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FAIR HOUSING AMENDMENTS: COLLISION BETWEEN PROPERTY RIGHTS AND CIVIL RIGHTS

STATUS

On July 30, the Senate Judiciary Committee reported S. 506, a bill concerning amendments to Title VIII (housing discrimination) of the Civil Rights Act of 1968. The bill was originally introduced by Senator Charles Mathias (R-Md.), but was substantially marked up by both the Constitutional Subcommittee and the full Senate Judiciary Committee. Previously, on June 11, the House of Representatives had passed its own version of the bill, H.R. 5200, sponsored by Representative Don Edwards (D-Cal.).

BACKGROUND

The purpose of the two bills is to make federal enforcement of existing housing discrimination laws more powerful and more expeditious. Substantive law concerning housing discrimination began in 1962 when President Kennedy issued Executive Order 11063 which forbade discrimination because of race, color, creed, or national origin in housing financed through federal assistance. It covered housing provided through mortgage insurance by the Federal Housing Administration, through loan guarantees by the Veteran's Administration, and in federally-assisted public housing. Title VI of the Civil Rights Act of 1964 extended the federal efforts in housing discrimination by including under its coverage all housing in urban areas as well as all public housing that received federal financial assistance. In 1968, with the passage of Title VIII of the Civil Rights Act, Congress acted to prohibit discrimination in the sale or rental of all housing, private and public.

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H.R. 5200 AND S. 506

Definitions

Under current law, it is unlawful for private individuals or corporations to engage in "discriminatory housing practices" in the sale or rental of housing, or in the provision of brokerage services, based on race, color, religion, sex, or national origin.

H.R. 5200 and S. 506 broaden the definition of "discriminatory" to include any failure by HUD or other government agencies to "affirmatively" administer Title VIII of the Civil Rights Act. Thus, individuals could sue the government if they felt that Title VIII was not being enforced satisfactorily.

Under current law, the handicapped are not covered by Title VIII. H.R. 5200 and S. 506 add the handicapped to the non-discrimination list of race, color, religion, sex, and national origin. For the purposes of Title VIII, "handicapped" would mean "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarding as having such an impairment; but such term does not include any current impairment that consists of alcoholism or drug abuse, or any other impairment that would be a direct threat to the property or the safety of others."

Under current law, a "direct victim" of housing discrimination can bring a suit immediately into federal court while an "aggrieved person" must bring his complaint to HUD. Current law defines an "aggrieved person" as "any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." The two bills permit an aggrieved person to bring his suit directly into federal courts.

S. 506 redefines an "aggrieved person" by eliminating from coverage those who "believe" that they have been victims of discrimination. Earlier this year, HUD had announced that it would begin to send federal employees into neighborhoods to act as "testors" for housing discrimination. S. 506 excludes this kind of entrapment by limiting its coverage to persons who are making "bona fide" attempts to purchase or rent housing.

Exemptions

Under current law, persons exempt from the power of Title VIII are those attempting to sell or rent a single-family home who live in the home before the transaction, those absentee owners who seek to sell or rent not more than three single-family homes, those owners seeking to sell or rent a unit of a four-unit dwelling who live in one of the units. But all those exemptions apply only to those who sell or rent their homes privately, that is, without the use of any real estate agents or brokers or any

advertising. Additionally, religious institutions or "private clubs not open to the public" are exempt from the scope of Title VIII. The two bills retain all these exemptions and, additionally, exempt local zoning ordinances that require minimum lot sizes unless such ordinances were enacted with discriminatory intent.

Prohibited Practices

Under current law, it is unlawful to discriminate on the basis of race, color, religion, sex or national origin in the sale or rental of housing, in making representations about housing or neighborhoods ("blockbusting"), in making housing loans ("redlining"), and in the provision of real estate brokerage services.

The two bills include the handicapped on the list of those who are protected from the above practices and add to the number of prohibited practices by outlawing discrimination in the sale of housing insurance, in real estate appraisals, and in the fixing of the interest and other conditions of real estate loans. The intent of the House bill is to prohibit real estate appraisers from taking into consideration the racial or ethnic composition of the neighborhood when evaluating property. This provision was hotly debated on the House floor because, it was contended, such a restriction violated the First Amendment rights of free speech of real estate appraisers and because it prevented appraisers from objectively evaluating real estate. S. 506 changes the provision to allow appraisers to take into account "all factors relevant to the appraiser's estimate of the fair market value of the property" provided that such factors are not considered for the purpose of discriminating under Title VIII as amended.

With regard to the handicapped, H.R. 5200 and S. 506 provide specific rules. Owners and landlords would be prohibited from discriminating against a handicapped person and from discriminating against a prospective buyer or renter who is associated (by family or otherwise) with a handicapped person. Owners and landlords would be forced to make "reasonable accommodations in policies, rules, services, or facilities" in order to make the enjoyment of the building by handicapped persons "substantially" equal to non-handicapped persons. Another clause provides that handicapped renters could force landlords to make "reasonable modifications" of buildings, but handicapped renters would have to pay to restore the premises after they left. Neither H.R. 5200 nor S. 506 nor the report of the House Judiciary Committee makes it clear whether the "reasonable accommodations...in facilities" is the equivalent of "reasonable modifications of premises." For this reason, it is unclear whether handicapped renters would always have to reimburse landlords for alterations or whether the landlords themselves would sometimes have to bear the costs. The issue is further obscured by still another clause that declares that "discrimination does not include refusal to make alterations in premises at the expense of sellers, landlords, owners...." But no one would be forced to make alterations to buildings that would "result in unreasonable inconveniences to other affected

persons or that would materially decrease the marketability or value of a building."

Enforcement

Under current law, any person who "claims to have been injured" or "believes that he will be irrevocably injured" by a discriminatory housing practice must file a complaint with the Department of HUD within 180 days of the alleged infraction. HUD may try to correct the alleged discriminatory housing practice by "voluntary compliance." If this is unsuccessful, the aggrieved person may bring a civil suit in federal district court, but only if a judicial remedy is not available under a state or local law. Additionally, the Attorney General may file suit on behalf of any aggrieved person or group of persons. As a remedy, a court may issue temporary or permanent injunctions, temporary restraining orders, or other judicial orders and may award actual damages and not more than $1,000 punitive damages, together with court costs and "reasonable" attorney's fees for a prevailing plaintiff.

H.R. 5200 completely revamps the enforcement procedures. An aggrieved person or HUD itself could bring a complaint to the Department of HUD. The Department, or a state housing agency certified by HUD, would make an effort to correct the alleged discriminatory practice by "voluntary compliance." If unsuccessful, HUD could file a complaint before administrative law judges (ALJs) of the Justice Department or request the Attorney General to bring a civil suit in a federal court. Additionally, the Attorney General could initiate suits in a federal district court on his own, as could the aggrieved person.

If the case is referred to an administrative law judge, an administrative hearing would be held at which the judge would issue findings of fact, conclusions of law and, where appropriate, compensatory and injunctive relief together with penalties of up to $10,000. HUD could not review the decision of an ALJ, but any party to an administrative ruling could appeal the ruling in a federal district court which would be able to make a de novo determination of the adequacy of the finding of fact and conclusions of law. Prevailing parties in both administrative hearings and civil suits could receive attorney's fees. Suits concerning zoning and land use could be brought to court by the Attorney General only.

S. 506 provides for another enforcement procedure. Housing discrimination complaints would be filed with the Department of HUD where an attempt would be made to resolve the complaint by voluntary compliance or conciliation, or, if the parties involved agreed, by binding arbitration. HUD could also refer the case to a state housing agency certified by HUD but the referral must be complete, that is, HUD could not take the case back if dissatisfied with the state agency's handling of the case. HUD could also refer the case to the Attorney General, who would bring the case into federal court. Alternately, HUD could refer the case to an administrative law hearing.

Under S. 506, administrative law judges hearing housing discrimination complaints would be employees of a new agency, the Fair Housing Review Commission, an independent commission headed by three commissioners, not more than two of whom could be from the same political party. Commissioners would sit for six-year overlapping terms. Decisions of ALJs would be reviewed by a panel of the commission consisting of one of the commissioners and two other ALJs. This panel could overturn any decision. Administrative law judges of the commission could not decide cases involving local land use or zoning practices or any "novel issue of law or fact." Such cases would be handled in federal courts by way of the initiative of the Attorney General. Monetary penalties imposed by ALJs would be the same as in H.R. 5200.

Any losing party to an administrative hearing could seek judicial review in a federal court of appeals. The standard for review would be the presumed conclusiveness of the findings of fact of an ALJ if supported by substantial evidence.

Legislative Veto

H.R. 5200 provides for a congressional veto over any rules and regulations promulgated under Title VIII. S. 506 contains no such provision. Under H.R. 5200, any agency proposing a regulation under Title VIII must submit that regulation to the judiciary committees of both Houses of Congress. The regulation would not become effective if (1) both Houses of Congress adopt a concurrent resolution of disapproval within 90 days, or (2) one House adopts a resolution of disapproval within 60 days and the other House does not disapprove that resolution within 30 days.

ADMINISTRATIVE ENFORCEMENT OF CIVIL RIGHTS

Under current law, the Secretary of HUD has sweeping powers, the most prominent of which is the threatened cancellation of federal funds, to back his ability to negotiate "voluntary compliance" in housing discrimination disputes. Nevertheless, only the Attorney General has the power to bring a Title VIII housing discrimination suit into the federal courts, although, in fact, the Attorney General normally acts upon the recommendation of the Secretary of HUD.

The Equal Employment Opportunity Commission has the statutory authority to sue individuals in employment discrimination cases, but must refer any possible suits against any level of government or against a governmental agency to the Attorney General. Overall, the primary responsibility for the enforcement of the many federal civil rights laws (i.e., the authority to sue in court) resides with the Attorney General. Other departments and agencies are restricted to the use of whatever "voluntary compliance" procedures they can concoct.

With respect to housing discrimination, H.R. 5200 creates a completely new procedure for the enforcement of civil rights -- the administrative law hearing. And with this creation the bill alters the normal practice and procedure of administrative law.

Administrative law is the law that governs all the practices and procedures by which the agencies and departments of the federal government carry out federal programs and enforce federal laws. Congress codified the practice of administrative law by passing the Administrative Procedures Act (APA) in 1946. The APA applies to any "authority" of the United States (any one of which is called an "agency" whether it is an agency, department, commission, etc.) except for the Congress, the federal judiciary, the governments of territories or possessions, and military commissions or court martials. Agencies are empowered to promulgate "rules," and such a power is the source of the familiar government regulations; in fact, it is nothing less than agency lawmaking. Additionally, agencies also issue "rules" which are often arrived at by means of an adjudication process. Such adjudications normally involve only a few parties and are for the purpose of settling factual disputes. Agency adjudications are presided over by administrative law judges (ALJs) and their usual course of business is to decide relatively non-controversial issues concerning licenses, permits, registrations, and eligibilities for government benefits. Today, almost 1100 administrative judges work in thirty different federal agencies, and over half of them settle benefits disputes in the Social Security Administration.

Administrative law governs the so-called fourth branch of government, the federal bureaucracy. Most agencies exercise all three of the constitutional powers of government: executive, legislative, and judicial. Since the 1825 case of Wayman v. Southard, the Supreme Court has upheld the authority of Congress to delegate its legislative authority to administrative agencies. And the Twentieth Century Supreme Court has several times held that judicial authority may be conferred on agencies (e.g., in RFC v. Bankers Trust Co. 318 U.S. 163, 1943).

Under the Administrative Procedures Act, the authority to make rules and orders is delegated to the agencies themselves, not to any administrative law judges who are employees of the agencies. And while the APA protects the independence of ALJs to make decisions as they see fit, the chief officer or board of officers of any agency retains summary power to review and overturn such decisions.

The authority over the delegated power, the obligation, and the duty rest with the agency, not with the ALJ. Findings of fact of an ALJ are not binding on an agency, and, in fact, a federal circuit court has said that the powers of an agency to review an initial or recommended decision of an examiner are greater than those of an appellate court reviewing the decision of a trial court (NLRP v. APW Products Co., 1963).

It can be seen that H.R. 5200 breaks with the APA by forbidding the Secretary of HUD from reviewing housing discrimination decisions of ALJs and thereby grants an altogether new authority to the decisions of administrative law judges.

Even though they are judicial in character, administrative adjudications are not courts and, therefore, are not exercises of the Article III judicial power of the Constitution. Such adjudications are, like other actions of agencies, methods of determining policy. H.R. 5200, by eliminating the review by agency heads, would transform them into what amounts to trial courts of first resort.

This is made clear by the fact that federal courts, in reviewing the decisions of ALJs, commonly show great deference to their findings of fact. There is no constitutional right to judicial review of administrative action. And Congress may grant or withhold judicial review of administrative action as it sees fit. When judicial review is authorized, it is the common practice for courts to presume that an agency's interpretation of its governing statutes is adequate. Different courts have ruled again and again that they will not review in detail an agency's findings of fact, but will consider only whether the facts are based on substantial evidence.

Under certain statutes and programs, Congress has provided that a party appealing an administrative decision is entitled to a _trial de novo_, that is, a completely new trial both as to the facts of a case and as to the rulings of law. But, even for such a new trial, the courts have accorded deference to the findings of fact of the agencies. H.R. 5200 invents a new kind of judicial review, a _de novo determination_. It is not altogether clear what a _de novo_ determination would be -- it would likely be defined by a court at some time -- but it seems that it would be something between a complete trial _de novo_ and a court's presumptions as to the validity of the findings of fact.

Since it is the purpose of both H.R. 5200 and S. 506 to speed up the processing of housing discrimination complaints, a party's right to a trial _de novo_ would run contrary to this purpose. For judicial review creating a _de novo_ determination, the House Judiciary Committee Report on H.R. 5200 cautions that "To the maximum extent possible, the record established in the administrative proceedings should be relied upon." Seemingly, under H.R. 5200, a reviewing judge would take a look at the adequacy of the findings of fact, but would not reopen the inquiry into those findings. Thus, the normal custom of judicial review of administrative action would seem to prevail --albeit without the review of an ALJ's decision by an agency itself. Under S. 506, with its inclusion of a review of ALJ decisions by the Fair Housing Review Commission, normal adminstrative practices would completely prevail. Reviewing judges would inquire whether the findings were based on "substantial evidence." Judicial review of administrative findings carries a weighty presumption that the

findings have been substantially proved. So, it can be presumed from both bills that most housing discrimination cases decided by an ALJ would be final. Additionally, it is the intention of both bills to award an appealing party the right to a trial by jury as provided by the Seventh Amendment to the Constitution. A trial de novo, that is, a completely new trial, would guarantee a jury trial to the appealing party. A de novo determination seemingly does not guarantee a trial by jury.

HANDICAPPED RIGHTS

By adding the handicapped to the non-discrimination list of race, color, religion, sex and national origin, the two bills will put the full force of the federal civil rights power into an area, handicapped rights, that is in a state of flux and confusion. With the passage of the Rehabilitation Act in 1973, the federal government began its involvement in the areas of handicapped rights and programs. There are now numerous programs designed to enforce handicapped rights and to provide services for the handicapped. The most publicized aspect about the federal handicapped policy has been the enormous costs incurred by educational institutions and governments at all levels in order to alter their buildings to comply with federal standards for the handicapped.

H.R. 5200 and S. 506 adopt a definition of handicapped that is as broad as any now used by any agency of the federal government -- although it eliminates alcoholism and drug addiction from coverage under the definition. (In past years, HEW has tried to get these two conditions included as handicapped conditions.) This definition is the same as that used in subchapters IV and V of Title 29 of the U.S. Code (the Rehabilitation Act of 1973). Most litigation concerning the handicapped has occurred under Title 29, although at least twenty-seven different federal agencies and departments have their own regulations with respect to the handicapped -- and individual definitions of what constitutes being handicapped. Court decisions under Title 29 show the area of handicapped rights to be a completely amorphous and nearly unlimited field. Subchapters IV and V of Title 29 forbid discrimination because of a handicapped condition in employment in the federal government and discrimination based on a handicapped condition by lower governments and institutions that receive federal funds. Litigation and government regulations in the handicapped field have been widespread.

Who is Handicapped?

A school district must consider hiring a blind person to teach sighted students. Gurmankin v. Constanzo 411 F.Supp. 982, aff. 556 F.2d 184 (1976).

New York City's board of education may not segregate children who were carriers of hepatitis B from other children in the public schools. NY State Ass'n for Retarded Children v. Carey 466 F.Supp. 487 (1978).

A boy with severe psychiatric difficulties may not be barred from competing in high school interscholastic sports. Doe v. Marshall 459 F.Supp. 1190 (1978).

A prior history of drug addiction comes under the definition of handicapped. Davis v. Bucker 451 F.Supp. 791 (1978).

An epileptic has a cause of action when she alleges that she was refused a job as a laboratory technician because of her epilepsy. Drennan v. Philadelphia General Hospital 428 F.Supp. 809 (1977).

A student with only one eye has standing to challenge a school district's refusal to allow him to participate in contact sports. Kampmeier v. Nyquist 553 F.2d 296 (1977).

Asthma can be considered a handicap when it makes achievement unusually difficult. Chicago v. State Department of Industry, Labor and Human Relations 62 Wis. 2d 392.

The New York Supreme Court ruled that a man confined to a wheelchair could not be excluded from participation in a marathon race. (New York Times, October 22, 1977)

A federal district judge in New York ruled that the American Hockey League could not exclude a one-eyed player from the league. (New York Times, February 3, 1978).

Regarding the number of handicapped people in the United States, the Library of Congress reports:

- an estimated 41.6 million "impairments" which include impairments of sight, hearing, and speech, paralysis, orthopedic handicaps, and absence of major extremities. (This does not mean that there are 41.6 million impaired people since it is common for one person to report more than one impairment.)

- an estimated 9.6 million people regarded as having "developmental disabilities," approximately 60 percent of whom are mentally retarded, 25 percent have epilepsy, 10 percent have cerebal palsy, and just under one percent are autistic.

- 16.6 million people, or 13 percent of the working population, have a work disability which prevents 2.1 million of those from working regularly. (Digest of Data on Persons with Disabilities, May 1979)

Handicapped Rights and Public Expenditures

Even at great expense to the public school system, minimally handicapped students must be "mainstreamed" into regular classrooms. Houston v. Drosick, 423 F.Supp. 180 (1976)

School districts must take into account the individual needs of each handicapped child and provide them with free public education. Doe v. Marshall 459 F.Supp. 1190 (1978).

The retarded have statutory rights to minimally adequate habitation. Holdeman v. Pennhurst State School and Hospital 446 F.Supp. 1295.

An autistic child had standing to sue because of a school district's failure to provide him with a free public education by refusing to pay for a full-time private tutor. Boxall v. Sequoia Union High School 464 F.Supp. 1104 (1979).

The Board of Education of New York City contends that compliance with court orders concerning special education for the handicapped would cost $350 million. (New York Times, December 21, 1979)

The American Public Transit Association is suing to block the Department of Transportation's new regulations requiring public transportation to be accessible to the handicapped. The Department claims that the conversion would cost $1.8 billion while the Transit Association claims that the conversion would cost $5 billion. (Washington Post, June 30, 1979)

CONCLUSION

Federal enforcement and judicial decisions under Title VIII are at a turning point. The next question to be decided is whether the federal notion of housing discrimination will follow the evolution of civil rights enforcement that has taken place in the fields of employment and education, whether there is to be an "affirmative action" version of housing discrimination or, in legal terms, whether the standard for housing discrimination will be discriminatory "intent" or discriminatory "effect."

Litigation under Title VIII has moved far from its original purpose, i.e., guaranteeing that persons will not be denied individual housing because of their race, and has become increasingly dominated by considerations of broad racial mixing and comparative racial statistics, placing, public housing in middle and high income neighborhoods, local zoning laws, and land use laws. In Village of Arlington Heights v. Metropolitan Housing Development Corp (429 U.S. 252, 1977), the Supreme Court ruled that a village's refusal to rezone a parcel of land to allow the construction of public housing was not a violation of the Equal Protection Clause of the Constitution because no discriminatory

intent was proved. However, the Court remanded the case to the Seventh Circuit Court of Appeals for a determination of whether the village could still be held liable to a violation of Title VIII. The Seventh Circuit decided that under some circumstances zoning laws could violate Title VIII if it could be demonstrated that their effect resulted in the segregation of the races. The decision of the Seventh Circuit closely paralleled a previous employment discrimination case before the Supreme Court, Griggs v. Duke Power Co. (401 U.S. 229, 1971), in which the Court held that Title VII of the Civil Rights Act prohibits employment practices that have the effect of discriminating on the basis of race even though no purposeful racial discrimination can be demonstrated. Since Arlington Heights, the other Circuit Courts of Appeal have split on the extent the effects test can be used to oversee the patterns of local housing. Nevertheless, such a test is now being litigated widely and needs only a final Supreme Court ruling on whether the now well-established federally-enforced procedures of statistical racial mixing used in education and employment will be completely extended to housing.

The two bills under consideration would give a new impetus to federal housing enforcement efforts. With the provision making administrative law judges the new adjudicators of civil rights on housing, the intention is to speed up enforcement and to handle ever more cases in this field. By adding housing insurance, real estate appraising, zoning and land use, and the fixing of interest of real estate loans to the already covered activities of selling, renting, making representations about housing or neighborhoods, housing loans, and brokerage services, the bills extend considerations of federal civil rights law to every transaction having to do with housing, both public and private.

There could hardly be a more sensitive area of litigation than a housing discrimination suit involving, as it does, a collision between property rights and civil rights. The Supreme Court has always acquiesced to the congressional delegation of judicial authority to administrative agencies because the issues concerned, such as individual eligibility for Social Security benefits, were issues that the Court did not want to be bothered with, or because the issues, such as communications licenses, were technical issues better handled by those with technical expertise. The two proposed bills transform civil and property rights into technical issues that can be dealt with by non-judicial means. This is a revolutionary idea.

The Congress of the 1970s granted extensive civil rights status to the handicapped. The costs for full social mobility and social integration of the handicapped were only vaguely considered at the beginning of the new federal effort. Today the undreamt of costs to schools and local and state governments are starting to mount up. How administrative regulations and judicial decisions will treat the handicapped with regard to their federal civil right to housing is unknown. Since no one has made the

effort to define precisely who is and who is not handicapped, the number of people affected is unknown. And the costs, both to individual landowners and local and state governments, are also unknown.

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