

**Testimony before the
The Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives**

**“The Recommendations of the National Commission on Fair Housing
and Opportunity to accomplish the goals of the Fair Housing Act.”**

Thursday, March 11, 2010

**Okianer Christian Dark, Associate Dean for Academic Affairs and
Professor of Law, Howard University School of Law and Commissioner,
National Commission on Fair Housing and Opportunity**

Testimony of Okianer Christian Dark, Associate Dean for Academic Affairs and Professor of Law, Howard University School of Law and Commissioner, National Commission on Fair Housing and Opportunity

**Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives**

Thursday, March 11, 2010

Good Afternoon, Chairman Jerrold Nadler and members of the House Committee on the Judiciary, I am honored to participate in this hearing on “Protecting the American Dream: A Look at the Fair Housing Act,” important legislation enacted in 1968, with the goal of desegregating our communities where we live so that we would ultimately look like an open and inclusive society and become an open and inclusive society.

I come to fair housing work in an unusual way. In 1986, I was a victim of housing discrimination in Richmond, Va when, as a young law professor at the University of Richmond School of Law, I attempted to rent an apartment and was unable to do so based on my race. I subsequently brought a lawsuit to challenge the discriminatory conduct which was successfully resolved. However, the experience changed me in important ways and so I made contributions to the fair housing movement in whatever ways possible. Eventually, I handled Fair Housing cases on behalf of the United States as an Assistant United States Attorney for the District of Oregon and helped to establish the Fair Housing Clinic at the Howard University where we are preparing a new cadre of student leaders to continue the important work in this field. I am sure it is no surprise to you that although the Fair Housing Act is well over 40 years old, housing discrimination persists and sadly, in new and insidious ways like in the housing foreclosure crisis.

More recently, I had the opportunity to serve on the National Commission on Fair Housing and Opportunity which was established by leading civil rights and fair housing organizations in the country. This Commission was formed by the Leadership Conference on Civil Rights Education Fund, the National Fair Housing Alliance, the NAACP Legal Defense and Educational Fund, and the Lawyers' Committee for Civil Rights Under Law. The primary purpose of the Commission was to investigate the state of fair housing in the 40th anniversary of the Fair Housing Act.

The seven-member Commission was bipartisan and lead superbly led by former U.S. Housing and Urban Development (HUD) Secretaries, the Honorable Henry Cisneros and the Honorable and late Jack Kemp. In addition to co-chairs Cisneros and Kemp, the Commission included Pat Vredevoogd Combs, 2007 President of the National Association of Realtors, I. King Jordan, President Emeritus, Gallaudet University, Myron Orfield, Professor of Law, University of Minnesota School of Law and Executive Director, Institute on Race and Poverty at the University of Minnesota and Gordon Quan, Former Mayor Pro Tem and Chair of the Housing Committee in the City of Houston. The Commission was also blessed to have two guest commissioners at two of its hearings, Tina Brooks, the Undersecretary for Housing and Community Development, Commonwealth of Massachusetts (Boston hearing) and Charles McMillan, the 2009 President of the National Association of Realtors (Houston hearing).

The Commission held hearings in five major cities --- Chicago (July 15, 2008), Houston (July 31, 2008), Los Angeles (September 9, 2008), Boston (September 22, 2008) and Atlanta (October 17, 2008). We heard testimony from a range of presenters – scholars and researchers, advocates, realtors, victims of discrimination, and in essence,

“[t]he hearings exposed the fact that despite strong legislation, past and ongoing discriminatory practices in the nation’s housing and lending markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households, in access to good jobs, quality education, homeownership attainment and asset accumulation.”¹ During the hearings, we heard from “hundreds of witnesses that there are still far too many segregated neighborhoods where skin color determines school quality and economic opportunity; and where municipal services track race and income, rather than need.”² We learned that “while nationally the incidence of discrimination [was] down; there [were] at least 4 million fair housing violations in our country every year.”³ Perhaps this high incidence of fair housing violations is reflective of the fact that approximately “two-thirds of new households being formed [today] are either racial or ethnic minorities or immigrants.”⁴ Additionally, individuals with disabilities are increasingly seeking housing options that supports their needs and preserves their dignity as their numbers increase in the schools (at all levels of educational attainment) and the workplace.

1. Create an Independent Fair Housing Enforcement Agency

“In order to address the long-standing and systemic problems with fair housing enforcement, we recommended the creation of an independent fair housing enforcement agency to replace the existing fair housing enforcement structure at HUD. Support for an independent fair housing enforcement agency was the most consistent theme of the

¹ Executive Summary of *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 1 (December 2008), www.civilrights.org/publications/reports/fairhousing.

² *Id.* at 2.

³ *Id.*

⁴ *Id.*

hearings. A reformed independent fair housing enforcement agency would have three key components: (1) career staff with fair housing experience and competence as the key criteria for employment; (2) an advisory Commission appointed by the president with the advice and consent of the Senate that is broadly representative of industry, advocates, and enforcers; and (3) adequate staff and resources to make fair housing a reality. Such an agency would be empowered at the public policy level to work with the HUD Secretary to advance proactively all of the fair housing issues that are critical to building stronger communities.”⁵

2. Revive the President’s Fair Housing Council

“In order to build, sustain, and grow strong, stable, diverse communities, we need strong federal leadership that coordinates fair housing policy and practice across agencies. In order to accomplish this, we strongly recommend that the President’s Fair Housing Council be revived and given a stronger mandate in the new administration. It must be staffed and reconvened as soon as possible – either within HUD or as part of the proposed White House Office of Urban Policy.”⁶ “All of the federal agencies with responsibility over housing and urban development activities are obligated not only to promote fair housing, but to ‘*cooperate with the Secretary* [of HUD] to further such purposes.’ (42 U.S.C. § 3608)”⁷

“Executive Order 12892 (1994) took this requirement of cooperation one step further, by establishing the President’s Fair Housing Council, which is required to ‘review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing.’ The Fair Housing Council has

⁵ *Id at 3.*

⁶ *Id at 4.*

⁷ *Id.*

been severely underutilized, and to our knowledge has only met once. Yet the Council has the potential to go beyond the housing-related agencies delineated in the Fair Housing Act to bring in virtually every other cabinet agency whose work may directly or indirectly affect housing.”⁸ “The Fair Housing Council, working through federal agencies such as the Department of the Treasury, Department of Education, and financial institution regulators would play a critical role in coordinating the work of the various federal government agencies that influence housing and lending policy and practice.”⁹

3. Ensure Compliance with the “Affirmatively Furthering Fair Housing” Obligation

“One of the basic principles in the Fair Housing Act and the Housing and Community Development Act of 1974 is that the federal government, and all of its programs and activities, must take proactive steps to advance fair housing, not just to avoid discriminating In order to take this statutory obligation a reality, we must make changes in federal programs and activities to avoid further segregation and promote wider housing choices for families.”¹⁰

“Since 1968, the Fair Housing Act has contained a requirement that HUD and other federal agencies engaged in housing and urban development and grantees that they fund, act in an affirmative way to further fair housing. (emphasis added) The courts have consistently recognized that this affirmatively furthering duty requires HUD to ‘do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

of genuinely open housing increases.”¹¹ “For example, the Section 8 Housing Choice Voucher Program, which creates a portable housing benefit that can be used by an eligible family to rent private apartments in multiple locations, could be reformed to increase access of eligible families to high opportunity communities,ⁱ by including higher rents where necessary, improving administrative portability of vouchers across jurisdictional lines, re-establishing housing mobility programs to assist voucher-holders seeking to move to higher opportunity areas, creating strong incentives and performance goals for administering agencies, and providing incentives to recruit new landlords into the program. We should mandate that families be provided information and counseling about their range of housing choices, including choices in more integrated areas.”¹²

4. Strengthen Compliance with the Affirmatively Furthering Fair Housing

Obligation by Federal Grantees

The hearings revealed that the current HUD structure does not facilitate or adequately support its leadership in enforcement of the affirmatively furthering obligation. “Currently, HUD only requires that communities that receive federal funds “certify” to their funding agency that a jurisdiction is affirmatively furthering fair housing. HUD requires no evidence that anything is actually being done as a condition of funding, and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing. Instead, a regulatory structure must provide guidance and direction to ensure that programs receiving federal funds advance fair housing. A reformed structure should be based on existing guidance in

¹¹ *Id.*

¹² *Id.* at 5.

HUD's Fair Housing Planning Guide but expanded to contain specific activities that are required to be undertaken consistent with this report."¹³

In addition, "HUD must also provide training and technical assistance to support the reformed affirmatively furthering initiative, including training and technical assistance to support groups that will work locally and regionally in communities to advance fair housing principles."¹⁴

5. Strengthen the Fair Housing Initiatives Program (FHIP)

A key area that must be address is the adequate funding for the Fair Housing Initiatives Program (FHIP) which supports fair housing enforcement and education. The bottom-line is that FHIP needs to be increased significantly given the importance of these frontline fair housing organizations all over the country in identifying and supporting claimants who have experienced discrimination in housing. "While the program has been an effective change agent in communities, severe funding constraints and an erratic funding stream have limited its usefulness. Current appropriation levels are grossly inadequate to fund existing private fair housing groups to perform enforcement activities."¹⁵ In addition, the FHIP program could be helped if there were separate funding for a testing program operated by HUD. In this way, the FHIP supported

¹³ *Id* at 5.

¹⁴ *Id* at 5-6.

¹⁵ According to the *Report of the National Commission on Fair Housing and Equal Opportunity*, "[a] full service private fair housing group that successfully competes in FHIP can be awarded no more than \$275,000 per year, whether it is located in New York City or Savannah, Georgia. Although about 140 agencies have received enforcement grants over the past ten years, current funding levels permit many fewer groups to be funded every year to conduct enforcement activities. Only 28 groups in the country received consistent funding over the five year period from FY 2003-2007 and 26 private fair housing groups, including some of the oldest and most respected groups, have closed or are at risk."

organizations would not need to use their FHIP funds to conduct the testing. I believe that a bill known as the Fair Housing Act would create a separate testing program funded by HUD that fair housing organizations could access.

6. Adopt a Regional Approach to Fair Housing

“To make real progress toward equal housing opportunity, all of the jurisdictions within a metropolitan area must be coordinated in their efforts.”¹⁶ In this way, “[i]mplementation of major investments [within a region] in transportation, employment, education, commercial development, and other infrastructure enhancements [can be] aligned with fair housing goals, to support and develop diverse, sustainable communities with access to opportunity for all residents of the region.”¹⁷

7. Ensure that Fair Housing Principles are Emphasized in Programs Addressing the Mortgage and Financial Crisis

We are all too well acquainted with the mortgage and financial crisis which has gripped our nation. In hearing after hearing, we heard how the foreclosures were devastating communities, particularly minority and immigrant communities. “The current mortgage crisis has its roots in decades of discriminatory housing and lending practices.”¹⁸ During the hearings, we heard from many witnesses about the connection between the foreclosure crisis and the lack of fair housing enforcement.

It is well documented that the proliferation of discriminatory lending practices in communities of color over the years, created an opportunity for financial institutions and others to target vulnerable minority communities as a means of maximizing short term

¹⁶ *Id* at 6.

¹⁷ *Id* at 6-7.

¹⁸ *Id* at 7.

profits.¹⁹ As one witness stated, “the subprime market discovered African American and Latino communities and targeted them for unfair and deceptive loan products and lending practices.”

This point was illustrated well at our Los Angeles hearing with the testimony of Mr. Jesus Hernandez, a real estate broker in The Sacramento area with experience in residential sales and financing. He stated that generally “subprime lenders target borrowers who have poor credit histories with mortgage products that bring an unusually high yield to lending institutions and their investors. Such excessive profit margins, realized through a pricing structure that includes periodic interest rate increases, prepayment penalties, and balloon payments, place a heavy financial burden on borrowers. Consequently, subprime borrowers are six to nine times more likely to be in foreclosure. Because homeowner equity remains the largest component of wealth for low-income and non-White households in the US, subprime lending, with its higher propensity for foreclosures, undermines and discourages the wealth building capacity of affected homeowners and targeted communities. Thus, the concentration of loans with high foreclosure rates brings a social and financial vulnerability to targeted neighborhoods leaving them highly unstable in times of economic crisis.”

Mr. Hernandez had conducted a study of contemporary housing credit practices and foreclosures in the Sacramento area and established a clear connection with segregated housing patterns in that area. His preliminary observations showed that subprime loan activity was highly concentrated in neighborhoods with high ratios of non-Whites resulting from long-standing practices of housing segregation in that city [racially

¹⁹ John P. Relman, *Foreclosures, Integration, and the Future of The Fair Housing Act*, 41 Indiana L. Rev. 629, 631 (2008).

restrictive covenants, informal enforcement of covenants, central city urban renewal programs and mortgage redlining]. Further, his research showed that those neighborhoods which coincidentally were largely African American and Latino were experiencing some of the highest mortgage default and foreclosure rates in the US.

In sum, preexisting conditions contributed to the concentration of subprime lending in specific localities and within specific populations.” Mr. Hernandez’s study was not the only one that empirically demonstrated that an unusually high number of subprime loans with highly questionable provisions were concentrated in low-income communities of color.²⁰

This is why the Commission strongly recommends that in order to more effectively address this problem the federal government must be improved by: “(1) fostering better coordination between HUD’s administrative enforcement of the Fair Housing Act, the Department of Justice, the bank regulatory agencies, and private fair housing groups; (2) prioritizing fair housing and fair lending litigation to identify and eliminate discriminatory predatory lending practices and policies; and (3) ensuring the legal standard for violation of the Fair Housing Act and the Equal Credit Opportunity Act includes the well-established disparate impact standard. HUD should also implement a

²⁰ The hearings also revealed that there was active litigation to respond to the predatory practices that led to the foreclosure problem based on the assumption that discriminatory housing practices were linked to the foreclosure problem. At our Chicago hearing, Illinois Attorney General Lisa Madigan announced that the state had instituted a lawsuit against Countrywide and at our Los Angeles hearing, we learned about a lawsuit brought by Attorney John Relman, Relman & Dane, on behalf of the City of Baltimore against Wells Fargo. “Baltimore became the first city to bring suit against a major lender for targeting its minority communities for discriminatory lending practices that it alleges have resulted in unnecessarily high rates of foreclosure. These foreclosures, Baltimore contends, are destroying minority neighborhoods and costing the city millions of dollars in out of pocket costs and damages.” While these lawsuits have not concluded in judgments against the Defendants, this is an indication that there is a substantial documented and reasoned belief in the connection between the foreclosure problem and discriminatory behavior.

special fair lending initiative to fund the investigation and redress of discriminatory practices in the lending sector.”²¹

8. Create a Strong, Consistent, Fair Housing Education Campaign

“HUD should use its direct budget authority to fund basic education and outreach materials, written in easy- to-understand language, in multiple languages, and in accessible formats. . . targeted to the different types of consumers of fair housing services.”²² In particular, the FHIP program should fund a five-year coordinated national multimedia campaign with two components: one that will educate consumers to recognize and report all types of discrimination for all protected classes and to recognize the value of challenging discrimination; and one that will recognize and advance the idea that diverse communities are stronger communities.”²³

9. Create a New Collaborative Approach to Fair Housing Issues

Collaborate! Collaborate! Collaborate! “No single agency or approach can change the face of our communities.”²⁴ . . . “This new approach will search out best practices and the most effective strategies from the housing industry, corporations, state and local governments, and fair housing practitioners and advocates to strengthen our communities. It will seek to involve constituencies at the local level that can bring new ideas and new energy to revitalize and empower our communities to promote residential integration.”²⁵

²¹ *Id* at 7.

²² *Id.*

²³ Also, this multi-media campaign should include a “revitalized approach to fair housing research . . . by developing data and analyzing the effectiveness of strategies to power new approaches to advancing fair housing.” *Id* at 7.

²⁴ *Id* at 8.

²⁵ *Id.*

As the nation is finding out, the persistence of housing discrimination and segregation affects all communities. When housing is undermined in a community (like it is in so many communities with the foreclosure crisis) then the community is destabilized and everything else in the community is adversely affected as well because of the interconnection between housing and education, access to credit, employment opportunities, environmental justice, transportation, etc..

That is why many of the Commission's recommendations stress agency coordination and cooperation across areas like education, housing and employment, and supports regional planning. We want to evict discrimination from our communities. By adopting and implementing the Commission's 9 recommendations, we will move significantly in the direction of a nation that is committed to integrated neighborhoods, an increase in the availability of affordable housing and a regulated lending environment in which people can borrow without fear. Thank you.

ⁱ See testimony of John Powell (Los Angeles); Kirwan Institute for the Study of Race and Ethnicity, *The Geography of Opportunity: Review of Opportunity Mapping Initiatives* (July 2008) (Los Angeles Exhibit)