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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellants,

v.

GEORGE W. ROMNEY, et al.,

Defendants-Appellees.

On Appeal from the Judgment of the United States
District Court for the Northern District of Illinois

CERTIFICATE OF SERVICE

The undersigned, one of the Attorneys for Plaintiffs-Appellants in the above matter, hereby certifies that he served a copy of Appellants' brief and appendix in the above matter by delivering two copies thereof to William J. Bauer, United States Attorney, 219 S. Dearborn Street, Chicago, Illinois 60604, and by mailing a copy thereof to Alan S. Rosenthal, Appellate Section, Civil Division, Room 3706, U.S. Department of Justice, Washington, D.C. 20530, all this 8th day of March, 1971.

Alexander Polikoff

Alexander Polikoff
109 N. Dearborn Street
Chicago, Illinois 60602
641-5570

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BRIEF FOR THE APPELLANTS

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred in dismissing the action under the following circumstances:

(1) The Defendant, George Romney, Secretary of the Department of Housing and Urban Development, knew that the Chicago Housing Authority, a local public housing authority,

was carrying on a de jure racially segregated public housing system;

(2) The Defendant nonetheless continued for many years to give formal agency approval to the racially discriminatory actions of the Chicago Housing Authority and to provide it with funds; and

(3) By reason of such approvals and funds the segregationist aspects of the Chicago public housing system were continued and expanded.

STATEMENT OF THE CASE

This action against George Romney, Secretary of the Department of Housing and Urban Development ("HUD"), was brought as a companion case to a separate action against the Chicago Housing Authority ("CHA"), a local public housing authority. Both actions charged that a deliberately racially segregated public housing system was being carried on in Chicago and sought equitable relief.* On the District Court's own motion this action was stayed pending disposition of the companion CHA case. The staying order said "the allegations of the Complaint here are virtually identical with those presented by the Complaint in the companion case" and "the determination of those issues may render this action moot or greatly facilitate discovery and trial of the action." (A-32.)

*For a succinct statement of "the scheme under which public housing is provided in the United States generally," see Knox Hill Tenant Council v. Washington, ___ F.2d ___ (D.C. Cir. 1971), slip opinion pp.2-5.

On February 10, 1969 plaintiffs' motion for summary judgment against CHA was granted. The accompanying opinion, 296 F.Supp. 907, found that CHA was deliberately carrying on a racially segregated public housing system by, among other things, building public housing projects exclusively in black areas of the City. The Court found that 99-1/2% of CHA's more than 30,000 family housing units were located in areas which were or soon would be substantially all Negro. 296 F.Supp. at 910. It said that,

> "It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas came about without the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas." 296 F.Supp. at 910.

And it concluded that CHA's site-selection practices and procedures reflected "a deliberate policy to separate the races." 296 F.Supp. at 914. Relief against CHA was granted by a judgment order entered on July 1, 1969. 304 F.Supp. 736.

Cross motions for summary judgment were then filed in this action.* The four count complaint asserted that HUD's approvals and funding of CHA's discriminatory actions constituted a violation by HUD of the Fifth Amendment's prohibition against racial discrimination (Counts I and III) and of Title VI of

*HUD's motion to dismiss was supported by affidavits and was properly treated as a motion for summary judgment under Federal Rule 12(b).

the 1964 Civil Rights Act, 42 USCA §2000d (Counts II and IV). The affidavits and briefs filed in connection with the motions for summary judgment established two key facts:

1. HUD was fully aware of CHA's discriminatory site location practices and indeed had sought unsuccessfully over a period of time to persuade CHA to abandon them.

2. Notwithstanding such knowledge, HUD continued to approve CHA's discriminatorily chosen sites, to participate in the administration of the segregated public housing system in the myriad ways such participation is provided for in the National Housing Act, and to provide CHA with the money necessary to the carrying on and enlargement of the Chicago public housing system.

HUD's awareness of CHA's discriminatory site location practices was evidenced in a number of ways: for example, by its rejection of a complaint that approval of CHA proposed sites would perpetuate a pattern of racial segregation on the ground that the Chicago political situation gave CHA no other choice (Rec. Item 33, Ex. B, Letter dated October 14, 1965 of Public Housing Administration), by its efforts over many years "to persuade the Chicago Housing Authority to locate low rent housing projects in white neighborhoods" (Rec. Item 52, Ex. A, ¶3, Affidavit of William E. Bergeron), by its efforts to "block" CHA's "discriminatory actions" (Rec. Item 52, HUD's Brief, p.9), and by its decision to approve segregated housing rather than to risk no housing at all. (Id. pp.13-13A.) HUD said it was faced with the "tough dilemma" of accepting CHA's sites, knowing "of the City's

intention to resist desegregation," or, by rejecting them, depriving potential public housing tenants of improved shelter. (Ibid.)

HUD's continued participation in and approval and funding of CHA's discriminatory site selection practices is equally clear and uncontradicted. Although HUD did not make the initial selection of sites, HUD set the site selection standards and criteria with which CHA was required to comply, and had and exercised the power to approve or disapprove every site selected by CHA. Thus HUD's trial court briefs state:

> "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." (Rec. Item 20, HUD's Memorandum, p.5.)*

> "... HUD also requires Housing Authorities to execute and record Declarations of Trust in favor of HUD and its Note or Bondholders on all project property, both real and personal, and on all income, rents, revenues, or other personalty held or used or derived from the projects." (Id. pp.6-7.)

> "Upon failure to live up to the requirements of the Federal law or certain provisions of the Annual Contributions Contract ... the Federal Government reserves the right to demand title or possession of the projects." (Id. p.6.)

*A 1966 affidavit filed by HUD discloses that since 1950 HUD had spent nearly 350 million dollars in financing CHA projects and that in 1965 HUD had paid 96.67% of the debt service on CHA projects. (Rec. Item 20, Affidavit of Marie C. McGuire, dated November 9, 1966, ¶¶ 10 and 12.)

"HUD, under the Annual Contributions Contract, requires certain approvals by it of some of the actions taken by the Housing Authorities. One of these approvals relates to the Chicago Housing Authority's action which is the subject matter of this suit, i.e., site selection." (Id. p.7.)

"Section 103, together with section 102, of Part Two of the Annual Contributions Contract, also recognizes the right of HUD to approve or to disapprove a site selected by the Housing Authority." (Ibid.)

HUD's Low-Rent Housing Manual establishes detailed site selection standards and criteria. (Rec. Item 29, Attachment to HUD's Second Supplemental Memorandum.)

"HUD has approved the sites selected by the Chicago Housing Authority for the 1965 projects, referred to in the Complaint in this suit as 'The Five Proposed Projects.' With respect to the sites for the 1966 projects, referred to in the Complaint as the 'Twelve Proposed Projects,' HUD is negotiating with the Chicago Housing Authority the question of approval of these sites." (Rec. Item 20, HUD's Memorandum, p.7.)

"[T]he following sites included in the 1966 projects have been approved: [listing omitted] Determination as to the remaining sites involved in the 1966 projects has not been made, and no approval has been given by HUD as to those remaining sites which are being held in abeyance." (Rec. Item 24, HUD's Supplemental Memorandum, p.2.)

HUD's "Annual Contributions Contract" with CHA (Part of Rec. Item 20) also shows the detailed role HUD plays in CHA's operations, including site selection. Virtually every clause of this contract conditions CHA activity on approval by HUD.*

*Before such a contract is entered into with respect to any project HUD requires that it tentatively approve a proposed site and determine that it meets HUD's site selection criteria. (Rec. Item 29, Attachment to HUD's Second Supplemental Memorandum, p.8.)

Part One of the Contract is 22 single-spaced typewritten pages and deals with a variety of topics. There are, in addition, numerous amendments. Part Two is a 56 page printed booklet (plus a 15 page index) containing ninety-seven different sections, each dealing with a separate subject. A random sample of a dozen of the section headings follows:

Sec.	
101	Efficiency and Economy in Development
103	Acquisition of Project Sites
106	Architectural and Engineering Services
121	Fees for PHA Representatives at Project Sites
206	Eligibility for Admission
208	Tenant Selection
213	Repair, Maintenance, and Replacement
306	Procurement
307	Personnel
309	Books of Account and Records
404	Development Cost Budgets
509	Rights of PHA to Terminate Contract

These contractual provisions are supplemented by voluminous regulations which HUD issues from time to time. There are, e.g., eight pages of regulations on Site Selection and Tentative Site Approval. (Rec. Item 29, Attachment to HUD's Second Supplemental Memorandum.)

The cross motions for summary judgment were disposed of by orders entered on September 1 and October 21, 1970, which denied plaintiffs' motion, granted HUD's motion and dismissed the action. (A-55, 56.) The District Court's memorandum opinion, which accompanied the September 1 order, determined that plaintiffs had standing to sue (A-37) and that the jurisdictional amount required under 28 U.S.C. §1331 was present. (A-38-39.) The Court said however that Count I failed "to state a claim over which this court has power to exercise jurisdiction or to grant relief" because Count I was rested solely on the Fifth Amendment and "the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit." (A-43.) Count II was said to have failed to state a claim upon which relief could be granted. (A-49.) Finally, both Counts were said to be additionally defective because they foundered on the rock of sovereign immunity. (A-50.) (Counts III and IV, identical to Counts I and II, respectively, except that they did not allege purposeful discrimination, were dismissed as well for their failure to make that allegation. A-36-37.)

The notice of appeal was filed on October 29, 1970. (A-57.)

SUMMARY OF ARGUMENT

The complaint alleges, and the affidavits and briefs filed below show without dispute: (1) the public housing system in Chicago was de jure racially segregated; (2) HUD knew it; (3) HUD tried and failed to persuade CHA to end its segregation practices; and (4) possessing such knowledge and notwithstanding such failure HUD continued, administratively and financially, to approve and participate in the carrying on and expansion of the segregated Chicago public housing system.

These undisputed facts show a violation of the Fifth Amendment prohibition against racial discrimination by a federal agency over which the District Court has jurisdiction. They also show a violation of the prohibition of Title VI of the Civil Rights Act of 1964 against racial discrimination in any program or activity receiving federal financial assistance. Neither action is barred by the doctrine of sovereign immunity.

ARGUMENT

We will deal in order with the three grounds for the District Court's decision to dismiss the action: dismissal of Count I for lack of jurisdiction, of Count II for failure to state a claim upon which relief could be granted, and of both

counts because of the doctrine of sovereign immunity.*

I.

COUNT I STATES A CLAIM OVER WHICH THE DISTRICT COURT HAS JURISDICTION UNDER 28 U.S.C. §1331.

The District Court apparently dismissed Count I of the Complaint because it viewed that Count as alleging only a violation of the Fifth Amendment and not of "... unauthorized or undelegated exercises of power under existent congressional statutes." (A-42.) Here is the Court's specific Count I holding:

*The District Court also dismissed Counts III and IV because those Counts, otherwise identical to Counts I and II, failed to allege "intentional and deliberate" discrimination. (A-36.) This was error. See, e.g., Green v. Kennedy, 309 F.Supp. 1127 (D.C.D.C. 1971), where the court said, "We have taken into account that what is involved in the case before us is the Federal Government, and not the States, and that there is no allegation or evidence that it is the purpose of the Federal statute or regulations to foster segregated schools. These considerations do not undercut the plaintiffs' claims ... [T]he lack of segregative purpose on the part of the Government does not avoid the constitutional issue if the Government action materially supports a program of school segregation." 309 F.Supp. at 1136; appeal dismissed, 398 U.S. 956 (1970). See also, Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291, 295 (9th Cir. 1970).

However, since it is now established that the discrimination in this case was intentional and deliberate, albeit reluctant (as to CHA see 296 F.Supp. at 914; as to HUD see, e.g., Rec. Item 52, HUD's Brief, pp.13-13A), we content ourselves in this brief with this mention of the separate error in dismissing Counts III and IV.

> "The court holds that the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit. Therefore, Count I fails to state a claim over which this court has power to exercise jurisdiction or to grant relief and the same is dismissed." (A-43.)

This holding is erroneous for two reasons: (A) The Constitution and 28 U.S.C. §1331 do authorize actions based solely on violations of the Constitution; and (B) In any event an unauthorized (i.e., unconstitutional) exercise of power under the National Housing Act is necessarily involved in the allegations of Count I.

A. The District Court has Jurisdiction over a Claim Based Solely on a Violation of the Fifth Amendment.

The District Court's holding as to Count I is refuted by the unambiguous language of the Constitution itself, the federal judiciary acts and decisions of the Supreme Court. The Constitution creates three independent sources of federal jurisdiction: constitution, laws, and treaties. It says that the power of the federal judiciary extends to all cases "arising under this Constitution, the laws of the United States and treaties ..." U.S. Const. Art. III, §2 (emphasis supplied). That power is vested in a Supreme Court and congressionally established inferior courts. U.S. Const. Art. III, §1.

Since at least 1801 the judiciary acts have vested jurisdiction in the federal trial courts in the same tripartite terms. The Judiciary Act of 1801 provided that,

> "[T]he said circuit courts respectively shall have cognizance ... of all cases in law or equity arising under the constitution and laws of the United States and treaties made, or which shall be made, under their authority ..." 2 Stat. 92 (1801) (emphasis added).

This pattern has been carried forward in every subsequent Judiciary Act: Judiciary Act of 1875, 18 Stat. 470; Judiciary Act of 1888, 24 Stat. 552; Judiciary Act of 1911, 36 Stat. 1091; Judiciary Act of 1948, 62 Stat. 930; and the current Judiciary Act of 1958, 72 Stat. 415, 28 U.S.C. §1331. The current provision is:

> "The District courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331(a).

There have been only minor language changes in over a century and a half, one of which was to substitute "or" for "and" between "laws" and "treaties." This change made it even plainer that "arises under the Constitution" is a separate and independent source of jurisdiction from "laws" and "treaties."

At least as early as 1822 the United States Supreme Court recognized that federal jurisdiction could be rested on

the Constitution alone (as distinct from legislation passed under the authority of the Constitution). In Cohens v. Virginia, 19 U.S. (6 Wheat) 89, 100, (1822), Chief Justice Marshall said:

> "A case in law or equity ... may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. ...
>
> The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed" (emphasis supplied).

In Bell v. Hood, 327 U.S. 678 (1946), an action was dismissed by the district court because federal jurisdiction was rested solely on the Fourth and Fifth Amendments. The action had been brought under the Judiciary Act of 1911, 36 Stat. 1091, which gave original jurisdiction to district courts over "all suits of a civil nature, ... where the matter in controversy ... arises under the Constitution or laws of the United States or treaties ..." Affirming the trial court the Court of Appeals said: "It will be noticed that Congress has enacted no law under the authority of the constitutional provision relied on by plaintiffs as the jurisdictional basis ..." 150 F.2d 96, 100 (9th Cir. 1945). Reversing, the Supreme

Court said:

> "... [W]here the complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted [immateriality or frivolousness of the Constitutional claim], must entertain the case." 327 U.S. at 681-82 (emphasis supplied).

As the District Court here recognized (A-40), Bolling v. Sharpe, 347 U.S. 497 (1953), is a more recent illustration of an exercise of jurisdiction based solely on the Fifth Amendment. The District Court distinguished Bolling because of "the unique status of the District of Columbia." (A-41.) Why that fact should make a difference under the Fifth Amendment or under §1331 was not explained. Certainly there is nothing in the Bolling opinion to support the view that the Court had jurisdiction to end racial discrimination by federal officials only because their authority was confined to the District of Columbia. (Although a jurisdictional question was not raised in Bolling as it was in Bell, lack of subject matter jurisdiction is of course fatal to a court's consideration of any case and may be raised by the court sua sponte.)

Cohens, Bell and Bolling, as well as the plain language of 28 U.S.C. §1331, support jurisdiction over Count I. We have found no authorities to support the District Court's contrary view.

B. The District Court Clearly has Jurisdiction Over a Fifth Amendment Claim Based on Defendant's Unconstitutional Performance of Statutory Duties.

Even under the trial court's jurisdictional view, which requires an allegation of "unauthorized or undelegated exercises of power under existent Congressional statutes" (A-42) as a basis for federal court jurisdiction, dismissal of Count I was erroneous. Although plaintiffs are asserting Fifth Amendment rights, the nature of their complaint against the defendant is that he has misapplied or exceeded his statutory authority, 42 U.S.C. §1401 et seq., in violation of those rights. So in Bolling the Court could have focused on the statutory authority under which the defendant school board members were (unconstitutionally) acting. Federal officials almost always purport to act pursuant to statutory authority. When in such a case they act unconstitutionally, "unauthorized or undelegated exercises of power under existent Congressional statutes" are involved. Congress rarely authorizes or delegates the power to act unconstitutionally, and when it does the constitutionality of the statute (not the case here or in Bolling) is the issue.

It is therefore clear that the District Court's dismissal of Count I was erroneous both because of the plain language of the Constitution and of 28 U.S.C. §1331, and because the District Court's own "premise for jurisdiction" (A-42) was in any event satisfied.

II.

COUNT II STATES A CLAIM OF VIOLATION OF TITLE 42 U.S.C. §2000d UPON WHICH RELIEF CAN BE GRANTED.

Count II of the Complaint alleges a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and rests jurisdiction on 28 U.S.C. §§1331 and 1343(4). The District Court said that the "only issue" as to Count II was,

> "did the continued approval and funding of a discriminatory housing program make the defendant a joint participant in the violations which CHA has been found to have committed;" (A-44.)

The Court answered that it did not, and therefore dismissed Count II. Both the Court's characterization of the issue and its holding are erroneous.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Since CHA's public housing system was a program "receiving Federal financial assistance," and in that program CHA discriminated against the plaintiffs on the basis of race, there can be no doubt that Section 2000d was violated. There is no dispute that HUD, knowing of the discrimination, nonetheless continued to approve CHA's racially discriminatory activities

and fund its program. In nearly identical factual circumstances a complaint against HUD was sustained in Hicks v. Weaver, 302 F.Supp. 619 (E.D. La. 1969); appeal dismissed, December 17, 1969, on motion of HUD. In Hicks the court said:

> "Likewise, through its Secretary Weaver, HUD has violated the plaintiffs' rights under 42 U.S.C. 2000d. As noted above, HUD was not only aware of the situation in Bogalusa but it effectively directed and controlled each and every step in the program. Nothing could be done without its approval. HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. §2000d." 302 F.Supp. at 623 (emphasis supplied).

Hicks is indistinguishable in principle from this case.

A recent decision of the Third Circuit Court of Appeals confirms the view that HUD's approval and funding of CHA's discriminatory program violated Section 2000d. In Shannon v. HUD, ___ F.2d ___ (3rd Cir. 1970), HUD had approved a rent supplement program of a local public agency, the Philadelphis Redevelopment Authority, to be utilized in a so-called "221(d)(3)" mortgage insurance project. The Court said that, from a social standpoint, the project was the functional equivalent of public housing:

> "[F]rom a social standpoint a 221(d)(3) project with 100 percent rent supplement occupancy is the functional equivalent of a low rent public housing project." Slip opinion p.17.

The Court also said that no site selection distinctions between low rent public housing and 221(d)(3) rent supplement housing had been developed, and that the latter program "would seem to have the same potential for perpetuating racial segregation as the low rent public housing program has had. See Gautreaux v. Chicago Housing Authority, 296 F.Supp. 907 (N.D. Ill. 1969); Hicks v. Weaver, supra." Slip opinion p.18.

In Shannon, as here, it was alleged that the local agency selected and HUD approved housing sites which "will have the effect of increasing the already high concentration of low income black residents [in the areas chosen]." Slip opinion p.2. There, as in Count II here, jurisdiction was laid under 28 U.S.C.A. §§1331 and 1343. Ibid. There, as here, HUD's site selection approval and funding were claimed to violate Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. §2000d. Id. at p.10.

The Court of Appeals so held, and said that under the Civil Rights Act of 1964 the Secretary of HUD was directed "to look at the effects of local planning action and to prevent discrimination in housing resulting from such action." Id. at p.11. It added:

> "Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in

> the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." Slip opinion p.20.

In Shannon HUD approved the program of the Philadelphia Redevelopment Authority without considering the factor of racial concentration. Slip opinion pp. 18,20. Here, knowing the racial concentration effects of past and proposed CHA programs, HUD deliberately approved and funded a program which not only increased racial concentration but continued and expanded a housing system which was de jure segregated. If mere failure to consider racial concentration in approving local agency site selection violates §2000d, as Shannon holds, there can be no doubt that HUD's conduct here does so.

The District Court's contrary conclusion in this case was that, "The court believes that plaintiffs have misconceived the remedial claim which should be taken and Count II of the amended complaint is dismissed for failure to state a claim for which relief can be granted." (A-49.) The reason for this conclusion is somewhat unclear; apparently it is based on the absence of an agency relationship between CHA and HUD. CHA was not HUD's agent, the District Court said, and its acts were not HUD's acts. "Funding and approval [by HUD] have not so reached into the operations of CHA as to make its functions federal governmental functions." (A-48.) The Court also noted

that CHA and HUD are "separate governmental entities." (Ibid.)

The District Court's conclusion is contrary to Shannon and Hicks. It is also contrary to the obvious intent of Congress which no doubt intended Title VI of the Civil Rights Act to apply to federally financed or assisted programs administered by or through state and local governmental bodies. For example, Senator Humphrey's answer to a question about Title VI showed clearly that the title was intended to apply where discrimination was carried on by a State or other local political subdivision:

> "Some Senators have expressed the fear that in its original form title VI would authorize cutting off of all Federal funds going to a State for a particular program even though only one part of the State were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all Federal assistance to a State if it were discriminating in any of the federally assisted programs in that State.
>
> "... [T]hese interpretations of title VI are inaccurate ... [A]ny termination of Federal assistance will be restricted to the particular political subdivision which is violating non-discrimination regulations established under title VI." (Congressional Record, June 4, 1964, pp. 12288-89, [emphasis added].)

The courts have so held. See, e.g., Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir., 1967).

Another aspect of the District Court's focus on the asserted absence of an agency relationship between HUD and CHA is its discussion of Burton v. Wilmington Parking Authority,

365 U.S. 715 (1961). In Burton a state agency leasing space to a private party was held jointly responsible with the private lessee for racial discrimination because the agency's relationship to the lessee made the agency a "joint participant" in the discrimination. The District Court here sought to distinguish Burton on the ground that two sovereignties are involved in this case whereas in Burton the parties were a state agency and a private lessee. (A-48.)

Count II does not allege a respondeat superior theory of liability.* Rather, it asserts that HUD's own conduct constitutes

*Even if there were some requirement that the discriminatory conduct of CHA be somehow attributable to HUD, whether on a "joint participation" theory or otherwise, the District Court's attempt to distinguish this case from Burton for the two sovereignties reason would be inappropriate. On constitutional grounds Simkins v. Moses Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), held the "separate but equal" provisions of the Hill-Burton Act violative of both the Fifth and Fourteenth Amendment. The fact that federal assistance was administered in some respects through state agencies provided no ground for avoiding the prohibitions of the Fifth Amendment. The Court said that the "language and holding [of Burton] is not to be limited to cases involving leases of public property." 323 F.2d at 968-69.

Nor would it be particularly novel, as the District Court apparently thought, to attribute the acts of a local agency to a federal agency. In Schetter v. Housing Authority of the City of Erie, 132 F.Supp. 149 (W.D. Pa. 1955), the court held that the United States could be liable under the Federal Tort Claims Act for the negligence of the Erie Housing Authority because of the extensive control of the Public Housing Administration over Erie. The court said:

> "I am compelled to find that Erie was an instrumentality of the United States, and that the United States is a proper defendant to the instant proceedings." 132 F.Supp. at 152.

a violation of §2000d. That section is violated, as Hicks v. Weaver held, when HUD knowingly participates, through supervision and funding, in a discriminatory program. HUD is not to be held liable for CHA's discrimination, as a principal may be held liable for the acts of his agent, by a mere showing of the relationship and without any participation in the agent's acts. HUD is liable for its own acts of knowing supervision and funding of a discriminatory program. Thus, the District Court's statement, "Funding and approval have not so reached into the operations of CHA as to make its functions federal government functions" (A-48), misses the point. HUD's funding, and HUD's approval of CHA's discriminatory program, with knowledge that the program was discriminatory, constitute acts of HUD which violate §2000d.

In Green v. Kennedy, 309 F.Supp 1127 (D.C.D.C. 1970), a preliminary injunction was granted which barred the Secretary of the Treasury and the Commissioner of Internal Revenue from granting tax exempt status to private schools in Mississippi unless they first determined that the schools were not racially segregated. The complaint alleged that the tax benefits violated §2000d. By contrast with the view of the District Court in this case concerning "agency", the Green defendants conceded that tax benefits should be denied if "state action" were involved in the operation of segregated schools.

The only issue was whether tax exemption could constitutionally be extended to segregated private schools not otherwise unconstitutional because of state involvement. The Court, holding that it could not be, said:

> "The inadequacy, from a constitutional point of view, with the statute as applied by the Internal Revenue Service, lies in the assumption by the Service that the ultimate constitutional issue is whether constitutional guarantees have been violated because the establishment and maintenance of segregated private schools has been aided by state involvement and support, independent of any support from federal tax benefits ..." 309 F.Supp. at 1137.

How ironic that the issue which the Service conceded is the one that stopped the District Court here. Clearly, as the Service conceded, if §2000d is violated by aiding private discrimination, (the holding of Green v. Kennedy), a fortiori it is violated by aiding state, (e.g., CHA), discrimination. And if such indirect aid as granting a tax benefit constitutes impermissible involvement in a discriminatory arrangement, the extensive and detailed involvement of HUD in CHA's operations "qualifies" as impermissible.

* * *

The facts showing HUD's involvement in the illegal discrimination of a local housing authority are at least as compelling as in Hicks, supra, where HUD chose not to appeal. Congress unquestionably intended the prohibitions of §2000d

to apply to discrimination by state and local agencies. Hicks, Shannon and Green, as well as the clear intent of §2000d, all show that the opinion below erred in its discussion of §2000d, and that HUD's conduct in this case was a violation of that Section. The dismissal of Count II of the complaint was therefore erroneous.

III.

THE ACTION IS NOT BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

Lastly, the District Court said that the action was barred by the doctrine of sovereign immunity. The Court quoted Dugan v. Rank, 372 U.S. 609 (1963), to the effect that a suit is against the sovereign if the effect of the judgment would be to restrain the government from acting or to compel it to act. (A-51.) It stated that a decree in favor of plaintiffs here would be "operative against the defendant in his official capacity" (A-52), and concluded,

> "This court does not have jurisdiction to direct and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention." (A-52-53.)

It is of course inappropriate to dismiss an action because of speculation as to the relief which might be granted. Moreover, declaratory as well as injunctive relief was sought.

See, Powell v. McCormack, 395 U.S. 486, 499 (1969). But accepting arguendo the trial court's statement that "the relief sought would not be effected by merely ordering the cessation of conduct" (A-52), the sovereign immunity doctrine does not apply in this case for two separate reasons, both of which require reversal:

(A) The government has by statute consented to be sued.

(B) This case falls within an acknowledged exception to the sovereign immunity doctrine.

A. The Government has by Statute Consented to be Sued.

Jurisdiction over this action is securely rested upon the "sovereign's" consent. That consent is found in 42 U.S.C. §1404(a), which provides:

> "The United States Housing Authority may sue and be sued only with respect to its functions under this chapter [Chapter 8 (Low-Rent Housing), Title 42] and sections 1501=1505 of this title."

This action is based upon the claim that, in the administration of the government's low-rent housing program, the defendant has exercised his powers in a manner which violates plaintiffs' constitutional rights. The defendant has acknowledged that his actions and authority are derived from Chapter 8 of Title 42. (Rec. Item 20, HUD's Memorandum, p.2.) Chapter 8 contains the express Declaration of Policy regarding low-rent housing (§1401), defines terms such as eligibility

(§1402), establishes the United States Housing Authority (§1403); empowers the Secretary of HUD to exercise the functions of the Authority (Id.), and generally, throughout its numerous other provisions, sets out the duties and guidelines for the Housing Authority. Within the provisions of Chapter 8 are the powers of funding and approval of sites for low-rent public housing, and it is the exercise of those powers in particular which form the basis of this action. Section 1404(a) therefore constitutes a consent to an action such as this and a waiver of whatever protective mantle sovereign immunity might have otherwise afforded.

In FHA v. Burr, 309 U.S. 242, 245 (1940), the Supreme Court, referring to a similar provision in the National Housing Act of 1934, stated:

> "... waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit."

In Sigona v. Slusser, 124 F.Supp. 327, 329 (D.Conn. 1954), the Court cited Burr and acknowledged that "under Section 1404(a) of Title 42 U.S.C.A., the Public Housing Administration may sue and be sued with respect to its function under Chapter 8 which includes the development and administration of a low rent housing project." See also Seven Oaks v. FHA, 171 F.2d 947, 948 (4th Cir. 1948).

Consent to suit is also found in Section 10 of the

Administrative Procedure Act, 5 U.S.C. §702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

It is generally held that this section "implies a comprehensive waiver of sovereign immunity in all actions otherwise sustainable against federal officers or agencies." Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, 284 F.Supp. 809, 834 (E.D. Pa. 1968).

It is true that some courts have on occasion denied that Section 10 of the A.P.A. constitutes a waiver of immunity as to those agency actions falling within its scope.* However, although the Supreme Court has not specifically ruled on the question, it seems to have assumed in Rusk v. Cort, 369 U.S. 367 (1962), that Section 10 is a grant of jurisdiction and a waiver of immunity. In Rusk jurisdiction in an action for declaratory and injunctive relief was rested on Section 10. The Court said (369 U.S. at 379-80) it would not hold "that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions ... in the absence of clear and convincing evidence that Congress so intended." Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), is in accord.

*See the cases collected and analyzed in Hearing before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, June 3, 1970, p.88 (hereinafter cited, "Hearing").

The weight of authority and the better reasoned and more recent cases also support Powelton's reading of Section 10. In Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874, (D.C. Cir. 1970), the Court said:

> "It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory."

Kletshka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969), held that the A.P.A. grants jurisdiction to federal courts to provide relief with respect to alleged violations of law by federal agencies and "constitutes a waiver of sovereign immunity concerning those claims which come within its scope." Similarly, in Estrada v. Aherns, 296 F.2d 690, 698 (5th Cir. 1961), brought solely under Section 10, the Court examined the relationship between sovereign immunity and the A.P.A. and said:

> "The practice of bringing suits against an individual official to restrain or review governmental action reflects the historical doctrine of sovereign immunity. In days now long gone by, relief could be obtained only by a showing that the official sued had acted on invalid authorization or outside his authorization and therefore could not be deemed to have acted for the government ... See Larson v. Domestic & Foreign Commerce Corp., 1949, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628; ...
>
> "... The doctrine is wearing thin. Recent years have witnessed a great expansion of

> the individual's rights to seek redress against the government for wrongs committed by it. See Davis, Administrative Law Treatise §25.01-.03 (1958); Hart & Weschsler, The Federal Courts and The Federal System 1161-63 (1952); Note 68 Harv.L.Rev. 506 (1955). Probably the two most important federal statutes waiving governmental immunity are the Federal Tort Claims Act of 1946 [28 U.S.C.A. §2674] and the statute involved in this case, the Administrative Procedure Act, also passed in 1946. By providing judicial review in an action brought by 'any person adversely affected or aggrieved by any agency action' Congress permitted suits which under established tests would certainly be barred as suits against the government. Cf., Larson supra, 337 U.S. at 693-695. The Act thereby makes a clear waiver of sovereign immunity in actions to which it applies." (emphasis supplied.)

Also supporting this view of Section 10 are Shannon, supra; Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), adhered to on rehearing, 379 F.2d 555 (1967); Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966); Mulry v. Driver, 366 F.2d 544 (9th Cir. 1966); Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967); and Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

Thus it is clear on two separate grounds that the "sovereign" has consented to be sued in an action such as this one and that the doctrine of sovereign immunity is therefore no bar to the suit.

B. This Case Falls Within an Acknowledged Exception to the Sovereign Immunity Doctrine.

In addition to the government's consent, which is itself fully dispositive of the sovereign immunity issue, this case falls within a well-recognized exception to the sovereign immunity doctrine.

That exception is that a private party may secure judicial redress against government officials for conduct in violation of constitutional or statutory provisions. As the Attorney General's Committee on Administrative Procedure observed:

> "While the Government enjoys sovereign immunity from suit, its officers do not share in that immunity. They are answerable for wrongs committed even in the course of their official work." Administrative Procedure in Government Agencies, S.Doc. No. 8, 77th Cong., 1st Sess., 80-82 (1941).

A formulation of this exception to sovereign immunity is found in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-02 (1949):

> "... the action of an officer of the sovereign ... can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." (Emphasis added.)

This exception is so well-recognized that the Government has been criticized for even arguing the contrary. In Toilet Goods Ass'n v. Gardner, 360 F.2d 677, 683 n.6 (2d Cir. 1966), aff'd 387 U.S. 158 (1967), Judge Friendly said:

> "[The Government makes] the surprising contention that an action for a declaration that federal regulatory officers have acted in excess of their authority constitutes an unconsented suit against the United States. ... [L]aw officers of the Government ought not to take up the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions."

Moreover, the former Assistant Attorney General who was assigned to express the views of the Department of Justice on a legislative proposal to modify the sovereign immunity doctrine said,

> "[T]here is no doubt that a court today may look into unauthorized or unconstitutional agency action ..." Letter from William P. Ruckelshaus, Assistant Attorney General to Hon. Edward Kennedy, Hearings, p.256-57.

Since the complaint here clearly alleges that the defendant exercised his powers in a manner which was "constitutionally void," the acknowledged exception to the sovereign immunity doctrine is clearly applicable. (Cases which explicitly utilize this exception against the Secretary of HUD and other federal defendants are discussed in the next following subsection of this brief.) For this separate reason the sovereign immunity doctrine is no bar to this suit.

C. The District Court's Contrary View is Erroneous.

The District Court seems to have been led astray because of its view that the relief sought would require "affirmative"

action (i.e., some sort of mandatory action) by a federal official. Thus, the court said that "the critical consideration is not the identity of the parties ... but rather the result of the judgment" (A-50), stated that it was without jurisdiction to compel the defendant Secretary to act in a particular manner "in discharging the myriad functions and programs entrusted to him by Congress," (A-52), and quoted Dugan v. Rank, 372 U.S. 609, 620 (1963) to the effect that "the general rule is that a suit is against the sovereign if the judgment sought would ... interfere with the public administration ... or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." (A-51.)

The trial court's reliance on such a "general rule" was misplaced. As Professor Kenneth Culp Davis, a leading authority on the doctrine of sovereign immunity, states:

> "This so-called general rule [of Dugan] never has been the general rule and is not likely to become the general rule. Judgments of courts have often ... interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do those things in the future." Davis, Administrative Law Treatise, §27.01 (1965 Pocket Part, at 149).

Examples of such "interference" with public administration are numerous, particularly in actions where, as here, violations of constitutional rights are alleged. Challenges have been upheld against the exercise of the Secretary of State's discretion in the issuance of passports, Kent v. Dulles, 357 U.S. 116 (1958);

against regulations issued by the Commissioner of Food and Drugs, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); and against the Postmaster General's decision to bar certain matters from the mails, Manual Enterprises v. Day, 370 U.S. 478 (1962). In Vitarelli v. Seaton, 359 U.S. 535 (1959), the Supreme Court ordered the government to reinstate an employee; in Greene v. McElroy, 360 U.S. 474 (1959), to restore a revoked security clearance; and in Schneider v. Smith, 390 U.S. 17 (1968), to approve an application for a merchant mariner's document.

These Supreme Court decisions have been followed in a number of lower court cases. See, e.g., Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Hicks v. Weaver, 302 F.Supp. 619 (E.D. La. 1969); Western Addition Community Organization v. Weaver, 294 F.Supp. 433 (N.D. Cal. 1968); Powelton Civic Homeowners Ass'n v. HUD, 284 F.Supp. 809 (E.D. Pa. 1968); Hobson v. Hansen, 269 F.Supp. 401 (D.C. 1967), appeal dismissed 393 U.S. 801 (1968); and Annie Bell Jay v. United States Department of Agriculture, 308 F.Supp. 100 (N.D. Tex. 1969).

In Shannon, supra, the Court thought so little of the sovereign immunity defense that it merely noted the defense was raised (slip opinion p.3) and did not discuss it further. The case was remanded "for the entry of an injunctive order prohibiting further steps in the finalization of mortgage

insurance or other federal financial assistance to the project until such time as HUD makes a determination in substantive and procedural conformance with this opinion ..." Shannon, slip opinion p.24. See also, Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1971); Carter v. Seamore, 411 F.2d 767 (5th Cir. 1969); Crowther v. Seaborg, 312 F.Supp. 1205 (D.C. Colo. 1970); Green v. Kennedy 309 F.Supp. 427 (D.C.D.C. 1970); Dermott Special School District v. Gardner, 278 F.Supp. 687 (E.D. Ark. 1968); and Lee County School District No. 1 v. Gardner, 263 F.Supp. 401 (D.S.C. 1967).

In Crowther the Court summed up a great deal of sovereign immunity discussion succinctly by stating two exceptions to the "general rule" of Dugan v. Rank:

> "A suit is not barred by sovereign immunity if (1) it alleges that the actions of the officers challenged are beyond their statutory authority, or (2) it alleges that although acting within the scope of that authority, the powers exercised, or the manner in which they are exercised, are constitutionally void." 312 F.Supp. at 1219.

In these and other cases in which plaintiffs have sought equitable relief against unconstitutional acts of federal officials, the doctrine of sovereign immunity has been no bar.

The trial court's assertion that "... the government must be permitted to carry out its functions unhampered by judicial intervention" (A-53) is thus contrary to the history

of judicial review of the acts of government officials.* The only two cases cited by the District Court on this point, Minnesota v. Hitchcock and Dugan v. Rank, each involved disputed property rights. This is an area in which special policy reasons and the availability of an alternate remedy in the Court of Claims buttress the application of the sovereign immunity doctrine, although Knox Hill seems to undermine the sovereign immunity doctrine even in this limited area. See Knox Hill slip opinion, pp. 11-14.

The opinion below referred to this quotation from Louisiana v. United States, 380 U.S. 145, 154 (1964):

> "We bear in mind that 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 as well as bar like discrimination in the future."

*"Many of the great constitutional decisions throughout our history have stopped the government in its tracks and have interfered in public administration. ...

When President Truman seized most of the steel mills in order to avert a strike that he believed would jeopardize national defense, and the steel companies challenged the President's action in a suit against the Secretary of Commerce for declaratory judgment and injunction, the question was surely whether the courts would stop the government in its tracks. The Supreme Court in the Youngstown case held that the seizure was beyond the constitutional power of the President, affirming a decree against the Secretary. The Court said nothing about stopping the government in its tracks or about interfering in public administration." Davis, Sovereign Immunity Must Go, reprinted in Hearings, pp. 219-20.

But the reference by the lower court was to assert that the principle of Louisiana "does not give free license to the court to determine and encompass issues not existent in the complaint." (A-52.) This attacks a straw man created by the court itself. Plaintiffs have not sought a "free license" for the court, nor has the court been asked to "control the policies of the United States" as the court's opinion implies. (A-53.) It is unpersuasive to suggest that an equitable remedy implementing the policies of 42 U.S.C. §2000d and fashioned in a responsible manner by a federal court would be a "free license" over issues not before the court or would encompass "control" of the policies of the United States. Viewing this notion from a somewhat different perspective, Professor Davis has asked:

> "Can a decree which carries out the sovereign's established constitutional law, statutory law or common law ever operate against the sovereign's paramount interest in preferring a rule of law of force? ... The dominant interest of the sovereign is in seeing that justice is done. ..." Davis, Sovereign Immunity Must Go, reprinted in Hearings, pp. 216-17.

Quite apart from the preceding considerations, to base jurisdiction on whether or not "affirmative" relief may be granted is neither a viable standard nor consistent with prior case law. Was it not "affirmative" action where the effect of the court order in Aptheker v. Secretary of State, 378 U.S. 500 (1964) was to require the Secretary of State to issue a passport?

Was the Secretary of HUD being "restrained" or was he being "compelled" by the order in Powelton, supra, to the effect that the Secretary could disburse no further funds for a particular project until the Secretary had afforded certain procedural opportunities to plaintiffs? Was the Coast Guard Commandant "compelled" or "restrained" by the decision in Schneider v. Smith, 390 U.S. 17 (1968), directing the Commandant to approve a license? Such metaphysical questions can be asked in nearly every case involving equitable relief. It would be a strange rule that was based on the outcome of such semantic enigmas.

Similar conceptual mysteries occasionally appear in the cases under the label of "interference" with governmental functions. Courts are understandably reluctant to impose their judgments upon administrative agencies and federal officials and therefore occasionally state that they decline to "interfere" with governmental functions. Thus, the trial court said, "the government must be permitted to carry out its functions unhampered by judicial intervention." (A-53.)

In numerous instances, from reapportionment to school segregation, courts have imposed their judgments upon governmental agencies. The question is not whether jurisdiction lies but what form of relief may be appropriate. In Powell v. McCormack, 395 U.S. 486 (1969), involving the expulsion of a member of the House of Representatives, respondents argued that the federal

courts were without jurisdiction. The Court said (395 U.S. at 511):

> "... there is a significant difference between determining whether a federal court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"

After finding federal jurisdiction based on Section 1331 (the case "arising under the Constitution," 395 U.S. at 511-13), the Court said that any remaining bar to reviewability would only arise from "the allocation of powers between the two branches of the Federal Government." 395 U.S. at 513. As to that issue (which the Court characterized as "confrontation" and which the trial court here referred to as "judicial intervention"), the Court declared:

> "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U.S. at 532.

In Hobson v. Hansen, 269 F.Supp. 401, 517 (D.C. 1967), the court said:

> "It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to

> defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in Brown v. Board of Education, Bolling v. Sharpe, and Baker v. Carr. So it is in the South where federal courts are making brave attempts to implement the mandate of Brown. So it is here." (Emphasis added.)

In Shannon the project had been built and occupied by the time of the decision. Nonetheless the Court said:

> "The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form. For example, the court could order that the project mortgage not be guaranteed under §221(d)(3) and that it be sold to a private profit-making owner. It could order that the project continue in non-profit ownership as a §221(d)(3) project, but that the rent supplement tenants be gradually phased out and replaced with market rental tenants." Slip opinion pp. 23-24.

Ultimate determination of the appropriate remedy was left to the trial court.

It thus appears that the trial court may have confused the question of jurisdiction with the problem of fashioning an appropriate remedy if plaintiffs prevail on the merits. The eventual issue of remedy in this case may not be free from difficulty, but that issue cannot be resolved by denying jurisdiction.

* * *

The foregoing discussion shows that this case falls within a well-recognized exception to the sovereign immunity doctrine, quite apart from the sovereign's consent to jurisdiction. But a few lines about the doctrine itself may be appropriate.

This case illustrates the pitfalls involved in that tangled doctrine. Typical is the question whether a suit is or is not brought against the "sovereign." Thus the trial court here felt compelled to insist that the desired relief made the suit one against defendant in his "official capacity" (as distinct from his "personal" capacity, however those terms may be defined). But when could a suit against a federal official, seeking relief from the unconstitutional exercise of that official's powers, not be an action brought against him in his "official capacity"?

As Professor Louis Jaffe has observed in his Sovereign Immunity, 77 Harv.L.Rev. 1, 35 (1963):

> "... as long ago as Osborn [Osborn v. The Bank of the United States, 22 U.S. 738, 6 L.Ed. 204 (1824)] Marshall taught that there were many suits for which consent was unnecessary though the Government or the states was deeply interested. Reference to 'reality' assumes a narrowly logical concept of what is 'really' a suit against the United States which such Justices such as Marshall, Bradley, Miller and Frankfurter have never accepted as established either by customary law or by the requirements of policy. Surely there is no obvious canon

> of common sense which tells us that to order an officer to perform his statutory duty to patent land either is or is not a suit against the United States. It would, no doubt, be taken under our linguistic usage as a suit against the Government. But the Government is not the United States. Indeed, it has been found impossible to establish a strict linguistic form which would tell us when a suit against an officer is really a suit against the United States." (emphasis added.)

Sovereign immunity is judge-made doctrine. There is no provision in the Constitution establishing it. There is no Act of Congress requiring it. The Supreme Court has said,

> "[T]he immunity enjoyed by the United States as a territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment." National City Bank v. Republic of China, 348 U.S. 356, 359 (1955).

To say the least, the courts have not been consistent in applying the doctrine. "As a matter of logic, it is not easy to reconcile all of [our cases on sovereign immunity]" Land v. Dollar, 330 U.S. 731, 738 (1947).

Responsible commentators uniformly characterize sovereign immunity as a doctrine of little value which is erratically applied and constitutes a trap for the unwary. (See e.g., the statements of Messrs. Jerre S. Williams, Ashley Sellers, Roger C. Cramton, Dan M. Byrd, Jr., and Kenneth Culp Davis and the Appendices in Hearings, pp. 6, 13, 45, 55, 61 and 76; 3 Davies,

Administrative Law Treatise, ch. 27 (1958); and Jaffe Sovereign Immunity, 77 Harv.L.Rev. 1 (1963).)

Professor Davis' summary is apt:

> "The strongest support for sovereign immunity is provided by that four-horse team so often encountered - historical accident, habit, a natural tendency to favor the familiar, and inertia. Nothing else supports sovereign immunity, despite the many recitations in judicial opinions that a court cannot 'stop the government in its tracks' or interfere in public administration." Davis, Sovereign Immunity Must Go, Hearings, p.202.

* * *

For the foregoing reasons the doctrine of sovereign immunity has no application to this action. It was error to dismiss the action on that ground.

CONCLUSION

The decision of the District Court should be reversed and the cause remanded with instructions to enter a declaratory judgment in favor of the plaintiffs as to all four counts of the complaint, and to determine and grant such additional relief as is appropriate.

Respectfully submitted,

Alexander Polikoff
Milton I. Shadur
Charles R. Markels
Merrill A. Freed

Bernard Weisberg
Cecil C. Butler
Stuart R. Cohn

By: Alexander Polikoff
Alexander Polikoff
One of the Attorneys for Appellants

March 8, 1971

Alexander Polikoff
109 N. Dearborn Street
Chicago, Illinois 60602
641-5570

INDEX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1073

DOROTHY GAUTREAUX, et al.,

Plaintiffs-Appellants,

v.

GEORGE W. ROMNEY,

Defendants-Appellees.

On Appeal from the Judgment of the United States
District Court for the Northern District of Illinois

APPENDIX

Relevant Docket Entries

8-9-66 - Filed Complaint

* * *

11-9-66 - Filed Amendment to Complaint

11-9-66 - Enter Order to Amend Complaint and Serve a Summons on New Defendant

* * *

12-20-66 - Filed Motion of Defendant to Dismiss

* * *

1-3-67 - Filed Memorandum and Affidavits in Support of Defendant's Motion to Dismiss

* * *

4-24-67 - Filed Defendant's Second Supplemental Memorandum in Support of Motion to Dismiss

* * *

5-9-67 - Filed Brief of Plaintiffs in Opposition to Motion of Defendant to Dismiss

* * *

6-8-67 - Filed Defendant's Reply Memorandum and Exhibits

* * *

6-19-67 - All Proceedings herein are Stayed and Cause is Continued Generally, etc. - DRAFT - Austin, J.

* * *

10-31-69 - Filed Plaintiffs' Motion for Summary Judgment and Brief in Support Thereof

* * *

12-4-69 - Filed Motion of Amici Curiae for Leave to File Brief in Support of Plaintiffs' Motion for Summary Judgment

* * *

12-9-69 - Filed Brief of Urban Law Institute, etc. et al., Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment

12-9-69 - Filed Brief of Metropolitan Housing and Planning Counsel Amicus Curiae in support of Plaintiffs' Motion for Summary Judgment

12-9-69 - Filed Brief of Lawyers Committee for Civil Rights, etc. Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment

12-9-69 - Motions of Lawyers Committee for Civil Rights et al. for leave to file Briefs as Amici Curiae Granted

1-8-70 - Filed Defendant's Answer in Support of Motion to Dismiss and in Opposition to Motion for Summary Judgment

1-8-70 - Enter Order on Motion of Defendant for Leave to File Instanter, without Objection by Plaintiffs, Defendant's Answer in Support of his Pending Motion to Dismiss and in Opposition to Plaintiffs Motion for Summary Judgment and Supporting Exhibits

* * *

1-26-70 - Filed Index pertinent to portions of Exhibit "H" to defendants answer to motion for summary judgment

1-26-70 - Enter order on motion of defendant for leave to file instanter an index to pertinent portions of Exhibit "H" to defendants answer to motion for summary judgment and additional pages to that exhibit

* * *

3-6-70 - Filed Motion of League of Women Voters of Illinois to join as Amicus Curiae

* * *

3-13-70 - Filed Motion of Leadership Council for Metropolitan Open Communities to join as Amicus Curiae

* * *

3-13-70 - Filed Motion of Urban Affairs Committee for leave to file brief

* * *

3-13-70 - Filed Plaintiffs Reply Brief in support of Motion for Summary Judgment

3-13-70 - Filed Brief of Urban Affairs Committee as amicus curiae in support of the constitutional rights asserted by plaintiffs

* * *

4-30-70 - Filed Affidavit of Don Morrow in support of defendants motion

4-30-70 - Filed Reply of defendant to amicus Curaie Brief filed by Urban Committee, Chicago Bar Association

5-5-70 - Filed Plaintiffs brief responding to reply of Defendant to Brief

* * *

6-12-70 - Filed affidavit of Don Morrow in further support of motion to dismiss and/or for summary judgment

* * *

9-1-70 - Filed memorandum

9-1-70 - Pursuant to the Court's memo filed this day defendant's motion to dismiss is sustained and the complaint is dismissed

10-21-70 - For the reasons given in the Court's memo dated September 1, 1970 this action is dismissed

10-29-70 - Filed Notice of Appeal by Plaintiffs

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES, RODGERS,
DOREATHA R. CRENCHAW, EVA JOHNSON,
JAMES RODGERS and ROBERT M. FAIRFAX,

Plaintiffs,

v.

THE HOUSING ASSISTANCE ADMINISTRATION,
A Corporate Agency of the Department
of Housing and Urban Development,

Defendant.

CIVIL ACTION

NO. 66 C 1460

COMPLAINT

COUNT I

1. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1331. This is an action in equity seeking declaratory relief under Title 28, U.S.C. §§2201 and 2202 and an injunction. The rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the value of $10,000.

2. This is a proceeding for a declaration that the defendant has assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago, Illinois, for a permanent injunction enjoining the defendant from continuing to assist in the carrying on of the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3. Plaintiffs are all Negro citizens of the United States who presently reside in the City of Chicago, Illinois, and are tenants in "regular family" public housing projects (i.e., projects for persons other than the elderly) operated by the Chicago Housing Authority (the "Authority"), or have filed, on forms provided for by the Authority, written applications for and are eligible to be housed in, and have a right in accordance with Authority Rules to be housed in, such projects.

4. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their behalf and on behalf of all other Negro tenants and applicants similarly situated. The members of the class on whose behalf this suit is brought are so numerous that

joinder of all members is impracticable.. There are questions of law and fact involved common to the class, the claims of the plaintiffs as representative parties are typical of the claims of the class, and the plaintiffs as representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, and (B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Defendant has acted, in all respects stated herein, on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

5. Defendant, the Housing Assistance Administration, is a corporate agency and instrumentality of the United States and is a constituent agency of the Department of the Executive Branch of the Government of the United States

known as the Department of Housing and Urban Development. Defendant was formerly known as the Public Housing Administration.

6. The Authority is a municipal corporation, organized and existing under the laws of the State of Illinois, with its principal office located in the City of Chicago, Illinois. The public housing facilities in the City of Chicago are under the jurisdiction, management and control of the Authority. Under the laws of the State of Illinois, the Authority has the power and the duty to engage in low-rent housing projects, which activity is declared by such laws to be a governmental function essential to the public interest.

7. Under the laws of the State of Illinois the Authority has the power and the duty to select and acquire real property as sites for regular family public housing projects in the City of Chicago, but such sites, when selected by the Authority, may not be acquired by it until the Authority has advised the City Council of the City of Chicago (the "City Council") of the description of the sites proposed to be acquired and the City Council has approved the acquisition thereof by the Authority. The statute of the State of Illinois which requires such approval by the City Council (Ill. Rev. Stats., Ch. 67 1/2, §9) was enacted and became effective in 1949.

8. During the period from 1950 to the present, the applicants for and tenants of regular family public housing projects of the Authority have been predominantly Negro. At present, approximately 93% of the applicants for regular family public housing projects whose names appear on the Authority's waiting list therefor are Negro, and approximately 90% of the tenants in such projects are Negro.

9. With respect to residence the City of Chicago is, and continuously since 1950 has been, highly segregated along racial lines. At the time of the filing of this Complaint, Negroes numbering approximately 1,000,000 persons constituted over 25% of the total population of Chicago. At such time over 85% of all Negroes living in Chicago resided in neighborhoods the racial composition of which was all Negro or substantially all Negro (hereinafter "Negro neighborhoods"). During the entire period from 1950 to the present, over 75% of all Negroes living in Chicago resided in Negro neighborhoods. Such Negro neighborhoods were and are predominantly large and contiguous, and not small and scattered, and they constitute compact, segregated areas of Negro residence the bulk of which is known as the Negro Ghetto.

10. Such large scale residential segregation of Negroes within the Negro Ghetto in Chicago has had and will continue to have highly detrimental effects upon Negroes living therein, including the following:

(a) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located generate, among Negro residents thereof, feelings of inferiority as to their status in the community that affect their hearts and minds in a way unlikely ever to be undone. The separation of the races is usually interpreted as denoting the inferiority of the Negro group, and the sense of inferiority thus imparted to residents of the Negro Ghetto detrimentally affects their motivation and their ability to become useful members of the society at large, and has a tendency to retard their educational, social and political development. Such feelings of inferiority and other detrimental effects have been and are produced by the Negro Ghetto in Chicago.

(b) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located results, and has resulted in Chicago, in a pervasive life pattern of pathology marked by ignorance, fear, racial misunderstanding, broken homes, illegitimacy, delinquency, drug addiction, hatred and violence, all of which cripples and destroys great numbers of persons living within the Negro Ghetto.

(c) Segregation in education invariably occurs where Negroes are residentially segregated and such educational segregation has occurred in Chicago and has followed the geographic pattern of the residential segregation hereinabove referred to. At the time of the filing of this Complaint approximately 90% of the Negroes attending elementary schools and approximately 70% of the Negroes attending high schools in Chicago attended segregated Negro schools -- i.e., schools which were all Negro or substantially all Negro. Such educational segregation is harmful to children attending such schools,

generates feelings of inferiority as to their status in the community that affects their hearts and minds in a way unlikely ever to be undone, results in inferior education for such children, and detrimentally affects their motivations and their ability to become useful adult members of the society at large.

(d) As is stated in Executive Order No. 11063 of the President of the United States, "discriminatory policies and practices result in segregated patterns of housing and necessarily produce other f rms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their inalienable rights to life, liberty and the pursuit of happiness." The Negro Ghetto in Chicago is one such segregated pattern, has produced and continues now to produce such other forms of discrimination and segregation and has caused and continues now to cause such deprivation of opportunity to the residents thereof.

11. Since 1950 and prior to April 7, 1965, numerous sites were selected by the Authority, approved by the City Council, and acquired by the Authority for the purpose of erecting regular family public housing projects thereon. Following such acquisition the Authority erected regular family public housing projects on such sites consisting of hundreds of dwelling units and housing thousands of tenants, and the Authority presently maintains and operates the same.

12. Substantially all of said numerous sites selected for regular family public housing projects by the Authority and approved by the City Council since 1950 and prior to April 7, 1965, were in neighborhoods which were at the time of such selection, and are now, Negro neighborhoods, and were and are within the areas known as the Negro Ghetto.

13. Prior to April 7, 1965, the Authority selected and on or shortly prior to April 7, 1965, the City Council approved sites for the following described proposed new regular family public housing projects:

1. Project 2-12, Washtenaw & 12th Place, 201 dwelling units.

2. Project 2-27, Adams and Wood Avenues, 105 dwelling units.

3. Project 2-28, Six Scattered Sites, 241 dwelling units.

4. Project 2-32, 43rd and Princeton, 444 dwelling units.

In addition, prior to April 7, 1965 the Authority selected Project 2-33, Pershing Road and Cottage Grove Avenue, for expansion, involving the construction of 606 additional dwelling units at or adjacent to the site of such project. Said proposed projects and the proposed expansion of Project 2-33 are hereinafter collectively referred to as the "Five Proposed Projects." Each of the sites for the Five Proposed Projects is in a neighborhood which was at the time of selection and is now a Negro neighborhood, and was and is within the areas known as the Negro Ghetto.

14. The Five Proposed Projects are large scale public housing projects designed and intended to provide in the aggregate approximately 1,600 new dwelling units for the housing of thousands of public housing tenants as follows:

2 - 15 story buildings	1 - 13 story building
1 - 14 story building	1 - 10 story building
4 - 8 story buildings	22 - 3 story buildings
5 - 7 story buildings	1 - 2 story building

Construction of the Five Proposed Projects has not yet begun.

15. In 1966 the Authority selected and submitted to the City Council for approval twelve additional sites for twelve proposed additional regular family public housing

projects, designed and intended to provide in the aggregate approximately 1,300 dwelling units for the housing of thousands of public housing tenants. Eleven of the sites for said twelve proposed projects (hereinafter collectively referred to as the "Twelve Proposed Projects") are located in the Woodlawn, Oakwood, Lawndale and East Garfield Park areas of Chicago, and the twelfth site is located at 118th Street and Wood Avenue. On or about July 11, 1966, the City Council approved 11 of such sites. Each of the sites for the Twelve Proposed Projects is in a neighborhood which was at the time of selection and is now a Negro neighborhood, and was and is within the areas known as the Negro Ghetto.

16. Since 1950 substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto because the Authority has deliberately chosen sites for such projects which would avoid the placement of Negro families in white neighborhoods. After 1949 the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods, because the Authority deliberately determined not to submit any sites for City Council approval of regular family public housing projects which would

result in the placement of Negro families in white neighborhoods.

17. The Authority deliberately chose Negro neighborhoods for each of the sites for the Five Proposed Projects and for the Twelve Proposed Projects to avoid the placement of Negro families in white neighborhoods.

18. The effect of the selection of sites by the Authority in Negro neighborhoods upon Negro applicants for and tenants of regular family public housing projects has been and continues to be that:

(a) Such applicants and tenants, if they choose to live in Authority's public housing facilities at all, have been and are forced to reside within the Negro Ghetto in the City of Chicago, and have been and are denied the opportunity to reside in public housing facilities in white neighborhoods;

(b) Existing patterns of Negro residential and school segregation in the City of Chicago have been and are continued and strengthened and the detrimental effects and evil consequences of such segregation, all as alleged in Paragraph 10 hereof, are enlarged

and imposed upon such applicants and tenants; and

(c) The impact of such detrimental effects and evil consequences, as alleged in paragraph 10 hereof, upon such applicants and tenants, is the greater because, by reason of the site selection policies hereinabove described, such impact appears to have the force and sanction of law.

19. By reason of the facts hereinabove alleged, construction of the Five Proposed Projects and of the Twelve Proposed Projects on the sites selected therefor, and perpetuation thereby of Authority's racially discriminatory public housing system, (a) will force plaintiffs and the class they represent to live exclusively in Negro neighborhoods within the Negro Ghetto if they choose to live in Authority's public housing facilities at all, (b) will preclude plaintiffs and the class they represent from having the opportunity to reside in public housing facilities in white neighborhoods, and (c) will continue and strengthen existing patterns of residential and school segregation in the City of Chicago and impose the evil consequences thereof, all as alleged in paragraph 10 hereof, upon plaintiffs and the class they represent.

20. The Authority has applied to the defendant for, has received from the defendant, and has employed Federal financial assistance in the construction of and otherwise in support of the numerous regular family public housing projects referred to in paragraph 11 hereof. The Authority has applied to the defendant for, either has received or shortly will receive from the defendant, and will continue thereafter to receive Federal financial assistance for the proposed construction of and otherwise in support of the Five Proposed Projects. Annual contributions contracts pursuant to which such assistance in the future will be provided have been executed by or on behalf of the Authority and the defendant in connection with each of the Five Proposed Projects. The Authority has applied to the defendant for and has received assurance that it will receive Federal financial assistance for the proposed construction of and otherwise in support of the Twelve Proposed Projects. The Authority proposes to use such assistance in the construction of and otherwise in support of the Five Proposed Projects and the Twelve Proposed Projects.

21. By reason of the facts hereinabove alleged the rights of plaintiffs and the class they represent under

the due process clause of the Fifth Amendment to the Constitution of the United States have been and will continue to be violated, and plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under the due process clause of the Fifth Amendment to the Constitution of the United States, and that plaintiffs and the class they represent have the right under said Amendment to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory

aspects of the public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which have been selected in a racially discriminatory manner or which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT II

1. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§1331 and 1343(4). This is an action in equity seeking declaratory relief under Title 28, U.S.C. §§2201 and 2202 and an injunction. The rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42, U.S.C. §2000d (Section 601 of Title VI of the Civil Rights Act of 1964). The matter in controversy exceeds, exclusive of interest and costs, the value of $10,000.

2. This is a proceeding for a declaration that the defendant has assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago, Illinois, in violation of Title 42, U.S.C. §2000d, for a permanent injunction enjoining the defendant from continuing to assist in the carrying on of the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3 - 20. The allegations of paragraphs 3 through 20 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 20 of this Count II.

21. By reason of the facts hereinabove alleged the rights of plaintiffs and the class they represent, under Title 42, U.S.C. §2000d, have been and will continue to be violated, and plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially

discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under Title 42, U.S.C. §2000d, and that plaintiffs and the class they represent have the right under said Title 42, U.S.C. §2000d to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which have been selected in a racially discriminatory manner or which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT III

1 - 15. The allegations of paragraphs 1 through 15 of Count I of this Complaint are incorporated herein by reference as paragraphs 1 through 15 of this Count III.

16. Since 1950 substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto. After 1940 the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods.

17. Each of the sites for the Five Proposed Projects and for the Twelve Proposed Projects is in a Negro neighborhood, and within the areas known as the Negro Ghetto.

18 - 21. The allegations of paragraphs 18 through 21 of Count I of this Complaint are incorporated herein by reference as paragraphs 18 through 21 of Count III.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under the due process

clause of the Fifth Amendment to the Constitution of the United States, and that plaintiffs and the class they represent have the right under said Amendment to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT IV

1 - 2. The allegations of paragraphs 1 and 2 of Count II of this Complaint are incorporated herein by reference as paragraphs 1 and 2 of this Count IV.

3 - 15. The allegations of paragraphs 3 through 15 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 15 of this Count IV.

16 - 17. The allegations of paragraphs 16 and 17 of Count III of this Complaint are incorporated herein by reference as paragraphs 16 and 17 of this Count IV.

18 - 21. The allegations of paragraphs 18 through 21 of Count II of this Complaint are incorporated herein by reference as paragraphs 18 through 21 of this Count IV.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under Title 42, U.S.C. §2000d, and that plaintiffs and the class they represent have the right under said Title 42, U.S.C. §2000d to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority

any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

Alexander Polikoff
Charles R. Markels
Bernard Weisberg
Milton I. Shadur
Merrill A. Freed

By_____
Alexander Polikoff
Attorneys for Plaintiffs
231 South LaSalle Street
Chicago, Illinois 60604
CEntral 6-4500

Charles R. Markels
120 South LaSalle Street
Chicago, Illinois
ST 2-3680

Bernard Weisberg
111 West Jackson Boulevard
Chicago, Illinois
HA 7-9250

Milton I. Shadur
208 South LaSalle Street
Chicago, Illinois
AN 3-3700

Merrill A. Freed
33 North LaSalle Street
Chicago, Illinois
RA 6-9020

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS and ROBERT M. FAIRFAX, Plaintiffs	)	CIVIL ACTION
vs.	)	No. 66 C 1460
THE HOUSING ASSISTANCE ADMINISTRATION, A Corporate Agency of the Department of Housing and Urban Development, Defendant	)	

AMENDMENT TO COMPLAINT

Plaintiffs, by leave of Court, first had and obtained, amend their Complaint as follows:

1. The description of the defendant in the caption of the Complaint is changed to read: ROBERT C. WEAVER, Secretary of the Department of Housing and Urban Development of the United States, Defendant.

2. Paragraph 2 of Count 1 is hereby deleted and the following new paragraph 2 is hereby substituted therefor:

> This is a proceeding (i) for a declaration that the Public Housing Authority, the corporate agency and instrumentality of the United States whose functions, powers and duties are now vested in the defendant, and defendant have assisted in the carrying on, and defendant continues to assist in the carrying on, of a racially discriminatory public housing system within the City of Chicago, Illinois, (ii) for a permanent injunction enjoining the defendant from continuing to assist in the carrying on of the racially discriminatory aspects of such public housing system in the future, and (iii) for other appropriate relief.

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3. Paragraph 5 of Count 1 is hereby deleted and the following new paragraph 5 is hereby substituted therefor:

> Defendant is the Secretary and head of the Department of the Executive Branch of the Government of the United States, known as the Department of Housing and Urban Development. As Secretary, he is vested with all functions, powers and duties that were formerly vested in the Public Housing Administration, a corporate agency and instrumentality of the United States which has ceased to exist.

4. Paragraph 20 of Count 1 is hereby deleted and the following new paragraph 20 is hereby substituted therefor:

> The Authority has applied to the Public Housing Administration for, has received from the Public Housing Administration, and has employed Federal financial assistance in the construction of and otherwise in support of the numerous regular family public housing projects referred to in paragraph 11 hereof. The Authority has applied to the defendant (or the Public Housing Administration) for, either has received or shortly will receive from the defendant, and will continue thereafter to receive Federal financial assistance for the proposed construction of and otherwise in support of the Five Proposed Projects. Annual contributions contracts pursuant to which such assistance in the future will be provided have been executed by or on behalf of the Authority and the defendant (or the Public Housing Administration) in connection with each of the Five Proposed Projects. The Authority has applied to the defendant (or the Public Housing Administration) for and has received assurance that it will receive Federal financial assistance for the proposed construction of and otherwise in support of the Twelve Proposed Projects. The Authority proposes to use such assistance in the construction of and otherwise in support of the Five Proposed Projects and the Twelve Proposed Projects.

5. All references in the Complaint to said paragraphs 2, 5, and 20 shall be deemed to be references to said paragraphs as above amended.

Alexander Polikoff
Charles R. Markels
Bernard Weisberg
Milton I. Shadur
Merrill A. Freed

By Charles R. Markels
Charles R. Markels
Attorneys for Plaintiffs
c/o Alexander Polikoff
231 S. LaSalle Street
Chicago, Illinois 60604
CE 6-4500

Charles R. Markels
120 S. LaSalle Street
Chicago, Illinois 60603
ST 2-3680

Bernard Weisberg
111 W. Jackson Boulevard
Chicago, Illinois 60604
HA 7-9250

Milton I. Shadur
208 S. LaSalle Street
Chicago, Illinois 60604
AN 3-3700

Merrill A. Freed
33 N. LaSalle Street
Chicago, Illinois 60602
RA 6-9020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS and ROBERT M. FAIRFAX, Plaintiffs,	)	
v.	)	NO. 66 C 1460
ROBERT C. WEAVER, Secretary of the Department of Housing and Urban Development of the United States, Defendant.	)	

M O T I O N

Now comes the defendant Robert C. Weaver, Secretary of the Department of Housing and Urban Development of the United States, by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure moves to dismiss this action on the grounds (1) that these plaintiffs do not have standing or capacity to sue this defendant, (2) that plaintiffs have failed to exhaust their administrative remedies, (3) for lack of jurisdiction of this court over the subject matter, (4) for failure of the complaint to state a claim upon which relief can be granted, (5) for failure of the complaint to join an indispensable party under Rule 19.

Pursuant to Rule 13(a) of the General Rules of the court, this defendant will file memorandum and materials in support of his motion within five days hereof.

Edward V. Hanrahan
United States Attorney
Room 1500, U.S. Courthouse
Chicago, Illinois 60604
353-5312

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ROBERT C. WEAVER, Secretary of the Department of Housing and Urban Development of the United States,	)	NO. 66 C 1460
	)	
Defendants.	)	

O R D E R

Noting that the substantive issues presented by the allegations of the Complaint here are virtually identical with those presented by the Complaint in the companion case brought by these same plaintiffs, 66 C 1459, Gautreaux, et al. v. Chicago Housing Authority, et al., and that the determination of those issues may render this action moot or greatly facilitate discovery and trial of the action,

IT IS HEREBY ORDERED that all proceedings herein are stayed and the matter continued generally until such time as there is a disposition of the companion case and that all pending motions presently under advisement shall continue under advisement until such time as it becomes necessary to rule thereon.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: June 19, 1967.

IN THE UNITED STATES DISTRICT COURT
FOR THE
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.	)	

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT
AND RELATED MOTIONS

Plaintiffs, by their attorneys, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court for summary judgment in their favor on the ground that there is no genuine issue as to any material fact and that plaintiffs are therefore entitled to summary judgment in their favor as a matter of law.

Plaintiffs also move the Court as follows:

1. For leave to add the Chicago Housing Authority as a party defendant to this cause;

2. For leave to withdraw plaintiffs' pending motion to consolidate this cause with the companion case, Gautreaux et al. v. CHA, 66 C 1459; and

3. For leave to withdraw plaintiffs' pending motion for discovery.

Alexander Polikoff
Charles R. Markels
Bernard Weisberg
Milton I. Shadur
Merrill A. Freed

By _____
Alexander Polikoff
Attorneys for Plaintiffs
231 South La Salle Street
Chicago, Illinois 60604
CEntral 6-4500

October 31, 1969

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

M E M O R A N D U M

The allegations of this complaint concern the same discriminatory pattern of public housing site selection considered by this court in the companion case and which was found to violate the Fourteenth Amendment to the Constitution. Gautreaux v. Chicago Housing Authority, 269 F. Supp. 907 (1969) and 304 F. Supp. 736 (1969). Proceedings in the instant suit against the Secretary of the Department of Housing and Urban Development were stayed pending resolution of that earlier suit. Ruling on defendant's pending motion to dismiss, plaintiffs' motion to consolidate and for discovery were deferred. The earlier suit having come to judgment, defendant has renewed its motion to dismiss, which is to be treated as a motion for

summary judgment under Rule 12(b), F.R.C.P. The plaintiffs have withdrawn their motions and have filed a motion for summary judgment which seeks to add the Chicago Housing Authority as a party defendant.

The amended complaint seeks a declaratory judgment that the defendant Secretary has "assisted in the carrying on, and . . . continues to assist in the carrying on, of a racially discriminatory public housing system within the City of Chicago" by granting federal financial assistance. ¶¶ 2, 20, Amended Count I. It is requested that defendant be permanently enjoined from further funding. The inappropriateness of that type of relief, however, has been conceded by all parties.

Although not expressly conceded, infirmities exist in Counts III and IV which are identical to those counts in 66 C 1459 wherein the court held that there was a failure to state a claim absent allegations of intentional and deliberate discrimination. Gautreaux v. C.H.A., 265 F. Supp. 582, 584 (1967).[1/] Accordingly, the motion to

1/ "A public housing program conscientiously administered in accord with the statutory mandate surrounding its inception (Ill. Rev. Stats., Ch. 67-1/2, §§1, 2 et seq.) and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative and discriminatory state action is required. * * *"

dismiss Counts III and IV is granted.

The renewed motion to dismiss as to Counts I and II is premised on five grounds: (1) that plaintiffs do not have standing or a capacity to sue this defendant; (2) that plaintiffs have failed to exhaust their administrative remedies; (3) for failure of jurisdiction over the subject matter; (4) for failure to state a claim upon which relief can be granted; and (5) for failure to join an indispensable party, i.e. the Chicago Housing Authority under Rule 19. The last ground is now obviated by plaintiffs request for such joinder and in the light of Powelton v. HUD, 284 F. Supp. 809, 814 (D.C. Pa., 1968); Bro. Locomotive Engrs. v. Denver & R.G.W., 290 F. Supp. 612, 615 (D.C. Colo. 1968); Kletschka v. Driver, 411 F. (2d) 436, 442 (C.A. 2, 1969); and unpublished opinion of my learned colleague Judge Hoffman in Inmates of Cook County v. Tierney, 68 C 504, this court would hold the joinder proper if the complaint withstands the other grounds of defendant's motion. In addition, the court having previously held in the earlier action (265 F. Supp. 582, 583) that said plaintiffs have standing to sue the Chicago Housing Authority ~~xxx~~ also holds that the same considerations must govern in this action and that standing exists in this suit. Data Processing v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397

U.S. 159 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Flast v. Cohen, 392 U.S. 83 (1968).

There remains the troublesome question of jurisdiction and failure to state a claim upon which relief can be granted. Count I of the Amended Complaint invokes the court's jurisdiction under §1331, 28 U.S.C. [2/] in that the "rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States" and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs.

Defendant contends there is lacking the requisite jurisdictional amount because no single plaintiff has an interest approaching $10,000 in any of the subsidies which the defendant has granted. Plaintiff responds that the amount in controversy is to be gauged by the "pecuniary result to either party which the judgment would directly product" and in any event the rental interest of one of the plaintiffs, Robert M. Fairfax, who has been a tenant

2/ §1331. Federal Question; amount in controversy; costs.
(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interes and costs, and arises under the Constitution, laws, or treaties of the United States."

in CHA housing since 1945 would to date equal the sum of $15,000 even if it averaged $50 per month. (Reponse Brf. to Reply, p. 2 fn) Neither approach is sound. The rule governing dismissal for want of jurisdictional amount is that, unless the law gives a different rule, the sum claimed by the plaintiff in good faith at the time of filing controls. 1 Moore Fed. Prac. ¶0.91, pp. 825-828. Cf. Giancana v. Johnson, 335 F. (2d) 366 (C.A. 7, 1964), cert. den. 379 U.S. 1001. A monetary value is difficult to assess in cases where violation of fundamental constitutional rights is alleged, and it does not appear in this instance that the allegation is not made in good faith. Further, aggregation in class actions is permitted where "one or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest". Snyder v. Harris, 394 U.S. 332, 335 (1969); Brown v. Trousdale, 138 U.S. 389 (1891). Where "the action is based on a public right, not on personal claims, the amount in controversy is the aggregated claim of the class, that is, the public's claim". 3A Moore Fed. Prac. ¶23.13, p. 3482; cf. Potrero Hill Community Action v. Housing Authority of City and County of San Francisco, 410 F. (2d) 974, 977, (C.A. 9, 1969).

From the argument that plaintiffs have standing to sue under the Fifth Amendment, plaintiff asserts that it is beyond dispute that an aggrieved citizen may sue a federal official for violation of his rights thereunder. In citing Bolling v. Sharpe, 347 U.S. 497 (1953) the plaintiff finds support for the application of the Fifth Amendment due process clause to that of the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States in that case dealt with the validity of segregation in the public schools of the District of Columbia. In holding that the District, being a body politic apart from the States, and thus not under the inhibition of the Fourteenth Amendment equal protection clause, the Supreme Court applied the Fifth Amendment due process clause because (p. 500)

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. * * *"

In making that application, the Court said: (p. 498)

> "We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable to the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts

> of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than "due process of law' and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized discrimination may be so unjustifiable as to be violative of due process. * * *"

Thus because of the unique status of the District of Columbia the Fifth Amendment was directly applied to implement desegregation of the public school in that district.

This is not to say that the Fifth Amendment does not apply as a restraint against federal officials, but its application has been confined to their actions as exercised under statutory authority apart from the Amendment alone, and except as such authority was exercised in violation thereof or under the common law. This is borne out by the plaintiffs cited cases of Schneider v. Rusk, 377 U.S. 163 (1963) wherein the Supreme Court of the United States held unconstitutional a section of the Immigration and Naturalization Act which resulted in loss of American citizenship acquired through naturalization by continuous residence for three years in the country of origin whereas an American born citizen did not suffer the same consequence. In Kent v. Dulles, 357 U.S. 116 (1958) a passport was denied under a regulation precluding granting the same to members

of the Communist party. The Court concluded that no statute delegated to the Secretary the kind of authority he exercised in promulgating the regulation and that he acted beyond his authority. In Flast v. Cohen, 392 U.S. 83 (1969) the expenditure of tax monies to finance instruction and instructional materials in religious schools was alleged to be in excess of the Secretary's authority under the Elementary and Secondary Education Act of 1965 and also that if such action was within the Act, then the Act was to that extent unconstitutional and void.

These cases found their premise for jurisdiction in unauthorized or undelegated exercises of power under existent Congressional statutes. With the exception of Bolling v. Sharpe, supra, they come within the exceptions to the right to sue the sovereign and find their premise not in the Fifth Amendment alone or any other Constitutional amendment, but in the circumscribed exercise of delegated authority under legislative enactments. From the passage of the Civil Rights Act, it also appears that Congress recognized that the Constitution in itself is not the source for authorizing a cause of action. No statutory premise is here alleged in Count I. Plaintiff stresses heavily that liability is on the basis of "joint participation" with the Chicago Housing Authority in perpetuating

a racially discriminatory public housing pattern, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1960).

The court holds that the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit. Therefore, Count I fails to state a claim over which this court has power to exercise jurisdiction or to grant relief and the same is dismissed.

Count II is premised on §1331 and §1343(4), 28 U.S.C. in that the "rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42 U.S.C. §2000d [Section 601, Title VI of the Civil Rights Act of 1964] and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs."

3/ "§1343(4). Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4/ §2000d, 42 USC. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Under §2000d-1, 42 U.S.C., the Secretary was authorized to promulgate rules and regulations to effectuate such non-disciminatory action in any fed rally funded program. Compliance therewith

> "may be effected (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, * * * or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. * * *"

In meeting the government's contention that there exist genuine issues of material fact which preclude entry of summary judgment, plaintiff states that its motion for summary judgment admits that defendant made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods" and therefore no dispute exists as to any material fact. The only issue remaining is whether despite these salutary efforts on the part of defendant, did the continued approval and funding of a discriminatory housing program make the defendant a joint participant in the violations which CHA has been found to have committed; or, should the defendant in order to absolve itself

of any of the illegal aura permeating CHA action have terminated federal financial assistance or followed another method as authorized under the Civil Rights Act §2000d-1 in lieu of continued funding and approval.

Plaintiff seeks to ground his claim for injunction to terminate funding on the theory of joint participation as found to exist in Burton v. Wilmington Parking Authy., supra. Burton had been refused service by a restaurant operator who leased premises from an agency of the State of Delaware. The building in which the restaurant was located was on public land, was built with public funds for public purposes, and was owned and operated by an agency of the State. The court held that when a State leases property, the proscription of the Fourteenth Amendment must be complied with by the lessee, stating (p. 725):

> "But no 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 not only made itself a party to the refusal but elicited to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle (leased restaurant) that it must be recognized as a joint participant in the challenged activity which on that account cannot be considered to have been purely private as to fall

without the scope of the Fourteenth Amendment."

It is of importance to note that joint participation was applied where a private party violated constitutional rights and wherein the government by virtue of its identity with such private party had been held to be a party to such private act; i.e., such private party stands in the shoes of the public entity. Simkins v. Cone Memorial Hosp., 323 F. (2d) 959 (C.A. 4, 1963); Colnon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (D.C.N.Y., 1968). Thus, evidentiary hearings were held in Burton to "sift" facts as to whether private discriminatory conduct was imbued with governmental participation and to determine whether such private being became an instrumentality of the government. The CHA is a public body performing a governmental and public function and we are thus not concerned with the "sifting" process to determine whether the acts of any private party were the acts of CHA or those of the federal government. But, plaintiff urges that CHA was found responsible in the earlier action although the acts fostering the illegal conduct were those of the City Council and that the measure of this defendant's liability must be the same. However, the responsibility of CHA was based on the theory of agency. Thus in Cooper v. Aaron, 358 U.S. 1 (1958) where the good faith attempts of the school district in

desegregating was being frustrated by other state officials, the Court said:

> ". . . it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of respondents when vindication of those rights was rendered difficult or impossible by the actions of other state officials . . ." pp. 15-16.

They were held to be agents of the State even though the acts of the Governor and the Legislature made impossible the implementation of the desegregation of the public schools. Indeed, in the companion case CHA could not act without the City Council in the performance of its governmental function.

The court is asked to extend the joint participation principle of Burton to the approval and funding, with attendant supervision, of the Department of Housing and Urban Development, an executive department of the federal government. In effect, under the Burton analogy, that the acts of the Chicago Housing Authority and the Chicago City Council were the acts of the federal government; that in the performance of their governmental functions they became the instrumentalities of the federal government and thus their acts became the acts of the federal government. To state such a proposition is to

reveal its inapplicability. Except as the separate acts of each are the result of concerted action to commit the tort of discrimination, joint participation cannot be extended to separate and distinct political entities and sovereignties each of whom are autonomous in their governmental functions. No such activity on the part of separate governmental entities can be equated to the Burton application. It is an ever-recurring fact that federal governmental financing is granted with greater frequency where needed to improve the condition of citizens of states, counties and cities, without thereby making the federal government a partner in the end result. Funding and approval have not so reached into the operations of CHA so as to make its functions federal governmental functions. If this were so, every federal funding, accompanied by supervision, would per se become a federal function and subsequent use become federal action. Even Hicks v. Weaver, 302 F. Supp. 619, (D.C. La. (1969) does not so hold.

The court is confronted, however, with a defendant who made efforts to correct the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take.

Justification for such action was made because

> ". . . faced with the tough dilemma of accepting some other sites proposed by the authority that were believed to be lawful but not optimal, or rejecting those sites and depriving potential housing tenants of improved shelter, HUD chose the former alternative."

In this court's view, the essence of defendant's wrong, if any, is not continued funding and approval but a purported dereliction of a stated statutory duty under §2000d-1, i.e., HUD could have terminated funding or have used other means to insure compliance. Cf. United States v. Frazier, 297 F. Supp. 319 (D.C. Ala., 1968). The fact that the Secretary did not pursue either of those steps does not result in making him a joint participant with CHA.

While the suit is not couched in the remedy to enjoin an official act on the ground that it was not within the authority conferred upon the defendant, or that it was an improper exercise of such authority, or that Congress lacked power to confer the authority, it is in reality such an action and the only action which plaintiff can bring against this defendant. The court believes that plaintiffs have misconceived the remedial claim which should be taken and Count II of the amended complaint is dismissed for failure to state a claim upon which relief can be granted.

Because many of the amici and plaintiffs themselves have through their briefs emphasized the importance and necessity of this defendant's supervision through a precisely formulated decree, the court feels their plea must be dealt with at this time even though nothing remains of the action upon which to premise that relief. Therefore, even if the action were alleged to be in derogation of defendant's statutory duty and power, and even if the court were to find that such duty and power were exercised in violation of plaintiffs' rights, the effect of the remedy sought as disclosed by plaintiffs and amici will be considered.

Where an agent or officer of the government purporting to act on its behalf have been held to be liable for his conduct which caused injury to another, the ground of liability must be found either in that he exceeded his authority or that it was not validly conferred. The action is therefore a personal action against the officer and not an action against the United States and an injunction against that officer is not against the sovereign for the sovereign cannot be enjoined.

The critical consideration is not the identity of the parties, however, but rather the result of the judgment or decree which might be entered. Minn. v. Hitchcock, 185 U.

373, 387 (1902). The perimeter of such remedy has been set forth in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

Plaintiffs and amici contend that if HUD can feasibly contribute to a prompter remedy than that contained in the decree heretofore entered against CHA which would accelerate desegregation of public housing in Chicago and create more new low income housing not only in the central city but in the General Public Housing area encompassing the remainder of Cook County [304 F. Supp. 736, 737], then they are entitled to an order calling for such efforts. Thus, the remedy should be framed with respect to that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago Housing Market area; that the order "will fashion the means of dealing with a major societal problem" which problem is that of increasing segregation of the races in the Chicago Metropolitan housing area and the serious lack of low income housing. Reference is made to major governmental study commissions which have reported on evidence that the problem is not confined to the central

city but that much of that problem is engendered through existence of a circle of surrounding white suburbs.

Buttressed by these scholarly reports, the plaintiffs appeal to this court is found in the language of the Supreme Court of the United States in Louisiana v. United States, 380 U.S. 145, 154 (1964):

> "We bear in mind that 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 as well as bar like discrimination in the future."

However, even that case does not give free license to the court to determine and encompass issues not existent in the complaint before it. [See Fn. 17, p. 154].

It appears clear to this court that the relief so earnestly desired by plaintiffs and amici would entail a decree operative against the defendant in his official capacity and not otherwise. The relief sought would not be effected by merely ordering the cessation of conduct. Cf. Hicks v. Weaver, supra. The defendant Secretary could satisfy the suggested methods of implementation to be contained in this decree only by acting in his capacity as Secretary of the Department of Housing and Urban Development in discharging the myriad functions and programs entrusted to him by Congress.

This court does not have jurisdiction to direct

and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention.

Although the preceding consideration is not required in the light of the disposition made of the pending motions, the egregious problem involved and adjudged in the companion case, and the earnest and dedicated efforts of counsel for plaintiffs and amici to seek implementation of corrective efforts already in effect, impels this court to explore the putative limits of its powers and in so doing finds them effectively circumscribed.

An order has this day been entered sustaining the defendant's motion to dismiss and dismissing the complaint.

Judge, United States District Court

Dated: September 1, 1970.

Messrs. Alexander Polikoff, Charles R. Markels, Bernard Weisberg, Milton I. Shadur and Merrill A. Freed, for Plaintiffs [109 North Dearborn];

Calvin P. Sawyier, Esq. for The Metropolitan Housing and Planning Council of Chicago, as amicus curiae, [53 West Jackson];

Messrs, Richard F. Babcock, Chas. A. Bane, Hammond E. Chaffetz, Allison S. Davis, James L. Harris and Edwin A. Rothschild for Lawyers' Committee for Civil Rights Under Law (National and Chicago Offices); The Urban Coalition; NAACP Legal Defense and Education Fund, Inc.; National Committee Against Discrimination in Housing, Inc., all as amici curiae [53 W. Jackson, 69604)

Robert L. Stern, Esq. for Urban Law Institute of George Washington Institute of George Washington University and Citizens Advocate Center as amici curiae [231 S. LaSalle St., 60603]

Messrs. Edward H. Hickey and Ellis A. Ballard for Urban Affairs Committee of the Chicago Bar Association as amici curiae (29 S. LaSalle St., 60603]

F. Willis Caruso, Esq. for Leadership Council for Metropolitan Open Communities amicus curiae [155 North Wacker Drive, 60606]

Stuart Bernstein, Esq. for The League of Women Voters of Illinois as amicus curiae [231 S. LaSalle St., 60604];

Hon. Thomas A. Foran, United States District Attorney, Chicago, for Defendant.

A TRUE COPY ATTEST
ELBERT A. WAGNER, JR., CLERK
BY:

Mary Ellen Mayer
DEPUTY CLERK, U.S. DISTRICT COURT
NORTHERN DISIRICT OF ILLINOIS
DATE: SEP 3 1970

DOCKET

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable _____

Cause No. 66 C 1460 Date Sept. 1, 1970

Title of Cause Gaudreau v Romney, etc.

Brief Statement of Motion Advisement

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk:

Pursuant to the Court's memo filed this day dept's motion to dismiss is sustd and the Complaint is dismissed.

SEP 2 · 1970

Austin J

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

FINAL ORDER

This matter coming on to be heard on the presentations of the parties, and the Court being fully advised

IT IS HEREBY ORDERED that for the reasons given in the Court's Memorandum dated September 1, 1970, the action be and the same is hereby dismissed.

/s/ BBA
Judge, United States District Court

Dated: October 21, 1970

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 66 C 1460
	)	
GEORGE W. ROMNEY, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs appeal to the United States Court of Appeals for the Seventh Circuit from the order entered herein on the 1st day of September, 1970, sustaining the defendants' motion to dismiss and dismissing the complaint, and from the order entered herein on the 21st day of October, 1970, dismissing the action.

Alexander Polikoff
Milton I. Shadur
Charles R. Markels
Merrill A. Freed
Bernard Weisberg
Cecil C. Butler

By /s/ ALP
Alexander Polikoff
One of the Attorneys for Plaintiffs

Alexander Polikoff
109 N. Dearborn Street
Chicago, Illinois 60602
641-5570

Dated: October 29, 1970