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HUD's Authority to Mandate Tenants' Rights in Public Housing*

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The Secretary of the U.S. Department of Housing and Urban Development has recently mandated more favorable lease terms and grievance procedures for the 2.5 million tenants¹ who reside in public housing. This action grew out of a series of meetings conducted by HUD with representatives of tenants and the local agencies which manage public housing. In ratifying their agreements, the Secretary has required each of the 1,900 local authorities to adopt lease provisions and grievance procedures that meet certain general standards recommended by the negotiators. Along with these guidelines, the Secretary is forwarding models of lease and grievance procedures, but these are only illustrative; local authorities are free to adopt their own forms within the prescribed guidelines.²

This essay presents the case that there are sensible statutory limits on the discretion of the Secretary, even when it comes to an act so clearly decent as trying to protect poor people in public housing from harsh treatment. Those limitations derive from the congressional design of the public housing program with its strong preference for local control of management. We will find, however, that HUD has

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1. These and other statistics concerning the size of the public housing program and the number of local housing authorities come from HUD, JUSTIFICATIONS FOR 1971 ESTIMATES, RENEWAL AND HOUSING ASSISTANCE PROGRAMS, prepared for the Committee on Appropriations, House of Representatives, p. E-19 (Feb. 1970).

2. RHM 7465.8 (Feb. 22, 1971); RHM 7465.9 (Feb. 22, 1971). Renewal and Housing Management circulars provide the customary vehicle for HUD rulings, and are kept in the various HUD-FHA offices throughout the country.

some specific base of authority, derived from either the housing statutes or recent constitutional decisions, for mandating many—although not all—of the negotiators' agreements. But we will also see that HUD could probably not take the next logical step and impose its own lease and grievance models on local authorities.

I. Tenants' Rights and the Interests of Tenants

Before reviewing the structure of the public housing program and the legislation which has shaped it, something should be said about the apparent conflict between the protection of tenants and the values of decentralized management. Some would argue, as a matter of policy, that the rights of tenants in dealing with their local housing authority landlords can only be achieved through HUD directives and enforcement. But this position is subject to question. On some occasions it may be true that the best enforcement of the rights of underprivileged people can be realized by the exercise of strong central power. If this has not been the case with civil rights, it has so clearly seemed to be that any suggestion to the contrary is more than suspect. But even the individual who is persuaded that civil rights are only obtainable in the United States through the vigorous intervention of federal authorities will recognize that interests of tenants might best be served by leaving some aspects of the landlord-tenant relationship to local option.

The advocates of tenants' rights acknowledge that while their bargaining position in the federal arena may be stronger than it is in some localities, there are a number of major cities in which tenants' groups would fare as well or better without federal precedent in negotiating the terms of their tenancy. Considerations other than Realpolitik also need to be regarded. Many big city authorities are in or near bankruptcy; lease provisions and even protracted grievance procedures which impair revenues and therefore the ability to operate may result in the abandonment and demolition of public housing units. Perhaps the most successful attempt of tenants to gain control over a housing authority operation was in St. Louis where after a long rent strike tenants virtually took over the infamous Pruitt-Igoe complex. Despite the heroic efforts of tenants, the Pruitt-Igoe rent roll fell so far short of the amount necessary to meet the costs of operation and maintenance that the project may have to be liquidated. All of this is not to suggest that in some matters federal control and a high degree of tenant participation might not be helpful or even vital in order to forward important

goals. It is only to suggest that there are values at stake of great importance to public housing tenants that may not be of constitutional dignity but still deserve some attention.

Consider the claim of a tenant not to be evicted until he has received an explanation of the reason for the attempted ouster and a chance to contest it. If he is being evicted for a spurious reason, this right seems important. Once evicted, he may have to move a considerable distance, pay a higher rent for a place that is no more than a filthy hovel, and thus be in a weakened position from which to pursue his claim against the housing authority. Even if he eventually wins, the apartment he had been occupying will probably be filled and he will be forced to wait for a vacancy. On the other hand, if he had been intimidating his neighbors with violence or threats of violence, the interests of tenants as a group might be served by effecting a prompt eviction with no opportunity to confront accusers. If the neighbors must bear witness against a fellow tenant—if he is entitled to confront them at a public hearing, and to remain in possession while the finder of fact decides the case—responsible people may never come forward to voice their complaints in the first place. Against the proposition that a frequent cause for eviction is asocial behavior, some have argued that even the asocial need a place to live, and that if they are not harassing people in public housing, they would be harassing people in the slums. Unfortunately, what has often happened is that decent tenants have been forced to abandon public housing when the indecent are not removed promptly. Without a steady contingent of responsible tenants, public housing cannot be maintained. When apartments in public housing are abandoned, buildings must eventually be demolished. As the supply of low rent housing is reduced, all who depend on such housing are affected, regardless of their life styles.

In one housing authority the management could be arbitrary, evicting those who refuse to act subservient to the janitors or managers of the project. In another, eviction could be effected only for prolonged nonpayment of rent or conduct that would amount at common law to constructive eviction of other tenants if the landlord refused to oust the troublemaker. The constitutional mandate against arbitrary evictions should certainly apply everywhere, but the kinds of safeguards that should be instituted—and that the tenants would, if polled, prefer to see instituted—would probably not be the same in the two places. The interests of tenants in public housing are not necessarily best advanced by a rigid formula devised in Washington. This point is espe-

cially difficult to accept while recognizing that public housing tenants have sometimes been mistreated by insensitive managers³ and often badly represented by housing authority board members and city councils. Fortunately, this is changing as tenants insist that their legitimate concerns be met.

II. The Practical Limits of HUD's Effective Power

To gain perspective on an inquiry into HUD's formal authority, it may be helpful to consider first the practical reach of HUD's control. The assertion that tenants would somehow be protected if only HUD proclaimed they should, is improbable. Whatever the Secretary's technical authority in the field, his effective powers to discipline those who would disregard his orders are, in fact, quite limited.

The Secretary's powers are defined by the structure of federal-local relations in the public housing program. The federally subsidized low rent public housing program accounts for all but a fraction of the subsidized dwelling units for low income people. The U.S. Department of Housing and Urban Development distributes this largesse and answers to Congress for the way it is spent. Funds are dispersed in the form of annual contributions to local housing authorities. These authorities are created by local governments, and overseen by boards whose members are designated by the local government. Each local housing authority proposes the volume of activity it will undertake. By federal law, the local government must elect whether to take the necessary steps to form a housing authority and also is required expressly to approve each application for funds, waive the right to receive property taxes from the project and agree nonetheless to provide a full measure of municipal services. Financing for public housing is somewhat complex. When a site has been approved by the locality, its acquisition and the costs of construction are met by the issuance of special local bonds. Because they are the obligations of the housing authority, interest on them is entitled to the same exemption from federal income taxation as on all

3. The instances of public housing mismanagement have attracted widespread concern, but to a degree which hints at scapegoating. Many public housing managers are certainly as able as their counterparts in the private sector, and some of them are lured in that direction. Conditions in public housing frequently range from disheartening to terrifying. Furthermore, few people have the training necessary for this difficult task. Efforts are being made both to retain existing staff and improve the quality of management. Nothing in the text should be misinterpreted either as a slur on the several thousand public housing managers or as a counsel of despair on the chances for continuing to improve the capabilities of management in public housing.

local indebtedness. These bonds are more secure than the usual local issuance because they are guaranteed by the federal government and repaid from proceeds of the annual contribution which the federal government has contracted with the local authority to make for each project. By virtue of a provision in the Housing Act, this housing must be exempted from taxation by the host locality. In lieu of taxes, a payment of no more than ten per cent of gross project rents is made to the city. Thus, the federal government underwrites the acquisition and development costs, and localities forego most of the property tax revenue on the projects.⁴ This leaves the costs of operation and maintenance—which are considerably higher for public housing than conventional apartments. These expenses must be satisfied from tenant rents, except that in recent years Congress has provided limited sums to supplement rent payments for particularly necessitous tenants.⁵

The “true believer” in tenants’ rights or the cynical realist, on understanding the importance of the federal role in financing this program, might ask why the Secretary need bother at all to determine the limits of his initial right. Even if it should appear that the Department is technically circumscribed in directing or commanding local authorities, what matters, after all, is not what HUD has formal authority to do, but what it does in fact. Technically, local authorities must only obey those policies from HUD which are valid “mandates.” These usually appear in circulars issued by the Department from time to time and are eventually incorporated in the official low-rent housing manual, a supplement to the annual contributions contract. (HUD has not traditionally placed its rulings in the Code of Federal Regulations.) In addition to mandates, the Department issues various policy statements which are purely advisory. These optional suggestions may be embodied in speeches by Department officials, letters, news releases or handbooks. Although the matters HUD is free to mandate are prescribed by statu-

4. 42 U.S.C. § 1410(h) (Supp. V, 1965).

5. 42 U.S.C. § 1410(a) (Supp. V, 1965).

There has been some Congressional sentiment that the federal government not have to bear the full burden of bond repayment, and that sufficient reserves might be accumulated from operating revenues to repay a portion of the indebtedness. This demand is pressed whenever instances of waste, incompetence, or corruption are cited. In fact, public housing is difficult and costly to manage and would be so even if there were severe restrictions on management overhead and no incidents of union featherbedding on maintenance contracts. Over the past few years both HUD and Congress have come to realize that maintenance of public housing is inevitably expensive, and that many of the older buildings require substantial expenditure for “modernization” if they are to become “decent, safe, and sanitary.” The recent history of the attempt to refurbish the deteriorated stock of public housing is discussed in Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 402-10.

tory and constitutional boundaries, the agency is nearly limitless in its discretion to tender friendly advice. In deciding whether a policy was meant to be optional or mandatory, courts will look to the form of issuance and tend to regard material contained in handbooks and the like as not binding. The Department's own treatment of a policy, its statements and conduct, become relevant in deciding whether it has attempted to prescribe or merely to suggest. Even though a policy statement regarding tenants' rights might be deliberately withheld from the official manual, if funds were denied a local authority for noncompliance, the policy could be regarded as a mandate, thus opening the issue of the scope of HUD's authority in this area. The burden, nonetheless, would be on the local agency to prove that HUD was mandating. If the local authority could not sustain this burden, it could plead alternatively that HUD had cut off funds for failure to comply with a mere "administrative suggestion," and that this was illegal. But trying to show the motivating reason for an administrative action such as a denial of funds is at best difficult, and often impossible. Unless the authority were able to obtain the aid of a Congressman to intervene forcefully on its behalf, HUD would seem to have ample means to keep it in line.

The enforcement powers of the Department, however, are not so extensive. As a practical matter, HUD has minimal leverage to eliminate existing programs. It could seek a basis for ceasing payments under annual contributions already in force. For instance, the Annual Contribution Contract requires each project to be kept "in good repair, order and condition."⁶ Deterioration is so widespread that HUD might exercise its right to reduce or terminate payments for breach of this obligation in many communities. Whether the position of the Department would be sustained in court, bondholders might be able either to enjoin such an act or exercise their rights under the federal guaranty. HUD might also maneuver to assume control of a project, or an entire housing authority operation, meanwhile continuing payments to bondholders. Where authorities are close to bankruptcy and require special assistance, they might be compelled to defer to such a takeover. But takeovers have proven infeasible; federal managers have performed badly, perhaps because HUD is simply not sufficiently experienced at managing apartments. Also, the development of new public housing requires step-by-step approval of local government, and since federally-appointed managers often lack the political acceptability of locally

6. National Institute for Education in Law and Poverty, *HANDBOOK ON HOUSING LAW*, ch. IV, pt. II, at 8.

HUD's Authority

designated officials, they are likely to be ineffectual at leading city councilmen to approve new projects. At best they become indifferent caretakers anxious for the return of local control. Once the possibility is discounted of imposing the federal will directly on the dispersal of outstanding commitments, only future funding remains as a potential source of sanction.

There are overriding limits, both of law and policy, on HUD's discretion even to deny applications for future funding. In theory, an uncooperative local authority could be refused new project approvals, modernization funds, tenant services grants and additional operating subsidies for elderly families, poorer residents and other groups for which appropriations have been made available. Congress has indicated a willingness to have funds for some of these programs conditioned on compliance with whatever HUD officials regard as sound local management practices. In other situations, such as the distribution of supplemental funds for those who cannot afford their pro rata share of maintenance, there is an implication in the statutes and the congressional history that the aid ought not to be withheld because the local agency has chosen to violate a HUD directive.⁷ If HUD failed to acknowledge this distinction and instead withheld all program funds from an offending authority, the Department might confront a decision like that reached against HEW in *Board of Public Instruction v. Finch*.⁸ For failure to comply with its racial desegregation guidelines, HEW withheld all school aid from Taylor County, Florida, although the alleged discrimination was not shown to have existed in all the various school programs the county conducted. The court's finding that the termination of funds be limited to the tainted program "or part thereof" was based upon a specific provision of the legislation under which HEW had been acting, the 1964 Civil Rights Act. But the court's endorsement of the limitation is of general import:

Limitations on the termination power are not primarily for the benefit of the political agency whose funds are withheld, but for the potential recipients of federal aid.⁹

7. The Congress was most concerned that the benefit of these subsidies reach eligible recipients. Illustrative of that intent was the express statement on welfare recipients in the conference report. The Secretary of HUD was instructed to ignore the 25 per cent rule of the statute in the case of welfare recipients if the consequence of his setting such a limit would be that welfare agencies reduced a tenant's entitlement to welfare in accordance with the increase he received in housing subsidy. The remainder of the conference report, as well, although speaking to the problems of lax management and the need for tenant participation, was so worded as not to make these considerations conditions precedent to the dispersal of rent subsidies. CONFERENCE REPORT TO ACCOMPANY S. 2864, HOUSING AND URBAN DEVELOPMENT ACT OF 1969, H.R. REP. NO. 91-740, 91st Cong., 1st Sess. 30-32 (1969).

8. 414 F.2d 1068 (5th Cir. 1969), cert. denied, 397 U.S. 298 (1970).

9. 414 F.2d at 1077.

The temporary withholding of funds may work occasionally and in the short run; the repeated refusal to fund recalcitrant local authorities must inevitably penalize the program's beneficiaries, the residents.

If an authority is financially secure or prepared to have no more public housing, it can safely ignore HUD threats to withhold future funding. Of the 1,900 local authorities, particularly some of the smaller ones, it might not take much federal interference to persuade a goodly number to curtail expansion with a view to possible liquidation of their remaining units. An exhaustive survey of housing authority commissioners a few years ago concluded that the average board member was a white male, well educated, in the middle or upper middle income ranges, in either business or a profession, middle aged or elderly.¹⁰ That study highlighted the considerable differences between the profile of the typical housing authority commissioner, who largely determines the shape of the program in his city, and the average public housing resident.¹¹ A substantial minority of commissioners held the view that there was already enough public housing in their communities, 61 per cent thought management should not negotiate with tenant unions, and 38 per cent expressed an opinion that most public housing tenants have no initiative.¹² Unless the composition of these authority boards

10. Hartman and Carr, *Housing Authorities Reconsidered*, 35 J. AM. INST. PLANNERS 10, 12 (1969).

11. This contrasts sharply with the tenant group for whom commissioners are responsible and whose interests they presumably represent. For example, 26 per cent of all public housing families lack a male head of household, yet few women serve as housing authority commissioners. Over 55 per cent of all households in public housing are nonwhite—a proportion which is steadily increasing—yet only six per cent of the commissioners are nonwhite. Only 11 per cent of public housing commissioners have incomes anywhere near the public housing range (and most of these have incomes so low only because they are retired): the median annual income in public housing nationally is \$3,132 for nonelderly households and \$1,468 for elderly households, compared with \$11,700 for the commissioners.

Id.

12. *Reasons for Not Adding More Public Housing*

	Authorities with over 1,000 units %	Total %
<i>Lack of pressure from families in need of decent housing (and from organizations which represent their interests)</i>	25 ^a	39 ^a
<i>Housing authority itself feels there is enough public housing at present</i>	35	32
<i>Lack of support from mayor or public officials</i>	18	20
<i>Not enough federal funds</i>	15	19
<i>Unwillingness of people in existing neighborhoods to allow public housing</i>	27	17
<i>Lack of land or high cost of land</i>	27	17

^a Percentages add up to more than 100 per cent, since commissioners in many cases indicated more than one reason.

HUD's Authority

is changed soon,¹³ a strategy of trying to exchange promises of future funding for greater tenant participation could be counterproductive. The exceptions might be in the big cities where black people have a greater stake both in public housing and in city politics. This is particularly so in those many big cities where housing authorities are at or close to bankruptcy and desperately need all the federal monies they can procure. As it happens, these are precisely the authorities most susceptible to successful tenant organizations—with or without much help from HUD. For instance, tenants in Philadelphia, as the price for their cooperation in the modernization program (which requires tenant involvement) were able to obtain a more favorable lease than one which

Attitudes toward Race, Rules, and Tenants

	Authorities with over 1,000 units			Total		
	<i>Agree^a</i> %	<i>No opinion</i> %	<i>Dis- agree^a</i> %	<i>Agree^a</i> %	<i>No opinion</i> %	<i>Dis- agree^a</i> %
<i>The authority ought to attempt to keep projects racially mixed through tenant assignment policies.</i>	62	5	34	48	10	42
<i>At present, the authority needs stricter rules and regulations, and proper means of enforcing them, in order to promote acceptable behavior on the part of tenants.</i>	47	5	48	59	14	27
<i>Management ought to recognize and negotiate with tenant unions.</i>	38	12	50	24	15	61
<i>Most public housing tenants have no initiative.</i>	31	9	60	38	13	49
<i>It is up to the government to make sure that everyone has the opportunity to obtain a secure job and a good standard of living.</i>	38	4	57	28	3	69

^a In the original survey respondents were given the option of checking "strongly agree" or "agree," "strongly disagree" or "disagree." In these tabulations the categories have been collapsed.
Id. at 13, 16.

13. It should be noted that HUD has encouraged and tenants' groups have urged that these boards be joined by more members who understand tenant problems. When proposals have been made to include tenants directly on the board, some city and state officials have contended that tenants were barred by conflict of interest and other state statutory provisions. To the extent that these erected significant obstacles to the placement of tenants on housing authority boards, Congress has sought to remove them. Section 1 of the United States Housing Act of 1937, 42 U.S.C. § 1401 (Supp. V, 1965), is now amended to include this policy statement:

It is the sense of the Congress that no person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a low-rent housing project.
1970 U.S. CODE CONG. & AD. NEWS 7036-37. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 211.

HUD has recommended nationally. In Long Beach, California, however, there is a good chance that an effort by tenants to block modernization funding until they are involved in the application may simply result in Long Beach losing a chance to perfect its application for these scarce funds. As more housing authority boards come to represent the views of tenants, directives from HUD coupled with the tacit threat of fund withholding may be more effective, but concomitantly, and ironically, they will also be less necessary since these boards will probably be more adept than HUD at treating the legitimate claims of tenants.

The tactics of enforcement, even of a mandate, are thus quite limited. Local authorities, fully cognizant of HUD's meager enforcement powers, sometimes ignore mandates. Yet, unless HUD issues a command in this form, tenants may have a difficult time persuading a court to regard it as binding. Tenants' representatives, having observed HUD's uneven success at enforcing its rules, understandably prefer the widest latitude in effecting compliance through the courts. For this reason, if for no other, determining the precise extent of HUD's authority to issue mandates cannot be avoided. It is to this task we shall turn, following a description of the tenants' rights negotiations which have occasioned this inquiry into HUD's authority.

III. The Tenants' Rights Negotiations

The U.S. Department of Housing and Urban Development was asked by representatives of tenant interests to enter formal negotiations on the status of tenants' rights in public housing shortly after the United States Supreme Court opinion in *Thorpe v. Housing Authority*,¹⁴ handed down in January, 1969. Whether the request would have been made without *Thorpe* cannot be known, but clearly the lawyers who sought to engage HUD in these negotiations realized that the case left open a range of issues concerning tenants' rights that would have to be answered on a case by case basis if HUD did not intercede, and possibly even if it did. They also might have felt that *Thorpe* contained a nearly irresistible invitation for further involvement by HUD on behalf of tenants.

Joyce C. Thorpe had been served an eviction notice by the Housing Authority of Durham. She was living in McDougald Terrace, a feder-

14. 393 U.S. 268 (1969).

ally assisted low-rent housing project, and the eviction notice was served the day following her election as president of a project tenants' organization, the Parents' Club. Suspecting a connection between the election and attempted eviction, Mrs. Thorpe sought to learn the reason for the notice of ouster; the authority refused to offer any explanation, relying totally on the right in the lease to terminate by giving any tenant 15 days notice to quit. Counsel for Thorpe sought to invoke the First Amendment, claiming that absent a satisfactory explanation, it could be assumed that the eviction was sought to penalize the tenant for her activities in the tenants' organization.

Although the North Carolina courts supported the position of the Housing Authority, the United States Supreme Court never had to address Mrs. Thorpe's First Amendment claim. By the time the case reached the Supreme Court, HUD had issued a circular requiring that housing authorities disclose to tenants, in a private conference, the reasons for eviction and a fair opportunity to respond. The Supreme Court remanded, in order to have the case decided in light of the circular. But the North Carolina courts declined to apply the circular retroactively. This prompted the Supreme Court to remand a second time. The circular had been duly issued pursuant to federal law and the federal rule is that laws existing when decision is rendered are applicable unless injustice or substantial inconvenience would result. Here all the Housing Authority had to do was make disclosure. In remanding, the Supreme Court noted that so modest an intervention in management as had been imposed by the circular neither had violated the principle of local autonomy nor would it impair in any material way the LHA's contracts with HUD or its tenants.

In sanctioning one item of federal control, *Thorpe* presented the possibility of further HUD issuances on the subject of tenants' rights. Hoping to widen the range of federal protections, various groups sought to engage HUD in a series of discussions on tenant rights in public housing. These meetings were initiated by what could be described as a tenants' lobby. The most active of the initiators was the National Tenants' Organization (NTO), a confederation of about 100 local tenant groups, the majority being in public housing projects. This organization does not charge dues, has no individual memberships, and does not maintain a roster that would enable an estimate of how many public housing tenants are affiliated with it. NTO was joined from time to time at the negotiating table by representatives of such groups as the National Council of Negro Women, and the National Welfare Rights

Organization. The National Housing and Development Law Project provided the supporting legal skills on behalf of the tenants.¹⁵

HUD personnel acted more or less as mediators between the tenants' representatives and the National Association of Housing and Redevelopment Officials. NAHRO is a voluntary association which includes among its members roughly 900 of the local housing authorities, and most of the larger ones, accounting for about 85 per cent of all public housing tenants.

At the outset NAHRO and NTO seemed to be adversaries with HUD providing the referees. NAHRO has usually been found in support of maximum discretion for local housing officials while NTO has seemed prepared to place greater reliance on federal control, if not direct takeovers, of public housing. The first step toward an accommodation between these positions was the proscription of certain clauses smacking of unfairness or unconscionability that frequently appeared in public housing leases. An example of these is the exculpatory clause. It purports to release an authority from liability for injury or damage, even though arising from the authority's own negligence. In a random survey of 57 housing authority leases,¹⁶ the National Housing and Development Law Project found that 37 contained exculpatory clauses, despite that in many states these provisions are unenforceable. In two-thirds of the leases examined by the Housing Law Project, there were clauses by which tenants waived various legal rights: service of process, notice required by law for termination of a lease, power to approve or consult with a court-appointed attorney prior to his confessing judgment on behalf of the tenant, and the right to appeal from a decree obtained from the exercise of this confession.

Although after the National Housing and Development Law Project survey NAHRO agreed with NTO that such clauses should be prohibited, the two groups parted company on what the Department should further impose on local authorities. Proscribing the most obnoxious and, in many instances, unlawful clauses is a modest intervention in local affairs compared to requiring a form lease or grievance procedure.

A compromise was embodied in two tentative drafts, one con-

15. The Housing and Development Law Project was organized in August, 1968, to assist Legal Services attorneys and community organizations in housing, economic development, and related matters. It is funded by a grant from the Legal Services Division, Office of Economic Opportunity, and located in The Earl Warren Institute, University of California at Berkeley, California.

16. This survey is on file at the University of Southern California Law Center Library.

HUD's Authority

cerning leases and the other grievance procedures. With certain changes, these have now been issued as circulars by HUD.¹⁷ The circular on grievance procedures, in substance, requires each LHA to devise a procedure which must conform to standards set out in the circular. It is now necessary for every grievance procedure to afford the tenant an opportunity for a hearing before an impartial official or a hearing panel. If representatives of management are on the panel, tenants must be represented in equal number. The right of the tenant to see the evidence against him, cross-examine witnesses, have the proceedings open or closed, and be represented by counsel are all secured. The final decision has to be rendered in writing and contain the reasons and evidence relied on.

This is a long step from the one that Congress took in the 1969 Act on Tenant Eligibility¹⁸ when it provided, in accordance with *Holmes v. Housing Authority*,¹⁹ that each LHA give prompt notice to applicants of any decision on eligibility for admission and to those found ineligible, an opportunity for a hearing. The Conference Report clarified this amendment by assuring that such hearings could be provided upon request only and would be informal in nature.²⁰ The grievance procedure being forwarded presently is far from informal.

By the express terms of LHA-HUD annual contribution contracts, written leases with tenants are already required. Under the circular as promulgated, leases will have to treat specified items, but each local authority will be free to develop its own forms so long as they comply with HUD's general guidelines. Every lease ought to contain all the usual provisions—description of the premises, careful delineation of the responsibilities of tenants and management with regard to maintenance, and the like. They will also have to spell out certain items of particular interest to tenants in public housing, such as the process by which rents and eligibility for occupancy are to be determined and the frequency of redeterminations. Rent in public housing is fixed as a percentage of income. For purposes of increasing the rent, the tenants' representatives would have preferred to restrict redeterminations of income to annual periods. But they were anxious to allow reassessments whenever a tenant loses income so that he may have his rent reduced. According to the model lease provision, if a housing authority

17. See note 2 *supra*.

18. Section 214 of the Housing and Urban Development Act of 1969, 42 U.S.C. 1410(a)(4) (Supp. V, 1965), amending Section 10(g) of the Housing Act of 1937.

19. 398 F.2d 262 (2d Cir. 1968).

20. CONFERENCE REPORT TO ACCOMPANY S. 2864, *supra* note 7, at 32.

fails to correct a condition hazardous to health within 72 hours after notice, such as if heat were turned off in the dead of winter, the tenant becomes entitled to an abatement of rent. Some authorities fine tenants for damaging property or breaking other rules (walking on the grass, for instance), and add those fines to the rent. Tenants do not feel they should have to pay for windows someone else broke, and they are especially distressed when fines are treated as additional rent, since this means that the tenant who refuses to pay may be evicted by summary process. Surprise visits by management are resented and although this is contrary to common law, some leases give the authority a right of entry without prior notice. Among NAHRO's members are many who believe HUD lacks authority to involve itself so directly in the affairs of local management as to proscribe or require these sorts of clauses.

IV. The Two Views on HUD's Authority

According to some, HUD's powers to mandate tenants' rights are virtually unlimited. We can characterize this view as the "general powers" position since it derives strength from Section 8 of the National Housing Act, vesting in the Secretary the power to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter."²¹ An interpretation of *Thorpe v. Housing Authority* supports the general powers view. In *Thorpe* one issue was whether the Department could properly mandate that a tenant be given an explicit reason for eviction. This, in the Court's opinion, fostered the statutory goal to provide "a decent home and a suitable living environment for every American family."²² As the Court stated, "A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance clearly furthers this goal."²³ From this fragment it would be possible to conclude that so long as a particular mandate could reasonably be said to promote one or another of the nation's general housing policies, as these have been articulated in federal statutes or are implicit in the mound of housing laws, HUD is acting within its rights. A reading of one of the new circulars would suggest that the expansive view has carried the day, for it states:

21. United States Housing Act of 1937 § 8, 42 U.S.C. § 1408 (Supp. V, 1965).

22. Housing Act of 1949 § 2, 42 U.S.C. § 1441a (Supp. V, 1965).

23. 393 U.S. at 281.

HUD's Authority

establishment of a grievance procedure by every local housing authority, embodying certain standards and criteria, would improve management-tenant relationships and promote improved housing environment to the advantage of the low-rent public housing program *thus implementing the national housing policy as expressed by Congress . . .*.²⁴

A more restrictive notion of HUD's right to prescribe in detail for the management of low-rent public housing can easily be supported. A basic theme of the Housing Act of 1937, repeated in 1949, 1959, 1961 and 1969, is that public housing should not be directed from Washington but rather that local authorities are to have the "maximum amount of responsibility in the administration of the low-rent housing program."²⁵

The program was first ordained in the Housing Act of 1937. When the United States Public Housing Authority was created, it was not empowered to produce or manage public housing. Its task was solely to dispense funds and to assure that localities spent the federal money properly. Previously some housing had been federally built and operated as WPA projects during the early years of the Roosevelt administration. It proved to be dramatically expensive. The 1937 Act gave primary responsibility to local authorities on the apparent belief that costs could best be controlled at the local level.²⁶ Each locality was and still is free to determine for itself whether to have public housing constructed within its boundaries. Without a state enabling law and local governing body enacting an express declaration of need, federal law prohibits HUD from dispensing funds in a community.²⁷

The Housing Act of 1949 was intended to revitalize the housing effort after the wartime lull. Its goal was ambitious: no less than "the realization as soon as feasible of a decent home and a suitable living environment for every American family."²⁸ Although some of this language found its way into the *Thorpe* opinion, the Court failed to take note of the ginger Congressional handling of the issue of local control. The Senate Report accompanying the bill affirmed that:

although the housing problem is obviously national in scope, it is fundamentally a local problem, and . . . the first responsibility for its solution therefore rests with the local community.

24. RHM 7465.9 (emphasis added).

25. United States Housing Act of 1937 § 1, amended by Housing Act of 1959 § 501, 42 U.S.C. § 1401 (Supp. V, 1965).

26. 81 CONG. REC. 7968 (1937) (remarks of Senator Wagner).

27. United States Housing Act of 1937 § 1, 42 U.S.C. § 1415(7) (Supp. V, 1965).

28. Housing Act of 1949 § 2, 42 U.S.C. § 1441a (Supp. V, 1965).

The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. The role of the Federal Government is restricted to the provision of financial assistance to the local authorities, the furnishing of technical aid and advice, and assuring compliance with statutory requirements.²⁹

The Congress initiated several points of potential federal control: maximum income limits set by local agencies were made subject to federal approval, local agencies were barred from discriminating against welfare recipients, and preference was to be given to the neediest families first. In these ways, Congress was attempting to prevent localities from barring the poorest of the poor and serving only the lower middle and middle class. For our purposes the significant aspect of these changes was that Congress elected not to seek its objective through the granting of broad powers to the federal administrators; instead it enacted particular standards to delimit the occasions when federal review of local management decisions would be appropriate.

Considerable misuse of federal funds was alleged before Congress in 1959, and still the resulting legislation restated the "policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program . . . with due consideration to accomplishing the objectives of this Act while effecting economies."³⁰ Known as the "local autonomy amendment," this has been the first and often the last word for adherents of local control. Similar tributes to the principle of local control over management decisions appear in the congressional records for 1961³¹ and 1969.³² In fact, the litany of local control has always been chanted whenever the Congress has taken formal cognizance of the public housing program.

29. 1949 U.S. CODE CONGRESSIONAL SERVICE 1551, 1566 (S. REP. NO. 84).

30. Housing Act of 1959 § 501, 42 U.S.C. § 1401 (Supp. V, 1965).

31. 42 U.S.C. § 1410(g)(2) (Supp. V, 1965), a 1961 amendment, required local agencies to "adopt and promulgate regulations establishing admission policies" so as to give preferences to those displaced by urban renewal. It was intended, according to its sponsors, to give local agencies greater authority. "The existing Federal law," they reported, "contains very detailed and complicated orders of preferences and eligibility to be applied among low-income families. It is impossible to establish rigid nationwide orders of this kind which will meet all local circumstances. Local housing authorities have had many years of experience under these Federal requirements and should be relied upon to be competent and fair . . ." *Hearings on S. 1478 Before the Subcomm. on Housing of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess., at 229 (1961).

32. When the Act was amended in 1969 to require a minimum degree of due process in the treatment of applicants for public housing, those found ineligible were, upon request, to be afforded an opportunity for an informal hearing on such determination—deference was expressed for the problems of local agencies. "In formulating this provision, we took into account the need to insure the maintenance of tenants' rights while avoiding cumbersome requirements which would impede the administration of public housing programs." 115 CONG. REC. 26722 (1969) (remarks of Senator Brooke).

How, then, could the Justices of the Supreme Court—or anyone else—subscribe unequivocally to the view that HUD's powers over local housing authorities are as wide as the language of the various housing acts can be stretched to make them? This is the question put by "strict constructionists" of the legislative history. But those who favor a narrow interpretation of HUD's powers need not dismiss *Thorpe*. Scrutinized closely, the opinion does not say that HUD's powers are limited only by the stretch of such aphorisms as the preamble to the 1949 Housing Act.

When the Court referred to the Secretary's broad powers under Section 8 to fulfill the objectives of national housing policy,³³ it was in response to two arguments, one raised by the Durham Housing Authority and the other by counsel for Thorpe. Joyce Thorpe claimed that she had been denied due process by the Housing Authority's refusal to state the reasons for her eviction and its failure to provide her a fair hearing. The Court did not have to reach this issue since it found ample authority in the general powers provision of Section 8 for the Secretary's issuance of the disputed circular. Once the circular could be said to apply retroactively, a remand was indicated so that the Housing Authority could have a chance to comply. The Authority had argued that HUD was acting beyond its statutory powers, as curtailed by the local autonomy amendment of 1959. The Court did not dispute that the 1959 law was a valid restriction on the general rule-making power of the Secretary; it pointed out instead how modest an intervention the circular at issue happened to have been. Using against the Housing Authority its own description of what the circular did not require, the Court noted:

It does not . . . purport to change the terms of the lease provisions used by Housing Authorities, nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms of the lease and the pertinent provisions of the State Law relating to evictions. It does not deal with what reasons are acceptable to HUD Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease.³⁴

If the Supreme Court had read the "general powers" section broadly, it would not have had to determine precisely how much the circular interfered with local prerogatives. The statutory argument would have

33. 393 U.S. at 274.

34. 393 U.S. at 278.

been answered by the Court's determination that the circular was promulgated in compliance with the pronouncements of the 1949 Act.

V. The Undisputed Statutory Bases of HUD's Powers to Issue Mandates

A. *Illustrations of Clear and Less Clear Authority*

There is no need at this point to choose between the wide and narrow interpretations of HUD's powers in this field. For the sake of caution, it would be prudent to assume, *arguendo*, that the legislative history of public housing conceivably sets boundaries on the Department's prerogatives. We can then seek the ways of discovering where these boundaries lie.

HUD is empowered to implement those specific standards which Congress expects the Department to enforce. The only contention on this score is how explicit the congressional authorization must be. Greater specificity than Congress has provided is often required for the clear and equitable administration of statutes. Sometimes Congress has made plain that HUD is to supply that needed specificity. One such example of Congress' directing HUD to fulfill a policy appears in the 1968 amendment which, in authorizing grants for tenant services, mandated expressly that HUD should give preference to programs providing for the maximum feasible participation of the tenants.³⁵ Under this provision HUD could probably give a preference in the dispersal of tenant services grants to those authorities which involved tenants in their grievance procedures, were willing to negotiate lease provisions with tenant representatives, or had tenants on their housing authority boards.

An example can be cited of a less apparent directive to HUD. The Housing Act of 1959 provides:

In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons.³⁶

It is presumably under this provision, given that so much public housing built in the past few years has been for the elderly, that HUD issued a circular establishing a "production mix" for fiscal 1969: two-thirds

35. Housing and Urban Development Act of 1968 § 204, 42 U.S.C. § 1415(10) (Supp. V, 1965).

36. Housing Act of 1959 § 501, 42 U.S.C. § 1401 (Supp. V, 1965).

HUD's Authority

family dwellings and one-third units for the elderly, with priority approval of applications for grants to projects meeting this standard.³⁷ The HUD position on this issue could be challenged; after all, Congress did not indicate whether the policy was to be administered with the benefit of HUD's prodding or left to LHAs for execution. When funds for public housing are limited, as they usually are, priorities must be established somehow, but Congress has not declared whether HUD may use this as a criterion for allocation in place of a more neutral, first-come, first-served method of distributing funds.

B. The Few Pieces of Statute Directly Applicable to the Negotiators' Work Product

Combing the statutes, only a few scraps could be found to support HUD's mandating grievance procedures or lease provisions. The conference report for the 1969 legislation on the financing of distressed authorities expressed concern over "lax management in many public housing projects,"³⁸ leading to high operating costs, destruction of property, sharp increases in crime and vandalism and an intolerable environment for the families living there. In ascribing causes, the conferees placed much of the blame for these conditions with project managers and local government officials. They mentioned only one specific item of mismanagement: "Too frequently individual projects have filled up with problem families to the exclusion of others with resulting vacancy rates which have caused local budget deficits." The conferees also made it clear that "the benefits of subsidized public housing . . . cannot be achieved without tenant responsibility, including responsibility for the protection and care of property."³⁹ The negotiators, with an apparent eye to these 1969 Congressional statements, proclaimed in the proposed circulars that an increase in the range of tenant rights would improve landlord-tenant relationships. However reasonable such an assumption may appear to a person schooled in the rhetoric of citizen participation, it is hard to find provable instances in which the alteration of legal rights in public housing has yielded cleaner or safer hallways. In the few occasions which seem to lend credence to this assumption, the gain in legal status was won by the vigorous efforts of local people. Whether these efforts would be augmented or retarded by the promulgation of exacting lease and grievance standards is diffi-

37. HUD Cir. 3-26-69.

38. CONFERENCE REPORT TO ACCOMPANY S. 2864, *supra* note 7, at 31.

39. *Id.* at 32.

cult to know. It is perfectly conceivable that clearly adhesive leases and arbitrary procedures, being so vulnerable, make reform simpler. To be sure, this is not to condone the unconscionable and the capricious but merely to suggest that the relationship between fair leases and the successful organization of a tenant patrol in a project is at best obscure.

The same statements from the conference report on the 1969 Act, however, could be read to justify HUD's insisting that maintenance responsibilities between landlord and tenant be carefully defined. Tenants should certainly be informed at the outset of precisely what their maintenance responsibilities are, and, in turn, the housing authority should make its obligations clear so that tenants know that they can count on management to do its share. To assure clarity in the allocation of maintenance tasks, HUD might prohibit attempts to allocate repair costs by indirect means. Otherwise, an authority assuming the burden of keeping exterior areas intact might shift that burden by fining tenants when their windows or hallway mailboxes are broken, in the absence of clear proof that the tenant had done the damage. The Department might also insist that tenants be given the explicit right to enforce any breach of management's maintenance duty. This would be added assurance that arrangements concerning maintenance agreed upon locally would be honored. Standing alone, though, the statements in the 1969 Act would probably not support such an impingement on the policy of local autonomy as would be effected if HUD attempted to impose any precise division of these responsibilities. Unless landlords and tenants are clear about their respective duties, maintenance might be haphazard; but which group is best able to assume particular burdens can admit of no satisfactory universal answer.

The lease circular issued by HUD walks a thin line on this matter. It requires that leases explicitly divide maintenance responsibilities, but in such a way as to imply that the tenant should be responsible for the care of his unit and the authority for all or most of the exterior areas. It thus resembles the standard form lease on maintenance. The difficulty in prescribing the usual division of responsibilities for public housing can be illustrated by considering the special problems of housing for the elderly. A widow may have considerable difficulty replacing a damaged garbage disposal or repairing a stopped toilet, and so a thoughtful housing authority might agree to lift these burdens from aged shoulders. The circular seems to suggest—no doubt, inadvertently—that such a shift might be officially scorned, if not proscribed.

The conclusions that might be drawn from the 1969 conference report hold as well for the 1970 proceedings. When the 1969 "Brooke

Amendment" authorized payments to local authorities to supplement the rents of those too poor to contribute a sufficient share toward the maintenance of public housing;⁴⁰ little was said about the precise eligibility for these funds. The basic concept of the legislation was that public housing tenants be charged no more than 25 per cent of their income for rent. Yet the definition of "income" was neglected. HUD adopted rather restrictive guidelines and in 1970 Congress clarified the purposes for which the Department was to allocate these new monies. Income was defined, and a long list was prepared of maintenance and operating costs for which HUD could provide subsidies. The enumeration included expenditures for "effective management-tenant liaison including tenant participation in all aspects of housing administration, management, and maintenance."⁴¹ The purpose of the subsidy, as explicated by the conferees, was

to provide local housing authorities with additional resources, not available to them from existing revenue sources, to improve immediately their fiscal situation and the deteriorated condition of their properties, while at the same time strengthening their administration and management functions, including activities designed to achieve maximum tenant participation and responsibility, so that they can become fully effective operations.⁴²

Although this statement shows a congressional concern for more tenant participation, the 1970 Act hardly seems to endorse HUD's trying to dictate the conditions of rapprochement between local authorities and tenants. The tenants' rights negotiations were pending during the congressional session, and officials of NAHRO and HUD had questioned the limits of HUD's authority. Although NTO representatives were in close touch with Senator Brooke, among others, not a word was spoken in the legislative history on the legal rights of tenants. Nor is any of the language concerning tenant participation included as a general prescription to be supervised by HUD; it relates only to the permissible uses the Department may make of special funds for operating and maintenance costs. Although this legislative history can doubtless be read by tenants' rights advocates as further justification for HUD to mandate a wider range of legal protections for tenants, such a reading is questionable. A more persuasive interpretation of what Congress

40. 42 U.S.C. § 1402(1) (Supp. V, 1965).

41. CONFERENCE REPORT TO ACCOMPANY H.R. 19436, HOUSING AND URBAN DEVELOPMENT ACT OF 1970, H.R. REP. NO. 91-1784, 91st Cong., 2d Sess. 60 (1970).

42. *Id.*

called for in 1970 would be that HUD may underwrite the expense of locally designed efforts at greater tenant involvement in all aspects of public housing. Thus interpreted, the 1970 amendments leave untouched the matter of HUD's authority to mandate lease terms or grievance procedures.

A final item from the 1970 Congress bears mentioning. The Congress has rarely, if ever, attempted to supplant state law through its housing programs. Clearly it could decide to replace state mortgage law with a federal law of mortgages for all federally subsidized or insured housing; or write a federal law of landlord and tenant for public housing; or expressly preempt exclusionary land use controls which have the effect of barring federally assisted housing. With all this deference to existing state law, it therefore comes as somewhat of a surprise that in 1970 Congress did express an intent to preempt one aspect of state law. Sometimes the attempt to place tenants on housing authority boards has been opposed on legal grounds: conflict of interest provisions in state laws or city charters are said to bar tenants from sitting on boards since to allow them to do so would be tantamount to their becoming their own landlords. In 1970 Congress undermined this argument by stating that it was the sense of Congress that tenants should not be excluded from membership on housing authority boards simply because of their status as tenants.⁴³ This, coupled with the direct authorization for HUD to spend monies in aid of local tenant participation in management and administration, suggests a congressional intention that the difficult tasks of tenant-management relations be resolved on a local level, that tenants share fully in working out these relationships, and that HUD serve mainly as a financier of this accommodation when funds are necessary and available.

C. Financial Stewardship as a Statutory Basis

Support for some mandates can be derived from HUD's acknowledged statutory position as a guardian of the federal largesse. The federal government guarantees the bonds issued to finance projects and bondholders are repaid from the proceeds of federal contributions. Bankruptcy of a local authority as a result of shoddy management could force the federal government to make good on its guaranty and to assume more than its obligation to reimburse bondholders for capital costs. If deficits threaten the existence of the project, a portion of oper-

43. 1970 U.S. CODE CONG. & AD. NEWS 7036-37. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 211.

ating costs could fall on federal shoulders, and HUD has even been compelled to take over the running of distressed projects.

Thus HUD requires such obvious measures as audits, and some less obvious measures such as minute supervision of construction (to guarantee both sturdiness of construction and honesty in the expenditure of funds). Some supervisory regulations go even further than this. The federal agency sets limits and conditions on the reimbursement of travel expenses of local agency officials, and establishes the policy governing local agency retirement plans. In their exercise of financial scrutiny, though, federal housing officials have been subject to repeated congressional attacks for undue interference in the production process. The "local autonomy amendment," mentioned earlier,⁴⁴ the strongest affirmation of maximum local responsibility, was initiated to curb an excessive federal control of financial decisions which was thought to have severely damaged housing production under the program. As proposed, the amendment was designed to give local agencies not just "responsibility for the establishment of rents and eligibility requirements"⁴⁵ but also broad discretion in the preparation of budgets and the control of expenditures. It is significant that federal officials were able to have the latter provision stricken by citing instances of bribery, payroll padding, embezzlement, and kickbacks,⁴⁶ thus reflecting the congressional intention that HUD keep a close eye for management inefficiencies.

D. Financial Stewardship and the Doctrine of Unconscionability as Applied to Leases

The present requirement in section 203(B) of the form Annual Contribution Contract that each LHA enter written leases with its tenants can be therefore justified as pursuant to HUD's legitimate interest in keeping local authorities solvent.⁴⁷ To the extent that local

44. See p. 478 *supra*.

45. 42 U.S.C. § 1401 (Supp. V, 1965).

46. The hearings on the Housing Act of 1959 were conducted by the Subcommittee on Housing of the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. The legislative history is discussed in Mulvihill, *Problems in the Management of Public Housing*, 35 TEMP. L.Q. 163 (1962).

47. The Annual Contribution Contract, section 201, purports to impose upon local housing authorities the responsibility of operating each project in such manner as to achieve the economic and social well-being of the tenants. To the extent that HUD might invoke this provision to enforce its notion of what tenants require as aids to their "social well-being," little confidence should be placed in it. Its legality is as questionable as attempting to prescribe from Washington the color of the kitchen paint: neither presents more than a naked assertion of authority without a stitch of congressional support.

authorities are allowed to use leases which can be characterized as unconscionable or adhesive, and might not be enforced by courts of equity, the federal financial stake is arguably at risk. Leases in public housing are tainted from the outset as potentially adhesive. One earmark of an adhesive contract is "a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantages of the relation."⁴⁸ The Housing Act itself makes clear that tenants in public housing are in this weaker position. If decent, safe and sanitary housing had been available to them in the private market, public housing could not have been lawfully constructed in the first place.⁴⁹ Among the best ways to free public housing authority leases of their possible taint would be to promulgate a mandatory lease form that had been hammered out as the result of negotiations between representatives of tenants' organizations such as NTO and management, represented by NAHRO. This would be making the most of the financial basis for HUD action.

The financial interest would also justify banning particular clauses which might lead a court to find a lease undeserving of equitable enforcement. In a rent strike—and rent strikes have become common events in public housing—if eviction is deemed an unfair or impractical remedy for the housing authority to seek, tenants may be able to maintain a period of rent-free possession unless the local authority can obtain some form of equitable relief. Equitable decrees such as the attachment of escrowed rent accounts would be granted only to petitioners adjudged to have clean hands. The landlord who has forced an unfair lease upon his tenants might not qualify.

In addition to general equitable principles, the Uniform Commercial Code permits a court which finds a contract or any clause of a contract to have been unconscionable when made to refuse enforcement not only of the particular clause, but also of the entire contract. Judge J. Skelly Wright has recently provided good reason to expect that provi-

48. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1751C (rev. ed. 1938) at 4968.

49. The United States Housing Act of 1937 § 2, as amended by the Housing Act of 1959 § 503, 42 U.S.C. § 1415(7)(b) (Supp. V, 1965), provides: "The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, . . . (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that a gap of at least 20 per centum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof"

sions of the U.C.C. on unconscionability will come to be applied by inference to leases. In a recent case he extended the implied warranties of fitness and merchantability to leases, observing that modern contract law, including the U.C.C., has recognized the dependence of buyers on the skill and honesty of the suppliers of goods. He noted that the "rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate,"⁵⁰ and without good cause. The judge was prepared to apply contract law and the law of products liability to suppliers of housing. He went further, though, and has provided the basis for utilizing in real property cases parts of the U.C.C. in addition to those dealing with merchantability:

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.⁵¹

With proper concern for the sweep of court decisions advancing tenants' rights, lease provisions that at first seem to protect the financial interest of LHAs appear on closer examination to be neutral or even to threaten it.

Some LHA leases add to the rent any damages for repairs. According to the new circular on leases, damages against a tenant, such as for a broken window, have to be collected separately. When damages are treated as rent, a tenant unwilling to pay can be evicted and the strength of this sanction would seem to militate in favor of housing authorities adding such items to rent—viewed strictly as a business matter. Eviction proceedings are summary in most jurisdictions; the only triable issue is the right to immediate possession. Equitable de-

50. *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1076 (D.C. Cir. 1970).

51. *Id.* at 1079-80.

fenses are either barred entirely or viewed with considerable disdain by the courts of very modest jurisdiction which are usually charged with deciding unlawful detainers. And yet a housing authority which wants to recover money can no longer safely assume that a threatened eviction is the way. Judge Wright has recently admonished landlords who attempt to tie summary evictions to suits for nonpayment of rent.⁵² The judge has intimated that if the landlord wants repossession, he may have his summary action. But if he seeks money, he cannot choose a form of action which deprives the tenant of the right to raise substantive defenses, such as that the premises are uninhabitable. No choice may exist save the filing of an action on the debt. Where this has become the law, there is little financial advantage in treating a bill for property damage as additional rent, unless the housing authority plans to bully tenants by using eviction as a threat though knowing the threat is legally meaningless. Such a tactic would only prejudice an authority's right to enforce an otherwise lawful lease.

For better or worse, the practice of treating unpaid fines as additional rent and seeking eviction for nonpayment can only be proscribed, if it may be proscribed at all, on a basis of unconscionability. One commentator has suggested an alternative statutory base:

if repair charges, charges for key loans, assessments for late payments, and the like are added to and considered to be rent, the final sum payable may exceed the maximum permissible rent chargeable in relation to the tenant's income.⁵³

The trouble with this contention is that it ignores the purposes for legislating a ceiling on the amount of income that a tenant may be charged for rent. Partly, such maxima protect tenants from overextending themselves, and this is particularly true when subsidies are available so that they can remain in possession at rents that are reasonable in relation to their incomes. Sometimes, however, an income-rent ratio serves to bar a destitute person from public housing. Here its purpose is not to benefit the excluded tenant but rather to provide financial security for the project, and hence to assure those who can afford to reside there that their fellow tenants will also be able to contribute a fair share towards maintenance. In no case are such restrictions imposed as a way of releasing the tenant from liability for committing waste or keeping his own apartment in order. To the extent

52. *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970).

53. Schoshinski, *supra* note 5, at 459.

that fines are assessed exclusively for breach of these obligations, they cannot be assailed as violating the income-rent ratios. There is one situation, however, in which a fines policy might be so indicted. Suppose a housing authority were depending on \$100,000 a year from fines to meet ordinary operating expenses. By November of any year, if this imagined authority had failed to collect the requisite sum, it would embark on a vigorous campaign of fining sharply for minor infractions of rules, just for the cash. These fines would be imposed neither with regard to the tenant's income nor for failure to perform essential conditions of tenancy; they would thus transgress statutory rent ceilings. Absent such a circumstance, the only question raised by a fines policy is whether, added to whatever else appears in the lease and in the local authority's operating practices, it might contribute to a judicial finding that the lease arrangement was unconscionable.

A line of argument based on unconscionability can also be made for requiring local authorities to pay interest on security deposits. The lease circular recommends that an authority which assesses a security deposit charge no more than one month's rent "or some reasonable set amount," and pay earned interest to the tenant when he vacates. This seems contrary to the pecuniary advantage of the LHA until one reviews the various state statutes lately enacted requiring the payment of interest,⁵⁴ estimates the likelihood that courts of other states will, if pressed, come to decree the payment of earned interest, and realizes that an authority failing to create adequate reserves for such an event may be embarrassed when it has to disgorge.

The lease circular is accompanied by a model lease which LHAs may, but need not, adopt. The model lease allows an abatement of rent if a hazardous condition is not repaired within 72 hours after notice to the landlord. Rent abatements for hazardous conditions have become the law in some states, and where it is or may become the law, a housing authority failing to recognize this potential source of rent slippage may commit folly by not making repairs promptly. One way to alert authorities to abatements is to provide for the event in the lease. A lease provision assures that the authority is given a definite period of notice before the right of abatement accrues, with the abatement right applying only for the most serious defects, and not at all if repair is beyond the authority's control (for instance, because of delay in delivery of a part).

54. See, e.g., 46 N.J. STAT. ANN. § 8-19 (Supp. 1970); N.Y. GENERAL OBLIGATIONS LAW § 7-103 (McKinney Supp. 1970).

E. The Limits of a Statutory Base

While some features of the 1937 Act can be thus construed to justify considerable federal intervention on behalf of tenants, other provisions serve to restrict the scope of what can be negotiated. One of the circulars issued by HUD establishes a grievance procedure for "any LHA action." This would be susceptible to an interpretation that oversteps the limits set by Congress for the program by authorizing a hearing for matters which Congress has removed from agency discretion entirely. For example, a tenant whose income exceeded the statutory maximum might properly be denied the right to a hearing on the general issue of whether over-income tenants should be permitted to remain. Indeed, to allow such a determination to be made by an impartial hearing examiner would defy the legislative limits on eligibility and thereby overstep constitutional bounds. Which income groups are entitled to occupancy of public housing is an issue within the congressional purview and an issue on which Congress has chosen to speak quite plainly. It can be comfortably distinguished from the question whether in a particular case the tenant's income was properly computed. This latter question is quasi-judicial, and one for which a hearing might well be provided. It can also be distinguished from the question whether adequate housing is available elsewhere for the "over-income" tenant, since the statute expressly allows him to remain if it is not.⁵⁵

Similarly, the question of how often a housing authority redetermines income should be viewed as a matter for HUD and each LHA to decide—in spite of the negotiators' recommendation that recertifications of income increases be made no more than annually. In fact, the lease circular as it stands only requires that each authority specify in its lease the frequency of rent and eligibility determinations. HUD could, of course, restrict local authorities to an annual review if it found that they were consuming an indefensible amount of time chasing down rumors that particular tenants had changed jobs and were earning higher pay. Conversely, the prohibition of periodic redeterminations might deprive housing authorities of needed revenues for no partic-

55. Taken literally, this determination could be regarded as non-delegable. It is prefaced with the phrase "unless the public housing authority determines that, due to special circumstances . . ." 42 U.S.C. § 1410(g)(3) (Supp. V, 1965). This matter has been held non-reviewable with dicta that would support an inference of non-delegability: "The method or manner in arriving at this conclusion is not material. In order to 'maintain' the action [the bringing of a forcible detention suit against an over-income tenant] it was only necessary for the authority to express or make a finding of their 'opinion' in the respects mentioned in the statute. The only way the authority could express such an opinion was by resolution of the governing body." *Housing Authority v. Stires*, 84 Ohio App. 331, 333, 84 N.E.2d 296, 298 (1949).

ularly compelling reasons of efficiency. The Federal Housing Administration has recently issued requirements that the incomes of beneficiaries of the home ownership interest subsidy program be re-examined annually; aid recipients must give consent for FHA examination of their income tax forms, and changes in earnings are to be reported within 20 days. Failure to supply accurate income data promptly can result in a termination of benefits or, under some circumstances, an assessment for the return of past subsidies. It is HUD's duty to oversee the financial aspects of public housing, and this would include the assurance that tenants contribute their fair share of rent, as prescribed by statute. The Department would be ill-advised to rely too heavily on the advice of tenants in deciding how best to fulfill this particular obligation.

VI. The Constitutional Basis for HUD's Authority

A. *The Constitutional Progression and Its Implications for HUD's Authority*

For at least the past four decades, courts have decreed against the dispersal and withholding of governmental largesse on conditions that were deemed unconstitutional. Only in the last two decades has the doctrine of unconstitutional condition been applied directly to affect tenants' rights in public housing. Until the mid-1950's courts were evenly divided on whether the government as landlord had any greater obligation to its tenants than did a private landlord.⁵⁶ This division may have been due more to the particular issues involved in the few initial leading cases. A tenant accused of slovenly maintenance or the rape of a neighbor compelled less sympathy than one who has unwittingly joined a suspect political organization. Whatever the reasons for the early doubt, the trend of decision now clearly holds that the administration of public housing is to be subject to a constitutional measure.⁵⁷

56. *Compare* Housing Authority v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (1963) with Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955).

57. *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955); *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Sanders v. Cruise*, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (1958); *Manigo v. Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (1966); *Thomas v. Housing Authority*, 282 F. Supp. 575 (E.D. Ark. 1967); *Vinson v. Housing Authority*, 29 App. Div. 2d 338, 288 N.Y.S. 2d 159 (1968); *Ruffin v. Housing Authority*, 301 F. Supp. 251 (E.D. La. 1969); *Lewis v. Housing Authority*, 397 F.2d 178 (5th Cir. 1968); *Holloway v. Department of Housing and Urban Development*, 418 F.2d 242 (5th Cir. 1969).

Even though local housing authorities are thus accountable, this does not mean that the Secretary of the Department of Housing and Urban Development has either the right or the duty to conduct the constitutional audit. The starting point is to be found in the statutes, for to the extent Congress has delegated the tasks of management to local authorities, the fact that some local authorities may violate the due process rights of tenants is a matter primarily for Congress and the courts. This much the *Steel Seizure* case⁵⁸ and section 5 of the Fourteenth Amendment imply. Section 5 designates Congress as the primary enforcer of the Amendment and the *Steel Seizure* case delimits the authority of the Executive to act even in an emergency, absent an enabling statute. When it comes to forcing the state and local governments to refrain from denying due process, Congress—not the executive branch—is to predominate.⁵⁹

The most explicit congressional statements directing the Secretary to implement constitutional norms are those contained in the Civil Rights Act of 1964⁶⁰ and the Fair Housing Law of 1968.⁶¹ The former bars discrimination in the administration of federal programs and empowers federal agencies to withhold funds from recipients which discriminate. The 1968 Act instructs the Secretary of HUD

to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subtitle.⁶²

The title prohibits discrimination on the basis of race, color, religion, or national origin in the sale, rental, and financing of housing. Save for the areas of civil rights and fair housing, Congress has provided little guidance on the extent to which local control should be subordinated to other sorts of constitutionally protected interests. The tenants' rights advanced through the proposed circulars are not of the kind generally regarded as civil rights.

Whether Congress has chosen HUD to serve as a constitutional policeman for tenants' rights has yet to be adjudicated explicitly. At this point we have little but common sense to draw on in speculating how it will be decided. *Thorpe*, though, provides a hint. The rights to notice and hearing which Joyce Thorpe asserted as her due process

58. *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952).

59. See generally Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

60. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (Supp. V, 1965).

61. 42 U.S.C. § 3601-3619 (Supp. V, 1965).

62. 42 U.S.C. § 3608(d)(5) (Supp. V, 1965).

entitlement were conferred by the Court without resort to the Constitution, and yet the opinion suggests one factor likely to be recognized when constitutional considerations impinge. In reconciling the general powers of the Secretary with the specific admonitions for local autonomy, the Supreme Court emphasized that the HUD circular interfered only slightly with local discretion.⁶³ Presumably, a claim of right that could only be policed by HUD if the Department were prepared to replace local managers with federal officers would require a more careful balancing of statutory considerations. It could also be posited that the courts would allow a wholesale infringement of the principle of local control only when absolutely necessary in order to secure rather important constitutional guarantees. The case for local autonomy is less compelling, though, whenever it becomes clear that the courts, if petitioned, would deprive local authorities of discretion in the matter even if HUD does not plan to intervene. In fact, the list of constitutionally protected tenants' rights is not long. And, save perhaps in a few instances where HUD already possesses clear authority by virtue of the statutory scheme, the steps necessary for compliance are so easy and short that HUD's commanding local authorities to take them does not strain the principle of local autonomy.

Until the past judicial season, local housing authorities could pass constitutional muster with ease. Except for a few lame efforts to evict for membership in the Communist party,⁶⁴ to segregate by race in the most blatant manner,⁶⁵ or to deny admission to welfare recipients,⁶⁶ local authorities were free to operate as they pleased. A 1968 decision of the Second Circuit, *Holmes v. Housing Authority*,⁶⁷ sought to stop an authority from handling its admissions policy in a haphazard style. The court went no further, though, than to require that some sensible basis be used for determining tenant eligibility, even if that basis were by lot or by time of application. To protect applicants against arbitrary exclusion, the authority was compelled to give reasons for denial of admission. But that was all; and a year later, Congress, as has been mentioned,⁶⁸ merely codified *Holmes*. *Colon v. Tompkins Square Neighbors, Inc.*⁶⁹ later extended *Holmes* on behalf of applicants for

63. See p. 479 *supra*.

64. *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955).

65. See, e.g., *Banks v. Housing Authority*, 120 Cal. App. 1, 260 P.2d 663 (1953), *cert. denied*, 347 U.S. 974 (1954).

66. Cf. *Colon v. Tompkins Square Neighbors*, 294 F. Supp. 134 (S.D.N.Y. 1968).

67. 398 F.2d 262 (2d Cir. 1968).

68. See p. 475 *supra*.

69. 294 F. Supp. 134 (S.D.N.Y. 1968).

admission into housing financed under Section 221(d)(3) of the National Housing Act. The specific allegation was that Colon had been excluded for being a welfare recipient, and this, the court held, was an invidious basis for selecting tenants. Defendants had sought to differentiate their case from *Holmes* since the project involved in the earlier case was supervised directly by a public authority while Section 221(d)(3) projects are managed by private entities. As usual, the effort to avoid due process standards by quibbling about the elements necessary to find "state action" failed. Because the 221(d)(3) project is federally insured and subsidized, it qualifies easily. Most recently, *Thorpe* sustained a HUD circular, but one which—the Court was careful to point out—mandated no more than that an evicted tenant be told the reason for eviction.⁷⁰

In the newly issued circular on leases, HUD has mandated a few provisions that may not be covered under its constitutional grant of authority. One is that leases not be terminated except for good cause. While the courts have held that a tenant may not be evicted or denied a lease renewal because of political activities, and while *Thorpe* supports the requirement that the tenant be told the reason for an eviction, there seems to be but one case holding as a constitutional requirement that public housing authorities must have good cause for refusal to renew a lease. Only *Vinson v. Housing Authority*⁷¹ can be cited for the proposition that eviction without cause is a violation of due process, and the burden of showing cause is on the housing authority. The negotiators also sought and obtained a clause that would bar managers from entering an apartment without giving the tenant reasonable notice. This might be easier to fit under the constitutional cover.⁷²

Perhaps the strongest reliance the negotiators have placed on constitutional principles is not in the area of lease provisions but rather in the grievance procedures they would see mandated. While many housing authorities have some informal arrangement through which tenants may challenge authority actions, few have adopted as rigorous a set of procedures as the HUD circular on grievances now compels.

70. See pp. 472-73 *supra*.

71. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968). On the extent of constitutional protections which public housing tenants have thus far established, see Schoshinski, *supra* note 5, at 418-54. See also *McQueen v. Drucker*, No. 7726 (1st Cir., Feb. 24, 1971).

72. Mr. Justice Blackmun, sustaining the right of caseworkers to visit the homes of welfare recipients as a condition to continued eligibility, observed: "Mrs. James, in fact, on this record presents no specific complaint of any unreasonable intrusion of her home She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry." *Wyman v. James*, 400 U.S. 309, 321 (1971).

Among the features distinguishing the formal procedure which will be required from that which the "enlightened" authorities have at present are the rights to confront and cross-examine witnesses, to receive a written opinion, and, if representatives of management are on the panel, to have an equal number of tenants.

These requirements closely parallel the elements of a fair hearing which the United States Supreme Court in *Goldberg v. Kelly*⁷³ held a welfare recipient was entitled to before benefits could be terminated. The list included a clear and complete notice of the reason for the proposed termination, an ample opportunity to be heard, representation by counsel at the recipient's option, an impartial decision-maker, full disclosure of all the evidence used against the recipient with an opportunity to compel the attendance and cross-examination of witnesses, and a statement by the decision-maker giving the reasons for his determination and indicating the evidence used in reaching it.

There could be some reason to doubt whether this full measure of rights will be extended to the public housing tenant. *Goldberg* was carefully predicated on the special importance of welfare receipts, which must be continued in order for the qualified recipient to assert his rights. As the Court explained:

the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate on finding the means for daily sustenance, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.⁷⁴

Perhaps a welfare recipient about to be deprived of his benefits is worse off than a public housing tenant about to be evicted. If so the Second Circuit has adjudged the difference insufficient to warrant a lesser standard. In *Escalera v. Housing Authority*,⁷⁵ the Second Circuit Court of Appeals applied all the safeguards of *Goldberg* to tenants who were about to be evicted for such diverse reasons as failure to pay small fines, keeping pets and statutory rape.

The result reached in *Escalera* is not beyond sensible challenge. Welfare benefits are terminable by administrators and no judicial pro-

73. 397 U.S. 254 (1970).

74. *Id.* at 264.

75. 425 F.2d 853 (2d Cir. 1970).

cess is required as a matter of course. But in most states a tenant cannot be evicted by the landlord's use of self-help. Resort must be had to some judicial process. In *Caulder v. Housing Authority*,⁷⁶ which applied the *Goldberg* standard to public housing evictions, the dissenting judge stressed this point, reminding his brethren that "a full judicial hearing is required before [a tenant] can be evicted."⁷⁷ The failure of the dissenter to persuade his colleagues might have been attributable to the limited jurisdiction of the magistrate's court empowered to hear evictions in North Carolina and the summary ejectment law which the housing authority had invoked in that case. This law sanctioned ejectment "when a tenant in possession of real estate holds over after his term has expired," and the housing authority, instead of alleging as the reason for its action a specific breach of a lease covenant or the nonpayment of rent, relied wholly on the fact that the tenancy was from month to month and notice of termination had been served. The question for the deciding magistrate was whether the tenant was holding after his lease had been terminated. With the issues framed in this manner, the tenant would have been denied the opportunity to raise his due process objections if the state court had made a literal application of its "holdover" statute. But whether the majority would have applied a less rigorous standard of due process had the matter not been tapered is nonetheless conjectural.

B. *Delimiting the Constitutional Rights of Tenants*

Constitutional guarantees are usually reserved to secure vital interests, and before *Escalera* the scope of these entitlements could have been assumed to be restricted to those authority actions which might result in eviction or denials of admission. But in *Escalera* the Second Circuit observed that tenants could be protected against the assessment of even minor fines, and not solely because these were treated as additional rent and could thus result in eviction. Again, using the words of the court:

To be sure, the size of the charges is relevant to the question of the burdensomeness of the required procedures, but even small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level.⁷⁸

Escalera therefore intimates that any deprivation inflicted upon a ten-

76. 433 F.2d 998 (4th Cir. 1970).

77. *Id.* at 1006.

78. 425 F.2d at 864.

ant in public housing may require notice and hearing, and a case can easily be fashioned for such expansive safeguards. Since by federal statute the residents must be people who have no suitable alternative housing, they are the easy victims of incompetent, corrupt, or callous management. Private tenants in conventional apartments can find other accommodations if they are mistreated or if their buildings are badly constructed or ineptly managed. And because the owners and managers of private apartments are usually eager to avoid the costs of vacancies and turnovers, redress of grievances is ordinarily simple to achieve. This is less often the case for tenants in rent-controlled or subsidized housing. Government subsidized housing may be managed more with an eye to satisfying political demands than to keeping tenants happy.

Even *Escalera*, examined closely, however, restricts the scope of constitutional protections. Take the matter of treating fines as additional rent as considered by the *Escalera* court. The New York City Housing Authority by its leases reserved the right to tack fines to monthly rents. Implicitly the Second Circuit held that the Authority was not violating the Constitution because it assessed fines for violations of house rules, even for minor violations. Nor was the Authority in constitutional error for including fines as part of the rent. Indeed, the chief constitutional objection to this practice is that when fines become rent and the tenant refuses to pay, he may be subject to a summary eviction process with no opportunity to raise equitable defenses. This is due, though, not to the lease provision concerning fines but to state laws which restrict the scope of defenses in eviction cases. This would certainly explain the Second Circuit's confining itself to the narrow procedural issues. Only the casual process utilized in assessing fines was subject to serious question. In the court's language:

The tenant should be notified in advance of the complete grounds for all proposed action; should have access to all the information upon which any decision will be based, and should be afforded the right to confront and cross-examine witnesses in appropriate circumstances. In addition, it would seem that the tenant should be afforded the opportunity to present his side of the case in the presence of an impartial official, not merely to the project manager who instituted the proposed action against the tenant.⁷⁹

The attempt to prohibit outright the treatment of fines as additional rent—and this is what HUD's lease circular requires—may be proscribed

79. *Id.* at 863.

on some other basis, perhaps the financial one suggested earlier,⁸⁰ but it has, to date, no constitutional foundation.⁸¹

The problem is to determine the standards the courts will employ in drawing the limits on the tenants' constitutional rights. HUD's circular on grievance procedures gives tenants the right to a formal hearing for "any LHA action or failure to act in accordance with the lease requirements, or . . . involving interpretation or application of LHA's regulations, policies or procedures which adversely affect the tenant's rights, duties, welfare or status."⁸² The statutes, we have noted, preclude certain decisions from being submitted to a grievance procedure, such as the setting of the income level that would disqualify a tenant for occupancy.⁸³ The proposition that *every* aspect of tenant-landlord relations should be subject to an exacting measure of constitutional protection can also be questioned. The best starting point for determining how the apparent rule of *Escalera* might come to be circumscribed is the 1970 opinion of the First Circuit in *Hahn v. Gottlieb*.⁸⁴ Hahn was a tenant in housing financed through a below-market interest loan issued under the National Housing Act. He was seeking an administrative hearing and judicial review of a proposed rent increase. Assessing the merit of his claim, the First Circuit attempted to calculate the benefits and burdens that such procedures would entail, and decided that, on balance, more was to be lost by expanding due process to require formal hearings on proposed rent increases.

The First Circuit keyed its effort to distinguish *Goldberg* and *Escalera* with this statement:

Plaintiffs are not legally "entitled" to low rents in the same sense that the welfare recipient in *Goldberg v. Kelly* . . . was entitled to basic sustenance under a system of categorical assistance. . . . Thus the government action in this case [a rent increase] poses a less serious threat to the private interest involved than the termination of welfare benefits in *Goldberg v. Kelly* . . . which deprived the recipient of the means of existence, or the denial of a security clearance in *Greene v. McElroy* . . . which meant loss of employ-

80. See pp. 487-89 *supra*.

81. One basis would be to invoke the 1969 Brooke Amendment, note 40 *supra*, which prescribed that no public housing tenant pay more than 25 per cent of his income for rent. Of course, fines are not supposed to be imposed as revenue raising devices. An authority which did attempt to meet its budget by levying fines would be acting contrary to the 1969 law. This statutory argument would be considerably less compelling against a "normal" fines policy, that is, one which used fines only as sanctions to cover the costs of actual damage done by a tenant to project property.

82. RHM 7465.9.

83. See p. 490 *supra*.

84. 430 F.2d 1245 (1st Cir. 1970).

ment, or the eviction in *Escalera v. New York City Housing Authority* . . . which as a practical matter meant total loss of decent low-rent housing.⁸⁵

This points to the fact that there are ten or more eligible recipients for each unit produced under subsidized housing programs. Under even optimistic assumptions this ratio will probably continue for at least a decade. Sustenance guaranteed on an equal basis to all is different from a housing subsidy available only to a fraction of the poor, and as it happens with most government housing projects, only to those among the poor who happen to have the means to pay all or most of the operating costs of their housing. The difference is not, however, of obvious legal significance. Perhaps the First Circuit meant to suggest that a housing recipient, being among the lucky few admitted, should be content; that occupancy in publicly supported housing is a privilege and not a right. If so, the court was relying on an adage no longer viable in justifying arbitrary exclusion or eviction. It could be that the court was only attempting to suggest that the chief deprivations in housing subsidy programs come when decisions are made about exclusion and eviction, and, therefore, that these were the appropriate places to draw the boundary of constitutional protection. The court seemed to affirm the text stated both in *Goldberg* and *Escalera* that takes into account the degree of deprivation without making a fetish of gross events, such as eviction. This is a possible construction of the court's approach to the deprivation under review:

the tenant's interest is not directly jeopardized each time the FHA approves a rent increase. The increase may be small, and rent supplement programs are available to those in greatest need.⁸⁶

If rents should be increased, although Congress has authorized a program of rent supplements,⁸⁷ the program is far from being an automatic assurance of continued occupancy for the marginal tenant. The reasons for this are varied. As usual, the program suffers from a lack of sufficient congressional appropriations. Local governments must, according to federal law, expressly authorize the acceptance of rent supplements, and many communities with 221(d)(3) projects⁸⁸ have refused

85. *Id.* at 1247.

86. *Id.*

87. 12 U.S.C. § 1701s (Supp. V, 1965).

88. This program is described more fully in the text at pp. 505-06 *infra*. It is an interest subsidy, but additional payments can be made to bring the effective rent level down to the point where families whose incomes would qualify them for public housing become eligible to occupy 221(d)(3) projects also.

to do so. Moreover, a considerable gap divides those eligible for occupancy to 221(d)(3) from those eligible for rent supplements. It would take not just a rent hike but a precipitous decline in income for the average 221(d)(3) resident to become eligible for rent supplements. Lastly, many owners of (d)(3) projects which opened without provision for rent supplements simply refuse to apply because they do not want a poorer class of tenants, and many of the (d)(3) tenants earning moderate incomes feel the same way and would not welcome an influx of families with incomes low enough to qualify for public housing. The *Hahn* court was either uninformed or less than candid when it suggested that rent supplements would be readily available to minimize the hardships of a rent increase. In fact, a rent hike can be tantamount to eviction for many tenants in subsidized housing. Even so, this goes not to the standard the First Circuit might have been employing but rather to the elegance of their application. That the degree of deprivation is a factor worth considering in defining the limits of a tenant's constitutional right cannot be repudiated by citing an instance in which the deprivation may have been greater than the court assumed. Nor is it entirely wrong to maintain that eviction is, on the whole, a more substantial deprivation than a rent increase.

A second consideration which seems to have applied in *Hahn* was the desire not to burden unduly either the administrative machinery or the government housing program. Most types of judicial intervention impose some costs of compliance upon administrative agencies, but there are more and less costly impositions. *Hahn* implies that when a proposed intervention could lead to financial failure of a housing project, the time for line drawing is probably overdue. In *Escalera* the tenants wanted no more than to remain in possession and to be free from what they considered arbitrary fines. Karl Hahn was going for the jugular, the cash flow. While it is undeniable that the failure to evict a few rowdy tenants promptly can disrupt a project, and an ineffectual policy of fines can result in a somewhat higher maintenance bill, an apartment house can survive both a few obstreperous tenants and a broken window or two. It cannot overcome an inadequate rent roll. Even public housing projects must be able to meet most, if not all, maintenance costs from rents. A project that fails financially is so poorly maintained that, as in many public housing projects, "it makes animals out of people."⁸⁹ Eventually, such projects must be abandoned, often at a substantial loss.

89. Maynard; *Public Housing: "It Makes Animals Out of People,"* Washington Post, Dec. 16, 1969, at A-8, quoting Judge Franklin I. Kral.

Taken literally, the right claimed by Mr. Hahn and his fellow tenants was not to forestall the imposition of rents sufficient for maintenance: they sought only to have the matter determined openly. This determination might cause delays in the imposition of rent increases, and the administration and judicial proceedings would cost something, but Hahn would certainly claim that he did not oppose the raising of needed rents. The First Circuit, however, might be excused for not being persuaded. If the long experience with rent control in New York City teaches anything, it is that tenant participation in the setting of rents may well result in a level too low to assure proper maintenance. The First Circuit made its concern along these lines quite plain:

Delay, the frictions engendered by the process of litigation, and the possibility—seldom discussed—of landlord appeals from FHA decisions in favor of tenants may lead to higher rentals and ultimately to less participation by private investors.

Turning finally to the impact of review on agency effectiveness, we think that resort to the courts might have a serious adverse impact on the performance of the FHA. Close judicial scrutiny inevitably leads to more formalized decision-making. This result may be tolerable and even desirable in some cases. However, FHA consideration of rent increases can recur as often as leases expire over the life of a forty-year mortgage. To impose the formalities which attend review on all these essentially managerial decisions seems to us inconsistent with the constant Congressional urgings to simplify procedures and expedite work. . . .

Equally important, such review would discourage increased involvement of the private sector which is the goal of § 221(d)(3).⁹⁰

A third test is implied in *Hahn* for determining when an administrative decision should be elevated to a level of constitutional visibility. Would a more formal process of decision be likely to reveal much? Hahn and his fellows were seeking to vindicate a group right to participate in rent increase decisions. They were not arguing, as were Thorpe, Escalera, and Colon,⁹¹ that a policy was arbitrary as to particular individuals. The facts Joyce Thorpe wanted to contest concerned her fitness as a tenant; the matters Karl Hahn wanted to debate involved the legitimate rate of return on equity, the proper treatment of tax shelter benefits in establishing that rate of return, the costs of maintenance, the likely trend in the property tax and so forth. As the court reminded,

90. 430 F.2d at 1250.

91. See pp. 493-94 *supra*.

procedural safeguards are characteristic of adjudicatory proceedings, where the outcome turns on accurate resolution of specific factual disputes. . . . Such safeguards are not, however, essential in "legislative" proceedings, such as rate-making, where decision depends on broad familiarity with economic conditions. . . . As Professor Davis has pointed out, when decision turns on "legislative" rather than "adjudicative" facts, a formal adversary hearing may contribute little or nothing to the agency's understanding of the issues.⁹²

To the extent that *Hahn* depends on the assumption that tenants are simply not competent to participate in decisions concerning rent increases, it is challengeable. When the tenants in this case protested their pending rent increase, an informal hearing was conducted before a member of the Boston FHA staff. The First Circuit recounted:

Several tenants gave graphic evidence concerning construction defects, which plaintiffs maintain were the cause of higher maintenance and operating costs.⁹³

The landlord had proposed a \$28 monthly hike for each apartment.

Shortly after the hearing, defendant Flynn notified plaintiffs that he had granted a monthly increase of \$22.00 per apartment, \$11.00 effective immediately and \$11.00 a year hence.⁹⁴

Even on matters of which tenants have no special knowledge, they might obtain experts to counter the landlord's contentions. But again, to allege that the First Circuit stated its own standard without sufficient modification or that the court failed to apply its standard appropriately to the facts is not to repudiate the criterion itself.

The gain in visibility to be realized from a judicially prescribed hearing is certainly reduced when the agency already has an informal process that is likely to elicit whatever the tenants can contribute. The court made clear that it was not trying to foreclose tenant participation in many of the aspects of management, including the setting of rents. Rather, it was attempting to leave the administrative agency ample room to experiment with various modes of tenant involvement.

Our decision will not, we hope, discourage efforts to develop effective procedures for the airing of tenant grievances. . . . We have considerable sympathy for the plight of those who must submit to the fiat of a large and sometimes insensitive bureaucracy. We real-

92. *Id.* at 1248.

93. *Id.* at 1245.

94. *Id.*

ize that agencies ostensibly dedicated to the public welfare can sometimes become preoccupied with the needs of their immediate clients, thus promoting what one cynic has described as "socialism for the rich and free enterprise for the poor". And we suspect that, the larger the bureaucracy, the more need there is for instituting procedures of communication and participation for those it is intended to serve—as a means of making better decisions in a more tranquil atmosphere. At the same time, we must also recognize that the achievement of a fair and effective housing program is inescapably in legislative and administrative hands. Accommodating procedures for tenant participation to the needs of effective housing management is, we think, primarily a task for Congress and the FHA, not the courts.⁹⁵

If HUD were to determine that a formal rent increase procedure was in the public interest, it would have ample statutory authority to order it. HUD's authority on this count would not depend on the scope of constitutionally protected tenants' rights. The Department's jurisdiction over rents both in the 221(d)(3) and public housing programs is implied in the statutes as part of the agency's essential function in dispensing subsidies for those programs. This was an important aspect of the court's reasoning in *Hahn*. The tenants had sought to invoke the Administrative Procedure Act as the basis for judicial review. The court, in turn, was put to the task of determining whether the exemption to review, contained in section 10, applied; that is, whether "agency action is committed to agency discretion by law."⁹⁶ In finding the exemption applicable, the court had necessarily to determine that the procedures to be used in setting rents were within the discretion of the FHA. At this point we can but speculate that the outcome might have been different if the matter had been one over which HUD would have had jurisdiction only upon a judicial finding of a constitutional entitlement.

The map has yet to be clearly drawn that would show the distance courts are likely to travel in carrying constitutional principles to their readings of the Housing Act of 1937. *Goldberg* and *Escalera* report a minimum excursion that most courts can be expected to undertake. *Hahn* marks one of the boundaries, and thus it provides a formula for evaluating future petitions. It directs attention to: (1) the gravity of the deprivation to tenants sought to be averted by a proposed improvement in the administration of landlord-tenant relations; (2) the burden

95. *Id.* at 1251.

96. 5 U.S.C. § 706 (Supp. V, 1965).

that a more formal process would be likely to place on administrators and programs; and (3) the chances that the improved process would evoke useful data or accomplish other valued ends.

C. *The Insignificant Distinction Between Public Housing and Interest Subsidy Programs for Constitutional Adjudication*

This reliance on *Hahn* can be challenged because the federal assistance involved there was an interest subsidy, and the interest subsidy programs—section 221(d)(3)⁹⁷ and its successor, section 236 of the National Housing Act⁹⁸—serve primarily not low income families but those of moderate means. By contrast, *Escalera* concerned public housing for which the subsidy is deeper than that available under the other housing programs, enabling a poorer class of tenants to benefit. Whether tenants in public housing, simply because they are poorer, should be entitled to greater protections over such items as rent increases and fines remains to be decided. A good wager can be made that courts will treat tenants of public housing and interest subsidy programs identically for constitutional purposes. According to language in the three leading cases—*Goldberg*, *Escalera*, and *Hahn*—what matters is not the financial condition of the petitioner but the severity of the deprivation he seeks to avert. And evicting from a 221(d)(3) project a moderate income family when vacancies in the conventional market are few can be a greater deprivation than excluding from Pruitt-Igoe, the snake pit of public housing, an applicant whose health and safety would only be further impaired if he were admitted. In fact, *Colon v. Tompkins Square Neighbors, Inc.* has extended the basic due process protections to the interest subsidy programs.⁹⁹ And the Court of Appeals for the District of Columbia found *Hahn* perfectly on point with a class action to enjoin a proposed rent increase that had been brought by a group of tenants in public housing.¹⁰⁰

There is further reason for not attempting to distinguish the two types of programs on the basis of the income group they are designed to serve. Although public housing is geared to a lower income recipient, as many as 40 per cent of the tenants in an interest subsidy apartment house may be eligible for rent supplements, and the income eligibility for rent supplements is the same as for public housing.

97. 12 U.S.C. § 1715(d)(3) (Supp. V, 1965).

98. 12 U.S.C. § 1715(z)-1 (Supp. V, 1965).

99. See pp. 493-94 *supra*.

100. *McKinney v. Washington*, No. 23,809 (D.C. Cir., Nov. 25, 1970).

Moreover, the 1969 Brooke Amendment provides that no public housing tenant should be charged more than 25 per cent of his income for rent.¹⁰¹ Hence, a rent increase in public housing is no longer supposed to result in undue burdens to individual tenants; Congress should be appropriating sufficient special funds to absorb those increased costs which tenants are unable to bear within the 25 per cent rule. On such matters as rent increases, then, the public housing tenant might be in a less vulnerable position than the 221(d)(3) or 236 resident. No parallel protection has been legislated for him short of the rent supplement program, and little reliance should be placed upon that program for reasons outlined above.

Another basis besides the incomes of eligible tenants could be asserted for distinguishing interest subsidy from public housing programs. It goes to the burden which a due process requirement is likely to impose on the program. Private investment plays a lesser role in public housing, or at least it has traditionally. This is not of particular significance for the obvious constitutional quest—the need to find “state action”—for that search was successfully concluded in *Colon* as to the interest subsidy programs.¹⁰² Rather it is significant in balancing the needs of tenants and management in these parallel programs. Tenants may be said to have a more substantial claim to due process protections in a wider range of policies when the interest of encouraging private developers is withdrawn from the scales, as it is in conventionally-built public housing.

Conventional public housing is usually owned, financed, and developed by a governmental entity. The 221(d)(3) and 236 projects are privately owned and operated, fully taxed, and financed by a private mortgage lender. After 20 years the mortgage can be prepaid and ownership may revert, free of FHA restrictions on rents, to the owners of the equity.¹⁰³ Listing the “public” and “private” incidents to the programs is, however, a little simplistic. A substantial number of interest subsidy projects are developed and owned by non-profit sponsors and cooperatives; only a little over 50 per cent of the interest subsidy buildings are the work of private, profit-motivated sponsors. Further, the assumption that private developers will realize the residual value of 236 developments after 20 years by prepaying the mortgage, and thus removing FHA rent ceilings, disregards one tax change

101. 42 U.S.C. § 1402(1) (Supp. V, 1965).

102. See pp. 493-94 *supra*.

103. 12 U.S.C. § 1715l(g)(4) (Supp. V, 1965).

enacted in 1969. The private owner of a 236 project, assuming he reinvests the proceeds in federally assisted housing, can avoid the payment of tax on the gain by selling to a nonprofit corporation or cooperative.¹⁰⁴ On the other side of the ledger, public housing has become more "private." Increasingly, it is being produced—even owned and financed privately—with the local housing authority just leasing the building and subleasing units to the tenants. This process, known as turnkey leasing, has received an impetus in the 1970 amendments to the public housing law. Congress extended the maximum permissible lease term under section 23 of the Housing Act of 1937 from five to 20 years.¹⁰⁵ The longer lease term will further encourage private development and financing of public housing since the 20 year term, secured by a federal commitment for annual contributions toward the payment of rent, is ample security for most private lending institutions to make long term mortgage loans on these projects.¹⁰⁶ Local housing authorities are also free to lease units in existing buildings. And in 1970 Congress mandated that at least 30 per cent of the new public housing contracts be for units in privately owned buildings—either existing or constructed under the turnkey program.¹⁰⁷ Thus both the interest subsidy and public housing programs rely on profit-motivated sponsors as well as non-profit or public initiatives. Whatever basis is finally chosen for predicting how far the courts will proceed in applying constitutional norms, a distinction along programmatic lines will be difficult to maintain.

D. *The Residential Segregation Cases as a Model for Assessing HUD's Responsibility to Guard the Constitutional Rights of Tenants*

If the issue of HUD's obligation to enforce the constitutional rights of tenants should ever come to litigation, there is one set of cases that

104. 26 U.S.C. § 1039 (Supp. V, 1965).

105. 1970 U.S. CODE CONG. & AD. NEWS 7034. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 204.

106. Under section 10(c) of the Housing Act of 1937 it is already possible to enter a lease of up to 40 years, but this provision requires a local waiver of property taxes and would therefore be subject to referendum requirements in those states which have them. Section 23 leasing does not require a property tax waiver and thus has been held not to need electorate approval in states which would demand it of conventional public housing. Thus the 20 year extension is of primary significance just in referendum jurisdictions. Should the United States Supreme Court affirm *Valtierra v. Housing Authority*, 313 F. Supp. 1 (N.D. Calif. 1970), *prob. juris. noted*, 398 U.S. 949 (1970), which declared unconstitutional the California referendum provision, this distinction between 10(c) and 23 programs would lose much of its vitality.

107. 1970 U.S. CODE CONG. & AD. NEWS 7034. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 203.

could be examined in estimating how the courts will likely respond. Those are the cases which have challenged the site selection and tenant assignment policies of local housing authorities for contributing to existing patterns of residential segregation. As mentioned before, Congress in the Civil Rights and Fair Housing Acts has expressly designated HUD as the agency charged with implementing such standards through affirmative action. But despite this clear delegation of authority, several lessons seem to be emerging from the cases brought under the 1964 and 1968 Acts. The first is that while courts are prepared to impose sanctions on local authorities which have contributed to patterns of segregation through site selection and tenant assignment policies, there is considerable reluctance by the courts to involve HUD in their decrees. The second is that as the Department attempts to fulfill its constitutional and statutory duty in this field, it becomes increasingly apparent that rigid and precise national standards, though seemingly easy to comprehend and enforce, ultimately make no sense. The most realistic action the Department can take is to prescribe general guidelines, leaving considerable leeway to local authorities. To the extent that any court has been willing to implicate HUD in these decisions, a third policy appears. That is one of permitting HUD to select whatever degree of procedural formality it deems fitting both in determining initially whether the location of a particular project will in fact contribute to segregation, and in reviewing that determination.

The reluctance of courts so far in compelling the Secretary to exercise his discretionary authority under the Civil Rights and Fair Housing Acts has been illustrated on a number of occasions. In *Vallierra v. Housing Authority*,¹⁰⁸ plaintiffs challenged the constitutionality of a provision in the California constitution which required the approval of the local electorate for the location of any public housing project. They also contended that if the referendum requirement were unlawful, HUD had to be enjoined from refusing to enter contracts with local housing authorities solely on the basis of an authority's failure to comply with the requirement. HUD was able to have itself dismissed from the suit. Apparently, the obligation of the Department to take affirmative action toward fair housing goals did not include a requirement that the Department determine the impact of its implicit enforcement of the California referendum provision on patterns of residential segregation.

A similar reluctance to implicate HUD explains the decision in

108. 313 F. Supp. 1 (N.D. Calif. 1970), *prob. juris. noted*, 398 U.S. 949 (1970).

Gautreaux v. Romney,¹⁰⁹ recently handed down in Chicago. In a former action, Gautreaux had sued the Chicago Housing Authority for perpetuating site selection and tenant assignment policies which resulted in new projects being located only in areas of existing minority concentration and which barred blacks from the few projects in white neighborhoods.¹¹⁰ Seeking to compel an integrated housing program, the court ordered that after 700 units were placed in white areas, three sites be selected in a white neighborhood for each site in the ghetto; that black applicants be assured a choice of living in a desegregated project; and that projects be of a small enough scale to afford easy mixing of project residents with others in the neighborhood.¹¹¹ The failure of the Housing Authority to achieve desegregation had been largely due to the refusal of city councilmen to approve the construction of public housing in white wards. It was relatively simple for the district court judge to prevent the location of housing in black neighborhoods. Compelling the council to approve desegregated sites, however, has proved considerably more difficult. To date, the council has failed to approve any, and there has been no new public housing contracted in Chicago since the decree. Part of the blame for this result lies with the many surrounding suburbs which are unreceptive to federally assisted housing and do all they can to bar the location of public housing outside the Chicago city limits.

In an attempt to make the district court decree effective, suit was activated against HUD in *Gautreaux v. Romney*. The plaintiff sought, among other things, to have HUD administer the FHA mortgage insurance program and its many aid programs—from urban renewal and model cities to sewer and water grants—in such a way as to induce Chicago and its suburbs to relent and make sites available for integrated public housing. Judge Austin, in denying the plaintiff's petition and reiterating that the government must be permitted to carry out its functions unhampered by judicial intervention, was careful to note:

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.¹¹²

109. *Gautreaux v. Romney*, No. 66 C. 1460 (N.D. Ill., Sept. 1, 1970).

110. *Gautreaux v. Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

111. *Gautreaux v. Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969) (judgment order reported).

112. *Gautreaux v. Romney*, No. 66 C. 1460 (N.D. Ill., Sept. 1, 1970).

Presumably this dicta is in deference to the principle that the Fifth Amendment becomes applicable to a federal agency only when that agency can itself be said to discriminate.

HUD is required by law to be more than a passive financier when it comes to civil rights and fair housing, and has tried to satisfy its obligation. The task is complex. The Department has maintained, even before *Gautreaux*, that sites in areas of minority concentration are disfavored, and subject to special scrutiny.¹¹³ This policy seems both vague and precatory and so displeases many inside the Department and out. It appears easy to evade¹¹⁴ by the expedient of a local housing authority's alleging that it has done its best—and then placing all its public housing at inner-city sites. Alternatively, in the name of strict compliance, all areas of minority concentration might be red-lined, and no public housing constructed there. This so closely resembles the old discriminatory practices of the Federal Housing Administration as to be suspect. Precisely for its long years of refusal to issue mortgage insurance in black neighborhoods, the FHA was attacked by the Chicago Contract Buyers' League. Their claim was that black families were forced to obtain financing from unscrupulous block-busters for want of any alternative method of finance. A spirit of mindless compliance also invites economic or class discrimination, as middle income blacks invoke the policy to bar low rent public housing from being built in their neighborhoods. Like their suburban counterparts, inner-city residents are fearful that lower-class entry will blight what are now pleasant enclaves.¹¹⁵ Thus a policy that results in no inner-city construction

113. The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in the areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration. Such submissions by Local Authorities may be made to the HAO Production Representative and Realty Officer for inclusion in this report.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOW INCOME HOUSING MANUAL ¶ 2(g) § 205.1 (emphasis added), pursuant to § 1.4(b) of HUD regulations, Title VI of the 1964 Civil Rights Act.

A thorough discussion of the present site selection policy can be found in Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

114. See, e.g., *El Cortez Heights Residents and Property Owners Ass'n v. Housing Authority*, 10 Ariz. App. 132, 457 P.2d 294 (1969), and *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969).

115. In both *El Cortez Heights Residents and Property Owners Ass'n v. Housing Authority*, 10 Ariz. App. 132, 457 P.2d 294 (1969), and *Shannon v. Romney*, 436 F.2d 809 (3rd

offers a prospect just as disquieting as a policy that leads to the location of all public housing in ghettos. For these reasons and in light of *Gautreaux*, the Department has been attempting to improve upon the site selection policy.

Among the proposals that could be considered is a directive that sites for public housing be located on the basis of one unit outside an area of existing minority concentration for each unit inside such an area, with exceptions for housing located in a model cities or urban renewal area. A policy which establishes a rule of thumb for measuring compliance has the advantage that, unlike a judgmental standard, it can be easily administered by General Service personnel. Precisely because of its objectivity, it is also more resistant to political intervention whenever a city is threatened with becoming ineligible for funds.

Moving to a fixed ratio is nevertheless likely to prove a disruptive loss. It would not have helped in Chicago, for if we were to take the three-for-one aspect of the Austin decree literally, a one-for-one formula would still have been too lax. Besides, if HUD had administered even the existing standard rigorously, it would probably have been put to the same dilemma the district court must now confront: whether to deny public housing funds to a locality, even though the blame for the lack of integrated sites lies not with the local housing authority, and certainly not with the likely beneficiaries of the program, but rather with the city council. An attempt by HUD to withhold funds for non-compliance with any such ratio would also be of doubtful legality in cities not subject to outstanding decrees. Before an agency may withhold funds pursuant to the 1964 Civil Rights Act, it must make an express finding of discrimination; the violation of a formula cannot be the basis for an administrative finding of discrimination per se. In *Board of Public Instruction v. Finch*,¹¹⁶ the Fifth Circuit refused to allow HEW to withhold funds from a school district for its failure to comply with a racial mix formula the Department had devised. As the court reminded:

Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory

Cir. 1970), the chief objectors seem to have been middle class blacks trying to keep low-rent housing from their neighborhoods.

116. 414 F.2d 1068 (5th Cir. 1969).

manner, or is so affected by discriminatory practices elsewhere in the school system that it becomes discriminatory.¹¹⁷

As a random ratio cannot be the final measure of discrimination under the 1964 Civil Rights Act, neither would it be of much use to the Secretary in fulfilling his obligation to take affirmative action under the 1968 Act. The difficulties that could arise were lately underlined in an opinion by the Third Circuit in *Shannon v. HUD*.¹¹⁸ Among the issues raised in the case was whether something like the present site selection criteria for public housing had to be developed by HUD for the rent supplement program. The Third Circuit provided an affirmative answer. In the course of its opinion, the court made a number of points of special interest here. The first was that HUD was duty bound not to disperse rent supplement monies to any locality without utilizing "some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information."¹¹⁹ While not wanting to prescribe a rigid format by which HUD or a local agency would have to obtain the relevant data, the Court of Appeals did provide a suggested list of questions to be asked, all going to the probable effects of a project's location on existing patterns of minority occupancy and dispersal.¹²⁰ Since the

117. *Id.* at 1079.

118. 436 F.2d 809 (3rd Cir. 1970).

119. *Id.* at 821.

120. 1. What procedures were used by the LPA in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?
6. Are some low income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?
7. What is the projected racial composition of tenants of the proposed project?
8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?
9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so how has this effected racial concentration?
10. Are there alternative available sites?
11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?

Id. at 821-22.

facts would vary from city to city and even within a given locale from time to time, this procedure mitigates against a uniform national standard. The court as much as said so when confronted with a HUD defense that rent supplement contracts had not been confined to ghettos but had been authorized for projects throughout the Philadelphia region. Explaining why this was irrelevant, the court emphasized that what mattered was not only the general location pattern of federally assisted housing, but the impact on segregation of each new proposal.¹²¹ The second point worth noting here was the court's willingness to recognize that in some cases, a concentration of subsidized housing in ghettos areas might well be justified.

Nor are we suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.¹²²

Finally, the *Shannon* court made quite explicit its hesitancy to impose any particular format on HUD in fulfilling its obligation.

121. Finally, defendants contend that there was no evidence in the record below of discriminatory site selection in the location of rent supplement projects. The district court found:

What proof there is on this question shows without dispute that rent subsidy housing is evenly and well disbursed within the city as well as without, in both ghetto and non-ghetto areas. (305 F. Supp. at 225).

Leaving to one side the plaintiffs' contention that this finding goes beyond the proof and is in any event the result of the district court's circumscription of evidence on that point, we think the finding is irrelevant. Congress has since 1949 refined its view of the factors relevant to achieving national housing objectives. At least under the 1968 Civil Rights Act, and probably under the 1964 Civil Rights Act as well, more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. Even though previously located rent supplement projects were located in non-ghetto areas the choice of location of a given project could have the "effect of subjecting persons to discrimination because of their race . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race . . ." 24 C.F.R. § 1.4(b)(2)(i). That effect could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood. That effect could be felt not only by occupants of rent supplement housing and low cost housing, but by occupants of owner occupied dwellings, merchants, and institutions in the neighborhood. 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. Approval of Fairmount Manor under the "red line" procedure produced a decision which failed to consider that policy.

Id. at 820-21.

122. *Id.* at 822.

The only institutionalized methods which have been called to our attention by which HUD can obtain the information necessary to make an informed decision on the effects of site selection or type selection of housing on racial concentration are the public hearings specified by § 105(d) of the 1949 Act and the Report on Minority Group Considerations (R-215) required by the Urban Renewal Handbook as a part of a Project application. A public hearing at the local level would be an obvious means for obtaining the relevant information. We do not now hold that such a public hearing is the only acceptable means. A requirement for a report from the applicant, such as the Report on Minority Group Considerations (R-215), may be an acceptable alternative. The Agency, with its own expertise, may find an alternative preferable to either. We hold, however, that the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.¹²³

VII. Conclusions

As part of the Department's financial stewardship, HUD already requires each housing authority to enter formal lease agreements with tenants. Under the same authority, the content of leases could be screened by the Department to assure that no clauses are used which might result in the lease being unenforceable. The only HUD mandates on lease forms that could be regarded as outside the Department's purview would be those potentially reducing the rental income of the local housing authority, while setting aside lease clauses which could not be assailed as unconscionable or unconstitutional.

The statutes, with their strong preference for tenant involvement, indicate that HUD might require each housing authority to discuss with tenants the need for grievance procedures and additional regulations to develop such procedures. The Department could go further on a constitutional basis. The trend of case law now suggests that evictions, possibly the imposition of fines, and certain other deprivations can be imposed on tenants only with some procedural safeguards. The courts have tended to refrain from prescribing in detail what those procedures must include. For welfare recipients the most rigorous protections are compelled by *Goldberg v. Kelly*; *Escalera* and *Caulder* have applied *Goldberg* to certain aspects of the landlord-tenant re-

123. *Id.* at 821.

lationshiPs in public housing. But given the distinctions between termination of welfare benefits and eviction from public housing, particularly the requirement of judicial process for eviction, it is likely that courts will allow landlord-tenant relationships to be governed by somewhat less formal grievance procedures than those applying to welfare recipients. Therefore, HUD probably has some leeway in what it may mandate with respect to grievance procedures, and this seems justifiable. Just as a uniform ratio would probably not satisfy the Department's obligation with respect to site selection, no procedure, however detailed, is free from the challenge that it was on a given occasion executed in an arbitrary fashion. Conversely, a housing authority which is meticulously fair in its treatment of tenants might be able to evict rather promptly, provide only an informal hearing, and still satisfy a court that it had afforded the aggrieved tenant due process—particularly if the procedures were developed with the active participation of local tenants.

The temptation is often irresistible for administrative agencies to promulgate detailed standards; these are simpler to understand for the personnel who must execute them, and compliance is easier to assess. For precisely this reason, outpourings from Washington are replete with specifics, and it is not surprising that the sense of directives is often lost as federal personnel, local managers, and others preoccupy themselves exclusively with satisfying the forms. The policy of local control in the public housing program serves as a continuing restraint upon HUD's authority to manage local housing authorities from Washington. In the delicate area of landlord-tenant relations, as in site selection, the most realistic course for the Department is to establish general guidelines, as it has now done, and then to initiate procedures for reviewing each local authority's final work product for substantial compliance with the rudiments of financial soundness, contractual fairness, and due process.

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Gregory L. Colvin, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case*

Bradford C. Snell, *Annual Style Change in the Automobile Industry as an Unfair Method of Competition*

David M. Schulte, *Commercial Banks and Minority Entrepreneurship*