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Domestic violence
Domestic violence day
Domestic violence insurance
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Drug abuse
Drug control
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Failing schools

Fair hsng

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Fair hsng free speech



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20410-0001

*For
Housing
[Signature]*

FAX TRANSMISSION

DATE: Saturday 1-17

NUMBER OF PAGES (including this page) 12

To: Tom Friedman

FROM: Jacquie Lowry

PHONE: _____

COMMENTS: _____

INCREASE IN HUD'S FAIR HOUSING BUDGET

Fair housing for all of our citizens is an integral part of the President's goal to increase homeownership and to bring us closer to his vision of One America. To fulfill his promises in these areas, he has directed the Department and Urban Development to double the number of enforcement actions we take in response to acts of illegal housing discrimination. Additionally, the budget request for the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity for fiscal year 1999 is increased from \$30 to \$52 million to support this effort.

Specifically, the money will be used to increase the effectiveness of the Department's enforcement activities by strengthening our support of our public and private partners. The budget would increase funding of the Fair Housing Initiatives Program (FHIP) from \$15 million to \$29 million, and the funding of the Fair Housing Assistance Program (FHAP) from \$15 million to \$23 million.

Fair Housing Initiatives Program (FHIP): \$29 million

FHIP was established by the Housing and Community Development Act of 1987 for the purpose of eliminating and preventing housing discrimination. This program provides a coordinated approach to: 1) further the purposes of the Fair Housing Act and 2) guarantee the rights of all people to seek housing in an open market free of discrimination and 3) inform the public and the housing industry of their rights and responsibilities under the Fair Housing Act. FHIP funds private, nonprofit fair housing organizations and public entities that combat discriminatory housing practices. In 1999, FHIP will fund three distinct categories: the Private Enforcement Initiative, the Education and Outreach Initiative, and the Fair Housing Organizations Initiative.

Through these initiatives, HUD will provide increased funding to:

- Expand and enhance the ability of private fair housing agencies to investigate discriminatory practices;
- Conduct a National Fair Housing Rights Education Campaign to inform all Americans of their fair housing rights and responsibilities;
- Fund audit-based enforcement projects in 20 geographical areas to establish indices of discrimination and;
- Establish new Fair Housing Organizations in underserved areas.

Fair Housing Assistance Program (FHAP): \$23 million

The FHAP provides assistance to State and local agencies that administer fair housing laws certified by the Department as "substantially equivalent" to Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988. FHAP assistance includes support for enforcement activities including: complaint processing, training, technical assistance, and data and information technology. The program is designed to coordinate intergovernmental enforcement of fair housing laws and provide incentives for States and localities to assume greater responsibilities for administering fair housing laws.

In FY1999, funding will be used to support the President's "One America" Initiative by providing increased funding to "substantially equivalent state and local agencies to help the Department fulfill the President's directive to double its fair housing enforcement actions.

**STATEMENT FROM THE VICE PRESIDENT
ON INCREASING THE FAIR HOUSING BUDGET**
Stamping Out Discrimination and Creating Equal Access for All

DRAFT

In 1997, the President embarked on his mission to advance racial reconciliation in this country through his One America Initiative. While a significant part of this Initiative has been to open a national dialogue on race in this country, this President knows that when it comes to combating discrimination, talk is not enough. That is why President Clinton has committed this Administration to finding the resources necessary to advance the cause of equal opportunity for all Americans.

Nowhere is discrimination more insidious than when it strikes at home. When Americans are denied the opportunity to live in the neighborhoods of their choice, it can have a negative impact on every aspect of their lives. Children may not be able to go to the school that best fits their needs, parents may not have access to the jobs that will best support their dependents, and families may be denied the social and community affiliations that will best advance their success.

Though we all wish differently, housing discrimination is still alive and well in this country. We have seen a rash of hate crimes, many of which occur when a family moves into a neighborhood in which it is not the majority. The White House recently held a Hate Crimes Conference in which we all heard stories that shocked and saddened us.

But discrimination may not always be as obvious as a hate crime, or a sign which reads "No blacks allowed." Discrimination today may be subtle, as when an African American is told that "no apartments are available," by a landlord who five minutes later rents to an equally qualified white person. While the face of discrimination may wear a smile rather than a white hood, it is no less ugly than it ever was.

This has been made clear to us through the efforts of Andrew Cuomo, Secretary of the Department of Housing, who has been vigorous in his defense of those who have suffered discrimination. President Clinton knows that if we cannot live together in our neighborhoods, we cannot come together as a nation. For that reason, President Clinton has directed Secretary Cuomo to double the number of fair housing enforcement actions taken by the Department. We cannot be complacent in the face of bigotry and we cannot accept discrimination as "business-as-usual." We must make it clear that Americans will not tolerate housing discrimination.

To further the Administration's commitment to aggressive enforcement of this country's fair housing laws, I am pleased to announce today that we will be proposing a \$22 million increase in the budget for HUD's Office of Fair Housing and Equal Opportunity. This money will go to local communities across this country to educate Americans on their fair housing rights and responsibilities so that -- hopefully -- fewer laws will be broken. The money will also go to agencies that work with HUD to enforce those laws when education is not enough.

While it may be easier to "talk the talk" of equal rights, this President is committed to ensuring that we will also "walk the walk." The President and I look forward to working with Congress to ensure that we do what we must to protect all Americans from discrimination and hate crimes.

Increasing the Enforcement Actions Combatting Discrimination and Expand Access for All

Today, Vice-President Gore will announce a plan for a funding increase of \$22 million for the Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity. This increase in fair housing activities is one of the primary elements of the President's "One America" policy, which will support new efforts to end housing discrimination, including a commitment to double the number of housing discrimination enforcement actions. Fair housing is inextricably linked to expanding rental and homeownership opportunities to all Americans.

The budget for this activity will increase funding of the Fair Housing Assistance Program (FHAP) from \$15 million to \$23 million and the funding of the Fair Housing Initiatives Program (FHIP) from \$15 million to \$29 million. Specifically, these funds will be used to increase the effectiveness of the Department's enforcement activities by strengthening our support of our public and private partners.

The Fair Housing Assistance Program - \$23 million

- assist State and local fair housing organizations to address housing discrimination against the underserved population by supporting agencies who can demonstrate that they have carried out marketing activities among underserved groups and communities which have substantially increased the number of jurisdictional complaints.
- support joint investigations and enforcement activities; support joint efforts among States and localities in order to most effectively address the barriers to fair housing in a given community or the discriminatory practices of a large lender or housing provider, agencies must have the vehicles to work cooperatively; and
- provide funds to litigate meritorious housing cases to support agencies if the case is meritorious and becomes a more costly through litigation.

The Fair Housing Initiatives Program - \$29 million

- create a National Fair Housing Rights Education Campaign to ensure that all American homeseekers know their fair housing rights, recognize discrimination in its subtle as well as blatant forms and get assistance in ending such illegal discrimination.
- provide funding in 20 selected communities to measure the extent of discrimination encountered by racial and

- o ethnic minorities in the rental and sale of housing;
o assist more than 50 local fair housing and other nonprofit groups to address barriers to fair housing, supporting at the neighborhood level, the President's commitment to take strong enforcement actions to address housing discrimination;
- o increase coordination of enforcement efforts between local governments and private organizations so that we are all partners in the fight against housing discrimination.

FACT SHEET

Enforcing the Fair Housing Act and other related fair housing laws is the job of HUD's Office of Fair Housing and Equal Opportunity (FHEO). HUD has worked during the past four years to strengthen and reinvent the ways in which housing discrimination is combated. It's Fair Housing Act administrative enforcement process has gone through a reinvention process, bringing increased efficiency through technology enhancements, high standards for customer service, and strong direction on decreasing non-jurisdictional claims which waste valuable resources. Other new initiatives include devolving responsibility for the fair housing planning process to State and local jurisdictions, requiring them to analyze impediments to fair housing within their communities and devise plans for overcoming these barriers based on their own circumstance and needs.

The commitment to fair housing infuses all the Department's actions and operations. Fair housing efforts are inextricably linked to our goals of empowering communities, expanding rental and homeownership opportunities in the private market and affirmatively furthering fair housing. The Department's fair housing activities will also become an integral part of the President's "One America" policy which will support new efforts to end housing discrimination. To further civil rights in America's housing markets, HUD proposes to fund the following two programs in FY 1999:

1. *Twenty-Nine Million Dollars for the Fair Housing Initiatives Program (FHIP)*

The FHIP was established by the Housing and Community Development Act of 1987 for the purpose of eliminating and preventing housing discrimination. This program provides a coordinated approach to: (1) further the purposes of the Fair Housing Act; (2) guarantee the rights of all people to seek housing in an open market free of discrimination; and (3) inform the public and the housing industry of its rights and obligations under the Fair Housing Act. FHIP provides funding to help private, nonprofit fair housing organizations and public entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices. In FY 1999, the Department will provide funding under three distinct categories of FHIP: the Private Enforcement Initiative, the Education and Outreach Initiative, and the Fair Housing Organizations Initiative.

Through these initiatives, HUD will provide funding to: assist private fair housing enforcement organizations and State and local fair housing organizations in joint enforcement activities; develop a National Fair Housing Rights Education Campaign that will inform the public of what constitutes housing discrimination, how to recognize discrimination, and where to go for assistance if they believe they have been the victims of housing discrimination; fund the establishment and operation of alliances to address multi-jurisdictional discriminatory practices; fund audit-based enforcement projects in 20 geographical areas to establish indices of discrimination based on race and national origin in the sale and rental of housing; and establish new fair housing enforcement organizations in underserved areas. This funding will also assist

other anti-discrimination activities by private fair housing groups to support the President's commitment to take stronger enforcement actions to address housing discrimination.

2. Twenty-Three Million for the Fair Housing Assistance Program (FHAP)

The FHAP provides assistance to State and local agencies that administer fair housing laws certified by the Department as "substantially equivalent" to Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988. The assistance includes support for enforcement activities, including complaint processing, training, technical assistance, data and information systems (including improvements to the new BPR technology system being expanded to FHAP agencies), and joint activities to increase fair housing enforcement. The program is designed to build coordinated intergovernmental enforcement of fair housing laws and provide incentives for States and localities to assume greater responsibility for administering fair housing laws.

In FY 1999, funding will be used to support the President's "One America" initiative by providing funding to "substantially equivalent" State and local fair housing agencies to help the Department in its efforts to double its fair housing enforcement actions. This funding will also be used to assist State and local fair housing organizations in addressing housing discrimination in underserved populations, support joint investigations and enforcement activities; reimburse fair housing agencies for case processing; provide capacity building funds and training; fund special enforcement actions such as, having hearings and pursuing cases through the courts; and to provide funds to litigate meritorious housing cases.

Enforcing the nation's laws and preventing housing discrimination. President Clinton has directed Housing and Urban Development Secretary Andrew Cuomo to lead the federal effort to crack down on housing discrimination. On September 30, 1997, Secretary Cuomo announced that HUD will double the number of civil-rights enforcement actions by the year 2000. Secretary Cuomo also announced that \$15 million dollars was being awarded to 67 fair-housing groups around the country to assist in combating housing discrimination this year. Since September 1997, HUD has initiated over 30 enforcement actions in 15 states, including one against a West Virginia couple who allegedly threatened a black family with a knife and gun, and intimidated the family by hanging plastic ducks, painted black to a cross. Other enforcement actions include charges against a Massachusetts rental service which used codes on listings to bar blacks and Hispanics from apartments, a Buffalo man who threatened to blow up a woman's house after she showed an apartment she owns to a prospective black tenant, and an Iowa housing provider who openly refused to rent to blacks. In this same period, the Department has also issued 79 enforcement agreements in 16 states.

Chronology of the Crackdown

September 30, 1997

CLINTON ADMINISTRATION CRACKS DOWN ON HOUSING DISCRIMINATION WITH NEW CHARGES AND \$15 MILLION IN GRANTS

In conjunction with the White House Conference on Race Relations, Secretary Cuomo announces his commitment to "crackdown" on housing discrimination and to double the number of enforcement actions taken by HUD in response to discrimination during President Clinton's second term. Attending this event are several victims of discrimination who spoke of their experiences. Ms. Antonina Ippolito describes how a caller threatened to firebomb her home if she leased one of her rental properties to blacks or Hispanics. Mr. and Mrs. David Fernandez, of Caldwell, Idaho recount how they were prevented from purchasing a manufactured home from Mrs. Fernandez's father because the owner of the park in which the home was sited did not want Hispanics living there. A video-taped statement from an witness, shown only in silhouette, describes how this former rental agent was instructed to code property listings with the word "Archie"--short for Archie Bunker--if the owner did not want blacks or hispanics as tenants.

At the same event, HUD announces the release of \$15 million in grant money to private non-profit groups that fight housing discrimination on the community level.

October 13, 1997

CUOMO ANNOUNCES HUD ACTION ON FOUR HOUSING DISCRIMINATION CASES IN FOLLOW UP TO CRACKDOWN ANNOUNCED BY PRESIDENT.

Following up on President Clinton's September 30th pledge, Secretary Cuomo announces the successful resolution of four complaints of race-based housing discrimination in Alabama, Pennsylvania, Arizona and California. Each complaint was resolved by means of a voluntary enforcement agreement. These agreements, which are enforced by the Department of Justice, provide relief to individuals injured by discrimination, give HUD greater oversight into the operations of the housing provider or agent against whom the complaint was filed, and commit the provider or agent to non-discriminatory practices in the future.

October 21, 1997

**CUOMO CONTINUES HUD CRACKDOWN ON HOUSING DISCRIMINATION
WITH CHARGES RISING OUT OF THREATS TO BLACK FAMILY IN
WEST VIRGINIA --**

At a press event in Charleston, West Virginia, the Department announces the filing of charges against a white family charged with harassing their black neighbors by barricading the path leading to the black family's land, threatening members of the black family with a gun and a knife, and hanging black plastic ducks from a white cross mounted near the black family's land. Craig and Gloria Smith, the victims of the alleged harassment, describe the acts of racial hatred committed against them and their three small children since they moved their modular home onto a piece of land adjoining the property of the Hobbs family.

October 30, 1997

**CUOMO ANNOUNCES AWARD OF 11.5 MILLION TO GOVERNMENT
AGENCIES IN 32 STATES TO FIGHT ILLEGAL HOUSING
DISCRIMINATION AND FILES CHARGES AGAINST AN IOWA
LANDLORD WHO REFUSED TO RENT TO BLACKS**

At a press event in Davenport, Iowa, Secretary Cuomo announces the award of \$11.5 million to civil rights enforcement agencies in 32 states, funding fair housing investigations and enforcement by state and local government partners around the country. At the same event, the Secretary announces that HUD will take legal action against Frank Quijas, a Davenport Iowa landlord who repeatedly turned away black apartment-seekers, telling them that his lawyer told him that he "doesn't have to rent to blacks." Jacqueline Ash and Andre Echols, both black apartment-seekers who were discriminated against by Quijas and who will be represented in a civil suit against Quijas by the Department, speak to the press.

November 7, 1997

**CUOMO ANNOUNCES HOUSING DISCRIMINATION SETTLEMENT
INVOLVING ACCESSIBILITY FOR PEOPLE WITH DISABILITIES IN
GEORGIA**

Secretary Cuomo announces the successful resolution of a complaint alleging that new multi-family housing built in Tucker Georgia was constructed without important accessibility features required by the Fair Housing Act. The builder of Bentley Place Apartments, Charlie Roberts, acknowledges that accessible housing

"is the law of the land and . . . a reasonable law," and pledges to retro-fit the 228-unit complex so as to bring it into full compliance with the accessibility requirements of the Act. In addition, the builder agrees to pay \$4,000 to the fair housing advocacy group that identified the violations as part of the settlement of the complaint.

November 10, 1997

**PRESIDENT CLINTON ANNOUNCES "MAKE 'EM PAY" CRACKDOWN
BOOSTING FINES FOR HOUSING DISCRIMINATION HATE ACTS**

As part of his crackdown on hate crimes, President Clinton today announced a five-part "Make 'Em Pay" initiative to fight housing-related acts of hate, violence and intimidation with sharply higher fines and increased enforcement. The plan set forth by the President and Secretary Cuomo:

- increases penalties for hate acts involving housing discrimination
- strengthens the partnership between HUD and the Department of Justice
- creates a closer relationship between HUD and non-federal civil rights agencies
- promises more training on the investigation and resolution of hate crime complaints and
- commits HUD to development of a new interactive site on its existing Web Page to facilitate the reporting of hate crimes.

November 14, 1997

**HUD-FUNDED GROUP ANNOUNCES SETTLEMENT OF SUIT AGAINST
LANDLORD CHARGED WITH EVICTING BLACK NUN BECAUSE OF HER
RACE**

Secretary Cuomo commends the Leadership Council of Chicago for their use of HUD funds to investigate and resolve a complaint filed by the Sisters of Providence after two nuns were evicted from a Chicago apartment allegedly because one of them was black. Sister Kathleen Burke, who is white, describes how she had leased an apartment with another nun from Clarence and Eileen Jacobs for four years. After Burke's first roommate left, Phillis Sheppard, a black psychologist and also a Sister of Providence at the time,

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moved in with Burke. When a member of the Jacobs family met Sheppard and became aware of her race, the nuns were abruptly told to vacate. The Jacobs, agrees to pay the Order an undisclosed sum in addition to the \$165,000 required to settle a related complaint filed before the city human relations commission.

November 15, 1997

HUD AND THE NATIONAL ASSOCIATION OF REALTORS JOIN FORCES TO PROMOTE EQUAL OPPORTUNITY & BOOST MINORITY HOMEOWNERSHIP UNDER PRESIDENT'S ONE AMERICA INITIATIVE

In New Orleans, during the national convention of the National Association of Realtors, Secretary Cuomo and NAR sign a historic partnership agreement to promote equal housing opportunity and increase minority homeownership. The initiative creates a new training and certification program open to more than 1.5 million real estate professional across the nation. NAR adopts the President Clinton's One America Logo for use by agents who are trained and certified in fair housing, committed to the principals of equal housing opportunities and who have no fair housing violations filed against them.

NOVEMBER 25, 1997

CUOMO ANNOUNCES HOUSING DISCRIMINATION CHARGES AGAINST OWNERS AND MANAGERS OF RICHMOND, VA APARTMENT COMPLEX. MANAGER ALLEGEDLY SAID SHE WOULD KEEP "NIGGERS" OUT

At a press event in Richmond, Secretary Cuomo announces that his office will file housing discrimination charges against the owners and managers of Wedgewood Village, an apartment complex in Richmond VA who are accused of refusing to rent to African Americans. HUD's investigation uncovered black apartment-seekers who were provided false information to discourage them from applying to Wedgewood Village and white tenants who said that the on-site apartment manager, Rita Baines-Lewis, boasted to them that she was "keeping the niggers out." The civil charges announced are against Lewis, the apartment management company, and the owners of the apartments for discriminating against prospective black tenants. In addition, HUD issues an order barring Lewis from employment by any company that receives HUD housing assistance for one year.

DECEMBER 5, 1997

**CUOMO ANNOUNCES HOUSING DISCRIMINATION CHARGES AGAINST
LOUISIANA APARTMENT OWNER**

At a news conference in Lake Charles, Louisiana, Secretary's Representative, Betsy Julian, announces the filing of charge against Mr. Danny LeBlanc of Lake Charles, Louisiana for refusing to rent a studio apartment to Mr. Gene Lewis of Mossville, because Mr. Lewis is African American. Mr. Lewis responded to an advertisement to see the studio apartment, which is located in a four-unit building, and was shown the unit by a woman who allegedly warned Mr. Lewis that the owner was prejudiced. When Lewis met with the owner after viewing the apartment, the owner informed him "I don't like to rent to you people... brown, black, colored, whatever you call yourselves." Later, a representative from the community organization ACORN called and LeBlanc told him that an apartment was still available. The Department's investigation revealed that within 12 days of Lewis's initial call to LeBlanc, LeBlanc rented three units- all to whites.

Letter of Transmittal

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

Sirs:

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

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

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

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

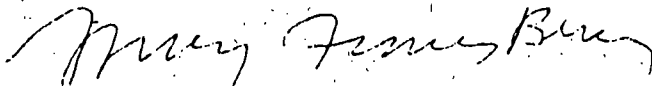
In the final pages of this report, we have described our 33 findings and recommendations in detail. Our recommendations are aimed at the elimination of problems associated with fair housing enforcement and implementation. The following highlights some of our key findings:

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

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

Respectfully,

For the Commissioners,

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

Mary Frances Berry
Chairperson

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1. Introduction

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

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

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

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

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

Measuring the Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷ Ibid.

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

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

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

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

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

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

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

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

10 Ibid.

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

12 Ibid., p. 8.

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

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

15 Ibid.

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

The Federal Role

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

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

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

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

16 Ibid.

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

18 Exec. Order No. 11,063, 3 C.F.R. 652 (1962), as amended by (among others) Exec. Order No. 12,259, 3 C.F.R. 307 (1981), reprinted in 42 U.S.C. § 3608 (1988).

19 42 U.S.C. § 2000d-4 (1988). ✓

20 *Id.* § 3604.

21 *Id.* and Housing and Community Development Act Amendments to the Fair Housing Act of 1974, Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 633, 729 (1974).

22 42 U.S.C. § 5309(a) (1988).

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

80s → HUD =
vol'y compliance

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

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

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

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

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

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

New Initiatives

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

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

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

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

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

27 42 U.S.C. § 3607(b) (1988).

1/1/94
P. Clinton =
Exec. order =
strengthening
HUD's enforcement
against discrimination in education and employment. However, during the Bush Administration HUD began the task of constructing a system of enforcement accessible to individual complainants, and the U.S. Department of Justice (DOJ) launched new initiatives in pursuing major mortgage lending cases. On January 17, 1994, President Clinton gave new visibility to fair housing enforcement with the issuance of an executive order strengthening the coordination and implementation of Federal fair housing policy.²⁸ HUD announced its intention to issue new regulations on disparate impact, insurance redlining, and mortgage discrimination, and began implementing a reorganization plan on April 15, 1994, that will give greater authority to the Assistant Secretary for Fair Housing and Equal Opportunity in supervising the processing of complaints.

Scope and Methodology

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

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

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

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

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

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

29 *Id.* § 3610(g)(2)(C).

30 *Id.* § 3613(o).

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

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

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

TABLE 3.1
Case Processing Times

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

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

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

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

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

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

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

¹⁶⁰ ¶ 25,034 at 25,363.

¹⁶¹ 3 F.3d at 957.

¹⁶² *Id.*

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

TABLE 3.2**Complaints Closed with Cause Findings**

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

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

TABLE 3.3**Complaints Closed with No Cause Findings**

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

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

TABLE 3.4**Timeliness of Case Processing by Closing Category
(Average Number of Days)**

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

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

TABLE 4.1
HUD Charges, by Elected Forum and Basis

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

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

7 30 v. 82?

TABLE 4.2
Disposition of HUD Charges by Basis

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

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

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

TABLE 5.1
HUD Regional Staff FTEs

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

Source: HUD Budgets, FY 1989-1994.

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

² Estimate for fiscal 1993 made during fiscal year.

³ Requested for fiscal 1994.

⁴ Estimate for fiscal 1993 made during fiscal year.

⁵ Requested number of fiscal 1994.

Case Processing

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

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

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

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

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

TABLE 5.2
Complainants Assisted

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

Source: HUD Budgets, FY 1988-1994.

¹ Complaints processed.

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

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

⁴ Hours spent on each complaint.

In contrast, HUD reported the number of complainants assisted ranged from nearly 5,000 in FY 1989 to more than 9,000 in FY 1992 (see table 5.2). The number of cases that aged as a proportion of cases closed has remained high (see below). For whatever reason, accurate estimates of staff resources needed were never forwarded to Congress.

To HUD's credit, the proportion of regional staff devoted to fair housing activities rose steadily from less than one-third to over half (table 5.1 above). Internally, HUD put more emphasis on Title VIII, but its absolute resources did not keep pace with the complaints filed.

Departmental Management Plans

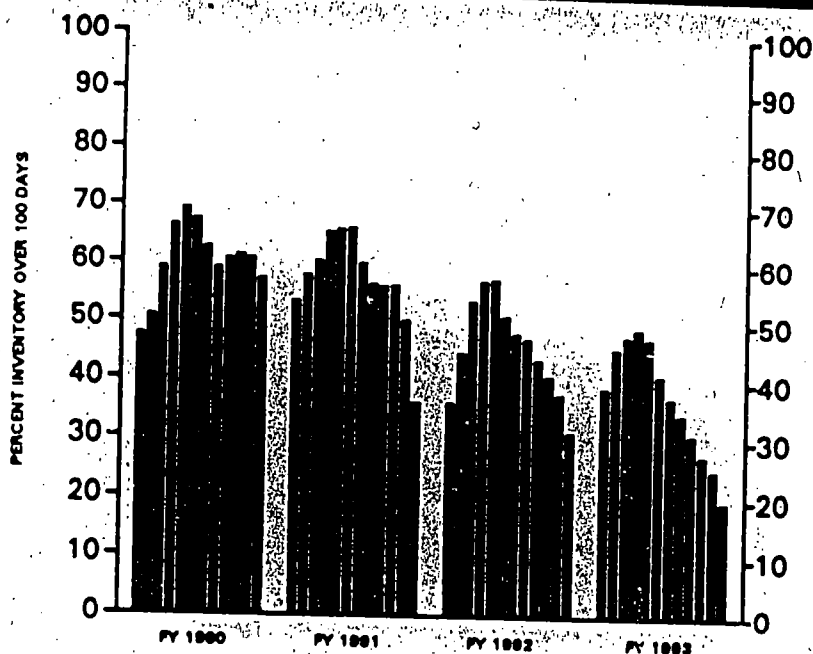
HUD produced its first comprehensive plan for enforcing FHAA for FY 1990. Three HUD documents provide an internal view of the success of HUD's plans: the "Secretary's Priorities," the "Departmental Management Plan (Executive Summary)," and the "Office of Fair Housing and Equal Opportunity Management Plan (Part B)."

The Secretary's Priorities document directed regional offices to conduct comprehensive investigations and improve case processing in order to "provide timely and thorough relief to victims of discrimination."⁵⁷ To fulfill the objective, five goals were listed:

⁵⁷ U.S. Department of Housing and Urban Development, Management Plan, FY 1990, Secretary's Priorities, (unpaged).

FIGURE 5.1

Cases over 100 Days as Percentage of Inventory: All Regions



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

between 40 and 70 percent (see figure 5.1).⁸⁸ Although by the end of 1991 the backlog of aged cases had fallen to its lowest level in 2 years, even then the rate was still 36 percent, substantially more than the 4 percent rate of "aging cases" reported for the regional offices. Furthermore, in FY 1992 the backlog rose again and remained significantly above 40 percent throughout most of the year.

After falling to 33 percent at the end of FY 1992, backlog rates once again rebounded in the first 4 months of FY 1993 to reach a peak of 49 percent at the end of January. Thereafter, rates tended downward, reaching a low of 19.5 percent by the end of the year. Unlike previous years, however, the backlog did not

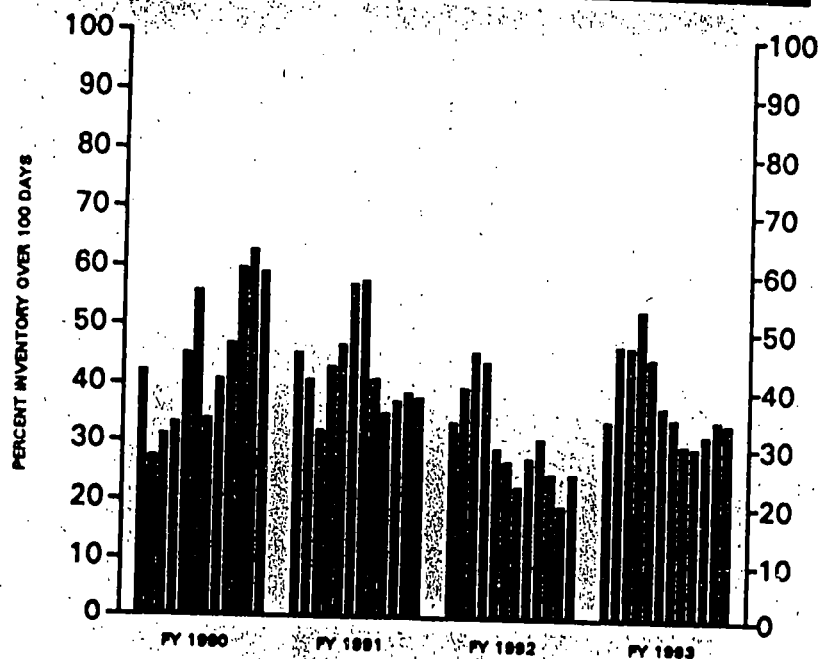
rebound in the first 4 months of FY 1994, suggesting that HUD may be able to consolidate gains made in 1993 and bring the backlog rate down to 20 percent or less.

Because HUD established the 73-day standard for regional office processing expressly in order to meet the 100-day standard set by the law, the apparent disparity in HUD's success in meeting these two goals is surprising. One explanation is that HUD's assumption that headquarters could complete processing cases investigated by regional offices in 27 days was too optimistic.

Alternatively, the disparity may have resulted from accounting differences: whereas the Assistant Secretary's measures of

⁸⁸ Figure 5.1 is based on HUD's Title VIII Database. It shows the fraction of cases in inventory that were more than 100 days old at the end of each month.

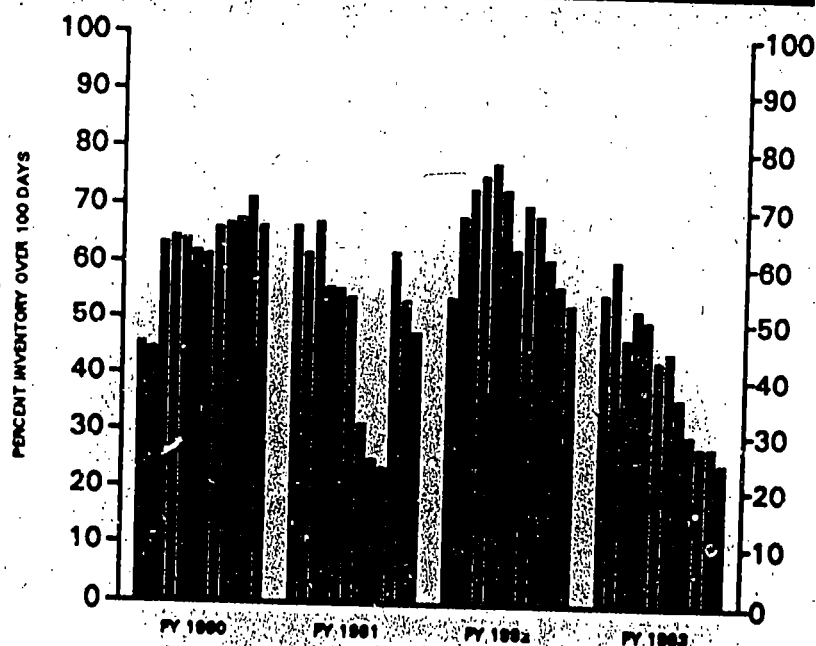
FIGURE 5.2
Cases over 100 Days as Percentage of Inventory: Region I



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

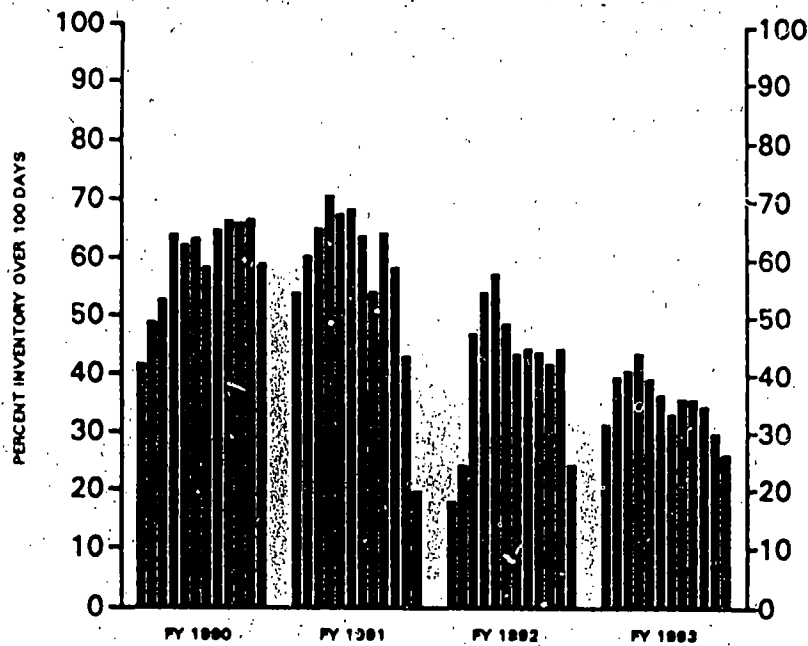
FIGURE 5.3
Cases over 100 Days as Percentage of Inventory: Region II



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

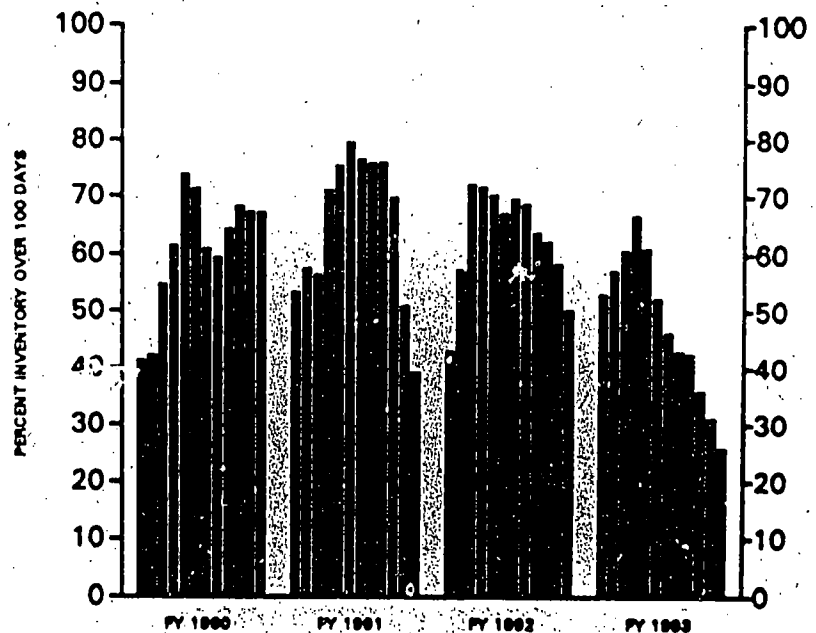
FIGURE 5.4
Cases over 100 Days as Percentage of Inventory: Region III



Source: HUD Tide VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

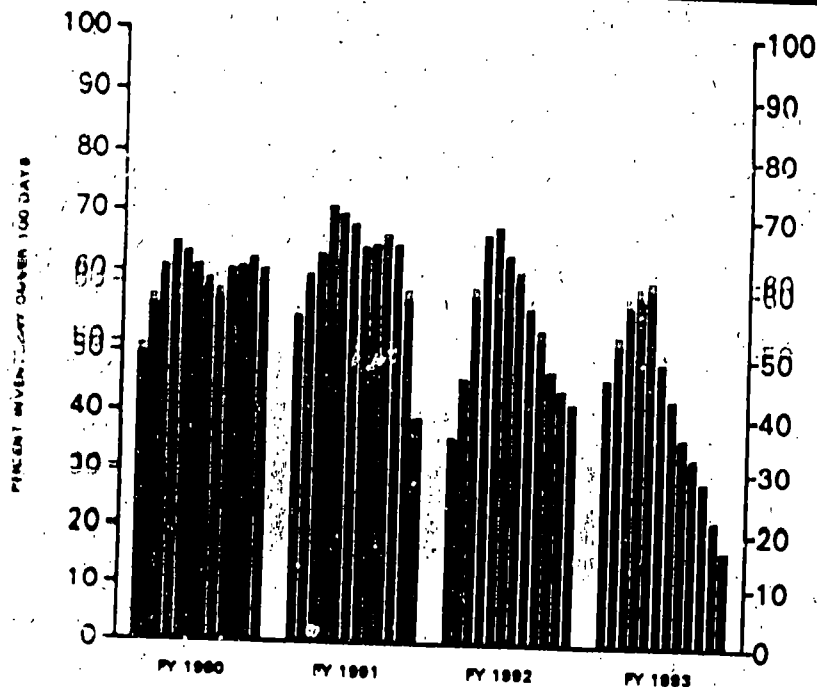
FIGURE 5.5
Cases over 100 Days as Percentage of Inventory: Region IV



Source: HUD Tide VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 old on the last day of October 1989.

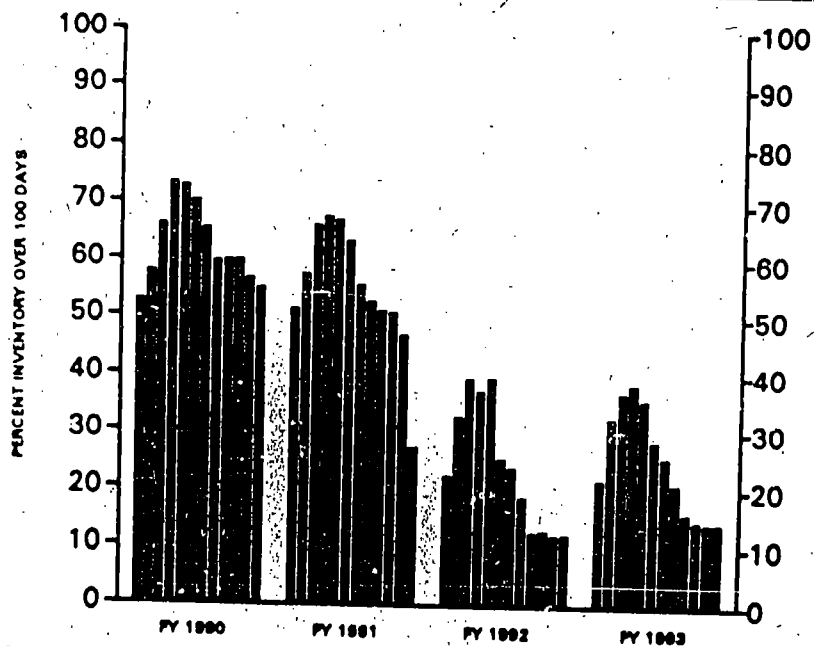
FIGURE 5.6
Cases over 100 Days as Percentage of Inventory: Region V



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

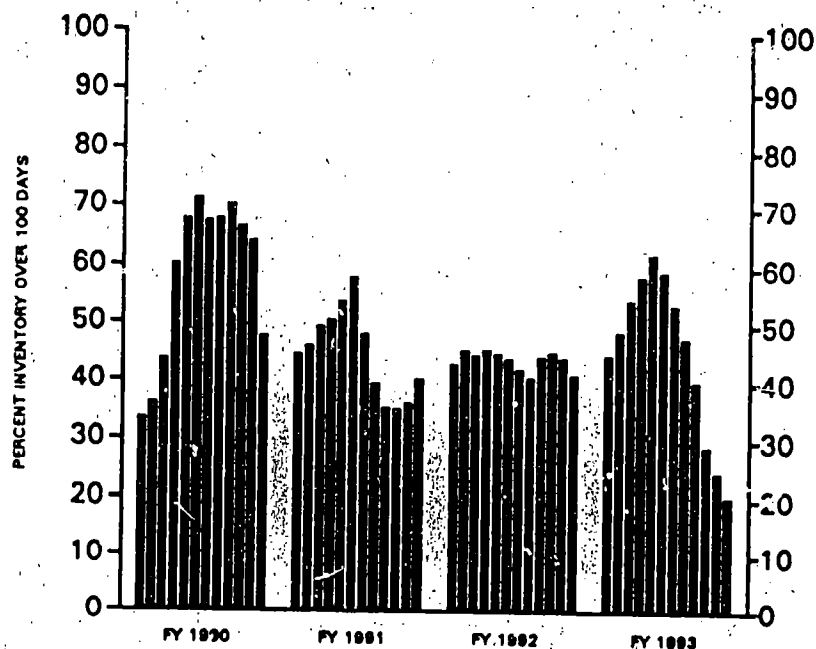
FIGURE 5.7
Cases over 100 Days as Percentage of Inventory: Region VI



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

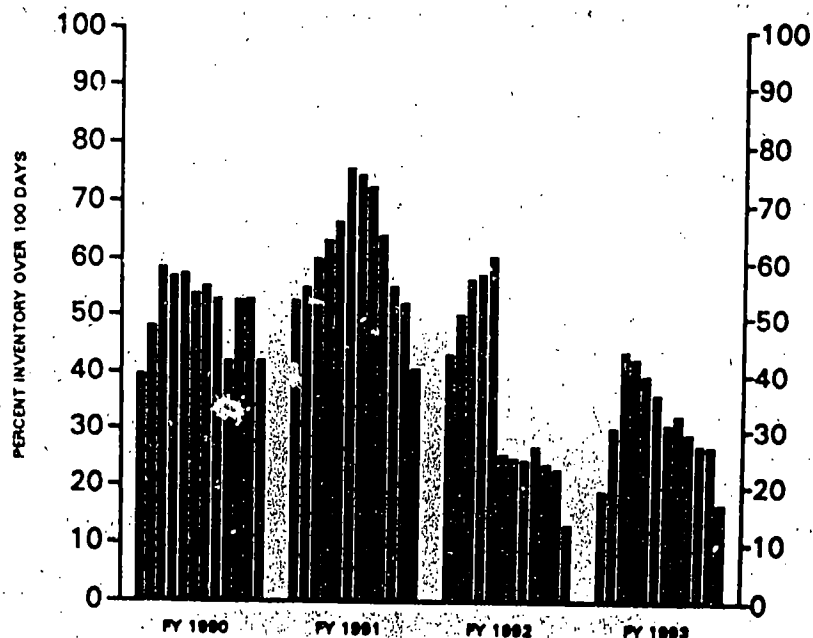
FIGURE 5.8
Cases over 100 Days as Percentage of Inventory: Region VII



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

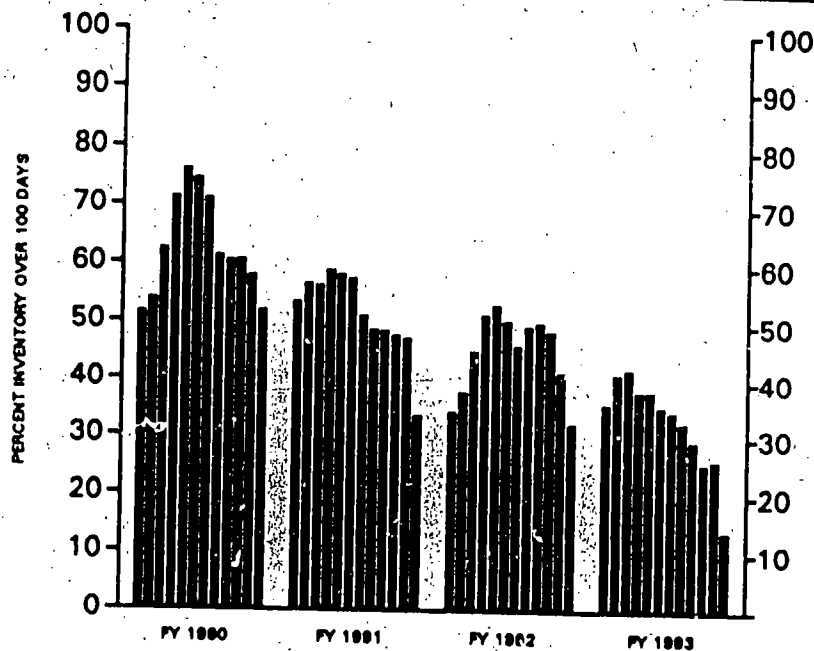
FIGURE 5.9
Cases over 100 Days as Percentage of Inventory: Region VIII



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

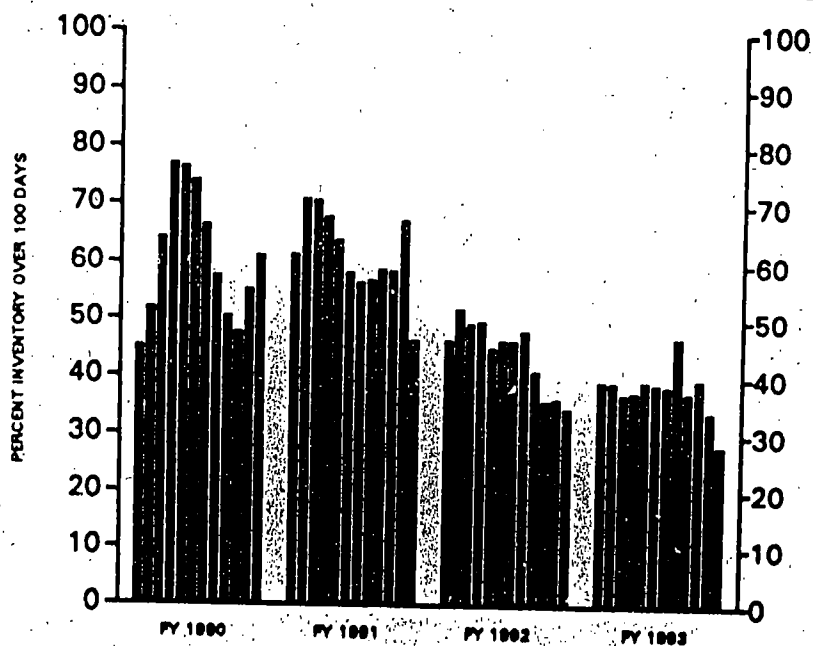
FIGURE 5.10
Cases over 100 Days as Percentage of Inventory: Region IX



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.11
Cases over 100 Days as Percentage of Inventory: Region X



Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

TABLE 7.1
FHIP Appropriations and Expenditures
(Millions of Dollars)

	Fiscal years					
	1989	1990	1991	1992	1993	1994
Appropriations	\$5.0	\$6.0	\$5.81	\$8.0	\$10.6	\$16.9
Outlays	—	—	4.464	4.635	5.344 ¹	N/A

Source: HUD Budgets, FY 1989-1994.

¹ Henry G. Cisneros, Secretary, HUD, letter to Mary Frances Berry, Chairperson, USCCR, June 9, 1994, p. 8 (HUD Comments).

Appropriations and expenditure for FHIP programs are summarized in tables 7.1 and 7.2.⁵⁵

FHIP Funds and HUD Litigation

The use of FHIP funds to provide relief through settlement of discrimination cases where HUD was named as a defendant is novel. In a suit filed in 1978, *NAACP Boston Chapter v. Kemp*, the local chapter of the NAACP in Boston alleged that HUD failed to carry out its mandate to promote fair housing within programs funded by a Housing and Community Development Block Grant.⁵⁶ On March 8, 1991, the court approved a consent decree stating that HUD, among other things,

agrees to spend money on certain fair housing activities:

Beginning in FY 1991, HUD shall provide the following amounts for use in the City of Boston, \$325,000 in FY 91 and, subject to available appropriations by Congress, which may be used for this purpose, \$125,000 in the subsequent three fiscal years (FY 92, FY 93, and FY 94), . . . to subsidize the unreimbursed legal assistance costs incurred by private attorneys pursuing judicial or administrative relief for fair housing violations. . . . This additional funding is subject to competitive bidding by eligible entities under applicable regulations or NOFAs and may be used independently or in connection with other grants. . . .⁵⁷

⁵⁵ Recently, the House of Representatives passed legislation authorizing appropriations for the FHIP program for FY 1995 and 1996. For FY 1995, the legislation authorizes an appropriation of \$26 million for the entire FHIP program: \$9 million for private enforcement initiatives; \$3 million for qualified fair housing organizations; \$7 million for the creation of new fair housing enforcement organizations; and \$7 million for education and outreach programs. For FY 1996, the legislation authorizes an appropriation of \$27 million to be divided in the same manner as the 1995 appropriation. See Housing and Community Development Act of 1994, H.R. 3838, 103d Cong., 2d Sess. (1994).

⁵⁶ *NAACP, Boston Chapter v. Kemp*, 2 Fair Housing-Fair Lending (P-H) ¶ 19,374 (D. Mass. Mar. 8, 1991) (Consent decree) (effective upon termination of appeals).

⁵⁷ *NAACP, Boston Chapter v. Kemp*, 2 Fair Housing-Fair Lending (P-H) ¶ 19,374, at 19,599 (D. Mass. Mar. 8, 1991). HUD was also required to grant the City of Boston \$325,000 in FY 1991, and \$125,000 in the subsequent 3 fiscal years, over and above HUD's annual Community Development Block Grant (CDBG) contributions to the city. The funds were designated for the operation of the Boston Housing Opportunity Center.

TABLE 7.2
FHIP Budget and Expenditures by Category
(Millions of Dollars)

<i>Administrative enforcement¹</i>	1989	1990	1991	1992	1993	1994
<i>Future estimate²</i>						
Number of grants	—	—	—	—	28	35
\$	—	—	—	—	2.1	3.3
<i>Budget estimate</i>						
Number of grants	—	—	—	32	28	—
\$	—	—	—	1.6	2.1	—
<i>Current estimate</i>						
Number of grants	—	—	—	30	10	—
\$	—	—	—	2.5	2.1	—
<i>Education and outreach³</i>						
<i>Future estimate</i>						
Number of grants	120	40	40	30	30	69
\$	2.0	2.0	2.0	2.1	2.5	6.0
<i>Budget estimate</i>						
Number of grants	120	40	40	30	30	—
\$	2.0	2.0	2.0	2.1	2.5	—
<i>Current estimate</i>						
Number of grants	10	35	58	69	31	—
\$	2.0	4.0	3.4	4.5	2.8	—
<i>Private enforcement⁴</i>						
<i>Future estimate</i>						
Number of grants	60	40	40	40	25	88
\$	3.0	4.0	3.6	4.3	3.0	10.0
<i>Budget estimate</i>						
Number of grants	60	40	40	40	—	—
\$	3.0	4.0	3.6	4.3	—	—
<i>Current estimate</i>						
Number of grants	30	70	58	55	—	—
\$	3.0	6.8	8.2	6.8	—	—

¹ In comments on this report, HUD revised the administrative enforcement figures. For FY 1991, HUD stated that the future estimate number of complaints was 32 and the budget estimate and current estimate for number of complaints was not available. For FY 1992, the future estimate cost of complaints was \$2.1 million, the budget estimate number of complaints was 32, and the current estimate number of complaints was 3.0. For FY 1993, the future estimate cost of complaints was \$3.3 million, the budget estimate number of complaints was 27, and the current estimate number of complaints was 1.0. For FY 1994, the future estimate number of complaints was 4.0 at a cost of \$3.0 million; the budget estimate number of complaints was 3.5 at a cost of \$3.3 million; and the current estimate complaints number was 2.8 at a cost of \$2.5 million. See HUD Comments, attachment 3.

² The Federal fiscal year begins October 1 and ends September 30. In its annual budget prepared 1 year in advance and sent to Congress more than 6 months in advance, HUD prepared estimates for the complaints for the fiscal year underway and the next one. In effect, the workload for each year is estimated twice; for example, the fiscal 1989 budget would contain an estimate for fiscal 1988 already underway and fiscal 1989. The following year, the 1989 estimate would be revised and an estimate offered for fiscal 1990.

³ In comments on this report, HUD revised the education and outreach figures. For FY 1989, HUD stated the future estimate was unavailable for number of complaints and cost. For FY 1991, the future estimate number of complaints was 30 at a cost of \$2.1 million. For FY 1992, the future estimate cost of complaints was \$2.5 million. For FY 1993, the future estimate number of complaints was 69 at a cost of \$6.0 million. For FY 1994, the future estimate number of complaints was 52 at a cost of \$7.0 million; the budget estimate number of complaints was 69 at a cost of \$6.0 million; and the current estimate number of complaints was 66 at a cost of \$6.0 million. See HUD Comments, attachment 3.

⁴ In comments on this report, HUD revised the private enforcement figures. For FY 1989, HUD said the future estimate was unavailable for number of complaints and cost. For FY 1990, the future estimate cost of complaints was \$3.6 million. For FY 1991, the future estimate cost of complaints was \$4.3 million. For FY 1992, the future estimate number of complaints was 25 at a cost of \$3.0 million. For FY 1993, the future estimate number of complaints was 88 at a cost of \$12.0 million; the budget estimate number of complaints was 25 at a cost of \$3.0 million; and the current estimate for number of complaints was 18 at a cost of \$3.0 million. See HUD Comments, attachment 3.

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	20
<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

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.

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.

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 ⁶	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 ⁶	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.

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 a 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 performed 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, *Prompts and Impact of Losing 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." 69 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-

ity 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.

APPENDIX 1
SUMMARY OF AUDIT ACTIVITIES
OCTOBER 1, 1995, THROUGH MARCH 31, 1996

AUDITS PERFORMED BY:

	OIG STAFF	OTHER FEDERAL AUDITORS (With Review and Processing by OIG Staff)	NON-FEDERAL AUDITORS (With Review and Processing by OIG Staff)	TOTAL
	Internal and Contract Audits	Contract Audits	Single Audits	

REPORTS ISSUED TO:

Department/ Office of the Secretary	2	0	10	12
Fish and Wildlife and Parks	9	0	90	99
Indian Affairs	2	0	200	202
Land and Minerals Management	7	11	73	91
Insular Areas	7	0	12	19
Water and Science	10	2	28	40
Other Federal Agencies	3	0	0	3
Subtotal	40	13	413	466

INDIRECT COST RATES NEGOTIATED FOR:

Indian Tribes and Organizations	125	0	0	125
State Agencies	43	0	0	43
Subtotal	168	0	0	168
TOTAL	208	13	413	634

APPENDIX 2

AUDIT REPORTS ISSUED AND INDIRECT COST AGREEMENTS NEGOTIATED DURING THE 6-MONTH PERIOD ENDED MARCH 31, 1996

This listing includes all internal, contract, and single audit reports issued and indirect cost agreements negotiated during the 6-month period ended March 31, 1996. It provides report number, title, issue date, and monetary amounts identified in each report (*funds to be put to better use, **questioned costs, ***unsupported costs (unsupported costs are included in questioned costs), and ****lost or potential additional revenues).

INTERNAL AUDITS

BUREAU OF INDIAN AFFAIRS

96-I-530 BUREAU OF INDIAN AFFAIRS PRINCIPAL FINANCIAL STATEMENTS FOR FISCAL YEAR 1995 (3/7/96)

96-I-641 REVIEW OF INDIAN IRRIGATION PROJECTS, BUREAU OF INDIAN AFFAIRS (3/29/96)
****\$14,000,000

BUREAU OF LAND MANAGEMENT

96-I-463 BUREAU OF LAND MANAGEMENT COMBINED FINANCIAL STATEMENTS FOR FISCAL YEARS 1994 AND 1995 (2/23/96)

96-I-638 INSPECTION OF SELECTED ADMINISTRATIVE ACTIVITIES, COLORADO STATE OFFICE, BUREAU OF LAND MANAGEMENT (3/29/96)

BUREAU OF RECLAMATION

96-I-313 AWARD AND ADMINISTRATION OF CONTRACT NO. 1425-2-CC-40-12260 WITH ENVIRONMENTAL CHEMICAL CORPORATION RELATED TO THE SUMMITVILLE MINE SITE CLEANUP, BUREAU OF RECLAMATION (3/14/96)

96-I-635 BUREAU OF RECLAMATION FINANCIAL STATEMENTS FOR FISCAL YEARS 1994 AND 1995 (3/29/96)

96-I-644 WORKING CAPITAL FUND, BUREAU OF RECLAMATION (3/29/96)
****\$35,000,000

INSULAR AREAS

American Samoa

96-I-206 STATUS OF IMPROVEMENTS IN FINANCIAL MANAGEMENT AND PROGRAM OPERATIONS, AMERICAN SAMOA GOVERNMENT (12/22/95)

96-I-533 AMERICAN SAMOA LEGISLATURE, AMERICAN SAMOA GOVERNMENT (3/22/96) *\$1,707,308

Commonwealth of the Northern Mariana Islands

96-I-157 STATUS OF IMPROVEMENTS IN FINANCIAL MANAGEMENT AND PROGRAM OPERATIONS, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (11/30/95)

96-I-596 MANAGEMENT OF PUBLIC LAND, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (3/20/96) *\$125,391,648 & ****\$27,439,716

Guam

96-I-67 STATUS OF AUDIT REPORTS ISSUED TO THE GOVERNMENT OF GUAM (11/13/95)

U.S. BUREAU OF MINES

96-I-307 U.S. BUREAU OF MINES PRINCIPAL FINANCIAL STATEMENTS FOR FISCAL YEARS 1994 AND 1995 (1/25/96)

U.S. FISH AND WILDLIFE SERVICE

96-I-270 OPERATION AND MAINTENANCE OF GOVERNMENT FURNISHED QUARTERS, U.S. FISH AND WILDLIFE SERVICE (1/29/96) *\$26,596

The Fair Housing Amendments Act of 1988: The Enforcement Report

September 1994

A Report of the United States Commission on Civil Rights