The Fair Housing Amendments Act of 1988: The First Decade

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Thirty years ago, Congress enacted the landmark Fair Housing Act of 1968, which outlawed for the first time private as well as public discrimination in housing. Twenty years later, Congress passed the Fair Housing Amendments Act of 1988, a law that significantly expanded the scope of the original legislation and strengthened its enforcement mechanisms. Like most important pieces of Federal legislation, the Fair Housing Act and the 1988 Amendments Act embody a series of careful compromises crafted by members of Congress.

In this article, we examine the first decade of experience under the 1988 Amendments. We briefly describe the unusual enforcement process created by the Amendments, that permits either party to choose which branch of government will adjudicate their dispute. Using contemporaneous legislative history, we also explain why Congress devised such an enforcement mechanism and how members expected it would operate in practice. In the remainder of the article, we use administrative data obtained from the Federal Government as part of an ongoing effort to evaluate fair housing enforcement to describe the first 10 years under the Amendment. Particular attention will be paid to the question of whether the enforcement mechanisms contained in the 1988 Amendments Act have fulfilled the expectations of its sponsors.

The Enforcement Provisions of the Fair Housing Act of 1968

Congress passed Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, on April 10, 1968, just 6 days after the Reverend Martin Luther King, Jr., was assassinated in Memphis. The Act made it illegal to discriminate in the sale or rental of housing on the grounds of race, color, religion, or national origin.[1] Despite the fact that several States and localities had already adopted laws forbidding discrimination in privately owned housing, Title VIII was the product of several years of contentious legislative debate. Indeed, the difficulty the sponsors had in amassing sufficient votes to overcome a Senate fillibuster is reflected in several compromises throughout the Act.

For example, the so-called *Mrs. Murphy* provision exempts landlords who occupy apartments in buildings of fewer than five units from the prohibitions against discrimination. Similar exemptions apply to sellers of single-family homes and religious institutions.

Perhaps the legislative compromise that would have the most profound impact on the Fair Housing Act's efficacy in fighting housing discrimination was its enforcement provisions. The original bill sponsored by Senator Walter Mondale contained provisions that would have empowered HUD to investigate discrimination of complaints, hold evidentiary hearings, and issue enforcement orders. After several successful filibusters, Senator Everett Dirksen introduced an amendment that stripped the bill of most of its enforcement provisions. Under the Act, persons who felt that they had been discriminated against could file complaints with HUD, but the agency only had the power to investigate and seek conciliation. If efforts to achieve voluntary settlements failed, as they often did, the complainant would be left to file a private lawsuit. Private litigants could seek actual damages and injunctive relief, but punitive damages were capped at $1,000. The Fair Housing Act also provided for the payment of legal fees, but only in instances where the complainant could not afford to pay his or her own attorney. Although HUD had little power to enforce the law, the U.S. Department of Justice (DOJ) was given the authority to bring lawsuits under the Act when it uncovered a pattern or practice of discrimination.

During the next 20 years, despite the fact that housing discrimination remained endemic in the United States, the Federal Government was either powerless or unwilling to take major steps to enforce the Act. HUD's conciliation efforts were often fruitless, and politics frequently constrained the DOJ from aggressively pursuing pattern and practice cases.[2] Indeed, in legislative debates over the 1988 Amendments Act, the consensus for change was bipartisan and widespread. One of two cosponsors of the bill in the Senate, Edward Kennedy, characterized the Fair Housing Act as a "toothless tiger" (Kennedy, 1988). Former HUD Secretary Patricia Roberts Harris was quoted as saying that filing a complaint was a "useless task" (Henderson, 1987), and her successor Secretary Samuel Pierce cited the lack of effective HUD enforcement power as the "most glaring deficiency in Title VIII" (Pierce, 1987).

The Fair Housing Amendments Act of 1988

Efforts to bolster Federal enforcement powers date back to the late 1970s when Congress repeatedly considered legislation to give HUD the power to enforce the Fair Housing Act, subject to judicial review in the Nation's courts of appeal. Despite significant support in Congress for amending the law, deep disagreements surfaced over the scope of power to be accorded to HUD and its administrative law judges. The major source of concern was whether Congress had the authority to vest sole jurisdiction over discrimination complaints in HUD administrative law judges. A 1974 Supreme Court case, *Curtis* v. *Loether* (415 U.S. 189, 1974), had interpreted the Seventh Amendment to the Constitution to provide respondents with the right to jury trial when they were sued for damages under the Fair Housing Act. In addition, the Reagan Administration questioned whether administrative law judges (ALJs) would be as efficient and cost-effective as proponents suggested (Reynolds 1987).

Representative Hamilton Fish of New York State broke the logjam by crafting a new enforcement mechanism in 1988. Fish, working in cooperation with civil rights groups and the National Association of Realtors, devised a compromise that sidestepped the constitutional issue. Upon the filing of a complaint alleging housing discrimination, HUD simultaneously seeks to achieve conciliation and to investigate the claim. If the complaint comes from a State or locality whose law has been deemed by HUD to be substantially equivalent to the Fair Housing Act, it must be referred to that States's human rights

agency. For complaints over which it retains jurisdiction, HUD must determine whether reasonable cause exists to believe that the complainant has been discriminated against. If HUD finds that reasonable cause exists, it files a charge with the Office of ALJs in HUD. Within 20 days either party can elect to have the case adjudicated in Federal district court rather than by an ALJ. If no election takes place, an ALJ hears the case and issues a ruling. In election cases, DOJ represents the interests of the complainant and the Government in Federal district court; in cases before the ALJs in HUD, the complainant is represented by an attorney from HUD's Office of General Counsel. Complainants also have the option of filing claims directly in Federal district court, bypassing the Federal enforcement apparatus altogether.

Remedies available to successful complainants vary depending upon the forum in which their claims are adjudicated. ALJs in HUD are empowered to grant compensatory damages, injunctive relief, and civil penalties up to $50,000 in the case of three offenses within a 7-year period. In addition to compensatory damages and injunctive relief, Federal district court judges or juries may award punitive damages.

In addition to strengthening Title VIII's enforcement provisions, the 1988 Amendments also brought within its protective embrace two additional groups. Under the Amendments, it is now illegal to discriminate against families with children and against persons with physical or mental disabilities. Builders of housing must also ensure accessibility in certain units and landlords and condominium associations must make reasonable accommodations to meet the needs of disabled tenants.

Congress retained the preference reflected in the 1968 Fair Housing Act for having complaints enforced by State and local human rights agencies. If an agency is certified by HUD to have laws with protections and enforcement mechanisms that are substantially equivalent to those of the Federal Government, HUD must refer the case to that agency for enforcement. Typically, these State and local agencies receive financial assistance from the Federal Government under the Fair Housing Assistance Program (FHAP) to defray the costs of enforcement. Indeed, the State and local agencies themselves are typically referred to as FHAP agencies. The 1988 Amendments gave FHAP agencies 40 months to bring their laws into compliance with the Fair Housing Act, which for many agencies meant adding protections based upon familial status and disability.

Although inferring legislative intent is seldom clear-cut, it seems that members of Congress had certain expectations at the time the 1988 Amendments were passed about how the legislation would work out in practice. Under the existing law, there was little incentive for respondents to conciliate discrimination claims because HUD had no power to penalize recalcitrant or culpable parties. Private litigation was, for the most part, an empty threat because it took too long for matters to be resolved and cost too much money. Therefore, several members of Congress, including the chairman of the House Committee on the Judiciary, Peter Rodino, expressed the view that the strengthened enforcement provisions would make parties take HUD's conciliation efforts more seriously and thereby promote settlements (Rodino, 1987).[3]

In addition, retention of the requirement that complaints from States and localities with substantially equivalent laws be referred back to State and local human rights commissions led many members of Congress to believe that most cases of housing discrimination would bypass the Federal Government altogether (see, for example, Fish, 1988). One member of Congress recounted that, of the 4,699 complaints received by HUD in 1987, 72 percent had been referred to State and local agencies (Thurmond, 1988).

It also seems likely that congressional sponsors of the 1988 Amendments Act expected that ALJs in HUD would hear most cases that did not settle and were not transferred to State and local agencies. The election provision was added to the bill fairly late in the legislative debate on the floor of the House of Representatives. The reason given by its author, Representative Fish, for introducing the provision was that it would insulate the legislation from constitutional challenges. Members of Congress repeatedly emphasized the need for an inexpensive and effective remedy, and there was virtually no debate over the ability of DOJ to handle the increased caseload from elections.

In terms of the increased scope of the Title VIII, most of the debate concerned the impact of the familial status protections on adult-only communities and whether the accessibility requirements would contribute to higher housing costs. Members of Congress seemed to have given little thought to how the new protected groups would affect the workload of HUD's Office of Fair Housing and Equal Opportunity.[4]

An Examination of the First 10 Years of Enforcement Efforts Under the 1988 Amendments Act

Whether the 1988 Amendments Act has fulfilled the expectations of its sponsors is a question that has received very little attention. The only comprehensive examination of enforcement efforts to date was completed in 1994 by the United States Commission on Civil Rights. According to the Commission, HUD had closed 23,007 cases through 1993. Of these cases, 4,461 were conciliated. Charges were issued in 619 cases, the majority of which involved claims based upon familial status, (61 percent) followed by race (16 percent) and disability (14 percent). In 369 of the 619 cases in which HUD found reasonable cause to believe that an act of discrimination had occurred, one or more party elected to proceed in Federal district court. In a majority of these cases, the party who elected was the respondent.

HUD's efforts to enforce the Fair Housing Act came under severe criticism by the Commission on the ground of timeliness. Under the statute, HUD is supposed to make its reasonable cause determination within 100 days unless it is impracticable to do so. According to the Commission, in 1993 HUD took an average of 151 days to close a case, an improvement of 55 days over 1991 but still far from conformity with the standard of 100 days set by Title VIII.

In a study funded by HUD and the Fannie Mae Foundation, the Center For Real Estate and Urban Policy at New York University School of Law is evaluating the election process under the Fair Housing Act. The study will involve interviews with up to 500 complainants and respondents involved in cases that have received reasonable cause charges by HUD since 1989. As part of this evaluation, we have had access to three unique databases maintained by the Federal Government. The first, the Title VIII Database, contains administrative records maintained by HUD's Office of Fair Housing and Equal Opportunity. All claims filed by complainants are logged into this database, and information is maintained about the complainant's protected group, the alleged discrimatory practice, and how HUD closed the case. Beginning in 1996, however, HUD began distinguishing between *complaints* and *claims.* A claim refers to a filing from a complainant that is not accepted for full investigation by HUD, nor referred to an FHAP agency. The basis for refusing to accept the filing can be attributable to the fact that the complainant failed to file in a timely manner, did not allege discrimination on a prohibited basis, or that an initial screening determined that continuation of the case was not warranted. Those filings designated as claims in the Title VIII Database do not have information on protected status or type of discriminatory treatment alleged.

The second source of data for this article is the ALJ Database maintained by the Office of Administrative Law Judges in HUD. The ALJ Database contains information about all 1,408 instances (charges) in which HUD has found reasonable cause to believe that a discriminatory act occurred. In addition to information about the parties to the complaint, the ALJ Database tracks the progress of cases that are adjudicated by the ALJs in HUD. The third and final data source is the DOJ Database, which contains administrative records for all cases in which one or more party elected to proceed in Federal district court. Like the ALJ Database, the DOJ Database tracks the progress of cases under the jurisdiction of the Justice Department.

Complaints Filed With HUD and FHAP Agencies

From 1989 through the end of 1997,[5] a total of 81,846 claims and complaints alleging housing discrimination were filed with HUD and FHAP agencies. As exhibit 1 shows, the total number of complaints or claims filed each year rose consistently from 1989 to 1993, when 10,190 filings were received. The number of complaints or claims then fell to 8,206 in 1995 before returning to a level above 10,000 in 1996 and 1997.

Exhibit 1

Complaints and Claims Filed With HUD and FHAP Agencies 1989–97

Fiscal Year	HUD	HUD Claims[a]	FHAP Agencies	Total
1989	3,257 50.50%	0 0%	3,193 49.50%	6,450 100%
1990	4,287 57.30%	0 0%	3,196 42.70%	7,483 100%
1991	5,836 63.50%	0 0%	3,354 36.50%	9,190 100%
1992	6,578 69.20%	0 0%	2,935 30.90%	9,513 100%
1993	6,211 61.00%	0 0%	3,979 39.00%	10,190 100%
1994	5,002 51.70%	0 0%	4,671 48.30%	9,673 100%
1995	3,105 37.80%	0 0%	5,101 62.20%	8,206 100%
1996	2,022 18.58%	4,615 42.40%	4,247 39.02%	10,884 100%
1997	1,679 16.37%	4,572 44.57%	4,006 39.06%	10,257 100%
Total	37,977 46.40%	9,187 11.22%	34,682 42.37%	81,846 100%

Source: Title VIII Database

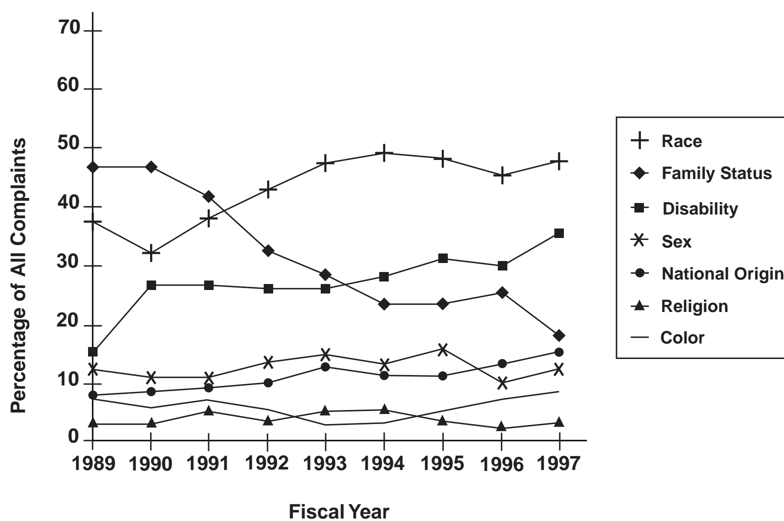
[a]In 1996 HUD began distinguishing claims from complaints. A claim is a filing from a complainant that is not accepted for full investigation by HUD or referral to a FHAP agency because it was untimely, did not allege discrimination based on a prohibited basis, or did not warrant continuation after an initial screening.

Although HUD's 1996 change in how it tracks cases makes it difficult to compare total caseloads consistently over time, contrary to the expectations of members of Congress, most complaints have been filed with and investigated by HUD, rather than FHAP agencies. This disparity reached a peak in 1992, when 69.2 percent of all complaints were handled by HUD. The pattern only reversed itself in 1995, as more State and local agencies brought themselves into conformity with Title VIII.[6] In 1997, when claims are excluded, 70.5 percent of all complaints were processed by the States or their localities.

The composition of complaints to HUD and FHAP agencies has changed somewhat over time. As exhibits 2 and 3 indicate, in the years immediately following passage of the 1988 Amendments, the proportion of complaints filed with HUD alleging discrimination based upon familial status actually was greater than the share of race complaints. For example, in 1990, 45.7 percent of all complainants claimed that they had encountered discrimination because of the presence of children in their households, compared with 33.5 percent who alleged discrimination based upon race.[7] The next largest category of complaint was households that claimed that they had been discriminated against because of a disability (24.6 percent). By 1997 the proportion of race-based complaints had increased to 43.2 percent, becoming the largest single group. Familial-status complaints fell precipitously, to only 18.2 percent, and filings by persons who felt that they had been discriminated against because of a disability increased to 35.6 percent.

Exhibit 2

Complaints Filed With HUD by Protected Status, 1989–97



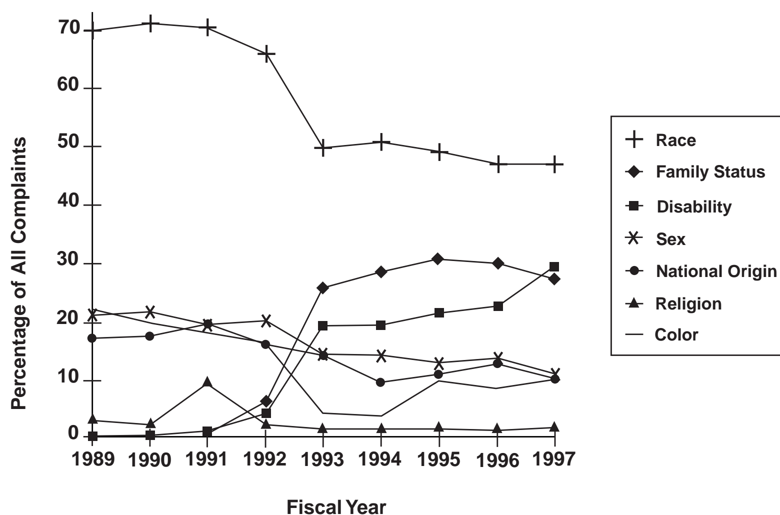
Source: Title VIII Database

Among FHAP agencies, a somewhat different pattern of filings emerges from the data. Throughout the period, race-based complaints always formed the largest share of annual filings. Nevertheless, over time their dominance has diminished somewhat as States and localities have brought their laws into conformity with the 1988 Amendments Act and added additional protected groups. In 1990, 71.7 percent of all Title VIII complaints filed with FHAP agencies including allegations of racial discrimination. By 1997 this

proportion had fallen to 43.7 percent, virtually identical to the share of race-based complaints received by HUD. Complaints alleging discrimination based upon disability increased from 0 in 1990 to 26.5 percent of the FHAP caseload in 1997; familial-status complaints grew from 0 to 23.8 percent during the same period.

Exhibit 3

Complaints Filed with FHAP Agencies by Protected Status, 1989-97



Source: Title VIII Database

The Federal Government categorizes complaints filed by the type of activity in which the respondent allegedly engaged. These categories are contained in exhibit 4. Throughout the entire period 1989–97, the most frequent allegation concerned the terms and conditions of housing. In 1989, slightly more than one-half (52.2 percent) of all complaints filed with both HUD and FHAP agencies contained allegations that their authors had received unfavorable treatment with respect to the terms, conditions, services, or use of facilities related to their homes. The proportion of terms and conditions complaints has risen gradually, reaching 67.8 percent in 1997. Conversely, the second largest category of complaints, based upon the refusal of a landlord to rent a house or apartment, declined gradually from 41.5 percent in 1989 to 30.4 percent in 1997. One somewhat surprising pattern is the relatively low proportion of complaints alleging a refusal to sell a home. In 1989, 7.3 percent of all complaints contained this allegation; in 1997 the proportion was only 2.6 percent. Similarly, allegations of lender discrimination make up a relatively small proportion of the total volume of fair housing complaints, although they did jump up a bit to more than 9 percent in 1993 and 1994, perhaps because of the widespread publicity of the results of the Federal Reserve Bank of Boston study (Munnell et al., 1992) on lending patterns and increased enforcement efforts by DOJ and the Federal bank regulatory agencies in this area.

Exhibit 4

Complaints Filed with HUD and FHAP Agencies by Type of Prohibited Action, 1989–97

Fiscal Year	Prohibited Action							
	Terms and Conditions	Refusal To Rent	Coercion	Advertising	Refusal To Sell	False Representation	Finance	Other
1989	3,413 52.19%	2,714 41.50%	200 3.06%	243 3.72%	478 7.31%	246 3.76%	219 3.35%	458 7.00%
1990	4,170 55.73%	3,286 43.91%	596 7.96%	338 4.52%	260 3.47%	301 4.02%	245 3.27%	318 4.25%
1991	5,307 57.75%	4,006 43.59%	1,085 11.81%	460 5.01%	241 2.62%	356 3.87%	321 3.49%	358 3.90%
1992	5,855 61.55%	3,949 41.51%	1,110 11.67%	180 1.89%	198 2.08%	414 4.35%	532 5.59%	400 4.20%
1993	6,431 63.11%	3,789 37.18%	1,617 15.87%	276 2.71%	252 2.47%	413 4.05%	918 9.01%	825 8.10%
1994	6,177 63.86%	3,453 35.70%	1,558 16.11%	300 3.10%	177 1.83%	362 3.74%	903 9.34%	638 6.60%
1995	5,321 64.84%	3,254 39.65%	1,125 13.71%	203 2.47%	177 2.16%	264 3.22%	434 5.29%	552 6.73%
1996[a]	4,008 63,93%	2,314 36.91%	848 13.53%	258 4.12%	159 2.54%	171 2.73%	262 4.18%	681 10.86%
1997[a]	3,854 67.79%	1,726 30.36%	672 11.82%	259 4.56%	149 2.62%	124 2.18%	280 4.93%	727 12.79%
Total	44,536 61.29%	28,491 39.21%	8,811 12.13%	2,517 3.46%	2,091 2.88%	2,651 3.65%	4,114 5.66%	4,957 6.82%

Source: Title VIII Database

[a]Beginning in 1996, claims are not included in complaints. Row percentages will add to more than 100% because complainants frequently allege more than one prohibited action.

Exhibits 5, 6, and 7 illustrate patterns of how HUD and FHAP agencies disposed of complaints or claims. Among FHAP agencies, most cases were closed either as a result of settlements or with no-cause findings. From 1989 to 1994, the rate of settlement tended to increase reaching a peak of 40.2 percent in 1994 and then dipped a bit to 36.2 percent in 1997. No-cause findings fluctuated throughout the 1989-97 period, reaching a peak of 44.8 percent of all closures in 1997. At the same time, cause findings tended to decline in both absolute and proportional terms from a high of 565 (17.0 percent) in 1990 to 178 (4.5 percent) in 1997.

For purposes of examining HUD closures, it is useful to divide the data into two periods, 1989–95 and 1995–97. During the first period, the two most frequent ways in which complaints were closed by HUD were settlements or the miscellaneous closure category which includes complaints that were filed in an untimely manner, cases dismissed for lack of jurisdiction, cases for which HUD was unable to locate the parties, cases referred to DOJ for criminal prosecution, or cases that alleged a pattern or practice of discrimination or concerned a zoning or land-use dispute. For example, in 1990, 45.1 percent of all complaints that were closed were settled by HUD, and 42.9 percent fell into the miscellaneous closure category. By 1995, however, the share of settlements increased to 49.8 percent and miscellaneous closures fell to 21.3 percent.

Throughout the period, the number of closures for which HUD found no probable cause to believe discrimination had taken place dwarfed the number of cases for which it issued charges and referred to ALJs in HUD, although the proportion of charges increased gradually. For example, in 1990 fewer than 2 percent of all complaints closed by HUD received charges, whereas by 1995, the proportion had increased to 7.55 percent. Similarly, the proportion of no-cause closures increased from 10.1 percent in 1990 to 21.4 percent in 1995.

HUD’s practice of dismissing claims, which began in 1996, seems to have had a major impact on both the proportion and absolute number of closures in the various categories. One would have expected that the miscellaneous category to decline, since there is significant overlap between claims and that category. Indeed, the numbers reflect this—in 1997, 69.5 percent of all closures were dismissed as claims; the proportion of complaints closed in the miscellaneous category that year plummeted to only 4.6 percent. However, both the number and proportion of closures in the other three categories also fell substantially. In 1997, 12 percent of all cases closed by HUD were settled, 12.7 percent received no-cause findings, and only 1.2 percent were charged. The absolute number of charges declined to 74 in 1997 from 213 in 1995.

Although allegations of racial discrimination form the single largest group of complaints filed with both HUD and FHAP agencies, they are less likely to receive reasonable cause charges as compared with the next two largest categories of complaints: those based upon familial status and disability. Exhibits 8 and 9 show the probability of complaints receiving a reasonable cause finding from HUD and FHAP agencies, respectively. Throughout virtually the entire period 1989–97, familial-status complaints had the highest likelihood of being closed with a reasonable cause finding. For example, from 1989 to 1997, of the 11,682 complaints alleging discrimination based upon familial status filed with HUD, charges were issued in 757 cases or 6.5 percent of the total. This compares with cause findings in only 359 of the 15,301 closures of race-based complaints (2.3 percent) and 211 of 9,003 complaints based upon disability (2.3 percent).[8] Similar patterns exist for cases closed by FHAP agencies. Thus in both proportionate and absolute terms, familial-status cases would dominate the caseload of the administrative law judges who would hear fair housing complaints as well as that of the courts.

Exhibit 5

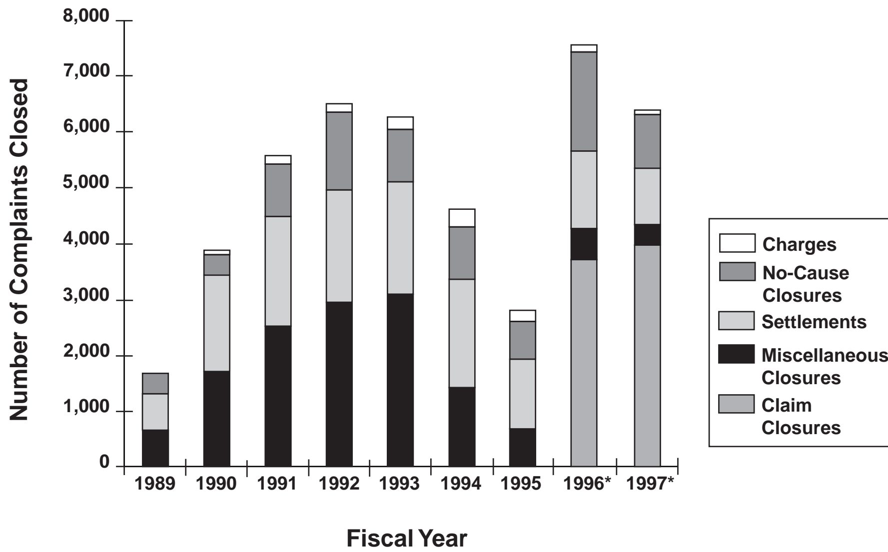
Closure by HUD and FHAP Agencies 1989–97

	HUD					FHAP Agencies			
	Settlements	Charges	No-Cause Closures	Miscellaneous Closures	Claim Closures	Settlements	Charges	No-Cause Closure	Miscellaneouse Closures
1989	583 38.36%	5 0.33%	331 21.78%	601 39.54%	N/A	927 27.10%	591 17.28%	1,340 39.17%	563 16.46%
1990	1,674 45.08%	73 1.97%	373 10.05%	1,593 42.90%	N/A N/A	861 25.87%	565 16.98%	1,290 38.76%	612 18.39%
1991	1,827 33.44%	152 2.78%	997 18.25%	2,487 45.52%	N/A	908 26.46%	508 14.80%	1,305 38.02%	711 20.72%
1992	2,057 31.58%	162 2.49%	1,317 20.22%	2,978 45.72%	N/A	1,040 27.99%	349 9.39%	1,535 41.31%	792 21.31%
1993	2,054 32.06%	210 3.28%	1,034 16.14%	3,109 48.53%	N/A	1,008 36.90%	220 8.05%	705 25.81%	799 29.25%
1994	1,956 40.07%	324 6.64%	1,212 24.83%	1,390 28.47%	N/A	1,350 40.23%	176 5.24%	939 27.98%	891 26.55%
1995	1,404 49.79%	213 7.55%	602 21.35%	601 21.31%	N/A	1,727 38.78%	195 4.38%	1,496 33.60%	1,035 23.24%
1996	1,104 15.28%	124 1.72%	1,394 19.29%	565 7.82%	4,039 55.90%	1,759 36.70%	211 4.40%	1,909 39.83%	914 19.07%
1997	757 11.99%	74 1.17%	802 12.70%	292 4.62%	4,390 69.52%	1,424 36.19%	178 4.52%	1,763 44.80%	570 14.49%
Total	13,416 36.83%	1,337 3.67%	8,062 22.13%	13,616 37.37%	8,429 23.14%	11,004 33.18%	2,993 9.02%	12,282 37.03%	6,887 20.77%

Source: Title VIII Database

Exhibit 6

HUD Closures of Fair Housing Complaints, 1989–97

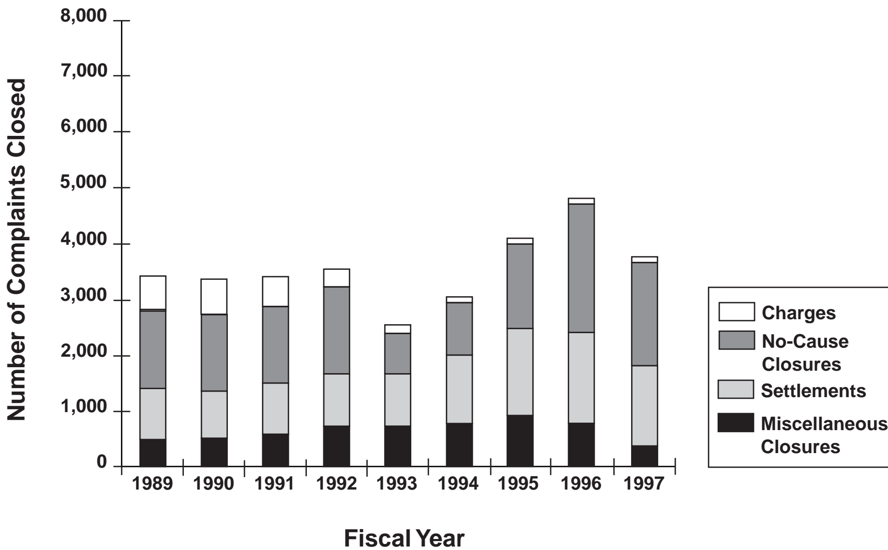


Source: Title VI II Database

*In 1996, HUD created a separate category of closures called claims. A claim is a case that is closed during the initial intake/screening process.

Exhibit 7

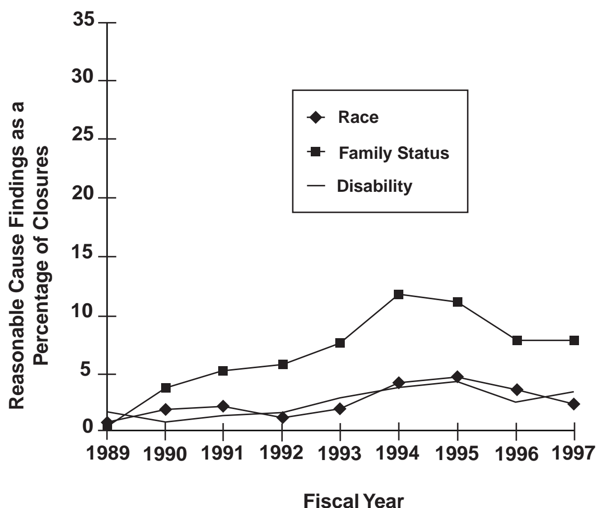
FHAP Agency Closures of Fair Housing Complaints, 1989–97



Source: Title VIII Database

Exhibit 8

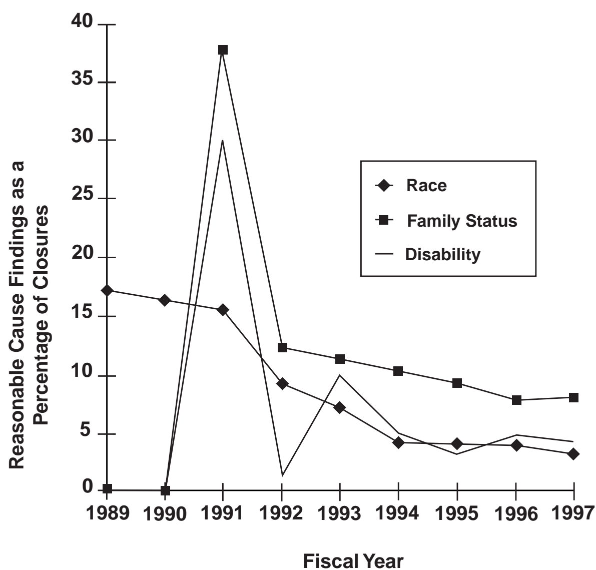
Reasonable Cause Findings as a Proportion of HUD Closures Based Upon Race, Familial Status, and Disability, 1989–97



Source: Title VIII Database

Exhibit 9

Reasonable Cause Findings as a Proportion of FHAP Agency Closures Based Upon Race, Familial Status, and Disability, 1989–97



Source: Title VIII Database

The Election Decision

Once a complaint receives a reasonable cause finding from HUD, it is docketed with the Office of the Administrative Law Judges in HUD, and each party has 20 days to make a decision about whether to have the matter adjudicated by the ALJs in HUD or in Federal district court. Similar procedures exist among the various FHAP agencies. In this section, we describe patterns in election decisions from 1989 to 1998. Because neither the Title VIII Database nor the ALJ Database tracks elections for cases charged by FHAP agencies, the discussion in this and the next section will focus solely on the Federal enforcement process.

As exhibit 5 illustrated, the number of charges issued by HUD and docketed with the ALJs in HUD has declined substantially since reaching a peak in 1994. Exhibit 10 shows the pattern of election decisions for all cases docketed in a particular year. As is apparent from an examination of the data, each year throughout the period 1989–98[9] except 1998, in the majority of the cases, one or more party elected to proceed in Federal district court. From 1989 to 1998, in 913 or 64.87% of the 1,408 charges, one or more parties elected to have their cases heard in Federal district court. The peak year for elections was 1995; in that year one or more parties selected Federal district court over the ALJs in HUD at a rate of 74.4 percent. In 1998, the same year that the number of charges reached an 8-year low, the rate of election dipped to only 44.9%.

As exhibit 11 demonstrates, in most instances the respondent makes the election decision. Overall, from 1989 to 1998, of the instances in which one or more party elected to proceed in Federal district court, the respondent, alone, made the decision in 604 cases (two-thirds of the time). The complainant made the decision in 247 cases or 27.1 percent of the time and both parties made a decision in the remaining 62 cases or 6.8 percent of the time. The disparity in who was making the election decision has fluctuated, dropping to its lowest level in 1995, when respondents made the decision alone only one-half of the time and then widening again in the last 3 years.

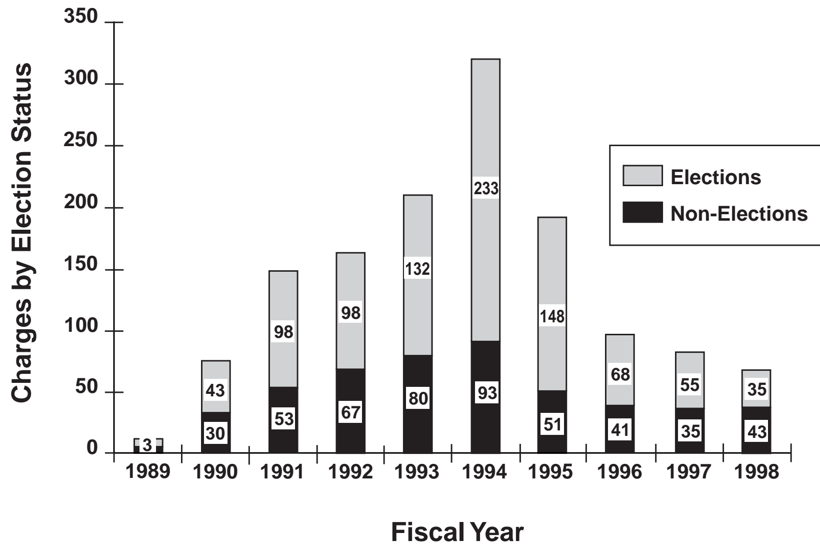
The high probability of one or more parties electing to have their complaints heard in Federal district court is consistent across different types of claims. As exhibit 12 illustrates, among the three largest categories of complaints, rates of election are highest in cases alleging discrimination based upon disability (68 percent) and race (67 percent). Election rates for familial-status discrimination cases are somewhat lower (61 percent).

Resolution of Fair Housing Complaints

A comparison of the resolution of cases in Federal district court to those before the ALJs in HUD may provide some insight into why rates of election have been so high and what the impact of these high rates has been on the parties. Because DOJ and the Office of ALJs in HUD use different methods to track cases,[10] it is necessary to standardize the data from the two sources. The following method was utilized for this article. Where more than one party brings a claim against the same respondent, HUD frequently issues more than one charge. For purposes of this analysis, however, data from multiple charges are combined into one "case" whenever the charges list the same respondent and have the same docket date. From 1989 to 1998, a total of 1,073 cases (defined in this manner) were docketed with the Office of ALJs in HUD. Because DOJ does not utilize the same identifiers as HUD or the Office of ALJs in HUD, election cases are tracked by party name and docket date. Ultimately, information was found in the ALJ Database and DOJ Database to account for 1,016 of the 1,073 cases, or 95 percent of the total. Of these 1,016 cases, 970 had been closed by the end of fiscal year 1998 and are used in our analysis.

Exhibit 10

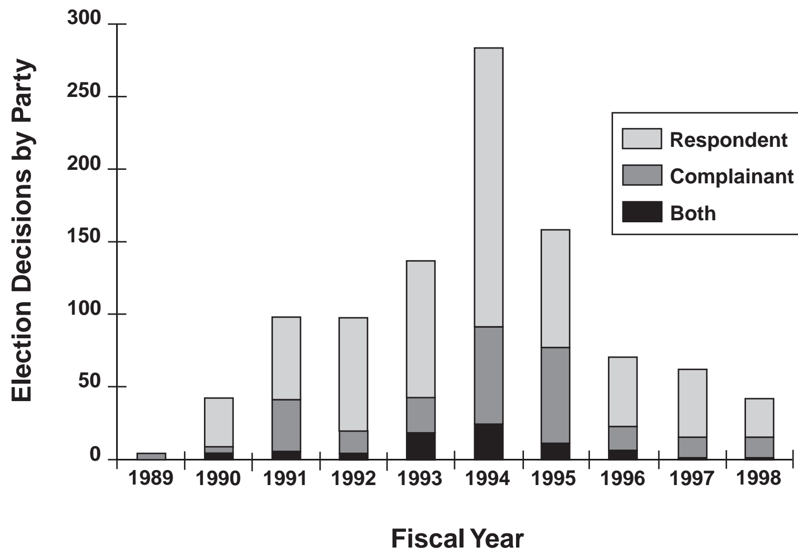
Election Decisions, 1989–98



Source: ALJ Database

Exhibit 11

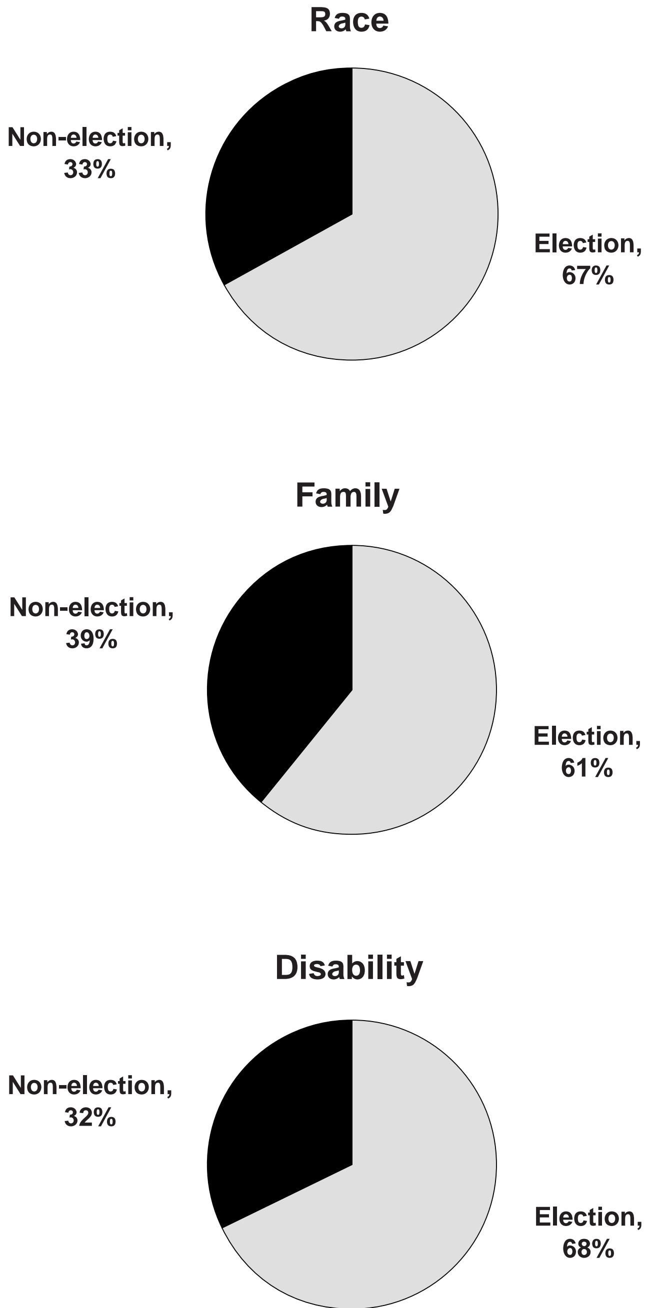
Party Electing to Proceed in Federal District Court, 1989–98



Source: ALJ Database

Exhibit 12

Cumulative Election Decisions by Basis of Claim, 1989–98



Source: ALJ Database

Exhibit 13

Outcomes of Closed Fair Housing Cases Charged by HUD, 1989–98

	Election Status		
Result	ALJs in HUD	Federal District Court	Total
Decision in Favor of Complainant	78 19.7%	19 3.3%	97 10.0%
Decision in Favor of Respondent	14 3.5%	10 1.7%	24 2.5%
Settlement	268 67.7%	506 88.2%	774 79.8%
Other[a]	36 9.1%	39 6.8%	75 7.7%
Total	396 100.0%	574 100.0%	970 100.0%

Source: ALJ Database and DOJ Database

Note: A case may be composed of more than one change.
[a]Category includes cases withdrawn or dismissed for reasons that do not go to the merits.

Exhibit 13 contains information about the outcomes of all "cases" charged by HUD. Overall, a decision was rendered in favor of the complainant in 10.0 percent of the cases and in favor of the respondent in 2.5 percent of the cases. The lion's share of cases—79.8 percent—was settled.

Cases under the jurisdiction of ALJs in HUD were more likely to be resolved on the merits; almost one in five were decided in favor of the complainant, and 3.5 percent were decided for the respondent. Although substantially fewer cases were decided on the merits in Federal district court, of those that were, the complainant also had a greater likelihood of success than the respondent. Rates of settlement were much higher in Federal district court; fully 88.2 percent of all closed cases were settled in that forum, as compared with 67.7 percent of the cases that remained within the jurisdiction of the ALJs in HUD.

On average, relief paid to complainants or the Government tended to be somewhat higher in Federal district court.[11] Because, for our purposes, more than one charge might be combined in a single case, we standardize the damage awards for purposes of comparison by dividing the total damages for each case by the number of charges in the case. Exhibit 14 shows the median compensation and penalties per charge paid to prevailing complainants and the Government as well as similar amounts paid as a result of settlements. Among cases in which there was a monetary award, the median monetary award per charge for prevailing complainants in Federal district court ($7,500) was 12 percent higher than the median for cases decided by the ALJs in HUD ($6,704). The disparity was even greater for settlements. Median settlement awards per charge in Federal district court ($6,250) were more than 50 percent higher than the amounts obtained in cases that remained within the jurisdiction of the ALJs in HUD.

Exhibit 14

Median Amounts of Money Received by Complainants and Government in Closed Fair Housing Cases, 1989–98

	Median Amount Received Per Charge[a]	
Source of Monetary Award	**ALJs in HUD**	**Federal District Court**
Prevailing party		
Compensation to Complainants[b]	$6,704	$7,500
Civil Penalties	$5,000	$3,333
Settlement	$4,118	$6,250
Compensation to Complainants[b]	$1,000	$5,813[c]
Civil Penalties		

Sources: ALJ Database and DOJ Database

Note: A case may be composed of more than one charge.
[a]Total compensation and civil penalties in a case are divided by the number of charges in that case.
[b]Compensation to complainants includes compensatory and punitive damages.
[c]Median figures for civil penalties awarded in Federal district court should be interpreted with caution because the number of observations is very small.

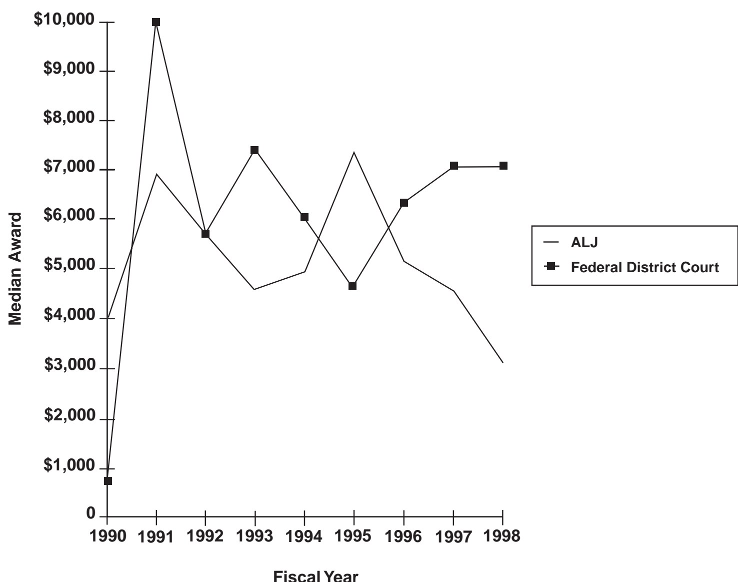
Differences in financial amounts received by complainants or the Government are even greater when one focuses on the larger awards per charge obtained as a result of judgments or settlements. From 1989 to 1998, twice the number of awards per charge in excess of $50,000 were obtained by complainants in Federal district court (24 cases) as compared with complainants before the ALJs in HUD (12 cases).[12]

Exhibit 15 shows the median financial amounts per charge awarded to both prevailing or settling complainants or the Government over time. In all but 3 of the 9 years, the median award per charge was greater for cases in which one or more of the parties elected to proceed in Federal district court.[13] In 1998, the disparity in absolute terms reached its highest level; the median award per charge was $7,000 in Federal district court and $3,475 in cases under the jurisdiction of the Office of ALJs in HUD.

Perhaps the most striking difference between the two forums concerns the time it takes for a case to be resolved. Exhibit 16 shows the average number of days it took for a case to be resolved in both Federal district court and before the ALJs in HUD. For decisions on the merits, it took more than twice as long for a case to be resolved in Federal district court. On average, it took 1.5 years for a case to be reach a verdict when one or both parties elected to proceed in Federal district court. This compares to 8.5 months for cases decided by the ALJs in HUD. For cases that were settled, it took, on average, almost 1 year in Federal district court and 7 months for cases under the jurisdiction of the ALJs in HUD to be resolved.

Exhibit 15

Median Financial Award Per Charge in Closed Fair Housing Cases Charged by HUD, 1990–98



Source: ALJ Database and DOJ Database

Exhibit 16

Time for Resolution of Cases Charged by HUD 1989-98

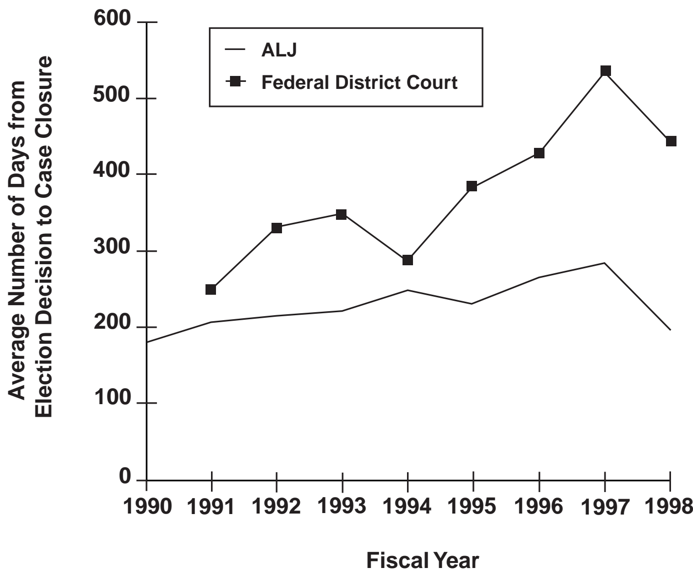
	Average Number of Days	
Type of Resolution	**ALJs in HUD**	**Federal District Court**
Decision for Complainant or Respondent	256	547
Settlement	209	352

Source: ALJ Database and DOJ Database
Note: A case may be composed of more than one change.

Finally, as exhibit 17 indicates, the disparities in the time it takes to resolve fair housing complaints have grown in recent years. For 1991 through 1996, on average, it took 102 days longer for a case to be resolved (on the merits or settled) in Federal district court as compared with ALJs in HUD. For 1997 and 1998, however, this disparity has increased to an average of 249 days.

Exhibit 17

Time for Resolution of Closed Fair Housing Cases Charged by HUD 1990–98



Source: ALJ Database and DOJ Database

Conclusion

The Fair Housing Amendments Act was adopted by Congress in 1988 primarily to provide an effective and efficient way for people who felt that they had been unlawfully discriminated against to vindicate their rights. Whether the provisions of the Amendments have achieved the objectives of its sponsors is open to debate. By all accounts, discrimination in housing remains a major problem throughout the United States. As some observers predicted, the expansion of protected groups in the Amendments may have drawn some resources and attention away from race-based enforcement. Although race-based complaints still constitute the largest category of complaints filed under Title VIII, they have a much lower probability of receiving a reasonable cause finding than do complaints that allege discrimination based upon familial status.

As predicted by the sponsors of the 1988 Amendments, settlements are the primary way that cases meeting jurisdictional requirements are resolved. Settlements and conciliation occur at two stages in the process. A substantial proportion of all cases filed, in some years between 40 and 50 percent, settle before the time HUD or a FHAP agency determines whether reasonable cause exists to believe that discrimination occurred. In addition, after a cause finding, settlements and conciliation are the most common way for a case to be resolved. Between 33 and 90 percent of all cases under the jurisdiction of the ALJs in HUD or DOJ, respectively, settle.

Perhaps surprisingly, one of the principal innovations of the 1988 Amendments, adjudication by ALJs in HUD, is only used in a minority of the cases. In most years, close to two-thirds of all the cases with reasonable cause findings are resolved in Federal district court, typically because the respondent has elected to proceed in that forum. The consequences of this disproportionate pattern of elections seem to be ambiguous. Because settlements were somewhat less prevalent, complainants tended to both win and lose more often when they had their cases heard by the ALJs in HUD, although the likelihood of winning was much higher than losing. Complainants who prevailed as well as those who settled, however, were likely to receive higher financial compensation in Federal district court than before the ALJs in HUD. These higher average awards are likely influenced by the presence of punitive damages in cases decided in Federal court. From the complainant's perspective, however, the price of higher damage awards and settlements in Federal court is time. On average, it takes much longer for cases to be resolved in Federal court than before the ALJs in HUD.

Administrative data from the Federal Government about enforcement of complaints alleging violations of the Fair Housing Act raise almost as many questions as they answer. Further research is needed to understand why the rate of newly charged cases has fallen so precipitously in recent years and why most parties seem to be bypassing the administrative adjudication procedures set up by Congress in 1988. While data from the Government's administrative records cannot tell us why these patterns have developed, they do suggest that they have important consequences.

Authors

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Notes

1. In 1974 Congress amended the Fair Housing Act to add sex as a protected status.

2. For example, during the first year of the Reagan Administration DOJ did not begin any Title VIII cases and filed only two in 1982. According to Massey and Denton (1993), it was not until the last year of the Reagan Administration that the total number of filings equaled the yearly average under the Carter administration.

3. Indeed, Representative Rodino made an analogy between the Federal administrative process and States and local enforcement of antidiscrimination laws by saying, "The highly successful experience of those agencies bears out a prediction made about H.R. 1158—administrative enforcement is effective primarily because it must be used often. Cases before those agencies are almost always settled prior to hearing." (Rodino, 1997.)

4. Indeed, one of the few references to this issue in the House Judiciary Committee report, the debate on the floor of Congress and in hearings was the concern voiced by former Assistant Attorney General William Bradford Reynolds that "housing discrimination based on familial status is not so wholly arbitrary that it should drain Federal resources from the enforcement effort against more egregious forms of housing discrimination such as those based on race, color, national origin, sex, religion, and handicap." (Reynolds, 1987.)

5. All years reported for the three databases are fiscal years, which commence on October 1 of the previous year. With respect to the Title VIII Database, our data are complete for fiscal year 1989 through fiscal year 1997. With respect to the ALJ Database and the DOJ Database, data are complete through fiscal year 1998.

6. In 1992, 7 States and 12 localities were certified as having laws substantially equivalent to the Fair Housing Act. By 1995 these numbers had increased to 38 States and 29 localities.

7. Some complaints allege both race and familial status discrimination. Because households can be part of more than one protected group, the total number of bases of claim sum to more than 100 percent.

8. Correspondingly, race-based complaints had a higher probability of receiving no-cause findings. From 1989 to 1997, HUD closed 26.7 percent of all complaints alleging racial discrimination with no-cause findings, compared with 16.0 percent of familial status complaints and 21.5 percent of disability complaints.

9. The number of election decisions each year depicted in exhibit 10 is not equal to the annual number of charges set forth in exhibit 5. The reason for this is twofold. First, an interval of time typically exists between when a case is charged and when the election decision is made. Upon issuing a charge, HUD must file the papers with the ALJs in HUD. In addition, under the statute, each party has 20 days to make an election decision. Therefore an election decision may be made in the year following the issuance of a charge. Second, data in this section were obtained from the ALJ Database, whereas the data in exhibit 5 were derived from the Title VIII Database. Due to different methods of counting cases and charges, small differences exist in the numbers obtained.

10. In particular, the Office of ALJs in HUD typically tracks each case separately by complainant, whereas the DOJ combines complainants when the same respondent was involved.

11. In addition to awards of damages, complainants frequently receive injunctive relief (for example, requirements that landlords engage in employee training or post signs that they do not discriminate). The ALJs in HUD ordered injunctive relief as part of 71.4 percent of the settlements and decisions in favor of complainants. The comparable rate of injunctive relief for cases that elected to proceed in Federal district court was 60.2 percent.

12. Of course, one would have expected that more awards in excess of $50,000 would be obtained in Federal district court because there were roughly 1.5 times the number of awards in that forum as compared with the ALJs in HUD. Nevertheless, the disparity in awards of $50,000 or more is significantly greater than this disparity in total awards.

13. However, in 1 of the 3 years when the median HUD ALJ award per charge exceeded the amount per charge in Federal district court (1990), only one case is represented for Federal district court.

References

Fish, Hamilton. 1988. *Congressional Record.* 100th Congress 2nd Session, H6498. Washington, DC: U.S. Congress.

Henderson, Wade J. 1987. Testimony. *Fair Housing Amendments Act of 1987.* Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 100th Congress, 1st Session. Washington, DC: U.S. Congress.

Kennedy, Edward. 1988. *Congressional Record.* 100th Congress 2nd Session, S10455. Washington, DC: U.S. Congress.

Massey, Douglas S., and Nancy Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass.* Cambridge, MA: Harvard University Press.

Munnell, Alicia, Lynn E. Browne, James McEneaney, and Geoffrey M.B. Tootell. 1992. *Mortgage Lending in Boston: Interpreting HMDA Data.* Boston: Federal Reserve Bank of Boston.

Pierce, Samuel R. 1987. Testimony. *Fair Housing Amendments Act of 1987.* Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 100th Congress 1st Session. Washington, DC: U.S. Congress.

Reynolds, William Bradford. 1987. Testimony. *Fair Housing Amendments Act of 1987.* Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 100th Congress, 1st Session. Washington, DC: U.S. Congress.

Rodino, Peter W. 1987. Statement. *Fair Housing Amendments Act of 1987.* Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 100th Congress 1st Session. Washington, DC: U.S. Congress.

Thurmond, Strom. 1988. *Congressional Record.* 100th Congress 2nd Session, S10457. Washington, DC: U.S. Congress.

U.S. Commission on Civil Rights. 1994. *The Fair Housing Amendments Act of 1988: The Enforcement Report.* Washington, DC: U.S. Commission on Civil Rights.