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The Fair Housing Amendments Act of 1988: The Enforcement Report

September 1994

A Report of the United States Commission on Civil Rights

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, to you pursuant to P.L. 98-183, as amended.

Study after study has shown that barriers to fair housing continue to persist. On January 17, 1994, President Clinton emphasized the importance of affirmatively furthering fair housing by issuing Executive Order No. 12,892 to strengthen the coordination and implementation of fair housing policy in all Federal programs and activities. As President Clinton stated in his Memorandum on Fair Housing, "Americans of every income level seeking to live where they choose feel the weight of discrimination because of the color of their skin, their race, their religion, their gender, their country of origin, or because they are disabled or have children." Discrimination in housing perpetuates segregation which in turn results in diminished educational and economic opportunities for many of our fellow Americans. Housing discrimination deprives people of much more than shelter; it has a corrosive effect on the quality of life and dignity of every person.

This report stems from the Commission's commitment to furthering fair housing and its comprehensive evaluation of the implementation and enforcement of the Fair Housing Amendments Act of 1988. The report assesses the fair housing activities of the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice (DOJ), both of which have a major responsibility to combat housing discrimination.

Title VIII of the Civil Rights Act of 1968 charged HUD with the responsibility to affirmatively further fair housing. In 1988 Congress assigned additional enforcement powers to HUD to conciliate and resolve allegations of discrimination in their early stages.

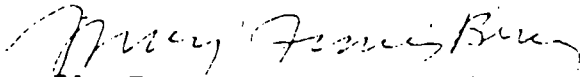
In the final pages of this report, we have described our 33 findings and recommendations in detail. Our recommendations are aimed at the elimination of problems associated with fair housing enforcement and implementation. The following highlights some of our key findings:

- Overall, the resources provided by Congress and the President have fallen well short of the funds needed by HUD and DOJ to implement their new responsibilities.
- In the vast majority of cases, HUD has not made a cause determination within the 100-day benchmark set by Congress. Congress clearly expected that HUD would reach a conclusion as to reasonable cause within 100 days in most complaints.
- Certification of substantially equivalent agencies still lags behind HUD's expectations when the FHAA was passed.
- HUD has been slow to distribute Federal grant funds to private nonprofit fair housing groups for private enforcement initiatives, testing, outreach, and education programs.
- With regard to the new jurisdictions, the Commission concludes that HUD and DOJ have failed to provide clarity through policy statements on novel and complex issues, such as occupancy codes and prohibited inquiries.
- HUD has lagged in using its ability to file Secretary-initiated complaints to attack unique or systemic discrimination and to break new ground in fair housing policy.

The Commission calls on Congress and the President, in their crucial leadership roles in Federal enforcement efforts, to adopt the Commission's recommendations and to encourage HUD and DOJ to implement the recommendations.

Respectfully,

For the Commissioners,

A handwritten signature in cursive script, appearing to read "Mary Frances Berry".

Mary Frances Berry
Chairperson

Acknowledgments

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Contents

Part I. The Setting

1. Introduction

Measuring the Problem	1
The Federal Role	1
New Initiatives	4
Scope and Methodology	5
	6

2. Background

Fair Housing Law	8
The Civil Rights Act of 1968	8
Private Enforcement	8
The Fair Housing Amendments Act of 1988	8
Other Fair Housing Provisions	10
Fair Housing Enforcement	13
The Department of Housing and Urban Development (HUD)	15
The Office of Fair Housing and Equal Opportunity	15
The Office of General Counsel	15
HUD's Regional Structure	18
The Department of Justice (DOJ)	20
State and Local Human Rights/Relations Agencies	21
Fair Housing and Other Advocacy Groups	23
	24

Part II. Complaints

3. Processing complaints

Intake	25
Legal Framework	25
Retroactivity of Complaints	25
The Intake Process	27
Conciliations	27
Legal Framework	32
The Conciliation Process	32
Conciliation Data	35
Withdrawal with Resolution	37
Investigations	37
Complaint Processing Deadlines	38
Determinations and Closures	40
Administrative Closures	42
Determinations	42
	43

4. Administrative Adjudication

Legal Framework	49
Interventions	49
Appointment of ALJs	52
Implementation	55
Nature of Cases Reviewed	56
Timeliness	56
Novel or Difficult Issues	58
Quality and Persuasiveness of Reasoning	59
Appropriateness of Penalty	60
	61

Awards in Different Forums	61
Appellate Court Review of ALJ Decisions	64
5. Managing Complaints	68
Organizational Structure	68
Internal guidance	70
The Office of Fair Housing and Equal Opportunity	70
The Office of General Counsel	72
Training	74
FHEO Budget and Staffing	76
Case Processing	77
Departmental Management Plans	78
Assessing HUD's Progress	82
Comparing Regions	84
Part III. HUD-Funded Activities	
6. The Fair Housing Assistance Program	92
FHAP Funding	93
FHAP Agency Certification	95
Complaint Referral	96
Temporary Referral and Extension Procedures	99
The Reactivated Caseload	100
Performance Assessments	101
Completed Assessments	103
Complaint Outcomes	105
7. Fair Housing Initiatives Program	106
Fair Housing Initiatives Program	106
The Administrative Enforcement Initiative	106
Education and Outreach Initiative	107
Private Enforcement Initiative	108
FHIP Expansion	108
Administrative Overview	109
FHIP Funds and HUD Litigation	112
Testing under FHIP	115
FHIP Testing Guidelines	115
Perspectives on Testing	118
Mortgage Lending Testing	120
Community Housing Resource Boards	123
Monitoring the CHRB Program	125
Funding for CHRBs	126
Revamping the CHRB Program	126
Part IV. The New Jurisdictions	
8. Handicap	128
Defining Handicap	128
Prohibited Handicap Discrimination	129
HUD's Enforcement Policy	130
Group Homes	131
HIV Infection and AIDS	133
Multiple Chemical Sensitivity Disorder	134
Accessibility Requirements	136

The Final Accessibility Guidelines	138
Applying the Accessibility Guidelines	139
Complaints Processed	142
9. Familial Status	143
Enforcement of Familial Status Provisions	144
The Older Persons Exemption	147
Occupancy Standards	149
Permitted Inquiries	152
Complaints Processed	153
Part V. Fair Housing Policy and Implementation	
10. HUD Policy and Implementation	154
Discriminatory Housing Practices	154
Proving Discrimination	158
The Title VII Analogy	158
Disparate Treatment or Intentional Discrimination	158
Mixed Motive Disparate Treatment	160
Disparate Impact	161
The Secretary's Role in Litigating Complaints	163
Secretary-Initiated Complaints	163
Secretarial Review	165
Interaction with DOJ	171
Zoning Referrals	171
Prompt Judicial Actions	175
Judicial Review	180
Elections	183
11. DOJ Policy and Implementation	189
DOJ-Initiated Civil Enforcement	190
Criminal Prosecutions	193
DOJ Litigation Program	194
Proving Discrimination	195
DOJ-Initiated Cases	197
Pattern or Practice	197
Decatur Federal	198
Testing	200
Other Major Cases and Interventions	201
Criminal Cases	202
Coordination with HUD	205
Zoning and Land Use Cases	205
Prompt Judicial Actions	206
Enforcing Conciliation Agreements and Subpoenas	208
Appellate Litigation	210
Judicial Elections	211
DOJ and the Newly Protected Classes	214
Remedies	216
Funding and Resources	218

Part VI. Conclusion	
12. Findings and Recommendations	221
Part I: The Setting	221
Part II: Complaints	222
Part III: HUD-Funded Activities	225
Part IV: The New Jurisdictions	227
Part V: Fair Housing Policy and Implementation	228

Concurring Statement of Commissioner Robert P. George	233
Statement of Mary Frances Berry, Chairperson	236

Appendices

A. Letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development	237
B. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice	248

Tables

3.1 Case Processing Times	41
3.2 Complaints Closed with Cause Findings	48
3.3 Complaints Closed with No Cause Findings	48
3.4 Timeliness of Case Processing by Closing Category	48
4.1 HUD Charges, by Elected Forum and Basis	57
4.2 Disposition of HUD Charges by Basis	57
5.1 HUD Regional Staff FTEs	77
5.2 Complainants Assisted	78
7.1 FHIP Appropriations and Expenditures	112
7.2 FHIP Budget and Expenditures by Category	113
11.1 DOJ Fair Housing Caseload	195
11.2 DOJ Pattern or Practice Cases, 3/12/89-12/6/93	199
11.3 DOJ Prompt Judicial Actions, 3/12/89-12/6/93	209
11.4 DOJ Elected Cases, 3/12/89-12/6/93	212

Figures

5.1 Cases over 100 Days as Percentage of Inventory	83
5.2 Backlog as Percentage of Inventory: Region I	85
5.3 Backlog as Percentage of Inventory: Region II	85
5.4 Backlog as Percentage of Inventory: Region III	36
5.5 Backlog as Percentage of Inventory: Region IV	86
5.6 Backlog as Percentage of Inventory: Region V	87
5.7 Backlog as Percentage of Inventory: Region VI	87
5.8 Backlog as Percentage of Inventory: Region VII	88
5.9 Backlog as Percentage of Inventory: Region VIII	88
5.10 Backlog as Percentage of Inventory: Region IX	89
5.11 Backlog as Percentage of Inventory: Region X	89

1. Introduction

More than 125 years after passage of Reconstruction laws giving African Americans the right to be free of discrimination in the possession and disposition of property, and more than 25 years after passage of the Federal Fair Housing Act of 1968,¹ discrimination continues to be a serious barrier to the full enjoyment of rights due to all persons who call our country their home.

The U.S. Commission on Civil Rights has monitored fair housing enforcement from its inception. In its report, *The Federal Fair Housing Enforcement Effort* (1979), the Commission advocated creation of an Equal Housing Administration within the U.S. Department of Housing and Urban Development (HUD), administered by the Assistant Secretary for Fair Housing and Equal Opportunity, to handle individual complaints of discrimination. The administration was intended to be autonomous in order to focus attention on fair housing. In addition, the Fair Housing Administration was designed to eliminate conflicts of interest resulting when HUD program officials, charged with assisting public housing authorities and the private housing industry, also supervised the fair housing staff charged with enforcing fair housing laws in those programs. In addition, the Commission urged the adoption of amendments to fair housing law that would enable the Secretary of HUD to initiate complaints; to accept third party complaints; and to hold hearings and issue cease and desist orders, including "the power to order all equitable relief, including affirmative action, goals and timetables, and such

other remedial steps as are necessary for effectuation of the act."²

In the mid-1980s, the Commission held two consultations with various fair housing experts. These consultations are summarized in the reports, *Issues in Housing Discrimination* (1985) and *A Sheltered Crisis: The State of Fair Housing in the Eighties* (1983). The Commission also produced two directories of fair housing organizations, *Directory of Private Fair Housing Organizations* (1986) and *Directory of State and Local Fair Housing Agencies* (1985). Additionally, the Commission published *An Annotated Bibliography on Selected Fair Housing Issues*.

Most recently, the Commission issued the report *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System* in September 1992, which assessed the consequences of the failure of State and local jurisdictions to meet the requirements for processing fair housing complaints contained in the Fair Housing Amendments Act of 1988. Finally, the Commission's State Advisory Committees have published numerous reports on fair housing issues.

Measuring the Problem

The persistence of racial prejudice has been measured by a variety of studies in recent years that compare the treatment of prospective buyers and renters of different backgrounds. Such studies have shown substantial ongoing discrimination. According to one study performed for HUD, African Americans and Latino Americans have at least a 50 percent chance of facing discrimination in the

1 42 U.S.C. §§ 3601-3619 (1988). Also called Title VIII of the Civil Rights Act of 1968.

2 U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 235.

rental and sales markets. The likelihood that they will face discrimination in any given encounter ranges from 56 percent to 59 percent.³

Discrimination in mortgage lending markets has also been the subject of recent studies, most notably one conducted by the Federal Reserve Bank of Boston. In this study, an analysis of thousands of actual conventional mortgage applications concluded that:

Even after controlling for financial, employment, and neighborhood characteristics, black and Hispanic mortgage applicants in the Boston metropolitan area are roughly 60 percent more likely to be turned down than whites. This discrepancy means that minority applicants with the same economic and property characteristics as white applicants would experience a denial rate of 17 percent rather than the actual white denial rate of 11 percent. Thus, in the end, a statistically significant gap remains, which is associated with race.⁴

A 1990 study by the Fair Housing Council of Greater Washington examined racial discrimination in the rental housing market. The study surveyed 200 rental properties in Wash-

ington, D.C., and its Maryland and Virginia suburbs, and found:

1) . . . black home seekers may expect to be treated less favorably than their white counterparts more than 60 percent of the time they visit apartment rental offices in certain neighborhoods in the Washington metropolitan area; and

2) the results of five years of testing studies conducted by the Fair Housing Council suggest little change in the opportunities for black home seekers in certain areas of the metropolitan area. While housing discrimination has become more subtle, unfortunately, it persists in all of the areas tested by the council.⁵

Given the audits and other study results, it is clear that invidious discrimination contributes heavily to housing segregation and racial isolation. Research from the 1980 census indicated that, among the 15 largest predominantly African American neighborhoods, the average degree of segregation was 78 percent.⁶ In Chicago, for example, the amount of segregation was 88 percent for African Americans, 64 percent for Latinos, and 44 percent for Asians.⁷ The percentage of blacks living in

3 Margery Austin Turner, Raymond J. Struyk, and John Yinger, *Housing Discrimination Study—Synthesis*, (Washington, D.C.: U.S. Department of Housing and Urban Development, 1991), p. 36.

4 Alice H. Munnell, Lynn E. Brown, James McEneaney, and Geoffrey M.B. Tootell, "Mortgage Lending in Boston: Interpreting HMDA Data," *Working Paper Series No. 92-7* (Federal Reserve Bank of Boston: October 1992), p. 2. The Boston study has been criticized and defended by a variety of social scientists. For criticism, see Gary Becker, "The Evidence against Banks Doesn't Prove Bias," *Business Week*, Apr. 19, 1993, p. 18; Peter Brimelow and Leslie Spencer, "The Hidden Clue," *Forbes*, Jan. 4, 1993, p. 48; and Ted Day and S.J. Liebowitz, "Mortgages, Minorities, and Discrimination," unpublished paper, Dec. 15, 1993. For defenders, see George C. Galster, "The Facts of Lending Discrimination Cannot Be Argued Away by Examining Default Rates," *Housing Policy Debate*, vol. 4, no. 1, pp. 141-146; Stephen Cross, "Discrimination Studies: How Critical Are Default Rates?" paper delivered at Home Mortgage Lending and Discrimination: Research and Enforcement Conference, U.S. Department of Housing and Urban Development, Washington, D.C., May 18, 1993; and James H. Carr and Isaac F. Megbolugbe, "The Federal Reserve Bank of Boston Study on Mortgage Lending Revisited," *Journal of Housing Research*, vol. 4, Issue 2, pp. 277-313.

5 The Fair Housing Council of Greater Washington, *Race Discrimination in the Rental Housing Market: A Study of the Greater Washington Area, 1990*, (Washington, D.C.: Fair Housing Council of Greater Washington, 1990), p. 3.

6 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., H. Rep. No. 100-711, p. 16, reprinted in 1988 U.S.C.A.N. 2173, 2177 (hereafter cited as FHAA House Committee Report). The cited authors used the term "settlements" to refer to places where the largest absolute numbers of African Americans live (not necessarily places with the highest concentrations.)

7 Ibid.

areas where they made up 60 percent or more of the residents decreased from 57.9 percent in 1980 to 51 percent in 1990, according to one study.⁸

A study of selected metropolitan areas conducted for *USA Today* using 1990 census data shows that the majority of the Nation's 30 million African Americans are as segregated now as they were at the height of the civil rights movement in the 1960s.⁹ Asian and Latino segregation also grew during the 1980s, although at considerably lower rates.¹⁰

Finally, a study covering the entire United States comparing racial and ethnic concentrations at the neighborhood level showed that 51 percent of blacks lived in areas with a 60 percent or higher concentration of blacks, down somewhat from 57.9 percent in 1980, and 33.9 percent of Hispanics lived in areas with a 60 percent or higher concentration of Hispanics, up slightly from 30 percent in 1980.¹¹ Conversely, 84.5 percent of nonblacks lived in neighborhoods less than 10 percent black in 1990, down from 87.5 percent in 1980, while 74.1 percent of non-Hispanics lived in

neighborhoods less than 5 percent Hispanic in 1990, down from 81.1 percent in 1980.¹²

Study after study has shown that segregated, mostly low-income neighborhoods are far more likely to have below average educational, medical, and recreational facilities and poor public services, such as trash pickup, police and fire protection, and public transportation. These factors all exact enormous social costs in lost earnings and productivity, increased incarceration rates, greater reliance on government-funded welfare programs, and increased alienation from the political and cultural mainstream of the Nation.¹³

Housing discrimination and segregation distort the operation of urban housing markets, artificially inflating rents and house values in some neighborhoods while contributing to disinvestment and decline in others.¹⁴ Further, evidence indicates that employment opportunities are expanding faster in the suburbs—which are predominantly white—than in central cities, where most African American and Latino neighborhoods are located.¹⁵ In addition, public schools in affluent suburban jurisdictions offer substantially better

8 David Judkins, James Massey, and Joseph Waksberg, "Patterns of Residential Concentrations by Race and Hispanic Origin," unpublished report dated December 8, 1992, p. 6. Judkins and Waksberg are with Westat, Inc., and Massey is with the National Center for Health Statistics. The views expressed are those of the authors.

9 *USA Today*. "Segregation: Walls Between Us," Nov. 11, 1991.

10 *Ibid.*

11 Judkins, et al., "Patterns of Residential Concentrations," p. 5.

12 *Ibid.*, p. 8.

13 See, for example, Gunnar Myrdal, *An American Dilemma: the Negro Problem and Modern Democracy*, (New York: Harper, 1944); Jonathan Kozol, *Death at an Early Age: the Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools*, (Boston: Houghton Mifflin Company, 1967); William Julius Wilson, *The Declining Significance of Race: Blacks and Changing America*, (Chicago: University of Chicago Press, 1978); William Julius Wilson, *The Truly Disadvantaged: the Inner City, the Underclass, and Public Policy*, (Chicago: University of Chicago Press, 1987); Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal*, (New York: Charles Scribner's Sons Publishers, 1992); and William P. O'Hare, "America's Minorities—the Demographics of Diversity," *Population Bulletin*, vol. 47, no. 4, December 1992. See also, *Report of the National Advisory Commission on Civil Disorders* (Washington, D.C.: U.S. Government Printing Office, 1968).

14 Turner, "Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits," *Housing Policy Debate*, vol. 3, no. 2, p. 187.

15 *Ibid.*

education than many central-city schools.¹⁶ In short, housing discrimination deprives people of much more than shelter. It has a corrosive effect on their quality of life and general well-being.

The Federal Role

The involvement of the Federal Government in housing discrimination has gone through a tremendous evolution over the course of the 20th century. The Government did not shift easily from active promotion of racial segregation and discrimination through the first half of the century to legislatively driven reversal of those positions beginning in the early 1960s.¹⁷ It took place as a result of landmark legislation designed to end discrimination in the rental and purchase of housing. Executive Order 11,063 (signed by President John F. Kennedy in 1962), Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, section 109 of the Housing and Community Development Act of 1974, and the Equal Credit Opportunity Act of 1974 (amended in 1976) attempted to eradicate, with varying degrees of success, certain aspects of housing discrimination.

Executive Order 11,063 outlaws discrimination based upon race, color, religion, sex, or national origin with respect to the sale, leasing, rental, or other disposition of residential property in federally owned, operated, or as-

sisted housing.¹⁸ Title VI of the Civil Rights Act of 1964 prohibits discrimination in programs or activities receiving Federal financial assistance from a loan or grant, but expressly excludes from coverage financial assistance provided solely through insurance or guarantee.¹⁹ As originally enacted, Title VIII of the Civil Rights Act of 1968 protected individuals from discrimination in the sale or rental of housing, with limited exceptions, on the basis of race, color, religion, national origin,²⁰ or by amendment in 1974, sex.²¹ Section 109 of the Housing and Community Development Act of 1974 "prohibits discrimination in programs and activities funded under Title I of the act establishing the community development block grant program administered by the Department of Housing and Urban Development."²² The Equal Credit Opportunity Act makes it unlawful for creditors to discriminate against any applicant with respect to any aspect of a credit transaction, including any mortgage transaction, on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), or because all or part of the applicant's income derives from any public assistance programs.²³

These laws laid the foundation for an assault against housing discrimination in almost all of its forms. Putting laws on the books, however, is only the first step. Without

¹⁶ Ibid.

¹⁷ Martin F. Sloane, "Federal Housing Policy and Equal Opportunity," *A Sheltered Crisis: The State of Fair Housing in the Eighties* (U.S. Commission on Civil Rights: Washington, D.C., 1983), pp. 133-34.

¹⁸ Exec. Order No. 11,063, 3 C.F.R. 652 (1962), as amended by (among others) Exec. Order No. 12,259, 3 C.F.R. 307 (1961), reprinted in 42 U.S.C. § 3608 (1988).

¹⁹ 42 U.S.C. § 2000d-4 (1988).

²⁰ *Id.* § 3604.

²¹ *Id.* and Housing and Community Development Act Amendments to the Fair Housing Act of 1974, Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 633, 725 (1974).

²² 42 U.S.C. § 5309(a) (1988).

²³ U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 2. The statute also proscribes discrimination based on the good faith exercise of rights provided under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)(3) (1988).

consistent, sustained enforcement, no law designed to overcome individual or group discrimination can work as created. However, over time civil rights enforcement weakened. Throughout the 1980s, HUD emphasized voluntary compliance as the principal mechanism for enforcing Title VIII.²⁴ Given the demonstrated persistence of the sociological and racial biases that underlay discrimination, relying primarily on voluntary compliance was doomed to fail.

To provide HUD with real enforcement power, Congress enacted the Fair Housing Amendments Act of 1988.²⁵ Prior to the 1988 amendments, HUD could only investigate and conciliate housing discrimination complaints. HUD had no power to enforce the law on behalf of individual complainants. The 1988 amendments changed that:

If conciliation fails and HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, then HUD can bring the case to a hearing before an Administrative Law Judge. Because HUD can continue to enforce the law if the conciliation is unsuccessful, there is a real incentive for both parties to conciliate and resolve the complaint in the early stages.²⁶

Coincidental with the renewal of interest in administrative enforcement as a means of ending housing discrimination against those groups protected by the Fair Housing Act of 1968, a national consensus was forming behind a new movement to reverse the isolation suffered in many areas of life by persons with mental or physical handicaps. The 1988 amendments made it illegal to discriminate

against such persons in the housing market, requiring landlords to make reasonable accommodations to disabled persons seeking housing. The act also required new construction to meet minimum standards of accessibility for the disabled.

Finally, the Federal Government addressed, for the first time, the difficulty facing families with children in securing adequate housing in the face of restrictions or outright bans on minors as housing occupants. The amendments made discrimination against families with children illegal, except when housing complexes are restricted to older residents only, as defined in the new law.²⁷

New Initiatives

Housing discrimination undermines a fundamental premise on which our free society rests: that every person, regardless of class or group background, should have the same right to the rewards of his or her work and enterprise. Housing discrimination has eliminated that possibility for untold numbers of Americans, denying them a chance at their American dream. Without strict enforcement of fair housing laws, those who suffer discrimination cannot be empowered to share fully in the opportunities that should be open to them as a matter of right.

This fundamental imperative has received new impetus in recent years. HUD has been the focus of the Federal Government's renewed interest in combating housing discrimination. Without an effective administrative enforcement mechanism until 1989, fair housing enforcement lagged behind the fight

24 Sloane, "Federal Housing Policy," p. 140.

25 The Fair Housing Amendments Act of 1988 (FHAA) amended Title VIII of the Civil Rights Act of 1968, also called the Fair Housing Act of 1968. In this report, the terms Fair Housing Amendments Act and Title VIII are used interchangeably.

26 FHAA House Committee Report, p. 17, 1988 U.S.C.A.N. 2173, 2178.

27 42 U.S.C. § 3607(b) (1988).

against discrimination in education and employment. However, during the Bush Administration HUD began the task of constructing a system of enforcement accessible to individual complainants, and the U.S. Department of Justice (DOJ) launched new initiatives in pursuing major mortgage lending cases. On January 17, 1994, President Clinton gave new visibility to fair housing enforcement with the issuance of an executive order strengthening the coordination and implementation of Federal fair housing policy.²⁸ HUD announced its intention to issue new regulations on disparate impact, insurance redlining, and mortgage discrimination, and began implementing a reorganization plan on April 15, 1994, that will give greater authority to the Assistant Secretary for Fair Housing and Equal Opportunity in supervising the processing of complaints.

Scope and Methodology

This report examines the quality of the Federal Government's implementation of the 1988 Fair Housing Amendments, giving special attention to the system by which HUD and DOJ investigate and adjudicate individual complaints. The discussion focuses primarily on the new enforcement mechanisms created by the FHAA, rather than reexamining established enforcement methods that have existed since 1968, such as DOJ's testing and pattern or practice authorities. The report also examines recent policy issues regarding the definition of discrimination and the evolution of its interpretation since 1968. The report analyzes discrimination policy issues that are covered primarily by the FHAA, and only touches upon issues that are addressed by other statutes, such as segregation, insurance redlining, and discrimination in public housing and mortgage lending.

In creating a new administrative enforcement mechanism, the law imposed on HUD the responsibility of creating a new system of receiving, processing, investigating, evaluating, and litigating complaints. It also called upon the Secretary of HUD to initiate complaints on behalf of individuals and to combat systemic discrimination. And it anticipated that HUD would set the pace in enunciating government policy regarding housing discrimination.

At the same time, the law continued the role of DOJ in filing lawsuits of general public importance and those alleging a pattern or practice of discrimination, and in litigating challenges to State or local zoning ordinances or other land use laws.²⁹ In addition, the law mandated DOJ to prosecute complaints where HUD found reasonable cause and where either party elected to have the matter tried before a Federal jury.³⁰

The issues arising from any examination of this process include how effectively HUD is carrying out its mandate, how well DOJ is executing its added responsibilities, and how well the two departments are coordinating their efforts. In addition, the report will examine the difficulties that have been encountered, if any, in applying and administering the statute.

To carry out this study, the Commission conducted numerous interviews with headquarters and regional staff at HUD, officials of State and local fair housing enforcement agencies, industry officials, and representatives of private housing enforcement and advocacy groups. Staff performed a statistical analysis of HUD's complaint database, which contains detailed information about more than 35,000 complaints filed under the new law, including the bases for allegations, timeframes for processing complaints, and

²⁸ Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 20, 1994).

²⁹ *Id.* § 3610(g)(2)(C).

³⁰ *Id.* § 3613(o).

outcomes. The Commission conducted an independent analysis of HUD administrative law judge decisions and decisions made in cases that reached the courts through the election process. The Commission also examined and evaluated numerous internal documents provided by HUD and DOJ. Finally, staff reviewed the literature that has accumulated on Title VIII since its effective date.

These activities have afforded the Commission a unique view of the initiation of an

important new phase in fair housing enforcement. The findings and recommendations contained in the conclusion of this report are designed not merely to critique the efforts of those involved, but to strengthen the operation of the law with a view toward assisting all Americans in their efforts to secure housing free of the invidious and arbitrary discrimination that has stained the Nation's history and continues to tarnish its future.

2. Background

Fair Housing Law

The Civil Rights Act of 1968

After public accommodations, education, and employment, housing discrimination was one of the last major issues tackled by the President and Congress in the civil rights era of the 1960s. Pressures to act mounted as a result of several factors: the ongoing open housing movement, which entailed demonstrations in major American cities; the difficulties surrounding school desegregation in segregated neighborhoods; and the urban unrest that stemmed in part from perceived ghettoization.

In response came passage of the Civil Rights Act of 1968,¹ the passage of which was partially in memory of Dr. Martin Luther King, Jr., (Title VIII of which became known as the Fair Housing Act). The act banned discrimination on the basis of race, color, religion, and national origin in most housing transactions. Title VIII of the act enabled the U.S. Department of Housing and Urban Development (HUD) to investigate and conciliate complaints of housing discrimination and authorized the Department of Justice (DOJ) to file suit in cases of pattern and practice discrimination or in cases of public importance. Finally, it allowed State and local agencies to process individual complaints filed with HUD where the Secretary determined that the State or local law provided rights and remedies substantially equivalent to those provided by Title VIII.

Although Title VIII made housing discrimination unlawful, it fell short in many ways:

[it] did not provide the Secretary [of HUD] with any administrative mechanism for redressing acts of discrimination against an individual. In addition, while the Secretary could refer a case involving a pattern or practice of discrimination to the Attorney General for the initiation of a civil action, Federal courts did not award individual relief to the victims of discrimination in such cases.²

Private Enforcement

Prior to the 1968 law, a Reconstruction-era statute was the only Federal law barring private and/or public discrimination in housing. The Civil Rights Act of 1866, as reconstituted and amended,³ contains two major sections. Section 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁴

This provision was intended to guarantee equal rights under the law specifically for the newly freed slaves. It provided broad protection of contract rights and mandated equal legal protections and obligations for all regardless of race.

1 Pub. L. No. 90-284, 82 Stat. 73.

2 24 C.F.R. Ch. I Subch. A, App. I, 911, 912 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

3 42 U.S.C. § 1981 (1988).

4 *Id.* § 1981(a).

Section 1982 provides "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."⁵ This section was the first piece of legislation directed at property and, thereby, housing rights and clearly included the real and personal property rights of nonwhite citizens.

For over a century, the provisions of the Civil Rights Act of 1866 were the only Federal legislation that "protected" any property rights of nonwhites, but they pertained only to race discrimination and were applied only to governmental or public action.⁶ In 1968 the Supreme Court in *Jones v. Alfred H. Mayer Co.*⁷ ruled that section 1982 covered private discrimination, stating that it "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."⁸ In this ruling, the Supreme Court recognized that a "person's [in]ability to buy property" based on race was a "relic of slavery."⁹

The import of the passage of Title VIII, coupled with the Supreme Court's ruling in *Jones v. Mayer*, has been summarized as follows:

... for the first time, the private housing market—and thereby the means by which most Americans secure housing—was subject to Federal laws that prohibited discrimination. Prior to 1968, the Constitution and other law... had banned certain forms of governmental housing discrimination, such as racial zoning, public housing segregation, and the enforcement of racially restrictive covenants. It was not until 1968, however, that the legal tools became available to attack all forms of housing discrimination and that the period of continuous, active fair housing litigation began.¹⁰

The legislative history of the Fair Housing Amendments Act of 1988, however, found the minimal Federal enforcement powers of the 1968 law inadequate:

Existing law has been ineffective because it lacks an effective enforcement mechanism. Private persons and fair housing organizations are burdened with primary enforcement responsibility. Although private enforcement has achieved some success, it is restricted by the limited financial resources of litigants and the bar, and by disincentives in the law itself. The Federal enforcement role is severely limited.¹¹

Congress noted that "HUD... lacks the power even to bring the parties to the conciliation table. HUD cannot sue violators to enforce the law, as in other civil rights laws."¹²

5 *Id.* § 1982.

6 Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (New York: Clark Boardman and Callaghan, 1991), p. 27-3 (hereafter cited as *Law and Litigation*).

7 392 U.S. 409 (1968).

8 *Id.* at 413.

9 *Id.* at 443.

10 Schwemm, *Law and Litigation*, p. 1-1.

11 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., 1988, H. Rep. No. 100-711, p. 16, reprinted in 1988 U.S.C.C.A.N. 2173, 2177 (hereafter cited as FHAA House Committee Report).

12 *Ibid.*

The role of DOJ is limited. DOJ may file suit:

... but can do so only in cases of a "pattern or practice" of discrimination. In order to redress the ordinary individual case of discrimination, the victim of discrimination must bring a lawsuit in court.

Although private enforcement has achieved success in a limited number of cases, its impact is restricted by the lack of private resources, and is hampered by a short statute of limitations, and disadvantageous limitations on punitive damages and attorney's fees.¹³

The Fair Housing Amendments Act of 1988

Passage of a stronger fair housing law with broader coverage and enforcement and administrative mechanisms was largely due to the concerns raised by fair housing advocacy groups and HUD itself. In its 1979 report, *The Federal Fair Housing Enforcement Effort*, the Commission had also strongly criticized the weakness of the 1968 act.¹⁴

At the 1987 hearings, former HUD Secretary Samuel R. Pierce testified on the need for a stronger fair housing law:

The enforcement mechanism of [Title VIII] has been criticized almost from the day of its enactment. Most of that criticism has been concentrated on Federal administrative enforcement and its limitation in individual cases to conciliation. If the parties are not willing to conciliate, the Secretary ... has no authority to go elsewhere. This is an obvious weakness. ...

I have been encouraged by the increasing role of State and local agencies ... , but I recognize that there can never be true housing opportunity in this

country until the Federal enforcement powers in Title VIII have been strengthened. ... The most glaring deficiency in Title VIII is the inability of the Federal Government to move people toward conciliation and have the decision be binding. ... I feel strongly that the Secretary ... should be empowered to initiate complaints.¹⁵

Advocacy groups also voiced discontent with Title VIII and lobbied for a more effective fair housing law with a stronger Federal role in enforcement. Benjamin Hooks, executive director of the National Association for the Advancement of Colored People (NAACP), explained in his statement:

Many black Americans know that [Title VIII] has no teeth in it; therefore, although our NAACP branches receive a number of verbal complaints regarding discrimination because of race, most of them do not submit written complaints to our branches, HUD, or to a State or local agency. ...

The chief defect in the existing fair housing law is its lack of an adequate enforcement mechanism. ... [O]ur nation must have a law which authorizes the Secretary of HUD to proceed administratively or refer the matter to the Attorney General for action in the courts. Under [Title VIII], the Secretary of HUD is virtually powerless to act against private discriminators. ...¹⁶

Raul Yzaguirre, president of the National Council of La Raza, also testified that a stronger law with bilingual outreach was necessary:

[T]he weak enforcement mechanism in the present fair housing law may contribute to the low numbers of complaints filed by Hispanics. The lengthy period required to reach conciliation and the lack of any real redress to the victim may deter Hispanic

¹³ Ibid.

¹⁴ U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 230.

¹⁵ U.S. Congress, Senate, Subcommittee on the Constitution of the Judiciary Committee, *Hearings on the Fair Housing Amendments Act of 1987*, 100th Cong., 1st Sess., 1987, pp. 49-50; 52 (hereafter cited as *1987 Senate Subcommittee Hearing*).

¹⁶ Ibid., pp. 64-66.

victims from filing complaints. In addition, rental agents and realtors are aware that they are not likely to be penalized for practicing illegal housing discrimination, and therefore, are not deterred from discriminating. These factors may limit confidence within the Hispanic community towards the HUD conciliation process, thus reducing the number of complaints.¹⁷

In response to these concerns, Congress rewrote the Fair Housing Act and, in 1988, passed the Fair Housing Amendments Act (FHAA).¹⁸ The FHAA established an administrative mechanism for enforcing the law, which could result in the award of damages and civil penalties for complaints filed with HUD and tried by an administrative law judge. In addition to other damages, civil penalties are also available to the Attorney General in cases involving a pattern or practice of discrimination, issues of public importance, zoning and land use, and conciliation breaches.¹⁹ However, should the complainant, respondent, or aggrieved person on whose behalf the complaint was filed elect to have the charge decided in Federal district court, only compensatory and punitive damages may be awarded by that court. The Attorney General may not seek civil penalties in election cases.

The new law allows individuals to file complaints with HUD,²⁰ and where the Secretary determines that reasonable cause exists to

believe that discrimination has occurred or is about to occur, he or she must immediately issue a charge on behalf of the complainant.²¹ The case will be heard in a formal administrative proceeding before an administrative law judge,²² unless the complainant or respondent (or an aggrieved person on whose behalf the complaint was filed) elects to move the case to an appropriate Federal district court.²³ The law also empowers the Secretary of HUD to authorize the Attorney General to file a civil action seeking appropriate preliminary or temporary relief, pending final disposition of a complaint.²⁴ Finally, the law authorizes the Secretary to file complaints of alleged discriminatory housing practices on his own initiative.²⁵

In addition to the enforcement provisions, the FHAA expands coverage to two newly protected classes. Discrimination against handicapped persons is now prohibited,²⁶ as is discrimination against families with children.²⁷

The FHAA specifies three important provisions regarding persons with disabilities. First, it is unlawful to refuse to permit "at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises. . . ."²⁸

17 Ibid., p. 81.

18 Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988)).

19 42 U.S.C. § 3614(d)(1)(C) (1988).

20 Id. § 3610.

21 Id. § 3610(g)(2)(A).

22 Id. § 3612(b).

23 Id. § 3612(a).

24 Id. § 3610(c)(1).

25 Id. § 3610(a)(1)(A).

26 Id. § 3604(c)-(f). See chap. 8.

27 Id. § 3604(a)-(e). See chap. 9.

28 Id. § 3604(f)(3)(A).

Second, landlords must make "reasonable accommodations" in rules, policies, practices, or services to afford persons with disabilities equal opportunity to use and enjoy a dwelling. Finally, multifamily dwellings first occupied after March 13, 1991, must be constructed so as to accommodate persons with disabilities.²⁹

Persons with disabilities have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973³⁰ and, in particular, section 504, as amended.³¹ The FHAA, through its handicap provisions,³² expresses a congressional commitment to end the exclusion and discrimination of disabled persons and ensure equal opportunity for such persons in all aspects of housing. As the legislative history of the FHAA notes:

[P]eople who use wheelchairs have been denied the right to [have] simple ramps to provide access, or have been perceived as posing some threat to property maintenance. People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently. People with Acquired Immune Deficiency Syndrome (AIDS) and people

who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others. . . . Because persons with mobility impairments need to be able to get into and around a dwelling unit . . . the bill requires that in the future covered multifamily dwellings be accessible and adaptable.³³

Discrimination against families with children, or as it is commonly termed, familial status discrimination, is also prohibited, with an exception for certain housing provided for senior citizens.³⁴ Familial status covers families with children younger than 18 years of age. Prior to the passage of the FHAA, 16 States did prohibit some form of discrimination against children in fair housing laws. However, these laws were limited and "varied tremendously."³⁵ A 1980 national survey sponsored by HUD showed that 25 percent of all rental units did not allow children; 50 percent were subject to some restrictive policy that limited the ability of families to live in those units; and almost 20 percent of families with children lived in dwellings considered less desirable because of restrictive practices.³⁶

Other research showed that discrimination against families has a racially discriminatory

29 *Id.* § 3604(f)(3)(C).

30 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq. (1973)).

31 29 U.S.C.A. § 794(a) (West Supp. 1993).

32 Although the phrases "handicap" and "handicapped persons" have fallen out of everyday usage, Congress has not yet amended the FHAA to replace the phrases with "disability" and "persons with disabilities." Therefore, throughout this report the older terms are used whenever discrimination against persons with disabilities is discussed in context of the FHAA statute or regulations.

33 FHAA House Committee Report, p. 18, 1988 U.S.C.C.A.N. 2173, 2179.

34 Familial status means "one or more individuals [not yet 18] being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee or such parent or other person having such custody, with the written permission of such parent or other person." Pregnant women or individuals in the process of securing custody are accorded familial status. 42 U.S.C. § 3602(k) (1988).

35 FHAA House Committee Report, p. 19, 1988 U.S.C.C.A.N. 2173, 2180.

36 *Ibid.*

effect because minority households are more likely to have children.³⁷ The FHAA legislative history highlighted the overlap in familial status and racial discrimination:

In addition, because predominantly white neighborhoods are more likely to have restrictive policies, racial segregation is exacerbated by the exclusion of children. For example, the national survey by HUD found that units in predominantly white neighborhoods restricted children at a rate of 28.9 percent compared with 17.5 percent in predominantly black neighborhoods, and also found that restrictions are greater in recently built units.³⁸

Other Fair Housing Provisions

HUD is not only responsible for enforcing the FHAA, but it has responsibilities in safeguarding the rights of individuals under Title VI of the Civil Rights Act of 1964, as amended;³⁹ Section 504 of the Rehabilitation Act of 1973;⁴⁰ the Equal Credit Opportunity Act, as amended;⁴¹ and the Housing and Community Development Act of 1974, as amended.⁴² HUD also administers the Fair Housing Initiatives Program, first enacted in the Housing and Community Development Act of 1987.⁴³

Title VI provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance.⁴⁴

Title VI requires recipients of Federal funds to administer their programs and activities in a nondiscriminatory manner. The principal use of Title VI in the fair housing field has been to challenge discrimination in federally assisted public housing.⁴⁵ After the passage of the Fair Housing Act in 1968, the importance of Title VI as a fair housing tool "faded substantially."⁴⁶ Compared to Title VIII as amended by the FHAA, the Title VI provisions are of more limited use to complainants in the housing area. In essence, Title VIII became the "principal weapon" used by HUD and private parties to challenge public as well as private housing discrimination. After the 1988 amendments, HUD's regional offices focused staff and resources on training and implementing the provisions of the FHAA, sometimes detaching Title VI staff to work in the fair housing enforcement area.⁴⁷

Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or any

37 Ibid., p. 21, 1988 U.S.C.A.N. 2173, 2182.

38 Ibid.

39 42 U.S.C. §§ 2000d-1 to 2000d-7 (1988 and Supp. IV 1992); 24 C.F.R. §§ 1.1-1.12 (1993).

40 29 U.S.C.A. § 794(a) (West Supp. 1993); 24 C.F.R. §§ 8.1-8.71 (1993).

41 15 U.S.C.A. §§ 1691-1691(e) (1982 and West Supp. 1993); 24 C.F.R. § 25.9 (1993).

42 Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified in scattered sections of U.S.C.).

43 24 C.F.R. Part 125 (1993).

44 42 U.S.C. § 2000d (1988).

45 See Schwemm, *Law and Litigation*, pp. 29-1, 29-2.

46 See *ibid.*, p. 29-4.

47 For a detailed discussion on the resources devoted to Title VIII enforcement, see chap. 5 of this report.

program or activity conducted by any Executive agency or by the United States Postal Service.⁴⁸

Federally assisted housing programs are covered by section 504. However, after the 1988 amendments, section 504 "became relatively less important"⁴⁹ given the FHAA's broader definition of handicap and the FHAA requirement that certain dwellings meet accessibility standards set by HUD.⁵⁰

The Equal Credit Opportunity Act (ECOA) makes it unlawful:

... for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction"—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided that the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.⁵¹

ECOA applies to housing in two ways: a) it covers applications for mortgages and other forms of credit in the housing area, and b) it provides a right of action for residents in segregated neighborhoods who are denied credit because of the racial makeup of their area.⁵² ECOA authorizes various methods of enforce-

ment, including pattern or practice suits by the Attorney General, upon referral of a matter to her, and private actions by persons aggrieved for actual damages, punitive damages of not more than \$10,000, equitable and declaratory relief, and reasonable attorney's fees and costs.⁵³ Credit discrimination in the acquisition of housing is prohibited by the FHAA,⁵⁴ however, ECOA covers marital status and age (although not family status and handicap).

The Housing and Community Development Act of 1974⁵⁵ added "sex" to the protected groups covered under the 1968 Fair Housing Act. It also created new housing assistance programs for lower income families, commonly known as section 8.⁵⁶ The act also established the Community Development Block Grant (CDBG) program,⁵⁷ which authorized HUD to make public works funds available to local communities for use on a nondiscriminatory basis⁵⁸ if they are willing to undertake certain fair housing responsibilities.

The Fair Housing Initiatives Program,⁵⁹ first enacted as part of the Housing and Community Development Act of 1987,⁶⁰ provides grants for fair housing activities carried out by public agencies and private organizations. The money is granted in four categories: administrative enforcement, education and

48 29 U.S.C.A. § 794(a) (West Supp. 1993).

49 Schwemm, *Law and Litigation*, p. 29-5.

50 Ibid. pp. 29-5 to 29-6.

51 15 U.S.C. § 1691(a) (1988).

52 Schwemm, *Law and Litigation*, p. 29-7.

53 15 U.S.C. § 1691e(h)-(d) (1982).

54 42 U.S.C. § 3605(a) (1988).

55 Pub. L. No. 93-383, Tit. V, § 109, 88 Stat. 633, 729 (codified, as amended, at 42 U.S.C.A. § 5309(a) (1988)).

56 It appears, as amended, at 42 U.S.C. § 1437f (1988 and Supp. IV 1992).

57 The CDBG program, as amended, appears at 42 U.S.C.A. §§ 5301-5317 (1983 and West Supp. 1993).

58 42 U.S.C. § 5309 (1988 and Supp. II 1990).

59 For a full discussion of this program, see chap. 7.

60 Pub. L. No. 100-242, tit. V, § 561, 101 Stat. 1942 (1988) (codified as amended at 42 U.S.C. § 3616a (Supp. IV 1992)).

outreach, private enforcement, and private organizations.

Administrative enforcement money is intended for State and local fair housing agencies who, by law and in operation, are deemed to be "substantially equivalent"—that is, they provide protection equal to that of HUD and Federal law.⁶¹ Funds for education and outreach are available to public or private entities implementing programs to prevent or eliminate housing discrimination.⁶² Money for enforcement efforts of private nonprofit groups only is awarded in the private enforcement category.⁶³ The Housing and Community Development Act of 1992⁶⁴ added funds specifically to help private fair housing enforcement groups in undeserved areas to carry out a national fair housing awareness media campaign and to designate national fair housing month.⁶⁵

Fair Housing Enforcement

The Department of Housing and Urban Development (HUD)

HUD, under the Secretary for Housing and Urban Development, is by law and executive

order the principal Federal agency responsible for the administration and enforcement of the Fair Housing Act, including the development of policies, procedures, regulations, standards, guidelines, and resources for the implementation of the act.⁶⁶ Three organizational elements of HUD have roles in fair housing enforcement that bear examination: the Office of Fair Housing and Equal Opportunity, the Office of General Counsel, and HUD's regional organization.

The Office of Fair Housing and Equal Opportunity

HUD's Office of Fair Housing and Equal Opportunity (FHEO) is headed by the Assistant Secretary for Fair Housing and Equal Opportunity, a post dating to the Fair Housing Act of 1968.⁶⁷ FHEO is comprised of seven offices, and is responsible for administering the FHAA and section 561 of the Housing and Community Development Act of 1987 that established the Fair Housing Initiatives Program.⁶⁸ In addition, the office also administers fair housing activities in connection with Title VI of the 1964 Civil Rights Act, as amended;⁶⁹ Title I, section 109 of the Housing and Community Development Act of 1974;⁷⁰

⁶¹ 24 C.F.R. § 125.201 (1993).

⁶² *Id.* §§ 125.301-302.

⁶³ *Id.* §§ 125.401-402.

⁶⁴ Pub. L. No. 102-550, § 905(b), 106 Stat. 3672, 3869-72 (codified, as amended, at 42 U.S.C. § 3616a (Supp. IV 1992)).

⁶⁵ 42 U.S.C. § 3616a (Supp. IV 1992).

⁶⁶ 42 U.S.C. §§ 3601-3619 (1988); Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. § 3608 (1988).

⁶⁷ 42 U.S.C. § 3608(b) (1988).

⁶⁸ This description of responsibilities of the Office of Fair Housing and Equal Opportunity (FHEO) relies on HUD's FY 1994 budget submission to Congress. See U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1994*, 103d Cong., 1st Sess., 1993, part 6, pp. 461-64 (hereafter cited as *FY 1994 Budget Hearings*).

⁶⁹ 42 U.S.C. § 2000d (1988).

⁷⁰ *Id.* § 5309.

section 504 of the Rehabilitation Act of 1973,⁷¹ and the Age Discrimination Act of 1975.⁷² Finally, the office administers internal HUD equal employment programs governed by Executive Order 11,478,⁷³ Title VII of the 1964 Civil Rights Act,⁷⁴ and the Age Discrimination in Employment Act.⁷⁵

With respect to Title VIII, FHEO is charged with oversight of all aspects of the complaint process up to adjudication, including intake, investigations, and conciliations. In addition, FHEO maintains the Title VIII complaint database, administers the substantial equivalency certification program regarding State and local fair housing agencies, and formulates fair housing policy for the Secretary in conjunction with the Office of General Counsel. In so doing, FHEO oversees (but does not supervise) the regional offices, which actually receive and process individual complaints.⁷⁶ (Other fair housing functions are noted below by office.)⁷⁷

Total fiscal year (FY) 1993 employment in FHEO for all these functions was 653 perma-

nent positions and 729 full-time equivalents (FTEs).⁷⁸ Headquarters staff totaled 140 permanent positions and 146 FTEs, while field staff totaled 513 permanent positions and 583 FTEs.⁷⁹ Of these, a total of 28.7 FTEs (17 headquarters and 11.7 field FTEs) are devoted exclusively to HUD's equal employment (nonhousing-related) functions⁸⁰; approximately 5 percent of the available work force.

Funding for FHEO activities in FY 1993 was \$48.525 million and \$47.964 million in FY 1994, representing a decrease of \$561,000.⁸¹

Estimates of FHEO headquarters employment devoted to Title VIII versus other HUD fair housing duties are difficult because HUD has not published its headquarters employment by function, as it has field employment. Instead, headquarters employment is described by office, and most offices (except for the internal equal employment office referenced above) have responsibility for fair housing activities required by more than one statute—such as Title VIII and Title VI, etc.

71 29 U.S.C. § 794 (1988).

72 42 U.S.C. §§ 6101-6107 (1988).

73 Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 compilation); see 24 C.F.R. § 7.1 (1992).

74 42 U.S.C. § 2000d (1988).

75 29 U.S.C. §§ 621-634 (1988 and Supp. IV 1992).

76 U.S. Department of Housing and Urban Development, "Functional Statements re: Assistant Secretary for Fair Housing and Equal Opportunity and re: General Deputy Assistant Secretary for Fair Housing and Equal Opportunity" submitted to the U.S. Commission on Civil Rights, December 1992.

77 The organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under its reorganization, effective April 15, 1994, HUD eliminated the regional administrator positions and replaced them with Secretary's Representatives. The regional offices became area offices and the regional FHEO directors now report directly to the Assistant Secretary for Fair Housing and Equal Opportunity. See Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, Comments of the Department of Housing and Urban Development, p. 2 (hereafter cited as HUD Comments).

78 U.S. Department of Housing and Urban Development, *Congressional Justifications for 1995 Estimates*, Part 2 (March 1994), p. Q-1 (hereafter *HUD 1995 Budget*, Part 2).

79 *Ibid.*, p. Q-2.

80 *Ibid.*, p. Q-5.

81 See Theodore Daniels, Director, Office of management and Field Coordination, Office of Operations and Management, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, telephone interview, Aug. 15, 1994.

The seven offices in FHEO as constituted during most of the first 5 years of the FHAA are described below:

1) The Office of Investigations includes two divisions: HUD Program Investigations and Fair Housing Enforcement. It reviews complaint investigations conducted in HUD regions and conducts investigations in preparation for the filing of Secretary-initiated complaints. The FY 1993 staff was 32; the 1994 FTE total is projected at 41, and 62 FTEs are proposed for FY 1995.⁸²

2) The Office of Program Training and Technical Assistance provides training and guidance to HUD fair housing staff and provides technical assistance to outside groups. The office has also been charged with developing an interagency training academy. Actual FY 1993 staff totaled 11; no change was projected for FY 1994. Twelve FTEs are proposed in FY 1995.⁸³

3) The Office of Program Standards and Evaluation is charged with reviewing all legislative proposals and regulatory and other official guidance regarding HUD program administration. The office also:

... develops long-range strategies; coordinates research programs and evaluation mechanisms

with the Office of Policy Development and Research;⁸⁴ reviews policy and HUD programs; provides evaluation assistance to ongoing FHEO programs; conducts formal EO oriented evaluations of specifically identified HUD programs; implements activities to strengthen civil rights data collection and reporting throughout the Department and within FHEO, and provides feedback to management on necessary improvements and/or changes to programs; and prepares annual reports to Congress on the state of fair housing and on racial and ethnic participation in HUD programs.⁸⁵

The FY 1993 staff was 19 FTEs. No increase was projected for FY 1994, but 24 FTEs are proposed for FY 1995.⁸⁶

4) The Office of Fair Housing Assistance and Voluntary Programs administers the Fair Housing Assistance Program;⁸⁷ the Community Housing Resource Board Program;⁸⁸ Executive Order 12,259 prohibiting discrimination in housing programs;⁸⁹ section 3 of the Housing and Urban Development Act of 1968,⁹⁰ which authorizes programs to create employment and training opportunities for low-income persons; and voluntary compliance program agreements. The FTE total for FY 1993 is 20; no change was expected for FY 1994. The total proposed for FY 1995 is 25.⁹¹

⁸² Ibid., p. Q-3.

⁸³ Ibid., p. Q-3.

⁸⁴ This office is headed by the Assistant Secretary for Policy Development and Research and derives its primary charge from Title V of the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770 (codified as amended 42 U.S.C. § 3535(d) (1988)).

⁸⁵ *FY 1994 Budget Hearings*, p. 463.

⁸⁶ Ibid., p. Q-4.

⁸⁷ See 42 U.S.C. § 3616a (1988 and Supp. IV 1992).

⁸⁸ This program began in 1976 pursuant to the Fair Housing Act of 1968 (see chap. 7). See 24 C.F.R. Part 120 (1993).

⁸⁹ Exec. Order No. 12,259, 3 C.F.R. 307 (1981), reprinted in 42 U.S.C. § 3608 (1988).

⁹⁰ Pub. L. No. 90-448, 82 Stat. 476 (codified, as amended, at 12 U.S.C. § 1701u (Supp. IV 1992)).

⁹¹ *HUD 1995 Budget*, p. Q-4.

5) The Office of the Deputy Assistant Secretary for Operations and Management develops and oversees programs regarding HUD's internal equal opportunity goals; personnel functions, staff training and allocation; and technical and management evaluations of field operations. The Deputy Assistant Secretary's Office consisted of 4 FTEs in FY 1993. No change was projected for FY 1994-1995.

6) Located within the Deputy Assistant Secretary's Office is the Office of Affirmative Action and Equal Employment Opportunity, which oversees HUD's internal affirmative action programs and functions mandated by Executive Order 11,748, as amended;⁹² Title VII of the 1964 Civil Rights Act, as amended; the Age Discrimination in Employment Act of 1967; and pertinent HUD regulations. The FTE total for FY 1993 was 17; no change was projected for FY 1994-1995.⁹³

7) Also located within the Deputy Assistant Secretary's Office is the Office of Management and Field Coordination. This office incorporates the Budget, Performance Evaluation, Management Planning, and Administrative Divisions. It performs budget, personnel, and management functions for headquarters FHEO, and provides technical and management assistance to regional FHEO units.

FTEs totaled 18 for FY 1993, with no change projected for FY 1994-1995.⁹⁴

These offices are all supervised by the Office of the Assistant Secretary. The Assistant Secretary:

... serves as the principal advisor to the Secretary and principal source of advice and technical assistance to other Assistant Secretaries and to Regional Administrators on all matters relating to equal opportunity in housing and community development, facilities, employment, business opportunities, and other matters relating to civil rights. The Assistant Secretary also serves as the Director of Equal Employment Opportunity for the Department.⁹⁵

The Office of the Assistant Secretary includes a quality assurance staff and a management information systems staff and is administered by the General Deputy Assistant Secretary. FTEs for the immediate Office of the Assistant Secretary were 25 in FY 1993; no increase was projected for FY 1994-1995.

The Office of General Counsel

The Office of General Counsel (OGC) incorporates seven legal offices, of which one is the Office of Equal Opportunity and Administrative Law.⁹⁶ FTEs for the entire Office of the General Counsel were 219 in FY 1993 and 214 in FY 1994.⁹⁷ The FY 1995 estimated FTEs for

⁹² Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 compilation).

⁹³ HUD 1995 Budget, p. Q-5.

⁹⁴ Ibid.

⁹⁵ FY 1994 Budget Hearings, p. 462.

⁹⁶ The explanation of OGC's structure offered here is based on the FY 1994 HUD budget submission reprinted in the FY 1994 Budget Hearings, pp. 483-86. HUD's organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under HUD's reorganization, effective April 15, 1994, there are eight Associate General Counsels in OGC, and the Associate General Counsel for Civil Rights and Litigation is responsible for fair housing. See HUD Comments, p. 2.

⁹⁷ U.S. Department of Housing and Urban Development, *Congressional Justifications for 1995 Estimates, Part 3* (March 1994), p. C-2 (hereafter HUD 1995 Budget, Part 3). See also Joy Herndon, Director, Administrative Services, Office of the General Counsel, U.S. Department of Housing and Urban Development, telephone interview, Aug. 15, 1994.

OGC are 233.⁹⁸ Actual FTEs for the Office of Equal Opportunity and Administrative Law were 46 in FY 1993 and 45 in FY 1994, increasing to 50 in FY 1995.⁹⁹ Expenditures were \$18.044 million in FY 1993, \$18.984 million in FY 1994 and \$22.284 in FY 1995.¹⁰⁰

The Office of Equal Opportunity and Administrative Law is comprised of the Administrative Law Division, the Fair Housing Division, and the Personnel and Ethics Law Division. The Administrative Law Division has a variety of responsibilities associated with the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; bodies created by the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA),¹⁰¹ including the Federal Housing Finance Board, the Thrift Depositor Oversight Board and the Resolution Trust Corporation; HUD's Lead-Based Paint Office; HUD procurement and grants; and various contract disputes. In addition:

the division provides legal advice and assistance concerning the Real Estate Settlement Procedures Act (RESPA), the Davis-Bacon Act, the National Environmental Policy Act (NEPA), the Privacy Act of 1974, the Federal Managers' Financial Integrity Act (FMFIA), the Federal Tort Claims Act (FTCA), and the Military Personnel and Civilian Employees' Compensation Act (MPCEA). The Division

is responsible also for all HUD delegations of authority, staff work for the Secretary's review of administrative law judge decisions, and general administrative law matters.¹⁰²

This workload is intensified by the fact that much of the responsibility is new and concerns relatively uncharted legal waters. This division was allotted 10 FTEs in 1993. A budget breakdown by division of money appropriated is not available.¹⁰³

The Fair Housing Division is responsible for a variety of civil rights matters. It advises the Secretary on the requirements of Title VIII and Title VI, section 504 of the Rehabilitation Act of 1974, the Americans with Disabilities Act, and the Age Discrimination Act, as they apply to HUD programs—an estimated 20 percent of its workload. It works on assuring that housing and community development activities promote fair housing (15 percent), and prosecutes Title VIII complaints in administrative law proceedings (45 percent). It also reviews State fair housing laws for substantial equivalency with Title VIII and reviews HUD regional counsel analyses of local fair housing ordinances (20 percent).¹⁰⁴ The division was allotted 17 FTEs in FY 1993 and FY 1994; of these, 13 are attorneys, including the assistant general counsel and 2 deputy assistant general counsels.¹⁰⁵

⁹⁸ Herndon interview, Aug. 15, 1994.

⁹⁹ HUD 1995 Budget, Part 3, p. C-2.

¹⁰⁰ Ibid., p. C-1. See also Herndon interview, Aug. 15, 1994.

¹⁰¹ Pub. L. No. 101-73, 103 Stat. 183 (1989).

¹⁰² FY 1994 Budget Hearings, p. 485.

¹⁰³ Joy Herndon, Director of Administrative Services, Office of the General Counsel, U.S. Department of Housing and Urban Development, telephone interview, July 26, 1993.

¹⁰⁴ FY 1994 Budget Hearings, p. 486.

¹⁰⁵ "Office of Equal Opportunity and Administrative Law," staff list supplied by HUD July 22, 1993, and Herndon interview, July 26, 1993.

The Personnel and Ethics Law Division deals with all litigation matters concerning the Merit Systems Protection Board, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission. It also provides policy and legal guidance regarding standards of conduct and other ethical questions, the Freedom of Information Act, and the correct use of appropriated funds. It was allotted nine FTEs in 1993.

HUD's Regional Structure

HUD's regional structure¹⁰⁶ incorporates fair housing enforcement in its 10 regional offices and in a few field offices. Under HUD's model for regional operations, a regional office is headed by a regional administrator who supervises all regional staff. Each regional office includes a director of fair housing and equal opportunity, who reports to a regional administrator, and in turn supervises a program compliance division, a fair housing enforcement division, and a program operations division. In addition, a model office includes an intake/conciliation coordinator and management liaison officer.¹⁰⁷

In reality, regional office organization varies, with some fair housing directors overseeing only two divisions and a management liaison officer, and others having the full complement of organizational positions.¹⁰⁸ The offices vary in size from 29 to 82, with fair housing enforcement divisions ranging widely as well. The FHEO divisions include intake staff, investigators, and liaison personnel with State and local fair housing agencies that process HUD complaints.

The relationship of headquarters FHEO to the regions is one of guidance and oversight; actual supervision of regional FHEO activities rests with the appropriate regional administrator. Regional FHEO staff are expected to coordinate their activities as necessary with the regional counsel and field legal services located in each regional office.¹⁰⁹

Total FHEO field employment was estimated at 543 for FY 1993 and 531 for FY 1994. Title VIII FTEs for FY 1993 were estimated at 269, and at 273 in FY 1994.

All HUD regional offices contain, in addition to an office of fair housing and equal opportunity, a regional counsel, deputy

¹⁰⁶ As a result of reorganization efforts, as of April 15, 1994, HUD eliminated its regional administrators and established a more direct chain of command between the former regional offices (now called Enforcement Centers) and the Assistant Secretary. "Because the investigative function will now report directly to the Assistant Secretary, more accountability and better communication of information should enhance enforcement efforts, as well as ensure that enforcement efforts are made more consistent nationally." According to HUD, the Assistant Secretary is already using this new chain of command as a mechanism to disseminate information and direction to the Enforcement Centers. In addition, HUD anticipates that the new chain of command will also result in more efficient case processing. See "Recent Fair Housing Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives). See also HUD Comments, p. 7. See also National Academy of Public Administration, *Renewing HUD: A Long-Term Agenda for Effective Performance* (August 1994), for an exhaustive analysis of HUD's overall mission and organization.

¹⁰⁷ "Model Regional Office of Fair Housing and Equal Opportunity," organization chart supplied by HUD, December 1992.

¹⁰⁸ HUD regional office organization charts, supplied by HUD in December 1992.

¹⁰⁹ U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1989*, p. 7.

regional counsel, associate regional counsels, and attorney-advisors.¹¹⁰ The regional counsels "receive operational direction and administrative support from their Regional Administrators and Managers, but on legal matters, they receive professional advice and direction from the General Counsel, the chief legal officer of the Department."¹¹¹

Regional counsels review all local (but not State) statutes submitted to HUD for certification as substantially equivalent to Title VIII.¹¹² In addition, regional counsels review some no-cause determinations. However, pursuant to internal FHEO procedures, "regional FHEO sends some no cause determinations involving novel or complex issues directly to FHEO headquarters for concurrence, such as determinations involving lending and insurance discrimination, zoning cases, applications of reasonable accommodations standards, and retaliation issues."¹¹³ Those determinations are then reviewed by OGC headquarters.¹¹⁴ A breakdown of staff time or FTEs spent on fair housing activities is not available, but the total actual employment for all field legal services in FY 1993 was estimated at 302; projected employment in FY 1994 was 299. FY 1993 estimated expendi-

tures totaled \$19.165 million; for FY 1994 the figure is \$20.327 million.¹¹⁵

The Department of Justice (DOJ)

Primary responsibility for litigating Title VIII matters in court rests with the Housing and Civil Enforcement Section located within the Civil Rights Division of DOJ. The Attorney General has authority to file suit in Federal district court whenever:

any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by [Title VIII] and such denial raises an issue of general public importance . . .¹¹⁶

The Attorney General is also authorized to pursue cases referred by HUD where "the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance."¹¹⁷ Furthermore, the Attorney General may file suit where the Secretary refers to her a breach of a conciliation agreement.¹¹⁸ In these cases only, the Attorney General may seek civil penalties to vindicate the public interest.¹¹⁹

¹¹⁰ The explanation of HUD's field legal services offered here is based on the FY 1994 budget submission reprinted in the *FY 1994 Budget Hearings*, pp. 492-95. The regional organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under its reorganization, effective April 15, 1994, HUD redesignated the ten regional counsels as assistant general counsels. See HUD Comments, p. 2.

¹¹¹ *FY 1994 Budget Hearings*, p. 492.

¹¹² *FY 1994 Budget Hearings*, p. 493.

¹¹³ HUD Comments, p. 2.

¹¹⁴ *Ibid.*

¹¹⁵ *FY 1994 Budget Hearings*, p. 492.

¹¹⁶ 42 U.S.C. § 3614(a) (1988).

¹¹⁷ *Id.* §§ 3610(g)(2)(C) and 3614(b)(1)(A).

¹¹⁸ *Id.* § 3614(b).

¹¹⁹ *Id.* § 3614(d)(1)(C).

Civil penalties in these cases may include up to \$50,000 for a first violation,¹²⁰ and up to \$100,000 "for any subsequent violation."¹²¹

The Attorney General also must seek "prompt" judicial action when the Secretary determines immediate intervention is necessary involving a complaint and authorizes a civil action,¹²² and may sue to enforce subpoenas.¹²³ HUD, through the Attorney General, may bring suits to enforce administrative orders.¹²⁴ In addition, the Attorney General is required to file suit when the Secretary of HUD finds reasonable cause¹²⁵ and the complainant, respondent, or aggrieved person on whose behalf the complaint was filed elects a trial in U.S. district court.¹²⁶ Finally, the Attorney General may prosecute "Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with"¹²⁷ persons exercising their fair housing rights under Title VIII.

These responsibilities are delegated within the department to the Assistant Attorney General for Civil Rights and, in turn, are

carried out by the Housing and Civil Enforcement Section. In addition to housing enforcement, this section is responsible for enforcement of the public accommodations provisions of the 1964 Civil Rights Act.¹²⁸

Actual staff for the section in FY 1993 totaled 58, including 33 attorneys.¹²⁹ Three or four additional attorneys were expected in FY 1994.¹³⁰

The Civil Rights Division budget for FY 1993 was \$52.7 million, of which \$6.415 million was devoted to housing and civil enforcement. The FY 1994 overall budget was \$59.956 million, with fair housing receiving \$9.283 million.¹³¹

To ensure coordination, consistency, and cooperation between HUD and DOJ in the enforcement of the Fair Housing Amendments Act, both departments have executed a "Memorandum of Understanding."¹³² The memorandum outlines the roles and responsibilities of each department with regard to prompt judicial action; election of civil action; pattern or practice, land use and zoning cases;

¹²⁰ *Id.* § 3614(d)(1)(C)(i).

¹²¹ *Id.* § 3614(d)(1)(C)(ii).

¹²² *Id.* § 3610(e)(1).

¹²³ *Id.* § 3614(c).

¹²⁴ *Id.* § 3612(j) and (m).

¹²⁵ *Id.* § 3614(b)(1)(A).

¹²⁶ *Id.* § 3612(a) and (e). Civil penalties are not available in election cases.

¹²⁷ *Id.* § 3631.

¹²⁸ Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., June 24, 1993.

¹²⁹ Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, letter to Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, Apr. 1, 1993.

¹³⁰ Hancock interview, June 24, 1992. In FY 1994, the section received 89 FTEs and 101 actual positions according to the Civil Rights Division's Budget Office. See Jean Chipouras, Budget Analyst, Budget Office, Civil Rights Division, U.S. Department of Justice, telephone interview, Aug. 15, 1994.

¹³¹ "Civil Rights Division Fund Tracking Chart Enacted Levels," supplied by the Department of Justice, July 1, 1993.

¹³² "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988," Dec. 7, 1990.

breach of conciliation agreements and enforcement of subpoenas; judicial review and enforcement of orders by administrative law judges; referral of matters from DOJ to HUD; situations involving interference, coercion, or intimidation; press relations; resolution of differences; and exchange of information.¹³³

State and Local Human Rights/Relations Agencies

In both 1968 and 1988, Congress recognized the importance of including State and local agencies in the enforcement of the law. According to the Commission's 1992 report on the certification of State and local agencies, "the 1988 Amendments reaffirmed and further codified the Federal Government's commitment to using State and local agencies in the enforcement of the Federal fair housing law."¹³⁴

In order to continue processing fair housing complaints under the amendments, State and local agencies must have laws and ordinances that are "substantially equivalent" to the Federal law. State or local law must substantially conform, "on its face," to the rights, remedies, judicial protection, and enforcement of such rights and remedies as are available under the FHAA.¹³⁵ An agency's "current practices and past performance [must] demonstrate that, in operation, the law provides substantially

equivalent rights and remedies.¹³⁶ If an agency, after meeting the facial determination, does not have an adequate record to permit HUD to reach a conclusion on the adequacy of the current practices, HUD may enter into an interim referral agreement" for a period of up to 2 years. During this time, HUD may refer complaints to the agency to allow it to build a performance record that HUD will monitor and assess before granting full certification.¹³⁷

As of May 1, 1993, HUD had signed interim agreements to enforce Title VIII with 22 States and 17 local agencies. The Texas Human Relations Commission, certified in October 1992, was the first and only agency fully certified as of May 1, 1993.¹³⁸ However, North Carolina's State agency achieved full certification later in 1993.¹³⁹

Upwards of 70 percent of all complaints received by HUD were processed by State and local agencies following the 1988 amendments,¹⁴⁰ until the agency certification requirement under the new law took effect in September 1992. On that date, HUD took back, in effect, 1,520 complaints,¹⁴¹ increasing its own caseload by approximately 75 percent to 3,709.¹⁴²

¹³³ Ibid.

¹³⁴ *Prospects and Impact*, p. 8; and 42 U.S.C. § 3610(f)(3)(a) (1988).

¹³⁵ 24 C.F.R. § 115.2(a) (1993). This is frequently called the facial determination.

¹³⁶ *Id.* § 115.2(b).

¹³⁷ *Id.* § 115.11.

¹³⁸ 57 Fed. Reg. 49,803 (Oct. 28, 1992).

¹³⁹ "In Brief," *Fair Housing-Fair Lending*, vol. VIII, no. 12, June 1, 1993, p. 14. HUD published its proposal to certify North Carolina Dec. 18, 1992 (57 Fed. Reg. 60,220), and the public comment period ended Jan. 19, 1993.

¹⁴⁰ *Prospects and Impact*, p. 6.

¹⁴¹ "FHAP Cases Open in Agencies as of Sept. 13, 1992," list of cases supplied by HUD, dated Sept. 29, 1992.

¹⁴² For a full discussion of reactivated cases, see chapter 6, Fair Housing Assistance Program.

Fair Housing and Other Advocacy Groups

Other major players in the processing of complaints include local fair housing organizations and civil rights advocacy groups. Local fair housing organizations have operated for the most part using HUD funds provided through the Fair Housing Initiatives Program. The fair housing groups conduct testing, assist individual complainants, and file lawsuits of public importance, often winning

substantial money damages to be used in furthering fair housing work.¹⁴³ Many of the fair housing organizations operate under an umbrella-group, the Fair Housing Alliance, which serves as a clearinghouse and resource center.¹⁴⁴ Other civil rights groups, such as the NAACP, NAACP Legal Defense and Education Fund, Inc., and the Lawyers' Committee for Civil Rights Under Law are also active in fair housing litigation.

¹⁴³ Shanna Smith, executive director, Fair Housing Alliance, interview in Washington, D.C., June 14, 1993.

¹⁴⁴ Smith interview, June 14, 1993.

3. Processing Complaints

The lack of government protection against housing discrimination was the principal motivating factor in the struggle for a new fair housing law for a decade before passage of the 1988 Fair Housing Amendments Act (FHAA). This chapter examines the implementation of the new law by the administrative structure created by the U.S. Department of Housing and Urban Development (HUD) to process complaints pursuant to the FHAA. The analysis below includes the intake, conciliation, and investigation of complaints; and the determination of no cause or reasonable cause to believe discrimination has occurred.

Intake

Intake, often regarded in complaint systems as a clerical function, is in fact critically important in screening out cases that do not fall within HUD's jurisdiction, in establishing the basic framework as much as possible for conciliation and investigation, and in determining if the complainant requires any immediate relief.¹

Legal Framework

The intake function is governed primarily by HUD regulations; only minimal requirements are spelled out in the law. Under the FHAA, complaints may be filed with the Secretary of HUD within 1 year of the date "an alleged discriminatory housing practice has occurred or terminated."² HUD regulations state that such complaints may be filed in person or in writing with HUD headquarters, regional, or field offices,³ or may be initiated by telephone with HUD regional and field offices.⁴ Complaints may also be filed with State or local agencies certified as substantially equivalent by HUD.⁵ Generally, the appropriate regional administrator will process the complaints.⁶

The Assistant Secretary may require that the aggrieved person or HUD file complaints on HUD forms or on a form containing substantially the same information as the HUD forms require.⁷ The complainant must sign the complaint and affirm the truth of its content.⁸ If a complaint is made by telephone, HUD will write out the complaint using the

1. Kathleen Coughlin, Director of Fair Housing Employment Opportunity, HUD Region IV (Atlanta), interview in Atlanta, Ga., Mar. 6, 1991 (hereafter cited as Coughlin, 1991 interview), and Shanna Smith, executive director, Fair Housing Alliance, interview in Washington, D.C., June 14, 1993 (hereafter cited as Smith interview).

2. 42 U.S.C. § 3610(a)(1)(A)(i) (1988). (For a discussion of FHAA's retroactive application, see below.)

3. 24 C.F.R. § 103.25(a)(1) (1993).

4. *Id.* § 103.25(a)(2).

5. *Id.* § 103.25(a)(3).

6. *Id.* § 103.25(b).

7. *Id.* § 103.30(b).

8. *Id.* § 103.30(a).

HUD complaint form and send it to the aggrieved person for signature.⁹ Each complaint must contain the following:

- (1) The name and address of the aggrieved person.
- (2) The name and address of the respondent.¹⁰
- (3) A description and the address of the dwelling which is involved, if appropriate.
- (4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.¹¹

Complaints may be amended "to cure technical defects or omissions; including failure to sign or affirm a complaint, to clarify or amplify the allegations in a complaint, or to join additional or substitute respondents."¹²

The Assistant Secretary is required to advise the aggrieved person that the complaint has been received, what the time limits are, and what forums he or she may use to pursue the complaint.¹³ The Assistant Secretary must use certified mail or personal service to notify the aggrieved person.¹⁴ The acknowledgment will include a notice of the right of the aggrieved party to file a civil suit in U.S. district court within 2 years of when the dis-

crimatory act occurred or terminated, not including the time consumed by an administrative proceeding under the act.¹⁵

Within 10 days of when the complaint is filed, the Secretary must notify the respondent as well, "identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this title, together with a copy of the original complaint."¹⁶ The notice will advise the respondent of his or her right to submit an answer to the complaint within 10 days of receiving HUD's notice of the complaint.¹⁷ The answer must be signed and affirmed in the same manner as a complaint, may be based on any defense that might be used in court,¹⁸ and may be "reasonably and fairly amended at any time with the consent of the Assistant Secretary."¹⁹ Finally, notice to the respondent must include a warning that retaliation against any person because of their participation in the complaint process is itself a discriminatory housing practice under the act.²⁰

A complaint filed regarding a discriminatory practice that occurred within the jurisdiction of a State or local agency certified to

9. *Id.* § 103.25(a)(2). An aggrieved person is one who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i) (1988).

10. "Respondent" is defined as "(a) The person or other entity accused in a complaint of a discriminatory housing practice; and (b) any other person or entity identified in the course of investigation and notified as required under [C.F.R.] § 103.50." 24 C.F.R. § 103.9 (1993).

11. *Id.* § 103.30(c).

12. *Id.* § 103.42.

13. 42 U.S.C. § 3610(a)(1)(B)(i) (1988); 24 C.F.R. § 103.45 (1993).

14. 24 C.F.R. § 103.45 (1993).

15. *Id.* § 103.45(a) and (d). However, the period for filing is extended to include "the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending."

16. 42 U.S.C. § 3610(a)(1)(B)(ii) (1988).

17. 24 C.F.R. § 103.50(b)(3) (1993).

18. *Id.* § 103.55(a).

19. *Id.* § 103.55(b).

20. *Id.* § 103.50(b)(6).

handle HUD complaints will be referred to such agency for processing.²¹ In such cases, both the complainant and the respondent will be notified of their rights as above.²² The Assistant Secretary will take no further action under Title VIII while the complaint is pending with the certified agency,²³ but may take action under other civil rights statutes.²⁴ Under certain circumstances, HUD may reactivate the complaint.²⁵

Retroactivity of Complaints

The complaint processing procedures found in part 103 of HUD's regulations apply to all complaints alleging discriminatory housing practices based on race, color, religion, sex, or national origin pending on March 12, 1989, or filed after that date.²⁶ However, the procedures apply to complaints based on family status or handicap only if the alleged discriminatory practice occurred on or after the March 12, 1989, effective date.²⁷ Thus, any complaint alleging discrimination on the traditional bases is processed under the amended procedures even if the practice occurred before the effective date of the FHAA.

HUD rejected proposed rules that would have restricted the scope of the new remedies in order to avoid the appearance of retroactive application.²⁸ The proposed rules would have

applied the new procedures only to complaints involving either alleged discriminatory practices occurring on or after the effective date, or complaints filed after the effective date that alleged discrimination based on practices occurring continuously before and after the effective date.²⁹

Although the final rule effectively applies the new procedures to certain categories of complaints older than the effective date of the FHAA, HUD's comments refute any retroactivity problems.³⁰ According to HUD, the 1988 amendments, except the provisions creating new categories of prohibited discrimination, "merely provide a new process" rather than "affect substantive rights."³¹ Therefore, following a general rule of statutory construction, legislation that is merely procedural may be applied to any pending claim as long as it does not affect any vested rights.³² Application of this rule depends upon the assumption that the FHAA affects only procedural rights.

The Intake Process

As noted above, Title VIII and HUD's formal regulations offer little insight into the conduct of intake as such. Although HUD provided the Commission with a draft technical guidance memorandum (TGM) on intake, it appears that HUD never circulated the

21 *Id.* § 103.100(a).

22 *Id.* § 103.100(b).

23 *Id.* § 103.105(a).

24 *Id.* § 103.105(b).

25 42 U.S.C. § 3610(f)(2)(A)-(C) (1988); 24 C.F.R. § 103.110 (1993).

26 24 C.F.R. § 103.1 (1993).

27 *Id.*

28 24 C.F.R. Ch. I, Subch. A, App. I, 911, 948-949 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

TGM, even in draft form, to HUD staff for use as guidance.³³

Currently, HUD no longer uses the draft TGM form for issuing guidance, but rather issues technical guidance materials in a memorandum format. In addition, HUD is actively developing new systems for providing information to investigative staff, such as a written compliance manual and a formal notice form for issuance of such instructions.³⁴

According to HUD, subjects of recent memoranda issuances include:

the intake process, the applicability of the disparate impact theory to Fair Housing Act cases, and the application of the First Amendment to certain actions under the act. Guidance in active preparation include subjects such as administrative closures, concurrent case processing (that is, the processing of complaints, which are covered by more than one civil rights law enforced by the Department), . . . and identification and investigation of systemic and pattern and practice cases.³⁵

As anticipated by HUD regulations, fair housing complaints are filed with HUD in several ways. Some are made over the telephone; others are filed in writing. Very few are "walk-ins," that is, made in person.³⁶ The predominant means of filing complaints appears to vary by region. One HUD intake specialist in Philadelphia told the Commission that most complaints are received in writing or transferred to HUD by State and local civil rights agencies. Walk-ins are rare because most complainants do not live within commuting distance of the regional office.³⁷ On the other hand, a Kansas City HUD staffer thought 75-80 percent of the complaints filed came in over the phone, with 10-15 percent referred by local agencies and the rest walk-ins.³⁸ One Fort Worth investigator said 95 percent were telephone complaints,³⁹ although another asserted that 60 percent come in the mail and 38 percent over the telephone.⁴⁰

HUD maintains a tollfree number exclusively for Title VIII complaints. Callers who

33 During the period covered by this report, HUD issued specific instructions in its internal system of TGMs. Beginning with TGM-12 in May 1991, HUD disseminated all subsequent TGMs in draft form only. HUD supplied the U.S. Commission on Civil Rights with the TGMs in response to a request for "Any technical materials (e.g. manuals, technical guidance memoranda) issued by headquarters to regional offices concerning compliance and case handling procedures and standards of performance specifically relating to intake, investigation, conciliation, reasonable cause determinations." See U.S. Commission on Civil Rights, Request for Information and Materials, Oct. 2, 1990. HUD supplied updates in response to a later request for "Current compliance manual/s, including draft manuals now used as guidance," and, "Any other relevant current documents outlining HUD procedures and directives on fair housing enforcement." See U.S. Commission on Civil Rights, Documents Update Request, Dec. 22, 1992.

34 See "Recent Fair Housing Enforcement Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development, to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives).

35 Ibid.

36 Vicki Gums, HUD intake analyst, interview in San Francisco, CA, Jan. 30, 1991 (hereafter cited as Gums 1991 interview).

37 Cheryl Burrichter, equal opportunity specialist, FHEO, Region III (Philadelphia) telephone interview, July 9, 1993 (hereafter cited as Burrichter 1993 interview). Complainants can, however, file a complaint at a HUD field office.

38 Edward Johnson, investigator, FHEO, Region VII (Kansas City), telephone interview, July 15, 1993 (hereafter cited as Edward Johnson, 1993 interview).

39 Thurman Miles, investigator, FHEO, Region VI (Ft. Worth), telephone interview, July 20, 1993 (hereafter cited as Miles 1993 interview).

40 Richard Redmon, intake specialist, FHEO, Region VI (Fort Worth), telephone interview, July 20, 1993 (hereafter cited as Redmon 1993 interview).

use the number will hear a menu of three selections. The first is for general information about fair housing and refers the caller to HUD's information clearinghouse service. The second is for complaints; the caller is asked to enter the area code and the call is forwarded to the appropriate HUD regional office, where it is answered by HUD staff. The third option directs the caller looking for general HUD program information to consult the telephone book for the nearest local HUD office.⁴¹

Many complaints are made on HUD forms: "We get people that go to other agencies that have our 903 [complaint] forms. They're easy to pick up. They can go to the Fair Housing Council . . . they have our forms. So, we get form 903s from all over."⁴²

One office responds to telephone complaints by mailing the aggrieved person a form 903 with a hotline to call upon receipt. HUD staff then "walks" the complainant through the process of filling it out. The result of such assistance is a nearly 100 percent return rate of blank forms mailed out.⁴³

Since HUD must mail the aggrieved and the respondent a notice of the complaint 10 days after it is filed, intake staff must act quickly to perfect the complaint; that is, to

record essential information, gather as much information as possible to assist the investigator, and determine whether the complaint is within HUD's jurisdiction.⁴⁴ As one intake specialist reported, "When the form 903s come in, I have to make sure that they've got names, phone numbers, addresses, and respondents. I get as much information as I can before I give it to the investigator because this cuts down on their time."⁴⁵

Although HUD has employed intake procedures since the 1968 law took effect, in the last 2 years several offices have instituted more rigorous procedures, which they call "scrubbing."⁴⁶ Scrubbing the complaint requires intake staff to ascertain and verify basic information about the allegations, to call the complainant and respondent to clarify their accounts of the circumstances surrounding the complaint, and prepare a memorandum recording such discussions for the record.⁴⁷

Intake staff must conduct a property search to determine if the respondent owns or manages multiple properties, and if other complaints have been filed against the respondent.⁴⁸ Access to an online database of property ownership similar to that used by HUD's valuation offices would be helpful, according to one intake staff.⁴⁹ One intake

41 Goldia Hodgdon, Director, Housing Enforcement Division, Office of Investigations, HUD, telephone interview, Sept. 3, 1993.

42 Kay Chandler, intake specialist, FHEO, Region IX (San Francisco), interview in San Francisco, Calif., Jan. 28, 1991 (hereafter cited as Chandler 1991 interview).

43 Don Johnson, intake specialist, FHEO, Region IV (Atlanta), telephone interview July 13, 1993 (hereafter cited as Don Johnson 1993 interview). It would appear this method means the intake process is essentially over before the complaint is logged and the 100-day period for investigation begins.

44 Chandler 1991 interview, and Andrew Quint, complaint intake analyst, FHEO, Region IX (San Francisco), interview in Los Angeles, Calif., Jan. 28, 1991 (hereafter cited as Quint 1991 interview).

45 Gums 1991 interview.

46 Burrichter 1993 interview; Edward Johnson, investigator, FHEO, Region VII (Kansas City), telephone interview, July 15, 1993 (hereafter cited as Edward Johnson 1993 interview); and Julius McMillen, conciliator, FHEO, Region V (Chicago), telephone interview, July 13, 1993 (hereafter cited as McMillen 1993 interview).

47 Burrichter 1993 interview.

48 Quint 1991 interview.

49 Cheryl Burrichter, equal opportunity specialist, FHEO, Region III (Philadelphia) telephone interview, 1991 (here-

specialist noted that a list of complaints filed, including the names and addresses of the parties and the properties involved, is distributed weekly in her office.⁵⁰

Although 10 days is the statutory standard, it may take up to 30 days to determine jurisdiction and obtain complete information from the complainant to frame the allegation,⁵¹ depending upon the complexity of the case and the ease of ascertaining the identity of the respondent. If the allegations do not constitute a violation of Title VIII, some HUD offices try to refer the aggrieved person to another agency.⁵²

Screening out nonjurisdictional complaints can be the most problematic part of the intake process. In HUD's TGM on maintaining case files, investigators are instructed that "if jurisdiction does not exist, administratively close the complaint,"⁵³ yet no instructions on determining jurisdiction or on assisting complainants to frame their allegations to meet jurisdictional requirements are given.⁵⁴ According to one intake specialist, most complaints received over the telephone do not fall within HUD's jurisdiction.⁵⁵ A regional director observed that a large portion of HUD's old (backlogged) cases should not have been ac-

cepted as fair housing complaints.⁵⁶ Several offices reported that effective "scrubbing" weeds out nonjurisdictional cases.⁵⁷ Others note that nonjurisdictional cases are not "weeded out" in intake, but are recorded as bona fide complaints in HUD's database and then closed, if appropriate.⁵⁸

Staff also reported that informal conciliation efforts by intake staff are another way in which they dispose of nonjurisdictional complaints. In the course of contacting the parties for clarification, intake staff may facilitate a "withdrawal with resolution" whereby complainants withdraw their complaints as part of an informal settlement (see below).⁵⁹

Staff must refer certain complaints for special attention. First are cases where the aggrieved will suffer irreparable harm unless the respondent is prevented from going forward. In such instances, HUD may seek "prompt judicial action"⁶⁰ (a temporary restraining order) through the Attorney General to preserve the status quo pending an investigation of the complaint. Cases involving mortgage lending, redlining, and insurance discrimination are presumed to involve systemic violations and are referred to the region's systemic unit, or to designated staff

after cited as Burrichter 1991 interview).

50 Chandler 1991 interview.

51 Quint 1991 interview.

52 Redmon 1993 interview.

53 HUD TGM-2, p. 11.

54 Vicki Guma, intake specialist, FHEO, Region IX (San Francisco), telephone interview, July 13, 1993 (hereafter cited as Guma 1993 interview).

55 Quint 1991 interview.

56 Coughlin 1991 interview.

57 Don Johnson 1993 interview; Edward Johnson 1993 interview; and Cheryl Burrichter 1993 interview.

58 Frank Riley, investigator, FHEO, Region IX field office (Orange County, Calif.), telephone interview, July 12, 1993 (hereafter cited as Riley 1993 interview), and Cheryl Burrichter 1993 interview.

59 Cheryl Burrichter 1993 interview, and Edward Johnson 1993 interview.

60 42 U.S.C. § 3610(e)(1) (1988).

in the absence of such a unit, for investigation.⁶¹ Intake staff should identify cases that lend themselves to the use of testing as an investigative tool.⁶² Finally, intake staff must also refer all cases eligible for handling by a HUD-certified State or local agency.⁶³ To speed such referral, one office reported faxing complaints to the agency involved and following up with mail delivery.⁶⁴

Although the 10-day deadline for notification of the respondent sets the parameter for intake processing, staff reported widely varying average timeframes. The shortest turnaround cited was 2 days,⁶⁵ with 20 days the outside limit.⁶⁶ In one case, the initial 10-day period was said to include any efforts at conciliation.⁶⁷

The organization and assignment of work in HUD regional offices also varies. Some of-

fices have intake units of up to three staff;⁶⁸ others use only one person⁶⁹ or have no formal unit.⁷⁰ In some cases intake staff are expected to be generalists familiar with other tasks such as investigation;⁷¹ elsewhere intake staff also carry out formal conciliation.⁷² One region experimented with asking field staff to carry out intake and investigations, but without direct accountability to regional FHEO; the experiment was judged a failure.⁷³

Caseloads also seem to vary widely. In one office, an intake specialist handled 50 cases a month;⁷⁴ in another, fewer than 20.⁷⁵ In the first, however, intake was the sole assignment, while in the second, 35 to 40 were successfully conciliated by the intake specialist.⁷⁶

Inexperienced intake specialists received 1 week of formal civil rights training prior to or soon after they were selected for an intake

61. Burrichter 1993 interview. According to HUD, the Secretary plans to establish a separate organizational unit within FHEO to address mortgage lending and insurance discrimination in a policy context. HUD has already begun to develop regulations which will define and describe discrimination in mortgage lending and insurance activities. See HUD Initiatives, p. 3.

62. Ibid.

63. 42 U.S.C. § 3610(f) (1988). It appears the law contemplates that HUD will officially receive the complaint prior to its referral, and not that complaints made to State or local agencies will be investigated by them first and then filed with HUD.

64. Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993 (hereafter cited as King 1993 interview).

65. Edward Johnson 1993 interview. Staff at other offices said 3 days was average. See Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993, and Redmon 1991 interview.

66. Burrichter 1993 interview.

67. Don Johnson 1993 interview.

68. Gums 1993 interview, and Miles 1993 interview.

69. Myrtle Wilson, chief, program services branch, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993.

70. Burrichter 1993 interview.

71. Redmon 1993 interview.

72. Don Johnson 1993 interview.

73. Coughlin 1993 interview.

74. Burrichter 1993 interview.

75. Don Johnson 1993 interview.

76. Don Johnson 1993 interview.

position,⁷⁷ but the training was not directly related to intake.⁷⁸ One specialist reported regularly receiving decisions made in HUD cases and the housing information service *Fair Housing-Fair Lending*.⁷⁹ however, another relied on her branch chief for new procedures and other relevant information.⁸⁰ Intake staff interviewed often recommended training specifically directed at intake procedures and definitive (not draft) instruction from headquarters, as well as updated telephone systems and adequate staffing levels.

Conciliations

Conciliation was for many years HUD's only means of resolving fair housing complaints, and it retains an important role under the new enforcement mechanism established by FHAA. However, conciliation as a means of dispute resolution has certain inherently problematic characteristics. Whether the techniques used to bring about agreement are fair and whether the results are just have been perennial concerns of complainants and respondents alike.

Legal Framework

According to Title VIII, "During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint."⁸¹ In its

regulations governing conciliations, HUD proposes:

... to achieve a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory housing practices, or the prevention of their occurrence, in the future.⁸²

Such a resolution takes the form of a conciliation agreement,⁸³ defined by Title VIII as an agreement between the complainant and the respondent, subject to the approval of the Secretary (of HUD).⁸⁴ The Secretary has, by regulation, delegated such authority to the Assistant Secretary for Fair Housing and Equal Opportunity.⁸⁵ (If the agreement is not approved by the Assistant Secretary, HUD's general counsel may still issue a charge of discrimination regardless of the parties' wishes.)⁸⁶

The relief obtained for a complainant as a result of conciliation may include:

- (1) monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;
- (2) other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief; or

⁷⁷ Chandler interview and Quint 1991 interview.

⁷⁸ Chandler interview, and Gums 1993 interview.

⁷⁹ Chandler interview.

⁸⁰ Vicki Gums, intake specialist, FHEO, Region IX (San Francisco), interview in San Francisco, Calif., Jan. 30, 1991.

⁸¹ 42 U.S.C. § 3610(b)(1) (1988).

⁸² 24 C.F.R. § 103.300(b) (1993).

⁸³ Agreements reached after a cause finding has been issued are called settlements, and may be submitted to the administrative law judge (ALJ) any time prior to the issuance of a final decision. *Id.* § 104.925.

⁸⁴ 42 U.S.C. § 3610(b)(2) (1988).

⁸⁵ 24 C.F.R. § 103.310(b)(1) (1993).

⁸⁶ *Id.* § 103.310(b)(2).

(3) injunctive relief appropriate to the elimination of discriminatory practices affecting the aggrieved person or other persons.⁸⁷

HUD regulations provide that a conciliation agreement shall not only be satisfactory to the parties, but shall "adequately vindicate the public interest."⁸⁸ In this regard, relief obtained may include:

- (a) Elimination of discriminatory housing practices.
- (b) Prevention of future discriminatory housing practices.
- (c) Remedial affirmative activities to overcome discriminatory housing practices.
- (d) Reporting requirements.
- (e) Monitoring and enforcement activities.⁸⁹

Conciliation agreements may also provide for binding arbitration of any or all aspects of the complaint.⁹⁰ Although arbitration may occur only as part of a conciliation agreement approved by the Secretary, the arbitrator's binding decision is not subject to the approval of the Assistant Secretary, and might not necessarily vindicate the public interest.⁹¹ Thus, it appears that while the Assistant Secretary may determine that the binding arbitration

process may vindicate the public interest in any given complaint, the Assistant Secretary has no authority to determine whether the resulting binding arbitration agreement serves the public interest. This apparent statutory contradiction is not addressed by HUD regulations nor discussed in HUD's commentary provided at the time the regulations were issued.⁹² However, HUD maintains that the public interest is protected sufficiently because the parties would have to enter into a conciliation agreement before the complaint could be brought to binding arbitration.⁹³ In any event, according to one senior HUD legal official, use of binding arbitration is rare or nonexistent.⁹⁴

HUD is required to make conciliation agreements public unless the parties request nondisclosure, and "the Assistant Secretary determines that disclosure is not required to further the purposes" of the law.⁹⁵

After an agreement is reached and approved by the Secretary, the respondent's failure to comply with its terms will cause the Secretary to refer the matter to the Attorney General "with a recommendation that a civil action be filed under section 814⁹⁶ for the enforcement of such agreement."⁹⁷ HUD regulations foresee periodic review of compliance

⁸⁷ *Id.* § 103.315(a).

⁸⁸ *Id.* § 103.310(b)(1)(ii).

⁸⁹ *Id.* § 103.320.

⁹⁰ 42 U.S.C. § 3610(b)(3) (1988).

⁹¹ Compare 42 U.S.C. § 3610(b)(2) (1988) and 24 C.F.R. § 103.310(b)(1) (1993) with 42 U.S.C. § 3610(b)(3) (1988) and 24 C.F.R. § 103.315(b) (1993).

⁹² See 24 C.F.R. Ch. I, Subch. A, App. I at 957-58 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

⁹³ "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development, to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 3 (hereafter cited as HUD Comments).

⁹⁴ Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, telephone interview, July 14, 1993.

⁹⁵ 42 U.S.C. § 3610(b)(4) (1988); 24 C.F.R. § 103.330(b) (1993).

⁹⁶ 42 U.S.C. § 3614 (1988).

⁹⁷ *Id.* § 3610(c).

with conciliation agreements, with the general counsel responsible for referral to the U.S. Department of Justice (DOJ) when he or she has reasonable cause to believe a respondent has breached the agreement.⁹⁸

HUD may suspend conciliation efforts "if the respondent fails or refuses to confer with HUD; the aggrieved person or the respondent fail to make a good faith effort to resolve any dispute; or HUD finds, for any reason, that voluntary agreement is not likely to result."⁹⁹

Finally, the law provides for confidentiality regarding conciliation attempts and protects the respondent from use of information against him or her: "Nothing that is said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned."¹⁰⁰

In the commentary accompanying the published regulations, HUD noted that information disclosed during failed conciliation attempts could be used in the course of a subsequent investigation:

Although it is fairly obvious that statements made during conciliation might prove useful investigative leads, Congress did not preclude the use of such statements. . . .

HUD notes that the use of such information in administrative hearings and civil actions will be

governed by Rule 408 of the Federal Rules of Evidence. . . .

Rule 408 makes inadmissible at trial "evidence of conduct or statements made in compromise negotiations" . . . does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."¹⁰¹

HUD published an extensive draft technical guidance memorandum on conciliation on August 11, 1992. According to the TGM, HUD "is obligated to pursue conciliation while the investigation is active, and possibly for a time thereafter."¹⁰² Indeed, "Prior to forwarding the case with a reasonable cause recommendation to Headquarters, it is mandatory that another conciliation attempt be made with the parties."¹⁰³

If, in the course of conciliation or investigation, it becomes clear the complaint is non-jurisdictional, "the conciliator must break off conciliation and initiate dismissal of the complaint. . . ."¹⁰⁴ The TGM stresses the need for HUD staff to remain impartial in appearance and in fact.¹⁰⁵ For that reason, conciliation agreements may not include compensation to a fair housing group that has assisted the complainant but is not a party, lest it appear HUD and the fair housing group have colluded.¹⁰⁶ Nevertheless, HUD points out that a fair housing group may be compensated for

98. 24 C.F.R. § 103.335 (1993).

99. *Id.* § 103.325.

100. 42 U.S.C. § 3610(d) (1988).

101. 24 C.F.R. Ch. I, Subch. A, App. I at 958 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

102. Draft TGM-16, p. 6.

103. Draft TGM-16, p. 24.

104. Draft TGM-16, p. 7.

105. Draft TGM-16, pp. 12-13.

106. Draft TGM-16, p. 21. The TGM refers to the commentary accompanying issuance of the Final Rule (54 Fed. Reg. 3265-66) in which HUD expresses this concern: Compensation to fair housing groups assisting complainants is common in private lawsuits.

injuries suffered due to respondent's discrimination and provided an opportunity to become a complainant or aggrieved person and thus participate in conciliation or adjudication.¹⁰⁷ Also, fair housing groups may be compensated in conciliation agreements with attorney's fees for providing legal representation to complainants.¹⁰⁸ In addition, conciliation agreements often arrange for fair housing groups to provide training or testing services to respondents who are required to provide training for their employees or who agree to ongoing testing.¹⁰⁹

The TGM also stresses the need to separate conciliation and investigation functions, and contemplates that, ordinarily, individual HUD staff may not play both roles in one case. However, the TGM also instructs investigators how to shift from investigation to conciliation, and even how to shift back again, although the latter is not recommended in a single interview.¹¹⁰ In order to safeguard the rights of participants, a factsheet, "Conciliation under the Fair Housing Act," must be given to all parties to a complaint.¹¹¹

The Conciliation Process

In practice, complaints that survive the intake screening process are sometimes as-

signed first to a conciliator,¹¹² and sometimes sent simultaneously to a conciliator and an investigator,¹¹³ depending on office procedures. In some offices, the conciliator has 5 to 10 days to attempt to achieve an informal settlement while the investigator proceeds with factfinding.¹¹⁴ In others, conciliation is attempted throughout the complaint process.¹¹⁵

HUD's database indicates that conciliations continue to be achieved well into the complaint process. Of the 923 successful conciliations achieved in fiscal 1990 (the first full year of operation), 61 percent were closed after 100 days. In 1991, the figure remained steady at 62 percent; it improved dramatically to 46 percent in 1992 and 39 percent in fiscal 1993.¹¹⁶

In a typical situation, the conciliator contacts the complainant and respondent by telephone to determine if both are interested in participating in the conciliation process and what resolution might be acceptable.¹¹⁷ If they agree to attempt conciliation, the two parties are brought together in an informal, confidential meeting to work out an agreement.¹¹⁸

The goal of a conciliation agreement is usually to achieve the original objective of the aggrieved, such as the next available apart-

¹⁰⁷ See HUD Comments, p. 3.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Draft TGM-16, pp. 10-11.

¹¹¹ Draft TGM-16, p. 28, Exhibit 1.

¹¹² Elaine Spina, investigator, FHEO, Region III (Philadelphia) telephone interview, July 20, 1993.

¹¹³ Burrichter 1993 interview, and Gums 1993 interview.

¹¹⁴ Lettie Barber, equal opportunity specialist/investigator, HUD, FHEO, San Francisco, CA., Region IX, interview in San Francisco, Jan. 30, 1991, (hereafter cited as Barber interview).

¹¹⁵ Kelsy Leon, investigator/conciliator and acting branch chief, Region IV (Atlanta), telephone interview, July 21, 1993.

¹¹⁶ Data obtained from Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Integrated Title VIII Database System (hereafter Title VIII Database).

¹¹⁷ McMillen 1993 interview.

¹¹⁸ Julius McMillen, conciliator, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

ment.¹¹⁹ The regulatory requirement that the agreement must serve the public interest is most commonly met by the inclusion of affirmative action and reporting requirements.¹²⁰ A conciliation agreement may also require respondent training.¹²¹ Although creativity is sometimes encouraged,¹²² "boiler plate" language is common.¹²³

Monitoring of conciliation agreements occurs primarily through the review of reports submitted pursuant to the agreement.¹²⁴ On-site monitoring was rarely reported. At least in one region, monitoring is inhibited by lack of staff and funds for staff travel;¹²⁵ in others,

staff from other regional office units are assigned to monitor agreements when needed.¹²⁶

In some offices, staff serve as both investigators and conciliators,¹²⁷ while in others conciliators specialize as such.¹²⁸ Caseloads vary from 40 or 50¹²⁹ to 82¹³⁰ in a year, but staff may have other assignments.¹³¹ Although well-received, the first national training on conciliation was not held until March 1993.¹³² Staff networking remains an important source of information and instruction.¹³³ Staff evaluations include both quantitative and qualitative criteria,¹³⁴ with recent revision of

119 William Fitzgerald, conciliator, FHEO Region V, telephone interview, July 13, 1993.

120 Coughlin 1993 interview.

121 Kelsy Leon, investigator/conciliator and acting branch chief, Region IV (Atlanta), telephone interview, July 21, 1993 (hereafter cited as Leon 1993 interview).

122 Edward Johnson 1993 interview.

123 Don Johnson 1993 interview, and Yvonne Poindexter, investigator, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

124 Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993, and Leon 1993 interview, among others.

125 John Eubanks, Director of FHEO, Region VI (Ft. Worth), telephone interview, July 19, 1993.

126 Laura Pelzer, conciliator, FHEO, Region III (Philadelphia) telephone interview, July 20, 1993 (hereafter cited as Pelzer 1993 interview).

127 Although staff may serve as both investigators and conciliators, generally, they do not perform both tasks with respect to a single complaint. However, an investigator may suspend factfinding and engage in conciliation if the rights of the aggrieved party and the respondent can be protected and the prohibitions on disclosure of information can be observed. 24 C.F.R. § 103.300(c) (1993). Despite the fact that HUD's regulations permit investigators to conciliate complaints in limited circumstances, the sixth circuit recently emphasized the rule rather than its exception, "... the failure to follow the general requirement that an investigator not be involved in conciliation of a complaint he has processed nullified any real possibility of resolving it by conciliation." *Kelly v. Secretary of HUD*, 3 F.3d 951, 957 (6th Cir. 1993).

128 Carolyn El-Amin, Branch Chief, FHEO, Region III, telephone interview, July 9, 1993, and McMillen 1993 interview.

129 Fitzgerald 1993 interview.

130 McMillen 1993 interview.

131 Pelzer 1993 interview.

132 Pelzer 1993 interview, and Gary Sweeny, Branch Chief, FHEO, Region VI (Ft. Worth), telephone interview, July 20, 1993.

133 Frank Riley, investigator, FHEO, Region IX field office (Orange County, Calif.), telephone interview, July 12, 1993, and Pelzer 1993 interview.

134 Pelzer 1993 interview.

expectations to include credit for more "significant and creative relief," including affirmative action and reporting requirements.¹³⁵

Conciliation Data

Analyzing HUD's complaint data yields some insights into the success of its conciliation efforts. From March 1989 through September 1993, HUD approved 4,461 conciliation agreements. Of these, 1,690 cases resulted in monetary relief, and 1,015 cases resulted in housing units for the complainants, including cases where both money and housing were obtained.¹³⁶

In FY 1989 HUD closed 1,503 complaints, of which 345 or 23 percent were conciliated. In FY 1990, HUD closed 3,489 complaints and conciliated 923 or 26 percent; in FY 1991, of 5,232 complaints closed, 1,002 or 19 percent were conciliated; in FY 1992, of 6,400 complaints closed, 1,141 or 18 percent were conciliated; and in FY 1993, 6,377 cases were closed, of which 1,050, or 16 percent, were conciliated. Although conciliations fell in 1991 and 1992, the decline reflects a rapid increase in the proportion of administrative closings during the period.¹³⁷

The number of cases with housing units obtained through conciliation numbered 132 (38 percent of cases conciliated) in FY 1989; 313 (35 percent) in FY 1990; 254 (25 percent) in FY 1991; 331 (29 percent) in FY 1992; and 273 (26 percent) in FY 1993.

Total monetary relief in FY 1989 was \$284,515; the average case that year yielded \$1,910 (the median award was \$545). In FY 1990 relief totaled \$1,235,820, for an average of \$2,704 and a median of \$800. In FY 1991

total relief amounted to \$1,340,281, with an average of \$2,607 and a median amount of \$600; in FY 1992, relief totaled \$1,479,008, for an average of \$2,599 and a median amount of \$750; and in FY 1993, relief totaled \$1,521,870, for an average of \$2,866 and a median figure of \$775.

Withdrawal with Resolution

The only instruction that appears to apply to complaints withdrawn with resolution is contained in the technical guidance memorandum on conciliations. There the subject appears to be covered under a paragraph headed "private settlements," which states that "There is not successful conciliation when the parties execute an agreement that HUD has not approved."¹³⁸

The memoranda goes on to point out that:

Even if the non-HUD agreement provides for withdrawal of the complaint, the complaint remains open until the complainant formally files a request with HUD to withdraw it.

Moreover, even after such withdrawal, HUD may pursue enforcement by a Secretary-initiated complaint, or referral of evidence to the Department of Justice, a regulatory or supervisory agency, etc.¹³⁹

Thus the instruction generally appears to look with disfavor on such withdrawals, but they nevertheless constitute a significant portion of complaints resolved. Although the process may eliminate less weighty complaints, leaving HUD staff able to focus on matters of broader import, fair housing advocates see two problems. First, informal resolutions may

¹³⁵ Maurice McGough, Deputy Director and Chief, Systemic Unit, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

¹³⁶ HUD Title VIII Database. In analyzing HUD's complaint data, a small number of complaints filed prior to October 1, 1987, were excluded, which affects some of the Commission's calculations, albeit in a minor way.

¹³⁷ Administrative closures more than doubled between 1990 and 1992, rising from 1,047 to 2,268. This growth increased the proportion of administrative closures from 30 percent in 1990 to 35 percent in 1992.

¹³⁸ TGM # 16, p. 7.

¹³⁹ Ibid.

allow repeat offenders to escape scrutiny.¹⁴⁰ Second, aggrieved persons may not receive the remedies or compensation their complaints merit,¹⁴¹ particularly since HUD plays only a mediating role and does not approve the agreements. (As noted above, HUD does not represent complainants until it finds reasonable cause to believe discrimination occurred after a full investigation.)

Median relief obtained in complaints withdrawn with resolution was \$510 in 1990 (with an average of \$1,465); \$543 in 1991 (with an average of \$2,357); \$566 in 1992 (with an average of \$3,300) and \$500 in 1993 (compared to an average of \$3,007). In general, relief obtained through withdrawal was less than relief obtained through formal conciliation.

Investigations

The FHAA prescribes very little regarding the conduct of investigations. The law does establish a timeframe:

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint . . . unless it is impracticable to do so.¹⁴²

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint . . . the Secretary shall notify the com-

plainant and respondent in writing of the reasons for not doing so.¹⁴³

The timeframe also applies if the complaint has been referred to a certified State or local agency for processing.¹⁴⁴

In addition, the law provides that:

At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing—

- (i) the names and dates of contacts with witnesses;
- (ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;
- (iii) a summary description of other pertinent records;
- (iv) a summary of witness statements; and
- (v) answers to interrogatories.¹⁴⁵

The Secretary may amend the final investigative report (FIR) if HUD discovers additional evidence.¹⁴⁶ HUD must provide information derived from an investigation, and the final report itself, to the complainant and the respondent upon request.¹⁴⁷

HUD regulations spell out the purposes of an investigation as obtaining information on events related to the alleged discrimination, documenting related policies or practices, and developing factual data to permit the Assistant Secretary and General Counsel to determine, as described below, whether there is

¹⁴⁰ Smith interview.

¹⁴¹ *Ibid.*

¹⁴² 42 U.S.C. § 3610(a)(1)(B)(iv) (1988); 24 C.F.R. § 103.225 (1993). The investigation is to include a determination of whether there is reasonable cause to believe a violation of Title VIII has occurred.

¹⁴³ 42 U.S.C. § 3610(a)(1)(C) (1988); 24 C.F.R. § 103.225 (1993). Currently, HUD is revising the letter which is issued to the aggrieved person and the respondent when HUD determines that completion of an investigation within 100 days is impracticable. HUD intends for the letter to serve as a "more substantive and effective communication to the parties to a complaint." See HUD Initiatives, p. 2.

¹⁴⁴ 42 U.S.C. § 3610(a)(1)(B)(iv) and (C) (1988).

¹⁴⁵ *Id.* § 3610(b)(5)(A).

¹⁴⁶ *Id.* § 3610(b)(5)(B).

¹⁴⁷ *Id.* § 3610(d)(2).

reasonable cause to believe that a violation of the fair housing law occurred.¹⁴⁸ The Assistant Secretary is charged with seeking voluntary cooperation "to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take and record testimony or statements of persons reasonably necessary for the furtherance of the investigation."¹⁴⁹ Nevertheless, the Assistant Secretary may conduct discovery and issue subpoenas as necessary and as is authorized for administrative proceedings.¹⁵⁰

The normal duties and functions of an investigator are established largely through standard practice and internal rules, including technical guidance memoranda. As noted above, in addition to the existing TGMs, TGMs, dating from mid-1991 have only been circulated in draft form. The draft status of these memoranda significantly circumscribes the ability to review the investigatory process.

Although little documentation exists on the investigation process itself, a draft instruction, entitled *Efficient Investigative Techniques*, (92-2-ECIF) proposed methods to improve the quality of investigation. The techniques include written interrogatories to obtain, for example, clarification of ownership of the dwelling at issue; lists of tenants and witnesses; sales, rental, or loan records by relevant classification; and accounts of what transpired. Investigators may obtain state-

ments by telephone, to the extent possible, with accompanying legible notes of the interview retained in the files (where testimony is critical, HUD should obtain an affidavit).¹⁵¹ The text of the draft ECIF suggests that the pressures in timely completing the workload result in attempts to avoid onsite interviews whenever possible.

The results of an investigation are placed in a file, the primary sections of which are the final investigative report, which summarizes factual data gained during the investigation; the evidentiary section, containing all testimonial and documentary evidence; and the deliberative section, containing all privileged and confidential data, personal impressions of the investigator, the reasonable cause memorandum,¹⁵² and any other deliberative or internal memorandum.¹⁵³ The file is then forwarded for cause/no cause determination, as described below.

If the case appears to involve pervasive or institutional discrimination, complex issues, or "novel questions of fact or law, or will affect a large number of persons," the Assistant Secretary may process the complaint as a "systemic" one. In that case, the investigation may involve a review of policies and procedures of the respondent for adherence to FHAA, as well as an inquiry into the facts surrounding an individual allegation.¹⁵⁴

Where the Secretary decides that a complaint challenges the legality of any State or local zoning or land use law or policy, the

¹⁴⁸ 24 C.F.R. §§ 103.200-103.230 (1993).

¹⁴⁹ *Id.* § 103.215(a).

¹⁵⁰ *Id.* § 103.215(b). The General Counsel must approve the legality of the subpoena prior to its issuance.

¹⁵¹ *Efficient Investigative Techniques* (draft 92-2-ECIF), draft memorandum from Leonora Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development.

¹⁵² The recommendation of HUD staff regarding whether a charge of discrimination should be issued by the general counsel.

¹⁵³ *File Format for Title VIII Cases* (TGM 2, Rev. 1, Jan. 31, 1990) (the TGM was subsequently amended in other respects).

¹⁵⁴ 24 C.F.R. § 103.205 (1993).

Secretary must refer the complaint immediately for action by the Attorney General.¹⁵⁶ HUD's regulations provide that the General Counsel decide whether such a challenge exists after the complaint has been investigated, and "in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action"¹⁵⁶

HUD staff rely on TGMs and agency training for guidance on how to conduct investigations. The shortcomings of TGMs for this purpose have been described above. Most staff interviewed reported receiving basic and advanced investigative training in 1989 and 1991, respectively. Some also reported in-house training and some training from outside experts. Those with prior investigatory experience in other civil rights areas relied heavily on that experience to guide them. Nearly everyone advocated annual training to keep current with developments in fair housing law and HUD policies, and many advocated that HUD issue a manual on complaints processing.

Staff uniformly reported that mortgage lending and zoning cases were the most com-

plex and time consuming. Cases involving mentally handicapped complainants were also considered difficult.

Complaint Processing Deadlines

Much has been made of the 100-day milestone. HUD itself has classified cases older than 100 days as "aged," and critics have assessed HUD's performance as if it were a deadline for issuance of determination.¹⁵⁷ Indeed, respondents have argued, largely unsuccessfully, that the failure to complete the investigation within the 100 days or to provide the written response destroyed the jurisdiction of the court.¹⁵⁸

Although the courts have found that HUD's delays have neither destroyed the jurisdiction of the court nor unduly prejudiced the respondents, the delays are affecting the amount of damages and penalties awarded. In *HUD v. Kelly*, the administrative law judge (ALJ) found that HUD's unexplained 17-month delay between the initial complaint and the issuance of the charge caused the complainant to suffer damages more than double the loss she would have suffered if HUD had acted within the statutory timeframe.¹⁵⁹ Thus,

¹⁵⁶ 42 U.S.C. § 3610(g)(2)(C) (1988).

¹⁵⁶ 24 C.F.R. § 103.400(a)(2)(ii) (1993).

¹⁵⁷ Leland Ware, "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act," report prepared for the Administrative Conference of the United States (January 1992), pp. 70-73; 73 (hereafter cited as Ware, "New Weapons").

¹⁵⁸ *Baumgardner v. Secretary of HUD*, 960 F.2d 572 (6th Cir. 1992) (notice submitted within a reasonable time; delay in investigation was not a statutory violation); *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992) (failure to give notice for approximately 120 days and failure to make cause determination for over 300 days was not jurisdictional limitation); *United States v. Curlee*, 792 F. Supp. 699 (C.D. Cal. 1992) (congressional authorization to continue investigation when impracticable to make determination within 100 days removes 100 day period as a mandatory requirement); *Contra United States v. Aspen Square Management Co.*, 817 F. Supp. 707 (N.D. Ill. 1993) (failure to make a cause determination or provide an explanatory letter for over 350 days deprived the court of jurisdiction). *Aspen Square* was vacated pursuant to a settlement between the parties, as observed in *United States v. Beethoven Assoc. Ltd. Partnership*, 843 F. Supp. 1257, 1260 (N.D. Ill. 1994). See HUD Comments, p. 4; Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, July 13, 1994, attachment, p. 1 (hereafter cited as DOJ Comments, attachment). HUD notes that the same district court in *Aspen Square* held in *Beethoven* that the court's jurisdiction was not destroyed by HUD's failure to meet the FHAA notice requirement regarding investigation and determination delays.

¹⁵⁹ *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,363 (HUD ALJ Aug. 26, 1992), *aff'd in part, vacated in part, and remanded in part*, *Kelly v. Secretary of HUD*, 3 F.3d 951 (6th Cir. 1993).

TABLE 3.1
Case Processing Times

FY	Avg. no. of days	Percent closed in more than:			Cases closed
		100 days	150 days	200 days	
1989	118	48	25	13	1,503
1990	184	64	48	36	3,489
1991	206	62	48	38	5,238
1992	140	40	27	19	6,400
1993	151	39	28	22	6,377

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

because HUD was responsible in part for the complainant's excessive loss, the ALJ did not impose a civil penalty in addition to the compensatory damage award.¹⁶⁰

On appeal the sixth circuit in *Kelly* remanded the case to HUD to allow for a proper conciliation effort.¹⁶¹ The court agreed with the ALJ's liability finding, but stated that even if conciliation fails, damages should not be assessed for the period in which HUD completely neglected the case.¹⁶²

Most staff agreed it was unrealistic to expect all cases to be investigated and a determination made within 100 days, for several reasons. First, since cases are investigated by regional staff, they must allot travel time for personal interviews. Second, cases involving larger institutions as respondents and complex issues require more interviews and research. Third, a shortage of staff, staff freezes, and the reactivation of upwards of 1,400 complaints from State and local agencies not certified by September 13, 1992, has greatly increased the burden on staff. Anecdotal remarks about caseloads bear out the observation that under current circumstances,

HUD will not be able to close complaints or make determinations in 100 days. For example, one investigator reported a caseload of 60 investigations and a closure rate of 6 per month; another reported 55 cases total, and 4 closed per month. Caseloads seemed to vary considerably, from a high of 75 a year to a low of 32.¹⁶³ In some cases, investigators also were assigned a large number of State and local cases to review, or additional special projects and systemic investigations.

HUD's own complaint database reveals that from 1989 to 1993, cases exceeding 100 days to close ranged from a low of 39 percent in 1993 to a high of 64 percent in 1990; cases exceeding 150 days ranged from 25 (1989) to 48 percent (1990 and 1991), and cases exceeding 200 days ranged from 13 percent in 1989 to 38 percent in 1991. (See table 3.1.) During this time period, the number of complaints filed rose from 3,034 in 1989 to 4,075 in 1990; 5,720 in 1991, and 6,521 in 1992. Against the backdrop of a rising caseload, HUD made progress in 1992, but lost ground again in 1993.

¹⁶⁰ ¶ 25,034 at 25,363.

¹⁶¹ 3 F.3d at 957.

¹⁶² *Id.*

¹⁶³ However, the complexity of the cases assigned could not be weighed.

The ratio of complaints closed to complaints received over time gives another indication that HUD still struggled to keep abreast of complaints filed. In 1989 the ratio was 50 percent; in 1990, 86 percent; in 1991, 91 percent; in 1992, 98 percent; and in 1993, 105 percent—not enough to overcome the backlog.

The database also yields some insights into overall case management. The average number of days from the date of filing to the date a case was assigned to an investigator was 23 in 1989; 26 in 1990; 58 in 1991; 33 in 1992; and 35 in 1993. The average number of days from assignment of a case to an investigator and the start of the investigation was 17 in 1989; 14 in 1990; 11 in 1991; 5 in 1992; and 23 in 1993. Finally, the average number of days from the start of the investigation to closure of the case was 76 in 1989; 160 in 1990; 179 in 1991; 136 in 1992; and 126 in 1993.

Determinations and Closures

Cases are closed through conciliation, administrative closure, or issuance of a "no cause" determination. Issuance of a cause determination means the case will advance to the adjudicatory stage. To find cause, HUD must decide "whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court."¹⁶⁴

Administrative Closures

Neither Title VIII nor HUD regulations appear to contemplate, much less define, administrative closure of complaints. In HUD's TGM on maintaining case files, investigators

are instructed that "if jurisdiction does not exist, administratively close the complaint."¹⁶⁵ Instructions for maintenance of the Title VIII database include case classification codes covering various reasons for closure, such as "untimely filed, dismissed for lack of jurisdiction, unable to locate complainant, complainant failed to cooperate, unable to identify respondent, and complaint withdrawn by complainant without resolution."¹⁶⁶ HUD staff confirmed that cases closed for these reasons fell into the category of "administrative closures."¹⁶⁷

From 1989 to 1992, administrative closure was the most frequent means of complaint disposition, totaling 5,377 (28 percent) of all complaints. In 1989 HUD administratively closed 402 complaints, or 27 percent of total complaints closed;¹⁶⁸ in 1990, 1,047 or 30 percent; in 1991, 1,716 or 33 percent; and in 1992, 2,268 or 35 percent.

Finally, in some regions, complaints that are determined to be nonjurisdictional upon receipt are nevertheless entered into the database and then closed. In other regions, such complaints are never counted at all. Thus, the data reveal substantial differences in the rate of administrative closures among regions. Administrative closures accounted for 13 percent of the total number of complaints received from 1989 through 1992 in Region I, while 50 percent of Region III cases were closed administratively. Other regions fell between: Regions II and IV administratively closed 44 and 45 percent of their cases; Regions IX and X closed 35 and 36 percent; Regions VI and VII

¹⁶⁴ 24 C.F.R. § 103.400(a) (1993). HUD emphasizes that "the prime focus of the reasonable cause determination is on the facts determined during investigation." See HUD Comments, p. 4. HUD observes that "reasonable cause determinations tend to be fact specific." *Ibid*.

¹⁶⁵ TGM-2 (Rev. 1, Jan. 31, 1990) (subsequently amended in other respects), p. 11.

¹⁶⁶ Integrated Title VIII Data Dictionary, pp. 39-40.

¹⁶⁷ Albert Mundy, Acting Director, Management Information Systems Staff, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, June 18, 1993.

¹⁶⁸ The complaints closed were not necessarily received that year; the percentages only offer a rough indication of closures compared to caseload.

closed 32 and 31 percent; Regions V and VIII closed 22 and 21 percent, respectively.

Determinations

The law provides that when the Secretary "determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur," he or she "shall immediately issue a charge on behalf of the aggrieved person. . . ."¹⁶⁹ The charge:

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and,

(iii) need not be limited to the facts or grounds alleged in the complaint. . . .¹⁷⁰

Effective March 21, 1989, the Secretary of HUD delegated the authority vested in him essentially to three officials—the Assistant Secretary for Fair Housing and Equal Opportunity, the General Counsel, and the Chief Administrative Law Judge.¹⁷¹ The Secretary delegated to the General Counsel the power to decide whether a facility met the statutory definition of "housing for older persons"; to pursue failures to comply with a conciliation agreement arising from a complaint; to seek prompt judicial action to protect a complainant prior to issuance of a charge and a deci-

sion; to determine whether or not reasonable cause exists to issue a charge of discrimination; to serve copies of such charge; to seek judicial review; and to seek court enforcement of an administrative order.¹⁷²

In addition, the General Counsel was empowered "to approve or disapprove the legality of subpoenas and interrogatories before their issuance by the Assistant Secretary . . . " during investigations and "to litigate claims asserted in charges in administrative hearings conducted by the Administrative Law Judge . . . , " that is, to present cases on behalf of complainants when a charge has been issued.¹⁷³

The Chief Administrative Law Judge is empowered to conduct administrative hearings on charges of discrimination.¹⁷⁴ All of the other powers of the Secretary under the law are delegated to the Assistant Secretary for Fair Housing and Equal Opportunity except the power to sue and be sued.¹⁷⁵ The Secretary also permitted the General Counsel and Assistant Secretary to redelegate most functions in turn.¹⁷⁶

Effective March 24, 1989, the Assistant Secretary for Fair Housing redelegated all of his powers to the regional administrators and regional housing commissioners and to the regional directors of fair housing and equal opportunity (who report to the regional administrators), except the responsibility of issuing HUD's annual fair housing report; promulgating rules, regulations, and

¹⁶⁹ 42 U.S.C. § 3610(g)(2)(A) (1988).

¹⁷⁰ *Id.* § 3610(g)(2)(B).

¹⁷¹ 54 Fed. Reg. 13,121 (1989).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

guidelines; filing and investigating Secretary-initiated complaints; issuing notices (not decisions) regarding reasonable cause; and certifying State and local agencies as substantially equivalent, on either an interim or permanent basis.¹⁷⁷

Effective July 1, 1990, the General Counsel redelegated the power to make no cause determinations regarding most complaints of discrimination to the regional counsels.¹⁷⁸ Regional counsels were to review complaints for no cause findings, determine if a no cause finding is warranted, issue the required summary of the case for a no cause finding, notify the parties of dismissal and make the dismissal public, and refer complex cases to the General Counsel.¹⁷⁹ Although this delegation provided authority to the regional counsels to make no cause determinations in most cases, the General Counsel retained his authority to make no reasonable cause determinations in all cases, and he retained the sole authority to act in the types of cases over which he did not delegate authority to the regional counsel.¹⁸⁰ In addition, the General Counsel retained the sole authority to determine if a facility qualified as "housing for older persons," where a reasonable cause determination would require a conclusion whether the housing would be exempt as housing for older persons. The General Counsel also had the exclusive au-

thority to make determinations in cases where occupancy codes were at issue, determine if reasonable accommodations or modifications for handicapped persons had been made in a particular case, refer zoning and land use cases to DOJ, handle cases in which HUD was the respondent, and handle Secretary-initiated cases.¹⁸¹

Six months later, the Secretary changed the delegation of authority to permit the Assistant Secretary to make the initial no cause determination, effective January 28, 1991.¹⁸² Pursuant to the new redelegation, the Assistant Secretary would review all case files.¹⁸³ The Assistant Secretary was required to make findings of no cause as warranted.¹⁸⁴ Where the Assistant Secretary believed a cause finding was warranted, he would forward the case to the General Counsel for review, who would make the final cause/no cause determination.¹⁸⁵ Effective on the same date, the General Counsel redelegated the power to make cause determinations to regional counsel, except in complex or novel cases or in cases involving the legality of local zoning or land use laws.¹⁸⁶ The General Counsel also redelegated to the Associate General Counsel for Equal Opportunity and Administrative Law (and the Assistant General Counsel for Fair Housing) the authority to determine whether a case involved complex facts or novel

¹⁷⁷ 54 Fed. Reg. 13,122 (1989).

¹⁷⁸ 55 Fed. Reg. 23,301 (1990).

¹⁷⁹ *Id.*

¹⁸⁰ HUD Comments, p. 4.

¹⁸¹ 55 Fed. Reg. 23,301 (1990).

¹⁸² *Id.* at 53,293 (1990).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 56 Fed. Reg. 2931 (1991).

questions of law or the legality of local zoning or land use laws.¹⁸⁷ However, the General Counsel retained the sole authority to make cause determinations in cases involving complex facts or novel issues of law.¹⁸⁸

Effective December 13, 1991, the power to make no cause determinations that had been transferred from the General Counsel and regional counsel to the Assistant Secretary was redelegated to the regional directors of fair housing and equal opportunity.¹⁸⁹ Thus HUD assigned the concurrent authority to find no cause to the regional fair housing directors, while the power to find cause (or no cause) rested largely with the regional counsels. Under HUD's reorganization effective April 15, 1994, "Reasonable cause determinations in all cases referred to the assistant general counsels [formerly regional counsels] in field location, including determinations in handicap and familial status cases, no longer require approval from the General Counsel."¹⁹⁰ The assistant general counsels have the authority to issue reasonable cause determinations in all cases, except those involving complex or novel issues, or complaints involving the legality of local zoning or land use ordinances.¹⁹¹ Therefore, while a complaint could be found to be meritless at any point, a decision to find cause underwent added scru-

tiny. It is also important to note that, despite the broad authority delegated to the regional counsels, the General Counsel always retains the authority to make determinations should he choose to do so.¹⁹²

Apparently to establish parallel checks on both cause and no cause determinations, the General Counsel subsequently affirmed the inherent right to reopen no cause determinations made by regional counsels;¹⁹³ the Assistant Secretary affirmed the inherent right to reopen no cause findings by the regional directors;¹⁹⁴ and the Secretary delegated to the General Counsel the authority to reopen no cause determinations made by the Assistant Secretary.¹⁹⁵ Effective September 30, 1992, the regulatory changes were accompanied by a memorandum jointly issued the same day by the General Counsel and the Assistant Secretary that further clarified the delegations of authority.¹⁹⁶ According to the memorandum:

Effective immediately, all Determinations of No Reasonable Cause must receive the concurrence of counsel prior to issuance. Regional Office Determinations of No Reasonable Cause will be reviewed by Regional Counsel and Headquarters Determinations of No Reasonable Cause will be reviewed by the Office of the Assistant General Counsel for Fair Housing.

187 *Id.* Cases involving the legality of local zoning or land use laws are referred by HUD to DOJ without a determination of whether reasonable cause exists, pursuant to 42 U.S.C. § 3610(g)(2)(C) (1988) and 24 C.F.R. § 103.400(a)(2) (1995).

188 56 Fed. Reg. 2931 (1991).

189 57 Fed. Reg. 296 (1992).

190 HUD Comments, p. 4.

191 *See Ibid.*, p. 5.

192 *Ibid.*, p. 5.

193 57 Fed. Reg. 45,066 (1992).

194 *Id.* at 45,066.

195 *Id.* at 46,398.

196 Frank Keating, General Counsel, and Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Memorandum to All Regional Counsel(s) and All Regional Directors of FHEO, RE: No Reasonable Cause Determinations under the Fair Housing Act, Sept. 30, 1992.

In all cases in which the Regional Director of FHEO or the Director of Investigations in Headquarters FHEO proposes to make a determination of No Reasonable Cause, the determination and the investigatory record will be submitted to the Regional Counsel or the Office of General Counsel for review and concurrence.

The memorandum states that counsel has 5 working days to concur in or reject a determination, and that failure to provide comments will be deemed as concurrence. When FHEO officials disagree with counsel, the Assistant Secretary and the General Counsel will resolve the matter.

On August 5, 1994, several months after the reorganization of HUD, the Secretary transferred the authority to find cause from the General Counsel (and the deputy general counsel) or his designee to the Assistant Secretary for Fair Housing and Equal Opportunity and the Deputy Assistant Secretary for Investigations and Enforcement, effective immediately.¹⁹⁷ This change was modified on September 12, 1994, when the Secretary issued a technical correction requiring the concurrence of the General Counsel in the Assistant Secretary's decision.¹⁹⁸

However, HUD still did not make provisions for formal appeals to the General Counsel by complainants dissatisfied with a no cause finding. In issuing the original regulations in January 1989, HUD observed that:

The statute does not contemplate a review of the reasonable cause determination. . . HUD believes that it is significant that the Act does not specifically provide for an appeal of the reasonable cause determination, particularly where such procedures are specified within other sections. (See section 812(h), which provides for Secretarial review of the ALJ's initial decision.) Moreover, HUD believes

that appeals of the determination of reasonable cause would be contrary to the legislative history of the 1988 Amendments, which supports the expeditious resolution of complaints.

HUD notes that the failure to provide for the review of the reasonable cause determination will not preclude an aggrieved person from filing a civil action under section 813 of the Act.¹⁹⁹

No doubt the low number of cause findings gave rise to the concerns about how decisions were made within HUD. In 1990 HUD issued 67 cause determinations, or 1.9 percent of the complaints closed; in 1991, 149 cause letters were issued, or 2.9 percent; in 1992, 156 cause letters were issued, or 2.4 percent; and in 1993, 211 cause letters were issued, or 3.3 percent of complaints closed.²⁰⁰ If the administrative closures are subtracted from the total received, the figures increase somewhat as time goes on. In 1990, the rate is 2.7 percent; in 1991, 4.2 percent; in 1992, 3.8 percent; and in 1993, 5.2 percent. (See table 3.2.)

The figures for no cause findings are higher. In 1990 no cause findings were issued in 364 cases, or 10.4 percent of all closed cases and 14.9 percent of cases not closed administratively. In 1991, 930 no cause letters were issued, representing 17.8 percent and 26.5 percent of all closed cases and cases not closed administratively; in 1992, 1,278 no cause letters were issued, or 20.9 percent and 30.9 percent; and in 1993, 1,024 no cause letters were issued, or 16.1 percent of all closed cases and 25.3 percent of cases closed administratively. (Many cases were carried over; see below.) (See table 3.3.)

197 59 Fed Reg. 39,955-56 (amending 24 C.F.R. § 103.335, §103.400, and §103.405).

198 *Id.* at 46,759-60 (amending 24 C.F.R. §103.400 and §103.405).

199 24 C.F.R. Ch. I Subch. A, App. I at 961 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

200 All complaint statistics are derived from the HUD Title VIII Database.

Another way to examine closures is to see how long they take. Administrative closures of cases filed in 1990 took an average of 170 days to process; 148 days for 1991 cases; 69 days for 1992 cases; and 94 days for 1993. In contrast, cause determinations took an average of 368 days for 1990 cases; 537 days for

1991 cases; 604 days for 1992 cases; and 592 days for 1993 cases. No cause findings were reached after an average of 174 days for 1989 cases; 377 days for 1990 cases; 386 days for 1991 cases; 260 days for 1992 cases; and 203 days for 1993 cases. (See table 3.4.)

TABLE 3 2
Complaints Closed with Cause Findings

Year	Cause findings	% of all cases closed	% of cases closed excluding admin. closures
1990	67	1.9	2.7
1991	149	2.9	4.2
1992	156	2.4	3.8
1993	211	3.3	5.2

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

TABLE 3 3
Complaints Closed with No Cause Findings

Year	No cause findings	% of all cases closed	% of cases closed excluding admin. closures
1990	364	10.4	14.9
1991	930	17.8	26.5
1992	1278	20.9	30.9
1993	1024	16.1	25.3

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

TABLE 3 4
Timeliness of Case Processing by Closing Category
(Average Number of Days)

Year	Administrative closures	Cause findings	No cause findings
1990	170	368	377
1991	148	537	386
1992	69	604	260
1993	94	592	203

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

4. Administrative Adjudication

Prior to the Fair Housing Amendments Act of 1988 (FHAA), an individual complainant suffering from housing discrimination that could not be conciliated by the U.S. Department of Housing and Urban Development (HUD) and was not litigated by the Attorney General had no option but a private civil suit in U.S. district court. The 1968 Fair Housing Act restricted monetary recovery to actual damages, capped punitive damages at \$1,000, and permitted an award of attorney's fees only to plaintiffs not able to bear the cost themselves. These limitations discouraged private parties or private counsel from investing in a civil suit except in cases of egregious discrimination.

To strengthen fair housing enforcement, Congress, through the FHAA, created the framework for an administrative adjudicatory process in addition to the private right of action already available to aggrieved parties.¹ The FHAA also removed the limit on punitive damages and provided for attorneys' fees to the prevailing party, at the court's discretion. More important, it expanded the investigative

powers of the Secretary of HUD and created a two-pronged mechanism for the governmental enforcement of fair housing rights.

Legal Framework

Once the Secretary issues a charge of housing discrimination based on a cause determination,² a complainant, a respondent, or an aggrieved person on behalf of whom the complaint was filed may elect to have the case decided in a civil action in U.S. district court.³ If no party elects to transfer the case to district court, the General Counsel will maintain an administrative proceeding⁴ before an administrative law judge (ALJ) designated by the chief ALJ.⁵ The responsibilities of the ALJ include conducting hearings, supervising all prehearing activities including discovery, disposing of motions, and making initial decisions.⁶ Although the HUD Office of Administrative Law Judges (OALJ) is administratively a part of HUD, it is functionally autonomous.⁷

Once a charge is brought by the Secretary, the FHAA requires the ALJ to commence a

¹ U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., 1988, H. Rep. No. 100-711, p. 13, reprinted in 1988 U.S.C.A.N. 2173, 2174 (hereafter cited as FHAA House Committee Report).

² 42 U.S.C. § 3610(g)(2)(A) (1988).

³ *Id.* § 3612(a). For a further discussion of the elections process, see chap. 11.

⁴ 24 C.F.R. § 103.410(c) (1993).

⁵ 42 U.S.C. § 3612(b) (1988); 24 C.F.R. § 104.100 (1993).

⁶ 24 C.F.R. § 104.110(a)-(j) (1993).

⁷ *Id.* § 104.140.

hearing within 120 days, unless it is impracticable.⁸ Under the FHAA, the prehearing discovery must be conducted as "expeditiously" as possible within the 120-day time period, and must be completed 15 days prior to the hearing date.⁹ However, discovery also must be "consistent with the needs of all parties to obtain relevant evidence."¹⁰

In addition to the time restraints, the hearing must be "conducted at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or about to occur."¹¹ The conduct of the hearing must follow the Administrative Procedure Act (APA),¹² and the presentation of evidence must be in accord with the Federal Rules of Evidence.¹³ Each party has the right to "appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas."¹⁴ The ALJ may decide a case based only on the submissions of written evidence, if all of the parties waive their right to appear before the ALJ.¹⁵

A settlement agreement resolving the charge may be submitted to the ALJ at any

time prior to HUD's final decision in the administrative proceeding.¹⁶ A settlement agreement must be signed by the parties, including the aggrieved person and the General Counsel, and then serves as the basis for an ALJ decision based on the agreed findings.¹⁷

In addition, during the course of the ALJ proceeding, the ALJ, upon request of either party or on the ALJ's own initiative, may request that the chief ALJ appoint another ALJ to conduct settlement negotiations.¹⁸ The settlement ALJ may be ordered to preside over the negotiation of all of the issues in the case, or the order may limit the scope of the negotiations to specified issues.¹⁹ The regulations do not stipulate the precise timeframe in which the settlement ALJ must conduct the negotiations, but do state that the order appointing the ALJ will specify when the settlement ALJ must report to the chief ALJ.²⁰ In addition, the negotiations may not unduly delay the commencement of the hearing.²¹

Under the regulations, the settlement ALJ convenes and presides over conferences and negotiations between the parties, and assesses the practicality of a potential

⁸ 42 U.S.C. § 3612(g)(1) (1988). If the hearing cannot begin on time, the ALJ is statutorily required to notify all the parties in writing as to the reason for the delay.

⁹ *Id.* § 3612(d)(1) (1988); 24 C.F.R. § 104.500(b) and (e) (1993).

¹⁰ 42 U.S.C. § 3612(d)(1) (1988).

¹¹ 24 C.F.R. § 104.700(b) (1993).

¹² *Id.* § 104.710.

¹³ *Id.* § 104.730.

¹⁴ 42 U.S.C. § 3612(c) (1988).

¹⁵ 24 C.F.R. § 104.720 (1993).

¹⁶ *Id.* § 104.925.

¹⁷ *Id.*

¹⁸ *Id.* § 104.620.

¹⁹ *Id.*

²⁰ *Id.* § 104.620(a).

²¹ *Id.* § 104.620(c).

settlement.²² The settlement ALJ must report to the chief ALJ describing the status of the settlement, assessing the likelihood of agreement, and recommending termination or continuation of the negotiations.²³ However, the chief ALJ must make the ultimate decision to terminate negotiations after consultation with the settlement ALJ.²⁴

Once a hearing is completed, the ALJ is statutorily directed to issue findings of fact and conclusions of law within 60 days unless it is impracticable.²⁵ This initial decision is subject to review by the Secretary before it may be considered the final decision. If the ALJ finds in favor of the respondent, the ALJ's initial decision dismisses the charge, and HUD must publicly disclose the dismissal.²⁶ However, if the ALJ finds in favor of the aggrieved party, he or she may award compensatory damages, injunctive relief, civil penalties, and/or any other appropriate relief.²⁷ Civil penalties are limited to \$10,000 per respondent for a first offense,²⁸ \$25,000 for a

second offense,²⁹ and up to \$50,000 for a repeat offender.³⁰ ALJs have no authority to award punitive damages, and attorney's fees may only be awarded to the prevailing party (other than the United States) after the initial decision becomes final.³¹

The Secretary may review any initial decision of an ALJ and serve a final decision within 30 days of the issuance of the initial ALJ decision; otherwise the initial order becomes the final and enforceable decision of the agency.³² This process provides the Office of General Counsel (OGC) with its only opportunity to appeal an adverse initial ALJ decision.³³ Under the APA the Secretary on review has broad discretion to take any action supported by the record, and is not bound by any finding or conclusion of the ALJ.³⁴ HUD is required to make public disclosure of each final decision.³⁵

Any party aggrieved by a final order in an administrative proceeding may obtain judicial review of that order by filing a petition for

22 *Id.* § 104.620(b)(1).

23 *Id.* § 104.620(b)(2).

24 *Id.* § 104.620(c).

25 42 U.S.C. § 3612(g)(2) (1988). If the decision cannot be made within this time period, the ALJ is statutorily required to notify all the parties in writing as to the reason for the delay.

26 *Id.* § 3612(g)(7).

27 24 C.F.R. § 104.910(b) (1993).

28 *Id.* § 104.910(b)(3)(i)(A).

29 *Id.* § 104.910(b)(3)(i)(B). The previous offense must have been adjudicated during the 5-year period preceding the filing of the current charge.

30 *Id.* § 104.910(b)(3)(i)(C). The prior offenses must have been adjudicated during the 7-year period preceding the filing of the current charge.

31 42 U.S.C. § 3612(p) (1988); 24 C.F.R. § 104.940 (1993).

32 42 U.S.C. § 3612(h)(1) (1988); 24 C.F.R. § 104.930(a) and (b) (1993). For a further discussion of the Secretary review process, see chap. 10.

33 "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 5 (hereafter cited as HUD Comments).

34 5 U.S.C. § 557 (1988).

35 24 C.F.R. § 104.930(c) (1993).

review in an appropriate U.S. court of appeals within 30 days after the order is entered.³⁶ Although HUD serves as a party to the administrative proceeding,³⁷ the General Counsel may only appeal an adverse initial decision of an ALJ to the Secretary.³⁸ Once an initial ALJ decision becomes the final decision of the Secretary, the General Counsel must defend that position, even where the final decision is adverse to the complainant and contrary to the litigation position taken by HUD's OGC at the hearing.³⁹ The final decision becomes the position of the agency which the Federal Government, represented by the U.S. Department of Justice (DOJ), must defend in any subsequent appeal.⁴⁰

If no petition for judicial review is filed within 45 days, the ALJ's decision will be conclusive in any future enforcement proceedings.⁴¹ The final order may be enforced either through a petition by HUD to the appropriate U.S. court of appeals for appropriate temporary relief or restraining order,⁴² or through a private proceeding initiated by anyone entitled to relief under the order.⁴³

Interventions

If the complaint proceeds in the administrative forum, HUD files a charge seeking relief from the respondent for the aggrieved party and vindicating the public interest.⁴⁴ Because HUD is responsible for representing the interests of both the aggrieved party and the Federal Government, the FHAA allows any aggrieved person to intervene as a party to the proceeding.⁴⁵ The legislative history indicates that Congress intended for the parties to a HUD proceeding to have all of the rights granted under the APA and added the right of intervention as an additional procedural safeguard for aggrieved persons.⁴⁶ According to the preamble to the regulations, HUD did not expand the classes of persons permitted to intervene beyond aggrieved persons primarily because of the statutory time limits on the issuance of administrative decisions.⁴⁷ However, other persons who are not parties to the proceedings may file *amicus curiae* briefs at the discretion of the ALJ.⁴⁸

The regulations provide that the ALJ shall permit an intervention if the intervenor is either the aggrieved person on whose behalf the charge is issued, or an aggrieved person

36 42 U.S.C. § 3612(i) (1988); 24 C.F.R. § 104.950(a) (1993).

37 24 C.F.R. § 104.200(a)(1) (1993).

38 HUD Comments, p. 5.

39 Ibid.

40 Ibid.

41 42 U.S.C. § 3613(l) (1988); 24 C.F.R. § 104.950(b) (1993).

42 42 U.S.C. § 3612(j)(1) (1968); 24 C.F.R. § 104.955(a) (1993).

43 42 U.S.C. § 3612(m) (1988); 24 C.F.R. § 104.955(b) (1993).

44 24 C.F.R. § 104.200(a)(1) (1993).

45 42 U.S.C. § 3612(c) (1988).

46 FHAA House Committee Report, p. 36, 1988 U.S.C.C.A.N. 2197.

47 24 C.F.R. Ch. I, Subch. A, App. I, 911, 965 (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

48 *Id.* § 104.200(c).

with an interest in the property or transaction involved in the charge.⁴⁹ If the charge was not filed on behalf of the aggrieved person seeking intervention, then the intervenor must demonstrate that the disposition of the charge may impair or impede his or her ability to protect that interest.⁵⁰ If the aggrieved person's interests are adequately represented by the existing parties, then the ALJ will deny the intervention request.⁵¹

Although the statute places no time constraints on the filing of an intervention, HUD requires an aggrieved person to file a timely request.⁵² A request will be considered timely if filed within 30 days after the date the charge was filed by HUD.⁵³ In response to suggestions from commenters, the HUD regulations do not impose an absolute deadline for interventions. HUD allows aggrieved persons to file after the 30-day period "to ensure that aggrieved persons will not be unnecessarily excluded from a proceeding."⁵⁴ In determining whether or not to permit an intervention, the ALJ may consider the stage and progress of the litigation, when litigation is sought, the reasons for any delay in seeking intervention,

and the prejudice to the other parties if intervention is permitted.⁵⁵

The right to request an intervention in an administrative proceeding beyond the 30-day limitation is significant because it may allow aggrieved persons who are not parties to the proceeding to intervene and appeal the final decision of the agency.⁵⁶ Under the regulations, aggrieved persons who are not parties may not appeal the final decision of the agency, even if they are adversely affected by it.⁵⁷ Further, an aggrieved person who is not a party to the proceeding cannot rely on HUD attorneys to appeal an adverse final decision of the agency, since that decision by definition is the final decision of the Secretary, and, therefore, of HUD itself. The Secretary cannot be aggrieved by his own final decision.⁵⁸

In one case, *HUD v. Downs*, ALJ Cregar permitted an intervention after the initial administrative decision became final.⁵⁹ Although the intervention was filed far beyond the 30-day threshold, the ALJ stated that the intervention was still timely and necessary to avoid prejudicing the public interest.⁶⁰ ALJ Cregar found that the complainants both met the threshold requirements of having an

⁴⁹ *Id.* § 104.200(a)(3).

⁵⁰ *Id.* § 104.200(a)(3)(ii).

⁵¹ *Id.*

⁵² *Id.* § 104.430.

⁵³ *Id.*

⁵⁴ *Id.*; see *id.* Ch. I, Subch. A, App. I at 966 (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

⁵⁵ *Id.* Ch. I, Subch. A, App. I at 966 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

⁵⁶ See *Aggrieved Parties Allowed to Intervene After ALJ's Decision Becomes Final*, 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 8, ¶ 8.1, p. 2 (Feb. 1, 1992).

⁵⁷ 24 C.F.R. § 104.950(a) (1993).

⁵⁸ HUD Comments, p. 5.

⁵⁹ *HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,017 (HUD ALJ Nov. 22, 1991).

⁶⁰ *Id.* at 25,235.

interest in the transaction and claiming to have been injured by the respondent's allegedly discriminatory actions.⁶¹

ALJ Cregar found that the intervenors' interests diverged from the Secretary's when the General Counsel declined to appeal the adverse initial decision of the ALJ to the Secretary.⁶² ALJ Cregar emphasized that aggrieved persons should not be required to intervene at an earlier stage in the proceeding simply to preserve a right to appeal which they may not need.⁶³ Instead, representation by HUD adequately protects the rights of aggrieved persons and keeps the costs of litigation low for the complainant, unless HUD takes a position with which the aggrieved persons do not agree, such as deciding not to appeal the initial decision.⁶⁴

Two months after *Downs*, ALJ Andretta denied a motion to intervene that was filed before the Secretary finalized the ALJ's initial decision.⁶⁵ Although this motion to intervene occurred at an earlier stage in the process than the motion in *Downs*, ALJ Andretta found that the request was not timely, stating

that the complainant had ample time to retain private counsel earlier in the proceedings.⁶⁶ Furthermore, although the complainant stated that her interests may diverge from the government's, ALJ Andretta stated that "Not only does she fail to state what this diversion of interest is, but she also fails to state what may cause such a diversion at some later date."⁶⁷ However, the Secretary did grant the intervention upon review.⁶⁸

Since only two fair housing cases have addressed the issue, it may be premature to determine whether the ALJs will permissively allow interventions, as in *Downs*, or will require a more definitive showing of timeliness and divergence.⁶⁹ However, according to some advocacy groups, the mere existence of OGC's discretion to appeal an adverse initial ALJ decision to the Secretary, and HUD's simultaneous representation of both the complainant and the public interest appear problematic for complainants.⁷⁰ Furthermore, as noted above, HUD cannot appeal adverse final agency decisions to Federal court.

61 *Id.*

62 *Id.*

63 *Id.* at 25,236.

64 *Id.*

65 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022 (HUD ALJ Jan. 21, 1992), *modified, set aside, and intervention granted*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992) (final decision).

66 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022, at 25,271 (order denying motion to intervene).

67 *Id.*

68 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,297-98 (final decision).

69 ALJ Andretta did note that in interpreting "rules of procedure for application to a given case, where there is little or no precedent yet established, guidance is provided by the corresponding section of the Federal Rules of Civil Procedure and [F]ederal case law." *Id.* at 25,271.

70 HUD Complainants Cover Uncertain Legal Terrain with Intervention Efforts 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 9, ¶ 9.2, p. 4 (Mar. 1, 1992). According to HUD, OGC has become more aggressive in using the Secretary review process to prevent ALJ initial decisions that are adverse to complainants from becoming the final decision of HUD. HUD Comments, pp. 5-6.

Shortly after both decisions, HUD issued two model letters for use by the regional offices informing complainants of their right to intervene in the administrative proceeding.⁷¹ One letter informing complainants of their right to intervene is mailed after the initial ALJ decision, but before the Secretary review period has expired.⁷² More recently, HUD designed another model informational letter which is issued to complainants at the end of the election period and prior to the commencement of the ALJ hearing. This model letter explains that the HUD trial attorney will "fully represent your interests and the government's interests, unless they conflict with each other. Therefore, you may wish to intervene to enable you to assert your interests in the event of such a conflict."⁷³

Appointment of ALJs

Administrative law judges are appointed by HUD pursuant to the APA.⁷⁴ Unlike district court judges who are presidentially appointed with the advice and consent of the Senate, administrative law judges are com-

petitively selected by the Office of Personnel Management (OPM) based on their writing ability and experience in administrative litigation, together with such factors as veteran's preferences.⁷⁵ OPM evaluates and ranks candidates for a general pool of ALJs, regardless of their experiences in particular fields of law.⁷⁶ Agencies, such as HUD, may appoint as many ALJs from OPM's list of "eligibles" as are necessary to conduct proceedings for the department.⁷⁷

To limit undue agency influence, ALJs are assigned cases in rotation⁷⁸ and cannot "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions of the agency."⁷⁹ Additionally, ALJs generally cannot "perform duties inconsistent with their duties and responsibilities as administrative law judges."⁸⁰ OPM is responsible for establishing the qualifications, pay, and removal (in most cases) of ALJs,⁸¹ and sets the salaries for ALJs irrespective of any agency ratings or standards.⁸² ALJs are tenured employees who may be removed or disciplined only for good cause established

71 *HUD to Notify Parties of Intervention Rights in Administrative Cases*, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 2, ¶ 2.7, p. 8 (Aug. 1, 1992).

72 *Ibid.*

73 *Ibid.*, pp. 8-9; HUD Comments, attachment 1.

74 5 U.S.C. § 3105 (1988).

75 *Id.* § 1305; 5 C.F.R. §§ 930.203(f) and 930.203a (1993).

76 With OPM approval, agencies may also select ALJs by a process known as "selective certification." 5 C.F.R. § 930.203a (1993). Selective certification allows the agency to select ALJs who possess specialized experience without regard to their rank in the general pool of OPM eligibles. 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, 593 n.9 (1986).

77 5 U.S.C. § 3105 (1988).

78 *Id.*

79 *Id.* § 554(dx2).

80 *Id.* § 3105.

81 *Id.* §§ 3105, 7521.

82 *Id.* § 5372.

and determined by the Merit Systems Protection Board.⁸³ Agencies are explicitly precluded from either rating the performance of the ALJ or implementing any performance-based removal actions.⁸⁴

Implementation

Nature of Cases Reviewed

Table 4.1 shows the breakdown of charges brought by HUD through November 4, 1993. The table describes the nature of discrimination and whether or not one party elected to have the case brought by DOJ in U.S. district court. As the numbers indicate, the vast majority of charges relate to family status discrimination. There is no significant difference between the percentages electing and not electing judicial action for each type of discrimination.⁸⁵

Of the charges brought, a very small number have resulted in final decisions, as shown in table 4.2. The breakdown by basis of cases reaching decision roughly approximates the breakdown by basis of charges brought. The FHAA, enacted after some 20 years of enforcement of the original Fair Housing Act, added two protected classes of victims to its cover-

age, but did not significantly change the parameters of illegal behavior. Accordingly, many of the cases examined simply take their place within the existing body of law. Many of the examined cases present factual disputes over issues such as ownership and the veracity of statements made by the parties, rather than disagreements over the rule of law. Although some of these cases present legal questions, the questions often arise directly from the original (1968) statutory language and simply reflect the ongoing evolution of civil rights law.

A survey of the cases arising since 1989 reveals that the race discrimination cases tried before ALJs represent the types of discrimination that have existed since the passage of the initial Fair Housing Act. The cases examined generally involve refusals to rent or sell, harassment, or the eviction of an existing tenant on the basis of the race of the tenant⁸⁶ or the race of his or her guest(s).⁸⁷ Few if any legal issues of any novelty are present; each case focuses on whether an adverse action had occurred in fact, and/or whether the reasons offered by the respondent for his or her conduct are legitimate or pretextual.

Higher profile race discrimination claims have proceeded in district court, and generally

⁸³ *Id.* § 7521(a).

⁸⁴ *Id.* §§ 4301(2)(D), 4302, 4303; 5 C.F.R. § 930.211 (1993).

⁸⁵ This report examines both charges and decisions as feasible. First, it incorporates findings from examining the HUD final decisions in 45 cases that have been released and published in the Fair Housing-Fair Lending Reporter (Prentice-Hall). Second, all available FHAA Federal district court and appellate decisions issued between Mar. 2, 1989 (the effective date of the FHAA), and Dec. 6, 1993, were examined. Detailed analysis was restricted to cases alleging private discrimination. Finally, all HUD secretarial reviews and final decisions of ALJ initial decisions through February 4, 1994, were included. In addition, the report examines all HUD charges filed through November 4, 1993. All multiple charges filed concurrently against the same respondent or respondents have been counted as one charge for purposes of this discussion.

⁸⁶ See, e.g., HUD v. Narlis, 2 Fair Housing-Fair Lending (P-H) ¶ 25,003 (HUD ALJ Sept. 11, 1990).

⁸⁷ HUD v. Jerrard, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005 (HUD ALJ Sept. 28, 1990).

TABLE 4.1**HUD Charges, by Elected Forum and Basis**

Basis	DOJ	HUD	Total
Race	52	30	82
Handicap	47	24	71
Sex	7	4	11
Family status	180	132	312
National origin	4	2	6
Religion	1	—	1
Retaliation	3	4	7
Combination	15	9	24
Total	309	205	514

Source: U.S. Department of Housing and Urban
Development, Office of Administrative Law Judges.

TABLE 4.2**Disposition of HUD Charges by Basis**

Basis	Decided	Settled	Pending¹	Total
Race	11	12	7	30
Handicap	5	13	6	24
Sex	1	2	1	4
Family status	24	91	17	132
National origin	—	2	—	2
Retaliation	1	1	2	4
Combination	3	4	2	9
Total	45	125	35	205

Source: U.S. Department of Housing and Urban
Development, Office of Administrative Law Judges.

¹ As of Mar. 16, 1994, these charges were still
pending in the administrative forum.

with private counsel. In addition to the customary claims just described, these high-profile cases have addressed the responsibility of real estate brokers,⁸⁸ insurers,⁸⁹ appraisers,⁹⁰ and even elevator repair companies⁹¹ for the subtler manifestations of discrimination found in society. These cases frequently raised questions of liability for apparent discriminatory effects without clear proof of discriminatory animus—questions which courts treated with great caution.

Few disability-based charges have been decided by an ALJ. Of these, one concerns the obligation of a housing provider to accommodate a disability by reserving a parking space;⁹² one, a refusal by developers to sell to a group home;⁹³ and one, the alleged harassment of a tenant with AIDS.⁹⁴ Once again, the

more legally complex cases have been decided in district court.⁹⁵

As noted, the majority of HUD charges brought in the period examined complain of familial status discrimination. Some of these cases involve refusals to rent to large families,⁹⁶ or evictions in which the issue is whether the apartment was in fact available, or whether the respondent had a legitimate nonpretextual reason for taking the action.⁹⁷ These cases, and the disability-based charges, fit easily into the existing body of fair housing and civil rights law, and have raised few new issues merely because of the new bases of discrimination.⁹⁸

Timeliness

By statute, HUD is required to provide administrative hearings within 120 days of

88 *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990); *City of Chicago v. Matchmaker Real Estate Sales Ctr.*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,663 (N.D. Ill. Nov. 7, 1990), *aff'd in part, rev'd in part*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied*, *Ernst v. Leadership Council for Metro. Open Communities*, 113 S. Ct. 2961 (1993).

89 *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2325 (1993).

90 *Steptoe v. Savings of Am.*, 800 F. Supp. 1100 (N.D. Ohio 1992).

91 *Clifton Terrace Assocs. v. United Technology Corp.*, 1989 U.S. Dist. LEXIS 8787 (D.D.C. July 27, 1989), *summ. judgment granted, dismissed*, 728 F. Supp. 24 (D.D.C. 1990), *aff'd in part, vacated in part*, 929 F.2d 714 (D.C. Cir. 1991).

92 *HUD v. Dedham Hous. Auth.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUD ALJ Nov. 15, 1991) (initial decision and order), *remanded*, HUDALJ No. 01-90-042401 (HUD Secretary Dec. 13, 1991) (remand order) (without determination on the merits), 2 Fair Housing-Fair Lending (P-H) ¶ 25,023 (HUD ALJ Feb. 4, 1992) (initial decision on remand and order).

93 *HUD v. George*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,010 (HUD ALJ Aug. 10, 1991).

94 *HUD v. Williams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

95 *See, e.g., United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992) (defining handicap in the context of drug and alcohol addiction). *But see HUD v. Hansen*, HUDALJ No. 09-91-2048-3 (HUD ALJ Apr. 28, 1993) (consent order) (Secretary-initiated test case for interpreting the FHAA accessibility guidelines). HUD emphasizes that it "developed an innovative approach to resolving complaints involving buildings that were subject to the FHAA design and construction requirements but which were already constructed in a manner that was not in compliance with those requirements." *See HUD Comments*, p. 7.

96 *E.g., HUD v. Morgan*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991), *aff'd in part, rev'd in part*, *Secretary of HUD v. Morgan*, 85 F.2d 1451 (10th Cir. 1993).

97 *E.g., HUD v. Hacker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,038 (HUD ALJ Dec. 2, 1992).

98 HUD stresses that "many of the cases which have come to hearing do involve legal issues of real significance. HUD decisions have been particularly instrumental in protecting the rights of families with children and persons with disabilities." *See HUD Comments*, p. 8.

bringing charges, and ALJs are to issue opinions within 60 days of the completion of the hearing. In all but six cases to date, the 120-day limitation was met. One delay was explained in the decision as due to settlement negotiations,⁹⁹ and one delay was explained due to respondent's health problems.¹⁰⁰ The remaining four delays were less than 30 days each and were not explained, but were evidently not at issue.¹⁰¹ Likewise, the 60-day requirement was met in all but two cases. In those cases decisions were issued within 65 days.¹⁰² The noted delays are *de minimis* and the progress of the cases remarkably efficient by comparison with civil litigation. The efficiency of the ALJs is in noted contrast with HUD's delay in processing complaints as discussed above, even allowing for the commensurate difficulties of conciliation and investigation.

Novel or Difficult Issues

Although the cases to date have generally involved familiar issues, some cases have raised issues of first impression, either be-

cause of the new FHAA provisions or because parties contested the manner in which old provisions should be applied to the newly covered situations. For example, since the beginning of the FHAA period, HUD has conducted extensive litigation on the eligibility of communities to qualify as housing for older persons exempt from the prohibition on family status discrimination.¹⁰³ This is a politically powerful issue,¹⁰⁴ because thousands of communities, ranging from retirement villages to mobile home parks, practiced family status discrimination prior to the FHAA. The FHAA permits family status discrimination only in communities restricted to, and focused on the needs of, older persons.¹⁰⁵ A succession of early ALJ cases have successfully established HUD's view that the exemption is a narrow one placing the burden of proof on the communities claiming the exemption.¹⁰⁶

Despite administrative decisions providing that communities of older persons must meet the requirements for exemption from the familial status provisions of the act at the time of a discriminatory action for the action to be

⁹⁹ HUD v. Leiner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,021, at n.1 (HUD ALJ Jan. 3, 1992).

¹⁰⁰ HUD v. Jancik, 2 Fair Housing-Fair Lending (P-H) ¶ 25,058 (HUD ALJ Oct. 1, 1993).

¹⁰¹ HUD v. Nelson Mobile Home Park, 2 Fair Housing-Fair Lending (P-H) ¶ 25,063 (HUD ALJ Dec. 2, 1993); HUD v. Paradise Gardens, 2 Fair Housing-Fair Lending (P-H) ¶ 25,037 (HUD ALJ Oct. 15, 1992); HUD v. Frisbie, 2 Fair Housing-Fair Lending (P-H) ¶ 25,030 (HUD ALJ May 6, 1992); HUD v. TEMS Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 25,028 (HUD ALJ Apr. 9, 1992).

¹⁰² HUD v. Lewis, 2 Fair Housing-Fair Lending (P-H) ¶ 25,035 (HUD ALJ Aug. 27, 1992); HUD v. Lashley, 2 Fair Housing-Fair Lending (P-H) ¶ 25,039 (HUD ALJ Dec. 7, 1992).

¹⁰³ See, e.g., HUD v. Carter, 2 Fair Housing-Fair Lending (P-H) ¶ 25,029 (HUD ALJ May 1, 1992) (mobile home park); HUD v. TEMS Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 25,028 (HUD ALJ Apr. 9, 1992) (planned community of single-family homes); HUD v. Murphy, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002 (HUD ALJ July 13, 1990) (mobile home park).

¹⁰⁴ For instance, the correspondence file provided by HUD contains a number of letters of inquiry from members of Congress and protests from their constituents.

¹⁰⁵ 42 U.S.C. § 3607(b)(1) and (2) (1988).

¹⁰⁶ See, e.g., HUD v. Murphy, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002 (HUD ALJ July 13, 1990). In its comments on this report, HUD emphasized that the *Murphy* case set the tough standard for qualification for the housing for older persons exemption, and the decision has been followed in subsequent administrative and judicial decisions. See HUD Comments, p. 6.

legal, at least one Federal district court ruled otherwise.¹⁰⁷ The court, while finding that the existing policies and procedures of the community qualified it for the "over 55" exemption, never addressed the issue of the timing of the discriminatory action, which occurred prior to the adoption of the requisite policies and procedures.¹⁰⁸ On appeal, the 11th circuit reversed and remanded the district court's decision, in part because the ALJ failed to consider that the age verification procedures used to restrict the housing to older persons were not instituted until after the discrimination occurred.¹⁰⁹

With some exceptions noted here and elsewhere, ALJs to date have not been called upon to answer truly novel questions, or to synthesize a body of law not previously analyzed for that purpose. Instead, the primary challenge of the ALJs has been to establish a body of case law implementing and enforcing the FHAA and its regulations, both new and old, against a body of pervasive behavior that had not been previously subject to fair housing restrictions.

The difficulty and importance of this task is in translating universal rules into particular decisions. For example, ALJs must decide whether the words "adult community" convey a preference against families with children,¹¹⁰ and whether restricted pool hours for children discriminate in the terms and conditions of housing.¹¹¹ The ALJs appear simultaneously to give genuine consideration to the arguments of the respondents, and yet in the end to reaffirm a strict interpretation of the law.

Quality and Persuasiveness of Reasoning

Because ALJ hearings are conducted without a jury, the ALJs, as triers of fact, meticulously detail the facts of each case, and tend to restrict their decisions to the particular situations at hand, rather than issue broad conclusions of law. In general, ALJs take comparable if not greater care to justify each resolution of disputed areas of fact than Federal judges. In the decisions reviewed, ALJs have discussed explicitly evidentiary contradictions; have identified the existence of corroboration or the nonexistence of expected corroboration; have stated their individual beliefs about plausibility; and have made credibility determinations with explicit reference to testimonial contradictions, mannerisms, etc. In addition, ALJs cite testimony, sometimes at length, to justify credibility determinations.

Since the actual motivation of the alleged wrongdoer is an important, but usually obscure, question in fair housing litigation, litigators must resort to proving disparate treatment or disparate impact. Therefore, the proper allocation of burdens of proof and persuasion are critical. The decisions reviewed stated the burdens consistent with precedent and appeared to observe them.

These ALJ decisions are readily reviewable. Unlike some trial court opinions that make credibility determinations and resolve questions of disputed fact without explaining the underlying evidence,¹¹² the reasoning of these ALJ decisions tends to be explicit to a fairly minute level.

¹⁰⁷ *Massaro v. Maniands Section 1 and 2 Civic Ass'n*, 796 F. Supp. 1499 (S.D. Fla. 1992), *rev'd, remanded*, 3 F.3d 1472 (11th Cir. 1993).

¹⁰⁸ *Id.*

¹⁰⁹ 3 F.3d at 1478.

¹¹⁰ *See, e.g., HUD v. Paradise Gardens*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,037 (HUD ALJ Oct. 15, 1992).

¹¹¹ *Id.*

¹¹² *United States v. Cannon*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,743 (D.S.C. Mar. 13, 1992), *aff'd in unpublished opinion*, *Mann v. Kemp*, 325 F.2d 1473 (11th Cir. 1991).

Similarly, the application of law to fact is careful, if not sometimes formulaic. ALJ opinions routinely recite the text of applicable law and carefully present the well-developed framework for analysis under cases such as *McDonnell Douglas Corp. v. Green*.¹¹³ The repeated recitation of established precedent allows the ALJs, in their decisions to date, to create a system of justice that does not merely reach a correct decision, but also shows the parties that they have been treated fairly.

Improper sympathy with either party has no place in the finding of liability. Although credibility or good faith determinations can mask bias, the careful elaboration of evidence supporting those determinations reduces the room for improper considerations. The ALJ cases examined seemed well-reasoned and persuasive.

Appropriateness of Penalty

The considerations involved in setting a civil penalty, although not identical to those involved in a punitive damage award, certainly invite attention to the blameworthiness of a respondent's actions. Therefore, an ALJ may legitimately lessen the harshness of a decision on an uninformed or unlucky respondent, just as he or she may properly increase the penalty for one who acted with malice. As long as ALJ decisions continue to follow established precedent, the ALJs may properly consider the degree of a respondent's blameworthiness.

Compensatory damages, by contrast, are supposed to be objective. Since they are supposed to return the complainant to the position in which he or she would have been,

absent the discrimination, compensatory damages are assessed largely independently of the blameworthiness of the respondent who caused the damage. Of course, rules of causality and proof prevail, but the common law rule is that tortfeasors take their victims as they find them, and are responsible for any damages they cause.

This maxim was openly violated by one ALJ on two occasions. In *HUD v. Guglielmi* and *HUD v. Williams*, the ALJ announced the rule that a rational relationship must exist between what the respondent did and how much he is made to suffer the consequences.¹¹⁴ As a result, the ALJ limited the compensatory damages, because in both cases the respondent was unsophisticated, not fully aware of the law, and without malice.

Awards in Different Forums

The individual complainant who approaches HUD without the aid of a lawyer or advocacy group may wish to know the comparative advantage of filing a private lawsuit or a complaint with HUD, or of electing a jury trial over an administrative hearing once HUD finds cause.¹¹⁵ A comparison of damage awards decided in Federal district or administrative courts is more an art than a science. First, the total number of decisions is fairly small, reducing the statistical significance of any apparent patterns in subcategories, such as race or family status cases. Second, it is difficult to determine whether calculations of average awards should reflect the value of complainant's alleged damages in cases decided in favor of the defendant. The different

¹¹³ *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). For a further discussion of the application of Title VII cases to Title VIII, see chap. 10.

¹¹⁴ *HUD v. Guglielmi*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,004 (HUD ALJ Sept. 21, 1990); *HUD v. Williams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

¹¹⁵ The Office of Fair Housing and Equal Opportunity's (FHEO) Program Evaluation Branch performed the "Election Study" in December 1991, and subsequently issued "The Fair Housing Law Election Process: What You Need to Know," in July 1992, a brochure to assist the parties in choosing a forum. See HUD Comments, p. 7.

success rates in each forum, if significant at all, may simply mean that more nonmeritorious cases ended up in court, or that Federal judges and juries are more likely to rebuff plaintiffs they dislike even while they penalize bad actors more heavily.

Another ambiguity arises from the fact that both administrative and judicial decisions can be altered on appeal. To the extent that this introduces uniformity, it may also obscure characteristic differences between the two systems. Therefore, although a plaintiff who chooses a judicial trial may get a higher initial award, a significant part of the difference between the administrative and judicial forums is viewed by the legal system as error and tends to disappear once appellate review is complete.

Finally, it is difficult to identify award amounts for comparison in every situation. Cases may be consolidated or otherwise present multiple claimants, thus inflating the total award even while the per-claimant award is average or low. Yet identifying a per-claimant award is difficult and perhaps misleading; especially in situations where a single act of discrimination might damage several family members in ways that are difficult to separate.¹¹⁶

Complainants generally fall into three separate categories, each suffering damages in distinctive ways. Some plaintiffs are testers,

some bona fide seekers of housing, and some are fair housing organizations. Testers generally recover less than bona fide homeseekers. Fair housing organizations can sometimes prove costs from diversion of resources that dwarf any economic damages an individual can prove.

For all these reasons, and to avoid a deceptive clarity, the comparisons of damage awards by forum are not presented in chart form. Unless otherwise stated, the following numbers represent all cases in which liability was found, and exclude verdicts favoring respondents. "Final" damages—i.e., as altered on appeal—are used, for both administrative and court outcomes. Excluded from the court awards are all damages to fair housing organizations and to testers, in order to get the most meaningful comparison with administrative decisions from the point of view of the individual complainant.¹¹⁷ Applying these constraints, aggrieved housing seekers in the cases examined succeeded more often and received higher damages in the administrative forum than in court. (Excluding testers and fair housing organizations is not meant to diminish in any way the importance of such cases, which often have very significant enforcement effects.)

In the ALJ cases studied, 5 of 45 decisions found no liability, and, thus, awarded no damages. Two of the 45 initial decisions found no

¹¹⁶ For example, although one person should not be able to recover for damages suffered by another, there are ways in which this can be accomplished. For instance, giving one an award for having to cope with the distress suffered by another, or giving one spouse an award for household income lost by the other spouse. Accordingly, household damages might reflect lost wages to one spouse, emotional distress to the other, and loss of playmates to the children, whereas a single parent-plaintiff might well be able to recover a comparable total.

¹¹⁷ These decisions largely explain the difference in our conclusions from those of, for instance, the Washington Lawyers Committee for Civil Rights. (See Reiman, *Federal Fair Housing Enforcement: The Dush Record and Recommendations for the New Administration*.) Other differences arise from certain reversals and remands not reflected in that paper, as well as minor errors in reporting damages in particular cases.

liability but were reversed by the Secretary and remanded for damage assessments.¹¹⁸ The mean award in family status cases heard administratively is \$7,075. The mean award in court cases is \$3,776. The mean ALJ award in race discrimination cases is \$39,214. The mean court award is \$28,378. This figure excludes not only tester and fair housing organization awards, as noted, but also cases in which the advertising for the unit conveyed an impermissible preference.¹¹⁹

Only a handful of cases exists for other types of discrimination, making comparison even less meaningful. ALJs awarded on average \$11,580 in four cases to plaintiffs proving handicap discrimination, and \$2,180 in two cases for sex discrimination. Only one Federal court handicap case in the sample studied produced a reported damage award (\$8,032) and two others won no damages even though liability was found. Similarly, only one sex

discrimination court award, of \$7,500, was noted.¹²⁰

Even the preceding figures may, in a sense, exaggerate the relative merits of the judicial forum. On the occasions when higher damages have been won in the judicial forum, they stem almost entirely from private litigation. Examination of the judicial damage awards show that those cases originating in election brought by DOJ tend to be the lower awards. The DOJ election cases are most directly comparable to the ALJ cases, so, if they were a statistically significant number, it might be possible to conclude that the administrative forum is markedly superior for complainants.

These comparisons take no account of civil penalties or punitive damages, an adjustment that would significantly change the balance if it could be accomplished scientifically. In the civil cases examined, prevailing plaintiffs or aggrieved parties represented by the Attorney General were awarded \$38,329 on the average

118 HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *rev'd and remanded*, *In re Bobbie Burris*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (record reopened on other grounds), *on remand*, HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,080 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded*, HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19, 1993) (decision), *on second remand*, HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd*, HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994); and

HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,043 (HUD ALJ Mar. 22, 1993) (initial decision), *on remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,048 (HUD ALJ June 18, 1993) (initial decision on remand), *rev'd and remanded*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 (HUD Secretary July 19, 1993), *on second remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD Secretary Oct. 20, 1993) (reversing ALJ's disparate impact analysis and entering judgment for charging party), *on third remand*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD ALJ Dec. 17, 1993) (third initial decision on remand).

119 Such exclusion is by no means intended to disparage the importance of these cases, which have resulted in very significant jury verdicts. However, because no advertising cases have been brought before ALJs, inclusion of these cases would distort the comparison of damage awards in both forums.

120 It should be noted that the apparent difference in sex discrimination cases, already statistically insignificant, is further distorted by our rules regarding the treatment of appellate reversals. Because in *HUD v. Baumgardner*, damages were reduced on appeal from \$15,000 to \$5,000, it could be argued that ALJ damages are more generous than shown, and courts are less generous. *HUD v. Baumgardner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006 (HUD ALJ Nov. 15, 1990), *aff'd in part, rev'd in part, and amended*, 960 F.2d 572 (6th Cir. 1992).

in punitive damages.¹²¹ By contrast, the civil penalties assessed by ALJs averaged \$5,600 for prevailing complainants.¹²² It is important to remember that while civil penalties are of interest for weighing the deterrent effect of a judgment, they are awarded to the government and are irrelevant to the complainant's compensation.

Court cases in which punitive damages may be collected appear to tip the balance toward court as a preferred forum for complainants because of the amount of damages awarded. However, this is no reflection on the desirability of the administrative forum. Congress chose not to allow punitive damages in the administrative forum, presumably to induce respondents to submit to the expedited procedures, and to give complainants faster and more certain resolution.

Furthermore, the large punitive and compensatory damage awards have usually resulted from cases that received atypical attention from fair housing organizations and/or expert lawyers, and that typically involve claims of race discrimination. However, for the average complainant seeking resolution and compensation for family status discrimination against an uninformed, but non-malicious defendant, the administrative

forum would appear equal to if not superior to a judicial determination.

Appellate Court Review of ALJ Decisions

To date, the ALJs' liability determinations were upheld in the four reported ALJ opinions that have been the subject of appellate review.¹²³ One was affirmed; damages were reduced in two; and one decision was remanded to allow for a reasonable conciliation effort. Once again, although these numbers are too low to extrapolate a weighty conclusion, they are consistent with the conclusion that ALJ decisions appear on their face to be generally well-reasoned and consonant with existing law, with certain controversial exceptions discussed here and in chapter 10.

HUD v. Blackwell was the first fair housing case decided by an administrative body.¹²⁴ *Blackwell* was a race discrimination case in which the chief ALJ applied a *McDonnell Douglas* analysis to find that the respondent's objections to the African American buyers were merely pretextual.¹²⁵ The 11th circuit upheld the methodology,¹²⁶ which has continued to serve as the model for subsequent ALJ decisions.¹²⁷

¹²¹ This average excludes the \$2 million punitive damage awarded by the jury in *Timus v. William J. Davis, Inc.*, both because the case is vulnerable to reversal or settlement and because, even if final, the award significantly distorts the average. See *D.C. Jury Awards More Than \$2.4 Million in Family Status Case*, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 3, ¶ 3.1, p. 1 (Sept. 1, 1992). This figure also excludes the only civil penalty imposed by a district court where no punitive damages were awarded. See *United States v. Canestrini*, No. 91-C-6651, 1992 U.S. Dist. LEXIS 17023 (N.D. Ill. Aug. 12, 1992).

¹²² This calculation excluded two decisions where no civil penalty was awarded. In *HUD v. Leiner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,021, at 25,261 (HUD ALJ Jan. 3, 1992), the Secretary did not seek a civil penalty, and in *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,363 (HUD ALJ Aug. 26, 1992), the ALJ stated that he would have awarded \$3,000, if HUD's delay had not increased the compensatory damages.

¹²³ For a discussion of reviews of ALJ initial decisions by the Secretary of HUD, see chap. 10.

¹²⁴ *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001 (HUD ALJ Dec. 21, 1989).

¹²⁵ *Id.* at ¶ 25,005.

¹²⁶ *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990).

¹²⁷ See *HUD v. Williams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007, at 25,113-14 (HUD ALJ Mar. 22, 1991).

HUD v. Downs was a more controversial decision than *Blackwell*.¹²⁸ The complainant, a mother with a child, had been denied housing after the leasing agent had asked questions about the child's noisiness and had leased the unit to someone without children. The ALJ concluded that the questions relating to the noise level of the child were legitimate because the owner wanted to avoid a noisy neighbor for an elderly tenant.¹²⁹ The ALJ also rejected the view that the leasing agent had expressed an illegal preference against children, on the grounds that her motive was innocent.¹³⁰

Represented by experienced fair housing advocates, the appellant attacked the sufficiency of the evidence and argued that, in considering a violation of the statute's discriminatory advertising provisions, the agent's questions should be judged based on whether an ordinary listener would find them discriminatory, not on whether the speaker had a discriminatory intent or motive. In affirming the decision, the second circuit implicitly praised the ALJ's careful analysis and found substantial evidence supported the ALJ's decision.¹³¹ While agreeing with the ordinary listener standard, the court held that

the motivation of the speaker was relevant to what the listener would hear.¹³²

Both the ALJ and appellate court rejections of the appellant's claim suggest an implied unwillingness to let fair housing legal theory, developed to combat race discrimination, totally replace the judges' view of common experience when other classes are complainants. In some circumstances inquiries as to children may be permissible, whereas inquiring as to race is never permissible. No ordinary applicant, the judges seem to say, should take offense at the questions asked in the context presented, provided such questions have a legitimate purpose.

In two cases, appellate courts reduced sharply the damages awarded by the HUD ALJ, although leaving intact the finding of liability. *HUD v. Baumgardner* involved a landlord's refusal to rent to a group of single men.¹³³ The sixth circuit reduced damages from \$5,000 to \$1,500.¹³⁴ An award of \$2,000 for "economic loss including inconvenience" was reduced to \$1,000, even "giving HUD and [complainant] the benefit of some considerable doubt."¹³⁵ A \$500 award for emotional distress was grudgingly allowed.¹³⁶

In addition, an award for, \$2,500 for "loss of civil rights" was overturned completely as

128 *HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011 (HUD ALJ Sept. 20, 1991) (initial decision), *permission to intervene granted*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,017 (HUD ALJ Nov. 22, 1991) (memorandum), *petition for review denied*, *Soules v. HUD*, 967 F.2d 817 (2d Cir. 1992).

129 *Id.*

130 *Id.*

131 *Soules v. HUD*, 967 F.2d 817 (2d Cir. 1992).

132 *Id.* at 824-25.

133 *HUD v. Baumgardner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006 (HUD ALJ Nov. 15, 1990), *aff'd in part, rev'd in part, and amended*, 960 F.2d 572 (6th Cir. 1992).

134 960 F.2d at 580-83.

135 *Id.* at 580-81.

136 *Id.* at 581.

an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven."¹³⁷ The \$4,000 civil penalty was reduced to \$1,500. While this reduction was due in part to HUD's procedural delays, the court also noted that the complaining party did not prove any other evidence of discriminatory conduct by the agent.¹³⁸

The appellate decision in *HUD v. Morgan* is similar to the decision in *Baumgardner*. In *Morgan*, a mobile home park owner was assessed over \$14,000 in damages by the ALJ after barring a family with children from the park.¹³⁹ The 10th circuit, on appeal, permitted economic damages to the complainant calculated based on the cost of a comparable unit, but eliminated all damages for inconvenience and emotional distress.¹⁴⁰

Most recently, the sixth circuit reviewed an ALJ opinion involving family status discrimination based on an invalid occupancy policy.¹⁴¹ Although the court agreed with the ALJ's liability finding, the court did not agree that the parties were afforded a reasonable opportunity to conciliate the complaint.

The ALJ relied upon *Baumgardner* in deciding that the respondent had a reasonable opportunity to conciliate the complaint.¹⁴²

The ALJ compared the forms of communication used and the number and length of the conciliation meetings and concluded that HUD had met its obligation to make an objectively reasonable attempt at conciliation.¹⁴³ However, on appeal, the sixth circuit concluded that the conciliation efforts were not objectively reasonable because the investigator also served as the conciliator of the complaint.¹⁴⁴ The sixth circuit found that "the conciliation efforts were seriously flawed" by the dual role of the conciliator/investigator, and remanded the case to allow for an unbiased conciliation process.¹⁴⁵

In addition to the disagreement over the effectiveness of the conciliation, the sixth circuit also questioned the ALJ's damage award.¹⁴⁶ The ALJ's initial damage award reflected the loss suffered by the complainant during HUD's 17-month delay in processing.¹⁴⁷ Recognizing that the damages were greater than they would have been if HUD had acted within the statutory period, the ALJ assessed the full economic damage amount against the respondent, but did not impose a civil penalty.¹⁴⁸

Although the court vacated the entire damage award to allow for a reasonable conciliation, the court implied that the ALJ erred in

¹³⁷ *Id.* at 583.

¹³⁸ 960 F.2d. at 583.

¹³⁹ *HUD v. Morgan*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991), *aff'd in part, rev'd in part*, *Morgan v. Secretary of HUD*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,816 (10th Cir. Feb. 18, 1993).

¹⁴⁰ *Morgan v. Secretary of HUD*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,816, at 17,320-21 (10th Cir. Feb. 18, 1993).

¹⁴¹ *Kelly v. Secretary of HUD*, 3 F.3d 951 (6th Cir. 1993).

¹⁴² *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,359 (HUD ALJ Aug. 26, 1992).

¹⁴³ *Id.*

¹⁴⁴ 3 F.3d at 955.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,360-61.

¹⁴⁸ *Id.* at 25,363.

the amount of economic damages he awarded. The court stated that, although the complainant should not be made to suffer for HUD's excessive delay in issuing the charge, the respondents should not have to pay for damages "assessed for the period during which HUD

completely neglected the case."¹⁴⁹ Therefore, the court suggested that even if the new conciliation effort fails and the ALJ is required to reconsider the charge, the economic damages should be lower than the ALJ originally determined.

¹⁴⁹ *Id.*

5. Managing Complaints

The investigation and adjudication of individual complaints of discrimination is perhaps the single most dramatic change in the 1988 fair housing law. HUD's organization and management of this function is crucial to fulfilling the law's promise. The scheme adopted by HUD attempts to adapt the requirements of administrative law and avoidance of conflict of interest to the existing departmental structure, with mixed results.¹

Organizational Structure

The Secretary of Housing and Urban Development is the lead official responsible for Federal fair housing policy² and for administering Title VIII.³ The Secretary plays not only a general oversight role, but a particular role in the issuance of hearing decisions, which he may reverse, revise, or remand. He has divided enforcement responsibilities for the Fair Housing Amendments Act of 1988 among

the Assistant Secretary for Fair Housing and Equal Opportunity; the General Counsel; and the Chief Administrative Law Judge.⁴

The Assistant Secretary and General Counsel in turn have delegated certain functions to regional fair housing directors (who in turn report to HUD regional administrators) and to regional counsels, supervised jointly by the regional administrators and the General Counsel. The regional administrators report to the Deputy Secretary. An assistant to the Secretary for field management "advises the Secretary, Deputy Secretary, and other principal staff on the effectiveness of regional and field operating policies and procedures and serves as the Secretary's principal focal point in all matters dealing with the regional and field offices."⁵

Thus while the Assistant Secretary is responsible for fair housing policy and promulgating internal guidance to staff as to how to

¹ As a result of reorganization efforts, as of April 15, 1994, HUD eliminated its regional administrators and established a more direct chain of command between the former regional offices (now called Enforcement Centers) and the Assistant Secretary. "Because the investigative function will now report directly to the Assistant Secretary, more accountability and better communication of information should enhance enforcement efforts, as well as ensure that enforcement efforts are made more consistent nationally." According to HUD, the Assistant Secretary is already using this new chain of command as a mechanism to disseminate information and direction to the Enforcement Centers. In addition, HUD anticipates that the new chain of command will also result in more efficient case processing. See "Recent Fair Housing Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives). See also "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 7 (hereafter cited as HUD Comments). See also National Academy of Public Administration, *Renewing HUD: A Long-Term Agenda for Effective Performance* (August 1994), for an exhaustive analysis of HUD's overall mission and organization.

² Exec. Order No. 12,259, 3 C.F.R. 307 (1981).

³ 42 U.S.C. § 3608(a) (1988).

⁴ 54 Fed. Reg. 13,121 (1989). See also 24 C.F.R. §§ 103.200, 103.400 and 104.100 (1993).

⁵ U.S. Congress, House, Committee on Appropriations, *Department of Veterans Affairs, and Housing and Urban Development, and Independent Agencies Appropriations for 1994: Hearings before the Subcommittee on VA, HUD, and Independent Agencies*, 103d Cong., 1st sess., 1993, Part 3, p. A-2 (hereafter cited as HUD FY 1994 Budget).

carry out HUD policy, she does not have line authority over the investigation of fair housing complaints, and her decisions as to reasonable cause are subject to review by the General Counsel.

A fundamental structural problem arises from this arrangement. At the top of the administrative structure implementing the statute are officials for whom fair housing is one of many concerns at both the regional and headquarters level. The General Counsel supervises offices of assisted housing and community development, insured housing and finance, program enforcement, litigation, legislation and regulation, and operations, in addition to the office of equal opportunity and administrative law. The latter office itself is responsible for a variety of other legal activities.

Similarly, the Assistant Secretary herself is responsible for a variety of fair housing and equal employment programs. In addition to Title VIII, programs under the Office of Fair Housing and Equal Opportunity (FHEO) include administering the Fair Housing Assistance Program and Fair Housing Initiatives Program, and enforcing Title VI of the 1964 Civil Rights Act, the Age Discrimination Act, section 504, the Americans with Disabilities Act, section 109, and section 3, as well as administration of the public housing affirmative compliance action programs (PHACA) and HUD's internal equal employment opportunity program.⁶ The Assistant Secretary is responsible for ensuring that all HUD programs affirmatively further fair housing.

Furthermore, the regional administrators, who supervise regional fair housing directors in charge of investigations and case management in HUD's 10 regional offices, are responsible for a wide variety of HUD programs in addition to fair housing, including the administration of numerous housing and commu-

nity development programs. It is not clear how heavily their enforcement of Title VIII weighs in their own annual evaluation by the Deputy Secretary in comparison to their performance of other tasks.

At headquarters, the only officials in a position to resolve differences, ensure the coordination of efforts, and monitor the performance of both the Assistant Secretary and the General Counsel are the Secretary or Deputy Secretary of Housing and Urban Development. However, the Deputy Secretary has oversight responsibilities for at least seven other assistant secretaries and the ten regional administrators.

The end result of this arrangement is a dilution of responsibility for the efficient administration of the act. The chain of command zigzags across separate entities, all of whom report to a central authority beset with problems and priorities other than fair housing. Personnel are evaluated by one set of officials (regional administrators and FHEO directors) while, in effect, receiving their instructions from another set (the General Counsel, Assistant Secretary, and other officials of the Office of Fair Housing and Equal Opportunity).

Overlaid on this chain of command is the route followed by a typical complaint, the merits or nonmerits of which are decided by officials answering to different authorities. The cross-reviews by FHEO and the General Counsel's office and regional FHEO and regional counsels described above⁷ are a convoluted attempt to deal with the oddity of having no single authority over the entire operation except the Deputy Secretary, who clearly is unsuited by other demands on his time and energy to be that single authority.

When HUD issued its proposed regulations implementing the FHAA, some commenters objected to the delegation by the Secretary of the responsibility to find reasonable cause and

⁶ HUD FY 1994 Budget, p. K-1, pp. K-2-K-5.

⁷ See chap. 3.

the prosecutorial function to the General Counsel rather than the Assistant Secretary. According to HUD, commenters asserted that the Assistant Secretary's long experience in administering civil rights matters, particularly 20 years of fair housing experience, made that official the logical decisionmaker regarding fair housing complaints. HUD pointed out, however, that the law refers nearly exclusively to the Secretary and not the Assistant Secretary, and that the near certainty that litigation will result from a cause finding necessitates the involvement of the department's chief legal officer.⁸

A commenter also pointed out that HUD's General Counsel would continue to defend the Department when it was sued for discrimination, presenting a conflict of interest. HUD responded that the Secretary would delegate the cause determination to another employee in such circumstances, but did not provide for such an eventuality in the regulations.⁹

Elsewhere in the Federal Government, agencies responsible for the disposition of complaints filed in quantity by the general public and having the authority to make deci-

sions based on administrative proceedings before administrative law judges, or their rough equivalent, are functionally independent, either as separate agencies or as autonomous units within larger agencies.¹⁰ While the HUD arrangement does not appear to present any legal conflicts of interest,¹¹ managerially it makes it difficult to fix responsibility for deficiencies in case processing.

Internal Guidance

The Office of Fair Housing and Equal Opportunity

The Fair Housing Amendments Act itself gave the Secretary 180 days from the date of enactment to issue rules implementing Title VIII as amended.¹² This deadline was met when the final rule was published January 23, 1989, effective March 12, 1989.¹³ Unfortunately, internal guidance from the Assistant Secretary and General Counsel has not been as timely.

The Deputy Assistant Secretary for Enforcement and Compliance¹⁴ issued a series of

⁸ 24 C.F.R. Ch. I, Subch. A, App. I, at 947 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

⁹ *Id.* at 947-48.

¹⁰ See the National Labor Relations Board, Federal Labor Relations Authority, Merit Systems Protection Board, and the Equal Employment Opportunity Commission as models of Federal agencies handling complaints from the general public.

¹¹ Some critics have pointed out that fair housing complaints against HUD-owned or funded facilities and programs pit fair housing officials against regional administrators. HUD's response has been to have complaints against programs operated by one region investigated by another region.

¹² 42 U.S.C. § 3601 note (1988).

¹³ 24 C.F.R. Ch. I, Subch. A, App. I, at 911-912 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

¹⁴ Leonora L. Guarraia. Later her title became General Deputy Assistant Secretary for Fair Housing and Equal Opportunity; beginning in August 1991, the TGMs were signed by Assistant Secretary Gordon H. Mansfield.

technical guidance memoranda to regional staff on case processing.¹⁵

Through 1992, approximately 24 memoranda were circulated to regional staff. However, beginning in May 1991, all memoranda to staff provided by HUD to the Commission were in draft form.¹⁶

The first formal instruction on case processing was issued by the Assistant Secretary on or about November 9, 1989. It consisted primarily of a description of how the investigative file (the Final Investigative Report, or FIR) was to be organized, along with sample formats.¹⁷ It focused on what information was required for the file and how to describe it. No instruction on how to gather information, determine jurisdiction, or identify the issues in a complaint were included. As late as April 5, 1991—2 years after the act became effective—HUD headquarters felt it necessary to instruct regional staff that:

The investigator must do more than state when, how, and with whom the contact was made. A summary of the content of the contact is also required. For example, following an interview with a complainant, summarize what he or she said relevant to the complaint. . . .

The same principle applies to the FIR's summary description of records. The investigator must be careful not to merely list the name of the record or document. Summarize the relevant information contained in each record or document.¹⁸

The first "how-to" instruction beyond technical details appeared in September 1990, when a TGM on the conduct of binding arbitration was issued.¹⁹ As noted above, however, binding arbitration is rarely used.

Instruction regarding complaints based on multiple chemical sensitivity disorder (often involving tenant objections to the application of pesticides, for example) was circulated in June 1991.²⁰ Procedures for expedited case processing where cause and no cause findings would appear to be apparent on their face were circulated in August 1991.²¹ The procedures included examples of the kinds of cases covered by the instruction. A lengthy and helpful instruction on the conduct of conciliation was circulated in August 1992.²² This was one of the very few TGMs with "how-to" advice. A TGM on preparing "no cause" determinations contained only procedural instructions for regional staff on what cases were to be routinely referred to headquarters, what

15 The technical guidance memoranda were supplied by HUD in response to a request by the U.S. Commission on Civil Rights for "Any technical materials (e.g., manuals, technical guidance memoranda) issued by headquarters to regional offices concerning compliance and case handling procedures and standards of performance specifically relating to intake, investigation, conciliation, reasonable cause determinations." See U.S. Commission on Civil Rights, Request for Information and Materials, Oct. 2, 1990. Updates were supplied in response to a later request for "Current compliance manual/s, including draft manuals now used as guidance," and, "Any other relevant current documents outlining HUD procedures and directives on fair housing enforcement." See U.S. Commission on Civil Rights, Documents Update Request, Dec. 22, 1992.

16 The Department is no longer using the draft TGM form for issuance of guidance and is in the process of developing new systems by which information will be provided to investigative staff. Among the systems in active development is a written compliance manual and a formal notice form for issuance of such instructions. "Recent Fair Housing Initiatives," (hereafter, HUD Initiatives).

17 Technical Guidance Memoranda #2, Nov. 9, 1989.

18 TGM #2, Addendum #1, p. 1.

19 TGM-7, Binding Arbitration under Title VIII, Sept. 5, 1990.

20 TGM 91-3, reissued as TGM-14, Multiple Chemical Sensitivity Disorder, June 6, 1991, marked "draft."

21 TGM-17, Expedited Case Processing Procedures, Aug. 8, 1991, marked "draft."

22 TGM-16, Conducting Conciliation, Aug. 11, 1992, marked "draft." (TGM-16 was dated a full year after TGM-17.)

the determination letter should contain, and how it should be issued.²³

An instruction on conducting investigations was not issued until July 1992,²⁴ and was in the nature of helpful hints rather than a comprehensive guide (it consisted of five and a half double-spaced typewritten pages). Much of the text focused on how to avoid onsite investigations, and concluded that, "In general, an onsite investigation is to occur only in exceptional cases."²⁵ The last "how-to" instruction provided to the Commission focuses on how to investigate complaints of discriminatory advertising and was circulated in August 1992.²⁶ An instruction on testing gave guidance on when to use testing and how to procure testing services, but not on how testing should be conducted.²⁷

As a whole, the TGM series is spotty at best, unfocused, and without a clear purpose. It is neither entirely procedural nor adequately substantive. It is not even systematically enumerated. At least half of the issuances have never been finalized. As a body of instruction,

it lacks coherence and omits guidance on critical topics, such as identifying pattern and practice or systemic cases; investigating complaints based on lending discrimination,²⁸ sexual harassment, or occupancy codes, for example; how and when to request prompt judicial action; or standard operating procedures for intake and administrative closures.

The TGM system was described in TGM-1 as designed to "allow us [HUD] to quickly disseminate guidance on our processing of Title VIII cases pending the issuance of the Title VIII Handbook."²⁹ The Title VIII handbook has never been issued, although at various times staff have been assigned to write it.³⁰

The Office of General Counsel

The Office of General Counsel has not maintained a set of formal issuances that offer guidance on processing fair housing cases. However, a survey of a chronological file supplied to the Commission consisting of a variety of inquiry letters, responses to inquiries,

23 TGM-18, Preparing and Issuing No Reasonable Cause Determinations under the Fair Housing Act, undated, but apparently finalized Dec. 6, 1991, marked "draft."

24 92-3-ECIF, Efficient Investigative Techniques, July 31, 1992, marked "draft." Occasionally, the numbering system used with the instructions varied; the material herein is presented in chronological order.

25 Ibid., p. 6.

26 TGM-92-5-ECIF, Investigating Complaints Alleging Discriminatory Advertising in Violation of Section 804(c), undated, marked "draft." None were issued in FY 1993.

27 Draft Technical Guidance Memorandum # (blank), Testing in Title VIII Cases, undated. Testing conducted under the Fair Housing Initiatives Program is regulated by 24 C.F.R. § 125.405; see chap. 7.

28 FHEO is developing and testing models for effective investigation and analysis of mortgage lending data, "HUD Initiatives," p. 2.

29 TGM-1, The Technical Guidance Memoranda System, Nov. 9, 1989.

30 Laurence Pearl, Director, Office of Program Standards and Evaluation, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Mar. 15, 1993.

internal policy memoranda, legal briefs, and other items offering such guidance³¹ does reveal something of OGC's role in disseminating guidance regarding HUD's fair housing policy and complaint processing.

One way to evaluate OGC's advice is to examine how it was tracking and integrating developments in fair housing law in civil and administrative cases into HUD's own investigative and prosecutorial apparatus. The files contained numerous legal memoranda addressing questions of interpretation arising in enforcement proceedings, including the reasonability of occupancy standards; use of human models in advertising; coverage of such facilities as university dormitories, intermediate care facilities, and supportive service environments for special needs groups; whether a residential lot or an RV site is a covered "dwelling" under the act; the standing of persons harmed through their acquaintance with friends or family; what differentiates an ex-drug user from a current one; and the status of multiple chemical sensitivity as a handicap. As a whole, the memoranda appeared competent and thorough.

Among the papers provided were memoranda discussing five of the ALJ decisions, one of the appellate reviews of an ALJ decision, and two of the Attorney General's election cases. These are most often addressed to the General Counsel, regional counsel, the Assistant Secretary for FHEO, and the regional directors for FHEO. There is no indication as to whether they received wider circulation. No memoranda were located discussing private civil cases decided during this period.

The case memoranda located were readable, reasonably thorough, and expressly directed toward drawing lessons from each decision, with regard to the underlying investigation, the presentation of the case, and legal arguments. It is not clear to whom they were circulated and whether other cases were covered elsewhere.

A memorandum from September 1992 established a "brief bank,"³² and another from February 1993 directed that all regional counsel be provided with copies of all opinions by HUD administrative law judges (ALJs).³³ A regional counsel's request for the ALJ opinions suggests that regional attorneys do not receive *Fair Housing-Fair Lending Reporter*,

31 The Commission requested:

1) All correspondence from HUD's Office of General Counsel to headquarters, regional, or field staff establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.

2) All correspondence from HUD's Office of General Counsel to members of the public, State or local agencies, or other external entities establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.

3) Any directive or memoranda to HUD headquarters, regional, or field staff from the Office of General Counsel establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.

Any draft documents that are considered operative, i.e., that HUD staff are directed to use as guidance, should be included in the ambit of this request.

(Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, letter to George Weidenfeller, Deputy General Counsel, U.S. Department of Housing and Urban Development, Mar. 17, 1993.)

32 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, Memorandum for All Regional Counsel, re: Legal Briefs—Fair Housing Cases, Sept. 24, 1992.

33 George Weidenfeller, Deputy General Counsel (Operations), Memorandum for All Regional Counsel, Re: Regional Counsel Meeting—Fair Housing Issues, Feb. 3, 1993, p. 2.

which would keep them current not only on all ALJ decisions, but also on private litigation and settlements as well as other fair housing news. Whether or not immediately relevant, such broader exposure would give valuable perspective and new ideas.

Very few memoranda were found that provided direct instruction as to how cases were to be pled and litigated. One from March 1993 reported that HUD had not uniformly been seeking civil penalties separately against each respondent although HUD ALJs had been awarding them when asked; the memorandum instructed that, henceforth, civil damages should be sought from each respondent.

Those examples of legal research and writing viewed in the documents appear to be of high quality. These, together with other materials in the file, certainly left the impression of an ongoing effort to develop and assert positions with regard to emerging legal and policy issues, based on the cumulative case experience including no-cause determinations, cause determinations, settlements, and decisions. However, the evidence was insufficient to draw any general conclusions about the coherence and comprehensiveness of the effort, or whether it was distributed in a

timely fashion to an appropriate universe of HUD staff.

An occasional divergence of opinion between staff and supervisor was apparent. One memorandum from the General Counsel announcing that HUD would deem reasonable occupancy standards of "one more than the number of bedrooms"³⁴ aroused considerable controversy.³⁵ An OGC staff memo indicated that FHEO expressed concern over the General Counsel's approach to occupancy cases.³⁶ Within a month of the issuance of the controversial memorandum, the General Counsel withdrew and replaced the earlier policy directive. The new memorandum states that the "two per bedroom" standard was not intended to serve as an occupancy policy to be used in every case, but rather was intended to guide the regional counsel on the evaluation of evidence in occupancy code cases.³⁷

Training

HUD's spending on formal Title VIII training has varied widely in the 4 years since the FHAA became effective in 1989. In fiscal year (FY) 1989, HUD spent \$215,161; in FY 1990, spending fell to \$54,653. It rose again to \$125,532 in FY 1991, and fell to \$39,208 in FY 1992.³⁸

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- ³⁴ Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement Policy: Occupancy Standards, Feb. 21, 1991.
- ³⁵ *HUD Internal Guidance on Occupancy Standards Draws Concern from Rights Groups*, 1 Fair Housing-Fair Lending (P:H), vol. 6, no. 11, ¶ 11.6, p. 6 (May 1, 1991).
- ³⁶ Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, note to Dorothy Brown, Associate Deputy General Counsel, U.S. Department of Housing and Urban Development, Re: Fair Housing Enforcement Policy: Proposed Memorandum on Occupancy Cases, Mar. 19, 1991.
- ³⁷ Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement Policy: Occupancy Cases, Mar. 20, 1991. On March 25, 1991, the General Counsel issued a brief statement explaining that the memorandum issued on March 20, 1991, superseded the February 21, 1991, memorandum on HUD's occupancy code policy. Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement: Memoranda on Occupancy Cases, Mar. 25, 1991.
- ³⁸ Peter Kaplan, Director, Program Training and Technical Assistance, FHEO, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Aug. 6, 1993, and Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Nov. 4, 1993.

In FY 1990, two training sessions focusing on "fair housing basic skills training" were attended by 80 FHEO field staff.³⁹ Activity increased again in FY 1991; 6 Title VIII sessions were attended by 171 FHEO field staff, including 5 week-long sessions on Title VIII and fair housing attended by 200 FHEO field staff and one session on voluntary compliance attended by 40 FHEO field staff. Another session on both the Fair Housing Assistance Program and Fair Housing Initiatives Program was attended by HUD staff and staff from State and local fair housing enforcement agencies and private fair housing groups.⁴⁰

Training dropped off dramatically in FY 1992, when only one session was held for 32 FHEO staff.⁴¹ But in FY 1993, 10 sessions were scheduled to be attended by 370 staff, including two that were repeated in three regions of the country. All but one focused on fair housing (the remaining session was on implementing the 1992 Housing and Community Development Act). The training appeared to become much more specialized, with sessions including such topics as identifying cases for prompt judicial action, use of statistical evidence in complaint processing, investigative writing, and preparation of the Final Investigative Report, and "advanced Title VIII investigative training." Projected spending would total \$402,565—nearly twice

the previous high of \$215,161 in FY 1989.⁴² The increase was part of a new emphasis placed on training by HUD. Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, noted that "My commitment to effective training resulted in setting in place an FHEO training program for this fiscal year that is eight times larger than the amount spent on training in fiscal year 1992."⁴³ FHEO "secured \$90,000 in additional funding to complete a training needs assessment this fiscal year."⁴⁴

In FY 1989 and 1990, training was the responsibility of the Office of Fair Housing Enforcement and Section 3 Compliance. In FY 1991, training became the responsibility of a new Office of Program Training and Technical Assistance,⁴⁵ with no apparent change in direction or productivity. Staff were selected for training by regional FHEO directors based on the positions they held (not necessarily on seniority or newest employees first).

Regions have provided some training on their own initiative. For example, Region IX provided staff with internal training on conciliations and on section 504 and the Age Discrimination Act,⁴⁶ while Region III trained staff on handling complainants with mental disabilities.⁴⁷ Most training is informal and acquired on one's own initiative,⁴⁸ sharing

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Roberta Achtenberg, Assistant Secretary, Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Arthur A. Fletcher, Chair, U.S. Commission on Civil Rights, Aug. 23, 1993.

44 Ibid.

45 Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Nov. 4, 1993.

46 Ibid.

47 Burrichter 1993 interview.

48 Vicki Guma 1993 interview.

case files and experiences is a prime means of learning the job.⁴⁹

The Office of General Counsel also conducted internal training, in August 1989, May 1990, December 1990, June 1992, and April 1994. Annual meetings of regional and field counsel included fair housing training, and both OGC and FHEO staff attended outside fair housing conferences.⁵⁰ HUD indicated in its comments on this report that the department considered substantive training activities to be a critical component of providing full, fair enforcement of the Fair Housing Act.⁵¹

FHEO Budget and Staffing

HUD got a late start on acquiring the resources to enforce the Fair Housing Amendments Act. In September 1988, when passage of the new law was imminent, HUD sought approval by the Office of Management and Budget of a FY 1989 supplemental appropriation of \$8 million. The \$8 million was intended to pay for 76.4 additional staff years for FHEO headquarters and regional operations, the Office of Administrative Law Judges, and the Office of General Counsel.⁵²

Congress failed to act on the request before adjournment. Instead, on November 15, 1988, HUD asked permission from both the House and Senate Appropriations Committees to redirect \$4.57 million and 41.5 staff years from other HUD programs. The request was approved December 9, 1988. The reprogrammed amount covered staff costs, travel, training, and data processing.⁵³

Later in FY 1989 HUD again asked for an additional \$3.49 million to reach the original levels sought earlier. The supplemental appropriation was approved June 30, 1989, just 3 months before the end of the fiscal year, 9 months after passage of the act, and 3 months after it became effective.⁵⁴

Regional fair housing staff, measured in FTEs,⁵⁵ rose from 142.4 in FY 1988 prior to the new law to 309 in FY 1992, the highest year. Table 5.1 shows that the largest increase took place in 1990, when staff rose by 103.5, from 167.3 to 270.8. For 1993 and 1994, HUD estimated that the figure would be 298.5 and 301.9, respectively. The staffing level requested of Congress by HUD was consistently less than the number authorized until 1992, when the figures are approximately the same.

49 Burrichter 1993 interview.

50 HUD comments, p. 7.

51 According to Henry Cisneros, Secretary, U.S. Department of HUD, the Department presented recent training programs to the FHEO staff and the substantially equivalent agencies staff (and which included many Department staff as participants and trainers) on investigative skills, and a series of week-long sessions on Advanced Investigative Skills. Secretary Cisneros also indicated that the Office of General Counsel presented joint training live by satellite to FHEO investigators and counsel nationally spring of 1994. He stated with over 300 participants, this interactive training focused on current critical issues in enforcement, including proof of fair housing violations, standards of seeking prompt judicial action, use of testing to aid in investigations, new and developing issues in zoning cases, standing, remedies, and multiple chemical sensitivity as a handicap under the Act. Presenters included DOJ attorneys, representatives from the National Fair Housing Alliance and the NAACP Legal Defense and Education Fund, and private counsel, as well as senior FHEO and OGC staff. "HUD Initiatives," p. 2.

52 This narrative is adapted from U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1989*, p. 7 (hereafter cited as *The State of Fair Housing 1989*).

53 Ibid.

54 Ibid.

55 Full-time equivalent positions measure the total number of hours worked or to be worked divided by the number of compensable hours applicable to each fiscal year, rather than the actual number of persons employed.

TABLE 5.1
HUD Regional Staff FTEs

	Fiscal years						
	1988	1989 ¹	1990	1991	1992	1993	1994
Actual:							
Fair housing staff	142.4	167.3	270.8	295.4	309.0	298.5 ²	301.9 ³
Total staff	456.0	491.4	545.0	582.0	566.0	543.0 ⁴	531.0 ⁵
Percent fair housing	31.2	34.0	49.7	50.8	54.6	55.0	56.9

Source: HUD Budgets, FY 1989-1994.

¹ In 1989 reprogramming increased the FTEs by 41.5 and a supplemental appropriation added another 34.9 FTEs. See *The State of Fair Housing 1989*, p. 7.

² Estimate for fiscal 1993 made during fiscal year.

³ Requested for fiscal 1994.

⁴ Estimate for fiscal 1993 made during fiscal year.

⁵ Requested number of fiscal 1994.

Case Processing

HUD began processing cases under the Fair Housing Amendments Act on March 13, 1989, halfway through FY 1989. In FY 1988 and 1989, HUD reported processing 4,682 and 4,943 cases respectively. It was not until FY 1990 that the number of complaints received leapt upward, to 7,476, and eventually in FY 1992 to 9,153. HUD's predictions of its caseload were not far off the mark. Its estimate⁵⁶ for FY 1990 was 7,833, increasing to 9,500 for 1992.

HUD reported that in FY 1988, staff spent 58.9 unit hours on each complaint. While it appears these figures are deduced from other information, rather than through direct observation or inference, e.g., an audit of actual time spent, they do provide a benchmark. In FY 1988 HUD was processing cases that in-

volved minimal investigation and voluntary conciliation for resolution. Despite a radical change in the depth of investigation and documentation required under the new law, case processing time varied very little. In FY 1989, HUD reported that unit hours actually fell to 58.4 before rising in FY 1990 to 67.8 and falling off again to 65.7 in 1991 and 61.6 in FY 1992. Advance projections of the time needed per case varied from a low of 47.5 in FY 1990 to a high of 64.2 in FY 1991.

Given HUD's expectations for the number of complaints it would receive and its knowledge of what the new law required, the low projections seem quite unrealistic. Contrary to the impression left in the budgets submitted to Congress, HUD never was able to process all the complaints it received in a timely fashion. In FY 1990 HUD closed 3,489 cases; in 1991, 5,238 cases; and in 1992, 6,400 cases.

⁵⁶ The Federal fiscal year begins October 1 and ends September 30. In its annual budget prepared 1 year in advance and submitted to Congress more than 6 months in advance, HUD prepared estimates for the complaints for the fiscal year underway and the next one. In effect, the workload for each year is estimated twice; for example, the FY 1989 budget would contain an estimate for FY 1988 already underway, and FY 1989. The following year, the 1989 estimate would be revised and an estimate offered for FY 1990.

TABLE 5.2
Complainants Assisted

Projected accomplishments:¹	1988	1989	1990	1991	1992	1993	1994
Actual	4,682	4,943	7,476	8,476	9,153	N/A	—
Estimate 1 ²	—	4,721	7,833	8,090	9,500	10,000	10,500
Estimate 2 ³	4,575	5,500	7,833	8,589	9,500	10,000	N/A
Projected unit hours:⁴	1988	1989	1990	1991	1992	1993	1994
Actual	58.9	58.4	67.8	65.7	61.6	N/A	—
Estimate 1	—	57.7	47.5	55.7	59.1	56.0	54.0
Estimate 2	58.3	55.3	57.7	64.2	58.9	56.2	—
Staff years:	1988	1989	1990	1991	1992	1993	1994
Actual	131.6	138.9	243.5	267.3	269.1	N/A	—
Estimate 1	—	130.9	178.9	215.9	268.0	268.0	271.9
Estimate 2	127.2	146.1	217.4	264.0	267.0	269.2	N/A

Source: HUD Budgets, FY 1988-1994.

¹ Complaints processed.

² Estimate 1 was projected by HUD 2 years in advance.

³ Estimate 2 was projected by HUD 1 year in advance.

⁴ Hours spent on each complaint.

In contrast, HUD reported the number of complainants assisted ranged from nearly 5,000 in FY 1989 to more than 9,000 in FY 1992 (see table 5.2). The number of cases that aged as a proportion of cases closed has remained high (see below). For whatever reason, accurate estimates of staff resources needed were never forwarded to Congress.

To HUD's credit, the proportion of regional staff devoted to fair housing activities rose steadily from less than one-third to over half (table 5.1 above). Internally, HUD put more emphasis on Title VIII, but its absolute resources did not keep pace with the complaints filed.

Departmental Management Plans

HUD produced its first comprehensive plan for enforcing FHAA for FY 1990. Three HUD documents provide an internal view of the success of HUD's plans: the "Secretary's Priorities," the "Departmental Management Plan (Executive Summary)," and the "Office of Fair Housing and Equal Opportunity Management Plan (Part B)."

The Secretary's Priorities document directed regional offices to conduct comprehensive investigations and improve case processing in order to "provide timely and thorough relief to victims of discrimination."⁵⁷ To fulfill the objective, five goals were listed:

57 U.S. Department of Housing and Urban Development, Management Plan, FY 1990, Secretary's Priorities, (unpaged).

a. Produce investigative files sufficient to make a determination whether reasonable causes exists to believe a discriminatory housing practice has occurred or is about to occur.

b. By fiscal year end, no more than 10 percent of all cases within the Region's control take more than 73 days to process before sending to headquarters.⁵⁸

c. By fiscal year end, no more than 10 percent of the cases within Headquarters control are remanded for additional work in the Regions.

d. Identify at least (10) ten housing practices or situations that warrant a Secretary-initiated investigation.

e. Provide training, guidance, and education as necessary to support the processing of Title VIII.⁵⁹

The FHEO management plan reiterated the case processing objective, along with goals (b) and (c) above and a corollary goal of ensuring that 90 percent of conciliation agreements reviewed by headquarters were acceptable. The FHEO plan did not ask regions to identify situations for Secretary-initiated complaints as in goal (d), a requirement that was apparently postponed.⁶⁰ Goal (e), arguably in part a headquarters function, was also omitted.⁶¹

Year-end reports show mixed results for 1990. Most regions reported implementing new systems and strategies to process cases in a timely fashion and to reduce backlogs. However, they also reported increases of 200-

300 percent in complaints filed, which impeded reducing the overall proportion of aged cases.

Aged cases⁶² were reduced to roughly one-third of caseloads in several regions, although performance varied considerably across regions. According to the plans, some regions introduced a peer review strategy to improve the quality of case files and some reported biweekly staff meetings and training sessions. Supervisory staff intervened to identify cases for conciliation and targeted the oldest cases for resolution. Some regions were able to hire new staff; one reported a 100 percent increase in caseload with no increase in staff. Those who reported on identifying opportunities to file Secretary-initiated complaints said they sent information to headquarters and heard nothing in return. They said they lacked the resources to investigate such complaints themselves.

In FY 1991, the Secretary's priorities continued to stress the need to improve the quality and timeliness of Title VIII case processing.⁶³ The goals for achieving this objective remained the same as 1990, with three notable exceptions.⁶⁴ First, while still requiring that investigative files be "sufficient" to make cause determinations, in 1991, one goal explicitly required investigative files to be in "proper format," presumably reflecting adoption of the TGM on final investigative reports. Second, the goal for Secretary-initiated investigations in 1991 was reduced to 3 from 10, but

⁵⁸ The 73-day standard in goal (b) applied to the investigative stage and was established so that headquarters could process complaints and make determinations within the 100-day goal set in the law.

⁵⁹ Ibid.

⁶⁰ U.S. Department of Housing and Urban Development, FHEO Management Plan, Part B, 1990, p. 8.

⁶¹ The departmental management plan for 1990 restated the same Title VIII objective and goals. See U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1991 Departmental Management Plan, (unpaged).

⁶² By statute, aged cases are older than 100 days. Regional offices reported as aged those cases exceeding the 73 days they are allotted for processing before sending the cases to headquarters.

⁶³ U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Part A, Secretary's Priorities, p. 1.

⁶⁴ Ibid.

instead of requiring only that such cases be *identified*, the 1991 goal required that investigations be *conducted*. Finally, regional offices were required to develop a staff training module, in addition to providing "training and guidance as necessary."⁶⁵

Another objective⁶⁶ focused on fair housing education and outreach, with special attention in one goal toward furthering awareness of the Fair Housing Act. The last objective mandated annual performance reviews of substantially equivalent State and local agencies and outreach and assistance regarding certification of substantially equivalent laws and ordinances.⁶⁷

Part B (Program Plan) of the Secretary's priorities contained more detailed goals tailored to the situations prevailing in individual regions. FHEO's assessment of regional performance in 1991 as measured against the FY 1991 plan was enthusiastic.⁶⁸ The rate at which cases were remanded from headquarters to the field for further investigation was reduced to 9.4 percent, exceeding the goal of 10 percent, an improvement that the Assistant Secretary labeled "extraordinary."⁶⁹ Four regions fell below a 6 percent remand rate, and only two regions exceeded 15 percent.⁷⁰ Finally, the assessment of FY 1991 performance pointed out that HUD obtained \$1.98

million in monetary relief and 565 housing units, "indicating that management initiatives to improve conciliation efforts were successful."⁷¹

In the 1991 "Headquarters Plan,"⁷² FHEO enumerated additional measures in support of the general goal of improving Title VIII enforcement and case management:

Take appropriate steps to assure that the pending inventory in Headquarters is reviewed timely [sic] in order to meet the statutory objective of 100-day processing of fair housing cases.

Implement a management case processing system to track and process Title VIII cases and related correspondence within specific time frames.

Document, distribute and implement uniform Title VIII processing standards.

Develop technical guidance manual(s) for processing Title VIII complaints.

Translate forms and informational materials for major linguistically different minorities.⁷³

HUD did not achieve its 1991 goal of developing technical guidance manuals, and has not yet published such a manual. As noted above, staff must rely primarily on a series of

⁶⁵ Ibid.

⁶⁶ Objective #A-3. Not all objectives pertained to Title VIII.

⁶⁷ Ibid.

⁶⁸ Memorandum for Linda Z. Marston, Assistant to the Secretary for Field Management, from Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Subject: Departmental Management Plan—Executive Summary Reports Assessment, Nov. 18, 1991.

⁶⁹ Ibid., p. 3.

⁷⁰ Ibid. pp. 4-6. The regional performance figures that exceeded the 10 percent goal were mislabeled, however, as having missed by a percentage figure that actually should have been expressed in percentage points. For example, a remand rate of 12.2 percent was said to have exceeded the 10 percent goal "by less than 3 percent," when in fact the rate exceeded the goal by 22 percent.

⁷¹ Ibid., p. 4.

⁷² U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1991 Departmental Management Plan, Office of Fair Housing and Equal Opportunity, Headquarters Plan, p. 1.

⁷³ Ibid., p. 1.