

## Transcript:

### Argument of Bork

Chief Justice Warren E. Burger: We will hear arguments next in 1047, Hills against Gautreaux.

Mr. Solicitor General.

Mr. Bork: Mr. Chief Justice may it please the Court.

We are here on writ certiorari to the Court of Appeals for the Seventh Circuit.

The history of this litigation is rather complex, but I think the facts that need to be stated for purposes of this review are stated rather briefly.

Respondents are six black residents of Chicago who brought this action in 1966 against a Department, an Agency of the Department of Housing and Urban Development.

On behalf of a class of black tenants in and applicants for public housing projects in Chicago, their claim which was subsequently upheld by the courts was that hard-aided public housing through financial assistance to the Chicago Housing Authority and that when it made that financial aid it knew that members of the Chicago City Council were blocking the efforts of Chicago Housing Authority to place this housing in white residential neighborhoods thus reinforcing patterns of residential segregation and most of the tenants and applicants here were black.

It should be said in this case by the way, I think it is of some interest that when we – as this case is developed, to phrase a black residential neighborhood or a limited housing neighborhood means one with more than 30% blacks.

So it can be 30% black and 70% white and still for purposes of this case be described as a black neighborhood or it can be within one mile of any such census tract that still be described as a black neighborhood.

Respondents brought a companion suit against the Chicago Housing Authority and the Court found that that authority had in fact engaged in these discriminatory practices.

It issued an injunction among the terms of which were an order to halt the practices, to build the next 700 dwelling units in the substantial a year over 70% white residential areas of Chicago and to locate at least three fourths of those units would be in those neighborhoods.

Now, in the parallel action against HUD, the Court of Appeals of the Seventh Circuit reversed the District Courts dismissal of the complaint and held that HUD's knowing act re-essences in CHAs, Chicago Housing Authorities admittedly discriminatory housing program brought HUD in the violation of the Fifth Amendment and of Section 601 of the Civil Rights Act of 1964.

I make no contention here of course that HUD did not violate those provisions by knowingly funding Chicago Housing Authority, but I think simple justice to the HUD officials involved requires me at least to note that during the time of the violation according to District Court, HUD made efforts, consistent efforts to correct what was happening and had succeeded in some respects and the Court of Appeals itself said that was fully sympathetic with HUD's dilemma of being forced to choose between the funding of construction of public housing in black neighborhoods or denying housing all together to thousands of needy Negro families.

The Court of Appeals on that appeal emphasized that its holding should not be construed as granting a broad license to interfere with the programs and actions of what it described as an already beleaguered Federal Agency and it suggest that the District Court might find that little equitable relief was needed beyond a best-efforts clause necessary to remedy the wrongs that had been committed.

At that point in the District Court, the actions against HUD and CHA were consolidated.

The District Court did enter a best-efforts clause and they were still outstanding of course against HUD and they were still outstanding of course the relief against the Chicago Housing Authority.

The District Court specifically rejected plaintiffs' proposal for a hearings to develop a plan of metropolitan relief for the areas surrounding the City of Chicago.

Upon appeal, a wholly new panel of the Seventh Circuit with one Judge dissenting, reversed and remanded for consideration of a comprehensive metropolitan area plan and that is the order.

Justice William H. Rehnquist: Mr. Solicitor General in the District Court, did the plaintiffs' request for a metropolitan remedy, was it accompanied by a prayer to join the outlying housing authorities?

Mr. Bork: I do not recall whether there was a prayer at that stage.

There was a prayer which was granted in the District Court after the remand from the Court of Appeals.

Justice William H. Rehnquist: I mean before the Court of Appeals?

Mr. Bork: Well, I believe there was a request.

Yes there was.

I believe there was a request to join them in the prospect in the District Court before the appeal so that a much (Inaudible) plan could be drawn up.

But the Court of Appeals ordered that a comprehensive metropolitan area plan be now considered is what is judicial here, meanwhile District Court has permitted respondents to file a supplemental complaint to add as party's defendant.

The 11 Local Housing Authorities outside the City of Chicago as well as the Illinois Housing Development Authority, the Northeastern Illinois Planning Commission and the Director of the Illinois Department of Local Government Affairs and respondents' current assertion in this Court is that housing in six Illinois Counties, Cook, a part of which is the City of Chicago, but much of which is not.

DuPage, Kane, Lake, McHenry and Will, those counties which contain 12 Local Housing Authorities and over 300 cities, villages and townships are the area which should be swept into this case and put under judicial supervision and used as a remedy, to remedy an act of segregation that occurred entirely within the City of Chicago.

Now, none of these counties or housing authorities or municipalities has been in this case previously.

None of them has been found to have committed any acts of discrimination, much less any acts of discrimination related in any way to what happened in Chicago.

The objection of the Secretary of the Department of Housing and Urban Development to the judgment of the Court of Appeals is precisely this.

The secretary of HUD will be required to impose obligations upon communities that are without fault in order to achieve a remedy for respondents that runs contrary to statutory obligations and a remedy that is not premised entirely upon wrong doing in Chicago.

Justice William H. Rehnquist: Are you arguing in a sense into the absence of indispensable parties?

Mr. Bork: I am not actually Mr. Justice Rehnquist.

I am arguing at this case is like Milliken against Bradley in the sense that District Court is being directed in effect by the Court of Appeals to exceed the scope of allowable equitable remedies and I am arguing also that the Swann case has something to say here about this case.

I think --

Justice William H. Rehnquist: Do you defend the District Court's refusal to permit the joining of these outlying districts for the purpose of offering proof?

Mr. Bork: No.

If the -- I think of the plaintiffs, I think this case is just like the Milliken.

If the plaintiffs allege and prove an inter-district violation, we would have a different case.

But that is not the posture this case is in now and I think as this Court said in Milliken, a controlling principle which is consistently been stated in the holdings of this Court is that the scope of the remedy is determined by the nature and the extent of the violation and as the concurring opinion put it there, the Courts there were in error for the simple reason that they thought what the remedy they thought necessary was simply not commensurate with the constitutional violation found and that is what I think is difficulty here.

I want to discuss Milliken, but I first want to develop a point which is not fully developed in our brief, although it is present and which in and of itself seems to me fully dispositive of this case.

As I said, respondents here proved a violation which was entirely within the City of Chicago and relief was ordered there quite properly and on this last appeal, the majority of the Court of Appeals ordered consideration of metropolitan relief.

Now, it gave a couple of reasons why it thought metropolitan relief was essential.

One was, that intra city relief had become less valuable while the case was pending because the number of neighborhoods with fewer than 30% black or outside of one mile within a census tract of less than 30% black residence had declined so that there was difficulty getting sites to put enough public housing in areas with more than 70% white population.

Well, I think it is important to ask why that is true and it is true not because of any action by any Governmental Unit.

It is true because of demographic shifts, shifts in residential patterns in the Chicago area.

Thousands of individuals and families made personal choices which they are legally free to make and as result we are told the Federal Courts must pursue those demographic shifts into outlying cities and townships and municipalities.

The Court is not pursuing Governmental action, or anything connected with Governmental action.

They are pursuing populations and demographic shifts.

Now, the other thing, the Court of Appeals said and it is quite clear in its opinion, is that it was reacting not to the constitutional violation in Chicago, but it was reacting to the phenomenon of white flight and it was reacting to sociological and demographic predictions about the distant future, 1984 was mentioned, the year 2000 was mentioned.

The remedy in short is actually addressed to a predicted de facto segregation and not to the limited proven de jure segregation in public housing in Chicago.

I happened to think that the sociological and demographic predictions made by the Court of Appeals are not accurate and if sociology were relevant to this Court, to this case, I would think that the remedy chosen to deal with sociological trends is the worst possible remedy one could choose, but that is not the point.

Chasing demographic shifts and attacking purely de facto living patterns I think is not a proper remedial function of Courts and I think this Court recognized that fact in Swann against Charlotte-Mecklenburg and that seems to me sufficient to require reversal of the Court of Appeals here.

But aside from the principle of Swann, there is the holding of Milliken against Bradley.

This violation took place as I have said repeatedly within the City of Chicago and it is therefore inappropriate to frame relief in an area that encompasses 300 other Governmental Units, more than 300 other towns and villages with a complete strangers to the action and to the violation.

Now, respondent's attempted answer to this is that this is not inter-district relief in the Milliken sense because it is not inter-district relief as to HUD, since HUD may operate over metropolitan areas.

That is fallacious, that answer is fallacious for two reasons.

The first is, that this remedy, even if it is nominally directed or actually directed only against HUD in a legal sense, will actually destroy the autonomy and some of the political processes of the cities and housing authorities, who have no connection with the violation in Chicago and secondly, I think it is irrelevant, it is a fallacious answer because the remedy would compel HUD and this cannot be gotten around, this remedy would compel HUD to ignore obligations placed upon it by Congress.

Now, respondent's argument as to the first point is that the 1974 Act permits HUD to bypass local communities and to deal with private developers.

And that --

Justice Potter Stewart: With that geographical restriction, if any?

Mr. Bork: Well, I think they may deal with private developers.

I do not think they used to comply with the zoning ordinance and so forth in the city you are in.

Justice Potter Stewart: That was within a -- given metropolitan community or --?

Mr. Bork: Yes.

They deal with private developers in any particular community, but under certain limitations.

But my first point is that even if those limitations were not present in the statute about what HUD may do, it is wrong to say that these communities are not being involved in this lawsuit because the result would still be that communities that have done nothing wrong whatever and that neither need nor want any public housing would have public housing placed upon them by Court order.

Chief Justice Warren E. Burger: Does HUD have authority of imminent domain to condemn land itself or must it operate through State and Local Housing Authorities?

Mr. Bork: It must operate through communities, State or Local Housing Authorities or with private developers under certain limitations.

But it does not -- HUD does not build these.

Currently, HUD is not building anything, it is not seizing property.

It is subsidizing rental.

Chief Justice Warren E. Burger: But some Federal Agencies do have power of imminent domain, is that not?

Mr. Bork: I believe that is true.

Chief Justice Warren E. Burger: But had you represent trust that they do not have that power?

Mr. Bork: That is correct.

They do not --

Unknown Speaker: They would have authority in your view to to enter into a contract with a private builder to erect a housing project contrary to local zoning laws --

Mr. Bork: No.

Unknown Speaker: Does not the decree of a -- does not the final paragraph of the opinion of the Court of Appeals in effect mandate that?

Mr. Bork: When I think what is going to happen and in fact mandates if it work, but respondents say that the decree does not allow them to nor do they wish to override local zoning ordinance.

It is not what is going to happen as a practical matter in the area around Chicago is it zoning changes are going to have to be requested to put up multi family dwellings of this size and has to be at least of a certain size, 50 to 100 families to make it economically feasible.

Justice Lewis F. Powell: But since the Local Agencies, the Local Housing Authorities and the Local Governmental Bodies were not parties to the case, what sanction will that be to compel and to comply with the --?

Mr. Bork: Well, I assume Mr. Justice Powell either in this case or in a separate case we will then have serious of litigation about whether refusal to make zoning changes or variances was discriminatory.

I think that is the way it would have to work out.

Justice William H. Rehnquist: But certainly Judge Austin if he is still on the case or if his successor might well feel that the issue of the availability of a metropolitan remedy would be foreclosed in favor of a metropolitan remedy by the Court of Appeals opinion here, might it not?

Mr. Bork: I think that Judge Austin, with the direction in that opinion and that order is bound to feel that he has to enter some kind of a metropolitan remedy.

But my point is, that quite aside from the limitations placed upon HUD, and I think this is an important point, about

dealing with local communities, if it were true, which it is not, if it were true that HUD could deal with private developers and ignore the local community, those local communities would have public housing they do not need, they do not want, they have committed no constitutional violation, and they are going to provide the services with a police protection, the fire protection, the additional schooling for families with children, to benefit citizens of Chicago.

But, and I want to say this, my point is not merely, that that is not a proper equitable remedy.

My point is, that a rather extraordinary legal principle is being formulated here.

Well, we remember what happened in this case.

Chicago Housing Authority was held responsible because of the acts of the Chicago City Council.

HUD was then held responsible because of the acts of the Chicago Housing Authority and now wholly uninvolved Town Governments are to be held responsible because HUD can reach them, that is all.

HUD is to be made in to a conduit through which the impact of local violations flows outward to all other Governments in the area, the respondents or the District Court think it useful to reach.

Now, I say that is an extraordinary legal principle because it is Federal Assistance and Federal Authority increases not only in this field, but in all kinds of fields.

That principle will expand the equitable powers of District Courts to unheard of dimensions.

In this very case, I think, it is clear that this Court has been pushed from performing a traditional, judicial function of framing an equitable remedy into a position what is going to become necessarily a metropolitan wide land use and social planning agency on a continuing basis.

I think all of that would be bad enough, but it is also true in respondent's brief, I think obscures this fact that metropolitan relief would require HUD to violate limitations built into which authority by Congress.

Now, it is all very well, I think respondent's counsel say that Congress contemplated metropolitan planning and that HUD officials endorsed metropolitan planning and that is entirely true.

HUD does that and HUD will continue to think in planning metropolitan terms regardless of the outcome of this case.

But it is also true that in metropolitan planning Congress has placed limitations and processes that must be observed and that a Court order would have to sweep away.

And the relief proposed here, I think would reverse the Congressional thrust in the 1974 Amendments to 1974 Housing Act to return more decision making to local communities and let me indicate briefly a couple of examples of how coercion would be necessary or how violation of HUD's statutory mandate would be necessary.

One example, a community which receives funding from HUD for community development activities under the Block Grant Program which is Title I of the 1974 Act, is required to prepare a housing assistance plan of its own housing needs in that community as part of its application.

Now, the statute requires or it is required that that housing assistance plan must be prepared by citizen participation including two public hearings for the citizens and it must be later reviewed and commented upon by the relevant area wide planning agencies to the State or the locality.

HUD cannot unilaterally decide to work with a private developer in order to put up a public housing in that community.

Instead, HUD is required under Section 213 of the Act to forward any proposal by private developer for public housing to the community and the community is required to determine whether or not that proposal is consistent with its housing assistance plan which it has been required to make and which had been made through citizen participation.

If a community says their proposal for public housing is not consistent, then Secretary cannot go forward unless she determines, despite that, that the proposal is consistent with the community's own housing assistance plan, and if HUD does that and goes forward, and the community disagrees then the community may seek judicial review.

That is all built into the 1974 Act.

Any community and the number of these communities do that has the Block Grant Program and a Housing Assistance Program, all of this would have to be swept away if you are talking about HUD dealing with the private developer without

interfering with the community.

If a town is not a participant in that plan, then Section 213 CF, Title II applies, secretary consults with the town, of course the town's wish has influence, but the secretary shall not approve a proposal there, even from a private developer, unless she determines that there is need for Federally Assisted Public Housing, taking into consideration the applicable State plans and finding that there is or will be available in the area public facilities and services adequate to service, their proposed development.

Now, I think that Court ordered metropolitan relief in this case no matter how gently it has gone about, no matter how it trained is bound to require HUD to ignore the safeguards of local autonomy and local political processes, the very safeguards that the Congress deliberately built into the 1974 Act.

Justice William H. Rehnquist: Mr. Solicitor General, what if there had been as there was not before the Court of Appeals ruling, a hearing in the District Court after a complaint in which all of the outlying authorities had been joined and there had been a finding by the District Court of inter-district violations on the part of all.

Would not that put the case in a somewhat different posture?

Mr. Bork: That would put the case in an entirely different posture Mr. Justice Rehnquist, but we have here the remedy appropriate to a case which is not here which is our problem.

Finally, there is not a shred of evidence in this case that anything done within Chicago produced any segregatory effect in any other city and certainly not segregatory effect between Chicago and any other city.

Now, there is Exhibit 11 which has been offered in this case and which is a map that is at the back of respondents' brief and I must say, that that Exhibit 11 does not prove anything.

It does not prove segregation.

It does not even raise a prima-facie case of segregation in any outlying city and it certainly does not prove any causation between what happened in public housing in Chicago and the situation in any outlying city.

Remember that these shaded areas, these limited housing areas, they get shaded if they are more than 30% black, those are not solid black communities or they get shaded if they are within one mile of a 30% black census tract.

Justice William H. Rehnquist: How did this come in to the record?

Mr. Bork: Respondents' counsel drew this map and put it into the record to indicate that there were no alternatives available to respondents to move into public housing in white areas outside of Chicago.

Justice William H. Rehnquist: Well, how was it authenticated?

Mr. Bork: I do not believe, I mean, I am subject to correction, but I do not believe it is authenticated.

I think it was drafted by respondents' counsel as an illustration and put in.

Justice William H. Rehnquist: Was it admitted an evidence in some factual proceeding in the District Court?

Mr. Bork: No.

I think it was just admitted, I do not think it is been there, I do not think any testimony taken about how this was drawn or the lines or anything else, but let me make a point about it.

If one looks at this rather large area with two close together dots for housing areas here, right below the City of Chicago, that is the Robbins, that is the town of Robbins.

Now, that looks like somebody has placed housing in the middle of a black area and maybe that is supposed to be segregatory.

It is worth noting that the town of Robbins itself is 98.1% black and that this census tract, upon which that public housing is located is 94.4% black.

So there is no way for the town of Robbins to put up any public housing that is not in a black area.

So that does not show segregation.

Justice Potter Stewart: Does Robbins have its own Housing Authority?

Mr. Bork: Well, it has its own government, I do not know if it has a Housing Authority because many of these communities do not have Housing Authorities.

It has handled -- I do not know if Robbins has a Housing Authority or whether it operates through its City Council.

Unknown Speaker: (Inaudible)

Mr. Bork: That is right.

I take it as no.

Directly below that one will see a black area with six black dots.

The three to the right, to the East are in the City of East Chicago Heights.

That city is 98.2% black and the public housing happens to be on the census tract which is 80% black.

There is again no possibility that any public housing could be put up in those two cities that was not in a black census tract.

So this map, if it showed it, does not even raise a prima-facie case of segregation in the suburbs.

If a de jure prima-facie case of segregation in the suburbs, it would certainly not show that there was any connection between what happened in Chicago and that -- I will take it back, I am told that the map is not Exhibit 11 it is just an exhibit in the brief, it is an attachment in the brief.

Milliken against --

Chief Justice Warren E. Burger: (Inaudible) aid, is that (Voice Overlap)?

Mr. Bork: Fairly so right.

The respondents offered it Mr. Chief Justice, and I guess it is offered as an indication of what they regard as prima-facie evidence.

I do not think it is prima-facie evidence of anything.

Our final submission is that Milliken against Bradley governs this case, the faults of one locality or being a -- made a jurisdictional predicate for area wide social planning on communities that are in no way involved and I think Swann suggest that judicial attempts to follow demographic shifts that are not due to any constitutional violation, really involves the Court in doing little more than requiring racial balance as a constitutional mandate where no constitutional violation has occurred.

Thank you.

Chief Justice Warren E. Burger: Mr. Polikoff.

Argument of Alexander Polikoff

Mr. Alexander Polikoff: Thank you Mr. Chief Justice and may it please the Court.

I wish to make two basic points this morning.

The first is, that a remedial order confined to HUD and extending throughout the HUD defined Chicago Housing Market Area is a practical option open to the District Judge.

It would be an appropriate order in this case and it would not be an Inter-district Order under Milliken and incidentally it would not be an order that answers to the description that the Solicitor General gave you of the order that was entered by the Court of Appeals.

I have a feeling that we are addressing two different cases here this morning.

The Solicitor General's view of what is mandated by the Court of Appeals as I will show in a moment is not my view of what that Court has mandated or indeed of what would be proper under equitable principles the Solicitor General and I, I am sure share.

Chief Justice Warren E. Burger: Would the power of exercise -- of imminent domain have to be exercised by someone to implement this decree?

Mr. Alexander Polikoff: It would have to be exercised Your Honor by private developers or by Local Housing Authorities and not by HUD.

HUD has never exercised the power of imminent domain in the operation of these programs and the exercise of that power presents no problem, no obstacle in framing equitable relief here where a developer, public or private, has acquired land, it then applies to HUD for funds to promote a subsidized housing project on that land.

If it has not acquired the land, it never comes to HUD for the money in the first place.

We have never contended in this case and we do not contend now that the zoning power is at issue.

The decree which the Solicitor General suggests mandates a judicial supervision of the exercise of zoning powers by local communities is not the decree we envision and it is not in our opinion the decree compelled by the Court of Appeals Order in this case.

I think the suggestion and it is one of many similar suggestions in the government's brief and in the argument here this morning that a parade of horrors will be the result of implementation of a Metropolitan Remedial Plan at the District Court level is simply inaccurate.

As our brief indicates, and we have cited cases and HUD regulations to this effect, subsidized housing is required to comply with local zoning and other land use control regulations. An

d nothing we have proposed in this case to date and nothing said by the Court of Appeals in our judgment changes that fact and the remand before the District Court, we would not propose anything different that I am saying here right now.

Justice William H. Rehnquist: Mr. Polikoff, what and is you conceive the decree that would be required under the remand of the Court of Appeals?

What effect would it have on the local authorities who were not previously parties to (Inaudible)?

Mr. Alexander Polikoff: It might have none, Your Honor.

Justice William H. Rehnquist: But what so -- but might it have some?

Mr. Alexander Polikoff: It might have an indirect impact and one of the problems is we cannot know because as my first of two points and I have not even told you yet what the second is, my first of two points was that an order might be confined to HUD alone.

If the District Court in its judgment on remand did confine such an order to HUD alone, it would have no direct impact upon Local Housing Authorities.

They would not be decreedly (ph) involved, the order would not run against them at all.

They would only be indirectly involved in the following way.

If and when a Local Housing Authority voluntarily chose to apply for HUD subsidy funds in order to develop some housing, a choice, I repeat for emphasis would be voluntarily made on its part, there would be no impact if it chose not to do so, it would then be subject to the conditions that HUD imposed on the use of federal funds offered to applying Housing Authorities.

In our view as indicated in the appendix to our brief, one conceivable remedial decree might be a direction to HUD to impose two additional conditions on the use of Federal Funds in the Chicago Housing Market Area by those who apply for such funds.

The first such condition, a condition essentially all ready contained in HUD regulations would be that housing be predominantly provided in the future in white rather than black neighborhoods because the history of the constitutional and statutory violation in this case is confining it to the black neighborhoods.

The second condition would be that a portion of the housing thus provided be made available to members of the plaintiff class as a remedial measure.

Now --



Justice William H. Rehnquist: But how can you justify the imposition of that second condition as against outlying authorities who have never had an opportunity to litigate any of these questions?

Mr. Alexander Polikoff: We do not.

We do not suggest that the imposition of that condition should be imposed against persons who have not had an opportunity to litigate.

That was the inherent implication in your question of the Solicitor General and I would like to advise Your Honor that the Solicitor General was correct before the District Court, long before the Court reached the Court of Appeals, we did request the District Court to enter an order, I will call it a Milliken type order if you will, in which he determined that it would be appropriate under the circumstances of the case to consider Housing Market Area Relief, but we said before doing so, it would be necessary to add the Governmental Parties, not the local communities that the Solicitor General talks about in the scores and in the hundreds because they do not provide housing, Robbins does not provide housing it is the Cook County Housing Authority which does, we suggest that before the District Court embarked on a consideration of metropolitan relief and because of the dictates of Milliken, the appropriate affected party should be at it.

We suggested it to the District Court which parties we would suggest the adding, the state of Illinois and the housing authorities in the Housing Market Area potentially to the affected.

We suggested that the District Court should direct HUD and CHA to indicate what additional parties if any ought to be at it and only at that stage we said to the District Court should you consider to -- should you proceed to consider a metropolitan plan, indeed Mr. Justice Rehnquist, we submitted a proposed order in connection with that motion to the District Court in which we specifically said, the Court is not now called upon to decide whether to order metropolitan relief, but only that for the consideration of such relief that is appropriate to add these parties.

That motion was denied and --

Unknown Speaker: Is that argument suggest that perhaps it is premature for us to grapple with the issues involved here?

Mr. Alexander Polikoff: I think it does Your Honor and --

Unknown Speaker: It is the same I gather is there is no order yet, none of us knows what the contours will be, none of us knows the impact on the outlying municipalities, indeed even the impact on HUD?

Mr. Alexander Polikoff: That is exactly correct.

It is, Mr. Justice Blackmun, said speaking for the Court in the recent case of Wheeler versus Barrera, the case involving teaching in parochial schools by publicly paid teachers, the order before the Court in that case, it was a statute, but I am drawing an analogy, did not mandate on the premises parochial school instruction so that issue was not yet presented and that if on remand, Missouri and its State Agencies chose to up for that form of instruction.

Mr. Justice Blackman said, the range of possibilities was still very broad and the First Amendment implications of such a plan would vary depending on what was adopted.

Unknown Speaker: I mean, with our recent summary affirmance in the Delaware school, desegregation (Voice Overlap).

Mr. Alexander Polikoff: I am, Your Honor.

Unknown Speaker: You recall there, it was proposed that the District Court consider a metropolitan remedy in the school desegregation case.

Mr. Alexander Polikoff: That is correct.

Unknown Speaker: But have not in fact entered a decree involving, providing a metropolitan remedy and we summarily affirmed, that was an appeal of course.

Does that (Voice Overlap).

Mr. Alexander Polikoff: I think that emphasizes the prematurity.

Indeed the second point which I have not yet had the opportunity to tell Your Honors about was precisely this, that the issue of a remedial decree that embraced, if it did and we do not know whether it would or not, but that embraced local housing authorities, is premature at this point because we do not have the shape of that decree before us, let alone

knowing for sure that such a decree will be entered.

Justice William H. Rehnquist: Yet do you not have to say that the Court of Appeals then too was premature in saying as it did that there should be a metropolitan remedy?

Mr. Alexander Polikoff: I do Your Honor and I must say with deference to the Court of Appeals that I am not here defending that opinion per se.

A remand, I am defending the result.

I think the result is sound, but I think the language is overly broad and this Court knows.

A remand to the District Court would be in compliance with whatever this Court said in its opinion, not with what the Court of Appeals said.

I think that on remand, with the proper parties added, it would be open to the District Court in theory.

I think it is very unlikely as a matter of fact for reasons I will come to.

I think it would be open to the District Court in theory to decide against the metropolitan plan and I do not think without having joined the appropriate parties to be joined and having heard them, a final determination can be made with respect to that matter either.

Unknown Speaker: In this respect is this not case and very much the same posture that the Milliken case was when it came here?

Mr. Alexander Polikoff: Not at all Your Honor.

The Government's brief, its reply memorandum rather makes the flat out statement that this case is at the same stage that Milliken was when this Court granted Certiorari.

I differ with that view.

The District Court in Milliken, before this Court took the case, had entered a plan -- entered an order which provided for the establishment of a panel of nine persons to formulate a desegregation plan and it had laid out a number of precise respects in which that panel was to operate.

It talked about the equalization of facilities between school districts, the financial arrangements to be made between them and a number of other particulars.

And only after it was clear in Milliken, as a result of the entry of that order, even though the Court of Appeals sent it back in some particulars that essentially affirmed the District Court's basic approach in dealing with those matters and involving the Local District, then it came to this Court.

Unknown Speaker: It was affirmed and approached though?

Mr. Alexander Polikoff: It affirmed and approached, but with a clear indication that in -- it was a long Court of Appeals' opinion Your Honor will recall, in a number of specifics that the District Court had indicated, that was the right way to go.

Now, we do not have that here.

We do not have anything like that here.

We have not even heard at lower court levels let alone at this Court level from the parties who might be affected, and therefore, it is not even clear Your Honor, and it was clear in Milliken, it is not even clear here, that the District Court would enter an order that would involve local housing authorities at all.

Justice Potter Stewart: You do not mean -- you mean out of Chicago?

Mr. Alexander Polikoff: Out of Chicago, it would not involve them at all.

I wish --

Chief Justice Warren E. Burger: But that is what the Court of Appeals was talking about?

Mr. Alexander Polikoff: The Court of Appeals was talking Your Honor, about the desirability on the record made in this

case of area wide, but not multi district relief.

In Milliken, this Court spoke not merely of area wide relief in a geographic sense, but of area wide multi district relief.

That is a quotation I believe from phrase that appears in Mr. Chief Justice Burger's opinion in Milliken and what that phrase meant in Milliken was that the relief envisioned by the lower court and the Court of Appeals in that case necessarily involved, what Your Honor called included districts.

Decrees that ran -- a decree that ran against local Governmental entities, discreet autonomous units and required them to do something they were decreedal parties.

In this case, the Court of Appeals' direction to be metropolitan area wide in scope need not involve the decreedal provisions that require the inclusion of additional parties.

My very first point, in answer to Mr. Justice Rehnquist's early question, was it one invisible, there is such a word, one invisible form of relief in this case is a decree confined to HUD that does not decreedly run against anybody else that tells HUD to utilize what it already utilizes administratively, a housing market area unit for administering the stream of Federal Subsidy Funds flowing into the Chicago area that is in the past caused discrimination and in the future ought to be used to remedy it.

Now, that flow of Federal Funds, HUD administers on an area wide basis, not an area wide multi-district basis as in Milliken, but an area wide basis, it compares competing proposals for the use of those funds that come to it from within that area.

Now, why does it choose such an area?

It does so because HUD's regulations say that in the real world, housing is not like schools.

Children are assigned to schools within a discreet geographic area and they have to go there, they cannot go anywhere else if they live within that area.

HUD says that by contrast in the housing situation, people look for housing in terms of how far they are from jobs, commuting distances, what the market for housing is as determined by HUD to be a specific geographic area that crosses the boundary lines of local political jurisdiction.

Justice William H. Rehnquist: But even if those housing authorities are not as you say, decreedly involved, if HUD is to be enjoined by the Court to treat them in a manner otherwise, then it would voluntarily treat them, ought they not to have had an opportunity to be heard on that question?

Mr. Alexander Polikoff: We insist that they should and I have been agreeing with you Mr. Justice Rehnquist is that should have been the procedure followed.

It was the procedure we requested the District Court to follow.

It was aborted because the District Court denied our motion to that effect.

And indeed, the notice of appeal to the Court of Appeals was an appeal not from the entire judgment order entered by the District Court, but only from that portion of the order that denied the motion you and I have just been talking about.

The rest of the judgment order was the general summary judgment against HUD.

We did not appeal from that.

HUD filed a cross appeal from that portion of the order and later abandoned it and rightly so because it was the order they themselves had proposed.

The second aspect of your question Mr. Justice Rehnquist implied as I understood it that there might be something inequitable even about an indirect involvement of the local housing authorities since they were not involved in the wrong, I am assuming for this purpose that the wrong is viewed as being limited to Chicago, we make that is not so also.

The cases cited in our brief show that in the administration of Federal programs, Federal Courts have a number of times in food stamp cases and employment services cases confined relief to the Federal Administering Agency in connection with the joint Federally, Locally Administered program.

The Courts have said that is proper.

The indirect impact on the State is something that is mandated by Federal Law, but even beyond that, the major current form of federally subsidized housing activities does not necessarily involve Local Housing Authorities at all.

HUD's current program is primarily a private developer program, not a local housing authority program.

HUD's dealings are primarily with private developers and with respect of that kind of flow of federally subsidized activities, the local jurisdictional boundary lines are completely irrelevant.

Housing authorities may, but need not enter into the program.

It is a matter of their own voluntary choice.

In sum, there are two alternatives it seems to me.

One is to dismiss the writ that is improvidently granted because the whole thing appears premature.

Justice Harry A. Blackmun: That if I might suggest that is what you have just said to us, you do not agree that the -- you do think that the opinion at least sweeps over broadly?

Mr. Alexander Polikoff: Correct.

I do.

Justice Harry A. Blackmun: So a dismissal leaving that stand probably would not be (Inaudible).

Mr. Alexander Polikoff: The second alternative and in my view by far the preferable one because this has been a long lasting litigation and clarity is desirable.

The second would be to recognize the force as I see it and I hope you do if I point number 1 that on any view giving the most weight and strength to the Milliken considerations on any view, a decree limited to HUD not running against the Local Housing Authorities or other Governmental Entities would be an appropriate order in this case and would not be inter-district under Milliken.

Now, on that view the Court of Appeals judgment, not its opinion of course, but the Court of Appeals judgment could be affirmed because all that judgment does is --

Justice Harry A. Blackmun: Was the limitation that you just suggested --

Mr. Alexander Polikoff: With limitation that I -- well, what I am suggesting is a limitation as to an appropriate order that might be entered by the District Court, but the District Court would not be confined to that.

The other possibilities in light of the procedural corrections that Mr. Justice Rehnquist and I have been talking about having been made, the District Court could then consider whether or not and I am not predicting, whether or not relief extending beyond HUD would be appropriate.

Justice Harry A. Blackmun: Do you rather, more like a modification of the remand of the Court of Appeals and District Court and does an affirmance as to both.

Mr. Alexander Polikoff: I agree with that Your Honor.

Justice Potter Stewart: It is an affirmance in that you think we ought to agree that the case ought to be remanded to the District Court.

Mr. Alexander Polikoff: Yes.

That is correct.

Justice Thurgood Marshall: (Inaudible)

Mr. Alexander Polikoff: Pardon me?

Justice Thurgood Marshall: You want the District Court to hold the hearing, you do not want just issue an order?

Mr. Alexander Polikoff: That is correct.

We think that the next step and indeed what we asked for in our motion below that was denied was the holding hearing.

Chief Justice Warren E. Burger: You said as I understand it, that when it came to the District Court, the District Court can say, would be free to say if he is so concluded that under Milliken he could not go beyond the boundaries of Chicago?

Mr. Alexander Polikoff: The District Court would not in our judgment be free to say that soundly and correctly because as I have indicated it is my first and principal point here Mr. Chief Justice Burger, that an order confined to HUD, even though it extended area wide to the housing market area, but did not involve other parties would not be an inter-district order under Milliken.

The --

Chief Justice Warren E. Burger: What kind of an order would go to HUD to say exercise your -- to the Secretary, exercise your discretion according to the following guidelines?

Mr. Alexander Polikoff: Not quite that way.

We have an order in Chicago Your Honor, to illustrate and I am not -- I am answering your question in terms of what District Court might do, what one of the options would be, we have an order in Chicago that essentially imposes two requirements on HUD.

It says that the Federal Housing Subsidy Funds, henceforth flowing into Chicago should meet two criterion if they are to be used in Chicago, in addition to all of the other criterion and those two criteria are first the predominance in white resident black neighborhoods and second, availability of some of the housing to the plaintiff class.

Now, to answer your question Mr. Chief Justice Burger, exactly those two criterion could be directed by the District Court to be used by HUD in the area HUD already uses to administer these programs that would not involve other parties, that would not in our view, therefore, be an inter-district order under Milliken and the District Court would not, therefore, be prohibited by Milliken from entering such an area wide order against HUD.

Chief Justice Warren E. Burger: But that is the authority of the District, the Federal District Judge to tell the Executive Branch how to exercise its discretion?

Mr. Alexander Polikoff: The authority, I would say the duty stems from the adjudication of liability against HUD.

The Federal Executive Branch is obligated to remedy its constitutional and statutory wrongs just as much as State and Local Governments are and cases without number have imposed restrictions and limitations on Federal Agencies requiring them to remedy their own wrongs.

Chief Justice Warren E. Burger: (Inaudible) identify here when you referred to that the --

Mr. Alexander Polikoff: The Solicitor General emphasizes and properly so that HUD's wrong was in a sense secondary because it consisted of funding and approving actions of another agency, but we insist and I think also correctly so that the Court of Appeals was right in finding that HUD's activities, although understandable were nonetheless an independent basis of wrongdoing and violated both the Constitution and the Civil Rights Act.

Justice William H. Rehnquist: All of that relate simply to the Chicago Housing Authority as I understand it.

It is not just that the Local Authorities have not had an opportunity to litigate factually in the District Court their activities in the area outside of Chicago, but I gather has been no factual hearing on HUD's activities outside of the Chicago housing authority area?

Mr. Alexander Polikoff: That is correct Your Honor.

In our view housing market areas or relief against HUD would not be dependent upon such a factual hearing because the Chicago, the City of Chicago is located within the Chicago Housing Market Area, an administrative area that HUD defines and uses as the appropriate area for a number of purposes, particularly and specifically including and I am now quoting from a HUD regulation "decreasing the effects of past housing discrimination."

Justice William H. Rehnquist: But your theory in the District Court that was upheld by the Court of Appeals on the first appeal was that HUD's violations had been secondary as a result of pressure from Chicago Alderman.

Now, it seems to me that when you get outside of the City of Chicago, you would have to make some sort of a new showing that this, that HUD had engaged in similar violations and the fact that it responded to pressures from Chicago Alderman would not necessarily mean that Joliet Alderman or Elgin Alderman would have put the same pressures on

the HUD?

Mr. Alexander Polikoff: I think not.

It is important to distinguish between what is necessary to demonstrate at the liability stage of the case and what is appropriate for an equity Court to consider at the remedial stage of a case.

If we assume for the moment and I am not arguing here, I am certainly not waiving and I will come to it shortly if there is time, but if we assume of this suburban discrimination aspect of the case, but if we assume for a moment that the wrongs were confined to the City of Chicago, nonetheless residents of the City of Chicago seek housing as HUD itself says, not within the boundaries of the City of Chicago, but within the housing market area.

They seek it throughout that entire area.

HUD constantly administers its programs with respect to that broader area.

Now, liability having been established on the part of HUD admittedly by assumption for our purposes here at the moment within the City of Chicago, it is incumbent upon HUD and it is incumbent by an equity Court to direct HUD to provide the fullest possible, the most effective relief that may be attainable with respect to the wrongs it has committed in Chicago.

Now, why implied in your question Mr. Justice Rehnquist, should HUD in doing that go beyond the City of Chicago's corporate boundary limits.

Well, the answer is, unlike the situations with schools, housing is sought by the persons in Chicago, including the wrong persons within the housing market area.

It is, therefore, possible for HUD to provide relief for those persons in accordance with its normal administrative activities as indicated by its own regulations in what is a realistic geographic area with respect to housing.

It would not be with respect to schools.

It is true that the nature of the wrong determines the scope of the remedy, but the nature of the wrong in this case is not a school's wrong, it is the housing wrong and the nature of the universe of housing is that we deal with market areas, we do not deal with identifiable and confined geographic units called school districts and the nature of the housing wrong in this case not only justifies, but compels the equitable relief of using the housing market area as the remedial geography.

Justice Potter Stewart: The school districts are geographic units, they were politically units?

Mr. Alexander Polikoff: Both, that is correct Your Honor.

Justice Potter Stewart: And here to you have political units?

Mr. Alexander Polikoff: And the political unit that is relevant with respect to HUD is of course the entity, the Department of Housing and Urban Development, which has chosen an administrative area that expands beyond the boundaries of the Local Housing Authorities who may not even be participants at all in a part of the remedial scheme we are talking about.

One of the anomaly --

Justice Potter Stewart: In Milliken, you have the State of Michigan with an overall regional educational policy and powers?

Mr. Alexander Polikoff: That is correct.

Not being exercised, it had a potential for late in power to compel the consolidation of local school districts in that case.

Here we do not have a potential or late empower on the part of HUD to compel anybody to do anything.

We are not talking about compelling.

We are talking about an order confined to HUD.

That is a practical option to the District Court that would not compel anybody other than HUD to do anything.

There would of course be indirect impacts on housing developers, private developers, as well as public developers who chose voluntarily to apply for the housing, but those indirect impacts are no ground for refusing or denying the relief

against HUD that plaintiffs are entitled to as a remedial matter.

I guess my time has expired.

Thank you.

Chief Justice Warren E. Burger: Mr. Solicitor General.

Rebuttal of Bork

Mr. Bork: Mr. Chief Justice, members of the Court.

Let me address the question of the remand because I think that would be totally improper in this case.

A remand would send this case back under respondents' counsel theory to consider a metropolitan wide relief which we think can be shown now and we think we have shown now as a matter of law to be improper.

Secondly, in answer the question by Mr. Justice Rehnquist, I think it would do no good Mr. Justice Rehnquist to bring in local communities for a hearing about a remedy.

They might be heard about a remedy, they might prevail, or they might be overridden, but they are being subjected to hearings and a possible remedy when they have committed no violation.

Justice William H. Rehnquist: Well, my question suggest is not a hearing about a remedy, but a question about whether there had been an initial wrong and then presumably if a finding of a wrong?

Mr. Bork: I quite agree in that case if the respondents' counsel wants to file a new case or amend this case and start a new lawsuit about an inter-district violation of the fact, of course.

Now, if we talk about ordering HUD alone and this not being inter-district as to HUD as a somatic game, it really ought to go on unchallenged.

The truth is, as I stressed in my opening statement, there would be an enormous practical impact on innocent communities who have to bear the burden of this housing.

We will have to house a plaintiff class from Chicago which they wronged in no way, who is -- political processes which are respected by Congress will be overridden and there is no way that is not an inter-district remedy even though you used HUD as the conduit.

It is very dangerous to say that anytime a Federal Agency does anything wrong in any locality because the Federal Agency has jurisdiction over a very wide area, the Federal Agency can be asked to sweep in the residents of that entire area, although they were not involved in any wrongdoing and in any shape or form.

Justice Thurgood Marshall: As I understand the position would that the Court might not issue any decree at all?

Mr. Bork: The Court might not.

I think Mr. Justice Marshall if the District Court were not to issue any metropolitan decree, it could only be because this Court vastly modified what that Court of Appeals said because that was a direction.

Justice Thurgood Marshall: (Inaudible) would be modified.

Secondly as I understand what they are saying is not been HUD makes any County or District or anything do anything, but that HUD studies it?

Mr. Bork: Oh.

HUD does study Mr. Justice Marshall.

Justice Thurgood Marshall: But what they are asking for and to see whether or not there is not some relief that HUD could give.(Voice Overlap)

Mr. Bork: Well that is a different --

Justice Thurgood Marshall: Not that HUD must do it?

Mr. Bork: I think it is a different lawsuit Mr. Justice Marshall.

If the question were, is HUD adequately exercising its discretion under its statute that would be a totally different statute, a lawsuit.

This is not that lawsuit.

This is a Constitutional violation in Chicago with no allegation that HUD is acting improperly anywhere else, but HUD is to be used because of its wide jurisdiction as a conduit to take the Chicago violation out and bring somebody else in for a remedy.

Now, on a remand, I think it is improper because HUD is going to have to litigate something that I think is improper to begin with.

These communities are going to be required to litigate it.

We have got 11 housing authorities in there who are not even alleged to have done anything wrong.

So that a remand, I think would be quite wrong.

HUD wide-spread jurisdiction was not intended to wipe out the Local Political Units that are supposed to make these decisions for their community.

Justice Thurgood Marshall: (Inaudible) HUD consider it as a region and wipe out the line and reconsider it?

Mr. Bork: No sir, Mr. Justice Marshall, it does not wipe out the lines.

Justice Thurgood Marshall: You mean that HUD does not look at five, six or more counties around in the city?

Mr. Bork: HUD may do that.

Justice Thurgood Marshall: And look at it as a unit without regard to district lines?

Mr. Bork: HUD looks at it for planning purposes, but when it is finished planning, it does not implement a plan which is inconsistent with the Local Communities Housing Assistance Plan for example.

The local community participates politically in this and has a number of checks upon this.

So, but what is obviously inevitable here is that in some form that local autonomy is going to be overridden or bypassed and we are going to wind up with effective remedies in towns that have done nothing wrong.

Justice Byron R. White: Do you think that HUD would generally say -- could cooperating in unconstitutional sites selection, was it not your trouble area?

Mr. Bork: No.

The order against HUD entered by the District Court Mr. Justice White was a best-efforts order and HUD is cooperating in the Chicago area, and will use its best efforts --

Justice Byron R. White: Well, I know but that is -- I will ask you again, what about that injunction applied to the Chicago housing area as a (Voice Overlap).

Mr. Bork: Oh the area, I am sorry, I am sorry.

And --

Justice Byron R. White: It is just not the kind of an order?

Mr. Bork: A best-efforts order.

Justice Byron R. White: Yes.

In the entire area just do not cooperate in anymore, whatever you are found guilty of -- HUD is found guilty then in Chicago, you ought to split it and split it in the Chicago Housing Area?

Mr. Bork: I do not see the legal predicate for an order against HUD in the Chicago housing area anymore because it did something wrong in Chicago.

Chief Justice Warren E. Burger: (Inaudible) I suppose something that is not in the record in this case that is, that is



someone is beating his wife, and therefore, stop beating your wife?

Rebuttal of Alexander Polikoff

Mr. Alexander Polikoff: I think I would Mr. Chief Justice, in fact I think that to be consistent --

Justice Byron R. White: (Inaudible) apparently you do not challenge the -- at least here this is lawsuit and the constitutional violation by HUD in Chicago.

You do not mind being ordered to stop that in Chicago?

Rebuttal of Bork

Mr. Bork: That is quite correct Mr. Justice White.

However, I would certainly would object --

Justice Byron R. White: You do not mind being ordered to stop violating the constitution in the Chicago housing area?

Mr. Bork: HUD is not being shown to and does not, to the best of my knowledge to violate the Constitution in anyway in the Chicago Housing Area and it is not doing it in the City of Chicago.

Justice Byron R. White: (Voice Overlap) you do object to it?

Mr. Bork: I certainly do Mr. Justice White and let me explain why.

I would object to it if the request for relief in this case were HUD is been found to acquiesce in the acts of the Chicago Housing Authority, and therefore, we are going to order HUD to stop it in New York, Detroit, Los Angeles, and San Diego.

HUD has not done anything like that and I think it ought not to be subjective to an order which is an equivalent of that.

Justice Byron R. White: (Inaudible) who are operating in the Chicago Housing Area, that operate inside Chicago, then we do have an issue post and I guess that is what the lawsuit is all about?

Mr. Bork: I must Mr. Justice White there has been no showing of a predisposition on the part on the part of HUD to this.

In fact, all of the Courts agreed that HUD opposed what was happening in Chicago, made some progress and in opposing it, but ultimately acquiesced and financed things they should not have because of the desperate need for housing and plaintiffs' affidavits about the kind of housing they were living in before HUD put up this public housing in Chicago illustrates that desperate need for public housing that existed at that time.

Justice Byron R. White: What was the basis for the Court of Appeals (Voice Overlap) remarks that at least had initially thought that a District Right remedy -- a metropolitan remedy was appropriate?

Mr. Bork: Well, HUD does think that it ought to work as its statutory mandate requires throughout the metropolitan area.

It does not think it ought to be subject to a Court order which is going to change its statutory mandate throughout that area when it has done nothing wrong in that area.

Justice Byron R. White: Do you think the Court of Appeals misread whatever it was that HUD represented --

Mr. Bork: I think the Court of Appeals did, Mr. Justice White and I think respondents' counsel too.

HUD keeps saying that it is important to work in the metropolitan area and that it will do so as its statute allows and the statute allows that, encourages that, but it does place limitations and there is no reason to destroy those limitations when nothing is wrong has been done at that area.

Chief Justice Warren E. Burger: Thank you gentlemen.

The case is submitted.