

decision himself, the Secretary ensures reconsideration of the initial decision before the expiration of his 30-day review period, thus extending the review process. In effect, this extension of the internal review process gives HUD two opportunities to reverse an adverse ALJ initial decision before it becomes the final decision of the agency. While it may appear that HUD, as counsel for the Secretary, has an advantage over the respondent when it comes to having an adverse decision reviewed by the Secretary, the respondent may appeal the final agency decision to Federal court, whereas OGC cannot appeal the final decision of its own agency.¹²⁵

In the four cases involving remands in which the Secretary issued an opinion, the decisions were written and signed by the Secretary's Chief of Staff instead of the Executive Officer for Administrative Operations and Management, who had signed the remand orders.¹²⁶ The order from the Chief of Staff instead of the Executive Officer indicates that, with respect to issuing final decisions, the Secretary follows the HUD Act's delegation of authority rather than the FHAA's delegation. Thus, HUD has employed the Secretary's delegation of the review authority available under the HUD Act, while applying the broader standard of review permitted by the FHAA.

Only one of the six cases involved a purely factual issue. In *re Bobbie Burris*, a race discrimination case, the Secretary's Chief of Staff

set aside and remanded the ALJ's decision to exclude the HUD investigator's testimony offered to support the complainant's assertion of discrimination.¹²⁷ Because the parties testified to "absolutely conflicting facts," the Chief of Staff stated that the testimony of the HUD investigator would be essential to the ALJ's assessment of the parties' credibility.¹²⁸ Thus, rather than defer to the ALJ's initial credibility assessment, the Chief of Staff set aside the decision and required the ALJ to admit the testimony offered by HUD's OGC to support the complainant's claim on remand.¹²⁹ The other five cases remanded by the Secretary involve significant issues of policy and law. For example, *HUD v. Holiday Manor Estates*, a case based on familial status discrimination and unlawful interference, was the first case in which the Secretary issued a final decision.¹³⁰ *Holiday Manor* is significant because it illustrates the potential conflicts of interests that arise when HUD attorneys represent the interests of both the individual complainant and the general public.

In *Holiday Manor* the complainant and her 10-year-old son planned to move into one of two mobile homes owned by the complainant's parents located in the mobile home park owned and operated by the Holiday Manor Estates Club, Inc.¹³¹ The complainant submitted a rental application to the club's board of directors and was rejected, because her parents' second mobile home was situated in a section of the park that did not permit minor

125. See *HUD Complainants Cover Uncertain Legal Terrain With Intervention Efforts*, 1 Fair Housing-Fair Lending (P-H) ¶ 25,047, at 25,472, p. 4 (Mar. 1, 1992).

126. See *HUD v. Ocean Sands, Inc.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,056, at 25,448; *In re Bobbie Burris*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050, at 25,475; *HUD v. Mountain Side Mobile Estates*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1, slip op. at 15 (HUD Secretary Oct. 20, 1993); and *HUD v. Holiday Manor Estates*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,203.

127. *In re Bobbie Burris*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050, at 25,476-78.

128. *Id.* at 25,477.

129. *Id.*

130. *HUD v. Holiday Manor Estates*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992).

131. *HUD v. Holiday Manor Estates Club, Inc.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,016, at 25,220 (HUD ALJ Nov. 26, 1991).

children.¹³² Several months later, the complainant moved into the park despite the respondent's rejection of her earlier application.¹³³ In addition to her claim for unlawful discrimination based on familial status, the complainant alleged that the respondent unlawfully harassed and interfered with her in retaliation for moving into the park without permission from the board of directors, and for filing the complaint with HUD.¹³⁴

The Secretary and ALJ Andretta disagreed on two major issues: whether the complainant employed impermissible remedies by moving into the park without authorization from the board of directors, and whether the complainant should be permitted to intervene in the case.¹³⁵ On secretarial remand, the ALJ had held that the proper course for the complainant would have been to seek injunctive relief, not to move into the park without permission.¹³⁶

This proposed decision was then reviewed again by the Secretary, who issued a final decision.¹³⁷ The Secretary applied a balancing test and held that the complainant was both a member of a protected class based on familial status and engaged in protected activity.¹³⁸ The Secretary stated that the respondent possessed a legitimate interest only in the public

spaces of the park, not in the private space the complainant occupied with the consent of her parents.¹³⁹ Thus, the complainant's activities were protected as long as she had the permission of the homeowners. Finally, the Secretary held that the respondents harassed the complainant's parents, but not the complainant herself.¹⁴⁰

OGC's representation of the complainant's interests was challenged when OGC refused, on appeal, to argue certain allegations in the complaint. Upon respondents' appeal to the Secretary, OGC no longer argued that the actions of the respondents had harassed the complainant. Instead, OGC indicated that substantial evidence in the record supported the ALJ's decision.¹⁴¹ (The Secretary's decision alludes to OGC's reversal.) OGC refused to continue pursuing the harassment charge despite the complainant's continued assertion that she had been harassed. The Secretary allowed the complainant to intervene on her own behalf while still rejecting her claim for damages stemming from the alleged harassment, in order to allow her to appeal the administrative decision in Federal court.¹⁴²

Recently, in a handicap discrimination case, the Secretary issued a final decision that did not agree entirely with the arguments

¹³² *Id.* at 25,220-21.

¹³³ *Id.* at 25,221.

¹³⁴ *Id.* at 25,229.

¹³⁵ HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,297 and 25,302-303 (final decision).

¹³⁶ See HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,025, at 25,285 (initial decision on remand).

¹³⁷ HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,302 (final decision).

¹³⁸ *Id.* at 25,299-300.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 25,300-301. However, since the respondents only harassed the complainant's parents, who neither filed the complaint, nor were the persons on whose behalf the suit was brought, the Secretary awarded no damages for the harassment.

¹⁴¹ *Id.* at 25,297.

¹⁴² *Id.* at 25,302. For further discussion on interventions, see chap. 4.

raised by OGC in its memorandum. In *HUD v. Ocean Sands, Inc.*, the Secretary agreed with OGC's position that the ALJ's initial award for emotional distress should be increased to reflect the amount of similar damages awarded in prior cases.¹⁴³ In addition, the Secretary clarified the ALJ's order prohibiting the condominium association from assessing the complainant's housing unit for any of the costs or attorneys' fees incurred during the litigation of the complaint.¹⁴⁴ However, the Secretary refused the request of the OGC attorneys to increase the \$3,500 civil penalty assessed against the respondent.¹⁴⁵

Interaction with DOJ

Although HUD is the lead agency in enforcement of Title VIII, the Department of Justice (DOJ) also plays a role in FHAA enforcement. The FHAA requires the Secretary to refer certain types of complaints to DOJ. The statute indicates that whenever the Secretary believes that a complaint filed with HUD involves the legality of any State or local zoning or land use law,¹⁴⁶ a pattern or practice of discriminatory behavior, an issue of general public importance, an enforcement of a subpoena, or proceedings by any government li-

censing or supervisory authorities, the Secretary must refer the claim to the Attorney General or the appropriate government authority.¹⁴⁷

Zoning Referrals

The FHAA states that the Secretary must immediately refer to the Attorney General complaints involving the legality of any State or local zoning or other land use law or ordinance.¹⁴⁸ However, under present practice, the Assistant Secretary for Fair Housing and Equal Opportunity (FHEO), in effect, prescreens complaints involving State or local zoning or land use laws or ordinances to determine if a discriminatory housing practice has occurred or is about to occur. In the preamble to its regulations, HUD explicitly stated its intention to investigate zoning complaints before forwarding the complaints to DOJ.¹⁴⁹

According to the regulations, the Assistant Secretary conducts a review of the factual circumstances in all complaints, regardless of the subject matter, as part of the HUD investigation.¹⁵⁰ If the Assistant Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary will dismiss the complaint.¹⁵¹ Thus,

143 *HUD v. Ocean Sands, Inc.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,056, at 25,552-53 (HUD Secretary Oct. 4, 1993) (decision and order).

144 *Id.* ¶ 25,056, at 25,553-554.

145 *Id.* at 25,553.

146 42 U.S.C. § 3610(g)(2)(C) (1988).

147 *Id.* § 3610(e)(2). The Attorney General may also commence a civil action in Federal court for a breach of a conciliation agreement upon referral from the Secretary. *Id.* § 3614(b)(1)(A).

148 *Id.* § 3610(g)(2)(C).

149 24 C.F.R. Ch. I, subch. A, App. I, p. 961 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

150 *Id.* § 103.400(a).

151 *See Id.* § 103.400(a)(1). Although the Assistant Secretary has delegated the authority to make no reasonable cause determinations to the directors of HUD FHEO regional offices, the Assistant Secretary maintains the authority to reopen no cause determinations made by regional FHEO directors. *See* 57 Fed. Reg. 45,066 (1992).

even if the complaint involves the legality of a zoning or land use law or ordinance, the Assistant Secretary will dismiss the complaint if no reasonable cause exists to pursue the claim.¹⁵²

If the Assistant Secretary does not issue a no cause determination, the Assistant Secretary shall forward the matter to the General Counsel for consideration.¹⁵³ Upon referral, the General Counsel will either issue a reasonable cause determination and charge, issue a no reasonable cause determination and a dismissal,¹⁵⁴ or refer the matter to the DOJ if the complaint involves the legality of a State or local zoning or land use law or ordinance.¹⁵⁵

The delegation to the General Counsel indicates that the referral to DOJ does not occur until after FHEO completes its investigation and prepares a final investigative report.¹⁵⁶ In this way, the Assistant Secretary prescreens complaints involving zoning and land use ordinances and only refers to the General Counsel claims in which reasonable cause may be found.

The General Counsel has redelegated concurrent authority to determine which complaints involve the legality of local zoning or land use laws to the Associate General Coun-

sel for Equal Opportunity and Administrative Law and to the Assistant General Counsel for Fair Housing.¹⁵⁷ If the Associate General Counsel or the Assistant General Counsel determines that the matter "involves the legality of zoning or land use," OGC must refer the complaint and the HUD investigative materials to the Attorney General in lieu of making a reasonable cause determination.¹⁵⁸ HUD is responsible for notifying the aggrieved persons and respondents by certified mail or personal service about the referrals to DOJ.¹⁵⁹

Once the zoning complaint is referred to DOJ, the Attorney General has the discretion to commence a civil action in Federal court no later than 18 months after the occurrence or termination of the alleged discriminatory housing practice.¹⁶⁰ DOJ and HUD have agreed that DOJ will review the zoning matter promptly, may conduct its own investigation, and will notify OGC, the complainant, and the respondent when it decides whether or not to file a civil action.¹⁶¹

To ensure that enforcement of zoning cases is not barred by the 18-month statute of limitations, FHEO developed a draft technical guidance memorandum (TGM) for regional FHEO directors on processing and investigating zoning and land use cases.¹⁶² The draft

¹⁵² 55 Fed. Reg. 53,293 (1990).

¹⁵³ 24 C.F.R. § 103.400(a)(2) (1993).

¹⁵⁴ *Id.* § 103.400(a)(2)(i) and (ii).

¹⁵⁵ *Id.* § 103.400(a)(3).

¹⁵⁶ See Schwemm, *Law and Litigation*, § 26.3(2), p. 26-27.

¹⁵⁷ 56 Fed. Reg. 2931 (1991).

¹⁵⁸ 24 C.F.R. § 103.400(a)(3) (1993).

¹⁵⁹ *Id.*

¹⁶⁰ 42 U.S.C. § 3614(b)(1) (1988).

¹⁶¹ Memorandum of Understanding, p. 6.

¹⁶² Leonora L. Guarraia, Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, memorandum to all regional FHEO directors, Draft TGM-15, Case Processing Procedures for Zoning and Land Use Cases, July 26, 1991.

TGM states that zoning cases will be immediately assigned for investigation, and if the region or the investigator has a backlog of cases, zoning cases must be a priority.¹⁶³

In addition, the investigation should be completed and the case transmitted to the Office of Fair Housing Enforcement not later than 15 months after the occurrence or termination of the alleged discriminatory act.¹⁶⁴ The TGM suggests that in determining the date of occurrence or termination, the regional director should "make a conservative, independent judgment that may differ from the date alleged by the complainant" in order to avoid violating the statute of limitations.¹⁶⁵ For example, the TGM explains that the regional director should toll the statute of limitations at the date of the first permit denial, rather than after any subsequent appeals or denials.¹⁶⁶

Additionally, the TGM states that the regional director should "be particularly cautious about interpreting an act as 'continuing'."¹⁶⁷ Although the TGM does not explain whether or not the application of discriminatory zoning ordinances is considered a "continuing practice" for purposes of the stat-

ute of limitations,¹⁶⁸ the extra caution indicates that FHEO believes that DOJ or the courts may be reluctant to consider zoning ordinances continuing practices. The Supreme Court accepted the propriety of the continuing violations theory under Title VIII for racial steering. In a similar situation involving zoning, the second circuit held that a suit could be brought under Title VIII where a denial of approval for housing funding was based upon a zoning ordinance.¹⁶⁹ While the courts have generally accepted the continuing violations theory, as used in *Havens*, specific application to zoning cases has not been interpreted by the courts.

In addition to HUD's ability to prescreen zoning cases prior to referral, HUD and DOJ have agreed that referral is not required if "a zoning issue is raised as an ancillary and insubstantial addition to a complaint that HUD has authority to address, and a reasonable cause determination can be rendered independent of the zoning issue."¹⁷⁰ In a position paper on zoning written before the final version of the "HUD-DOJ Memorandum of Understanding," OGC detailed to what extent HUD may retain jurisdiction over certain

¹⁶³ Ibid.

¹⁶⁴ Ibid., p. 1.

¹⁶⁵ Ibid., p. 2.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ The Supreme Court addressed continuing practices generally under Title VIII in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). HUD adopted the continuing violation theory for tolling the limitations period in FHAA complaints generally at 24 C.F.R. § 103.40(c) (1993). See Schwemm, *Law and Litigation*, § 25.2, p. 25-8.

¹⁶⁹ *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 394 n.3 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983).

¹⁷⁰ Memorandum of Understanding, p. 6.

matters involving the legality of zoning and land use cases.¹⁷¹ According to OGC, the initial confusion over zoning matters involved the "legality of" language inserted into the FHAA.¹⁷² OGC stated that, for the purposes of mandatory referral to DOJ, the zoning issue must be significant and not merely tacked on as an incidental issue. This is significant because a complainant or respondent may attempt to use the zoning issue to force the matter into Federal court.¹⁷³

Based on FHAA legislative history and policy considerations, OGC concluded that referral to DOJ after the HUD investigation is proper in cases "which raise a significant issue as to the facial validity, the operation, or the administration of a zoning or land use ordinance."¹⁷⁴ OGC will refer such cases regardless of the intent of the State or local governing authority.

OGC also stated that policy considerations support referral to DOJ when the zoning issues are significant. Because of the limited remedies available to HUD in administrative proceedings, OGC asserted that DOJ is better equipped to litigate zoning complaints in which revision of the law or ordinance is the appropriate remedy.¹⁷⁵ Thus, if it is determined that a zoning board is making decisions

with consideration to race, color, religion, sex, familial status, national origin, or handicap, then it may be necessary to reform the process by which the zoning board members are selected or provide for review of zoning board decisions. If HUD were to handle all zoning cases, OGC would have to determine, before the administrative hearing, that such remedies are unnecessary, whereas DOJ may pursue such remedies in Federal court at its discretion.¹⁷⁶ According to OGC, in practice, DOJ rarely pursues revision of zoning ordinances or restructuring of zoning boards, but instead asserts that exemptions or reasonable accommodations should be issued by the responsible zoning authority.¹⁷⁷

Despite the fact that HUD has ostensibly prescreened the validity of all the zoning and land use complaints it refers to DOJ, DOJ files civil claims in relatively few of the complaints referred by HUD. According to DOJ data, as of March 29, 1993, DOJ has filed claims in only 14 of the 93 zoning complaints referred by HUD.¹⁷⁸ Of the 79 complaints not filed, 53 complaints are listed as "closed" or "to be closed," and 23 complaints are under DOJ investigation.¹⁷⁹

171 Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum to Leonora L. Guarraia, Deputy Assistant Secretary for Enforcement and Compliance, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Oct. 26, 1989. Harry L. Carey's title changed from Assistant General Counsel for General Law to Assistant General Counsel for Fair Housing at some point between the Jan. 12, 1990, and Jan. 25, 1991, delegations of authority. See 56 Fed. Reg. 41,369 (1991).

172 Ibid.

173 Ibid., p. 2.

174 Ibid., p. 3.

175 Ibid., p. 3.

176 Ibid.

177 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Dec. 20, 1993 (hereafter cited as Pratt December 1993 interview).

178 DOJ Caseload Database as of Mar. 29, 1993.

179 Ibid.

Prompt Judicial Actions

HUD and DOJ must also coordinate their efforts to obtain prompt judicial actions.¹⁸⁰ The FHAA allows the Secretary to authorize the Attorney General to pursue a prompt judicial action in Federal court for immediate intervention whenever such action is necessary to "carry out the purposes" of the act.¹⁸¹ The statute clearly indicates that the prompt civil action is only temporary or preliminary pending final disposition of the complaint, and should not affect the initiation of the administrative proceedings by HUD.¹⁸² In addition, the FHAA requires that all temporary restraining orders, or other preliminary or temporary orders, must be issued in accordance with the Federal Rules of Civil Procedure.¹⁸³

The FHAA requires that once HUD issues the authorization, DOJ must pursue whatever temporary or preliminary relief is requested.¹⁸⁴ However, to permit initiation, the regulations require HUD to consult with the

Assistant Attorney General for the Civil Rights Division before making the determination that a prompt judicial action is necessary.¹⁸⁵ Thus, although DOJ has no choice but to pursue an action once it is authorized by HUD, the prompt judicial action cannot be authorized without consulting DOJ first.

On occasion, DOJ has received information about cases requiring prompt judicial action before HUD has made a referral,¹⁸⁶ but DOJ still cannot proceed without authorization from HUD. Consequently, DOJ must wait until HUD investigates the need for temporary relief before proceeding to court.¹⁸⁷

Because prompt judicial actions often require immediate attention and quick investigation, HUD has tried to develop an efficient internal process for the disposition of these actions. HUD regulations and internal guidance have attempted to coordinate the roles of FHEO and OGC regional and headquarters offices, as well as the interaction with DOJ.

¹⁸⁰ A prompt judicial action is a temporary or preliminary order, such as a temporary restraining order or a preliminary injunction, designed to prevent further injury to aggrieved persons pending a complete investigation of the merits of their claims. According to both OGC and DOJ, it is often unnecessary to file the action officially with the Federal court, because the mere threat of a prompt judicial action will cause the defendant to voluntarily comply with the request. Jonathan Strong, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Strong, HUD OGC July 1993 interview); Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 19, 1991, transcript, pp. 42-43 (hereafter cited as Hancock 1991 interview).

¹⁸¹ 42 U.S.C. § 3610e(1) (1988). The Secretary delegated this authorization power to the General Counsel at 54 Fed. Reg. 13,121 (1989).

¹⁸² 42 U.S.C. § 3610e(1) (1988); 24 C.F.R. § 103.500(a) (1993).

¹⁸³ 42 U.S.C. § 3610e(1) (1988). For general requirements for preliminary injunctions and temporary restraining orders, see Fed. R. Civ. P. 65(a) and 65(b).

¹⁸⁴ 42 U.S.C. § 3610e(1) (1988).

¹⁸⁵ 24 C.F.R. § 103.500(a) (1993). According to one HUD official, the consultation prior to authorization gives DOJ implicit approval authority over prompt judicial actions. Pratt December 1993 interview. Thus, the application of this provision appears to conflict with congressional intent indicating that the Secretary should determine the merits of the claim. The legislative history states that prompt judicial actions should be authorized "when the Secretary concludes that such action is necessary. This will be important where, for example, the dwelling unit is still available and the Secretary believes the complaint has merit." U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., 1988 H. Rept. 100-711 reprinted in 1988 U.S.C.C.A.N. 2173, 2196 (hereafter cited as FHAA Committee Report).

¹⁸⁶ Hancock 1991 interview, p. 63.

¹⁸⁷ *Ibid.*, p. 63.

The 1989 memorandum of understanding between FHEO and OGC indicates that HUD policy initially emphasized the roles of FHEO and OGC headquarters offices in the prompt judicial action process.¹⁸⁸ The memorandum states that the FHEO headquarters office must provide OGC with early notification of any request for prompt judicial action.¹⁸⁹ Then, OGC must consult with DOJ as soon as possible upon receipt of the request from FHEO headquarters, to ensure the prompt initiation of a civil action.¹⁹⁰ Thus, according to the 1989 memorandum, the prompt judicial action request should be transmitted, after the initial intake, from the FHEO regional office to FHEO headquarters, from FHEO headquarters to OGC, and from OGC to DOJ.

Perhaps in recognition of the fact that regional offices have the greatest access to and familiarity with the investigation of complaints, the Assistant Secretary and the General Counsel delegated most of the responsibility for prompt judicial actions to the

regional directors and counsel, respectively.¹⁹¹ A 1990 OGC memorandum states that the regional counsel will be responsible for processing cases for prompt judicial actions, and coordinating the development of evidence between the FHEO regional office and the Housing and Civil Enforcement Section of the Civil Rights Division at DOJ.¹⁹²

Accordingly, the consultation with DOJ is conducted primarily by the regional counsel who is most familiar with the facts of the cases, thereby eliminating the intermediate step of transmitting the available case information to both FHEO and OGC headquarters. Once the consultation with DOJ is completed, the regional counsel must advise the Assistant General Counsel for Fair Housing¹⁹³ of the cases that are identified for consideration of prompt judicial action and routinely report on the progress of those cases.¹⁹⁴ In practice, DOJ, OGC headquarters, and FHEO headquarters often participate in a conference call with the regional investigator and regional

188 "Memorandum of Understanding Between FHEO and OGC on the Implementation of the Federal Fair Housing Law," 20 May 19, 1989, signed by Carolyn Lieberman, Acting General Counsel and Thomas D. Casey, General Deputy Assistant Secretary (hereinafter cited as FHEO-OGC Memorandum of Understanding).

189 *Ibid.*

190 *Ibid.*

191 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, memorandum to Regional Counsel, Feb. 27, 1990 (hereinafter cited as Keating Feb. 27, 1990 memorandum). The *Federal Register* does not contain an official notice of this redelegation to the regions. Recently, the National Performance Review indicated that HUD will eliminate all regional offices under a 5-year plan. *From Red Tape to Results: Creating a Government that Works Better & Costs Less*, Report of the National Performance Review, Sept. 7, 1993, p. 96. In addition, Secretary Cisneros announced a plan to implement the elimination of regional offices. See "Cisneros Outlines HUD Revamp But Has No Specifics on Savings," *Washington Post*, Dec. 2, 1993, p. A-19.

192 Keating Feb. 27, 1990 memorandum.

193 The General Counsel redelegated the authorization and consultation powers concurrently to the Associate General Counsel for Equal Opportunity and Administrative Law and the Assistant General Counsel for Fair Housing, formerly known as the Assistant General Counsel for General Law, 24 C.F.R. § 103.500(a) (1993); 55 Fed. Reg. 1286 (1990). The Assistant General Counsel for General Law was renamed as the Assistant General Counsel for Fair Housing at some point between the Jan. 12, 1990, and Jan. 25, 1991, delegations of authority. See 56 Fed. Reg. 41369 (1991).

194 Keating Feb. 27, 1990 memorandum.

counsel to discuss the preliminary information required to justify a prompt judicial action.¹⁹⁶

Regional counsel are also responsible for obtaining the information necessary for these cases, and for preparing correspondence for the signature of the Assistant General Counsel for Fair Housing officially authorizing DOJ to seek prompt judicial action.¹⁹⁶ In any case in which prompt judicial action is authorized, the regional counsel must work with DOJ to provide the documentation necessary to obtain appropriate orders.¹⁹⁷ It appears that in order to minimize time spent, OGC has given the regional counsels the authority to process prompt judicial actions and consult with DOJ while still retaining the final authorization power, thus eliminating the need for FHEO and OGC headquarters to serve as intermediaries in the investigations.¹⁹⁸

To understand the standards of proof required for each type of prompt judicial action under the FHAA, it is first necessary to understand the general distinctions made by the Federal Rules of Civil Procedure and the Federal courts. Although applications for both types of prompt judicial actions are subject to

the discretion of the court, the Federal Rules of Civil Procedure distinguish procedurally between preliminary injunctions and temporary restraining orders.¹⁹⁹ Under the rules, a preliminary injunction cannot be issued without notice to the adverse party nor without a hearing.²⁰⁰ In fact, the rule allows the court to consolidate the hearing on the preliminary injunction with a full presentation of evidence on the merits of the claim, in part, because a preliminary injunction has a greater and longer effect on the adverse party.²⁰¹ A temporary restraining order, on the other hand, may be entered without prior notice to the other party or parties after a showing that the order is needed to prevent immediate and irreparable injury, until a motion for a preliminary injunction can be considered.²⁰² However, according to DOJ, this is only an exception, and courts are extremely cautious about allowing an order without notice to the other party.²⁰³ According to HUD, although a temporary restraining order may be entered without prior notice, prior notice is often provided.²⁰⁴

A preliminary injunction cannot be issued by a Federal court without a hearing "which affords the adverse party an opportunity to

196 Strong, HUD OGC July 1993 interview. According to OGC, the authorization power has been internally delegated from the General Counsel to the Assistant General Counsel for Fair Housing. Now, the Associate General Counsel for Equal Opportunity and Administrative Law can sign a request to DOJ for prompt judicial action and send a copy to the General Counsel, rather than having to meet with the General Counsel in every case. *Ibid.*

196 *Ibid.*

197 *Ibid.*

198 Under HUD's reorganization, effective April 15, 1994, the regional counsels have become Assistant General Counsels for various geographic areas. They now have the authority to authorize DOJ to seek temporary restraining orders without review or concurrence by the General Counsel. HUD Comments, p. 11.

199 Compare Fed. R. Civ. P. 65(a) (preliminary injunctions) with Fed. R. Civ. P. 65(b) (temporary restraining orders).

200 *Id.* 65(a)(1).

201 *Id.* 65(a)(2); see Schwemm, *Law and Litigation*, § 25.3(4)(c), p. 25-45.

202 Fed. R. Civ. P. 65(b). A temporary restraining order issued without notice to the adverse party is known as an *ex parte* restraining order. An *ex parte* order expires after a fixed term determined by the court and not to exceed 10 days.

203 DOJ Comments, p. 5.

204 HUD Comments, p. 11.

present evidence in his behalf."²⁰⁵ Additionally, a preliminary injunction usually is issued for an indefinite period of time, "since its purpose is to preserve the status quo until the issues are adjudged after a final hearing."²⁰⁶

The Federal circuit courts have generally accepted a traditional approach for evaluating the propriety of a preliminary injunction. This approach consists of four factors: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm if the injunction is not granted; (3) whether the benefits of the injunction will outweigh any harm to the defendant caused by the injunction; and (4) whether the public interest favors or disfavors issuing the injunction.²⁰⁷ Since these factors are not required by Rule 65 of the Federal Rules of Civil Procedure or a Supreme Court decision, the application of the factors varies among the circuits.²⁰⁸

Unlike a preliminary injunction in Federal court, a temporary restraining order may be entered "upon a summary showing of its ne-

cessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties... upon a motion for a preliminary injunction."²⁰⁹ The grant or denial of the temporary restraining order does not preclude the grant or denial of a preliminary injunction on a subsequent motion.²¹⁰ In addition, a party may not ordinarily appeal a temporary restraining order, unless the temporary restraining order was continued in violation of the Federal Rules.²¹¹

HUD and DOJ do not agree on when HUD should request injunctive relief. One HUD official characterized the issue as a disagreement over the standard of proof for preliminary injunctions and temporary restraining orders.²¹² Although HUD argues that temporary restraining orders should require only a demonstration of irreparable harm in order to maintain the status quo during further investigations by HUD, HUD reports that DOJ expects HUD to authorize temporary

205 See James Wm. Moore et al., *Moore's Federal Practice* ¶ 65.05, at 65-102 (1990).

206 *Ibid.*

207 See, e.g., *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988); *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983). See also Schwemm, *Law and Litigation*, § 25.34, p. 25-44 (citations omitted).

208 *Haitian Centers Council, Inc. v. McNary*, 960 F.2d 1326, 1338 (2d Cir. 1992) (requiring a showing of irreparable harm if the injunction is not granted, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992) (applying a "sliding scale" approach that balances likelihood of success on the merits against irreparable harms); and *United States v. Village of Palatine*, No. 93-C-2154, 1993 U.S. Dist. LEXIS 13814 (N.D. Ill. Sept. 28, 1993) (applying the balancing test in a fair housing case).

209 James Wm. Moore et al., *Moore's Federal Practice* ¶ 65.05, at 65-100 (1990). See, e.g., *Haitian Centers Council, Inc. v. McNary*, 789 F. Supp. 541, 546-47 (E.D.N.Y. 1992) (a court may issue a temporary restraining order upon a showing of irreparable harm and for the purpose of preserving the status quo long enough to hold a hearing).

210 See James Wm. Moore et al., *Moore's Federal Practice* ¶ 65.05, at 65-102 to -103 (1990).

211 See *ibid.*, at 65-102.

212 Wilson, HUD OGC July 1993 interview: HUD and DOJ will need to resolve the issue, in light of a new "Program and Management Plan" issued by Secretary Cisneros. As part of the plan to reduce discrimination in housing and to enforce Title VIII aggressively, the Secretary hopes to increase the use of prompt judicial actions. The plan states that by Sept. 30, 1994, HUD will develop and issue technical guidance and conduct training in all the HUD regions on the proper use of prompt judicial actions. See *Creating Communities of Opportunity: Priorities of the U.S. Department of Housing and Urban Development*, Program and Management Plan, October 1993, p. 15 (hereafter cited as HUD 1993 Program and Management Plan).

restraining orders only when enough evidence exists to support a reasonable cause determination on the merits.²¹³ The disagreement may arise, in part, because DOJ usually files a request for both a temporary restraining order and a preliminary injunction at the same time.

In its comments on this report, DOJ implied that temporary restraining orders and preliminary injunctions should not be treated as "two totally separate things." DOJ's support for this position is that in virtually all cases a temporary restraining order is accompanied by a request for a preliminary injunction.²¹⁴ However, as HUD maintains, the fact remains that it is well within the Federal Rules of Civil Procedure to treat the two actions separately and to use the distinction between their evidentiary standards to the advantage of the complainant seeking prompt judicial action.²¹⁵

Because DOJ often files both motions at the same time, DOJ requires HUD to develop enough evidence to succeed on the merits of the claim.²¹⁶ However, situations that require temporary restraining orders, such as alleged discriminatory evictions, often arise on short notice and may require a court order within 24 hours.²¹⁷ Accordingly, HUD believes that

DOJ should pursue a motion for a temporary restraining order on a demonstration of irreparable harm to delay the adverse action while HUD investigates the merits of the claim for a preliminary injunction.²¹⁸ However, in its comments on this report, DOJ points out that, because a temporary restraining order is generally in effect for no longer than 10 days, the gathering of evidence as to the merits of the claim is "of some urgency."²¹⁹ Despite HUD's concern that the need for action is often immediate, DOJ stated that, "No one has ever been evicted or suffered other adverse consequences as a result of our requiring investigation into the facts."²²⁰

In response to DOJ's position on evidence required for temporary restraining orders, OGC headquarters issued a memorandum explaining the procedures that FHEO regional investigators should follow in pursuing motions for a temporary restraining order.²²¹ The memorandum details the specific evidence to be collected by the regional investigator before a temporary restraining order request will be authorized. In addition to evidence of irreparable harm, threat of imminent eviction, or sale of the unit to a third party, the memorandum requires investigators to collect evidence that is "so substantial as to show that the

²¹³ *Ibid.* See Pratt December 1993 interview.

²¹⁴ DOJ Comments, p. 5.

²¹⁵ For an example of a complaint for prompt judicial action filed by DOJ, see, e.g., *United States v. Bobak*, No. 89-C-3232, 2 Fair Housing-Fair Lending (P-H) ¶ 21.049 (N.D. Ill. Apr. 20, 1989) (complaint for prompt judicial action); see also Schwemm, *Law and Litigation*, App. D., p. D-16 (reprint of Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction in *United States v. Blackwell*).

²¹⁶ Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Pratt, HUD OGC July 1993 interview).

²¹⁷ Hancock 1991 interview, p. 8.

²¹⁸ Pratt, HUD OGC July 1993 interview; Pratt December 1993 interview.

²¹⁹ DOJ Comments, p. 5.

²²⁰ *Ibid.*

²²¹ Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum to Wagner Jackson, Director, Office of Fair Housing Enforcement and Section 3 Compliance, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, June 2, 1989.

complainant is likely to prevail in a trial on the merits of the complaint.²²² This evidence includes statements and affidavits of the complainant(s), other witnesses to the alleged discriminatory action, and/or testers.²²³

Regardless of either agency's official position, it appears that the day-to-day practice of prompt judicial actions has affected the frequency of requests by regional counsel. According to one former OGC official, the number of prompt judicial action requests is significantly lower than anticipated by the Secretary, because regional counsel tend prematurely to eliminate from consideration cases that they believe will not survive DOJ's standards.²²⁴ In its comments on this report, DOJ took exception to the claim that its standards have the effect of reducing the number of prompt judicial action requests from HUD. According to the Assistant Attorney General for Civil Rights, on numerous occasions, DOJ has brought possible prompt judicial actions to the attention of HUD for investigation.²²⁵

Judicial Review

The FHAA provides that any party aggrieved by a final order for relief may obtain a review of that order in the appropriate U.S. court of appeals.²²⁶ Under the regulations, the party must file the petition for review within 30 days of the date of issuance of the final decision.²²⁷

As HUD's lawyer, OGC may not appeal to Federal court any adverse administrative decisions that become the final order of the agency.²²⁸ Thus, if an aggrieved person on whose behalf a complaint was originally filed wishes to preserve a right to appeal an adverse administrative decision, the aggrieved person must intervene in the proceedings and provide his or her own representation.²²⁹

If a party aggrieved by the administrative decision chooses to appeal the final order, DOJ is responsible for the judicial review litigation actions before the court of appeals regardless of the relief sought.²³⁰ However, in recognition of HUD's interest in the outcomes of appeals, the memorandum of understanding between HUD and DOJ provides for some coordination between the two agencies with respect to the litigation of the appeals.²³¹

DOJ may authorize HUD to litigate appeals "in appropriate cases to be determined by the Department of Justice after consultation with HUD" subject to DOJ's ultimate review.²³² Although DOJ has not authorized HUD to litigate any appeals to date, the memorandum of understanding provides guidance for delegating responsibility in those instances. According to the memorandum, the two agencies should work closely to draft briefs and pleadings and to prepare the record for the court. Any brief that DOJ wishes to file will be submitted to HUD for "suggestions and

222 Ibid.

223 Ibid.

224 Pratt December 1993 interview.

225 See DOJ Comments, p. 5.

226 42 U.S.C. § 3612(i) (1988); 24 C.F.R. § 104.950(a) (1993).

227 42 U.S.C. § 3612(i)(2) (1988); 24 C.F.R. § 104.950(a) (1993).

228 *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).

229 For a discussion of the intervention process, see chap. 4.

230 Memorandum of Understanding, p. 8.

231 Ibid.

232 Ibid., p. 9.

comments," but any brief submitted by HUD "shall be reviewed by DOJ" before it is filed.²³³ Thus, it appears that although HUD's appellate arguments are subject to final approval from DOJ, DOJ is only required to give HUD the opportunity to comment on DOJ briefs.

DOJ's appeal in *HUD v. Baumgardner* illustrates the effect that DOJ's involvement in Federal court litigation has on shaping HUD's internal strategy for litigating administrative cases.²³⁴ The complainant alleged that the respondent refused to rent a four-bedroom house to the complainant and three other single men because of their gender.²³⁵ The ALJ had awarded the aggrieved parties \$2,000 for "economic loss including inconvenience," \$500 for emotional distress, and \$2,500 for "loss of civil rights," and assessed a civil penalty of \$4,000.²³⁶

On appeal, the sixth circuit reduced the civil penalty to \$1,500 and reduced damages from \$5,000 to \$1,500.²³⁷ The \$2,000 award for "economic loss including inconvenience," was reduced to \$1,000, "giving HUD and [com-

plainant] the benefit of some considerable doubt."²³⁸ The \$500 award for emotional distress was also affirmed reluctantly, based on giving the complainant the same "benefit of the doubt."²³⁹ The \$2,500 award for "loss of civil rights" was overturned completely as an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case."²⁴⁰

On appeal, DOJ did not try to defend the award for loss of civil rights as compensation for the abstract value of the complainant's civil rights, but instead argued that the award was intended to redress a compensable injury, namely, the loss of a housing opportunity.²⁴¹ According to HUD, OGC strongly voiced its objection to the argument raised in DOJ's appellate brief. After DOJ refused to change its position, "HUD continued to press Justice to revise the brief to minimize the damage to HUD's position on the issue but, unfortunately, Justice made only the most minimal concessions on this issue."²⁴²

²³³ *Ibid.*

²³⁴ *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992).

²³⁵ *HUD v. Baumgardner*, 2 Fair Housing Fair Lending (P-H) ¶ 25,006, at 25,094 (HUD ALJ Nov. 15, 1990).

²³⁶ *Id.* at 25,099-101.

²³⁷ *Baumgardner v. HUD*, 960 F.2d at 580-83. Although the reduction was due in part to HUD's procedural delays, the court considered the award unduly punitive for a respondent who had made a relatively innocent mistake in a career otherwise unblemished by discriminatory practices. *Id.* at 583.

²³⁸ *Id.* at 580-81.

²³⁹ *Id.* at 581.

²⁴⁰ *Id.* at 583.

²⁴¹ Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, memorandum to Frank Keating, General Counsel, Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, all regional counsel, and all regional directors of FHEO, June 22, 1992, p. 6 (hereafter cited as Wilson, June 22, 1992 memorandum). See also *Baumgardner v. HUD*, 960 F.2d at 581.

²⁴² HUD Comments, p. 12. See also Strong, HUD OGC December 1993 interview. Jonathan Strong stated that "lost civil rights" is a statutory intangible loss as opposed to the personal intangible loss contemplated by an award for "lost housing opportunity." However, Strong also stated that asking for both types of damages is strategically difficult since a request for multiple intangible injuries might cause an ALJ to question the validity of the complainant's tangible losses. In addition, Strong indicated that because both intangible awards do not generally exceed \$500, they are, in effect, interchangeable.

DOJ's position on appeal is alluded to in the appellate opinion, but is more clearly revealed in an internal HUD memorandum.²⁴³ Nine days after DOJ argued the appeal in *Baumgardner*, OGC issued a memorandum to all regional counsel stating that DOJ does not consider the loss of a complainant's civil rights to be a compensable injury.²⁴⁴ Accordingly, the memorandum further instructed HUD attorneys to seek damages for the compensable loss of housing opportunity in their administrative charges, where appropriate, rather than seek compensation for the loss of civil rights.²⁴⁵ Following the circuit court's ruling in *Baumgardner*, another HUD memorandum stated that HUD attorneys litigating claims before ALJs need to link any presumed damages for loss of civil rights to actual injuries, in order to avoid future appellate reversals.²⁴⁶

However, although the court in *Baumgardner* stated that the allowed damages accounted sufficiently for this complainant's "intangible dignitary interests," the court did not rule out the possibility that presumed damages may be possible in other civil rights cases in which the complainant can prove actual

injury.²⁴⁷ A sixth circuit opinion cited a Supreme Court case holding that:

When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for. Presumed damages must be tied to a compensatory purpose for harms that may be impossible to measure.²⁴⁸

In addition to this new possibility of compensation for intangible injuries recognized by the Supreme Court and the sixth circuit majority, Circuit Judge Nathaniel Jones wrote a concurrence to "reinforce the majority's observation that presumed damages may be appropriate for civil rights violations."²⁴⁹ Judge Jones' concurrence, although not controlling, appears to serve as an invitation to both HUD and DOJ to continue to pursue the loss of civil rights damages in the sixth circuit in a case with better facts to support the award.

Based on the potential claim for intangible injuries suggested by the Supreme Court and

243 HUD stated in its comments that only DOJ could have appealed the decision of the sixth circuit in *Baumgardner*. HUD added that, "The Sixth Circuit's rejection of an award for loss of civil rights was not inconsistent with Justice's position." HUD Comments, p. 12.

244 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, memorandum to all regional counsel, Aug. 15, 1991. DOJ argued the appeal on Aug. 8, 1991. See *Baumgardner v. HUD*, 960 F.2d at 572.

245 Ibid. Loss of housing opportunity refers generally to the aspects of a housing situation uniquely valuable to the discrimination victim and not otherwise reflected in the sale or rental value, such as proximity to school or work. Thus, in appropriate circumstances lost housing opportunity is a genuinely compensable injury not properly conflated with the abstract value of a right, which has no relation to the victim's actual experience. DOJ argued that the ALJ intended the award for loss of civil rights to serve as compensation for actual injury, not the abstract value of civil rights. However, the court rejected DOJ's assertion, and held that the ALJ had intended "loss of civil rights" to be "an added award for an intangible injury not in the nature of proven compensatory damages." 960 F.2d at 582.

246 Wilson, June 22, 1992 memorandum, p. 6.

247 *HUD v. Baumgardner*, 960 F.2d at 583.

248 *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986) (citations omitted). Although the Supreme Court ruled against the plaintiff in this particular 42 U.S.C. § 1983 claim, the Court did not entirely preclude an award of presumed damages.

249 *HUD v. Baumgardner*, 960 F.2d at 585.

the sixth circuit, it is possible to argue that, given a case with better facts, presumed damages may be appropriate. In addition, even if an award for the loss of civil rights is precluded in the sixth circuit, it may still be possible to seek damages for the loss of civil rights in other circuit courts which have not ruled against such an award.²⁵⁰

Elections

Once HUD files a charge, the complainant (including the Assistant Secretary for FHEO if HUD initiated the complaint), the respondent, or any aggrieved party on whose behalf a charge was filed may elect to litigate the claim in a Federal civil action rather than in a HUD administrative proceeding.²⁵¹ The right to remove a fair housing complaint to Federal court was included in the 1988 FHAA in order to satisfy the constitutional right to a jury trial in common law suits involving an amount in controversy over \$20; certain members of Congress believed that an administrative proceeding allowing for damage awards without a jury violated the seventh amendment.²⁵² Failure to elect a judicial proceeding amounts to a waiver of any claim asserting that the HUD administrative proceeding violates the constitutional right to a jury trial.²⁵³

The party wishing to pursue a civil action has 20 days from receipt of the charge to make the election.²⁵⁴ If the Assistant Secretary chooses to elect a civil action, she must do so within 20 days of service of the charge.²⁵⁵ In addition, the notice of election must be filed with the Office of Administrative Law Judges (OALJ) and served on the General Counsel, the Assistant Secretary, and the other parties.²⁵⁶ If a civil trial begins under any Federal or State law regarding an alleged discriminatory housing practice, the ALJ may not continue any administrative proceedings regarding the challenged practice.²⁵⁷

Once an election is made, the General Counsel must immediately authorize a civil action in Federal district court seeking relief under the FHAA on behalf of the aggrieved person.²⁵⁸ Upon authorization from the General Counsel, the Attorney General must commence and maintain the civil action within 30 days.²⁵⁹ Although DOJ is responsible for the litigation of the complaint, the regulations specifically provide that HUD's General Counsel should be available for consultation with the Attorney General to discuss appropriate litigation strategies in the event of new court decisions or new evidence relevant to the original reasonable cause determination.²⁶⁰

²⁵⁰ In commenting on this report, the Department of Justice stated that "given the ruling of the Supreme Court in the *Stachura* case that the 'abstract value' of a right cannot form the basis for damages, there had to be an actual injury cause by any such loss of right in order for compensation to be appropriate. The *Stachura* decision is quite absolute on this point, and we have no basis for believing that there will be any different result in circuits other than the Sixth Circuit on this issue." DOJ Comments, p. 2 of attachment.

²⁵¹ 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(a) (1993).

²⁵² See Schwemm, *Law and Litigation*, § 24.8(1).

²⁵³ See *ibid.*

²⁵⁴ 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(b) (1993).

²⁵⁵ 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(b) (1993).

²⁵⁶ 24 C.F.R. § 103.410(b) (1993).

²⁵⁷ 42 U.S.C. § 3612(f) (1988).

²⁵⁸ 24 C.F.R. § 103.410(d) (1993).

²⁵⁹ 42 U.S.C. § 3612o(1) (1988).

²⁶⁰ 24 C.F.R. § 103.410(e) (1993); 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing

HUD included the consultation provision in the regulations to give the agencies an opportunity to discuss appropriate litigation strategies in the event of new court decisions or new evidence relevant to the original reasonable cause determination.²⁶¹ Many people commenting on the regulations claimed that the consultation provision "is unnecessary, serves no useful purpose, may be used by DOJ to reduce its caseload, is not required by statute and should be deleted."²⁶² However, because an election claim might not be filed in district court until 56 days after the charge is issued,²⁶³ it is possible that new facts or court decisions may surface rendering the cause determination inappropriate and the civil action unnecessary. If new information does materialize, HUD may amend its final investigative report or void the reasonable cause determination before DOJ is required to proceed with the litigation of the claim.²⁶⁴ Thus, HUD included the consultation provision:

for the sole purpose of assuring that all civil actions are supportable at the time of filing and, in line with the intention of Congress, to ensure that the

Secretary is the official making the determination whether to proceed with...[the cause of action].²⁶⁵

The United States, represented by DOJ, is the plaintiff in the lawsuit initiated on behalf of the aggrieved parties. However, the statute provides that any person aggrieved by the issues in the case has the right to intervene in the civil action.²⁶⁶ If the court finds that a discriminatory practice has occurred or is about to occur, it may grant any relief that would be available to the aggrieved party in a private civil action.²⁶⁷ Such relief may include actual and punitive damages, permanent or temporary injunctions, temporary restraining orders, or any other order the court may wish to impose.²⁶⁸ In addition, the court may award to any prevailing party, other than the United States, a reasonable attorney's fee and costs.²⁶⁹ A nonintervening aggrieved party will not be permitted damages if he or she refuses to comply with court-ordered discovery.²⁷⁰

To allow DOJ the maximum amount of time to prepare the charges brought as elections, HUD's General Counsel redelegated the authorization of the Attorney General to the

Fair Housing Amendments Act of 1988).

261 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

262 *Id.*

263 In addition to a copy of the reasonable cause determination and charge, each party receives a standard notice from the OALJ explaining each party's rights and responsibilities and a scheduled hearing date. The standard notice states that an election to proceed in district court must be received by the OALJ chief docket clerk within 26 days from the date the charge was mailed. See, e.g., HUD v. Dove Creek Apts., HUD ALJ No. 98-91-0722-1 (Mar. 18, 1992) (determination of reasonable cause and charge of discrimination). Once the election is received by the OALJ, DOJ has 30 days to file the claim in Federal district court.

264 42 U.S.C. § 3610(b)(5)(B) (1988).

265 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

266 42 U.S.C. § 3612(o)(2) (1988).

267 *Id.* § 3612(o)(3).

268 *Id.* § 3613(c).

269 *Id.* § 3612(p).

270 *Id.* § 3612(o)(3).

regional counsel, thus bypassing the need for OGC to serve as an intermediary.²⁷¹ In addition, a few months before the official delegation, OGC issued a memorandum to all regional counsel requiring them to send case files directly to DOJ as soon as they become aware of the fact that an election has been made.²⁷² The memorandum states that neither an official authorization letter nor the OALJ's Notice of Election is necessary before transferring the case file.²⁷³ The memorandum states that these files can be forwarded separately when they are completed.²⁷⁴

In 1992 OGC issued a memorandum to all regional counsel as to whether settlement negotiations should be conducted during the 30-day period between issuance of the charge and expiration of the opportunity to elect for a judicial hearing.²⁷⁵ According to the memorandum, it has generally been the practice of both OGC and regional counsel to avoid attempting settlement in this period. Despite the general HUD policy favoring conciliation and settlement of HUD charges, OGC has avoided settlement in this period for several

reasons. One reason is to "keep respondents from utilizing such discussions to assist them in 'forum shopping' between HUD's administrative hearing process and a federal civil action."²⁷⁶ The emphasis on preventing respondents from forum shopping may result from the fact that respondents consistently elect judicial proceedings at a rate of 79 percent to 21 percent.²⁷⁷

According to Assistant General Counsel Harry Carey, OGC no longer insists that regional counsel avoid settlement during the election period.²⁷⁸ Instead, OGC policy indicates that while regional counsel still do not solicit settlements during the election period, regional counsel are authorized to negotiate settlements upon request of the respondents.²⁷⁹

One issue of controversy between HUD and DOJ involves whether and to what extent DOJ may return elected charges to HUD either for further investigation or for a revised reasonable cause determination.²⁸⁰ Although the FHAA requires DOJ to file a lawsuit in every election,²⁸¹ DOJ has returned a few

271 56 Fed. Reg. 41,369 (1991).

272 George L. Weidenfeller, Deputy General Counsel for Operations, U.S. Department of Housing and Urban Development, memorandum to all regional counsel (May 17, 1991).

273 *Ibid.*

274 *Ibid.*

275 Carole Wilson, Associate General Counsel, memorandum to all regional counsel regarding settlement of Title VII cases during election periods, Oct. 6, 1992.

276 *Ibid.*

277 Janet Rouamba, chief docket clerk, Office of Administrative Law Judges, telephone interview, Oct. 14, 1993. For a further discussion of elected cases, see chap. 11.

278 Harry L. Carey, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Dec. 15, 1993 (hereafter cited as Carey, HUD OGC December 1993 interview).

279 *Ibid.*

280 See Strong, HUD OGC July 1993 interview; Strong, HUD OGC December 1993 interview.

281 42 U.S.C. § 3612(o) (1988).

election charges for further investigation by HUD.²⁸² DOJ interprets the consultation provision of the regulations as allowing DOJ to return elected charges to HUD for further analysis and/or reconsideration.²⁸³ DOJ and HUD disagree over both the limits of DOJ's procedural authority to return elected charges and the extent to which DOJ may challenge the substance of HUD's reasonable cause determinations.²⁸⁴

OGC has stated that DOJ has inappropriately returned a few election cases to HUD. OGC believes that DOJ's refusals to file certain elected charges represent an impermissible review of HUD's reasonable cause determinations.²⁸⁵ OGC argues that, in the event that DOJ discovers new information that might alter the initial reasonable cause determination, DOJ may only seek consultation from the General Counsel, not return cases unilaterally.²⁸⁶ However, DOJ maintains it does not return elected charges unless the

charge issued by HUD is flawed.²⁸⁷ Although DOJ acknowledges its obligation to support HUD's reasonable cause determinations and charges, DOJ contends that it also has a responsibility to abide by the rules of Federal court that prevent the filing of frivolous claims.²⁸⁸ Thus, although HUD insists that DOJ impermissibly returns cases based on the substantive policy issues involved in the charges, DOJ maintains that elected charges are returned only when the complaint is based on insufficient evidence or procedural error.

For example, in one election case that DOJ returned to HUD, OGC had issued a section 804 charge against the Farmers Home Administration (FmHA) of the Department of Agriculture and the owner of the housing development receiving FmHA Rural Rental Housing Assistance funds.²⁸⁹ In returning the charge against FmHA, DOJ asserted that the doctrine of sovereign immunity prevents DOJ from filing suit against another government

282 According to Joseph Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, DOJ has returned no more than five election charges to HUD during the entire FHAA period. See Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993 (hereafter cited as Rich interview). However, HUD OGC believes that DOJ has refused to file at least 10 elected charges since the FHAA took effect. See Strong, HUD OGC July 1993 interview.

When a case is returned to HUD, the initial charge is voided and refiled later if appropriate. See Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, telephone interview, Oct. 21, 1993 (hereafter cited as Strong October 1993 interview). According to Joseph Rich, HUD has withdrawn four out of the five elected charges returned by DOJ. See Rich interview.

283 See, e.g., John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, Oct. 29, 1991, citing 24 C.F.R. § 103.410(e) (1993). See also Rich interview.

284 Pratt December 1993 interview.

285 Pratt, HUD OGC July 1993 interview; Wilson, HUD OGC December 1993 interview.

286 24 C.F.R. § 103.410(e) (1993).

287 Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Dec. 20, 1993 (hereafter cited as Hancock December 1993 interview).

288 Hancock December 1993 interview, citing Fed. R. Civ. P. 11.

289 HUD v. FmHA, HUDALJ No. 08-90-0195-1 (Dec. 4, 1992) (determination of reasonable cause and charge of discrimination). DOJ filed the claim against the owner in *United States v. Sollenberger*, DJ No. 175-13-109 (Jan. 28, 1993), and a consent decree was entered July 1, 1993.

agency.²⁹⁰ However, OGC's policy has consistently supported HUD's ability to issue administrative charges against other governmental entities under the FHAA.²⁹¹

Although OGC consistently argues in favor of an FHAA waiver of sovereign immunity against other Federal agencies, Paul Hancock believes that HUD policy does not favor a waiver of sovereign immunity when HUD is the defendant. Hancock stated that HUD always raises a sovereign immunity defense whenever the agency is sued by a private complainant.²⁹² HUD stated in its comments that the preamble to its regulations recognizes HUD's responsibility to investigate, make reasonable cause determinations, conduct administrative proceedings, and use HUD employees to prosecute claims whenever complaints are filed against HUD.²⁹³

It is said that "The doctrine of sovereign immunity generally protects the United

States and its agencies and departments from suit unless Congress has waived that immunity in a statute."²⁹⁴ Although it remains unclear whether the FHAA includes a sufficient waiver of sovereign immunity,²⁹⁵ HUD argues that the FHAA was amended to allow charges against all respondents, including government entities, not merely against private persons.²⁹⁶ In addition, HUD believes that regardless of DOJ's views on sovereign immunity under the FHAA, DOJ is required to support HUD's position on the issue of proper respondents under the act.²⁹⁷ However, DOJ's Housing and Civil Enforcement Section asserts that under current DOJ policy, it lacks authority to file suits against other Federal agencies under the FHAA.²⁹⁸

HUD reports that DOJ is also unwilling to proceed in election cases that do not involve "significant" issues of law, although they may involve blatant violations of the FHAA.²⁹⁹ For

290 Hancock December 1993 interview citing Exec. Order No. 12,146, 3 C.F.R. 409 (1979). The Executive order cited by Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice does not appear explicitly to prevent civil law suits between agencies. If two executive agencies, whose heads are not named to a term of years, cannot resolve a legal dispute, the matter will be submitted to the Attorney General, unless "a specific statutory vesting of responsibility for a resolution" is elsewhere. See Exec. Order No. 12,146, 3 C.F.R. 411, § 1-402.

291 See Frank Keating, General Counsel memorandum to Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Jan. 22, 1992. See also Harry L. Carey, Assistant General Counsel for Fair Housing, memorandum to John Deller, regional counsel, Feb. 19, 1993. Recently, DOJ's Office of Legal Counsel issued a memorandum stating that, although the antidiscrimination provisions of the FHAA apply to Federal agencies, the doctrine of sovereign immunity bars recovery of monetary damages for their violations of the FHAA. See Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to James S. Gilliland, General Counsel, U.S. Department of Agriculture, Apr. 18, 1994. See also DOJ: *Government Immune from Monetary Damages under Fair Housing Act*, 1 Fair Housing-Fair Lending (P-H), vol. 9, no. 12, ¶ 2.1, pp. 1-3 (June 1, 1994).

292 See Hancock December 1993 interview.

293 See HUD Comments, p. 12, citing, 24 C.F.R. Ch. I, Subch. A, App. I, pp. 94'-48 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

294 Schwemm, *Law and Litigation* § 12.3(4)(d), p. 12-34.

295 See Schwemm, *Law and Litigation*, § 12.3(4)(d), pp. 12-34 to 12-35.

296 Frank Keating, General Counsel memorandum to Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Jan. 22, 1992, citing 42 U.S.C. §§ 3602(n), 3610(a)(1)(B)(ii) (1988).

297 Pratt December 1993 interview.

298 Hancock December 1993 interview. Paul Hancock did contemplate the possibility that the FHAA could be amended to allow HUD to charge a Federal respondent in an internal HUD administrative hearing process without a right to election. According to Hancock, an administrative hearing would not raise the same conflicts of representation that would occur if DOJ had to litigate in Federal court representing both the complainant and the respondent.

example, in one elected handicap charge returned by DOJ, HUD maintains that DOJ refused to file the claim because the complaint did not involve a novel issue, and because DOJ does not agree with HUD's interpretation of the FHAA reasonable accommodation requirement.³⁰⁰ HUD's complaint alleged that the respondent condominium association had failed to reasonably accommodate the complainant's disability by allowing her to use a flotation device in the swimming pool and had made unreasonable requests for information regarding the nature of the complainant's disability.³⁰¹

In returning the case, DOJ maintained that the charge was based on a factual error. The DOJ investigation alleged that although the respondent condominium association had threatened the complainant with a fine, the

association had not actually prevented her from using the flotation device while she resided at the condominium.³⁰² Furthermore, DOJ disagreed at least in part with the basis for HUD's reasonable cause determination. DOJ asserted that the respondents' request for more information regarding the nature of the complainant's disability was not unreasonable.³⁰³ Thus DOJ directly and, in HUD's view, impermissibly challenged the Secretary's authority to make reasonable cause determinations.

Regardless of DOJ's reasons for returning the elected charges, HUD believes that DOJ should be willing to deputize OGC attorneys so that HUD can litigate the claims that DOJ does not wish to pursue. To date, DOJ has refused to do so.³⁰⁴

299 Wilson, HUD OGC July 1993 interview. OGC reports that DOJ calls issues having little legal significance "swimming pool cases," because these cases often involve housing units that discriminate against families by restricting swimming pool use to adults only. OGC believes that DOJ's unwillingness to file these claims implies that the cases are not worthy of DOJ's attention.

300 Strong October 1993 interview.

301 HUD v. The Club at East Brunswick Condominium Ass'n, HUDALJ No. 02-91-0940-1 (HUD Jan. 29, 1993) (determination of reasonable cause and charge of discrimination).

302 Hancock December 1993 interview.

303 Ibid.

304 Wilson, HUD OGC July 1993 interview.

11. DOJ Policy and Implementation

The U.S. Department of Justice (DOJ) plays a leading role in the enforcement of the Fair Housing Amendments Act of 1988 (FHAA).¹ Under the original Fair Housing Act of 1968,² the Attorney General was authorized to file suits that either challenged a pattern or practice of housing discrimination, or were of significant public importance regarding such discrimination.³ Under the 1968 law, courts ruled that the Attorney General could not obtain actual or punitive damages on behalf of aggrieved parties represented by DOJ,⁴ but could only obtain equitable relief in the form of injunctions or declaratory judgments, and occasionally restitution of victims' security deposits or other discriminatory overcharges.⁵ If conciliation efforts failed to resolve a fair housing complaint, victims of discrimination had to pursue their claims in private civil actions in order to obtain full monetary relief.⁶ In addition to creating an administrative adjudication process within the U.S. Department of Housing

and Urban Development (HUD), the FHAA dramatically altered DOJ's litigation options. Congress expanded the Attorney General's litigation authority and the types of relief available to the Attorney General for resolving fair housing complaints. In turn, the Attorney General's primary civil litigation responsibilities under Title VIII have been delegated internally to the Housing and Civil Enforcement Section⁷ of the Civil Rights Division.

To ensure coordination, consistency, and cooperation between HUD and DOJ in the enforcement of the FHAA, both departments have executed a "Memorandum of Understanding."⁸ The memorandum outlines the roles and responsibilities of each department with regard to several matters: pattern or practice cases, prompt judicial actions, land use and zoning cases, breaches of conciliation agreements, subpoena enforcements, prosecutions for interference with fair housing rights, judicial review and enforcement of

1 42 U.S.C. §§ 3601-16, 3617-19, 3631 (1988).

2 Fair Housing Act of 1968, Pub. L. No. 90-284, § 8, 82 Stat. 85 (1968).

3 42 U.S.C. § 3613 (1988).

4 See Robert G. Schwemm, *Housing Discrimination Law* (Washington, D.C.: The Bureau of National Affairs, 1983), p. 286 (hereafter cited as Schwemm, *Housing Discrimination Law*).

5 *Ibid.*, p. 287.

6 Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 19, 1991, transcript, p. 7 (hereafter cited as Hancock 1991 interview).

7 This unit is also responsible for the enforcement of the public accommodations provisions of the 1964 Civil Rights Act (see Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., June 24-25, 1993 (hereafter cited as Hancock June 1993 interview)) and the Equal Credit Opportunity Act 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. 2 (hereafter cited as DOJ Comments, attachment).

8 "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 (hereafter cited as Memorandum of Understanding).

HUD administrative law judge (ALJ) orders, and judicial elections, as well as referrals of matters from DOJ to HUD, press relations, resolutions of differences, and exchanges of information.⁹

DOJ-Initiated Civil Enforcement

The Attorney General may initiate a civil action in Federal district court whenever she has reasonable cause to believe that an individual or group is involved in "a pattern or practice of resistance to the full enjoyment of any of the rights" granted by the FHAA.¹⁰ In addition, the FHAA statute and regulations require the HUD General Counsel to refer to the Attorney General any claims reasonably believed to involve a pattern or practice of discrimination.¹¹ Although the Federal courts decide whether or not DOJ has proven that a pattern or practice of discrimination actually occurred, the courts will not review the Attorney General's initial reasonable cause determination.¹² Thus, the Attorney General's discretion and authority to file claims are not in dispute. The FHAA does not require DOJ to

file a pattern or practice claim within a specific statutory timeframe. In fact, because pattern or practice cases require extensive investigation over long periods of time, DOJ pattern or practice claims have never been rejected for failure to file in a timely manner.¹³ However, because the FHAA now allows DOJ to obtain monetary relief on behalf of an aggrieved party, some may argue that DOJ should be required to meet the same statute of limitations required of private litigants.¹⁴

Although "pattern or practice" is not defined in the statute, the Supreme Court has held that "the words reflect only their usual meaning."¹⁵ The definition of pattern or practice applied to other civil rights laws is helpful with respect to Title VIII, to wit:

more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.¹⁶

"Pattern or practice" has been construed to mean discriminatory policies or practices that

⁹ Ibid.

¹⁰ 42 U.S.C. § 3614(a) (1988).

¹¹ See *id.* §§ 3610(e)(2), 3614(a) (1988); 24 C.F.R. § 103.500(b) (1993).

¹² See Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, (Deerfield, IL: Clark Boardman Callaghan, 1992), § 26.2(1), p. 26-4 (citing *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1291 n.9 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988)) (hereafter cited as Schwemm, *Law and Litigation*).

¹³ Ibid. § 26.2(4), p. 26-11.

¹⁴ Ibid. A private civil action initiated by an aggrieved person must be filed not later than 2 years after the occurrence or termination of an alleged discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A) (1988). Similarly, while the FHAA does not impose a statute of limitations on Secretary-initiated complaints, HUD's own regulations require the Secretary to file a complaint within 1 year of the occurrence or termination of the alleged discriminatory housing practice. Compare 42 U.S.C. § 3610(a)(1)(A)(i) with 24 C.F.R. § 103.15 (1993). See generally Schwemm, *Law and Litigation*, § 24.4(1), p. 24-9. For a further discussion of Secretary-initiated complaints, see chap. 10.

¹⁵ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.11 (1977), *remanded*, *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690 (5th Cir. 1981). See also Schwemm, *Law and Litigation*, § 26.2(2), p. 26-5.

¹⁶ 431 U.S. at 336.

affect groups or classes rather than isolated episodes affecting only individuals.¹⁷ In his treatise on the subject, housing expert Robert Schwemm has noted that although most successful pattern or practice cases have involved three or more instances of discriminatory behavior, DOJ need not demonstrate a minimum number of discriminatory acts.¹⁸ As Schwemm noted, the "key to a pattern or practice case is the defendant's overall policy toward protected class homeseekers."¹⁹ Isolated instances of discrimination against particular individuals have been used, not to establish a pattern of discriminatory behavior, but as examples of the defendant's overall behavior patterns.

Similarly, the FHAA permits the Attorney General to file a claim of discrimination not only against an individual, but also against any "group of persons" believed to have engaged in a pattern or practice of discriminatory behavior.²⁰ The FHAA does not require DOJ to prove that each member of the group independently engaged in discriminatory behavior, but rather that the behavior of the individuals taken as a whole was discriminatory, as in blockbusting or steering practices.²¹

The FHAA also authorizes the Attorney General to file suit when there is reasonable cause to believe that "any group of persons has been denied any of the rights granted by this title [FHAA] and such denial raises an issue of general public importance. . . ."²² The "general public importance" provision gives DOJ broad discretion to initiate claims of housing discrimination.²³ DOJ may file suit against a defendant for an issue of general public importance even if the alleged discriminatory practice does not involve a pattern or practice of behavior.²⁴ However, the statutory language indicates that Congress intended to limit DOJ's enforcement power regarding private citizens to violations with a measurable public impact.²⁵ Courts have also held that the Attorney General's demonstration of reasonable cause in cases of general public importance, as with pattern and practice cases, is not reviewable by the courts.²⁶

DOJ is no longer limited to seeking only injunctive relief in the cases it pursues, but may also obtain monetary damages for aggrieved persons and civil penalties to vindicate the public interest in certain types of claims.²⁷ To permit greater coordination between private civil claims and DOJ actions, the FHAA allows DOJ to obtain monetary

17 Administrative Conference of the United States, "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act," by Leland Ware (Washington, D.C.: January 1992), p. 24 (hereafter cited as Ware, "New Weapons").

18 Schwemm, *Law and Litigation*, § 26.2(2), p. 26-6.

19 Ibid.

20 42 U.S.C. § 3614(a) (1988).

21 *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 123 (5th Cir.), cert. denied, 414 U.S. 826 (1973).

22 42 U.S.C. § 3614(a) (1988).

23 *United States v. Northside Realty Assocs.*, 474 F.2d 1164, 1168 (5th Cir. 1973), later appeal, 501 F.2d 181 (5th Cir. 1974), cert. denied, 424 U.S. 977 (1976) (based on pre-FHAA statute).

24 See *United States v. Hunter*, 459 F.2d 205, 218 (4th Cir. 1972), affg 324 F. Supp. 529 (D. Md. 1971), cert. denied, 405 U.S. 934 (1972); *Cabrera v. Fischler*, 814 F. Supp. 269 (E.D.N.Y. 1993).

25 See Schwemm, *Law and Litigation*, § 26.2(1), p. 26-4, (citing *United States v. Hunter*, 459 F.2d at 217).

26 *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. at 1291 n.9; see Schwemm, *Law and Litigation*, § 26.2(1), p. 26-4.

27 42 U.S.C. § 3614(d)(1) (1988).

damages for aggrieved persons, even if the aggrieved parties have not intervened in the DOJ action or filed their own private claim.²⁸ Under the statute, civil penalties are available in both pattern or practice and general public importance cases.²⁹ Civil penalties in these cases may include up to \$50,000 for the first violation,³⁰ and up to \$100,000 "for any subsequent violation."³¹

DOJ may also participate in private civil actions brought by aggrieved persons.³² Under the FHAA, private parties have 2 years from the date of occurrence or termination of the alleged discriminatory housing practice in which to file a private civil action.³³ The Attorney General may intervene in a civil action if she certifies that the case is of general public importance.³⁴ However, if the Attorney General does not intervene in the private action, DOJ may still bring its own civil action

against the same defendant at a later date.³⁵ DOJ and the private plaintiff may consolidate their claims against the same defendant, or proceed separately without limitations based on the actions or results obtained by the other.³⁶ If the Attorney General intervenes in a private civil action, she may obtain preventive relief in the form of a permanent or temporary injunction, temporary restraining order, or other order necessary to guarantee the full enjoyment of rights provided by the FHAA.³⁷ The court also has the discretion to award any other appropriate relief, including actual and punitive monetary damages, to the aggrieved party, as well as attorneys' fees and costs to prevailing parties other than the United States.³⁸ In lieu of actual interventions into private civil actions, DOJ often files *amicus curiae* briefs in support of the complainant.³⁹

²⁸ See Schwemm, *Law and Litigation*, § 25.1, pp. 25-4 to 25-5.

²⁹ 42 U.S.C. § 3614(d)(1)(C) (1988). In addition, civil penalties are available for any claims involving patterns or practices of discrimination, the legality of zoning or land use ordinances, and enforcement of conciliation agreements. However, civil penalties are not available in judicial election actions under 42 U.S.C. § 3612(o)(3).

³⁰ *Id.* § 3614(d)(1)(C)(i).

³¹ *Id.* § 3614(d)(1)(C)(ii).

³² Aggrieved persons may pursue a private civil action in addition to or in lieu of filing a complaint with HUD. See *id.* § 3613(a). An aggrieved person is not automatically a party to the HUD charge, but the ALJ may permit the aggrieved person to intervene on his or her own behalf if an intervention request is timely filed. *Id.* § 3612(c) (1988); 24 C.F.R. § 104.200(a)(3) (1993). For a further discussion of interventions in HUD complaints, see chap. 4.

³³ *Id.* § 3613(a)(1)(A). Under the 1968 act, individuals were authorized to file suit and could win both injunctive relief and actual damages. In addition, the courts could assess up to \$1,000 in punitive damages. Complainants in private actions had to file their claims within 180 days of the alleged occurrence of the discriminatory practice. See *id.* § 3612(a), (c).

³⁴ *Id.* § 3613(e). Similarly, the aggrieved party may intervene in a § 3614 suit brought by DOJ and may obtain the same relief as is available in a private civil action. See *id.* § 3614(e).

³⁵ See Schwemm, *Law and Litigation*, § 26.1, p. 26-3.

³⁶ *Ibid.* § 25.1, p. 25-4.

³⁷ 42 U.S.C. § 3613(c)(1) (1988).

³⁸ *Id.* § 3613(c)(1)-(2). Although the statute appears to indicate that DOJ cannot obtain civil penalties when intervening in a private civil action, Housing and Civil Enforcement Chief Paul Hancock does not concede that civil penalties are precluded in interventions, although DOJ has not attempted to obtain civil penalties through this method. Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Sept. 23, 1993 (hereafter cited as Hancock September 1993 interview).

³⁹ Hancock September 1993 interview.

Criminal Prosecutions

The FHAA also makes it unlawful for any person to interfere in another person's rights under the statute. The FHAA states that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by [provisions of the FHAA].⁴⁰

A violation of this section may be brought as a HUD complaint, as a private lawsuit, or as a civil lawsuit or criminal prosecution by the Attorney General.⁴¹

The Attorney General may initiate a criminal prosecution for coercion, intimidation, or interference pursuant to the FHAA. Under the statute, 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" persons exercising their fair housing rights under Title VIII.⁴² If the defendant interferes with housing rights without causing bodily injury, as in most cross-burning situations, the defendant is charged with a misdemeanor and can be fined up to \$1,000 and/or imprisoned for not more than 1 year.⁴³ If bodily injury results from the intimidation or interference, the crime is elevated to a felony and the defendant may be fined up to \$10,000 and/or imprisoned for not more than 10 years.⁴⁴ If death results, the defendant may be sentenced to life imprisonment.⁴⁵

In 1990 Congress directed the United States Sentencing Commission to enhance the penalties for crimes committed in furtherance of discrimination.⁴⁶ Under the sentencing guidelines, a defendant convicted of criminal interference involving the threat or use of force may be sentenced as a felon to 10 years' imprisonment if no injury occurred, or 15 years if injury occurred.⁴⁷ If the defendant

40 42 U.S.C. § 3617 (1988). These actions can be brought by either HUD or DOJ.

41 A complaint alleging interference may be brought to HUD pursuant to § 3610(a)(1)(A); filed as a private civil action pursuant to § 3613(a); and/or prosecuted by the Attorney General pursuant to § 3631 if the matter involves the use of force or threat of force.

42 42 U.S.C.A. § 3631 (West Supp. 1993). Hereafter, the phrase "criminal interference" will be used to refer to all of the criminal acts prohibited by the FHAA, including the use of force or threat, intimidation, and coercion.

43 *Id.* Senator Arlen Specter recently reintroduced a bill, which was referred to the Committee on the Judiciary, that makes interference in the exercise of housing rights a felony even if no bodily injury results. See S. 668, 103d Cong., 1st sess. (1993).

Under the new bill, 42 U.S.C. § 3631 would elevate the base offense to a felony punishable by imprisonment for one year and/or a fine of up to \$100,000. The bill increases the penalties if the crime is aggravated by any of the following conditions: (1) if the defendant's actions result in property damage exceeding \$100, (2) if the defendant uses or carries a firearm in the commission of the offense, or (3) if the defendant uses or attempts to use fire in the commission of the act. If the crime is aggravated and no bodily injury results, it would be punishable by up to 5 years imprisonment and a fine up to \$250,000 or both. If the crime is aggravated and death results, the defendant may be sentenced to imprisonment for life or death. See U.S. Congress, Senate, Committee on the Judiciary, *Fair Housing Rights Amendments Act of 1993*, 103d Cong., 1st sess., 1993, S. Rept. 103-149, p. 2-3.

44 *Id.*

45 *Id.*

46 Recently, the U.S. House of Representatives passed legislation directing the United States Sentencing Commission to further enhance sentences for persons convicted of hate crimes. Hate Crimes Sentencing Enhancement Act of 1993, H.R. 1152, 103d Cong., 1st sess. (1993). 139 Cong. Rec. H6792 (daily ed. Sept. 21, 1993) (passed as amended by voice vote).

47 18 U.S.C. app. § 2H1.3 (Law. Co-op. 1993). Under certain circumstances, the punishment may be increased. *Id.*

committed criminal interference without the threat or use of force, he or she may still be convicted as a felon to 6 years' imprisonment.⁴⁸

DOJ Litigation Program

DOJ primarily affects fair housing policy through litigation, by using each case to establish the Government's positions on issues.⁴⁹ However, unlike other civil rights statutes, the FHAA requires a unique coordination between Federal agencies with respect to litigation.⁵⁰ Generally, the FHAA limits the discretion of both HUD and DOJ by requiring HUD to investigate every complaint and requiring DOJ to file suit whenever a party elects to pursue a Federal civil action after reasonable cause is found.⁵¹ Thus it appears that Congress envisioned that the Federal Government would investigate every complaint and HUD would prosecute or refer to DOJ all

apparent violations of the FHAA.⁵² Recognizing the unique interagency coordination required by the FHAA, HUD and DOJ meet weekly to discuss which policies to pursue and which claims to litigate.⁵³

The Housing and Civil Enforcement Section of DOJ's Civil Rights Division is primarily responsible for litigating fair housing cases, although some assistance is provided by local U.S. attorneys.⁵⁴ According to DOJ, 46 cases were assigned to U.S. attorneys' offices nationwide. In addition, the criminal prosecutions for intimidation and coercion are litigated by the Criminal Section of the Civil Rights Division, and all civil and criminal appeals are handled by the Appellate Section of the Civil Rights Division.⁵⁵ Nearly all cases pursued by DOJ are based upon factual investigations conducted by both HUD and DOJ using the criteria established by the FHAA and agency regulations.⁵⁶

48 *Id.* app. § 2H1.5. Under the statute, this provision applies to "other deprivations of rights in furtherance of discrimination." As with crimes involving the use of force, imprisonment can be increased under certain circumstances.

49 Congress required only the Secretary to issue rules implementing Title VIII within 180 days after the enactment of the FHAA. See 42 U.S.C. §§ 3601 note & 3614a (1988).

50 Hancock 1991 interview, p. 18.

51 DOJ is not required to file every HUD-referred zoning case. See 42 U.S.C. § 3614(b)(1)(A) (1988).

52 *Ibid.* However, the FHAA requires HUD to refer complaints to any certified State or local agency that operates under a fair housing law substantially equivalent to the FHAA. 42 U.S.C. § 3610(d) (1988); 24 C.F.R. § 103.100 (1993). See also chap. 6.

53 *Ibid.*, p. 23; Hancock June 1993 interview.

54 According to Paul Hancock, U.S. attorneys in some districts do litigate civil rights issues. However, in the past, DOJ has only given prompt judicial action cases to U.S. attorneys offices with a civil rights division and/or experienced civil rights litigators, such as the southern district of New York and the district serving the Chicago area. Hancock 1991 interview, pp. 36-37.

The U.S. attorney in southern Florida started a voluntary civil rights task force to combat discrimination against persons displaced by Hurricane Andrew. Hancock June 1993 interview.

In addition, the Attorney General has implemented a plan to enlist the assistance of U.S. attorneys offices to litigate election cases and prompt judicial action requests. See *AG Reno Announces Major Expansion of DOJ's Housing Section*, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993) and Attachment to DOJ Comments, p. 2.

55 Ware, "New Weapons," p. 58.

56 Hancock 1991 interview, p. 35.

TABLE 11.1
DOJ Fair Housing Caseload

	Actual		Estimates	
	1991	1992	1993	1994
Total number of cases filed or participated in	105	85	125	135
HUD referrals requiring filing	79	66	80	80
Other HUD referrals	7	5	10	10
Pattern or practice or intervention	6	9	20	30
<i>Amicus curiae</i>	8	3	5	5
Consent decrees	36	74	80	90
Litigated judgments	16	12	20	25

Source: DOJ Budget, 1994.

DOJ handled only 13 fair housing cases in FY 1988,⁵⁷ increasing to 27 following the fiscal 1989 effective date of FHAA.⁵⁸ In FY 1990 DOJ filed 40 fair housing claims.⁵⁹ Table 11.1 represents the Housing and Civil Enforcement Section's current and projected caseload as reported in the FY 1994 DOJ appropriations hearings.⁶⁰

Proving Discrimination

One of the most controversial policy issues in civil rights litigation generally involves the standard of proof required to prove discrimination. As discussed above in chapter 10, the standards of proof required to prove a viola-

tion of the FHAA have evolved from analogies to Title VII case law. Generally, a complainant alleging discrimination under the FHAA must demonstrate either that she or he was treated differently on a prohibited basis or that the respondent's actions had a discriminatory effect or disparate impact on members of a protected class.

Attorney General Janet Reno stated that DOJ plans to apply the disparate impact theory to housing discrimination cases.⁶¹ Although under the Bush administration, HUD generally had endorsed an effects test or disparate impact analysis,⁶² DOJ refused to apply a disparate impact analysis in litigating

⁵⁷ Ibid., pp. 9-10.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ U.S. Congress, House, Committee on Appropriations, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies*, 103d Cong., 1st sess., 1993, p. 684 (hereafter cited as *DOJ 1994 Hearings*). The previous peak for DOJ fair housing cases occurred in 1973 when 58 suits were filed. Joseph D. Rich, "Survey: Enforcement of the Fair Housing Act, As Amended, By the Department of Justice," *The Business Lawyer*, vol. 46 (1991), p. 1337.

⁶¹ Janet Reno (speech delivered at the National Fair Housing Summit, Arlington, Va., Jan. 21, 1994), p. 8.

⁶² Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Strong, HUD OGC July 1993 interview). See also Hancock June 1993 interview.

On October 13, 1993, Secretary Henry G. Cisneros issued a new "Program and Management Plan" for HUD making

FHAA cases.⁶³ However, Assistant Attorney General for Civil Rights Deval Patrick stated in his comments on this report, "Regardless of what may have happened under previous administrations, the current position of this Department is unqualified support for the disparate impact theory."⁶⁴

According to one DOJ official, the effects test is unnecessary for a variety of reasons. First, since DOJ must prove a discriminatory intent to obtain punitive damages or civil penalties, DOJ attorneys always try to establish liability based on intent.⁶⁵ Second, DOJ may prove intent by demonstrating through both direct and indirect evidence that the aggrieved persons were simply treated differently, rather than by demonstrating that the respondent held a discriminatory animus toward the protected class of which the complainant is a member.⁶⁶ Under this interpretation of the intent standard, virtually all acts of discrimination in housing are intentional.⁶⁷

Although 10 of 13 circuit courts have applied an effects test as of November 1992,⁶⁸ the district court in *United States v. Lepore* found for the complainant without explicitly applying an effects test.⁶⁹ The case involved a mobile home park that had a two-person per unit occupancy limit for over 25 years and a separate adults only policy for over 10 years.⁷⁰ The complainants, who were expecting a child, filed a complaint with HUD alleging familial status discrimination.⁷¹ In response to the HUD investigation, the defendant withdrew his "adults only" policy; however, he continued to apply the occupancy restriction and attempted to evict the complainants for violation of the occupancy limit after the baby was born.⁷²

The court, apparently at the urging of the Government, found that the enforcement of the occupancy limit evidenced a discriminatory intent and thus violated the FHAA.⁷³ The court ruled that an intent to discriminate

aggressive enforcement of Title VIII a priority for the Department. As part of the plan to reduce discrimination in housing, HUD plans to propose and publish new regulations on the use of the effects test by Sept. 30, 1994. See *Creating Communities of Opportunity: Priorities of the U.S. Department of Housing and Urban Development, Program and Management Plan*, October, 1993 (hereafter cited as HUD 1993 Program and Management Plan). For a full discussion of HUD's disparate impact policy, see chap. 10.

⁶³ Hancock June 1993 interview.

⁶⁴ DOJ Comments, p. 6.

⁶⁵ Hancock June 1993 interview.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Despite DOJ's past reluctance to argue in favor of an effects test, 10 Federal circuit courts have applied an effects test in FHAA cases, and the remaining 3 circuits have not addressed the issue. See Schwemm, *Law and Litigation*, § 10.4(1) p. 10-22 (release date November 1992).

⁶⁹ *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991).

⁷⁰ *Id.* at 1014.

⁷¹ *Id.* at 1013.

⁷² *Id.*

⁷³ *Id.* at 1020. See also *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992) (holding that a landlord's facially neutral single occupancy requirement for one-bedroom apartments violated the FHAA).

could be inferred from the earlier and admitted open discrimination of the "adults only" policy, coupled with the enforcement of a policy the defendants "knew would essentially perform the same function [to exclude children] as the adults only policy."⁷⁴

By imputing knowledge of the "function" of the occupancy limit to defendants, the court essentially inferred an intent to discriminate from the discriminatory effect of the policy. The court found the inferred intent adequate to establish liability, but did not find the defendants' intentional behavior sufficiently egregious to warrant an award of punitive damages.⁷⁵ Based on the court's reliance on the effect of the practice to establish liability, it is difficult to understand why this court and DOJ will acknowledge relying on the impact of a housing practice as indirect evidence of intentional discrimination, but will not establish liability based on discriminatory effect alone.

DOJ-Initiated Cases

Pattern or Practice

DOJ also uses pattern or practice cases to set forth its fair housing policy. By exercising the discretion to choose which pattern or practice cases to pursue, DOJ helps shape the policy direction of the FHAA. Because the

FHAA does not require DOJ to file pattern or practice cases within a specific statutory time limit, DOJ can take time to pursue its policy objectives, investigate violations thoroughly, and develop strong arguments against defendants before filing a claim.⁷⁶

Although not limited by a statutory filing deadline under the FHAA, DOJ has not been able to investigate every alleged pattern or practice violation because of a lack of resources.⁷⁷ Therefore, DOJ has prioritized its investigations in pattern or practice cases by focusing on claims involving race, national origin, mortgage lending, and homeowner's insurance.⁷⁸ According to DOJ, familial status cases are not a priority because the department believes that these cases are resolved adequately through the HUD process.⁷⁹ Because familial status cases often involve blatant acts of discrimination, victims of such discrimination are aware of the acts and are able to file complaints, as opposed to race cases in which the victims of discrimination often do not know they have been injured in violation of the law.⁸⁰ DOJ not only relies on its own knowledge of pattern or practice violations, but may also initiate investigation of a pattern or practice claim based on referrals from HUD, judicial elections,⁸¹ information

⁷⁴ *Id.*

⁷⁵ *Id.* at 1024.

⁷⁶ Hancock 1991 interview, p. 65.

⁷⁷ *Ibid.*

⁷⁸ Hancock June 1993 interview.

⁷⁹ *Ibid.* As Table 11-2 indicates DOJ has filed 28 pattern or practice cases alleging familial status discrimination and only 5 cases alleging discrimination based on national origin. Although these figures appear to demonstrate that DOJ has wavered from its stated priorities, 17 of the 28 family status cases were first brought to DOJ as party elections, and only after investigating the private claim did DOJ find enough evidence to allege a pattern or practice of discrimination. Consistent with the stated priorities, DOJ has filed 30 pattern or practice cases alleging racial discrimination. See Table 11-2.

⁸⁰ *Ibid.*

⁸¹ Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993 (hereafter cited as Rich interview). According to Rich, some pattern or practice cases begin as elections. During the investigations of these cases, DOJ uncovers enough evidence to pursue pattern or practice claims and amends the complaints to reflect the additional charge.

obtained from fair housing groups, or newspaper articles.⁸²

Table 11.2 represents the total number of pattern or practice cases that DOJ has filed since the FHAA took effect, the basis for each case, and the current status of each case as of December 6, 1993.⁸³ As the table indicates, DOJ has filed 88 pattern or practice cases and obtained consent decrees in 56 of the cases filed.

Decatur Federal

Perhaps DOJ's largest pattern and practice case to date involved race discrimination in mortgage lending practices.⁸⁴ DOJ began studying mortgage lending patterns and practices in the Atlanta area after the publication of a series of newspaper articles highlighting disparities in the number of mortgage loans approved in white and black neighborhoods.⁸⁵ After surveying the lending industry, DOJ focused its investigation on Decatur Federal Savings and Loan Association because of its size, poor record of loan origination in black neighborhoods, and high rejection rate of black applicants.⁸⁶ Although DOJ targeted Decatur Federal, DOJ stated that its investigation could have applied to other Atlanta-based institutions, as well as other financial institutions nationwide.⁸⁷

After a lengthy investigation, DOJ simultaneously filed a complaint and consent decree against Decatur Federal alleging that the institution engaged in unlawful race discrimination in its mortgage lending program.⁸⁸ The complaint not only alleged that Decatur Federal consistently rejected black applicants at significantly higher rates than white applicants, but also that the institution opened branch offices only in predominantly white areas of Atlanta.⁸⁹

In order to avoid costly litigation on the merits, both parties agreed that the complaint should be resolved voluntarily. Thus the parties agreed that the consent decree is not to be construed as an admission by Decatur Federal of the validity of any of the claims asserted in the complaint.⁹⁰ In addition to enjoining Decatur Federal from engaging in any racially discriminatory practices, the consent decree also provides that Decatur Federal will extend its serving area to include minority communities, establish an advertising program, follow a home mortgage loan production program to increase its origination of loans to black borrowers, and apply the same evaluation and underwriting criteria to both black and white applicants.⁹¹

82. Hancock 1991 interview, p. 11.

83. DOJ Casebased Database as of Dec. 6, 1993.

84. *United States v. Decatur Federal Savings and Loan Ass'n*, 2 Fair Housing-Fair Lending (P-H) ¶ 19,377 (N.D. Ga. Sept. 17, 1992) (consent decree).

85. U.S. Congress, Senate, Committee on Banking, Housing, and Urban Affairs, *Hearings on Mortgage Lending Discrimination*, 103d Cong., 1st sess., Feb. 24, 1993, statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, p. 3.

86. *Ibid.*, p. 3.

87. *Ibid.*, pp. 3-4.

88. *United States v. Decatur Federal Savings and Loan Ass'n*, No. 1-92-CV-2198 (N.D. Ga. Sept. 17, 1992) (complaint).

89. Complaint at 4-7.

90. *United States v. Decatur Federal Savings and Loan Ass'n*, 2 Fair Housing-Fair Lending (P-H) ¶ 19,377, 19,624 (N.D. Ga. Sept. 17, 1992) (consent decree).

91. *Id.* at 19,624-28.

TABLE 11.2

DOJ Pattern or Practice Cases, 3/12/89-12/6/93

Status as of 12/6/93	Race	Family status	Handicap	Sex	National origin	Religion	Combined basis	Total
Presuit	1	—	—	—	—	—	—	1
Pending	8	1	2	2	5	1	3 ¹	22
Settlement entered	—	1	—	—	—	—	—	1
Consent decree entered	17	25	9	1	—	—	4 ²	56
Summary judgment for U.S.	—	—	1	—	—	—	—	1
Judgment for U.S.	1	1	—	—	—	—	—	2
Jury verdict for U.S., penalty order	1	—	—	—	—	—	—	1
Judgment for U.S. on appeal	1	—	—	—	—	—	—	1
Judgment for U.S. and relief reversed	—	—	1	—	—	—	—	1
Settlement after judgment for defendant	1	—	—	—	—	—	—	1
Not filed	—	—	1	—	—	—	—	1
Total	30	28	14	3	5	1	7	88 ³

Source: DOJ Caseload Database.

¹ One case alleged race and familial status discrimination, one case alleged discrimination based on familial status and disability, and one case alleged both national origin and familial status discrimination.

² One case alleged discrimination based on race and sex; one involved race and familial status discrimination; one case alleged discrimination based on familial status and national origin; and one involved alleged interference with the enjoyment of housing rights.

³ Twenty-one of the pattern or practice cases were first brought as elections and enough evidence was discovered to amend the complaint to include a pattern or practice violation. Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993.

In addition, Decatur Federal has agreed to develop special programs to serve low and moderate income home buyers and to recruit and train black employees.⁹² The consent decree also established a \$1 million fund to be distributed by the United States to individual complainants identified by DOJ as aggrieved persons under the FHAA and the Equal Credit Opportunity Act.⁹³

Testing

In order to improve the investigation of pattern and practice cases, DOJ has begun a testing program.⁹⁴ Testing is often the most effective investigative technique for producing evidence in pattern or practice cases.⁹⁵ Although DOJ plans to test for discrimination against all protected classes in housing sales and rentals, race and national origin discrimination are the major focus of the testing program due to the ongoing covert nature of such discrimination.⁹⁶

DOJ's testing is conducted proactively based on bona fide allegations but not neces-

sarily on specific complaints.⁹⁷ The DOJ testing program has added credibility because all encounters with housing providers are taped, which often eliminates disagreements over the content of conversations and sequence of events.⁹⁸

DOJ contracts with private fair housing organizations to conduct testing.⁹⁹ However, unlike HUD's Fair Housing Initiatives Program (FHIP), which provides grants to private fair housing groups serving as testers (see chapter 7), DOJ hires its own employees to conduct testing in areas not served by fair housing groups.¹⁰⁰ The Housing and Civil Enforcement Section now has three employees exclusively working to coordinate the testing program.¹⁰¹ In addition, the section has trained 100 DOJ employee volunteers to conduct testing in areas of the country not served by member organizations of the National Fair Housing Alliance.¹⁰²

DOJ has begun testing in large metropolitan areas.¹⁰³ Currently, DOJ is involved in six major testing cases; a significant increase

92 *Id.* at 19,629-31.

93 *Id.* at 19,631. 15 U.S.C. § 1691.

94 DOJ 1994 Hearings, pp. 685-86. In FY 1994 DOJ plans to use \$1.46 million to expand the mortgage lending initiative and the testing program. In prior years, DOJ reprogrammed a portion of its budget earmarked for other programs to fund its own testing program. DOJ Announces Plans to Conduct Testing for Housing Discrimination, 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

95 Hancock 1991 interview, p. 50.

96 DOJ Announces Plans to Conduct Testing for Housing Discrimination, 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

97 *Ibid.*

98 Hancock June 1993 interview.

99 DOJ Files First Lawsuits Based on Evidence Gathered Under Testing Contracts, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 6, ¶ 6.20, p. 21 (Dec. 1, 1992).

100 DOJ Announces Plans to Conduct Testing for Housing Discrimination, 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

101 DOJ Testing Program Yields \$350,000 Settlement in Michigan Race Case, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 3, ¶ 3.6, p. 8 (Sept. 1, 1993).

102 *Ibid.*

103 Hancock June 1993 interview.

over the previous seven testing cases in 20 years.¹⁰⁴ The first lawsuits filed by DOJ based on the new testing program targeted the metropolitan Detroit area.¹⁰⁵ The lawsuits each alleged that an apartment complex and a mobile home park engaged in a pattern and practice of racial discrimination against prospective tenants.¹⁰⁶

In 1993 DOJ obtained the largest civil penalty ever in a housing discrimination case, by settling one of the Detroit lawsuits.¹⁰⁷ Under the terms of the settlement, the owners will pay a \$125,000 civil penalty and \$225,000 in actual damages, distributed by DOJ, to individuals with valid claims.¹⁰⁸ The owners are also required to advertise their vacancies monthly in Detroit-area newspapers, and pay for advertising to locate people who may have been turned away from the apartment complex because of their race or color.¹⁰⁹

DOJ defends the need for its own testing program by pointing to the importance of testing in the development of pattern and practice cases. By bringing pattern or practice cases

based on testing, DOJ can attack housing discrimination more efficiently on a metropolitan basis than through the litigation of individual complaints.¹¹⁰ In addition, although private fair housing groups such as the National Fair Housing Alliance are largely successful,¹¹¹ DOJ testers can test in areas not served by housing groups.¹¹² Finally, despite the valuable role private fair housing advocacy groups play in eradicating discrimination, DOJ believes that the primary instrument of civil rights enforcement should be the Federal Government.¹¹³

Other Major Cases and Interventions

Cases of general public importance may be filed when the Attorney General can prove that more than one person was affected by a discriminatory act.¹¹⁴ General public importance cases may involve statutory conflicts with State or local law, issues of law with major implications for the FHAA, or decisions affecting a large number of property owners or businesses.¹¹⁵

¹⁰⁴ Ibid.

¹⁰⁵ DOJ also filed a lawsuit earlier in 1992 alleging race discrimination by a housing provider in the Los Angeles area. *DOJ Files First Lawsuits Based on Evidence Gathered Under Testing Contracts*, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 6, ¶ 6.20, p. 20 (Dec. 1, 1992).

¹⁰⁶ Ibid.

¹⁰⁷ Michael Isikoff, "Justice 'Sting' Finds Housing Discrimination," *The Washington Post*, June 22, 1993, p. A6.

¹⁰⁸ *DOJ Testing Program Yields \$350,000 Settlement in Michigan Race Case*, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 3, ¶ 3.6, p. 7 (Sept. 1, 1993) (citing *United States v. Grillo*, No. 92-CV-75869-DT (E.D. Mich. June 21, 1993)).

¹⁰⁹ Ibid., p. 8.

¹¹⁰ Ibid., p. 9 (quoting Paul Hancock).

¹¹¹ See *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), cert. denied, 114 S. Ct. 58 (1993). The seventh circuit upheld the jury's verdict which was based largely upon testing conducted by the Metropolitan Milwaukee Fair Housing Council, and remanded for an award of punitive damages, civil penalties, and damages to testers for emotional distress.

¹¹² Hancock 1991 interview, pp. 47-49. In particular, Hancock stated that DOJ needs to bring testing programs to areas of the Southeast, including Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, and Tennessee.

¹¹³ Hancock June 1993 interview.

¹¹⁴ *United States v. City of Parma*, 494 F. Supp. 1049, 1095 (N.D. Ohio 1980), aff'd in part, rev'd in part, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982).

¹¹⁵ See, e.g., *United States v. Hunter*, 459 F.2d 205, 218 (4th Cir.), cert. denied, 409 U.S. 934 (1972). See generally Schwemm, *Housing Discrimination Law*, pp. 285-86.

Although permitted by law to intervene in private civil actions, DOJ rarely exercises this option.¹¹⁶ In fact, since the FHAA took effect, DOJ has only intervened in three cases; two alleging discrimination based on disability and one alleging discrimination based on familial status.¹¹⁷ Such intervention is rare because it requires a nondelegable authorization from the Attorney General certifying that the case is of public importance.¹¹⁸ Thus, rather than wait for Attorney General certification, the Housing and Civil Enforcement Section merely initiates its own companion claim.¹¹⁹ The two claims are usually consolidated by the court for discovery and trial, and often DOJ obtains an order that is entered in both cases.¹²⁰

After reviewing the statutory construction, one might surmise that DOJ avoids intervening in private civil actions because the FHAA does not permit civil penalties in an intervention.¹²¹ Although the Housing and Civil Enforcement Section has never asked for civil penalties in an intervention, DOJ is unwilling to concede that civil penalties are unavailable in such an action.¹²² As noted above, if DOJ

believes civil penalties are warranted in a claim, the Housing and Civil Enforcement Section initiates its own claim instead of filing an intervention.¹²³

In lieu of intervention, DOJ has filed *amicus curiae* briefs in support of private civil actions, which tend to lend added credibility to the complainants' arguments.¹²⁴ DOJ has filed *amicus curiae* briefs in 23 private civil actions. Of these, 23 briefs were filed in support of plaintiffs alleging discrimination based on handicap status; 5 were in support of plaintiffs alleging race discrimination; and 4 supported plaintiffs alleging discrimination based on familial status.¹²⁵

Criminal Cases

As of December 8, 1992, DOJ had filed 57 criminal housing cases alleging illegal interference, coercion, or intimidation.¹²⁶ Sometimes, HUD receives the initial complaint, which may involve, for example, assault and battery, cross-burnings, or firebombings. Thus it is crucial for the HUD intake person to recognize claims that may require a criminal investigation and immediately refer them

¹¹⁶ Hancock September 1993 interview.

¹¹⁷ DOJ Caseload Database as of Dec. 6, 1993.

¹¹⁸ 42 U.S.C. § 3613(e) (1988).

¹¹⁹ Hancock September 1993 interview.

¹²⁰ Hancock 1991 interview, p. 15.

¹²¹ 42 U.S.C. § 3613(e) (1988). This provision indicates that upon an intervention, the Attorney General may seek the same relief that is available to her under 42 U.S.C. § 3614(e). Under 42 U.S.C. § 3614(e), the court is authorized to grant the same appropriate relief as would be available in a civil action under 42 U.S.C. § 3613. The relief provision for civil actions, 42 U.S.C. § 3613(c), does not list civil penalties among the available remedies.

¹²² Hancock September 1993 interview.

¹²³ *Ibid.*

¹²⁴ See, e.g., *NAACP v. American Family Mut. Ins., Co.*, 1990 U.S. Dist. LEXIS 18522 (E.D. Wis. Dec. 17, 1990), *aff'd in part, rev'd in part*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

¹²⁵ DOJ Caseload Database as of Dec. 6, 1993.

¹²⁶ "DOJ Criminal Housing Cases Filed 1989-1992."

to FHEO headquarters and then to DOJ.¹²⁷ Most often, cases prosecuted by DOJ under the criminal provisions are brought to the attention of the department from non-HUD sources.¹²⁸

Because these claims involve both criminal and civil fair housing issues, DOJ and HUD must coordinate their activities.¹²⁹ In practice, if DOJ chooses to pursue a criminal investigation, then HUD will defer the fair housing investigation until the criminal investigation is completed or DOJ indicates that the civil investigation may continue.¹³⁰ The HUD process will be deferred even if the delay will cause the investigation to remain open beyond the statutory 100-day timeframe.¹³¹

According to the HUD-DOJ memorandum of understanding, it is understood that the pending criminal investigation is appropriate grounds for asserting that completion of the HUD investigation is "impracticable."¹³² Although HUD is statutorily required to disclose fully to the parties in writing the reasons for

a delay in the investigation,¹³³ the memorandum requires HUD to notify the parties in a manner designed not to jeopardize DOJ's criminal investigation.¹³⁴

Under the Bush administration, DOJ urged Congress to increase the penalties for cross-burning and certain other forms of illegal intimidation under the FHAA.¹³⁵ Former Acting Assistant Attorney General Bruce Navarro encouraged the increases in fines and penalties at the time, because "the message of hatred and violence that cross-burnings convey inflicts enormous psychological damage on victims."¹³⁶ Although Congress has not amended the substantive criminal provision of the FHAA, in September 1993 the House of Representatives passed legislation directing the United States Sentencing Guidelines Commission to amend the sentencing guidelines to enhance the penalties for criminal interference based on the defendant's discriminatory motive, the force used, and the severity of the injury.¹³⁷

127 Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Pratt, HUD OGC July 1993 interview); Hancock 1991 interview, p. 22.

128 Attachment to DOJ Comments, p. 2.

129 HUD may process a complaint under 42 U.S.C. § 3610(a)(1)(A)(i) (1988) alleging a violation of the protections against coercion, intimidation, or interference found in § 3617.

130 "Memorandum of Understanding," p. 10; Hancock 1991 interview, p. 22.

131 "Memorandum of Understanding," p. 10. HUD must complete an investigation within 100 days after the filing of the complaint. 42 U.S.C. § 3610(a)(1)(B)(iv) (1988).

132 "Memorandum of Understanding," p. 10. HUD may exceed the 100-day investigation limit, if it would be impracticable to complete the investigation within the statutory period. *Id.* § 3610(a)(1)(B)(iv).

133 42 U.S.C. § 3610(a)(1)(C).

134 "Memorandum of Understanding," p. 10.

135 *DOJ Seeks Increased Penalties for Intimidation Under Fair Housing Act*, 1 Fair Housing-Fair Lending (P-H) vol. 6, no. 1, ¶ 1.5, p. 6 (July 1, 1990).

136 *Ibid.*

137 Hate Crimes Sentencing Enhancement Act of 1993, H.R. 1152, 103d Cong., 1st sess. (1993); 139 Cong. Rec. H6792 (daily ed. Sept. 21, 1993) (passed as amended by voice vote); 139 Cong. Rec. S12241 (daily ed. Sept. 22, 1993) (referred to the Senate Judiciary Committee). In addition, Senator Dianne Feinstein introduced a companion bill in the Senate on Oct. 6, 1993, that was also referred to the Senate Judiciary Committee. See Hate Crimes Sentencing Enhancement Act of 1993, S. 1522, 103d Cong., 1st sess. (1993); 139 Cong. Rec. S13172 (daily ed. Oct. 6, 1993). See also Sentencing Guidelines for the United States Courts, 18 U.S.C. app. §§ 2H1.3, 2H1.5, and 2J1.1 (1993). See gen-

Although antidiscrimination laws such as the FHAA have long been held to be constitutional,¹³⁸ "hate crimes" and the issue of penalty enhancement have been addressed recently by the Supreme Court. Hate crimes have received attention because some defendants have argued that their acts of coercion, intimidation, and/or interference are protected by the free speech clause of the first amendment.

In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a city ordinance that prohibited the placement on any public or private property of symbols, objects, or graffiti "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. . . ."¹³⁹ Although all nine Justices voted to defeat the ordinance, the majority of five held that the ordinance unconstitutionally prohibited otherwise permitted speech based solely on the subjects addressed and the ideas expressed.¹⁴⁰ Thus, it appears that the first amendment may limit the government's ability to restrict conduct that is singled out because of its racial hostility.¹⁴¹ However, the *R.A.V.* defendants were prosecuted by DOJ and convicted for the same crossburning that

was the subject of the city's prosecution, and the conviction was upheld by the eighth circuit in April 1994.¹⁴²

Some fair housing scholars have asserted that the decision in *R.A.V.* may restrict the criminal interference provision of the FHAA.¹⁴³ However, the Supreme Court has also addressed the issue of penalty enhancement for hate crimes in a way that appears to leave the FHAA provisions intact. In *Wisconsin v. Mitchell*, the Supreme Court unanimously upheld a State sentence enhancement provision that increased the maximum penalty for perpetrators of certain crimes who select their victims because of the victim's race, religion, national origin, or sexual orientation.¹⁴⁴ The Court held that it is permissible for a sentencing judge to take into account the defendant's motives and racial animus towards his or her victim, as long as doing so proves something more than the defendant's abstract beliefs.¹⁴⁵

The FHAA's criminal interference provision continues to survive constitutional challenge after both *R.A.V.* and *Mitchell*. For example, in a recent cross-burning case, the seventh circuit rejected the defendants' argument that cross-burning is protected

erally House Panel Approves "Hate Crimes" Bill, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 4, ¶ 4.22, p. 21 (Oct. 1, 1993).

¹³⁸ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

¹³⁹ 112 S. Ct. 2538, 2541 (1992) (citing *St. Paul Bias-Motivated Crime Ordinance* § 292.02, St. Paul, Minn. (1992)).

¹⁴⁰ *Id.* at 2542-50.

¹⁴¹ Schwemm, *Law and Litigation*, § 20.3, p. 20-15.

¹⁴² *U.S. v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); see also Attachment to DOJ Comments, p. 3.

¹⁴³ *Ibid.*, § 20.3, pp. 20-15 to 20-16.

¹⁴⁴ 113 S. Ct. 2194 (1993).

¹⁴⁵ *Id.* at 2200.

speech.¹⁴⁶ Although the court stated that cross-burning is a form of expressive conduct, the court found the government's prohibition of the conduct a permissible, content-neutral regulation.¹⁴⁷ The court stated that the criminal interference provision of the FHAA is "aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech."¹⁴⁸ Thus, the provision does not directly regulate speech, but rather furthers an important government interest unrelated to the suppression of speech, namely, the protection of fair housing rights.¹⁴⁹

Also, the Attorney General delegated to the Federal Bureau of Investigation's (FBI) Uniform Crime Reports Section the Attorney General's responsibility to collect and publish statistics on crimes motivated by hate under the Hate Crimes Statistics Act passed in 1990.¹⁵⁰ The act applies not only to crimes

against persons, but also crimes against property, including arson and destruction, damage, or vandalism of property.¹⁵¹ DOJ is required to collect data on crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.¹⁵²

Coordination with HUD

Zoning and Land Use Cases

As of December 16, 1993, DOJ had filed 14 cases alleging discrimination in zoning or land use laws. Of these, 11 cases alleged discrimination based on handicapped status; 2 alleged discrimination based on familial status; and 1 case involved a combination of both bases.¹⁵³ As of December 6, 1993, DOJ litigated and won three cases, lost one case, and obtained consent decrees in four cases; two cases are on appeal, and two cases are still pending.¹⁵⁴

Although HUD is statutorily required to refer all zoning and land use cases to DOJ,

¹⁴⁶ *United States v. Hayward*, 6 F.3d 1241, 1249-52 (7th Cir. 1993). See also *United States v. Garner*, No. 92-5069, 1993 U.S. App. LEXIS 1925 (4th Cir. Feb. 4, 1993) (per curiam) (upholding a sentence enhancement based on defendant's racial animus toward the victim).

But see *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993). In *Lee* the eighth circuit reversed a criminal conspiracy conviction for cross-burning because of the trial judge's unconstitutional application of the facially neutral statute in his jury instructions. The circuit court held that the application of the facially neutral criminal conspiracy provision focused impermissibly on the "communicative and emotive impact" of the cross-burning rather than on the defendant's intent to incite and produce imminent lawless action. *Id.* at 1301-02. Although the jury acquitted the defendant on the charge of the use of force or threat in criminal interference with housing rights, the decision addresses the application of facially neutral restrictions on expressive conduct which may have future implications for FHAA cases in the eighth circuit. See generally *Opposite Fates Accorded Cross-burning Convictions By Federal Appeals Courts*, 1 Fair Housing-Fair Lending (F-H), vol. 9, no. 6, ¶ 6.10, pp. 10-11 (Dec. 1, 1993).

¹⁴⁷ 6 F.3d at 1250-51.

¹⁴⁸ *Id.* at 1250.

¹⁴⁹ *Id.*

¹⁵⁰ Hate Crimes Statistics Act, 28 U.S.C. § 534 note (1993). The act is scheduled for reauthorization in 1994. See 55 Fed. Reg. 28,610 (1990) and 57 Fed. Reg. 4888 (1992).

¹⁵¹ *Id.* The act requires DOJ to collect data on crimes against persons including, murder, nonnegligent manslaughter, forcible rape, aggravated assault, simple assault, and intimidation.

¹⁵² *Id.* Although DOJ is required to collect data on these crimes under the statute, the act does not create the right to bring an action in court. 28 U.S.C. § 534(b)(3) note. In addition, while requiring DOJ to maintain statistics on crimes based on sexual orientation, the act does not create a cause of action based on sexual orientation, nor does it recognize sexual orientation as a protected classification. 28 U.S.C. § 534(b)(3) and Sec. 2 note.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* Of the remaining cases, one was closed by summary judgment for the United States and the other by a voluntary dismissal.

DOJ has discretion to decide if the matter should be litigated.¹⁵⁵ DOJ may challenge an exclusionary zoning law without a HUD referral if the case involves a pattern or practice of behavior or raises an issue of general public importance.¹⁵⁶ If the law does not qualify as a pattern and practice or general public importance action, DOJ has the discretion to litigate any HUD-referred zoning or land use claims under the general discriminatory housing practice provision of the FHAA.¹⁵⁷

According to the memorandum of understanding, HUD and DOJ have interpreted the FHAA as requiring referral to DOJ of all challenges to zoning or land use decisions, as well as direct challenges to the underlying laws.¹⁵⁸ However, if the zoning issue raised is "an ancillary and insubstantial addition to a complaint that HUD has authority to address," then no referral is necessary if HUD can make a reasonable cause determination independent of the zoning issue.¹⁵⁹

During the committee debates on the FHAA, strong opposition was voiced to the provision of the FHAA regarding discrimination in zoning and land use cases. The opposition expressed concern that the FHAA as passed would be "used by advocacy groups,

Federal judges or bureaucrats to bust local zoning."¹⁶⁰ The opposition wanted to require proof of a discriminatory intent before declaring a particular zoning or land use law discriminatory; in order to protect what they called "quintessentially a local government decision."¹⁶¹ However, by failing to require proof of intentional discrimination, the legislative history suggests that Congress did not wish to limit the scope of the zoning cases subject to DOJ review.

Prompt Judicial Actions

Although the FHAA grants to DOJ the exclusive authority to litigate prompt judicial actions in Federal court, as noted above, the claims require close cooperation between DOJ and HUD.¹⁶² In practice, DOJ, OGC, and FHEO participate in a conference call with the regional investigator to discuss the preliminary information required to justify a prompt judicial action.¹⁶³ While DOJ is expediting the paper work, HUD will notify the respondent of the impending action. DOJ is usually prepared to send an attorney to court within 24 hours to request a temporary restraining order (TRO) or preliminary injunction, but often such action is unnecessary, because the mere threat of a TRO will cause the defendant

¹⁵⁵ Compare 42 U.S.C. § 3610(g)(2)(C) with § 3614(b)(1)(A) (1988). See chap. 10 for a full discussion of HUD's policies on the legal issues involved in zoning.

¹⁵⁶ 42 U.S.C. § 3614(a).

¹⁵⁷ *Id.* § 3614(b).

¹⁵⁸ "Memorandum of Understanding," p. 6.

¹⁵⁹ *Ibid.*

¹⁶⁰ U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., 1988, H. Rept. 100-711 reprinted in 1988 U.S.C.C.A.N. 2173, 2224 (hereafter cited as *FHAA House Committee Report*).

¹⁶¹ *Id.*

¹⁶² See 42 U.S.C. § 3610(e)(1) (1988). For a full discussion of the legal framework for prompt judicial actions, see chap. 10.

¹⁶³ Hancock 1991 interview, p. 63. According to HUD's OGC, the authorization power has been internally delegated from the General Counsel to the Assistant General Counsel for Fair Housing. Now, the Associate General Counsel for Equal Opportunity and Administrative Law can sign a request to DOJ for prompt judicial action and send a copy to the General Counsel, rather than having to meet with the General Counsel in every case. See Strong, HUD OGC July 1993 interview.

to take the appropriate action without the court order.¹⁶⁴

As discussed in chapter 10, HUD and DOJ do not always agree on the evidence needed to obtain a prompt judicial action.¹⁶⁵ DOJ asserts that its attorneys must be able to sustain a meritorious claim in Federal court showing irreparable harm, and, therefore, it is not unreasonable to request some evidence of the merits before proceeding to court.¹⁶⁶ In order to maintain the claim for prompt judicial action, DOJ needs some evidence indicating that a cognizable issue needs to be resolved.¹⁶⁷ Thus, DOJ expects HUD to investigate the prompt judicial action claims as thoroughly as possible in the time available.

However, according to HUD, DOJ's prompt judicial action standards, while not explicitly restrictive, have the effect of reducing the number of prompt judicial actions pursued by HUD regional staff.¹⁶⁸ Despite HUD's assertion that the net effect of DOJ's standards results in fewer prompt judicial action requests, the Assistant Attorney General for Civil Rights, Deval Patrick, has stated, "Let me assure you that prompt action has never been delayed as a result of our request to HUD for information on the merits."¹⁶⁹ He continued:

We would also take exception to a claim that our actions have had the effect of holding down the number of prompt judicial actions which have been sought. In fact, on numerous occasions, we have brought possible PJAs (prompt judicial actions) to the attention of HUD where we have received information about the need for possible immediate enforcement action and we need the agency to begin investigation of a complaint.¹⁷⁰

While it is true that early in the FHAA's enforcement, HUD rarely requested prompt judicial action of its own accord, HUD maintains that DOJ's standards now have the effect of discouraging the use of prompt judicial actions.

Prompt judicial action is an area of litigation in which DOJ may benefit from the help of local U.S. attorneys. Although DOJ has been reluctant to use them in the past, the Attorney General recently announced a plan to have U.S. attorneys handle prompt judicial action requests.¹⁷¹ According to one DOJ official, the success of the plan to seek assistance from U.S. attorneys offices will depend on the amount of time and resources DOJ will have to train them in housing discrimination litigation.¹⁷²

DOJ obtained both a TRO and a preliminary injunction under the FHAA in *United*

164 Hancock 1991 interview, pp. 42-43. See also Strong, HUD OGC July 1993 interview.

165 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Wilson, HUD OGC July 1993 interview).

166 Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Dec. 20, 1993 (hereafter cited as Hancock December 1993 interview). See also DOJ Comments, p. 4.

167 Hancock December 1993 interview.

168 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Dec. 20, 1993 (hereafter cited as Pratt December 1993 interview).

169 DOJ Comments, p. 4.

170 DOJ Comments, p. 5.

171 *AG Reno Announces Major Expansion of DOJ's Housing Section*, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

172 Hancock 1991 interview, p. 37; Hancock December 1993 interview.

States v. Blackwell.¹⁷³ This early attempt at fully exercising this power encountered a particularly recalcitrant defendant.¹⁷⁴ The case involved an African American family who contracted to buy a house, after which the white owners leased the property to a white family.¹⁷⁵ The would-be buyer filed a complaint with HUD, which in turn asked DOJ to obtain a TRO.¹⁷⁶ DOJ obtained the TRO¹⁷⁷ and, later, a preliminary injunction preventing the sale or rental of the house to anyone other than the complainant; the owner failed to comply and was ultimately cited for contempt.¹⁷⁸

The case was tried before an ALJ who found for the complainant and awarded monetary relief of approximately \$75,000, including a \$10,000 civil penalty.¹⁷⁹ The owner failed to comply with the ALJ decision, and DOJ filed a petition to enforce the order with the court of appeals, which upheld the ALJ ruling.¹⁸⁰ While undoubtedly a trying episode for the complainant, the case gave DOJ the opportunity to demonstrate its willingness to pursue

FHAA protections exhaustively on behalf of victims of discrimination.

Table 11.3 represents DOJ's prompt judicial action caseload as of December 6, 1993.¹⁸¹ As the table indicates, half of the actions are resolved either through settlement or conciliation.¹⁸² The table also shows that 14 of the 35 actions filed alleged discrimination based on family status, and 13 of the 35 actions alleged discrimination based on handicap discrimination.

Enforcing Conciliation Agreements and Subpoenas

The FHAA requires that, "whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed . . . for the enforcement of [the] agreement."¹⁸³ Under the regulations, the General Counsel has been charged with the obligation to make such referrals.¹⁸⁴

173 See *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, at 25,004 (HUD ALJ Dec. 21, 1989), *enforced*, 908 F.2d 864 (11th Cir. 1990).

174 DOJ requested prompt judicial action in three earlier cases, but in one election case a consent decree was entered, and the other two cases were conciliated making the prompt judicial actions unnecessary.

175 *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) at 25,003.

176 *Id.* at 25,004.

177 The district court issued an *ex parte* temporary restraining order on July 28, 1989, prohibiting respondent from selling or leasing the house or implementing any lease executed subsequent to the contract of sale with the complainants.

178 *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) at 25,004.

179 *Id.* at 25,016-17.

180 *HUD v. Blackwell*, 908 F.2d 864.

181 DOJ Caseload Database as of Dec. 6, 1993.

182 The power of a prompt judicial action is further supported by a partial list of temporary restraining order (TRO) assignments provided by HUD. The partial list of TRO assignments to OGC attorneys indicates that HUD investigated 67 complaints requiring prompt judicial actions between June 1991 and July 1993. Clearly, most of these claims were either resolved or dropped by DOJ prior to the filing of a prompt judicial action. See Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, letter to Frederick Isler, Deputy Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, July 6, 1993.

183 42 U.S.C. § 3610(c) (1988).

TABLE 11.3

DOJ Prompt Judicial Actions, 3/12/89-12/6/93

Status as of 12/6/93	Classification of discrimination				Total
	Race	Family status	Handicap	National origin	
Settled without filing	1	2	7	1	11
Motion to dismiss filed	1	—	—	—	1
Case dismissed after conciliation	1	4	—	1	6
Consent decree in election case	—	2	—	—	2
Consent decree in zoning case	—	—	1	—	1
TRO granted, PI granted, case dismissed	1	—	—	—	1
TRO granted, PI granted, consent decree	—	—	2	—	2
TRO granted	1	1	—	—	2
TRO granted, PI granted	—	2	—	—	2
TRO granted, PI denied	—	—	1	—	1
TRO denied, complaint filed	—	—	1	—	1
TRO denied	—	1	1	—	2
ALJ decision affirmed	1	—	—	—	1
United States won in election case	—	2	—	—	2
Total	6	14	13	2	35

Source: DOJ Caseload Database.

The Attorney General has discretion, as in zoning and land use referrals, to file a civil action against the respondent for breach of a conciliation agreement.¹⁸⁵ If the Attorney General chooses to pursue the claim, DOJ must commence a civil action no later than 90 days after the date of referral.¹⁸⁶ If the Attorney General does not pursue enforcement, the statute also authorizes any person aggrieved by the breach to pursue a private civil enforcement of the agreement.¹⁸⁷

Although the regulations indicate that HUD will submit all conciliation breaches to DOJ, HUD attempts to resolve breaches internally before notifying DOJ to proceed in Federal court.¹⁸⁸ However, if HUD cannot resolve the breach, the Secretary refers the matter to DOJ. DOJ's Housing and Civil Enforcement Section has one paralegal who regularly monitors compliance with HUD orders, including conciliations. If DOJ receives information about an alleged conciliation breach before HUD is notified, DOJ consults with HUD to

¹⁸⁴ 24 C.F.R. § 103.335 (1993).

¹⁸⁵ 42 U.S.C. § 3614(b)(2)(A) (1988).

¹⁸⁶ *Id.* § 3614(b)(2)(B).

¹⁸⁷ *Id.* § 3613(a)(1)(A).

¹⁸⁸ 24 C.F.R. § 103.335 (1993). See also Hancock 1991 interview, p. 60.

determine the appropriate method for proceeding.¹⁸⁹

Whenever possible, DOJ tries to avoid a court proceeding, because civil actions are costly and time-consuming for the aggrieved party, who often needs compliance as soon as possible, and for the Government as well. Since the FHAA became effective, DOJ has only filed five conciliation enforcement cases, all of which alleged discrimination based on familial status.¹⁹⁰ Instead of proceeding directly to court, DOJ has submitted some breaches for binding arbitration, which often results in a quicker resolution of the matter.¹⁹¹

HUD believes that conciliation breaches need more attention.¹⁹² If respondents know that conciliations will be enforced vigorously, they may be less likely to breach an agreement. In addition, complainants may be more willing to conciliate if they are confident that the agreement will be enforced strictly. For these reasons, OGC has offered openly to seek enforcement of conciliation agreements in Federal court, rather than requiring DOJ to litigate conciliation breaches.¹⁹³ According to HUD, the authority to enforce breaches in

conciliation agreements could be delegated to OGC without a change in the statute.¹⁹⁴

In addition to pursuing referrals from HUD, the Attorney General may seek enforcement of a subpoena issued by the Secretary or issued on behalf of any other party, including the defendant.¹⁹⁵ Subpoenas are issued to aid in investigations and hearings in administrative or judicial proceedings on behalf of HUD or any party in a HUD proceeding.¹⁹⁶ In addition to ordering enforcement of the subpoena, the court may award reasonable attorneys' fees and costs to the prevailing party other than the United States, and may hold the United States liable for attorneys' fees and costs pursuant to the Equal Access to Justice Act.¹⁹⁷

Appellate Litigation

As of December 6, 1993, DOJ has litigated 24 ALJ decisions in Federal appellate courts.¹⁹⁸ DOJ is ultimately responsible for all appellate litigation, including petitions to review and enforce HUD ALJ orders and decisions of the Federal courts. However, because HUD has a vested interest in appellate proceedings, DOJ is permitted to authorize HUD to litigate "in appropriate cases" subject to

189 "Memorandum of Understanding," p. 7.

190 DOJ Caseload Database as of Dec. 6, 1993.

191 Hancock 1991 interview, pp. 61-62.

192 Harry L. Carey, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Carey, HUD OGC July 1993 interview).

193 Ibid.

194 Ibid.

195 42 U.S.C. § 3614(c) (1988); 24 C.F.R. § 103.500(b) (1993).

196 Schwemm, *Law and Litigation*, § 26.4, p. 26-29. DOJ may only proceed for enforcement of a subpoena in the district court in which the person "resides, was served, or transacts business." 42 U.S.C. § 3614(c) (1988).

197 *Id.* § 3614(d)(2); 28 U.S.C. § 2412 (1988).

198 DOJ Caseload Database as of Dec. 6, 1993.

DOJ's ultimate review.¹⁹⁹ As noted above, DOJ has not authorized HUD to litigate any appeals, but the memorandum of understanding provides guidance for delegating responsibility in such instances.²⁰⁰

Judicial Elections

In a majority of cases, parties have elected to proceed in district court rather than pursue an administrative proceeding handled by HUD. As of October 14, 1993, parties have elected to proceed in Federal court in 369 of 619 charges issued by HUD, or in approximately 60 percent of all HUD charges.²⁰¹

Respondents have made the elections in 79 percent of the cases where election occurred.²⁰² As of October 14, 1993, respondents in 268 charges elected to proceed in Federal court, as compared to 77 complainants. In 24 charges, both the respondent and the complainant chose the judicial forum.²⁰³

Table 11.4 represents the number of election charges processed by DOJ as of December 6, 1993.²⁰⁴ The table indicates that DOJ addressed 293 election charges and resolved 166 by consent decree.²⁰⁵ Based on these figures,

only 17 cases went to court, 16 of which ended ultimately in a judgment for the United States.

Congress did not anticipate the high number of judicial elections, but instead expected that the administrative forum would serve the best interests of the litigants.²⁰⁶ Thus it is important to understand why the parties, especially the respondents, are electing a judicial forum.

Aggrieved parties may find elections preferable because proceeding in Federal court provides potential recovery of punitive damages.²⁰⁷ In addition, even if the case does not actually proceed to court, the threat of punitive damages may raise the amount of money a complainant can receive in a settlement. However, because it is difficult to prove the level of intent required to warrant punitive damages, the possibility of obtaining punitive damages may not adequately explain the high percentage of elections made by plaintiffs.²⁰⁸

In light of the case backlog in most Federal district courts, respondents may elect judicial proceedings as a tactical move to slow the progress of the case.²⁰⁹ However, defendants

¹⁹⁹ "Memorandum of Understanding," p. 9. For a full discussion of HUD's interest in appellate litigation, see chap. 10.

²⁰⁰ According to Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, HUD's OGC has requested authorization to litigate at least one appeal, but DOJ denied OGC's request. Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., Dec. 15, 1993 (hereafter cited as Wilson, HUD OGC December 1993 interview).

²⁰¹ Janet Rouamba, docket clerk, Office of Administrative Law Judges, telephone interview, Oct. 14, 1993 (hereafter cited as Rouamba interview). According to Paul Hancock, DOJ initially anticipated that only 25 percent of the parties would choose to proceed in Federal court. See Hancock 1991 interview, p. 10.

²⁰² Rouamba interview. This figure represents the 268 charges in which only the respondent elected a judicial forum and the 24 charges in which both parties elected to proceed in Federal court. Complainants elected in 27 percent of the total charges, including the 24 charges in which both parties made elections. Thus, there is a 6 percent overlap.

²⁰³ *Ibid.*

²⁰⁴ DOJ Caseload Database as of Dec. 6, 1993.

²⁰⁵ This figure includes 3 consent decrees which were filed but not entered by the court as of Dec. 6, 1993.

²⁰⁶ *FHAA House Committee Report*, 1988 U.S.C.A.N. 2173, 2178.

²⁰⁷ Hancock 1991 interview, p. 67.

²⁰⁸ Ware, "New Weapons," p. 69.

²⁰⁹ *Ibid.*

TABLE 11.4
DOJ Election Cases, 3/12/89-12/6/93

Status as of 12/6/93	Race	Family status	Handicap	Sex	National origin	Religion	Combined basis	Total
Case to be filed	3	4	4	—	—	—	1 ¹	12
Pending	17	48	12	2	1	2	4 ²	86
Settlement	1	1	2	—	—	—	1 ³	5
Consent decree	24	114	18	3	2	—	5 ⁴	166
Charge withdrawn	—	—	1	—	—	—	—	1
Charge not filed	—	—	1	—	—	—	1 ⁵	2
Motion to dismiss granted	—	—	1	—	—	—	—	1
Dismissed and intervention on appeal	—	—	—	1	—	—	—	1
Summary judgment for U.S. & pending remedy	—	1	—	—	—	—	—	1
Summary judgment & damages for U.S.	—	1	—	—	—	—	—	1
Summary judgment for U.S. on liability with partial consent decree & damages	—	—	1	—	—	—	—	1
Stipulated judgment	1	1	—	—	—	—	—	2
Judgment for U.S.	2	8	—	—	—	—	1 ⁵	11
Judgment for defendant	1	—	—	—	—	—	—	1
Judgment for defendant, consent decree	—	1	—	—	—	—	—	1
Judgment for defendant reversed on appeal	—	1	—	—	—	—	—	1
Total	49	180	40	6	3	2	13	293

Source: DOJ Caseload Database.

¹ Based on both sex and familial status.

² Three based on race and familial status; one based on race and national origin.

³ Entered in a charge for alleged interference in the enjoyment of housing rights.

⁴ Two based on race and sex; one based on race and familial status; one based on sex and handicap; and one based on a charge of interference with enjoyment of housing rights.

proceeding in Federal court must defend themselves against the United States and the skills, resources, and experience of DOJ, which they perceive to be overwhelming or intimidating.²¹⁰ Despite the fact that HUD attorneys have developed equal expertise in litigating housing matters since the FHAA went into effect, the perception remains that DOJ is a more formidable opponent because DOJ attorneys have been litigating fair housing cases since 1968 under the original Fair Housing Act. Indeed, as table 11.4 indicates, over half of the election cases filed by DOJ are resolved prior to an actual courtroom trial.

Defendants may also choose a civil court proceeding based on the fear that HUD administrative law judges are biased in favor of the OGC attorneys litigating the cases,²¹¹ despite the fact that the ALJs' decisionmaking process is functionally separate from HUD's OGC.²¹² In addition, because the Secretary has recently increased the use of his review authority to reverse adverse ALJ decisions, it might appear to respondents that the Secretary, as the final arbiter in the administrative forum, is also biased in favor of the OGC

attorneys.²¹³ The high number of elections may simply result from the fact that both parties are more familiar and thus more comfortable with civil court than with administrative proceedings.²¹⁴

Because an examination of cases filed in both forums reveals no significant advantage to having a jury serve as the factfinder in fair housing cases, the administrative process may prove to be a better forum for both parties.²¹⁵ Administrative forums are less expensive and more expeditious than Federal court proceedings. In addition, both parties may benefit from decisions made by administrative law judges who are selected based in part on their expertise in housing law.

Although the FHAA requires DOJ to file a claim in every election,²¹⁶ DOJ has returned a few election charges for further investigation by HUD.²¹⁷ Although FHAA regulations provide that DOJ may consult with the General Counsel if new court decisions or new evidence affect HUD's initial reasonable cause determination,²¹⁸ OGC finds it troubling that DOJ refuses to proceed in some cases.²¹⁹ OGC asserts that DOJ returns

210 Ibid. For example, DOJ has more financial resources than HUD to devote to hiring expert witnesses in election cases. Hancock June 1993 interview.

211 Strong, HUD OGC July 1993 interview.

212 24 C.F.R. § 104.140 (1993).

213 See chap. 10 for a further discussion of the Secretary review process.

214 Hancock 1991 interview, p. 67.

215 Ware, "New Weapons," p. 70. See also 1 C.F.R. § 305.92-3 (1993) (Recommendations of the Administrative Conference of the United States on Enforcement Procedures Under the Fair Housing Act).

216 42 U.S.C. § 3612(o) (1988).

217 According to Joseph Rich, DOJ has returned no more than five election cases to HUD during the entire FHAA period. See Rich interview. However, HUD OGC believes that DOJ has refused to file at least 10 election cases since the FHAA took effect. See Strong, HUD OGC July 1993 interview.

218 24 C.F.R. § 103.410(e) (1993).

219 Pratt, HUD OGC July 1993 interview; Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, telephone interview, Oct. 22, 1993 (hereafter cited as Strong October 1993 interview).

elected charges when DOJ does not agree with the substantive issues involved in HUD's reasonable cause determination.²²⁰ However, DOJ maintains that it only returns an elected HUD charge when new information makes filing a claim inappropriate or frivolous.²²¹ While DOJ acknowledges that it must support the Secretary's reasonable cause determination, DOJ argues it must also fulfill its obligations to the Federal courts to file only sound claims.²²²

DOJ and the Newly Protected Classes

DOJ's top priority in the enforcement of protections for disabled persons has been the challenge of local zoning laws used to block the construction of group homes for disabled persons.²²³ DOJ filed its first disability-based claim in June 1989 against the city of Chicago Heights, Illinois, which had denied a special use permit to construct a group home for 15 mentally disabled adults.²²⁴ DOJ charged that the denial was based on the handicap of the residents, in violation of section 804(f) of the FHAA.²²⁵ To avoid further litigation, the

city signed a consent decree, without any admission or concession of liability, granting the permit and awarding \$30,000 to the builder as partial reimbursement for costs.²²⁶ The city also agreed to place \$15,000 in an escrow account to be distributed evenly among the first 15 residents of the facility as compensation for the delay caused by the discriminatory act.²²⁷ In addition to litigating denials of building permits for group homes, DOJ is developing policy by challenging municipal "spacing" requirements that limit the distance between group homes.²²⁸ In one such case in which DOJ intervened, a local law required that all community living arrangements must be located at least 2,500 feet apart.²²⁹ In granting summary judgment for the plaintiffs on the issue of liability, the district judge stated that the zoning board's "strict adherence to a rule that has the effect of precluding handicapped individuals from residing in the residence was precisely the type of conduct that the FHAA sought to overcome."²³⁰

DOJ also litigated a claim against members of a homeowners' association for using a restrictive covenant to prevent a homeowner

²²⁰ For a full discussion of the substantive issues involved in returned election charges, see chap. 10.

²²¹ Hancock December 1993 interview.

²²² Hancock December 1993 interview.

²²³ Rich, p. 1344.

²²⁴ *United States v. City of Chicago Heights*, 2 Fair Housing-Fair Lending (P-H) ¶ 19,369, at 19,551 (N.D. Ill. Jan. 16, 1990) (consent decree).

²²⁵ *Id.* at 19,551.

²²⁶ *Id.* at 19,552.

²²⁷ *Id.*

²²⁸ Hancock June 1993 interview.

²²⁹ *United States v. Village of Marshall*, 787 F. Supp. 872, 873 (W.D. Wis. 1991) (summary judgment).

²³⁰ *Id.* at 879.

from selling to a group home for the disabled.²³¹ Another DOJ case challenged an owner's refusal to negotiate the sale of a house to an organization that provided group homes for learning disabled children.²³²

In the early years of the statute, DOJ brought four cases involving the new fair housing protections for individuals recovering from drug addictions or alcoholism.²³³ DOJ obtained mixed results in *United States v. Southern Management Corp.*, a test case designed to establish the rights of persons recovering from addiction.²³⁴ The lower court ruled that individuals recovering from drug abuse and participating in a treatment program are covered by the FHAA.²³⁵ The court issued an injunction barring property owners from refusing to rent to individuals who had completed a year in a drug treatment program, who were drug free for a year, and who were entering the reentry phase of their treatment.²³⁶ In addition to the jury award of \$10,000 in compensatory damages and \$26,000 in punitive damages, the district court assessed a \$50,000 civil penalty for dis-

crimination against participants in a county-run treatment program considered to be drug-free.²³⁷

On appeal, the fourth circuit vacated the entire monetary award, but still affirmed the injunctive relief and liability determinations.²³⁸ The fourth circuit added that protection from discrimination for individuals recovering from addiction "does not per se exclude from its embrace every person who could be considered a drug addict," but is instead designed to recognize addiction as a disease that may be treated through rehabilitation.²³⁹ Thus, the FHAA extends protection to individuals with a history of drug or alcohol problems, if they discontinue using drugs or alcohol and participate in recovery or a rehabilitation program.²⁴⁰ DOJ has defended the FHAA against two challenges to its constitutionality based on its coverage of family status. In *Seniors Civil Liberties Association v. Kemp*, the 11th circuit affirmed a lower court ruling that the over-55 provisions of the FHAA are well within Congress' commerce clause power and do not violate any of the

²³¹ Rich, p. 1345 (citing *United States v. Scott*, 788 F. Supp. 1555 (granting summary judgment for United States on liability), *later proceeding on relief*, 809 F. Supp. 1404 (D. Kan. 1992)).

²³² Rich, p. 1345 (citing *United States v. Saxonville Realty, C.A. 90-12744MA* (D. Mass. Dec. 20, 1991) (consent decree)).

²³³ Rich, p. 1345. Persons currently using illegal substances are not protected against discrimination. See 42 U.S.C. § 3602(h) (1988); 24 C.F.R. 100.201(a)(2) (1993).

²³⁴ *United States v. Southern Management Corp.*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,651 (E.D. Va. Oct. 15, 1990), *aff'd in part, rev'd in part*, 955 F.2d 914 (4th Cir. 1992).

²³⁵ *United States v. Southern Management Corp.*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,651 at 16,338 (E.D. Va. Oct. 15, 1990).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992). The award was vacated because of a perceived "ambiguity" in Congress' statutory exclusion of those "addicted." *Id.* at 923. The grammar of the statute was ambiguous because it was unclear whether "current" modifies "use" [of drugs] alone or also addiction [to drugs]. *Id.* at 920.

²³⁹ *Id.* at 923.

²⁴⁰ 42 U.S.C. § 3602(h) (Law. Co-op. 1983 and Supp. 1993). See also FHAA House Committee Report, 1988 U.S.C.C.A.N. 2173, 2183.

constitutional rights of property owners.²⁴¹ In February 1993, the 10th circuit also rejected a similar constitutional challenge to the FHAA raised by the respondents on appeal from an ALJ decision.²⁴² Thus, DOJ is confident that the FHAA will continue to resist constitutional challenges.²⁴³

The majority of family status cases involve either "adults only" policies or unit occupancy limits adversely affecting families with children. Since Congress recognized that certain housing units catering to older persons should be exempt from the familial status provisions, so as not to adversely affect the rights of older residents²⁴⁴ it is understandable that most litigation over "adults only" policies involves defendants who claim exemption as housing providers for older persons.

Remedies

After the passage of the Fair Housing Amendments Act (FHAA), DOJ moved quickly to assert its new opportunity to seek monetary relief by filing two cases the day

after the FHAA became effective. In both cases, DOJ sought monetary damages for the alleged pattern or practice of racial discrimination in apartment rentals.²⁴⁵

In *United States v. Rent America, Corp.*, the court ruled not only that the Government was entitled to request monetary relief for actual damages, damages for emotional distress, and punitive damages,²⁴⁶ but also that such relief could compensate for discrimination occurring before the FHAA became effective.²⁴⁷

DOJ computes and recommends damage awards based on the seriousness of the violation. In this assessment, DOJ considers the extent of the injury to the aggrieved parties, including out-of-pocket costs and emotional distress.²⁴⁸ DOJ tends to combine all of the separate damages together to judge the overall value of the case. In addition, DOJ always assesses the defendant's financial resources.²⁴⁹

Since the FHAA became effective March 12, 1989, through May 1994, DOJ won \$29,651,645.72 for victims of discrimination

²⁴¹ *Seniors Civil Liberties Ass'n v. Kemp*, 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). The court also dismissed constitutional challenges based on vagueness of the act and taking of property without just compensation.

²⁴² *Morgan v. Secretary of HUD*, 985 F.2d 1451 (10th Cir. 1993), *aff'd in part, rev'd in part* HUD v. Morgan, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991).

²⁴³ Hancock June 1993 interview.

²⁴⁴ 42 U.S.C. § 3607(b)(1)-(3) (1988).

²⁴⁵ Rich, p. 1338 (citing *United States v. Rent America, Corp.*, 734 F. Supp. 474 (S.D. Fla. 1990) and *United States v. Klinkner*, DOJ No. 175-39-25 (D. Minn. Dec. 19, 1989) (consent decree)).

²⁴⁶ *United States v. Rent America, Corp.*, 734 F. Supp. 474, 482 (S.D. Fla. 1990). Schwemm thinks the law fails to explain clearly whether or not DOJ can request punitive damages on behalf of a nonintervening aggrieved party under the provision allowing for "other appropriate relief." Schwemm, *Law and Litigation*, § 26.2(5)(c), p. 26-21.

²⁴⁷ The court applied the three-part test used in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) requiring consideration of: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in the law upon those rights." 734 F. Supp. 474, 479-80 (S.D. Fla. 1990). It appears that the penalties may apply retroactively only if the substantive aspects of the discriminatory acts were also impermissible under the old FHA, otherwise, defendants' substantive rights might be deprived.

²⁴⁸ Hancock June 1993 interview.

²⁴⁹ *Ibid*.

in 271 cases where damages were awarded,²⁵⁰ including \$20 million from the New York City Housing Authority.²⁵¹ Fair housing groups received \$586,500 in 23 of these cases, and in 11 cases other aggrieved parties received awards totaling \$326,221.²⁵² Civil penalties of \$719,100 were assessed in 26 cases.²⁵³

While DOJ has succeeded in winning compensatory damages for the victims of housing discrimination, it has been considerably more difficult to obtain punitive damages and compensation for emotional distress suffered by the aggrieved parties. Recently, a district court judge drastically reduced a jury award of damages for emotional distress and punitive damages in a private (non-DOJ) civil action.²⁵⁴ The jury in *Darby* awarded the plaintiffs \$200,000 in compensatory damages, including over \$185,000 for emotional distress. The judge reduced the compensatory award to \$50,000, in order to reduce the jury's award for emotional distress, because it far exceeded the damages awarded in other housing discrimination cases. In addition, the jury had awarded the plaintiffs \$250,000 in punitive damages that the district judge reduced to \$50,000, because the jury award was not

found to be reasonably related to the reduced amount of compensatory damages.²⁵⁵

DOJ has also succeeded in obtaining damages for fair housing organizations. These awards not only compensate fair housing groups for the testing they conduct, but also include compensation for future fair housing training sessions they may conduct for a defendant's personnel. As a matter of policy, DOJ has pursued damages "for private fair housing groups who played important roles in uncovering the alleged discrimination involved."²⁵⁶

Although in the view of one DOJ official, "The most significant awards of monetary relief have come in cases involving race discrimination,"²⁵⁷ awards have also been made in cases where members of the newly protected classes were the plaintiffs.²⁵⁸ However, especially in group home situations, injunctive relief is more important to the aggrieved parties.²⁵⁹

In addition to monetary relief, DOJ also requests affirmative measures to prevent future or continuing discrimination.²⁶⁰ Affirmative relief may include requiring a defendant to advertise a nondiscriminatory policy, conduct fair housing sensitivity training for

²⁵⁰ Attachment to DOJ Comments, p. 3.

²⁵¹ *Davis v. New York City Housing Auth.*, Nos. 90-CIV-0628(PNL), 92-CIV-4873(PNL), 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992). Under the consent decree, HUD is required to issue 200 Section 8 housing vouchers for use in the private housing industry. The \$24 million award is calculated based on the estimated value of the vouchers over a 15 year period.

²⁵² Attachment to DOJ Comments, p. 3.

²⁵³ *Ibid.*

²⁵⁴ *Darby v. Heather Ridge*, 827 F. Supp. 1296 (E.D. Mich. 1993), *denying motion for new trial, granting, in part, motion for remittitur*, 806 F. Supp. 170 (1992).

²⁵⁵ *Id.* DOJ continues to assert that "emotional distress and punitive damages

²⁵⁶ Rich, p. 1348.

²⁵⁷ *Ibid.* This result is consistent with DOJ's litigation priorities.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ 42 U.S.C. § 3614(d)(1)(A) (1988).

employees, adopt objective criteria to screen rental applicants, or maintain records on the race of applicants.²⁶¹

DOJ often requires apartment buildings to post listings of the cost and availability of apartments to make it more difficult for housing providers to give false information about availability and prices.²⁶² DOJ also asks for periodic reports, sometimes including a photograph of the listings, to ensure continued compliance with the enforcement order.²⁶³

Funding and Resources

The Housing and Civil Enforcement Section is headed by a section chief and three deputy chiefs.²⁶⁴ To enforce the FHAA, the Housing and Civil Enforcement Section was initially authorized to hire 33 people to serve

as attorneys, paralegals, and clerical support.²⁶⁵ At the end of FY 1990, the section consisted of 26 attorneys, 4 professional staff, and 9 clerical staff.²⁶⁶ By the close of FY 1991, the section had an operating staff of 30 attorneys, 6 professional staff, and 10 clerical staff members.²⁶⁷ At the close of FY 1992, the section had a \$6.357 million budget,²⁶⁸ and consisted of 37 attorneys, 9 professional staff, and 10 clerical staff.²⁶⁹ The Civil Rights Division budget for FY 1993 was \$52.7 million, of which \$6.415 million was intended for housing and civil enforcement.²⁷⁰ The Housing and Civil Enforcement Section staff for FY 1993 totaled 58, including 33 staff attorneys.²⁷¹

The FY 1994 Civil Rights Division overall budget was \$59.956 million, with Housing and Civil Enforcement receiving \$9.283 million.²⁷² In December 1993 the Attorney General

261 Schwemm, *Housing Discrimination Law*, p. 288.

262 Hancock 1991 interview, p. 57.

263 *Ibid.*, p. 58.

264 Paul Hancock, Chief, Housing and Civil Enforcement Unit, 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.

265 Ware, "New Weapons," p. 58.

266 "Civil Rights Division Historical Tracking of Full-Time Permanent Positions," supplied by the Department of Justice, Nov. 12, 1993.

267 *Ibid.*

268 DOJ 1994 *Hearings*, p. 667. Between November 1991 and September 1992 DOJ devoted a considerable amount of time and resources to the investigation of race discrimination in mortgage lending in the *Decatur Federal Savings and Loan Ass'n* case. DOJ 1994 *Hearings*, p. 685.

269 "Civil Rights Division Historical Tracking of Full-Time Permanent Positions," supplied by the Department of Justice, Nov. 12, 1993.

270 DOJ 1994 *Hearings*, p. 665.

271 Paul Hancock, Chief, Housing and Civil Enforcement Unit, 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 (hereafter cited as DOJ submission letter).

272 See Jean Chipouras, Budget Analyst, Budget Office, Civil Rights Division, U.S. Department of Justice, telephone interview, Aug. 15, 1994. See also "Civil Rights Division Fund Tracking Chart Enacted Levels," supplied by the Department of Justice, July 1, 1993; DOJ 1994 *Hearings*, p. 667.

stated that she had reallocated \$1.1 million of the FY 1994 budget to the Housing and Civil Enforcement Section.²⁷³ The reallocation was used to fund 18 new staff positions for the section.²⁷⁴

Until the introduction of the election process, DOJ attorneys in the Housing and Civil Enforcement Section did not litigate in jury trials. In order to prepare for jury trial litigation, the attorneys attended the DOJ Advocacy Institute and a 1-day retreat, and consulted other DOJ attorneys about jury selection and courtroom demeanor.²⁷⁵ In addition, "some attorneys on the section staff had jury trial experience from previous employment in the private sector," and others with such experience were hired. Informal and formal discussions and training on the job has been ongoing.²⁷⁶

Because of the unanticipated high numbers of judicial elections, in the past DOJ has had to take time and resources away from pattern and practice cases in order to litigate the large number of elections.²⁷⁷ However, DOJ plans to enlist the assistance of U.S. attorneys offices to litigate election cases as well as prompt judicial actions.²⁷⁸ According to the

Attorney General, the assistance of the U.S. attorneys is intended to allow the Housing and Civil Enforcement Section to devote more of its resources to testing initiatives and enforcement efforts against lending discrimination and insurance redlining.²⁷⁹ In FY 1994 DOJ planned to use \$1.46 million to expand the mortgage lending initiative and the testing program.²⁸⁰ The allocation will be used to formulate and conduct testing and to hire testers on a contractual basis.²⁸¹ DOJ has also allocated resources for education and public outreach. Between October 1988 and April 1993, DOJ officials made over 200 public appearances to discuss FHAA enforcement with representatives of the housing industry, State and local governments, legal organizations, and fair housing advocacy groups.²⁸² Although representatives from both DOJ and HUD are usually invited to speak at these conferences, the two departments try to coordinate their appearances to avoid duplication.²⁸³

DOJ has maintained an outreach program for housing providers to encourage voluntary compliance.²⁸⁴ In addition, DOJ wrote to local civil rights and fair housing organizations

273 *AG Reno Announces Major Expansion of DOJ's Housing Section*, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

274 *Ibid.* In FY 1994, the section received 89 FTEs and 101 actual positions according to the Civil Rights Division's Budget Office. See Chipouras interview, Aug. 15, 1994.

275 Hancock June 1993 interview.

276 Attachment to DOJ Comments, p. 3.

277 Hancock 1991 interview, p. 68.

278 *AG Reno Announces Major Expansion of DOJ's Housing Section*, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

279 *Ibid.*

280 *DOJ 1994 Hearings*, p. 685. The mortgage lending initiative is designed to attack the racially discriminatory mortgage lending practices of some financial institutions.

281 *Id.*

282 "Public Appearance and Outreach Efforts Since Enactment of the Fair Housing Amendments Act of 1988," (from Oct. 25, 1988 to Apr. 29, 1993), DOJ submission letter.

283 Hancock 1991 interview, p. 35.

284 *Ibid.*, p. 33.

across the country advising them of the changes in the law.²⁸⁵ DOJ also has spoken with organizations representing persons with

disabilities, to explain the new protections afforded them.²⁸⁶

²⁸⁵ Ibid., p. 32.

²⁸⁶ Ibid., p. 33.

12. Findings and Recommendations

The passage of the Fair Housing Amendments Act of 1988 (FHAA) required a complete reorientation of the U.S. Department of Housing and Urban Development, from an agency devoted to resolving fair housing complaints through conciliation and voluntary compliance to one devoted to administrative enforcement, with all the changes such a transformation requires. HUD staff were required to learn how to make a case that could withstand scrutiny in a judicial setting—how to amass evidence, present findings, determine cause, and ultimately defend decisions before either an administrative or, through the Department of Justice, a Federal district court judge.

This shift in emphasis required a substantial increase and retraining of staff, creation of complaint processing systems, and maintenance of quality assurance in securing justice for individual complainants. In addition, the law gave HUD new tools to make fair housing laws work, including the power to file complaints at the Secretary's discretion, the availability of civil penalties for offenders, and certain legal tools, including the power to subpoena witnesses, conduct discovery, and seek prompt judicial action, among others.

In response to these new tasks, HUD has moved from construction of an administrative structure during the Bush administration to promulgation of new policy and enforcement initiatives in the Clinton administration. Under Secretary Cisneros, HUD has become the focus of much of the civil rights activity in the new administration.

The Department of Justice also acquired new responsibilities to obtain prompt judicial action and pursue charges of discrimination on behalf of individual victims in Federal district court. The enforcement scheme envisioned by the Fair Housing Amendments Act relies heavily on coordination and cooperation between HUD and DOJ. In addition, DOJ must continue to play a leading role in initiating

fair housing cases of public importance and where a pattern or practice of discrimination can be demonstrated.

Apart from the new administrative responsibilities of both HUD and DOJ, the Fair Housing Amendments Act expanded the bases on which discrimination is barred to include disability and family status (families with children). HUD was assigned the task of setting policy governing the definition of discrimination against the newly covered groups, and both HUD and DOJ were called upon to demonstrate the Government's commitment to enforcing the new protections through filing complaints and lawsuits and prosecuting cases before administrative and Federal district court judges.

Part I: The Setting

Finding: Overall, the resources provided by Congress and the President have fallen well short of what is needed by HUD to carry out its new responsibilities. Budget analyses reveal that an enormous increase in workload has occurred, both because of increased number of complaints from the original protected groups, complaints from the newly protected groups, vastly increased investigative requirements, and lack of fully certified State and local agencies to process complaints. Consequently, enforcement of the new statute has entailed substantial backlogs and lengthy delays in processing cases from the first year in which the law became effective.

In addition, until recently HUD has taken a passive approach to fair housing enforcement, failing to utilize its authority to file complaints (see below), to provide adequate outreach and education, and to provide adequate policy guidance on fair housing discrimination.

Recommendation: Congress and the President should ensure that funds and other resources are provided to fully meet HUD and DOJ's expanded enforcement responsibilities

under the Fair Housing Amendments Act of 1988. Congress should hold oversight hearings to examine how well HUD and Justice have implemented the law and what additional resources may be required. In addition, HUD should evaluate all its activities to ensure implementation of proactive enforcement of fair housing law, and not simply respond to individual complaints of discrimination.

Part II: Complaints

Management

Notwithstanding the difficulties inherent in implementing a comprehensive new scheme of administrative law, HUD's management of the complaint process has been deficient since 1989 in several respects.

Procedures

Finding: HUD has lacked a systematic approach to processing complaints that would ensure timely, consistent management of complaints across regions.

HUD has failed to promulgate a set of systematic instructions or a comprehensive manual that would guide staff in the uniform intake, investigation, and disposition of complaints. For example, HUD has failed to define administrative closure or systemic complaints. The majority of the instructions disseminated in the form of a series of technical guidance memoranda (TGMs) have been issued in draft form and never finalized. It is not clear whether the TGM series is intended to serve primarily as a reference for procedures or policy or both.

Recommendation: HUD should develop and publish a fair housing complaints manual instructing staff on how to process complaints and on current HUD policy regarding what evidence is needed to support a claim of discrimination under Title VIII. HUD should review existing instructions, revise them as needed and finalize them, organizing them into a set of easily-referenced memoranda whose primary aim is to provide technical guidance. Policy guidance should be provided through a complaints manual and appropriate, timely supplements to such a manual.

HUD should analyze the topics covered in existing memoranda and add new instructions as appropriate.

Travel

Finding: HUD instruction to staff appears to discourage onsite investigation of complaints, which is often necessary to investigate charges fully and to conduct conciliation.

Recommendation: HUD should ensure that complaints are investigated onsite as necessary by allotting sufficient funds and staff time for travel.

Testing

Finding: Intake procedures do not appear to emphasize identifying cases amenable to immediate testing as a technique of investigation. In general, testing for disparate treatment in individual cases appears little used by HUD.

Recommendation: Testing should be routinely incorporated in HUD's investigative techniques. HUD should instruct staff to identify cases for testing for disparate treatment and disparate impact as soon as possible after they are filed, and should maintain the ability to test quickly as needed, using preselected contractors.

Training

Finding: HUD staff training, while showing improvement, has been sporadic and uneven since 1988. Budgets from year to year have varied enormously. Training has been focused on national or regional sessions of a few days' duration. Regional offices have been left on their own to provide on-the-job training, without national goals or standards.

Recommendation: A comprehensive approach to training new and continuing staff should be developed and implemented. Budgets should be developed and maintained consistently from one year to the next. HUD should explore arrangements for ongoing professional training at the regional and field level using educational resources available on location at law schools and paralegal training programs. Regional offices or their organizational successors should be required to meet clearly defined training goals for new and continuing staff.

Conciliation

Finding: Standards for the conciliation of complaints have been lacking. HUD's interest in resolving the complaint, often prompted by large complaint backlogs, may result either in undue pressure on the complainant, who may be unaware of his or her options and most likely lacks counsel, to settle for less compensation than might otherwise be available, or on the respondent, who may feel coerced into a settlement of complaint without basis. Conciliation agreements must serve the public interest, but the implementation of provisions in such agreements that protect the public interest are apparently not often monitored, except for the receipt of required written reports.

Recommendation: HUD should revisit its instruction to staff regarding conciliation, and care must be taken that the parties' rights are fully respected, including their right to refuse conciliation if they so wish. Public interest provisions of conciliation agreements should be aggressively monitored. Such mandates can only be implemented through a sound quality assurance program.

Withdrawals

Finding: Many complaints are resolved when complainants withdraw their complaints in return for a given resolution, sometimes with the encouragement of HUD staff. In such cases neither formal agreements enforceable by HUD nor endorsement of the resolution as in the public interest by HUD are required. Respondents who have apparently discriminated are permitted confidential settlements, and they escape future detection as repeat offenders. Withdrawals with resolution appear to substitute for the conciliation process intended by Congress.

Recommendation: Complainants should be fully informed as to the consequences of resolving a complaint outside the conciliation process, which include that HUD assumes no responsibility for enforcing such agreements. Respondents should be made aware that resolution of a complaint in return for withdrawal does not preclude the Secretary from pursuing the complaint or referring it to the

Department of Justice or other appropriate legal authority. Such withdrawals should be routinely reviewed as potential Secretary-initiated complaints.

Timeliness

Finding: In the vast majority of cases, HUD has not made a cause determination within the 100-day benchmark set by Congress. While it can be anticipated that some complaints will require more than 100 days to reach a determination, Congress clearly expected that HUD would reach a conclusion as to reasonable cause within 100 days in most situations. Delays beyond 100 days risk a court decision that the delay has weakened the complaint, and they are costly to all the parties. In addition, as cases age they become more difficult to prove, thus permitting discrimination to go unaddressed.

Recommendation: HUD should reexamine its procedures, staffing, and resources and institute procedures that will result in timely processing of most complaints without sacrificing the quality of its investigations, determinations, or other essential areas of fair housing enforcement. If the reexamination reveals reasons why HUD cannot determine cause within 100 days, HUD should make those reasons known and seek the resources needed to correct the situation.

Consistency

Finding: Not only has HUD as a whole failed in the majority of cases to make a cause determination within 100 days, but HUD's regional offices have also varied widely in their methods of case management and their ability to complete investigations in a timely fashion prior to evaluation of the complaint for a cause determination. For example, the regions also have widely varying backlogs measured as a percentage of the total caseload that exceeds 100 days and 200 days.

Recommendation: HUD should evaluate each region's performance and determine what factors are responsible for the wide variation in processing times. Based on this evaluation, HUD should adjust staff and resources, training, and headquarters

monitoring in order to achieve a uniformly timely disposition of complaints.

Organization

Finding: The division of responsibility for administering the 1988 Fair Housing Amendments Act between HUD's General Counsel and the Assistant Secretary for Fair Housing and Equal Opportunity has resulted in the anomaly whereby no one below the Secretarial level has sole responsibility for the equitable and efficient implementation of the law. Furthermore, implementation of the law at the regional level has been accomplished by delegating supervisory authority to a regional administrator responsible for a variety of functions in addition to fair housing. This delegation has also had the effect of severing policy and administrative responsibilities from the Assistant Secretary for Fair Housing and Equal Opportunity.

Recommendation: A single independent administrative agency within HUD at the deputy secretary level should be created to carry out HUD's responsibilities under the law. This agency would contain the legal and general fair housing staff required to enforce the law.

HUD should ensure that its regional and/or field structure for fair housing enforcement, however reorganized, reports directly to the agency head. Similarly, regional attorneys assigned fair housing duties should report to and be evaluated by both the General Counsel and the Assistant Secretary. Should an independent agency be created, the Office of Administrative Law Judges should remain an independent entity within HUD.

Administrative Adjudication

Overall, the administrative adjudication program set up by the Fair Housing Amendments Act has been a reasonably effective tool of fair housing enforcement once cause determinations were made. On their face, the decisions of administrative law judges (ALJs)

have been reasoned in a competent fashion, and have marshalled fact and law appropriately to justify their conclusions in accordance with HUD policy. Damage awards have been at least commensurate with the damages awarded in the court system. At the same time, the ALJs have treated respondents fairly and have found in favor of respondents against whom solid proof was lacking. For this reason, it is unlikely that many ALJ decisions will be overturned on appeal.

HUD's attorneys appear to have been able to establish the reach of the FHAA at, or certainly close to, its widest defensible limits in the vast majority of cases reviewed. The statutory and regulatory interpretations offered and the standards of proof employed have resulted in fairly aggressive enforcement of the FHAA. Despite the newness of the amendments, the heretofore "socially acceptable" nature of housing discrimination against children and some disabled persons, and the ignorance of the law or lack of ill-will exhibited by many defendants, HUD ALJs have generally avoided creating loopholes and allowing excuses.

The cases that have been most problematic for the ALJs are also instructive. In two cases, *HUD v. Downs* and *HUD v. Williams*, ALJs condoned inquiries about a person's protected status, despite HUD's argument that the mere inquiry is illegal.¹ These decisions appear to create a zone of conduct in which an ALJ will not penalize a person for what the ALJ perceives to be a slight mistake without proof of intent to discriminate. Such attempts to draw fine distinctions are problematic and could lead to uneven and perhaps unjust enforcement of the law.

Interventions

Finding: Only the parties to a case may appeal the final agency decision reached after an administrative hearing. In each case, HUD serves as the charging party on behalf of both

¹ *HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011 (HUD ALJ Sept. 20, 1991); *HUD v. Williams*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

the complainant and the public interest. Since the final agency decision is in effect the Secretary's decision, HUD's OGC cannot appeal adverse administrative decisions. A complainant represented only by HUD, who loses in the administrative forum, therefore cannot appeal the decision unless he or she intervenes in the administrative forum to become a party to the case. In addition, intervention is the only method by which complainants may argue their own position in the administrative forum if the complainant's interests differ from the public interest in the ALJ proceeding. Under the current law, an aggrieved person adversely affected by an ALJ decision who is not an officially a party to the case must file a timely request for intervention. However, the law does not clearly set the period for a timely request. In addition, the ALJs have disagreed about when an intervention request will be considered timely.

Recommendation: HUD should develop clearer regulations governing the intervention process. HUD should set a reasonable timeframe in which aggrieved persons may intervene in the administrative process. Recognizing that reasonable differences occur as to the best interests of aggrieved persons and of the public, HUD should make clear that aggrieved persons may intervene at any stage in the administrative process, up to and including just prior to the deadline for any appeal, in order to present their own case or to preserve a right to appeal an adverse decision in Federal court.

Part III: HUD-Funded Activities

In addition to fair housing activities carried out by HUD staff directly, HUD funding of State and local agency programs and non-profit fair housing groups makes a significant contribution to expanding the reach of Title VIII. State and local fair housing agencies have historically been a presence in areas

where HUD resources do not permit Federal activity, thereby providing service to underserved areas and allowing HUD to focus resources on areas where no alternative agencies exist. Such agencies can continue to perform important educational and outreach functions and provide local access to fair housing enforcement with support from the Fair Housing Assistance Program.

Fair housing groups assisted by the Fair Housing Initiatives Program can also play an important educational role, provide representation to complainants, ferret out local patterns of discrimination, and conduct fair housing tests of allegations of discrimination and audits of fair housing opportunities.

Fair Housing Assistance Program

The Fair Housing Assistance Program has perforce been completely revamped by the Fair Housing Amendments Act of 1988. Agencies must meet the standards set by the new act, and while upwards of two dozen are in the process of doing so, only two have been judged to be operating under substantially equivalent statutes and have actually been granted status as substantially equivalent agencies.² In view of this limited experience, findings cannot be extensive, but certain observations are warranted.

HUD Reimbursement

Finding: Certification of substantially equivalent agencies still lags behind HUD's expectations when the FHAA was passed. While there may be a variety of reasons for disinterest in or inability of State and local agencies to achieve certification, one possibility apart from the political difficulties inherent in the passage of new laws is that the monetary incentives are insufficient to induce States and localities to expend the effort required for certification. Currently, cases are reimbursed on a flat fee basis, regardless of the individual agency's costs, although, on

² For a complete discussion of the problems and issues surrounding certification, see the Commission's report, *Prospects and Impact of Linking State and Local Agencies from the Federal Fair Housing System* (Washington, D.C., 1992). In that report, the Commission upheld HUD's insistence that the standards for certification remain strong.

average, costs vary depending on agency overhead and on the extent of investigation required (e.g., whether a case is fully investigated or closed administratively).

Recommendation: First, HUD should examine its incentive structure to see whether the compensation offered provides sufficient incentives for State and local jurisdictions to achieve substantial equivalency and actually reimburses agencies for the costs incurred in investigating and adjudicating cases where cause has been found. Second, consideration should be giving to reimbursing cases in varying amounts depending on the effort required to resolve the complaint (whether it is dismissed administratively, conciliated, or fully investigated).

Agency evaluations

Finding: In the two evaluations for substantial equivalency status of State agencies conducted by HUD, no civil rights or women's organizations were interviewed, nor were any fair housing groups consulted as to their knowledge of the performance of the agencies in question, nor were any special local outreach efforts made to ascertain the views of local interested parties other than those few groups selected by HUD itself.

Recommendation: In certifying that agencies are performing in a substantially equivalent status in fact, HUD should include interviews with civil rights and women's groups and fair housing advocacy organizations as well as real estate industry groups and other community organizations. HUD should consider publishing the content of its *Federal Register* notice that it invites comment on the performance of such agencies in statewide newspapers and mail it to appropriate interested organizations.

Finding: Evaluation of State and local agencies must sometimes occur with very little data on complaints. Some jurisdictions are simply too small to generate very many complaints. Newly created or revamped agencies do not always receive very many housing complaints in their first years of operation. Finally, outreach may be inadequate to the task of informing the broad population of its fair

housing rights, resulting in fewer complaints filed.

Recommendation: A threshold requirement for a minimum caseload by which to judge substantially equivalent status should be established. HUD should consider seeking alteration of the 2-year deadline by which it must abrogate interim certification and certify an agency as substantially equivalent or deny certification altogether. In the alternative, HUD should exercise greater scrutiny of agencies with limited records when they have been granted full certification.

Fair Housing Initiatives Program

The Fair Housing Initiatives Program has funded worthwhile efforts by private non-profit fair housing groups, but its administration has been flawed by funding delays and apparent indecision regarding the purposes for which funding would be granted.

Distribution of funds

Finding: HUD has been dilatory in distributing funds in a timely fashion to groups able to make constructive use of them, to the point where congressional intent that such groups receive timely funding has been frustrated. The program has consistently distributed money at the end of the fiscal cycle permitted by law, and notices of funding availability have often been suspended, delayed, and revised such that it appears HUD lacks a clear plan for or even commitment to the distribution of the money and the purposes for which it is intended.

Recommendation: HUD should revise its internal procedures such that timely announcement and distribution of FHIP funds are made, and so that a clear set of priorities for use of the funds is established and publicized.

Underserved areas

Finding: When analyzed geographically, distribution of FHIP funds has been concentrated in the Northeast and Midwest, upholding the finding of Congress that new fair housing organizations are needed in unserved and underserved sections of the country.

Recommendation: HUD should actively assist in the formation of fair housing groups

in underserved areas of the country, using FHIP funds allocated under the Fair Housing Organizations Initiative. This assistance can take the form of aid to fair housing groups in formation or groups with the capacity to expand elsewhere, as well as conducting conferences and meetings to stimulate interest in the formation of such groups.

Testing

Finding: HUD will fund testing activities for law enforcement purposes only in response to a "bona fide" allegation of housing discrimination. Such an allegation is defined as a complaint by an individual alleging an instance of discrimination.

Recommendation: HUD should fund testing activities for law enforcement purposes not only when a complainant alleges discrimination but also wherever there are reasonable grounds to believe discrimination may be occurring, such as observed statistical disparities, media reports, or substantive anecdotal evidence.

Part IV: The New Jurisdictions

Several questions have arisen regarding coverage extended by the Fair Housing Amendments Act to persons with disabilities and families with children.³ In some instances, the questions pertain to what extent the law regarding treatment of new groups can be derived by analogy to the groups originally protected by Title VIII. In other cases, questions arise from situations unique to the FHAA. As with other issues, HUD policy has emerged from regulations, written guidance, answers to letters of inquiry, ALJ decisions, and secretarial review. DOJ, too, has had to grapple with issues arising from the new provisions of Title VIII.

For the most part, such policy has properly expressed the intent of Congress, with few exceptions. In some cases, greater clarity could be achieved by explicit policy statements of HUD's view of the law.

Privacy

Finding: The extent of privacy rights of those involved in real estate transactions has been the subject of dispute. In one case, a condominium association attempted to require an owner to produce a doctor's description of her disability before approving use of a flotation device. HUD argued correctly that such a description went beyond the association's need to know, and that a simple statement from a doctor that an accommodation was required should be sufficient. DOJ disagreed, arguing the inquiry was not improper.

In a separate inquiry, the extent to which a disability can or need be disclosed by a broker (or presumably a buyer or tenant) was at issue when a hypothetical situation involving Acquired Immune Deficiency Syndrome was posed to HUD. HUD took the position that an agent ought not volunteer such information and need not answer any question as to HIV status.⁴

Recommendation: HUD should issue policy guidance detailing what inquiries are proper regarding the disability of a person involved in a real estate transaction.

Zoning and Land Use Laws

Finding: DOJ challenges individual applications of zoning laws that fail to make reasonable accommodations for persons with disabilities by disapproving group homes, but the laws themselves are not modified by this approach. Thus every zoning complaint is addressed separately.

³ Some of the issues raised here are discussed in Part V.

⁴ HUD has already revised its regulations governing discovery to bar requiring a medical exam as part of the proceedings in a given case, except where ordered by an administrative law judge. The medical exam can only be ordered upon "a showing by the moving party that the physical or mental condition of the person who is the subject of the request is in controversy and that good cause exists for the requested examination." 59 Fed. Reg. 1642.

Recommendation: HUD, in consultation with DOJ, should issue policy guidance stating that zoning ordinances should not only permit reasonable accommodations to persons with disabilities, but also contain a presumption in favor of providing reasonable accommodations.

Prohibited inquiries

Finding: HUD has argued that it is improper to make inquiries of potential tenants or owners that indicate an impermissible bias on a prohibited basis. For example, it is widely accepted that inquiring as to the race of an applicant for housing has no legitimate purpose. However, administrative law judges have held that inquiries about the desirability of a given applicant may arise from the protected status of the applicant. For example, an ALJ ruled that to inquire whether an applicant's children are noisy does not indicate bias against children.

Recommendation: HUD should issue formal policy guidance clarifying the nature of proper inquiries of prospective tenants or buyers which makes clear that questions indicative of a tenant's suitability must be based on business necessity and asked of all prospective tenants where they might apply.

Ancillary facilities

Finding: As HUD has noted in its regulations, the Fair Housing Amendments Act of 1988 bars discrimination in all facilities associated with housing, such as use of recreational and parking facilities. HUD has issued internal guidance regarding such facilities based on its experience. For example, HUD has held that landlords may reasonably develop safety rules regarding the use of swimming pools or recreational equipment, as long as such rules apply equally. Rather than prohibit all children from swimming without a parent, HUD has said landlords should bar all nonswimmers from using a pool without a responsible swimmer in attendance.

Recommendation: HUD should publish policy guidance in the *Federal Register* on the use of facilities, similar to the guidance it has distributed internally.

Part V: Fair Housing Policy and Implementation

Federal leadership in fair housing policy has been delegated by the President to the Department of Housing and Urban Development in a 1994 executive order, while the responsibility for litigation remains with the Department of Justice. Both HUD and DOJ have generally pursued fair housing policies that address the needs of both complainants and respondents, as well as the public interest. More recently, HUD Secretary Cisneros has used the secretarial review provisions to clarify HUD policy in a forthright manner. However, HUD has lagged in using its ability to file Secretary-initiated complaints to attack unique or systemic discrimination and to break new ground.

DOJ has been innovative in pursuing cases against discrimination in new arenas, such as mortgage lending, but not in ascertaining the reach of the law through, for example, utilizing generally accepted tenets of disparate impact in litigation.

Given the unique nature of the agencies' shared responsibility for fair housing enforcement, HUD and DOJ are required to coordinate their efforts to establish and implement fair housing policy consistent with the intent of Congress. To date, the two departments generally cooperate, but some disagreements have not been adequately resolved.

Proving discrimination

Disparate impact

Finding: Since passage of the Fair Housing Act of 1968 (Title VIII), courts have borrowed from the standards of proof developed under Title VII to prove discrimination under Title VIII. Under the Bush administration, HUD pursued fair housing cases using a disparate impact analysis, while DOJ declined to do so. Under the Clinton administration, both the Secretary of HUD and the Attorney General have stated that they will pursue housing cases alleging discrimination based on disparate impact. HUD plans to issue regulations supporting the use of disparate impact, and the Attorney General has stated that DOJ will

now present disparate impact arguments in Federal court.

Recommendation: Both HUD and DOJ should continue to apply the disparate impact analysis in fair housing cases.

Secretary-initiated complaints

Finding: Secretary-initiated complaints can be an effective tool of Title VIII enforcement with great, albeit unrealized potential. Secretary-initiated complaints, like pattern or practice cases filed by DOJ, afford HUD the opportunity to pursue broader cases of discrimination without relying on individual complainants. Since the effective date of the FHAA, HUD has filed only eight Secretary-initiated complaints.

Recommendation: HUD should greatly intensify its efforts to develop Secretary-initiated complaints. It should issue guidance or regulations detailing the subjects that may be properly pursued in a Secretary-initiated complaint. Further, HUD should target discrimination least susceptible to correction through individual complaints, either because individuals are unaware they are being discriminated against or because the remedy for an individual might be inadequate to prevent future discrimination. To meet this goal, staff and resources devoted to Secretary-initiated complaints must be substantially increased.

Timeliness

Finding: HUD regulations currently require the Secretary to file his complaint within one year of the occurrence or termination of the alleged discriminatory housing practice despite the fact that the FHAA does not appear to impose such a filing limitation. The Department of Justice may file a pattern and practice case at any time the Attorney General has reasonable cause to believe such a case is warranted.

Recommendation: HUD should remove or at least lengthen the regulatory time constraints on filing Secretary-initiated complaints, so that HUD may pursue complex cases that may require more time and resources than are currently permitted.

Conciliation agreements

Finding: An important conciliation agreement reached in a Secretary-initiated complaint has been kept secret, robbing it of any deterrent effect although a prima facie case of discrimination was evident.

Recommendation: While all conciliation agreements should generally be made public, in particular, the terms of conciliation agreements reached as a result of Secretary-initiated complaints should be disclosed and publicized barring extraordinary circumstances. Such circumstances should be defined in new regulations. Public disclosure is particularly important in the case of large corporations or public entities that are closely monitored by similarly situated organizations. Such agreements may serve to stimulate voluntary compliance by putting potential respondents on notice.

Secretarial review process

The Secretary of HUD serves as the final arbiter of issues and cases raised in the administrative forum. Thus, when HUD's position, as argued by OGC, does not persuade an ALJ, HUD may, in effect, internally appeal the decision to the Secretary. The Secretary has full discretion to affirm, modify, reverse, or remand initial ALJ decisions and orders so that they may be consistent with HUD policy. Procedures

Finding: While the substantive positions taken by the Secretary in his review of ALJ initial decisions have fulfilled the purpose of the Fair Housing Amendments Act, the Secretarial review procedure itself appears biased in favor of HUD as the complaining party, in one respect. Respondents or other parties are not made aware of the option to file objections to the decision of an administrative law judge with the Secretary prior to his review, and the Office of General Counsel may file its objections without notice to the respondent.

Recommendation: HUD should clarify the rights of parties to object to the decision of an administrative law judge prior to its review by the Secretary, and so notify them.

Policymaking

Finding: The Secretary has used the review process to establish policies on new and controversial issues through adjudication. For example, the Secretary recently used his review authority to establish policy for the agency on the application of the business necessity standard in disparate impact cases. While such decisions serve as precedent for ALJs to follow and are not in the least inappropriate, they are essentially reactive in nature and easily reversed by a different Secretary. Agency policy is best set by regulation open to public comment and review and not reversible except by the same process. Policy set by regulation also gives better guidance to ALJs and carries greater weight should cases end up in appeals courts.

Recommendation: Policies with broad application that interpret Title VIII should be promulgated through the regulatory process and open for public comment and review. Issues that arise in the course of administrative adjudication should be addressed as needed through the secretarial review process, but should also be regularized by issuance of appropriate regulations on a timely basis.

Other matters

Zoning cases

Finding: Although the FHAA requires HUD to refer all complaints involving the legality of State or local zoning or land use laws immediately to the Attorney General, the Assistant Secretary prescreens and investigates zoning complaints before referring them to DOJ. Thus, if the Assistant Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary must dismiss the complaint regardless of whether the case involves the legality of a zoning or land use ordinance.

The legal requirement to refer viable zoning cases to DOJ for litigation is important because DOJ may pursue remedies in Federal court not available to HUD in the administrative process. Unlike HUD, DOJ has the discretion to pursue remedies such as reforming the selection process for zoning board members or

providing for a review process of zoning board decisions.

Recommendation: The Assistant Secretary should continue to prescreen cases involving the legality of State and local zoning or land use ordinances. The prescreening process allows HUD to eliminate no cause complaints early in the FHAA process, thus conserving resources for complaints demonstrating reasonable cause.

Prompt judicial actions

Finding: Prompt judicial actions are an effective method by which HUD and DOJ can eliminate discrimination without costly litigation. Often the mere threat of a prompt judicial action causes the respondent to comply with HUD's position. In particular, temporary restraining orders are extremely valuable for preventing, on short notice, allegedly discriminatory evictions or sales of property to innocent third parties.

Although DOJ is required by statute to pursue whatever temporary or preliminary relief HUD authorizes, DOJ exerts considerable influence over HUD, prior to HUD's authorization, with respect to the standard of proof required to authorize temporary restraining orders. HUD maintains that temporary restraining orders, unlike preliminary injunctions, require only a demonstration of irreparable harm in order to maintain the status quo during further investigation by HUD on the merits. However, it appears that DOJ expects HUD to authorize both preliminary injunctions and temporary restraining orders only when enough evidence exists to support a reasonable cause determination on the merits. It appears that this disagreement over the appropriate standard for authorizing a temporary restraining order has reduced the frequency of prompt judicial action requests by regional counsel.

Recommendation: It is essential that HUD and DOJ agree on the standards necessary to pursue temporary restraining orders. Because of the often severe consequences involved in situations requiring prompt judicial action, DOJ should agree to pursue temporary restraining orders upon a showing of irreparable harm to the complainant, rather than

requiring the higher standard of likely success on the merits.

HUD's plan to issue technical guidance and provide training in the HUD regions on the use of prompt judicial actions is commendable. However, the guidance and training will only be effective if HUD and DOJ agree on the standards required to authorize such actions. Without a clear position, HUD regional counsel are less able to identify situations in which the harm to the complainant could be reduced by maintaining the status quo pending further investigation.

Judicial review

Finding: DOJ is responsible for representing the United States in all appeals reviewing the final decisions of HUD. However, DOJ may authorize HUD to litigate appeals in Federal court. DOJ and HUD, by their own agreement, are supposed to work closely together on all appeals.

DOJ's involvement in Federal court appellate litigation often influences HUD's internal strategy for litigating administrative cases. For example, DOJ did not defend the ALJ's decision to award damages for loss of civil rights in its appeal in *Baumgardner v. HUD* before the sixth circuit. Thus, after the sixth circuit overturned that particular damage award, HUD issued a memorandum stating that regional counsel should no longer seek damages for loss of civil rights even if the complaint does not arise in a sixth circuit jurisdiction because DOJ does not consider the loss of civil rights to be a compensable injury. Thus, rather than pursue the damage award in other cases, in other circuits, DOJ accepted the view of the sixth circuit and refused to argue in favor of damages for loss of civil rights.

Recommendation: HUD and DOJ should work closely together to develop the litigation strategy for appeals in Federal court. In the rare event that they disagree on such strategy, DOJ should make every effort to develop an approach that will incorporate HUD's views such that HUD's policy positions are adequately represented. In addition, when appropriate, DOJ should test the limits of fair

housing law by continuing to pursue important substantive issues in other circuit courts.

Judicial elections

Finding: In passing the FHAA, Congress wanted to create an administrative process that would provide a fair and inexpensive means of resolving fair housing disputes. However, complainants and, in particular, respondents are electing to proceed in Federal court in the majority of cases, rather than litigating their complaints in the HUD administrative forum. The number of elected charges has far exceeded the expectations of both HUD and DOJ. To alleviate the burden on DOJ attorneys litigating fair housing cases, DOJ has recently authorized U.S. attorneys to litigate elected charges.

Once an election is made, the FHAA requires HUD to authorize a civil action and requires DOJ to litigate the complaint on behalf of both the aggrieved persons and the public interest in Federal court. DOJ is allowed to return elected charges to HUD only when new court decisions or new evidence may be relevant to the initial reasonable cause determination. However, HUD believes that, on occasion, DOJ has returned elected charges simply because DOJ does not agree with HUD's reasonable cause determination or HUD's substantive policy position. While DOJ acknowledges its responsibility to support HUD's reasonable cause determination, DOJ maintains that it only returns elected charges when the charge is flawed or when it conflicts with DOJ's responsibility to avoid filing frivolous claims in Federal court.

Recommendation: While recognizing DOJ's obligations to the Federal courts, DOJ must in turn recognize that HUD's reasonable cause determination is not reviewable except when a new court decision or new evidence would affect the initial determination. If DOJ disagrees with the substantive issues of a HUD charge such that it cannot litigate the charge in good faith, DOJ should authorize HUD attorneys to pursue the charge. In addition, DOJ should authorize HUD attorneys, as well as U.S. attorneys, to handle the litigation of elected charges where appropriate or where resources are otherwise inadequate.

In addition, Congress, HUD, and DOJ should study the election process to determine why parties, particularly respondents, are electing to litigate in Federal court rather than pursue the administrative adjudication intended by the FHAA.

Sovereign immunity

Finding: Currently, HUD and DOJ disagree as to whether or not HUD may file an administrative charge against another Federal agency. Most recently, the controversy has arisen in the context of a judicial election of a HUD charge filed against the Farmers Home Administration. While HUD asserts that the FHAA was amended to allow charges against all respondents including government entities, DOJ maintains that Federal agencies generally may not sue one another and that Congress did not expressly permit such suits in the FHAA. Thus, until the issue is settled, according to DOJ, Federal agencies may only be sued by private litigants for violating the FHAA.

Recommendation: The President should issue an executive order requiring Federal agencies charged with fair housing discrimination to submit to binding arbitration of fair housing complaints. In the alternative, Congress should either mandate such binding arbitration, as it has in certain employment matters, or expressly waive sovereign immu-

nity in order to allow HUD or DOJ to sue another Federal agency for a violation of the FHAA.

Conciliation breaches

Finding: If a party breaches a conciliation agreement, HUD attempts to resolve the breach internally before seeking enforcement in Federal court. However, if HUD cannot resolve the breach, HUD refers the breach to DOJ with a recommendation to pursue a civil action. The Attorney General may then decide whether to file a claim in a conciliation breach. Rather than file a civil action, DOJ tries to avoid costly and time-consuming litigation by attempting to resolve the breach or by submitting the case for binding arbitration, which often results in a faster resolution of the matter.

Recommendation: DOJ should litigate conciliation breaches more aggressively, so that such litigation can serve as an effective deterrent against respondents who may wish to breach an agreement. If complainants are confident that conciliation agreements will be enforced effectively, they may be more willing to conciliate.

Recognizing the extensive burden on DOJ attorneys and resources primarily because of the high number of elected charges, DOJ should delegate the authority to enforce conciliation breaches to HUD.

Concurring Statement of Commissioner Robert P. George

This report offers a number of recommendations to strengthen administrative enforcement of amendments passed by Congress in 1988 to a series of fair housing laws over the last 25 years. I concur in the view that laws should be enforced by the executive departments such as HUD, which were created for that purpose.

I also concur in the report's declaration that "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." (p. 5)

I write separately, however, to record my misgivings about certain aspects of the general approach to civil rights problems adopted in the report. These are, in my judgment, obsolete, unhelpful, and potentially counterproductive to the cause of civil rights.

The focus of my concern is symbolized by the report's undifferentiated use of the invidious word "segregation" to describe virtually all racially and ethnically concentrated communities. Most American citizens understand "segregation" as the legal or socially enforced separation of persons by racial categories. The concept of "separate but equal" rights for different races, constitutionally sanctioned by the Supreme Court in *Plessy v. Ferguson* (1896), came under continuous legal and political challenge until it was abolished by the Court in *Brown v. Board of Education of Topeka*, whose 40th anniversary we are celebrating this year.

Following the *Brown* decision, President Kennedy issued Executive Order 11063 outlawing discrimination in public housing. Since then Congress has acted repeatedly to reduce and eliminate legal and social barriers to freedom of access to housing for all Americans, passing the Civil Rights Act of 1964, the 1968 Civil Rights Act, the Housing and Community Development Act and the Equal Credit Opportunity Act in 1974, and the 1988 Fair Housing Amendments, which are the subject of this report.

Since that time, too, state governments, municipalities, and other governmental entities have passed thousands of laws and regulations to break down race based segregation in housing. Billions of dollars have been spent since the 1960s by governments at all levels to provide public, mixed, and low income housing mostly for the benefit of minorities, sometimes fighting challenges through the courts for years to ensure that housing for minorities is available in white neighborhoods such as Yonkers and Mount Laurel.

Because of these efforts America's communities today look very different from those of 30 years ago. Yet this report disparages three decades of struggle for equal civil rights in housing. Citing a *USA Today* newspaper article, the report endorses the assertion 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." (p. 3) I believe that this defeatist viewpoint should have no place in the document the Commission sends to Congress today.

If it were true that 30 years of vigorous desegregation efforts have utterly failed, then the Commission would find itself in agreement with opponents of civil rights and anti-discrimination laws who always argued that progress could not be made in desegregation by passing Federal, state, and local legislation. Moreover, such a failure could be taken by others as a justification for enacting punitive legislation in a misguided endeavor to make the Nation conform to a politically correct model of a multicultural society.

The report's method of precisely calculating racial concentrations implies an egalitarian standard that could only be achieved by a draconian policy of racial and ethnic quotas. Its methodology, in other words, points down the path of increasing government intervention in local communities and interference with the homes and families of America, a path which has already strained the virtues of responsibility, individual choice, independence, and self-government which should distinguish the citizens of a democracy.

Nowhere does the report canvas the range of explanations, some legitimate, others not, for why people of common racial and ethnic backgrounds live together in particular neighborhoods. It apparently disregards the historical fact that immigrant peoples have often settled in urban communities of common tongue and custom until later generations were "Americanized." In a free regime many of those arriving from abroad probably will choose to live with others who share their ethnic, religious, cultural, and linguistic heritage.

Neither does the report examine a second crucial feature in minority residence patterns, the impact of economic barriers to home ownership in more affluent neighborhoods. Since a large number of blacks, Latinos, and other minorities are poor, homes in many suburban communities are out of reach for most.

Yet even as this report was being drafted, the *Washington Post* was reporting record numbers of black families abandoning Washington, D.C., for suburbia:

The District's population loss is accelerating, and nearly equal numbers of whites and minorities are making the exodus. . . . The District had more black residents than all the suburbs combined in 1980; by the end of the decade, more blacks lived in the Maryland suburbs than in the city.

William Frey, a demographer at the University of Michigan who studies city-suburb relationships, said the census data suggest that flight from the city is now led by blacks. ["Migration From D.C. Is Booming," p. A1, April 28, 1994].

A refusal to acknowledge the factors of choice and poverty in minority residence patterns blinds the report both to the powerful dynamics among minorities who *are* moving freely from community to community, as well as to deeper problems of the poor such as the homelessness of thousands of minority families, about which the report is silent.

Over 150 years ago the prophetic observer of America, Alexis De Tocqueville, warned democracies of a new form of "soft despotism" that threatened to undermine the capacity for moral choice that characterizes human beings. Rising concerns about our nation's growing problems of inner city crime, violence, drug abuse, and family breakdown exemplify Tocqueville's warnings about the dangers created by an ever expanding government which is gradually co-opting our freedom to make intelligent decisions about our lives. In *Democracy in America* Tocqueville wrote:

[Centralized government] daily makes the exercise of free choice less useful and rarer, restricts the activity of free will within a narrower compass, and little by little robs each citizen of a proper use of his own faculties . . .

[G]overnment . . . covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd. . . .

It does little good to summon those very citizens who have been made so dependent on the central power to choose the representatives of that power from time to time [i.e., in elections]. However important, this brief and occasional exercise of free will will not prevent them from gradually losing the faculty of thinking, feeling, and acting for themselves, so that they will slowly fall below the level of humanity. [G. Lawrence, trans., pp. 692, 694]

An important part of the freedom Tocqueville argued for is in the area of how and where to house our families. Governmental policies which overregulate and aim indiscriminately at outcomes rather than enhancing people's freedom to live where they wish generate the

perception that government is being manipulated by some groups at the expense of others, creating resentment and rationalizing prejudice.

The goal of housing laws should be the elimination of remaining barriers to the equal opportunity to live wherever one chooses. The Commission and the Nation should focus attention in the 1990s on what my fellow commissioner, Russell Redenbaugh, calls a "new paradigm" for free society in which the poor are empowered morally and materially to shape their lives well by their own choices. This model of self-government is the very opposite of the "soft despotism" Tocqueville described so well in 1840.

In the "new paradigm" of freedom, the poor can be liberated from unlivable public housing slums often run by uncaring, corrupt officials. In some cases we can, for example, sell public housing units to tenant occupants; in other cases we can turn management over to tenants; and we can provide vouchers for use in the private housing market. Fundamentally the "new paradigm" means that self-government requires *trust* in the American people to make their own decisions without assuming that most are prejudiced, bigoted, or acting in bad faith.

Over the past 30 years we have made great progress in defeating segregation and advancing the cause of civil rights. Still, prejudice remains and our fight must continue. The means we use in this just cause, however, must themselves be just. Indeed, if the means we employ are unjust we will have undermined the very cause of civil rights to which we have dedicated ourselves. So we must ask whether the race-based categorizing of individuals that has become the hallmark of our statecraft has compromised this great cause. We must ask whether policies that treat people differently based on ethnic or racial characteristics, thus dividing Americans into categories of skin color and speech pattern in order to dole out benefits, have had the effect of stimulating prejudice and exacerbating racial tension. Our report should not have left these questions unasked and unanswered.

Statement by Mary Frances Berry, Chairperson

This Fair Housing Report is designed to implement the Commission's responsibility to monitor the enforcement activities of Federal civil rights agencies and to recommend ways that they can improve their job performance. The report is designed to help HUD, in concert with the Justice Department, to implement the Fair Housing Amendments Act of 1988 more efficiently.

President Reagan proposed and Congress enacted Fair Housing legislation in 1988 because governmental officials acknowledged that civil rights enforcement in housing had been weak and ineffectual for years. Discriminatory barriers kept too many Americans from gaining access to the housing of their choice. In 1985, John Knapp, General Counsel at HUD told this Commission at a consultation that there were about 2 million instances of housing discrimination occurring every year.

The housing opportunities of African Americans are only one important aspect of the housing discrimination problem. However, urban residential segregation of African Americans remains greater than that of any other racial or ethnic group, and when African Americans move to the suburbs they are most often subjected to involuntary segregation through the use of steering and other tactics. Discrimination in access to housing of their choice, whether in the suburbs or the cities for African Americans, even when they can afford it, has been well documented by researchers and the use of testers. African Americans are not free to live where they choose whatever their socioeconomic status.

The work of HUD under the Fair Housing Amendments Act of 1988 focuses on the claims of people who seek housing and are denied illegally. This report makes important recommendations, which should help HUD and the Justice Department to respond more efficiently to those who are excluded from the housing of their choice, because of disability, familial status, race, sex, color, national origin, or religion.

Appendix A



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE SECRETARY

WASHINGTON, D.C. 20410

October 13, 1994

Mary Frances Berry
Chair, U.S. Commission on Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Dear Madam Chair:

The Department of Housing and Urban Development is pleased to provide its response to the recommendations included in the Commission's report, "The Fair Housing Amendments Act of 1988--The Enforcement Report." Your graciousness in providing the opportunity to comment is greatly appreciated.

I take my responsibility to enforce the Fair Housing Act very seriously. Together with the Assistant Secretary for Fair Housing and Equal Opportunity Roberta Achtenberg, I have endeavored to improve the operation of HUD's fair housing enforcement programs and to shift badly needed departmental resources to this effort. To that end, I have elevated the office of Fair Housing and Equal Opportunity ("FHEO") to stand equal with HUD's other program offices. In an environment of government-wide staff reductions, I have authorized Assistant Secretary Achtenberg to add 48 new employees to her staff so that the civil rights obligation of the Department can be more faithfully and effectively discharged. And, in an effort to leverage and maximize human resources, the Department has increased threefold staff training funds for fair housing, and hired outside consultants to improve management systems and provide needed expertise on technical issues.

I believe that many of the recommendations made in the Commission report have been resolved or will be addressed as the results of HUD's reorganization of the Fair Housing Act enforcement function are felt. Beginning in April, 1994, fair housing field staff, including those who carry out investigations to determine if the Fair Housing Act has been violated, now report directly to HUD's chief civil rights enforcement official. The restructuring will enable the office of Fair Housing and Equal Opportunity to oversee field activity more directly, and to provide consistent and thorough application of the Fair Housing Act.

Additionally, the Department has also completely revamped its system for making determinations of whether or not a Title VIII complaint filed by a private party should be brought to a hearing or to trial. Authority to make determinations of whether there is cause to believe that a violation of Title VIII has occurred is now lodged with FHEO. The Office of General Counsel ("OGC") will continue to play an essential role, and have concurrence authority

in these determinations. With the assistance of counsel, fair housing staff will begin identifying legal issues prior to the commencement of investigations. In order to develop a consistent system for determining whether cause exists for HUD to go forward, both cause and no cause cases will be reviewed in Headquarters before a charge is issued. We believe that after a period of adjustment, the new system will substantially address issues of consistency and timeliness.

Below are comments on each of the report's recommendations.

Part I: The Setting

We agree that funding should be provided to meet HUD's expanded enforcement responsibilities. The Department has already allocated additional funds to support new initiatives to address mortgage lending and insurance discrimination and undertake more aggressive action in national and regional systemic investigations. The Department has already begun to evaluate all of its activities toward full and fair enforcement of the Fair Housing Act. In addition to providing resources for more effective enforcement, the Department has strengthened the role of the Office of Fair Housing and Equal Opportunity throughout the Department, so that fair housing concerns have become a component of all of the Department's program activities, in an unprecedented fashion. Beyond the allocation of resources to a particular office, the Department is committed to utilizing its existing program resources to advancement of fair housing issues within the entire Department.

Part II: Complaints

Procedures

The Department's actions are already well underway to address the Commission's concerns about the lack of a consistent system for processing complaints. The Department has initiated a new system for provision of guidance to the field on uniform procedures. It has issued guidance and provided training on consistent intake procedures. It has issued guidance on administrative closures. Guidance on systemic investigations and Secretary-initiated complaints will be issued in the very near future.

The Department has replaced the "draft TGM" system with a formalized system of Notices which are public documents and which go through an internal clearance process. Where circumstances are urgent, interim guidance is issued in memorandum form, which is also considered to be a public document, and which is later placed in the Notice format. The first Notice issued addressed administrative closures, and contained a consistent national approach to circumstances in which such closures may, and may not, be used.

Six chapters of a compliance manual are expected to go into internal HUD clearance by the end of October. These chapters will address such critical investigative guidance issues as Intake, Conducting an Investigation, and Conciliation. Other chapters are in active preparation.

Travel

Although in the past financial resources may not have been made available for on-site investigation in cases under the Fair Housing Act, every effort was made this fiscal year to make such funds available. We are unaware of any current circumstances in which on-site investigation is being discouraged or not utilized in all appropriate cases. Moreover, for the first time, as a result of the FHEO reorganization, FHEO will now have control over allocation of travel funds for its own staff. FHEO intends to ensure the availability of funds in the future. The issue of using on-site investigations routinely will be also be re-emphasized in future guidance.

Testing

The Department agrees that testing to confirm or refute experiences described by complainants has been an underutilized investigative tool in the past. This administration made funding available to each of its regional offices in FY '94 for procurement of testing services from private fair housing groups as part of the Department's investigative effort. The Department has budgeted funds for FY '95 to continue this practice. This will assure that adequate funds will be available in FY '95 to make testing in individual complaint situations a viable option. We note, however, that the prompt availability of trained testers may not always be possible in some parts of the country, and HUD is considering alternatives to address that concern.

Training

The Department agrees that past training on fair housing enforcement issues, dating back to 1989, has been wholly inadequate. Beginning last year, shortly after Assistant Secretary Achtenberg was confirmed, FHEO initiated a series of substantive training activities. Among them was a basic course on conciliation techniques, an advanced program on investigation techniques, and a joint training for attorneys and investigators which was broadcast nationally to over 400 participants. This teleconference addressed current difficult issues, including use of prompt judicial actions as an enforcement technique, zoning issues, theories of proof in fair housing cases, and proof of damages. Among the presenters were the best in the field, from the Department of Justice, private fair housing groups, private counsel, civil rights advocates and FHEO and OGC staff.

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FHEO has provided the first ever intake training, to intake staff from across the country, to provide direct and concrete instruction on dealing consistently and effectively with intake issues. Other trainings have included two one week courses on investigation of mortgage lending cases, which included hands-on case analysis and sampling techniques, and a course on advanced disability techniques. Every training session provided during the past year, including a fair housing planning conference for fair housing field staff, has included a substantial component devoted to proof theories in fair housing cases.

The Department is currently considering ways to institutionalize and broaden its training activities on an on-going and consistent basis. Among the areas in preliminary development are basic fair housing orientation training materials, self-taught materials on the Intake process, and effective conciliation techniques. In addition, the Department is preparing video tapes of several of its recent training courses, including the Intake training, for distribution to state and local agencies which enforce laws which are substantially equivalent to the Fair Housing Act and to field offices for use in training current employees.

Conciliation

The Department agrees that further instruction and training on effective, and non-threatening, conciliation techniques is critical to the process. Written guidance on conciliation will be included in the compliance manual currently in production. Staff has already received clear instruction on the rights of the parties to a complaint to engage or not to engage in conciliation. However, because various judicial decisions have indicated clearly that the Department must engage in adequate conciliation efforts, it is necessary to at least ascertain, and perhaps re-confirm, the desire of the parties to engage, or not to engage, in conciliation.

The Department will also require its newly created enforcement centers to monitor compliance with conciliation agreements. Tests will be one way by which this monitoring may be performed.

Withdrawals

The Department has already issued guidance which instructs staff on the proper handling of private settlements of cases, including the specific requirement that staff not encourage private settlements and advise complainants and respondents of the disadvantages of such settlements. The Administrative Closure guidance requires staff to review private agreements and take appropriate action, including recommendation of a Secretary-initiated complaint, where policy issues are not resolved by private settlement. This issue is also addressed in formal guidance which will be issued in the near future regarding criteria for recommendation of Secretary-initiated complaints.

Timeliness

The Department is currently engaging in a review of cases which have been in investigation for over 100 days, through on-site visits in the field and consultations with staff on the reasons for delay. Every Enforcement Center has already been asked to develop procedures to ensure more timely processing of cases, and this requirement has been incorporated in their management plan. Part of the Department's assessment will include a review of resources and other issues within the Department's control; however, some cases, by their nature, cannot be investigated, and a determination made, within the 100-day period. The Department has also initiated a new letter which will be used to advise the parties in cases where investigation cannot be completed within 100 days. The letter includes an estimated time for completion of the investigation. Compliance with that date will be monitored routinely.

The Department also expects that implementation of a revised delegation process in effect on October 1, 1994, which authorizes the Assistant Secretary for Fair Housing and Equal Opportunity to make determinations of cause and no cause, will expedite the determination process, because it requires involvement of counsel from the beginning of the complaint process and will therefore not require extensive delays in cases resulting from legal reviews. Counsel will concur on every determination to ensure that concerns from a legal perspective are addressed.

Consistency

The new determination process is expected to improve consistency, as well as case processing times. Under the revised system, field offices which have conducted the investigation will prepare a determination, but all determinations, at least initially, will be reviewed by the Office of Investigations in FHEO Headquarters. Steps have been taken to help ensure that this process does not unduly delay case processing; on the other hand, development of a consistent approach to case outcomes will be facilitated by a central review process, as well as by the legal review. The system will also allow monitoring of individual field office performance.

The Department is reviewing case processing time frames on an office-by-office basis. High level staff from the Washington office are reviewing all cases over 100 days old. In some instances, additional staff have been provided, or specific guidance given, to improve performance. Priority is being given to addressing the most serious performance problems first.

Organization

I share the Commission's belief that by consolidating Title

VIII case processing under a single office and increasing the authority of the Assistant Secretary to guide the process, enforcement will improve. For this reason, as discussed more fully above, I have used a "delegation of authority" to place authority to make determinations of cause and no cause in fair housing cases with the Assistant Secretary for Fair Housing and Equal Opportunity. This determination will be made with the concurrence of the General Counsel. In addition, the implementation of this new delegation will result in closer and more ongoing consultation with the Office of General Counsel throughout the investigation. That delegation was effective October 1, 1994.

Interventions

Currently, complainants are provided with information regarding their right to intervene in a Title VIII case and appeal an adverse decision reached by an Administrative Law Judge. HUD currently has no plans to issue regulations regarding the intervention process.

Part III: HUD-Funded Activities

Fair Housing Assistance Program

HUD Reimbursement

Congress has approved a significant increase in funding for the Fair Housing Assistance Program for FY 1995. This program reimburses state and local fair housing agencies for processing complaints under non-federal fair housing statutes. FHEO is currently conducting a comprehensive study of actual case processing costs to assess whether the reimbursement schedule should be modified. Among matters being considered are increased rates for complex or time-consuming cases, and incentive funding to allow the funding of special projects or activities which will enhance investigatory performance.

Agency Evaluations

The recommendation regarding interviews with women's groups and civil rights advocacy groups in the certification process is a helpful one, as is the recommendation regarding notification of such groups on the opportunity to comment on performance issues when determinations on equivalency are being made. HUD will redouble its efforts to consult widely in its next round of reviews.

Fair Housing Initiatives Program

Distribution of Funds

HUD has overhauled its administration of the Fair Housing Initiatives Program (FHIP) to address the types of changes recommended in the Commission's report. Through a process known as Business Process Reengineering ("BPR"), we have streamlined and modified the grant-making process. As a result of the effort, the funding cycle time for FHIP has been reduced from 131 weeks to 36 weeks; a substantial amount of staff time has been redirected to activities that add value to the final product; a five-year cost savings of over \$1.9 million is projected; and a proactive, customer-service approach has been adopted.

The FHIP BPR project has been so successful that it was awarded the Price Waterhouse Worklight Award in October 1994. The FHIP project was selected for its creativity and customer-focus in identifying opportunities for improving the FHIP funding process. The award serves as a model for reinvention efforts throughout government and private industry. The FHIP BPR project also was recognized as one of the top twenty best BPR efforts in the country as listed in the September issue of *CFQ* magazine. Of the twenty, the FHIP BPR project was the only one from a government agency.

Underserved Areas

Like the Commission, the Department is very pleased with the 1992 legislation which created the Fair Housing Organizations Initiative. Both the FY 1993 and FY 1994 Notices of Funding Availability (NOFA) identified specific unserved and underserved areas of the country in which the Department sought to create new private fair housing organizations. (The FY 94 NOFA also allowed applicants to identify additional areas which were unserved/underserved by existing groups.) Since the legislative amendment, 24 new private fair housing enforcement organizations have been created in underserved areas of the country. FHEO has recently issued a notice to all current and potential program participants soliciting their comments on the administration of the new program.

Testing

As a result of 1992 legislation, FHIP has been expanded to permit recipients to carry out testing programs wherever they have a reasonable basis for doing so, including statistical disparities, reports and other types of substantive information. The Department has fully implemented the new authority. Through NOFAs and the proposed FHIP rule, published for comment on August 29, 1994, HUD has informed FHIP recipients that the old restrictions on testing activities have been lifted.

Part IV: The New Jurisdictions

Privacy

The Task Force on Occupancy Standards in HUD Public and Assisted Housing submitted its final report to HUD on April 7, 1994. Chapter 9 of the Report, Privacy and Confidentiality, is being reviewed by the Department. Any needed regulatory changes will be proposed by December 31, 1994; modified or new guidance will be issued in the form of handbook or forms changes.

Zoning and Land Use Laws

The Department has no objection to the development of policy guidance on requirements that zoning ordinances should incorporate the concept of reasonable accommodations for persons with disabilities. However, the Department believes that preparation of such guidance would more properly be led by the Department of Justice, which has the authority to determine which zoning/land use cases to litigate. Unlike the usual procedure under the Fair Housing Act, HUD does not make determinations of whether zoning or land use provisions violate the Act.

Prohibited Inquiries

The Task Force on Occupancy Standards in HUD Public and Assisted Housing submitted its final report to HUD on April 7, 1994. A discussion of Disability-Related Inquiries in the Application Process (P. 1-34 et seq. of the Task Force Report) recommended that HUD clarify the scope of limited inquiries that can be made. This recommendation is being reviewed to determine the need for regulatory changes or other guidance to HUD-assisted housing providers.

Ancillary Facilities

The Department does not object to the publication of guidance addressing health and safety rules as a defense to discrimination cases. However, this issue is one with many potential ramifications, which will require a significant amount of time to address comprehensively.

Part V: Fair Housing Policy and Implementation

Proving Discrimination-The Department is routinely applying a disparate impact analysis to its cases, through application of case law precedent. In the lending area, the Department successfully urged the Interagency Taskforce on Fair Lending, composed of HUD, DOJ, and the federal bank regulatory agencies, to include in the Fair Lending Policy Statement published in the Federal Register on April 15, 1994, provisions describing the applicability of a disparate impact analysis in lending situations. The Department is

in the process of developing a regulation which will be applicable to all types of Fair Housing Act cases, to be published in 1995.

Secretary-initiated Complaints

Guidance which tracks the recommendations of the report is in the final stages of preparation. Additional resources have already been devoted to identification of potential targets for Secretary-initiated complaints and investigation of such complaints. More staff is being added to handle the investigation of such cases at the Headquarters level. Additionally, field resources will be brought into play on such cases. A significant number of Secretary-initiated complaints have recently been initiated, specifically targeted to discrimination in mortgage lending.

Timeliness

The Fair Housing Act states:

An aggrieved person may, not less than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint. Sec. 810(a)(1)(A)(i).

It is the Department's interpretation that the one year statute of limitations applies to all complaints, including Secretary-initiated complaints. However, HUD is actively applying the theory of continuing violations wherever appropriate, in accordance with existing law, to enable us to reach on-going discriminatory practices which otherwise would exceed the statute of limitations period.

Conciliation Agreements

The Fair Housing Act states:

Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.

When conciliating complaints in which the Secretary is a complainant, the Department will ensure that all Conciliation Agreements are disclosed.

Secretarial Review Process, Procedures

HUD will initiate action to develop an appropriate mechanism to assure that all decisions issued by HUD ALJs include a statement that the decision will become final after 30 days and that any

objections to the findings and conclusions must be submitted to the Secretary within that time frame.

Secretarial Review Process, Policymaking

HUD agrees that, to the extent that policy is made by Secretarial decisions, rulemaking may be necessary to institutionalize the policy or interpretation.

Other Matters

Zoning Cases

The Department has no plans to modify its current process of making no cause determinations in zoning cases.

Prompt Judicial Actions

HUD takes the position that prompt judicial relief may be necessary to maintain the status quo to avoid irreparable harm to complainants during the investigation, where the equities favor protecting the fair housing rights of complainants.

Judicial Review

The Department and DOJ have agreed to put an effective mechanism in place which will enable joint strategy decisions on pursuit of all appeals in fair housing cases.

Judicial Elections

The Department conducted an early study of the reasons parties elected to have their cases heard in a judicial, rather than administrative forum. Several changes were made to address issues identified in the study.

The Department has presented strong evidence of damages to Administrative Law Judges which has resulted in higher damage awards during the past two years. Since there has been more passage of time, and more parties continue to make the election, this issue should be re-visited. Included in such a study should be the types and amounts of relief awarded in the various forums.

Sovereign Immunity

The Office of Legal Counsel at the Department of Justice has ruled that principles of separation of powers and sovereign immunity result in a conclusion that the Department may not issue a charge under the Fair Housing Act against a federal agency. The Department is continuing to accept complaints, conduct investigations, and attempt conciliation in such cases. The

Department, in consultation with DOJ's Civil Rights Division, is considering a variety of options for addressing the issues which the Office of Legal Counsel has identified.

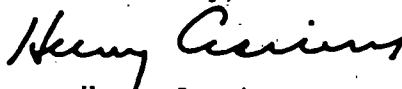
After completing a comprehensive review of the options, a joint decision will be made on appropriate action.

Conciliation Breaches

HUD and DOJ recognize the importance of enforcement actions where breaches of conciliation agreements occur and will aggressively pursue litigation where compliance with an agreement cannot be obtained voluntarily. HUD and DOJ will allocate necessary resources to accomplish this enforcement objective.

Thank you for the opportunity to present these comments.

Sincerely,



Henry G. Cisneros

Appendix B



U.S. Department of Justice

Civil Rights Division S.C.C.R.

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Office of the Assistant Attorney General

Washington, D.C. 20535

OCT 13 1994

Honorable Mary Frances Berry
Chairperson
United States Commission on Civil Rights
624 9th Street, N.W., Room 700
Washington, D.C. 20425

Re: The Fair Housing Amendments Act of 1988 -
The Enforcement Report

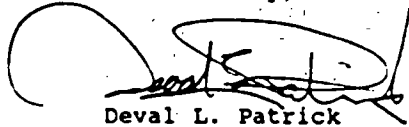
Dear Madame Chairperson:

Thank you for providing us with a copy of the Commission's Enforcement Report concerning the Fair Housing Amendments Act of 1988. We have reviewed this draft and appreciate its thoroughness and your consideration of the July 13, 1994 comments provided on behalf of the Civil Rights Division of the Department of Justice to the Commission's earlier Draft Report. While those comments, which apparently will be attached to the final Report, speak for themselves, we continue to be concerned with what appears in our view to be the undue focus of the Report on the few occasions where this Department and the Department of Housing and Urban Development (HUD) have disagreed on whether a so-called HUD "election" case should be filed in federal court. As I indicated in my July letter, the amendments to the Fair Housing Act have necessitated a great amount of interaction and cooperation between HUD and this Department in the fair housing enforcement arena, and that process has worked very well. Since the amended Act went into effect in March 1989, "elections" to proceed in federal court with a HUD charge of discrimination have been made on approximately 400 occasions, yet, as indicated in my previous letter, the number of times our agencies have been unable to resolve differences with regard to these cases has been extremely small. This is not reflected in the Commission's latest draft, and I would suggest that far too much discussion is expended concerning a very minor problem.

Federal enforcement of the Fair Housing Act is at an unprecedented level. Cooperation between HUD and this Department in this area has been and continues to be a vital factor in the increasing federal presence in the fair housing field. We pledge our continuing commitment to work with HUD in this ever important area of civil rights. Again, I would like to commend the

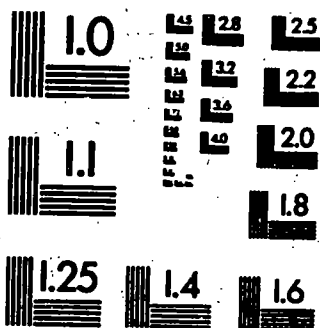
Commission for the thorough analysis and careful thought which have gone into its efforts in preparing its Report.

Sincerely,

A handwritten signature in black ink, appearing to read "Deval L. Patrick", with a large, stylized loop at the beginning and a horizontal line across the middle.

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

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