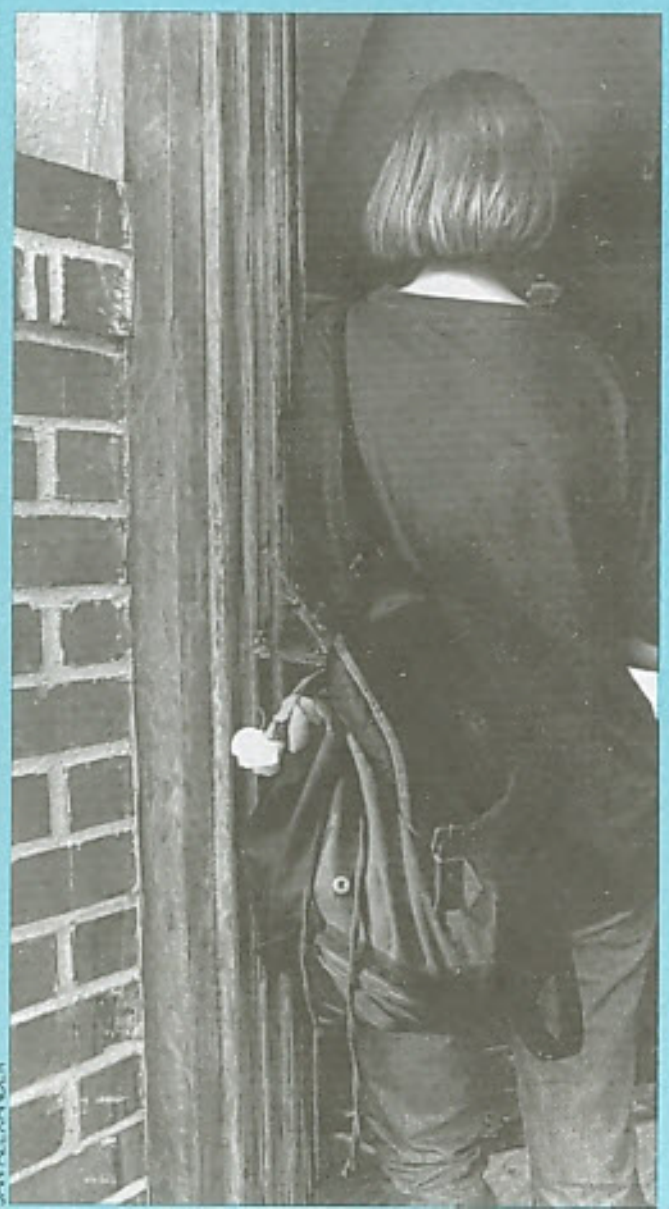
Clearinghouse Review

NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC.

Volume 27 ■ Number 12

April 1994



JAN ALEXANDER

Protecting Battered Women And Their Children

Defining and Addressing ALJ Bias and Unfitness in the Social Security System

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I. Introduction

What recourse does a social security claimant have in the following situation?

-- [The ALJ] believes that claimants living in Hispanic, black, or poor white communities are only "attempting to milk the system," that they are "perfectly capable of going out and earning a living," that they "prefered [sic] living on public monies," "that [the ALJ] had no intention of paying them" and that "[the ALJ] did not care what the evidence showed." /1/

The right to a hearing before an unbiased decisionmaker is a basic element of constitutional due process. /2/ This guarantee is also at the core of the Administrative Procedure Act (APA), which contemplates impartial fact finding and adjudication by independent ALJs, free from agency coercion or influence. /3/ By utilizing APA-protected ALJs, SSA has acknowledged a claimant's right to a full and fair hearing by an impartial adjudicator in social security proceedings. /4/

Recently, a number of individual incidents, several government reports, and litigation have revealed that a certain percentage of ALJs may be biased or unfit in ways that interfere with the fairness of SSA's administrative process. Since that process relies upon the integrity of each and every fact finder, the existence of bias and unfitness, even among a small number of adjudicators, taints the integrity of the entire system.

A 1992 report by the United States General Accounting Office (GAO) indicates that race appears to be a factor in the outcome of disability decisions at the ALJ level. /5/ GAO's study found that ALJs generally allowed benefits to African American claimants at a lower rate than they allowed benefits to white claimants. In Title II cases, 55 percent of African American claimants versus 66 percent of white claimants were allowed benefits. In SSI cases, 51 percent of African American claims versus 60 percent of whites were allowed. /6/ GAO concluded that the racial disparity in hearing level allowance rates /7/ could not be rationalized, as it could at the other administrative levels, by demographic characteristics (i.e., age, education, sex, geographic location, and percentage of urban population) and impairment severity. /8/ Noting that "even the appearance of discrimination is intolerable," GAO recommended that "the Commissioner further investigate the racial difference in

allowance rates at the ALJ level and, if needed, take appropriate actions to correct and prevent any unwarranted disparities." /9/

In another 1992 report, the Ninth Circuit Gender Bias Task Force raised serious allegations of ALJ bias against female claimants in social security disability hearings within Ninth Circuit states. /10/ Such allegations may be related to the fact that only 6 percent of all federal ALJs are female. /11/

In addition to these reports, the litigation concerning particular ALJs also illuminates the problem of ALJ bias and unfitness. /12/ Four cases have been filed in which plaintiffs alleged that the ALJ was biased and not an impartial adjudicator and, thus, that their right to a fair hearing had been violated. The plaintiffs' allegations were supported by evidence of numerous deficiencies in the hearings. The ALJs involved have been charged with forcing unrepresented claimants to waive important rights, failing to obtain interpreters, engaging in rude and insensitive behavior, failing to elicit important medical information, routinely finding the claimant's testimony not credible, omitting from decisions important information favorable to the claimant, routinely ignoring the law, and failing to follow instructions from the courts and the Appeals Council. /13/

Despite the studies and the litigation to date, the actual number of ALJs who may be biased or unfit is difficult to assess. Only four of the more than 800 SSA ALJs have become the subject of class action lawsuits, and the reports have not enumerated the exact number of ALJs or specified the particular ALJs whose conduct may be considered in any way suspect.

Any analysis of ALJ bias and unfitness must also take into account the history of tension between SSA and its ALJs. The face-to-face hearing before an ALJ provides many claimants with their only administrative opportunity to have an impartial adjudicator review their case, and historically, ALJs, on average, have allowed a high number of claims. /14/ During the mid-1980s, SSA utilized the "Bellmon review" program to pressure ALJs to deny claims by targeting particularly high-allowance-rate ALJs for automatic review of all their decisions by the Appeals Council. /15/ SSA abandoned Bellmon review after several courts held that it infringed on ALJs' independence because it biased the decisionmaking process against claimants. /16/ Notwithstanding the official abandonment of Bellmon review, advocates remain concerned about SSA's continued tolerance of ALJs who persistently deny meritorious claims. Advocates also remain alert to the possibility that SSA may seek to revive Bellmon review or initiate other forms of pressure that could contribute to ALJ bias against claimants.

This article describes the problem of ALJ bias and unfitness, and the degree to which current procedures address the problem. It also discusses litigation and legislative efforts that seek to establish an improved complaint procedure with relief for aggrieved claimants.

II. Defining and Recognizing ALJ Bias and Unfitness

Bias in the social security hearing system is evidenced through conduct or a pattern of decisionmaking which deprives claimants of the right to a fair hearing because the ALJ has prejudged the case and has thus decided the claim for reasons other than the applicable legal rules and the evidence in the record. /17/ Bias is manifested in a number of ways. "General bias" may be

evidenced against groups or categories of claimants based on specific characteristics such as race, /18/ ethnicity, gender, /19/ specific impairments, financial status, /20/ or pro se status. /21/ In addition, an ALJ may also have a "personal bias" against a particular claimant or representative.

The ALJ may also be generally "unfit" to hear cases by virtue of being grossly incompetent, ignorant, volatile, insulting, or otherwise engaging in inappropriate behavior.

ALJ bias or unfitness may be evidenced through acts and patterns of misconduct including:

- ignoring evidence favorable to the claimant;
- making unfavorable credibility findings;
- refusing to admit relevant documents into the record;
- discarding relevant documents;
- consistently making errors against the claimant's interest;
- intimidating unrepresented claimants into waiving important rights (e.g., to an oral hearing, to counsel, to translation, to development of the hearing record, to submit supplementary evidence);
- engaging in inappropriate conduct during the hearing, such as insulting or cutting off the claimant; and
- refusing to apply controlling law, including the law of the case.

III. Current Procedures for Addressing ALJ Bias and Unfitness

A. Requesting Disqualification Prior to Hearing

Pursuant to regulations and the HALLEX, /22/ a claimant may ask an ALJ to disqualify himself or herself prior to the hearing due to "partiality or prejudice." /23/ Requests for disqualification may lead to appointment of a different ALJ or have the salutary effect of inducing the ALJ to rectify his or her behavior. Making the request also prevents SSA from subsequently alleging that the claimant failed to exhaust administrative remedies.

Nevertheless, advocates have been understandably hesitant about making disqualification requests. For example, if an ALJ granted a disqualification request based on allegations of bias or unfitness, the ALJ would have trouble justifying continuing to preside in other cases, so few ALJs typically grant such requests. Additionally, when presented with a disqualification request, an ALJ could become more hostile toward the claimant or representative. Another drawback with the disqualification approach is that it is ineffective for the many claimants, especially those who are unrepresented, and those who are unaware of the ALJ's bias or unfitness at the time of the hearing.

Thus, one court has specifically rejected SSA's argument that the disqualification procedure is adequate to deal with allegations of bias. /24/

B. Requesting Review by the Appeals Council

If an adverse hearing decision is appealed on the merits, claims of bias and unfitness may be raised before the Appeals Council. /25/ In October 1990, after several class actions had been filed raising SSA's failure to address ALJ bias and unfitness comprehensively, SSA issued a HALLEX provision describing the duties of Appeals Council members who are concerned about an ALJ's conduct. The 1990 HALLEX instruction represents SSA's acknowledgement, for the first time, of the need to address the problem of ALJ bias and unfitness. Pursuant to the HALLEX instruction, the Appeals Council may conduct an "inquiry" into a suspect ALJ. /26/ Thus, raising a colorable claim of bias or unfitness at the Appeals Council level may result in a remand for a new hearing before a different ALJ. /27/

Unfortunately, the HALLEX provision sets forth only minimal instructions that provide no detailed procedure, and fails to ensure that claims of ALJ bias and unfitness will be seriously investigated. While the HALLEX procedure has rarely, if ever, been used, similar procedures were used in two cases before the HALLEX instructions were issued. /28/ Both inquiries proved to be inadequate. Despite the fact that in each case very serious problems regarding the specific ALJ's pattern of decisionmaking were found to exist, the Appeals Council concluded that the ALJ was not "biased" and failed to provide any relief to the claimants affected by the ALJ's improper decisionmaking.

C. Individual Judicial Appeals

Bias and unfitness can be litigated in individual civil actions appealing a final decision of the Secretary, by alleging violations of constitutional due process and agency regulations that impose an underlying duty on SSA to provide claimants with a full and fair hearing before an impartial adjudicator. The courts can order SSA to provide documents responsive to discovery requests concerning bias and unfitness. /29/ Bias and unfitness can also be highlighted in requests for attorney fees filed pursuant to the EAJA. /30/

If a court finds that an individual was denied the right to a hearing before an impartial adjudicator, the case is often remanded for a new hearing before a different ALJ or is reversed outright and the claimant awarded benefits. /31/ Litigating bias in individual civil actions creates a record that may eventually provide the basis for broader relief. /32/ However, despite individual successes, an individual court order ultimately provides relief only to the plaintiff in the particular case and does not address the problem of the ALJ's continuing conduct toward other claimants.

D. Interim Complaint Procedure

Following a congressional hearing in September 1992, SSA published an "interim procedure" on October 30, 1992, to deal with allegations of bias or misconduct by ALJs. /33/ The procedure

provides that a complaint may be filed at any SSA office or Office of Hearings and Appeals (OHA) or with the assistance of a teleservice operator. /34/ SSA must place posters in OHA waiting rooms notifying claimants of the procedure for filing a complaint.

Complaints are handled initially by the regional chief ALJ who investigates and recommends to the chief ALJ of OHA whether to investigate further. If a complaint is filed while the hearing decision is pending, the claimant will be notified of the results of the investigation. If filed while a request for review is pending before the Appeals Council, the complaint will be considered as an additional ground in support of the request for review but will also be fully investigated apart from proceedings on the request. Theoretically, the chief ALJ could recommend that SSA remove or suspend the ALJ. However, the interim procedure sets forth no details for conducting the investigation or how recommendations are to be implemented.

E. Merit Systems Protection Board

Pursuant to the APA and implementing regulations, the Merit Systems Protection Board (MSPB), upon request from an agency, may authorize the agency to remove or suspend an ALJ for "good cause." /35/ While MSPB proceedings may be initiated only by the employing agency, the agency could be prompted to act regarding an ALJ's conduct based on evidence obtained during the HALLEX or "interim complaint" proceedings.

From a claimant's perspective, the MSPB process is inadequate for several reasons. While SSA has initiated many cases with MSPB for disciplinary reasons, very few of the SSA referrals have been based on an ALJ's apparent bias or unfitness. /36/ In addition, claimants, their representatives, or members of the public may not file complaints with MSPB. Finally, MSPB has no authority to provide relief to claimants affected by the ALJ's unlawful conduct since the only issue in the MSPB proceeding is whether there are grounds to discipline the ALJ.

F. Class Action Option

Given the limitations of the current administrative complaint procedures, several challenges to ALJ bias and unfitness have been filed as federal class actions. In these cases, the plaintiffs argue that their statutory and constitutional right to a fair hearing before an impartial adjudicator has been violated. The relief sought falls into several categories: (1) protect future class members' rights by "removing" the particular ALJ from all adjudicating duties; /37/ (2) reopen all of the ALJ's decisions in class members' cases and schedule de novo hearings; and (3) prevent any preclusive effect of the ALJ's decisions with regard to future claims. /38/ In connection with these lawsuits, SSA has proposed less dramatic remedies (that notably provide no relief for aggrieved individuals), such as: (a) "retraining" the ALJ; /39/ (b) heightened scrutiny of the ALJ's decisions by the Appeals Council; /40/ (c) suspending the ALJ; /41/ and (d) transferring the ALJ to another OHA office. /42/

The class action option also has limitations. The courts have reached differing results regarding their ability to adjudicate class actions alleging bias and unfitness. The only decision to date by a federal court of appeals held that the district court's jurisdiction is limited to review of the

Secretary's final decision (i.e., the Appeals Council's decision) on the issue of whether the ALJ is biased and that the district court may not conduct a de novo trial on the issue of bias. /43/ In one of the other lawsuits, the district court favorably resolved the individual plaintiff's claim but denied a motion to certify a class, thus terminating the action. /44/ However, in the two other lawsuits, the district courts have granted the plaintiffs' motions to certify a class and have denied the government's motions to dismiss. /45/

IV. Developing an Adequate Procedure to Address Complaints

While some procedures exist for raising complaints of ALJ bias or unfitness, no single procedure provides for an adequate forum. Various suggestions to improve the system have been made, including creation of an independent board to review complaints, with the authority to provide relief to aggrieved individuals (e.g., reopening claims, providing new hearings); requiring ALJs to serve a probationary period; and setting term limits for ALJs.

Congressional interest in the issue has provided an impetus for development of an adequate procedure. In response to the April 1992 GAO report on racial differences in disability allowance rates, the U.S. Senate held a hearing in September 1992 regarding allegations of bias in the social security disability program. /46/ The hearing was held by the same congressional subcommittee which, in the mid-1980s, uncovered "blatant" and "subtle" efforts by SSA pursuant to the Bellmon review program to pressure ALJs to deny disability claims. In reaffirming their position that SSA "must not intrude upon the legitimate independence" of ALJs, the subcommittee noted that the 1992 "hearing [was] in no way intended to impugn the integrity of the vast number of ALJs who often are the vanguard of fairness for thousands of disability claimants." /47/ The subcommittee nevertheless acknowledged that allegations existed that "bias has crept into the decisionmaking of some of the ALJs"; it characterized the alleged ALJ behavior as "outrageous," with "painful consequences for claimants." /48/

The hearing included testimony from various government officials and advocates for claimants. Advocates testified about specific cases in which claimants were subjected to biased and unfit behavior by ALJs and about the inadequacies of the current complaint procedures, namely, claimants' lack of awareness that any procedure exists; existing procedures that are vague, applied on an ad hoc basis, or do not provide adequate and appropriate relief to aggrieved individuals; and the existing limited review that is not performed by impartial examiners. Their recommendations included (1) creating an independent board to review complaints; (2) creating a detailed procedure for filing complaints, and for review and investigation of complaints; and (3) giving the board authority, consistent with the APA, to make findings and recommendations regarding relief for aggrieved claimants and discipline of ALJs, . /49/

Testifying in response to questions regarding procedures to deal with complaints of bias, SSA admitted that the only existing procedures were "ad hoc interim" and had not been publicized. SSA also stated that it was developing a proposal for dealing with individual complaints of bias and was seeking input from a variety of different agencies, including MSPB, the Department of Justice, and EEOC. At the hearing, SSA announced that it would take at least six months to make the procedure

final and that it would publish an "interim procedure." /50/ This led to the publication in October 1992 of "SSA Procedures Concerning Allegations of Bias or Misconduct by ALJs." /51/

In November 1993, the U.S. Senate passed S. 486, a bill that would reorganize the federal administrative judiciary and create a uniform administrative law judge corps. /52/ The bill contains a complaint procedure with many of the basic requirements recommended by advocates, such as review of complaints by an independent board with the authority to recommend relief for aggrieved individuals. Speaking in support of the bill's complaint procedure, Senator William Cohen (R-Me.), one of the Senators who initiated the September 1992 hearing, described SSA's current "interim" procedure as "still [containing] basic flaws in how the agency handles these complaints that too easily allow an ALJ who is unfair or biased to go unsanctioned, and continue to hear disability cases." /53/

A complaint procedure with the basic requirements such as those included in S. 486 does not expose ALJs to excessive scrutiny. On the contrary, the procedure serves to place the ALJs in the same position as other federal and state decisionmakers. Every state and the District of Columbia have a complaint procedure and commission to deal with judicial misconduct, and the federal judiciary is subject to a detailed statutory complaint procedure. /54/

Primary provisions of the complaint procedure in S. 486 include:

- Rules of conduct. The Corps must adopt and issue rules of judicial conduct for ALJs that include standards governing "avoidance of bias or prejudice." /55/

- Review by an independent board. A complaints resolution board (CRB), comprised equally of ALJ and non-ALJ members, would deal with complaints concerning the conduct of ALJs. /56/ The bill thus comports with the experience of advocates who have found that a "peer review" approach does not adequately protect claimants.

The need for outside, impartial examiners has been nearly unanimously adopted by all state judicial conduct commissions that have recognized that judges may have a problem judging their own colleagues. As a result, 49 states have commissions with some combination of judges, attorneys, and public citizen members, with one state including no judges. In fact, when commission membership has been changed, the general trend has been to increase public participation. /57/ The policy reason behind this is obvious: public confidence in the integrity of the oversight process is increased.

- A procedure for filing and processing complaints. The procedure is clear and simple and allows "any interested person," including claimants, representatives, other ALJs, employees, and members of the public, to file a complaint. /58/ The complainant and the ALJ are to be given notice of receipt of the complaint. /59/ While the procedure requires the complaint to be in writing, it may also be originated by the Chief ALJ. /60/

- A procedure to ensure thorough review and investigation of complaints. Following an initial screening, /61/ the board would have the authority to conduct a full investigation of the complaint, including the authority to hold hearings and issue subpoenas, examine witnesses,

and receive evidence. The board would also be required to issue a report, including recommended action to be taken, at the conclusion of the investigation. Notice of action taken, including dismissal upon initial screening, is provided to the complainant and ALJ at every stage. A record of complaints, including dismissed complaints, is also to be maintained. /62/

- Authority of the board to issue recommendations. The CRB has the authority to issue findings and disciplinary recommendations that are binding, unless the ALJ appeals to MSPB. /63/

If CRB finds that claimants have in fact been affected by ALJ bias or misconduct, it can recommend to the head of the agency or department where the ALJ is employed that action be taken to provide relief to aggrieved individuals. /64/ Recommended relief for aggrieved claimants should include new hearings before different ALJs and reopening and redetermination of their claims.

V. Conclusion

Claimants for Social Security, SSI, and Medicare benefits rely on ALJs assigned to OHA to correct the errors made in their cases at earlier administrative levels. Even a single ALJ who is biased or unfit has a considerable impact on hundreds, perhaps thousands, of claimants given the agency's current large caseloads. The Commissioner of Social Security has acknowledged that "the mere suggestion of bias in [the] adjudicatory process must be dealt with vigorously and decisively." /65/ Unfortunately, SSA has not yet effectively dealt with the bias or unfitness of its ALJs, thereby damaging the integrity of its appeals process. The damage will be repaired only when an effective complaint procedure is established to review complaints independently. SSA, ALJs, and the public will all benefit since "independent review can only strengthen public confidence in the administrative process. And, an administrative process which enjoys public confidence will in the end function more efficiently." /66/

footnotes

/1/ Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993) (Higginbotham, J., dissenting) (describing class allegations of misconduct by a particular ALJ).

/2/ See Goldberg v. Kelly, 397 U.S. 254 (1970). See also Johnson v. Mississippi, 403 U.S. 212 (1971) ("Trial before an 'unbiased judge' is essential to due process."); Hummell v. Heckler, 736 F.2d 91 (3d Cir. 1984).

/3/ See 5 U.S.C. Secs. 4301(2)(D) and 7521(a).

/4/ See, e.g., 42 U.S.C. Secs. 405(b)(1), 1383(b)(1); 20 C.F.R. Secs. 404.929-404.953, 416.1429-416.1453.

/5/ GAO, SOCIAL SECURITY: RACIAL DIFFERENCES IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION (GAO/HRD-92-56 Apr. 1992) [hereinafter GAO REPORT]. GAO, the investigative arm of Congress, conducts on-site monitoring activities within

federal agencies and special studies at the request of individual members and committees of Congress.

/6/ Id. at 5, 40.

/7/ In the Title II program, the largest difference in favor of whites was in the Chicago region (17 percent). In SSI, the largest difference was found in the New York region (15 percent). Id. at 43.

/8/ GAO found that racial differences in initial decisions were generally explained by age (i.e., African American applicants tended to be younger) and impairment severity (i.e., a larger proportion of African Americans than whites applied with impairments associated with low allowance rates, regardless of race, such as hypertension). Id. at 4, 36-37.

/9/ Id. at 47.

/10/ The Preliminary Report of the Ninth Circuit Gender Bias Task Force, Executive Summary, Discussion Draft 11 (July 1992). Claimants in the circuit were equally divided between men and women; however, 92 percent of ALJs within the circuit and more than 70 percent of medical and vocational experts used in hearings were male. In a survey conducted by the Task Force, about 45 percent of claimants' representatives believed that gender improperly influences the adjudicatory process. These views varied: male representatives were less likely than female ones to perceive gender influences on decisionmaking. However, both male and female representatives believed that female claimants' claims were less likely to be credited by ALJs than males. The conclusion drawn was that "many of the 'facially neutral' aspects of SSA disability determinations may have gender-differentiated impacts." Id.

/11/ Paul Verkuil, et al., The Federal Administrative Judiciary, Report to the Administrative Conference of the United States 67-68 (May 1992). In addition, only 6 percent of all federal ALJs are racial minorities. Id.

/12/ Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993) (district court lacks jurisdiction to conduct de novo trial and is limited to review of Secretary's "final decision," i.e., the Appeals Council's decision); Small v. Sullivan, 820 F. Supp. 1098 (S.D. Ill. 1992) (denying government's motion to dismiss and granting plaintiffs' motion for class certification); Kendrick v. Sullivan, 784 F. Supp. 94 (S.D.N.Y. 1992) (denying government's motion to dismiss and granting plaintiffs' motion for class certification); Doe v. Sullivan, Civ. Action No. 90-7363 (E.D. Pa. Nov. 27, 1991) (denying plaintiffs' motion for class certification).

/13/ See, e.g., Kendrick, 784 F. Supp. at 97; Small, 820 F. Supp. at 1108.

/14/ For instance, the overall allowance rate in fiscal year 1992 was 69 percent. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK 62 (Comm. Print WMCP 103-18). A table of allowance rates for fiscal years 1979-92 is also included. Id. at 63.

/15/ The "Bellmon review" process occurred during a period when millions of beneficiaries were being improperly terminated, when mentally ill applicants were being improperly denied benefits, and numerous lawsuits were filed against SSA, challenging these practices and policies. The end result was landmark legislation and litigation rectifying these illegal policies. See Bowen v. New York, 476 U.S. 467 (1986); Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984). For a thorough discussion of the Bellmon review process, see Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985).

/16/ See, e.g., Barry v. Bowen, 825 F.2d 1324 (9th Cir. 1987); Association of ALJs v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984).

/17/ The ALJ's decision "must be based on evidence offered at the hearing or otherwise included in the record." 20 C.F.R. Secs. 404.953, 416.1453.

/18/ See GAO REPORT, supra note 5.

/19/ See report of Ninth Circuit Gender Bias Task Force, supra note 10. See also Linda G. Mills, Recent Developments, A Calculus for Bias: How Malingering Females and Dependent Housewives Fare in the Social Security Disability System, 16 HARV. WOMEN'S L.J. 211 (1993). This article was recently cited in a strong dissent by Judge Patricia Wald of the U.S. Circuit Court of Appeals for the District of Columbia in Williams v. Shalala, 997 F.2d 1494 (D.C. Cir. 1993) (Wald, J., dissenting). In a footnote to her dissent, Judge Wald states:

-- [T]here is evidence in the legal literature to suggest that female applicants like Williams, who have been housewives for most of their lives, do not fare as well as others in convincing [ALJs] (90 percent of whom are male) or medical professionals used by the agency that their "subjective complaints" reflect actual debilitating illnesses . . . . This circumstance underscores the need to scrutinize closely apparent errors in the records of such cases to insure that they are not prejudicial.

Id. at 1504 n.3.

/20/ See Caldwell v. Sullivan, 736 F. Supp. 1076 (D. Kan. 1990). The court found that the ALJ demonstrated a "shocking distrust" of the claimant and her motivations because she was not a wealthy woman and, as a result, subjected her credibility to a higher level of scrutiny. In finding this attitude "not only extremely distasteful, but it is legally insupportable," the court stated that "[a]n ALJ is required to be fair and impartial, not prejudiced against a claimant because of the claimant's financial status." Id. at 1081.

/21/ See Kendrick, 784 F. Supp. at 94.

/22/ "HALLEX" is the abbreviation for "Hearings, Appeals, Litigation and Law (LEX) Manual." Similar to the role of the POMS at the initial and reconsideration levels, the HALLEX provides instructions, primarily on procedural issues, for Office of Hearings and Appeals (OHA) staff, i.e., ALJs, the Appeals Council, Office of Civil Actions.

/23/ See 20 C.F.R. Secs. 404.940 and 416.1440; HALLEX I-2-160. The HALLEX provides for recusal where an ALJ believes he or she cannot give the claimant a fair hearing or where the ALJ's participation would give the appearance of impropriety.

/24/ See Kendrick, 784 F. Supp. at 100. The court stated:

-- This case does not present the ordinary situation warranting disqualification, where the claimant could be expected to be aware that the administrative law judge has a particular, specific interest or predisposition regarding his claim. Plaintiffs allege instead that they were the victims of a generalized bias of which they could not have been cognizant at the time their administrative hearings were held.

/25/ In addition, if an ALJ refuses to disqualify him or herself, the denial of the request should be raised before the Appeals Council in an appeal on the merits of the claim. See 20 C.F.R. Secs. 404.940, 416.1440.

/26/ HALLEX I-3-125.D. If an Appeals Council member identifies a problem, or if the Appeals Council receives complaints from claimants or the public, the Appeals Council may determine that a formal inquiry is needed by an Appeals Council member or by a "jurisdictional group." Findings by the member or the group will then be presented to the Appeals Council en banc, "for a decision on what action is needed, ranging from no action to convening a formal panel to review the allegations." Id.

/27/ According to the HALLEX, the Appeals Council will remand a case to a different ALJ only if it is issuing a second remand order or it is determined that the claimant did not receive a full and fair hearing. HALLEX I-3-740. Remand with assignment to a different ALJ due to a colorable claim of bias should be specifically raised before the Appeals Council.

/28/ Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993); Doe v. Sullivan, Civil Action No. 90-7363 (E.D. Pa. filed June 5, 1991) (Clearinghouse No. 96,818).

/29/ See, e.g., Hummell v. Heckler, 736 F.2d 91 (3d Cir. 1991); but see Grant, 989 F.2d at 1344.

/30/ Equal Access to Justice Act, 28 U.S.C. Sec. 2412.

/31/ Examples of decisions addressing bias in individual cases include Hummell, 736 F.2d at 91; Torres v. Bowen, 700 F. Supp. 1306 (S.D.N.Y. 1988); Rivera v. Bowen, 664 F. Supp. 708 (S.D.N.Y. 1987); Spears v. Heckler, 625 F. Supp. 208 (S.D.N.Y. 1985); Oliver v. Sullivan, Civil Action No. 91-2295, 1992 WL 208977 (E.D. Pa. Aug. 10, 1992).

/32/ See, e.g., Kendrick, 784 F. Supp. at 102-3 ("[T]he Court notes that many federal court decisions reviewing ALJ Anyel's denial of claims appear to support these allegations [of serious violations of disability claimants' right to a fair hearing]").

/33/ 57 Fed. Reg. 49186-87 (Oct. 30, 1992); POMS DI 03103.300 (7-93). In publishing the procedure, SSA stated: "SSA is committed to providing every claimant and his or her

representative fair and unbiased treatment in the handling of all claims buy [sic] its OHA hearing offices." 57 Fed. Reg. at 49186.

/34/ The operator helps draft the complaint and mails the original to the individual to be signed and brought to an SSA field office. The operator must also make a copy and send it directly to the field office. POMS DI 03103.300G.

/35/ 5 U.S.C. Sec. 7521. Before the MSPB makes the "good cause" determination, the ALJ is accorded an opportunity for a hearing before the MSPB. Since ALJs are not appointed for a set term and given the APA's limitations on removal, ALJs essentially have life tenure once appointed.

/36/ Examples of MSPB removal proceedings include SSA v. Anyel, Doc. No. CB 7521910009T1 (June 25, 1993). Anyel is the ALJ who was the subject of litigation in Kendrick. MSPB remanded the case to SSA for further proceedings. The agency has accused the ALJ of "(1) unacceptable performance of her judicial functions, and (2) frequent violation of agency policy and denial of due process of law with respect to pro se claimants." Kendrick, 784 F. Supp. at 98. See also In re Chocallo, 1 M.S.P.R. 605, 1980 MSPB LEXIS 512, aff'd, 673 F.2d 551 (Fed. Cir. 1982), cert. denied, 459 U.S. 857 (1982) (MSPB authorized permanent removal of ALJ for gross misconduct).

/37/ Questions concerning the ALJ's actual job status, salary, and MSPB authorization of job termination would appear to remain within the discretion of HHS and MSPB.

/38/ This may include reopening other ALJs' decisions that adopted findings of the biased ALJ (e.g., ability to return to past relevant work, residual functional capacity).

/39/ See, e.g., Doe, Civ. Action No. 90-7363. Following the Appeals Council panel's ad hoc investigation, the acting associate commissioner ordered the ALJ to undergo retraining.

/40/ See, e.g., Kendrick, 784 F. Supp. at 98-99. Heightened Appeals Council scrutiny was also ordered in Doe.

/41/ See, e.g., Kendrick, 784 F. Supp. at 102. After the Kendrick lawsuit was filed, HHS initiated proceedings before the MSPB and suspended the ALJ with pay. The three ALJs involved in the other lawsuits continue to hear cases.

/42/ In Grant, 939 F.2d at 1332, the ALJ was transferred from Harrisburg, Pennsylvania, to Washington, D.C. In Doe, Civ. Action No. 90-7363, the ALJ was transferred from Philadelphia to Miami.

/43/ Grant, 989 F.2d at 1332.

/44/ Doe, Civil Action No. 90-7363 (E.D. Pa. Nov. 27, 1991). The opinion is unpublished but is described and distinguished in Small, 820 F. Supp. at 1110.

/45/ Small, 820 F. Supp. at 1098; Kendrick, 784 F. Supp. at 94.

/46/ Allegations of Bias Within the Social Security Disability Program: Hearing before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992) [hereinafter Hearing].

/47/ Id. at 3 (opening statement of Sen. William Cohen).

/48/ Id.

/49/ Id. at 6-12 (testimony of Ethel Zelenske, National Senior Citizens Law Center, and Catherine C. Carr, Community Legal Services, Philadelphia).

/50/ Id. at 25-41 (testimony of Louis D. Enoff, Acting Commissioner, SSA). At the time this article was written, SSA had drafted a proposed procedure that it had just begun to distribute for review and comment to a variety of interested parties throughout government and in the private sector. According to a December 1993 letter from Shirley S. Chater, the Commissioner of Social Security, "[o]nce comments are received, we will develop the details of the process and publish final Agency instructions."

/51/ 57 Fed. Reg. 49186 (Oct. 30, 1992). In addition to the Senate hearing in 1992, another federal entity, the Administrative Conference of the United States (ACUS), an independent agency of the federal government whose purpose is to promote improvements in federal agencies, conducted a detailed study of the federal administrative judiciary. See supra, note 11. Following the study, ACUS issued a recommendation that agencies establish (1) a "peer review system" providing for ALJs to have their work periodically reviewed by the chief ALJ of the agency and (2) a "complaint system" providing claimants with the opportunity to file complaints about misconduct and to expect an investigation and response from the agency. ACUS Recommendation 92-7, codified at 1 C.F.R. Sec. 305.92-7.

/52/ S. 486, 103d Cong., 1st Sess. Sec. 599e (1993), 139 CONG. REC. S16,561-62 (daily ed. Nov. 19, 1993). The bill will be considered by the U.S. House of Representatives in 1994.

/53/ 139 CONG. REC. S16,564 (daily ed. Nov. 19, 1993) (statement of Senator Cohen). Sen. Howell Heflin (D-Ala.), the principal sponsor of the legislation, strongly endorsed Senator Cohen's statement, noting that "its provisions are a balanced effort to make the provisions fairer . . . to insure objectivity and impartiality." Id. at S16,563.

/54/ For a thorough description and comparison of the 50 state judicial conduct commissions, see JUDITH ROSENBAUM, PRACTICES AND PROCEDURES OF STATE JUDICIAL CONDUCT ORGANIZATIONS (American Judicature Society 1990). In addition, the American Bar Association has adopted standards dealing with judicial discipline. ABA Standards For Judicial Discipline and Disability Retirement (1978). See 28 U.S.C. Sec. 372(c).

/55/ S. 486, Sec. 599e(b)(3).

/56/ CRB would have 32 members consisting of 16 ALJs (two from each division) and outside membership of 16 attorneys who are not ALJs. A five-member panel would then be chosen from

the 32-member CRB, consisting of three ALJs and two attorneys, to review complaints. S. 486, Sec. 599e(e)-(f).

/57/ ROSENBAUM, supra note 54, at ch. 1, p. 2.

/58/ S. 486, Sec. 599e(d).

/59/ Id. Sec. 599e(h).

/60/ This is similar to procedures in most states and the federal judiciary that require the complaint to be in writing but provide for more liberal rules in practice. See 28 U.S.C. Sec. 372(c)(1) ("on the basis of information available to the chief judge of the circuit," the chief judge may issue an order dispensing with filing of a written complaint); ROSENBAUM, supra note 54, at ch. 2, pp. 1-3.

/61/ The screening in S. 486 allows the Chief ALJ to (1) dismiss a complaint if it is "directly related to the merits of a decision" or "frivolous"; (2) conclude the proceeding because it is no longer necessary; or (3) refer the complaint to CRB. See Sec. 599e(g).

/62/ S. 486, Sec. 599e(g)-(i). The procedure for the federal judiciary includes similar elements. See 28 U.S.C. Sec. 372(c).

/63/ S. 486, Sec. 599e(h)(4), (j), (k).

/64/ Id. Sec. 599e(k).

/65/ GAO REPORT, supra note 5, at 75 (comments on report by Gwendolyn King, former Commissioner of Social Security).

/66/ Grant, 989 F.2d at 1355 (Higginbotham, J., dissenting) (describing need for de novo review by district courts regarding allegations of ALJ bias).