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bill**Fair Housing Reform and Freedom of Speech Act of 1997
(Introduced in the House)**

HR 589 IH

105th CONGRESS

1st Session

H. R. 589

Cheney

To amend the Fair Housing Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES**February 5, 1997**

Mr. BILBRAY (for himself, Ms. HARMAN, Mr. HORN, Mr. WHITE, Mr. CALVERT, Mr. CUNNINGHAM, Mr. PACKARD, Mr. BAKER, Mr. HAYWORTH, Mr. HUNTER, Mr. LEWIS of California, Mr. KING, and Mr. DREIER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Fair Housing Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Fair Housing Reform and Freedom of Speech Act of 1997'.

SEC. 2. AMENDMENTS TO FAIR HOUSING ACT.

(a) IN GENERAL- The first sentence of section 807(b)(1) of the Fair Housing Act (42 U.S.C. 3607(b)(1)) is amended by inserting before the period the following: ', including any restriction relating to the maximum number of unrelated persons permitted to occupy a dwelling, or governing the proximity of dwellings to each other, in connection with the occupancy of a dwelling by a convicted felon, sex offender, or recovering drug addict, if the purpose of the

restriction is to restrict land use to single family dwellings'.

(b) PROTECTION OF CERTAIN ACTIVITIES- Title I of the Fair Housing Act (42 U.S.C. 3601 et seq.) is amended by adding at the end the following new section:

SEC. 821. PROTECTION OF CERTAIN ACTIVITIES.

Nothing in this Act shall be construed to apply to any otherwise lawful activity engaged in by one or more persons, including the filing or maintaining of a legal action, that is engaged in solely for the purpose of--

- (1) achieving or preventing action by a governmental entity or official; or
- (2) receiving an interpretation of any provision of this Act in a court of competent jurisdiction.

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APPENDIX

104TH CONGRESS
2D SESSION

S. _____

A BILL

TO AMEND TITLE VIII OF THE ACT COMMONLY CALLED THE CIVIL RIGHTS ACT OF 1968, AS AMENDED BY THE FAIR HOUSING AMENDMENTS ACT OF 1988, TO PROHIBIT INVESTIGATIONS AND PRIVATE LAWSUITS BASED ON CONDUCT PROTECTED BY THE FIRST AMENDMENT AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE HOUSE OF REPRESENTATIVES AND THE SENATE OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

SECTION 1. - SECTION 807 [42 U.S.C. § 3607] IS AMENDED BY ADDING AT THE END THE FOLLOWING:

"(c) Activities protected by First Amendment; votes by government officials; enforcement of laws

"(1) The following conduct shall not be a violation of the Act:

"(A) any speech, activity, belief, affiliation or membership protected by the First Amendment to the Constitution of the United States, including but not limited to:

"(i) written or oral communications with government officials or members of entities exercising government functions;

"(ii) non-violent expressions of opinion in any form, for example, print, speech, or electronic methods of communication;

"(iii) participation, affiliation or membership in organizations engaged in lawful activity; or

"(B) the filing of an action in any federal or state court for damages or to enforce or seek enforcement of any federal, state, or local law, including regulations or ordinances; *provided* that the action satisfies the standards set forth in Federal Rule of Civil Procedure 11(b).

"(2) In an action or proceeding against a government official, or a member

of an entity exercising a government function, in his or her official capacity for a violation of the Act, no evidence of the following shall be admitted or considered to prove a violation:

"(A) that the official or member received communications, expressions of opinion, or information about another person's membership in organizations of the type described in section 807(c)(1), or was otherwise exposed to activity or conduct described in section 807(c)(1); or

"(B) that the official or member was the defendant or subject of an action described in section 807(c)(2), even if the action did not satisfy the standards set forth in Federal Rule of Civil Procedure 11(b).

"(3) Any regulation or guideline for the determination of housing discrimination considered, proposed, or adopted after the effective date of these amendments shall be drafted so as to make explicitly clear that any speech, activity, belief, affiliation or membership protected by the First Amendment to the Constitution of the United States is not to be restricted and does not constitute evidence of housing discrimination."

SECTION 2 - SECTION 810(a)(1)(A) [42 U.S.C. § 3610(a)(1)(A)] IS AMENDED BY ADDING AT THE END THE FOLLOWING:

"(iv) no complaint shall be filed or accepted for filing by the Secretary unless it describes the alleged discriminatory housing practice in sufficient detail to enable the Secretary to determine, and the Secretary so determines, that the alleged conduct is not within the scope of the exemptions set forth in Section 807(c) of the Act."

SECTION 3 - SECTION 810(a)(1)(B)(ii) [42 U.S.C. § 3610(a)(1)(b)(ii)] IS AMENDED -

(A) by inserting after "identifying the alleged discriminatory housing practice" the following: "and describing in detail the alleged unlawful conduct"; and

(B) by inserting after "procedural rights and obligations of respondents under this subchapter," the following: "including the protections and exemptions set forth in Section 807(c) of the Act."

SECTION 4 - SECTION 810 [42 U.S.C. § 3610] IS AMENDED BY ADDING AT THE END THE FOLLOWING:

"(i) **Sanctions for Impermissible Complaints**--If a Court determines that a complaint filed, or accepted for filing, by the Secretary under this section is an impermissible complaint under Section 810(a)(1)(A)(iv), the court--

"(1) shall promptly dismiss the complaint; and

"(2) shall impose appropriate sanctions on the Secretary, including the assessment of all costs (including attorney's fees) incurred by the respondent as a result of the filing of the complaint.

o O o

Testimony before the United States Senate

Committee on Banking and Housing

Subcommittee on the Constitution

Hearing on

"Protecting Freedom of Speech and Neighborhood Safety under the Fair Housing Act"

by Roger L. Conner, Executive Director,

American Alliance for Rights & Responsibilities

and

Robert F. Hoyt, Esq.

Wilmer, Cutler & Pickering

September 18, 1996

Testimony of Roger Conner and Robert Hoyt

Mr. Chairman, members of the Sub-Committee, we thank you for the opportunity to testify before you today concerning the implementation of the Fair Housing Act Amendments (FHAA) by the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ).

This testimony has been prepared jointly by Roger Conner, Executive Director of the American Alliance for Rights & Responsibilities (AARR), and Robert F. Hoyt, an associate with the law firm of Wilmer, Cutler & Pickering. The AARR is a non-partisan, national organization of citizens of many different political persuasions. AARR works to help citizens at the grass roots level regain control over their streets, parks and other public spaces from crime and disorder, and to defend public policies which strike a balance between individual liberties and community responsibility. Mr. Hoyt and Andrew N. Vollmer of Wilmer, Cutler & Pickering are representing the AARR in this matter, and have helped the AARR to advise various community groups that have sought our assistance on these issues.

Over the past four years the AARR has been contacted by neighborhood groups across the country who are concerned about the misuse of the FHAA to reinforce historic patterns of discrimination and discourage citizens from participating in decisions of their government on issues which directly affect their lives. AARR has investigated a number of these complaints, filed protests with DOJ and HUD, and circulated a petition to neighborhood groups across the country.

In the course of this work AARR has reached six principal conclusions.

1. **We need an expansion in this country of shelter combined with supportive services** for persons who are mentally ill and/or addicted to drugs and alcohol, especially those who have burned their bridges to friends and family -- the "homeless."

There is an overwhelming consensus today that untreated mental illness, addiction to drugs and alcohol, and a combination of these maladies is the primary explanation for the persistent problem of visible, desperate, seemingly helpless people who make their lives on our city streets. We work with downtown business leaders and inner city neighborhood leaders who tell us they cannot address the quality of life problems which customers and residents complain of without expanding shelter *combined with social services* for people now living on the street.

For this reason, we applaud Secretary Cisneros in his commitment to a spectrum of facilities to provide treatment and support for recovery for this needy population. There has

been a lot of talk about false victimization recently, but we should all recognize that many of the street people are victims in the truest sense. Nobody chooses to be a schizophrenic.

2. Polices of DOJ and HUD are reinforcing historic patterns of discrimination. For over twenty years state and local governments have been in the process of deinstitutionalization and privatization of social services for exceptionally needy persons. Instead of mental institutions we have SRO's. Instead of orphanages we have group foster care homes. Instead of prisons we have half way houses. Instead of public hospitals or institutions for drug addicts we have drug rehabilitation facilities in residential neighborhoods.

For a variety of reasons, the for profit and not-for-profit organizations who operate these facilities have tended to concentrate them in "at risk neighborhoods." These are communities where an active struggle is underway between the community builders and the forces of social disintegration; communities which are often integrated by social class, race and ethnicity. They are typically politically weak and poorly organized. And they carry a staggering percentage of the drug rehabilitation facilities, half way houses for released criminals, group homes for disabled or dysfunctional persons, SROs for mentally ill substance abusers, Hospices for AIDS sufferers, and so on.

In the past few years, citizens in these at risk neighborhoods have begun to fight back against crime and disorder, especially the threat represented by open drug markets. Roger Conner is co-author of The Winnable War, a Community Guide to Eradicating Street Drug Markets, which has sold over 15,000 copies across this country, and has been in touch with many of these neighborhoods in the course of his research.

Citizens in these neighborhoods believe that a high concentration of such facilities is harmful to the health of their neighborhoods. First, the operators are not uniformly able or accountable. Inevitably, some become the equivalent of slum landlords. Second, there is a very high recidivism rate among the addicted population. Drug dealers understand this, and by creating concentrations of recovering addicts we inadvertently create a target for dealers. A badly managed facility which provides shelter or housing to mentally ill and addicted persons is a disaster for an at risk neighborhood. A high concentration of such facilities creates a negative synergism that drains the energy of neighborhood activists who have enough problems to cope with as it is.

Non-profit providers and local government agencies have a tendency to target these neighborhoods, however, because, compared to other neighborhoods, residents are relatively weak politically, the property is relatively cheap, and the buildings tend to be relatively large. And providers who manage several sites, which is commonplace, gain efficiencies by clustering the facilities. From Columbia Heights in Washington D.C. to the lower east side in Manhattan to University Boulevard in Berkeley, the pattern is the same.

Because at risk neighborhoods are subjected to high concentrations if matters are left to the decisions of private non-profit organizations, the only way to prevent unfair concentrations is for cities to adopt and enforce explicit "fair share" or "anti-concentration policies," which a few

cities are starting to do. Or I should say *were* starting to do until officials in local HUD offices and also from DOJ concluded that "fair share" policies are inherently suspicious. What is worse, HUD and DOJ considers citizen complaints about unfair concentration so verboten that they will treat such statements in public hearings as evidence that any subsequent local decision to deny a rezoning or special use permit is motivated by discrimination. Indeed, if you were a member of a city council or planning board instead of a Congressional Committee, and you voted to deny a special use permit using the arguments I just made about over concentration and the tendency of recovering addicts to backslide, complaints could be filed against you personally. HUD could investigate and demand that you enter a voluntary agreement to refrain from such conduct or face civil penalties. In at least one instance I have been told that a former governor's staff screened his mail to make sure he did not have a chance to read such politically incorrect input from his constituents, thanks to a consent agreement he entered into with HUD.

It is hard for me to believe that the Congress, in passing the FHAA, intended for HUD to reinforce past patterns of discrimination against at risk neighborhoods, but that is precisely what they are doing.

3. The policies of HUD's and DOJ in the past six years have had an enormous chilling effect on citizen participation across the U.S. I wish I could count the number of calls we have received in the past two years from citizens' groups that are afraid to organize, to speak at public hearings, or to gather signatures on petitions. They are being threatened, both publicly and privately, with the filing of HUD complaints or DOJ lawsuits. Publicity about the actual investigations has been devastating to groups which rely on volunteer citizen energy. HUD's newly published guidelines are welcome, but guidelines can be changed on a whim.

More important, the HUD Guidelines do not purport to be an interpretation of the statutory rights of citizens of the U.S. under the FHAA. There are mere guidelines which describe the cases which the agency, in the exercise of its "prosecutorial discretion" will and will not investigate. The guidelines recognize that the FHAA gives a right of action to private persons and to DOJ, explicitly state that they are not intended to prevent these other persons from filing civil lawsuits against the politically incorrect.

4. HUD's ambiguous policies on citizen suits and DOJ's inconsistent actions are creating confusion and a further chilling effect. I have received calls from a woman in Illinois who wanted to contest a re-zoning from commercial to multi-family on the basis that the re-zoning was in conflict with a recently adopted master plan. Her suit was permitted by state and local law. She said to me, "we can afford to sue under the zoning law, but we couldn't afford to take on a federal suit, and the developer has promised to file a HUD complaint and if we go to court. Our lawyer says our suit is valid, but HUD might determine otherwise. He says HUD could investigate us, and that the Justice Department could sue for civil damages. If there is any risk of that, my neighbors and I must abandon our case because we are persons of very modest means." I had to tell her the developer was right, that she risked being attacked by her own government if she tried to vindicate local zoning laws in court.

Why should HUD and DOJ hold this legal Sword of Damocles over the necks of citizens who disagree with its interpretation of federal law? HUD has many tools to resist lawsuits it does not like. The United States government can intervene or file *amicus* briefs in such cases, for example. As to sham lawsuits, there are rules to discipline lawyers who bring frivolous, abusive lawsuits.

5. HUD and DOJ's strategy is divisive and destructive to community-building. I realize that there are many of my colleagues who are involved in advocacy for juveniles, mentally handicapped, homeless children, and other worthy and needy populations who like the FHAA as it is. They like being exempted from local zoning, since they are suspicious of local government. And some of them enjoy being able to brandish the FHAA to silence their opponents in public meetings before local government agencies.

The Biblical admonition that "he who sows the wind shall reap the whirlwind" is operating with a vengeance in this field. Citizens who question new facilities for their neighborhoods are now routinely threatened with HUD complaints and DOJ lawsuits. Public officials who listen to their constituents are warned publicly that they will be investigated and fined as private citizens if they vote the wrong way. This strategy is the dead cat in the well of public support for FHAA enforcement and residentially based facilities. Because people are not very inclined to be trustful or to compromise when the threat of federal investigations is hanging over the room.

6. The Department of Justice's 11th Hour Conversion has not solved the problem created by its misinterpretation of the FHAA.

In 1992, DOJ filed United States v. Duncan Robinson, et. al. The defendants in Robinson were neighbors who had sued their city government to compel the city to enforce a facially valid, neutral city zoning ordinance. The theory of the Justice Department's complaint was that the Robinson group's lawsuit was motivated by discrimination, and sought an illegal purpose, "regardless whether the state court suit was well grounded in state law." United States Opposition and Response to Motions to Dismiss by Defendants Duncan and Elizabeth Robinson, United States of America v. Duncan Robinson et. al, Civ., Action No. 392CV00345, Nov. 23, 1992, at 10.

In September 1994, HUD issued its Guidelines, providing that *only* a "lawsuit which is frivolous can be a violation of the Act." *The Robinson case is cited with approval in the guidelines at p. 5*, even though the government's brief in Robinson appears to squarely contradict the Guidelines. DOJ's brief states:

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Bill Johnson's and its progeny make clear that a lawsuit that seeks an illegal objective may be sanctioned pursuant to federal law regardless whether it is otherwise meritorious, such as when it states a valid claim under state law, and regardless what the petitioner's motivation for bringing it. . . . regardless whether the state court suit was well grounded in state law. Opposition and Response to Motions to Dismiss by Defendants, Nov 23, 1992, at 10. (Emphasis in original.)

As District Court Judge W.T. Gilroy Daly would later affirm, in proceedings before a Magistrate Judge, the government had "disavowed any intent to rely on the sham exception. See Magistrate Judge's Opinion at 12 (noting government's concession on issue at oral argument before Magistrate Judge." Ruling on Objections to Recommended Ruling, January 26, 1995, District Court Judge W.T. Gilroy Daly, at n.13.

After the Guidelines were issued, the Robinson defendants requested oral argument before the District Court Judge, asserting that DOJ's lawsuit should be withdrawn. The Justice Department responded with a pleading which stated that HUD's guidelines did not apply to them (DOJ) -- "these are internal guidelines for investigation of complaints to HUD and therefore have no impact on this litigation,"; and further, notwithstanding the Guidelines, "the position of the Justice Department has not changed". Response and Opposition to the Motion of Defendants Hodgson and Leventhal for Oral Argument, Sept. 16, 1994 at 2, 3.

On January 26, 1996, the District Court dismissed the Justice Department's complaint in the Robinson case. The opinion contains extensive discussion of the standard set forth in the Supreme Court's opinion in Bill Johnson's Restaurants Inc. v. NLRB, and rejects the DOJ's interpretation of Bill Johnson's.

In the succeeding months, DOJ filed a notice of intent to appeal Robinson. Lawyers for DOJ made representations to the Robinson defendants that the appeal would be vigorously pursued. Facing escalating attorneys fees, the victorious defendants agreed to a settlement which required them to collect \$30,000 from citizens in the community as a civil fine for activities which District Judge Daly had found were "within the heartland of the Petition Clause."

Last week, before the House Subcommittee on the Constitution, the Justice Department reiterated the position it took in Robinson -- that it will pursue relief under the FHA against those who file lawsuits "that are frivolous, harassing, malicious prosecution, an abuse of the legal process or seek an illegal objective." Statement of S. Ishimaru at 13 (emphasis added). In other words, *even lawsuits that are not frivolous can still be illegal so long as they "seek an illegal objective."* Since any one who disagrees with DOJ's interpretation of the FHAA and files a state court suit is seeking "an illegal objective", in their view, this interpretation is a very broad and blunt weapon to intimidate the "politically incorrect."

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It is disturbing enough that Justice would maintain this position more than two years after HUD took the opposite position in its public apology. What is worse, the Department has repeatedly cited Bill Johnson's to justify its crabbed interpretation of the First Amendment rights of citizens who sue when the Supreme Court in that case took precisely the opposite position. There, the Court wrote "The filing and prosecution of a well-founded lawsuit may not be enjoined . . . even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [National Labor Relations] Act." 461 U.S. at 743. Thus, the Bill Johnson's case does not permit the Justice Department to sue individuals for filing lawsuits because of their alleged intent to seek an illegal objective -- rather, it permits the Justice Department to sue *only* if the individual's lawsuit was "objectively baseless" *and* seeks an illegal objective.

On September 9, 1996, Mr. Patrick sent a letter to the House Subcommittee offering the latest twist in its interpretation of the law and of the HUD Guidelines. Now, contrary to its position in the Robinson case, DOJ states that it operates according to the principles stated in HUD's Guidelines. Now, contrary to Mr. Ishimaru's written and oral testimony before the House Subcommittee, DOJ states that citizens lose their First Amendment protection only if they bring suits which are "frivolous" and seek an illegal objective.

On closer examination, the DOJ letter and the HUD guidelines do not draw a bright line to clarify citizens' rights, but only confuse matters further. It claims that lawsuits which seek an illegal purpose and which are "frivolous" are illegal. But what makes a case "frivolous?" In the Robinson discussed above, DOJ took the position that plaintiffs' case was "frivolous" even though a State Superior Court judge agreed with the citizens, even though no state appellate court had never ruled on the issue, even though the issues later decided in the Edmonds case by a divided Supreme Court were involved, and even though a Federal District Court Judge held that the citizens legal theory was well grounded in state law.

Even if Mr. Patrick's letter and the HUD Guidelines were clear and understandable, the Congress should adopt them into law. This sordid history of new positions and interpretations of the law -- which has left the First Amendment rights of many citizens trampled in its path -- must come to an end. While we welcome the Justice Department's apparent shift in position, we fear that it will evaporate with the next lawsuit, or the next Assistant Attorney General for Civil Rights, the next administration. Congress should make it clear that it is not within the Executive Branch's discretion to continue respecting the First Amendment rights of citizens.

Attached to this testimony as an appendix is draft legislation that AARR has developed that takes a different approach altogether. This standard strikes a appropriate balance between the First Amendment and the purposes of the Fair Housing Act by protecting "the filing of an action in any federal or state court for damages or to enforce or seek enforcement of any federal, state, or local law, including regulations or ordinances; provided that the action satisfies the standards set forth in Federal Rule of Civil Procedure 11(b)." This language has the virtue of providing citizens and lawyers considerable guidance, something a new and

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ambiguous standard like "frivolous" does not. This language follows the mandate of the Supreme Court in the Bill Johnson's case, and is entirely consistent with the Justice Department's latest position on what its policy is . . . unless DOJ hopes to quiet its Congressional critics while retaining broad power to intimidate potential litigants.

We respectfully suggest that until these protections are reduced to law, the uncertainty that has resulted from the Robinson case and others like it will continue to chill the First Amendment rights of many citizens, and will undermine the policies and protections of the Fair Housing Act. Assistant Attorney General Patrick will not be in office forever. The abuses outlined in this letter originated under a Republican predecessor, and were continued by the current administration. A mere letter from Mr. Patrick will not bind the hands of any future person who holds his title.

Indeed, the best evidence of the need for legislation is the Justice Department's continuing opposition. If the Department's adherence to the principles of the Guidelines is fixed, if it has no hope or expectation for a relaxation on these self-imposed limitations, why is it opposed to an amendment to the statute which would simply put its *most recent* interpretation into clear and binding legislative language?

FAXMEMO

from

Joseph J. Deringer

1349 Addison Street, Berkeley, CA 94702

Voice: (510) 843-9000, Fax: (510) 843-9005 E-mail: jderinger@msn.com

Date: September 4, 1996

To: **Roger Conner**

From: Joseph Deringer

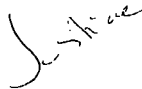
Subject: **Testimony – Residential Care Facilities**

Attached is my testimony.

Hope this does the trick.

If there are any problems please call.

Best regards, Joseph Deringer



Testimony before Congress, House of Representatives
Committee on the Judiciary

Observations on HUD's Residential Care Facilities Program

by Joseph J. Deringer, resident of Berkeley, CA

September 5, 1996

Honorable Chairman and Committee Members, I thank you for the opportunity to offer my observations in writing on HUD's Residential Care Facilities Program. Please allow me to submit my written testimony into the record.

I am Joseph J. Deringer, architect and energy efficiency consultant. I live with my artist wife and 2 children within an ethnically diverse urban corridor in Berkeley, CA. The corridor is also economically diverse within a predominantly low income framework¹

In 1993-94, a neighbor, my wife and I became the subjects of an extended HUD "investigation" over our neighborhood opposition to a HUD funded housing project for homeless persons, many of whom may be "disabled." The HUD investigation became a national controversy when we claimed that HUD was violating our First Amendment rights, and the rights of numerous persons like us around the country. As a result, HUD changed its policies somewhat, but not nearly enough.

Today, within 300 feet of my house there are over 250 subsidized low income housing units, many funded by HUD. HUD is now working with a local church in a nearby neighborhood to set up a group house. Within 300 feet of my house, there is also been a group house for juveniles. The residents were juvenile defendants, who routinely committed crimes in the neighborhood. When nearby residents complained, the cars on the block were trashed. Problems included:

1. No local jurisdiction. Exemption from local zoning by the state prevented existing city laws from being used to correct a very bad situation.
2. There was poor oversight from the state.
3. There were no repercussions to the juveniles, who were already essentially incarcerated.

¹ See Attachment A for further detail.

Key Issues Concerning Residential Care Facilities

Relative to Residential Care Facilities, I think there are two key issues with the legislation being discussed today:

1. the First Amendment issue
2. the issue of exempting of facilities for "disabled" populations from all local zoning, both for single family and for mixed use situations.

The First Amendment Issue

This is the easy issue. Citizens must have the right to speak out directly and about very real issues concerning needs and services for disabled populations, without fear of retribution from a "big brother" government with many lawyers and deep pockets. Residential care facilities for "disabled" persons can present a very difficult set of issues concerning locations, design, operation and services. If our democracy is to continue to prosper, we must have free, complete, and open discourse concerning all issues, especially such "difficult" issues.

I have included as Attachment A a copy of my 1994 testimony to the Judiciary Committee, which describes our experience. That testimony highlights the need to fully and completely protect the rights of citizens to speak and to redress grievances, including litigation.

Exempting Of Facilities For "Disabled" Populations From All Local Zoning

This issue is both extremely important and difficult. I urge congress to eliminate these exemptions from local zoning. Otherwise, we will have the ironic situation where citizens are free to speak, but local government officials will not be free to listen and will have no power to act.

For example, local officials will not be able to take action on a number of factors that could seriously affect the quality of the facility, such as:

- limiting the number of persons in facilities;
- making provisions for social services; and,
- requiring testing for ongoing drug or alcohol abuse.

The legislation as it stands now has removed power from local government. Instead, non-profits and private housing companies have been given tremendous power, which they should not have

My experience is that non-profits can and do abuse that power. For example, in Berkeley they have been very hostile to valid and reasonable concerns of several moderate-income ethnically-diverse neighborhoods. Thank you for your attention to my concerns and those of my neighbors.

ATTACHMENT A: J. Deringer Testimony 9/28/94 Page 1

Testimony before Congress, House of Representatives
Committee on the Judiciary
Subcommittee on Civil and Constitutional Rights

Observations on HUD's New Fair Housing Guidelines

by Joseph J. Deringer, resident of Berkeley, CA

September 28, 1994

Honorable Chairman and Subcommittee Members, I thank you for the opportunity to speak before you today to offer my observations on HUD's new Fair Housing Guidelines. Please allow me to submit my written testimony into the record and to provide a verbal summary of its key points.

I am here today because I am concerned about still unresolved issues concerning civil, constitutional and land use rights that surfaced in a controversial 10 month HUD Fair Housing Act investigation of three of us in Berkeley. We were among many who opposed a housing project for the homeless in our neighborhood.¹ The HUD investigation has had a chilling effect on discussion by Berkeley's citizens. A parallel 11 month HUD investigation of city officials, on the same project, is having a chilling effect on discussion of issues by the city government. I would like to summarize key facts in our case, to highlight the chilling effect this has had on the free public discourse of important and difficult social issues, and to ask you to take action to address issues that are still unresolved, given the new HUD guidelines.

PERSONAL BACKGROUND

I am an architect, and specialize in energy efficiency for commercial buildings. I have been a key player in development of the current federal standard for commercial buildings, and I have helped a number of third world countries to develop energy efficiency standards for commercial buildings. I have always considered myself very liberal. My wife is an artist who also helps administer my consulting practice. I have a 13 year old step-son and a 4 year old daughter.

¹

The homeless include the mentally ill and substance abusers

A DIVERSE, MULTI-RACIAL, LOW INCOME URBAN NEIGHBORHOOD

We live in a modest urban Berkeley neighborhood that is characterized in city documents as multiracial and predominantly low-income. Our neighborhood is in the middle of a major but run-down commercial corridor along University Avenue. The neighborhood is wonderfully diverse, both ethnically and economically. Over 50% of the residents are non-white. Many merchants are non-white, too. For example, the block where I live is a melange of Americans with origins in Africa, Laos, Latin America, the Philippines, Europe, Japan, China, and the middle east. While median income is low, economic diversity is high. The neighborhood contains: teachers, gardeners, architects, laborers, chefs, parole officers, sculptors, fast food workers, attorneys and legal aides, university professors, contractors, seniors. My neighborhood is a basically healthy one, it has the diversity that America is all about, and I like living there.

EXISTING OVERCONCENTRATION

However, we are also a neighborhood at risk, from crime and from government actions. Our neighborhood has a high crime rate for Berkeley, which in turn has one of the highest crime rates in California, and our neighborhood streets are growing less safe.

The University Avenue corridor, a one mile by 4 block area, already has an over-concentration of government-funded housing and social services. For example², this area containing fewer than 4,000 housing units has:

- 1/3 of its rental units are publicly subsidized (and rental units are 2/3 of all housing units)
- almost 1/2 of all of Berkeley's project-based tax-subsidized housing units (in a city of over 100,000 persons)
- 1/3 of all homeless beds in Alameda County (in a county of over 1.25 million persons)³
- over 25 social service sites, with many providing safety net and crisis type services.

Berkeley is providing 5 times the level of services to the homeless as other East Bay cities. Ours is a liberal neighborhood in an extremely liberal city. We are not NIMBYs. Rather, we are FULLBYs. Our neighborhood backyards are already full and overflowing, and we are worried about the ability to absorb any more without the collapse of the area's social and economic fabric.

2 Statistics are derived primarily from Berkeley city planning documents.

3 From conversation with Boona Cheema, Director of Berkeley Oakland Support services.

THE BEL AIR - A CONTROVERSIAL HOMELESS PROJECT IN BERKELEY

The project was to convert a 35 room motel on University Avenue into permanent housing for the homeless. Many neighbors strongly opposed the project for substantial reasons:

- The project was increasing concentrations in an already saturated area
- The project was poorly conceived, with major flaws including lack of on-site services and a common kitchen with access only from outdoors.
- An inappropriate site was selected, next to 2 liquor stores and near a third, and the developer misrepresented the site in its application by carefully omitting mention of any liquor stores.
- The project was grossly overpriced, and the appraisal process was manipulated behind the scene.
- The project was a "done deal" with site control and funding in place before the neighborhood was notified, and the non-profit developer took a "take it or leave it, but get out of our way" attitude with the neighborhood.
- a conflict of interest occurred by a zoning board member who also chaired the board of the non-profit developer of the project.

The controversy became very political, for the project was supported by a political machine that has dominated city politics for 16 years, and by a powerful local housing and social service industry with strong influence within city government.

WHAT DID WE NEIGHBORS DO IN OPPOSITION TO THE PROJECT?

We attended meetings and public hearings. We distributed leaflets, and submitted petitions to our government officials expressing our opposition. We wrote letters to the editor and articles. We published a newsletter. We also sought redress of grievances by petitioning our government in court to require a new zoning board vote untainted by the conflict of interest that we thought influenced the initial vote.

I believe that all of the actions we took were fully protected under the first amendment. Further, I feel strongly that the actions we took are not only the right, but the *responsibility* of citizens when confronted with a government project that they feel is flawed, inappropriate and grossly overpriced.

However, our efforts were unsuccessful; after over a year of controversy, the project was approved, and is now under construction.

A BIZARRE HUD INVESTIGATION

On November 1, 1993, a social service provider in Berkeley, without direct connection to the Bel Air project, filed a Fair Housing Act complaint with HUD, against three neighbors, including my wife and I, alleging that we were "...blocking the project because they perceive the primary residents of the facility will be the mentally disabled or the disabled through substance abuse."

The complaint contained no further detail. It failed to allege a violation of the Fair Housing Act, was without merit either in fact or in law. I feel that it was submitted in the expectation that intimidation could silence political opposition. The three of us were apparently chosen because of our high profile. Yet, the complaint resulted in a 10 month investigation of us by HUD that ended only after the case became prominent in the national press.

HUD initiated its investigation with intimidating letters to us alluding to overwhelming fines and demanding that we submit copies of all writings, correspondence, meeting minutes, names of all individuals involved. We were subsequently interviewed by a HUD investigator, who focused on articles that we had written. Then, a HUD conciliator communicated to our attorney an offer from the social service provider who filed the complaint to drop the complaint if we would agree to stop publishing articles and letters involving housing projects in Berkeley.

HUD never provided any indication that we had broken any law, or even what any potential offenses might have been. After some indications from HUD officials in San Francisco that the investigation would be dropped, a HUD attorney in San Francisco informed our attorney that the investigation and the case were ordered by anonymous officials in Washington, and that he could not close the investigation.

The investigation had a profound negative impact on us. We were very concerned about economic catastrophe just from the potential cost of litigation, not even considering threatened fines. Our ability

to speak about housing issues was curtailed. At one point my wife started taking went to a doctor and started taking anti-depressants.

In June this year, after the investigation had dragged on 8 months with no further word from HUD, we asked our attorney to write to HUD Secretary Cisneros asking that the case be dropped because our civil rights were being violated, and because the case was abridging the free speech rights of others in Berkeley.⁴ Then in mid July, upon continued lack of response from HUD, we decided to publicize the case in the press.

We were surprised to learn in the ensuing national press coverage that we were not alone, and that HUD had over 30 similar investigations against individuals underway. People under investigation from around the country began calling us with tales of their experiences with HUD investigations. While I am a strong advocate of ensuring fair access to housing, many of these cases appeared to us in Berkeley to be as unwarranted as the investigation against us.

I am thankful for protections provided in the constitution and for the power of a free press. How close were my wife, I and our neighbor from the economic devastation of the legal expense of defending ourselves in court against unwarranted legal action caused by zealots in the bureaucracy of the Federal government? On July 22, Mr. Philips, HUD spokesman was cited in a major San Francisco paper (The Examiner) as saying the HUD investigation found that we had broken the law. Yet, three weeks later on August 16, after considerable national press attention, HUD Assistant Secretary Achtenberg sent a letter to us saying our case was closed, with a finding that there was no reasonable cause to believe that the Fair housing Law had been violated as alleged.

KEY ISSUES ARE NOT RESOLVED BY NEW HUD GUIDELINES

The new HUD guidelines are a welcome first step, and should prevent repeats of the most glaring offenses that have occurred against those of us subjected to recent HUD investigations. However, the guidelines do not go far enough to prevent other abuses, and several key issues are not resolved.

⁴ Neighborhood concerns about a proposed home for aids patients in another part of Berkeley had caused a letter from the city attorney to those neighbors implying that they might have personal liability for statements they might make. Stare law was cited, and the neighbors knew of the HUD investigation of us.

Today, the future of my neighborhood and others like it are not at all secure either from continued over-concentration of HUD projects or from the negative impacts of poorly conceived and executed HUD projects.

We were particularly concerned to learn two of two types of HUD actions. First, that HUD was targeting several groups like us, in urban areas that already had existing high concentrations of subsidized housing and social services (e.g., in New York City and Seattle). Second, that HUD had pressured Washington State to override a City of Seattle dispersion ordinance that it had enacted. The new guidelines apparently address neither of these actions, and both will affect my neighborhood in Berkeley now and in the future.

Relative to over-concentration, the homeless are not simply like you and me, but just poorer. The homeless population is one with severe and varied problems. Eighty percent have been institutionalized, 1/3 are released mental patients, 1/3 are serious substance abusers, and only 1/3 are simply economically stressed. Forty percent have been incarcerated (average stay of 2 years).⁵ Mental illness and substance abuse afflict not just the poor and the ethnic minorities but all strata and ethnic groups.

Of course everyone should have equal rights to housing and the other opportunities of our society. But accumulating high concentrations of troubled populations in selected and defenseless urban areas have documented negative impacts on those communities. This is not a case of discrimination against the homeless. In fact, over-concentration can be viewed as a form of discrimination not only against the neighborhoods involved but also against the homeless persons being so concentrated.

I feel that my multi-racial, low-income neighborhood is the victim of de facto racial and economic discrimination. Ever-increasing concentrations of society's troubled populations are being imposed on our politically and economically weak neighborhood, while the predominantly white, more affluent

⁵ Statistics are from Richard W. White, Jr. *Rude Awakenings, What the Homeless Crisis Tells Us*, ICS Press, San Francisco, 1992 and William Tucker, *The Excluded Americans, Homelessness and Housing Policy*, Regnery Press Washington, DC, 1990

areas of Berkeley and other cities bear little or none of the burden.

Will HUD policies concerning the Fair housing Act support a further increase in the over-concentrations in our area of Berkeley and in similar locales in other cities? Or will HUD policies be neutral, or favor dispersal? These are not trivial questions, and the future viability of neighborhoods like mine is involved. While HUD Secretary Cisneros is appears to be promoting a policy of dispersion, HUD enforcement of the Fair Housing Act may be viewed as having the opposite effect. Clarity is needed on this important point.

For example, just two months ago, Berkeley sent a request to HUD to fund the conversion of another motel on University Avenue into housing for the homeless. If HUD approves this request, an impact will be to further increase and institutionalize the existing over-concentrations in this area of town. Recently, in a Berkeley meeting that I attended, a social service provider stated that it was illegal to oppose housing projects on the basis of over-concentration. She did not provide documentation. What is HUD policy, given its recent actions against the dispersion ordinance in Seattle? Would litigation about this potential Berkeley project on the basis of over-concentration be considered "frivolous" by HUD? Would it be considered a basis for a HUD Fair Housing Act investigation and lawsuit against neighbors in Berkeley? What are the rights of Berkeley neighbors to this and other projects? HUD should simply not investigate private individuals or groups for litigation based on existing valid local, state or federal laws or ordinances. Adequate safeguards against frivolous suits are considered to exist in other areas of law, why not for the Fair Housing Act?

Relative to the mitigation of negative impacts of specific HUD projects, the HUD investigation of Berkeley elected officials concerning use permit provisions on the Bel Air project is still active. HUD has forwarded the complaint the Justice Department with no comment other than that it involves land use issues. What is the intent? It has been 11 months since the complaint was filed. HUD has acted in secret the entire time, and has not communicated to anyone in Berkeley the slightest indication of wrongdoing. This is having a *profound* chilling effect upon public debate in Berkeley on these issues.

Why the 11 month delay in silence? Why are officials in Berkeley, which has done so much more than

most cities for the homeless, being targeted? Is it HUD's intent to prevent *any* local jurisdiction from exercising quality control on HUD projects, or from attempting to mitigate potential negative impacts of projects? Is HUD establishing itself, via police action, as the only arbiter of the quality of its projects? As the only decision-maker about what can constitute effective mitigation efforts? These questions become particularly important when combined with the issue of over-concentration and "fair share."

I REQUEST THAT CONGRESS TAKE SEVERAL ACTIONS

First, please initiate a GAO investigation into HUD's recent and current enforcement of the Fair Housing Act. We have a government of laws, and also of the men and women who administer the laws. I know from experience that most civil servants attempt to administer to the best of their ability. However, if just a few zealots in the civil service are permitted to arrogantly abuse their power, we all suffer. Who *were* the "officials in Washington" who directed the attorney in San Francisco that our case be kept open? Why have they not been identified and held accountable for violating our free speech rights? The free speech rights of innocent people in Seattle, New York, and elsewhere have also been violated. Will you please take action to ensure that the zealots in HUD who have caused these events are held accountable?

Second, please establish and maintain an independent oversight function over HUD's enforcement of the Fair Housing Act. Providing affordable housing is a complex issue. Our current policies are unfortunately far from successful, and in my neighborhood, their implementation is sometimes disastrous. These issues must be openly and fully debated in our communities, in congress and in our courts. The solution is NOT secret Gestapo tactics by HUD's thought police that chill speech throughout entire communities.

Third, perhaps it is time for a re-assessment of the Fair housing Act and the refinement of its implementation, with the intent of improving social policy. For example, is it sound policy to concentrate the mentally ill in urban commercial corridors, as is so often the case? Is it sound policy to allow recovering substance abusers, a population with a high recidivism rate, to be housed adjacent to liquor stores? Is it sound policy to house diverse subsets of the homeless population in unstructured

settings; in which case, too often, some become victims and some predators?

Fourth, please require HUD to develop a formal rulemaking that more clearly covers a broader range of issues. The recent HUD guidelines are either vague or silent about several key issues, including over-concentration, negative impacts of multiple projects, fair share, and mechanisms for ensuring appropriate mitigation of negative impacts. Also, the definition of "legitimate litigation" should be clarified. For example, over-concentration and fair share issues should not be cause for HUD investigations. Nor should establishing reasonable mechanisms for mitigating negative impacts of projects. Also, HUD should stop outlawing dispersion ordinances in cities and counties. It is simply too easy to keep dumping more and more facilities into economically and politically weak neighborhoods such as mine, ultimately turning these neighborhoods into institutional ghettos.

Fifth, please take action to publicize these actions widely, so that the chilling effects of recent HUD actions in communities throughout the country can begin to be healed.

Thank you very much for your attention to these important matters. Your actions now will strongly impact the future of the community in which I live.

D R A F T

LEGISLATIVE STATEMENT

H.R. ____ is a bill to reinforce the protections afforded to speech, expression and the right to petition by the First Amendment to the Constitution of the United States. The Bill does so by prohibiting the Federal government and private parties from investigating or suing persons or groups for exercising their rights to petition their government and fellow citizens through peaceful speech, expression and association in the judicial and political processes.

The need for H.R. ____ has been amply demonstrated by numerous investigations and enforcement actions brought by the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ"), based on vague and improbable allegations that the targets of the investigations violated the Fair Housing Amendments Act of 1988 ("FHAA") by speaking out on issues relating to housing and affecting groups protected by the FHAA. By pursuing these actions, HUD and DOJ have, in effect, promoted or facilitated a policy of intimidating groups engaged in peaceful expression, merely because HUD and DOJ disagree with the viewpoint being expressed.

Perhaps even more alarming than the practice of governmental investigation of citizens engaged in peaceful public expression is the persistent refusal of HUD's and DOJ's highest officials to recognize and rectify their agencies' transgressions. Rather than acknowledge the misguided nature of these policies, HUD's Assistant Secretary for Fair Housing and Equal Opportunity and DOJ's Assistant Attorney General for Civil Rights have proclaimed that peaceful speech is not protected by the Constitution when it expresses a viewpoint contrary to the government's interpretation of the FHAA. HUD and DOJ also

claim it was the express intent of Congress, in enacting the FHAA, to *require* HUD to investigate expressive activity ostensibly protected by the First Amendment "just to make sure" the actors have not violated the law.

Even after HUD adopted guidelines designed to prevent the recurrence of such investigations, it refused to acknowledge that First Amendment protections apply to all forms of peaceful expression, including circumstances where the government disagrees with the content of the speech or the objectives of the speakers. DOJ, on the other hand, has completely shunned HUD's guidelines as inapplicable to DOJ proceedings. As DOJ lawyers stated earlier this year in court papers addressing the impact of HUD's guidelines, "the position of the United States has not changed."

There should be no mistake that the sponsors of this legislation are committed to the vigorous enforcement of the FHAA's prohibitions against violence, intimidation, physical threats and discrimination in the provision of housing opportunities. However, these sponsors are equally committed to the zealous protection of the First Amendment rights of freedom of speech, expression, association and active participation in local government that are so essential to this nation's democracy. These goals are not inconsistent, and should be pursued with equal zeal by HUD, DOJ and all other arms of the Federal government. HUD's and DOJ's stubborn refusals to recognize and honor these fundamental protections of our Constitution are alarming, and must be redressed immediately.

Background

There is no clear public record of the number of investigations initiated under the FHAA against individuals or groups based solely on their protected First Amendment

activity. Nor is there a clear record of the number of such cases that have been resolved through HUD's "voluntary" conciliation agreements, in which the investigative targets surrender their First Amendment rights in return for having the charges against them dismissed.¹

HUD has acknowledged that as of September 2, 1994 (the date it adopted Guidelines concerning this issue) it was in the process of investigating at least 17 individuals based on complaints about their protected speech.² According to a letter from HUD to Rep. Henry J. Hyde, the following are examples of the alleged "unlawful conduct" that caused HUD to initiate federal investigations:³

- "discriminatory statements and organization of protest meetings"
- "individual citizens who handed out flyers and held rallies"
- "various remarks . . . at public meetings"
- "neighborhood opposition toward a group home"
- "lobby[ing] government officials to reduce its funding of complainant's organization"
- "delay[ing] zoning decisions through . . . opposition"
- "organizing neighborhood opposition, including circulation of fliers and petitions"
- "petition circulation, newspaper articles, protest organization and litigation"

Notably, in each of these cases, the government's invasion of the protections of the First Amendment was doubly offensive. First, it commenced investigations on the basis of pure speech activity that is plainly protected by the First Amendment. But, in perhaps an even more sinister invasion of civil liberties, the government commenced these

investigations only in cases where the viewpoint being expressed was in opposition to housing plans for protected groups. Individuals who lobbied government officials, organized neighborhood groups or circulated petitions in favor of such housing projects have never been the targets of investigations; only those who oppose some aspect of the projects are singled out for punishment. Such a pattern of enforcement, going beyond content discrimination to actual *viewpoint* discrimination, violates the most basic precepts of the First Amendment.

Once targets are identified in a complaint (often filed by groups or persons with an economic interest in the success of the housing facility), HUD subjects them to an Orwellian ordeal of threats, scrutiny and intimidation. They receive a notification from HUD informing them that they are being investigated by the Federal government, that they may be sued in Federal court, and that they must submit a sworn written response to the allegations against them within 10 days. They are advised that they may face fines of up to \$50,000 and incarceration.

The targets are then served with a HUD "Data Request." These requests routinely seek, among other things, the names and addresses of all members and contributors to the target organization, and all documents (including personal diaries, journals and letters) relating to the target organization or the housing project at issue. Once again, responses are due within 10 days, and the targets are advised that the information will be subpoenaed if not supplied "voluntarily."

As the "investigation" proceeds, HUD officials will attempt to resolve the complaint through a "conciliation" process through which HUD will offer to terminate its

investigation, but only if the target commits in writing not to engage in the challenged conduct in the future. These terms are generally proposed before there has been any written finding that the targets' conduct actually violated the law. Unfortunately, where the conduct complained of is peaceful speech and expressive activity, the conciliation agreements proposed by HUD require the targets to sacrifice their First Amendment rights. For example, in a recent Seattle, Washington case, the conciliation agreement proposed by HUD:

- regulated the content of the target organization's future communications to its members;
- required the target organization to submit to HUD on a regular basis an updated membership list and copies of all mailings it sends to its members;
- required members of the target organization to join, advocate and solicit support for community organizations supported by the complainant; and
- prohibited the target organization from circulating petitions, scheduling community meetings or meeting with city officials about problems concerning the complainant without first notifying the complainant.

The chilling effect of this investigative process is extraordinary. As the Congress already learned in the September 28, 1994 Oversight Hearings on the Fair Housing Amendments Act,⁴ the frequency and notoriety of those investigations have instilled fear in individuals and neighborhood groups who would otherwise express their viewpoints freely at public hearings or in letters to public officials and newspapers. Individuals have withdrawn their support for community organizations out of fear that the organization's speech or petition activities will expose members to a HUD investigation. And community groups now hesitate before petitioning the courts to enforce valid local zoning ordinances, for fear that they will be investigated and sued for merely seeking a declaration or enforcement of the

law.

Perhaps the most troubling indicator of the chilling effect of HUD's investigations is the extent to which the promoters of housing projects have masterfully manipulated HUD's investigatory process to squelch the slightest hint of community opposition. These promoters have on numerous occasions threatened to trigger an FHAA investigation against any protester who dares speak out against a housing project. The groups are even so brazen as to announce these threats at the beginning of public hearings or other public forums, thus ensuring that those who have attended to express a contrary view are aware of the threat. And the tactic succeeds, but only because everyone who participates in these debates is aware that a complaint under the FHAA, no matter how vague or frivolous on its face, will be enough to cause HUD to initiate a Federal inquisition.

HUD's Response

HUD's response to criticisms of its enforcement process has been schizophrenic and disjointed at its best, and simply disappointing at other times. After the Wall Street Journal exposed HUD's investigation of a citizen group in Berkeley, California for having protested the oversaturation of social service facilities in a small neighborhood,⁵ Assistant Secretary Achtenberg addressed concerns over the chilling affect of these investigations on First Amendment activity.⁶ As the title of her response suggested — "Sometimes on a Tightrope at HUD" — Secretary Achtenberg attributed HUD's Berkeley debacle to a perceived "natural tension" between protecting housing rights and preserving First Amendment liberties. According to Achtenberg, even though the members of the Berkeley group "had simply exercised their First Amendment rights to influence the outcome

of a government decision," HUD's investigation was warranted *and necessary* "to determine whether the activities of the group of private citizens was protected free speech or unlawful discriminatory conduct."⁷

In short, HUD's position was that under the current law, even where a complaint alleges nothing more than peaceful speech, expression, petition or association, HUD *must* initiate an investigation, with all of its concomitant threats and intrusions, in order to ensure that nothing more sinister has taken place.⁸ The fact that the investigation had a devastatingly chilling effect on the Berkeley organization's members — who were forced to retain counsel, who faced threats of massive fines and jail terms, and who were told by one government investigator that the case could be dropped, but only if the members would agree never to write or speak on housing issues again — was chalked up to the "friction between fair-housing and free-speech rights."⁹ Achtenberg's response concluded ominously by acknowledging "We can anticipate more cases of this kind."

The response to Achtenberg's statement was uniformly negative.¹⁰ Accordingly, on September 2, 1994, HUD announced new "Guidelines" articulating for the first time a policy of not investigating complaints that merely allege conduct protected by the First Amendment.¹¹ The Guidelines also described procedures for HUD field offices to follow before an investigation is commenced, to ensure that HUD's new First Amendment policy is followed.¹² Unfortunately, HUD announced that it would not implement or revise any regulations to make the protections in these Guidelines binding on the agency or enforceable by private citizens.

The HUD Guidelines plainly fell short of providing the substantive protection guaranteed by the First Amendment. The policy statement on respect for First Amendment activities specifically *excluded* the rights of individuals and groups to resort to the Courts to seek enforcement of local zoning ordinances or other laws.¹³ The Guidelines provided that such matters were not entitled to automatic First Amendment protection, but would instead be handled on a case by case basis. The case by case consideration would turn on a HUD official's determination of whether the lawsuit at issue is frivolous, but the Guidelines set forth no standards for determining whether a suit is frivolous.¹⁴ The Guidelines also provided that all of the prohibitions against investigating complaints related to First Amendment activities could be overridden at the discretion of HUD Headquarters — the very same discretion exercised by the very same bureaucrats who produced and refused to address this problem in the beginning.¹⁵ Moreover, none of the prohibitions in the Guidelines prevent HUD from referring complaints to DOJ for civil or criminal prosecution, and the Guidelines expressly invited private groups to continue bringing private enforcement actions, even in circumstances where the new "protections" would otherwise apply.¹⁶

The significance of these exceptions, exclusions and provisos soon became apparent in United States v. Robinson, an action filed by DOJ against a New Haven, Connecticut neighborhood group. DOJ alleged that Robinson and his group had violated the FHAA by suing in state court to enforce a facially valid, neutral zoning ordinance. After the HUD Guidelines were issued, the Robinson defendants presumed that DOJ would dismiss the enforcement action, because the HUD Guidelines recognized that the right of citizens to petition their government through lawsuits is protected by the First Amendment so long as

the action is not frivolous, and DOJ had conceded (and a Federal Magistrate had ruled) that the defendants' lawsuit to enforce the ordinance was not frivolous. However, DOJ claimed it was not bound by HUD's "internal guidelines," and refused to abandon its case against the Robinson defendants.¹⁷ As DOJ stated in a brief submitted under the name of Deval L. Patrick, Assistant Attorney General for Civil Rights, "The United States has already set forth its position . . . and the position of the United States has not changed."¹⁸

Luckily for the First Amendment and the Robinson defendants, the unchanged "position of the United States" was summarily rejected by Federal District Court Judge Daly, who held that the neighborhood group's right to seek relief in the Courts was protected by the First Amendment, and dismissed DOJ's complaint.¹⁹ Nevertheless, DOJ has continued to press its position, contrary to the HUD Guidelines, by filing a notice of its intention to appeal the District Court's ruling.

Explanation of Legislation

The purpose of H.R. ____ is to clarify — to HUD, DOJ and the community groups that are the subject of these investigations — that the exercise of First Amendment rights will not subject a person to liability under the FHAA, or to an investigation by the government. Section I does so by squarely stating the proposition that HUD and DOJ have steadfastly refused to acknowledge or commit to regulation — that conduct protected by the First Amendment shall not constitute a violation of the Fair Housing Amendments Act. The clear, enforceable, statement of that principle will operate to assure individuals and community groups that they may peacefully express any view on housing issues without fear

of private or Federal retribution.

Section I further clarifies that the filing of an action to enforce state or local zoning laws shall not be a violation of the act, unless the action fails to satisfy the standards set forth in Federal Rule of Civil Procedure 11(b) relating to frivolous actions.²⁰ This provision will do away with subjective or case by case definitions of "frivolous" and clarify for interest groups and the government alike the narrowly limited circumstances under which people expose themselves to liability under the FHAA by seeking a declaration or enforcement of the law. Moreover, this section will further ensure that HUD and DOJ do not attempt to stifle judicial enforcement of the laws as a way for private citizens to petition the government with their grievances. If the local laws that private parties seek to enforce are ultimately determined by a court to be pre-empted by the FHAA, that finding will sufficiently protect the Federal interest in fair housing, *without* unnecessarily sacrificing the rights of private parties to petition the government for redress.

Finally, Section I addresses the limited problem of government officials who are accused of acting with improper motivations simply because they were exposed to persons or groups exercising their First Amendment rights to express unpopular views. The legislation provides for this situation by prohibiting actions or proceedings against such an official if they are based solely on the views expressed to that official prior to acting. This section is not intended in any way to diminish the governmental immunity typically enjoyed by such officials.

Sections II and III of the legislation provide for procedural protections designed to guarantee the effectiveness of the substantive amendments. Section II ensures

that HUD will not commence an investigation of protected First Amendment activities merely because a complaint is vague or general in its allegations of misconduct. This section places the burden on HUD to obtain sworn allegations, from the complainant or some other source, with sufficient detail to enable the Secretary to determine that the conduct complained of is not protected by the First Amendment and may properly be investigated. This procedure will assist HUD in gathering information prior to commencing an investigation, and will ensure that the substantive portions of the preceding provisions are not circumvented by ambiguous or artfully drafted complaints.

Section III ensures that citizens who are notified by HUD that they are the targets of investigations are informed of the specific conduct that is alleged to be unlawful under FHAA. Section III further requires HUD to notify targets of investigations of the procedural rights and protections of the FHAA, including the protections of First Amendment expression provided for by this legislation. These disclosure requirements will serve to alert targets that a Federal investigation of their First Amendment activities is improper and will not be allowed under the Act.

Endnotes

1. We know of at least one such case, and based upon the number of open HUD investigations of this type as of September 1994, there is ample reason to believe that many times that number were investigated prior to that date.
2. See Letter from Hon. Roberta Achtenberg to Rep. Henry J. Hyde at 7 (Dec. 27, 1994).
3. See id. at 6-7 (discussing categories of cases determined to infringe on First Amendment rights).
4. Conducted before the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights.
5. See Heather MacDonald, Free Housing Yes, Free Speech No, Wall St. J. (August 8, 1994).
6. Roberta Achtenberg, Sometimes on a Tightrope at HUD, Wash. Post (Aug. 22, 1994).
7. Id.
8. Id.
9. Id.
10. See, e.g., HUD Plays Too Rough, N.Y. Times (August 27, 1994) (editorial) ("HUD has been operating without clear distinctions between legitimate protest and discrimination"); Intimidating Political Protest, Wash. Post (Aug. 22, 1994) (editorial) ("in operation, these investigations alone can be so intimidating as to quash speech").
11. See Memorandum from R. Achtenberg to FHEO Office Directors, Enforcement Directors, Compliance Directors, Staff, Office of Investigations (Sept. 2, 1994).
12. Id. at 3-5.
13. Id. at 5.
14. Id.
15. Id.
16. Id. at 2, n.2.

17. United States v. Robinson, Civ. No. 3:92CV00345, United States' Response and Opposition to the Motion of Defendants Hodgson and Leventhal for Oral Argument at 2 (filed Sept. 15, 1994).

18. Id. at 3.

19. See United States v. Robinson, Civ. No. 3:92CV00345, Ruling on Objections to Recommended Ruling (D. Conn. Jan. 26, 1995).

20. Federal Rule of Civil Procedure 11(b), as amended through December 1 1993, provides as follows:

Representations to Court. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fair housing

FAIR HOUSING: ELIMINATING DISCRIMINATION AND REDUCING BARRIERS TO CREATE ONE AMERICA

As we expand opportunity and create jobs, no one can be left out. We must continue to enforce fair lending and fair housing and all civil rights laws, because America will never be complete in its renewal until everyone shares in its bounty.

President Clinton, State of The Union Address, January 25, 1994

Today President Clinton attended the second meeting of his Race Advisory Panel and announced a three-part initiative to eradicate housing discrimination: (1) doubling the number of enforcement actions against housing discrimination; (2) giving new grants to help private non-profit groups, state and local governments and others to eliminate housing discrimination; and (3) filing civil charges in three housing discrimination cases.

PRESIDENT CLINTON ANNOUNCES \$15 MILLION IN GRANTS TO ENFORCE FAIR HOUSING LAWS. These grants-- a total of 67 awards -- are going to 33 states and the District of Columbia to support the efforts of private non-profit organizations, state and local governments, disability advocacy groups, community development corporations and others to enhance compliance with the nation's fair housing laws. Grants will be used for both education and enforcement efforts -- including funding for enforcement organizations that undertake testing and provide housing counseling and other activities to prevent and eliminate discriminatory housing practices and promote fair housing.

PRESIDENT CLINTON ANNOUNCES THAT HUD WILL DOUBLE THE NUMBER OF ENFORCEMENT ACTIONS AGAINST HOUSING DISCRIMINATION. Under President Clinton's leadership, the rate of home ownership in America is approaching the highest in our history -- we are one-tenth of one percentage point away. Minority homebuyers account for a large and growing share of these new homeowners -- from 1993-1996, minority homeowners accounted for 29% of all new homebuyers. Unfortunately, as the rate of minority participation in housing has increased, so too have complaints of housing discrimination. The Clinton administration is committed to eliminating barriers to home ownership and allowing even more Americans to own homes in safe and affordable communities. Today, the President announced that the Secretary of Housing and Urban Development will double the number of enforcement actions against housing discrimination in the next four years to help eliminate housing discrimination.

CIVIL CHARGES FILED IN THREE CASES OF ALLEGED ILLEGAL HOUSING DISCRIMINATION. Today HUD Secretary Andrew Cuomo announced that the Department of Housing and Urban Development will file civil charges of housing discrimination against three individuals and one business under the Fair Housing Act, which bars discrimination in the sale, rental, financing and advertising of almost all housing in the nation on account of race, color, religion sex, disability, family status and national origin. The actions today send a message that the Administration will immediately strengthen enforcement of our nation's fair housing laws, in compliance with the President's announcement.

FAIR HOUSING INITIATIVES PROGRAM

1997 GRANT AWARDS

DESCRIPTION OF PROGRAM

The Fair Housing Initiatives Program (FHIP) of the Department of Housing and Urban Development (HUD) provides support to private non-profit organizations, State and local governments and others to strengthen enforcement of, and enhance compliance with, the nation's fair housing laws. FHIP was authorized by the Housing and Community Development Act of 1987. While FHIP grants support education and enforcement efforts, the program focuses on helping private, non-profit fair housing enforcement organizations undertake testing and other enforcement activities to prevent and eliminate discriminatory housing practices.

1997 GRANT AWARD COMPETITION

In fiscal year 1997, \$15 million is being made available for grants in three categories:

- Private Enforcement Initiative -- (\$10.2 million)-- These funds go to enforcement organizations to investigate allegations of housing discrimination, provide housing counseling, and promote fair housing.
- Fair Housing Organizations Initiative -- (\$2.7 million) -- These funds help organizations build their capacity to undertake fair housing enforcement activities. Approximately \$1.3 million of these funds have been designated to help disability advocacy organizations.
- Education and Outreach Initiative -- (\$1.8 million) -- This category of grants includes funds to promote reconciliation in communities experiencing racial tensions as may occur when members of minority groups move into formerly all-white areas.

OVERVIEW OF GRANT AWARDS

- A total of 67 awards, totaling \$15 million.
- Awards in 33 states and the District of Columbia, with at least 2 private enforcement initiative awards in every HUD region in the country.
- A broad range of grant recipients that are active on fair housing issues including: private fair housing enforcement organizations, housing industry groups, community groups, disability advocacy groups, city governments, fair housing agencies, legal service agencies, and community development corporations.

**LOCATIONS OF
FAIR HOUSING INITIATIVES PROGRAM GRANT RECIPIENTS**

ALABAMA -- Birmingham, Montgomery

ARKANSAS -- Arkadelphia, Little Rock

ARIZONA -- Tucson

CALIFORNIA -- Berkeley, Fresno, Ontario

COLORADO -- Denver (2)

CONNECTICUT -- Hartford

DELAWARE -- Wilmington

DISTRICT OF COLUMBIA -- Washington (2)

FLORIDA -- Cocoa, Miami

GEORGIA -- Savannah

IDAHO -- Boise (2)

ILLINOIS -- Chicago (3); Winnetka

KENTUCKY -- Louisville (2)

LOUISIANA -- New Orleans

MARYLAND -- Baltimore, Upper Marlboro

MASSACHUSETTS -- Amherst, Holyoke

MINNESOTA -- Minneapolis (2)

MISSOURI -- Kansas City (2), St. Louis

MONTANA -- Missoula

NEBRASKA -- Omaha

NEVADA -- Carson City, Reno

NEW HAMPSHIRE -- Manchester

NEW MEXICO -- Albuquerque

NEW YORK -- Buffalo, Islandia, Jamaica-Queens-NYC, Rochester, Syracuse

NORTH CAROLINA -- Elizabeth City, Raleigh

NORTH DAKOTA -- Bismarck

OHIO -- Cincinnati, Cleveland (2), Parma, Toledo

OREGON -- Eugene, Portland

PENNSYLVANIA -- Pittsburgh Swarthmore

TENNESSEE -- Jackson, Memphis, Nashville

UTAH -- Salt Lake City

VERMONT -- Burlington

WISCONSIN -- Appleton, Milwaukee

WASHINGTON -- Lakewood, Seattle

FAIR HOUSING

Internal Qs & As

Q. What is covered under the Fair Housing Act?

The Fair Housing Act prohibits discrimination in the sale, rental, financing or advertising of housing based on race, color, religion, sex, disability, family status, or national origin. The act applies to almost all housing in the United States. It applies to private landlords and property management firms, property owners, federally-assisted housing, public housing authorities, realtors, and lenders and insurers of housing.

Q. How are violations of the Fair Housing Act handled?

Persons who believe they are victims of discriminatory housing practices can file a complaint with the U.S. Department of Housing and Urban Development (HUD). Fair housing investigations are conducted by HUD, state and city agencies working with HUD, and private fair housing groups that receive HUD funds. If an investigation shows that illegal housing practices have occurred and the parties will not settle, HUD can issue civil enforcement charges -- such as the three announced today -- and legal action is taken. HUD handles over 12,000 inquiries from potential complainants annually.

Q. How many complaints has HUD processed and what was their disposition?

Since the Clinton administration took office, HUD has investigated 16,325 housing complaints, taken enforcement actions on 1,085 cases, reached out-of-court settlements on 6,517 cases, and collected \$17.8 million in compensation to victims of housing discrimination.

Q. Why is the President directing HUD to double its the level of its enforcement actions against housing discrimination?

One of the most basic civil rights is the ability to live where you want. Discrimination in housing represents a serious barrier to achieving true racial reconciliation in the country. If people are kept apart in their homes and neighborhoods, how can we ever come together as a nation? Discrimination in housing is illegal and it is wrong. That's why I am directing Secretary Cuomo to do everything in HUD's power to ensure that this Nation's fair housing laws are enforced.

Homeownership helps build strong communities, which is why another goal of my administration has been to increase the homeownership rate. We cannot achieve that goal without ensuring that fair and equal housing opportunity is open to all Americans. Over the past four years, more than 34,000 complaints of housing discrimination have been made to federal, state and local agencies. It is critical to address these problems, and so in

the next four years, HUD will double its enforcement actions to ensure that all Americans have a full range of opportunities for home ownership.

Q. What has been the level of enforcement activity in the past four years? How much will enforcement actions increase as a result of this announcement?

A total of 1,085 enforcement actions were taken during fiscal years 1993, 1994, 1995 and 1996: during that time 882 charges finding violations of the Fair Housing Act were issued and 203 cases were referred to the Department of Justice for enforcement action. Over the next four years, at least 2,170 enforcement actions will be taken.

Q. How have minorities fared in terms of home ownership over the past few years?

With the economy going strong and ownership becoming more affordable, many minority and immigrant households are buying homes. The Ford Foundation-sponsored study, The State of the Nation's Housing: 1997, issued by the Joint Center for Housing Studies of Harvard University found that minority and immigrant households account for nearly 30% of the overall growth in homeownership, and in many areas anchor the first-time buyer market. The number of minority households buying homes for the first time increased by 994,000 from 1993 to 1996 -- almost 30 percent of the overall increase of 3.3 million.

During those three years, 460,000 Hispanic households have become homeowners -- an increase of 16.3 percent. African-Americans and other minorities also posted significant gains.

Q. What does the Fair Housing Initiatives Program(FHIP) do? How are these grants used?

FHIP provides funds to public and private entities carrying out programs to prevent or eliminate discriminatory housing practices. Federal funds provide support to private non-profit organizations, State and local governments and others to strengthen enforcement and enhance compliance with the nation's fair housing laws. While both educational and enforcement efforts are funded, the program's main emphasis is the support of private non-profit fair housing enforcement organizations that undertake testing and other enforcement activities to prevent and eliminate discriminatory housing practices.

Q. Why is FHIP important to HUD's mission?

The FHIP represents a significant Federal commitment to fair housing activity and is a critical component of HUD's enforcement of the provisions of the fair housing laws. It is the only grant program available within the federal government whose primary purpose is to prevent and eliminate discriminatory housing practices. FHIP also promotes local partnerships with other public/private entities in addressing fair housing violations.

Q. What types of activities are funded under FHIP?

Examples of funded activities include:

- investigating complaints alleging discrimination in housing -- including rental, sales, lending and insurance;
- testing as a means of detecting different treatment;
- training housing industry groups and others regarding their responsibilities under the Fair Housing Act.

Q. What types of organizations typically receive FHIP awards?

The majority of FHIP recipients are fair housing enforcement organizations that provide the full-range of fair housing services to the public. FHIP also funds:

- State and local governments;
- disability advocacy organizations;
- legal services organizations;
- community development organizations; and
- housing industry groups (this year, a National Outreach and Education award is being made to the National Association of Homebuilders Research Center).

Q. What have FHIP funding levels been in the past? How much has been requested for FY 1998?

FHIP Funding 1991-1997

1991	\$5.8 million
1992	\$8.0 million
1993	\$10.6 million
1994	\$20 million
1995	\$26 million
1996	\$17 million
1997	\$15 million, requested \$18 million
1998	Requested \$24 million.