

THE FAIR HOUSING ACT AT FIFTY: TIME FOR A CHANGE

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INTRODUCTION

In 2018, the Fair Housing Act (FHA) turned fifty. There has been a plethora of commemorations of that important event in the life of the United States throughout the year, including *The Fair Housing Act After*

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Fifty Years symposium held at the Benjamin N. Cardozo School of Law on March 28, 2018. I was honored to be invited to speak on a panel at that event entitled *Origins and Development of the FHA: A Look Back*. This Article builds on my remarks at the symposium and specifically focuses on recommendations I made regarding the role of the U.S. Department of Housing and Urban Development (HUD) in the enforcement of the FHA.

The story of the passage of the FHA is, like most legislation, the story of negotiation and compromise as much as principle and purpose.¹ It was the last major piece of legislation to come out of the contemporary civil rights movement. Its passage, coming in the wake of the Kerner Commission Report² and the assassination of Dr. Martin Luther King, Jr., gives it a somewhat unique historical context. As others have pointed out, while the statute was not perfect, and did not have everything its proponents wanted, the fifty-year failure to fulfill the promise of the Act was not because the statute was substantively inadequate to the task, but rather because of the political inadequacies of the country, and the political and structural inadequacies of HUD.³ Whatever the vision of HUD was in 1968, the decades that followed have made clear that the agency has never been and will never be sufficiently resourced politically or fiscally to do all it has been tasked to do. Justice Kennedy concluded his opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (*TDHCA v. ICP*) by acknowledging the FHA's "continuing role in moving the Nation toward a more integrated society."⁴ The time has come to revisit HUD's role under the FHA to achieve that historic commitment.

In order to put my views in this Article in context, I am going to briefly reference the experience upon which I base my comments. I am a civil rights lawyer. I filed my first systemic housing discrimination lawsuit in 1980 and litigated cases against HUD, cities, and local housing agencies through the 1980s up until I left private practice in

¹ See Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247 (2016).

² NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

³ See Zasloff, *supra* note 1.

⁴ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015).

1993 to join the Clinton administration at HUD. For the next seven years, I looked at things from the inside, first as Deputy General Counsel for HUD's Civil Rights and Litigation office, and then as Assistant Secretary for its Fair Housing and Equal Opportunity office. Since 2000, after leaving HUD, I have continued to be engaged in policy advocacy and litigation related to the FHA, challenging policies and practices that created and perpetuate the harms of segregation and have continued to sue HUD for its own discriminatory practices and failure to meet its obligations under the FHA.

The Fair Housing Act declares that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁵ The FHA implements that policy in two primary ways: it prohibits housing discrimination in both public and private housing transactions, including discrimination in residential real estate transactions as defined in the statute (the non-discrimination provisions);⁶ and it mandates that the federal government shall administer all federal housing and community development programs and activities in a manner to affirmatively further the purposes of the Act (the affirmative mandate to address the legacy of housing segregation, generally referred to as AFFH).⁷

The Secretary of HUD was given the statutory authority and responsibility for administering the FHA, including responsibility for enforcing the non-discrimination provisions related to both public and private housing discrimination, and compliance with the affirmative mandates in federal programs.⁸ In addition to HUD, the statute provides for enforcement actions brought by the Department of Justice under appropriate circumstances,⁹ and provides for a private cause of action in federal court to individual victims of discrimination for violations of the non-discrimination provisions.¹⁰ The statute does not provide for a private cause of action to enforce the statutory mandate to

⁵ 42 U.S.C. § 3601 (2018).

⁶ 42 U.S.C. §§ 3604–05 (2018).

⁷ 42 U.S.C. § 3608(c)–(d) (2018).

⁸ 42 U.S.C. § 3608(a) (2018).

⁹ 42 U.S.C. § 3614 (2018).

¹⁰ 42 U.S.C. § 3613 (2018). While the courts are theoretically available to a private litigant, the concern was and continues to be that many individual acts of discrimination, while important to the individual involved, are simply not something that private lawyers, even those committed to the fair housing cause, often have the resources to pursue.

affirmatively further fair housing. While that is an inherent flaw in the FHA, fortunately courts have consistently held that the Administrative Procedure Act establishes the cause of action necessary to challenge HUD's failure to comply with its own AFFH obligation, if not the recipients of federal funds directly.¹¹ Thus, courts are available to private litigants seeking to vindicate their rights under federal fair housing law challenging both private and public acts of discrimination, and federal failure to affirmatively further the purposes of the act in programs it administers.

HUD has additional civil rights responsibilities under other statutes as well. These relate to ensuring that recipients of federal funds comply with those statutes in the use of those funds.¹² The Secretary has delegated the Department's responsibilities under the FHA to the Assistant Secretary of the Office of Fair Housing and Equal Opportunity (FHEO), which has over time organizationally distinguished between what it calls "enforcement" activities, related to complaints of discrimination under the non-discrimination provisions of the FHA, and "compliance" activities, related to ensuring that recipients of federal funds administered by HUD comply with the FHA's AFFH mandate and other civil rights laws. The provisions in the FHA related to the duty to affirmatively further fair housing are directed to HUD and other federal agencies administering housing and urban development related programs, not the recipients themselves, but most statutes governing HUD programs include a requirement that the recipients certify that

¹¹ See *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987); *Latinos Unidos De Chelsea En Accion v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774, 793 (1st Cir. 1986); *MHANY Mgmt. Inc. v. Cty. of Nassau*, 843 F. Supp. 2d 287, 333 (E.D.N.Y. 2012), *aff'd in part, vacated in part on other grounds*, 819 F.3d 581 (2d Cir. 2016); *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 202 (D.D.C. 1997), *aff'd*, No. 97-5341, 1998 WL 315581 (D.C. Cir. May 12, 1998); *Inclusive Cmty. Project v. U.S. Dep't of Treasury*, No. 14-CV-3013-D, 2016 WL 6397643, at *4-*8 (N.D. Tex. Oct. 28, 2016).

¹² See Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07 (2018); Section 109 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5309 (2018); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91f (2018); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793-94 (2018); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2018). See also Exec. Order No. 12432, 48 Fed. Reg. 32551 (July 14, 1983); Exec. Order No. 12259, 46 Fed. Reg. 1253 (Dec. 31, 1980); Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980); Exec. Order No. 11625, 36 Fed. Reg. 19967 (Oct. 13, 1971); Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965); Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 20, 1962).

they will affirmatively further fair housing.¹³ The Secretary also has a number of data gathering and reporting obligations related to those enforcement and compliance duties. A review of the FHEO Annual Report to Congress sets out in detail all of the statutory duties imposed on HUD by the FHA and provides data on those activities which are required to be reported annually.¹⁴

I. THE EVOLUTION OF THE FHA OVER THE FIRST TWENTY YEARS

Between 1970 and 1990, there was significant litigation under the FHA brought by private litigants and the Department of Justice. The litigation involved challenges to exclusionary and discriminatory housing practices, which were the focus of the need for the Act.¹⁵ During that same period, HUD was itself sued by private litigants for policies and practices that perpetuated racial segregation in federally-subsidized housing and community development programs, in violation of the Constitution and the FHA.¹⁶ That was perhaps an indication that there would be challenges to HUD effectively discharging all the responsibilities that had been placed upon it related to furthering the purposes of the FHA.

During the first twenty years, one of the oft heard criticisms of the FHA as passed in 1968 was its weak enforcement provisions, which did not give HUD or the Department of Justice the ability to effectively prosecute and obtain relief for individual victims of discrimination.¹⁷

¹³ For example, Section 109 of the Housing and Community Development Act of 1974 requires AFFH certifications by recipients of Community Development Block Grant Funds. See 42 U.S.C. § 5303 (2018).

¹⁴ See U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: FY 2008 ANNUAL REPORT ON FAIR HOUSING (2009), https://www.hud.gov/sites/documents/DOC_12309.PDF [<https://perma.cc/GP95-C3HY>].

¹⁵ See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375–77 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979); *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

¹⁶ See *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994); *Walker v. HUD*, 912 F.2d 819 (5th Cir. 1990); *Young v. Pierce*, 822 F.2d 1368 (5th Cir. 1987); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005).

¹⁷ See Zasloff, *supra* note 1, at 250.

While this view has been challenged,¹⁸ it was repeated often enough by fair housing advocates that it became a sort of “truism” over the first twenty years of the Act’s existence. In 1988, Congress amended the FHA to add two new protected classes—handicap and familial status—and create a new elaborate complaint-driven enforcement structure that was to “correct” the initial failure to provide enforcement teeth to the fair housing mandate.¹⁹ The new enforcement scheme involves not only HUD personnel, but also local public and private enforcement entities funded by HUD, and an Administrative Law Judge (ALJ) system as an alternative to suits in federal court that promised a more effective and efficient system for complaints to be resolved. The fundamental problem with that “fix” is that HUD/FHEO has never had the political support or staffing and other resources to make that promise real. So, while the extension of the FHA was an important development that recognized that housing discrimination harms more than just those explicitly protected by the Constitution, that expansion, coupled with the new administrative complaint process and enforcement structure lodged in FHEO, put an even heavier burden on the most politically weak and under-resourced part of the HUD bureaucracy.

II. THE NEXT TWENTY YEARS

In 1993, a new administration arrived on the scene and set new priorities, including how to deal with the numerous civil rights cases pending against HUD. The new HUD Secretary Henry Cisneros declared that HUD would no longer deny and defend the federal government’s role in creating and perpetuating housing segregation. He tasked the political appointees in both the General Counsel’s Office and related program offices with settling the pending housing desegregation cases against HUD in a manner that actually “affirmatively furthered fair housing.”²⁰ That happened by and large and to some extent righted

¹⁸ See *id.* at 250–54.

¹⁹ See Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601–19 (2018).

²⁰ See Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA, <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [https://perma.cc/Z7DU-HWKP] (last updated July 8, 2015) (presents the story of the failure of both Democratic and Republican administrations to effectively meet the obligation to affirmatively further fair housing).

some wrongs. But the actions taken during those few years did not come close to remedying the harms inflicted by past actions of HUD or the federal government caused by the segregation for which its actions and inactions were responsible.

On the enforcement side during the early days of the Clinton administration, the FHEO, under the leadership of Assistant Secretary Roberta Achtenberg, received much appreciated attention from both a political and budgetary standpoint.²¹ And, through internal reorganization and prioritization, the “enforcement” section of FHEO allowed HUD to pursue complaints of discrimination in the lending and insurance industries in a way that had not been seen before. That got the attention of those powerful industries, and some positive results were obtained in terms of sensitivity to fair housing and enhancing the role of private fair housing organizations, particularly of the National Fair Housing Alliance, in enforcing the FHA. Unfortunately, in 1994, the political winds shifted, and Republican hostility to the progressive work being done at HUD around fair housing was on full display as the Gingrich Congress sought to dismantle the Department and move responsibility for enforcing the FHA to the Department of Justice.²² While that effort ultimately failed, it is a cautionary tale about how vulnerable HUD is in general, and how remarkably weak the proponents of vigorous enforcement of the FHA within HUD are when the pitchforks come out. After the 1994 midterm elections, complaints from Congress and powerful political constituents of HUD about enforcement efforts that were deemed too aggressive were both common and, unfortunately, often effective. At the end of the day, even a Democratic HUD was unable to promulgate a regulation that fair housing advocates all agreed was necessary to effectively implement the duty to affirmatively further fair housing.²³ The inability to get agreement on such a clearly pro-fair housing/civil rights regulation within the Department under a “progressive” administration reflects both internal ideological and bureaucratic tensions and external pressures from HUD’s more powerful constituencies that have hampered HUD’s fair housing work from the beginning.

²¹ *See id.*

²² *See id.*

²³ *See id.*

The next eight years under a Republican administration saw the usual retrenchment on the issue of fair housing, especially related to race and the AFFH mandate. “Enforcement” consisted primarily of bureaucratic processing of individual complaints against private actions, the majority of which were found not to have sufficient merit to pursue. Meanwhile, federal dollars continued to flow without regard to the duty to affirmatively further fair housing, and the politically impotent FHEO was unable to do much more than watch.²⁴

III. THE 2008 REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY

By 2008, the fortieth anniversary of the passage of the FHA, and twenty years after its 1988 amendments, fair housing advocates decided it was time to take an in-depth look at fair housing, particularly as it was being administered by HUD. Former HUD Secretaries Jack Kemp (Republican) and Henry Cisneros (Democrat) chaired the bipartisan National Commission on Fair Housing and Equal Opportunity, which endeavored to take on this task.²⁵ The Commission published a report based on almost a year of public hearings, extensive research, and consideration of a vast amount of material related to the forty years of HUD enforcement. The Commission held hearings in Chicago, Houston, Los Angeles, Boston, and Atlanta, learning from a wide variety of stakeholders and experts, and reviewed a voluminous written record.²⁶ The eighty-five page Report is a sobering assessment of the state of fair housing in the United States after forty years. Its conclusions and recommendations are detailed and wide ranging, but the first and perhaps most important recommendation was for the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at HUD in order to address what the Commission characterized as “the longstanding and systemic problems

²⁴ See *id.*

²⁵ NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY (2008), https://www.prrac.org/projects/fair_housing_commission/The_Future_of_Fair_Housing.pdf [<https://perma.cc/7QLU-KQF3>].

²⁶ See *id.* at 1.

with fair housing enforcement.”²⁷ The Commission noted that “[s]upport for an independent fair housing enforcement agency was the most consistent theme of the hearings.”²⁸

While the Commission conducted its business prior to the 2008 election, the final Report was not released until December of 2008, shortly after the election of Barack Obama. For perhaps understandable reasons, including the Obama election ushering in a sense of optimism about a progressive civil rights agenda that addressed fair housing, advocates did not press for such a radical change at a time when friendly faces were showing up in leadership positions at HUD for the first time in almost a decade. And certainly the new administration had a lot on its plate, including dealing with the housing crisis that exploded in the year immediately prior to Obama being sworn in as President. In any event, the Report, and this specific recommendation, were shelved in favor of a robust effort, both within and without HUD, to move the ball forward on a number of fair housing fronts that were long overdue, without seeking the radical structural change that the recommendation would have required.

The optimism about fair housing at HUD in early 2009 was not entirely misplaced. Just prior to the Obama administration assuming office, a federal court in upstate New York issued a ruling involving the duty of recipients of federal funds to affirmatively further fair housing that got HUD’s attention.²⁹ The *Westchester* case, as it is known, was not a suit brought under the FHA, but rather was brought under the False Claims Act. The suit alleged that Westchester County, New York, a recipient of HUD-administered Community Development Block Grant funds, had falsely certified that it was affirmatively furthering fair housing in its administration of HUD’s federal funds.³⁰ But the implications for HUD and the enforcement of the long-neglected AFFH provision of the FHA were profound. The top Obama appointees at HUD declared that they were going to take steps to finally enforce (one might also say comply with) the AFFH provision in the FHA. It took the

²⁷ *Id.* at 19.

²⁸ *Id.*

²⁹ *United States ex rel. Anti-Discrimination Ctr. of Metro. N.Y. v. Westchester Cty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

³⁰ *Id.* at 376–77.

next eight years, but in 2015 the promised AFFH regulation was issued.³¹

The issuance of the AFFH regulation followed the 2013 issuance of the just as long-awaited regulation affirming the position of the courts and of most HUD administrations that disparate impact claims were cognizable under the FHA.³² The Supreme Court, ruling in 2015 to uphold disparate impact under the FHA, while not basing its ruling on the HUD rule, did acknowledge the rule as consistent with its ruling.³³ These two administrative actions by HUD were the first major developments under the FHA since the passage of the 1988 amendments, and they both placed new emphasis on the country's legacy of racial segregation.

However, a review of FHEO's 2016 Annual Report to Congress, while more enthusiastic about fair housing and certainly about the need to address racial segregation under the AFFH mandate, shows essentially an unremarkably consistent pattern.³⁴ No matter who is in power, funding for fair housing activities, whether it be enforcement or compliance, must compete within the HUD bureaucracy for attention and resources without the support of politically powerful constituencies that other program offices within the Department have. The "longstanding and systemic problems with fair housing enforcement" discussed in great detail in the 2008 Commission Report, even with informed and committed leadership, do not appear to have appreciably changed in fundamental ways neither in terms of resources or results.³⁵ And while the Obama administration clearly moved further than its predecessors, by the end of two terms, the fulfillment of the promise made regarding the AFFH mandate had just begun.

In 2016, the political landscape changed yet again. The Trump administration, less than two years into its term, has already evidenced

³¹ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903).

³² See Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100); 24 C.F.R. pt. §§ 100.5(b), 100.70(d)(5), 100.120(b), 100.500(a) (2018).

³³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015).

³⁴ OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, ANNUAL REPORT TO CONGRESS: FY 2016 9, 14, 29–93 (2017), <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF> [<https://perma.cc/95E5-DC8B>].

³⁵ NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 25, at 19.

an intent to roll back these two important FHA actions taken by HUD. The new HUD has “extended” the implementation date for the AFFH rule, and withdrawn a key part of the AFFH rule (known as the Tool) that was designed to help jurisdictions comply with their obligation to affirmatively further fair housing as a condition of receiving federal funds.³⁶ On the disparate impact front, HUD is seeking to revisit its Disparate Impact regulation, specifically asking for comments on whether or not the rule is “consistent” with the Supreme Court ruling in *TDHCA v. ICP*.³⁷ It is not a state secret that the affordable housing and insurance industries are anxious to argue for an interpretation of the Supreme Court decision that limits its impact on industry practices that discriminate and perpetuate segregation. It remains to be seen how that will play itself out, since in both cases the law depends not just on HUD interpretations of the FHA, but also on the FHA statute itself—and clearly there is more coming from HUD on both fronts.

IV. LOOKING BACK, LOOKING FORWARD

Ten years after the issuance of the 2008 Commission Report, and under an administration that has demonstrated its hostility to efforts to enforce the FHA when it comes to race and segregation, I submit that it is time to revisit the National Commission on Fair Housing and Equal Opportunity’s Report, especially its recommendation for the creation of an independent enforcement entity outside of HUD.³⁸ The Report

³⁶ *HUD Indefinitely Suspends AFFH Rule, Withdraws Assessment Tool*, NAT’L LOW INCOME HOUSING COALITION (May 21, 2018), <http://nlihc.org/article/hud-indefinitely-suspends-affh-rule-withdraws-assessment-tool> [<https://perma.cc/8RQB-ES45>].

³⁷ Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28,560, 28,561 (proposed June 20, 2018) (to be codified at 24 C.F.R. pt. 100).

³⁸ We can start by reminding ourselves of what the Commission said in 2008 about the value of creating an independent fair housing enforcement agency: “In order to address the longstanding and systemic problems with fair housing enforcement, we recommend the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at HUD.” NAT’L COMM’N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 25, at Executive Summary. The Commission’s detailed recommendations include specifics:

A reformed independent fair housing enforcement agency would have three key components: (1) career staff with fair housing experience and competence as the key criteria for employment; (2) an advisory Commission appointed by the President with the advice and consent of the Senate that is broadly representative of industry,

contains many specific and detailed recommendations for how to secure a better future for the FHA, both internal and external to HUD. It is not the purpose of this Article to embrace those recommendations in their entirety, but rather to urge that the Report be used as a starting point for renewing the discussion about how to reinvigorate the commitment to the purposes of the FHA, improve on HUD's role in furthering those purposes, and address the facts about past failures, regardless of who wins the next election.

There are, of course, legitimate concerns about undertaking what would certainly be a radical reworking of the way the FHA is enforced, and the way the federal government approaches its obligations under the FHA and related civil rights laws. Some understandably fear "opening that can of worms" on the grounds that such change would require revisiting the FHA in ways that might result in its significant diminution, if not its outright demise. There may be fear that such change would provoke a national conversation about fair housing and equal opportunity that reveals our lack of national commitment, or perhaps outright hostility, to the principles that underlie the FHA. Much like those who fear polls that periodically suggest that the Bill of Rights itself would not survive such a conversation,³⁹ civil rights advocates fear what could be lost if efforts were made to address the serious shortcomings of entrusting the enforcement of the FHA to HUD. Those are real and legitimate concerns. However, the weak political and financial support FHEO has almost always had within HUD reflects the entrenched and powerful interests that are at play in the hydra-like institution that is HUD. Those interests often see the FHA as a nuisance at best and a threat at worst. They give lip service to

advocates, and enforcers; and (3) adequate staff and resources to make fair housing a reality. Such an agency would be empowered at the public policy level to work with the HUD Secretary to advance proactively all of the fair housing issues that are critical to building stronger communities. . . . The agency would focus solely on fair housing enforcement, required by Section 810 of the Fair Housing Act, 42 U.S.C. § 3610, and fair housing and fair lending education.

Id. The Commission Report noted, "[a]lthough this type of structural change is not without costs and challenges, making the agency independent should help restore credibility to the effort in light of the many problems experienced with placement of fair housing enforcement at HUD." *Id.*

³⁹ See Charles C. W. Cooke, *Why the Bill of Rights Would Never Pass Today*, NAT'L REV. (May 4, 2015, 8:00 AM), <https://www.nationalreview.com/2015/05/remember-bill-rights-charles-c-w-cooke> [<https://perma.cc/2SCW-BFFM>].

the high-minded ideals behind “fair housing,” but in their day-to-day actions they see the FHA as something to be marginalized and ignored as much as possible. While there is no guarantee that an independent agency governed by a bipartisan commission focused solely on enforcing the non-discrimination provisions of the FHA would not encounter the same headwinds, particularly in perilous political times, it would elevate the importance of fair housing enforcement in a singular way that embedding that aspect of the Act in HUD does not, and would allow for a more bipartisan effort than is available in a federal agency that is controlled by the political party in the White House. One could look to successful local (including state-wide), private fair housing enforcement organizations with a history of bipartisan support, such as the Connecticut Fair Housing Center, for some sense of the value of such an approach.⁴⁰ And of course the National Fair Housing Alliance has long worked to maintain a bipartisan aura to its work, even in hyper-partisan times, without compromising its principles or commitment to the purposes of the FHA.⁴¹

V. THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING?

The creation of an independent fair housing enforcement agency to process individual complaints of private housing discrimination, in addition to giving fair housing enforcement a better chance to focus and deliver on the promise of an effective remedy for housing discrimination, would enable HUD to focus its resources more effectively on meeting its obligations under the FHA to administer its programs and activities in a manner that affirmatively furthers fair housing. The development of the AFFH regulation is a study in bureaucracy at work, and it should not have taken almost eight years to implement it, but the record is now made. The elephant in the room—segregation—has finally been acknowledged, and a constituency both within and outside of the Department that supports the full implementation of the regulation has evolved, as the current litigation

⁴⁰ See generally CONN. FAIR HOUSING CTR., <https://www.ctfairhousing.org> [https://perma.cc/P859-BS7K] (last visited Nov. 24, 2018).

⁴¹ See generally ABOUT NFHA, NAT'L FAIR HOUSING ALLIANCE, <https://nationalfairhousing.org/about> [https://perma.cc/9NWU-2XR4] (last visited Jan. 2, 2019).

by civil rights advocates makes clear.⁴² Effective compliance with, and enforcement of, the regulation will involve a significant investment of time and effort on the part of HUD staff—not just FHEO staff, but all program departments. If the day-to-day enforcement of the complaint-driven non-discrimination provisions of the FHA is placed within an independent, bipartisan entity whose charge is to ensure that individuals who have legitimate claims of discrimination are given the ability to get those claims addressed in a timely and appropriate manner, it will put HUD in a position—whether it wants to be or not—of dealing with the systemic problem of segregation that has plagued HUD since its inception. For almost fifty years, HUD has avoided meeting its responsibility to affirmatively further fair housing. It would be appropriate if that provision of the FHA at long last assumes its primacy in all of HUD's programs and activities. Removing the enforcement responsibilities from an overtasked FHEO would make that more likely.

VI. NON-GOVERNMENTAL LITIGATION/ADVOCACY UNDER THE FHA

As noted at the outset, enforcement by the executive branch of the federal government, whether by HUD, the Department of Justice, or an independent agency such as the Equal Employment Opportunity Commission, is not the only enforcement vehicle available under the FHA to persons who believe they are victims of discrimination. The other essential component of an effective FHA enforcement scheme is the private cause of action available to persons aggrieved by a discriminatory housing practice, which allows them to bring a lawsuit in federal court for relief, independent of HUD or any other federal agency. Indeed, much of the most important case law developed under the FHA involved suits brought by private parties. To the extent that the administrative enforcement of the non-discrimination provisions of the Act is moved to an entity outside of HUD, that work will continue to need to be bolstered by the actions of private parties and members of the federal judiciary, who are even more independent of the machinations of federal bureaucracy. Moreover, there is no reason to think that, even

⁴² Recent civil rights litigation challenging HUD's efforts to roll back the AFFH regulation and the Small Area Fair Market Rent pilot are excellent examples. See *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018); *Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017).

with the progress made on the AFFH mandate at the end of the Obama Administration, HUD will not need civil rights advocates to continue their insistence that HUD meet its obligations to both comply with and further the purposes of the Act, as the actions of the current administration are making clear.⁴³

CONCLUSION

There are many good people, both within and outside HUD, who will be resistant to this proposal, or even having this discussion, out of good faith concerns about doing harm to the FHA. I understand those concerns and respect them. But after fifty years, it is clear that HUD does not have, nor will it ever have, either the political or fiscal resources necessary to truly comply with all parts of the FHA mandate that it is charged with enforcing. The statutory obligations to both address discrimination and affirmatively further fair housing in HUD programs will continue to be a heavy lift for HUD, but that is all the more reason that such work should be the primary focus of HUD's fair housing responsibility. HUD should not act as a super-FHIP,⁴⁴ dealing with individual or even systemic acts of private discrimination, which can be better addressed through an administrative agency structure that is more independent and focused on enforcement of the law as it pertains to the wide range of discrimination that can and does occur in the private housing market and related activities.

Nothing is perfect and there will be challenges to making such changes. But, by all accounts, individual acts of housing discrimination continue to be a significant problem for all protected classes, and the legacy of racial segregation continues to plague our communities and the country. Moving those enforcement responsibilities out of HUD's purview does not mean less attention to either issue, but rather creates the possibility that a better result can be achieved by acknowledging the limitations of the HUD bureaucracy alone to make the sort of difference

⁴³ See sources cited in *supra* notes 36, 42.

⁴⁴ Fair Housing Initiative Program, in which HUD funds local, private non-profit fair housing enforcement organizations throughout the country. See *Fair Housing Initiatives Program (FHIP)*, U.S. DEP'T HOUSING & URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP [<https://perma.cc/42N6-HWA9>] (last visited Jan. 2, 2019).

that the architects of the FHA clearly hoped it would make. We have not shown any real ability to fundamentally change that dynamic within the HUD institutional structure, even under progressive leadership. There are risks, but if we as a country are prepared to turn our back on the vision and mandate of the FHA at this stage of our history, we should do it out in the open, with full disclosure, rather than continuing to let it happen by default.

Decisions about the details of what an independent entity would look like and how the implementation of such a change might unfold are things that would and should take time and involve all the stakeholders. The purpose of this Article is to remind the fair housing community of the important work done by the Fair Housing Commission ten years ago. At this point in our country's history, we should look again at the Commission's Report to see what stands the test of time. There will never be a structural or organizational "fix" for lack of political will, and ultimately that is what has most hampered the effectiveness of the FHA over the past fifty years. However, with the right combination of structural changes within the government and continued aggressive litigation and advocacy outside the government, either supporting or challenging its actions as appropriate, the goals of the Fair Housing Act may yet be achieved.