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Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?

BY ALEX WALDROP*

INTRODUCTION

One of the ironies of modern civil rights legislation is that the Department of Housing and Urban Development (HUD) was granted primary "authority and responsibility for administering" the Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968) but was given no real power to enforce Title VIII beyond methods to achieve voluntary compliance. Because the role of the Attorney General in enforcement is also "minimal," the enormous task of assuring equal access to housing falls primarily on private litigants who must

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2 Id. at §§ 3601-3631 (1982).
3 42 U.S.C. § 3610(a) (1982) provides that the Secretary of the Department of Housing and Urban Development [hereinafter cited as HUD] "shall proceed to try to eliminate or correct [any] alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."
act on their own behalf "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." 

While some believe that private litigation should remain the primary generating force in assuring fair housing, recent HUD studies indicate that discrimination in housing continues to be common and widespread. One nationwide survey concluded that if a black visits four apartment complexes, "there is a 72 percent chance that he or she will be discriminated against at least once." Likewise, researchers concluded that prospective black home buyers visiting four sales firms risk a 48 percent chance of encountering discrimination in the sales market. Title VIII of the Civil Rights Act of 1968 embodies a congressional promise to eradicate discrimination in housing. To fulfill that promise, a more effective enforcement system must be devised.

In his 1983 State of the Union Address, President Reagan, recognizing that housing discrimination still exists, committed his Administration to increased enforcement of the fair housing laws. Accordingly, Reagan proposed Senate Bill 1612 to the Ninety-eighth Congress. The bill would have amended Title VIII by authorizing the United States Attorney General to pursue individual victim cases in which HUD's conciliation efforts

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5 409 U.S. at 211 (quoting from an amicus curiae brief submitted by former Solicitor General Erwin Griswold).


7 See generally HUD, Recent Evidence on Discrimination in Housing, Office of Policy Development and Research, (1984) [hereinafter cited as Recent Evidence].

8 Id. at 13.

9 Id.


failed to resolve the matter satisfactorily. Civil rights groups and others have long recognized the inadequacy of Title VIII and have pushed for an administrative enforcement procedure. Similar to the Reagan Administration proposal, the administrative enforcement procedure advocated by civil rights groups would serve as a back-up to the conciliation process. This procedure would be unique, however, in that it would place administrative enforcement power either with HUD or with a separate fair housing commission. Senate Bill 1220, introduced by Senator Charles Mathias in the Ninety-eighth Congress, is a recent example of the administrative enforcement approach. With the Reagan Administration now actively pursuing a change in fair housing enforcement, the debate has focused on how the enforcement procedures of Title VIII should be amended. As the following legislative history makes clear, however, there has always been a divergence of opinion concerning the role of the federal government in Fair Housing Act enforcement.

After first looking at relevant legislative history underlying the most recent proposals, this Article considers the strengths and weaknesses of the administrative alternative, using the Reagan Administration’s proposal as a critical tool. Relying in part on the experience of the Kentucky Commission on Human Rights in administering and enforcing Kentucky’s fair housing laws outside the courtroom setting, a middle ground approach will be offered that provides a variety of avenues for enforcing the Fair Housing Act. This intermediate approach not only grants HUD administrative enforcement power, but also acknowledges the role both private litigation and the United States Attorney General may play in assuring plaintiffs full damage recovery.

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12 See S. 1612, 98th Cong., 1st Sess. § 6(g), at 9-11.
13 See, e.g., Fair Housing Act, Hearings, supra note 6, at 323 (statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights).
14 See Administration and S. 1220 (Mathias), Fair Housing Amendments Proposals, HUD, Office of the General Counsel ¶ 3 (1983) [hereinafter cited as Administration and S. 1220].
16 See notes 17-42 infra and accompanying text.
I. LEGISLATIVE HISTORY

Disagreement concerning the need for a nonjudicial method of enforcement has surrounded federal fair housing legislation since its inception. Although the earliest fair housing proposal, introduced in the Eighty-ninth Congress, contained no technique for administrative relief, the proposal was amended in 1966 by adding HUD enforcement power to “provide a more expeditious and less burdensome method of resolving housing complaints.” Congress rejected this early amendment. Fair housing legislation introduced in 1967 by then-Senator Walter F. Mondale, Senate Bill 1358, gave HUD responsibility for both administering and enforcing the Act, including the power to hold hearings and issue appropriate orders where discrimination was found to exist. When the House version of the Fair Housing Act, House Resolution 2516, reached the Senate in 1968, Senate Bill 1358 was grafted onto the House measure in the form of the Mondale-Brooke amendment. After several unsuccessful attempts at passage of the Act with HUD’s enforcement power intact, the Mondale-Brooke amendment was withdrawn in favor of a compromise offered by Senator Everett Dirkson that reduced HUD’s enforcement powers to (the now familiar) “informal methods of conference, conciliation, and persuasion.” Congress ultimately enacted the Dirkson compromise as Title VIII of the Civil Rights Act of 1968.

18 Id. See also id. at 105 n.15 (citing remarks by Rep. John Conyers explaining the need for the addition of administrative remedies to House Resolution 14,765).
19 The 89th Congress failed to pass any fair housing legislation. A Senate filibuster prevented action on House Resolution 14,765 as amended by the House Judiciary Committee to include administrative enforcement power. See 112 CONG. REC. 1183 (1966).
21 See id. at § 9.
23 See Dubofsky, Fair Housing: A Legislative History and a Perspective, 8 WASHBURN L.J. 149, 152 (1968-69).
24 See id. at 156-57. See also 114 CONG. REC. S1877, S1883 (daily ed. Feb. 28, 1968).
26 See 114 CONG. REC. H2826 (daily ed. Apr. 10, 1968). For a complete discussion of the events leading to the final passage of Title VIII of the Civil Rights Act of 1968,
Within three years of Title VIII’s enactment, Congress conducted hearings concerning the role of the federal government in assuring equal opportunity in housing.\textsuperscript{27} Testimony of some fifteen witnesses appearing before those early congressional hearings made evident the serious inadequacies both in the law and in various agencies’ enforcement efforts.\textsuperscript{28} Congress later studied discrimination in suburbia, in rural America, and in housing programs administered by the Veterans Administration,\textsuperscript{29} concluding not only that discrimination was still “national in scope” but also that it was “supported or tolerated by government agencies.”\textsuperscript{30} As a result, House Resolution 3504\textsuperscript{31} and House Resolution 7787\textsuperscript{32} were introduced in the Ninety-fifth Congress in 1977. The former granted HUD administrative enforcement power similar to that found in Senator Mondale’s ill-fated Senate Bill 1358. The latter granted HUD power to institute private litigation on behalf of Title VIII complainants.\textsuperscript{33} As before, extensive hearings were conducted.\textsuperscript{34} When the Ninety-sixth Congress convened in 1979, sponsors of the earlier amendments took the suggestions and comments and redrafted a new resolution, House Resolution 2540.\textsuperscript{35} Based almost entirely on House Resolution 3504, the new resolution was submitted to Congress.\textsuperscript{36} After yet another extensive hear-

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\textsuperscript{30} See \textit{id.} at 2 nn.3-5, 3 n.6.

\textsuperscript{31} \textit{Id.} at 3.

\textsuperscript{32} H.R. 3504, 95th Cong., 1st Sess., \textit{reprinted in Fair Housing Act, Hearings, supra} note 6, at 422.

\textsuperscript{33} H.R. 7787, 95th Cong., 1st Sess. (1977), \textit{reprinted in Fair Housing Act, Hearings, supra} note 6, at 442.

\textsuperscript{34} See \textit{H.R. REP. No. 865, supra} note 28, at 3.

\textsuperscript{35} See generally \textit{Fair Housing Act, Hearings, supra} note 6 (In 1978, the subcommittee conducted seven days of hearings in which seventeen witnesses testified and over fifty-four additional comments were received.).


\textsuperscript{37} See \textit{H.R. REP. No. 865, supra} note 28, at 3.
ing process in 1979,37 House Resolution 2540 was reported favorably out of the House subcommittee as a clean resolution (subsequently introduced as House Resolution 5200) and was thereafter reported favorably to the floor of the House.38 Although the measure passed in the House, it was ultimately withdrawn from the Senate on December 9, 1980, after a cloture motion to end a Senate filibuster failed.39

Since that time there have been efforts in both the Ninety-seventh40 and Ninety-eighth41 Congresses to reintroduce legislation affecting in some way HUD's enforcement powers. But as before, disagreement regarding who should enforce the fair housing laws has left Congress without a solution.42

II. ADMINISTRATIVE ENFORCEMENT POWER

While there is a consensus of opinion concerning the need for stronger enforcement of Title VIII,43 the issue remains "how best to improve the law."44 What follows is a consideration of arguments commonly put forth when debating the merits of

38 H.R. REP. No. 865, supra note 28, at 3.
39 See 126 CONG. REC. S15,853 (daily ed. Dec. 9, 1980). See also R. SCHWEMM, supra note 26, at 230 n.27.
42 See notes 10-15 supra and accompanying text for a discussion of the disagreements in the 98th Congress. As of this writing, only Sen. Hatch has introduced legislation (S. 139) dealing with HUD's enforcement power, but both the Reagan Administration and Sen. Mathias have plans to reintroduce legislation early in the 99th Congress. Telephone interview with Marion Morris, staff counsel for Sen. Mathias (Feb. 18, 1985).
administrative enforcement of Title VIII, with careful attention drawn to the evolution of recent legislation in response to the debate.

A. Arguments by Proponents of Administrative Enforcement Power

1. Agency Power Facilitates Resolution at the Conciliation Stage

A basic argument in favor of granting HUD the power to hold hearings and issue enforcement orders in much the same manner as other agencies\(^4\) is that this power "is necessary in order to make [HUD's] present powers of investigation and conciliation effective in resolving complaints of discrimination."\(^5\) As former Secretary of HUD Patricia Harris explained:

Respondents frequently ignore HUD's conciliation process because there is no real inducement to cooperate. Where conciliation is successful, it is most often because the respondent knows that a realistic threat of private litigation is present, should HUD's efforts fail.

But where the victim of discrimination meets with the HUD conciliator and with the respondent, and it is evident that the complainant is unrepresented by counsel, conciliation often collapses. There is no credible threat of "consequence" should the respondent refuse to cooperate.\(^6\)

According to former Secretary Harris, the fair housing laws passed in 1968 identified the problem but failed to provide the proper enforcement tools necessary to prevent discrimination.\(^7\) Thus, she said, "In the absence of such remedies, con-

\(^{4}\) In 1977, at least sixteen federal agencies had the administrative authority to issue "cease and desist" orders. See Fair Housing Act, Hearings, supra note 6, at 686-717 (legal memorandum prepared by Congressional Research Service concerning Federal administrative authority to issue cease and desist orders).

\(^{5}\) Fair Housing Amendments of 1979, Hearings, supra note 37, at 647-48 (legal memorandum prepared by the Congressional Research Service concerning arguments for and against granting HUD cease and desist authority).

\(^{6}\) Fair Housing Act, Hearings, supra note 6, at 4-5.

\(^{7}\) See Fair Housing Amendments of 1979, Hearings, supra note 37, at 70.
conciliation has become more a symbol of impotence than a constructive tool to redress housing discrimination complaints. Others agree that this lack of adequate enforcement power is primarily responsible for the failure of the federal government in reaching the goals of the Fair Housing Act. Nonetheless, former Secretary Harris and others believe that when enforcement authority backs the conciliation process, conciliation is "highly effective in bringing respondents to the table, resolving complaints speedily, and providing access to disputed housing." It is expected that, with the administrative remedy, a high percentage of disputes will be resolved without resort to hearings or orders. In fact, evidence supports this conclusion.

Private suits remain critical if fair housing laws "are to be taken seriously by those in a position to violate them." Nonetheless, private litigation simply does not provide the needed incentive to resolve disputes at the conciliation table. Private suits are not only expensive, but also time consuming and slow to resolve. Although attorney's fees may be awarded

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49 Id.


51 Id. at 71. See also H.R. Rep. No. 865, supra note 28, at 6.


53 See notes 180-191 infra and accompanying text for a discussion of the Kentucky Human Rights Commission's apparent success in utilizing the conciliation process in conjunction with agency enforcement power.

54 Scanlon, supra note 6, at 19. See also Fair Housing Act, Hearings, supra note 6, at 146 (testimony of Avery S. Friedman, Chief Counsel, the Housing Advocates, Inc.) (high jury verdicts needed to deter violation of Title VIII). Litigation is also needed to ensure that disputes involving new or complicated issues of law or fact are fairly decided. Recognizing this fact, Senate Bill 1220, which advocated administrative enforcement, required that charges involving "any novel issues of law or fact or other complicating factors" be referred to the Attorney General. S. 1220, 98th Cong., 1st Sess. § 7, at 20-21 (1983).

55 See Fair Housing Act, Hearings, supra note 6, at 5 (testimony of Patricia Harris, former Secretary of HUD) ("The most significant deterrent to litigation remains its high cost.").

56 See Fair Housing Amendments of 1979, Hearings, supra note 37, at 175 (testimony of former HUD Secretary Robert Weaver). One study has concluded that, on the average, the period between the time of filing and the date of the court's final order is approximately twenty-one months. See H.R. Rep. No. 865, supra note 28, at 5 n.18.
to prevailing plaintiffs under present statutes,\textsuperscript{57} few attorneys have been willing to accept such cases.\textsuperscript{58} As a result, "all but those most persistent and steadfast in their determination to exercise rights guaranteed by the statutes"\textsuperscript{59} are discouraged from utilizing their private remedy.

Accepting the premise that a backup mechanism is needed to make the conciliation process fully effective, the Reagan Administration, during the Ninety-eighth Congress, opted not for administrative enforcement but for judicial enforcement with substantially higher penalties.\textsuperscript{60} Primary reliance for dispute resolution would continue to be on the more speedy, informal conciliation method. Under the Administration's proposal, if after 30 days the parties did not agree to conciliate, the Secretary of HUD could refer the case to the United States Attorney General with a recommendation that a civil action be commenced on behalf of the complainant in federal court.\textsuperscript{61} This option would expand the present jurisdiction of the Justice Department beyond the so-called "pattern or practice" cases\textsuperscript{62} to include cases involving victims of individualized discrimination.

In theory, suits by the Justice Department would provide the needed impetus to conciliate. In practice, however, reliance on Justice Department officials to pursue cases referred by HUD may be misplaced. The record of the Reagan Administration in pursuing civil rights violations is less than exemplary.\textsuperscript{63} Prior to 1980, the Justice Department exercised its

\textsuperscript{57} See 42 U.S.C. § 3612(c) (1982). Title VIII, unlike the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), permits awards only to prevailing "plaintiffs" and limits awards to only those plaintiffs who are financially unable to assume the attorney's fees. See also R. Schwemm, supra note 26, at 269-75.

\textsuperscript{58} See H.R. Rep. No. 865, supra note 28, at 5 & n.19. One author has opined that private litigation of the fair housing laws can be supported only if larger damage awards and higher attorney's fees are sought in every case. Scanlon, supra note 6, at 19. Otherwise, private enforcement groups such as the Lawyer's Committee for Civil Rights Under Law will soon be unable to continue representing their clients. Id.


\textsuperscript{60} See S. 1612, 98th Cong., 2d Sess. § 6(g), at 11 (1983).

\textsuperscript{61} See id. at 9-10. Senate Bill 1220 also provided for Justice Department enforcement, but added the option to refer the complaint to an administrative law judge. See S. 1220, 98th Cong., 1st Sess. § 7, at 21 (1983).


\textsuperscript{63} See Selig, supra note 4, at 504; Sloane, supra note 4, at 140.
authority in "pattern or practice" cases with "frequency, vigor and success" participating in "over three hundred cases in the first ten years of its enforcement efforts under the Fair Housing Act." In the first three years of the Reagan Administration, the Justice Department had filed only six Title VIII cases.

One conclusion that has been drawn from the Administration's record is that Justice Department civil rights enforcement policies, at least in the Reagan era, are ideologically and politically determined. If the Justice Department is to have responsibility for enforcing individual Fair Housing Act cases, it is of paramount importance that potential defendants be certain that the Justice Department will initiate litigation on behalf of those injured by discrimination.

The more convinced parties become that failure to conciliate will lead to some sort of legal action, the greater will be the motivation to settle the dispute at the conciliation table. Private suits offer little incentive to resolve the matter peaceably. Both the Reagan Administration's approach and the administrative approach will bolster to some extent the conciliation conference. However, given the vulnerability of the Justice Department to the claim that it has no enthusiasm for civil rights enforcement under the present Administration, granting HUD administrative enforcement power is a better way of insulating fair housing enforcement efforts from the ideological vicissi-

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64 Selig, supra note 4, at 446.
65 Id.
66 Sloane, supra note 4, at 139-41.
67 Joel L. Selig, former Deputy Chief of the Civil Rights Division of the United States Department of Justice responsible for Fair Housing Act enforcement from 1978 to 1982, stated:

[T]he most disturbing aspect of the Reagan Administration's stewardship of the Civil Rights Division [of the Justice Department] has been the unprecedented extent to which it has undermined the Division's tradition of incrementally progressive, nonpolitical law enforcement. The difficulties of the early Nixon years pale in comparison to the negative ideological agenda, and the failure to appreciate the obligations of responsible law enforcement, that now hold sway.

Selig, supra note 4, at 504 n.232.
68 See notes 45-52 supra and accompanying text.
2. Agency Power Allows for More Effective and Expeditious Resolution of Disputes

Proponents also argue that administrative enforcement power is a more effective and expeditious remedy for complainants. Administrative enforcement power would grant HUD dual enforcement powers. One such power is "cease and desist" power. With this power, HUD could "freeze the status quo pending the resolution of a complaint." Should the conciliation process break down, then HUD would need administrative enforcement power to conduct hearings and issue orders resolving the dispute. This second type of power often includes the power to assess penalties.

Preliminary cease and desist power, because it enjoins defendant housing providers from selling or renting the dwellings denied the complainant, tends to speed dispute resolution. Absent HUD cease and desist power, violators of the Fair Housing Act tend to "test out" HUD in every instance, delaying the process at every turn. This cease and desist power serves one other important function: it assures the complainant that if, in fact, he has been discriminated against in violation of the Act, the unit sought will not be rented to another while the conciliation process takes place.

Admittedly, HUD like the Justice Department, is subject to a change in policy with each change in administration. However, while Justice enforcement under present and proposed mechanisms is discretionary, HUD enforcement would be mandatory in the event that the conciliation fails. But see Selig, supra note 4, at 504 n.232 (questioning whether HUD's past record lends any support to the idea that it will be more diligent than the Justice Department in enforcing the fair housing laws).

See, e.g., Fair Housing Amendments of 1979, Hearings, supra note 37, at 651-53 (legal memorandum prepared by Congressional Research Service concerning arguments for and against granting HUD cease and desist authority for Fair Housing Act enforcement).

Id. at 651-52.


See Fair Housing Amendments of 1979, Hearings, supra note 37, at 651-52.

Fair Housing Act, Hearings, supra note 6, at 66 (statement of Drew Days III).

See id. at 305. One General Accounting Office (G.A.O.) report on Title VIII enforcement found that during one three-year period, HUD resolved only thirty-six of
When arguing that the administrative process is expeditious, its proponents point to the relatively simple questions of law and fact often presented by housing discrimination cases. These questions, it is argued, can best be resolved in an administrative setting.\(^7\) One survey found that discrimination in the market place usually takes the form of higher sales or rental prices, higher interest rates, longer waiting periods, higher down payments, and fewer showings of homes or apartments.\(^7\) A random selection of cases revealed that most housing discrimination suits involve simple allegations of discrimination,\(^7\) and once evidence is collected, the proof necessary to establish the violation is not complex.\(^7\)

Another advantage of the administrative enforcement mechanism that advocates say makes the process more expeditious is its simplicity.\(^8\) Rules of evidence and prehearing procedures are all but ignored in an administrative hearing. Defendants can also participate without the expense of hiring counsel.\(^8\) Because hearings can be held close to the parties involved, many proponents believe the administrative process is also more convenient.\(^8\)

The goal of any secondary enforcement mechanism should be to facilitate the obtaining of housing. Speed, therefore, is particularly important.\(^8\) Granting HUD the power to obtain preliminary or injunctive relief pending the outcome of the conciliation process not only speeds the process but also assures that, in cases in which the housing is still available when the complaint is filed, the unit will be available when a set-

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the 332 complaints received by the G.A.O. Of those resolved, the complainant obtained the unit in only four instances. *Id.* But see S. 1220, 98th Cong., 1st Sess. § 7, at 19 (1983) (granting Secretary of HUD the power only to refer the matter to the Attorney General if it appears that temporary or preliminary relief is necessary).\(^7\)


See *id.*

See *id.* at 5 n.17 (citing HUD, Office of Fair Housing and Equal Opportunity, *Remedies Obtained Through Litigation of Fair Housing Cases: Title VIII and the Civil Rights Act of 1866* 2 (1979)).

See *id.* at 6.

See *id.* at 5-6.
tlement is reached. If conciliation breaks down, the relative simplicity of the agency hearing process provides an inexpensive\(^4\) and prompt settlement to the dispute.\(^5\) Even the Reagan Administration, critical of the agency approach in general,\(^6\) admits that housing discrimination cases are not easily resolved in federal court.\(^7\) The relative simplicity of housing discrimination suits and the low monetary amount in controversy do not fit well into the federal court system.\(^8\) For these reasons, granting HUD enforcement power seems to provide the simplest and most convenient method for assuring injured parties prompt and effective relief.

The need for a quick, simple, and effective resolution to housing discrimination disputes is clear. At present, HUD reviews approximately 4,500 to 5,000 complaints yearly.\(^9\) Given the extensiveness of discrimination in the United States,\(^10\) this is a paltry figure. As victims of discrimination come to view the overall agency process as a fast, inexpensive, and successful response to racial discrimination in housing, more complaints will be filed.\(^11\) By the same token, as defendants come

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\(^4\) See notes 54-59 supra and accompanying text for a discussion, in another context, of the costs of privately litigating a fair housing case.

\(^5\) But see Administration and S. 1220, supra note 14, at 4-5. Administration officials admit that an agency hearing is quicker than a court trial. Nevertheless, they point out that "the difference is not likely to be critical in terms of the objective related to the remedy sought." Id. at 5.

\(^6\) See generally id. at 4-6.

\(^7\) See Remarks by John J. Knapp, General Counsel for HUD, before the Arlington Young Republicans, Arlington Va., at 7 (Apr. 19, 1984) [hereinafter cited as Remarks by John J. Knapp to Young Republicans].

\(^8\) See id.


\(^11\) See Fair Housing Amendments Act of 1979, Hearings, supra note 37, at 653. Former Secretary Harris summed up this position best when testifying before Congress in favor of House Resolution 3504, granting HUD administrative enforcement power:

I would venture a curbstone judgment that people don't usually undertake useless acts, and if it is apparent that there is not much point in bringing a complaint because one may have lots of meetings and lots of discussion, but there will be no remedy and certainly no quick remedy, the average
to view HUD’s enforcement potential as a realistic threat, more of those complaints will be conciliated without resort to an agency hearing.

B. Arguments By Opponents of Administrative Enforcement Authority

1. Recent Agency Enforcement Proposals Have Encumbered the Dispute Resolution Process

The original 1977 proposed amendment (H.R. 3504) to the Fair Housing Act gave HUD broad administrative enforcement powers including the power to investigate charges of discrimination, issue cease and desist orders, conduct hearings on the record, and issue orders providing relief, which included money damages, injunctive relief, and punitive damages. In short, HUD was given all of the remedial power of a federal court without procedural requirements such as discovery and pleading which tend to slow the decision-making process. In this manner, drafters of the legislation thought that remedies for housing discrimination could be awarded quickly and efficiently.

Subsequent proposals, responding to several specific criticisms, have given HUD far more restricted powers. This was

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complainant is not likely to come into the process. This is why I feel very strongly that we need enforcement potential.

Fair Housing Act, Hearings, supra note 6, at 27.

92 H.R. 3504, 95th Cong., 1st Sess. (1977), reprinted in Fair Housing Act, Hearings, supra note 6, at 422.

93 See id. § 208, at 5.

94 See id. § 208, at 8-9.

95 See id.

96 See id. § 208, at 8-9, 13-14.

97 See Administration and S. 1220, supra note 14, at 3-4.

98 See id. One of the earliest criticisms of House Resolution 3504 was directed at the resolution’s elimination of any reference to the conciliation process. Former Secretary Harris, with the support of former Assistant Attorney General Drew S. Days III, urged the recognition of the conciliation process “as a desirable first step in remedying discriminatory housing practices.” Fair Housing Act, Hearings, supra note 6, at 7. In fact, evidence has shown that the conciliation process, when successful, can be more speedy and efficient than the administrative hearing process. The average amount of time required to complete HUD conciliation proceedings is about one hundred days, while the administrative hearing process takes about 229 days. See Administration and S. 1220, supra note 14, at 5.
particularly evident in proposed Senate Bill 1220, the most recent measure designed to place agency powers in the hands of HUD officials. Continuing to direct the Secretary of HUD to investigate any charge of discriminatory housing practice, Senate Bill 1220 gave cease and desist power to the Attorney General if the Secretary decided that prompt judicial action was necessary. According to administration officials, this change resulted because cease and desist authority is rare in federal statutes and too controversial a power for an administrative agency to exercise in a context as sensitive as fair housing law.

Unlike the original amendments, Senate Bill 1220 would have delegated the power to conduct hearings to an administrative law judge (ALJ) rather than to the Secretary of HUD. The Secretary of HUD's role would have become that of an advocate, representing the complainant in the agency hearing. In addition, Senate Bill 1220 would have established a Fair Housing Review Commission composed of three members appointed by the President. This commission would have appointed the ALJs, heard appeals from hearings conducted by the ALJs, and issued final orders which would then have been reviewable in the appropriate federal circuit courts of appeals.

This drastic change in the hearing process resulted from the classic "judge-prosecutor-jury" criticism. Critics feared

100 In both Senate Bill 1220 and House Resolution 3504, the Secretary of HUD was given not only the power to act when an aggrieved person filed a charge, but also the power to act on his or her own initiative. See S. 1220, 98th Cong., 1st Sess. § 7, at 14 (1983); H.R. 3504, 95th Cong., 1st Sess. § 208, at 5.
101 See S. 1220, 98th Cong., 1st Sess. § 7, at 19-20. See also text accompanying notes 73-75 supra discussing the importance of preliminary cease and desist power.
102 See Administration and S. 1220, supra note 14, at 4. But see Fair Housing Act, Hearings, supra note 6, at 686-717 (federal administrative authority to issue cease and desist orders found in sixteen federal agencies).
103 See Administration and S. 1220, supra note 14, at 4.
105 See id. § 6(a), at 11.
106 See id. at 10-12.
107 See id. § 7, at 22.
108 See Fair Housing Amendments Act of 1979, Hearings, supra note 37, at 208 (legal memorandum submitted by the National Committee Against Discrimination in Housing). See also Administration and S. 1220, supra note 14, at 4.
that without a "separation of functions" within the agency, the investigatory or prosecutorial arm of the agency might control a hearing or influence an agency head in his or her role as judge.\textsuperscript{10} This, critics argue, would violate the defendant's due process rights.\textsuperscript{110}

While it is no longer disputed that placing investigative and adjudicative functions in the same agency is consistent with due process if there is an appropriate separation of administrative functions,\textsuperscript{111} Senate Bill 1220 went to an extreme to avoid the possibility of bias. The bill addressed the problem of improper influence by creating the Fair Housing Review Commission and placing the ALJs outside the authority and control of HUD.\textsuperscript{112} In so doing, however, the bill created yet another appeals board through which a complainant had to

\textsuperscript{10} Lubbers, \textit{A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level}, \textit{65 Judicature} 266, 272 (1981).

\textsuperscript{110} See \textit{Fair Housing Amendments Act of 1979, Hearings, supra note 37}, at 656 (Congressional Research Service memorandum concerning arguments for and against granting HUD cease and desist power).

\textsuperscript{111} See Withrow v. Larkin, 421 U.S. 35, 46-55 (1975) (combination of investigative and adjudicative functions in one agency does not unconstitutionally risk denial of due process). According to Section 554(d) of the Administrative Procedure Act, proper separation of administrative functions within agencies requires that:

\begin{quote}
    The employee who presides at the reception of evidence . . . may not . . .
    be responsible to or subject to the supervision or direction of an employee
    or agent engaged in the performance of investigative or prosecuting func-
    tions for an agency. . . .
    
    [A]n employee or agent engaged in the performance of investigative
    or prosecuting functions for an agency in a case may not, in that or a
    factually related case, participate or advise in the decision, recommended
    decision, or agency review pursuant to Section 557 of this title, except as
    witness or counsel in public proceedings.
\end{quote}


\textsuperscript{112} No doubt, this was the result of strong criticism aimed at House Resolution 5200, 96th Cong., 1st Sess. (1980), concerning the supposed bias inherent in having HUD ALJs hear HUD-investigated cases. \textit{See} 38 CONG. QUART. WEEKLY REP. 1175 (1980). When House Resolution 5200 came before the House and Senate in 1980, some of the strongest criticism came from the National Association of Realtors (N.A.R.). One realtor described the powers given to HUD as "down right scary." The N.A.R.'s general counsel, Bill North, revealing a somewhat cynical attitude toward the agency process, said: "There's no question those judges will be paid by HUD, will operate in HUD facilities, will be hired by HUD, and their promotions will be determined by HUD." \textit{Id.} at 1176.
pass before enforcement of a final order. According to opponents, what was once designed as a speedy, efficient process had now been slowed by the burden of excess due process protection. For this reason, the Reagan Administration opposed this approach and instead supported a judicial process as the sole backup mechanism to conciliation.

The Reagan Administration argued that the best procedure for achieving the objectives of swift and non-burdensome relief is the conciliation process. While agency enforcement and Justice Department litigation would theoretically enhance conciliation in the same manner, the Administration maintained that litigation had the advantage of self-enforcement, while HUD procedures entailed possibly two appeals and then a civil action to enforce the order. In the Administration's view, agency enforcement would be neither more efficient nor more speedy.

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113 S. 1220, 98th Cong., 1st Sess. (1983), required that no order issued by an ALJ become a final order until after the Fair Housing Review Commission had reviewed that order and affirmed it. See id. § 6(a), at 11-12. If the defendant failed to appeal to the Review Commission, the order became final after thirty days. See id. Nevertheless, this final order was itself appealable to an appropriate federal circuit court of appeals. Finally, any final order, either by the agency or the Commission, as a practical matter, had to be enforced by the Attorney General in a civil action. See id. § 7, at 25.

114 See note 119 infra.

115 See Administration and S. 1220, supra note 14, at 3-4.

116 See note 98 supra explaining that HUD conciliations take about one hundred days to complete while administrative hearings take about 230 days. See also Remarks by John J. Knapp to Young Republicans, supra note 87, at 3-4 (quoting President Reagan's remarks introducing Senate Bill 1612).

117 But see notes 63-69 supra and accompanying text discussing the negative effects on the conciliation process of a Justice Department that lacks enthusiasm for fair housing enforcement.

118 See Administration and S. 1220, supra note 14, at 4. See also note 113 supra listing the various options under Senate Bill 1220.

119 In a recent address, John J. Knapp, General Counsel for HUD, explained the Administration's view in the following manner:

I believe that the primary thrust of both proposals is to devise an efficient means of dealing, without undue expense of money or time, with simple cases of discrimination against individuals - the so-called garden variety cases. We think that the procedures contained in the Mathias proposals don't meet that objective; they aren't efficient, with their multiple review lawyers, and the unlimited remedial powers of the administrative law judge and the review commission aren't sufficiently tailored to permit confidence that what is seen as a simple case when it starts out will remain one.

Remarks by John Knapp to Young Republicans, supra note 87, at 6-7.
2. Constitutional Limitations Restrict Monetary Relief to Complainants

The administrative enforcement mechanism is particularly vulnerable to the charge that it is too limited in the kinds of remedies that can be awarded plaintiffs.\(^{120}\) This limitation results because agencies, unlike courts, do not utilize the jury system.\(^{121}\) Constitutionally, there are limits on the types of monetary damages that can be awarded absent a jury determination of liability.\(^{122}\) The scope of this constitutional limitation is the source of substantial debate.\(^{123}\)

As originally drafted, the early amendments to Title VIII granted HUD the authority to award compensatory damages, including punitive damages to the aggrieved party.\(^{124}\) These same remedies were available to private plaintiffs bringing civil actions in a court of law.\(^{125}\) Critics were quick to cite the 1974 Supreme Court opinion, *Curtis v. Loether,*\(^{126}\) holding that the “Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under Section 812 [Section 3612 of Title VIII].”\(^{127}\) Accordingly, it was argued, the scope of agency enforcement power must be limited to civil penalties payable to the government and injunctive relief only, because any award of either actual or punitive

\(^{120}\) See *Administration and S. 1220, supra* note 14, at 4-6.

\(^{121}\) See *Schwartz, supra* note 72, at 71.

\(^{122}\) The seventh amendment provides that “in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. CONST. amend. VII.

\(^{123}\) See *Fair Housing Act, Hearings, supra* note 6, at 644 (congressional research memorandum concerning HUD’s enforcement powers [hereinafter cited as Cong. Research Memorandum]); *Fair Housing Amendments Act of 1979, Hearings, supra* note 37, at 38 (National Committee Against Discrimination in Housing [NCADH] memorandum concerning the constitutionality of HUD administrative enforcement of Title VIII through provision of monetary relief to complainants [hereinafter cited as NCADH Memorandum]); *Fair Housing Act: Hearings, supra* note 6, at 15 (memorandum of Larry Hammond, Deputy Assist. U.S. Atty. Gen., Office of Legal Counsel [hereinafter cited as Memorandum of Larry Hammond]).


\(^{125}\) See *id.* at 435-36; 42 U.S.C. § 3612(c) (1982).


\(^{127}\) *Id.* at 192.
damages to the complainant would violate the defendant’s seventh amendment rights.\textsuperscript{123}

Subsequent versions of the proposed amendments have each excluded language allowing HUD to award punitive damages.\textsuperscript{129} As a deterrent,\textsuperscript{130} more recent proposals have granted HUD the power to assess civil penalties of up to $10,000.\textsuperscript{131} ALJs have also been authorized to issue an order providing such relief “as may be appropriate (including compensation for all damages suffered by the aggrieved person as a result of the discriminatory housing practice).”\textsuperscript{132} The scope of these so-called compensatory damages remains the focus of some debate.\textsuperscript{133}

Proponents of the administrative enforcement mechanism point out that, without authority in HUD to order monetary relief for the aggrieved party in the form of expenses and “out-of-pocket” loss resulting from the discriminatory conduct, the successful complainant cannot be made whole.\textsuperscript{134} It is correctly noted that any “remedial gap is of great public importance in that it threatens to undermine the integrity and utility of the

\textsuperscript{123} See Fair Housing Act, Hearings, supra note 6, at 5-6 (testimony of Patricia Harris, former Secretary of HUD). Former Secretary Harris suggested that rather than allow HUD to assess damages, the Resolution [House Resolution 3504] should be amended, on the basis of Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n, 430 U.S. 442 (1977), to allow HUD to assess civil penalties payable to the Government. Atlas makes clear that such penalties, based on a substantial public interest such as the interest in providing fair housing, would survive seventh amendment attack. Fair Housing Act, Hearings, supra note 6, at 6.

“Provision for equitable relief in the form of temporary or permanent injunctions in no way offends the Seventh Amendment’s preservation of juries in ‘suits at common law’.” Memorandum of Larry Hammond, supra note 123, at 18. See also R. Schwemm, supra note 26, at 397-98.


\textsuperscript{131} See H.R. 5200, 96th Cong., 1st Sess. (1980); S. 1220, 98th Cong., 1st Sess. § 7, at 22 (1983). This provision is apparently the result of Secretary Harris’s comments concerning House Resolution 3504. See note 128 supra and accompanying text.


\textsuperscript{133} Attorney’s fees and other related costs of bringing the complaint before the agency were covered by Senate Bill 1220. Because these are beyond the scope of the seventh amendment right to jury trial, ALJs can award them without being in violation of the U.S. Constitution. See Bixton v. Patel, 595 F.2d 1182, 1183 (9th Cir. 1979). See also R. Schwemm, supra note 26, at 397.

\textsuperscript{134} See NCADH Memorandum, supra note 123, at 42.
administrative process as an enforcement mechanism." Acknowledging that there is no definitive answer to the seventh amendment question, proponents argue, on the basis of *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, that the jury right turns not only on the nature of the issue to be decided, but also "on the forum in which it is to be resolved." Citing *NLRB v. Jones & Laughlin Steel Corp.*, proponents note that the Supreme Court upheld an award of back pay by the NLRB without a jury trial. In that opinion the Court held the seventh amendment not applicable in an administrative forum where a jury trial is incompatible with the concept of administrative adjudication. Because HUD's role "in protecting against housing discrimination would be functionally identical to the role of the NLRB in protecting against unfair labor practices," proponents argue that just as the NLRB's authority to award back pay has been upheld, so too will HUD's power to award out-of-pocket expenses.

Even if courts were to accept this argument, complainants would still be left uncompensated for nonquantifiable types

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135 Id.
136 Id. at 43.
138 Id. at 460-61. See NCADH Memorandum, supra note 123, at 46-47.
139 301 U.S. 1 (1937).
140 See NCADH Memorandum, supra note 123, at 56.
141 Id. (citing 415 U.S. at 194).
142 Id.
143 See id.

144 The NCADH Memorandum, supra note 123, misconstrues a fundamental component of the law related to a jury right in the context of administrative proceedings. Curtis v. Loether, 415 U.S. 189, remains the definitive case in this area. NCADH apparently argues that it is the forum that dictates the jury right. See NCADH Memorandum, supra note 123, at 58. Curtis, however, makes clear that simply allowing rights to be adjudicated by the agency process does not, in and of itself, dispense with the jury right where those same rights can also be adjudicated in a federal court. See 415 U.S. at 195.

Although an administrative action is statutorily created and therefore did not exist at common law, this does not decide the seventh amendment question. As the *Curtis* Court states: "If the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law," then the seventh amendment does apply. *Id.* at 194.

Broadly speaking, the seventh amendment does not apply where Congress has
of injury such as embarrassment and humiliation. This remedial gap is significant because, as one Administration official has pointed out, these "intangible damages such as humiliation and distress . . ., in a damage sense, are the most meaningful part of the recovery in most housing discrimination cases." In Title VIII cases, where out-of-pocket expenses are usually minimal, the absence of an ability to award damages for embarrassment and humiliation is a serious flaw with which proponents of the administrative enforcement mechanism must reckon.

properly assigned the adjudicatory function to an administrative tribunal with whose proceedings the use of a jury trial would be incompatible. Nevertheless, the Supreme Court in Atlas Roofing limited the jury-free administrative proceeding to those instances where "public rights" were involved. 430 U.S. at 458. The crucial question then becomes, "What are "public rights"?

This important distinction was made in Crowel v. Benson, 285 U.S. 22 (1932), where the Court sustained the role of an administrative tribunal in awarding relief under the Longshoremen's and Harbor Worker's Compensation Act. Holding that the proceedings were adjunct to the federal court's admiralty jurisdiction and thus presented no seventh amendment problem, the Court characterized the case at bar as "one of private right, that is, of the liability of one individual to another under the law as defined." Id. at 51. Here, the Court focused not only on the role of the Act created by Congress but also on the nature of the liability created. This comports with Atlas Roofing, where the liability created was to the government in the form of a civil penalty.

But see B. Schwartz, Administrative Law § 2.19, at 67-69 & § 2.21, at 71-72 (2d ed. 1984) (author considers the distinction between public and private rights unwarranted).

It can be concluded from the above that (1) more than a simple "public interest" is necessary to come within the phrase "public right" as used in Atlas Roofing; and (2) the nature of the relief afforded by the agency tribunal is relevant for seventh amendment purposes. Merely because a government agency plays a role in adjudicating rights pursuant to stated public policy does not mean a "public right" is involved. When the liability created is between individuals in the form of private damages, even though that liability is created pursuant to a public policy to end discrimination, Crowell and Marathon Pipe Line say that the "right" is a private one. For this reason, it is unlikely that even actual damages in the form of out-of-pocket expenses will survive a constitutional challenge.

See R. Schwartz, supra note 26, at 255-60.

Remarks by John J. Knapp to Young Republicans, supra note 87, at 7.

See, e.g., Steele v. Title Realty Co., 478 F.2d 380, 383-84 (10th Cir. 1973) (economic injuries limited to $13.25 in telephone expenses and $125.00 in moving and storage expenses).

See notes 212-213 infra and accompanying text, which attempt to answer this criticism.
Reagan Administration officials argue that, while the language of Senate Bill 1220 attempted to encompass the assessment of "compensation for all damages suffered,"\(^{149}\) compensatory damages for humiliation and mental distress "are legal damages which constitutionally cannot be awarded except by a court after a jury trial."\(^{150}\) The Supreme Court’s decision in *Curtis v. Loether*,\(^ {151}\) where a damages action under Section 812 [Section 3612(c)] of Title VIII was described as an action to enforce "legal rights" within the meaning of the seventh amendment supports this argument.\(^ {152}\)

A damages action under the statute sounds basically in tort - the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law.\(^ {153}\)

Unlike out-of-pocket expenses, damages for embarrassment and humiliation fall squarely within the kind of damages that *Curtis* enunciates can be assessed only after a jury trial.\(^ {154}\) Thus, it would appear that administrative tribunals are, in fact, limited as to the kinds of damages they can award — if they can award them at all.

3. *Agency Action in Effect Cuts Off Rights to Legal Damages*

The limitation on administrative damages awards leads to a third criticism of the administrative enforcement mechanism as proposed in Senate Bill 1220. The bill prevented a complainant from initiating a private action after the Secretary had

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\(^ {150}\) *Administration and S. 1220*, supra note 14, at 9.

\(^ {151}\) *415 U.S.* 189 (1974).

\(^ {152}\) *Id.* at 195.

\(^ {153}\) *Id.* The court likened a suit for racial discrimination to an action for defamation or intentional infliction of emotional distress. *Id.* at 195 n.10.

\(^ {154}\) The *Curtis* Court notes that it need not go so far as to assert that "any award of monetary relief must necessarily be 'legal' relief." *Id.* at 196. It is here, apparently, that some would argue that out-of-pocket expenses can be assessed by an agency without violating the seventh amendment. *But see* note 144 supra.
already commenced an administrative hearing. Some argue that this would “cut off” the right of the complainant to seek legal damages in a subsequent civil action.

The bill need not be interpreted so restrictively, however. Senate Bill 1220 specifically provided for a two year statute of limitations. The statute itself did not purport to “cut off” any private civil action but rather precluded a defendant from having to defend himself in two forums at one time. Given the two year statutory bar to a right of action, it is conceivable that there would still be time to commence a civil action after the close of the HUD proceeding.

4. HUD Has No Commitment to Fair Housing Enforcement

One final criticism of the administrative enforcement mechanism relates to the suitability of HUD to carry out the objectives of the Fair Housing Act. Some critics believe that HUD is fundamentally indifferent to fair housing. Drawing on HUD’s history of indifference to racial and economic segregation, documented in studies by the United States Commission on Civil Rights and others, these critics say there is little indication that HUD is capable of making affirmative action in fair housing the policy of the nation. One study revealed that HUD had consistently failed to begin investigating complaints until long after they had been submitted, often as long as one hundred days after HUD received a complaint. All this leads to the important question whether HUD can use

156 See Administration and S. 1220, supra note 14, at 10.
158 Senate Bill 1220 provides only that an approved party “shall not commence a civil action... if the Secretary... has commenced a hearing on the record.” Id.
159 See Fair Housing Amendments Act of 1979, Hearings, supra note 37, at 661 (memorandum concerning arguments for and against granting HUD cease and desist authority).
160 See id. (citing Paul Davidoff and Mary E. Brooks of the Suburban Action Institute). See also Selig, supra note 4, at 504, n.233 (“Regardless, HUD’s record of performance does not inspire confidence. . . .”).
effectively the administrative mechanism it believes is so necessary to the enforcement of the Fair Housing Act.

Most of these criticisms surfaced during the Fair Housing Act hearings in 1978 and related to a back-log of "over-age" complaints. Largely due to the efforts of then-Secretary of HUD Patricia Harris, a new complaint processing mechanism was instituted that reduced the back-log of "over-age" complaints from 817 to forty-eight. HUD also reduced from ninety days to sixty days the length of time a complaint could remain open without being classified as "over-age." It should also be remembered that at this time HUD first began expressing the need for agency enforcement power. In fact, rather than point out some fundamental flaw in HUD's ability to enforce Title VIII, these criticisms highlight the need for a back-up mechanism to conciliation.

One other program proposed in early 1978 in response to criticisms of HUD, the Fair Housing Assistance Program, has become one of HUD's most successful. Devised to provide incentives for state agencies administering the fair housing laws, the program uses funds to assist state and local governments in processing HUD-referred complaints and thereby to assist HUD in enforcing Title VIII. The program allows various state agencies, such as the Kentucky Commission on Human Rights, to act as partners with the federal government in enforcing the fair housing laws.

One way to evaluate the potential success of allowing HUD administrative enforcement power is to look more closely at states presently having the administrative power to enforce Title VIII in a way that HUD has not. What follows is an ex-

162 See notes 33-36 supra and accompanying text.
163 See Fair Housing Amendments Act of 1979, Hearings, supra note 37, at 89 (letter of Patricia Harris, former Secretary of HUD, responding to Dr. Arthur Flemming, former Chairman of the U.S. Commission on Civil Rights).
164 Id. at 91-92.
165 Id. at 92.
166 See id. at 92-93.
167 Id. at 93.
168 See notes 175-176 infra and accompanying text.
169 See Fair Housing Amendments Act of 1979, Hearings, supra note 37, at 93 (letter of former Secretary Harris to former Chairman Flemming).
170 Id.
amination of one such agency — the Kentucky Commission on Human Rights.

III. THE STATE’S ROLE IN FAIR HOUSING ENFORCEMENT

Title VIII provides that “wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter,” the Secretary of HUD shall notify that state or local agency of the complaint and shall take no further action on the matter unless that agency fails to act. At present, thirty-three states and fifty-seven localities have laws that HUD has certified to be “substantially equivalent” to the Fair Housing Act. As a result, the percentage of complaints referred to state and local agencies has grown from 7 percent in 1979 to 67 percent in 1984. Clearly, the action is shifting toward the states.

A. State Agency Enforcement Has Encouraged Conciliation

Kentucky’s Civil Rights Act is one of the most comprehensive in the nation. This fact, coupled with the administrative enforcement powers granted to Kentucky’s Human Rights Commission (“the Commission”), makes the Commission’s experience particularly instructive when evaluating the effectiveness of an agency with broad enforcement power.

While the Commission receives as many as five hundred housing-related inquiries in a year, only a fraction are actually

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172 See id.
174 Id.
175 Id.
176 Note that this rise in state involvement has coincided with the development of the Fair Housing Assistance Program (F.H.A.P.). See id. at 1. Last year’s F.H.A.P. budget was nearly five billion dollars. See HUD, FY 1986 Budget at FHEO 7 (Summ. Feb. 1985).
178 Interview with Samuel H. DeShazer, Assistant Compliance Director, Kentucky Commission on Human Rights, in Louisville, Kentucky (Feb. 28, 1985) [hereinafter cited as DeShazer Interview].
"docketed" for agency investigation.\textsuperscript{180} Last year, the Commission docketed only thirteen complaints.\textsuperscript{181} Previously, the Commission averaged between forty and fifty complaints per year.\textsuperscript{182} Of those docketed, the vast majority were either dismissed for lack of probable cause\textsuperscript{183} or conciliated\textsuperscript{184} in the same manner that HUD conciliates many of its complaints. According to one Commission attorney, the presence of an agency enforcement mechanism is most certainly an incentive to conciliate.\textsuperscript{185}

The Commission has only seven full time staff attorneys doing all housing, employment, and public accommodations work, yet the staff resolves many disputes in as little as one month.\textsuperscript{186} The average amount of time spent in reaching conciliation is close to that found at HUD - one hundred days.\textsuperscript{187}

Under Kentucky law, if conciliation is not reached within sixty days, then the hearing process begins.\textsuperscript{188} In the past, the Commission has averaged between two and three hearings annually.\textsuperscript{189} Considering that, except in 1984, the Commission has averaged forty to fifty complaints per year, the percentage of potential defendants that actually go before a hearing is miniscule.\textsuperscript{190} This percentage lends strong support to the HUD as-

\textsuperscript{180} DeShazer Interview, \textit{supra} note 178. The Commission docket only those complaints that it feels have merit. This initial screening is distinguishable from a finding of probable cause, which is a necessary determination before a conciliation conference can be called pursuant to KRS § 344.200(2).


\textsuperscript{182} See \textit{Kentucky Human Rights Commission}, Cumulative Report (1978-83). The substantial discrepancy from years past is due in part to the inavailability of F.H.A.P. funds with which to finance statewide testing programs. DeShazer Interview, \textit{supra} note 178.

\textsuperscript{183} See KRS § 344.200(2).

\textsuperscript{184} See KRS § 344.200(4).

\textsuperscript{185} Telephone interview with Tom Ebendorf, Compliance Director, Kentucky Commission on Human Rights (Feb. 26, 1985).

\textsuperscript{186} DeShazer Interview, \textit{supra} note 178.

\textsuperscript{187} Id.

\textsuperscript{188} See KRS § 344.210(1).

\textsuperscript{189} See, \textit{e.g.}, \textit{Kentucky Commission on Human Rights}, Cumulative Reports (1978-84).

\textsuperscript{190} It is impossible to arrive at a precise percentage calculation because the statistics kept by the Commission record only yearly totals, not individual cases. See, \textit{e.g.}, \textit{Id.}
sertion that a hearing process would bring people to the conciliation table.\textsuperscript{191}

\textbf{B. Agency Enforcement Requires Federal Initiative}

In comparing federal fair housing efforts under HUD to states' efforts, states have two advantages. First, in the area of damages, state agencies such as Kentucky's Commission are not subject to the limitations found in \textit{Curtis v. Loether}\textsuperscript{192} concerning damages for embarrassment and humiliation. In \textit{Kentucky Comm'\textquotesingle n on Human Rights v. Fraser},\textsuperscript{193} the Kentucky Supreme Court held that there was no constitutional infirmity in the extension of adjudicatory powers to a state administrative agency, even to determine liability between individuals for such intangible damages as embarrassment and humiliation.\textsuperscript{194} This means that Kentucky complainants will not risk losing damage claims by opting for the state agency route rather than the private litigation route.\textsuperscript{195}

Second, the local nature of housing discrimination problems also gives state agencies, like the Kentucky Commission, an advantage because, unlike HUD, state agencies are local investigatory bodies. Thus, travel and expenses are minimal. HUD investigators, on the other hand, often must travel long distances across state lines to investigate alleged housing discrimination.\textsuperscript{196} This fact, coupled with damage award capability, makes it tempting to argue that perhaps all enforcement authority under the Fair Housing Act should be handed over to the states. Certainly, the move toward more state involvement should be encouraged. Nonetheless, not even the states' rights conscious Reagan Administration takes the position that all authority should be given up. In his message to Congress

\textsuperscript{191} See notes 45-52 \textit{supra} and accompanying text.
\textsuperscript{192} 415 U.S. 189 (1974). See also R. \textit{Schwemm}, \textit{supra} note 26, at 397.
\textsuperscript{193} 625 S.W.2d 852 (Ky. 1981).
\textsuperscript{194} See id. at 854. See generally \textit{Damages for Embarrassment and Humiliation in Discrimination Cases}, Kentucky Human Rights Commission, Staff Report 82-1 & Staff Report 82-8 (1982).
\textsuperscript{195} KRS § 344.450 preserves a civil cause of action for those who so choose.
\textsuperscript{196} For example, the HUD regional office nearest to Kentucky is in Atlanta, Georgia.
introducing Senate Bill 1612, President Reagan pointed out that the Federal Fair Housing Act remained just that - a federal act embodying national policy. Accordingly, he said, "Vindication of federally protected civil rights is a federal right that cannot be abdicated." Furthermore, few states, if any, have both the agency power and the broadly phrased statute found in Kentucky. While it may be true that Kentucky would not quickly give up the struggle to end housing discrimination, according to some, there are more than a few states that, without federal initiative and support, would not continue to monitor and control the problem.

IV. LEGISLATIVE PROPOSALS

It is imperative that Congress act soon to adopt a logical and consistent federal strategy for implementing the policy goals of Title VIII. The need for a federal strategy is clear. To begin, Congress must pass authorizing legislation which will allow HUD to implement its proposed Fair Housing Assistance Program (FHAP). This program, with its tripartite emphasis on state administrative enforcement and compliance, education and outreach, and private enforcement, will provide a comprehensive approach to enforcement of fair housing legislation. It will also enable HUD to utilize in a more coordinated fashion its primary "authority and responsibility for administering" Title VIII.

While the goal of FHAP is to raise the consistently low number of housing discrimination complaints received by federal, state and local enforcement agencies (a goal shared by

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199 DeShazer Interview, supra note 178.
200 Senator Charles Mathais and other proponents of a new administrative enforcement remedy similar to that suggested infra plan to introduce legislation into the Ninety-ninth Congress in December of 1985. Telephone interview with Marion Morris, Staff Counsel for Senator Mathias (Feb. 18, 1985).
201 See HUD, FY 1986 Budget at FHEO 7 (Summary Feb. 1985) [hereinafter cited as HUD Budget].
202 See id. at FHEO 7-9.
204 See HUD Budget, supra note 201, at FHEO 7.
proponents of a back-up mechanism to conciliation), those complaints still must be resolved. As stated above, conciliation alone, without a back-up mechanism to ensure that injured parties get a fair hearing, is often futile. This means Congress must make a choice.

Congress must choose either to grant HUD administrative enforcement power or to allow the Justice Department the power to pursue individual victim cases referred to it by HUD. Both proposals have merit. Each has problems as well. Perhaps the proper course combines the better features of both proposals.

The use of ALJs, without the interposition of a Fair Housing Review Commission, is crucial to a middle ground approach. It is possible to assure defendants of due process while avoiding the delay inherent in multiple levels of review. While political acceptance of this approach may be more difficult, the middle ground approach offers the best chance of simple, efficient, and expedient resolution of housing disputes.

Additionally, HUD’s lack of administrative power to award private damages makes the agency enforcement approach vulnerable. Congress must grant the Justice Department the power to pursue cases of individual discrimination as the Reagan Administration argues, and allow HUD officials, in their discretion to refer cases to Justice if it appears that the complainant has a good chance to recover substantial damages from a jury. Moreover, because the complainant may also opt for private litigation if his or her chances of recovery appear great, HUD must be required to apprise plaintiffs of the limits, as

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205 See notes 89-91 supra and accompanying text.
206 See notes 45-52 supra and accompanying text.
207 At this time, HUD officials, Justice Department officials, key congressmen, and a coalition of civil rights groups are meeting to form a consensus. It appears that this group is recognizing that ALJs, alone, offer the most expedient alternative to the present conciliation process. Housing Affairs Letter 6 (Jan. 25, 1985) (unpublished).
210 See note 111 supra and accompanying text.
211 See note 112 supra.
212 See notes 70-88 supra and accompanying text.
213 See notes 120-154 supra and accompanying text.
well as the benefits, of the hearing process before proceeding. Nonetheless, in the "garden variety" discrimination case where simple issues of law and fact are presented, there is no reason to deny HUD the power to hear and resolve the dispute. 213

CONCLUSION

From the beginning, HUD, charged with primary responsibility for administering the Fair Housing Act, has been hampered in its efforts by a lack of enforcement power.214 The only means of enforcement has been a voluntary conciliation conference which, absent an adequate back-up mechanism, has been treated with little respect. Administration officials have sharply criticized recent attempts to supply the needed incentive to conciliate by granting HUD agency power. Pointing to overly burdensome due process protections and to constitutional limitations on the kinds of damages that agencies can award,215 the Reagan Administration has advocated enforcement by the Justice Department. The Administration's proposal has been criticized both for its lack of sincerity and for its utilization of the ill-suited federal courts. Based in part on the success of agency enforcement at the state level, a middle ground approach has been presented.216 It has been suggested that ALJs should work with HUD, thereby avoiding the cumbersome Review Commission. Moreover, constitutional limitations on damages may be avoided both by allowing the Justice Department to pursue certain cases and by informing complainants of their options. The approach has merit because it gives HUD the full power it was denied when the Fair Housing Act was originally enacted in 1968 while also recognizing that, in some instances, enforcement power must be shared to assure plaintiffs full compensation. Most importantly, the approach would be a major step by Congress toward fulfilling the promise embodied in Title VIII of the Civil Rights Act of 1968: the eradication of discrimination in housing.

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213 See note 119 supra defining "garden variety" cases as simple cases of discrimination against individuals.
214 See note 3 supra and accompanying text.
215 See notes 120-154 supra and accompanying text.
216 See notes 207-213 supra and accompanying text.