UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 66 C 1460
	)	
GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development of the United States,	)	
	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

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Pursuant to leave of Court this reply brief supports plaintiffs' motion for summary judgment and responds to the answering brief of HUD, filed on January 7, 1970. The HUD answering brief (both the first 7 pages dealing with the motion to dismiss and the final 31 pages dealing with the motion for summary judgment) is referred to as "HUD's brief." Our brief in support of plaintiffs' motion for summary judgment, filed on October 31, 1969, is referred to as "our brief" or "our first brief."

I. HUD'S MOTION TO DISMISS THE ACTION SHOULD BE DENIED.

HUD's motion to dismiss the action rested on five

grounds, each of which was discussed in our first brief. As it relates to the motion to dismiss, HUD's brief deals with only two of these - (1) standing, and (2) CHA as an allegedly indispensable party whose presence would destroy venue. It does not discuss the other three grounds - (3) exhaustion of administrative remedies, (4) jurisdiction and (5) the alleged failure to state a claim upon which relief may be granted. (Our br. 18-30.) These last three issues are therefore not discussed further in this brief.

A. Plaintiffs Have Standing to Sue.

(1) Plaintiffs Have Standing Under the Fifth Amendment.

In our first brief we said it was beyond dispute that an aggrieved citizen may sue a federal official for violation of his federal constitutional rights. We said that principle was so clear that even HUD did not contest it, and we cited three cases illustrating the principle in operation.

In Bolling v. Sharpe, 347 U.S. 497 (1954), aggrieved citizens successfully sued federal officials who were violating their Fifth Amendment rights by operating a racially segregated school system. HUD is silent about that case. In Kent v. Dulles, 357 U.S. 116 (1958), aggrieved citizens successfully sued a federal official who was

violating their Fifth Amendment rights by refusing to issue passports to them. HUD is silent about that case too. Flast v. Cohen, 392 U.S. 83 (1968), held that aggrieved citizens "as federal taxpayers" (392 U.S. at 88) had standing to sue federal officials for violating their First Amendment rights by using federal funds to finance instruction in religious schools. The plaintiff citizens "were resting their standing to maintain the action solely on their status as federal taxpayers." (392 U.S. at 85.) HUD has chosen to comment on only this case of the three.

We cited Flast in our brief because HUD's basic argument against plaintiffs' standing rested on taxpayer cases such as Frothingham v. Mellon, 262 U.S. 447 (1923), from which HUD's first brief quoted the Court's observation that,

> "(Where an interest) is shared with millions of others, (it) is comparatively minute and indeterminable ..." (HUD's first brief [filed Dec. 1966], p.8.)

Frothingham had stood for 45 years as an impenetrable barrier to suits brought by plaintiffs who could assert only the interest of federal taxpayers. Flast, decided after HUD's first briefs were filed, held that even when a plaintiff's standing rested solely on his status as a federal taxpayer,

standing would be upheld notwithstanding Frothingham where the plaintiff taxpayer had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (392 U.S. at 99.) We think that even if plaintiffs were bringing this case as taxpayers they would meet the test of Flast and that HUD's reliance on the Frothingham line of cases would not avail it. Therefore we cited Flast.*

But of course "plaintiffs here have not brought this case as taxpayers" (HUD br. 3-4), they have brought this case "as present and future users of the [public housing] system," Gautreaux v. CHA, 265 F.Supp. 582, 583, as the Bolling plaintiffs brought their case as users of a school system, and as the Kent plaintiffs brought their case as

*Flast found the required "personal stake" where the federal action complained of was a violation of a specific constitutional (First Amendment) prohibition, as distinguished from cases like Frothingham where standing was based merely on claims that the federal action was increasing the amount of taxpayers' taxes or exceeded the general powers of Congress. The Fifth Amendment prohibition against racial discrimination which is at issue here is in this respect like the First Amendment prohibition against the establishment of religion. See Arrington v. City of Fairfield, Alabama, 414 F.2d 687, 691-92 (5th Cir. 1969), for a discussion and application of the Flast test in a racial discrimination context.

applicants for passports. It is ostrich-like on the part of HUD to ignore Bolling and Kent while fretting about whether, under Flast, plaintiffs would have had standing to bring this case as taxpayers had they sought to do so.*

We have also emphasized, though HUD has ignored the point, that standing exists in this case on two grounds - the Fifth Amendment and the Civil Rights Act of 1964.

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*HUD cites South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535 (7th Cir. 1969), which distinguished Flast and held that the plaintiffs there lacked standing as a taxpayer. The Court in Safeway did not say why it found Flast inapplicable to the plaintiff's claim of violation of constitutional rights (see 416 F.2d at 536-37). Presumably it was because the constitutional claim was patently frivolous, being based on an asserted but nonexistent statutory right to the protection of a competitive interest alleged to have been unconstitutionally invaded by reason of the fact that compensation was not paid for the invasion. (The plaintiff bus company challenged a grant of federal funds to establish a competitive service.)

> "In the absence of a broad statutory provision for review, economic injury alone is generally assumed to be insufficient to give standing for a challenge of administrative action." Cahn and Cahn, The New Sovereign Immunity, 81 Harv. L. Rev. 929, 935 (1968) [hereinafter cited as New Sovereign Immunity].

See also, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 927 (2nd Cir. 1968). The taxpayer thus lacked the "legally protected interest" required by Flast. Cf., Jenkins v. McKeithen, 395 U.S. 411, 424 (1969). In any event, Safeway is so utterly unlike Flast, Arrington or this case on its facts that it could not furnish guidance on the ability of plaintiffs to bring this case as taxpayers even if that were a relevant question.

The several cases cited in our first brief to show that there is standing under the Civil Rights Act also support standing under the Constitution; if there is standing to sue HUD for violating a statute, there is standing also to sue it for violating the Constitution. Thus, if HUD were right about standing, Norwalk, Powelton, Western Addition and Hicks, all cases successfully brought against HUD, must have been wrongly decided.*

Finally, of course, HUD also ignores Gautreaux v. CHA. If plaintiffs have the "personal stake" to sue CHA for a violation of the Fourteenth Amendment, they self-evidently do not lose that personal stake when they sue HUD for a violation of the Fifth Amendment.

(2) Plaintiffs Have Standing under the Civil Rights Act.

It is ostrich-like too for HUD to ignore our discussion of the cases cited in our brief which have undermined Green Street Association v. Daley, 373 F.2d 1 (7th Cir. 1967), and support plaintiffs' standing to sue under Section 601 of the Civil Rights Act (42 U.S.C. §2000d). Since HUD does little more than cite Green Street again, we will not repeat our discussion of that case but merely refer the Court

*See our br. 10-12, and the next subsection of this brief. See particularly the discussion of the obligation of the courts to hear claims of violations of constitutional rights in Norwalk, 395 F.2d at 926-32.

to pages 6-17 of our first brief. It should be noted, however, that subsequent to the filing of our brief (and relying on the Abbott Laboratories case there cited) two decisions of the Supreme Court have contributed to "the trend ... toward enlargement of the class of people who may protest administrative action" where statutory rights are asserted. Association of Data Processing Organizations v. Camp, 38 Law Week 4193, 4194 (March 3, 1970). See also, Barlow v. Collins, 38 Law Week 4195 (March 3, 1970).

It should also be noted that (again subsequent to the filing of our brief) the Supreme Court ruled that even where Congress has stated that there is to be no right of judicial review under a statute, such review will be allowed where the administrative agency has clearly proceeded unlawfully. Breen v. Selective Service Board, ___ U.S. ___, 90 S.Ct. 661 (1970). Ironically, Breen is the very case cited in our first brief as involving a statute containing "clear and convincing evidence" that Congress intended no review. (Our br. 8.)*

*Safeway denied standing under the statute there involved because of the Court's conclusion that Congress did not intend "resort to judicial review" to be had under that statute. 416 F.2d at 539. That conclusion as to that statute plainly does not require a like conclusion as to Section 601 of the Civil Rights Act. However, the thrust of Breen appears to be that even if the Court were to conclude

(Continued on next page)

B. CHA is not Indispensable but Should be Joined as a Courtesy, and May be Joined without Destroying Venue.

HUD says CHA is an indispensable party (HUD br. 5), but cannot be joined without destroying venue (HUD br. 6). The result is said to be that "there is no court" in which this action can be brought. (Ibid.) In reaching this harsh conclusion HUD utterly ignores the arguments made on the subject in our brief. (Our br. 30-31.)

CHA is not indispensable because, contrary to what HUD says (HUD br. 5), we do not seek an injunction which would affect any rights of CHA. See the closely analogous situation in Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp. 809, 814 (E.D. Pa. 1968), from which a quotation appears at page 31 of our brief.

But the indispensable party issue is academic since we have moved to join CHA, and the remaining question is whether venue would be destroyed by the granting of that motion. HUD asserts that the statute upon which venue in this action

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(Continued from previous page)
that Congress did not intend judicial review of violations of Section 601 by federal officials, such review would be allowed in cases where rights granted under Section 601 had clearly been violated. That, of course, is this case, whereas in Safeway the asserted violation of statutory rights appeared to be as frivolous as the alleged violation of Constitutional rights. It should be recalled that Hicks v. Weaver explicitly held HUD liable for its violation of Section 601, presumably (since the decision preceded Breen) because it believed that Congress did not intend to preclude judicial review of such violations.

is based, 28 U.S.C. §1391(e), requires that each defendant be an officer, employee or agency of the United States and that therefore venue under this section would be destroyed if CHA were joined. (HUD br. 6.)

A 1967 Pennsylvania District Court case, Chase Savings and Loan Ass'n. v. Federal Home Loan Bank Board, 269 F.Supp. 965 (E.D. Pa. 1967), is the only authority cited to support HUD's construction of the venue statute. But two later District Court decisions and a later Court of Appeals decision each rejected the "absurd result which derives from such a construction" of the venue statute. Brotherhood of Locomotive Eng. v. Denver & R. G. W. Co., 290 F.Supp. 612, 615 (D. Colo. 1968). The two District Court decisions, Brotherhood and Powelton, were cited in our first brief. Each, after considered discussion, concludes that §1391(e) sustains venue in cases like this one. (Our br. 31; neither case is mentioned in HUD's brief.) The Court of Appeals for the Second Circuit has now reached the same conclusion. Kletschka v. Driver, 411 F.2d 436, 442 (2nd Cir. 1969).

Moreover, since the filing of our first brief we have learned that Judge Hoffman of this District had earlier reached the same result. Inmates of the Cook County Jail v. Tierney, No. 68 C 504 (1968), concerned the custody of federal and

non-federal prisoners in the Cook County Jail and both federal officials (resident in the District of Columbia) and state officials were named as defendants. The federal defendants argued, exactly as HUD argues here, that §1391(e) was inapplicable to such a situation and that the action should therefore be dismissed, relying on Chase Savings. In rejecting the argument Judge Hoffman said:

> "Having examined the legislative history [of §1391(e)], the Court concludes that the interpretation called for by the defendants would thwart the Congressional policy revealed in that history. The intention of Congress was to facilitate access to the Courts by plaintiffs with a cause of action against federal officials. Such access would be hindered rather than facilitated where a plaintiff is compelled by the facts of his case to sue not only the federal official or officials but also other defendants residing in another district such as the district in which he or they reside." (Transcript of Proceedings on August 22, 1968, pp. 23-24.)*

*In declining to follow Chase Savings Judge Hoffman said:

> "The only case in which this question has been raised and which adopted the argument made by these defendants did not examine the legislative history behind the subsection but relied solely on its literal language, specifically 'each defendant.' Chase Savings & Loan Association vs. Federal Home Loan Bank Board, 269 F.Supp. 965, Eastern District of Pennsylvania, 1967." (Transcript, supra, pp. 22-23.)

It seems clear that HUD's venue views are unsupportable and that granting our motion to add CHA as a party (as a courtesy and not because CHA is indispensable) will not destroy the venue upon which this action is based.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED.

A. There is no Genuine Issue of Material Fact.

HUD asserts over and over again that there are issues of fact. For example, "there is a clear showing of genuine issues of material facts unresolved" (HUD br. 8); "Substantial issues of fact precluding summary judgment exist in this matter" (Id. 9); there is a need to "sift" facts and to get the "specific" facts and not to "foreclose the factual issues ... by attributing the intentions and actions of CHA to the Secretary" (Id. 4); etc.

It should be plain that in this action we have relied exclusively upon HUD's own briefs, affidavits and exhibits for the facts as to the Secretary's actions and intentions. We do not dispute HUD's assertions and have offered no evidence of our own in the form of affidavits or otherwise as to either matter. We have directed the Court exclusively to the documents submitted by HUD itself for the facts as to HUD's actions and intentions.

The HUD briefs, affidavits and exhibits show that three facts with respect to HUD's actions and intentions are undisputed:

> 1. HUD participated in and approved almost every action taken by CHA in the carrying on of the low-rent public housing program in Chicago, specifically including site selection. (See our brief 24-28.)
>
> 2. HUD supplied CHA with substantially all of the funds necessary for the carrying on of that program, which is entirely dependent upon such financing. (Our br. 25.)
>
> 3. HUD was aware of the fact that the low-rent housing program was being carried on in a discriminatory way and made numerous and consistent efforts, commencing in 1950, to change the discriminatory site selection pattern. (HUD Exhibit A, ¶3.)

These three facts (the last of which is discussed in more detail below) are clearly not in dispute. HUD's constantly reiterated assertion that genuine issues of material fact exist in this case is disingenuous rhetoric.

B. HUD's Liability is Clear as a Matter of Law, and is not Based upon "Vague" or "Hazy" Concepts.

HUD accuses us of talking "vaguely" of HUD's financial and administrative involvement in CHA's discriminatory conduct (HUD br. 3) and refers to our "hazy concept of involvement." (Ibid.) And in discussing the cases upon which we rely to demonstrate its legal liability, HUD twice distorts our

position by implying that HUD liability is sought to be based upon financial assistance or involvement "standing alone." (HUD br. 5, 6.)

There is nothing "vague" or "hazy" about HUD's involvement with CHA. The facts already referred to in the preceding sub-section of this brief appear in depth in documents filed by HUD and in statements made in its brief. HUD's financial involvement is succinctly stated by HUD as follows:

> "In practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." (HUD's first brief, p.5; further detail appears at page 25 of our brief.)

HUD's administrative involvement is equally clear although, because so extensive, it is not possible to state so succinctly. We have reviewed some of that involvement at pages 25-28 of our first brief, to which pages the Court is respectfully referred. As those pages show, HUD approves just about everything CHA does. Thus, HUD's involvement with CHA is not "financial assistance standing alone", and is neither vague nor hazy. It is extensive, pervasive and quite specific. It is administrative and operational as well as financial. And it admittedly continued over a period of decades with full

knowledge of the unwillingness or inability of CHA "to locate low rent housing projects in white neighborhoods" (HUD's Exhibit A, ¶3) - with full knowledge, that is, of what HUD's brief calls "the City's intention to resist desegregation." (HUD's br. 13-A.)

HUD's legal liability flows directly out of that involvement and knowledge. In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Authority leased a portion of its premises to a restaurant operator (Eagle) who declined to serve Negroes. The Authority could have affirmatively required in its lease to Eagle that there be no discrimination against Negro customers but it did not do so. The Supreme Court said:

> "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. ... By its inaction, the Authority, and through it the State, has ... made itself a party to [Eagle's] refusal of service ... The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity ..." 365 U.S. at 725.

HUD suggests that Burton is not a controlling authority here because "no such relationship of interdependence between

the Secretary and the CHA has been established." (HUD br. 4.) But it is perfectly obvious that the relationship of inter-dependence between the Parking Authority and Eagle was trifling compared with that between the Secretary and CHA. The Parking Authority had "not located the business of Eagle within the [parking] facility for the convenience and service of the public using the parking service." Wilmington Parking Authority v. Burton, 157 A.2d 894, 902 (Del. 1960). The Authority had "not financially enabled the business of Eagle to operate." (Ibid.) "The only concern the Authority ha[d] with Eagle [was] the receipt of rent ..." (Ibid.) The Authority "disclaim[ed] any control over the policies of its tenant ..." and had "not purported to dictate to the restaurant as to how its business should be run." Burton v. Wilmington Parking Authority, 150 A.2d 197, 198 (Ct. of Chancery, Del., 1959). In short, the "interdependence" in Burton was a typical lessor-lessee relationship with the lessor having no right to control the lessee's business operation or other special authority, right or position. By contrast, CHA is not only "entirely dependent" upon HUD financially but must obtain HUD's specific approval with respect to almost every detail of its ongoing operation.

HUD quotes from this Court's first opinion in the CHA

case the requirement of showing affirmative discriminatory action, presumably to imply that there is no such showing with respect to HUD. (HUD br. 7.) But such action is shown as a matter of law by HUD's relationship to CHA, just as in Burton, where there was no showing of discriminatory action by the Parking Authority apart from its relationship to its restaurant lessee, the Court concluded that, given the relationship, the Authority had made itself a party to the discrimination "by its inaction." 365 U.S. at 725.

HUD says Burton argues against a summary judgment here because of its emphasis upon the need for "sifting facts." (HUD br. 4.) In fact, Burton was decided on a motion for summary judgment (365 U.S. 715, 722), and what the Supreme Court said was that facts must be sifted to attribute true significance to the nonobvious involvement of the State in private conduct. (Ibid.) Here, the involvement of HUD in CHA's conduct is hardly nonobvious, and in any event the undisputed facts as to the HUD-CHA relationship are before the Court in voluminous detail. Surely this case is a fortiori when laid alongside Burton.

Burton relied upon Cooper v. Aaron, 358 U.S. 1 (1958), for the statement in the latter opinion that a state will be responsible for discrimination if it participates in the

challenged activity "through any arrangement, management, funds or property." (365 U.S. 722.) HUD's response to this principle is to pretend that we are dealing here with a case of "financial assistance to a discriminating party, standing alone" (HUD br. 5), a pretense which, even if true, would still be non-responsive to the teaching of Cooper.

Finally, HUD seeks to avoid the force of Hicks v. Weaver, 302 F.Supp. 619 (E.D. La. 1969), by pointing out the self-evident fact that Chicago, Illinois is not Bogalusa, Louisiana. (HUD br. 5.) But we cited Hicks not because we were confused about geography but because the court there noted, what is equally true here, that HUD "could have halted the discrimination at any step in the program." (Our br. 29.) HUD's failure to do so made HUD an "active participant" in discrimination in the view of the Hicks court, a conclusion compelled by Burton no less in Chicago than in Bogalusa.

Burton, Cooper and Hicks all require that HUD be adjudged jointly liable with CHA for the segregated Chicago public housing system.*

*See also Colon v. Tompkins Square Neighbors, Inc., 294 F.Supp. 134, 138 (S.D.N.Y. 1968), cited in our first brief at p.33:

> "By virtue of the State's election to put its property, power and prestige behind the housing project, in addition to its failure to affirmatively insure strict adherence to constitutional guarantees, it thereby becomes a party to the alleged discrimination. Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725, 81 S.Ct. 856."

C. HUD's "Consistent Activity to Preclude Discrimination" does not Absolve it from Liability.

HUD also tries to avoid the impact of Burton, Cooper and Hicks by arguing that, because it has numerous equal opportunity regulations and has tried to dissuade CHA from its discriminatory policies, it is not legally responsible as a "joint participant" under the Burton doctrine for Chicago's segregated public housing system.

Attached to HUD's brief are approximately 2 inches of HUD regulations and other documents applicable to HUD's various programs (Exhibit H) "each of which makes careful provision for protection of equal opportunity and enforcement of the requirements of the Civil Rights laws." (HUD br. 27.)* An affidavit describes HUD's fair housing enforcement activities against real estate brokers and others. (Exhibit G, p.2.) HUD refers to the fact that for equal opportunity reasons it compelled CHA to abandon the "proximity rule" in the elderly housing program, a program not involved in this case. (HUD br. 8.) HUD also points to its continuous efforts to dissuade CHA from continuing to locate family housing exclusively in Negro neighborhoods, advising that it "made

*Compare CHA's reliance upon its non-discrimination resolution in the companion case. See CHA's Memorandum filed October 14, 1966, p.2.

strenuous efforts to induce the Authority to come forth with sites that would produce a more balanced program." (HUD br. 13.) An affidavit of William E. Bergeron (Exhibit A), for over 20 years the HUD official in charge of the low-rent housing program in the Chicago area, says:

> "Numerous and consistent efforts have been made since 1950, first by the Public Housing Administration and then by HUD to persuade the Chicago Housing Authority to locate low rent housing projects in white neighborhoods. I personally recollect a meeting in the early 1950's which I attended with the then Mayor of Chicago, Martin Kennelly, and others where we attempted to enlist the Mayor's assistance in having project sites located in white neighborhoods." (Exhibit A, ¶3.)

HUD also refers to the testimony of another HUD official in the companion case to the effect that HUD had determined to reject some proposed CHA sites on racial grounds, although this determination was never communicated to CHA because CHA withdrew the sites after protests from community groups. (Burstein deposition, 57-59, 103-108.)*

In sum, HUD points to "continuous activity on the part

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*This same official testified that it was "common knowledge" that sites for regular family projects in Chicago were not located in white areas because the Chicago City Council would not permit Negroes to move into those areas (Burstein deposition, 63-64), and that the objection "was on the basis of the white composition of these areas" and the "generally understood occupancy of public housing as being virtually all Negro." (Id. 66.)

of HUD to preclude the kind of discrimination that was held to be state action in Burton v. Wilmington Parking Authority." (HUD br. 14.)

Before examining the legal significance of this activity the related undisputed facts should also be stated. First, during the entire period (from 1950) to which Mr. Bergeron's affidavit refers, CHA was carrying on a discriminatory housing program. Gautreaux v. CHA, 296 F.Supp. 907. Second, HUD was, during the entire period, perfectly aware of this discrimination. The Bergeron affidavit, the Burstein deposition and HUD's brief all make this clear, including particularly this ironic comparison:

> "If mere knowledge of the City's intention to resist desegregation implicates HUD, then the policeman is indeed implicated in the nefarious activities of those he pursues." (HUD br. 13-A.)*

Finally, possessing this knowledge, and despite the fact that its "continuous activity" met with absolutely no success whatever in respect to CHA's family housing program, HUD continued for decades to approve CHA's sites and to fund its projects, thereby making it possible for CHA to produce

*HUD says it "believed" CHA's sites to be "lawful but not optimal." (HUD br. 13.) We assume this to be the case and have not charged HUD with believing that its course of conduct was illegal any more than we charged CHA with believing that its conduct was in violation of law.

Chicago's segregated family public housing system.

Since none of the foregoing facts is in dispute (all come from HUD's own affidavits, exhibits and briefs) the Court is presented with a precisely formulated legal issue: Do HUD's non-discrimination regulations and efforts, particularly its "numerous and consistent efforts ... to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods," absolve it from legal responsibility for having approved and funded a discriminatory public housing program?

As a matter of legal principle this Court has already answered a substantially identical question in the companion case. There CHA (1) urged that its officials never entertained racist attitudes, (2) pointed to the City Council's power to approve sites which, as a matter of practical politics, compelled CHA, however reluctantly, to accommodate its procedures to the Council if the urgent goals of the low cost housing program were to be achieved, and (3) emphasized its own efforts to influence the Council's actions by its persistent selection of white sites at the initial stage. (See 296 F.Supp. at 914.) The Court responded to these arguments as follows:

> "It is no defense that the City Council's power to approve sites may as a matter of

> practical politics have compelled CHA to adopt the pre-clearance procedure which was known by CHA to incorporate a racial veto. In fact, even if CHA had not participated in the elimination of White sites, its officials were bound by the Constitution not to exercise CHA's discretion to decide to build upon sites which were chosen by some other agency on the basis of race. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); Orleans Parish School Board v. Bush, 268 F.2d 78 (5th Cir. 1959)." 296 F.Supp. 914.

The Court also said:

> "It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." 296 F.Supp. 914.

So too here. We might paraphrase the Court's language in the companion case as follows:

> "[HUD's] officials were bound by the Constitution not to exercise [HUD's] discretion to decide to [approve and fund] sites which were chosen by some other agency on the basis of race."

By approving sites which it knew resulted from "the City's intention to resist desegregation" (HUD br. 13-A), and by thereafter supplying the money to build projects on such sites, HUD legally became a "joint participant" in CHA's

discrimination.*

D. The Need for Relief in the Form of an Order Against HUD is Acute; the Case is not Moot.

HUD asserts that plaintiffs have obtained all the relief to which they are "entitled" and that the action is therefore now "moot." (HUD br. 1.)

As a matter of law HUD's responsibility for the wrongs done to the plaintiffs entitles them to an order against HUD notwithstanding the order entered against CHA in the companion case. 50 C.J.S. Judgments §760a.

But apart from this, we have already pointed out the limitations necessarily inherent in the order entered in the companion case and the reasons why an order against HUD is essential if equity is to be done. (Our br. 34-37.) HUD does not respond in any intelligible way to those views. Plaintiffs are "entitled" to the fullest relief which a court of equity can feasibly fashion, and HUD's unsupported assertion of "mootness" rings hollow against the backdrop of over 30,000 units of segregated public housing constructed in Chicago over a period of 30 years. That dismal situation will

*Which is to say that the policeman is implicated in the nefarious activities of those he pursues if, having failed to dissuade them, he approves and funds their activities.

not be remedied overnight by the most diligent adherence to the principles laid down in the Court's order in the companion case.* If HUD can feasibly contribute to a prompter remedy of that situation than would be possible without its efforts, plaintiffs are "entitled" to an order calling for such efforts and the case is not "moot." The Court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past ..." Louisiana v. United States, 380 U.S. 145, 154 (1965). The Supreme Court has also advised that,

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded ... '[F]ederal courts may use any available remedy to make good the wrong done.'" J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

See also, United States v. Board of Public Instruction of Polk County, Florida, 395 F.2d 66, 69 (5th Cir. 1968), interpreting the decree in United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. 1967):

> "There is an affirmative duty, overriding all other considerations with respect to the locating of new schools, except where inconsistent with 'proper operation of the school system as a whole,' to seek means

*If CHA continues to supply family units at its average historical rate, at the end of a full decade of operation under the Court's order in the companion case there would still be only about 7500 housing units in white neighborhoods as against about 32,500 in black.

to eradicate the vestiges of the dual system." (Emphasis in original.)

Inconsistently with its mootness argument HUD asserts, "The Plaintiffs' Objectives Will Be More Readily Achieved By The Voluntary Efforts Of The Defendant Than By The Coercion Of A Judicial Decree." (HUD br. 22.)* It should suffice for response to note that HUD's "voluntary efforts" availed nothing while plaintiffs' constitutional rights were being thwarted over a period of decades in the manner which forced this suit. But in addition we should like to remind the Court of the eloquent observations of another federal governmental agency concerning voluntary efforts. On June 2, 1969, the United States Commission on Civil Rights wrote this Court as follows:

> "In all regions of the United States, in cities of every size, where housing authorities have the most varied composition

*As to CHA's similar suggestion that the Court rely on CHA's best efforts to remedy the discrimination of the past, HUD said:

> "[W]e accept the Court's view that a generalized Order such as that proposed by CHA ... will not serve the Court's purpose ... See, e.g., Louisiana v. United States, 380 U.S. 145, 154 (1965); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1052-53 (5th Cir., 1969). Accord: Green v. County School Board of New Kent County, 391 U.S. 430, 437-8 (1968); Brown v. Board of Education, 349 U.S. 295, 299, 301 (1955)." Memorandum for the United States, filed with the Court in the companion case on June 30, 1969, pp. 2-3.

and constituencies, we have found a remarkably consistent pattern of racially distinct low-income housing projects. This pattern has been established, and perseveres today, in spite of State and local fair housing laws, Title 6 of the 1964 Civil Rights Act and its Federal administrative apparatus, and Title 8 of the 1968 Civil Rights Law. While we have been impressed with the good intentions of local housing authorities and their staffs, as well as the 'good offices' of Federal Housing officials, the fact remains that the tax monies of all the people are largely being spent, even to this day, for low-income housing that bonds into brick and mortar, a nation that is racially separate and unequal.

"Officials of the Chicago Housing Authority have suggested, in essence, that your decree rely on their best efforts once the City Council has been restrained from discriminatory control over site selection. Our national experience suggests, however, that neither local housing authorities nor the Department of Housing & Urban Development has been able to achieve non-discriminatory tenant and site selection in even those localities where the political process is racially neutral.

"The essential reason for this failure to provide equal protection is the fact that the Federal low-income housing system has a clearly established operating priority: the production of the maximum number of units at the lowest price. The result has been to institutionalize a system of second class, high density housing that has become anathema to urban neighborhoods throughout the country. ...

"You cannot rely on Federal requirements to produce this effect [insuring goals of equal protection] because they still present an array of options, alternatives, and generalized mandates that allow the system to achieve its

> priority goal - production of the maximum number of low priced units - by overriding the need for equal protection." (Emphasis added)*

Like observations have been made in less muted language by others. Thus, one observer of urban problems, who has also served as a consultant to several government agencies, including HUD, says that current urban renewal and housing programs, including public housing programs, "could be viewed as a concerted effort to maintain the ghetto."**

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*For a case study in microcosm - relating to eviction procedures - of what may be expected from HUD's "voluntary efforts," see New Sovereign Immunity, 81 Harv. L. Rev. 964-65. It is illuminating to observe that HUD views as a significant illustration of its voluntary efforts an offer to engage in an unnecessary and therefore meaningless screening of CHA site proposals to advise the Court as to their conformity with the Court's order in the companion case. (HUD br. 20-B, 29.)

**John F. Kain and Joseph J. Persky, Alternatives to the Gilded Ghetto, The Public Interest, No. 14, Winter 1969, p.79. Kain is the consultant. The authors also noted the conclusion of the Civil Rights Commission that government policies for low cost housing were "further reinforcing the trend toward racial and economic separation in metropolitan areas," and said:

> "An alternative approach would aim at drastically expanding the supply of low income housing outside the ghetto. Given the high cost of reclaiming land in central areas, subsidies equivalent to existing urban renewal expenditures for use anywhere in the metropolitan area would lead to the construction of many more units." (Id. 80.)

HUD's voluntary efforts, like CHA's best efforts, will be enormously helpful in creatively working out the implementation of a remedial decree. Absent such a decree we will be left with the continuing "good intentions" and "good offices" of federal officials who for years tried to reverse the Chicago pattern - and wound up with a dismal and unconstitutional all-Negro public housing system.

E. HUD's "Scare" Arguments in Opposition to an Order are not Supportable.

To persuade this Court that no order should be entered against it HUD makes a number of assertions which may fairly be characterized as "scare" arguments. These are arguments which appear to be designed, without authority or supporting logic, to frighten the Court into relieving HUD of the responsibility which should be imposed upon it. They do not merit extended response.

(1) The Full Faith and Credit of the United States is not Involved.

The first scare argument is that the order we seek would produce a breach of a solemn obligation of the United States and a dishonoring of its full faith and credit. HUD asserts that we are asking the Court "to terminate a solemn obligation of the United States to the performance of which

the full faith and credit of the United States is pledged," (HUD br. 15), and "to have the United States dishonor the pledge of its full faith and credit to the discharge of its contract obligations." (Id. 16.) HUD speaks of "forced default" in the financing of the low-rent housing program, and says the Court cannot acquiesce in our prayer for relief "without repudiating the full faith and credit of the United States." (Id. 17.)

This argument may charitably be described as nonsense. It is plain that we do not seek the repudiation of any commitment of the United States; indeed we affirmatively argued (our br. 16-17) that the termination of federal assistance would be counter-productive and harmful to the plaintiff class. This position HUD's brief conveniently ignores except that, after all the references to the repudiation of full faith and credit have presumably had their intended effect, HUD does acknowledge that plaintiffs "appear to have abandoned their claim to a termination of Federal financial assistance for the program in Chicago." (HUD br. 22.) But even this grudging concession is inaccurate. Apart from the fact that the relief now sought is affirmative and not prohibitory, the complaint in this case did not seek a "termination of Federal financial assistance for the program

in Chicago." It asked only that HUD be enjoined from making financial assistance available to CHA "in connection with or in support of the racially discriminatory aspects" of Chicago's public housing system. (Would HUD suggest that it has a contractual obligation to fund an unconstitutional continuation of the discriminatory aspects of CHA's housing program?) In other words, as HUD only partly acknowledges, we have not sought and do not seek to interfere in any way with HUD's solemn obligations to CHA or bondholders.

(2) An Order Against HUD Will not Affect its Cost of Money.

HUD also asserts that "any injunction based upon the administration by HUD of the federally assisted low-rent housing program has an immediate and an escalating effect upon the cost of money for the entire program." (HUD br. 16.) Exhibits are supplied which show the extent of HUD financing of low-rent housing programs throughout the country. (HUD Exhibits D and E.)

Since, as just noted, no injunction against the expenditure of HUD funds to finance CHA's existing program is sought, HUD's argument would be irrelevant even if it were valid. However, this particular scare argument did not dissuade the court in Hicks v. Weaver from entering an order

which enjoined HUD from expending funds with respect to the proposed unconstitutional portion of the Bogalusa, Louisiana program, without interfering with HUD's continued financing of the previously constructed Bogalusa projects. The effect of the order in the Hicks case, which was entered on May 31, 1969, was apparently less than disastrous because some 6 months later HUD decided to dismiss its appeal, leaving the order against it still in effect.*

(3) The Discretionary Allocation of Funds is not Involved.

HUD implies that the order we seek will usurp the prerogative of the Secretary to determine what portion of HUD's congressionally appropriated funds is to be allocated to the Chicago area, and suggests the spectre of Courts across the land hastening to enter decrees to protect allocations of funds for their communities. (HUD br. 24; see also

*Order of Dismissal entered by the Fifth Circuit Court of Appeals on December 17, 1969, Appeal No. 28267, pursuant to HUD's motion filed on December 1, 1969. HUD seeks to distinguish Hicks because the only injunctive order so far entered in that case is temporary, not permanent. The injunctive order in Hicks has already been in effect for many months and we are advised that a permanent hearing is not set even yet. But apart from this it may be doubted that the distinction between a temporary and permanent injunction would have any significance in the HUD money market if, indeed, "any injunction based upon the administration by HUD of the federally assisted low-rent housing program has an immediate and an escalating effect upon the cost of money." (HUD br. 16.)

HUD br. 21.)

Nothing we have said or implied justifies HUD in attributing to us such a motive. Just as in the companion case, where the order sought to provide a remedy within the framework of funds available to CHA and dealt solely with the utilization of those funds, so here the remedy will be framed with respect to that portion of HUD's resources which the Secretary has in his discretion determined to allocate to the Chicago, Illinois Housing Market area.*

(4) Dictation of Sites by the Federal Government is not Involved.

A like bogeyman is HUD's assertion that, "Nothing would be more catastrophic than to have the Federal Government dictate the sites for low-rent public housing in the areas covered by the more than 2,500 housing authorities presently in the program." (HUD br. 15.)** The implication is that we

*The cases cited by HUD (HUD br. 21) are inapposite. They deal with such unrelated matters as the validity of Interstate Commerce Commission rules governing the leasing of equipment by regulated carriers, American Trucking Associations v. United States, 344 U.S. 298 (1953). None presents the question of the power of a federal court to order federal administrators to remedy constitutional wrongs which they have committed. See Part III, infra.

**Why nothing would be more catastrophic does not appear. Existing site selection policies may not be the very best that could be devised. Of the quarter of a million public housing units constructed in the nation's 24 largest metropolitan areas, only 76 (and these in only one metropolitan area) have been built outside central cities. "In effect,

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seek "dictation" of sites by the federal government.

We have not asked for such an order in Chicago, let alone throughout the country. We do not seek to put this Court into the housing business as a kind of super administrator We would remind the Court that in the companion case it was not we, but the expert administrators, who proposed that each suggested package of public housing sites be submitted for Court approval. We are satisfied that the object criteria approach which was utilized in the companion case is preferable to that solution, and it is more than slightly unfair of HUD to accuse us of advocating the precise opposite of the type of approach which HUD knows us to have sponsored.

(5) The Allegedly Disastrous Consequences for the Administration of the Housing Titles of the Civil Rights Acts of 1964 and 1968 are Imaginary.

HUD implies that we are asking the Court to "wrest control" from the Secretary of his "vast civil rights responsibilities" (HUD br. 20) and says that the entry of a judgment against the Secretary would have "disastrous consequences for the administration of the housing titles of

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therefore, the public housing program has served to intensify the concentrations of the poor and the nonwhite in the central city." U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (U.S. Govt. Printing Office, 1967), Vol. 1, p.23.

the Civil Rights Acts of 1964 and 1968." (HUD br. 18.) It is suggested that the Secretary would in such an event "lose all credence as the administering and enforcing agent of the Civil Rights Act of 1968, and his efforts to enforce the 1964 Act would be ridiculed as the efforts of a law violator to compel others to obey the law." (HUD br. 21.)

The claimed disastrous effect is imaginary. This particular demon may be completely exorcised by simply underscoring part of the statutory injunction of the 1968 Civil Rights Act on HUD "to provide, within constitutional limitations, for fair housing throughout the United States." If, as in this case, HUD has provided for public housing in derogation of rather than within constitutional limitations, it has by definition mal-administered the Act. We do not understand how, under our system of laws, a judicial correction of HUD's constitutional delinquency can be a "disastrous consequence." (In any event the disaster, if such it be, has already occurred. Hicks v. Weaver, supra.)

Moreover, at least since Marbury v. Madison it has been basic to our governmental structure that the unconstitutional conduct of federal officials is "called to account" (HUD br. 20) by the federal courts. Bolling v. Sharpe and Kent v. Dulles are merely recent applications of that venerable

tradition. HUD's suggestion that Congress and not the federal courts must call it to account for its "derelictions" (Ibid.) not only flies in the face of that tradition but of reality as well. Two keen students of the administrative process in the grant-making federal agencies, having first noted that it is "exceedingly difficult" to generate congressional action to deal with matters left to administrative discretion ("It is precisely this kind of interstitial lawmaking function which lies beyond the conventional political process.") say that the problem is "to extend the rule of law to grant-making agencies ..." (New Sovereign Immunity, 968, 970. And see Part III, infra.)

HUD's argument that it did not "deliberately conspire" to produce discriminatory housing (HUD br. 20) has already been answered in the discussion of Burton. The culminating irony is HUD's assertion that the "time has not yet arrived for a Court to conclude that the defendant has been so derelict in discharging his responsibilities under the Civil Rights Act that he must be made to operate within the confines of judicial decrees." (HUD br. 21-22.) The HUD-assisted pattern of discrimination in site selection has continued for thirty years. Is it that inspiring example of administrative effectiveness that entitles HUD to super-

constitutional status?

* * * *

The sum total of HUD's scare arguments is not pretty to behold. HUD has sought to conceal the transparency of its legal arguments against its liability as a joint participant under the Burton doctrine by surrounding them with a screen of supposed horrors made up of the liberal use of such adjectives as "disastrous" and "catastrophic." We trust that the Court has better eyes than that.

III. HUD'S PLEA FOR DISCRETION SHOULD NOT DISSUADE THIS COURT FROM REMEDYING CONSTITUTIONAL WRONGS.

When one finally cuts through HUD's arguments, there is at the core but a single seed - a plea to be let alone. We can do it better. Do not label us a law breaker. Do not interfere with our discretion. Let us be.

But, at a level of dialogue not found in HUD's brief, some portion of this plea must be seriously dealt with. There is a tradition of non-interference by the judiciary with the discretion of administrative officials. What is

to be said of that?*

First, it should be noted that the tradition itself is increasingly questioned. Indeed, the necessity of subjecting the modern federal grant programs to the rule of law was precisely the theme of the recent proceedings of the National Institute on Federal Urban Grants. One of HUD's own officials set the stage:

> "During the latter part of the nineteenth century and the early decades of this century, Federal and state legislation to promote health and welfare was based principally on the Federal power over interstate commerce and the state police power, and was correspondingly directed more toward regulation than toward financial support. In recent decades, particularly the 1960's, we have witnessed increasing reliance by the Federal government, and to a lesser extent the states, on financial support through grants based upon the general welfare clauses of the Federal and state Constitutions.
>
> "The bench and bar have been slow, however, in reacting to the implications of this shift. Relatively little attention has been focused on the control of administrative discretion in grant programs ..."**

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*One thing to be said is that HUD's plea to be let alone is premature. We seek at this point only the granting of our motion for summary judgment, not the entry of a final judgment order. HUD will have ample opportunity in the working out of the provisions of that order to raise questions concerning its discretion. See Part IV, infra.

**Preface by David E. Pinsky (a Deputy Associate General Counsel of HUD) and Stephen Kurzman to Proceedings of the National Institute on Federal Urban Grants: Policies and Procedures, 22 Ad. Law Rev. 113 (1970). See also the similar observations of another participant in the

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In somewhat stronger language, two commentators have called the administration of grant programs an area of "overriding significance," and have noted that a disinclination of the courts to intervene produces "a no man's land of official anarchy, a state of affairs inherently repugnant to both the rule of man and the rule of law." New Sovereign Immunity, 81 Harv. L. Rev. 930.

Second, we are entitled to be chary about the plea for uncontrolled discretion, or, as the Supreme Court has recently termed it, "administrative absolutism." Association of Data Processing Service Organizations v. Camp, supra, 38 Law Week at 4195. Administrators tend to overstate the extent to which the articulation of criteria and standards

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Institute with long experience in the federal bureaucracy:

> "The Federal grant-in-aid is only now beginning to get from the bench and the bar the attention that is its due as an instrument of government. ... Operation of Government programs in isolation from any relevant profession is unhealthy, and without doubt the law is relevant to these programs.
>
> Lulled perhaps by the resemblance to private gifts, lawyers have been too prone to consider public grants as being beyond the reach of legal demands, whether of substance or procedure, and to forget that the award or denial of a grant is as much a governmental act as any other." Alanson W. Willcox, The Function and Nature of Grants, 22 Ad. Law Rev. 125.

will hobble them, or interfere with the achievement of their legitimate objectives.*

Third, responsive perhaps to considerations such as these, the courts have begun to step into the no man's land and apply the rule of law to the grant making agencies. In one degree or another Norwalk, Powelton, Western Addition and Hicks all illustrate this development with respect to HUD itself.**

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*A related observation is perhaps pertinent:

> "Officials dealing in the field of social welfare are not accustomed to being sued; they take it personally as a reflection on their integrity and their good intentions. And it will take a good bit of experience before these officials respond to litigation or the threat or litigation with the objectivity and professional detachment of their counterparts in the regulatory agencies which are sued with great regularity." New Sovereign Immunity, 81 Harv. L. Rev. 958.

**A recent illustration involving another department is found in Annie Bell Jay v. United States Department of Agriculture, Civil Action No. 3-2885-C, CCH Poverty Law Reporter ¶10,790 (N.D. Texas 1969). There the Court entered the following order because it found the Department had failed to carry out Congressional intent in the administration of two federal food programs entrusted to its administrative discretion (by declining to implement such programs where county officials objected):

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Norwalk explicitly observed that the reasons for judicial review are just as applicable to the actions of the grant making agencies as they are to the regulatory agencies:

> "The possibility that an administrative agency, charged with enforcing a requirement established by Congress in the public interest, will not adequately perform the task is equally great whether enforcement is through contract or through direct regulation. Accordingly, the reasons for allowing those who have a direct, personal interest in furthering the Congressional purpose to seek judicial review of administrative action are as compelling in one situation as in the other." 393 F.2d at 934.

At the National Institute on Federal Urban Grants

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> "1. The United States Department of Agriculture, together with the other Federal defendants herein, their successors, agents and employees, shall immediately put into effect, in the shortest time feasible and at Federal expense, the Commodity Distribution Program in every Texas area that has no Food Stamp Program. ...
>
> "2. ... In addition, starting on January 15, 1970, the Federal defendants shall monthly report to the Court about the progress that is being made in establishing a Food Stamp or Commodity Distribution Program in the Texas counties presently without Federal food assistance.
>
> "3. So long as the State of Texas chooses to participate in the Family Food Assistance Programs, the State defendants must include every Texas area in either the Food Stamp or Commodity Distribution Program." ¶10,790, at p.11,629.

It is notable that this relief was given in a case involving only statutory, not constitutional, violations.

Judge Harold Leventhal of the Court of Appeals for the District of Columbia Circuit addressed himself to the plea of the administrators to be let alone. He said:

> "The government administrators have said from the very beginning that you really cannot bring us in and ask us what we are doing, because we are the government and the government is immune from suit, one way or the other.
>
> "There are many doctrines, but they have that feature in common. And the courts, usually citing, or perhaps citing precedents that go back as far as Coke, and even Bracton, have said that the King is not above the law. ...
>
> "Now, there have been areas which were put forward as being without the proper cognizance of the judiciary, and I think we have seen, say, over the last 30 years, at least, maybe more than that, that these bastions of immunity from judicial analysis have fallen. ...
>
> "Now, I would say this is even true, by the way, today in such areas as were recently thought to be completely immune from court analysis, such as prison discipline - so far, only on constitutional grounds, e.g., the Black Muslims say that they are being discriminated against because of their religion. But nevertheless, the courts on that basis are even getting into considering questions of prison management." Panel Discussion, 22 Ad. Law Rev. 235-36.

Judge Leventhal summed up his views succinctly:

> "... [T]he law of judicial review has progressed to a point where it will not be deterred by blatant hanky-panky." Id. 255.

HUD's second-in-command, Under Secretary Richard C. Van Dusen, made some candid observations. "[W]e must recognize the inadequacy of the system to deal with the problems." Id. 174. He said that the "web of federal programs has grown so tangled that localities often cannot figure out which way to turn," and that he had been "startled to discover how little we do in the way of performance evaluation." Id. 175. He concluded that the opportunity with which federal officials are presented is not to arrest what he acknowledged to be the erosion of the doctrine of sovereign immunity, but to "redistribute a sovereignty which has become overcentralized and unresponsive." Id. 180. Mr. Van Dusen may not have meant to include the courts in such a redistribution (although the courts, not the administrators, have done the eroding of which he speaks approvingly), but it is submitted that, until an effective alternative is suggested, we will either have an overcentralized and unresponsive federal bureaucracy, or we will have judicial review.*

Finally, whatever one's views of these developments in the law of judicial review, we deal in this case with a very

*"Judicial review obtains not only to advance what have traditionally been viewed as 'legal rights,' but also to vindicate the public interest ..." Norwalk, supra, 395 F.2d at 934.

precise and circumscribed situation with respect to which judicial supervision of administrative action, even if viewed distastefully, is mandated by basic principles of equity. Here we deal not with the discretionary administration of a benign federal program but with the mandatory redress of constitutional wrongs. We may put to one side the question of the proper scope to be allowed federal officials in the ongoing administration of a federal program absent constitutional wrongdoing. Surely it is right and proper for the courts to lay down some guidelines and to insist on some "performance evaluation" when it has been established that the administrators have committed constitutional wrongs which they are obligated to remedy. Surely the administrator has not an equal claim to discretion in each situation. "[C]ourts do not credit administrative agencies with any special expertise where constitutional rights are involved." New Sovereign Immunity, 81 Harv. L. Rev. 942.

Moreover, the vindication and enforcement of federal constitutional rights is one of the central functions of the federal judiciary.

> "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained ... [W]here wrongs to individuals

> are done by violation of specific guarantees, it is abdication for courts to close their doors." Flast v. Cohen, 392 U.S. at 111 (concurring opinion).

It would be an ironic inversion of priorities if the demand of the administrator for unchecked discretion were to render the judiciary powerless with respect to so central a judicial function as remedying constitutional wrongs.

The courts themselves have not adopted so niggardly a view of their powers, even when the political branches of government are themselves directly involved, provided there has been a constitutional wrong which needs righting. The legislative reapportionment cases are "a classic enunciation of an affirmative duty imposed by the judiciary on the political branches of government," where imposition of such a duty has been deemed necessary to remedy constitutional wrongs.* How much clearer it is that the courts will act when the constitutional wrongdoers are administrators who have abused the discretion with which the legislature entrusted them.

We seek an exercise of the traditional power of an equity court to fashion a decree to fit a particular situation to the end of granting complete relief - here, "to render a

*Arthur Selwyn Miller, Toward a Concept of Constitutional Duty, 1968 Supreme Court Review 199, 218.

decree which will so far as possible eliminate the discriminatory effects of the past." Louisiana v. United States, 380 U.S. 145, 154 (1965). In this case such discriminatory effects have been brought about by the unconstitutional exercise of discretionary powers by government administrators. Those same administrators are now saying to this Court of equity that it may not direct the employment of those powers for the specific purpose and to the limited end of eliminating those discriminatory effects because to do so would hamper their discretion. We trust that the value system which produces that judgment about what is important in our society is not shared by this Court.

IV. IT IS PREMATURE TO DEAL NOW WITH THE PRECISE FORM OF ULTIMATE RELIEF.

HUD accuses us of being "coy" in suggesting that the Court invite HUD to propose the form of an order. (HUD br. 23.)

There is nothing coy about that suggestion. In a wide variety of cases, of which the school desegregation cases are only one example,* courts, having found liability on the part

*"The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." Green v. County School Bd. of New Kent Co., Va., 391 U.S. 430, 439 (1968).

of the defendant, have requested the defendant to propose the form of remedial order. This is precisely the procedure which the Court followed in the companion case. See Gautreaux v. CHA, 296 F.Supp. 907, 914.

We would expect to play a constructive role in the formulation of such an order once HUD's proposal had been submitted to the Court (or, indeed, to attempt to work out an agreed order with HUD). Several of the amici, bearing impressive housing credentials, have offered assistance. Again, the companion case is instructive. The process of decree preparation there involved a developing interchange of ideas and suggestions participated in by the parties, the Court and outside experts, based upon initial proposals of the parties.*

*We must comment, however, upon HUD's statement that a suggestion made by one of the amici is misguided and would "paralyze" certain housing programs. (HUD br. 24.) The assertion of paralysis appears nakedly without any supporting argument; presumably the Court is simply to accept HUD's word. The suggestion is said to be misguided because the programs referred to - moderate income programs - are said to serve only persons above the maximum income limits for admission to low-rent housing and not the income group of which plaintiffs are a part. (HUD br. 24.) However, as the brief of the amicus noted, these moderate income programs are in part made available to the income group of which the plaintiffs are a part. HUD's own Memorandum to the Court in the companion case said, "Projects developed under this FHA moderate-income housing program will be able to house families in the public housing income range if they are operated to utilize the maximum Federal subsidy available." Memorandum for the United States, supra, p.8.

CONCLUSION

The HUD motion to dismiss should be denied, plaintiffs motion for summary judgment should be granted and the Court should direct HUD to submit a proposed remedial order which might then serve as the basis for a constructive approach to the problems which the Court's opinion in the companion case so clearly articulated.

Respectfully submitted,

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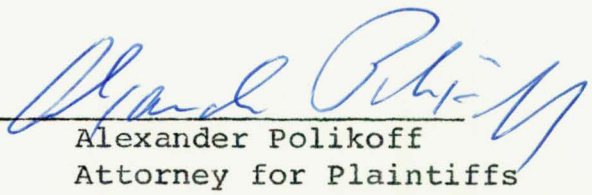
By 

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March 13, 1970