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Cover Page Footnote

Professor of Law, University of Richmond. This is an updated and expanded version of an article co-authored by Mr. Wolf. See Sharp & Wolf, *The Housing Crises: Shortfalls in Affordability and Accountability*, 44 CONSUMER FIN. L. Q. REP. 225 (1990). The author thanks Jeffrey F. Sharp for his important contributions to Part II of the original version of this article, Karla Palmer for her diligent research assistance, and John Paul Jones and Betty Morganstern Wolf for helping to sharpen some of the arguments as they appeared in earlier drafts.

HUD AND HOUSING IN THE 1990s: CRISES IN AFFORDABILITY AND ACCOUNTABILITY

*Michael Allan Wolf**

America is increasingly becoming a nation of housing haves and have-nots. While the majority of American homeowners are well housed and have significant equity in their homes, the prosperity of these homeowners does not reflect the plight of the nation's growing number of low- and moderate-income households.¹

[D]uring the tenure of Secretary Pierce HUD was an agency in total disarray and was woefully mismanaged. Housing programs established to benefit the poor were abused. During much of the 1980's, HUD was enveloped by influence peddling, favoritism, abuse, greed, fraud, embezzlement and theft. In many housing problems objective criteria gave way to political preference and cronyism, and favoritism supplanted fairness. "Discretionary" became a buzzword for "giveaway."²

I. Introduction: A Plethora of Programs?

Half a century ago, in the Housing Act of 1949, Congress declared optimistically that every American should have access to safe, decent, affordable housing.³ In an effort to realize that ambitious objective, federal lawmakers have devised and bureaucrats have implemented a wide array of housing schemes. One commentator has provided nine categories for what he deems the "bewildering variety of housing-related programs:"

* Professor of Law, University of Richmond. This is an updated and expanded version of an article co-authored by Mr. Wolf. See Sharp & Wolf, *The Housing Crises: Shortfalls in Affordability and Accountability*, 44 CONSUMER FIN. L. Q. REP. 225 (1990). The author thanks Jeffrey F. Sharp for his important contributions to Part II of the original version of this article, Karla Palmer for her diligent research assistance, and John Paul Jones and Betty Morganstern Wolf for helping to sharpen some of the arguments as they appeared in earlier drafts.

1. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 1 (1988) [hereinafter NATION'S HOUSING].

2. COMMITTEE ON GOVERNMENT OPERATIONS, ABUSE AND MISMANAGEMENT AT HUD: TWENTY-FOURTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS TOGETHER WITH ADDITIONAL VIEWS, H.R. DOC. NO. 101-977, 101st Cong., 2d Sess. 3 (1990) [hereinafter REPORT].

3. Housing Act of 1949, Pub. L. No. 81-171, § 502, 63 Stat. 413 (1949). One "goal" included in the preamble is "a decent home and a suitable living environment for every American family." *Id.* at 413.

1. a federally regulated mortgage finance system;
2. mortgage insurance;
3. interest rate subsidies to home owners, developers, and landlords;
4. tax deductions for mortgage interest;
5. special depreciation allowances for rental housing;
6. low-rent public housing;
7. rent supplements for low-income households;
8. subsidy packages for central city redevelopment; and
9. anti-discrimination measures.⁴

To this list, we can add urban homesteading, Nehemiah Housing Opportunity Grants, housing vouchers, Housing Development Grants, and other recent variations on the affordable housing theme.⁵

While observers of federal housing initiatives may disagree strongly about the wisdom and efficacy of one or more of these varied approaches, the fact remains that the goal of decent housing for all has not yet been reached. Nor, in the light of recent revelations, investigations and admissions, can we accurately state that the federal officials responsible for overseeing and administering the means for achieving that goal have performed at acceptable levels of competence and responsibility.

This article highlights two acute crises that face the nation as we seek to renew our national commitment to decent housing:⁶ the widening gap between housing costs and household income, and the recent scandal over federal housing programs that has embroiled (and threatens the future effectiveness of) the federal government's lead agency in this crucial area — the Department of Housing and Urban Development (HUD, H.U.D. or Department).⁷ The author's purpose

4. Mitchell, *The Historical Context for Housing Policy*, FEDERAL HOUSING POLICY AND PROGRAMS 3-4 (1985).

5. See, e.g., C. HAAR & M. WOLF, *LAND-USE PLANNING* 1014-19 (4th ed. 1989).

6. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 102, 104 Stat. 4079, 4085 (1990) ("The objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American . . .").

7. Although HUD can trace its inception as a cabinet-level department to September 1965, the Department inherited a number of existing programs from its most recent precursor — the Housing and Home Finance Agency (HHFA). M. MCFARLAND, *FEDERAL GOVERNMENT AND URBAN PROBLEM; HUD: SUCCESSES, FAILURES, AND THE FATE OF OUR CITIES* 19-21 (1978). Included in the HHFA legacy were the Federal Housing Administration (FHA), National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246, 1246 (1934), Public Housing Administration (PHA), Reorganization Plan No. 3 of 1947, 61 Stat. 954 (1947), and the Federal National Mortgage Association (FNMA), Pub. L. No. 80-864, § 301, 62 Stat. 1206 (1948). Despite this head start, the public law creating HUD provided an early clue that the goals of the new agency were much too ambitious:

is straightforward: only after appreciating the breadth of these two formidable challenges can we proceed to shape and effectively implement a federal housing agenda for the 1990s — the goal of liberals and conservatives alike in the legislative and executive branches.⁸ It makes little sense to proceed with active implementation and full funding of an ambitious National Affordable Housing Act⁹ — partic-

[T]o achieve the best administration of the principal programs of the Federal Government which provide assistance for housing and for the development of the Nation's communities; to assist the President in achieving maximum coordination of the various Federal activities which have a major effect upon urban community, suburban, or metropolitan development; to encourage the solution of problems of housing, urban development, and mass transportation . . . ; to encourage the maximum contributions that may be made by vigorous private homebuilding and mortgage lending industries to housing, urban development and the national economy; and to provide for full and appropriate consideration . . . of the needs and interests of the Nation's communities and of the people who live and work in them.

Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 2, 79 Stat. 667, 667 (1965).

8. The Findings and Conclusions section of the House of Representatives Committee on Government Operations report, *Abuse and Mismanagement at HUD: Twenty-Fourth Report by the Committee on Government Operations Together with Additional Views*, begins with this understatement: "Since it was created in 1965, HUD has not been an agency without problems." REPORT, *supra* note 2, at 3. Surviving shifting political trends seems to have been the Department's most significant obstacle. Richard Nixon's dismantling of Democratic programs was replicated by Ronald Reagan in the 1980s. See *Pennsylvania v. Lynn*, 501 F.2d 848, 849 (D.C. Cir. 1974) (court refused to order HUD Secretary "to resume accepting, processing, and, where appropriate, approving applications for federal subsidy under three different housing programs" suspended by President Nixon's moratorium); NASULGC Urban Housing Working Group, *A Statement of Appropriate Private and Public Responses to Urban Housing Needs*, 36 WASH. U.J. URB. & CONTEMP. L. 63, 81-82 (1989) [hereinafter NASULGC] (charts illustrating decline in budget funding for HUD housing programs); see also Simons, *Toward a New National Housing Policy*, 6 YALE L. & POL'Y REV. 259 (1988). "The very existence of a federal housing policy has been threatened in the 1980s. Federal appropriations for new housing commitments were slashed by almost 80%, more than any other sector of the national budget." *Id.* at 260.

These are not, by a long shot, the sole examples of the politicization of the Department. See Lord, *Government Agencies*, in THE GREENWOOD ENCYCLOPEDIA OF AMERICAN INSTITUTIONS, 122, 127 (D. Whitnah ed. 1983):

It is somewhat remarkable that since its inception HUD has been used for purposes extraneous to its role as the Department of Housing and Urban Development. It was established in order to elevate a black to the Cabinet. It was invigorated by programs to calm the black protest from the ghetto. It was dismantled by an ideological opponent, as part of Nixon's overall scheme to diminish the federal government. It was half-heartedly revived by President Carter, who wanted credit with his liberal constituency at little cost. And it was gutted by the Reagan Administration intent on reducing government expenditures.

9. The official name of the new comprehensive housing legislation is the Cranston-Gonzalez National Affordable Housing Act (Cranston-Gonzalez Act). Pub. L. No. 101-625, § 1(a), 104 Stat. 4079 (1990). President Bush signed the Cranston-Gonzalez Act on November 28, 1990, referring to the measure as "a bipartisan initiative to break down the

ularly the new Home Investment Partnership,¹⁰ National Homeownership Trust Fund,¹¹ and Homeownership and Opportunity for People Everywhere (HOPE)¹² initiatives — before we address and re-address the shortfalls and failures of the recent past.

II. The Chronic Housing Crisis: Rising Costs and Reduced Supply

Housing built with government subsidies in the 1960s is becoming eligible for sale or conversion to upscale condominiums and developments; public housing is deteriorating and underfunded; and tax incentives for encouraging private investment in low-income housing have been changed. At the same time, the demand for such housing is increasing, as a greater proportion of the nation's population falls below the poverty line.¹³

There is certainly no lack of statistical evidence indicating that the nation is in the throes of a crisis in the provision of adequate housing.¹⁴ For example, a recent Congressional Budget Office (CBO) Study, *Current Housing Problems and Possible Federal Responses*,¹⁵

walls separating low-income people from the goal of homeownership." *President Bush Signs 1990 Housing Bill, Calls Preservation Incentives Too High*, [Current Developments] Hous. & Dev. Rep. (BNA) 655 (Dec. 10, 1990). See also *National Affordable Housing Act: Hearings before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking, Housing, and Urban Affairs U.S. Senate*, S. HRG. NO. 948, 100th Cong., 2d Sess. (Sept. 14, 21, 22, 28, 1988).

10. See Home Investment Partnership Act (HOME), Pub. L. No. 101-625, §§ 201-89, 104 Stat. 4079, 4094-4128 (1990); *Conferees Complete Major Housing Authorization Bill; House Approves*, [Current Developments] Hous. & Dev. Rep. (BNA) 498, 498 (Oct. 29, 1990) (describing HOME as "a comprehensive program to allow states and local governments flexibility in tailoring housing assistance to their area's needs").

11. See National Homeownership Trust Act, Pub. L. No. 101-625, §§ 301-10, 104 Stat. 4079, 4129-33 (1990); *Conferees Complete Major Housing Authorization Bill; House Approves*, [Current Developments] Hous. & Dev. Rep. (BNA) 498 (Oct. 29, 1990) (purpose of National Homeownership Trust Act is "to provide down payment and mortgage assistance to first-time home buyers").

12. See Homeownership and Opportunity for People Everywhere Programs (HOPE), Title IV, Pub. L. No. 101-625, §§ 401-48, 104 Stat. 4079, 4148-80 (1990); *Conferees Complete Major Housing Authorization Bill; House Approves*, [Current Developments] Hous. & Dev. Rep. (BNA) 498 (Oct. 29, 1990) (HOPE program offered by Bush Administration "to allow public and assisted housing tenants an opportunity to purchase their units").

13. U.S. GENERAL ACCOUNTING OFFICE, HOUSING AND URBAN DEVELOPMENT ISSUES, DOC. NO. OCG-89-22TR HUD ISSUES, at 4 (1988) [hereinafter GAO STUDY].

14. See, e.g., NAT'L ASS'N OF STATE UNIV. AND LAND GRANT COLLEGES HOUSING TASK FORCE, URBAN HOUSING: NEED AND RESPONSE (1988); NAT'L HOUSING TASK FORCE, A DECENT PLACE TO LIVE (1988).

15. CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, CURRENT HOUSING PROBLEMS AND POSSIBLE FEDERAL RESPONSES (1988) [hereinafter CBO STUDY].

provides disturbing data on three categories of "housing problems:" affordability, physical deterioration of existing dwellings and crowding.¹⁶ While one-third of the households in America suffered from at least one of these problems in 1985, high housing costs relative to income overshadowed the other two.¹⁷ Perhaps most troubling is the fact that nearly seventy percent of those households in the lowest income category are spending more than thirty percent of their income on housing.¹⁸

Affordability is a problem that affects those attempting to buy housing units and those seeking a decent place to rent, as well as those Americans simply attempting to escape homelessness. *The State of the Nation's Housing*, a policy study prepared by Harvard's Joint Center for Housing Studies, notes that "[n]ationwide, the cash cost of owning the representative home was \$7,720 [in 1987], or 32.4 percent of the estimated median income of potential first-time homebuyers"¹⁹ The picture was equally bleak for the nation's renters — a median gross rent of \$4,368 annually, "represen[ting] almost 30 percent of the median income of all renters."²⁰ Although the Northeast and West feature the heaviest "cash cost burden of homeownership,"²¹ in every region such burdens have increased significantly since the early 1970s.²²

The steadily rising after-tax cost of homeownership is especially troublesome for young families seeking to buy their first home. For example, from 1974 to 1987, annual income (measured in real terms) for households headed by those age twenty-five to thirty-four fell from \$27,366 to \$24,230.²³ Not surprisingly, the percentage of homeowners in this key age group has markedly declined — for those aged twenty-five to twenty-nine, from 43.6 percent in 1973 to 35.9 percent in 1987 and for those aged thirty to thirty-four, from 60.2 percent to

16. *Id.* According to the definitions used by the CBO researchers, "more than two persons per bedroom" constitutes crowding, while affordability problems occur when occupants of a household pay more than thirty percent of their income on housing costs. *Id.*

17. *Id.* at 9-10. In more than one-quarter of American households, occupants paid more than thirty percent of income on housing (eleven percent paid more than one-half). Seven percent of the housing units were in need of rehabilitation and three percent of the populace experienced crowding. *Id.* at 10.

18. *Id.* at 9. "A four-person household is classified as very-low income if its income is less than or equal to 50 percent of the area's median income. Threshold incomes are adjusted for family size." *Id.* at 12.

19. NATION'S HOUSING, *supra* note 1, at 10.

20. *Id.*

21. *Id.*

22. *Id.* at 21-22.

23. *Id.* at 7.

53.2 percent.²⁴

Renters have been hit particularly hard by the gap in the supply of affordable housing. Gross rents, adjusted for inflation, are at their highest levels in twenty years, despite a sharp rise in rental vacancies.²⁵ A rise in real rents and a decline in the median income of renters (measured in constant dollars) have contributed to a serious tenant squeeze: in 1985, forty-two percent of all renters (more than twelve million persons) earmarked more than thirty percent of their pre-tax incomes for housing.²⁶ Some tenants are at great risk. For example, for single parents in the twenty-five to thirty-four age group, falling median income (from over \$10,000 in 1974 to just over \$7000 in 1987, measured in 1986 dollars)²⁷ and rising rental payments (increasing from \$319 to \$354 during the same period)²⁸ translate into a gross rent burden in 1987 of 58.4 percent, up 13.5 percent over the thirteen-year span.²⁹ As this burden increases, these and other Americans, more than five million of whom are poverty-level renters,³⁰ face the dim, but too real prospect of homelessness.

Many of the nation's homeless, a group now numbered in the millions,³¹ simply cannot locate affordable rental housing:

Gradually, it is becoming clear that the problem of the "new homelessness" is not primarily caused by personal pathologies such as mental illness or alcoholism. Homelessness is primarily an economic problem: in large metropolitan areas, many households simply cannot find affordable housing at the bottom of the rental

24. *Id.* at 7, 12.

25. *Id.* at 5.

26. CBO STUDY, *supra* note 15, at 16-17.

27. NATION'S HOUSING, *supra* note 1, at 15 (Exhibit 18: "Changes in Rental Burden for Selected Household Types").

28. *Id.* at 27 (Appendix Table 11: "Rent Burden by Age and Family Type"). These are Gross Rent figures, defined as: "contract Rent plus fuel and utilities, property taxes and insurance." *Id.* at 20 n.3.

29. *Id.* at 15 (Exhibit 18). "Gross rent burden" is defined as "the ratio of median rent to income." *Id.* at 14.

30. *Id.* at 19.

31. "While precise numbers are inherently difficult to derive, informed estimates put the national figure somewhere around 2 million people, and growing." CRITICAL PERSPECTIVES ON HOUSING xvii (R. Bratt, C. Hartman & A. Meyerson eds. 1986) [hereinafter CRITICAL PERSPECTIVES] (citations omitted). "In the spring of 1984, HUD issued a study estimating the number of homeless at from 250,000 to 350,000, a figure drastically below previous estimates . . . Critics charged political motivations . . . and shoddy methodology." *Id.* at 20 n.3 (citation omitted).

A November 1988 U.S. General Accounting Office study stated that "[a]s many as 3 million people in the United States may be homeless, and most studies agree that the number is growing rapidly, especially among families with children." GAO STUDY, *supra* note 13, at 11.

market. As a result they are forced onto the streets.³²

In some large cities, housing authorities collect back as many as half of the housing vouchers they distribute, "because adequate, affordable, rental units cannot be found."³³

Even though federal spending on housing has grown significantly over the past two decades,³⁴ only a small fraction of eligible lower income households have been program participants/beneficiaries. Fewer than one-third of renter households with annual incomes below \$5,000, and not more than one in four households in the \$5,000 to \$10,000 range, received any rental assistance in 1987.³⁵ Indeed, using the federal government's poverty definitions, "only 2.1 million (or 28 percent) of the nation's 7.5 million poverty-level renter households lived in public housing or other subsidized rental housing [in 1987]."³⁶

The impact of this shortage in supply upon those teetering on the edge of homelessness is profound. No less significant is the impact of the dwindling federal governmental housing presence on low- and moderate-income households attempting to secure safe, modern, and affordable rental stock, or to acquire ownership of a home for the first time. Over the past few decades the federal government, primarily through the programs managed and administered at HUD, has attempted to improve the state of the nation's housing in two basic ways: by means of direct spending programs (chiefly subsidies for lower-income households, such as rental assistance)³⁷ and through in-

32. Swanstrom, *No Room at the Inn: Housing Policy and the Homeless*, 35 WASH. U.J. URB. & CONTEMP. L. 81, 81 (1989).

33. CRITICAL PERSPECTIVES, *supra* note 31, at xiii.

34. "By any measure, the Housing and Community Development Act of 1974 sparked a major expansion in the number of households receiving rental assistance." NATION'S HOUSING, *supra* note 1, at 17; see Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633 (1974). The 1987 total for those living in public housing or federally subsidized housing climbed nearly seventy-three percent from the 1974 level. NATION'S HOUSING, *supra* note 1, at 17.

35. NATION'S HOUSING, *supra* note 1, at 17. This is still a marked advance over the 1974 figures (less than seventeen percent for both income groups). *Id.*

36. *Id.* at 18.

37. CBO STUDY, *supra* note 15, at 2-3. The Congressional Budget Office study provides a helpful graphic representation of HUD and Farmers Home Administration (FmHA) rental assistance and homeownership assistance programs. It lists twelve historic and extant project-based rental programs, including public housing (authorized in 1937), the Section 8 New Construction and Substantial Rehabilitation program, Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633, 653 (1974), and Housing Development Grants (HoDAG), Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 301, 97 Stat. 1155, 1196 (1983). The two (active) household-based programs are New Construction and Substantial Rehabilitation Program and Section 8 Existing-Housing Certificates, Housing and Community Develop-

direct assistance (tax expenditures such as interest deductions for homeowners, mortgage insurance and guarantee programs, and secondary mortgage market participation).³⁸

Direct housing assistance is not provided as an entitlement; instead the form and amount of subsidies, and the type and number of households to be included, are subject to constant revision by Congress and to the prejudices of each succeeding administration. Budgetary constraints and shifting priorities can have a profound effect on direct assistance:

[Recent] measures have included a dramatic slowdown in the rate at which assistance is expanding, virtual elimination of expensive types of assistance provided through new construction programs, increases in the out-of-pocket housing expenditures made by assisted households, and more explicit targeting of available resources toward a poorer segment of the population.³⁹

From 1981 to 1986, funding for HUD's low-income housing programs dropped from \$30.17 billion to \$9.97 billion; during the first six years of the 1980s, subsidized housing starts plummeted from 183,011 to 17,080.⁴⁰

When the problems of affordability noted here are combined with concerns over mortgage availability, substandard housing conditions, overcrowding, and racial and ethnic segregation, the challenges faced by HUD (and by the state and local housing agencies that have increasingly been called upon to fill the gap caused by the Reagan Administration's withdrawal from the housing arena)⁴¹ may well appear

ment Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633, 653 (1974) and Section 8 Vouchers, Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 207, 97 Stat. 1155, 1181 (1983). The two homeownership assistance programs are the Rural Housing Loans (Section 502 Rural Housing Loans), Housing Act of 1949, Pub. L. No. 81-171, § 502, 63 Stat. 413, 433 (1949), and Mortgage-Interest Subsidies (Section 235 Mortgage-Interest Subsidies), Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 101, 82 Stat. 476, 477 (1968) (authorized in 1968, for which no new funds were appropriated in fiscal year 1989). *See id.* at 30-35 (Table 7: "Overview of Major Federal Programs for Direct Housing Assistance in Chronological Order").

For a helpful summary of programs introduced, revised and eliminated by the Cranston-Gonzalez Act, see *Special Report*, [Current Developments] Hous. & Dev. Rep. (BNA) 580 (Nov. 12, 1990).

38. CBO STUDY, *supra* note 15, at 5-6.

39. *Id.* at 1.

40. Swanstrom, *supra* note 32, at 94. Contrast these figures with the foregone revenues attributable to various forms of indirect assistance. Even after the enactment of the Tax Reform Act of 1986, with its restrictions on deductibility, it is estimated that the mortgage interest and property tax deductions will account for more than \$38 billion in tax expenditures in 1989. CBO STUDY, *supra* note 15, at 4.

41. *See, e.g.*, NASULGC, *supra* note 8.

An invigorated federal housing commitment must stress partnership with state

insurmountable.

III. The Newsworthy Housing Crisis: HUD Underfunded and Under Attack

HUD under the administration of Secretary Samuel Pierce has become part of the American vocabulary. It is synonymous with rampant abuse, favoritism, and mismanagement. . . .

The tragedy of the "HUD Scandal" is that programs established to provide decent and affordable housing for the poor and lower-income families became a federal assistance program for ex-HUD officials and so-called consultants.⁴²

Given the fact that decent, affordable housing is still out of reach for large numbers of the nation's lower-income households, it is doubly disturbing that the federal government's lead agency in the crucial realm of housing should be enmeshed in an imbroglio that, since the spring of 1989, has received increasing attention on newspaper pages and radio and television news broadcasts. The extent of this second housing crisis was first revealed to the American public through news accounts of HUD Inspector General Paul A. Adams's scathing appraisal of the Department's shoddy — even scandalous — administration of the Section 8 Moderate Rehabilitation Program

and local governments and the private and nonprofit sectors. These groups have proven themselves innovative and successful housing providers. Since 1980, more than 100 housing programs have been instituted by states using state funds. Foundations such as the Local Initiatives Support Corporation and the Enterprise Foundation have provided assistance. . . . Thousands of neighborhood and nonprofit groups have participated in rehabilitation and other housing activities. From Boston to Chicago to Dallas, scores of housing "partnerships" bring together these government, business, and nonprofit organizations.

Id. at 70 (footnote omitted). See also A. STEGMAN & J. HOLDEN, *NON-FEDERAL HOUSING PROGRAMS* (1987).

The Cranston-Gonzalez Act includes within its purposes "to extend and strengthen partnerships among all levels of government and the private sector, including for-profit and nonprofit organizations, in the production and operation of housing affordable to low-income and moderate-income families." Pub. L. No. 101-625, § 103(3), 104 Stat. 4079, 4085 (1990). The drafters found that "an increasing number of States and local governments have been successful in producing cost-effective low-income and moderate-income housing by working in partnership with the private sector, including nonprofit community development corporations, community action agencies, neighborhood housing services corporations, trade unions, groups sponsored by religious organizations, limited equity cooperatives, and other tenant organizations . . ." Pub. L. No. 101-625, § 202(10), 104 Stat. 4079, 4094 (1990). The HOME Investment Partnerships and Community Housing Partnership, authorized by Title II of the Cranston-Gonzalez Act are the key tools designed to invigorate this local-state-federal partnership. Pub. L. No. 101-625, § 1(a), 104 Stat. 4079, 4079 (1990).

42. REPORT, *supra* note 2, at 111-12.

(MRP).⁴³

Through this program, first authorized in 1978,⁴⁴ HUD paid the difference between the actual rents collected for the modestly rehabilitated units (with a maximum of 125 percent of local fair market rent) and payments made by the tenants. MRP was administered by local public housing authorities (PHAs);⁴⁵ as of 1987, 76,000 households received assistance from this project-based program.⁴⁶

The Inspector General's audit of April 26, 1989, provides the following description of the MRP process:

... HUD enters into Annual Contributions Contracts (ACC) with PHAs who solicit applications from owners or developers and then determine whether the units are feasible for inclusion in the MRP. . . .

For units determined eligible, the PHA and owners enter into an Agreement to enter into a Housing Assistance Payments (AHAP) Contract. When the units are rehabilitated and the work accepted by the PHA, the Housing Assistance Payments (HAP) contract is executed for a term of 15 years. The owner receives a contract rent that is defined as the total rent including the rent paid by the family.

The regulations specify a rent calculation involving a two-part process. First, a Base Rent is established for each unit to be assisted, using the rent or cost approach. The monthly amount necessary to amortize an actual or imputed rehabilitation loan for the work to be accomplished under the program is then added to the Base Rent to obtain the Contract Rent. In its most basic form this process can be illustrated as follows:

43. Moderate Rehabilitation Program, Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 301, 97 Stat. 1155, 1196 (1983). See, e.g., *Ex-HUD Aides, Others Apparently Used Inside Data to Win Pacts, Report Says*, Wall St. J., Apr. 27, 1989, at A18, col. 2. See also OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, AUDIT OF SECTION 8 MODERATE REHABILITATION PROGRAM iii (1989) [hereinafter OIG AUDIT]:

Overall, we concluded that the MRP [the Section 8 Moderate Rehabilitation Program] was poorly managed. There was little or no documentation or accountability for the PHAs selected by HUD Headquarters to receive funding allocations. Moreover, PHAs selected developers without complying with the need for an effective competitive selection process and oftentimes in violation of their own Administrative Plans. There was an absence of clear, written policy and guidelines.

Id.

44. See REPORT, *supra* note 2, at 9.

45. See Reorganization Plan No. 3 of 1947, 61 Stat. 954 (1947).

46. CBO STUDY, *supra* note 15, at 32-33.

$$\frac{\text{Base Rent}}{\text{Debt Service}} + \frac{\text{Monthly Rehabilitation}}{\text{Rent}} = \text{Initial Contract}^{47}$$

The fifteen years of subsidized rents, combined with the elimination of, or restrictive budgeting for, federal housing aid during the Reagan years made MRP a developer's plum that was hard to resist.⁴⁸

The *Wall Street Journal* headline for its April 27, 1989 article is not atypical of the initial accounts of the MRP scandal: "Ex-HUD Aides, Others, Apparently Used Inside Data to Win Pacts, Report Says."⁴⁹ The story reported that "former HUD officials and well-connected consultants apparently used 'inside information' to win lucrative rent subsidy contracts for their clients."⁵⁰ Three prominent names were among the list of those who benefited from MRP consulting work: Frederick Bush, a major fund-raiser for President Bush's election campaign and the President's choice for Ambassador to Luxembourg (whose firm received \$195,000 from a Puerto Rican developer); Edward Brooke, former United States Senator from Massachusetts (who collected \$183,000); and James Watt, Ronald Reagan's outspoken, controversial Interior Secretary (who picked up \$300,000 for "talking to the 'right people'").⁵¹ HUD Secretary Jack Kemp's response was swift and decisive: he canceled MRP subsidies for 1989 that had not yet been announced.⁵²

According to the Inspector General's audit, a critical factor contributing to the favoritism that dominated MRP awards was HUD's decision beginning in fiscal year (FY) 1983 to abandon fair-share pro-

47. OIG AUDIT, *supra* note 43, at 1-2.

48. See REPORT, *supra* note 2, at 10 ("The mod rehab program . . . became in the words of one developer 'the only game in town' as these increasingly scarce funds were much in demand.")

49. Wall St. J., Apr. 27, 1989, at A18, col. 2.

50. *Id.*

51. *Id.* See also REPORT, *supra* note 2, at 20-24 ("Essex, Maryland Project — Getting Watt You Paid For"), 64-66.

52. Wall St. J., Apr. 27, 1989, at A18, col. 3. On October 3, 1989, Kemp "announced a series of proposals to 'clear the decks' at his scandal-ridden department by eliminating virtually all discretionary spending in Federal housing programs." N.Y. Times, Oct. 4, 1989, at A20, col. 5. See [Current Developments] Hous. & Dev. Rep. (BNA) 1034, 1034-35 (May 1, 1989) ("In nearly every instance, HUD accepted the OIG's findings, agreed to its recommendations, and developed an aggressive schedule for implementing the recommended changes.")

Section 127 of the Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act of 1989) corrects many of the flaws of the MRP; the Act includes, for example, a provision that limits annual units to no more than one hundred per project. Pub. L. No. 101-235, § 127, 103 Stat. 1987, 2025-26 (1989).

cedures in favor of a system of discretionary funding.⁵³ The results were inequitable and suspect:

Only about 204 PHAs received funding allocations during the five-year period [January 1, 1984 through November 30, 1988].

Ten States received over 51 percent of all units whereas their fair-share needs percentage, as developed by HUD, was only about 16 percent, a difference of 35 percent.

Fifteen PHAs received more than four allocations during the period. The allocations consumed over 33 percent of all units allocated.

Former HUD officials and employees actively sought and participated as developers, consultants or lender representatives in over 55 projects.⁵⁴

These and other improprieties and abuses are costly as well: the Inspector General has estimated total excess housing assistance during the MRP's fifteen-year contract terms to be over \$413 million for projects funded during the period covered by the audit.⁵⁵

In succeeding months, through news accounts and the investigations of a subcommittee of the House Committee on Government Operations,⁵⁶ the nation has learned that the initial accounts of MRP irregularities revealed but the tip of the iceberg. What follows is a partial list of the difficulties facing HUD officials past and present:

53. See *OIG AUDIT*, *supra* note 43, at 5 ("Management officials used the alternative informal and undocumented discretionary methods to allocate funding based on a verbal opinion of the General Counsel."); see also *REPORT*, *supra* note 2, at 12 ("Thus, an oral opinion by HUD General Counsel Knapp which in fact was never uttered seems to have taken on a life of its own, and supposedly became the basis of all kinds of decisions by people at HUD, including Secretary Pierce."). *But see* N.Y. Times, Aug. 1, 1989, at A10, col. 1 ("A former general counsel for the Department of Housing and Urban Development told a House subcommittee today that he never rendered the legal opinion that has been cited as the basis for discretionary awards of millions of dollars in Federal housing subsidies.").

54. *OIG AUDIT*, *supra* note 43, at 6 (citations to appendices omitted).

55. *Id.* at i. Incorrect rent calculations alone accounted for excess assistance totaling more than \$58.8 million. *Id.* See also *REPORT*, *supra* note 2, at 2.

56. See *REPORT*, *supra* note 2, at 2.

The HUD Inspector General's report triggered a series of hearings and a lengthy investigation by the Employment and Housing Subcommittee on abuses, favoritism and mismanagement in HUD programs during the administration of HUD Secretary Samuel R. Pierce, Jr.

The subcommittee's investigation of what came to be commonly referred to as the "HUD Scandal," became one of the major Congressional investigations of the 101st Congress. Over a period of 14 months beginning in May 1989, the Employment and Housing Subcommittee held 27 hearings which lasted more than 120 hours. Some 50 witnesses appeared before the subcommittee.

Id.

1. *The MRP scandal is much more widespread than first reported.* Inspector General Adams, requested by the Senate Committee on Housing and Urban Affairs (one of several congressional panels actively investigating HUD improprieties) to widen his inquiry beyond the seventy-three MRP projects studied initially, discovered that the aggregate fees paid by developers to twenty well-connected consultants exceeded \$5.7 million.⁵⁷ Key names added to the high-paid consultants list include Carla Hills, former HUD Secretary and currently United States Trade Representative (more than \$130,000); Joseph Strauss, former Special Assistant to HUD Secretary Samuel Pierce (about \$1.7 million); and Bill Taylor, former chair of the Florida Republican Party (\$146,000).⁵⁸ The General Accounting Office (GAO) has revealed that in several projects, developers who put little money into projects made profits that greatly exceeded costs associated with acquiring and rehabilitating the properties.⁵⁹

2. *Secretary Pierce's competence, management style, and integrity have become the focus of increased scrutiny and criticism.* Pierce, the only department chief to remain in office through both of President Reagan's terms, struggled not only with administration officials bent on dismantling his housing portfolio, but also with a nickname — "Silent Sam" — that somewhat unfairly marked him as aloof and unresponsive.⁶⁰ In testimony before the House Government Operations Subcommittee on Employment and Housing (chaired by California Democrat Tom Lantos) (Lantos Subcommittee), the former Secretary admitted, "[p]erhaps we could have watched the [MRP] closer than we did."⁶¹ Pierce, however, refused to accept the blame laid at his feet by former aides, particularly his executive assistant, Deborah Gore Dean.⁶²

As reporters and government investigators focused more attention on MRP abuses, Ms. Dean emerged as a leading figure in the HUD tragedy: "An ambitious young woman from a wealthy, well-connected family, [Dean] used contacts to get into government and, like many other relatively obscure officials in Washington who became in-

57. N.Y. Times, Aug. 2, 1989, at A16, col. 4.

58. *Id.* See also REPORT, *supra* note 2, at 41, 87, 105-06.

59. N.Y. Times, Aug. 2, 1989, at A16, col. 5.

60. See N.Y. Times, June 18, 1989, at A1, col. 5. "Mr. Pierce . . . has argued that the 'Silent Sam' nickname was deeply unfair. In an interview with The New York Times in January, he said it was the product of his refusal to see the press in his first three months in office while he 'studied the hell out of these programs.'" *Id.* at A22, col. 3.

61. Wall St. J., May 26, 1989, at A12, col. 4.

62. N.Y. Times, May 26, 1989, at A1, col. 3.

fluent, built a career by cloaking herself in the power of her boss."⁶³ A "dramatic turn in the Congressional investigation" occurred on June 13, as Dean, who feared she was becoming a "scapegoat,"⁶⁴ refused to testify before the same House subcommittee, invoking her fifth amendment right against self-incrimination.⁶⁵

In the weeks following Dean's refusal, evidence surfaced that indicates that Pierce did play a more active role in MRP decision-making than he first indicated.⁶⁶ In mid-July, Shirley McVay Wiseman, the former Acting Assistant Secretary of Housing, testified that "Mr. Pierce called her in 1985 and told her to provide multimillion-dollar rent subsidies to a project in Durham, North Carolina, that was being promoted by a former law associate of his."⁶⁷ Within three weeks, the *New York Times* would report "that for friends and political allies, including Republican congressional candidates facing tough election fights, Mr. Pierce and his department were available, and often eager, to help."⁶⁸

Apparently, the Secretary had contact (through phone calls, interviews, and personal correspondence) regarding potential HUD projects with the most prominent consultants already named in the wide-ranging inquiry — Senator Brooke, Secretary Hills, and Secretary Watt — as well as with such other luminaries as Senator Strom Thurmond (Republican from South Carolina), Representative Barney Frank (Democrat from Massachusetts), and Secretary of Defense

63. N.Y. Times, May 31, 1989, at A19, col. 1.

64. Wall St. J., June 12, 1989, at A16, col. 1.

65. N.Y. Times, June 14, 1989, at A1, col. 1. "While Ms. Dean wielded tremendous power and influence as Secretary Pierce's top aide at HUD, and was certainly a key player in the mod rehab funding game, it remains an open question whether Ms. Dean was the power broker or was acting as an agent for the Secretary." REPORT, *supra* note 2, at 87-88.

66. The following exchange occurred during questioning of HUD Deputy Assistant Secretary DuBois Gilliam by counsel for the Lantos Subcommittee:

COUNSEL. About a year ago, when the subcommittee started this investigation of HUD, I likened the situation at HUD to "Let's Make A Deal," with Secretary Pierce behind Door No. 1, Deborah Dean behind Door No. 2, and Tom Demery behind Door No. 3, and remarked that the open question was "who was the big dealer." My question to you is, based on your personal experiences and observations, who was the big dealer at HUD?

Mr. GILLIAM. Door No. 1.

COUNSEL. That's Secretary Pierce?

Mr. GILLIAM. That's correct.

REPORT, *supra* note 2, at 67-68 (citation omitted).

67. N.Y. Times, July 15, 1989, at A1, col. 4.

68. N.Y. Times, August 4, 1989, at A1, col. 1. The MRP and the HUD Secretary's discretionary fund for special projects also assisted members of the loyal opposition, as evidenced by this headline: *Democrats, Too, Benefited from H.U.D. Programs*. N.Y. Times, August 13, 1989, at A26, col. 3.

Caspar W. Weinberger.⁶⁹ The HUD scandal was swiftly moving from indications of lax management to allegations of influence peddling at the highest levels of government. When Pierce refused to testify on September 26, 1989, citing his fifth and sixth amendment rights, frustrated congressional investigators suggested that criminality, and not mere negligence or mismanagement, may have tainted HUD's inner circle.⁷⁰ When, a month later, Pierce refused once again to offer testimony, nineteen House Democrats asked Attorney General Richard Thornburgh to appoint an independent prosecutor; on February 1, 1990, Thornburgh announced that he would seek an independent counsel to investigate possible illegality in the administration of the MRP between 1984 and 1988 by Pierce and other high-ranking HUD officials.⁷¹

In early January 1991, Arlin M. Adams, the former federal judge who was selected as independent counsel in March 1990, received authorization to expand his inquiry to include questions concerning whether "Pierce lied to Congress and violated the law in dealings with his former law firm and former executive assistant [Lance Wilson]." ⁷² The three-judge panel of the United States Court of Appeals of the District of Columbia charged with overseeing the investigation acceded to the request of the Lantos Subcommittee as seconded by the Justice Department in August 1990.⁷³

3. *It has become apparent that mismanagement and abdication of*

69. N.Y. Times, Aug. 4, 1989, at A1, col. 1. See also *Pierce May Have Kept Hands Off, but Projects of Pals Sailed Through*, Wall St. J., July 12, 1989, at A1, col. 1; *H.U.D. Approved Subsidies After [the Colorado brewer Joseph] Coors Wrote the Chief*, N.Y. Times, Apr. 24, 1989, at A1, col. 1; *Pierce Helped His Old Law Firm on H.U.D. Requests, Files Show*, N.Y. Times, Aug. 6, 1989, at A1, col. 1; *HUD Provided \$4.3 Million for Project Backed by Pierce's Old Firm, Ex-Clients*, Wall St. J., Aug. 7, 1989, at A18, col. 5.

70. Wall St. J., Sept. 27, 1989, at 24, col. 1. "In his opening statement yesterday, Mr. Pierce, who had been subpoenaed by the subcommittee after refusing to appear voluntarily Sept. 15, complained that his lawyers haven't had sufficient time to review 48 boxes of HUD documents and other material he said may be relevant." *Id.*

71. N.Y. Times, Feb. 3, 1990, at 12, col. 4; N.Y. Times, Feb. 2, 1990, at A1, col. 1. Predictably, Pierce's attorney proclaimed his client's innocence, while some members of Congress complained that the Department of Justice inquiry was too narrow. N.Y. Times, Feb. 3, 1990, at 12, col. 2; N.Y. Times, Feb. 2, 1990, at A1, col. 1.

72. Wash. Post, Jan. 8, 1991, at A5, col. 5. See also REPORT, *supra* note 2, at 3 (describing subcommittee's detailed request to Judge Adams); N.Y. Times, Jan. 8, 1991, at A14, col. 1 ("The court also added the multifamily housing co-insurance program . . . to the moderate rehabilitation program and other H.U.D. programs already under investigation.").

73. Wash. Post, Jan. 8, 1991, at A5, col. 1. In August 1990, the court had permitted Judge Adams to investigate the UDAG, Housing and Community Development Act of 1977, Pub. L. No. 95-128, § 110, 91 Stat. 1111, 1125 (1977), technical assistance, and special projects programs, in addition to the MRP. *Id.* See also REPORT, *supra* note 2, at 3.

responsibility were not confined to the administration of the MRP during the Pierce years at HUD. Hundreds of millions of dollars have been misspent, lost, and wasted, particularly in government insurance and co-insurance programs instituted or reformed to meet the Reagan Administration's commitment to privatizing traditionally governmental functions. In early July 1989, as program after program joined the dishonorable list, one high-ranking HUD official described the Department's strategy as "management triage:"

We've tried to determine how many patients there are in the emergency room. Now we need to know how badly each is injured and start treating them. When we finish we can move on to things like simple inefficiency and waste. It's a gigantic workload.⁷⁴

Secretary Kemp's July 1989 reckoning that the various HUD scandals combined would cost a budget-obsessed federal government two billion dollars now seems quite conservative, even wishful.⁷⁵

Federal Housing Administration (FHA) co-insurance program losses alone have been projected to reach the one billion dollar level, according to Price Waterhouse auditors hired by federal officials to examine the troubled program.⁷⁶ In 1983, the government inaugurated a system of spreading mortgage insurance risks between the FHA (roughly eighty-one percent) and private co-insurers (nineteen percent).⁷⁷ The idea was to delegate the responsibility for overseeing the underwriting tasks, credit checks, and property appraisals to the private "partner."⁷⁸ Unfortunately, a significant portion of the huge co-insurance losses can be attributed to "some lenders' practice of vastly overvaluing property that was being mortgaged."⁷⁹ In the event of default, the lender co-insurer, who had already received inflated servicing fees tied to the size of the mortgage, could still profit from the deal even after deducting its twenty-percent share of insurance costs. Co-insurance from just one such partner — DRG Funding Corporation — has already resulted in \$55 million in government losses, according to Inspector General Adams.⁸⁰

74. N.Y. Times, July 7, 1989, at A1, col. 1, A11, col. 1 (quoting Alfred A. DelliBovi, HUD Under Secretary).

75. Wall St. J., July 12, 1989, at A3, col. 4; N.Y. Times, July 12, 1989, at B5, col. 1; REPORT, *supra* note 2, at 2. Cf. N.Y. Times, Sept. 28, 1989, at A1, col. 6 (GAO audit performed by Price Waterhouse estimated FHA losses (some attributable to mismanagement) at \$4.2 billion in 1988).

76. N.Y. Times, July 13, 1989, at A1, col. 1.

77. See REPORT, *supra* note 2, at 37.

78. *Id.*

79. *Id.*

80. N.Y. Times, July 13, 1989, at A1, col. 1, A20, col. 2. See REPORT, *supra* note 2, at 37 (Inspector General estimate that losses attributable to DRG will reach \$370 mil-

Adding insult to this significant injury is alarming evidence of widespread "equity skimming" involving FHA loans, particularly in the recession-plagued West and Southwest.⁸¹ "Buyers" assume a number of federally insured mortgages and pay no down payment (the sellers are thankful to get out from under the home), then lease the homes. The fraudulent landlord fails to make mortgage payments, but several months typically pass before lenders actually foreclose. The landlord pockets the rent during the interim and HUD is left to foot the bill for the FHA-insured loans.⁸² HUD investigators estimate losses totalling hundreds of millions of dollars.⁸³

The list of programs in which HUD and the Department of Justice investigators have uncovered abuses continues to grow. Within one week, Secretary Kemp announced the suspension of two mortgage programs. On June 29, 1989, Kemp revealed plans to end the Title X FHA Land Development Mortgage Insurance Program.⁸⁴ A fairly modest program begun in 1965 (in some years as few as two loans were originated), Title X has cost the federal government \$90 million in losses since 1977, according to HUD estimates.⁸⁵ However, losses are not the only concern with the program. A 1986 audit of seventeen projects disclosed that all but one had housing "not affordable under Title X guidelines," including the Desert Falls Country Club in Palm Desert, California, a (defaulting) development featuring a golf course, clubhouse, pools, tennis courts, and spa.⁸⁶

lion). In January 1990, Secretary Kemp eliminated the co-insurance program, labeling it "structurally flawed and fundamentally unsound as well as administratively unfixable"; in its place the Department will return "to a full insurance program for multifamily projects, performing mortgage approval functions in-house and assuming 100 percent of any losses." *Id.* at 32-43. See also Pub. L. No. 101-235, § 139, 103 Stat. 1987, 2029 (1989) (Co-Insurance Amendments).

81. See Wall St. J., June 19, 1989, at A5, col. 1.

82. *Id.* at A5, cols. 1-2.

83. *Id.* at A5, col. 1.

84. [Current Developments] Hous. & Dev. Rep. (BNA) 139 (July 10, 1989):

The Title X program, which authorizes HUD to provide mortgage insurance for land acquisition, off-site costs, site improvements, and other fees, is designed to aid private developers to acquire and develop land for residential and related uses, including facilities for public or common use.

Id.

85. *Id.* at 139-40. In August, HUD published a proposed rule designed to terminate the program. See [Current Developments] Hous. & Dev. Rep. (BNA) 253, 253 (Aug. 21, 1989) ("The rule may hit a roadblock, though, since several House housing subcommittee members have questioned HUD's authority to terminate a statutorily authorized program.")

86. N.Y. Times, June 30, 1989, at A1, col. 7, A10, col. 5. See also Report of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 133, 103 Stat. 1987, 2027 (1989) (repealing Title X program).

In the Retirement Service Centers program, officials approved the underwriting of millions of dollars of mortgages to finance the construction of community centers for the elderly "before determining whether there was an adequate demand for them."⁸⁷ Half of the centers studied in the Midwest were either in default or in financial distress; at stake are more than \$120 million in mortgages.⁸⁸ When announcing suspension of the program on July 6, 1989, Kemp commented, "[t]his is a program that should serve low-income people but instead is serving upper- and middle-income persons — and doing it very poorly at that."⁸⁹

4. *Private parties contracting with HUD have been engaging in highly lucrative illegal activities.* In June 1989, the national press carried alarming reports that private escrow agents have allegedly embezzled several million dollars that should have been paid to the federal government following sales of homes (purchased with the assistance of government-guaranteed loans) that HUD had acquired through foreclosure.⁹⁰ Investigators were shocked at the Department's negligent supervision:

"The laxity of oversight by H.U.D. was frightening," said an investigator involved in the joint effort between the housing department and the Justice Department. "Nobody noticed, nobody cared, that the money wasn't coming in. These private agents apparently felt after a while they had *carte blanche* to keep it."⁹¹

In Baltimore, a federal grand jury was evaluating the United States Attorney's case against Marilyn L. Harrell, an escrow agent dubbed "Robin HUD" who has admitted to diverting more than five million

87. N.Y. Times, June 8, 1989, at B9, col 1.

88. *Id.* See also N.Y. Times, July 4, 1989, at A6, col. 1 (HUD audit cited a Minneapolis project that received federal assistance even though the site, located near a large gravel pit, "was clearly remote from major population centers and any concentration of elderly persons").

89. N.Y. Times, July 7, 1989, at A1, col. 1. One program-assisted project in Palm Beach featured two-bedroom units with a monthly rental of \$2,100! *Id.* at A11, col. 4. Apparently, such mis-targeting was legion. An audit of the Discretionary Loan Management Set-Aside Program (LMSA), whereby Section 8 units are targeted to stave off foreclosure of FHA-insured projects, has revealed that almost half of the assisted projects studied were not eligible for the program. N.Y. Times, June 29, 1989, at B6, col. 1. "Representative Bill Green, a Manhattan Republican, said he was convinced after examining the report and interviewing investigators that 'regulations for picking recipients objectively were ignored and recipients were picked instead on the basis of favoritism.'" *Id.* at B6, cols. 2-3. See also [Current Developments] Hous. & Dev. Rep. (BNA) 1082, 1082-1083 (May 15, 1989).

90. See, e.g., N.Y. Times, June 11, 1989, § 1, at 1, col. 1.

91. *Id.* at A1, col. 1; A30, col. 1.

dollars intended for the government to charity.⁹² According to one account, Harrell "used H.U.D. money to buy 20 homes and nearly 40 automobiles for needy people in the suburbs of Washington."⁹³ In June 1990, Harrell pled guilty to embezzlement charges; she received a prison term of three years and ten months and was ordered to pay \$600,000 in restitution.⁹⁴

Evidently, Secretary Pierce's "hands-off" management style has been replicated in local HUD offices throughout the country. On June 15, a Justice Department spokesman announced that Attorney General Thornburgh had ordered the nation's ninety-four United States Attorneys to investigate all local HUD offices for evidence of fraud and embezzlement.⁹⁵ Secretary Kemp, who had requested a criminal investigation two days before, was instituting additional in-house and independent reviews of MRP contracts and sales of government property.⁹⁶

5. *Many ex-HUD officials evidently have parlayed their experience in the Department into profitable private sector activities in the housing area.* Most prominent on the list of program beneficiaries (after the waiting period prescribed by federal law) is the Winn Group, an assortment of partnerships involving four former HUD officials that renovated more than thirteen hundred housing units located in seven MRP projects in the West.⁹⁷ When one member of the group was testifying before the Lantos Subcommittee in June 1989, the chairman observed, "Many of these units were awarded to you because of your pre-existing relationship with high-ranking H.U.D. officials."⁹⁸ Lantos's Republican colleague, Connecticut Representative Christopher Shays was more colorful: "They were involved in a dirty, smelly, slimy business, and they made millions off the taxpayers because of their special relationship with the agency."⁹⁹

One member of the Winn Group took his HUD connections to

92. REPORT, *supra* note 2, at 34.

93. N.Y. Times, June 11, 1989, § 1, at 30, col. 1; *see also* N.Y. Times, June 17, 1989, at A1, col. 6, A8, cols. 1-2.

94. REPORT, *supra* note 2, at 36. *See also id.* at 36 n.29 (listing other closing agents prosecuted for embezzlement).

95. N.Y. Times, June 16, 1989, at A1, col. 1.

96. *Id.*

97. N.Y. Times, July 14, 1989, at A1, col. 1. The group consisted of Philip D. Winn, formerly Assistant Secretary for Housing and currently the Ambassador to Switzerland; Philip Abrams, a past Under Secretary at HUD; J. Michael Queenan, a housing official in HUD's Denver office; and Lance H. Wilson, Deborah Gore Dean's predecessor as Secretary Pierce's top aide. *Id.* at A1, col. 1, B5, col. 2. *See* REPORT, *supra* note 2, at 94-98.

98. N.Y. Times, July 14, 1989, at B5, col. 2.

99. *Id.*

Wall Street. Rumors of favoritism and influence-peddling have resulted in an internal investigation at PaineWebber Group, Inc., where Lance Wilson, Samuel Pierce's former executive assistant, was hired as a first vice president in the firm's Municipal Securities Group.¹⁰⁰ The brokerage concern's HUD-related activities increased substantially once Wilson joined PaineWebber in early 1986 (two years after leaving HUD), causing government investigators and members of Congress to question the propriety of Wilson's more recent contacts with HUD.¹⁰¹

The company's own inquiry was prompted in part by questions raised by HUD's selection of PaineWebber as financial adviser for the Department's sale of \$400 million in government securities, a job potentially worth \$1.3 million to the company.¹⁰² Although an advisory panel had recommended selection of Chemical Bank, HUD under Secretary Carl Covitz chose PaineWebber. Though Covitz denies any lobbying by Wilson, there is no question that the former top aide "was actively involved in PaineWebber's proposal."¹⁰³ Wilson has reportedly made millions of dollars in investment returns and consulting fees since leaving the inner circles of HUD.¹⁰⁴ On September 28, 1989, Wilson, like his former boss the day before, invoked his constitutional rights and refused to answer questions posed by Representative Lantos's subcommittee.¹⁰⁵

Unfortunately, Wilson's case, though extreme in terms of influence and profit, is by no means unique.¹⁰⁶ The revolving door at HUD was apparently well-oiled and unguarded.¹⁰⁷

100. REPORT, *supra* note 2, at 99.

101. *Id.* at 103-05.

102. Wall St. J., Aug. 11, 1989, at A14, col. 5; N.Y. Times, Aug. 11, 1989, at A10, col. 1.

103. Wall St. J., Aug. 11, 1989, at A14, col. 5; *How HUD Aide Used Ties to Help Himself, Later PaineWebber: Lance Wilson Made a Fortune on Housing Deal, Opened Doors for Wall Street Firm*, Wall St. J., Sept. 22, 1989, at A1, col. 6.

104. N.Y. Times, July 28, 1989, at A1, col. 5.

105. Wall St. J., Sept. 28, 1989, at A11, col. 1, B5, col. 2.

106. See, e.g., REPORT, *supra* note 2, at 93-111 ("HUD Alumni"); Wall St. J., July 31, 1989, at A12, col. 1; N.Y. Times, July 29, 1989, at A1, col. 4: "Joseph Monticciolo, the housing agency's New York regional administrator from 1981 to 1988, told a Congressional committee investigating political favoritism at H.U.D., 'I made recommendations to Washington that ultimately benefited people who are partners of mine now.'" *Id.*

107. See REPORT, *supra* note 2, at 93.

While HUD was part of the 'revolving door' between Government and industry with HUD officials leaving the agency to work as housing consultants and developers, it appears that the door at HUD was always open to former HUD officials.

Id. Cf. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 101, 103 Stat. 1716 (1989) ("Restrictions on Postemployment Activities").

6. *The Reagan Administration's aggressive stance against "traditional" federal housing strategies resulted not only in widespread cuts but also in a significant waste of the taxpayers' money.* At a time when budget restraints cause belt-tightening throughout the federal bureaucracy, in one egregious case HUD decision-makers chose to pass up savings estimated at more than \$800 million rather than run the risk of re-funding a mortgage subsidy program dating back to the years of the Great Society.¹⁰⁸

At issue were "Section 235 payments," first authorized in 1968, whereby private lenders received interest rate subsidies to benefit low- and moderate-income homebuyers who were unable to finance their purchases at prevailing rates.¹⁰⁹ In February, 1987, the Inspector General's office recommended that the subsidized borrowers be encouraged — through financial inducements — to refinance high-interest loans written during the most recent periods of steep inflation.¹¹⁰ Initial outlays of \$33 million in the refinancing year would be much more than offset by *monthly* savings of \$5 million, according to Department estimates.¹¹¹

Despite Adams' urging, high-ranking HUD officials, including Secretary Pierce, rejected the plan time and again. Unfortunately, it appears that politics won out over frugality:

One main reason the refinancing proposal was rejected was that senior officials feared the money saved would be plowed back into the subsidy program, which the Reagan administration wanted to pare back. "The department has not pursued actions to refinance high interest mortgages because of . . . the possibility of savings being used to fund new activity ([t]he department does not wish to reactivate the . . . program)," a Feb. 25, 1987, report from the inspector general said.¹¹²

Zealous pursuit of ideological goals can indeed have a high price tag.¹¹³

7. *Congress shares some of the blame for the extent of the scandal*

108. See Wall St. J., July 3, 1989, at A30, col. 1.

109. See CBO STUDY, *supra* note 15, at 34-35 (Table 7).

110. Wall St. J., July 3, 1989, at A30, col. 1.

111. *Id.* at A30, cols. 1-2 (emphasis added).

112. *Id.* at A30, col. 1. "They'd rather waste the money as a way to drain' the program, a veteran HUD employee who was one of several department officials who had suggested the refinancing plan, said in an interview." *Id.*

113. In Section 125 of the HUD Reform Act of 1989, Congress authorized the HUD Secretary to refinance the Section 235 mortgages. Pub. L. No. 101-235, § 125, 103 Stat. 1987, 2022 (1989). "While such refinancing could have saved \$840 million had it been implemented a few years ago, it is estimated that it could still save almost \$400 million." See REPORT, *supra* note 2, at 7.

and for failing to move more swiftly to halt the abuses. While there are indications that HUD officials were less than forthcoming with information sought by legislators regarding program irregularities,¹¹⁴ members of Congress failed to act upon repeated warnings by the Inspector General that much was amiss at HUD:

“There was plenty of evidence for those of us who had the responsibility to get involved, and we just didn’t do it,” former Senator William Proxmire, the Wisconsin Democrat who was chairman of the H.U.D. Subcommittee of the Senate Appropriations Committee, said “Clearly, the reports did not get the attention they deserved.”¹¹⁵

In September, none of the six congressional panels charged with overseeing federal housing activities responded after HUD reported hundreds of indictments and convictions growing out of HUD programs.¹¹⁶

Some elected officials apparently played a more active role, benefiting in significant ways from funding and other program decisions at HUD. For example, projects favored by Senator Alfonse M. D’Amato, a New York Republican who sits on two committees with HUD oversight responsibilities, received “thumbs up” from department officials during the Reagan years.¹¹⁷ Not surprisingly, several housing industry participants, recognizing the Senator’s influence at HUD, responded with generous campaign contributions.¹¹⁸ Although there have been no allegations of wrongdoing on the Senator’s part (the same cannot be said of local HUD officials), such marked favoritism toward one geographic area in times of severe program restrictions — even elimination — raises serious questions about the independence of a lucrative and sensitive part of the executive branch.

Thus ends the sad compendium of travails facing HUD, Congress and those who look to the federal government to solve, in whole or in part, their own housing needs. By no means is the list presented here a complete one. Now that the scope of the independent counsel’s in-

114. *Aides to Pierce Hid Much Data, Papers Indicate*, N.Y. Times, Aug. 5, 1989, at A1, col. 5.

115. N.Y. Times, July 3, 1989, at A9, col. 1.

116. N.Y. Times, July 3, 1989, at A9, cols. 1, 3.

117. N.Y. Times, June 18, 1989, at A22, col. 1. “Almost a third, or \$12 million, of the nearly \$38 million in a [HUD Secretary] discretionary fund . . . went to projects in New York State between 1981 and 1988. And all but a small fraction of that went to causes championed by [D’Amato].” *Id.*

118. *H.U.D. and D’Amato: Hopes for Grants Prompted Gifts*, N.Y. Times, July 28, 1989, at B1, col. 2.

vestigation has widened considerably, a quick resolution to the HUD Scandal is most unlikely. In fact, all evidence points to a long, slow bleeding over the next several months.¹¹⁹ We can only hope that, unlike the medicinal bleedings rendered centuries ago, the results will not be fatal for the patient.

IV. Putting the Housing House in Order

This is neither the forum nor the time for offering full-blown solutions. Conjoined with other weaknesses — such as public resistance to low and moderately priced housing developments (that is, “projects”), stigmatization of housing program participants, and segregation of government assisted housing — the two crises introduced here threaten even the most creative and well-intentioned strategy. Instead, the author offers some tentative suggestions for beginning what promises to be a long road to constructive reform and some predictions about the legal consequences of the HUD scandal.

First, any dramatic new federal housing programs, especially those introduced by the Cranston-Gonzalez National Affordable Housing Act of 1990,¹²⁰ should be put on hold until the problems that gave rise to the HUD scandal are behind us. Secretary Kemp and Congressman Lantos are to be commended for responding energetically and creatively to the wide-ranging predicament in which the Department, the housing community, and the nation find themselves.¹²¹ These should be first steps, not final successes.

Precious resources, technical expertise, and energy should not yet be shifted from investigation of the expansive scandal to implementation and promotion of substitute schemes. Instead, the President, HUD Secretary and Congress should begin a serious investigation of the intricate structural and governance difficulties faced by a cabinet department characterized by wide-ranging responsibilities, seriously inadequate funding and a long history of neglect, waste and abuse. We do not need a new national task force to diagnose the nation's

119. Ex-Secretary Pierce is by no means admitting guilt: “Pierce's attorney, Paul L. Perito, issued a statement saying: . . . ‘We are fully confident that, at the conclusion [of the expanded investigation], the independent counsel will find Secretary Pierce did not violate any federal laws or regulations.’” Wash. Post, Jan. 8, 1991, at A5, cols. 5-6.

120. Pub. L. No. 101-625, § 1, 104 Stat. 4079 (1990).

121. See, e.g., REPORT, *supra* note 2, at 6-8 (noting the reforms already implemented by HUD and Congress in the months since the HUD scandal story broke). The efforts to rein in privatization, particularly in the escrow and co-insurance areas, are impressive. Until evidence is forthcoming that these sensitive (and potentially lucrative) functions can be performed relatively free from profiteering, lawmakers should continue to put this aspect of the Reagan Revolution on hold.

housing needs or to devise new programmatic panaceas; we should instead focus expert attention on creating the proper administrative structure and environment in which extant and future programs can most effectively be designed and executed.¹²²

Second, the White House should continue to send down the message that influence-peddling, favoritism and lax management will not be tolerated, indeed, that such acts and omissions will be punished. President Bush concluded his remarks made upon signing the HUD Reform Act of 1989,¹²³ by stating that "never again must we let the programs of the Department of Housing and Urban Development — or any other agency — be abused for political purposes or personal gain."¹²⁴ When the next set of housing abuses are revealed, the President ought to follow up this rhetoric with action.

Third, leaders of both parties should work to ensure greater longevity for HUD programs. We have seen too many housing programs tossed aside either after failing to yield immediate results, or following changes in presidential administrations. The strong bi-partisan support for HUD reforms and for a new housing agenda, inspired in large part by the widely perceived crisis in affordable housing and the alarming growth in the number of homeless Americans, might temporarily counter such debilitating tendencies. There are no guarantees, however, that this spirit of cooperation will survive when partisan concerns drift elsewhere.

We can also begin to assess the potential impact of the HUD scandal on the state of housing law as interpreted by judges and as crafted by elected lawmakers. The notoriety of the scandal makes judicial notice — *de facto*, if not *de jure* — of the sad state of affairs at HUD

122. The Lantos Subcommittee concluded that "[t]here is a need to make HUD as an institution less political without unduly infringing on the right of a HUD Secretary to conduct policy and to have his or her team running the agency." REPORT, *supra* note 2, at 8. Minority members dissented, however, from the specific recommendation "that all Deputy Assistant Secretary positions at HUD should only be filled by HUD career employees." *Id.* at 113. Perhaps the problem is that HUD is not political enough. That is, instead of asking the Bush Administration to sacrifice these sensitive executive positions for the cause of technical expertise, Congress, for example, could encourage Secretary Kemp to make an effort to fill these and other noncareer positions with senior state and local officials from both parties who would bring to the job technical housing and *political* expertise. After all, the crisis in affordable housing has tended to blur the distinctions between liberal and conservative approaches. Such a strategy might enhance the survivability of HUD programs from one administration to the next and create an ample pool of political appointees to move up the Department chain of command.

123. Department of Housing and Urban Development Reform Act of 1989 (HUD Reform Act of 1989), Pub. L. No. 101-235, 103 Stat. 1987 (1989).

124. Statement by President George Bush Upon Signing H.R. 1, 1989 U.S. CODE CONG. & ADMIN. NEWS 1465-1, 1465-3 (Dec. 15, 1989).

practically unavoidable. What effect, if any, should the Department's recent history have on the generous deference normally accorded the housing agency in exercising its discretionary functions?¹²⁵ Future litigants challenging HUD decision-making might find, for example, that the judicial audience, in the light of continuing accounts of widespread irregularities, will be more receptive to allegations that department officials abused their discretion and violated the public trust. Judges who are especially committed to the ideal of judicial restraint will face special challenges in these cases. Officials charged with administering extant and prospective HUD programs, and legal counsel representing the Department, should anticipate this potential legacy of the HUD scandal — a legacy of judicial skepticism leading to delay, and, perhaps, to modification or invalidation of agency decisions.

Judges are not the only interested observers who might have an impact on the future direction of the Department. Extensive negative publicity should have a decided influence on public perceptions of HUD. Throughout the nation, news reports and editorial pages bemoaned the sad state of affairs in federal housing and development. This universal condemnation should make it extremely difficult to generate popular support for any new substantive programs that vest significant discretion in high-ranking, political appointees at HUD. Secretary Kemp's objections to the contrary, the HUD scandal will continue to have a noticeable impact on legislators (and their staffers) who draft, broker, promote and shepherd housing legislation through the congressional lawmaking process. What member of Congress is willing to risk the opprobrium of constituents who are angered because their elected representative proposed a discretionary housing program that resulted in yet another HUD scandal?

There is the further risk that judicial and popular displeasure will be replicated on the state and local levels. Nonfederal housing officials and legislators — already pressed by dwindling HUD dollars and budgetary shortfalls — can hardly afford such negative fallout. State judges, in evaluating state and local administrative decision-

125. See, e.g., C. DAYE, D. MANDELKER, O. HETZEL, *HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS* 70 (2d ed. 1989) [hereinafter DAYE].

Judicial review of federal programs lies in the federal courts and is primarily governed by the federal Administrative Procedure Act (APA). The Act places substantial obstacles in the way of successful litigation in its provision that action "committed to agency discretion" is not subject to judicial review. Because federal housing legislation usually confers a substantial amount of discretion on federal and local agencies, judicial challenges to agency action in these cases may not be successful. . . . Courts are likely to find program decisions discretionary and not subject to judicial review.

Id.

making, like their federal counterparts will find it hard to ignore the pervasive improprieties and excesses that tainted the nation's central housing agency during the Pierce years.

There could, of course, be a positive side to jurists questioning the normally generous deference accorded local, state, and federal housing agencies. Judicial attention to the decision-making process might lead to more carefully crafted programs that are more responsive to housing needs and less attractive to windfall-seeking developers and their consultants. Unfortunately, there is the real risk that judicial and popular oversight could have a profound chilling effect on the kinds of innovative housing programs designed to narrow the disturbing affordability gap. Such a development — when combined with the predominant judicial refusal to recognize a fundamental right to decent housing¹²⁶ — would be most unwelcome given the needs and demands of unsheltered and inadequately housed Americans.

In the coming months, we will witness countless proposals for “fixing” HUD.¹²⁷ Some will advocate stricter congressional oversight, perhaps by one or two key committees. Others might suggest that some responsibilities such as FHA be taken away from the scandal-ridden Department and transferred either to an independent agency or to the domain of another cabinet secretary. Some may even be so bold as to proffer the dismantling of the Department, a process that proceeded *de facto* during the Reagan presidency. Perhaps the federal government could spend its time and resources better supporting innovative state and local endeavors.

Whatever substantive schemes emerge from Washington, we must not lose sight of the ultimate goal, a goal expressed as the nation emerged victorious from World War II with visions of rebuilding on a grand scale. We must do our best to ensure that the “solutions” cho-

126. See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972). “We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.” *Id.* at 74. Justice White’s cold rhetoric is perhaps the most telling sign that the Warren Court era was truly at an end. *But cf.* DAYE, *supra* note 125, at 47-55 (“A Right to Housing and the Challenge of Homelessness”).

127. For an especially ambitious proposal, see [Current Developments] *Hous. & Dev. Rep.* (BNA) 317 (Sept. 18, 1989):

Two high-ranking HUD officials have drafted a \$10 billion, 26-point housing initiative for HUD Secretary Jack Kemp’s consideration that emphasizes homeownership through such ideas as changing HUD’s name to the HOME Department, launching an aggressive campaign to sell 50,000 houses in the FHA inventory, and creating inner-city “housing zones.”

Id.

sen increase the chances that all Americans will have access to decent, affordable housing. For, as Associate Justice Oliver Wendell Holmes, Jr., reminded the nation shortly after it celebrated victory in the First World War, “[h]ousing is a necessary of life.”¹²⁸

128. *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

