Testimony of

Shanna L. Smith
President and CEO
National Fair Housing Alliance

Before the

United States House Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Hearing on the Enforcement of the Fair Housing Act of 1968

June 12, 2008

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Members of the Committee, my name is Shanna Smith, and I am the President and CEO of the National Fair Housing Alliance (NFHA) located in Washington, DC. I have been NFHA since its founding in 1988. Previously, I was the Executive Director of the Toledo Fair Housing Center for fifteen years. Thank you for inviting me to speak with you today.

Founded in 1988 and headquartered in Washington, DC, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Through comprehensive education, advocacy and enforcement programs, NFHA protects and promotes equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

The members of the Alliance are dedicated to working to develop and implement strategies to reduce, and eventually eliminate, racially, ethnically and economically segregated housing patterns and to make all housing accessible regardless of race, color, religion, sex, familial status, disability or national origin. Since 1990, the Alliance has focused on developing investigative tools in the areas of discriminatory sales, lending and homeowners insurance practices. NFHA has shared with its membership as well as staff of federal, state and local governmental enforcement bodies the techniques used to investigate and test complaints in these areas. Additionally, the Alliance remains committed to providing programs that focus on prevention of discriminatory conduct and will continue to work with members of the housing, lending and insurance industry to provide education and outreach, guidance and self-testing programs.

The purpose of this testimony is to comment on the implementation of the fair housing enforcement programs of the U.S. Departments of Justice and Housing and Urban Development (HUD) and make recommendations that will help further fair housing compliance and promote residential integration in the United States.

Lack of enforcement of fair housing laws is the main cause of the mismatch between the high incidence of housing discrimination and the low incidence of complaints of housing discrimination. Landlords, real estate agents, lenders, insurance agents and others have limited fear of getting caught in the act of discriminating simply because neither the federal, state nor local governments have made fair housing enforcement a priority. Even those who are prosecuted often pay such a small penalty that discrimination becomes just another cost of doing business. As a result, housing providers continue to discriminate and our country remains highly segregated.

The Fair Housing Act, passed by Congress 40 years ago, stated that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the country."

The Fair Housing Act has two purposes as outlined in the law, legislative history and discussed by the U.S. Supreme Court in its decision in the 1972 case *Trafficante v Metropolitan Life.*

1. to eliminate housing discrimination in the United States, and
2. to promote residential integration.

We are not yet there as a nation – and we need real changes in fair housing enforcement to ever get there. This is why the National Fair Housing Alliance, the Leadership Conference on Civil Rights Education Fund (LCCREF), Lawyers' Committee for Civil Rights Under Law (LCCRUL) and the NAACP Legal Defense Fund have created the National Commission on Fair Housing and Equal Opportunity to conduct four regional hearings across the country this year that will gather testimony, research, data and information on fair housing enforcement and the persistence of residential segregation forty years after the passage of the Fair Housing Act. The Commission will be chaired by former HUD Secretaries Jack Kemp and Henry Cisneros. The Commission will culminate in a report at the end of the year that outlines the recommendations on how we can move forward together to meet the goals of the Fair Housing Act.

JUSTICE DEPARTMENT'S DWINDLING INVOLVEMENT IN FAIR HOUSING ENFORCEMENT

Ten years ago on July 17, 1998, I testified before this subcommittee about ways in which the Justice Department could increase its fair housing enforcement. I had excellent examples of the work that Justice was doing to litigate mortgage lending and real estate sales and bring sexual harassment cases against landlords. While the Reagan Justice Department refused to accept that sexual harassment in housing was a violation of the Fair Housing Act, beginning in 1993 Justice not only investigated these complaints, but secured relief for victims and insured that these landlords would never come into contact with female tenants or their children. Justice continues to work to protect women and children against sexual harassment by landlords. We can also credit Justice for bringing some rental discrimination cases, doing a pretty good job of investigating and resolving through consent decrees design and construction cases and the Department does very good work on sexual harassment in housing cases. By it has failed to address race and national origin issues in sales, lending and insurance.

DOJ Filed Only 35 Cases in 2007

The Department of Justice has filed fewer fair housing cases in the past two years than in previous years. DOJ filed 35 fair housing cases in 2007 and 31 cases in 2006, compared to 42 in 2005, and down from 53 in 2001. The number of cases filed each year since 2003 is significantly lower than the number of cases filed from 1999-2002.

Total DOJ Cases Filed by Year								
FY99	**FY00**	**FY01**	**FY02**	**FY03**	**FY04**	**FY05**	**FY06**	**FY07**
48	45	53	49	29	38	42	31	35

DOJ's Fair Housing Authority and Mandate

Segregation and discrimination in America are so systematic and so widespread that nothing short of major institutional solutions will do. Indeed, this was the perspective of the Fair Housing Act and its 1988 Amendments, and these pieces of legislation place much authority and responsibility in the hands of the Department of Justice. DOJ is the principal legal authority tasked with enforcing federal fair housing laws, and it has both a clear mandate and wide discretion with respect to fair housing enforcement.

The 1968 Fair Housing Act gave DOJ the authority to prosecute cases involving a "pattern or practice" of housing discrimination, as well as cases involving acts of discrimination that raise "an issue of general public importance." As LCCREF's report *Long Road to Justice* documents, the Civil Rights Division of DOJ used this authority successfully to secure negotiated consent decrees and to challenge discriminatory zoning ordinances in court. One such zoning case involving the city of Black Jack, Missouri, resulted in the court's ruling that an ordinance needn't be intentionally discriminatory to violate the Fair Housing Act. According to the court, "Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivation, but more importantly, because…whatever our law was once,…we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[1] The authority to prosecute such cases involving "disparate impact" is an important and powerful tool, one that ought to be used vigorously to combat the discrimination that exists today in the housing and lending markets.

In addition to these tools, the Fair Housing Amendments Act of 1988 added to DOJ's fair housing authority and responsibilities. When, after investigation, HUD issues a Charge of Discrimination in response to a fair housing complaint, the complainant or respondent may elect to have the claims asserted either in an administrative proceeding *or* in federal court. If the latter is elected, DOJ "shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court" on behalf of the aggrieved person within 30 days.[2] The 1988 Amendments also require HUD to refer to DOJ all matters involving alleged fair housing violations by any state or local zoning or land-use laws, and the Attorney General now has authority to initiate civil lawsuits in response to these referrals.[3] DOJ is also permitted to seek monetary relief in "pattern or practice" cases ($50,000 for a first violation and up to $100,000 for subsequent violations).[4]

Finally, the Civil Rights Division of DOJ has the authority to establish fair housing testing programs, which it first did in 1991. The division also subsequently established a fair lending

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[1] *United States v. City of Black Jack*, 508 F2nd 1179, 1184-86 (8th Cir. 1975). See the discussion in *Long Road to Justice*, The Leadership Conference on Civil Rights Education Fund, Sept. 2007. Available at reclaimcivilrights.org.

[2] 42 U.S.C. 3612.

[3] See Bill Lann Lee, "An Issue of Public Importance," in *Cityscape: A Journal of Policy Development and Research*, v. 4, n. 3 (1999), pp. 35-56, p. 47n17.

[4] Ibid., p. 37.

program designed to challenge discriminatory lending mortgage practices and to educate lenders of their obligations under the Fair Housing Act and Amendments.

DOJ's Recent Record

As documented above, the Department of Justice has filed fewer fair housing cases during the past two years than in previous years. DOJ filed 35 fair housing cases in 2007 and 31 fair housing cases in 2006, compared to 42 in 2005, and down from 53 in 2001. While we do not dispute that DOJ has filed several cases with important outcomes, the decline in the number of cases and the failure to focus on patterns that contribute to segregated living in this nation merit serious concern.

The Department provided to NFHA data for Fiscal Years 1999-2007. The data reveal some disturbing trends:

- In the four years 1999-2002, DOJ brought 195 cases; in the five years 2003-2007, DOJ brought 175 cases.
- In the four years 1999-2002, DOJ brought 35 pattern and practice cases based on race; in the five years 2003-2007, DOJ brought 24 pattern and practice cases based on race.
- In the four years 1999-2002, DOJ filed 24 pattern and practice cases based on its testing program; in the five years 2003-2007, DOJ filed 11 pattern and practice cases based on its testing program.
- In the four years 1999-2002, DOJ filed 15 *amicus curiae* briefs; in the five years 2003-2007, DOJ filed 3 *amicus* briefs.

One reason for the decline in filed cases may be that DOJ has recently taken the stance that it is not required to file "election" cases from HUD, insisting that it may instead perform additional investigations, thereby duplicating HUD's activities and prolonging the process. One example occurred in Chicago where DOJ refused to file a federal suit after HUD referred an election case, even in spite of intervention by a Congressional representative. The case eventually settled – but the DOJ's actions served to undercut the relief provided to the complainants in the case.

Another significant problem is DOJ's refusal to prosecute disparate impact cases. In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination.[5] The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints. Disparate impact cases are crucial in the fight against housing discrimination. As the courts emphasized in permitting disparate impact cases in the first place, many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact that is at odds with the purpose of fair housing legislation. Recent examples of proposed ordinances and laws that have prima facie disparate impact include (1) placing a limit on the number of persons per bedroom, which has a disparate impact against families with children, and (2) imposing a minimum loan or insurance amount, which has a disparate impact against properties in minority neighborhoods.

[5] HUD HUB Directors' meeting (Rhode Island, 2003).

In the realm of mortgage lending, the Civil Rights Division failed to recognize and combat the deleterious and discriminatory effects of practices within the subprime market. It also did little to induce or require conventional lenders to operate within minority communities. Although it brought a series of successful, high-profile lawsuits against mortgage lenders engaged in "pattern or practice" discrimination in the 1990s, DOJ has prosecuted only a handful of new lending discrimination cases since 2000, despite the significant discriminatory predatory lending that has been going on throughout the past several years.

Moreover, despite continuing indications of redlining in the homeowners insurance industry, the Division has missed several opportunities to confront the discrimination directly and to correct underlying practices. Aside from two cases in the mid 1990s against the insurance companies Nationwide and American Family, the Division has missed the opportunity to take enforcement efforts in this area, leaving it to the private fair housing groups and their lawyers. One suit brought against Nationwide by Housing Opportunities Made Equal in Richmond, Virginia, was instigated by the housing group's dissatisfaction at the Housing Division's settlement with Nationwide. The subsequent suit resulted in the largest jury verdict ever in a Fair Housing Act case – over $100 million dollars.

Mortgage Lending Investigation at the Justice Department

When I testified in 1998, I applauded the ground breaking work of the Justice Department in mortgage lending:

- 1992 consent decree with Decatur Federal Savings Loan brought to light redlining on a massive scale and exposed how subprime lenders provided the only loan option for African American borrowers. Justice created maps showing that mortgage loans were indeed being made in Atlanta's moderate, middle and high income African-American neighborhoods, illustrating there was a market for conventional or prime loans.
- 1994 settlement with Chevy Chase Bank/B.Saul Mortgage illustrated that redlining was a serious problem in the nation's capital. The consent decree included important affirmative marketing programs and a commitment to make loans and open branches in Black neighborhoods. While fair housing and community groups applauded the consent decree, members of the banking industry strongly criticized the Department saying it had overstepped its bounds.
- 1996 Long Beach Bank was Justice's first official predatory lending settlement which put the subprime industry on notice that charging higher rates and fees to women and people of color was illegal. This case made it clear that whether or not the bank engaged in such practices or purchased loans from brokers that included predatory schemes, the bank would be liable.

In the late 1980s and early 1990s, Justice assumed its leadership role by taking on the complex lending cases that previously were pioneered by fair housing centers in Cincinnati and Toledo, Ohio. The Toledo Fair Housing Center, where I was executive director before coming to Washington, brought the first fair lending case in 1988 against a private mortgage insurance company for denying insurance based on the age and value of the home. We had been prepared

for protracted litigation when the Justice Department weighed in 1989 by telling the parties that it was preparing an amicus brief in support of the plaintiffs, affirming that the Fair Housing Act did cover private mortgage insurance. Just the inquiry by Justice into the case bought the defendants to the table and resulted in a settlement that required the company to eliminate its discriminatory lending practices.

Yet today, in the face of countless studies demonstrating the targeting of minority homebuyers by unscrupulous lenders, Department of Justice reported resolving four fair lending cases in 2007, three of which involved auto financing. Compare this to the 1,245 complaints processed by private fair housing groups in 2007. This is a very sad commentary –historically the Department did excellent work in mortgage lending. In 1995, when Justice brought the Long Beach Bank case, it learned about the practices within the subprime market. And the complaints resolved in Grand Rapids, Chicago, and Gary between 2002 and 2006 are especially important because they included appropriate affirmative relief. (Please note that these investigations were initiated in the 1990s.) We have to wonder why the Department did not investigate Countrywide Financial or New Century or Argent—the largest subprime lenders.

Questions for Justice on Mortgage Lending: When we examine the foreclosure crisis in America, we can identify policies and practices by many lenders, appraisers, and real estate agents and Wall Street that assured people would lose their homes. So the question is "Where was the Justice Department when civil rights advocates and consumer advocates identified the institutional players?"

Testing Program at the Justice Department

In 1998, I asked this subcommittee for more money for Justice to expand its testing program into real estate sales practices and homeowners insurance companies underwriting issues. I noted the very important role Justice played in an important sales case against the largest real estate broker in Alabama (*Debra Byrd and Patricia Humes v. First Real Estate Corporation of Alabama et al*.).

I was certain in 1998 that more resources for testing and staff for the Department's Housing and Civil Enforcement Section would result in important investigations and litigation that challenge the systems of discrimination blocking equal access to apartments, homes, loans and insurance.

The private fair housing movement has historically been in the forefront of identifying, testing, and litigating fair housing complaints; however, in 1990 several pattern and practice complaints alleging discriminatory rental procedures were referred to the Justice Department. The referral of cases to the Department is significant because between 1980 and 1989 there was virtually no cooperation between the Department and private, non-profit fair housing organizations on matters under investigation or litigation by fair housing organizations. There are several reasons the fair housing groups began to cooperate with the Department and to provide information and case referrals. The first reason was a commitment from the Assistant Attorney General for Civil Rights and the Chief of the Housing and Civil Enforcement Section of the Civil Rights Division to become fully engaged in fair housing litigation as authorized under the Fair Housing

Amendments Act of 1988. The most important reasons, however, were the way Justice handled the initial cases referred to it and its commitment to seek funding for a testing program.

However, for the past seven years we have seen little or no evidence that the testing program has resulted in investigations and litigation involving discriminatory polices or practices by real estate sales companies, mortgage lenders, mortgage brokers, appraisers, or homeowners insurance companies. In fact, the Department's website says that over the thirteen years, the testing program resulted in 79 cases. According to the website's numbers and other Justice documents, 60 out of the 79 cases were brought before 2001.

This Committee should ask the Justice Department how many tests have been conducted and in what area: rental, sales, lending and/or insurance. The career staff at the Department's Housing and Civil Enforcement Section are dedicated to fair housing enforcement; however, after finding out how many tests have been completed since 2000, the follow up question is "Has the Department failed to authorize the filing of fair housing complaints?"

Questions for Justice on Its Testing Program: Did the Department stifle testing in mortgage lending to combat predatory practices? Wall Street investors paid a premium to lenders/brokers for ARMs. Everyone knows that ARMs were originally created for niche market: people with incomes that rise rapidly living in neighborhoods where homes have steady appreciation. The option ARM, 2/28 and 3/27 ARMS, and interest only loans were not designed for the average homebuyer or homeowner. When these loans first appeared, the underwriting required proof of earning potential and appreciation of homes. Did the Department have a plan to investigate Wall Street for providing the incentive to lenders to push exotic loans in the markets? Did the Department look at the low doc and no doc loan products to evaluate its abuse and the impact these loans products would have on people color, women and minority neighborhoods?

What was its plan to investigate and test appraisal companies using automated systems that perpetuated inflated appraisals in neighborhoods of color? If the Department had identified and stopped the churning of the artificially constructed housing bubble, would America have averted this foreclosure crisis? Where are the investigations and testing of mortgage brokers who changed loans terms and conditions at closing from 30 year fixed to exploding ARMs? Where are the insurance complaints? Did the Department test insurers to see if credit scoring was applied equally to all homeowner applicants? Did the department examine if the insurers paid claims based on policies or the race or national origin of the policy holder following the hurricanes in 2005? Where are real estate sales steering complaints?

HUD'S MEAGER FAIR HOUSING ENFORCEMENT EFFORT

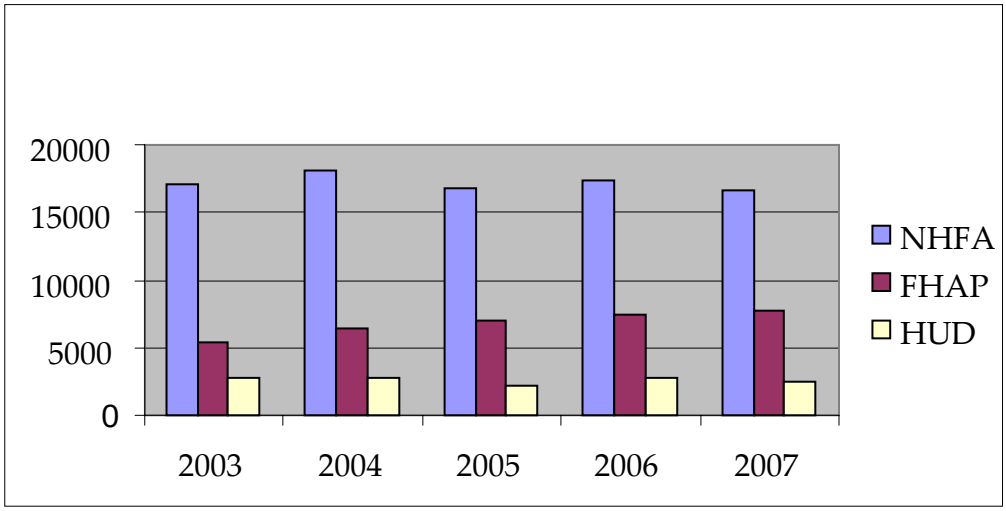
Each year NFHA collects data from both private fair housing groups and government entities in order to present an annual snapshot of fair housing enforcement in America. And each year these numbers paint the same picture: even compared to an extremely conservative estimate of the gross number of annual fair housing violations, the aggregate number of complaints documented and investigated by all polled entities is miniscule. The following chart reports on complaint filings and (in the case of DOJ) case filings reported by private and governmental fair

housing agencies and organizations since 2003. Fair Housing Assistance Program (FHAP) organizations are state and local government organizations that receive HUD funding to investigate and process fair housing complaints. Under the Fair Housing Act, HUD is required to refer cases to these agencies if the agencies are "substantially equivalent" under the law, i.e. that the state or local law is substantially equivalent to the federal law.

TOTAL FAIR HOUSING COMPLAINTS FILED						
Agency	**Claims/ Complaints**	**2003**	**2004**	**2005**	**2006**	**2007**
NFHA	Complaints	17,022	18,094	16,789	17,347	16,834
FHAP *	Claims and Complaints	5,352	6,370	7,034	7,498	7,705
HUD *	Claims and Complaints	2,745	2,817	2,227	2,830	2,449
DOJ *	Case Filings	29	38	42	31	35
Totals		**25,148**	**27,319**	**26,092**	**27,706**	**27,023**

* HUD, FHAP and DOJ data are for Fiscal Year 2007. DOJ data represent case filings of HUD Election and Enforcement cases, and Pattern or Practice cases. DOJ's jurisdiction under the Fair Housing Act is limited to pattern or practice cases and cases referred by HUD. HUD, FHAP and NFHA data represent fair housing complaints received and/or processed.

Or shown in another way:



While there are at least 4 million fair housing violations annually, only 27,023 complaints were filed in 2007. Private fair housing groups processed 16,834 of the 27,023 complaints and cases filed in 2007 – a total of 62 percent of all complaints. (This number does not account for double counting of complaints that are referred to HUD and FHAP, and for which fair housing groups are often not given credit for filing.) HUD processed only 2,449 complaints and state and local agencies (FHAPs) processed 7,705. This is a decrease for HUD from last year and modest increase for FHAP agencies from last year. As shown in the chart that follows, the number of cases HUD is processing has drastically declined since the 1992 high of 6,578 complaints. (NOTE: Private fair housing organizations continue to process more than 60 percent of the complaints, despite the fact that over the past five years more than 25 organizations have closed or been on the brink of closing.)

Number of HUD Administrative Complaints by Year	
1990	4286
1991	5836
1992	6578
1993	6214
1994	5006
1995	3134
1996	2054
1997	1808
1998	1973
1999	2198
2000	1988
2001	1902
2002	2511
2003	2745
2004	2817
2005	2227
2006	2830
2007	2449

Aged Cases

Although the Fair Housing Act regulations require that HUD process a case in 100 days or less (except for complex or systemic cases), HUD routinely has a significant "aged" case load, and many cases are open for months and even years and never investigated. In its annual report to Congress released April 1, 2008, *HUD reported that 1,353 cases passed the 100 day mark in FY07, 181 more than in FY06.*[6] This does not include the number of cases that were aged prior to the start of FY07. NFHA has several cases filed at HUD, none of which has been investigated within 100 days. Although many of these cases represent complex or systemic issues, only one case has been referred to HUD's systemic case unit. Some of this may reflect the fact that the

[6] *The State of Fair Housing – FY2007 Annual Report on Fair Housing*, US Department of Housing and Urban Development, the Office of Fair Housing and Equal Opportunity (March 31, 2008), p. 30.

Office of Fair Housing and Equal Opportunity is understaffed, and some of it reflects a breakdown of investigatory practices and systems. We also note that there are 4,081 ongoing investigations by Fair Housing Assistance Program Agencies (HUD's counterparts at the state/local levels) that have passed the 100 day mark, an increase of 141 over FY06.[7]

One NFHA member has several design and construction complaints that have been pending with HUD for almost 4 years. Several of NFHA's cases are three years old. Given HUD non-performance on these complaints, NFHA filed its design and construction cases in federal court.

HUD Charged Only 31 Complaints in 2007

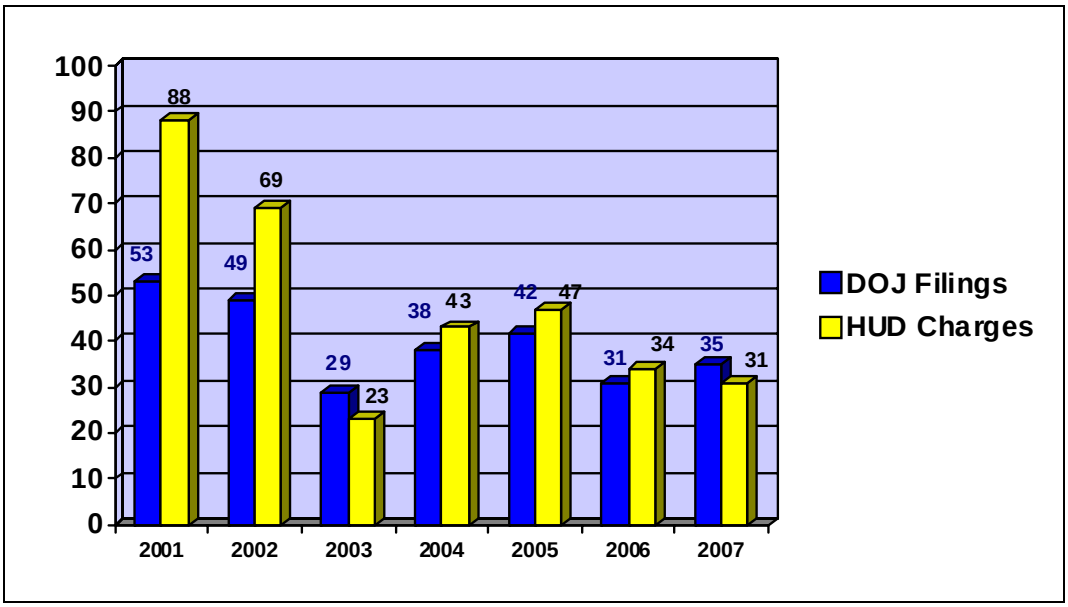
After an investigation, HUD makes a determination as to whether or not there is reasonable cause to believe that illegal discrimination has occurred. If HUD finds reasonable cause, the agency must prepare a final investigative report, make a written determination of its cause finding, and issue a charge. Issuance of a charge is the standard way that government enforcement of fair housing laws is initiated. Following issuance of a charge, the parties to a case – the complainant(s) and the respondent(s) – may elect to have the case heard in federal district court in a case filed by DOJ. If no election is made, a HUD Administrative Law Judge hears the case.

HUD issued only 31 charges following a determination that there was reasonable cause to believe that unlawful discrimination occurred in fiscal year 2007. The number of charges issued by HUD in 2007 dropped from even the small number of 34 issued in FY 2006. Even the recent high of 88 charges in FY 2001 is much too low in light of the level of housing discrimination in America. HUD has consistently set the bar for issuance of a charge too high; issuance of a charge should mean only that there is reasonable cause to believe that there has been a violation – not proof beyond a reasonable doubt.

Fair Housing Act Cases in which HUD Issued a Charge Fiscal Years 2001-2007							
2001	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**TOTAL**
88	**69**	**23**	**43**	**47**	**34**	**31**	**335**

[7] Ibid., p. 56.

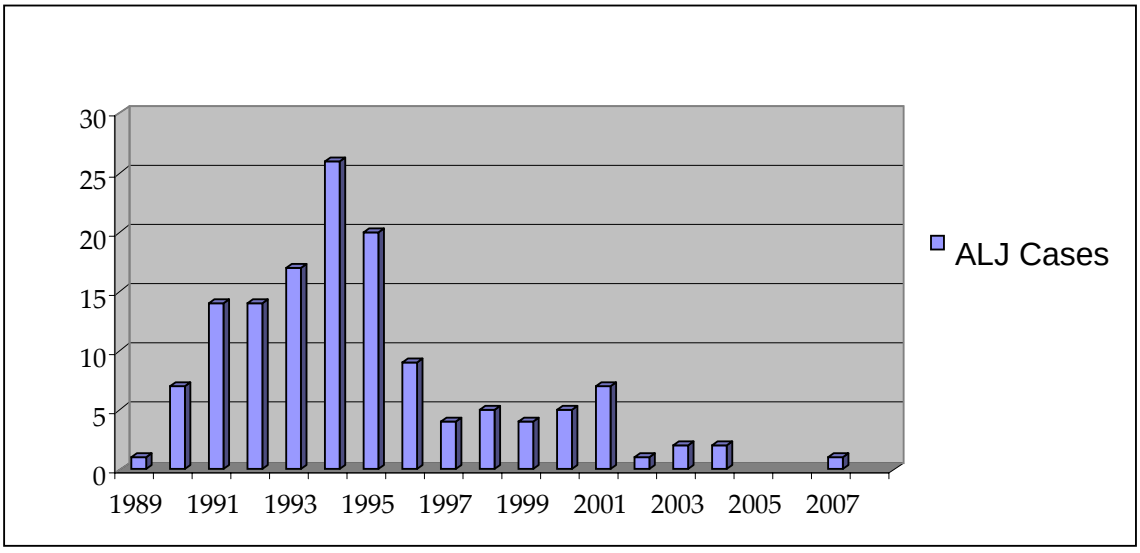
Complaints charged by HUD and consent decrees/lawsuits filed by DOJ



Administrative Law Judge Function is Essentially Defunct

While Administrative Law Judge case processing was considered a positive feature of the Fair Housing Amendments Act of 1988, HUD's failure to properly process, cause, and charge cases, particularly in recent years, has made a farce of the system. The following chart illustrates the number of HUD ALJ proceedings since 1989. **There were no cases in 2005 and 2006 and only two cases in 2007.**

Administrative Law Judge Cases



In February, NFHA was told that HUD currently has no Administrative Law Judges for fair housing cases. Fair housing proceedings must be heard by an ALJ in another department, such as the Environmental Protection Agency.

Inconsistent Standards and Inadequate Investigations

HUD enforcement efforts operate largely through ten "HUB" regional offices. HUD allows these offices in many cases to create their own policies and practices. NFHA has provided information to HUD and met with HUD officials on many occasions to object to the fact that fair housing case processing and legal standards differ from region to region. Many investigators lack information related to basic fair housing case law and many are unable to properly investigate a case. In a recent appellate decision in the Second Circuit (*Boykin v. KeyCorp,* C.A.2 (N.Y.), 2008), the Court identified HUD's practice of allowing inconsistent policies between HUBs as a significant problem. In this particular case, HUD's inconsistent policy related to when an administrative case was considered closed and whether or not a regional HUB sent a closure letter to a complainant, even when the matter had been referred to a Fair Housing Assistance Program agency. The court provided the following assessment of HUDs reasoning in the matter: ". . .we note that HUD's own characterization of this interpretation as 'a matter of practice' does not suggest that it was thoroughly considered. Nor can we conclude, on the record before us, that HUD's practice is validly reasoned. "

Case Study: Crestbrook Apartments

Beginning in 2005, NFHA conducted an investigation of the rental practices of Crestbrook Apartments in Burleson, TX. After revealing multiple instances of housing discrimination, NFHA filed a complaint with HUD on December 28, 2006. Through its own subsequent investigation, HUD verified that Crestbrook agents discouraged Black potential applicants by providing false information about the application process and by providing Black potential applicants with less favorable service and information about available units than was provided to White potential applicants. Additionally, HUD uncovered evidence of a practice of discrimination against Black applicants in application procedures.

Despite these discoveries, HUD did not attempt to conciliate or move forward with a charge of discrimination based on the evidence collected. HUD then erroneously and without appropriate process issued a "no reasonable cause" determination in the matter. Yet the evidence clearly meets the standards for housing discrimination set out in HUD's own regulations.[8] Moreover, in its Determination of No Reasonable Cause, HUD distorted facts by ignoring and suppressing evidence of Fair Housing Act violations. Further, HUD neglected to provide NFHA with standard information about the investigation as it progressed and failed to follow procedures established in the federal regulations.

NFHA has since requested that HUD reopen and complete this investigation, issue a finding of reasonable cause, and evaluate the investigative procedures that led to the unwarranted "no reasonable cause" determination. NFHA's request for reconsideration was granted, and the case

[8] See 24 CFR Part 14.

was reopened. Fortunately, NFHA has the resources and knowledge with which to make such a request; most housing discrimination complainants would be unable to identify and counteract HUD's failures in a similar manner.

HUD Is Handling Less Than 1% of the Cases of Housing Discrimination in America

HUD will claim that conciliations are as important as charges. I support the use of conciliation to resolve housing discrimination claims. When conducted properly and in a timely manner, conciliation can resolve the complaint, secure a unit for the complainant, provide immediate relief for the victim and provide training and self-testing to help the respondent learn how to follow the law and evaluate his/her own compliance with the law.

However, conciliation must be attempted early and it works best after some initial investigation by HUD is conducted. Why? Because then the HUD has evidence available to either support or dismiss a complaint. If there is no case, then the complaint should be dismissed. This cannot be determined without some initial investigation. Secondly, the initial investigation can indicate if the discriminatory conduct was isolated or pervasive. The answer to this question drives the remedy.

Questions for HUD on Case Investigation: How many cases were conciliated at HUD? When was the case filed and when was conciliation reached? Was the case thoroughly investigated or did the investigator simply ask the parties what would it take to resolve the matter? Paying to make something go away when you did not violate the Fair Housing Act leaves a bitter taste in the mouth and certainly does not promote the cause of fair housing. Does HUD require apartment complexes to report on applications, vacancies, rental deposits, rental rates on a quarterly basis? Does HUD conciliation include funds to pay for someone to examine if the monitoring reports are accurate? Do large apartment complexes use self-testing to guarantee that mangers follow the law? With the high turnover in apartment managers this is absolutely necessary to insure compliance.

The Committee should also compare the relief secured by HUD and state and local government agencies (FHAPs) to the relief secured by private fair housing agencies. The Committee will find that the relief by fair housing agencies is more comprehensive and designed to insure that no further violations occur.

Why Are the Numbers So Low?

One major reason that the numbers are so low is HUD's failure to fund national media campaigns as required by the statute that funds the Fair Housing Initiatives Program. (This is the only federal funding stream designated for private fair housing efforts and it is approximately $23.5 million.) In 2001, HUD funded its first anti-predatory lending campaign through my organization. NFHA partnered with the Ad Council and secured matching funds from Fannie, Freddie Mac, Ford Foundation and several lenders to create TV and radio public services announcements, print advertisements for news papers, magazines, outdoor advertising (billboards and bus stops) and a fulfillment kit with vital information for consumers including HUD 1 form and other information to help them spot and reject predatory loan terms.

HUD failed to fund a national media in 2005 and 2006—crisis years for fair lending – despite letters from me and meetings with NFHA explaining the Department's violation of the statute. Then in 2007 HUD advertised in the FHIP NOFA for a national media, but precluded fair housing organizations from applying for the funds. NFHA was the first media grant recipient in 1990. When NFHA conducted this campaign, HUD received 110,000 calls to its Fair Housing HOTLINE in six months; the previous year, HUD had received only 13,000. HUD did not fund another campaign until 1994. Rather than seeking more funding to handle the massive increase in complaints, HUD shut down the pipeline.

HUD's current campaign was developed by an ad agency with no experience in fair housing. So far, we have only seen one TV spot about lending and the tag line is "One call, many answers." In the past the tag line has been "Fair Housing: It's not an Option, It's the law." There is a big difference. The latter promotes an enforcement message and encourages people to report violations. Who needs to be told "One call, many answers?" Are you really going to call a government agencies that says – Well, when you call you will get many answers?

The Committee should ask HUD for copies of all the media materials and sort between those created by NFHA and the Leadership Conference on Civil Rights Education fund over the years and those created by groups that are not experts in fair housing. You will see that when either Democrat or Republican administrations used groups without expertise in fair housing that the message was confused and the complaint numbers reduced.

If there is a commitment to fair hosing enforcement, there must be a commitment to producing a coherent, consistent national message. Changing the tag line and failing to build upon successful campaigns simply undermines the message to consumers and industry. HUD must have an enforcement message that drives people to action, both for consumers to report problems and the housing, lending and insurance industries to comply with the law because they know the government and private fair housing agencies are watching, monitoring and enforcing.

RECOMMENDATIONS

This testimony documents a problem too costly for our country to ignore. We can no longer tolerate housing discrimination and the persistence of segregated neighborhoods. Many of the recommendations that follow require additional funding, but these funds represent a small fraction of the cost of failing to address what are comprehensive social and economic ills. Some of these recommendations require only a change in policy. All are necessary to achieve our nation's goal and the benefits of balanced and integrated living patterns.

HUD and DOJ Must Use Their Full Authority to Enforce the Fair Housing Act

HUD Must Enforce the CDBG Requirement to Affirmatively Further Fair Housing

HUD's Community Development Block Grant (CDBG) funding is the only other federal funding source available for fair housing activities. With the level of housing discrimination that NFHA has documented in its annual *Fair Housing Trends Reports*, NFHA urges HUD to promulgate

enforceable and meaningful regulations requiring local jurisdictions to include fair housing in their comprehensive plans and their funding decisions. Those regulations should require that Analyses of Impediments to Fair Housing Choice (AIs): are prepared; accurately reflect the community's needs; describe strategies to improve fair housing compliance; are followed; and are updated at least every five years. If a state or local government fails to comply with these obligations, the regulations should require that HUD reduce or terminate CDBG funding. HUD's Office of Community Planning and Development (CPD) should require recipients to set aside adequate funding for fair housing education and enforcement staff and associated costs.

HUD and DOJ Must Improve Their Processing of Cases

With the annual number of complaints approaching 27,000, and the estimated number of violations more than four million, it is insufficient that last year HUD issued only 31 charges of discrimination and DOJ filed only 35 cases, 16 of which were HUD election cases, and therefore duplicate some of the HUD charges. These numbers speak for themselves. HUD must have consistent and quality standards for investigations, ensure its investigators are well versed in legal standards and case law, and improve its case processing so that cases are investigated in a timely manner. In addition, HUD has spent millions of dollars in the past twenty years educating builders about design and construction requirements. No builder can fail to be acquainted with these requirements. HUD should move these resources to systemic enforcement of the law.

DOJ Must Follow the Statute and Pursue Cases Charged by HUD

The Fair Housing Act as Amended (1988) clearly states that DOJ must pursue cases charged by HUD. DOJ took the position in 2005 that it is not required to file these cases but that it may instead perform additional investigations, thereby prolonging and duplicating the process.

In addition, there are two areas of enforcement at DOJ that have been underutilized in recent years: cases brought under their testing program and mortgage and predatory lending cases. Cases in those two areas have dropped precipitously in the past few years. With this underutilization, DOJ is neglecting its opportunity and obligation to fight housing discrimination.

DOJ Must File Disparate Impact Cases

DOJ has publicly stated its position that it will not litigate disparate impact cases involving housing discrimination.[9] Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, lending, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing.

[9] HUD HUB Directors' meeting Rhode Island 2003.

Address Unfair and Predatory Lending Practices

Fair housing centers are at the forefront of the foreclosure crisis – working to counsel people who have been victims of housing discrimination and predatory lending practices and finding ways to enforce the laws intended to protect them. Today, too many individuals and families are targeted for abusive home loans that strip away their hard-earned home equity and put their homes at a high risk of foreclosure. People of color are at greater risk of losing their homes – and their hard-earned wealth – as a result of high-cost, risky lending and abusive servicing.

Congress must enact comprehensive predatory lending legislation that includes: effective rights and remedies; prohibitions against steering; a designation of "high-cost" that includes all loan fees; a ban on yield spread premiums; a ban on pre-payment penalties; no federal preemption; and advanced disclosure of costs and fees. NFHA supports S.2452, the Home Ownership Preservation and Protection Act.

The Federal Reserve and other regulators should expand their fair lending examinations to substantially include the actions of the affiliates and third party vendors of their member lending institutions. The Federal Reserve must enact a strong rule under the Truth in Lending Act. The proposed rule states only that creditors would be prohibited from engaging in a pattern or practice of extending credit without considering borrowers' ability to repay the loan; it does not allow for individual or group complaints. This is too burdensome and would probably make it impossible for an individual to do anything to remedy his or her situation. The final rule must, among other things, do the following: ban pre-payment penalties and yield spread premiums; restrict bait-and-switch tactics, especially at the closing table; cover all loans, not only subprime loans; require the verification of income on all home mortgages; and require escrowing of taxes and insurance.

To assist those currently in bad loans and at risk of foreclosure, Congress must enact strong legislation that permits bankruptcy courts to restructure mortgages on a family's home. NFHA supports S.2636, the Foreclosure Prevention Act and H.R.3609, the Emergency Home Ownership and Mortgage Equity Protection Act of 2007.

In the face of countless studies demonstrating the targeting of minority homebuyers by unscrupulous lenders, HUD has initiated only 3 fair lending investigations since FY2006 and has processed only 137 fair lending complaints; Justice filed only 4 cases in FY2007. Combined, this amounts to only 10 percent of the cases that private groups have filed. Since federal financial regulatory agencies refer fair housing cases to the Department of Justice, it is clear that these agencies have failed in their responsibility to identify and counteract discriminatory and predatory lending practices. They need to improve training on these issues and increase the attention and importance assigned to fair housing requirements.

Increase Fair Housing Funding and Focus Resources on Investigations

Enact the Housing Fairness Act

Introduced in 2007, the Housing Fairness Act (H.R. 2926/S.1733) represents a significant rededication to fair housing funding by the Congress. The legislation authorizes funds to root out housing discrimination through a $20 million nationwide testing program, a doubling of the funding authorization for the Fair Housing Initiatives Program to $52 million, and the creation of a $5 million competitive matching grant program for private nonprofit organizations to examine the causes of housing discrimination and segregation and their effects on education, poverty, and economic development. The nationwide testing program alone would allow for 5,000 paired tests, amounting to an average of fifty paired tests in each of the nation's one hundred largest metropolitan statistical areas (which contain 69 percent of the nation's population). NFHA urges the Congress to pass this important legislation.

Increase Appropriations for the Fair Housing Initiatives Program

NFHA calls on HUD and Congress to increase appropriations for the Fair Housing Initiatives Program to at least $52 million in fiscal year 2009 to meet the demand. In FY2006, for example, 269 organizations applied for FHIP funding – *a total of $51.75 million in requests* – but only 102 groups received grants totaling $18.1 million. In FY 2007, only 87 groups received grants: 55 organizations received Private Enforcement Initiative (PEI) grants ($14 million) and 32 groups received Education and Outreach Initiative (EOI) grants (3.1 million) for a total of $17.1 million. (HUD has not publicly released the number of organizations that applied in FY2007.)

An appropriation of $52 million would enable FHIP recipients to address thousands of additional complaints. This increase also has the potential to accomplish two important goals:

1. encourage those encountering housing discrimination to come forward to file their complaints with greater hope of resolution; and
2. provide fair housing groups with the capacity to address larger systemic issues, including sales practices, predatory lending practices and insurance policies that are discriminatory.

Restructure the Fair Housing Initiatives Program

We applaud HUD for following NFHA's suggestion of creating a three-year grant cycle for qualified full-service private nonprofit fair housing organizations beginning in 2005. Currently, 39 organizations are funded at that level. While this longer-term funding provides some stability, it also constrains the funds available to other qualified organizations because the funding level is so low. A total of only 55 organizations received enforcement grants ranging from $70,000 to $275,000.

As outlined in NFHA's proposal entitled *A Reformed Fair Housing Initiatives Program: the Private Enforcement Initiative*,[10] FHIP should include funding to provide training to agency

[10] See *A Reformed Fair Housing Initiative Program: the Private Enforcement Initiative,* NFHA (2005).

personnel and to implement programs to improve and enhance agency performance. The minimum grant award should be $300,000 annually and increase to $1 million annually depending upon the service area's population size, number of investigations handled, demographics and other performance measures.

Fund an Annual National Media Campaign

NFHA calls on HUD to abide by the FHIP authorizing statute to fund an annual national media campaign rather than violating the statute as it has for the past three years. As mentioned above, HUD failed to fund a media campaign in accordance with the statute in 2005, 2006 and 2007.

Thank you again for the opportunity to testify before the subcommittee today. I wish that I would have had better news to report today, ten years after coming before this subcommittee in 2008. But we have a long way to go to achieve the dream of fair housing. I hope that I can count on you to work with us to see that we achieve it together.

Submitted as an attachment: *Dr. King's Dream Denied: Forty Years of Failed Federal Enforcement,* the National Fair Housing Alliance's 2008 Fair Housing Trends Report