

1990

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Minna J. Kotkin

Brooklyn Law School, minna.kotkin@brooklaw.edu

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17 N.Y.U. J. L. & Soc. Change 755 (1989-1990)

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THE FAIR HOUSING AMENDMENTS ACT OF 1988: NEW STRATEGIES FOR NEW PROCEDURES

MINNA J. KOTKIN*

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INTRODUCTION

The Fair Housing Amendments Act of 1988 [hereinafter FHAA or the Act]¹ represents the culmination of a ten-year effort to expand the federal government's enforcement authority over complaints of housing discrimination. The original anti-discrimination legislation, Title VIII of the Civil Rights Act of 1968 [hereinafter 1968 Act],² commonly known as the Fair Housing Act, was enacted in the wake of Martin Luther King, Jr.'s assassination and the urban unrest of the 1960s.³ The 1968 Act proscribed discrimination on the basis of race, color, national origin or religion in the sale or rental of private housing.⁴ While the Act expressed a strong national policy directed toward the elimination of racial bias in housing,⁵ it provided no effective administra-

* Professor of Law, Brooklyn Law School. A.B., 1972, Barnard College; J.D., 1975, Rutgers University School of Law. I would gratefully like to acknowledge the research assistance of Harvey Mechanic, Geanine Towers-Dioso and the support provided by the Brooklyn Law School summer research stipend program. I would also like to thank Bonnie Milstein of the Mental Health Law Project for her helpful comments.

1. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C.A. §§ 3601-3620, 3631 (West Supp. 1989)).

2. 42 U.S.C. §§ 3601-3619, 3631 (1982 & Supp. IV 1986), as amended by Act of Sept. 13, 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

3. For the legislative history of the 1968 Act, see Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); see also Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733.

4. 42 U.S.C. § 3604 (1968). The Act also prohibited discriminatory advertising, financing, and brokerage service. See 42 U.S.C. §§ 3604(c), 3605, 3606 (1968). In 1974, the Act was amended to bar housing discrimination on the basis of sex. Act of August 22, 1974, Pub. L. No. 93-383, § 808(G)(1)-(3), 88 Stat. 729 (codified as amended 42 U.S.C. §§ 3604-3606).

5. See, e.g., *Trafficante v. Metropolitan Life Insurance*, 409 U.S. 205 (1972); *Williams v.*

tive mechanism for resolving statutory claims. The agency charged with enforcement, the Department of Housing and Urban Development [hereinafter HUD], was given authority merely "to try to eliminate or correct" discriminatory practices "by informal methods of conference, conciliation and persuasion."⁶ The only other avenue of relief for an individual complainant under the statute was a private action brought in federal court.⁷ Government sponsored litigation was limited to "pattern or practice" actions brought at the discretion of the Justice Department.⁸

For reasons obviously not limited to the failure of statutory enforcement, the 1968 Act had little impact on the elimination of housing discrimination. One oft-cited study estimated that two million acts of discrimination in the sale or rental of real estate occur annually, and that an African-American renter will experience discrimination in 75% of contacts with the housing market.⁹ Whatever the complex causes of continuing discrimination, however, Congress and civil rights advocates saw the 1968 Act's failure to provide efficient enforcement mechanisms as a materially weak link in the federal effort to address the problem of bias.¹⁰ Attempts to amend the statute to provide agency enforcement beyond conciliation began in 1980 following

Mathews Co., 499 F.2d 819 (8th Cir. 1974), *cert. denied*, 419 U.S. 1027 (1974); *Williamsburg Fair Housing Committee v. New York City Housing Authority*, 450 F. Supp. 602 (S.D.N.Y. 1978); *McHaney v. Spears*, 526 F. Supp. 566 (W.D. Tenn. 1981).

6. 42 U.S.C. § 3610(a) (1968).

7. 42 U.S.C. § 3612 (1968). If an administrative complaint was filed, the aggrieved party had to give the agency 30 days to attempt conciliation before bringing a civil action. 42 U.S.C. § 3610(d) (1968). There was no requirement that a party exhaust the administrative process, or utilize it at all. *See, e.g., Concerned Tenants of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980); *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379 (E.D. Mich. 1977).

8. 42 U.S.C. § 3613 (1968). The Justice Department's efforts under this section have never been particularly vigorous, and during the years of the Reagan administration, the thrust of enforcement was primarily directed to attacking affirmative action in housing. *See Kushner, The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1069 n.79, 1081-1086 (1989); *see also Schwemm, Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 376 (1988); *Wolvovitz & Lobel, The Enforcement of Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252, 257-58 (1986).

9. *See Kushner, supra* note 8, at 1052 & n.7; *accord* H.R. REP. NO. 711, 100th Cong., 2d Sess. 15, *reprinted in* 1988 U.S. CODE & ADMIN. NEWS 2176 [hereinafter HOUSE REPORT]; *Note, Recent Developments: Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249, 254 (1989).

10. The House Report states that the Judiciary Committee viewed lack of enforcement mechanisms "as the primary weakness in existing law." HOUSE REPORT, *supra* note 9, at 15; *see also id.* at 16 ("Existing law has been ineffective because it lacks an effective enforcement mechanism"). The House Report and the House and Senate debates comprise the primary sources of the FHAA's legislative history. The Senate adopted the House bill, H.R. 1158, with only minor amendments, and did not publish a committee report. 134 CONG. REC. S10,454-5 (daily ed. Aug. 1, 1988). Several senators referred to the House Report as the authoritative interpretation of the bill. *See, e.g.,* 134 CONG. REC. S10,462 (daily ed. Aug. 1, 1988) (statement of Sen. Kennedy); 134 CONG. REC. S10,464 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin).

For an extended discussion of enforcement problems, *see generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 21, 32 (1979); GENERAL ACCOUNTING OFFICE, STRONGER FEDERAL ENFORCEMENT NEEDED TO

extensive congressional hearings. Bills were introduced and additional hearings conducted in almost every subsequent year until passage of the Act.¹¹ Finally, the 100th Congress adopted the Fair Housing Amendments Act, which became effective on March 12, 1989.¹² It provides for full adjudicatory resolution of housing discrimination complaints at the agency level.

The FHAA is not only a statute directed at procedural reform. It also greatly expands the 1968 Act's substantive protection by adding two new protected classes: families with children and disabled persons.¹³ The added protections for these groups has far reaching implications which go beyond traditional notions of individual discrimination. New multi-family constructions to provide access for people with disabilities will be required,¹⁴ for example, and substantial restrictions on "adult" housing developments will be imposed.¹⁵

The FHAA's substantive provisions have been considered by other commentators.¹⁶ The extension of protection to new classes of persons is addressed here only where issues regarding enforcement arise. Nevertheless, it is worth noting that the procedural issues and concerns raised in this Article probably will be addressed in the first instance in claims of discrimination on the basis of disability. Advocates for clients with disabilities are in the best position to test HUD's commitment to implementing the amendments, because these claims may not be subject to referral to state agencies during the extended implementation period provided for in the Act.¹⁷

The FHAA has been heralded as a breakthrough in civil rights law,¹⁸ presenting novel approaches to the traditional disincentives of delay and expense in enforcement, and indeed, its structure may create an effective mecha-

UPHOLD FAIR HOUSING LAWS (1978); Chandler, *Fair Housing Laws - A Critique*, 24 HASTINGS L.J. 159, 189-205 (1973).

11. For a summary of legislative efforts to amend the Fair Housing Act, see HOUSE REPORT, *supra* note 9, at 14-15; see also Kushner, *supra* note 8, at 1087 n.156.

12. The House bill, H.R. 1158, was passed on June 29, 1988 by a vote of 376-23. A slightly revised Senate bill, S. 558, was adopted on August 2, 1988, by a vote of 94-3. The revised version was passed in the House on August 8, 1988 and signed into law by President Reagan on September 13, 1988, to become effective 180 days thereafter.

13. See 42 U.S.C.A. §§ 3604-3607 (West Supp. 1989). Although the statute uses the term "handicapped," many view this terminology as offensive, given its historical derivation.

14. See *id.* § 3604(f)(2) & (3).

15. See *id.* § 3607(b).

16. For a discussion of some of the issues raised by these new prohibitions, see Note, *supra* note 9; Milstein, Pepper & Rubenstein, *What The Fair Housing Amendments Act of 1988 Means for People with Mental Disabilities* 23 CLEARINGHOUSE REV. 128 (1989); C.R. Feldblum, FAIR HOUSING AMENDMENTS ACT OF 1988 (American Civil Liberties Union Foundation 1989) (addressing coverage for people with AIDS and HIV infection); Note, *The Fair Housing Amendments Act of 1988: A Critical Analysis of "Familial Status"*, 54 MO. L. REV. 393 (1989).

17. See *infra* text accompanying notes 163-68.

18. See, e.g., *Black Wins \$40,000 Under Stiff Housing Law*, N.Y. Times, May 13, 1989, at A1, col. 2; Leuck, *The New Teeth in the Fair Housing Law*, N.Y. Times, Mar. 12, 1989, § 10, at 1, col. 2; *House Backs Move to Strengthen Enforcement of Housing Rights*, N.Y. Times, June 30, 1988, at A20, col. 1; *Housing Law: A Wooden Sword*, N.Y. Times, June 29, 1988, at A26, col. 1.

nism for expeditious resolution of bias complaints. However, since the Act's procedures are largely without precedent, the ramifications of certain innovative provisions are untested by experience or judicial construction. This Article will explore some of these potential ramifications and suggest strategies to ensure that the promise of effective enforcement is fully realized. This Article is intended primarily to assist those representing litigants in housing discrimination matters to negotiate the procedural choices provided by the Act. Part I outlines the statutory provisions governing the two routes of enforcement, administrative proceedings and federal court actions, and compares their relative advantages and disadvantages. Part II examines two critical junctures in the newly created administrative enforcement route that may detract from its effectiveness as a speedy and inexpensive method of dispute resolution. The first has to do with provisions for determination by the agency as to whether reasonable cause exists to believe that a violation has occurred or is about to occur¹⁹ — from which springs determination of the agency's duty to prosecute the claim. The second considers the election process whereby either party may remove an agency proceeding to federal court.²⁰ This section suggests strategies for minimizing risks to efficient enforcement posed by these windows of discretion and choice. Finally, Part III considers the extent to which the provision for referral of claims to "substantially equivalent" state and local agencies²¹ significantly delays the actual implementation of the Act, and recommends ways of guarding against this result.

I.

THE INITIAL CHOICE: AGENCY PROCEEDINGS OR FEDERAL COURT

Given the structure of the FHAA, the decision whether to litigate a claim of housing discrimination before the agency or before the federal court involves at least three major considerations: availability of relief, control and expense of prosecution, and concerns of expedition. In making this decision, litigants will tread largely uncharted territory. Prior to the 1988 amendments, federal court was the only alternative under the statute in the event agency efforts at voluntary conciliation failed. Now, complainants can achieve an adjudicatory resolution of their claims in either of two forums. In order to examine the ramifications of the choice, an understanding of the different procedures in each forum is necessary.

A. *Federal Court Actions*

The provisions of the FHAA governing federal court actions do not substantially change the structure of the 1968 Act. Rather, the drafters' intent was to remove some of the perceived disincentives to private enforcement that

19. See 42 U.S.C.A. § 3610(g) (West Supp. 1989).

20. See *id.* § 3612(a).

21. See *id.* § 3610(f).

previously existed: a short statute of limitations, and limitations on punitive damages and attorney's fees.²² Other changes, discussed below, codify expansive judicial interpretations of the 1968 Act.²³

First, the amendments explicitly provide that the federal right of action exists independent of the administrative process, and that administrative exhaustion is not required.²⁴ The provision of the 1968 Act permitting a postponement of the civil action if the court believed that conciliation efforts were "likely" to result in a settlement is eliminated.²⁵ This concept of two independent procedural routes of enforcement is further highlighted by the Act's failure to mandate an initial election of remedies. The amendments provide that a civil action may not be commenced if an administrative law judge has begun a "hearing on the record" regarding the same claim.²⁶ Thus, one unusual feature of the statute results from the converse of this section: the filing of a federal action during the pendency of an administrative proceeding is permitted up until the time of hearing. The Act also allows for the administrative proceeding to go forward while a federal court action is pending, but halts the agency enforcement if a trial begins.²⁷ These two provisions are designed to prevent multiple adjudications, according to FHAA's legislative history,²⁸ but they seem to invite simultaneous commencement of proceedings in the two forums. The strategy ramifications of this possibility are discussed in Part II.

Judicially created standing rules are also codified under the amendments. The statute now speaks of "aggrieved parties," defined to include those who believe another person will be injured by a discriminatory housing practice,²⁹ rather than "plaintiffs." The intent of this change is to incorporate the Supreme Court's *Havens Realty* decision, broadly interpreting Title VIII to give standing to "testers."³⁰ Presumably, fair housing organizations and non-

22. The Judiciary Committee stated that "[a]lthough private enforcement has achieved success in a limited number of cases, its impact is restricted by the lack of private resources, and is hampered by a short statute of limitations, and disadvantageous limitations on punitive damages and attorney's fees." HOUSE REPORT, *supra* note 9, at 16 (footnotes omitted).

23. See, e.g., *infra* notes 29, 31, 34 & 43 and accompanying text.

24. See 42 U.S.C.A. § 3613(a)(2) (West Supp. 1989). This section provides that a civil action may be commenced whether or not an administrative complaint has been filed and "without regard to the status of any such complaint," unless a conciliation agreement has been reached. An action may also be brought to enforce the terms of a conciliation agreement. The FHAA thus eliminates the provisions of the 1968 Act which required a party to refrain from bringing a civil action for 30 days after the filing of an administrative complaint. See 1968 Act, 42 U.S.C. § 3610(d).

25. See *id.* § 3612(a).

26. See 42 U.S.C.A. § 3613(a)(3) (West Supp. 1989).

27. See *id.* § 3612(f). In addition, the agency may not issue a charge if a trial has commenced. *Id.* § 3610(g).

28. See HOUSE REPORT, *supra* note 9, at 37, 39.

29. See 42 U.S.C.A. § 3602(i)(2) (West Supp. 1989); see also *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989) (developer had standing under FHAA to seek injunction against discrimination against persons with AIDS, even though he did not have the disease himself).

30. See HOUSE REPORT, *supra* note 9, at 23. The Report specifically refers to *Havens*

minority community residents, already given standing under *Havens Realty* and earlier Supreme Court decisions, are similarly included within the new definition.³¹ A final example of the drafters' efforts to codify liberal construction of Title VIII is found in the addition of the term "affirmative action" to the list of appropriate forms of relief in the section governing private enforcement.³² While the legislative history of the Act does not directly address what is intended by this term, the Judiciary Committee noted that the amendment contemplates the continuation of the type of relief provided under current law.³³ Some lower courts have required the adoption of temporary plans to increase minority representation after finding Title VIII violations.³⁴ The amendments appear to confirm judicial discretion and flexibility in fashioning remedies for violations of the Act.³⁵

In the minds of the drafters, the most significant change in the private enforcement realm is the elimination of the statute's \$1,000 cap on punitive damages.³⁶ The Judiciary Committee considered this limit to be a "major impediment to imposing an effective deterrent on violators and a disincentive" to suits.³⁷ This premise is open to question, however. Before the amendments, the cap could be effectively neutralized in most cases by the joinder of a claim

Realty Corp. v. Coleman, 455 U.S. 363 (1982), in which the Court permitted "tester" actions. See also 24 C.F.R. § 100.80(G)(5) (1989); 54 Fed. Reg. 3238 (January 23, 1989) (preamble to regulations).

31. See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (minority and white residents had standing to challenge racial steering); *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) (non-profit corporation organized to promote city as integrated community had standing to sue real estate agents for housing discrimination); *Project Basic Tenants Union v. Rhode Island Housing and Mortg.*, 636 F. Supp. 1453 (D.R.I. 1986) (tenants union had standing to sue in an action for Fair Housing Act violations).

32. See 42 U.S.C.A. § 3613(c)(1) (West Supp. 1989). The 1968 Act provided that a court could order "such affirmative action as may be appropriate" subject to the provisions of Section 3612, which referred only to injunctive relief and damages. 42 U.S.C. § 3610 (1982), amended by 42 U.S.C.A. § 3610 (West Supp. 1989). Thus, the addition of the term "affirmative action" to Section 3613, the successor to Section 3612, might be viewed simply as a clarification.

33. See HOUSE REPORT, *supra* note 9, at 39. An amendment to prohibit affirmative action was rejected by the House. 134 CONG. REC. H4902-08 (daily ed. June 29, 1988).

34. See, e.g., *Gresham v. Windrish Partners, Ltd.*, 730 F.2d 1417 (11th Cir.), cert. denied, 469 U.S. 882 (1984); *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Young v. Pierce*, 685 F. Supp. 975 (E.D. Tex. 1988); *Burney v. Housing Authority*, 551 F. Supp. 746 (W.D. Pa. 1982); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975).

35. The Second Circuit recently invalidated permanent quotas and the Supreme Court refused to hear the matter. *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), cert. denied, 109 S. Ct. 376 (1988). In the *Starrett* case, however, the court acknowledged the legitimacy of quotas as temporary remedial measures. See Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing*, 55 BROOKLYN L. REV. 197 (1989). For discussion of the complex issues raised by affirmative action in the Title VIII context, see generally Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Rabinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U.L. REV. 49 (1979).

36. See HOUSE REPORT, *supra* note 9, at 40. Compare 1968 Act, 42 U.S.C. § 3612(c).

37. HOUSE REPORT, *supra* note 9, at 40.

under 42 U.S.C. Section 1982 with a Title VIII claim, thus making full punitive damages available.³⁸ The removal of the cap, therefore, might be viewed as more a symbolic gesture than a serious effort to encourage private action.³⁹ The same qualification applies to the changes in the provision for awards of attorney's fees. The 1968 Act allowed for awards only to prevailing plaintiffs unable to afford private counsel,⁴⁰ but this limitation could be circumvented since Section 1982 claims are covered by the Civil Rights Attorney's Fees Act of 1976, which has no income qualification.⁴¹ The amendments conform Title VIII to the typical civil rights fee shifting provision, which permits awards to either party regardless of ability to pay. In one sense, however, this change could be read as discouraging private enforcement, since it allows for the possibility of awards to prevailing defendants. The impact of potential defendant awards should be negligible, however, since the joinder of Section 1982 claims already presented this risk. In addition, it is likely that courts will apply a very restrictive standard, as they have in other civil rights contexts, permitting awards only when the plaintiff's claims are found to be frivolous.⁴²

Two other changes in the private enforcement scheme are noteworthy. The amendments lengthen the statute of limitations for commencement of an action from 180 days to two years, and toll the period during the pendency of administrative proceedings.⁴³ Of course, the short filing deadline in the origi-

38. See, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978); *Williams v. Adams*, 625 F. Supp. 256 (N.D. Ill. 1985).

39. In most individual cases, a Section 1982 claim is usually available because there is discriminatory intent. Joinder of claims becomes problematic only when discriminatory intent, which may be required under Section 1982, is difficult to show. "Disparate impact" cases, in which a neutral policy is alleged to have a discriminatory effect, have been held cognizable under Title VIII. See, e.g., *Huntington Branch N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The FHAA does not address the validity of disparate impact analysis, but can be seen as intended by its proponents as an implicit endorsement of the doctrine. However, when President Reagan signed the bill, he stated that the Act should be read as requiring proof of intent. Senator Kennedy moved to correct this attempt at a *post hoc* statutory construction of legislative history by stating on the Senate floor that Congress intended no such requirement. 134 CONG. REC. S12,449 (daily ed. Sept. 14, 1988).

On the other hand, Section 1982 does not bar discrimination on the basis of sex. See *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976), *aff'd*, 556 F.2d 567 (3d Cir. 1977); *Raether v. Phillip*, 401 F. Supp. 1393 (W.D. Va. 1975). However, with regard to national origin, the statute covers persons who would have been considered members of distinct races in the mid-19th century. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

40. 42 U.S.C. § 3612(c) (fees awarded only if plaintiff is "not financially able to assume said attorney's fees"); see *Keith v. Volpe*, 644 F. Supp. 1317 (C.D. Cal. 1986), *aff'd*, 858 F.2d 467 (9th Cir. 1988).

41. See 42 U.S.C. § 1988; see also *Marable v. Walker*, 704 F.2d 1219 (11th Cir. 1983); *Oliver v. Foster*, 524 F. Supp. 927 (S.D. Tex. 1981).

42. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980). The FHAA defines "prevailing party" by reference to Section 1988. See 42 U.S.C.A. § 3602(o) (West Supp. 1989).

43. Compare 1968 Act, 42 U.S.C. § 3612(a), with FHAA, 42 U.S.C.A. § 3613(a). The FHAA also acknowledges the concept of a continuing violation: the two-year period runs, as

nal Act had not applied to Section 1982 claims, which carry with them the applicable state statute of limitations, which is generally at least two years.⁴⁴ Finally, the statute provides a new right of intervention by the Attorney General in cases of "general public importance," which allows for the imposition of substantial civil penalties in addition to the plaintiff's actual and punitive damages.⁴⁵

B. Administrative Proceedings

Compared to the changes in private enforcement, which are somewhat less than revolutionary given the availability of Section 1982 claims, the administrative resolution mechanism of the FHAA is truly a new creation. Only two features of the original statute are retained: the requirement that the agency first attempt conciliation,⁴⁶ and the requirement that complaints initially be referred to state and local agencies certified as "substantially equivalent" by HUD.⁴⁷ This latter provision is particularly significant, in that the administrative process outlined below will not be available to many complainants until 1992: forty months from the date the amendments were enacted,⁴⁸ the period of time given to previously certified state and local agencies to bring their laws and practices into equivalence with the FHAA. The problematic nature of this grandfathering provision is discussed in Part III; the following description of administrative proceedings assumes that the complaint is considered at the federal level.

The process begins with the filing of a complaint by either an aggrieved person,⁴⁹ or the HUD Secretary upon her own initiative, with the statute of limitations for filing extended from 180 days to one year.⁵⁰ The agency is

courts had previously held the 180-day period to have run, from the "occurrence or termination" of the practice, or from the breach of a conciliation agreement, whichever occurs last. *Id.*; see, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

44. See, e.g., *Kittrell v. City of Rockwall*, 526 F.2d 715 (5th Cir. 1976), *cert. denied*, 426 U.S. 925 (1976); *Baker v. F. & F. Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

45. 42 U.S.C.A. § 3613(e) (West Supp. 1989). This section authorizes the award of civil penalties applicable to "pattern or practice" cases: up to \$50,000 for a first violation, and to \$100,000 for a subsequent violation. See *id.* § 3614(d). The FHAA leaves intact the Attorney General's independent right to commence an action based on "pattern and practice" or raising issues of "general public importance." *Id.* § 3614(a). Since there is no change in the law in this respect, independent Justice Department litigation is not addressed in this Article.

46. 42 U.S.C. § 3609 (1982 & Supp. V 1987).

47. Such certification exists "[w]herever a state or local fair housing law provides rights and remedies . . . which are substantially equivalent to [those] provided by [the FHAA]." *Id.* § 3610(c).

48. See 42 U.S.C.A. § 3610(f)(4) (West Supp. 1989).

49. The same statutory definition of "aggrieved person" applies in administrative and court proceedings. See 42 U.S.C.A. § 3602(i) (West Supp. 1989), which includes in the definition anyone who claims to have been an aggrieved person. See also *supra* note 29; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

50. 42 U.S.C.A. § 3610(a)(1)(A)(i) (West Supp. 1989). Continuing violations are recognized here as well as in federal court actions. See also *supra* note 43.

required to complete an investigation of the complaint within 100 days, unless "impracticable,"⁵¹ and in that event, she must inform the parties of the reasons therefor.⁵² During this period, conciliation is attempted,⁵³ and the agency must prepare an investigative report which is available to the parties.⁵⁴ Also within the 100 day period, the agency must make a determination as to "whether reasonable cause exists" to believe that discrimination has occurred. This time limit is also subject to the impracticability exception, which requires a statement of reasons.⁵⁵ In the event no cause is found, the complaint is dismissed with public disclosure of that action.⁵⁶ Upon a finding of reasonable cause, the agency must "immediately" begin prosecution with the service of a charge on the respondent.⁵⁷ Along with the charge is served a notice of election: either the complainant or the respondent may, within twenty days, choose to proceed by way of civil action.⁵⁸ In that event, the Attorney General must commence the action in federal district court within thirty days.⁵⁹ The aggrieved party may intervene as of right and seek the same remedies as available under the private right of action.⁶⁰ Whether or not the aggrieved party intervenes, however, she is entitled to monetary relief.⁶¹ If no federal court election is made, an administrative law judge [hereinafter ALJ] must

51. The FHAA, by not defining the term, has left the determination of what is "impracticable" up to the Secretary.

52. 42 U.S.C.A. § 3610(a)(1)(B)(iv), (C) (West Supp. 1989).

53. *Id.* § 3610(b)(1), (5). Conciliation agreements are to be made public unless the parties and the agency agree otherwise. *Id.* § 3610(b)(4). If the agency has reasonable cause to believe that a conciliation agreement has been breached, it must refer the matter to the Attorney General, with a recommendation that an action for enforcement be brought under the § 3614 procedures that provide for civil penalties. *Id.* §§ 3610(c), 3614; see also *infra* notes 55-60 and accompanying text. The Attorney General apparently has discretion over whether to file suit; Section 3614 says only that she "may" commence such an action.

54. The investigative report includes statements and a summary of witness contacts, a summary description of other records, and answers to interrogatories. 42 U.S.C.A. § 3610(b)(5)(A) (West Supp. 1989). HUD must provide both the report and the underlying information to the parties upon their request. *Id.* § 3610(d)(2). Such a change can open the administrative enforcement process to more effective participation by the aggrieved party.

55. *Id.* § 3610(g)(1). HUD has divided responsibility for investigative and prosecutorial functions within the agency. The Assistant Secretary for Fair Housing is responsible for the investigatory phase, while the General Counsel is delegated authority over reasonable cause determinations and prosecution. See 54 Fed. Reg. 3258 (1989) (preamble to regulations) (codified at 24 C.F.R. §§ 100-146 (1989)).

56. 42 U.S.C.A. § 3610(g)(3) (West Supp. 1989).

57. *Id.* § 3610(g)(2)(A). If reasonable cause is found on a complaint involving zoning or land use law, the matter is referred to the Attorney General for action under the § 3614 procedure. *Id.* § 3610(g)(2)(C). Thus, when the Justice Department chooses to exercise its discretion and enforce a complaint, such a claim will be litigated in federal court.

58. 42 U.S.C.A. §§ 3610(h), 3612(a) (West Supp. 1989). Section 3612 also allows for election by an aggrieved party on whose behalf a complaint was filed. This provision seems to apply, for example, to the situation in which a complaint is filed by a fair housing organization on behalf of an individual. Also, the "complainant" would include the Secretary for complaints filed on her own initiative. See *id.* § 3602(j).

59. *Id.* § 3612(o)(1).

60. *Id.* § 3612(o)(2).

61. *Id.* § 3612(o).

conduct an "on the record" hearing, governed by the Federal Rules of Evidence, with intervention permitted by the aggrieved party.⁶² Discovery may be conducted, as "expeditiously and inexpensively" as possible.⁶³ The hearing must be commenced within 120 days of the issuance of the charge and a decision issued sixty days after its conclusion.⁶⁴ Again, the agency must justify any determination that these time limits are "impracticable."⁶⁵

The ALJ may order appropriate injunctive or other equitable relief, actual damages, and civil penalties varying from \$10,000 for a first offense to \$50,000 for repeat offenders.⁶⁶ The ALJ decision may be reviewed by the Secretary within thirty days, after which time it becomes final.⁶⁷ An aggrieved party may seek judicial review of the final order in a court of appeals within thirty days, or the agency may petition for enforcement within sixty days, also in the circuit court.⁶⁸ If neither occurs, any person entitled to relief may petition without time limit for a decree enforcing the order, which may be issued by the circuit court clerk.⁶⁹ Both the ALJ and the reviewing court are authorized to award attorney's fees to the prevailing parties, other than the government.⁷⁰

At any time after the filing of a charge, the agency may authorize the Attorney General to bring a civil action for temporary relief, and the Attorney General is required to commence the action "promptly." Such an action does not affect the continuation of the administrative proceedings.⁷¹ If, however, an aggrieved party has filed a private action in state or federal court concerning the same claim, the commencement of a trial in that action halts the administrative proceedings. The agency may not issue a charge under these circumstances.⁷² If a charge has already been issued, the ALJ is directed to

62. *Id.* §§ 3612(b), (c); see also Administrative Procedure Act §§ 5, 7, & 8, 5 U.S.C. §§ 554, 556, 557 (1988) (governing "on the record" hearings).

63. 42 U.S.C.A. § 3612(d)(1) (West Supp. 1989). The Secretary is empowered to issue subpoenas during both the investigatory and the hearing stages. Criminal penalties are provided for the failure of a witness to appear. *Id.* § 3611(c).

64. *Id.* § 3612(g)(1).

65. *Id.* § 3612(g)(2).

66. *Id.* § 3612(g)(3).

67. *Id.* § 3612(h)(1). The Secretary may affirm, modify, set aside or remand the initial decision for further proceedings. 24 C.F.R. § 104.930 (1989).

68. 42 U.S.C.A. §§ 3612(i), (j) (West Supp. 1989). If review is not sought within 45 days, the ALJ's findings are deemed conclusive in connection with a petition for enforcement. *Id.* § 3612(l). The statute creates a discrepancy in the filing deadlines at the appellate level. Petitions for review must be filed within 30 days, but Section 3612(l) suggests a 45-day time limit. HUD recognized the inconsistency but decided not to reconcile it because the time limits were statutorily specified. See 54 Fed. Reg. 3270 (1989).

69. 42 U.S.C.A. §§ 3612(m), (n) (West Supp. 1989).

70. *Id.* § 3610(e)(1) & § 3612(p). Fees to a party who has prevailed against the government are awarded under the Equal Access to Justice Act, which limits hourly rates to \$75, absent special circumstances, and requires a showing that the agency position was not "substantially justified." Administrative Procedure Act, 5 U.S.C. § 504 (1988).

71. 42 U.S.C.A. § 3610(e)(l) (West Supp. 1989).

72. *Id.* § 3610(g)(4).

discontinue the proceedings.⁷³

The scheme described above presumes that HUD retains the complaint. When the complaint falls within the jurisdiction of a certified state or local agency, it must be referred to that agency. HUD has no further involvement, unless the certified agency fails to commence proceedings within thirty days, does not carry forward the proceedings with "reasonable promptness," or the Secretary determines that the agency no longer qualifies for certification.⁷⁴ Certification by the Secretary requires "substantially equivalent" substantive rights, procedures, remedies and judicial review. However, any agency certified prior to the passage of the amendments retains its status for forty months after September 13, 1988.⁷⁵

C. Considerations in the Choice of Forum

In evaluating a litigant's choice between court and agency proceedings, one concern is readily apparent from the complex statutory framework. The concept of choice is, in a sense, illusory. Even if an aggrieved party chooses the agency process, the respondent may remove the matter to federal court under the election procedure. Of course, there is one significant difference between a private action commenced in federal court, and a removed action: in the former, the aggrieved party has the burden of prosecution; in the latter, the burden rests with the agency. Nevertheless, the problem of delay in the federal courts that the administrative process was designed to remedy is not fully resolved under the FHAA because of the removal opportunity. Thus, it should not be presumed that the choice by the aggrieved party of the agency route will necessarily result in more rapid disposition.

Putting aside the question of election, which is addressed more fully in Part II, there remain certain distinctive aspects of litigation in the two forums that command attention. These relate to the availability of various forms of relief and to control of the prosecution of the claim. First, punitive damages are available only from the federal court. An ALJ may award only actual damages and civil penalties, the latter of which inures to the benefit of the government, not the aggrieved party. Courts have generally interpreted actual damages to include recovery for emotional distress and humiliation beyond out-of-pocket expenses in Title VIII actions,⁷⁶ but awards have not been gen-

73. *Id.* § 3612(f).

74. *Id.* § 3610(f). There are no certified agencies, as yet, for disability and familial status claims; however, HUD has contracted with some agencies to conduct investigations and then turn the files over to HUD. Letter from Harry L. Carey, Assistant General Counsel for General Law, U.S. Dept. of Housing and Urban Development (March 26, 1990) [hereinafter HUD correspondence] [on file with Author].

75. *Id.* The certification does not appear to apply to claims relating to disability or family status, however. See *infra* Part III.

76. See, e.g., *Smith v. Anchor Building Corp.*, 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973); *Morehead v. Lewis*, 432 F. Supp. 674 (N.D. Ill. 1977), *aff'd* 594 F.2d 867 (7th Cir. 1979).

erous.⁷⁷ Just as the limitation on punitive damages under the 1968 Act was viewed as a disincentive to private enforcement,⁷⁸ the punitive damage bar in agency proceedings may be an important consideration for litigants, to be balanced against the advantages of government prosecution.

A second and similar distinction concerns the inclusion of "affirmative action" in the types of relief that the federal court may grant and the absence of that phrase in the description of remedies at an ALJ's disposal. Whether this was a purposeful exclusion is not apparent from the statute's legislative history. Nevertheless, if a significant goal of litigation is the imposition of quotas or preferences as a remedy for past acts of discrimination, the potential roadblock posed by the administrative route can be avoided by the selection of the judicial forum.

Finally comes the question of temporary relief, which in many housing discrimination matters is of critical importance. A victim of discrimination in a tight housing market may be primarily concerned with gaining a preliminary injunction preventing the sale or rental of the property. Courts have not been adverse to granting such relief,⁷⁹ which, as a practical matter, often provokes the settlement of the action. Of course, a preliminary injunction or restraining order requires a showing of likelihood of success on the merits, and generally, "testers" evidence will be critical. Litigation along these lines requires both planning and quick action. While the administrative scheme provides for temporary relief, the process is cumbersome, requiring agency referral of the matter to the Justice Department, which must then commence a federal action. Moreover, there is no provision in the Act that mandates or even encourages the use of testing in the agency investigation of complaints, and HUD has taken the position that it will not engage in or seek out and contract with private agencies to do testing in connection with its investigatory process.⁸⁰ Thus, given these two limitations on HUD's powers, there is cause for concern as to whether preliminary relief will be widely available through the administrative process.⁸¹

77. See Kushner, *supra* note 8, at 1076-78; see also Schwemm, *supra* note 8, at 380. For a complete listing of damage awards, see J. KUSHNER, FAIR HOUSING DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION at app. 9-1 (Supp. 1989).

78. See *supra* text accompanying notes 36-37.

79. See, e.g., Johnson v. Snyder, 639 F.2d 316 (6th Cir. 1981); see also Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989). Baxter, the first reported decision applying the FHAA, affirms the availability of such relief, as well as the broad principle of standing, discussed *supra* text accompanying notes 29-31.

80. See 54 Fed. Reg. 3263 (1989). In addition, HUD regulations require that before the agency makes a referral for preliminary relief, it must "consult" with the Justice Department. 24 C.F.R. § 103.500(a) (1989). This provision has been criticized as creating additional opportunity for delay, but HUD views the consultation requirement as encouraging expeditious applications. See 54 Fed. Reg. 3269-70 (1989).

81. Despite the apparent unwieldiness of the preliminary relief process, it appears that the Justice Department has efficiently processed those claims received from HUD so far. Between March 12, 1989, the FHAA's effective date, and January 22, 1990, the Justice Department was referred eight matters for "prompt judicial action" and has obtained temporary restraining order relief in six. DEPARTMENT OF JUSTICE, DOJ FAIR HOUSING ACT CASE ACTIVITY SINCE

Another consideration in the choice of forum relates to control and expense of prosecution. The judicial route requires an aggrieved party to obtain counsel,⁸² who will typically rely primarily on compensation through the statute's fee shifting provision. The contingent nature of compensation, which requires some measure of success in the litigation, limits the pool of attorneys willing to take on Title VIII and other civil rights actions. The administrative scheme, on the other hand, holds out the possibility of prosecution completely at agency expense. Liberal intervention provisions permit an aggrieved party to retain some measure of control over the process, but also may necessitate the assistance of counsel. In the event that this course is pursued, however, there is a question concerning compensation for the intervenor's attorney. Prevailing parties in the administrative process — including intervenors — are entitled to reasonable fee awards.⁸³ However, HUD has indicated that the reasonableness of a fee award to a prevailing intervenor must be evaluated as a question of fact by the ALJ, given the participation of federal attorneys, considering factors such as the appropriateness, necessity and effectiveness of the work performed.⁸⁴ Thus, there exists the possibility that decision makers will view the work of an intervenor's attorney as redundant and unnecessary. In the context of Section 1988 fee applications, courts have carefully scrutinized the intervenor's role before awarding fees to insure that the intervenor has contributed significantly to the favorable outcome.⁸⁵ If this view takes hold and the likelihood of fee shifting becomes more uncertain, aggrieved parties, unable to afford the cost of private counsel, will be required to cede complete control of the prosecution to the government if they pursue the administrative route. If, however, the fee award provisions are interpreted liberally to encourage participation of aggrieved parties, it may be easier for housing discrimination victims to obtain counsel. Attorneys concerned with the contingent nature of awards, dependent upon success in the litigation, may be encouraged to take on representation because of the agency's initial determination that "reasonable cause" exists.⁸⁶

MARCH 12, 1989 (Jan. 22, 1990). However, since this record represents a processing rate of less than one claim per month, it cannot serve as much of an indicator as to the efficiency of a fully operating system.

82. The statute provides that the court may appoint counsel upon application of either the plaintiff or the defendant. 42 U.S.C.A. § 3613(b) (West Supp. 1989). But the court cannot compel an attorney to represent a party. *See* *Mallard v. United States*, 109 S. Ct. 1814 (1989).

83. *See* 42 U.S.C.A. §§ 3612(c), (p) (West Supp. 1989).

84. 54 Fed. Reg. 3274-75 (1989) (preamble to regulations). The regulations provide that prevailing intervenors should receive fees unless "special circumstances" make recovery unjust. 24 C.F.R. § 104.940(6) (1989).

85. *See* *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 386-88 (M.D.N.C. 1987); *see also* *American Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324, 331-33 (S.D. Ind. 1986).

86. Under the statute, intervenors run the risk of being responsible for paying prevailing respondent's attorney's fees. However, HUD regulations permit such awards only if the intervenor's participation was "frivolous or vexatious, or was for the purpose of harassment." 24 C.F.R. § 104.940 (1989). *Cf.* *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989) (same result under Title VII).

II.

THE ADMINISTRATIVE PROCESS: A CLOSER LOOK

Despite limitations on relief and the possible loss of control over prosecution, the FHAA administrative process remains a very attractive enforcement mechanism for a victim of discrimination who seeks the resolution of his claim with a minimum investment of time, money and effort. It was Congress' expectation in enacting the statute that the administrative process would become the primary and preferred means of enforcement.⁸⁷ Whether this expectation is fulfilled will rest in large part on the diligence and vigorousness of HUD's investigative and prosecutorial efforts. Even at this early juncture in the statute's history, however, there is some cause for concern about the efficacy of the administrative route, arising out of HUD's interpretation of and procedures relating to the "reasonable cause" finding as set forth in its recently promulgated regulations.⁸⁸ In addition, the election process by which agency proceedings may be removed to federal court may render the administrative route substantially less advantageous than anticipated by Congress.⁸⁹ This section explores these two issues, and suggests strategies for bolstering the inherent benefits of the administrative scheme.

A. The Reasonable Cause Determination

The entire federal enforcement effort established by the FHAA is contingent on a finding of "reasonable cause." A finding of cause virtually requires the institution of adjudicatory proceedings, while a negative determination leaves the aggrieved party with only her private right of action in federal court. Given the importance of the determination, controls on agency conduct are of utmost importance. HUD regulations governing this stage of the process seem designed to maximize its discretion, however, rather than to ensure efficient and accurate determinations.

First, HUD's investigative procedures seem to provide for substantially greater input and control by the respondent than by the complainant. The regulations permit the agency to utilize formal discovery methods — deposi-

87. HOUSE REPORT, *supra* note 9, at 39.

88. See 54 Fed. Reg. 3232 (1989). The FHAA required HUD to issue regulations, after notice and comment, not later than March 12, 1989. See Pub. L. 100-430, 102 Stat. 1619, § 13(a) (1988). Proposed rules were published on November 7, 1988, and more than 6,000 comments were received. 54 Fed. Reg. 3234 (1989). The final rules, issued on January 23, and effective March 12, were not substantially modified with regard to procedural issues, although some of the concerns expressed in this Article were raised by commentators.

89. Early statistical information appears to bear out the concerns voiced here. In the Act's first 11 months, well over one thousand complaints were filed with HUD. Only approximately 229 complaints were investigated and referred to the General Counsel's office. HUD Correspondence, *supra* note 74. Of those, there were 24 determinations of "reasonable cause" and 106 of no "reasonable cause." Most of the remainder were "pending a determination." *Id.* Of the 24 complaints that HUD agreed to prosecute, nine are simply separate counts, filed by multiple complainants, against one respondent, *id.*, leaving a total of 15 cases actually prosecuted. And in eight of these prosecutions, a party has elected to remove to federal court. Approximately half of these cases were removed at the election of the complainant. *Id.*

tions, interrogatories, and requests for production and admissions — during the initial investigatory period, as well as during the pre-administrative hearing stage. In the 100-day investigatory period, however, while the respondent is given the same rights as the agency, no access to the discovery process is provided to the aggrieved party.⁹⁰ Thus, for example, a respondent could take the deposition of or serve interrogatories on the complainant, while the complainant must rely solely on the agency to establish reasonable cause, and cannot independently gather information through formal channels. HUD's position with regard to this disequilibrium is that a respondent should be permitted to obtain information in its own defense, while the complaining party, by choosing the administrative rather than the judicial route, "places the conduct of the investigation in HUD's hands."⁹¹ The agency suggests that an aggrieved party who wants independent discovery can obtain it by filing a civil action.⁹² This view of the investigatory process seems unnecessarily to prejudice the complainant in this crucial first stage,⁹³ and to run counter to the congressional intent of encouraging administrative resolution. HUD perceives its role to be that of a neutral fact finder at this stage.⁹⁴ Neutrality would seem to be best served by permitting discovery to both or neither of the parties. The denial of discovery rights to complainants makes careful monitoring of HUD investigatory efforts a necessity.

A second troubling aspect of the reasonable cause determination process relates to HUD's definition of cause. The regulations indicate that the determination will be made "based solely on the totality of factual circumstances," and the agency "shall consider whether the facts . . . are sufficient to warrant the initiation of a civil action in Federal Court."⁹⁵ While this language appears to suggest a Rule 11 standard,⁹⁶ the agency's commentary to the regulations indicates that its view of reasonable cause in fact may be more restrictive.⁹⁷ Both the HUD commentary and Rule 11 require that the complaint be "well-grounded in the facts."⁹⁸ However, under the commentary,

90. 24 C.F.R. § 103.215(G) (1989); *see also* 24 C.F.R. §§ 104.500-.580 (1989) (governing the conduct of discovery). In addition, the requirement that the agency "seek voluntary cooperation" in obtaining documents and statements in the first instance may provide an opportunity for a recalcitrant respondent to slow down the administrative process at its earliest stage. 24 C.F.R. § 103.215(a) (1989).

91. *See* 54 Fed. Reg. 3263 (1989).

92. *Id.*

93. Another problem with this provision is that it allows for the intimidation of complainants through abuse of the discovery process. HUD does not provide legal representation to an aggrieved party confronted with discovery requests. *See* HUD correspondence, *supra* note 74. The need to obtain counsel at this stage, or to appear unrepresented at a deposition, for example, might cause an aggrieved party to withdraw her claim.

94. *See* 54 Fed. Reg. 3263 (1989) ("While HUD is neutral with respect to the parties, the parties' positions are not equal").

95. 24 C.F.R. § 103.400 (1989).

96. *See* FED. R. CIV. P. 11.

97. The proportion of cases finding no reasonable cause seems to suggest that a rigid view is being applied. *See supra* note 89.

98. *Compare* FED. R. CIV. P. 11 and 54 Fed. Reg. 3267 (1989).

cause requires conduct that "appears to constitute a violation of the Act," while Rule 11 permits complaints where there exists "a good faith argument" for extension, modification, or reversal of existing law.⁹⁹ While the language of the regulation would prevail over the commentary, the agency's comments nevertheless are worrisome, particularly for those complainants who are asserting novel claims of discrimination on the basis of disability or family status, areas in which what constitutes a violation of the Act has not yet been judicially defined.

A third issue concerning the reasonable cause determination is its appealability. HUD takes the position that no right of appeal is contemplated by the statute,¹⁰⁰ and suggests that the private right of action provides a sufficient substitute.¹⁰¹ It seems likely, however, that this issue will find its way to the courts. Under general principles of administrative law, preclusion of judicial review of agency action is disfavored.¹⁰² A presumption in favor of review governs unless a contrary intent is explicitly stated in the statute, is "fairly discernible in the statutory scheme,"¹⁰³ or unless the "agency action is com-

99. Compare FED. R. CIV. P. 11 and 54 Fed. Reg. 3267 (1989).

100. See 54 Fed. Reg. 3268 (1989). The evidence upon which HUD relies is not particularly convincing. HUD cites the statutory direction that complaints be "promptly dismissed" upon a finding of no reasonable cause, the failure to provide specifically for review, and the general goal of expeditious resolution which finds support in the FHAA's legislative history.

101. *Id.* ("HUD notes that the failure to provide for the review of the reasonable cause determination will not preclude an aggrieved person from filing a civil action . . .").

102. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In *Bowen*, the Supreme Court rejected the argument of the Secretary of Health and Human Services that Part B of Title XVIII of the Social Security Act (The Medicare Act) precludes judicial review. The Court held that preclusion of judicial review must be clearly and convincingly articulated by Congress. The "clear and convincing" standard was evoked by the Court to reject the Secretary's arguments that the Medicare Act implicitly precluded judicial review of Part B of the Act by explicitly providing for review of actions under Part A, and remaining silent on judicial review of actions under Part B.

The *Bowen* standard derives directly from *Abbott Laboratories*, in which the Court rejected the Food and Drug Administration's assertion that pre-enforcement review of administrative regulations is precluded by lack of ripeness. Justice Harlan maintained that since the Administrative Procedure Act endorses the basic presumption of review, the courts must require a clear and convincing showing of evidence of a contrary legislative intent to restrict review. *Abbott Laboratories v. Gardner*, 387 U.S. at 140.

103. *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970); see also *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). In *Ass'n of Data Processing Service Organizations*, a data processing organization brought suit against the comptroller of currency challenging his ruling that banks could offer data processing services. The Court held that judicial review of the comptroller's action was not barred by the APA unless (1) statutorily precluded or (2) the action is committed to agency discretion by law. The Court read the first exception to the presumption of judicial review to mean either a specific expression by Congress of intent to preclude review or a fairly discernible purpose for withholding review found in the statutory scheme. These expressions must meet the "clear and convincing" standard articulated in *Abbott*. After interpreting the relevant statutes, the Court held that the suit was not precluded. 397 U.S. at 158.

In *Block v. Community Nutrition Institute*, the Court used the same reasoning to reach the opposite result. In an opinion by Justice O'Connor, the Court decided that allowing a consumer group to sue the Secretary of Agriculture over the price of certain types of milk would "severely disrupt this complex and delicate administrative scheme." *Block v. Community Nu-*

mitted to agency discretion by law."¹⁰⁴

The FHAA contains no explicit exclusion; rather, the statute is silent on the subject of whether reasonable cause determinations are subject to review. Whether an intent to preclude review is discernible from the statutory scheme as a whole is a close question, and in recent years the Supreme Court's decisions in this area have evidenced a certain indeterminacy.¹⁰⁵ Courts might find that the statute's specific allowance of review following an administrative hearing and the private right of action create a clear structure for expeditious resolution of complaints that would be disturbed by still another level of judicial involvement. However, given the substantial distinctions between agency prosecution dictated by a finding of cause, and individual federal court proceedings, it may be that the courts will find that the overall scheme does not rise to the level of "clear and convincing evidence" of a congressional intent to preclude review.¹⁰⁶ The resolution of the issue may become case-specific, depending largely on whether there develops a sense that HUD's determinations in fact appear arbitrary or ill-founded.

The final exception to the presumption of review relates to agency discretion. Courts are not always willing to review agency actions that fall within the scope of prosecutorial discretion,¹⁰⁷ but the availability of review will turn on how much discretion the agency is deemed to have actually been afforded

trition Institute, 467 U.S. at 348. Justice O'Connor found that the "clear and convincing" standard was flexible enough to allow an inquiry into whether granting review would frustrate the meaning of the statute. *Id.* at 351. The statute involved in *Block* regulated milk prices between producers and handlers. The statute made no mention of consumer participation. In the eyes of the Court, allowing such participation would provide a way for handlers of milk to bypass the administrative remedies set forth in the statute by suing in their capacity as consumers. *Id.* at 352. Thus, the Court found a preclusion of consumer claims fairly discernible in the statutory scheme. *Id.* at 351-52.

104. Administrative Procedure Act § 10, 5 U.S.C. § 701 (1966); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (very narrow construction of the "committed to agency discretion" exception). *Volpe* concerned the Secretary of Transportation's decision to run a highway through a national park. The Court held that the exception to the APA right of judicial review for acts committed to agency discretion is only applicable in those instances where there is no law to apply. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 410 (citing S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)). The Court interpreted the statute involved to limit the Secretary's discretion in ways that were judicially enforceable. *Id.* at 410-13. Thus, it remanded the case for determination whether the Secretary's choice was the only "feasible and prudent" alternative, the legal standard specified the statute. *Id.* at 420.

105. Compare *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984) (suggesting a searching inquiry into the statutory structure and goals) with *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1984) (reiterating a strong presumption against preclusion unless explicitly stated).

106. See *Abbott Laboratories v. Gardner*, 387 U.S. at 141.

107. See *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Heckler*, the Court held that it could not review the Food and Drug Administration's refusal to take action against states that used drugs to inflict capital punishment by lethal injection. The Court used language contained in the Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2) (1988), to create a presumption against judicial review of agency refusal to take prosecutorial action. Since an agency must use its particular expertise to determine whether a violation has actually occurred and a refusal to act is not an exercise of "coercive power over an individual's right to liberty or property," whether or not to prosecute was presumed to be a matter left to agency discretion. *Id.* at 831-

in its decision making. When agency decisions to prosecute are circumscribed by "clearly defined factors," judicial review is appropriate.¹⁰⁸ If a decision is left solely to the judgment of the agency, however, courts will typically find no right to judicial review, on the theory that there is no legal standard upon which to evaluate the propriety of the agency action.¹⁰⁹

Under the FHAA, HUD is not entitled to pick and choose among the complaints it prosecutes. If HUD decides that there is reasonable cause, it must commence proceedings. The real question thus relates to the standards governing the cause finding. Here, the agency's enunciation of a Rule 11 standard¹¹⁰ suggests that judicial review may not be precluded under the "discretionary" exception. Moreover, HUD has implied that it will not take into consideration in "cause" findings such typical discretionary options of the prosecutor as the anticipated amount of recovery, resource allocation, and ease of prosecution.¹¹¹ Courts have become accustomed to utilizing the Rule 11 standard in litigation over sanctions or other relief,¹¹² and may well find that it sufficiently circumscribes the agency's discretion for review purposes. Moreover, a court faced with an appeal from a reasonable cause assessment would not be hindered by the lack of an administrative record to review. The

32. This presumption may be rebutted only if a substantive statute gives specific guidelines for an agency to follow in the exercise of discretion. *Id.* at 833.

108. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975), in which the Court found that the Secretary of Labor must state reasons for his failure to challenge the results in the election for a union officer. The Court held that the Secretary's refusal to prosecute was subject to judicial review because the rationale (later expressed in *Heckler v. Chaney*, 470 U.S. 821 (1985)) that inaction did not affect individual rights did not apply in this case. For, in this instance, individual union members would be left without a remedy. *Id.* at 574-75. Thus, where the decision whether to bring suit depends on a "rather straightforward factual determination and [there is] nothing in the nature of that task that places the . . . decision 'beyond the judicial capacity to supervise,'" judicial review may not be precluded. *Bachowski v. Brennan*, 502 F.2d 79, 88 (3d Cir. 1974), *rev'd on other grounds* *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

109. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); see also *Webster v. Doe*, 486 U.S. 592 (1988). *Webster* illustrates that, in cases of constitutional magnitude, there is always a legal standard upon which to evaluate agency action. *Webster* reaffirms the *Overton Park* and *Heckler* decisions by allowing a covert agency technician for the C.I.A., who was discharged because of his sexual orientation, to bring a constitutional claim against the agency. 486 U.S. at 604. Although the decision as to whether to dismiss an employee was expressly left to the C.I.A. Director's discretion by the statute, the statute cannot preclude consideration of colorable constitutional claims based on an individual discharge. *Id.* Thus, the Court reminds us in *Webster* that administrative agencies never have the discretion to ignore constitutional guarantees, even in cases where their actions are statutorily unreviewable. Similarly, where FHAA claims involve constitutional issues, judicial review must be guaranteed.

110. See *supra* text accompanying notes 93-97.

111. See 54 Fed. Reg. 3267 (1989). HUD has further stated that its intent is to base the reasonable cause assessment solely on the facts, excluding consideration of "extraneous matters not related to the factual determination of liability."

112. The question of standards under Rule 11 has engendered much scholarly attention. See, e.g., Bloomenstein, *Developing Standards for the Imposition of Sanctions under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289 (1988); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575 (1987); Note, *Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

requirement of a developed administrative record distinguishes the FHAA from many administrative schemes.¹¹³ Not only must HUD prepare a written investigative report under the statute;¹¹⁴ the regulations also provide that the agency will issue "a short and plain written statement of the facts" upon which it bases a determination of no cause.¹¹⁵ Thus, a reviewing court would appear to have a sufficient record to determine whether the agency action was arbitrary or capricious, or an abuse of discretion — the appropriate standard of review under the Administrative Procedure Act.¹¹⁶

As the foregoing discussion implies, the question of judicial review at this early stage is most significant when the agency finds against the complainant. It is unlikely that a court would rule favorably on a claim for review by a respondent from a determination that cause exists, because the agency action is not final — the respondent may be absolved of liability in later administrative or judicial proceedings — and there has been no exhaustion of remedies.¹¹⁷ The complainant who receives a no cause determination, on the other hand, is clearly without further recourse at the agency level; thus, issues of finality and exhaustion are satisfied.

The fourth and final area of concern with regard to reasonable cause determinations relates to the "impracticability" exception¹¹⁸ to the 100-day investigatory period.¹¹⁹ Expeditious complaint processing is an obvious advantage of the administrative scheme. The time limits statutorily provided

113. Even where the administrative scheme calls for informal action which does not generate a record or require the issuance of agency findings, it may still be advantageous for agency decision-makers to issue findings, as illustrated by the decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). After holding that the statute in question limited the Secretary of Transportation's discretion to allow highways to be constructed through national parks, Justice Marshall, writing for the Court, turned to the issue of the record necessary for judicial review. *Id.* at 409. Because the agency was involved in informal adjudication in deciding that there were no "feasibly prudent" alternatives to running a six-lane highway through Overton Park, no formal findings were required by the APA. *Id.* at 417. In order to provide a record on which the Court could review the decision, Justice Marshall recommended that the administrative officials who participated in the decision testify and explain their action if they did not voluntarily wish to submit written findings. *Id.* at 420. Thus, Justice Marshall skillfully provided for the issuance of findings even in informal adjudications where judicial review is not precluded by "clear and convincing" evidence found within the statute or statutory scheme. Agency heads, rather than subject themselves to in-court examination of the basis for their decisions, were prompted by the decision in *Volpe* to issue findings.

114. 42 U.S.C.A. § 3610(G)(5)(a) (West Supp. 1989).

115. 24 C.F.R. § 103.400 (1989).

116. 5 U.S.C § 706 (1988); see also *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975) (where there is no "clear and convincing evidence that Congress intended to prohibit all judicial review of [agency action] . . . courts are [not] necessarily . . . without power or jurisdiction . . . if it should clearly appear that the [administrator] has acted in an arbitrary and capricious manner. . . .").

117. See *Federal Trade Commission v. Standard Oil Co. of Calif.*, 449 U.S. 232, 236 (1980) (FTC's issuance of a complaint after investigation was not "final agency action" warranting judicial review); see also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) (rule requiring exhaustion of administrative remedies cannot be avoided by claim that NLRB complaint is groundless and holding of an administrative hearing would cause irreparable damage).

118. See *supra* note 51 and accompanying text.

119. 42 U.S.C.A. § 3610(a)(1)(B)(IV) (West Supp. 1989). HUD appears to be interpreting

at every stage contemplate final resolution at the agency level in less than one year.¹²⁰ Each such deadline, however, is qualified by an "impracticability" exception. Despite this recognition by Congress of the realities of decision making, the drafters designed two checks on the utilization of the exception. First, in the event a deadline is not met, the agency must notify the parties in writing of the reasons for the delay. Second, the agency must prepare an annual report to Congress that tabulates the number of instances in the preceding year in which investigations, reasonable cause determinations, commencements of hearings, and issuances of decision did not meet the specified time limitations.¹²¹ Neither of these provisions, however, will serve to control agency delay given HUD's interpretation of "impracticability." The agency has refused to define in its regulations the circumstances under which it will invoke the exception, but has explicitly indicated that "demands upon HUD's resources caused by other docketed cases" would be a legitimate consideration.¹²² If HUD uses backlog to excuse the statutory deadlines, the controls on delay will stand a good chance of being rendered meaningless, and a major advantage of the administrative scheme nullified. This risk is particularly acute at the investigatory stage. Once there is a finding of reasonable cause, delay in final resolution is at least mitigated, since an aggrieved party is assured of prosecution at agency expense.

It could be argued that including resource availability in the interpretation of impracticability is contrary to the intent of the statute. The House Judiciary Committee Report suggests that an extension of the 100-day investigatory period is contemplated only in "exceptional" cases.¹²³ Thus, a more reasonable interpretation of the statutory exception is that only factors peculiar to a particular complaint — for example, difficulties in collecting information or identifying witnesses, prolonged discovery, or the need for extensive testimony — should excuse compliance with the time limitations. In the event that a regular pattern of extensions becomes the norm in the administrative process, consideration should be given to challenging the HUD interpretation of the exception.

B. The "Election Procedure"

The most novel feature of the FHAA is the "election" procedure, by which, after a finding of reasonable cause, either the aggrieved party or the respondent may choose to have the claim prosecuted by HUD in federal court

this exception loosely. Investigations are not being completed within 100 days. See HUD correspondence, *supra* note 74.

120. 42 U.S.C.A. § 3610 (West Supp. 1989). The scheme allows 100 days for investigation and reasonable cause determination, 120 days from issuance of the charge to commencement of a hearing, 60 days for issuance of a decision, and 30 days for review by the Secretary — a total of 310 days, not including actual hearing days.

121. 42 U.S.C.A. § 3608(c)(A) (West Supp. 1989).

122. 54 Fed. Reg. 3265 (1989). See HUD correspondence, *supra* note 74.

123. HOUSE REPORT, *supra* note 9, at 33 (a section-by-section analysis).

rather than before an ALJ.¹²⁴ The original committee bill did not contain this provision.¹²⁵ It allowed only for a private claim in federal court and for HUD prosecution in the administrative level.¹²⁶ The election was adopted by amendment on the House floor proposed by Representative Hamilton Fish,¹²⁷ and in the Senate by Senator Edward Kennedy.¹²⁸ Its purpose, made clear in the congressional debates,¹²⁹ was to save the FHAA from being declared unconstitutional as an abridgement of the seventh amendment's right to a jury trial, and as a violation of Article III of the Constitution, which safeguards litigants' rights to independent and impartial federal adjudication.

One area of constitutional concern surrounding the power of an ALJ to award actual damages and civil penalties arises from the Supreme Court decision in *Curtis v. Loether*.¹³⁰ The Court in *Curtis* held that because Title VIII conferred "legal" rights and remedies, as indicated by the allowance of compensatory damages as well as equitable relief, the seventh amendment entitled either party to a trial by jury.¹³¹ That the claim was created by statute, rather than by common law, was not viewed as determinative since the claim involved rights and remedies typical of actions at law.¹³² *Curtis* seemed to suggest that Title VIII claims would require consideration in Article III courts. However, several years later in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*,¹³³ the Court held that administrative adjudication of a government claim for a civil penalty did not violate the seventh amendment. Congress was entitled to assign to agencies fact finding and "initial adjudication" of claims created by statute. Thus, the constitutionality of the delegation of adjudicative authority over Title VIII claims would depend on whether the claim was private or public. The *Curtis* distinction between legal

124. The agency may also elect removal when a complaint is filed on the Secretary's own initiative. 42 U.S.C.A. §§ 3610 (a)(1)(A)(i), 3612(a), (o) (West Supp. 1989); see also *id.* § 3602(j) (stating that "[c]omplainant" means the person (including the secretary) who files a complaint under Section 3610 of the Title").

125. See HOUSE REPORT, *supra* note 9, at 35-36 (section-by-section analysis).

126. A number of members of the House Judiciary Committee expressed reservations about the bill on several grounds. First, they viewed adjudication by ALJs as too controversial, voicing the concerns of the National Association of Realtors that ALJs would lack sufficient independence from HUD. Second, they questioned the constitutionality of the delegation of adjudicative power. Finally, they suggested that the administrative scheme was both inefficient, in that enforcement petitions in the circuit court might create substantial delay, and inappropriate, in that the jury system was more responsive to discrimination cases. Their proposal would have given HUD authority to seek expedited emergency injunctive relief in the federal court, with the jury's findings binding in a subsequent action for damages. See HOUSE REPORT, *supra* note 9, at 69-79 (additional views of Messrs. Moorehead *et al.*).

127. 134 CONG. REC. H4679 (daily ed. June 23, 1988) (the vote was 401-0).

128. 134 CONG. REC. S10454 (daily ed. August 1, 1988).

129. See, e.g., 134 CONG. REC. S10460 (daily ed. August 1, 1988) (remarks of Senator Hatch); 134 CONG. REC. H460 (daily ed. June 22, 1988) (remarks of Representative Fish).

130. 415 U.S. 189 (1974).

131. *Id.* at 192.

132. The Court saw Title VIII claims as most analogous to tort actions. *Id.* at 195.

133. 430 U.S. 442 (1977).

and equitable remedies receded in significance.¹³⁴ The opportunity for agency adjudication raised by *Atlas* was called into question, in the view of some, by the Supreme Court's 1987 decision in *Tull v. United States*.¹³⁵ In *Tull*, the Court returned to the *Curtis* analysis, giving greater importance to the form of relief than to the public/private distinction in determining the constitutional necessity of a jury trial. It held that a jury trial is required to determine liability when the government seeks injunctive relief and civil penalties under the Clean Water Act because civil penalties are a common law form of relief, like punitive damages. *Tull* can be read consistently with *Atlas* as not applying to administrative proceedings.¹³⁶ The decision raised the concern, however, that even if the initial delegation to an agency of adjudicative power under Title VIII could survive a seventh amendment challenge, the government's attempt to collect a civil penalty would necessitate the relitigation of the entire matter before a federal court jury.

A second and related constitutional concern stems from the Supreme Court's recent focus upon separation of powers doctrine. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹³⁷ seemed to signal the adoption of a rigid view that the determination of "private rights" must be confined to Article III courts. In that case, the Court declared unconstitutional the power of bankruptcy judges to resolve contract claims. In several subsequent decisions — particularly the *Schor* and *Thomas* cases — however, a majority of the Court adopted a more functional approach to delegations of adjudicative power based on an evaluation of the degree of incursion on the federal judiciary when Congress switches authority for resolution of a private claim from an Article III to an Article I court.¹³⁸ This balancing approach, however, has created substantial uncertainty as to how much delegation will survive a con-

134. The *Atlas* Court specifically noted, although in dicta, that "even if the Seventh Amendment would have required a jury" trial where the adjudication was assigned to a federal court, Congress could delegate adjudication to an agency. *Id.* at 455.

135. 481 U.S. 412 (1987).

136. *See id.* at 416 n.4. The Court suggested in a footnote that *Atlas* survives as authority for the proposition that functional and practical considerations preclude the application of the seventh amendment to administrative hearings.

137. 458 U.S. 50 (1982).

138. *See* *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (allowing the Commodity Futures Trading Commission (CFTC) to adjudicate private state law counterclaims in fraud adjudications actions heard by the commission). In *Schor*, Justice O'Connor spoke for the Court when she emphasized the limited nature of the extension of jurisdiction to a very small class of claims related to commodities. The convenience of having the commission decide all the claims together far outweighed separation of power concerns and any prejudice that might result from having private claims decided by an Article I court. *See also* *Thomas v. Union Carbide Agricultural Products Co.* 473 U.S. 568 (1985). *Thomas* involved an action over the price charged by one insecticide manufacturer to another for information required by the Federal Insecticide, Fungicide and Rodenticide Act before a new product was registered. These disputes were to be settled by an administrative arbitrator, with judicial review only for fraud, misrepresentation or other misconduct. In another opinion by Justice O'Connor, the Court deemed the private right to adjudication of these claims "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U.S. at 594.

stitutional challenge.¹³⁹ Moreover, in areas other than adjudicative delegation, the Court has displayed a new sympathy to separation of powers challenges.¹⁴⁰

The unsettled state of the law led Congress to hold extensive hearings in 1987 and seek opinions on the question of whether mandatory ALJ adjudication, at the choice of the aggrieved party, would withstand constitutional attack.¹⁴¹ The Justice Department took the view that the bill would likely be declared unconstitutional on Article III and seventh amendment grounds.¹⁴² A number of legal scholars disputed the Justice Department's analysis, however. They interpreted *Tull* as not applicable to statutory schemes in which adjudication has been assigned by Congress to an administrative agency.¹⁴³ In addition, they saw the balancing approach of *Schor* as insulating the proposed Title VIII structure from a separation of powers challenge. The committee seems to have been sufficiently persuaded by the latter analysis that it made no substantial modifications to the bill.¹⁴⁴

Once the bill reached the full Congress, however, it became apparent that the Justice Department's arguments had provided enough ammunition to stop

139. Justice Scalia, in his concurrence in *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), attacked the *Thomas* test of analyzing whether a right was "closely integrated into a public regulatory scheme," as having no constitutional basis. 473 U.S. at 594 (Scalia, J., concurring). Balancing tests, he posited, have no application to the constitutional guarantees set forth in Article III regarding adjudication of claims between citizens.

140. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986), which struck down the Gramm-Rudman-Hollings Act as an unconstitutional delegation of executive power to the legislative branch. Certain budget-cutting powers were placed with the Comptroller General who, the Court determined, was controlled by Congress through its broad power to remove him. The Court found the delegation to be a violation of the separation of powers doctrine. "By placing the responsibility for the execution of the [Gramm-Rudman-Hollings Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function." *Id.* at 716.

Likewise, in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), the Court struck down as a violation of separation of powers a federal statute which authorized a one-house congressional veto of the Attorney General's granting of compassionate suspension of deportation. Once Congress had vested the power to make such determinations with the Attorney General, the Court reasoned, it could not wrest it back by using the veto procedure, which violates the bicameralism and executive presentment clauses of the Constitution.

But see *Mistretta v. United States*, 109 S. Ct. 647 (1989) (upholding a delegation by Congress to the United States Sentencing Commission, an agency made up of six members, three of which are federal judges, and peculiarly placed in the judicial branch); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding Ethics in Government Act, which gives the Attorney General power to appoint independent counselors to investigate and prosecute government officials for federal criminal violations).

141. *See Fair Housing Amendments Act: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 585-843 (1987) [hereinafter 1987 *Hearings*].

142. *Id.* at 776, 795 (memorandum of Office of Legal Counsel, Department of Justice).

143. *See id.* at 570 (statement of Professor Girardeau Spann); *id.* at 571 (statement of Dean Paul Carrington); *id.* at 585, 721 & 755 (testimony of Professor Arthur Wolf); *id.* at 684 (testimony of Professor Thomas Rowe).

144. Indeed, while the constitutional concerns raised are not frivolous, the vigor of their assertion suggests that political rather than purely legal considerations were significant, if not determinative.

the legislation.¹⁴⁵ The election procedure put forward by Representative Fish rescued the bill from defeat.¹⁴⁶ The congressional debates primarily reflect a sense of relief that a compromise was reached and indicate virtually no analysis of the effect of the procedure on a major goal of the legislation — to provide expeditious and efficient resolution of complaints.¹⁴⁷ In part because the election procedure was not the subject of committee consideration, its ramifications were never fully explored.¹⁴⁸

There is no question that removal will provide respondents with a real opportunity to delay the process of complaint resolution. A responding party does not have to elect removal until 120 days after the administrative complaint is filed, assuming that the investigatory period has not been extended by the agency.¹⁴⁹ The Justice Department then is afforded another thirty days to commence an action in federal district court. Thus, it will take a minimum of

145. See 134 CONG. REC. H4606 (1988). On June 22, 1988, Representative Fish indicated his intention to offer the "election" amendment that "responds to certain constitutional concerns that have been raised in connection with the administrative enforcement mechanism." *Id.* He stated:

In an effort to resolve this problem, I have worked closely with subcommittee Chairman Don Edwards, the Leadership Conference on Civil Rights, the NAACP, the American Civil Liberties Union, civil rights litigation groups, and the National Association of Realtors to formulate a compromise solution. Reflecting his strong commitment to civil rights, Vice President Bush talked with me on more than one occasion to offer his encouragement and personal assistance in this effort. The distinguished minority leader, Bob Michel, was also instrumental in forging this needed compromise.

Under the terms of my proposed amendment, following the Secretary's issuance of a charge, complainants, respondents, or any other aggrieved person would be given the option of electing to go to a U.S. District Court rather than to go before an administrative law judge. This election option means that any of the affected persons could unilaterally act to obtain a jury trial in these cases, after the HUD Secretary issues a discrimination charge

Id.

146. See 134 CONG. REC. H4677 (daily ed. June 23, 1988) (remarks of Representative Sensenbrenner). Representative Sensenbrenner was among those who questioned the Judiciary Committee report endorsing mandatory administrative adjudication. Commenting on the election procedure, he stated: "The solution was so simple, I wish we had come up with it years ago [This] compromise . . . has broken the logjam that has prevented this Congress from enacting a strengthening of the fair housing law for at least 11 years." See also *id.* (remarks of Representative Michel).

147. *Id.* at H4676 (remarks of Representative Glickman) ("The two-track procedure offered today . . . is expeditious, fair to both parties, and legally sound. It solves the constitutional and administrative law questions, . . . but more important, this unique approach may serve as a model for laws in the future."); see also *id.* at 4677 (remarks of Representative Michel) ("Under the excellent amendment, authored and fostered by Mr. Fish, we are able to combine the efficient, effective enforcement . . . with the option of a jury trial mandated by the seventh amendment").

148. Senator Thurmond strongly objected to the fact that the Fish version of the legislation was not returned to the Senate Judiciary Committee, which had held hearings on the constitutional issues. See 134 CONG. REC. S10457 (daily ed. August 1, 1988) ("this bill deserves the consideration of the Judiciary Committee, and its thinking").

149. As noted *supra* at note 115, "HUD is *not* completing the investigative stage of the complaint process within one hundred days." HUD correspondence, *supra* note 74 (emphasis added).

five months before the complaint is filed in court. The respondent thereafter may utilize the full range of procedural devices that can cause discrimination actions to languish for years, including motion practice, extensive discovery and the litigation of discovery disputes. Moreover, insistence on a jury can further delay substantially even an action ready for trial, given the current docket congestion in the federal courts.¹⁵⁰

There are some disadvantages to a respondent who elects federal court, however, and corresponding advantages to the aggrieved party. The administrative proceeding limits the complainant to actual damages; civil penalties assessed by an ALJ would inure to the government. In a removed action, however, the respondent risks not only actual damages and civil penalties, but also punitive damages payable to the aggrieved party, whether or not the aggrieved party intervenes in the federal action.¹⁵¹ Despite these considerations, however, it was the realtors' and builders' lobby that consistently objected to mandatory agency adjudication and finally supported the Fish compromise, which strongly suggests that the election procedure is viewed as beneficial to and will be utilized by respondents.¹⁵²

If this proves to be the case, aggrieved parties will reap only a partial benefit from the FHAA. They will find themselves in federal court, as they had under the original provisions of Title VIII, but with the assistance of government prosecution by the Justice Department. Even that benefit may prove illusory, however, if the Justice Department does not vigorously fulfill its responsibilities, a legitimate concern given its track record on Title VIII enforcement to date.¹⁵³ Aggrieved parties may find it necessary to intervene with private counsel, thus leaving them in the same position, after a substantial passage of time, as if they had pursued the private enforcement route.

C. *The Choice of Simultaneous Proceedings*

Many of the concerns outlined above can be addressed by the simultaneous filing of a private enforcement action under Section 3613 and an administrative complaint under Section 3610 of the FHAA. The statute clearly

150. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (1989). This report noted that drug-related criminal prosecutions have increased substantially and now heavily dominate the federal court docket, making the trials of civil matters subject to tremendous delay. It has been estimated that in a metropolitan federal district court, it takes an average of 2 1/2 years before a civil matter is put down for trial.

151. See *supra* text accompanying notes 36-42.

152. See HOUSE REPORT, *supra* note 9, at 79.

153. See, e.g., *supra* note 8. It is too early to judge the Department's commitment to the litigation of individual actions for which it becomes responsible under the election procedure, since only four cases have taken this route, according to the Department's statistical records. See DEPARTMENT OF JUSTICE, DOJ FAIR HOUSING ACT CASE ACTIVITY SINCE MARCH 12, 1989 (January 22, 1990). The Department has been more active, however, in its pattern and practice litigation since the passage of the FHAA. It has filed 17 actions: seven based on race discrimination, six based on familial status, and four on discrimination against the "handicapped." *Id.*

permits this procedure, and indeed, HUD's regulations almost appear to encourage it.¹⁵⁴ It represents the optimal enforcement strategy since an aggrieved party's options are not limited in any way by dual filings. While the statute requires that administrative proceedings be halted if a federal trial is commenced, it is unlikely that a federal court action would go to trial before the commencement of an administrative hearing. If, however, the federal court held an expedited trial, consolidated with a motion for preliminary relief,¹⁵⁵ for example, the aggrieved party obviously would benefit from the rapid adjudication. In the more typical situation, the aggrieved party would have the option to pursue the possibility of agency prosecution of the claim, while not sacrificing the expeditious utilization of the available private remedies. Moreover, the pendency of the federal action gives an aggrieved party the opportunity for greater control and influence over the administrative process in several ways.

First, the pendency of a court action allows the aggrieved party to seek discovery against the respondent. This right equalizes the information-gathering positions of the complainant and the respondent during the investigative stage of the administrative process. And the discovery product obtained in the federal action could be utilized to bolster the aggrieved party's case while the agency is reaching its critical reasonable cause determination.¹⁵⁶ This strategy may prove particularly important if experience shows that HUD investigative efforts are less than rigorous, or if the agency delays investigations under the impracticability exception.

Another advantage of simultaneous filing is that it avoids delay in the event that the agency finds no reasonable cause. An aggrieved party loses at least 100 days during the investigative stage, and given the agency's view that lack of resources is a sufficient excuse for not meeting the statutory deadlines, there is the possibility that investigations will languish indefinitely. Since the statutory scheme explicitly endorses dual proceedings prior to the trial stage, there is little reason for complainants not to guard against possible delay. If, of course, the agency finds reasonable cause, and neither party elects removal, the federal action can be dismissed upon stipulation or by court order.¹⁵⁷

Third, the filing of simultaneous proceedings could also be used to influence the conciliation process at the administrative level. The structure of the

154. See *supra* text accompanying notes 24-28. The problems of the disallowance of discovery to aggrieved parties during the investigation stage and the non-appealability of reasonable cause determinations are alleviated, according to HUD, by the availability of private enforcement action. See *supra* text accompanying note 90.

155. See FED. R. CIV. P. 65 (a)(2) (on an application for a preliminary injunction, the court may order the consolidation of a trial on the merits).

156. If this strategy is to be utilized effectively, plaintiffs would be well-advised to serve discovery requests along with the complaint, since responses should be obtained before the 100-day investigatory period expires. See FED. R. CIV. P. 30(a) (depositions may be taken after 30 days after service of the complaint); see also FED. R. CIV. P. 33, 34 (interrogatories and document requests may be served with the complaint; defendant has 45 days to respond).

157. See FED. R. CIV. P. 41.

FHAA provides little impetus for respondents to engage in serious settlement discussions during the 100-day investigatory period. The respondent loses nothing by simply waiting out the investigation to determine whether there is a determination of reasonable cause, on the assumption that without such a finding many aggrieved parties will abandon their claims. The filing of a federal court action along with an administrative complaint, however, gives notice that the aggrieved party intends to pursue the claim vigorously through every available procedure. And, whereas a respondent might not necessarily obtain counsel at the early administrative stages, the pendency of a federal court action virtually requires the expenditure of fees for representation. Thus, dual filings may encourage the respondent to attempt a quick resolution of the entire claim through serious participation in the conciliation process.

Fourth, early motion resolution in the federal courts might circumscribe the agency's discretion with regard to reasonable cause determinations. For example, if the aggrieved party's complaint survives a motion to dismiss for failure to state a claim, the agency would be hard pressed to conclude that the complaint does not constitute a violation of the Act from a legal, if not factual, viewpoint. In the case of claims for which there does not yet exist an established body of case law — in areas of discrimination on the basis of disability or familial status, particularly — this strategy may prove effective in encouraging agency prosecution.

Finally, simultaneous filing may permit an aggrieved party some influence over the election process. A respondent facing the need to defend the claim on two fronts through discovery may be willing to waive the right to elect removal to federal court at a later time, in exchange for the aggrieved party's agreement to the dismissal of the pending federal court action. The aggrieved party may also engage in a certain amount of forum — or, more precisely, opinion — shopping through this procedure. It seems likely that an action brought pursuant to an election would be consolidated with a previously commenced private action.¹⁵⁸ Thus, the aggrieved party, by filing a federal court action, can determine whether to pursue the claim in that forum, given the possibility that a removed agency prosecution will be joined with it, or to dismiss the action, thereby allowing another opportunity for a federal court forum in the event of removal.

The filing of the same claim in two fora may seem contrary to notions of judicial economy and restraint. Courts initially may view federal court housing discrimination filings as unnecessarily duplicative of the administrative remedies. However, Congress' intention to allow dual proceedings up until the point of trial is clear on the face of the statute and from its legislative history. While a defendant in a federal court action might seek a stay pending resolution of the administrative proceeding, a court would be hard pressed to grant such a motion given the structure of the FHAA.

158. See FED. R. CIV. P. 42(a) (actions involving common questions of law or fact may be consolidated by court order).

III.

REFERRAL TO STATE AND LOCAL AGENCIES

The procedural reforms contemplated by the FHAA are rendered illusory in many instances by the "grandfathering" of state and local agencies as the appropriate forum for claim resolution. Under Section 3610(f) of the statute, HUD must continue to refer complaints to state and local agencies certified by the agency as of September 13, 1988.¹⁵⁹ States and localities maintain their certification for forty months, during which period it is intended that the legislatures amend their statutes to make them equivalent to federal law.¹⁶⁰

This provision in essence means that most aggrieved parties will not reap the advantages of the federal enforcement scheme. At the time that the FHAA was enacted, some thirty-six states and seventy-six localities were certified.¹⁶¹ In 1987, of the 4,699 housing complaints filed with HUD, 3,388 — or approximately 75% — were referred to certified agencies.¹⁶² These state and local schemes of fair housing enforcement vary tremendously,¹⁶³ but it is fair to say that many do not even approach the procedural rights and remedies contained in the new federal statute. For example, not all states and localities provide for administrative hearings,¹⁶⁴ time limits on the processing of complaints,¹⁶⁵ and the right to attorney's fees or unlimited damages.¹⁶⁶ The HUD

159. 42 U.S.C.A. § 3610(f) (West Supp. 1989). In terms of future certification, the HUD regulations make clear that "substantial equivalence" in rights and remedies will be strictly required. Not only must the state and local legislation be equivalent on paper, it must be demonstrated that by the agency's practices and performance that the law "in operation" provides the same rights and remedies. Among the specific equivalences required are that the agency must complete investigations within 100 days and render a disposition within one year "unless impracticable," and have authority to grant actual damages and civil penalties or arrange for court adjudication at agency expense allowing the award of actual and punitive damages. There must be provisions for judicial review of agency action, as well as a private right of action, permitting actual and punitive damages as well as attorney's fees. See 24 C.F.R. § 115 (1989).

160. See HOUSE REPORT, *supra* note 9, at 35 ("This allows most jurisdictions sufficient time to conform their laws to the new federal standards so that they may remain certified."). An additional grace period of eight months may be granted by the Secretary in jurisdictions where additional time is needed due to the infrequency of legislative session. See 42 U.S.C. § 3610(f)(4) (West Supp. 1989).

161. See 24 CFR § 115.6(f)(1) (1989). For a list of certified agencies, see also J. KUSHNER, *supra* note 77, at app. 8-1.

162. See 134 CONG. REC. H4606 (June 22, 1988) (statement of Rep. Fish).

163. See Kushner, *supra* note 8, at 1099 ("Too many jurisdictions—reflecting an earlier era when housing bias was acceptable to the majority—have limited the reach of, or remedies under, fair housing laws").

164. See HOUSE REPORT, *supra* note 9, at 17. Among the certified states that do not provide administrative hearings are Florida, Maine, Nebraska, North Carolina and Virginia. See 1987 Hearings, *supra* note 141, at 607-08 (app. B to testimony of Prof. Arthur Wolf).

165. In New York, for example, there is a backlog of more than 10,000 cases before the state agency responsible for employment and housing discrimination claims, and some claimants wait as long as seven years for a resolution. *Case Backlog is Swamping Rights Agency*, N.Y. Times, July 17, 1989, at B1, col. 5.

166. For example, while California is a certified state and will remain so for 40 months, it limits punitive damages to "a maximum of three times the amount of actual damages." CAL. CIV. CODE § 52 (Deering 1989); see also MINN. STAT. ANN. § 363.071(2) (West Supp. 1989)

regulations make clear that grandfathered certification does not constitute a determination that the agency is substantially equivalent in administrative or judicial remedies.¹⁶⁷

The grandfathering provision is particularly problematic in the areas of discrimination based on familial status and disability. Since these bases of discrimination were not illegal under the Fair Housing Act prior to its amendment, HUD did not consider whether states or localities provided such protection in determining whether to grant certification. Thus, the question arises whether complaints alleging these newly prohibited discriminatory acts will be referred or retained by HUD. The statute does not address this issue, and its legislative history is less than clear. The House Report notes that some certified agencies protect these classes from discrimination, but if an agency does not, the Committee does not intend that such complaints be referred; jurisdiction would remain with the Secretary "until the agency is certified as substantially equivalent for the new classes."¹⁶⁸ The Report does not elaborate, however, on how extensive the protection afforded these classes must be in order that referral be considered appropriate, nor do the legislative debates address the issue.

One HUD regulation governing this issue indicates that no grandfathered agency will be considered certified for complaints alleging familial status or disability discrimination.¹⁶⁹ Another section of the regulations states that "no complaint based in whole or in part on allegations of discrimination on the basis of familial status or handicap shall be referred to [a grandfathered agency] without regard to whether the fair housing law administered by [the] agency appears to prohibit discrimination based on familial status or handicap."¹⁷⁰ Thus, it seems that under HUD's interpretation, the agency would not refer such complaints. In practice, however, it appears that HUD is referring complaints to certain agencies for investigation, if not for "cause" determination, on a contractual basis.¹⁷¹

Until the treatment of complaints of disability and family status discrimination is clarified, aggrieved parties in these classes run substantial risks should they attempt to utilize the administrative process. For example, as a substantive matter, the FHAA clearly protects persons with AIDS or HIV-infection.¹⁷² State or local law may bar discrimination on the basis of disabil-

(actual and punitive damages, as well as attorney's fees cannot exceed \$8,500); MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 1988) (\$2000 cap on all damages); OKLA. STAT. ANN. tit. 25, § 1505(c) (West 1987) (\$1000 limit on punitive damages). In fact, of the 42 states that have enacted fair housing statutes, only three contain specific authorization of some punitive award. See 1987 *Hearings*, *supra* note 137, at 607-08 (app. B to testimony of Prof. Arthur Wolf).

167. See 24 C.F.R. § 115.6(d)(2) (1989).

168. See HOUSE REPORT, *supra* note 9, at 35.

169. 24 C.F.R. § 115.6(d)(1) (1989).

170. 24 C.F.R. § 115.10(b) (1989).

171. HUD correspondence, *supra* note 74. Florida apparently has had such an arrangement with HUD. *Id.* This referral process arguably violates the Act.

172. See HOUSE REPORT, *supra* note 9, at 18, 22 and n.55; see also 134 CONG. REC. H4599-06 (1988) (statement of Rep. Weiss); 134 CONG. REC. H4921-4922 (1988) (statement of

ity, but by excluding some categories of disability, the protection provided by the state or local statute may not be as broad as that of federal law. If HUD refers a complaint not covered by state or local law, the aggrieved party may find herself not only procedurally but substantively denied the scope of protection afforded under the FHAA. Therefore, before a complaint is filed alleging disability or family status discrimination, it will be necessary to carefully analyze the substantive statutory provisions of the state or locality to which referral would be appropriate. In the event that the party's likelihood of success is greater under the FHAA,¹⁷³ a private federal court action would seem the only prudent route, assuming that there is some chance that HUD will refer complaints of disability or family status discrimination.

For those alleging forms of discrimination barred under the 1968 Act in jurisdictions certified by HUD, complaints presumably will be referred as a matter of course. Thus, the choice between federal court and administrative proceedings must be considered in light of the procedural peculiarities of state and local schemes. If a state scheme, for example, severely restricts monetary recovery, has a history of delayed complaint processing and resolution, or necessitates retention of counsel for effective enforcement, the federal court processes may be more advantageous.

One alternative course is available to litigants faced with the choice between federal court and referral of the complaint to a jurisdiction where procedural protections are not as broad as those of FHAA. The statute permits HUD to reactivate a referred complaint if the certified agency fails to commence proceedings within thirty days of referral or fails to carry forward the proceedings with "reasonable promptness."¹⁷⁴ HUD regulations state that it must confer with the certified agency to determine the reasons for delay before utilizing this reactivation provision, and if it appears that the process will then proceed expeditiously, HUD has discretion to leave the complaint with the certified agency.¹⁷⁵ The term "reasonable promptness" is not defined. However, the performance standards for certification after the grandfathering period require that investigations be completed within 100 days, and final

Rep. Waxman); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989) (persons with AIDS are persons with "handicap" under FHAA).

173. According to one authority, not a single local or state law would meet the "substantially equivalent" standard with respect to the newly protected classes. See Milstein, Pepper & Rubenstein, *supra* note 16, at 140. Only 16 states offer any protection against discrimination based on familial status, and most of those statutes are weaker, substantively and procedurally, than the FHAA. See Morales, *Creating New Housing Opportunities for Families with Children: The Fair Housing Amendments Act of 1988*, 22 CLEARINGHOUSE REV. 744, 750 (1988).

174. 42 U.S.C.A. § 3610(f)(2) (West Supp. 1989). Another provision allows the recall of a complaint if the Secretary determines that the agency is no longer qualified for certification, that is, the agency is no longer substantially equivalent. *Id.* Since state and local agencies need not meet the "substantially equivalent" standard for 40 months, 42 U.S.C.A. § 3610(f)(4) (West Supp. 1989), however, it would seem that this provision could not be utilized until the expiration of that period of time.

175. 24 C.F.R. § 103.110(c) (1989).

administrative disposition take place within one year.¹⁷⁶ These time limits might serve as parameters for "reasonable promptness."

Neither the regulations nor the statute provide any procedural guidance regarding how the reactivation provisions are to be set in motion, however. Certified agencies are not required to advise HUD of their progress in resolving referred complaints, and there is no provision for HUD to engage in independent monitoring. Presumably, therefore, it is up to the aggrieved party to notify HUD of any delay. Litigants who would profit from the utilization of the FHAA procedures, as compared to those of a certified agency to which their complaint has been referred, should petition HUD for reactivation if it appears that prompt action is not forthcoming. A showing of a pattern of delay would be useful in encouraging HUD to recover jurisdiction. Under the Administrative Procedure Act, an aggrieved party filing such a petition would be entitled to prompt notice of the agency's decision to deny a request for reactivation, and a brief statement of the grounds,¹⁷⁷ and there is the possibility of judicial review of such a denial.¹⁷⁸ Unless the reactivation provision is vigorously pursued, it is unlikely that the FHAA's promise of expeditious processing will be fully realized until the grandfathering period expires.

CONCLUSION

With the passage of the FHAA, fair housing enforcement has entered a new era. There is no question that the Act increases the enforcement options and opportunities for those with complaints of discrimination, and creates greater deterrents to illegal housing practices. But the Act also creates difficult choices for litigants. Despite its surface appeal, the administrative enforcement scheme poses some significant disincentives for aggrieved parties. The scheme requires a party to forego substantial monetary relief from punitive damage awards in exchange for agency prosecution which may or may not prove vigorous and effective. Given the removal election, this trade-off does not even guarantee the simplicity and expedition contemplated by the administrative enforcement option. And few litigants will profit by the administrative scheme until state and local agencies bring their substantive and procedural protections into compliance with the FHAA, which may take up to four years.

The concerns voiced here about the administrative process are based somewhat on theoretical constructs.¹⁷⁹ It may turn out, however, that HUD

176. 24 C.F.R. § 115.4(b)(2) (1989).

177. Administrative Procedure Act § 6(d), 5 U.S.C. § 555(e); *see also* American Horse Protection Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987).

178. *See supra* text accompanying notes 66-68.

179. There are no enforcement models in the civil rights context that have comparable procedures. The nineteenth century civil rights statutes, 42 U.S.C. §§ 1981, 1982, 1983, 1985, provide no administrative enforcement mechanisms. Under Title VII of the Civil Rights Act of 1964, the first modern civil rights statute, employment discrimination complainants have a limited exhaustion requirement. 42 U.S.C. 2000e-5 (1982). They must allow the EEOC 180 days to investigate and attempt to conciliate the claim, before filing a private federal court action. *Id.*

will conduct thorough investigations within the statutory time limits. Reasonable cause determinations may comport with the remedial purposes of the Act, with the benefit of any doubt given to the complainant, thus making judicial review an unnecessary check on agency discretion.¹⁸⁰ The agency may act quickly to reactivate complaints not promptly processed at the state or local level, thus mitigating the delay on procedural reform created by the grandfathering provisions. Finally, respondents may choose not to remove charges to federal court, thus permitting rapid adjudication within the administrative framework.¹⁸¹ But a preliminary reading of agency policy — as expressed in the HUD regulations — does not bode well. And the early evidence of prosecutorial zeal is not overwhelming: in the first eleven months since the FHAA became effective, with over one thousand matters filed, HUD has accepted the cases of only fifteen complainants.¹⁸² Until more empirical evidence is collected, and the agency's enforcement track record can be evaluated, the risk of relying exclusively on the administrative route seems to outweigh its potential advantages. Simultaneous or sole reliance on private enforcement through the federal courts guards against the pitfalls that surface upon a close examination of the agency's adjudicatory mechanisms.

If a complainant chooses to pursue the administrative route rather than file in federal court, the EEOC may issue a reasonable cause determination, but there is no provision for an administrative hearing. The agency may then commence an action in federal court if conciliation fails, but it is not mandated to do so. *Id.* Procedures under the Age Discrimination in Employment Act are similar. 29 U.S.C. § 626 (1982). Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Rehabilitation Act of 1973 all prohibit discrimination against certain classes in programs receiving federal financial assistance. *See* 42 U.S.C. § 2000d (1982), 20 U.S.C. § 1681 (1988), 29 U.S.C. § 794a (1982). Under these statutes, an administrative hearing procedure is in place, but the only remedy available is the withdrawal of federal funds. Monetary relief for the aggrieved party can be pursued through an implied private right of action, for which no exhaustion is required. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

180. *But see supra* note 115.

181. *Id.*

182. *See* HUD correspondence, *supra* note 74. *But see Lavelle, Stiffer Housing Law Gets Results*, Nat'l L.J., at 3, col. 1 (October 2, 1989) (lauding the Justice Department's enforcement efforts).