

STATEMENT OF PROFESSOR FLORENCE WAGMAN ROISMAN *
FOR THE COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY

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Government – federal, state, and local – has been and still is the principal engine of racial and economic segregation in the United States. This statement will focus on the federal government. The “sad, shameful fact is that . . . the federal government is still – forty years after the 1964 Civil Rights Act – spending billions of dollars to keep people of color in housing that is separate and unequal, in units, buildings, and neighborhoods that are vastly inferior to the units and buildings and neighborhoods in which federal housing dollars help white, ‘Anglo’ people to live.”¹

Part I reviews the government’s responsibility for segregating housing. Part II proposes some solutions. Part II necessarily is suggestive only, by no means exhaustive.²

I. The Federal Government’s Responsibility for Creating and Maintaining Residential Racial Segregation.

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¹Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 *Howard L.J.* 913, 916 (2005) (discussing the extent of discrimination and segregation in federal housing programs and suggesting ways of reducing them).

²For other suggestions, see, inter alia, Bruce Katz & Margery Austin Turner, *Rethinking U.S. Rental Housing Policy: Build on State & Local Innovations* (The Brookings Institution 2007), http://www.brookings.edu/papers/2007/0228metropolitanpolicy_katz_Opp08.aspx. For lack of time and knowledge, I have not provided specific recommendations for the Departments of Defense, Veterans Affairs, or Agriculture. I do note, however, that the Department of Defense has promulgated a regulation intended to “eliminat[e] discrimination against DoD personnel in off-base housing” 32 C.F.R. § 192.4. It provides that submission of a complaint is not necessary, and that even the absence of a statutory remedy “does not relieve a commander of the responsibility to ensure equal treatment and equal opportunity” *Id.*

Beginning in 1932, the federal government virtually created residential apartheid in four ways:

It essentially commanded the movement of white families to the suburbs through the FHA (Federal Housing Administration) and VA (Veterans Administration) programs, which made buying suburban homes cheaper than renting in the cities and assured that the suburban housing would be racially segregated and available almost exclusively to whites³);

It displaced millions of households – disproportionately households that were poor and of color – through the urban renewal and interstate highway programs; It provided only a limited amount of housing for the poor people of color who had been displaced by the urban renewal and highway programs, and made most of that replacement housing high-rise, high-density public housing in central city, high poverty, predominantly minority-occupied neighborhoods⁴;

It provided tax subsidies for homeownership that benefitted whites far more than people of color.⁵

These federal efforts destroyed racially integrated communities, drove whites out of cities and into all-white suburbs, and literally embedded racially segregatory land use patterns, establishing boundaries that people came to see as natural, inevitable, and permanent.⁶

³“[L]ess than 2 percent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to Negroes.” Mark I. Gelfand, *A Nation of Cities: The Federal Government and Urban America 1933-1965*, at 221 (1975).

⁴This summary is taken from Florence Wagman Roisman, *End Residential Racial Segregation; Build Communities That Look Like America*, Harvard Law & Policy Review Online (2008) (<http://www.hlpronline.com/>).

⁵The tax advantages of homeownership disproportionately benefit whites rather than minorities because “blacks are less likely to own homes, . . . black homes are on average less expensive than white homes, . . . [and] most of the benefits . . . are available only when taxpayers itemize their deductions . . . [and] many black taxpayers . . .” do not do this. Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 44 (1995); see also Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 St. Louis U. L.Rev. 665, 673-4 (2002).

⁶Many authorities document these statements. For good overviews, see Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 26-59 (1993); Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 190 - 230 (1985). With regard to the FHA and VA, see also Leonard S. Rubinowitz & Elizabeth

From the time of its first serious involvement in housing during World War I through 1954, the Federal government openly and deliberately engaged in *de jure* racial segregation.⁷ Even after the decision in *Brown v. Board*, federal housing programs continued to operate in a racially discriminatory and segregatory way.⁸ President Kennedy's Executive Order of 1962 and the

Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 Nw. U. L. Rev. 491, 590-95 (discussing studies concluding that FHA-assisted housing programs tend to maintain, if not exacerbate, existing segregative housing patterns); and Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 Ind. L. Rev. 103 (2005). With respect to urban renewal, see also Martin Anderson, *The Federal Bulldozer* 7-8, 64-65, 217 (1964) (showing the disparate racial impact of the federal urban renewal program); Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940-1960*, at 273-75 (1983) (summarizing the role of Chicago's redevelopment program in displacing and segregating blacks); Marc A. Weiss, *The Origins and Legacy of Urban Renewal*, in *Urban and Regional Planning in an Age of Austerity* 68-72 (Pierre Clavel et al. eds., 1980); Carolyn Adams et al., *Philadelphia: Neighborhoods, Division, and Conflict in a Postindustrial City* 106-10 (1991) (explaining how federal and state urban renewal plans failed to spur development in Philadelphia's inner-city, low-income neighborhoods. See also Thomas J. Sugrue, *The Origins of The Urban Crisis: Race and Inequality in Postwar Detroit* (1996); David M. P. Freund, *Colored Property: State Policy & White Racial Politics in Suburban America* 99-240 (2007); *Thompson v. HUD*, 348 F. Supp.2d 398, 465-469 (D. MD 2005) (reviewing the history of public housing segregation, including statements by former HUD Secretaries Romney and Cisneros).

⁷From its creation in 1933 through 1964, "public housing was *de jure* segregated. These projects were operated according to a Public Housing Administration ([federal] 'PHA') policy of 'separate but equal.'" *Young v. Pierce*, 628 F. Supp. 1037, 1045 (E.D. TX 1985). See also Gail Radford, *Modern Housing for America: Policy Struggles in the New Deal Era* 104-05 (developments in the predecessor program administered by the Public Works Administration sometimes had both Black tenants and white tenants, but it was "the agency's decision not to disrupt pre-existing racial patterns of neighborhoods."); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA L.Rev. 1351, 1354 ns. 11 and 12 (with regard to highway and other policies), *id.* at 1357-58 (with regard to public housing and other programs administered by HUD).

⁸See Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, in *From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth Century America* 206, 219 (John F. Bauman et al. eds., 2000) (stating that after the ruling in *Brown*, "HHFA [the Housing and Home Finance Agency] embarked on a course of increasing the quantity and improving the quality of black-occupied housing while issuing no challenge to segregation").

provisions of the Civil Rights Act of 1964 had no real effect on the operation of these federal programs.⁹ In 1968, the Kerner Commission warned:

Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization.¹⁰

Title VIII of the 1968 Civil Rights Act prohibited discrimination and segregation in housing and imposed on all federal agencies administering housing and urban development programs the obligation “affirmatively to further” both non-discrimination and integration.¹¹ HUD never has promulgated regulations to implement the “affirmatively further” requirements. At least until 1992, neither HUD nor any other federal agency did anything significant to satisfy its constitutional obligation to dis-establish the existing residential segregation, let alone to promote

⁹Executive Order 11,063, 27 Fed. Reg. 11,517 (1962); 1964 Civil Rights Act, Pub. L. No. 88-352, Title VI, 78 Stat. 252 as amended, codified at 42 U.S.C. § 2000d. See Leonard S. Rubinowitz with Ismail Alsheik, A Missing Piece: Fair Housing and the 1964 Civil Rights Act, 48 Howard L.J. 841 (2005) (discussing why the 1964 Civil Rights Act applied to only some federally assisted housing, and why even that was ineffective).

¹⁰Nat’l Advisory [Kerner] Comm’n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 474 (1968); see also U.S. Comm’n on Civil Rights, Twenty Years After Brown 114 (1977) (stating that “[t]he Federal Government . . . has . . . been most influential in creating and maintaining urban residential segregation.”).

¹¹HUD also has an obligation to assure that public housing authorities (PHAs) and other recipients of HUD funds affirmatively further fair housing. See, e.g., U.S. Housing Act of 1937, 50 Stat. 888, as amended by the Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, 112 Stat. 2531 (42 U.S.C. §1437c-1(d)(15)) (requiring PHAs to certify that they will affirmatively further fair housing).

residential integration.¹² In 1995, HUD's Assistant Secretary for Fair Housing and Equal Opportunity said:

That the federal government, including HUD, has a long history of having precipitated and perpetuated housing discrimination, there can be no question. . . . The federal government's home-ownership programs also reinforced discrimination and separation by income and race in our housing markets. The earliest Federal Housing Administration (FHA) mortgage insurance programs enabled and encouraged middle-class white families to obtain financing for new housing in the burgeoning suburbs. . . .¹³

In 1995, Secretary Cisneros testified to Congress that "public housing is itself concentrated in high poverty neighborhoods. Due to deliberate siting decisions, public housing tends to be located in areas lacking jobs, economic opportunities and basic amenities."¹⁴ He acknowledged

¹²The Constitutional obligation is acknowledged in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968) (requiring disestablishment of existing segregation and elimination of the vestiges of past segregation "root and branch"). While *Green* was a suit involving public education, its principles apply as well to housing. See *Thompson v. HUD*, 348 F.Supp.2d 398, 466 (D. MD 2005) (quoting former HUD General Counsel John Knapp). Also, HUD's Title VI regulations state that recipients of federal financial assistance "must take affirmative action to overcome the effects of prior discrimination" and that "even in the absence of such prior discrimination, a recipient . . . should take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 24 CFR § 1.4(b)(6)(i),(ii). See Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 *Cityscape* 171, n. 22 at 180-81 (1999).

In 1985, in a case challenging HUD's segregatory actions with respect to public housing in 36 counties in Texas, U.S. District Judge William Wayne Justice meticulously reviewed HUD's record of enforcement of Title VI and described its ineffectiveness; he concluded that HUD has "actively employed race-conscious policies which result in segregation." *Young v. Pierce*, 628 F. Supp. 1037, 1056. For relevant excerpts from this opinion with regard to HUD's defalcations, see Roisman, *Keeping the Promise*, supra note 1, at 918-921. In 2005, holding HUD liable for failure to promote desegregated housing in Baltimore, MD, U.S. District Judge Marvin Garbus also reviewed HUD's history and found it still deficient. *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 348 F. Supp.2d 398, 466-70 (D. MD 2005).

¹³Roberta Achtenberg, Keynote Address, 143 U. PA L. Rev. 1191, 1993 (1995).

¹⁴*Thompson v. HUD*, 348 F. Supp. 2d 398, 467 (quoting testimony before the Housing and Community Opportunity Subcommittee of the Banking & Financial Services Committee of the House of Representatives (Oct. 13, 1995)).

that HUD had been “complicit in creating isolated, segregated, large-scale public housing” and that “HUD has traditionally been part of the problem.”¹⁵

Secretary Cisneros brought to HUD staff experienced in and deeply committed to efforts to undo residential racial segregation, and from 1993 to 2000 several initiatives promoted those efforts, though their overall impact was small.¹⁶ Since 2000, however, those efforts have been abandoned. Indeed, HUD has continued to exacerbate the problems of racial and economic segregation in the programs it administers. HUD has administered the voucher program in such a way as to discourage families from moving to high opportunity areas. In the HOPE VI program, HUD is squandering an opportunity to undo segregation in the worst of the racially isolated public housing developments, instead sponsoring the demolition of 75,000 public housing units and replacing them with many fewer, smaller, often more expensive dwellings. The incentives HUD built into the HOPE VI program virtually assure that replacement housing will be limited to the same racially isolated neighborhoods rather than racially diverse, high opportunity areas.

Meanwhile, since 1987, the principal federal program for creating new and rehabilitated subsidized housing has been one administered not by HUD but by the Department of the Treasury and state and local housing finance agencies. This is the Low Income Housing Tax

¹⁵Id. at 467, quoting News Conference, HUD Secretary Holds News Conference to Discuss the Transformation of Public Housing, 1996 WL 158456 at 7 (April 3, 1996).

At Secretary Kemp’s urging, Congress created the Moving to Opportunity (MTO) program, which was modeled on the Gautreaux Housing Mobility Program which successfully promoted integration of low-income African-American families into predominantly white suburbs. Unfortunately, however, MTO was framed in terms of economics, not race, and many of the minority households who have moved under MTO have moved into neighborhoods that are predominantly minority. See the testimony to this Commission of Professor James Rosenbaum.

¹⁶For a discussion of the initiatives, see Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 *Cityscape* 171, 172-73 (1999). Even a 1998 report, however, concluded that residents of existing publicly subsidized housing suffered separate and unequal treatment on the basis of race. Modibo Coulibaly, Rodney D. Green, & David M. James, *Segregation in Federally Subsidized Low-Income Housing in the United States* (1998). (In 1997, the Department had set the outrageously inadequate goal of reducing racial and ethnic segregation in public and federally assisted housing by 5 percent at the end of 5 years in 50 percent of “selected localities.” U.S. Dept. of Housing and Urban Dev., *Strategic Plan* (<http://www.hud.gov/reform/>). See also Elizabeth K. Julian & Demetria McCain, *Housing Mobility is a Civil Right*, in *The Integration Debate: Competing Futures for American Cities* (Chester Hartman & Gregory D. Squires, eds. forthcoming 2009) (discussing the inadequacy of HUD’s actions during the Clinton Administration).

Credit program (LIHTC).¹⁷ The Treasury Department has refused to acknowledge that its obligation “affirmatively to further” desegregation means that it must assure that tax credits are allocated so as to reduce the level of residential racial segregation and that data about racial segregation be collected and reported. Neither Treasury nor the housing finance agencies have taken effective steps to require even that racial segregation be taken into account when decisions are made about where to site LIHTC developments. Treasury does not even require reporting on the racial characteristics of the sites or the residents of the developments. Not surprisingly, but outrageously, this has resulted in the apparent reality that the occupants of many LIHTC developments themselves are racially segregated and that the developments are sited in neighborhoods that are racially impacted. In fact, studies indicate that many of the LIHTC financed developments for families with children are being sited in neighborhoods that are predominantly minority and undoubtedly are “served” by low-performing schools.¹⁸ Thus, the Treasury Department, administering the principal subsidized housing development program today, is ignoring the mandate “affirmatively to further” residential integration, not requiring that siting decisions even take into account the impact on segregation and not even requiring submission of the data that would be necessary to determine authoritatively the extent to which that mission is being accomplished.¹⁹ The federal government is repeating in the LIHTC program the evils of the urban renewal program.²⁰

The other federal agencies with major responsibilities for housing are the departments of Agriculture, Veterans Affairs, and Defense. Neither the Department of Agriculture nor the

¹⁷26 U.S.C. §42; Alanna Buchanan et al., *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program 1* (2006), <http://www.pprac.org/pdf/BuildingOpportunity.pdf>.

¹⁸A recent study concluded, with considerable understatement, that “[p]roviding less racially isolated housing opportunities, per se, does not appear to be a priority for states as they administer the LIHTC program.” Jill Khadduri, Larry Buron, & Carissa Climaco, *Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* 22 (Abt Assoc. July 28, 2006) http://www.pprac.org/pdf/LIHTC_report_2006.pdf.

¹⁹Id. at 22-23 (stating that “the systematic collection of data on the characteristics of households occupying Tax Credit units . . . would be needed for monitoring the effect of this program on fair housing. . . . Additional data collection and analysis is sorely needed in order to determine whether poor people and people of color actually have access to these potential housing opportunities.”).

²⁰See Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 *Miami L. Rev.* 1011 (1998); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 *Vand. L. Rev.* 1747 (2005).

Department of Veterans Affairs has done anything effective to dis-establish segregation or promote integration.²¹ It is likely that the Department of Defense may have a better record in this respect, since studies have shown that communities in the vicinity of military bases are among the best integrated in the United States, but there has been relatively little study of this.²² On the other hand, the Department of Defense apparently has done a terrible job of assuring that people on active duty are able to occupy decent housing. Past studies have indicated that many servicepeople live in substandard housing and some experience literal homelessness.²³

²¹With respect to the Department of Agriculture, see Darryl Fears, *USDA Is Called Lax on Bias: GAO Accuses Agency of Inaction on Racial Discrimination*, *The Washington Post*, May 28, 2008, at A6; Associated Press, *Bias Suits by Farmers Could Cost Billions*, *The N.Y. Times*, June 29, 2008, at A18. While this involves racial discrimination in loans to farmers, it is suggestive of comparable liability with respect to discrimination in housing financed by the Department. No class action litigation has yet been filed with respect to housing discrimination. The Department of Agriculture's civil rights regulations are at 7 CFR §1944.

The housing problems of veterans, especially veterans with disabilities, are severe and worsening. See Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing 2008* at 27, 29-30; Roisman, *National Ingratitude*, *supra* note 6, at 169-75 (suggesting improvements in the provision of housing assistance to veterans).

²²See Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 *Am.Soc.Rev.* 23, 32, 35 (1994) (stating that the presence of universities as well as military bases was associated with a decrease in segregation).

²³See Chester Hartman & Robin Drayer, *Military Family Housing: The Other Public Housing Program*, in Chester Hartman, *Between Eminence & Notoriety: Four Decades of Radical Urban Planning* 233 (2000) and other authorities cited in Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 *Ind. L.Rev.* 103, 105 n. 4 (2005).

II. Some Proposed Solutions: What Should We Do?

Solutions to the problem of residential racial segregation are not hard to identify.²⁴ What has been difficult has been finding people who combine the power, the vision, and the courage to implement these remedies. The following discussion of proposed solutions to the problem of residential racial segregation is divided into four parts: (1) general principles, (2) actions that can and should be taken by the members of this Commission and other individuals, (3) actions that can and should be taken by the President and other parts of the Executive Branch, and (4) actions that can and should be taken by Congress.

1. General Principles.

John Charles Boger, Dean of UNC Law School and a former civil rights lawyer, drew from other, more successful, civil rights statutes, three lessons for fair housing:

- (1) rely upon objective, system-wide goals;
- (2) demand concrete progress toward those goals from the chief institutional actors who implement them; and
- (3) offer powerful financial incentives, both positive and negative, to promote compliance.²⁵

To this I would add:

- (4) Remedies must be both race-conscious and class-conscious. If we use only class-conscious standards, we will not achieve racial desegregation. (This is one of the lessons of the MTO experiment.) If we use only race-conscious standards, we will not provide any redress for the poor people of color who have been most victimized by past segregation. Please note in this regard that affirmative race-conscious remedies are fully justified under Title VIII and the Thirteenth Amendment.²⁶

²⁴See Roisman, End Residential Racial Segregation, *supra* note 4.

²⁵John Charles Boger, Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction, 71 N.C. L. Rev. 1573, 1590 (1992).

²⁶With regard to the necessity of distinguishing between fair housing enforcement and desegregative activity, and distinguishing between poverty deconcentration and desegregation, see Florence Wagman Roisman, The Lessons of *American Apartheid*: The Necessity and Means of Promoting Residential Racial Integration, 81 Iowa L. Rev. 479, 514-18 (1995). With respect to the statutory and constitutional validity of affirmative action to achieve racial integration in housing, see *Jones v. Mayer*, 392 U.S. 409 (1968) and Florence Wagman Roisman, Constitutional and Statutory Mandates for Residential Racial Integration, in *The Integration Debate*, *supra* note 16.

(5) Regionalism. While the federal government bears enormous responsibility for the residential apartheid in the United States, much damage also has been done by state action and inaction and by local zoning and other land use regulation and school finance policies. The federal government has powerful leverage with state and local governments, and should emphasize regional administration at every opportunity.

2. What Members of this Commission and Other Individuals Can and Should Do.

The public discourse about residential integration has been controlled by the Right.²⁷ The public in general is hostile to residential racial integration, largely because of fear and ignorance.²⁸ In fact, residential integration has had beneficent impacts on communities that have experienced it, but the general public does not know about this.

It is essential that progressives provide leadership in a public discussion about the value and necessity of residential racial – and economic – integration. We need people – like Secretaries Kemp and Cisneros – speaking out about the value of integration. What the “experts” know is not known or believed by the general public.²⁹

3. What the President and Executive Branch Can and Should Do.

A. The President Should Establish an Office Whose Single Mission is the Elimination of Residential Racial Segregation.

One reason why residential racial segregation – even in the federally assisted housing market – has not been eliminated or even substantially reduced is that no person or agency is focused exclusively on achieving this result. While HUD and the Department of Justice have lead responsibilities in this area, each also has multiple, diverse, and sometimes contradictory missions, as evidenced in the fact that civil rights cases brought against federal agencies are defended by the Civil Division of the Department of Justice (while the Civil Rights Division brings civil rights cases on its own), and that HUD and other federal agencies often are

²⁷See, e.g., Hanna Rosin, *American Murder Mystery*, *The Atlantic Monthly*, July/August 2008, available at www.theatlantic.com/doc/print/200807/memphis-crime; see also Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 *Ind. L. Rev.* 507, 515-521 (forthcoming 2008) (introducing a symposium that includes Professor James Kushner’s discussion of “developments that provide ‘reason to question the value of integration and diversity in contemporary American culture’”).

²⁸See Rubinowitz with Alsheik, *supra* note 9, at 906-910 (describing the continuing causes of housing discrimination and segregation).

²⁹See Roisman, *The Lessons of American Apartheid*, *supra* note 26, at 522-24.

defendants in civil rights cases (although all federal agencies are obligated “affirmatively to further” fair housing and HUD is charged with principal authority for achieving this result). We need an office whose sole mandate is eliminating residential racial segregation.

The President should establish such an office within the White House. Congressional authorization and funding for a permanent agency also should be sought. (See below.)

One of the first things this office should do is draft and propose national “fair share” legislation as suggested in John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*.³⁰

B. HUD

In January 2008, Housing Scholars and Research and Advocacy Organizations in the United States filed a report to the U.N. Committee on the Elimination of Racial Discrimination. The Report contained recommendations for actions that HUD should take to bring the United States into compliance with the International Convention on the Elimination of all Forms of Racial Discrimination.³¹ In addition to the recommendations of that report, I offer these suggestions:

As the agency with primary responsibility for enforcing the obligation “affirmatively to further” fair housing, HUD should require that all agencies administering housing and development programs mandate that assisted developments adhere to specific goals and timetables for including appropriate percentages of minorities, voucher holders, people with disabilities, and very low income and large families. Each development should be required to have and implement an Affirmative Fair Housing Marketing Plan (AFHMP) and each development should be required to report semi-annually on the racial, disability, and income characteristics of its occupants, separating the reporting on families with children from the reporting about other households.³²

³⁰71 N.C. L. Rev. 1573, 1601-1618.

³¹Residential Segregation and Housing Discrimination in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination: A Response to the 2007 Periodic Report of the United States of America (January 2008) at 23-24 (hereinafter “CERD Response”). I was one of those on whose behalf this Response was filed.

³²See Roisman, *Intentional Racial Discrimination*, supra note 7, at 1375 (“[S]hallow-subsidy developments, publicly financed but privately owned, are located in predominantly white, nonpoverty-concentrated areas in cities and suburbs. . . . Shallow-subsidy developments should be required to accept a percentage of Section 8 certificate and voucher holders or, at the least, be prohibited from discriminating against them.”)

In every situation in which HUD or another federal agency has discretion in distributing funds, it should favor communities that promote desegregation, by inclusionary zoning and other methods. As Michael Schill has proposed, federal and state governments should “reduce the fiscal motives of municipalities to zone out low-cost housing by increasing intergovernmental grants-in-aid, thereby diminishing local reliance on the property tax.”³³

Mobility standards should be incorporated into every housing-related program administered by a federal, state, or local agency. Mobility programs should be improved by adding assistance with education (including adult literacy), employment, childcare, transportation, and other issues.³⁴

HUD should revise its public housing, HOPE VI, voucher, Community Development Block Grant (CDBG), and other program requirements to promote racial and economic integration and undo and forbid actions that perpetuate segregation.³⁵ In particular, HUD should:

1. Create and fund a fair housing enforcement organization in each MSA that does not have one, with a particular charge to protect Section 8 recipients from unlawful discrimination;
2. Require and fund effective mobility counseling in all Section 8 programs and authorize and encourage every Section 8 administering agency to grant exception rent levels, approve over-FMR tenancies, enlarge the 120-day search time, and advise recipients that this relief is available, all with the goal of enabling poor people of color to use vouchers in communities that have excellent resources;

³³Michael H. Schill, *Race, The Underclass, and Public Policy*, 19 *Law & Soc. Inq.* 433, 451-52 (1994).

³⁴See Alexander Polikoff, *Racial Inequality and the Black Ghetto, Poverty & Race* (Nov./Dec. 2004) http://www.prrac.org/full_text.php?text_id=1010&item_id=9330&newsletter_id=78&header=Search%20Results; James E. Rosenbaum, *Black Pioneers – Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 *Hous. Pol’y Debate* 1179 (1991) (explaining that the Gautreaux Housing Mobility Program has succeeded despite the fact that the families do not receive educational counseling or supplemental assistance with employment, childcare, transportation, or other problems); James E. Rosenbaum, *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 *J. Pol’y Analysis & Mgmt.* 556, 571 (“A program that provided such support might produce even more encouraging results.”); Massey & Denton, *supra* note 6, at 220 (endorsing these recommendations).

³⁵See Roisman, *Long Overdue*, *supra* note 16, at 174 (re FMRs).

3. Strongly prefer regional administration of Section 8;
4. Review all residency preferences and invalidate any that have the effect of perpetuating racial or economic segregation;
5. Require PHAs to make payments needed to facilitate desegregative moves;
6. Improve mobility programs by addressing employment, gender, transportation, childcare, and other issues;
7. Preserve and desegregate federally assisted housing developments;
8. Initiate effective Title VI compliance reviews, starting with the largest and most segregated MSAs; addressing all federally assisted programs, including state and local Community Development Block Grant expenditures, and focusing on relief that includes promotion of inclusionary zoning ordinances and other effective desegregative activities³⁶;
9. Re-create the Voluntary Mobility Program and the Regional Opportunity Counsel initiative, with mobility standards;
10. Revise the FHA program to promote desegregation, including providing incentives for home purchases that promote desegregation, such as a lease-purchase option and a zero downpayment program, as recommended by the Twentieth Century Fund Task Force on Affordable Housing.³⁷

C. The Department of the Treasury:

The Department of the Treasury should by regulation direct that allocating agencies must assure that tax credit developments “affirmatively further” racial desegregation, and should require that agencies collect data on the racial, economic, and disability characteristics of the neighborhoods in which proposed developments are located and of residents who live in

³⁶Id. at 175-78, 181 n. 22. Those MSAs that met this standard in 1980 and 1990 were New York; Kansas City; MO., Newark, NJ; Philadelphia, Cleveland, Detroit, Gary-Hammond-East Chicago; Indianapolis; Los Angeles-Long Beach; Milwaukee; and St. Louis.; Columbus; San Francisco-Oakland; Birmingham, AL; Greensboro-Winston Sales, NC; Houston; Norfolk-Virginia Beach; Tampa-St. Petersburg; and Atlanta. Id. at 173. See the testimony to this Commission of Professor John R. Logan.

³⁷See Michael A. Stegman, *More Housing, More Fairly: Report of the Twentieth Century Fund Task Force on Affordable Housing, Background Paper on the Limits of Privatization 20* (1991).

existing developments. The Department also should require, scrutinize, monitor, and enforce affirmative fair marketing plans for all tax credit developments. Agencies should require racial integration and fair representation of voucher holders, people with disabilities, and households with incomes below 30% AMI. Treasury should direct that allocating agencies site developments only in areas that will provide desegregated housing.

Treasury should establish by regulation that HFAs may not simply require certification of compliance with civil rights obligations but must establish, monitor, and enforce performance standards.³⁸

D. The Department of Justice³⁹:

The Department of Justice should restore and enlarge its fair housing testing program, and should target testing on LIHTC developments in high opportunity areas to assure that racial minorities, voucher holders, and people with disabilities are not subjected to discrimination.

The Department should initiate strategic litigation enforcing Title VIII in situations that will have the greatest impact in achieving racial desegregation.⁴⁰

E. Actions that Can and Should be Taken by Congress⁴¹:

1. Congress should vastly increase the number of vouchers available and should require higher FMRs, exception rents, extended search times, and authority and funding for other mobility elements that will promote desegregation. Vouchers should be targeted to very low income minority families with children who will move from high poverty neighborhoods to neighborhoods that have little poverty, good public schools, and a substantial percentage of white, Anglo residents.⁴²

³⁸See Building Opportunity, *supra* note 17, at 3.

³⁹These are in addition to the recommendations in the CERD Response, *supra* note 31, at 24-25.

⁴⁰See Seok Joon Choi, Jan Ondrich, & John Yinger, Changes in Rental Housing Discrimination Since 1989, 10 *Cityscape* 301, 328 (2008) (finding “strong evidence that discrimination against Black customers by larger agencies has increased since 1989” and recommending “a rental testing program that focuses on relatively large rental agencies”).

⁴¹These are in addition to the recommendations in the CERD Response, *supra* note 31, at 25-26.

⁴²See Margery Austin Turner, *Expand and Strengthen Housing Choice Vouchers, 16 Poverty & Race* 8 (2007).

2. Congress should require that before any currently occupied public or federally assisted housing unit is demolished or otherwise removed from the low-rent stock (regardless whether demolition or disposition already has been authorized or displacement proceedings begun and regardless of the status of the occupants), the occupants must be provided with decent and affordable replacement housing adequate in size and located (with respect to educational, employment, and other resources) in a neighborhood desired by the occupants after the occupants have had an opportunity to receive effective mobility counseling.

3. Congress should amend the federal Fair Housing Act:

- * to add source of income as a protected category, so that landlords would be forbidden to refuse to rent to people because they are voucher holders;
- * to resolve the statute of limitations issue raised by the decision in *Garcia v. Brockway*⁴³;
- * to clarify that the statute protects people already living in their homes and prohibits discriminatory or segregatory provision of municipal services (thus resolving the issues presented by the decisions in *Halprin v. Prairie Single Family Homes* and *Cox v. City of Dallas*)⁴⁴;
- * to bring Title VIII into conformity with Title VII with respect to mixed-motive analysis and other matters⁴⁵;
- * to add sexual orientation as a protected category.

4. Congress should amend Section 42 of the Internal Revenue Code to require all of the changes that have been suggested for the Department of the Treasury and also should amend the Qualified Census Tract (QCT) and Difficult Development Area (DDA) provisions of the statute so as to eliminate the incentives to place LIHTC developments in areas that are predominantly minority and poor. Congress also should prohibit the siting of LIHTC family

⁴³*Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008).

⁴⁴*Halprin v. Prairie Single Family Homes*, 308 F.3d 327 (7th Cir. 2004); *Cox v. City of Dallas, TX.*, 430 F.3d 734 (5th Cir. 2005), cert. denied, 547 US. 1130 (2006). see Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 Ind. L. Rev. 717 (forthcoming, 2008).

⁴⁵See Cassandra A. Giles, *Shaking Price Waterhouse: Suggestions for a More Workable Approach to Title VIII Mixed Motive Disparate Treatment Discrimination Claims*, 37 Ind. L. Rev. 815 (2003).

developments in neighborhoods served by public schools that have poor records under the No Child Left Behind statute. Congress also should require Housing Finance Agencies to establish in their Qualified Allocation Plans (QAPs):

- * that an essential element of siting decisions is the impact the siting and occupancy would have on racial and economic segregation, with desegregation a standard by which decisions are made;
- * that all developments must submit and enforce Affirmative Fair Housing Marketing Plans⁴⁶;
- * that all developments must collect and report data on the racial, income, and disability status of occupants⁴⁷;
- * minimize local approval and contribution requirements.⁴⁸

5. Congress should enact national fair share legislation.⁴⁹

6. Congress should re-define “disability” for purposes of the housing programs to include households that include a child or children with disabilities. (The definition now is only for heads of households or spouses with disabilities.)

7. Congress should provide incentives and otherwise encourage state legislatures to mandate inclusionary zoning requirements for local communities, and local communities to adopt and enforce inclusionary zoning requirements even absent state mandates.

⁴⁶See Building Opportunity, *supra* note 17, at 13-18; see also *id.* at 18-30 re: preferences for voucher holders, families on waiting lists for subsidized housing, people with disabilities, large households, and households with very low incomes.

⁴⁷See Building Opportunity, *supra* note 17, at 30-31.

⁴⁸See Building Opportunity, *supra* note 17, at 11-13.

⁴⁹See John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. Rev. 1573 (1993).