Security disability cases typically are of the "specific" type.[24] This Note, however, focuses on instances of general bias—specifically, bias against claimants as a whole.[25] It will explore how, if at all, a claimant can confront and remedy such general bias by working *within* the framework of the Social Security Act, the Commissioner's regulations, and the federal courts.[26]

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small role in ALJ decisions; the Social Security disability guidelines are fairly mechanical and, therefore, do not provide the opportunities for judicial persuasions to manifest themselves significantly. *See supra* note 3 and accompanying text.

24 *See, e.g.*, Aden v. Barnhart, No. 01 Civ. 5170(LAK), 2003 WL 21361723, at *2–3 (S.D.N.Y. June 12, 2003); Shepard v. Massanari, No. Civ.A.01-0953, 2002 WL 31190917, at *8 (E.D. La. Aug. 15, 2002); Lowry v. Massanari, No. CV-99-1210-ST, 2001 WL 34047027, at *1 (D. Or. Apr. 5, 2001); Epherson v. Apfel, No. CIV.A.99-1761, 2000 WL 341024, at *8 (E.D. La. Mar. 30, 2000); Lowe v. Apfel, No. C 98-3972 SC., 1999 WL 447597, at *4 (N.D. Cal. June 28, 1999).

25 *See, e.g.*, Pronti v. Barnhart, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (alleging general bias against Social Security disability claimant); Myles v. Apfel, No. 95 C 3929, 1998 WL 473940, at *6 (N.D. Ill. Aug. 3, 1998) (same); Pastrana v. Chater, 917 F. Supp. 103, 107 (D.P.R. 1996) (same); Small v. Sullivan, 820 F. Supp. 1098, 1108 (S.D. Ill. 1992) (same); Kendrick v. Sullivan, 784 F. Supp. 94, 97–103 (S.D.N.Y. 1992) (same); Grant v. Sullivan, 720 F. Supp. 462, 463–64 (M.D. Pa. 1989) (same), *rev'd sub nom.* Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993), *remanded sub nom. to* Grant v. Comm'r, 111 F. Supp. 2d 556 (M.D. Pa. 2000). The nature of the general bias in these particular cases is characterized as a bias against Social Security claimants as a whole. Though it has been argued that what may be exhibited in cases such as these is truly race-, gender-, or even class-based bias, *see* Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1544–51 (1995), this Note accepts the biased comments as having their facial meaning. This removes equal protection issues from the table and allows the discussion to focus squarely on the inadequacy of the remedies for general ALJ bias in the Social Security disability context.

26 One plausibly could contend that the issue of general bias is not cause for concern. After all, many judges (if not most) probably have certain decisional tendencies, such as being pro-big business, anti-tobacco, or pro-criminal defendant. Judges are allowed and expected to have—if not specifically nominated or elected for having—those biases. *See* Republican Party v. White, 536 U.S. 765, 778–79 (2002). One might make an even stronger case that agencies should be allowed to exhibit certain administration-encouraged general biases. *See* FTC v. Cement Inst., 333 U.S. 683, 700–03 (1948). Agency general biases, however, are usually tolerated more in rulemaking procedures than adjudicatory ones. *See* Schwartz, *supra* note 8, at 531. Social Security benefits proceedings are adjudicatory actions and thus necessitate a lower tolerance for bias. *See id.* And despite the modern push by ALJs to make themselves perceived and treated more like Article III judges who presumably are free to have some general biases, *see* Golin, *supra* note 25, at 1536–43, ALJs are not Article III judges and should not receive equivalent leeway. *See* Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) ("The due process requirement of an impartial decisionmaker is applied *more strictly* in administrative proceedings than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings." (emphasis added)). Furthermore, even if the permissible amount of ALJ bias is equivalent to that of Article III judges, one would expect that even Article III judges exhibiting the types of general bias this Note focuses on, *see supra* note 23; *infra* Part I.C, would incur *some* form of remedial action. *See* ABA CODE OF JUDICIAL CONDUCT, Canon 3(B)(5) (1990) (

> A judge shall perform judicial duties without bias *or prejudice*. A judge shall not, in the performance of judicial duties, by words or conduct manifest

B. Procedural Overview[27]

For a claimant to receive Social Security benefits,[28] the individual must first file an application with the Social Security Administration.[29] The Administration then makes an initial determination on the merits of the individual's claim.[30] If the claimant's application is denied, he may request that the Social Security Administration reconsider its initial determination under the same staff review process used initially.[31] Upon an unfavorable decision at reconsideration, the claimant can request a hearing before an ALJ[32] who will, after collecting the necessary evidence and holding a hearing, decide (using specific guidelines) whether the claimant is entitled to benefits.[33]

A claimant who is still dissatisfied with the ALJ's disability determination can appeal the decision to the Appeals Council of the Social Security Administration.[34] The Appeals Council has the ability to decline review[35] or, upon review, affirm, reverse, or modify the decision of the ALJ.[36] At this point, the ruling becomes the final decision of the Commissioner. Claimants still faced with an adverse decision after their multiple appeals at the agency level may appeal the final deci-

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> bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . . .

(emphasis added)).

27 The intricacies of this process and these regulations as they specifically relate to the issue of ALJ general bias will be explored fully in Part II. For now it is enough only superficially to understand the "life" of a Social Security benefits claim. For a rather complex, but thorough, depiction of the entire claims process, see the Social Security Administration Online, *Flow of Cases Through the Disability Process*, *at* http://www.ssa.gov/disability/disability_process_frameset.html (last visited Jan. 8, 2005).

28 For purposes of this Note, the term "Social Security benefits" refers to those payments made under both Titles II and XVI of the Social Security Act. Pub L. No. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 401 *et seq.*, 1381 *et seq.* (2000)). Title II benefits are commonly known as Social Security Disability Insurance benefits (SSDI), and Title XVI benefits are commonly known as Supplemental Security Income (SSI). The definition of "disability" is the same for both types of benefits: the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* § 423(d)(1)(A). Likewise, the Code of Federal Regulations applies identical requirements for proof of disability under both Titles. *Compare* 20 C.F.R. § 404.1501 *et seq.* (2004) (regulations for determining disability for SSDI benefits), *with id.* § 416.901 *et seq.* (regulations for determining disability for SSI benefits).

29 *See* 20 C.F.R. § 404.603 (2004).

30 *See id.* § 404.902–06.

31 *See id.* § 404.907–22.

32 *See id.* § 404.929–43.

33 *See id.* §§ 404.944–61, 404.1501–99, 416.901–98.

34 *See id.* § 404.966–67.

35 For the criteria the Appeals Council uses to decide whether to hear an appeal, see *id.* § 404.970.

36 *Id.* § 404.979.

sion of the Commissioner to the federal court in the district in which the claimant resides.[37] There, the court must affirm the ALJ's decision if it is supported by substantial evidence contained in the administrative record.[38] The court may not conduct its own hearing or discovery;[39] it is limited to the record evidence filed with the Commissioner's answer to a claimant's complaint.[40]

As the previous outline demonstrates, ALJs play an undeniably significant role in the Social Security disability claim process. In fiscal year 2000, nearly 2,000,000 applications for Social Security Disability Insurance and Supplemental Security Income benefits were reviewed by the Social Security Administration.[41] Fully 62% of applications were denied at the initial determination.[42] Thirty-five percent of those initially denied—just under 500,000 claimants—eventually had their case heard on appeal before an ALJ,[43] which resulted in an

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37 42 U.S.C. § 405(g) (2000).

38 *Id.* (

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . . .

). The Snpreme Court has interpreted the substantial evidence standard to be extremely deferential. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 11.2 (2000 cum. supp.); *see also* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) ("Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established."); Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (stating that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Nevertheless, federal district courts reverse or remand the Social Security Administration's disability determinations more than 50% of the time. Paul Verkuil & Jeffery Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Board*, at 31 (Mar. 1, 2002), *available at* http://www.ssab.gov/VerkuilLubbers.pdf (last visited Jan. 8, 2005). Though district courts outright reverse only 6% of Social Security Administration disability determinations, fully 48% are remanded, resulting in a grant of benefits about 60% of the time. SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 67.

39 *See* Johnson v. Heckler, 741 F.2d 948, 952–53 (7th Cir. 1984); Parker v. Harris, 626 F.2d 225, 231–32 (2d Cir. 1980). *But see* Bowen v. City of New York, 476 U.S. 467 (1986) (permitting a full trial in the district court). The Social Security statute itself does provide for a single, narrow exception. *See* 42 U.S.C. § 405(g) (2000) (

> [The court] may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . .

). This exception is further examined *infra* notes 140–44 and accompanying text.

40 *See Johnson*, 741 F.2d at 952 ("A trial *de novo* is improper."); *Parker*, 626 F.2d at 231 ("Assuming the Secretary has applied proper legal principles, judicial review is limited to an assessment of whether the findings of fact are supported by substantial evidence . . . .").

41 SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 67 (showing the total applications filed to be 1,988,425).

42 *Id.* (equaling about 1,232,824 applications).

43 *See id.* (showing that ALJs decided a total of 433,584 cases in fiscal year 2000).

award of benefits 59% of the time.[44] Significantly, approximately 22% of all Social Security disability claimants had a hearing before an ALJ,[45] and about 23% of all claimants who were awarded benefits had their benefits awarded by an ALJ.[46] Less than one percent of all claimants had their case heard at the federal court level.[47] Consequently, because ALJs play such a prominent role in a significant number of disability claims, if they indeed harbor unacceptable general biases the potential for widespread negative impact is great—and correction in the federal courts is only a fleeting remedy.

C. General Bias on Display: Two Cases

Given the combination of an ALJ's significance in awarding Social Security disability benefits, the limited federal court review of benefits claims, and the sheer number of Social Security disability benefits claims filed per year, ALJ bias is a potentially immense problem. In Part III, this Note will use the following two cases to demonstrate both how general bias is manifested in Social Security disability cases and that the problem is largely without satisfactory remedy in either the Social Security Administration or the federal courts.

1. Grant v. Sullivan[48]

Social Security disability claimant and plaintiff Lois M. Grant filed in federal court an appeal from the decision of ALJ Russell Rowell on June 17, 1988.[49] In addition to the standard ground for appeal—that ALJ Rowell's decision was not supported by substantial evidence—Grant also alleged that "ALJ Rowell, who presided over [her administrative] hearing and rendered a decision denying her application for disability benefits, was biased against her and against disability claimants generally."[50] Grant contended that ALJ Rowell manifested his

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44 *Id.* This does not equate to a 41% denial rate. Dismissals account for 12% of total dispositions as well. SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 67.

45 *See id.* (showing that 433,584 of 1,988,425 cases were heard by an ALJ).

46 *Id.* (showing that ALJs granted 253,615 of 1,106,344 total allowances).

47 *See id.* (showing that federal courts decided only 12,011 Social Security disability cases in fiscal year 2000). Still, in fiscal year 2000, over 15,000 new Social Security disability appeals were filed in federal district courts—constituting more than 5% of the civil docket. Verkuil & Lubbers, *supra* note 38, at 9, 29.

48 720 F. Supp. 462 (M.D. Pa. 1989), *rev'd sub nom.* Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993), *remanded sub nom. to* Grant v. Comm'r, 111 F. Supp. 2d 556 (M.D. Pa. 2000).

49 *Grant v. Sullivan*, 720 F. Supp. at 464.

50 *Id.* This was not the first time the Commissioner had been haled into court because of alleged general bias on the part of ALJ Rowell. Indeed, Judge Muir began his opinion (the first in this litigation spanning over twelve years): "*Once again* we are presented with a case in which a claimant or claimants for Social Security disability benefits allege that Administrative Law Judge (ALJ) Russell Rowell is biased against disability claimants generally." *Id.* at 463 (emphasis added). The opinion then cited several such cases, including *Wallace v. Sullivan*, CIV No. 88-0295, 1989 WL 109098 (M.D. Pa. Mar. 20, 1989),

bias when exercising discretion in making credibility determinations.[51] ALJ Rowell allegedly "use[d] his discretion to find that the claimant and the witnesses supporting the claimant were not credible[,] thereby enabling him to conclude that the claimant was not disabled and therefore not entitled to disability benefits."[52]

Throughout the course of the litigation, several individuals testified regarding ALJ Rowell's bias against Social Security disability claimants, including Michael Brown and Jaqueline Alois, both of whom had previously worked with ALJ Rowell.[53] According to their testimony, in the mind of ALJ Rowell, the critical decision to be made in any case was whether the claimant could be considered a so-called "no-goodnik"[54] on the one hand, or an "'upstanding citizen[ ] who happened to have had a bad turn of luck'" on the other.[55] Brown testified that although he did not know precisely what caused a claimant to be labeled a "no-goodnik," ALJ Rowell frequently assigned this label to claimants who were "black, Hispanic, a poor white, a union member, obese, allegedly mentally impaired, a workmen's compensation claimant, a controlled substance addict, a Department of Welfare employee, or an accident victim."[56]

ALJ Rowell apparently was bent on denying benefits to "no-goodniks," regardless of the law.[57] Alois claimed that, during one conversa-

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and *Schneck v. Bowen*, CIV No. 88-0901, 1989 WL 109557 (M.D. Pa. Feb. 27, 1989). In each of these cases the claimants raised a general bias issue, but it was never ruled upon. Judge Muir concluded his opening paragraph by noting that "this may be the case in which [the court is] required to address the merits of whether ALJ Rowell is biased as alleged." *Grant v. Sullivan*, 720 F. Supp. at 464.

51 *Id.* at 469.

52 *Id.*

53 *Grant v. Comm'r*, 111 F. Supp. 2d at 558–61.

54 *Id.* at 559. According to Brown, ALJ Rowell "referred to [claimants] in that manner hundreds, if not thousands, of times." *Id.* (citing Brown's testimony before a Social Security Administration panel). Indicating the apparent frequency with which ALJ Rowell used the term, Brown testified that the term appeared across the top of instruction sheets to decision writers, as if no more needed to be said. *See id.*

55 *Id.* at 561 (quoting Alois's testimony before a Social Security Administration panel). Brown also had the same impression. Summarizing Brown's testimony before a Social Security Administration hearing, one panel member said: "'Well, I gather then from your testimony that the key determination for [ALJ Rowell] was the so-called no-goodnik determination . . . .'" *Id.* at 560 (alteration in original).

56 *Id.* at 559. This quotation, along with other evidence and testimony in the record, raises the specter of racial and class bias. One could certainly make a strong case that ALJ Rowell harbored such biases. Although that may be true, this Note focuses on that aspect of ALJ Rowell's bias that can be classified as bias against Social Security claimants *as a group*. This position is tenable given that the apparent qualifications of a "no-goodnik" include much more than race- and class-based categorizations. Indeed, Grant herself never alleged racial or class bias (the decisions do not even indicate her race or class), but only that ALJ Rowell was biased "against disability claimants generally." *Grant v. Sullivan*, 720 F. Supp. at 464.

57 *Grant v. Comm'r*, 111 F. Supp. 2d at 560 ("'[O]nce [ALJ Rowell] made [a "no-goodnik"] determination, . . . he sought a means to structure a denial regardless of what obsta-

tion, ALJ Rowell "[sat her] down and explain[ed] to [her] why [he was] not paying this case":

> "[ALJ Rowell] had a theory about blacks, Hispanics, [and] poor white people that he had developed while he was in California, and that typically these people are drug addicts or alcoholics or have decided to adopt a lifestyle where they just will not work no matter what, that they preferred living on public monies, including welfare payments, Worker's Compensation if they could get it if they had a work history, and Social Security Benefits. He said that he did not care what the evidence showed, that he did not care if his Decision was reversed by the Appeals Council or the Courts, that he had no intention of paying the case based on what he had."[58]

In light of this statement, it is clear why Alois "'felt that [ALJ Rowell's decisions] were not sound legal decisions based on the evidence.'"[59] Brown further confirmed the lawlessness of ALJ Rowell, testifying that

> [i]n a case involving a worker's compensation claim, "there was usually a manipulation of the earnings to distort the relation between Worker's Comp and this individual's earnings while he was working." ALJ Rowell would do this deliberately to create a "misimpression." ALJ Rowell would use even the most minute discrepancy in information provided by a disfavored claimant to undermine the claimant's credibility. ALJ Rowell would manipulate medical records even when he granted benefits so that it would be easier to terminate those benefits at a later time. He would attempt "to circumvent" the applicable law.[60]

Still more testimony supported Grant's allegation that ALJ Rowell manifested bias in his credibility determinations.[61] For instance, Brown testified that ALJ Rowell presumed "no-goodniks" to be unreliable and frequently stated that "'this is a matter of credibility, and then he'd kind of chuckle, and that's bad for the claimant. It was just—that was a normal part of the discourse.'"[62] Even a fellow ALJ testified that ALJ Rowell "had once said to him [that] '[t]he issue is credibility. And that's bad for the claimant.'"[63] Statistical evidence

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cles there might be in the record or the case law.'" (quoting panel member's summary of Brown's testimony before a Social Security Administration panel)).

58 *Id.* at 560–61 (quoting Alois's testimony before a Social Security Administration panel).

59 *Id.* at 560 (quoting Alois's testimony before a Social Security Administration panel).

60 *Id.* at 559 (internal citations omitted) (quoting Brown's testimony before a Social Security Administration panel).

61 *See Grant v. Sullivan*, 720 F. Supp at 468–69 (examining allegations by Louise O. Knight that ALJ Rowell had a reputation in Pennsylvania for being biased against disability claimants).

62 *Grant v. Comm'r*, 111 F. Supp. 2d at 560 (quoting Brown's testimony before a Social Security Administration panel).

63 *Id.* at 561 (alteration in original) (quoting 1989 deposition of ALJ Garth Stephenson).

supported this testimony. An initial special panel for the Social Security Administration investigated a sample of 212 of ALJ Rowell's cases and found that he denied benefits in 53% of those cases.[64] The panel reviewed 82 of those denials, finding that in 69 (84%) of them, ALJ Rowell had "unlawfully determined that the claimant was not credible."[65]

One did not need to rely solely on hearsay and statistical data, however. ALJ Rowell's own written opinions contain additional evidence manifesting bias against "no-goodniks." For instance, in at least three decisions, ALJ Rowell repeatedly described claimants as "manipulative" and labeled them as "malingerer[s]" and "prevaricator[s]."[66]

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64 *Id.* at 558. Recall that in fiscal year 2000, ALJs granted benefits an average of 59% of the time. *See supra* note 44 and accompanying text.

65 *Grant v. Comm'r*, 111 F. Supp. 2d at 558–59. Ironically, the court noted that the Social Security Administration panel concluded that this evidence did not support "'*any* conclusion concerning the claimant's racial or ethnic background.'" *Id.* at 558. The court felt differently, however, and asserted that "[a]lthough statistics in and of themselves may have limited probative value, the fact that the information reviewed by the initial special panel revealed such a significant number of unlawful credibility determinations is noteworthy." *Id.* at 559.

66 *Id.* at 562–63. The passages are too revealing not to quote at length. In the case of Laura Tate—a mentally impaired African-American claimant who had previously been involved in several automobile accidents—ALJ Rowell wrote:

> "Although the shenanigans of the claimant have effectively frustrated and prevented the undersigned from more fully developing the evidence in this case, the undersigned does draw the reasonable inference from the claimant's refusal to cooperate by providing the requested series of automobile accidents for the primary if not the sole purpose of collecting insurance monies and other financial benefits. The fact that she would defraud insurance companies in such a manner establishes that she would not hesitate to lie in regard to her impairments, restrictions and limitations in regard to her claim for Social Security benefits. . . . The claimant is found to be a prevaricator, is manipulative and is a malingerer."

Id. at 562 (quoting ALJ Rowell's decision). How ALJ Rowell could conclude that Tate had defrauded insurance companies merely from her apparent inability to placate ALJ Russell's request for documentation is as much the reader's guess as it is this author's. Ultimately, the court noted that "[t]he Laura Tate case is a specific instance where ALJ Rowell made judgments against the claimant once he knew merely that she had a number of his disfavored characteristics." *Id.* at 559. The true meaning of the above-quoted statement may lie in ALJ Rowell's extra-legal fixation on a concept of "secondary gain." This, along with corroboration of Alois's "California theory" testimony, is evidenced in the case of B.L.H.:

> "[The claimant's] lifestyle can be described as having adjusted to a no-work lifestyle without any productive activity either in or out of the home, whereby she stays home mostly lying down and watches television and receives help with household chores from her daughter. The secondary gains accruable to the claimant's ongoing efforts to obtain disability benefits, compounded by her no-work lifestyle and protestation of pain and limitations, unsupported by the objective medical evidence adequately support the conclusion that the claimant's testimony is not credible. Also, it is concluded that she is manipulative and a malingerer."

Id. at 562 (quoting ALJ Rowell's decision). ALJ Rowell obviously crafted his credibility determinations to serve the goal of denying benefits to "no-goodnik" claimants, even if, as Alois and Brown testified, he circumvented the law in the process. In the case of L.A.Z., for example, ALJ Rowell concluded that the claimant used "considerable manipulative behav-

Moreover, these decisions also provide anecdotal evidence of ALJ Rowell's practice of discounting not only the testimony of claimants, but also their *physicians*—based solely on the *claimant's* purported incredibility![67]

Although Ms. Grant did obtain a ruling that ALJ Rowell was biased,[68] the route to that final determination was undeniably inadequate—and more than twelve years late. The district court attempted to conduct its own discovery into ALJ Rowell's bias, but was prevented from doing so by the Third Circuit.[69] In the midst of that litigation, however, the Social Security Administration felt the pressure to investigate on its own, which revealed the statements from ALJ Rowell's coworkers recounted above.[70] Even still, the Administration found that ALJ Rowell was not biased. In the end, the district court reversed that Administration determination, finding it not to be supported by substantial evidence;[71] but as Part II will show, the court's ruling lacks the firm legal grounding future claimants (and legal purists) may have desired—and indeed needed.

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ior during the course of the [administrative] hearing," recounting several of his personal observations of the claimant. *Id.* at 562–63. Contrary to the regulations, he then used these observations as the basis of his unfavorable credibility determination. *See id.* at 563; *see also* Schaal v. Apfel, 134 F.3d 496, 502 (2d Cir. 1998) (holding that personal observations of the ALJ are entitled to limited weight).

67 *See Grant v. Comm'r*, 111 F. Supp. 2d at 563. In the case of C.S., ALJ Rowell discounted the claimant's physician, Dr. Hawk, because he had "relied primarily on claimant's representations, and . . . ha[d] given full credibility thereto. Accordingly it [was] concluded that Dr. Hawk ha[d] been manipulated by the claimant, and Dr. Hawk's impression of inability to engage in work activity [was] rejected and . . . receive[d] no weight." *Id.* Discounting a treating physician's opinion for this reason is in clear violation of the regulations. *See* 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2004). Finally, ALJ Rowell's decision in the case of L.T. displays the full panoply of his lawless tactics:

> "[I]t is concluded that no weight will be given to the opinions advanced by Mr. Anderson [L.T.'s doctor], and his views are rejected. It is evident that Mr. Anderson's views and opinions are based to a large extent upon his assessment of full credibility to the claimant's descriptions of [her pain] . . . . In brief, it appears that Mr. Anderson bas been had, and obviously, has been manipulated by a scheming, manipulative, malingering, and prevaricating claimant into expressing views and opinions based largely upon assessment of full credibility of her representations . . . ."

Grant v. Comm'r, 111 F. Supp. 2d at 563 (quoting ALJ Rowell's decision).

68 *Id.* at 569 ("The only conclusion to be drawn after considering all of the evidence in the record is that ALJ Rowell harbored biases which rendered him unable to fulfill his duty . . . to decide cases fairly. Those biases were clearly manifested in the manner in which ALJ Rowell made credibility determinations." (footnote omitted)).

69 *See infra* notes 140–48 and accompanying text.

70 *See infra* Part II.B.2.

71 *See infra* notes 157–59 and accompanying text.

2. Pronti v. Barnhart[72]

Pronti v. Barnhart is only at the beginning of potentially years-long court and agency litigation. In contrast to *Grant*, which involved a substantial record clearly illustrating ALJ Rowell's biases,[73] this case presents a rather pure look at the problems many claimants face when attempting to prove ALJ bias within the confines of the Social Security disability regulations. The plaintiff, Anne M. Pronti, filed an appeal in federal court on June 10, 2002 from the decision of ALJ Franklin T. Russell. As in *Grant*,[74] Pronti claims both that the decision was not supported by substantial evidence and that ALJ Russell is not "free of bias against claimants seeking disability benefits."[75] The plaintiff's amended complaint alleged that ALJ Russell had "freely stated to counsel and others over the last six years that he requires very completely documented proof of every single aspect of disability before he will grant a case and that his personal goal is to protect the public treasury."[76]

With one exception[77] (which did not indicate bias as clearly as ALJ Rowell's harsh slurs[78]), Pronti does not attribute any inflammatory comments to ALJ Russell. Instead, Pronti filed numerous affidavits from lawyers who practice before ALJ Russell.[79] According to Pronti, these lawyers "understand and know his bias thoroughly."[80]

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72 339 F. Supp. 2d 480 (W.D.N.Y. 2004).

73 *See supra* Part I.C.1.

74 *See supra* note 50 and accompanying text.

75 Am. Complaint ¶ 36, Pronti v. Barnhart, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (No. 02-CV-6309L(F)) [hereinafter *Pronti* Am. Compl.].

76 *Id.* ¶ 16. Scott J. Learned, an attorney who represented numerous claimants before ALJ Russell, recounts this statement. In his sworn affidavit, Learned describes a hearing in which ALJ Russell interrogated a vocational expert, "ask[ing] a number of leading questions" after the expert opined in a manner supporting a benefit award for the claimant. Aff. of Scott J. Learned ¶ 8, *Pronti* (No. (02-CV-6309L(F)) [hereinafter Learned Aff.]. Regarding this interrogation, Learned states:

> I objected, indicating that the vocational expert had . . . rendered [an] "impartial opinion" [as ALJ Russell had requested]. Judge Russell then sharply informed me that he could ask whatever questions he wanted, in his role as the "guardian of the Social Security Trust Fund". I again objected, stating my belief that [ALJ Russell's] role was to impartially weigh the evidence. He then attempted to minimize the previous remark by asserting that he "wore several hats."

Id.

77 *See supra* note 76.

78 *See, e.g.*, *supra* notes 54, 56, 58, 66, 67 and accompanying text.

79 *See* Learned Aff., *supra* note 76; Aff. of William J. McDonald, Jr., *Pronti* (No. (02-CV-6309L(F)) [hereinafter McDonald Aff.]; Aff. of Andrew M. Rothstein, *Pronti* (No. (02-CV-6309L(F)) [hereinafter Rothstein Aff.]; Aff. of Gregg A. Thomas, Pronti v. Barnhart (W.D.N.Y. 2004) (No. (02-CV-6309L(F)) [hereinafter Thomas Aff.]; Aff. of Amanda C. L. Vig, *Pronti* (No. (02-CV-6309L(F)) [hereinafter Vig Aff.]. It is not even clear that the court can properly consider these affidavits. *See supra* note 38–40 and accompanying text, *infra* Part II.C.

80 *Pronti* Am. Compl., *supra* note 75, ¶ 19.

This bias, the complaint concludes, causes ALJ Russell to "regularly approve[ ] a very low percentage of the cases that come before him."[81]

The affiants point to several indicators of ALJ Russell's bias. First, as in *Grant*, Pronti alleges that ALJ Russell uses his discretion inappropriately to attack the credibility of claimants.[82] Second, the affiants claim that ALJ Russell erroneously discounts the opinions of claimants' treating physicians.[83] Finally, Pronti claims that even when ALJ Russell awards benefits to a claimant, he has "a penchant" for using his discretion to find a later disability onset date than the one claimants allege, which results in decreased benefit payments.[84] All of these

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81 *Id.* ¶ 20.

82 One lawyer, Gregg A. Thomas, states that ALJ Russell "uses an illegal standard in judging claimants' credibility," and will "search for any apparent inconsistencies in a claimant's medical record, testimony, or written statement to SSA in order to challenge a claimant's credibility." Thomas Aff., *supra* note 79, ¶ 24. According to Thomas, ALJ Russell manages to find such inconsistencies even where none exist. *Id.* For example, "if a claimant's medical records fail to reflect a history of repeated complaints about pain or functional limitations in each and every note in a treating source's records . . . , ALJ Russell . . . cites the lack of objective, clinical evidence as a reason to disbelieve a claimant's testimony." *Id.* Another lawyer, William T. McDonald, Jr., correctly points out that ALJ Russell applies the wrong legal standard in making his credibility assessments by requiring claimants to fully substantiate their claims of pain. McDonald Aff., *supra* note 79, ¶¶ 18–19. Indeed, the regulations only require that a claimant's description of pain merely be *consistent with* the objective medical evidence, not *fully substantiated* by it. *See* Youney v. Barnhart, 280 F. Supp. 2d 52, 61 n.4 (W.D.N.Y. 2003) (citing 20 C.F.R §§ 404.1529(b), 416.929(b), 404.1529(c)(3), 416.929(c)(3) and Castillo v. Apfel, No. 98 CIV. 0792, 1999 WL 147748, at *7 (S.D.N.Y. Mar. 18, 1999)). According to McDonald, ALJ Russell's use of an erroneous standard resulted in a finding that his clients were credible only 11% of the time. McDonald Aff., *supra* note 79, ¶ 22.

83 McDonald Aff., *supra* note 79, ¶ 13–17; Thomas Aff., *supra* note 79, ¶ 23. The regulations require ALJs to afford a treating physician's uncontradicted opinion "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2004). If the treating physician's opinion is contradicted, the regulations may nonetheless require an ALJ to afford the opinion at least *some* extra weight, based on several factors (such as the length, nature, and extent of the treatment relationship, and whether the opinion is supported by other evidence). *Id.* McDonald accuses ALJ Russell of being "much less critical of [a] medical opinion which is unfavorable to the claimant," regardless of the source. McDonald Aff., *supra* note 79, ¶ 16. Thomas alleges that ALJ Russell "has no problem" subordinating treating physicians' reports and instead "adopting the adverse opinions" of Social Security Administration physicians, who merely review a claimant's medical records or examine the claimant a single time. Thomas Aff., *supra* note 79, ¶ 23. In McDonald's experience, ALJ Russell has given a claimant's treating physician's opinion controlling weight only 12% of the time and little or no weight 26% of the time. McDonald Aff., *supra* note 79, ¶ 14. In further violation of the regulations, *see* 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2004), ALJ Russell fails even to indicate how much weight he gave a claimant's treating physician a majority (53%) of the time, *see* McDonald Aff., *supra* note 79, ¶ 14.

84 Learned Aff., *supra* note 76, ¶ 12. Claimants are paid benefits only from the determined date of the onset of their disability, which results in only a partial victory for a claimant awarded benefits from a date later than that originally asked. If appealed, however, a claimant risks a complete denial of benefits. This, says one affiant, "confronts the claimant with the Hobson's choice of risking current benefits by seeking further Appeals Council review." *Id.* ¶ 12; *see also* Letter from Andrew M. Rothstein, attorney, to Hon. John R. Tarrant, Chief Administrative Law Judge (Sept. 4, 2002) (submitted with Rothstein Aff.,

allegations add up to what Pronti claims is ALJ Russell's *modus operandi* for effectuating his bias against Social Security disability claimants: a higher standard of proof than the regulations require.[85]

Pronti's affiants further allege (reminiscent of ALJ Rowell's lawlessness in *Grant*[86]) that ALJ Russell manipulates the record so as to make it more unfavorable to claimants. ALJ Russell allegedly accomplishes this by holding the record open after a claimant's administrative hearing has concluded,[87] refusing to allow attorneys to respond to his comments,[88] and holding supplemental hearings "solely for the purpose of creating evidence to rationalize his decision to deny benefits."[89]

In what may be the most persuasive evidence of bias, however, the affiants detail the rate at which ALJ Russell has denied benefits to their clients. By dividing ALJ Russell's final dispositions into three categories—fully favorable, partially favorable, and denied—the affiants support their allegations that ALJ Russell's denial rate is extremely high. According to the affiants, ALJ Russell denied between 41% and 76% of their clients' claims,[90] making a weighted average denial rate of 58% across the four affiants who provided data. Even a favorable

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supra note 79) [hereinafter Rothstein Letter] ("Judge Russell has changed the onset date, to the detriment of the claimants, 41% of the time. The other Judges did so in only 12% of the approvals."); Vig Aff., *supra* note 79, ¶ 7 ("Of the six [decisions] that have been partially favorable, five were given a later onset date than the claimants' alleged date of onset."). According to McDonald, instances where ALJ Russell employs this technique prove the point made earlier regarding credibility assessments, *see supra* note 82; curiously, ALJ Russell *will* accept a claimant's testimony as credible *after* the later onset date. *See* McDonald Aff., *supra* note 79, ¶ 20.

85 *Pronti* Am. Compl., *supra* note 75, ¶18; *see also* Learned Aff., *supra* note 76, ¶ 2 ("[ALJ] Russell has demonstrated a consistent pattern of holding claimants to a standard of proof far higher than that set forth in the Social Security Regulations and Rulings."); Rothstein Aff., *supra* note 79, ¶ 4 ("ALJ Russell requires facts approaching proof beyond a reasonable douht . . . .").

86 *See supra* notes 59–60 and accompanying text.

87 Vig Aff., *supra* note 79, ¶ 11. The implication is that once ALJ Russell has all of the evidence supporting a claimant's application, he can then fill the record with counterevidence. *See id.*

88 McDonald Aff., *supra* note 79, ¶¶ 5–7. McDonald states that in one hearing he requested an opportunity to respond to ALJ Russell's comments, to which ALJ Russell "stated that the hearing was closed, that he refused to permit me to make any further statement on the record and he instructed the clerk to turn off the tape recorder." *Id.* ¶ 5. McDonald subsequently requested and received a copy of the tape; however, the tape no longer contained the above exchange. *Id.* ¶¶ 6–7.

89 Thomas Aff., *supra* note 79, ¶ 20; *see also id.* ¶ 25 ("ALJ Russell improperly uses vocational experts to concoct evidence to support his adverse findings.").

90 Four affiants provided data on the total number of their clients' cases that ALJ Russell decided and how many of these decisions fit into each of the three above-mentioned categories. Based on a total of 17 cases, Vig claims a 41% denial rate. *See* Vig Aff., *supra* note 79, ¶ 6. Out of 72 cases, affiant Rothstein claims a 46% denial rate. *See* Rothstein Letter, *supra* note 84. Out of 19 cases, affiant Thomas claims a 63% denial rate. *See* Thomas Aff., *supra* note 79, ¶ 14. And out of 58 cases, affiant McDonald claims a 76% denial rate. *See* McDonald Aff., *supra* note 79, ¶ 11.

decision from ALJ Russell was often only a marginal victory. Across the affiants, ALJ Russell's approvals were only partially favorable 51% of the time, ranging from as low as 41% to as high as 74%.[91]

These numbers are impressive by themselves, but only when held against some objective standard do the claims of bias against ALJ Russell become convincing. Affiant Rothstein demonstrates the point by comparing his clients' record before ALJ Russell—46% denial, 41% partially favorable approvals—with his other clients' record before all other ALJs—9% denial, 12% of approvals only partially favorable.[92] Affiant McDonald uses nationally reported statistics to support his claim that ALJ Russell is biased. He claims that his experience before ALJ Russell, which has produced a 75% denial rate, is not in line with the national average of 29%.[93] Indeed, these statistics comport with the figures affiant Rothstein obtained through a Freedom of Information Act request.[94] These data show that ALJ Russell's 63% denial rate is well above that of other ALJs both in his region (43%) and in the entire country (34%).[95] These data also show that the national rate of partially favorable decisions is only 8%,[96] while ALJ Russell's partial approval rate among the affiants is 51%.[97]

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91 Of the 39 total approvals for affiant Rothstein, 41% were only partially favorable. *See* Rothstein Letter, *supra* note 84. Of the 7 total approvals for affiant Thomas, 4 were partially favorable. *See* Thomas Aff., *supra* note 79, ¶ 14. Of the 10 total approvals for affiant Vig, 6 were partially favorable. Vig Aff., *supra* note 79, ¶ 6. And of the 14 total approvals for affiant McDonald, 10 were only partially favorable. McDonald Aff., *supra* note 79, ¶ 11.

92 *See* Rothstein Letter, *supra* note 84; *see also* Vig Aff., *supra* note 79, ¶ 9 (claiming that other Judges had an 18% denial rate and that only 17% of their approvals were partially favorable, compared to 41% and 60%, respectively, with ALJ Russell).

93 McDonald Aff., *supra* note 79, ¶ 12, exhibit 1 (citing SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 67). To be fair, in order to compare the national ALJ denial rate with McDonald's figures, dismissals should be excluded from the calculations. Once this is done, the national denial rate is about 33%, which is still significantly below ALJ Russell's denial rate. *See* SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 67.

94 *See* Letter from Andrew M. Rothstein, attorney, to Mr. Jack Wolf, Information Disclosure Specialist, Office of Hearings and Appeals (July 9, 2002) (submitted with Rothstein Aff., *supra* note 79).

95 Letter from Social Security Administration to Andrew M. Rothstein (July 2, 2003) (on file with Court Reporter to Judge David G. Larimer, United States District Court for the Western District of New York, in connection with *Pronti v. Barnhart*, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (No. 02-CV-6309L(F))).

96 *Id.*

97 *See supra* note 91 and accompanying text. The Social Security Administration offered to Affiant Rothstein the following possible explanations for the aberrations:

- The ALJs who serve as Hearing Office Chief Judges sometimes handle a large part of the dismissal workload, particularly those that involve late filing.
- Other workloads may not be assigned randomly. Depending upon the types of cases worked, these differences could either increase or decrease individual allowance rates. Factors such as the age of claimants, their education and work history, and the nature of their impairments can affect outcomes.

In September 2004, the district court remanded the *Pronti* case to the Social Security Administration for additional fact finding on the issue of ALJ Russell's general bias.[98] The Administration has yet to make any findings. What is important to notice thus far, however, is the importance of statistical evidence in demonstrating (if not conclusively proving) that a claimant was indeed the victim of ALJ general bias—evidence on which the district court relied despite the uncertain propriety of doing so. That an ALJ applying what are supposed to be semimechanical regulations and standards can have approval rates so out of line from the regional and national norm is beyond credibility. Without invidious comments demonstrating an ALJ's bias (such as those exhibited by ALJ Rowell[99]), the ability to review many cases at once is essential for plaintiffs hoping to prove an ALJ's general bias.[100] The current system, however, makes doing so nearly impossible.

II
INADEQUATE PROCEDURES: HOW THE REGULATIONS AND REVIEW PROCESS PREVENT MEANINGFUL REDRESS

With *Grant* and *Pronti* serving as a backdrop, this Part addresses the various evidentiary, procedural, and practical obstacles claimants face when attempting to obtain redress for denials at the hands of a generally biased ALJ. The task here is to examine the adequacy of what typically would be the first and most obvious avenues of redress for such claimants: the process provided by the Social Security Act and regulations. As this Part will show, however, there is no adequate recourse there to be found.

- To expedite the hearing process, some ALJs are used to identify cases that can be paid without a hearing. Clearing a large number of those cases will increase a given ALJ's allowance rate.
- ALJs are independent decision-makers. They cannot be influenced by the Agency into issuing specific decisions (i.e., favorable or unfavorable).
- When issuing decisions, ALJs rely on SSA law, which can and does vary among judicial jurisdictions.

Letter from Willie J. Polk, Freedom of Information Officer, Social Security Administration, to Andrew M. Rothstein, attorney (July 2, 2003) (submitted with Rothstein Aff., *supra* note 79). Whether these justifications are valid or applicable to ALJ Russell is something the district court may one day face. *See infra* note 230 and accompanying text (threatening to use the court's mandamus jurisdiction to decide the issue of ALJ Russell's alleged bias).

98 Pronti v. Barnhart, 339 F. Supp. 2d 480, 501 (W.D.N.Y. 2004).

99 *See supra* notes 54, 56, 58, 66, 67 and accompanying text.

100 *See* Miller v. Poretsky, 595 F.2d 780, 796 (D.C. Cir. 1978) (Robinson, J. concurring) ("Absent something amounting well nigh to an open admission of discriminatory purpose, victims may find it virtually impossible to prove that fact unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others."); *supra* notes 18–23 and accompanying text.

A. Disqualification of the ALJ

The first place to which a claimant would naturally turn when confronted with a biased ALJ is the Social Security disability regulations. The regulations provide that "[a]n administrative law judge shall not conduct a hearing if he or she is prejudiced or partial."[101] The procedures a claimant must follow to enforce this regulation are, however, quite uncomfortable. An objecting claimant must first notify the ALJ in question at the claimant's "earliest opportunity," at which point the ALJ "shall consider [the claimant's] objections and shall decide whether to proceed with the hearing or withdraw."[102] Aside from the obvious absurdity of having the very person accused of bias deciding whether to recuse himself,[103] this regulation cannot practically address the problem of a generally biased ALJ.

That a claimant would even be aware of an ALJ's general bias at such a stage in the proceedings is dubious. As noted in *Small v. Sullivan*, "a general predisposition to deny disability claims is not the sort of bias a person would perceive at the time an administrative hearing is held."[104] Because there may be only one or two indications of bias per case,[105] to be able credibly to object at the hearing level would require knowledge gathered from many experiences with a particular ALJ. To place such a burden on claimants is unrealistic and impairs the right to object in the first place.

One could argue that an ALJ's general bias, even if not known to the claimant, should be known to his lawyer by word-of-mouth and prior experience with an ALJ. There are several significant counterpoints to such a claim, however. As an initial matter, in 2000, at least 13% of claimants were unrepresented in their administrative hearings.[106] In addition, roughly 17% were represented by non-attorneys.[107] Relying solely on lawyers to protect against ALJ general bias,

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101 20 C.F.R. §§ 404.940, 416.1440 (2004).

102 *Id.*; *see also* Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) (detailing the steps the claimant took to have the ALJ removed pursuant to the regulation).

103 If you imagine a claimant who must ask ALJ Rowell to recuse himself because he is biased, the unlikelihood of a claimant actually employing such a remedy becomes readily apparent—especially if the claimant is unrepresented. *See also* Pronti v. Barnhart, 339 F. Supp. 2d 480, 496 (W.D.N.Y. 2004) ("Assuming an ALJ was biased, it stands to reason that he would not admit as much by agreeing to withdraw from the case.").

104 820 F. Supp. 1098, 1105 (S.D. Ill. 1992) (citing Kendrick v. Sullivan, 784 F. Supp. 94, 100 (S.D.N.Y. 1992) and Grant v. Sullivan, 720 F. Supp. 462, 472 (M.D. Pa. 1989)); *see also Pronti*, 339 F. Supp. 2d at 495 ("[The evidence of bias] was not available to plaintiff Pronti at the time of her . . . hearing before ALJ Russell . . . .").

105 Recall that the only overt evidence of general bias by ALJ Russell in the *Pronti* case was his comment regarding his supposed role as the protector of the public treasury. *See supra* note 76.

106 *See* SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 56.

107 *See id.*

therefore, will not solve the problem for many claimants.[108] Furthermore, not all attorneys can be expected to know of a given ALJ's general bias. A lawyer may be new to either Social Security disability law or to a particular ALJ. Indeed, the *Grant* case provides anecdotal evidence that this does take place; Ms. Grant's attorney had never before handled a Social Security disability case.[109]

Even if claimants could meet such a burden, however, the regulation providing for the objection would still be inadequate because it provides only for objections to prejudice or partiality "with respect to any *party* or . . . any *interest in* the matter pending for decision."[110] The language of the regulation indicates that it is only designed to address instances of specific bias, not general bias.[111] At least two courts, including the court in *Pronti*, have recognized the restrictive nature of this regulation regarding claims of general bias:

> [I]f plaintiffs were required to present their bias claim at the administrative level, they would simply be confronted with administrative procedures which are not designed to address the problem of an administrative law judge who is generally biased against claimants. . . . [T]he Social Security regulations do not allow for disqualification of an administrative law judge on the ground of general bias and unfitness.[112]

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108 Such reliance would also be contrary to the general nature of Social Security proceedings, which are intended to be nonadversarial. *See* 20 C.F.R. § 404.900(b) (2004) (providing that the Social Security Administration will "conduct the administrative review process in an informal, nonadversary manner"); *see also* Sims v. Apfel, 530 U.S. 103, 110–12 (2000) (discussing the inquisitorial—as opposed to adversarial—nature of Social Security proceedings).

109 Ms. Grant's attorney provided an affidavit with the following relevant declarations:

> Prior to the time of Plaintiff Grant's case I had never handled a Social Security case as an attorney, and I had no prior knowledge of ALJ Judge [sic] Russell Rowell . . . .
>
> At no time during the course of the hearing proceedings nor through the time of the appeal to the Appeals Council was I aware of the existence of a claim of bias on the part of ALJ Rowell towards Plaintiff Grant nor towards Social Security claimants in general. . . . I first became aware of a possible claim of bias when on May 13, 1988 I had a telephone conversation with Peter B. Macky[, who] . . . had extensive experience with Social Security cases and . . . [informed me of] several cases where a claim of bias was being lodged against ALJ Rowell.

Grant v. Sullivan, 720 F. Supp. at 469 (first alteration in original).

110 20 C.F.R. §§ 404.940, 416.1440 (2004) (emphasis added).

111 *See supra* notes 9–15 and accompanying text (discussing the difference between specific and general bias).

112 Kendrick v. Sullivan, 784 F. Supp. 94, 100 (S.D.N.Y. 1992); *see also* Pronti v. Barnhart, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (

> [B]ased on the record before the Court, there are serious questions as to whether 20 C.F.R. § 404.940 is an adequate mechanism when the bias alleged does not relate to a particular plaintiff, but is based on a claim that the ALJ is generally biased against all Social Security claimants. . . .
>
> . . .

Therefore, if the regulation is used strictly for its intended purpose—as it should be—it is apparent that, in addition to the unpleasant burden of objecting directly to the judge accused of bias, objecting to the ALJ on the basis of general bias is also an inadequate solution.

B. Appeals Council Review

1. *The Regulations*

After an unfavorable ALJ decision, a claimant may appeal directly to the Social Security Appeals Council. To obtain Council review, a claimant must appeal the decision within sixty days of its issuance.[113] The Appeals Council decides whether to review the decision at all and, if it chooses to do so, either affirms or reverses the ALJ's decision.[114] This appellate process, however, solves precisely none of the evidentiary problems relevant to general bias.

At the heart of the inadequacy is that the Appeals Council only examines the record created at the ALJ hearing level. Although the regulations appear to allow the presentation of "new" evidence, such evidence must also be "material."[115] Given that the Social Security

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> For many reasons, this regulation is not well-suited to claims of general bias. . . . [T]he Appeals Council reviews claims of bias on a case-by-case basis only, which does not take into account the nature of a claim of general bias.
>
> This is precisely what occurred in *Ballard* [a companion case to *Pronti*]. In response to the plaintiff's allegation that ALJ Russell was biased generally against claimants, the Appeals Council responded in its decision denying review of the case as follows:
>
> > The Appeals Council has considered your representative's contention that the Administrative Law Judge has a bias in general against disability claimants because of the low percentage of favorable decisions he issues for your representative's clients. The Appeals Council considers each case which comes before it on an individual basis. The Council found no indication that the Administrative Law Judge adjudicated your claim on a basis other than his evaluation of the issues and evidence of record. Accordingly, the Appeals Council finds no support for your representative's contention that the Administrative Law Judge is biased.
>
> . . . [S]erious questions exist regarding whether § 404.940 is merely a futile remedy for a plaintiff seeking to raise a general bias claim . . . .

(citations omitted)); Grant v. Shalala, 989 F.2d 1332, 1354 (3d Cir. 1993) (Higginbotham, J., dissenting) ("[T]hose regulations [20 C.F.R. §§ 404.940, 416.1440] are obviously not designed to handle claims of general bias.").

113 20 C.F.R. § 404.968(a)(1) (2004). The issues presented on appeal to the Appeals Council include any decision by an ALJ not to withdraw from a case due to alleged bias. *See id.* §§ 404.940, 416.1440 ("If the administrative law judge does not withdraw, you may, after the hearing, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge.").

114 *See* 20 C.F.R. § 404.967 (2004).

115 *Id.* § 404.976(b)(1).

regulations fail to provide for the removal of an ALJ on the grounds of general bias,[116] such evidence would not be material to the claimant's case. Thus, there is no opportunity to present any evidence sufficient to prove general bias—namely, evidence from other claimants' cases.[117] Without such evidence in the record, and with no opportunity independently to present it to the Appeals Council, general bias is impossible to prove. Recall that in both *Grant* and *Pronti*, anecdotes and statistics culled from many cases were necessary to establish general bias on the part of the ALJs.[118] Because the current procedures make it nearly impossible to introduce such evidence to the Appeals Council,[119] the current "solution" to general bias claims is really no solution at all.[120]

Furthermore, even if a claimant were able to offer evidence of general bias to the Appeals Council, the sixty-day time period is insufficient for a claimant or his representative to identify and document an ALJ's previously unrecognized general hias.[121] As shown above, courts have already recognized the time and serendipity necessary to

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116 *See supra* Part II.A.

117 *See* 20 C.F.R. § 404.976(b)(1) (2004) (providing that "[t]he Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision"); *see also Pronti*, 339 F. Supp. 2d at 496 ("'The Appeals Council considers each case which comes before it on an individual basis. The Council found no indication that the Administrative Law Judge adjudicated *your* claim on a basis other than his evaluation of the issues and evidence of record.'" (quoting the Appeals Council decision) (emphasis added)).

118 *See, e.g.*, *supra* notes 64–67, 83–97 and accompanying text (recounting the statistical evidence presented in the *Grant* and *Pronti* cases).

119 Indeed, if the claimant were to gather such evidence of general bias, he may be denied a hearing on the issue due to the requirement of issue exhaustion. If the claimant had not raised the issue of general hias at the hearing level, the Appeals Council would not have considered the issue on appeal. This practice has apparently been abandoned with the procednres detailed in Social Security Administration Procedures Concerning Allegations of Bias or Misconduct by Administrative Law Judges, 57 Fed. Reg. 49,186 (Oct. 30, 1992) [hereinafter Bias Procedures]. *See infra* Part II.B.2.

120 Whether this particular regulation was *intended* to be the Social Security Administration's solution to general bias is beside the point. Courts that currently dismiss claims of general bias due to lack of evidence simultaneously—and strangely, given the above analysis—cite §§ 404.940 and 416.1440 as the proper regulations to use for dealing with it. *See, e.g.*, Hopper v. Barnhart, 02-CV-6387(CJS) (W.D.N.Y. Aug. 11, 2003) (claiming that there was "no reason why the regulation could not be used to raise a claim of systematic bias"); Sanborn v. Barnhart, 02-CV-6399(CJS) (W.D.N.Y. Aug. 11, 2003) (consolidated case).

121 *See, e.g.*, *Pronti*, 339 F. Supp. 2d at 495 ("[The evidence of bias] was not available to plaintiff Pronti . . . when she made her . . . request for review by the Appeals Council."); Grant v. Sullivan, 720 F. Supp. 462, 469 (M.D. Pa. 1989) ("'At no time during the course of the hearing proceedings *nor though the time of the appeal to the Appeals Council* was 1 aware of the existence of a claim of hias on the part of ALJ Rowell towards Plaintiff Grant nor towards Social Security claimants in general'" (quoting affidavit by Grant's attorney) (emphasis added)).

discover that an ALJ harbors a general bias.[122] Thus, the Appeals Council process cannot squarely address problems of general bias.

2. *"Interim" Procedures*

During the ongoing proceedings in the *Grant* case, and ostensibly with an eye toward remedying the problem of discovering bias in a timely manner, the Social Security Administration issued "interim" procedures to deal with complaints of bias against ALJs.[123] Close examination of these procedures, however, reveals latent inadequacy.[124] The "key features" of the procedures provide that: (1) claimants have the ability to file a complaint of bias with the Office of Hearings and Appeals (which oversees ALJs); (2) claimants be "notified" as to the progress of their complaint, and assured that it will be "investigated promptly;" and (3) claimants be "notified" as to the decision reached and action taken, if any, in response to the complaint.[125] Furthermore, in revealing language, the procedure provides that:

> If a complaint is filed after a decision by an Administrative Law Judge on a claim for benefits has been issued, but before the expiration of the time for filing a request for review by the Appeals Council, the claimant and his or her representative will be *notified* in writing that . . . the complaint may be presented to the Appeals Council as a basis for granting review; that the allegations will be reviewed as part of the request for review; and that, regardless of the final decision on the merits of the claim for benefits, the complainant and his or her representative will be *informed* of the results of the review.[126]

Though acknowledging the problem of general bias, this procedure does little to solve it. It appears that the Administration sought simply to issue a rule that would relax court scrutiny but avoid dealing with ALJ general bias.[127]

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122 *See supra* notes 104–09 and accompanying text. Although these comments specifically address the problems involved with requiring claimants to raise the issue of general bias in front of the ALJ at the hearing level, the same logic applies to raising such objections before the Appeals Council.

123 *See* Bias Procedures, *supra* note 119, at 49,187.

124 A cynic might suggest that the procedures purposely are shrouded in language merely intended to assuage irate victims of ALJ general bias while carefully creating an impotent process in the Social Security Administration and federal courts. *See infra* notes 128–36 and accompanying text. ALJs' general biases, therefore, remain protected by the system and the Social Security Administration does not earnestly have to confront the issue of general bias. Lending support to this theory is the fact that despite all of the evidence recounted in Part I.C.1 regarding ALJ Rowell's bias—evidence which was produced via *this very process*—the Social Security Administration *still* found ALJ Rowell to be unbiased.

125 Bias Procedures, *supra* note 119, at 49,187.

126 *Id.* (emphasis added).

127 The Social Security Administration's action (more appropriately, inaction) since issuing these "interim" procedures lends credence to this notion. *See* Pronti v. Barnhart, 339 F. Supp. 2d 480, 499 (W.D.N.Y. 2004) (

First, the procedure does nothing to alleviate the strict sixty-day time constraint within which a claim of general bias must be filed.[128] If it is unrealistic to expect that a claimant or his lawyer will discover an ALJ's general bias before the administrative hearing,[129] it is not much more plausible to believe that another sixty days will suffice. Again, the claimant or his attorney must review tens (if not hundreds) of cases in order to discover general bias.[130] The procedure, thus, does nothing to relieve the timing problem.

Second, the procedure does not at all clarify the means by which a claimant is to present evidence supporting a claim of general bias. There is no provision abrogating the requirement that the evidence be "material."[131] Furthermore, it is far from certain that the Social Security Administration wishes the *claimant* to provide any evidence at all. The procedure provides only for an "investigation" by the Office of Hearings and Appeals and "notification" to the claimant and his representative of the decision reached.[132] It mentions nothing about

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> [T]he Interim Procedures for investigating and hearing plaintiff's claims of general bias may not provide a meaningful or adequate vehicle to demonstrate general bias. It cannot be overlooked that the Interim Procedures, initially passed in 1992, were supposed to be finalized within six months of their publication. Twelve years later that has yet to occur. Therefore, the Social Security Administration still has no final regulation that applies to claims of general bias.

). Such a claim is even further supported by the lack of seriousness with which the Administration has handled the bias claims against ALJ Russell. As of September 2004, the investigation had consisted of interviews with attorneys and other representatives who had practiced before ALJ Russell, the Administration's Hearing Office Chief Administrative Law Judge, the Hearing Office Director and Hearing Office staff, as well as ALJ Russell himself. These interviews apparently were informal in nature—no transcript, tape recording, detailed notes, or a formal record of any kind having been taken. *See id.* at 498. "[A] random sample of 42 cases, including decisions and hearing tapes, as well as 'many of the cases cited by attorneys as problematic'" had also been reviewed. *Id.* at 498 (quoting a memorandum from ALJ David Nisnewitz, Office of Hearings and Appeals, attached to a September 2, 2004 letter to the court from U.S. Attorney Christopher Taffe). The district court "remind[ed] the Commissioner [of Social Security] that a full record must be developed on this issue [of general bias] . . . . A full and adequate record must be assembled for this Court to adequately review the issue when the cases are returned here." *Id.*

128 *See* Bias Procedures, *supra* note 119, at 49,187 (providing that the complaint must be filed "before the expiration of the time for filing a request for review by the Appeals Council"—sixty days, *see* 20 C.F.R. § 404.968(a)(1) (2004)).

129 *See supra* notes 104–09 and accompanying text.

130 To gather the evidence against ALJ Rowell in the *Grant* case, the Social Security Administration examined no fewer than 212 of ALJ Rowell's decisions. *See* Grant v. Comm'r, 111 F. Supp. 2d 556, 558 (M.D. Pa. 2000). The affidavits submitted in the *Pronti* case present statistics based on at least 190 of ALJ Russell's decisions and well over 200 decisions of other ALJs. *See* Rothstein Letter, *supra* note 84; Thomas Aff., *supra* note 79, ¶¶ 14–22; Vig Aff., *supra* note 79, ¶¶ 3–11.

131 20 C.F.R. § 404.976(b)(1) (2004); *see supra* notes 115–17 and accompanying text.

132 *See* Bias Procedures, *supra* note 119, at 49,187.

any presentation (evidentiary or otherwise) or any other type of direct involvement by the claimant.[133]

Finally, despite appearing to combine a bias complaint with an appeal of the ALJ's decision,[134] the actual language of the procedure conflicts with any such notion. Immediately after supposedly creating a process to review alleged bias, the rule then provides that the claimant will merely be "informed" of the results of the bias review "regardless of the final decision on the merits of the claim for benefits."[135] Such language indicates that the bias decision is *not* "part of" the review of the ALJ decision; indeed, the bias review seems secondary to—if not wholly separate from—the decision on the claim. When viewed in this manner, the procedure not only is inadequate as an intra-agency solution, but also further exacerbates the already inadequate review process by precluding further review in federal court.[136]

C. Federal Court Review

As anyone familiar with administrative law understands, one would do well to win at the agency level; chances of a reversal in federal court are slim given the standard of review.[137] Combining this deferential standard of review with the interpretations courts have actually given the Social Security disability statute paints a very stark picture for victims of ALJ general bias. The statute provides that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."[138] Courts have interpreted this language as strictly limiting review to the agency-compiled record filed with the court.[139] The district court may not conduct its own discovery to bol-

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133 *See id.*

134 *See id.* ("[T]he allegations will be reviewed as part of the request for review . . . .").

135 *Id.*

136 Despite its concerns about the inadequacy of the "interim" procedures, *see supra* note 127, the court in *Pronti* remanded the case to the Social Security Administration pursuant to § 405(g) for further fact finding on the issue of bias, *see* Pronti v. Barnhart, 339 F. Supp. 2d 480, 501 (W.D.N.Y. 2004). The court, however, refused at that time to endorse the procedures. *Id.* at 498 ("This Court cannot now determine whether [the "interim" procedures] provide an adequate record for review; that remains to be determined."). Furthermore, it is not at all clear that the conclusions the Social Security Administration reaches as the result of its "interim" procedures are reviewable by a federal court. *See infra* notes 157–59 and accompanying text.

137 *See also supra* note 38 (describing the "substantial evidence" standard of review in the federal courts). *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating that where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

138 42 U.S.C. § 405(g) (2000).

139 *See* Johnson v. Heckler, 741 F.2d 948, 952 (7th Cir. 1984) ("Judicial Review of the administrative law judge's decision is limited to an evaluation of that decision . . . . A trial

ster the record with facts sufficient to support a claimant's allegation of general bias.[140]

The statute, however, does provide that "[t]he court . . . may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a *showing* that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding."[141] This language seems to permit *limited* discovery in the district court so that a "showing" might be made and the case remanded to the Commissioner for *full* investigation.

Indeed, in *Hummel v. Heckler*,[142] the Third Circuit permitted discovery where the plaintiff alleged that the Social Security Administration's "Bellmon Review" program put undue pressure on ALJs to disapprove applications.[143] The district court in *Grant* viewed *Hummel* as sufficient basis to proceed with its own discovery,[144] but the Third Circuit reversed, distinguishing the discovery approved in *Hummel*: "In *Hummel*, we held that a claimant was entitled to discovery as to whether the ALJ had undergone a 'Bellmon Review' and, if so, the nature of the review. We did not sanction depositions of the ALJ's coworkers and staff."[145] Thus, it appears that although *Hummel*-type review is permissible under section 405(g), *Grant*-type review is not.

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de novo is improper."); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980) (noting that if the agency "has applied proper legal principles, judicial review is limited to an assessment of whether the findings of fact are supported by substantial evidence").

140 Although the Third Circuit's reasoning was ultimately statutorily based, in reversing the district court in *Grant*, it also opined that the "[a]vailability of the type of discovery and trial that the plaintiffs sought in [that] case would undermine [the] vital independence [of ALJs] . . . . [W]e are convinced that such fact-finding would have a deleterious effect on the independence of ALJs and thus on the administrative process." Grant v. Shalala, 989 F.2d 1332, 1344 (3d Cir. 1993). The court continued, saying that "[i]t has long been recognized that attempts to probe the thought and decision making process of judges and administrators are generally improper." *Id.* (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) and United States v. Morgan, 313 U.S. 409, 422 (1941)). Although the amount of deference afforded to ALJs appears to be well-settled in the courts, whether so much deference should be afforded them—as a matter of policy—is nevertheless debatable. *See* Golin, *supra* note 25, at 1534–44.

141 42 U.S.C. § 405(g) (2000) (emphasis added).

142 736 F.2d 91 (3d Cir. 1984).

143 *Id.* at 94–95. A "Bellmon Review" was a review conducted under section 304(g) of Pub. L. 96-365, and is named after the Senator who introduced the amendment. *Id.* at 94 n.1; *see* Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456 (1980) ("The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, . . . and shall report to the Congress . . . on his progress."). For a somewhat more complete description, see *infra* Conclusion.

144 Grant v. Sullivan, 720 F. Supp. 462, 467–68 (M.D. Pa. 1989).

145 Grant v. Shalala, 989 F. 2d 1332, 1344–45 & n.17 (3d Cir. 1993) (citation omitted).

This distinction may be artificial, but it is the law in at least one circuit and effectively precludes the type of evidence needed to prove an ALJ's general bias. The most convincing evidence in the *Grant* case came from depositions and testimony given by two of ALJ Rowell's coworkers[146]—evidence that the Third Circuit ruled prohibited. In addition, without supplemental discovery it would be impossible to uncover evidence from other cases, such as the statistical evidence submitted in *Pronti*.[147]

Even if one were somehow to overcome this tremendous hurdle, there is another statutory restriction the Third Circuit did not address in *Grant*. Recall that under the statute, in order for a district court to order the collection of additional evidence, there must be a showing that such evidence would be "material" and that there was "good cause for the failure to incorporate such evidence into the record in a prior proceeding."[148] This presents the same problem that has been encountered all along the way: according to the regulations, general bias is not a reason for removing an ALJ from a case.[149] Consequently, evidence of such bias is irrelevant to any issue in a Social Security disability case and is, *a fortiori*, both immaterial and absent from the record for "good cause."

Perhaps the only obstacle that does not persist at the federal court level is the lack of time to discover (in the lay sense) an ALJ's general bias.[150] Due to the enormous backlog of cases at the Appeals Council, a claimant and his representative have ample time to learn of an ALJ's general bias before ultimately appealing to federal court. Average processing time for a review request from the Appeals Council is over 500 days[151] and increasing rapidly; in the six years between 1994 and 2000, the processing time more than quadrupled.[152] The situation is now such that the rate of requests for review exceeds the rate of disposal of such requests.[153] Though bleak from an administrative standpoint, the enormous backlog provides claimants with the opportunity to investigate and discover any wrongs potentially suffered at their initial ALJ hearing. Unfortunately, as explained above, such knowledge is ultimately useless.

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146 *See supra* Part I.C.1.

147 *See* Miller v. Poretsky, 595 F.2d 780, 796 (D.C. Cir. 1978) (Robinson, J. concurring) ("Absent something amounting well nigh to an open admission of discriminatory purpose, victims may find it virtually impossible to prove that fact unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others."); *supra* Part I.C.2.

148 42 U.S.C. § 405(g) (2000).

149 *See supra* notes 115–17 and accompanying text.

150 *See supra* notes 104–09 and accompanying text.

151 SOCIAL SECURITY ADVISORY BOARD, *supra* note 1, chart 60.

152 *Id.*

153 *Id.*

Nevertheless, some plaintiffs have achieved success in federal court despite the courts' apparent lack of authority to act. For instance, the plaintiff in *Grant* eventually obtained a ruling that the Social Security Administration Appeals Council's finding that ALJ Rowell was not biased was not supported by substantial evidence.[154] The district court ruling followed the conclusion of the processes established in 57 Fed. Reg. 49,186[155] and simply reviewed the Administration's bias decision as if it were just another disability determination.[156]

Future plaintiffs should not be exuberant, however. Although the Social Security statute does provide that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing *to which he was a party* . . . may obtain a review of such decision by a civil action,"[157] recall that 57 Fed. Reg. 49,186 is deliberate in its characterization of the role of the claimant in the process. The claimant is merely to be "notified" of the progress of the Social Security Administration's investigation; nowhere does the procedure make the claimant a *party* to the investigation in any formal sense.[158] By carefully avoiding the creation of party status for the claimant, 57 Fed. Reg. 49,186 makes judicial review of the conclusions reached by the Social Security Administration extremely tenuous. Indeed, during oral arguments on the cross-motions for judgment on the pleadings in the *Pronti* case, the Assistant U.S. Attorney representing the Social Security Administration suspiciously evaded directly answering questions on whether the court had jurisdiction to review decisions from the investigation underway in that case.[159] The Social Security Administration thus appears ready to contest the basis of the ruling in the *Grant* case. And despite the unsatisfying place in which it leaves a claimant, the Administration is likely correct in its current interpretation of the statute.

D. Class Actions

Class action suits are the most common method of attacking ALJ general bias.[160] Initially it was unclear whether class action suits could

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154 Grant v. Comm'r, 111 F. Supp. 2d 556, 570 (M.D. Pa. 2000).

155 *See supra* notes 123–26 and accompanying text.

156 *See Grant v. Comm'r*, 111 F. Supp 2d at 565–70.

157 42 U.S.C. § 405(g) (2000) (emphasis added).

158 *See* Bias Procedures, *supra* note 119, at 49,187; *supra* Part II.B.2.

159 *See* Christopher Taffe, Asst. U.S. Att'y, Oral Arguments on Cross-Motions for Judgment on the Pleadings (Aug. 2003), Pronti v. Barnhart, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (No. 02-6309L(F)) (transcript on file with Court Reporter to Judge David G. Larimer, United States District Court for the Western District of New York) (oral arguments attended by author).

160 *See, e.g.*, Small v. Sullivan, 820 F. Supp. 1098 (S.D. Ill. 1992); Kendrick v. Sullivan, 784 F. Supp. 94 (S.D.N.Y. 1992); Grant v. Sullivan, 720 F. Supp. 462 (M.D. Pa. 1989). The *Pronti* suit might have been brought as a class action except for the fact that Pronti was

even be brought in the Social Security context; there are compelling statutory arguments supporting the contention that 42 U.S.C. § 405(g) does not authorize class action lawsuits. First, the statute authorizes suit by "[a]ny individual" for judicial review of "any final decision . . . to which [the plaintiff] was a party."[161] And, upon review, the court can "enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security."[162] This language suggests provision for only individual suits and individual decisions. Nevertheless, the Supreme Court has ruled that the Federal Rules of Civil Procedure permit class action suits in *all* civil actions[163]—which includes, by definition, Social Security disability appeals[164]—and there is nothing explicit in the Social Security statute suggesting otherwise.

Despite the availability by Supreme Court interpretation, class actions are likely not the end-all to ALJ general bias. As the Third Circuit made clear in *Grant*, a Social Security disability appeal simply brought as a class action is not released from the substantive evidentiary restrictions of the statute; namely, the district court is bound to an examination of the records produced at the administrative hearings.[165]

Bringing a class action suit in a general bias case is not without benefits, however. Class actions place evidence from multiple cases before the district court—exactly the broad type of evidence needed for the court to reverse or remand an ALJ's decision on the ground of general bias.[166] By uniting many claimants' cases, the district court may, within the statutory limits, collectively consider the facts of each case. If but one piece of evidence in the record of each case tended to show an ALJ's general bias, a class action could conceivably cull

represented by the federal Legal Services Corporation, which under federal law is prohibited from bringing class action lawsuits. *See* Legal Services Corporation Act, 42 U.S.C. § 2996e(d)(5) *et seq.* (2000); 45 C.F.R. § 1617.3 (2004).

161 42 U.S.C. § 405(g) (2000).

162 *Id.*

163 *See* FED. R. CIV. P. 23; Califano v. Yamasaki, 442 U.S. 682, 699–700 (1979); *see also* FED. R. CIV. P. 1 (providing that the rules "govern the procedure in the United States district courts in *all* suits of a civil nature" (emphasis added)).

164 *See* 42 U.S.C. § 405(g) (2000) ("Any individual . . . may obtain a review of [an ALJ's decision] by a civil action . . . .").

165 *See* Grant v. Shalala, 989 F.2d 1332, 1339–44 (3d Cir. 1993); *supra* notes 38–40 and accompanying text.

166 *See* Miller v. Poretsky, 595 F.2d 780, 796 (D.C. Cir. 1978) (Robinson, J., concurring) ("Absent something amounting well nigh to an open admission of discriminatory purpose, victims may find it virtually impossible to prove that fact unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others."); *supra* notes 18–23 and accompanying text.

enough evidence to persuade a district court that an ALJ was generally biased.[167]

Even with the fodder additional cases may provide, however, the task of proving general bias remains formidable—especially when the administrative record is unlikely to contain evidence of the type necessary. For instance, the most damaging evidence in *Grant* was the testimony from ALJ Rowell's co-workers,[168] yet the Third Circuit roundly condemned the use of such depositions to "probe the mind of an ALJ."[169] Ultimately, the district court was only able to obtain that evidence through reference to the Social Security Administration's record of investigation.[170] And it is unclear whether the Administration will permit such use in the future.[171]

Likewise, the most persuasive evidence in *Pronti* is the exceptionally disparate approval rates of ALJ Russell.[172] In order to determine such rates, however, the calculation requires the inclusion of those cases both denied *and* approved. Additionally, the national or regional rate of denial—which is necessary for comparison purposes—cannot be part of *any* claimant's administrative record because such information is not "material."[173] Furthermore, if one wished to conduct the statistical analysis necessary to correlate denials with variables such as economic class (or any other group which may be the subject of an ALJ's general bias), one would need to include *approved* cases as well as those denied. Claimants who were awarded benefits would certainly not (and indeed could not) appeal their cases. Because such claimants would not be members of the class, their records would not be available to the court.

III
UNEXPLORED RELIEF: THINKING OUTSIDE 405(G)

Given the inadequacy of the conventional and near-conventional methods available to address an ALJ's general bias, claimants may be forced to contemplate unorthodox and perhaps untested methods. This Part presents two possible solutions—two causes of action independent of the Social Security statute and regulations.[174] By bringing

167 This at least partly took place in *Grant*. Recall the numerous references to many *separate* decisions of ALJ Rowell in which he labeled claimants as "prevaricators," "malingerers," and as having "no-work lifestyles." *See supra* Part I.C.1.

168 *See supra* notes 53–63 and accompanying text.

169 *Grant v. Shalala*, 989 F.2d at 1344–45.

170 *See* Grant v. Comm'r, 111 F. Supp. 2d 556, 558–64 (M.D. Pa. 2000).

171 *See supra* notes 157–59 and accompanying text.

172 *See supra* notes 90–97 and accompanying text.

173 *See supra* notes 115–17 and accompanying text.

174 Potential remedies via the Merit Systems Protection Board, which has the power to discipline ALJs, are outside the scope of this Note. Only an agency can initiate a proceed-

these actions, a claimant theoretically would be freed from the statutorily imposed evidentiary restrictions normally present in a Social Security disability claim appeal. This Part only begins the exploration necessary to evaluate the efficacy of these causes of action in the Social Security context. Whether courts will agree with their viability remains to be seen.

A. *Bivens* Action

Because ALJ general bias is a violation of due process, basing a cause of action directly on the Constitution is an appealing solution. Social Security ALJs are not state officials, however, so the traditional 42 U.S.C. § 1983 cause of action is not available against them.[175] There appear to be no further statutory causes of action that can encompass claims of general bias against ALJs.[176] Nevertheless, since *Bell v. Hood*,[177] the Supreme Court has recognized that a cause of action against federal officials could rest directly on the Constitution.[178] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* extended the holding to include an action for money damages.[179] Both cases considered only Fourth Amendment violations (illegal searches) by federal agents, but the principle was extended in *Davis v. Passman*[180] to include violations of the Fifth Amendment's Due Process Clause. A *Bivens* action is brought against a federal officer in his individual capacity for damages caused by the unconstitutional actions of that officer.[181] Applying *Bivens* actions in the Social Security context, though, is not a matter of simply following precedent.

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ing at the board; individual claimants have no formal role in the proccss. *See* Golin, *supra* note 25, at 1555–57.

175 *See* Sheila M. Lombardi, Comment, *Media in the Spotlight: Private Parties Liable for Violating the Fourth Amendment*, 6 ROGER WILLIAMS U. L. REV. 393, 394 n.6 (2000) (stating that "*Bivens* applies to federal actors, whereas 42 U.S.C. § 1983 applies to state actors").

176 The Federal Tort Claims Act created the most widely known statutory cause of action providing for monetary relief. *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 9.2.3, at 616–30 (4th ed. 2003). Intentional torts, however, are not covered, *id.* at 619–20, and biased adjudication would certainly qualify as an intentional tort. Another statutory cause of action is contained in the Administrative Procedure Act. 5 U.S.C. § 702 (2000). Section 702 provides that: "A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." *Id.* Unlike *Bivens* actions, however, this cause of action is for "relief other than money damages." *Id.*

177 327 U.S. 678 (1946).

178 The Supreme Court hinted at the reality of an implied cause of action in *Ex parte Young*, 209 U.S. 123 (1908). The Court, however, did not acknowledge what it had actually done in *Ex parte Young* until *Bell v. Hood*. *See* 327 U.S. at 682–83.

179 403 U.S. 388 (1971).

180 442 U.S. 228 (1979).

181 *See Bivens*, 403 U.S. at 389. Therefore, a successful *Bivens* action in the Social Security context would not result in the claimant receiving regular benefits. Instead, the claimant would recover a one-time damage award (presumably equivalent to those benefits wrongly withheld up to that point).

Because *Bivens* actions are Supreme Court-created causes of action, they are subject to whatever restrictions the Court places on them, and the Court has subsequently indicated that the holding in *Bivens* was narrow.[182] The Court has refused to extend *Bivens* to First Amendment violations arising in the context of federal employment[183] or to actions by military personnel injured by the unconstitutional actions of their superior officers.[184] Additionally, in *Schweiker v. Chilicky*—a case that should give pause to Social Security bias victims—the Supreme Court declined to apply the logic of *Bivens* to Social Security disability claimants who alleged that their due process rights had been violated.[185]

The facts of *Schweiker* are distinguishable, however. *Schweiker* involved the procedure used by the Social Security Administration to review the propriety of previously-awarded disability benefits. After Congress recognized that "benefits were too often being improperly terminated by state agencies, only to be reinstated by a federal [ALJ],"[186] it enacted emergency legislation providing that a Social Security disability benefits recipient could not have his benefits immediately terminated simply upon a state agency's determination that he was no longer eligible.[187] Instead, payments would continue until an ALJ reviewed the case and approved the termination.[188] The claimants in *Schweiker* were unfortunately "caught in the middle" of the reform, their benefits having been terminated without the protection of Congress's new process.[189]

The Supreme Court, again expressing its reservation to "extend" *Bivens* "into new contexts," refused to grant relief to the claimants.[190] The Court rested its decision on its finding that Congress had already acted to correct the problems of the benefits review process.[191] Because Congress is "competen[t] at 'balancing governmental efficiency and the rights of [individuals,]'" the Court refused to extend the applicable context of *Bivens* actions.[192] The Court concluded that re-

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182 *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–67 (2001).

183 *See* Bush v. Lucas, 462 U.S. 367 (1983).

184 *See* Chappell v. Wallace, 462 U.S. 296 (1983).

185 *See* Schweiker v. Chilicky, 487 U.S. 412, 420–23 (1988).

186 *Id.* at 415.

187 *See id.*

188 *Id.*; *see* Pub. L. 97-455, § 2, 96 Stat. 2498 (codified as amended in scattered sections of 42 U.S.C.).

189 *See Schweiker*, 487 U.S. at 429.

190 *Id.* at 421, 429.

191 *See id.* at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

192 *Id.* at 425 (quoting Bush v. Lucas, 462 U.S. 367, 389 (1983) (second alteration in original)).

gardless of its opinion of the adequacy of the remedy provided, "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program."[193]

Although Congress had acted to correct the constitutional inadequacies of the process in *Schweiker*, it has not done so in the context of ALJ general bias. Nothing in the current statute indicates that Congress has noted or attempted to correct the problem. Indeed, the bias regulation conspicuously omits any reference to general bias and instead deals only with specific biases, such as monetary and personal interest.[194] Thus, the circumstances under which the *Schweiker* Court refused to extend *Bivens* are not applicable to general bias cases like *Grant* and *Pronti*. Therefore, under the Supreme Court's own reasoning, *Bivens* justifiably could be extended. And it would be a small extension at that—*Bivens* already applies to violations of Fifth Amendment Due Process.[195]

If one could convince a court to recognize a *Bivens* action for ALJ general bias claims, however, there would be an additional hurdle to clear. The Social Security statute removes federal question jurisdiction from the courts for cases "arising under" Title 42.[196] This presents a problem beyond finding a cause of action for a claim of general bias. "Jurisdiction" and "cause of action" are two separate questions, and both are required for a court to adjudicate a claim.[197] If *Bivens* only provides a claimant with a cause of action—not jurisdiction—then this "solution" to a Social Security claimant's conundrum would be fleeting. Indeed, in *Davis*, the Court appeared to address the need for both jurisdiction and a cause of action by noting—before creating a *Bivens*-type cause of action for Fifth Amendment viola-

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193 *Id.* at 429.

194 *See* 20 C.F.R. §§ 404.940, 416.1440 (2004).

195 *See* Davis v. Passman, 442 U.S. 228 (1979).

196 *See* 42 U.S.C. § 405(h) (2000); *see also* 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

197 *See* FED. R. CIV. P. 12(b); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (1999) (

> Nor, as many courts have noted, should a motion under Rule 12(b)(1) be confused with a motion under Rule 12(b)(6) to dismiss for failure to state a claim for relief under federal or state law because the two are analytically different; as many courts have observed, the former determines whether the plaintiff has a right to be in the particular court and the latter is an adjudication as to whether a cognizable legal claim has been stated.

); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

tions—that "the District Court had jurisdiction under 28 U.S.C. § 1331(a) to consider petitioner's claim."[198]

Given the withdrawal of federal question (§ 1331) jurisdiction by 42 U.S.C. § 405(h), such a distinction raises serious doubt about the viability of a *Bivens* action in the Social Security context.[199] Nevertheless, there may be hope for the beleaguered bias victim. The *Davis* Court did imply that any distinction between "cause of action" and "jurisdiction" is without difference in the context of a constitutional violation.[200] Bringing out the heady language of *Marbury v. Madison*, the Court quoted: "'The very essence of civil liberty' . . . 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'"[201] The Court then returned to *Bell v. Hood*, stating that "'it is established practice for this Court to sustain the *jurisdiction* of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do.'"[202] It thus appears that the Supreme Court sees no meaningfnl distinction between "jurisdiction" and "cause of action" in the context of a constitutional violation. Therefore, removal of federal question jurisdiction by 42 U.S.C. § 405(h) appears to be of no consequence here.[203]

Even if the Supreme Court determined, however, that *Bivens* provides merely a cause of action (and that a separate jurisdictional grant is needed), 28 U.S.C. § 1331 still should be sufficient to grant a court jurisdiction, despite the language in 42 U.S.C. § 405(h). Because federal courts are loathe to accept that Congress has removed jurisdiction to hear claims (especially constitutional claims), there is a well-established presumption against restrictions on court reviewability.[204]

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198 *Davis*, 442 U.S. at 236. The Court cited *Bell v. Hood* for this proposition, indicating that although the principle of the case provides a cause of action, it does not confer jurisdiction. *Id.* at 242.

199 The Supreme Court has already held that, whatever causes of action the Administrative Procedure Act may provide, it does not create subject matter jurisdiction for Social Security-related causes of action. Califano v. Sanders, 430 U.S. 99, 107–08 (1977).

200 *Davis*, 442 U.S. at 236–44.

201 *Id.* at 242 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

202 *Id.* (emphasis added) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

203 *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.4 n.18 (3d ed. 1999) (stating that, in *Bivens*, federal jurisdiction existed because the plaintiff's constitutional claim was substantial). The issue of Congress's ability to withdraw federal jurisdiction of constitutional claims is one of the most debated in all of American law. For an overview of the debate, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 342–45 & nn. 19–25 (5th ed. 2003). This Note obviously takes the not uncontroversial view that individuals *must* be able to bring their constitutional claims *somewhere*.

204 *See* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984).

For instance, in *Bowen v. Michigan Academy of Family Physicians*, the Court ruled that "clear and convincing" evidence is required "to overcome the 'strong presumption that Congress did not mean to prohibit all judicial review,'" thus preserving the courts' ability to review constitutional challenges to the administration of the Medicare statute.[205] In line with such a restrictive presumption, the "arising under" language must be read narrowly in jurisdictional restrictions. A constitutional claim does not "arise under" a statute at all; rather it "arises under" the Constitution and is thus not barred by a statutory jurisdictional restriction. And though *Bowen* was technically a Medicare case, it dealt with the exact same Social Security jurisdiction statute relevant to disability claims.[206] Indeed, the Ninth Circuit has held, and the Supreme Court did not disagree, that the jurisdictional bar of § 405(h) is of no consequence when adjudicating constitutional claims in the Social Security context.[207]

Interestingly, victims of ALJ general bias may have been unwittingly pleading *Bivens*-type causes of action for some time. Claimants in *Small*, *Kendrick*, *Grant*, and *Pronti* all pleaded their cause of action not only on the usual 42 U.S.C. § 405(g) substantial evidence ground, but also on the Due Process Clause of the Fifth Amendment.[208] Oddly enough, none of these cases squarely confronted the *Bivens* issue—the opinions addressed only those aspects relating to the Social Security Act.[209] Although the plaintiffs failed to indicate clearly their

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205 476 U.S. 667, 681 (1986) (quoting Dunlop v. Bachowski, 421 U.S. 560, 567 (1975)).

206 42 U.S.C. § 405(h) (2000). This statute is incorporated into the Medicare statute only by reference. *See id.* § 1395.

207 *See* Schweiker v. Chilicky, 487 U.S. 412, 419 (1988); *cf.* Lowry v. Apfel, No. CV-99-1210-ST, 2000 WL 730412, at *8–11 (D. Or. June 7, 2000) (holding that a lawyer is not precluded by 42 U.S.C. § 405(h) from bringing *his own* constitutional claim in connection with a Social Security disability case).

208 *See* Small v. Sullivan, 820 F. Supp. 1098, 1103 (S.D. Ill. 1992) ("The plaintiffs seek a declaratory judgment that ALJ Ritter is biased against disability claimants generally and that such bias has deprived them of their right to fair hearings before an impartial judge in violation of . . . the Due Process Clause of the Fifth Amendment to the United States Constitution."); Kendrick v. Sullivan, 784 F. Supp. 94, 97 (S.D.N.Y. 1992) ("Plaintiffs claim that ALJ Anyel's bias and refusal to apply applicable law deprives claimants of fair hearings on their claims, in violation of the Social Security Act and the due process clause of the Fifth Amendment to the United States Constitution."); Grant v. Sullivan, 720 F. Supp. 462, 463–64 (M.D. Pa. 1989) (

> The Plaintiffs-claimants assert in this case, as others have in the past, that because of ALJ Rowell's bias, they have been and will be denied fair Social Security disability claim hearings in violation of the Social Security Act and the due process clause of the Fifth Amendment to the United States Constitution.

); *Pronti* Am. Compl., *supra* note 75, ¶ 36 ("The defendant Commissioner has not provided a fair forum in ALJ Franklin T. Russell['s courtroom] for the claimant to receive a fair hearing . . . in violation of the due process clause of the Fifth Amendment of the Constitution . . . .").

209 To be fair, the court in *Pronti* did touch on the issue. The *Pronti* decision noted that the plaintiff had asserted § 1331 federal question jurisdiction in the course of pleading

desire to pursue a *Bivens* action, given the liberal manner in which pleadings are to be read, such poor pleading alone should not prevent the court from addressing a claim founded directly on the Fifth Amendment.[210]

With a valid cause of action separate from the Social Security Act and regulations, claimants would be free to discover and present evidence relevant to their claim—namely, evidence of general bias in their case and others. Claimants would no longer be bound to the administrative record because the cause of action would not be subject to the restrictions placed on claims arising under the Social Security Act. Thus, a *Bivens* action could be a viable means to redress ALJ general bias.

B. Writ of Mandamus

Another possible remedy for Social Security disability claimants who have been victims of ALJ general bias is a writ of mandamus. The writ is normally issued to compel an official to perform a duty which he refuses otherwise to perform.[211] Chief Justice Taft in *Work v. United States ex rel. Rives* wrote that

> [m]andamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injuction or mandamus to keep within them.[212]

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a due process violation. Pronti v. Barnhart, 339 F. Supp. 2d 480, 499 (W.D.N.Y. 2004). The court, however, never discussed § 1331 (where *Bivens* necessarily would have been raised), focusing instead on its potential mandamus jurisdiction. *Id.* at 499–500; *see also infra* note 230 and accompanying text (discussing *Pronti*'s statements regarding mandamus relief).

210 *See* FED. R. CIV. P. 8(a)(2) (requiring that a party set forth "a short and plain statement of the claim showing that the pleader is entitled to relief"); Conley v. Gibson, 355 U.S. 41, 47 (1957) (

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

); *see also* FRIENDENTHAL ET AL., *supra* note 203, § 5.7 (describing the basic requirements of notice pleading).

211 LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 176 (1965). Note that, like a *Bivens* action, this remedy would not result in the awarding of regular Social Security disability benefits. Rather, the claimant would receive a court ruling that an ALJ is indeed biased—a big feat given the procedural problems previously explored in this Note—and an order that the hearing be conducted absent such bias.

212 267 U.S. 175, 177 (1925).

The remedy is difficult to obtain; the Supreme Court has labeled it "extraordinary."[213] It is "extraordinary" not only because the qualifications for obtaining the writ are so strenuous, but also because "in the minds of some American judges[,] there have been difficulties in coming to a coherent view of mandamus."[214] The primary source of this difficulty may be the concern that mandamus is inconsistent with the separation of powers doctrine.[215] Nevertheless, since *Marbury v. Madison*[216] the Supreme Court has acknowledged that a writ of mandamus is appropriate in certain circumstances. The usual requirements for a writ of mandamus include: (1) that the claim be clear and certain; (2) that the officer's duty be ministerial and free of discretion; and (3) that no other remedy is available.[217] But "[e]ven if a plaintiff fails to satisfy this three-part test, the court still has discretion whether to grant mandamus relief."[218]

Applying these elements to the Social Security disability context can yield somewhat promising results. First, a genuine claim that an ALJ possessed a general bias would seem to be a clear violation "certain" to warrant remedy. The second requirement, that the officer must have a clear, nondiscretionary duty to act,[219] should also be fairly easy to meet; it is beyond question that an ALJ has an explicit, nondiscretionary duty to conduct a fair and impartial hearing.[220] Usually, however, courts add an additional test to this element: the officer must presently be refusing to perform the duty in question.[221] Here, claimants may face trouble. Most certainly, few ALJs will openly *refuse* to give a claimant a fair hearing. The refusal requirement, however, is only a prong of the mandamus test, not a *jurisdictional* bar. Therefore, a claimant would have the opportunity, after discovery, to prove the

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213 Califano v. Yamasaki, 442 U.S. 682, 698 (1979); *see also* Kerr v. U.S. Dist. Court for the N. Dist. of Cal., 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.").

214 JAFFE, *supra* note 211, at 178.

215 *See id.*

216 5 U.S. (1 Cranch) 137 (1803).

217 Lowry v. Apfel, No. CV-99-1210-ST, 2000 WL 730412, at *11 (D. Or. June 7, 2000) (citing Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986)); *see also* Heckler v. Ringer, 466 U.S. 602, 616 (1984) (stating that mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty"). Formulation of the elements for when the writ may issue takes various forms. *E.g.*, Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972) ("(1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.").

218 *Lowry*, 2000 WL 730412, at *11; *see also Kerr*, 426 U.S. at 403 ("[I]t is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.").

219 *See Ringer*, 466 U.S. at 616.

220 *See supra* notes 6–7 and accompanying text.

221 *See* JAFFE, *supra* note 211, at 176.

ALJ's recalcitrance and may be able to produce enough evidence to raise a strong inference that an ALJ was affirmatively refusing to perform his duty.

The real battle, however, would be over the final criterion: a claimant must have absolutely no other adequate avenue for relief.[222] The Social Security Administration would argue that claimants have many available and adequate remedies for dealing with ALJ general bias, including recusal, the Appeals Council, the procedure in 57 Fed. Reg. 49,186, and federal court review. Such an argument, though, should be easily dismissed given the review of those remedies in Part II. Not only is there no *adequate* alternative remedy for such claimants, there appears to be no remedy *at all.* Only the procedure outlined in 57 Fed. Reg. 49,186 comes close to providing an avenue to remedy bias, but it is nonetheless *inadequate.*[223]

With mandamus thus appearing proper, the final questions are jurisdictional ones. As originally enacted, the Social Security Act precluded judicial review pursuant to "section 24 of the Judicial Code of the United States."[224] In 1948, those words were replaced with "section 1331 or 1346 of Title 28."[225] But only later, in 1962, was mandamus first codified—in Title 28, section 1361.[226] Thus, because § 1361 was codified after §§ 1331 and 1346 were specifically inserted in 42 U.S.C. § 405(h), there is some question as to whether the new language (which references only §§ 1331 and 1346, but not § 1361) was meant to be only a more specific way of saying the same thing as the previous language ("section 24 of the Judicial Code," which encompassed mandamus) or whether it was meant to restrict jurisdiction to only those cases brought under §§ 1331 and 1346.

The Supreme Court has never ruled whether a writ of mandamus can issue in the Social Security disability context.[227] The Third Circuit

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222 *Ringer*, 466 U.S. at 616.

223 Albeit in a different context, the *Lowry* court rejected the contention that the procedures in 57 Fed. Reg. 49,186 are sufficient to preclude mandamus relief. *See* 2000 WL 730412, at *11–12.

224 *See* Elliot v. Weinberger, 564 F.2d 1219, 1227–28 & n.12 (9th Cir. 1977).

225 Act of June 25, 1948 to Revise, Codify, and Enact Into Law Title 28 of the United States Code Entitled Judicial Code and Judiciary, Pub. L. 80-773, 62 Stat. 869.

226 Mandamus and Venue Act, Pub. L. No. 87-748, 76 Stat. 744 (1962); *see* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 311–12 (1967).

227 *See Ringer*, 466 U.S. at 616 ("Assuming without deciding that the third sentence of § 405(h) does not foreclose mandamus jurisdiction in all Social Security cases . . . ."); Califano v. Yamasaki, 442 U.S. 682, 698 (1999) ("[W]e do not reach the question whether mandamus would otherwise be available."); Mathews v. Eldridge, 424 U.S. 319, 332 n.12 (1976) ("Given our conclusion that jurisdiction in the District Court was proper under § 405(g), we find it unnecessary to consider Eldrige's contention that notwithstanding § 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. § 1361 . . . .").

skirted the issue in *Grant* but did not foreclose it.[228] Some courts, however, have explicitly held that mandamus jurisdiction indeed lies.[229] In fact, the district court in *Pronti* recently implied that mandamus would be a proper remedy for biased ALJs. In sweeping dictum, the clearly agitated court embraced mandamus as a potential means for the court to address the bias of ALJ Russell:

> The Court . . . is not constricted by § 405(h). The allegations of bias are significant enough that, if they are not addressed adequately by the Commissioner, this Court could proceed *de novo* to consider the bias issue in connection with the alternative causes of action that have been filed.
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> . . . Although I have opted to remand the issue of general bias to the Commissioner, I could have done otherwise.
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> . . .
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> . . . [I]t should be clear that plaintiffs may be entitled to have their due process claims heard in the district court directly, especially if the Commissioner is unable or unwilling to conduct a full and fair review of these most serious issues relating to bias.[230]

This is the strongest endorsement of mandamus jurisdiction in the Social Security disability context to date—even if dictum—and is the first time it has been seriously threatened in response to the general bias of an ALJ. Mandamus, therefore, seems ripe for exploration and may fully be tested in the near future.

CONCLUSION

After delving headlong into the problems facing Social Security disability claimants confronted with a generally biased ALJ, it warrants a step back to realize the full implications of the solutions presented. Effectively addressing the issue of ALJ general bias undoubtedly would

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228 *See* Grant v. Shalala, 989 F.2d 1332, 1342 (3d Cir. 1993).

229 *See* Lopez v. Heckler, 725 F.2d 1489, 1507–08 (9th Cir. 1984), *vacated on other grounds*, 496 U.S. 1082 (1984); Dietsch v. Schweiker, 700 F.2d 865, 868 (2d Cir. 1983); Elliot v. Weinberger, 564 F.2d 1219, 1227–28 & n.12, *modified sub nom.* Califano v. Yamasaki, 442 U.S. 682 (1979); DeLao v. Califano, 560 F.2d 1384, 1388 (9th Cir. 1977); White v. Matthews, 559 F.2d 852, 856 (2d Cir. 1977); Cockrum v. Califano, 475 F. Supp. 1222, 1230–31 (D.D.C. 1979) (dictum); Lyons v. Weinberger, 376 F. Supp. 248, 255 (S.D.N.Y. 1974).

Even if § 1361 mandamus relief were held not to lie in the Social Security context because of 42 U.S.C. § 402(h), the Administrative Procedure Act provides for both jurisdiction and a cause of action for relief similar to mandamus. *See* Administrative Procedure Act § 703, Pub. L. No. 79-404, 60 Stat. 237 (1946) (providing for relief "including actions for declaratory judgments or writs of prohibitory or mandatory injunction"); *Mathews*, 424 U.S. at 332 n.12 ("Given our conclusion that jurisdiction in the District Court was proper under § 405(g), we find it unnecessary to consider Eldrige's contention that notwithstanding § 405(h) there was jurisdiction over his claim under . . . the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*").

230 Pronti v. Barnhart, 339 F. Supp. 2d 480, 499–500 (W.D.N.Y. 2004).

require that ALJs be subject to greater scrutiny and higher objectivity standards. But courts historically have been averse to scrutinizing the internal decisionmaking of judges—even ALJs.[231]

Indeed, courts have dealt with a similar issue in Social Security Administration disability cases before. In the 1980s, the Social Security Administration undertook the "Bellmon Review" program to examine ALJs whose rate of approval was thought to be *too high*.[232] At least four courts passed on the legality of the program and generally found it to be invalid.[233] The main concern was the program's impact on the independence and impartiality of ALJs.[234] Using statistics to "evaluate" ALJs was especially controversial.[235]

The extreme nature of the biases demonstrated in *Grant* and *Pronti* indicates that some oversight is in order. Unfairness to disability claimants by denying needed assistance surely carries more weight than unfairness to ALJs by denying their ability to wield unacceptable prejudice. Any valid concern that the solutions proposed in this Note would negatively impair the independence and impartiality of ALJs should be allayed by courts' institutional aversion to them. Finally,

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231 *See* Grant v. Shalala, 989 F.2d 1332, 1345 (3d Cir. 1993) (

> In short, it appears that the plaintiffs made very extensive efforts to probe the thinking and decision making process of an officer occupying a position described by the Supreme Court as "functionally comparable" to that of a judge.
>
> Such efforts to probe the mind of an ALJ, if allowed, would pose a substantial threat to the administrative process. Every ALJ would work under the threat of being subjected to such treatment if his or her pattern of decisions displeased any administrative litigant or group with the resources to put together a suit charging bias. Every ALJ would know that his or her staff members could be deposed and questioned in detail about the ALJ's decision making and thought process, that co-workers could be subpoenaed and questioned about social conversations, that the ALJ's notes and papers could be ordered produced in discovery, and that any evidence gathered by these means could be used, in essence, to put the ALJ on trial in district court to determine if he or she could be barred from performing the core functions of his or her office. This would seriously interfere with the ability of many ALJs to decide the cases that come before them based solely on the evidence and the law.

(footnote omitted)).

232 *See* W.C. v. Heckler, 629 F. Supp. 791, 793–94 (W.D. Wash. 1985) (describing the Bellmon Review Program); *see also* Stieberger v. Heckler, 615 F. Supp. 1315, 1376–79 (S.D.N.Y. 1985) (same), *vacated on other grounds*, 801 F.2d 29 (2d Cir. 1986).

233 *See* Barry v. Bowen, 825 F.2d 1324, 1330–31 (9th Cir. 1987); Salling v. Bowen, 641 F. Supp. 1046, 1055–56, 1073–74 (W.D. Va. 1986); Assoc. of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1133–36, 1143 (D.D.C. 1984). *But see* Nash v. Bowen, 869 F.2d 675, 678–81 (2d Cir. 1989) (upholding the validity of the Bellmon Review Program only after accepting the Secretary's claim that the program did not seek to "coerce ALJs into . . . deciding more cases against claimants").

234 *See* L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 617–18 (1986).

235 *See id.* at 605–06.

the benefit of any remaining doubt should surely be placed with an Article III federal judge or an individual claimant, not an Article I ALJ.[236]

This Note has shown that the current evidentiary allowances are inadequate to address ALJ general bias. There are many conceivable solutions. The Social Security Administration could promulgate regulations that would allow a claimant effectively to challenge a generally biased ALJ. Alternatively, Congress could mandate that the Social Security Administration undertake the task—or even craft the procedures on its own. Additionally, courts could reinterpret the evidentiary restrictions imposed by the statute so as to allow claimants an easier method by which to address the problem. All of these possibilities are viable, but each requires action by parties other than claimants. This Note has suggested two additional solutions that plaintiffs could attempt under current doctrine: *Bivens* actions and writs of mandamus. Until Congress or the Social Security Administration acts, plaintiffs can fare no worse by attempting either of these solutions than they do under the current system.

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236 The Supreme Court has held that ALJs were intended to be merely a "'special class of semi-independent subordinate hearing officers,'" not on par with Article III federal judges. Ramspeck v. Fed. Trial Examrs. Conference, 345 U.S. 128, 132 (1953) (citing Legislative History of the Administrative Procedure Act). As a starting point in the debate over the proper deference afforded ALJs, see Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863 (1995); Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 937–48 (1990).