

Questions and Answers on H.R. 5200 and S. 506 - The Fair Housing  
Amendments Act of 1979

1. What is the current federal fair housing law?

Title VIII of the Civil Rights Act of 1968 provides that it is unlawful to discriminate on the basis of race, color, religion, sex, or national origin, in the sale, rental, financing, etc. of homes. Enforcement is available solely by court suits brought by the victims of discrimination or, in "pattern and practice" cases, in suits brought by the U.S. Attorney General. The Department of Housing and Urban Development (HUD) is responsible for seeing that the law is implemented, but its only power is to attempt to bring about a conciliation of the parties.

2. Hasn't the present law eliminated discrimination?

Recent studies show that unlawful discrimination is massive throughout the country. For example, one recent nation-wide study, commissioned by HUD, used black and white "testers" to determine the existence of discrimination. The study demonstrated that blacks seeking a rental unit have an 85 percent chance of encountering at least one instance of discrimination. In looking for a house to purchase, the chance of experiencing racial discrimination is 48 percent. A similar study in Dallas, Texas concluded that a dark-skinned Mexican-American has a 96 percent chance of experiencing discrimination in the typical housing search.

Discrimination now often takes subtle, but effective forms - minorities are quoted higher sales or rental prices, larger down payments, longer waiting periods, given less courteous or helpful attention, etc. In addition, the practice of "steering" blacks to black or integrated neighborhoods, and whites to white neighborhoods, has contributed to and perpetuated segregated housing patterns.

3. Why hasn't the present law worked?

Without any power to back up its conciliation efforts, HUD has been unable to get respondents to take the process seriously. Few agree to consider conciliation at all; still fewer agree to any kind of agreement that rectifies an act of discrimination. Likewise, victims of discrimination realize that conciliation is often a waste of time and effort, and rarely file a complaint with HUD.

Court action can be effective, but very few victims have the money to hire attorneys to take on their cases. Very few private attorneys can or will agree to receiving only those attorneys fees that the court, in its discretion, orders the losing respondent to pay. In addition, the court process is slow, complex, and expensive. In a typical, "simple" case, it is ill-suited to the primary goals of quickly providing the dwelling to the victim of discrimination.

The effectiveness of the Attorney General's role is likewise limited by the delays and complexity of litigation. Furthermore, it is restricted by a limited budget and jurisdiction. Only about 13 attorneys are assigned to bringing cases, and since only "pattern and practice" cases may be brought, individual cases that do not raise legal or factual issues of great national importance cannot be brought by the Justice Department.

4. What are examples of housing practices that current law prohibit (but which continue because of the absence of effective enforcement)?

- Telling a member of a protected class (racial or ethnic minority, women) information different from that provided to others, which makes a dwelling less "available," e.g. that the unit is not available, the agent is not authorized to sell or rent, etc.
- Steering - i.e. suggesting that blacks seek housing only in black or integrated areas, and likewise limiting the choice of whites to white neighborhoods.
- Requiring different terms of sale or rental for protected classes e.g. higher interest rate, down payment, security or cleaning deposit, etc.
- Redlining - refusal to finance or insure a dwelling because of the racial composition of the neighborhood.
- Exclusionary zoning - unreasonable refusal to permit the construction or establishment of dwellings because they will be inhabited primarily by "protected classes."

5. Who will the bill help?

By creating effective enforcement powers, fair housing will become a reality, and thereby benefit all Americans. Freedom of choice in housing will mean less bussing to achieve integration in schools, better access to jobs, and decreased taxpayers' support of institutions now needed to house the handicapped. Furthermore, those in the business of providing housing--realtors, financiers, insurers, etc.--who want to obey the law and support the goal of fair housing--will not be forced to compete with those who may attain some economic advantage by discriminating.

The classes of persons who will most directly benefit are those traditionally discriminated against--racial and ethnic minorities, and women. Furthermore, the bill expands the protections of the law to include the handicapped, who now number 36 million people in this country, including many elderly Americans.

6. How will the bill help the handicapped?

The same protections provided to the other protected classes are needed for disabled Americans in order to end their isolation and dependence and to correct the massive lack of understanding on the part of America's non-disabled population.

7. What kinds of acts with respect to the handicapped will be unlawful and what will not?

It will be unlawful:

- to refuse to rent or sell to a blind, deaf, retarded, or otherwise physically or mentally disabled person because of that person's disability.
- to refuse to permit a handicapped person to make reasonable modifications (at his or her expense) to make a dwelling unit accessible. (so long as the tenant agrees to restore the premises to their original condition) For example, the landlord must permit a prospective tenant who uses a wheelchair to install a ramp, so long as that ramp does not create unreasonable inconvenience to other affected persons or does not significantly alter the manner in which the building has been used.

It will not be unlawful:

- for a landlord or builder to refuse to pay for architectural changes necessary to make a dwelling unit accessible to mobility disabled occupants.
- to refuse to lease a unit to a person who suffers from current alcohol or drug abuse, or other impairments that constitute a threat to the safety or property of others, or who is unable to comply with rules, policies and practices of the facilities and reasonable accommodations of those rules cannot be made. Therefore, it would not be unlawful to refuse to rent to a person who is actually disruptive, irresponsible, or otherwise unable to care for the premises.

8. What changes in enforcement powers does the bill make?

HUD will be given the authority it needs to enforce the federal fair housing law. In addition to facilitating conciliation agreements, and investigating charges of discrimination, HUD will be able to hold hearings, present evidence and make binding orders, i.e. issue orders stopping discriminatory practices, award damages, and other appropriate remedies. Temporary orders could be obtained from regular courts.

9. Is it fair to let HUD investigate, prosecute, and adjudicate?

Although all three functions will be performed by the same agency, other federal law (the Administrative Procedure Act, or the APA) permits this and ensures the fairness of the process by requiring that separate parts of the agency perform each function. The person who renders a decision in a particular case (the Administrative Law Judge, or A.L.J.) may have no involvement with the other functions, and may have no involvement with the other functions, and may have no contact with either side to a controversy except in the context of the hearing. The hearing process itself must conform to the requirements of the APA which ensure that all sides obtain due process of law, e.g. the right of parties to subpoena persons and documents, present evidence, conduct cross-examination, obtain the transcript and the rest of the record, etc.

10. What kind of appeal is available?

The appeal of the administrative decision by HUD will be heard in the federal District Court where the subject property is located. The District Court judge will be charged not only with reviewing the record created in the administrative proceedings, but also will be authorized, under limited circumstances, to receive additional testimony or other evidence to supplement that record. Such additional evidence can be heard in the District Court itself or the case can be sent back to the Administrative Law Judge to receive it, but only where that evidence had been improperly excluded before, or because there is a "compelling need" to receive that evidence.

The standard to be used is that of "de novo" review. Unlike the standard of testing the record to see if it is supported by "substantial evidence," in a de novo review, the court looks at the record, and decides independently what the outcome should be. No presumption of validity is afforded the ALJ's decision, although those findings, like the transcript, are a part of the record below.

11. Has this kind of enforcement system ever been used before?

Similar administrative enforcement systems have been created by Congress and used for many years, and have been controlled by the governing principles of the APA since 1946. At least 17 federal agencies now have "cease and desist" authority. They include the Department of Agriculture, the Interstate Commerce Commission, the Federal Home Loan Bank Board, HUD itself (to enforce provisions of the National Housing Act), the Federal Reserve Board, the Federal Trade Commission, the Department of the Interior, the Small Business Administration, and the National Labor Relations Board.

In addition, many state agencies that are responsible for enforcing state fair housing laws have cease and desist authority.

In cases challenging the constitutionality of these administrative enforcement systems the courts (including the Supreme Court) repeatedly and consistently have held that this type of process is fair and lawful.

12. Why give this authority to HUD instead of another federal agency?

As the Department with primary responsibility for administering this nation's housing programs and policies, HUD is the logical governmental agency to be given this authority. It has special expertise in housing issues as well as in "fair" housing.

13. Will victims of discrimination still have the right to have cases heard in court?

Yes. This bill not only creates a "cease and desist" authority in HUD, it preserves and strengthens the right to have a case decided in court.

The victim of discrimination will have to decide whether he or she wants HUD to investigate and prosecute the charge in an administrative hearing, or, alternatively, to go straight to court. Once having had an administrative hearing, however, the parties cannot then have another trial in court. (Although, of course, the right to an appeal in a court would still be available.)

14. Why have both administrative and court enforcement?

The advantages of an administrative hearing are:

- simplicity of process compared to the courts. Strict rules of evidence and other procedural requirements are not applied, so lawyers for the parties are usually not needed.
- speed - in court, cases are subject to scheduling delays and delays due to complicated pre-trial motions. Speed is especially important in housing cases, when the goal is usually to obtain a much needed dwelling unit as quickly as possible.
- reduced expense - the relative simplicity of the process reduces the cost for all sides, particularly the victim of discrimination. If HUD decides there is reasonable cause to believe that discrimination has occurred, HUD will gather and present the evidence at the hearing.

- Governmental support - the assistance the government provides to a victim of discrimination in obtaining relief is particularly appropriate when, as here, there is a public interest in enforcing the law.

The advantages of a court trial are:

- management of complexity - cases involving complex legal and factual issues, community-wide practices, and multi-party disputes are more easily managed in court, under the civil rules of procedure that are specifically designed to deal with these eventualities.
- interpretation - like most statutes, Title VIII establishes general principles which must be applied to specific and differing fact situations. It is the role of the judiciary to decide whether and how those general principles (as well as those contained in other statutes and the Constitution) should be applied to a particular case. In the context of Title VIII, courts have played a major role in ensuring that the principles of that law are applied to new and ever more subtle and sophisticated forms of discrimination. For example, courts have held that Title VIII applies to certain zoning decisions, appraisals, redlining, and steering. Administrative law judges, on the other hand, tend to view their role more narrowly.

In conclusion then, some kinds of cases are more amenable to resolution in the courts, while the more "ordinary" cases will be better dealt with in an administrative forum. Both the victim of discrimination and HUD will be in a position to make that choice.

Finally, as one witness stated, "[W]hile government enforcement is essential for broad coverage, private suit remains important also as a cutting edge, to assure that government does its job effectively and to give confidence to the minority community that, if necessary, it can rely on its own resources - private lawyers."

15. What role will the Attorney General play in enforcing Title VIII?

In addition to the current authority of the Department of Justice to pursue "pattern and practice" cases in court, the Secretary of HUD will be able to refer individual cases to the Attorney General to seek relief in court. Thus, if a case would be better handled in court (see above) and the victim is not in a position to hire an attorney or otherwise manage the case, the Attorney General can seek relief in the courts.

16. What amendments may be offered on the floor which are opposed by the sponsors, the Leadership Conference, and the administration?

(a) Appraisers amendment

The Society of Real Estate Appraisers is seeking the adoption of an amendment which would permit appraisers to rely on racial or ethnic factors in determining the value of property (euphemistically called "all relevant factors".) Current law and federal regulations bar this on the grounds that (1) the racial or ethnic composition of a neighborhood is an unreliable predictor of value (2) the reliance on a racial etc. factors in a manner that results making housing unavailable is a violation of the spirit and letter of the present law (S 804(a) of Title VIII). Historically, appraisers' reliance on racial and ethnic factors sometimes resulted in undervaluing property because integration was equated with a decrease in value. This resulted in making financing difficult or impossible to obtain, and contributed to the downward spiral known as "redlining."

No other part in the real estate chain - financial institutions, brokers, sellers, landlords, etc. - is permitted to let racial factors influence their decision-making. This is the very purpose of "fair housing." Whether or not appraisers think race can be shown to be relevant to value is itself irrelevant. No amount of "documentation" permits a bank to deny a loan on the ground that blacks - or whites - statistically have a poorer record of repaying loans. Fair housing means the process must be colorblind.

If, in fact, a house's value is affected by an increase or decrease in demand generated by the racial or ethnic composition of a neighborhood, this will be reflected in the objective, non-racial indicators of value that appraisers have always relied upon in determining value - things like comparable sales prices, employment stability, marketing time, rent levels, vacancy rates, level of municipal services, and so forth.

The bill does not change existing law. The appraisers seek a change.

There is no evidence that the appraisers' clients - the financial institutions for whom they provide value estimates - are unhappy with the present state of affairs. Banks and savings and loans are not telling us that the failure to include racial information makes the appraisers' reports less accurate, useful or reliable. Nor are their customers - home buyers - denied information they need. Appraisers normally are retained only after a customer has identified a house and has viewed the neighborhood.

(b) Insurance Amendment

The insurance industry is seeking support for an amendment to strike that part of the bill which would outlaw discrimination on the basis of race, etc., in the providing of hazard insurance (i.e. fire, theft, etc. home insurance). Case law has held that insurance redlining discrimination is now part of Title VIII's coverage, since the availability of insurance is often a prerequisite for home financing.

Thus, the provision would simply codify this interpretation. Nevertheless, the insurance industry objects to this provision on the ground that enforcement of insurance anti-discrimination laws should be left to state insurance commissions. However, the evidence is strong that

- (i) insurance discrimination is a continuing and nationwide problem.
- (ii) state insurance anti-discrimination laws lack the coverage and authority to provide adequate detection and correction.
- (iii) many states have not attempted vigorously to enforce what little authority they have.
- (iv) a model state statute proposed to remedy these inadequacies has not been enacted nor would it provide as full coverage and authority as H.R. 5200.
- (v) neither the McCarran-Ferguson Act nor any other law provide a bar to the enactment of federal law prohibiting race, etc., discrimination in insurance.

17. What will this bill cost?

HUD has estimated its additional budgetary needs, if this bill is enacted, to be about \$2.6 million or about 1¢ per American.

18. Who supports the bill?

The bill was reported favorably from the House Committee on the Judiciary on March 5, 1980, by a vote of 24 - 5. Endorsement of the bill has come from the President of the United States, the Secretary of HUD, the Attorney General, the Federal Home Loan Bank Board, the National Association of Real Estate Brokers, Inc., labor organizations, including the AFL-CIO, and UAW; every major civil rights group, including the Leadership Conference on Civil Rights, the NAACP, the National Council of LaRaza, the NAACP Legal and Educational Defense Fund, and other organizations representing blacks, Hispanics, and women; the National Committee Against Discrimination in Housing; the Low Income Housing Coalition; the League of Women Voters; the Urban League; the National Urban Coalition; the American Coalition of Citizens with Disabilities, and other organizations representing the interest of the handicapped, including the American Council of the Blind, Goodwill and the Consortium concerned with the Developmentally Disabled; the National League of Cities; the U.S. Conference on Mayors; the U.S. Civil Rights Commission; all members of the Congressional Black Caucus; and many other Democratic and Republican members of Congress.

19. Where can I get more information?

Leadership Conference on Civil Rights  
2027 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
667-1780

Mark Miller, Office of Congressman Don Edwards  
- 225-3072.

Janice Cooper, Counsel to the House Subcommittee on  
Civil and Constitutional Rights - 225-1680.

Liz Bankowski, Office of Congressman Robert Drinan  
- 225-5931.

Ben Dixon, Counsel to the Senate Subcommittee on  
the Constitution - 224-9259.

Marian Morris, Office of Senator Charles Mathias  
- 224-8798.

## SENSENBRENNER AMENDMENT

The amendment offered by Rep. F. James Sensenbrenner of Wisconsin would have deleted the administrative enforcement mechanism in the bill--literally the heart of the bill. The amendment would have meant that any victims of housing discrimination would still have to rely on the Federal courts to achieve any kind of justice. This was shown in the Subcommittee hearings to be much too costly and time-consuming to accomplish something that by its nature must be resolved quickly.

The enforcement mechanism devised in the bill is both moderate and workable. Several of its features were refined to address the concerns of those who were worried about overzealous administrative enforcement by HUD. Among the bill's current provisions are:

- An emphasis on conciliation throughout
- A mandatory referral of a complaint to a certified state or local fair housing agency. This feature will minimize the roll of the Federal government in State affairs where there is a substantially equivalent method for resolving fair housing complaints.
- No power by HUD to issue preliminary cease and desist orders.
- Judicial review of any decision in U.S. District Court if either party is dissatisfied with the decision and chooses to appeal.

With these protections in the bill for both the victim and the accused, the Judiciary Committee correctly saw that all parties were well served under the provisions of the bill and voted down the Sensenbrenner amendment by a vote of 20-10.

The estimated cost of the system envisioned in the bill is less than \$3 Million yearly-- about a penny per person per year to stamp out this despicable practice.

## APPRAISERS AMENDMENT

This amendment was offered by Rep. Henry Hyde (R-Ill.). It was introduced at the behest of the Society of Real Estate Appraisers. The amendment states that appraisers will be allowed to use "all relevant factors" in determining the value of property. This wording is something of a smokescreen since the only factors in question under the bill are the use of race, color, creed, sex, national origin or handicap in determining property values. Essentially, the amendment would allow an appraiser to attach a value to the racial makeup of the neighborhood. The objections to this amendment are several:

(1) No other party in the real estate chain - financial institutions, brokers, sellers, landlords, etc. - is permitted to let racial factors influence their decision-making. This is the very purpose of fair housing. Whether or not appraisers think race can be shown to be relevant to value is itself irrelevant. No amount of "documentation" permits a bank to deny a loan on the grounds that blacks - or whites - statistically have a poorer record of repaying loans. Fair housing means the process must be colorblind.

(2) The appraisers are now covered by the 1968 Fair Housing Act. Such an amendment would let them out from under coverage. In essence they would be given a right and a license to discriminate. Since the appraisers have been prevented from using racial factors, there has been no evidence presented by the appraisers or any of their clients that leaving racial factors out causes any loss of confidence in the appraisals of property. Not one witness testified to a loss of confidence.

(3) There is no evidence - none - to suggest that racial makeup of a neighborhood is any kind of accurate indicator of value.

(A) Policy statement of the American Institute of Real Estate Appraisers:

"Racial, religious and ethnic factors are deemed unreliable predictors of value trends or price variance."

(B) Policy statement of the Society of Real Estate Appraisers:

"SREA does not teach that neighborhood stability or value are necessarily affected, positively or negatively, by the movement into or out of a neighborhood of a different racial, religious or ethnic group."

The appraisers apparently concede the point but still feel they ought to be allowed to use race as a value indicator.

(4) There are many proven indicators of property value - comparable sales prices, employment stability, marketing time, rent levels, vacancy rates, etc. - that do not involve judging the value of someone's color. There is no evidence that these do not adequately reflect property value.

The amendment was defeated by a vote of 17-12 in committee.

## INSURANCE AMENDMENT

Representative John Ashbrook (R-Oh.) offered an amendment to exempt home hazard insurance from the provisions of the bill. Like the appraisers, the insurance companies are now covered by current law to the extent they engage in the housing industry. They apparently feel they ought to be able to discriminate in offering home hazard insurance. The Judiciary Committee rejected this amendment on a 19-9 vote. Again, there were several reasons for it:

(1) The insurance companies maintain that regulation of their activities should only take place at the State level. The bill does not seek to change this. The bill provides for mandatory referral to a state agency any complaint brought under the act provided that the state agency has protections substantially equal to those provided in the Federal law. Thus the bill will retain the rights of States to regulate in the area of home hazard insurance.

(2) Home hazard insurance is an integral part of the "real estate chain". Many states require hazard insurance before a sale can be consummated. Even where this is not the case, it is very foolish for a homeowner not to have some kind of coverage. Thus, any discrimination in the sale of this insurance will have the effect of rendering housing unavailable because of race.

(3) Currently, the hands of most State insurance commissioners are tied in attempting to deal with problems in this area. The National Association of Insurance Commissioners did attempt to write a model bill 5 years ago. The Federal Insurance Administrator has called this model bill "deficient in many respects". It really doesn't matter though; the GAO reports that "most state insurance departments have not instituted the changes recommended by the NAIC-sponsored study five years ago."

(4) A most compelling argument made against this amendment in the House Judiciary Committee was that this would create an exception in the law, essentially a license to discriminate. The Federal government would be sending a signal that it is alright for one sector of the housing industry to discriminate. This would not be right. The insurance industry should not be treated any differently than others involved in the housing industry with respect to civil rights.