

# **New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act\***

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## INTRODUCTION

At the time of its enactment, the 1968 Fair Housing Act seemed to be the final nail in the coffin of an elaborate system of state sanctioned racial segregation that prevailed during the first half of the twentieth century. After the Supreme Court endorsed the policy of racial segregation in 1896,<sup>1</sup> African-Americans were crowded into urban ghettos in which the predominate features were substandard housing and unsafe living conditions.<sup>2</sup> Beginning in 1917, the opponents to policies favoring

1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. Historically residential concentration was thought to be caused by "three main factors: poverty preventing individuals from paying for anything more than the cheapest housing accommodation; ethnic attachment; [and] segregation enforced by white people." Gunnar Myrdal, *An American Dilemma; The Negro Problem and Modern Democracy* 619 (1962) speculated that:

segregated housing began a decades long struggle to obtain fair housing laws.<sup>3</sup> After a preliminary victory in *Shelley v. Kraemer*,<sup>4</sup> which declared racially restrictive covenants unenforceable, the Supreme Court finally reversed the separate but equal doctrine of *Plessy v. Ferguson* in the 1954 school desegregation case, *Brown v. Board of Education*.<sup>5</sup>

The *Brown* decision prompted an era of civil rights activism, which culminated in the Civil Rights Act of 1964,<sup>6</sup> the Voting Rights Act of 1965,<sup>7</sup> and the Fair Housing Act of 1968.<sup>8</sup> Despite the enactment of these statutory prohibitions against racial discrimination, twenty-five years later, the vast majority of African-Americans still occupy the lowest paying and least desirable jobs.<sup>9</sup> African-American children continue to receive inferior education in segregated schools<sup>10</sup> and the majority of African-American families reside in what a 1989 study described as a condition of "multi[-]dimensional hypersegregation."<sup>11</sup> In a study published in 1991, the Department of Housing and Urban Development (HUD) concluded that "both blacks and Hispanics can expect to encoun-

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(e)ven if initially the tendency on the part of whites to enforce segregation on Negroes was but slight, the actual concentration of a growing population consisting of poor uneducated negroes in the slum sections would soon call forth more active intentions on the part of whites to force segregation upon this group.

*Id.* at pp. 619-20.

3. *Buchanan v. Warley*, 245 U.S. 60 (1917). The Court in *Buchanan* invalidated a Louisville, Kentucky ordinance prohibiting black families from owning, renting, or occupying property outside of specified areas within the city.

4. 334 U.S. 1 (1948).

5. 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)) (holding "separate but equal" doctrine of *Plessy* "inherently unequal").

6. 42 U.S.C. §§ 2000a - 2000h-6 (1988).

7. *Id.*, §§ 1971-1974e.

8. *Id.*, §§ 3601-3619, 3631, as amended by Pub. L. No. 100-430, 102 Stat. 1619 (1988).

9. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 382 (1989). Participation in the labor force is an option denied fully one-quarter of the central city blacks who are underemployed or unemployed. *Id.*

10. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1055 [hereinafter Kushner, *Second Generation*]. Kushner suggests a nexus between housing discrimination and school desegregation, noting that "frustrated school desegregation litigators hope fair housing enforcement will generate school integration in the face of ineffective school desegregation litigation." *Id.* at 1055-56.

11. Massey & Denton, *supra* note 9, at 389.

ter some form of systematic unfavorable treatment in more than half of their visits to inquire about housing."<sup>12</sup>

As these studies make clear, racial discrimination in housing remains the most visible vestige of formal segregation and its impact can be seen in the deepening degradation of the Nation's inner-cities.<sup>13</sup> Some gains have been made, most notably in the migration of middle-class African-American families whose economic circumstances have allowed them to escape from the ghettos.<sup>14</sup> Nevertheless, laws prohibiting discrimination in housing have not resulted in the elimination of segregated housing patterns.<sup>15</sup> Furthermore, the records of the federal agencies responsible for fair housing enforcement have been dismal.

Shortly after the enactment of the 1968 legislation, fair housing proponents recognized the shortcomings of the statute. The original administrative enforcement mechanism was limited to sanctionless conciliation, a process tantamount to voluntary compliance that the real estate industry largely ignored. A private right of action was established, but even if a victim of housing discrimination prevailed (often after years of expensive and protracted litigation), the relief awarded typically consisted of a nominal award of damages and an injunction that ordered the defendant simply to comply with existing laws.<sup>16</sup>

Congress eventually became aware of these failings. After nearly a decade of abortive efforts, Congress enacted, in 1988, a comprehensive overhaul of the enforcement mechanism and added two new categories to the groups falling under the Fair Housing Act's protection.<sup>17</sup> After

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12. JOHN YINGER, *HOUSING DISCRIMINATION STUDY, INCIDENCE OF DISCRIMINATION AND VARIATIONS IN DISCRIMINATORY BEHAVIOR* (1991).

13. *Id.* "Aggregations of monoracial tracts are densely settled and geographically restricted, comprising a small portion of the urban environment closely packed around the city center, a zone known for poverty and social disorganization long before [the arrival of blacks]." *Id.* at 389.

14. Kushner, *Second Generation*, *supra* note 10, at 1050 (stating that "an increasing number of blacks are present in America's suburbs and predominantly white neighborhoods").

15. *Id.* "[H]ousing remains the most segregated aspect of American life and the greatest failure of the civil rights revolution." *Id.* at 1051.

16. Private fair housing organizations worked persistently to "obtain larger damages and stronger injunctive relief" under the Fair Housing Act of 1968. F. Willis Caruso & William H. Jones, *Fair Housing in the 1990's: An Overview of Recent Developments and Prognosis of their Impact*, 22 J. MARSHALL L. REV. 421, 432 (1989) [hereinafter Caruso & Willis, *Overview*].

17. The 1988 amendments to the Fair Housing Act brought families with children and handicapped persons within the aegis of the Fair Housing Act. The Fair Housing

languishing for twenty years with virtually no enforcement authority, HUD now has what is probably the most comprehensive enforcement mechanism of any possessed by the various federal agencies that are charged with civil rights enforcement responsibilities. In fact, the statutory enforcement process established by the 1988 Amendments should prove to be a model for other agencies.

This analysis will review the key provisions of the 1988 legislation and examine HUD's implementation efforts during the two year period following the effective date of the Amendments. The first section briefly reviews the history of housing discrimination in America and the early efforts to eliminate segregated housing patterns. The second section examines the 1968 Fair Housing Act, the legislative history of that statute and the enforcement mechanism established by the original fair housing legislation. The next section reviews the enforcement efforts that were made under the 1968 Act and includes a discussion of the failings that led to the 1988 Amendments. The next section discusses the 1988 Amendments along with the legislative history of the new amendments. After a detailed examination of the enforcement mechanism established by the 1988 Amendments, the analysis concludes with a review of the implementation efforts that occurred during the two year period following the adoption of the 1988 Amendments.

As we shall see, HUD has made significant strides towards the implementation of the enforcement process. The addition of two new protected categories (families with children and individuals with disabilities), however, has resulted in a considerable increase in HUD's case-load. These additions have slowed the processing of fair housing complaints to such an extent that only a fraction are processed within the one hundred day maximum allotted by the statute. The delay creates a bottleneck in the administrative process, violates the statute, and is contrary to the efficient administrative process that Congress envisioned.

A second problem concerns the high percentage of cases in which the parties elect to litigate in district courts, rather than to pursue the administrative process before an administrative law judge. These elections do not result in the speedy resolution of fair housing claims that Congress anticipated when it created what was intended to be an inexpensive and

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Amendments Act of 1988, § 804(c) (codified at 42 U.S.C. §§ 3601-3619 (1988) [hereinafter 1988 Act]). See generally, Michael P. Seng, *Discrimination Against Families with Children and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act*, 22 J. MARSHALL L. REV. 541 (1989) (discussing historical need for legislation provided in 1988 amendments to Fair Housing Act).

expeditious administrative process. Another problem concerns the failure of state and local fair housing agencies to secure certification under the 1988 Amendments. Because the Fair Housing Act anticipates shared responsibility for enforcement, a diminished level of enforcement at the state and local levels will shift far more enforcement responsibility to HUD than Congress anticipated when it enacted the 1988 Amendments. This will, at a minimum, require an allocation of more resources at the federal level than originally anticipated. These concerns are discussed in greater detail below. The final section contains some recommendations for correcting these problems.

### I. THE ORIGINS OF RACIALLY SEGREGATED HOUSING

Racially segregated housing patterns are a remnant of a pervasive system of government-sponsored racial discrimination that was validated by the separate but equal doctrine of *Plessy v. Ferguson*,<sup>18</sup> an 1896 decision that permitted segregation on public transportation. Segregation in public facilities began in the post-Reconstruction era and spread rapidly during the final decades of the nineteenth century.<sup>19</sup> Segregated housing was merely one aspect of an elaborate system. By the early years of the twentieth century, African-Americans were segregated in virtually all aspects of economic and social relations.<sup>20</sup>

Early efforts to establish segregated housing were mainly a reaction to the migration of African-American families from rural areas to urban industrial centers.<sup>21</sup> The beginnings of this migration coincided with the First World War and continued up to and after the Second World War.<sup>22</sup> The movement was encouraged by the availability of enhanced employment opportunities in cities and by a mass flight from the economic deprivations and racial tensions which prevailed in the South.<sup>23</sup>

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18. 163 U.S. 537 (1896).

19. See *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (invalidating portion of Virginia statute mandating segregated seating on buses involved in interstate travel while acknowledging that legislatively mandated segregation confined to state's borders was valid means to "promote amicable relations" between races).

20. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW*, (1974).

21. Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 739 (1989).

22. See Myrdal, *supra* note 2 (stating concentration of uneducated African-Americans in slum sections would contribute to segregation).

23. *Id.* at 208. Myrdal's "main hypothesis" regarding the harsh economic conditions facing southern African-Americans was that of the "vicious cycle" where poverty itself breeds poverty. Similarly, as to racial terrorism, Myrdal notes that while lynch-

One response to the African-American migration was the adoption of legislation that prohibited African-Americans from owning or renting property except in designated locations. Because these ordinances involved state action that discriminated on the basis of race, they were challenged and eventually declared unconstitutional in a 1917 decision, *Buchanan v. Warley*.<sup>24</sup>

After *Buchanan*, property owners resorted to private covenants to enforce racially segregated housing patterns. The Supreme Court affirmed the wide-spread use of private covenants in a 1926 decision, *Corrigan v. Buckley*.<sup>25</sup> Although the Supreme Court declined to review the merits of *Corrigan* on jurisdictional grounds, it issued an opinion in which it indicated in dicta that unlike *Buchanan*, the private covenants in *Corrigan* did not include the state action needed to invoke the Equal Protection Clause of the Constitution.<sup>26</sup> This, in effect, operated to validate private covenants as a means of maintaining segregated housing in the United States.

After private covenants were approved in *Corrigan*, the use of racially restrictive covenants accelerated rapidly. In communities across the nation, African-Americans and other racial minorities were confined to discrete residential districts in which the prominent features were substandard housing and overcrowded conditions. Nevertheless, the population explosion caused by the continued migration of African-American families resulted in arrangements that were used to circumvent the covenants. The most prevalent of these was the use of a white "strawman" who would purchase property and resell it to an African-American purchaser, usually at a substantial mark-up. As more African-American families relocated to urban centers, the demand for housing increased exponentially, causing the continued circumvention of the covenants. This, in turn, generated litigation by white home owners to enforce the covenants. Over the years, many of these cases were handled by National Association for the Advancement of Colored People (NAACP) lawyers. Limited successes were secured in cases such as *Hansberry v. Lee*,<sup>27</sup> in which the Supreme Court refused to enforce a racially restric-

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ing had attracted a great deal of attention, "[i]t should not be forgotten, however, that lynching is just one type of extra-legal violence in a whole range of types that exist in the South." *Id.* at 560.

24. 245 U.S. 60 (1917).

25. 271 U.S. 323 (1926).

26. *Id.* at 330, 331.

27. 311 U.S. 32 (1940).

tive covenant on procedural grounds. Beginning in 1945, however, the NAACP convened a series of conferences to discuss the pending covenant cases and to develop an overall strategy for securing a victory in the Supreme Court. The first meeting was held in Chicago in July, 1945.<sup>28</sup> Others were held in New York City and Washington, D.C. The NAACP's coordinated strategy culminated in May, 1948, when the Supreme Court issued its decision in *Shelley v. Kraemer*.<sup>29</sup>

The central issue in *Shelley* involved consideration of whether judicial enforcement of the racial covenants could be deemed to be state action for purposes of the Fourteenth Amendment.<sup>30</sup> In a decision that continues to generate some controversy today, the Supreme Court held that private covenants were permissible, but could not be enforced by the courts since this would constitute state action violating the Fourteenth Amendment.

The Supreme Court's decision in *Shelley* was the result of a highly organized effort involving more than thirty years of litigation in hundreds of cases. From 1926 to 1947, the NAACP and the lawyers fighting against the covenants lost the vast majority of the hundreds of cases in which they challenged the covenants.<sup>31</sup> By 1944, the American Law Institute's Restatement of Property, one of the most influential treatises in the field, had endorsed racial covenants as a valid exception to the

28. Minutes of the NAACP Chicago Conference (July 9-10, 1945), Records of the NAACP, Group II, Box 133 (Library of Congress).

29. 334 U.S. 1 (1948).

30. As the author of the *Shelley* opinion, Chief Justice Vinson noted: [E]xamples of state judicial action which have been held by this Court to violate the [Fourteenth] Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by the courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.

*Id.* at 17.

31. *Ware, supra* note 21, at 743-44. There were, however, two notable exceptions. In *Hansberry v. Lee*, 311 U.S. 32 (1940), overruling an Illinois Supreme Court decision that affirmed the validity of a racially restrictive covenant, the Court did not address constitutional questions, but rather held that the Hansberrys were not procedurally barred from challenging a restrictive covenant that had been the subject of an earlier suit. In *Hundly v. Gorewitz*, 132 F.2d 23 (D.C. Cir. 1942), the Court of Appeals for the District of Columbia Circuit sustained a challenge to a racially restrictive covenant based not upon constitutional grounds but the equitable doctrine of "changed circumstances."



general rule against restraints on the alienation of property.<sup>32</sup> Even in the face of a vast amount of adverse legal precedent, the NAACP lawyers retained faith that they would ultimately prevail. Their perseverance bore fruit with the Supreme Court's landmark decision in *Shelley*.<sup>33</sup>

After the *Shelley* decision was issued, the Federal Housing Administration and the Veterans Administration announced that they would not insure mortgages on property encumbered by racially restrictive covenants.<sup>34</sup> In a denouement to *Shelley*, the Supreme Court held in *Barrows v. Jackson*,<sup>35</sup> that damages could not be awarded against a property owner who had breached a racially restricted covenant by selling her home to an African-American family.

After the decision in *Barrows*, however, the focus of the Civil Rights campaign moved from discrimination in housing to school desegregation cases. These efforts ultimately resulted in *Brown v. Board of Education*,<sup>36</sup> the case in which the Supreme Court finally repudiated the separate but equal doctrine of *Plessy*. The Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited the states from maintaining racially segregated public schools.<sup>37</sup> The Court later applied the *Brown* precedent to other forms of state-sanctioned segregation.<sup>38</sup>

Although the 1950s and '60s are remembered as an era of civil rights activism, fair housing remained a relatively dormant issue until the early 1960s when President Kennedy issued Executive Order No. 11,063, on November 20, 1962.<sup>39</sup> This Order directed federal agencies to prohibit

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32. RESTATEMENT OF PROPERTY § 406(l) (1944).

33. The Supreme Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), was actually a consolidation of appeals from two state supreme court decisions: *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946) (involving property located in St. Louis, Missouri), and *McGhee v. Sipes*, 25 N.W.2d 639 (Mich. 1947) (involving property located in Detroit, Michigan). The companion decision, *Hurd v. Hodge*, 334 U.S. 24 (1948), represented the consolidation of two cases concerning properties located in the District of Columbia: *Hurd v. Hodge*, and *Urciolo v. Hodge*. All of these cases were heard together in the United States Supreme Court.

34. HISTORICAL OVERVIEW—EQUAL OPPORTUNITY IN HOUSING, P.H. FAIR HOUSING-FAIR LENDING RPTR. §§ 2301, 2303.

35. 346 U.S. 249 (1953).

36. 347 U.S. 483 (1954).

37. *Id.* at 495.

38. *See, e.g., Mayor & City Council v. Dawson*, 350 U.S. 877 (1955) (regarding beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (discussing golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (involving buses); and *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (concerning parks).

39. 27 Fed. Reg. 11,527 (1962).

discrimination in transactions involving property that was owned, operated, or financed by the federal government. The Order was limited, however, to federally assisted housing and did little to alter the segregated housing patterns that existed at that time. The next major step towards fair housing took place when the bill that became the Fair Housing Act of 1968 was introduced in the Senate.

## II. THE FAIR HOUSING ACT OF 1968

The 1968 Fair Housing Act prohibited discrimination based upon race, color, religion, sex, and national origin in connection with the sale or rental of residential housing.<sup>40</sup> Coverage under the 1968 Act extended to: housing owned or operated by the federal government; dwellings supported in whole or in part with the aid of federal loans; advances, grants or contributions; houses and buildings supported in whole or in part by federally secured financing; and residences purchased, rented, or otherwise obtained using federal funds.<sup>41</sup>

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40. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-19 (1988). See generally *Hearings on S. 1353, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 8-13, 260-64 (1967)*.

41. 42 U.S.C. § 3603 (1988). Effective dates of certain prohibitions of the 1968 Act are as follows:

### Application to certain described dwellings

(a) Subject to the provisions of subsection (b) of this section and section 3607 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 of this title shall apply:

(1) Upon enactment of this subchapter, to-

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968: *Provided*, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into

The Act also prohibited, in connection with selling or renting residences: refusing to deal;<sup>42</sup> discrimination with respect to terms;<sup>43</sup> discriminatory advertising;<sup>44</sup> false representations that a dwelling was not available for sale or rent;<sup>45</sup> and making representations, whether true or false, regarding the availability of housing to persons of a particular race, color, religion, sex, or national origin.<sup>46</sup>

Exemptions from the 1968 Act's coverage included: single family homes owned by private individuals owning less than four dwellings, as long as in any two-year period, the individual did not sell more than one residence in which he was not the most recent resident;<sup>47</sup> and multifamily dwellings consisting of less than four units, if the owner resided in one of the apartments (the "Mrs. Murphy" exception).<sup>48</sup> This did not apply, however, to dwellings sold or rented by a broker or other person involved in the real estate business, or if discriminatory advertising was used in the transaction.<sup>49</sup>

#### A. *The Legislative History of the 1968 Act*

The 1988 Amendments to the Fair Housing Act might not have been needed. The original bill contained enforcement provisions similar to those in the 1988 Act. Congress deleted these provisions, however, in a compromise prior to passage of the original Act. The Fair Housing Act of 1968 had its genesis in S. 1358, a bill originally offered by Senator Walter Mondale (D-Minn.) as an amendment to another bill, H.R. 2516,<sup>50</sup> which had been passed by the House and was intended to provide protection for civil rights workers. Senator Mondale's bill followed on the heels of other far-reaching civil rights legislation that had been

after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

*Id.*

42. *Id.* § 3604(a) (1981).

43. *Id.* § 3604(b).

44. 42 U.S.C. § 3604(c) (1981).

45. *Id.* § 3604(d).

46. 42 U.S.C. § 3604(e).

47. *Id.* § 3603(b)(1).

48. *Id.* § 3603(b)(2). This was termed the "Mrs. Murphy" exception as it was intended to protect the owner/operators of traditional boarding houses. 114 CONG. REC. S2495 (daily ed. Jan. 15, 1968) (statement of Sen. Mondale).

49. 42 U.S.C. § 3603(b) (1981).

50. H.R. 2516, 90th Cong., 1st Sess. (1967).

enacted in previous years. In 1964, Congress enacted comprehensive civil rights legislation that outlawed segregation in public facilities<sup>51</sup> and federally assisted educational facilities,<sup>52</sup> and made job discrimination unlawful.<sup>53</sup> In 1965, the Voting Rights Act extended the franchise to thousands of African-American citizens who resided in several southern states.<sup>54</sup>

The debates over the passage of the Fair Housing Act occurred in a period marked by large scale civil rights and anti-war demonstrations. The peaceful, nonviolent protests and marches that began during the early 1960s had given way to devastating urban riots that left vast areas of major cities in flames. In this highly charged atmosphere, the debates over fair housing commenced. Hearings on the fair housing bill, S. 1358,<sup>55</sup> began in August, 1967. The Subcommittee conducting the hearings received testimony from several individuals including Attorney General Ramsey Clark,<sup>56</sup> Secretary of Housing and Urban Development Robert Weaver,<sup>57</sup> various law professors,<sup>58</sup> government employees,<sup>59</sup> and church leaders.<sup>60</sup> Some of these individuals spoke in favor of the bill, while others opposed its passage. The Committee, however, took no action on the bill at that time.

The next session of the Senate convened in January, 1968. Majority Leader Mike Mansfield (D-Mont.) announced that the House-passed bill

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51. The Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988).

52. *Id.* § 2000d.

53. *Id.* § 2000e-2.

54. *Id.* §§ 1971-1974e.

55. *Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) [hereinafter Hearing I].*

56. *Id.* at 3.

57. *Id.* at 29.

58. *Id.* at 127. The law professors who testified were: Robert F. Drinan, Dean, Boston College Law School; Jefferson B. Fordham, Dean, University of Pennsylvania Law School; Louis H. Pollack, Dean, Yale Law School; and Gerard A. Ferere, Professor of French and Spanish at St. Joseph's College, Philadelphia, Pennsylvania. *Id.* at 204.

59. The government employees who testified were: Frankie M. Freeman, Commissioner, Commission on Civil Rights, *id.* at 76; and Thomas D. Morris, Assistant Secretary, Department of Defense. *Id.* at 89.

60. The church leaders who testified were: Rabbi Jacob Rudin, President, Synagogue Council of America; Truman B. Douglas, President, National Council of Churches of Christ; and Thomas D. Hinton, Chairman, National Catholic Coordinating Committee on Equal Opportunity. *Id.* at 358.

providing protection to civil rights workers would be taken up as the first order of business during this session.<sup>61</sup> Meanwhile, Senator Mondale secured the support of other Senators to add his fair housing proposal to the Civil Rights bill. The "Mrs. Murphy" exemption was added, which removed from the bill's coverage dwellings containing up to four units if one of the units were occupied by the owner.<sup>62</sup> Most of the Banking and Currency Committee members supported Senator Mondale's amendment.<sup>63</sup>

When the Senate debates began, the Attorney General testified that the legislation was supported by the Equal Protection and Commerce Clauses of the United States Constitution.<sup>64</sup> Other witnesses testified that fair housing would have a positive psychological and economic impact upon African-Americans because of the employment and educational opportunities that were available outside ghetto areas.<sup>65</sup> Testimony offered during the hearings revealed, among other things, that many jobs had relocated from inner-city areas to the surrounding suburbs, and that residents of inner-city areas, who did not have access to the suburban jobs, suffered from severe unemployment rates.<sup>66</sup>

Opponents of the fair housing bill claimed that the legislation would interfere impermissibly with the right of citizens to control the disposition of their property.<sup>67</sup> Senator Sam Ervin, Jr. (D-N.C.) contended that the bill was "an attempt to destroy the basic property rights of all Americans. It is proposed to rob all Americans, 200 million Americans of all races, of a basic right, in the expectation that such action will make them forget race or religion and live in integrated fashion."<sup>68</sup> Other opponents feared that the bill would force integration through the use of racial quotas in housing. One opponent wondered whether "our society [will] benefit from sending a swarm of Federal investigators and enforcers over the land to break down the doors of private boarding-houses or close them down?"<sup>69</sup>

Responding to these arguments, the proponents assured the opposition

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61. 114 CONG. REC. S5 (daily ed. Jan. 15, 1968) (statement of Sen. Mansfield).

62. *Id.* at S2495.

63. *Id.* at S2272.

64. *Hearing I, supra* note 55.

65. *Id.* at 127.

66. *Id.* at 3.

67. 114 CONG. REC. S3421 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

68. 114 CONG. REC. S3249 (daily ed. Feb. 16, 1968) (statement of Sen. Ervin).

69. *Id.* at S3346 (daily ed. Feb. 19, 1968) (statement of Sen. Stennis).

that the basic right to buy, sell, or rent property would not be affected. The proposal, they explained, simply prohibited racial discrimination. As one supporter explained,

[t]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.<sup>70</sup>

Supporters of the bill emphasized that the legislation would require sellers, landlords, and real estate agents to treat all prospective buyers and tenants equally, regardless of race.<sup>71</sup>

Senator Mondale argued, for example, that "America's goal must be that of an integrated society, a stable society . . . . If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation."<sup>72</sup> Another supporter, Senator Edward Brooke (R-Mass.), expressed his belief that the nation had a moral obligation to assure fair housing. "America's future," he argued, "must lie in the successful integration of all our many minorities, or there will be no future worthy of America."<sup>73</sup>

Approximately two weeks after the fair housing bill's introduction, Senate Majority Leader Mansfield called for a vote.<sup>74</sup> Opponents led by Senator Ervin objected. Senator Ervin and other opponents argued that the federal government should defer fair housing policy to the states, especially since a majority of the states already had some form of fair housing legislation.<sup>75</sup> After obtaining the signatures of twenty-nine Senators, Majority Leader Mansfield filed a petition to invoke cloture.<sup>76</sup> The Senate rejected cloture fifty-five to thirty-seven,<sup>77</sup> but supporters refused to let the bill die, as evidenced by a vote of fifty-eight to thirty-

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70. *Id.* at S3421 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

71. *Id.* at S3421-22.

72. *Id.* at S3422.

73. 114 CONG. REC. S2525 (daily ed. Feb. 7, 1968) (statement of Sen. Brooke).

74. *Id.* at S3235 (daily ed. Feb. 16, 1968) (statement of Sen. Mansfield).

75. *See Summary of Coverage of State Fair Housing Laws, as of September 1, 1967*, as submitted to the Congressional Record by Senator Joseph Tydings (D-Md.), 114 CONG. REC. S2530-32 (daily ed. Feb. 7, 1968) (statement of Sen. Tydings) (summarizing fair hearing legislation in 23 states).

76. 114 CONG. REC. S3235 (daily ed. Feb. 16, 1968) (statement of Sen. Mansfield).

77. *Id.* at S3427 (daily ed. Feb. 20, 1968).

four in opposition to a move to permanently table the amendment<sup>78</sup> and by the signatures of the forty-four senators who endorsed the next cloture petition.<sup>79</sup> This second cloture vote failed by a vote of fifty-six to thirty-seven.<sup>80</sup>

The Fair Housing Amendments of 1988 might have been unnecessary if the original bill had passed without the deletion of certain key provisions. The original bill provided for enforcement by HUD with provisions for conciliation of complaints as the first step in the enforcement process.<sup>81</sup> If conciliation failed, the Secretary could issue a complaint, hold hearings, and if discrimination were found, the Secretary could issue enforcement orders subject to judicial review.<sup>82</sup> In an effort to secure needed support for the legislation, Senator Everett Dirksen (R-Ill.) developed a compromise to replace these provisions.<sup>83</sup> The Dirksen amendment drastically reduced HUD's enforcement powers. It also removed from the bill's coverage single family homes that were sold by owner-occupants who did not use a real estate broker.<sup>84</sup> Senator Mondale later proposed that his amendment to H.R. 2516 be tabled.<sup>85</sup> It was, by a vote of eighty-three to five.<sup>86</sup> Senator Dirksen submitted a cloture petition on his substitute amendment, which forty-eight senators signed.<sup>87</sup> The Senate rejected cloture again by fifty-eight to thirty-five.<sup>88</sup>

Additional support for the fair housing bill was generated by the report of the Kerner Commission, which was issued on March 1, 1968 (the Report). The Kerner Commission described at length the dismal

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78. *Id.* at S3807 (daily ed. Feb. 21, 1968).

79. *Id.* at S4064 (daily ed. Feb. 26, 1968).

80. *Id.*

81. These enforcement provisions were the source of the bill's most vehement criticism. See 114 CONG. REC. S3134-35 (daily ed. Feb. 15, 1968) (statement of Sen. Ellender) (criticizing amendment's delegation of powers as "far reaching"). Senator Allen J. Ellender (D-La.) was concerned that many personal liberties guaranteed by the Bill of Rights would be infringed if too much power was vested in the enforcement mechanism. *Id.*

82. *Id.*

83. *Id.* at S4570-73 (daily ed. Feb. 28, 1968).

84. *Id.* at S4571.

85. *Id.* at S4568 (daily ed. Feb. 28, 1968) (statement of Sen. Mondale).

86. *Id.* at S4570 (daily ed. Feb. 28, 1968). The amendment was tabled by a vote of 83 to five. *Id.*

87. 114 CONG. REC. S4576 (daily ed. Feb. 28, 1968).

88. *Id.* at S4845.

state of American race relations. In a much quoted conclusion, the Report found that "our nation is moving toward two societies, one black, one white, separate and unequal."<sup>89</sup> After the Report was received, the Senate was finally able to reach cloture on the amendment to H.R. 2516 by a vote of sixty-three to thirty-two (the two-thirds required).<sup>90</sup> The legislation's passage was virtually assured since all of the Senators who voted in favor of cloture would also vote in favor of the Dirksen amendment.

By the time cloture finally occurred, more than eighty amendments to the Dirksen amendment had been proposed.<sup>91</sup> The Senate finally passed H.R. 2516, as amended, on March 11, 1968, by a vote of seventy-one to twenty.<sup>92</sup> The bill was then returned to the House of Representatives for approval. When the Senate bill reached the House, an objection was made to the Senate's request for unanimous consent to the amendments; thus, H.R. 2516 was sent to the Rules Committee.<sup>93</sup>

Dr. Martin Luther King, Jr.'s assassination on April 4, 1968, and the resulting wide-spread civil unrest, provided the final impetus needed to push H.R. 2516 out of the House Rules Committee.<sup>94</sup> During the final debates, a House member urged the bill's approval, stating that:

[t]he assassination of Martin Luther King, Jr., has given us a tragic reminder of the urgency for Federal protection of the exercise of civil rights . . . . A national fair housing act . . . is required unless the explosive concentration of Negroes in the urban ghettos is to continue. The hour is late. If Congress delays, it may be writing the death warrant of racial reconciliation.<sup>95</sup>

On April 9, the House approved the Senate's version of H.R. 2516

89. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968). The Kerner Commission found that "most Negro families have remained within predominantly Negro neighborhoods, primarily because they have been effectively secluded from white residential areas." *Id.* at 119.

90. 114 CONG. REC. S4960 (daily ed. Mar. 4, 1968).

91. 114 CONG. REC. S4956 (daily ed. Mar. 4, 1968) (statement of Sen. Ervin). One notable amendment offered by Senator Robert C. Byrd (D-W.Va.) exempted from the Act's coverage single family homes sold through a real estate agent. *Id.* (statement of Sen. Byrd). The Senate rejected this proposed amendment. *Id.* at S4977. Nevertheless, another exemption excluding certain vacation homes passed. *Id.* at S5644 (daily ed. Mar. 7, 1968).

92. *Id.* at S5992 (daily ed. Mar. 11, 1968).

93. *Id.* at S6503 (daily ed. Mar. 14, 1968) (statement of Sen. Madden).

94. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION § 5.2 (1990) (noting effect of dramatic national event in passage of Act).

95. 114 CONG. REC. H9589 (daily ed. Apr. 10, 1968) (statement of Rep. Ryan).



without additional amendments.<sup>96</sup> Debates were held the following day. During those debates, Representative William Ryan (D-N.Y.) concluded that fair housing legislation was a means “to achieve the aim of an integrated society.”<sup>97</sup> Another supporter, Representative Emmanuel Celler (D-N.Y.), the Chairman of the House Committee on the Judiciary, also pressed for the bill’s passage “to eliminate the blight of segregated housing.”<sup>98</sup> The House eventually approved H.R. Res. 1100 by a vote of 250 to 172.<sup>99</sup> The Fair Housing Act of 1968 finally became law when President Lyndon B. Johnson signed H.R. 2516 on April 11, 1968.<sup>100</sup>

### B. *The Enforcement Mechanism of the Fair Housing Act of 1968*

The enforcement provisions of the 1968 Act consisted of: (1) administrative proceedings within HUD; (2) administrative proceedings by a state or local agency; (3) a civil action commenced by an aggrieved party in a United States district court; and (4) civil enforcement actions in pattern and practice cases filed by the Attorney General of the United States.<sup>101</sup> Despite these various avenues for securing redress, the enforcement provisions of the original 1968 Fair Housing Act were not very aggressive, as they were the product of substantial conciliation. Much of the enforcement burden was shifted to state and local fair housing agencies.<sup>102</sup> The federal enforcement mechanism was not available to redress violations of federal law when state or local laws were deemed substantially equivalent to the procedures and remedies accorded by the federal Fair Housing Act.<sup>103</sup> Even when there was no

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96. H.R. 2516 was approved through the adoption of H.R. Res. 1100 which provided for agreement to the Senate amendments. 114 CONG. REC. H9333 (daily ed. Apr. 9, 1968).

97. *Id.* at H9591 (daily ed. Apr. 10, 1968) (statement of Rep. Ryan).

98. *Id.* at H9559 (daily ed. Apr. 10, 1968) (statement of Rep. Celler).

99. *Id.* at H9620-21.

100. 4 WEEKLY COMP. PRES. DOC. 673 (Apr. 11, 1968).

101. The Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(c), 82 Stat. 81, 42 U.S.C. §§ 3601-3619 (1988) [hereinafter Act of 1968]. The adoption of H.R. Res. 2516 cleared the way for President Lyndon B. Johnson who, upon signing the bill into law, stated that the new law “proclaims that fair housing for all—human beings who live in this country—is now part of the American way of life.” The President’s Remarks Upon Signing the Bill Into Law, 4 WEEKLY COMP. PRES. DOC. 674 (Apr. 11, 1968).

102. Act of 1968, *supra* note 101, § 810(c).

103. *Id.*

preemption by state or local law, HUD's enforcement role was limited primarily to the investigation and conciliation of complaints.<sup>104</sup>

The 1968 Act also established a private right of action to enforce violations of the federal statute.<sup>105</sup> But, even if a litigant could secure a federal forum, the remedies available were limited to injunctive relief, actual damages, and a maximum of \$1000 in punitive damages.<sup>106</sup> Given these drastic limitations on the federal government's role in enforcing the statute, it is not difficult, in retrospect, to understand why so little was accomplished during the twenty-year period between the enactment of the original Fair Housing Act and the 1988 Amendments.

### 1. *Administrative Proceedings*

The enforcement provisions of the 1968 Act were set forth in section 810(a) of the statute. Under these provisions, persons aggrieved by practices prohibited by the federal Fair Housing Act could file a complaint with the Secretary of HUD.<sup>107</sup> When complaints were filed, the Secretary was obligated to conduct an investigation and to eliminate any discriminatory practices that were found through informal methods such as conferences, conciliation, and persuasion.<sup>108</sup> All complaints had to be filed within 180 days of the date that the act of discrimination occurred.<sup>109</sup> Section 811(a) of the original legislation authorized the Secretary to issue subpoenas to compel the attendance of witnesses and to submit interrogatories to respondents.<sup>110</sup> To enforce subpoenas, the Secretary was required by section 811(e) to pursue an action in a United States district court.<sup>111</sup> Section 811(g) required the Attorney General to conduct any litigation in which the Secretary participated as a party or as amicus.<sup>112</sup>

### 2. *Referrals to State and Local Agencies*

Under the 1968 legislation, much of the enforcement burden was shifted to state and local agencies. Section 810(c), for example, required

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104. *Id.* § 810(a).

105. *Id.* § 810(d).

106. *Id.* § 812(c).

107. Act of 1968, *supra* note 101, § 810(a).

108. *Id.*

109. *Id.* § 810(b).

110. *Id.* § 811(a).

111. *Id.* § 811(e).

112. Act of 1968, *supra* note 101, § 811(g).

HUD to refer all complaints of housing discrimination to state and local agencies whenever state or local law provided rights and remedies that were "substantially equivalent" to those accorded by the federal statute.<sup>113</sup> After complaints were referred to state or local agencies, the Secretary could take no further action unless HUD certified that the protection of the rights of the parties required further action by the Secretary.<sup>114</sup>

If the Secretary were unable to secure voluntary compliance (or in the case of referrals, the state or local agency) with the Fair Housing Act within thirty days after a complaint was filed, section 810(d) allowed the aggrieved party to commence a civil action in a United States district court.<sup>115</sup> Persons aggrieved by violations of the federal statute, however, could not file a federal civil action if the applicable state or local statute provided substantially equivalent rights and remedies.<sup>116</sup> In that event, the aggrieved individual was limited to a state or local forum. If a state or local law did not preempt the federal proceeding, an action under section 810(c) could be brought in federal court irrespective of the amount in controversy.<sup>117</sup>

### 3. *Civil Actions in District Court*

Under the 1968 Act, a person aggrieved by a violation of the Fair Housing Act could file an administrative complaint with HUD (or, if appropriate, with a certified state or local agency) under section 810 and subsequently file a civil action if the administrative complaint was not resolved. If the aggrieved party did not wish to pursue an administrative remedy under section 810, a separate provision, section 812, allowed aggrieved individuals to file an action directly in the United States district court. The private action in district court created by section 812 could be maintained without resorting to the administrative mechanism established by section 810.<sup>118</sup> Civil actions had to be filed within 180 days following the alleged act of discrimination.<sup>119</sup> Even when civil actions under section 812 were otherwise appropriate, the district courts were required to delay proceedings in any case in which it appeared that

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113. *Id.* § 810(c).

114. *Id.*

115. *Id.* § 810(d).

116. *Id.*

117. Act of 1968, *supra* note 101, § 810(d).

118. *Id.* § 812.

119. *Id.* § 812(a).

administrative conciliation efforts were likely to be successful.<sup>120</sup> Section 812 also gave district courts the discretion to appoint attorneys for plaintiffs and to commence actions without the payment of costs upon a showing that the plaintiff could not afford attorney fees and costs.<sup>121</sup>

One of the most criticized features of the original legislation concerned the limitations on the relief available to prevailing plaintiffs. Section 812(c) limited the relief available to injunctive relief, actual damages, and not more than \$1000 in punitive damages.<sup>122</sup> An award of attorney fees and costs was available only where the court determined that the plaintiff was not able to pay his or her own attorney fees and costs.<sup>123</sup>

The Attorney General was authorized to initiate enforcement actions in certain types of cases. Section 813 of the 1968 Act authorized the Attorney General to file civil actions in pattern and practice cases<sup>124</sup> as well as in cases that raised issues of general public importance.<sup>125</sup> Damage awards were not available in actions brought under this section.

### C. Enforcement Activities Under The 1968 Act

Shortly after the enactment of the 1968 Act, the Department of Justice (DOJ) established a section consisting of approximately thirty people within the Civil Rights Division that were responsible for pursuing fair housing enforcement actions.<sup>126</sup> During the twelve-year period from

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120. *Id.*

121. *Id.* § 812(b).

122. Act of 1968, *supra* note 101, § 812(c).

123. *Id.* § 812(c).

124. Pattern and practice was construed to mean discriminatory policies or practices that affected groups or classes of people rather than isolated episodes that affected individuals. Caruso & Jones, *Overview, supra* note 16, at 524-25. There are essentially two types of pattern and practice cases. The first allows one to sue any corporate or individual defendant whose discriminatory practice is more than an isolated departure from fair housing practices. To find such pattern and practice violations it need not be proven that the discriminatory conduct was uniformly performed by the defendant, provided that the violations were not atypical. *Id.* The second type of pattern and practice case is that of the "group pattern or practice." *Id.* This type exists where the cumulative impact of the discriminatory practices by several individual defendants causes substantial violations of the Act. *Id.* To find a "group pattern or practice" it need not be shown that there was a conspiracy of coordinated activity between the defendants. *Id.*

125. *Id.* § 813(a).

126. Caruso & Jones, *Overview, supra* note 16, at 429.

1968 to 1980, DOJ filed only 300 suits.<sup>127</sup> During the early years of the Reagan Administration, DOJ did not file any cases, and in 1987, DOJ filed only seventeen cases.<sup>128</sup>

In the years following the enactment of the Fair Housing Act, hundreds of private actions were adjudicated, and a body of caselaw interpreting various aspects of the Fair Housing Act was developed.<sup>129</sup> Despite these activities, advocates of fair housing became increasingly disenchanted with the barriers imposed by the lack of any meaningful enforcement authority at HUD and the severe limitations on the relief available to prevailing plaintiffs.<sup>130</sup> Congress eventually responded to the growing dissatisfaction with enforcement provisions of the 1968 Act when Committee hearings were commenced in 1978 on bills that sought to enhance HUD's enforcement powers.<sup>131</sup>

In 1980, H.R. 5200, a bill that contained many of the basic features of the 1988 Fair Housing Amendments Act, was introduced in the House.<sup>132</sup> The House passed H.R. 5200 by a vote of 310 to ninety-five on June 12, 1980.<sup>133</sup> The Senate later attempted to pass H.R. 5200, but failed to obtain the sixty percent of the vote needed to end the filibuster that blocked the bill.<sup>134</sup> During the next six years, several bills similar to H.R. 5200 were introduced, but none progressed beyond the hearing stage.<sup>135</sup> The Reagan Administration opposed these bills and offered

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127. JAMES A. KUSHNER, FAIR HOUSING, § 10.01 n.2 (1984).

128. James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Effort*, 6 YALE L. & POL'Y REV. 348 (1988) [hereinafter Kushner, *Unfinished Agenda*].

129. See generally, ROBERT G. SCHWEMM, HOUSING DISCRIMINATION (1990); Kushner, *Unfinished Agenda*, *supra* note 128.

130. Kushner, *Unfinished Agenda*, *supra* note 128; and See Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 383-84 (1988) (urging passage of Fair Housing Amendments Act to deal with severe limitations on enforcement of 1968 Act).

131. *Federal Government's Role in the Achievement of Equal Opportunity in Housing: Hearings Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92nd Cong., 1st and 2d Sess. (1972).

132. H.R. 5200, 96th Cong. 2d Sess. (1980).

133. 126 CONG. REC. H14,478 (daily ed. June 12, 1980). The House report on this bill was H.R. REP. NO. 865, 96th Cong., 2d Sess. (1980). The House committee hearings can be found in *Fair Housing Amendments Act of 1979: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 2540*, 96th Cong., 1st Sess. (1979).

134. 126 CONG. REC. S31,699, S32,989 (daily ed. Dec. 3, 1980). The bill failed by a vote of 54-43. *Id.*

135. S. 570 and H.R. 1973, 97th Cong., 1st Sess. (1981); S. 1220 and H.R. 3482,

several counter-proposals.<sup>136</sup> This impasse was finally broken by the introduction of what eventually became the Fair Housing Amendments of 1988.

### III. THE 1988 AMENDMENTS TO THE FAIR HOUSING ACT

The provisions of the Fair Housing Amendments of 1988 fall into three major categories: those related to enhanced methods of enforcement; those designed to provide equal housing opportunities for the handicapped; and those designed to provide such opportunities for families with children.<sup>137</sup> A new enforcement mechanism consists of an administrative enforcement procedure and an improved system that authorizes civil actions by private parties and the Attorney General.<sup>138</sup> There is also an election provision that allows either of the parties to opt to have the action heard in federal district court or through administrative proceedings.<sup>139</sup>

Administrative hearings are to be held in accordance with the Administrative Procedure Act (APA),<sup>140</sup> and the Federal Rules of Evidence govern the presentation of evidence.<sup>141</sup> An Administrative Law Judge (ALJ) is empowered, upon finding a respondent guilty of discriminatory housing practices, to impose a civil penalty against a defendant of up to \$10,000 for the first offense, \$25,000 if there has been a prior violation within five years, and \$50,000 if there have been two or more violations within the prior seven years.<sup>142</sup> Decisions of the ALJ are subject to review by the Secretary. All final decisions are subject to appellate review in the United States circuit court of appeals provided that a petition for review is filed within forty-five days of the issuance of the ALJ's order.<sup>143</sup>

The private right of action that existed prior to the 1988 Amendments

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98th Cong., 1st Sess. (1983); S. 2040 and H.R. 4119, 99th Cong., 2d Sess. (1986). Coverage of familial status discrimination appeared for the first time in the 1983 bills, S. 1220 and H.R. 3482, 98th Cong., 2d Sess. (1983).

136. S. 1612 and H.R. 3747, 98th Cong., 1st Sess. (1983) and S. 2146, 99th Cong., 1st Sess. (1986).

137. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3619 (1988)) [hereinafter Act of 1988].

138. *Id.* §§ 810, 812.

139. *Id.* § 812(a).

140. *Id.* § 812(b).

141. *Id.* § 812(c).

142. Act of 1988, 42 U.S.C. § 812(g)(3).

143. *Id.* § 812(i).

is continued with the addition of provisions intended to lessen the burden of the complainant in these actions. The statute of limitations is lengthened to two years,<sup>144</sup> the complainant is not required to exhaust administrative remedies before filing in court, and courts are empowered to appoint an attorney for either party upon a showing of need.<sup>145</sup> The remedies established by the prior law are continued,<sup>146</sup> but the \$1000 cap on punitive damages has been removed, and the court is authorized to award attorney fees and costs.<sup>147</sup>

As in the 1968 legislation, the Attorney General is authorized by the 1988 Amendments to initiate civil actions in both pattern or practice cases<sup>148</sup> as well as in cases in which an "issue of general public importance" is involved.<sup>149</sup> The court may award the relief that was available under the previous statute as well as civil penalties of up to \$50,000 for the first violation and \$100,000 for any subsequent violations.<sup>150</sup> These penalties are not automatic and may be tailored as justice requires.<sup>151</sup>

New provisions were also added to protect handicapped persons from discriminatory housing practices. These provisions are designed to target practices covered by the prior statute as well as additional practices that are relevant only to handicapped persons. Practices rendered illegal by the amendments include: the refusal to permit reasonable modifications to dwellings to facilitate handicapped access,<sup>152</sup> the refusal to make reasonable modifications to rules such that the use of housing facilities by handicapped persons may be aided,<sup>153</sup> and the creation of accessibil-

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144. *Id.* § 813(a).

145. *Id.* § 813(b)(1) - (b)(2).

146. *Id.* § 813(c).

147. Act of 1988, 42 U.S.C. § 813(c)(2).

148. *Id.* § 814(a).

149. *Id.* See also Caruso & Jones, *Fair Housing Act Matrix 1968-1988 with Comments*, 22 J. MARSHALL L. REV. 449, 525 (1989) [hereinafter Caruso & Jones, *Matrix*].

150. Act of 1988, 42 U.S.C. § 814(d)(1)(C).

151. See H.R. REP. NO. 100-711, 100th Cong., 2d Sess. 40 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, [hereinafter 1988 HOUSE REPORT].

152. Act of 1988, 42 U.S.C. § 804(f)(3)(A).

153. *Id.* § 804(f)(3)(B).

A discriminatory rule, policy practice or service is not defensible simply because that is the manner in which the rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity use and enjoy the dwelling.

ity requirements for some structures to eliminate architectural barriers.<sup>154</sup> State and local laws that impose accessibility requirements stricter than those called for by the Amendments are to remain in force.

The Act also includes provisions that were added to protect families with children from discriminatory housing practices.<sup>155</sup> This group is afforded protection from the same types of housing discrimination prohibited by the Fair Housing Act of 1968. Notably, housing established for the elderly is exempted from these protections,<sup>156</sup> whether privately constructed or financed pursuant to a state or federal program.<sup>157</sup> Similar to the provisions related to handicapped persons, state and local regulations protecting families with children that are stricter than those contained in the 1988 Amendments are to remain in effect.

#### A. *The Legislative History of the 1988 Amendments*

The passage and approval of the Fair Housing Act Amendments of 1988,<sup>158</sup> on September 13, 1988, represented the completion of an effort begun eight years earlier, an effort to fulfill the "empty promise" of fair housing offered by the Fair Housing Act of 1968.<sup>159</sup> The bill that became the 1988 Amendments, H.R. 1158, was introduced on February 19, 1987, by Representatives Hamilton Fish, Jr. (R-N.Y.) and Don Edwards (D-Ca.).<sup>160</sup> The provisions of H.R. 1158 were similar to those of H.R. 5200, the Fair Housing Amendments Act of 1980, which was also introduced by Representatives Fish and Edwards.<sup>161</sup> H.R. 5200, which provided for enhanced administrative enforcement and expanded protection to handicapped persons, was approved by the House of Representatives by a vote of 310 to ninety-five, but failed to pass the Senate.<sup>162</sup>

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1988 HOUSE REPORT, *supra* note 151, at 25, reprinted in 1988 U.S.C.C.A.N. at 2186.

154. Act of 1988, 42 U.S.C. § 804(f)(3)(C). See generally, *Barrier Free Environments, Inc., "Adaptable Housing," Office of Policy Development and Research, Department of Housing and Urban Development* (1988) at 7.

155. Act of 1988, 42 U.S.C. §§ 806, 804(a)-(e).

156. *Id.* § 807(b)(2).

157. *Id.*

158. Act of 1988, 42 U.S.C. § 3601-3619.

159. 134 CONG. REC., S10,454 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy).

160. *Fair Housing Amendments Act of 1987, Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 9 (1987) [hereinafter *1987 Subcommittee Hearings*].

161. 1988 HOUSE REPORT, *supra* note 151, at 14.

162. *Id.*



H.R. 5200 was itself the product of a long process beginning in the 92nd Congress with a series of oversight hearings on equal opportunity in housing.<sup>163</sup> These hearings resulted in the introduction of a series of bills in the 95th and 96th Congresses on which extensive hearings were held.<sup>164</sup> Similar to H.R. 1158, the earlier bills evinced a desire by Congress to improve the enforcement mechanism of the Fair Housing Act. Characteristic of these efforts were administrative enforcement mechanisms similar to those contained in H.R. 1158, or grants of authority to HUD and DOJ to sue on behalf of individual complainants.<sup>165</sup> H.R. 4119, a bill embodying these improved enforcement devices, was introduced by Representatives Fish and Edwards in the 99th Congress and was the subject of two hearings before the Subcommittee on Civil and Constitutional Rights,<sup>166</sup> but no further action was taken at that time.

In the 100th Congress, the Subcommittee on Civil and Constitutional Rights held extensive hearings on H.R. 1158. An identical bill, S. 558, was introduced in the Senate by Senators Edward M. Kennedy (D-Mass.) and Arlen Specter (R-Pa.).<sup>167</sup> Similar to the earlier bills, H.R. 1158 and S. 558 created an improved administrative enforcement mechanism and extended Title VIII's protection to handicapped persons and to families with children.<sup>168</sup> On March 3, 1988, the Subcommittee sent to the Committee H.R. 1158, as amended, and on April 27, by a twenty-six to nine vote, ordered H.R. 1158 reported favorably to the House of Representatives.<sup>169</sup> The bill passed the House on June 29 and the Senate on August 2. It was approved on September 13, 1988.<sup>170</sup> The pre-eminent purpose of H.R. 1158 was the creation of an effective enforcement system that would provide some muscle to the Fair Housing Act, a statute that, without effective enforcement provisions, had been little more than a "toothless tiger."<sup>171</sup> The enforcement provisions of the bill

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163. *Id.*

164. *Id.*

165. H.R. 5143, 99th Cong., 2d Sess. (1986), introduced by Mr. Sensenbrenner, and H.R. 4425, 100th Cong., 2d Sess. (1988), introduced by Mr. Michel.

166. 1988 HOUSE REPORT, *supra* note 151, at 14, reprinted in 1988 U.S.C.C.A.N. at 2175.

167. On June 27, 1987, the Senate Judiciary Committee on the Constitution ordered reported S. 558, as amended, for consideration by the full committee. S. 558 as ordered reported is substantially the same as H.R. 1158.

168. 1988 HOUSE REPORT, *supra* note 151, at 14, reprinted in 1988 U.S.C.C.A.N. at 2175.

169. *Id.* at 15.

170. Caruso & Jones, *Overview*, *supra* note 16, at 421.

171. 134 CONG. REC. S10,454 (daily ed. Aug. 1, 1988) (statement of Sen. Kenne-

were comprised of an administrative enforcement system, subject to judicial review, and separate provisions authorizing district court actions by private litigants and DOJ.<sup>172</sup> The second and third purposes of the Act, were, respectively, to extend anti-discrimination protections to handicapped individuals and to families with children.<sup>173</sup>

As the long history of bipartisan attempts to amend the Fair Housing Act suggests, Congress has long recognized the need for sturdier enforcement tools in the context of discriminatory housing practices.<sup>174</sup> Given the long-standing consensus regarding the detrimental effects of discriminatory housing practices, the fact that it took Congress more than eight years to pass the Fair Housing Amendments requires some explanation. To that end, it will be useful to discuss some of the obstacles to the passage of the Amendments.

The proposed expansion of the groups protected by the Fair Housing Act created some dissension. Although the inclusion of handicapped persons seemed desirable, it soon became clear that to some legislators, its level of desirability depended upon the definition of "handicapped."<sup>175</sup> A compromise was eventually reached, which would allow "handicapped" to be defined to include, for example, individuals infected with the HIV (or AIDS) virus, but not individuals whose current substance abuse/addiction posed a threat to others.<sup>176</sup> Similarly, the inclusion of families with children disturbed a few legislators who anticipated a dilution of effective enforcement of fair housing claims due to the sizable increase in the number of claims this group would likely generate.<sup>177</sup>

One of the most significant problems facing the enactment of the 1988 Amendments, however, was the debate regarding the constitutionality of the administrative enforcement provisions. The earliest efforts to draft new enforcement procedures were crippled over concern that proceedings before an administrative law judge would deny the Seventh Amendment right to a jury trial.<sup>178</sup>

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172. 1988 HOUSE REPORT, *supra* note 151, at 13, reprinted in 1988 U.S.C.C.A.N. at 2174.

173. *Id.*

174. *Id.* at 15-16.

175. *Id.* at 82.

176. Act of 1988, 42 U.S.C. § 802(h)1, (h)3.

177. 1988 HOUSE REPORT, *supra* note 151, at 82, reprinted in 1988 U.S.C.C.A.N. at 2218. To some extent, these fears have been borne out. *Id.* at 88.

178. *Id.* at 69-70 (discussing various legal issues surrounding denial of jury trial

This concern was, in part, based upon the Supreme Court's holding in *Curtis v. Loether*,<sup>179</sup> a case in which the Court held that fair housing claims brought under Title VII gave rise to the right to a jury trial as guaranteed by the Seventh Amendment. Following *Curtis*, in 1978, Professor Walter Gellhorn of Columbia Law School contended in a letter to the Judiciary Committee Counsel that shifting adjudicatory powers from the judiciary to ALJs would likely precipitate constitutional challenges, and that these challenges would have a significant likelihood of success.<sup>180</sup>

A subsequent Supreme Court opinion, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*,<sup>181</sup> however, seemed to lend support to the contention that complaints lodged under the Fair Housing Act could be adjudicated administratively without violating the Seventh Amendment right to a jury trial. The *Atlas Roofing* holding created some ambiguity regarding the extent to which Congress could assign matters to ALJs without impinging upon Seventh Amendment jury trial rights.<sup>182</sup> *Atlas Roofing* held that a jury is not required at the administrative level, particularly when the matter was limited to an initial adjudication.<sup>183</sup> Moreover, the Supreme Court in *Atlas Roofing* explained that government actions to enforce public rights, such as those created by safety regulations, could be adjudicated in administrative proceedings without a jury, but adjudication of private rights would trigger Seventh Amendment protection.<sup>184</sup> The *Atlas Roofing* decision's ambiguity stemmed from the difficulty in defining a "public right."

In the case of the 1988 Amendments to the Fair Housing Act, some legislators believed that the rights asserted by complainants were "public," while many, like Senator Orrin G. Hatch (R-Utah), were "convinced that claims under [the Act] remain private in nature."<sup>185</sup> Indeed, John Knapp, former general counsel for HUD, maintained that:

when you read . . . [a] case's description of what are private rights and public rights, . . . private rights being reserved to [the judiciary], and if you lay that

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where remedies are to be sought through administrative enforcement procedures).

179. 415 U.S. 189 (1974).

180. 1988 HOUSE REPORT, *supra* note 151, reprinted in 1988 U.S.C.C.A.N. at 2173.

181. 430 U.S. 442 (1977).

182. 134 CONG. REC. S10,461 (daily ed. Aug. 1, 1988) (statement of Sen. Hatch).

183. *Atlas Roofing*, 430 U.S. at 450-55.

184. 134 CONG. REC. S10,461 (daily ed. Aug. 1, 1988) (statement of Sen. Hatch).

185. *Id.*

alongside the Supreme Court's decision in *Curtis v. Loether*, which I think is the case which determines that a Fair Housing Act damage case invokes the constitutional right to a jury trial, . . . I think you get a somewhat fuzzy picture.<sup>186</sup>

To a large extent, the applicability of the Seventh Amendment to claims such as those that would arise from the 1988 Amendments was determined by the Supreme Court's decision in *Tull v. United States*,<sup>187</sup> where the Court determined that an Environmental Protection Agency enforcement action in federal district court fell within the aegis of the Seventh Amendment. *Tull* premised the Seventh Amendment jury trial right upon the nature of both the action and the remedy in question.<sup>188</sup> An action seeking the recovery of civil damages, according to *Tull*, is an "action in debt requiring trial by jury."<sup>189</sup> Similarly, the Court characterized civil penalties as the type "that could only be enforced in courts of law."<sup>190</sup> In light of *Tull*, section 812(g) of the Fair Housing Act, which empowers ALJs to order civil penalties as well as unlimited actual and punitive damages, seemed in genuine peril of being held unconstitutional. Yet, the ruling in *Atlas Roofing* suggests that the Seventh Amendment concern may have been somewhat overstated. In any event, it is clear that the concerns surrounding the jury trial question posed a formidable obstacle to the passage of the Amendments.

This stumbling block was finally surmounted by a compromise "[s]ingle-handedly . . . forged" by the bill's co-sponsor, Representative Fish.<sup>191</sup> The Fish Amendment, which established a provision that allows the parties to elect to proceed before an administrative law judge or to secure a forum in a district court, appeased representatives who opposed the bill on Seventh Amendment grounds<sup>192</sup> and effectively eliminated any remaining questions concerning the constitutionality of the proposed Amendments.<sup>193</sup> Moreover, the compromise was deemed not to have weakened the bill in any way, but to have in fact strengthened it by adding flexibility in the choice of forums and immunizing it

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186. 1988 HOUSE REPORT, *supra* note 151 (citing *Fair Housing Amendments Act Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 83-84 (1986), reprinted in 1988 U.S.C.C.A.N. at 2218-19).

187. 481 U.S. 412 (1987).

188. *Id.* at 417.

189. *Id.* at 418.

190. *Id.* at 417-18.

191. 134 CONG. REC. H4677 (daily ed. June 23, 1988) (statement of Rep. Michel).

192. *Id.* (statement of Rep. Sensenbrenner).

193. *Id.* at H4678 (statement of Rep. Edwards).

from constitutional challenge.<sup>194</sup> As a direct result of the Fish Amendment, H.R. 1158 passed the House of Representatives on June 29, 1988, by a vote of 376 to 23.<sup>195</sup>

On August 1, 1988, the Senate commenced its debate on H.R. 1158.<sup>196</sup> Although certain aspects of the bill were aimed at adding new groups to the protections accorded by Title VIII, it was clear from the discussion on the Senate floor that the bill was enacted primarily to strengthen the enforcement provisions of the existing Act.<sup>197</sup> The impediments to passage in the Senate had, in large part, been alleviated in the House by the resolution of points of contention such as who exactly was to be included in the definition of "handicapped."<sup>198</sup> Most notable among these was the Fish Amendment to the enforcement provision, which was characterized in the Senate debates as the "key compromise in this legislation."<sup>199</sup> As a result of the Fish Amendments, the Senate offered only minor changes to H.R. 1158. It was passed as amended on August 2, 1988.

### *B. The Enforcement Provisions of the 1988 Amendments*

The most significant changes effectuated by the 1988 amendments consisted of the addition of two new protected groups and a significantly enhanced administrative and judicial enforcement mechanism. After twenty years with almost no enforcement authority, HUD now has what is likely the most comprehensive civil enforcement mechanism of any of the various federal agencies that have civil rights enforcement responsibilities.

#### *1. Administrative Investigations*

Section 810(a) requires the Secretary to initiate investigations after the receipt of a complaint alleging a discriminatory housing practice.<sup>200</sup> HUD is also authorized to commence investigations on its own initia-

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194. *Id.*

195. Memorandum of Senators Arlen Specter (R-Pa.) and Edward M. Kennedy (D-Mass.) regarding their substitute amendment, 134 CONG. REC. S10,455 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy).

196. *Id.* at S10,454 (statement of Sen. Kennedy).

197. *Id.* at S10,455 (statement of Sen. Kennedy).

198. Act of 1988, 42 U.S.C. § 802(h)1, (h)3.

199. 134 CONG. REC. S10,455 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy).

200. Act of 1988, 42 U.S.C. § 810(a).

tive.<sup>201</sup> Complaints must be filed within one year after the alleged act of discrimination occurred or terminated.<sup>202</sup> This represents a doubling of the 180 day time period that was allowed prior to the enactment of the 1988 Amendments.

When a complaint is filed, the statute requires the Secretary to notify the complainant that the complaint has been received. The party against whom the allegations are made must be advised that a complaint has been filed and informed of his or her rights under the statute, including the right to file an answer and to choose a forum in which to proceed. The Secretary is required to complete the investigation within one hundred days unless it is impractical to do so.<sup>203</sup> If an investigation is not completed within the time period prescribed by the statute, the Secretary is required to issue a written explanation for the delay.<sup>204</sup> Section 810(b) continues the conciliation features of the pre-existing law. As in the original legislation, the 1988 Amendments encourage conciliation and voluntary settlement.<sup>205</sup> The relevant statutory provision specifically directs the Secretary to endeavor, "to the extent feasible," to engage in conciliation efforts.<sup>206</sup> Any settlement that the parties reach through the conciliation process must be approved by the Secretary.<sup>207</sup> As an adjunct to the conciliation process, the parties may agree to submit their dispute to binding arbitration.<sup>208</sup>

Section 810(e), which provides for prompt judicial action, authorizes the Secretary to initiate proceedings for temporary relief when the Secretary determines that interim relief is necessary during the pendency of the administrative proceedings.<sup>209</sup> This would allow, for example, an action to secure a preliminary injunction prohibiting the sale or rental of the premises involved in the alleged act of discrimination pending the

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201. *Id.* § 810(a)(1)(A)(iii).

202. *Id.* § 810(a)(1)(A)(i).

203. *Id.* § 810(a)(1)(B)(iv).

204. *Id.* § 810(a)(1)(C).

205. Act of 1988, 42 U.S.C. § 810(b)(1). Conciliation, to be successful, must be fair, remedy the violation, and ultimately eliminate the practice. Caruso & Jones, *Matrix*, *supra* note 149, at 492 (citations omitted).

206. Act of 1988, 42 U.S.C. § 810(b)(1).

207. *Id.* § 810(b)(2).

208. *Id.* § 810(b)(3). Conciliation will cease if an agreement seems unlikely, the parties are uncooperative, or the trial phase of a civil suit commences. Caruso & Jones, *Matrix*, *supra* note 149, at 492 (citations omitted).

209. Act of 1988, 42 U.S.C. § 810(e)(1).

resolution of the dispute.<sup>210</sup>

## 2. Referrals to State and Local Agencies

Section 810(f) provides for the certification of state and local agencies and for the referral of complaints to such agencies. Regulations implementing section 810(f) are set forth in 29 C.F.R. Part 115. The 1988 Amendments anticipate that state and local agencies will continue to play the integral role in handling discrimination complaints that they had under the original legislation. State and local agencies are eligible for certification if the rights, procedures, and remedies available under the state or local laws are "substantially equivalent" to those available under the federal Fair Housing Act.<sup>211</sup> Complaints made in locations that have a certified local agency must be referred by the Secretary to the local agency.<sup>212</sup> Once the referral is made, the Secretary cannot take any further actions unless: (1) the local agency fails to take any actions on the referral within thirty days after receipt of the complaint; (2) the agency fails to proceed with reasonable promptness; or (3) the Secretary determines that the agency no longer qualifies for the "substantially equivalent" certification.<sup>213</sup>

At the time of the adoption of the 1988 Amendments, thirty-six state and seventy-six local agencies had obtained certification under the existing federal authorization.<sup>214</sup> These state and local agencies were allowed to retain their certified status for forty months (with provisions for a possible eight month extension), to allow for any modifications that might be required by the 1988 Amendments.<sup>215</sup> The Secretary is also required to review certifications of local agencies every five years.<sup>216</sup> To the extent local agencies are not equipped or authorized to process complaints alleging discrimination on the basis of the new categories added by the 1988 Amendments, such as discrimination on the basis of handicap or familial status, HUD has retained jurisdiction over complaints falling in these new categories.<sup>217</sup>

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210. *Id.*

211. *Id.* § 810(f)(3)(A).

212. *Id.* § 810(f)(1)(A)-(B).

213. *Id.* § 810(f)(2)(A), (B), (C).

214. Act of 1988, 42 U.S.C. § 3601-19.

215. *Id.* § 810(f)(4).

216. *Id.* § 810(f)(5). If any agency is not qualified, the Secretary will take appropriate action. *Id.*

217. *Id.* § 810.

Regulations governing the standards and procedures for equivalency certifications are contained in 24 C.F.R. Part 115. The regulations require HUD to determine that the state or local fair housing law under which the locality operates is, on its face, equivalent to the federal fair housing law with respect to the rights and procedures that are available to claimants. The regulations also require HUD to determine that the actual practices and procedures utilized by the locality are the same as those established by the federal statute.<sup>218</sup> The regulations establish specific criteria that each locality must satisfy to secure an equivalency certification. Under these criteria, the locality must have an enforcement mechanism that provides for the filing and investigation of complaints within the one hundred day time period prescribed by the federal statute. If an investigation results in a finding that a violation has occurred, the parties must be given a choice of forums in which to proceed and the adjudicatory mechanisms must be the same as those that are available under the federal statute. Thus, as in the case of federal fair housing complaints, complainants and respondents in state and local proceedings must be provided with an administrative or judicial forum for the resolution of complaints that proceed beyond the investigatory stage.

The local administrative agency must also have the authority to issue subpoenas and to secure prompt judicial action to maintain the status quo during the pendency of the proceeding. The relief available to prevailing complainants must be the same as the relief available under the federal statute. In addition, judicial review of agency orders must be available to the parties of an administrative proceeding.<sup>219</sup> In addition to setting substantive equivalency standards, the regulations also create a procedure for securing certifications of equivalency.<sup>220</sup> These provisions require the submission of requests for certifications to the Assistant Secretary for Fair Housing, and establish a procedure for consideration of requests for certifications. Other provisions of Part 115 govern denials of requests for certifications, withdrawal of certifications, conferences, and interim referrals.<sup>221</sup>

As will be discussed in greater detail below, problems have emerged with certifications of state and local agencies that were grandfathered under section 810(f). The vast majority of these agencies did not

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218. 24 C.F.R. § 115.2 (1992).

219. *Id.* § 115.3.

220. *Id.* §§ 115.5, 115.6. Section 115.5 discusses requests for certification, and § 115.6 outlines the certification procedure.

221. *Id.* §§ 115.7, 115.8, and 115.9.



achieve equivalency status by January 13, 1992, the date by which equivalency was to be secured. Several of these agencies' deadlines have been extended for an additional eight month period, but it seems likely that many will not achieve equivalency by the expiration of that period.

### 3. *Determinations of Cause*

The Secretary is required under section 810(g) of the 1988 Amendments to conclude all investigations within one hundred days. If reasonable cause exists to believe that a violation has occurred, the Secretary is required to issue a formal charge of discrimination.<sup>222</sup> If reasonable cause is not found, the complaint must be dismissed and HUD is required to issue a public notification of the dismissal.<sup>223</sup> If the Secretary is unable to complete the investigation within one hundred days, he must advise the parties in writing of the reasons for his failure to comply with the one hundred day completion requirement.<sup>224</sup>

Section 811 gives the Secretary the authority to issue subpoenas and to order discovery to the same extent the federal courts are allowed to do so under the Federal Rules of Civil Procedure. Failure to comply with subpoenas or discovery orders may subject non-complying parties to fines of up to \$100,000 and confinement in prison for a period of one year.<sup>225</sup>

Under section 812, after a formal charge is issued, a complainant or a respondent may elect to adjudicate the claim as a civil action in a United States district court in lieu of the administrative proceeding before an ALJ.<sup>226</sup> Any party desiring to make this election must do so within twenty days after receipt of the formal charge.<sup>227</sup> If one of the parties invokes the election provision, the action is prosecuted by the Attorney General on the Secretary's behalf.<sup>228</sup> The aggrieved individual may intervene as a party to the civil action.<sup>229</sup>

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222. Act of 1988, 42 U.S.C. § 810(g)(2)(A).

223. *Id.* § 810(g)(3). There are no express statutory or regulatory provisions providing for review of "no cause" determinations. A complainant may arguably be able to seek judicial review under the Administrative Procedure Act (APA) as a person aggrieved of final agency action. 5 U.S.C. § 704 (1988). It seems likely, however, that a "no cause" decision would be deemed to be a non-reviewable exercise of prosecutorial discretion. *Heckler v. Chaney*, 470 U.S. 821 (1985).

224. Act of 1988, 42 U.S.C. § 810(g)(1).

225. *Id.* § 811(c)(1).

226. *Id.* § 812(a).

227. *Id.*

228. *Id.* § 812(o).

229. Act of 1988, 42 U.S.C. § 812(o). Regulations implementing the handling and

#### 4. Administrative Hearings

When the Secretary determines that there is reasonable cause to conclude that a violation has occurred and a formal charge has been issued pursuant to section 810(a), an ALJ is required, under section 812(b), to conduct an adjudicatory hearing pursuant to the provisions of the APA<sup>230</sup> except where the parties elect to proceed in a United States district court.<sup>231</sup> When the formal charge is issued, section 812(b) requires the ALJ to notify the parties of the pendency of the charge and to designate the time and place of the hearing.<sup>232</sup>

Section 812(c) mandates that the provisions of the APA govern the hearing.<sup>233</sup> The presentation and receipt of evidence are governed by the Federal Rules of Evidence.<sup>234</sup> Section 812(d) requires the adjudicatory proceedings to be as expeditious as practicable and the discovery and the hearing processes to be inexpensive. The parties to the hearings are HUD, which is represented by its Office of General Counsel, and the respondent.<sup>235</sup> The aggrieved individual may intervene as a party<sup>236</sup> to the proceeding and secure representation by private counsel. The parties are entitled to engage in discovery on an expedited basis.<sup>237</sup> Furthermore, although the Federal Rules of Evidence govern the presentation of testimony and documentary evidence, section 812(d) indicates that the proceedings are to be slightly less formal than a trial

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processing of complaints of housing discrimination are codified at 24 C.F.R. § 103 (1991). The regulations state, albeit in greater detail, the obligations established by the 1988 Amendments. Subpart A sets forth several general definitions. Subpart B establishes procedures for the actual filing of complaints. Subpart C provides for referrals to state and local agencies in referral jurisdictions. Subpart D sets forth the procedures to be followed in the investigation of complaints. Subpart E governs the conciliation process, and subpart F governs the issuance of formal charges. Subpart K states procedures for securing interim judicial relief, and subpart H governs certain miscellaneous procedures.

230. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1988) (originally enacted as the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946)).

231. Act of 1988, 42 U.S.C. § 812(a).

232. *Id.* § 812(b).

233. *Id.* The Federal Rules of Evidence, for example, will apply to the introduction of evidence here as in federal district court. *Id.*

234. *Id.* § 812(c).

235. *Id.* § 812(d).

236. Act of 1988, 42 U.S.C. § 812(c).

237. *Id.* § 812(d).

in a federal district court.<sup>238</sup>

Section 810(b) requires the consent of the charging party to any settlements that may be negotiated prior to the conclusion of the formal hearing.<sup>239</sup> If a civil action is filed in a United States district court, section 812(f) requires the termination of the administrative proceeding.<sup>240</sup> Section 812(g) states that administrative hearings must commence within 120 days after the charge has been issued and that the decision must be issued by the ALJ within sixty days after the conclusion of the hearing.<sup>241</sup> The ALJ's decision must include findings of fact and conclusions of law.<sup>242</sup>

Part 104 of the applicable regulations<sup>243</sup> governs the conduct of administrative hearings. The regulations provide for a full blown evidentiary hearing at which the parties may be represented by counsel,<sup>244</sup> with evidence introduced,<sup>245</sup> and witnesses examined and cross-examined.<sup>246</sup> Subpart D provides for the filing of pleadings and motions.<sup>247</sup> Subpart E governs pre-hearing discovery.<sup>248</sup> Discovery may be secured through interrogatories, depositions, requests for the production of documents, and requests for admissions.<sup>249</sup> Subpart E also provides for sanctions in the event either party fails to cooperate during the discovery phase of the proceedings.<sup>250</sup>

Subpart F provides for a final pre-hearing conference.<sup>251</sup> As is the practice in most federal district courts, the parties to an administrative proceeding under the Fair Housing Act must submit pre-trial statements that contain a summary of their legal positions and designate the witnesses and evidence to be presented at the hearing.<sup>252</sup> Subpart H of the regulations sets forth the procedures that apply to the actual hear-

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238. *Id.*

239. *Id.*

240. *Id.* § 812(f).

241. Act of 1988, 42 U.S.C. § 812(g)(1), (g)(2).

242. *Id.* § 812(g)(2).

243. 24 C.F.R. § 104 (1992).

244. *Id.* § 104.210.

245. *Id.* § 104.540.

246. *Id.* § 104.200.

247. *Id.* §§ 104.400 - 104.450.

248. 24 C.F.R. §§ 104.500 - 104.580 (1992).

249. *Id.*

250. *Id.* § 104.580.

251. *Id.* § 104.610.

252. *Id.*

ings.<sup>253</sup> The hearing rules follow the procedures used in civil actions in district courts. Subpart I provides for the issuance of final decisions after the conclusion of the evidentiary hearing.<sup>254</sup> Subpart J sets forth procedures for securing judicial review<sup>255</sup> and enforcement of final agency decisions.<sup>256</sup>

### 5. *The Relief Available to Prevailing Parties*

Another major change effected by the 1988 Amendments involved a considerable expansion of the relief available to prevailing parties. If the hearing results in a determination that the charging party was the victim of an unlawful discrimination, section 812(g) authorizes the ALJ to award compensatory damages,<sup>257</sup> injunctive and other equitable relief,<sup>258</sup> and to impose civil penalties.<sup>259</sup> The civil penalties may include a fine of up to \$10,000 in the case of first time violators;<sup>260</sup> \$25,000 if there has been a previous violation by the same individual within a five year period;<sup>261</sup> and \$50,000 if there have been two or more violations by the same individual within the preceding seven years.<sup>262</sup> Section 812(g) also allows ALJs and courts to award attorney fees and costs to the prevailing party unless the prevailing party is the United States.<sup>263</sup> If a bona fide purchaser or renter does not have actual notice of the proceedings, section 812(g)(4) states that the relief awarded may not affect the sale, lease, or encumbrance of the premises.<sup>264</sup> If a violation is found, the Secretary is obligated by section 812(g)(5) to transmit a copy of the ALJ's decision to the appropriate state or local licensing authority.<sup>265</sup>

The Secretary is authorized by section 812(h)(1) to review any finding issued by an ALJ.<sup>266</sup> The filing for review must be completed

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253. 24 C.F.R. §§ 104.700 - 104.810 (1992).

254. *Id.* § 104.930.

255. *Id.* § 104.950.

256. *Id.* § 104.955.

257. Act of 1988, 42 U.S.C. § 812(g)(3).

258. *Id.*

259. *Id.*

260. *Id.* § 812(g)(3)(A).

261. *Id.* § 812(g)(3)(A) - (B).

262. Act of 1988, 42 U.S.C. § 812(g)(3)(C).

263. *Id.* § 812(p).

264. *Id.* § 812(g)(4).

265. *Id.* § 812(g)(5).

266. *Id.* § 812(h)(1). This review will be exercised at the Secretary's discretion,

within thirty days or the ALJ's order becomes final and binding.<sup>267</sup> The Secretary is also required to notify the parties of the final decision.<sup>268</sup> The Secretary's review is discretionary. No statutory or regulatory provisions authorize either the complainant or the respondent to petition for the Secretary's review of a decision issued by an ALJ. The applicable regulations provide that review by the Secretary will be reserved for extraordinary cases, such as those with a potential impact beyond the parties to the immediate proceeding.<sup>269</sup>

#### 6. *Judicial Review of Administrative Decisions*

Decisions issued by ALJs are decreed final agency action by section 812(i) and are reviewable directly in the United States court of appeals for the circuit in which the violation occurred.<sup>270</sup> A petition for review in the court of appeals must be filed within thirty days after HUD's final decision.<sup>271</sup> Judicial review of ALJ decisions is governed by statute.<sup>272</sup> The scope of review is governed by the substantial evidence standard.<sup>273</sup> The ALJ's decision becomes final and binding forty-five days after its issuance unless one of the parties petitions for judicial review in the court of appeals.<sup>274</sup> Enforcement of the Secretary's decision is vested in the United States court of appeals for the circuit in which the violation occurred. Enforcement petitions may be filed by the Secretary or any person entitled to relief, in the event the Secretary fails to petition for enforcement.<sup>275</sup>

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most likely in only those cases of high public impact. Caruso and Jones, *Matrix*, *supra* note 149, at 514.

267. Act of 1988, 42 U.S.C. § 812(i)(2).

268. *Id.* § 812(h)(2).

269. *Id.* § 814.

270. Act of 1988, 42 U.S.C. § 812(j)(1).

271. *Id.* § 812(i)(2).

272. 28 U.S.C. §§ 2341 - 2351 (1988).

273. See *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951) (stating that substantial evidence is "more than a mere scintilla, it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

274. Act of 1988, 42 U.S.C. § 812(l).

275. *Id.* § 812(m). Appellate review of agency decisions by a circuit court of appeals is the most common form of judicial review of formal agency action in the federal system. This procedure was first utilized by the Federal Trade Commission Act of 1914 and has subsequently been adopted by virtually all federal regulatory agencies. GLEN O. ROBINSON, ET AL. *THE ADMINISTRATIVE PROCESS* 331 (West 1986).

Section 813 preserves and expands the private right of action that existed under prior law. Thus, in lieu of pursuing an administrative proceeding, parties seeking redress of violations of the Fair Housing Act may file civil actions in a United States district court.<sup>276</sup> Parties who elect to proceed under section 813 are not required to exhaust their administrative remedies prior to filing an action in district court.<sup>277</sup> An aggrieved person, however, may not initiate a private action in district court if an administrative proceeding is pending. If an action is brought under section 813, a prevailing party may, in addition to compensatory and injunctive relief, also secure an award of punitive damages.<sup>278</sup> Section 813 also allows the prevailing party to obtain an award of attorney fees and costs.<sup>279</sup>

### 7. *Actions by the Attorney General*

Section 814 continues the authority of the Attorney General to initiate civil actions in pattern and practice cases, and cases in which discriminatory practices raise an issue of general public importance.<sup>280</sup> Section 814(a) allows the Attorney General to intervene as a party in private actions if such an action raises an issue of general public importance.<sup>281</sup> Section 814 also authorizes the Attorney General to commence zoning and other land use cases and to initiate actions to enforce subpoenas and conciliation agreements.<sup>282</sup>

## IV. HUD'S IMPLEMENTATION OF THE 1988 AMENDMENTS

### A. *1989 Activities*

Section 808(e)(2) of the Fair Housing Act requires the Secretary to submit an annual report to Congress stating the progress made towards reaching the goal of eliminating discrimination in housing.<sup>283</sup> Among other things, the Secretary must report: the number of investigations that

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276. Act of 1988, 42 U.S.C. § 813(a)(1)(A).

277. *Id.* § 813(a)(2).

278. *Id.* § 813(c)(1).

279. *Id.* § 813(c)(2).

280. *Id.* § 814(a).

281. Act of 1988, 42 U.S.C. § 814(a).

282. *Id.* § 814(b) - (c).

283. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE STATE OF FAIR HOUSING: REPORT TO CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT (1989) [hereinafter 1989 HUD REPORT].

were not completed under section 810(a)(1)(B); the number of determinations that were not made in a timely manner under section 810(g); and the number of hearings not commenced or findings and conclusions not made as required by section 812(g).<sup>284</sup>

The Secretary issued the first annual report prepared pursuant to the 1988 Amendments on September 12, 1990.<sup>285</sup> In this report, the Secretary concluded that the most significant accomplishments made during the first year of operation under the 1988 Amendments included: the promulgation of comprehensive regulations; securing an operating budget; assigning duties to staff; revising complaint processing procedures; and initiating the process for the certification of state and local agencies as required by the 1988 Amendments.

1. *Organizational Structure: The Office of Fair Housing and Equal Opportunity*

Overall responsibility for the administration of the Fair Housing Act was delegated to the Assistant Secretary for Fair Housing and Equal Opportunity.<sup>286</sup> Responsibility for receipt, investigation, and conciliation of complaints was delegated to the Directors of Fair Housing and Equal Opportunity at the ten regional HUD offices.<sup>287</sup> Oversight, guidance, and responsibility for making recommendations concerning the certification of state and local agencies were retained by the Assistant Secretary and his staff at HUD headquarters in Washington, D.C.<sup>288</sup>

HUD's Office of General Counsel handles reasonable cause determinations; prosecutes charges in administrative proceedings; and requests DOJ to initiate actions in district courts to secure prompt judicial relief where injunctive or other equitable relief is needed to maintain the status quo during the pendency of the administrative proceedings.<sup>289</sup>

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284. *Id.* at i.

285. *Id.* at 4.

286. *Id.* at 7.

287. *Id.*

288. 1989 HUD REPORT, *supra* note 283, at 4, 11, 12.

289. *Id.* at 8-10. The real world effects of this particular empowerment are notable, as the story of the first temporary restraining order (TRO) issued under the Fair Housing Amendments illustrates. The TRO was obtained on behalf of a family of four who had found an apartment especially well-suited to their needs (space, schools, budget, etc.), only to be told that the apartment was unavailable to families with children. When contacted by HUD, the owner refused to keep the apartment open or begin processing the family's application. HUD authorized a TRO in April, 1989. In early May the respondents settled, allowing the family to move in and giving them

## 2. *The Office of General Counsel*

Fair Housing cases are handled by a section of the Office of General Counsel that is headed by the Assistant General Counsel for Fair Housing. There are two Deputy Assistant General Counsels. One deputy is in charge of enforcement activities. The other deputy is responsible for legal opinions. In addition to the Assistant General Counsel and his two deputies, there are thirteen line attorneys, two paralegals, and two support staff members. The Assistant General Counsel is responsible for all of HUD's civil rights matters, but the bulk of the efforts of his office are devoted to fair housing enforcement matters. In addition to the staffing described above, attorneys in each of the ten regional offices handle fair housing matters. The amount of attorney time, however, like the caseload, varies from region to region.<sup>290</sup>

## 3. *Operating Budget for FY 1988*

The amount budgeted for fiscal year 1988 for the Fair Housing and Equal Opportunity (FHEO) headquarters and regional offices totalled \$29,193,000. This supported 590 staff years, 169 of which were devoted to fair housing enforcement. An additional \$4,570,000 was requested in September, 1988, in anticipation of the passage of the 1988 Amendments. This request was approved by the Office of Management and Budget (OMB), but Congress was unable to act before adjourning. HUD later requested and received approval to transfer \$4,570,000 from other HUD activities. In fiscal year 1989, a request for a supplemental appropriation of \$3,490,000 was submitted and approved as part of the Supplemental Appropriations Act of 1989. Staffing for the increased responsibilities created by the 1988 Amendments began prior to the effective date of the Amendments (without an additional appropriation) with the addition of eighty-five investigators in HUD's regional offices. FHEO reported in its 1989 report that the 169 staff years expended during fiscal year 1989 would grow to 309 staff years by 1990.<sup>291</sup>

During the first year of operation under the 1988 Amendments, HUD trained approximately 150 investigators in the new procedures created by

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three months of free rent. In addition, the respondents gave \$400 to the housing center that assisted the family with its complaint. 1989 HUD REPORT, *supra* note 283, at 16-17.

290. Interview with Harry L. Carey, Assistant General Counsel for Fair Housing, Office of General Counsel, HUD, in Washington, D.C. (June 11, 1991).

291. 1989 HUD REPORT, *supra* note 283, at 7.



the Amendments. The primary change at the investigatory level was a shift from an adversarial posture to that of a neutral fact-finder. HUD also developed a comprehensive technical guidance and memoranda system for investigators. An automated complaint tracking system was developed that integrated into a single computerized data base information from the regional offices and information generated by HUD headquarters.<sup>292</sup>

#### 4. *Complaint Processing Procedures*

After the 1988 Amendments became effective, the bulk of HUD's efforts were devoted to the development of a new complaint processing procedure in order to incorporate the alterations that the Amendments effectuated. The procedure that was ultimately developed commences with the receipt of a complaint alleging a violation of the Fair Housing Act at any of the ten regional offices. The complaint is initially screened by a staff person, who has been assigned intake responsibilities. At that point, a determination is made as to whether the complaint falls within HUD's jurisdiction.<sup>293</sup>

Complaints barred by the statute of limitations or that do not allege a grievance redressable under the Fair Housing Act are closed administratively.<sup>294</sup> Complaints are also closed at this stage when the complainant cannot be located, the complainant fails to cooperate with the investigation, or other factors preclude further processing.<sup>295</sup> Complaints challenging the validity of local zoning or land use laws are referred to DOJ.<sup>296</sup> Investigations that proceed beyond the initial screening stage are usually handled by a HUD regional office. The individual assigned to conduct the investigation initiates conciliation efforts. If information needed for the investigation cannot be secured voluntarily, subpoenas and other discovery orders are issued in appropriate cases. If conciliation efforts prove successful, a settlement agreement is executed and the investigation is closed.<sup>297</sup>

If conciliation proves unsuccessful, a Final Investigation Report (FIR) is prepared that sets forth the investigator's findings and recommendations. During 1989, all FIRs were reviewed by a regional office and

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292. *Id.* at 10.

293. *Id.* at 8-10.

294. *Id.* at 8.

295. *Id.*

296. 1989 HUD REPORT, *supra* note 283, at 8.

297. *Id.*

thereafter by FHEO headquarters in Washington, D.C. Completed FIRs were referred to the Office of General Counsel to determine if sufficient cause existed to initiate an enforcement action. Alternatively, if the General Counsel concluded that adequate cause did not exist to justify the issuance of a formal charge, the complaint was dismissed. If the General Counsel made a determination that sufficient grounds existed, HUD issued a formal charge against the respondent.<sup>298</sup>

At this point, the charge is referred to the Office of ALJs. Notification of the time and place for an administrative hearing before an ALJ is issued within three days after the formal charge is issued. The parties have twenty days after receipt of the charge to elect to change forums to the United States district court.<sup>299</sup> If an election is not made, the charge proceeds to a hearing before an ALJ. When the charge proceeds to a hearing, the Office of the General Counsel prosecutes the charge on behalf of the complainant. The complainant, however, may intervene as a party to the proceeding and secure separate representation by his or her own counsel.<sup>300</sup>

##### 5. *Enforcement by State and Local Agencies*

When the 1988 Amendments became effective, HUD certified the existing state and local agencies under the grandfathering provisions of the Fair Housing Act. At the time that the 1989 report was issued, HUD anticipated that these agencies would continue to handle all complaints alleging discrimination based upon race, color, religion, or national origin until January 13, 1992, the date by which they were required to achieve substantial equivalency.<sup>301</sup> All complaints filed in jurisdictions covered by equivalent state or local Fair Housing Acts are processed, whether filed with HUD or directly with the local agency, and are counted in HUD's overall caseload.

During 1989, six jurisdictions submitted new laws to HUD for certification. One was determined not to satisfy the equivalency requirements. Another, the state of Texas, was given a provisional approval subject to the promulgation of the new fair housing regulations. The remaining four applications were still pending when HUD's 1989 report was issued. Federal support for state and local agencies was provided through the Fair Housing Assistance Program (FHAP), which provides support

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298. *Id.* at 10.

299. *Id.*

300. *Id.*

301. 1989 HUD REPORT, *supra* note 283, at 11.

for processing complaints, training programs, technical assistance, information systems, and other enforcement activities. HUD allocated \$5.8 million to the Fair Housing Assistance Program from its 1990 appropriation.

During the 1989 fiscal year, HUD contracted with twenty-five states and local agencies to investigate and conciliate on HUD's behalf complaints alleging handicap and familial status discrimination. These contractors were paid approximately \$650 for each successful investigation and conciliation and \$375 for each administrative closure.<sup>302</sup>

#### 6. *Complaints Processed in 1989*

During 1989, a total of 7174 fair housing complaints were filed. Of these, 3952 fell within the HUD's jurisdiction. The remaining 3222 fell under the jurisdictions of various state and local fair housing agencies. Three times as many complaints were filed with HUD in 1989 than were filed in the previous year. There was, however, no corresponding increase in the number of such complaints filed with state and local agencies. A substantial portion of the increased caseload was attributable to complaints alleging discrimination based on handicap and family status.<sup>303</sup>

Ninety-five percent of the complaints filed at HUD during 1989 were filed after March 12, 1989, the effective date of the 1988 Amendments.<sup>304</sup> An average of 387 complaints were filed with HUD each month. During the preceding year (1988), the average was only eighty-three complaints per month. More than half of the complaints (1923) filed after the effective date of the 1988 Amendments asserted claims of discrimination based on familial status. The types of claims asserted in this category included improper exclusion of older persons; refusals to rent to families with children under a certain age; occupancy limits applied to children; and the exclusion of children from services provided

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302. *Id.* at 12.

303. *Id.* at 13. HUD offers two probable reasons that state and local agencies experienced no substantial increase in complaints. First, the enforcement powers of state and local agencies were not directly strengthened by the 1988 Amendments. Second, state and local agencies actually lost jurisdiction over complaints that alleged discrimination based upon more than one criteria (e.g., race and physical handicap). *Id.* Notably, responses to an informal survey of state and local agencies conducted by the author suggest that the emphasis placed upon employment discrimination claims may serve to diminish the attention given to claims of housing discrimination.

304. Ninety-five percent of HUD's 1989 complaints were filed after March 12th of that year. 1989 HUD REPORT, *supra* note 283, at 13.

to adults.<sup>305</sup>

During the same period, approximately one-third (1309) of the complaints involved claims of race discrimination. The average number of such complaints filed on a monthly basis (135) represented a fifty percent increase over the previous year. Typical of the race claims were false denials concerning the availability of a rental unit, refusals to rent to inter-racial couples, and racial harassment. Approximately one-fifth of the complaints filed alleged handicap discrimination. The 713 complaints in this category included the application of "no pets" policies to guide dogs, refusals to install stairway lifts at the complainant's expense, refusals to permit group homes for handicapped persons, and refusals to permit parking that would make apartments wheelchair accessible.<sup>306</sup>

Four hundred and ten of the 1989 complaints alleged sexual discrimination. The remaining complaints alleged discrimination based upon national origin, religion, or color. Fifty-three percent of the post-amendment complaints (2235) were open for more than the one hundred day period allowed by the statute. Six hundred and ninety-one of these were closed by the end of the year. As of December 31, 1989, however, 1544 complaints more than one hundred days old were still pending. HUD's 1989 report attributed the backlog to the amount of information gathering and analysis required to process complaints.

HUD reported more success with conciliations. During 1989, 862 cases were successfully conciliated, which represented a monthly average of eighty-nine. By contrast, in 1988, only 205 cases were successfully conciliated, representing a monthly average of one percent of the total number of complaints filed. Twenty-five percent of the 1989 conciliations resulted in housing for the complainants. DOJ obtained interim judicial relief in eight cases.<sup>307</sup>

During the first year of implementation, a relatively small number of cases were sent to the Office of General Counsel for determinations of cause. As of December 31, 1989, the General Counsel had made cause determinations in ninety-one cases. Findings of cause to believe that a violation had occurred were made in only nineteen of the ninety-one cases referred. Seventy of the remaining cases were dismissed after the General Counsel concluded that cause determinations were not warranted, and two were carried over to the next fiscal year.<sup>308</sup>

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305. *Id.* at 14.

306. *Id.* at 14, 15.

307. *Id.* at 16.

308. *Id.* at 18.

### 7. *Complaints Handled by State and Local Agencies*

In 1989, state and local agencies received 3222 complaints of housing discrimination. This represents a less than two percent increase over the 3167 that were filed in 1988. HUD believes that this relatively level caseload is attributable to the fact that there were no changes in state and local laws comparable to the changes that were effectuated by the 1988 Amendments to the federal Fair Housing Act. Furthermore, complaints alleging more than one category of discrimination (e.g., race and handicap status) that might in the past have been referred to a state or local agency could not be referred under the 1988 Amendments based on the new categories of coverage. The Amendments established a retention requirement when complaints alleged discrimination in one or more of the newly-covered categories. State and local agencies closed 3030 complaints in 1989. This represents an eighty percent decrease from the number of cases closed in 1988 (3297). State and local agencies successfully conciliated 846 complaints during the 1989 reporting period.<sup>309</sup>

### 8. *Administrative Hearings*

The Office of Administrative Law Judges (OALJ) is responsible for adjudicating charges of housing discrimination. OALJ staffing consists of four ALJs, two attorneys, a docket clerk, an office manager, and a secretary.<sup>310</sup> Cases are tracked on a computerized database. Although the bulk of OALJ's efforts is devoted to adjudicating fair housing cases, OALJ is also responsible for handling other types of hearings. These include: contractor debarment hearings; mortgage review board hearings; mobile home construction hearings; personnel grievances; program fraud cases; miscellaneous disputes; and occasional non-HUD matters. The caseload is growing and OALJ anticipates adding additional staff and judges in the near future. All cases are heard in the vicinities in which the complaints were filed.<sup>311</sup>

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309. 1989 HUD REPORT, *supra* note 283, at 20. See exhibits 5-12, at 19 for further statistics on FHAP complaints in 1989.

310. Interview with Alan W. Heifetz, Chief Administrative Law Judge, Office of Administrative Law Judges, HUD, in Washington, D.C. (June 11, 1991) [hereinafter Heifetz interview]. See Memorandum from Alan W. Heifetz, Chief Administrative Law Judge, to Johnnie B. Booker, Deputy Assistant Secretary for Operations and Management, HUD (Oct. 18, 1990) (reporting status of fair housing cases handled by ALJs) [hereinafter Heifetz/Booker Memorandum].

311. Heifetz interview, *supra* note 310; Heifetz/Booker Memorandum, *supra* note

HUD reports that twenty-one charges were filed with the OALJ in 1989. Six of these involved claims based on race; four involved claims based on sex; thirteen asserted claims based on familial status; and one involved a claim based on handicap. The claims arose in eleven states. By the end of 1989, the election period had run in nineteen of the twenty-one cases. In four of the nineteen, the parties elected to litigate in district court. Two elections for federal court were made by respondents; two were made by complainants. The first administrative hearing was held in Atlanta, Georgia. The court commenced the hearing sixty-eight days after the charge was issued (120 days are allowed by the statute) and decided the case forty-five days after the conclusion of the hearing.<sup>312</sup>

### B. Changes and Developments in 1990

#### 1. Cases Processed by the Office of Administrative Law Judges in 1990

On January 1, 1990, sixteen fair housing cases were pending in the OALJ.<sup>313</sup> During the 1990 calendar year, eighty-one new cases were docketed. Out of the total cases processed by the OALJ in 1990, sixty-two elected to proceed to federal district courts. Forty-three elections were made by respondents and the remaining fifteen were made by complainants. In four of the election cases, both parties requested the district court forum. Administrative hearings were held by the OALJ in fourteen cases. Decisions were issued in thirteen of these cases. The remaining case was carried over to 1991. Another case was withdrawn as a result of a decision issued in a state fair housing proceeding. Ten other cases were resolved with consent decrees. The twelve remaining OALJ cases were carried over to 1991. During 1990, all of the cases referred to OALJ were commenced within 120 days after the charges were issued. Ninety-two percent of the thirteen decisions issued were concluded within sixty days following the hearings. In one instance, a decision was issued two days late because of word-processing difficulties.<sup>314</sup>

OALJ reports that cases are moving relatively smoothly. Most discovery disputes are resolved during telephone conferences. Pleadings and

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312. 1989 HUD REPORT, *supra* note 283, at 21.

313. Heifetz interview, *supra* note 310.

314. *Id.*

documents must be filed with OALJ in Washington, D.C., but filings may be effectuated through mailings and by telecopier. Another case handling feature within OALJ involves the appointment in some cases of a settlement judge to facilitate pre-hearing settlements. If negotiations do not produce a settlement, a different ALJ is assigned to hear the case.

OALJ recently reported continued success with its settlement program. Since the effective date of the 1988 Amendments, a total of 312 cases have been docketed at OALJ. Elections occurred in 189, or approximately sixty-one percent, of the cases. The parties in 123 cases opted to remain in the administrative process. With respect to these cases, final written decisions were issued in thirty-four cases. Six additional cases have been concluded and are pending the issuance of a final decision. With respect to settlements, forty-seven cases have settled, almost all with the assistance of OALJ's settlement process. Six additional cases are pending settlement. In cases that have settled, claimants have received a total of \$373,529, which represents an average of roughly \$8000 per case. Settlements have ranged from \$500 to \$60,000.<sup>315</sup>

## 2. *Changes in Complaint Handling Procedures*

In December, 1990, the authority to make "no cause" determinations was delegated from the Office of General Counsel to the Assistant Secretary for Fair Housing.<sup>316</sup> In January, 1991, the authority to make cause determinations was delegated from the General Counsel's office in Washington, D.C., to the regional attorneys in each of the ten regional offices.<sup>317</sup> This latter delegation was limited to cases involving claims of race, sex, or national origin discrimination.<sup>318</sup> Thus, cause determinations in claims involving familial status or handicap discrimination must still be approved by the Office of General Counsel in Washington, D.C. In addition, cases involving race, sex, or national origin discrimination that raise unusual, complex, or novel legal issues are also reviewed and approved by the Office of General Counsel in Washington, D.C.<sup>319</sup>

The procedure for investigating complaints has not changed. All complaints are investigated by investigators at one of the ten regional offic-

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315. *Id.*; Heifetz/Booker Memorandum, *supra* note 310.

316. Interview with Harry L. Carey, Assistant General Counsel for Fair Housing, Office of General Counsel, HUD, in Washington, D.C. (June 11, 1991) [hereinafter Carey interview].

317. *Id.*

318. *Id.*

319. *Id.*

es.<sup>320</sup> Each investigatory file is divided into three sections: an evidentiary section; a deliberative section; and a section containing the Final Investigative Report.<sup>321</sup> All completed investigations are reviewed by supervisors at the regional office level and, if the complaint involves familial status or handicap discrimination, subsequently at FHEO headquarters in Washington, D.C., for a final determination of cause.<sup>322</sup>

### 3. Justice Department Activities

The Housing and Civil Enforcement Section of DOJ's Civil Rights Division is responsible for prosecuting fair housing cases in the various federal district courts. Some assistance is provided by local U.S. Attorneys. Two other sections within the Civil Rights Division have some fair housing responsibilities. The Criminal Section prosecutes criminal violations and the Appellate Section handles civil and criminal appeals.

The Housing and Civil Enforcement Section consists of thirty-two attorneys, a mathematical statistician, five paralegals, a staff assistant, eight secretaries, and two legal technicians. The section is headed by a Section Chief and three Deputy Chiefs.<sup>323</sup> For the period beginning March 12, 1989, through June 10, 1991, DOJ handled thirty-nine pattern and practice cases. In eighteen of these cases, consent decrees were entered. A favorable judgment was entered after a trial in one pattern and practice case. Sixteen other pattern and practice cases are pending. Five zoning cases were filed after referral from HUD. A favorable judgment was entered in one zoning case. The remaining four zoning cases are still pending. Prompt judicial action was taken in ten cases. DOJ intervened as a party in two private cases. In three other cases, DOJ sought enforcement of HUD decisions in several circuit courts of appeals. In another civil action, DOJ is seeking the enforcement of a conciliation agreement.<sup>324</sup>

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320. *Id.* See 1989 HUD REPORT, *supra* note 283, at 8 (detailing HUD fair housing complaint processing procedures).

321. Carey interview, *supra* note 316.

322. Final Investigative Reports are routinely referred to the Office of General Counsel in Washington, D.C. when the complaints involve discrimination based upon physical handicap or familial discrimination. *Id.*

323. Interview with Paul Hancock, Chief of Housing and Enforcement, Civil Rights Division, DOJ, in Washington, D.C. (June 12, 1991) [hereinafter Hancock interview].

324. *Id.*; See Housing and Civil Enforcement Section Tour of Duty Roster (June 3, 1991) (on file with author) [hereinafter Duty Roster] (listing staff of Housing and Civil Enforcement Section). The information contained in this article does not reflect



A total of seventy-four cases handled by DOJ were the result of elections made by parties to administrative proceedings. Within this group of cases, forty-eight involved claims of discrimination based upon familial status.<sup>325</sup> Seven other cases alleged handicap discrimination and the remaining nineteen cases concerned claims of discrimination based upon race, sex, or national origin. The vast majority of the election cases are still pending before various district courts.<sup>326</sup> Consent decrees have been entered in twelve cases. Judgments have been entered in only three cases.<sup>327</sup> One of these decisions was adverse to the United States and is now pending before the United States Court of Appeals for the Eighth Circuit.<sup>328</sup> The Housing and Civil Enforcement Section is also representing HUD in five cases in which HUD was joined as a defendant. DOJ filed amicus briefs in ten private cases.<sup>329</sup>

#### 4. *Complaint Processing in 1990*

From January 1, 1990, through December 31, 1990, a total of 7675 complaints were filed alleging discriminatory housing practices.<sup>330</sup> HUD handled 4457 of these complaints.<sup>331</sup> State and local agencies handled the remaining 3218. The highest number of complaints were filed in Regions 5 (954) and 9 (808). As in the previous year, almost half (2056) of the complaints that were processed by HUD alleged discrimination on the basis of familial status. The second highest category was race with 1648 complaints. Another 1088 alleged discrimination on the basis of handicap and 465 complaints alleged sexual discrimination. Two hundred and seventy-one complaints claimed discrimination on the basis of national origin. Another 149 were based on color. The remaining seventy-two complaints alleged religious discrimination.<sup>332</sup>

During 1990, HUD closed 1740 complaints. Conciliation efforts were successful in 1709 of these cases. The Office of General Counsel made

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changes after June, 1991.

325. *Id.*

326. *Id.* (stating that 51 cases are currently pending in district courts).

327. *Id.*

328. *Id.*

329. Duty Roster, *supra* note 324.

330. Housing and Urban Development, 1990 Complaint Processing Data 1 (Apr. 25, 1991) (on file with author) [hereinafter Complaint Data].

331. *Id.* Letter from Lawrence Pearl, Director, Office of Programs Studies and Evaluation, HUD (June 18, 1991) (on file with author).

332. Complaint Data, *supra* note 330, at 3.

cause determinations in eighty cases. In 689 other cases, the Office of General Counsel concluded that there were not sufficient grounds to believe that an act of discrimination had occurred. During 1990, a total of 4485 cases were not processed within the one hundred day period prescribed by the 1988 Amendments. Two thousand, six hundred and forty of these, however, were closed by the end of the year. Another 1489 complaints were processed within the one hundred day time period.<sup>333</sup>

#### V. THE STATUS OF FAIR HOUSING ENFORCEMENT TWO YEARS AFTER THE AMENDMENTS

In 1988, Congress gave HUD a formidable weapon to aid in its efforts to eliminate discriminatory housing practices. The enforcement mechanism established by the 1988 Amendments reflects one of the fundamental principles of the administrative process. Congress has delegated a broad grant of authority to an agency that specializes in housing matters. The investigations and conciliations are conducted by experienced investigators who are well versed with the Fair Housing Act and regulations. When Congress created statutory deadlines for the completion of investigations and adjudications, it intended to provide victims with an expeditious and inexpensive means for the resolution of their claims.<sup>334</sup>

If the Secretary determines that cause exists to believe that the Fair Housing Act has been violated, a charge is issued and forwarded to OALJ. At that point, either of the parties can elect to proceed in a United States district court.<sup>335</sup> If an election is not made, the matter proceeds to an administrative hearing.<sup>336</sup> As with investigations, Congress has mandated that the hearings be completed within a specified period of time.<sup>337</sup> Charges that proceed before OALJ are prosecuted by HUD's Office of General Counsel.<sup>338</sup> If the administrative forum is used, a claimant could have a final administrative determination within seven or eight months from the date the original complaint is filed.<sup>339</sup> If an election is made, DOJ prosecutes the case. Prevailing plaintiffs can

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333. *Id.* at 9, 12, 18.

334. Act of 1988, 42 U.S.C. § 812(d)(2).

335. *Id.* § 812(a).

336. *Id.* § 812(b).

337. *Id.* § 812(d)(3).

338. 1989 HUD REPORT, *supra* note 283, at 21.

339. Heifetz interview, *supra* note 310.

secure a full range of relief including damages, attorney's fees, and equitable relief.<sup>340</sup> To advocates of fair housing, the enforcement mechanism created by the 1988 Amendments represents the fulfillment of the "empty promise" that was made in 1968.

During the first two years of the implementation of the 1988 Amendments, FHEO has made significant strides towards establishing the enforcement mechanism that the Amendments require. Comprehensive regulations were drafted and finalized during the first year of operation. Procedures for investigating complaints have been established. The adjudicatory process at OALJ is in place and is operating efficiently. The Fair Housing Enforcement section at DOJ is organized, fully staffed, and is handling a large caseload. FHEO has been expanded in Washington, D.C., and additional staff has been added to each of the ten regional offices. Training programs for investigators are ongoing.

During interviews with HUD officials, it became evident that HUD's fair housing responsibilities are being taken seriously. It was also clear that HUD officials are proceeding with prudence. The degree of caution is understandable since the agency's credibility with the courts, the public, and other agencies will aid considerably in the execution of HUD's enforcement duties. The enforcement program is still in its infancy and will need some additional time before it can be expected to operate at peak efficiency. There are, however, some patterns that have emerged.

#### *A. The Impact of the Addition of New Categories*

Complaints alleging discrimination on the basis of familial status constitute approximately one-half of FHEO's caseload. FHEO can expect complaints falling within this newly added status to continue to occupy a vast amount of its time and attention. Furthermore, because families with children are a newly protected group under the anti-discrimination laws, there is little to which HUD can look for guidance in developing interpretations concerning this aspect of the 1988 Amendments.

When an agency is confronted with a new problem, it has two choices. It can proceed on a case-by-case basis, relying on the courts and OALJ to establish precedents in the context of specific factual settings, or it can promulgate rules of general applicability.<sup>341</sup> The choice as to

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340. Act of 1988, 42 U.S.C. § 812(g)(3).

341. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (stating that "choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").

which of the two courses to choose remains with the agency as long as there is a reasoned basis for doing so.<sup>342</sup> Some basic principles of anti-discrimination law, however, have been applied across the board, regardless of the status of the protected group. Many of these theories have already been applied to housing discrimination cases. Thus, the disparate treatment theory, and the order and allocation of proof in such cases, has been applied to housing discrimination.<sup>343</sup> Therefore, a plaintiff must prove that he applied for housing, that his request was denied, and that the housing remained available or was given to someone who is not a member of the protected group.<sup>344</sup> Once this showing is made, the defendant must articulate a legitimate non-discriminatory reason for its actions.<sup>345</sup> Furthermore, the disparate impact theory of *Griggs v. Duke Power Co.*,<sup>346</sup> as modified by *Ward's Cove Packing Co. v. Antonio*, applies to housing discrimination.<sup>347</sup>

State courts construing state anti-discrimination legislation have consistently relied upon Title VII precedent as guidance for interpreting state laws in areas in which there was no existing state precedent.<sup>348</sup> Although discrimination in housing occurs in a slightly different context, it seems likely that housing cases will follow the same approach. To facilitate the development of precedent in the newly covered areas, the Assistant General Counsel may wish to consider a litigation strategy in which cases raising significant or novel issues are carefully screened to allow the resources of the Office to be devoted to the cases that present the best fact patterns to obtain the desired results. With a remarkable success record, the Solicitor General at DOJ has long used a similar policy for Supreme Court cases.

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342. *Id.* at 194.

343. This approach was first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

344. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (detailing Title VII claims on hiring practices).

345. *Id.* at 805.

346. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court held that discriminatory effects are adequate to establish a *prima facie* employment discrimination claim under Title VII of the Civil Rights Act of 1964. The Act was held to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

347. 490 U.S. 642, 659 (1989). See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1745) (superseding *Ward's Cove* and other prior Supreme Court decisions).

348. *Konecny v. District of Columbia Dep't of Employment Servs.*, 447 A.2d 31 (D.C. 1982).

Unlike familial status claims, cases asserting claims of handicap discrimination should present fewer problems, since a body of caselaw already exists that construes various aspects of section 504 of the Rehabilitation Act.<sup>349</sup> With respect to these new categories of coverage, FHEO should recall the concerns of some of the legislators who feared a dilution of HUD's enforcement efforts based upon the numerous claims that they anticipated under the handicap and familial status categories. Given the sheer volume of family status and handicap cases, the race, sex, color, and national origin cases may receive lower priority in the enforcement effort. Although the congressional intention to include two new categories must be acknowledged, it should be remembered that segregation in housing was the target of the original legislation and it remains one of the most visible vestiges of formal segregation. FHEO should take care to assure that the goal of eliminating racially segregated housing patterns remains among its highest priorities.

### *B. The High Percentage of Judicial Elections*

It was surprising to discover that in the majority of cases, the parties elected to proceed in district court rather than before an ALJ. The statutory reasons for doing so are the availability of jury trials<sup>350</sup> and the potential for a recovery of punitive damages.<sup>351</sup> An award of punitive damages, however, requires evidence of conduct that would be legally adequate to justify such an award and that is sufficient to persuade a jury that punitive damages are warranted. Since this is not likely to occur in most cases, the availability of punitive damages does not explain the high percentage of elections to district court. From a tactical perspective, a defendant might wish to slow the progress of a case. This result is achieved by selecting the district court forum because of the backlogs that exist in most federal districts.

There are, however, other concerns that would ordinarily weigh heavily against the desirability of a district court forum. First, housing cases

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349. Under § 504 of the Rehabilitation Act of 1973 an individual is considered handicapped if he or she "has a physical or mental impairment which substantially limits one or more . . . major life activities, [if he or she] has a record of such impairment, or is regarded as having such impairment." 29 U.S.C. § 706(8)(B) (1988). See also 34 C.F.R. § 104.3(j)(2)(ii) (1992) (defining "major activities" in Rehabilitation Act of 1973). This statute has been somewhat widely construed. See *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982) (suggesting broad interpretation of statute by ruling that hypersensitivity to smoke is "handicap").

350. Act of 1988, 42 U.S.C. § 813(c).

351. *Id.* § 813(c)(1).

are, in essence, the federal government versus the defendant. The government is represented by its elite litigating corps—DOJ. The attorneys at DOJ are specialists recruited in a highly selective process.<sup>352</sup> Moreover, there is no fair housing bar comparable to the employment and labor bars at HUD. Thus, most experience and expertise in fair housing law would be found at DOJ and HUD. Any strategic gain that might be derived from the district court forum would probably be offset by the time and expense of pre-trial proceedings and the trial itself. In addition, due to the time and expense of pre-trial proceedings, the defense costs will be far greater when the district court forum is chosen.

These considerations suggest that the more desirable forum for both parties would be the administrative proceeding before an ALJ. Under the 1988 Amendments, this proceeding must be completed within a relatively short period of time after the charge is filed,<sup>353</sup> with review available in the court of appeals.<sup>354</sup> Hearings are required, by statute, regulation, and practice to be expeditious and inexpensive. The litigants also have the advantage of a decisionmaker who is well versed with the subject matter of the litigation. There is, of course, a jury trial available in district court,<sup>355</sup> but fair housing cases are not the sort of proceedings in which there would be any significant advantage gained by having a jury find the facts, except in cases where the defendant's discriminatory conduct might prompt the jury to award damages in an amount higher than usual. The high percentage of elections is not a result that Congress anticipated and it seems to operate against the interests of the parties.

After a draft of this report was circulated, HUD responded with a letter to the Administrative Conference.<sup>356</sup> In this response, HUD indicated that it had conducted a study entitled "A Study of the Election Decision" to determine why so many parties have elected to proceed in the judicial, rather than the administrative, forum.<sup>357</sup> The letter concluded that the "findings indicate that HUD could probably do a better job of informing the parties about the election process."<sup>358</sup> HUD also stat-

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352. Hancock interview, *supra* note 323.

353. Act of 1988, 42 U.S.C. § 812(g)(1).

354. *Id.* § 812(k).

355. *Id.* § 813(c).

356. Letter from Gordon Mansfield to Nancy G. Miller (Feb. 7, 1992) (on file with the author).

357. *Id.*

358. *Id.*

ed that it was developing a brochure to be distributed to complainants, that would attempt to explain, in layperson's language, the availability of the forums, and to provide information that would allow the parties to make a more informed choice concerning forum elections.<sup>359</sup> Informal discussions suggest two reasons for the high number of elections to proceed in district court: (1) a general lack of knowledge concerning the new procedures that are available under the 1988 Amendments; and (2) a lack of confidence in HUD's ability to resolve claims in an expeditious manner. In the case of respondents, there is also a perception that since claims are prosecuted by HUD, an administrative proceeding will not provide the impartial and unbiased adjudication that undergirds administrative procedure.

### C. *Delays in Investigating Complaints*

As HUD officials are aware, there is one area in which the agency has failed to implement the enforcement mechanism in accordance with its statutory mandate. In the vast majority of cases, complaints are not processed within the one hundred day time period that is allocated by the statute. Subsequent to the enactment of the 1988 Amendments, the volume of complaints filed with HUD has almost doubled.<sup>360</sup> Most of the increase is attributable to the newly protected categories—handicap and familial status discrimination. Furthermore, the burden imposed by the increase is heavier than it might otherwise have been since none of the state and local agencies are processing complaints falling within newly added categories.

During the two year period following the enactment of the Amendments, there has been no rush by state and local governments to amend their anti-discrimination statutes to conform to the changes in the federal statute. Furthermore, in a time of recession and reduced tax revenues, states and localities might be willing to add familial status and handicap to their local anti-discrimination laws but they may not be able to assume the costs of creating adjudicatory mechanisms that would function like OALJ and to hire attorneys to prosecute claims.

It is quite possible that FHEO will continue to bear a disproportionate case-load as a result of the inability of states and local agencies to achieve substantial equivalency after the grandfathering provisions of the 1988 Amendments expire. In December, 1991, a meeting was held in

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359. *Id.*

360. See generally 1989 HUD REPORT, *supra* note 283, at 13; Heifetz interview, *supra* note 310.

Raleigh, North Carolina, with HUD and various state and local fair housing agencies. During this meeting, it became apparent that the vast majority of the state and local fair housing agencies that were grandfathered as existing equivalent agencies on the effective date of the 1988 Amendments would be unable to satisfy either the equivalency requirements of the 1988 Amendments or the implementing regulations by the date required by statute.<sup>361</sup> At the time the meeting was held, only a small number—less than ten agencies—had been certified as equivalent under the 1988 Amendments.

During the course of the meeting, which was attended by HUD officials, representatives of the state and local fair housing agencies, and representatives of fair housing advocacy groups, a tentative arrangement was proposed. Under the proposal, which formed the basis of an agreement by the various groups, state and local agencies that had shown substantial progress towards achieving equivalency would be eligible to receive an eight month extension under the provisions of section 810(f) of the 1988 Amendments (which allows for extensions of interim equivalency certifications in exceptional circumstances). It was also agreed that during this period, investigations would be conducted by the state and local agencies. In the case of complaints in which cause determinations are made, however, the parties will be allowed to elect to proceed under the federal adjudicatory process. This means that parties in state or local proceedings may use the administrative adjudicatory mechanism that is available at HUD or they could opt to have their claims adjudicated in a federal district court. Pursuant to this proposal, 113 state and local agencies requested an extension of the interim equivalency certifications. HUD approved 110 of these requests. The 110 state and local agencies that were approved had until September 13, 1992, to achieve statutory equivalency.<sup>362</sup>

To reduce the existing backlog of complaints, FHEO may wish to reassess its own complaint processing procedures. At present, all complaints are reviewed at the regional office level and by FHEO headquarters in Washington, D.C. In January, 1990, the Office of General Counsel delegated the authority to make cause determinations to the various regions, but no corresponding delegation was made by FHEO. The deci-

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361. See Certification of Substantially Equivalent Agencies, 24 C.F.R. § 115 (1992) (containing regulations on agency equivalency requirements).

362. Interview with Leonora L. Guararia, Deputy Assistant Secretary, HUD (Apr. 7, 1992); Interview with Lawrence Pearl, Director, Office of Program Standards and Evaluation, HUD (Apr. 6, 1992).



sion to centralize the review process was probably prudent during the initial months of the implementation process, but it adds a substantial period of time to complaint processing.

Comprehensive regulations have been promulgated. If the investigators at the regions perform their duties with adequate guidance from the regional attorneys, a time-consuming level of review could be eliminated. The investigations could be carried out at the regional level with headquarters retaining only oversight responsibility. FHEO has developed an investigation manual, and it is conducting training sessions at the various regional offices. At some point, the regional offices should develop sufficient expertise to make cause recommendations with little more than a pro forma review by FHEO headquarters.

Congress enacted the one hundred day requirement for a reason. Several agencies have been unsuccessful defendants in mandamus actions which required them to promulgate regulations, process claims, or to carry out enforcement obligations established by Congress. Congress was aware of these cases when it specified deadlines in the statute rather than leaving the agency to set its own deadlines with regulations. The HUD Secretary does not have any discretion in this regard. There is nothing more frustrating to a complainant than to file a complaint and not hear anything further for several months.

Furthermore, prompt judicial action should be taken in more cases. Housing discrimination is, by definition, extremely time sensitive. The complainant in a Title VIII action is an individual or a family in search of housing—an essential need which must be met. Apartments do not remain vacant indefinitely and houses do not remain unsold. If alternative housing is secured during the pendency of the complaint, the incentive to pursue the claim is diminished considerably, if not lost altogether.

Because of these circumstances, the procedure for determining whether prompt judicial action is appropriate should be improved. This, of course, would require the involvement of attorneys who could analyze the need for, and likelihood of, securing interim equitable relief. This determination would need to take place at the regional level with some means of communicating the recommendation in an expeditious manner to DOJ in Washington, D.C. FHEO's caution and desire to maintain a high level of quality is admirable, but its failure to satisfy its statutory obligation is one of its most significant shortcomings and must, therefore, be rectified.

## VI. RECOMMENDATIONS

The enforcement initiatives brought about by the 1988 Amendments to the Fair Housing Act are still in their earliest stages of development. A few trends, however, have become sufficiently salient to provide the basis for recommendations. HUD officials have exhibited a serious conviction towards bringing about, for the first time, a functioning fair housing enforcement mechanism; there is reason to believe that these concerns, as well as others, will be addressed in the near future.

### *A. Racial Segregation as a Unique Problem Requiring Special Attention*

Congress's decision to bring two new categories within the protection afforded by the Fair Housing Act is unquestionably a laudable one. Racially segregated housing and the myriad of secondary effects caused thereby, however, are as big a problem today, as they were in 1968. These secondary effects, discussed in the introduction, are distinct from any that might be attributed to the denial of housing to handicapped persons and to families with children. It is crucial, therefore, that these new categories, and the resultant increased complaint caseload, should not be allowed to obscure the original mission of the Fair Housing Act: the elimination of racially discriminatory housing practices. To that end, HUD must acknowledge the differences between each protected category and strive to tailor its procedures accordingly.

### *B. The Need for Increased Utilization of OALJ Proceedings*

Much of the hope for increased enforcement of the Fair Housing Act offered by the 1988 Amendments was found in the provisions expanding the use of administrative adjudications of complaints. The OALJ forum would appear to be the better route, due not only to the added expertise but also to the increased efficiency and reduced costs. To a large degree, the success of the enforcement provisions of the 1988 Amendments is dependent upon the increased utilization of this forum. Accordingly, it is incumbent upon HUD to devise and implement procedures to enlarge the role of OALJ.

### *C. The Need for Rapid Complaint Resolution*

Shelter is such a basic human need that it should be recognized that alternative housing must and will be obtained during the pendency of complaint enforcement. This reality requires that the enforcement mecha-

nism not only be fair, but fast if the complaint is to be resolved in a way that results in the aggrieved individual's actually acquiring the premises that were denied before settling into another abode. If HUD is to pursue rapid complaint resolution genuinely, it must first acknowledge the increasing threat that state and local agency referrals pose to that goal. The widespread depletion of state and local fiscal resources has direct bearing upon these agencies' ability to react quickly to complaints referred from HUD. It is up to HUD to evaluate each state and local agency to determine its particular ability to resolve complaints quickly. This ongoing evaluation should provide the basis not only for which agencies are utilized, but for the optimum number and type of complaints that can be processed by that agency. By directing cases accordingly, HUD can insure that state and local referrals do not become the equivalent of "shelving" complaints.

#### CONCLUSION

The elimination of segregated housing patterns would ameliorate many of the vexing problems of race relations that confront this nation in the final decade of the twentieth century. The continuing segregation in public schools is attributable, in a large measure, to the concentration of African-American families in inner city areas and the prevalence of white families in suburban areas. On March 31, 1992, the Supreme Court held, in *Freeman v. Pitts*,<sup>363</sup> that federal courts could relinquish supervision and control of school districts in incremental stages, prior to the time that full compliance with an earlier desegregation decree is achieved. Perhaps, most significantly, the Court found that where resegregation of public schools is a product of private choices, as opposed to state action, a school board does not have a duty to remedy any resulting racial imbalances caused by demographic factors such as racially segregated housing patterns.<sup>364</sup> This decision demonstrates that racial segregation in housing has a direct effect upon continuing problems and issues in school desegregation. If racial segregation in housing is eliminated, the continuing dilemma of segregated schools could be resolved without the use of controversial measures, such as busing, to achieve racial balance. Another consequence of segregated housing is a lack of access to employment opportunities. Since the conclusion of World War II, the employment opportunities that originally lured African-American workers to urban centers have moved to suburban areas to

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363. 112 S. Ct. 1430 (1992).

364. *Id.*

which the residents of inner cities have limited access. This access problem is just one of the factors contributing to disproportionately high unemployment rates in urban areas.

These key elements—the denial of equal educational and equal employment opportunities—are the core of problems that plague the African-American community. Although the elimination of segregated housing patterns would not eliminate these problems in their entirety, it would assist considerably in their mitigation. In short, the need to eliminate racially segregated housing patterns cannot be over-emphasized. It is essential to remove the lingering vestiges of formal segregation. If housing patterns are the result of choice without respect to race, a different and better future will result.

Congress recognized this when it enacted the original Fair Housing Act in 1968, but it was unable at that time to include an adequate enforcement mechanism. The 1988 Amendments have added the ingredient that was missing from the original legislation. HUD now has the means to enforce violations of the Fair Housing Act. When housing providers become aware of the severe economic consequences of their unlawful conduct, they will have a considerable incentive to eliminate discriminatory practices. Effective enforcement is essential to obtain the result Congress intended. Congress has created an adequate enforcement mechanism; whether HUD will implement its responsibility consistent with its congressional mandate remains to be seen.

#### APPENDIX

ENFORCEMENT PROCEDURES UNDER THE FAIR HOUSING ACT  
AS ADOPTED BY THE ADMINISTRATIVE CONFERENCE  
OF THE UNITED STATES, JULY 8, 1992  
(CODIFIED AT 1 C.F.R. § 305.92-3 (1993))

#### RECOMMENDATION

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. HUD should notify each complainant of his or her option to select private counsel (separate from counsel from the government), at the time a reasonable cause finding is made, and at future points, where action by government counsel is potentially adversely dispositive of that

complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, Congress, and the public.

4. HUD should undertake an educational program to advise both potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the one hundred day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure that it is perceived as working fairly. In addition, it should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

