

Supreme Court of the United States

In the Matter of:

Docket No. 20

JOYCE C. THORPE,

Petitioner

vs.

HOUSING AUTHORITY OF THE CITY OF DURHAM

Respondent.

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Place Washington, D. C.

Date October 23, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ARGUMENTS OF:

P A G E

James M. Nabrit, III, Esq., on behalf of the
Petitioner

2

Daniel K. Edwards, Esq., on behalf of the
Respondent

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -x
4 JOYCE C. THORPE, :

5 Petitioner; :

6 vs. :

No. 20

7 HOUSING AUTHORITY OF THE CITY OF DURHAM. :
8 - - - - -x

9 Washington, D. C.

10 Wednesday, October 23, 1968

11 The above-entitled matter came on for argument at

12 10:30 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice
15 HUGO L. BLACK, Associate Justice
16 WILLIAM O. DOUGLAS, Associate Justice
17 JOHN M. HARLAN, Associate Justice
18 WILLIAM J. BRENNAN, JR., Associate Justice
19 POTTER STEWART, Associate Justice
20 BYRON R. WHITE, Associate Justice
21 ABE FORTAS, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Number 20, Joyce C. Thorpe, petitioner, versus the Housing Authority of the City of Durham.

Mr. Nabrit?

ORAL ARGUMENT OF JAMES M. NABRIT, III, ESQ.

ON BEHALF OF THE PETITIONER

MR. NABRIT: Mr. Chief Justice, may it please the Court, this case is here on certiorari the second time to review a judgment of the Supreme Court of the State of North Carolina affirming an order that petitioner and her four children be evicted from a low-income public housing project in Durham, North Carolina.

The question for decision is whether tenants in federally financed projects, operated under the United States Housing Act of 1937, as amended, may be evicted from their homes and their Federal benefits terminated without being told any reason or given any opportunity to be heard in their own defense before the decision to evict is made by the Housing Authority.

Let me emphasize at the outset that in our view the fundamental, underlying question here is whether poor people who depend on the Government for the necessities of life will get the same kind of procedural rights and protections that our system has long given to more fortunate citizens in their contacts with Government administrators.

1 Q Is that really the issue, or an underlying issue
2 here, that people who have leases with private landlords have,
3 as a constitutional matter, the rights which you are contending
4 here?

5 A No, Your Honor, I wouldn't contend that. I said
6 "poor citizens in their contacts with the Government."

7 Q Tell me about that. Where do you get that flavor
8 in the constitutional aspects in this case?

9 A It is our position, may it please the Court, that
10 it is commonplace in administrative law in all sorts of situa-
11 tions, when a professional man's license is threatened, securi-
12 ties as in the Goldsmith case, to get a notice and a hearing.

13 Q Let's take a comparable case if we can think of
14 one. Let's pose that a person has a lease with a concession-
15 naire to occupy premises, and the lease says it is terminable;
16 that this is a month-to-month lease and it is terminable upon
17 30 days' notice, and there is no provision for notice or hear-
18 ing, or a statement of the reason why the lease is not being
19 renewed.

20 Does the concessionnaire have a constitutional right
21 to be heard?

22 A The difference I perceive is a difference in the
23 purpose of the program. The purpose of this program under the
24 Housing Act is to provide housing for poor people. It is a
25 Government benefit program.

1 To the extent that there are differences between
2 Government benefit programs and identical programs, programs
3 identical to the management of Government buildings, you may
4 have different principles to apply to them. My argument is not
5 addressed to that.

6 Q This is a terribly important and new area of
7 constitutional law to which you are addressing yourself now.
8 Whether it is appropriate to analyze it in terms of giving poor
9 people rights that are given to more fortunate fellow citizens
10 or not is a problem of the utmost consequence, I would think,
11 this matter of the developing application of a constitutional
12 principle.

13 I, myself, believe, and I am sure you agree with me,
14 that it is one that requires the most prayerful and careful
15 analysis. Perhaps the game is not advanced when we set a case
16 like this in terms of equalizing the rights of the poor vis-a-
17 vis the rights of the rich.

18 You first have to establish, if I may respectfully
19 suggest to you, that there is an analogous right given to more
20 fortunate citizens vis-a-vis the Government.

21 A I agree that these issues about the rights of
22 the poor are a challenge to us all; that they are not without
23 difficulties. Let's look at the position of the Housing
24 Authority in this case.

25 They claim, after all this transpired, after three years

1 of this litigation, they still maintain that they don't even
2 have to have a reason, they don't have to have any cause to
3 evict a low-income family from its home. They claim that they
4 have no duty to tell the tenant anything or listen to anything
5 the tenant has to say.

6 Their position is, in sum, that these destitute people
7 that depend on the Government for shelter don't have any rights,
8 procedural rights, that authorities are bound to respect. I
9 think it is relevant. The point is not lost on poor people.
10 I think they do understand what is going on when the legal
11 system treats them this way.

12 Q Mr. Nabrit, I will leave you alone after this
13 point.

14 The problem of fundamental consequence in this and
15 other cases exists. I suggest to you that perhaps there are
16 two possible lines of approach. One is a line of discrimination
17 between the poor and the rich with respect to the central
18 governmental rights. The other, and it may be -- this is for
19 you to argue and not for me -- the one that is applicable to
20 this case.

21 The other is that in this kind of a governmental
22 activity, that is to say, the rental of residential property,
23 whether it is middle income, high income or low income, the
24 Government takes on certain responsibilities as a constitutional
25 matter which a private landlord does not have.

1 I don't know whether that is right or wrong, but
2 what I am suggesting to you is a possibility that that may be
3 the basic premise to which one must address oneself.

4 A Justice Fortas, I think I agree with that. I
5 think the principal problem in the case is what sort of pro-
6 cedures and processes are required when the Government is the
7 landlord and deals with people. I don't disagree with that at
8 all.

9 Let's begin with a few words about this Federal law,
10 the Housing Act of 1937, so that we have a statutory frame of
11 reference to discuss the constitutional question. The Congress
12 has declared the policy of using Federal funds and credit to
13 remedy the unsafe and insanitary housing conditions in an acute
14 shortage of decent, safe and sanitary dwellings for families of
15 low income.

16 Housing in this particular program was provided only
17 for families who were in the lowest income group and who cannot
18 afford to pay enough to private enterprise to build an
19 adequate supply of decent, safe and sanitary dwellings for
20 their use.

21 The subsidies in this program, although operated by
22 local housing authorities, are almost entirely 100 percent
23 Federal. The permanent financing of these projects is done
24 by bonds sold by the local authorities. The Federal law sub-
25 sidizes these bonds in several ways.

1 First, they make the interest on the bonds federally
2 tax exempt. It has the effect of lowering the interest rate.

3 Then the Government of the United States pledges its
4 credit, the credit of the United States, to assure the payment
5 of the bonds. Under its annual contributions contract with the
6 local authorities, the United States agrees to pay up to 100
7 percent of the debt service on the bonds. The local authorities
8 apply their net receipts to the payment of the debt service,
9 and any difference the United States makes up.

10 There are some projects where the United States does
11 actually pay 100 percent of the debt service.

12 In addition, the United States makes additional cash
13 contributions for elderly families and on account of displaced
14 families, families displaced by Federal projects.

15 Finally, the United States pays the administrative
16 cost of the Housing Assistance Administration on the part of
17 HUD itself. The state and local governments, rather than sub-
18 sidizing the projects, in some cases actually gain from them
19 by receiving payments in lieu of local real estate taxes from
20 these housing authorities which, under the statute, may amount
21 to up to 10 percent of the rental income of the projects.

22 There are now 2.6 million people in the United States
23 living in these federally assisted projects. Perhaps a
24 quarter of a million of them have moved into these projects
25 since this case was last argued here a year and a half ago.

1 The program is rapidly expanding. About half of
2 these people are black, about a third of them are elderly. Their
3 median family income is a little over \$2700. The average rent
4 they pay is about \$50. Those figures are for 1967.

5 The petitioner was found eligible and she moved into
6 her apartment at \$29 a month in November 1964. Her lease was
7 a month-to-month tenancy. It gave both the tenant and the
8 Authority the right to terminate by giving 15 days' notice be-
9 fore the end of any month.

10 She lived in the project without any incident for
11 eight or nine months. On August 10, to be precise, 1965, Mrs.
12 Thorpe was elected President of the tenants' organization that
13 was being organized in the project. The very next day the
14 authorities sent her a notice that her lease was terminated
15 at the end of that month.

16 Several times she asked for a hearing. She was told
17 only that the Authority was not required to give a reason or a
18 hearing. When she did not move out, this present suit for a
19 summary eviction was brought in the State courts, which ordered
20 her eviction.

21 The State Supreme Court ruled on the first appeal that
22 the lease was terminated because the term had expired. The
23 reason the Authority terminated it was immaterial.

24 This Court granted review during the October Term,
25 1966. After argument here in this Court a year and a half

1 ago, the case was remanded to the court below to reconsider it
2 in view of a super being event, an administrative direction,
3 a circular, issued by the Department of Housing and Urban
4 Development which directed that tenants not be given notices
5 to vacate without being told the reasons and an opportunity to
6 reply.

7 On remand, the court below again affirmed, stating
8 that its prior opinion stood, and stood by it, and ruled that
9 the circular was inapplicable because it issued after the
10 lease, the termination notice and the court order. Mrs. Thorpe
11 remains in her apartment under stay orders issued throughout
12 these appeals.

13 Q Could you tell us how the Housing Authority is
14 constituted?

15 A Yes, Mr. Chief Justice.

16 Q Would you do that briefly, please?

17 A Yes, Mr. Chief Justice.

18 The authority is created under a North Carolina
19 statute called the North Carolina Housing Authority Laws,
20 General Statutes of North Carolina, section 157.1. Actually,
21 it is section 157.4 which describes in some detail the pro-
22 cess, it can be filed by petition, by taxpayers, they have to
23 have hearings to determine whether or not there is a housing
24 shortage in the community, there have to be certain specific
25 findings made. Then the authority is incorporated under State

1 law as a governmental agency.

2 Q How are the commissioners selected?

3 A How are they chosen?

4 Mr. Edwards has indicated that they are appointed by
5 the Mayor of the municipality. I can't find a reference to
6 that. It is the Mayor or the Council. I am sure it is in
7 157.4, which is the statute. It is on page 9(a) of the peti-
8 tioner's brief.

9 As I said at the beginning, it seems to us that it is
10 a commonplace in administrative law that governmental agencies
11 grant notice and hearings before taking actions. Particularly
12 this is true where the action is based on what amounts to an
13 adjudication, that a citizen is guilty of misconduct.

14 Tradition of due process rejects the idea of ex parte
15 contraventions. Mr. Justice Frankfurter once put it that
16 fairness can rarely be obtained by secret, one-sided deter-
17 minations of facts decisive of rights. The court has applied
18 that principle in numerous cases.

19 As recently as a few terms ago, in a case called
20 Wilner against the Committee on Character and Fitness, the
21 principle was applied to a lawyer whose profession, the right
22 to practice law, was at stake. It

23 It was applied to meatpackers as long ago as the
24 famous Morgan cases.

25 The same principle was true for the engineer who was

1 denied a security clearance and whose right to earn a living
2 was at stake.

3 I emphasize that the issue here is primarily the
4 question of procedural process. To use Mr. Justice Brandeis'
5 phrase, "due process in the primary sense of an opportunity to
6 be heard and to defend."

7 I think the case does not involve whether there is a
8 right to public housing for all poor. I think it does not
9 necessarily involve even what grounds might justify evictions,
10 but, rather, only what procedures due process of law requires
11 if benefits are to be terminated.

12 Q But that assumes that there is some sort of a
13 right other than the rights we have heard about in these cases.
14 I think there is a proposition about turning to the other faces
15 of the case. I think that is a proposition you should face
16 up to. Is there some right other than the right inferred by
17 the lease?

18 A I would submit the right to be treated fairly
19 by a governmental agency when it is determining whether or not
20 to terminate your benefits under a Federal benefit program,
21 the right to fair proceedings.

22 Q So far as the lease is concerned, Mrs. Thorpe
23 may have had her lease terminated just because they were tired
24 of having her there, for no reason at all. On this record,
25 we cannot assume, can we, that her lease was terminated because

1 she was a leader of this tenants' group or that she was guilty
2 of any sort of misconduct or that anything like that was con-
3 sidered?

4 A I will address myself, if I might, Mr. Justice
5 Fortas, to the first portion of your question, as to whether or
6 not they can terminate because they were tired of having her
7 there.

8 It seems to me you have to focus on the statutory
9 frame and the permissible kinds of things the authority could
10 do under the statute. Indeed, a private landlord can evict
11 someone because he wants to make more profit or he wants the
12 apartment for his brother-in-law, or because he wants to tear
13 the building down, for any number of reasons. But the Housing
14 Authority cannot have these reasons.

15 The purpose of the program is to house poor people,
16 and they can't leave it vacant and obey their duty under the
17 statute.

18 Q What you are saying is that from the fact that
19 the purpose of the program is to provide housing for poor
20 people, there derives a procedural right, that procedural right
21 being that before the lease is terminated or allowed to expire
22 by its terms there has to be a statement of charges, a state-
23 ment of reasons, and an opportunity for hearing, which assumes,
24 too, that there has to be a reason, a good reason.

25 A That is right. There has to be a reason under

1 the statute.

2 Q What does the statute say about it? The statute
3 doesn't say anything about it, does it?

4 A The statute does give us some guidelines such
5 as 1410(g), which is in our brief at page 3a. 1410(g)(2). It
6 does lay out the general considerations that the Government
7 wants considered in this program. Let me read it.

8 It refers to the admission policy, but I take it
9 the admission policy and the right to remain would be under
10 the same policy generally. It says:

11 "The Public Housing Agency shall adopt and promul-
12 gate regulations establishing admission policies which
13 shall give full consideration to its responsibility for
14 the re-housing of displaced families, to the applicant's
15 status as a serviceman or veteran or relationship to a
16 serviceman or veteran, or to a disabled serviceman or
17 veteran, and to the applicant's age or disability, housing
18 conditions, urgency of housing needs, and source of
19 income: provided, that in establishing such admission
20 policies, the Public Housing Agency shall accord to
21 families of low income such priority over single persons
22 as it determines to be necessary to avoid undue hardship."

23 For example, if a hearing developed that a housing
24 agency evicted a family in order to give a single person hous-
25 ing, they would be doing something that would be quite opposed

1 to the statutory policy.

2 Q Mr. Nabrit, do I assume that when Mrs. Thorpe
3 is put out, she will be replaced with another poor family in
4 exactly the same position that she is in?

5 A Roughly, yes.

6 Q Exactly what constitutional provision are you
7 relying on for your due process argument?

8 A Mr. Justice Marshal, your question suggests to
9 me that it is relevant to analyze what the tenant has at stake
10 in this, what the Authority has at stake, in determining what
11 procedures fairness requires.

12 What we rely on is the due process clause. It seems
13 to me it is useful to look at the interest of a tenant who is
14 in a low-rent Federal housing project. In the first place,
15 the general framework of it is pretty well defined by the State-
16 Federal statutes. We know merely from looking at the statutes
17 that the housing project wouldn't be built in the first place
18 without specific finding that there was a shortage of housing
19 in the community.

20 Q Maybe I have not made myself clear. Let me try
21 again.

22 But for the fact that she was elected President of
23 this tenants' union, would you be here?

24 A The personal component is part of our case. My
25 answer is yes, because these authorities contend that they have

1 right to kick people out without telling them any reason why. I
2 think that alone raises the question of due process, the ques-
3 tion of procedural fairness.

4 Q And solely because it is Federal money?

5 A Yes.

6 Q So that a member of the authority who has a pri-
7 vate building could put somebody out without a hearing, but he
8 could not vote to put somebody out of a public building?

9 A I can assume that that is so. I don't address
10 myself to that question.

11 Q You don't recognize the fact that when a private
12 citizen makes a contract with another private citizen for ren-
13 tal of an apartment in which he agrees that he can be thrown
14 out without notice, that cannot be enforced?

15 A No, I agreed with that. I said I assumed that
16 this case doesn't implicate the rights of nongovernmental
17 agencies. This case depends on the fact that this is Govern-
18 ment; that the Government is the landlord.

19 I was about to address myself to what the tenant has
20 at stake. It seems to me just looking at the statute alone,
21 that obviously if tenants who are eligible get into these pro-
22 jects and are then evicted, they stand to lose the only chance
23 they have to homes which they can afford which are decent, safe
24 and sanitary.

25 So what the tenant has at stake is of great value.

1 Whether you call it a right, or a privilege, or whatnot, what
2 is at stake ---

3 Q Your time is about up. Can't we dispose of this
4 case on the circular, the HEW direction? Am I correct in
5 remembering, and it is quite a while since I read the briefs
6 and record in this case, am I correct in recalling that the
7 local authority held that the circular direction by HEW was not
8 retroactive?

9 A The court below; yes, sir.

10 Q And can we dispose of the case if we should con-
11 clude that, as we read this, that the circular of the HEW is
12 retroactive?

13 A I believe that would be open to the Court. How-
14 ever, I would urge that the Court dispose of the case on the
15 constitutional issues. I think there are many other cases
16 pending which involve these same issues. The housing program
17 is growing every day. The issue needs to be decided.

18 Q Assuming the circular can be held retroactive,
19 do you think the terms of the circular go as far as your argu-
20 ment?

21 A Not entirely. The circular would have to be con-
22 strued in order to give meaning to the content of this general
23 provision. The circular is not very specific.

24 Q It seems if you are given notice and opportunity
25 to respond, that would be sufficient.

1 A It is a little more specific. It indicates, for
2 example, some details as to what the notice would have. But
3 it is not very clear.

4 Q Does it provide for a hearing?

5 A None.

6 Q On your due process argument ---

7 A Mr. Justice, we do not contend for a full-
8 fledged evidentiary hearing. We think that the Department of
9 Housing and Urban Development can work out something that is
10 practical in the circumstances. What they do need to be told
11 is that the tenant evictions of the housing authorities are not
12 being done in fairness.

13 Q What kind of hearing should be held?

14 A It seems to me it would be --

15 Q Representative of the local housing authority?

16 A Yes, sir.

17 Q Would she be entitled to a lawyer?

18 A I don't believe the authority can exclude the
19 lawyer, or another representative, a social worker.

20 Q Then, of course, wouldn't it apply to a private
21 person or group who owned apartment houses?

22 A That would not.

23 Q You are saying that the Government, even if it
24 sets up rules and says you have to obey them, cannot, like a
25 private apartment owner, oust someone for failing to obey them

1 without giving him a hearing. Could that be taken to court,
2 then, that hearing?

3 A Mr. Justice, I think it is a process, the admin-
4 istrative process and the judicial process in these cases hav-
5 ing to be looked at. Perhaps if you get more rights at an
6 earlier stage, that affects the necessary scope of judicial
7 review. In other words, if you have a very perfunctory admin-
8 istrative proceeding, then you need a full and fair judicial
9 proceeding.

10 Q Isn't there one here in any event, a full and
11 fair hearing? Let's assume there is an eviction proceeding
12 brought. The tenant stays in and doesn't obey the notice to
13 quit and there is an eviction proceeding brought.

14 Can the tenant at some point in that process enjoy a
15 full due process hearing and urge any defenses to the eviction?
16 Doesn't State law provide an opportunity for the tenant to
17 challenge that eviction?

18 A I think not. It seems to me that under this
19 particular --

20 Q That is the way the case got here. That is the
21 way the case got here and there were full findings on the ques-
22 tion of whether the alleged reason was the reason or not.

23 A Mr. Justice, I think not, and for this reason:
24 It seems to me that the North Carolina law is very clear that
25 the only question up to the court to decide in the summary

1 eviction proceeding under this statute is, Number 1, whether
2 the person is a tenant, and, Number 2, whether they are holding
3 over after the term is over. That has been the law in North
4 Carolina under this statute as long as the statute has been
5 there.

6 Q Let's assume for the moment that in the eviction
7 hearing the tenant attempts to urge that she was evicted be-
8 cause she exercised constitutional rights, and North Carolina
9 said, "Sorry, we won't listen to this reason," but it was estab-
10 lished as a matter of constitutional law that North Carolina
11 had to listen. What is wrong with that?

12 You just don't think the North Carolina hearing in
13 the North Carolina courts that the tenant gets is the equiva-
14 lent of a full due process hearing?

15 A I really have several answers to that. The
16 last thing you mentioned is one of them. In fact, in North
17 Carolina, it is not open to do this. I don't deny for a moment
18 that it is possible to devise a judicial proceeding that could
19 give you a hearing on the relevant issues. I suggest that
20 that is not available.

21 The second thing that hasn't been said, that I should
22 say, Mr. Justice, is this: that there are not any reasons for
23 which you must evict someone from the housing.

24 Finally, it is a discretionary decision by the
25 housing manager. No one suggested the court is ever going to

1 make that kind of discretionary judgment. It is that decision
2 which ought to be made fairly, which ought to be made in accor-
3 dance with fair procedures.

4 Q Tell me what is wrong with the North Carolina
5 hearing when the landlord brings an efiction case. You say the
6 only question that is open is, is the term over and is he still
7 there? Is that it?

8 A That is right. That is what the statute says.

9 Q When the term is ended because of some right
10 of re-entry based on some act of the tenant, isn't there any
11 room for the tenant to challenge? Assume the landlord said,
12 "We terminate because you scratched up the walls of the apart-
13 ment," and the tenant says, "I haven't either."

14 A That proceeding would be brought under another
15 subsection of the law. If I could refer the Court to the North
16 Carolina summary efiction statute, at page 21a of petitioner's
17 appendix, it provides for an eviction under subsection (1):
18 "when a tenant in possession of real estate holds over after
19 his term is expired."

20 That is what is involved here. Under subsection (2),
21 then the tenant has breached the lease. If they allege ~~can~~
22 and proceed under subsection (2), they allege that tenant
23 didn't pay rent or scratched up the walls and breached the
24 lease, they have to prove it. But if they allege that the
25 term is over, that he is holding over after the lease has

1 expired, under subsection (1), that is all they have to prove.

2 Q But the lease expired only because the landlord
3 gave notice.

4 A That is right. That is all they have to prove;
5 that they gave the statutory notice.

6 Q It doesn't make any difference for what reason?

7 A That is right. The Supreme Court of North Caro-
8 line held that that reason is immaterial. That is entirely in
9 accord with North Carolina practice over the years.

10 Q But why didn't the trial court make some find-
11 ings on this question? The North Carolina court recited those
12 facts.

13 A I suppose the court was being careful. But the
14 trial court also said there was no obligation to give a reason.
15 The trial court also held that.

16 Q Let's assume for the moment, though, that the
17 tenant did bring to bear all the questions that you think he
18 ought to be able to bring to bear in an administrative hear-
19 ing. Suppose that in North Carolina the eviction proceeding
20 permitted him to do that. Would you say that there has to be
21 the constitutional right in an administrative hearing prior to
22 that time?

23 A My position, Mr. Justice, is that there is a
24 constitutional right to certain elements of fairness at some
25 stage in this procedure, ranging from the beginning of the

1 administrative procedure to the end of the judicial procedure.
2 I don't have any rigid notion of where you have to get your
3 rights. It seems to me someplace in that proceeding the ten-
4 ant, where the Government is the landlord, ought to be told
5 why his benefits are being terminated and have the opportunity
6 to address himself to that.

7 Additionally, it seems to me, at least on the ques-
8 tion of notice and reason, some minimal opportunity to address
9 himself to it, the tenant ought to have that at the administra-
10 tive stage.

11 I say that particularly where we have low income
12 tenants who are unlikely to be able to afford lawyers and
13 afford to go to court. They certainly can't afford to go to
14 court to fight an eviction if they don't know why they are
15 being evicted. It seems to me the Housing Authority also --

16 Q I have your point, I think. Thank you.

17 Q Do you think this HEW regulation can be read
18 to be retroactive?

19 A Yes, I think it can be read to apply to this
20 pending case. The reason I think that is that it is entirely
21 conventional, it seems to me, to apply new procedural rules to
22 cases where the judgments are not found.

23 I think further it is entirely artificial to view this
24 case as the authority does, as one where they are being deprived
25 of some property. As we said earlier, they are going to rent

1 this same apartment to somebody else at the same rent. By
2 requiring them to go back and give the tenant the reasons she
3 is being evicted, it seems to me, doesn't deprive them of any-
4 thing. It just makes them be fair to the tenant.

5 I wanted to complete an answer to the prior question.
6 Also, it seems to me important that the authority be made to
7 state a reason at the administrative level so that they will
8 have a reason, so that the reason they later present in court
9 is not a post facto justification for something they decided
10 earlier.

11 It seems to me that the person who makes the decision
12 to terminate Government benefits like this ought to be required,
13 if he is going to operate under law, to say why he is acting.

14 MR. CHIEF JUSTICE WARREN: Mr. Edwards.
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1 ORAL ARGUMENT OF DANIEL K. EDWARDS, ESQ.

2 ON BEHALF OF RESPONDENT

3 MR. EDWARDS: Mr. Chief Justice, if the Court please,
4 as Justice Fortas suggested, we are at the threshold of develop-
5 ing new constitutional concepts about the relationship of the
6 poor with the Government.

7 I don't know whether I can supply much thought that
8 is worthwhile, except this: that the philosophy that has been
9 developed in the brief of the petitioner, at least by quoting
10 certain individuals such as Professor Jones, Professor Rich,
11 on the subject on page 36 and 37 of the brief, seems to follow
12 the line of thought that what we are doing is to give the poor
13 the same rights in their contact with Government that is pos-
14 sessed by other people; that is, we equate them, and that we
15 haven't arrived yet, in any case that I know of, where they
16 are given some different rights.

17 When you supply them with a lawyer because they are
18 poor and can't afford one, you are not giving them additional
19 rights in a sense. All you are doing is equating them with the
20 fellow who can afford a lawyer.

21 In this case, you have a lease that is standard pro-
22 cedure between landlord and tenant. Now the question arises
23 with the common law procedures, the common law concepts, the
24 common laws or the statutory laws applicable to everybody in a
25 landlord and tenant relationship, do not they supply reasonable

standards of fairness?

Q I am sure, Mr. Edwards, you understood my question of Mr. Nabrit. What I was trying to find out from him was whether the principle of putting the poor on an equivalent basis with people who are better off in terms of legal rights, constitutional rights, whether that principle really got him anywhere in this case. That was my question.

A And I am sure it does not, because they are placed on an equal basis here. The only question, then, is whether one should go further. I say not; that perhaps that is a matter that the Congress can consider, as to whether or not they want to make the relationship different, or the State Legislature.

Q Or HEW can do it, presumably, pursuant to its statutory authority, issuing a circular here which does provide a right, for what it is worth.

A The circular is the thing I would like to take up next, if I may.

Q Mr. Edwards, before you get to it, you do recognize the difference between the Housing Authority operating under State and Federal auspices and private apartment house owners?

A There are differences. I don't know -- one, the difference would be, I assume, that a housing authority could not say "We will require you to sign a statement that you never

1 belonged to certain organizations found by the Attorney General
2 to be subversive as a condition to occupying these apartments."
3 You can't do that. Or you can't say that you can't occupy
4 these apartments if you decide to vote, or if you decide to
5 make a speech somewhere.

6 In other words, I think that to that extent the
7 Housing Authority is perhaps in a different situation than the
8 private landlord, although I wouldn't be adamant in saying that
9 a private landlord might not be constitutionally prohibited.

10 Q Are you familiar with the Wilmington bus situa-
11 tion?

12 Well, obviously you are not.

13 Once the State takes over, it is not a private busi-
14 ness any longer. You do recognize the right of HUD to set rules
15 and regulations, or do you not?

16 A No, sir.

17 Q You don't recognize that?

18 A Within the limits of their annual contributions
19 contract they do have that right and privilege. HUD itself
20 recognizes this. That is why I wanted to get this preliminary
21 to this circular, because I wanted to know whether you say this
22 circular is binding or not.

23 A I say it is not. The reasons for that are
24 these: The United States Housing Act of 1937 did provide that
25 HUD could issue certain general rules and regulations to

1 implement the chapter, the provisions of the chapter. But it
2 also provided in there just as clear as it could be that it
3 should deal with housing authorities set up under the State
4 law, as this one was, under the State statute, by entering into
5 a contract with them, which is called an annual contributions
6 contract.

7 It wasn't given the power by any statute to run the
8 housing authority set-up under the State law by edict or by
9 rule or by regulation absent a contract with that agency, that
10 local housing authority. It had to have a contract, an annual
11 contributions contract. That is in there, that the general
12 power to make rules and regulations was within the framework
13 of the concept that their sole control over this local housing
14 authority was by virtue of the contract for annual contributions
15 that it entered into. It had to put the provisions in that
16 contract.

17 As I say, HUD recognizes this. The petitioner, in
18 preparing this case, directed certain inquiries to HUD with
19 reference to the February 7, 1967 circular and we received
20 some answers from HUD in response to their inquiry. You will
21 find those in the petitioner's brief on page 48a, Appendix 5,
22 back in the back part of the brief.

23 That is the pertinent one that I would like to call
24 the Court's attention to. There HUD says "HUD policy over the
25 years has been to treat the local housing authorities as

1 contracting parties under the annual contributions contract
2 not covered by the term 'public'. Material issued from time
3 to time for the guidance of local housing authorities in the
4 implementation of the annual contributions contract has, there-
5 fore, not been published in the Federal Register, but local
6 authorities are given actual notice of these matters by supply-
7 ing the material, manuals, bulletins, circulars and similar
8 publications, directed to the local authority."

9 The Housing Act didn't require that there be inserted
10 in the annual contributions contract any controlling features
11 about eviction or what sort of lease should be given to the
12 tenants, and the annual contributions contract itself contained
13 no such provision.

14 Q Is the Durham Housing Authority abiding by that?

15 A It is right now.

16 Q It is abiding by it?

17 A It is; yes, sir.

18 Q But it doesn't consider it to be retroactive?

19 A It does not consider it to be retroactive.

20 Q As of tomorrow, a person, Mrs. Thorpe, if she
21 is put back on regular status, could not be put out without
22 a due process hearing?

23 A I think as a matter of policy, what the Housing
24 Authority would do, as they are now doing, would be to follow
25 the procedures set out in the HUD circular.

1 Q Since this case is still being litigated,
2 wouldn't the best way to be just to forget about this?

3 A To forget about the eviction?

4 Q This one woman.

5 A I think as a practical matter, unless the Court
6 wants to establish some new concept and make some pronounce-
7 ment as to constitutional law about the thing --

8 Q Couldn't your clients, without any constitutional
9 law, pronouncements or anything else, moot this case?

10 A They could.

11 Q But they haven't?

12 A They haven't done so; that is correct.

13 Q Perhaps I don't understand you, Mr. Edwards.
14 I assumed that everything in the way of directions in the HUD
15 mnuals and in the various circulars issued from time to time
16 were binding as a matter of law on the local housing authority.
17 Do you contest that?

18 A I do, sir. I don't think that is correct.

19 Q On page 31a of the petitioner's brief is an
20 excerpt from the Low Rent Housing Manual. It says HUD, PHA at
21 that time, has established minimum requirements with local
22 authorities. Do you think it has exceeded its statutory
23 authority?

24 A Not necessarily. I think the annual contribu-
25 tions contract that HUD writes --

1 Q Does that exhaust its authority?

2 A That HUD writes, the annual contributions con-
3 tract, the authority enters into that contract with it.

4 Q And that exhausts its authority?

5 A It does, unless the contract provides that cer-
6 tain things shall be done pursuant to HUD's from time to time
7 directives and advice.

8 Q Does the term "directive" contain any reference
9 to manual or circulars or regulations to be issued by HUD?

10 A No, sir. It does not provide that HUD be given
11 that authority.

12 Q This says below, on the same page, the PHA manuals
13 contain the requirements to supplement the provisions of the
14 contracts between the local authority and the PHA. That doesn't
15 change your view, I take it?

16 A No, sir; because I think what they are talking
17 about are those areas where there needs to be some rule-making,
18 for example with respect to the keeping of records.

19 Q I suggest you look at page 32a, the second para-
20 graph, with respect to the operation of the projects.

21 A That is the PHA requirements. There, again, this
22 is the housing manual that is issued, and the annual contribu-
23 tions contract under the statute is the connecting link between
24 the two. We say there just hasn't been anything shown to be
25 in that contract which is really the only link between this

1 Q If we assume that this circular is binding on
2 the local housing authority, there is no question that it would
3 require notice, et cetera, to a tenant upon termination of her
4 tenancy?

5 A I don't think it would, sir, necessarily, as a
6 matter of law, and for this reason: If you analyze the circu-
7 lar itself, the first paragraph makes an announcement of fact,
8 and there have been a lot of evictions around the country,
9 with public dissatisfaction about it.

10 The second paragraph says "We" -- that is, HUD --
11 "believe that it is essential to advise with the tenant before
12 the eviction action is taken."

13 Then the third paragraph says that in addition to
14 advising with the tenant, from this date the local authority
15 shall keep certain records.

16 In analyzing what they meant by the circular, it is
17 significant, I think, that HUD does have the authority under
18 the annual contributions contract and under the statute to
19 require the local authority to keep records. The only direc-
20 tive part, the mandatory part of this circular, related to the
21 keeping of records. It says "from this date forward you shall
22 keep certain records."

23 The statute set forth on page 7a of the petitioner's
24 brief sets that out, that HUD does have authority to require
25 the local authority to keep records. So when they wrote this

1 circular, they gave one paragraph of information about what
2 was going on, the second paragraph about what they believed,
3 and then a third paragraph which directed then, pursuant to
4 their authority, to require records to be kept.

5 Q So you think we have to decide a constitutional
6 question here because you think the circular is just the state-
7 ment of a belief which may or may not be imparted by the local
8 authorities as praiseworthy but certainly is not binding?

9 A I think that is correct.

10 Q Let me ask you this question: Putting the ques-
11 tion of retroactivity aside for a moment, and taking it as it
12 was when this woman was first evicted from her premises, sup-
13 pose this housing authority, which is employed by the Mayor-
14 of the city, was following the practices of many cities in the
15 South of resisting integration of any kind, and it took the
16 process of throwing out every Negro who came into the apartment
17 house on 15 days' notice without any mention at all of why it
18 was done, and absolutely defeated the purpose of this Act,
19 which is to give all poor people an opportunity to have decent
20 housing in the community in which they lived.

21 Would you say if the commissioners appointed by the
22 Mayor, and the management that they appointed, took that kind
23 of a position and ejected every Negro who had been admitted to
24 the apartment house, that no Negro could complain in the courts
25 because no reason was assigned for his eviction?

1 A No, sir; I certainly would not. I would say
2 that they would be violating the Constitution of the United
3 States and probably the Constitution of North Carolina if they
4 acted in such a fashion.

5 Q Why shouldn't he be entitled to know if that was
6 the reason for his ejection or if it wasn't?

7 A In court I think he would be entitled to inquire
8 into the matter.

9 Q In your eviction process?

10 A In the eviction process. That is one point
11 where I disagree with my friend, on the effect of going into
12 court on an eviction process and proceeding. I think con-
13 stitutional issues are relevant there, and can be raised in any
14 court in any stage of the proceeding if they are constitutional
15 issues, requirements of the Constitution. The eviction statute
16 couldn't say, "You cannot raise a constitutional issue before
17 the court."

18 Q The supremacy clause would also require con-
19 sideration of any binding rules of the Federal authority.

20 A Exactly so. So you have to consider them in
21 these courts. There is no question about it. The trial judge
22 before whom the matter is brought, if you say "They are vio-
23 lating my constitutional rights here," would have to consider
24 it.

25 Q I understood that you thought that because they

1 had made a contract in connection with this tenancy, that there
2 was no substantial difference between the case where the
3 Government is the owner and the case where the landlord is a
4 private individual, and that all he would have to show would
5 be that, by contract with this tenant, it is to the effect
6 that "On 15 days' notice, I can terminate the tenancy and I
7 don't have to give any reason at all for it."

8 A No, sir; we don't take that position. We take
9 the position that constitutional issues would be relevant as
10 they were ruled on here in this very case. The court below,
11 when she raised the point "My First Amendment rights are being
12 violated," the court didn't say "That is irrelevant. You will
13 not be heard on that." The court heard evidence on that very
14 issue, not ruling it irrelevant, but making a decision and
15 making a finding of fact based on competent evidence that her
16 First Amendment rights had not been violated.

17 Q It isn't true, then, that in the courts of North
18 Carolina all they had to show was 15 days' notice was given?

19 A No, sir; they did not hold that in this case,
20 because the finding was, when she raised the issue and said
21 "My First Amendment rights have been violated," the court did
22 not deny her a hearing on that but, instead, held a hearing on
23 it, and permitted evidence to be introduced.

24 There was no denial of any request by the petitioner
25 to cross-examine anyone, and no denial of the petitioner of

1 her right to introduce any evidence that she saw fit on this
2 or any other issue. There is nothing in the record that indi-
3 cates there was any such denial.

4 Q Is the difference between you and the tenant
5 that you claim the rights should be raised in the court, and
6 they claim the right under the Constitution that they should be
7 given notice before going to court?

8 A That is our difference.

9 Q And the statute defines that; that notice was
10 given.

11 A We did give notice.

12 Q I understand that is what you did. Then you
13 think she would win in the court if she hadn't been given
14 notice.

15 A That is correct.

16 Q Where do we find that articulated in your brief?

17 A On page 8 we talk about the adequacy of the
18 trial below, sir, in which an adequate hearing was provided in
19 the trial below. That is the point you are referring to.

20 Q Is there a concession in your brief that they
21 are entitled to that?

22 A Yes, sir. We say that during the trial, the
23 defendant did not quarrel with the nature of the scope of the
24 judicial inquiry -- that is the petitioner -- but contended only
25 that due process requires the housing authority to give the

1 tenant notice of its reason and the hearing before it instituted
2 action. We do go on and we say we do not contend that we could
3 violate this petition of the First Amendment rights as a con-
4 dition to her remaining in the apartment; that we couldn't place
5 a denial of a constitutional right, such as a right to vote or
6 any other right -- free speech -- as a condition precedent to
7 her remaining in there.

8 Q Or you couldn't penalize her by throwing her out
9 for having done it?

10 A That is correct. We concede that. We say that
11 that was found to be relevant by the Trial Court and passed upon
12 by the Trial Court and, of course, when it was here before, there
13 was some language in the opinion of the Supreme Court that indi-
14 cated it might be considering it irrelevant that such an issue
15 be raised.

16 But when it went back for rehearing, the court re-
17 viewed the matter and said, in effect, that the Trial Court
18 had before it whether her First Amendment rights had been vio-
19 lated, and so on, and that the Trial Court decided the issue on
20 competent evidence and it should be sustained.

21 Q Mr. Edwards, would you take the same position if
22 this were a housing project that was privately owned and had
23 exactly the same facts?

24 Let's take a more dramatic illustration such as the
25 Chief Justice put to you, a privately owned housing project

1 and every Negro tenant in it is terminated at once. It is the
2 same kind of a lease.

3 Would you say the tenants can't challenge the termi-
4 nation on the constitutional grounds; that they wouldn't have a
5 constitutional basis for challenging if they could demonstrate
6 the termination was because they were Negroes?

7 A If I were a representative of the tenants, or if
8 I were a judge considering the matter, I would say they would
9 have a valid right under Shelly versus Franklin, or cases of
10 that sort, in which they go into the court and ask the court to
11 enforce something such as the trespass in a criminal case or an
12 eviction proceedings, when you say the Constitution forbids the
13 State Court from taking this kind of governmental action to im-
14 plement that kind of denial of constitutional rights.

15 Q So that this is a qualification of the property
16 owner's right in his property, that is, the qualification being
17 that he cannot discriminate on the grounds of race to the extent
18 of terminating the tenancy of the person because they are Negroes?

19 A It would certainly be arguable.

20 Q We can argue anything. I am asking, is that the
21 principle upon which your brief is based? When you say that the
22 Public Housing Authority of Durham could not lawfully terminate
23 the tenancy of Mrs. Thorpe if it did it for the reason that she
24 organized this tenant union, then you are assuming that she has
25 a constitutional right.

1 My question to you is whether she has that constitu-
2 tional right, because this is a public agency, or would she have
3 that constitutional right even if it were a private agency?

4 A The only answer I can give is that most of the
5 cases in the past have said that the fact that it was a govern-
6 mental agency brought about that issue and that the restrictions
7 of the Constitution were framed to restrain Government because
8 it had unusual powers.

9 Q The only reason this is a constitutional right
10 is because this is Government. The First Amendment doesn't say
11 no person shall abridge any other person's right of free speech,
12 does it?

13 A That is correct. But I am saying also that you
14 have the situation where you could go and force --

15 Q You say that in the eviction hearing, Federal
16 issues may be raised, litigated and disposed of. You seem to
17 think that that would be required. I tend to agree with you.

18 Let's assume that in the eviction hearing the lessee
19 who is being evicted says, "I am being evicted because I organized
20 some tenants," or "I made a speech," and the Administrator of
21 the Housing Authority goes on to say, as he did in this case, I
22 think, "That isn't the reason at all." The lawyer for the
23 tenant says, "What reason was there?" and he said, "None of
24 your business."

25 Can he get away with that?

1 A No, sir.

2 Q Does he have to answer the question?

3 A I think you would have to answer the question on
4 cross-examination.

5 Q What if he said, "No reason at all. I just didn't
6 like him"?

7 A Then he would have answered the question, if he
8 said "No reason at all."

9 Q Then how does the eviction hearing come out?

10 A I think the Housing Authority would succeed, if
11 there was no reason at all.

12 Q Unless there was some Federal rule that says
13 there has to be some good reason?

14 A That is correct. We are saying that, as the matter
15 now stands and has in the past --

16 Q There aren't any bad reasons except constitutional
17 rights.

18 A The bad reasons are the constitutional ones. The
19 statute doesn't say there has to be any other kind of reasons.
20 We don't think that the Constitution says you have to have other
21 kinds of reasons. As long as you say that the standards appli-
22 cable in this housing authority which has no governmental powers
23 other than that given to ordinary landlords, the mandates and
24 restrictions of the Constitution apply to Government generally
25 and which are designed to restrict Government wouldn't necessarily

1 apply because they have to go into eviction proceedings to get
2 their property back.

3 They have to sign a lease. They are like any other
4 landlord. As an agency of Government, it does not have a single
5 power that an ordinary landlord has.

6 Q Why are they appointed by the Mayor? If it is
7 just like a private organization, a renting company, why is it
8 appointed by the Mayor?

9 A Because it is handling public funds.

10 Q When it is handling public funds, it is differ-
11 ent. That is the point, isn't it?

12 A That is one point.

13 Q That is the point, as to the constitutional
14 matters.

15 A My position was, sir, that some of at least the
16 restrictions of the Constitution between an individual and the
17 Government is they were designed to prevent Government, through
18 its greater authority and power, from imposing on the indivi-
19 dual. Therefore, the constitutional prohibition is against
20 Government taking certain actions vis-a-vis an individual.

21 That reasoning would not give rise to any constitu-
22 tional prohibitions as against this Housing Authority, because
23 it didn't have any power or authority greater than that. But
24 when it comes to the theory, "Well, you are administering public
25 funds, therefore a morality founded on constitutional principles

1 needs to be applied to you" --

2 Q As an example, Mr. Edwards, a private housing
3 authority could say, "None of my tenants will be permitted to
4 speak in any way that I dislike." That is nothing wrong with
5 that, is there?

6 A There is something wrong, but I think legally,
7 no, there is nothing wrong.

8 Q But the Durham Housing Authority couldn't make
9 such a rule.

10 A That is correct, I am sure.

11 Q So that is another thing.

12 A That is correct.

13 Q Isn't that what is involved in this case?

14 A That is involved in this case and it was decided
15 in this case because the petitioner presented her contention of
16 what right was being violated. The court listened to evidence
17 upon it and decided against the petition.

18 Q Let me read to you from the findings of the court,
19 from the transcript:

20 "By giving the defendant written notice of termination
21 of her lease on the 12th day of August 1965, the plaintiff
22 effectively terminated the tenancy of the lease of the
23 defendant as of the 31st day of August 1965."

24 Then she appealed to the Superior Court. This is the
25 judgment of the Superior Court:

1 "The defendant having gone into possession as tenant
2 of the plaintiff and having held over without the right to
3 do so after the termination of her tenancy, the plaintiff
4 was entitled to bring summary ejectment proceedings against
5 her to restore the plaintiff with possession of what ade-
6 quately belongs to it."

7 And then further:

8 "It is immaterial what may have been the reason for
9 the lessor's unwillingness to continue the relationship
10 of landlord and tenant after the expiration of the term as
11 provided by the lease."

12 That is the end of the judgment.

13 A But you see, this has been to the Supreme Court
14 of North Carolina twice. That was the first time.

15 Q But where did they ever say that she has a con-
16 stitutional right to test these other matters?

17 A When it went back on rehearing, they considered
18 that matter, and the Supreme Court of North Carolina on rehearing,
19 on page 39, said "She refused to vacate, charging her lease was
20 being vacated because of her having been elected President of
21 the Parents' Club. No evidence was offered as to the purposes
22 of the club, nor that its activities conflicted with the interest
23 of the Authority.

24 "The manager of the Authority stated unequivocally,
25 under oath, that the termination of the lease had no connection

1 whatever with the tenants' activities in connection with the
2 Parents' Club." Judge Bickett so found.

3 Q Where did Judge Bickett so find?

4 A In the Superior Court judgment.

5 Q Was that the language that I just read?

6 A No, sir. The language you just read was one of
7 the findings; that is true.

8 Q On page 21.

9 A On page 21, Finding No. 10. It says in the
10 finding of the court below, "that the plaintiff, the Housing
11 Authority of the City of Durham, acting through CSO, the Manager
12 and Executive Director, gave notice to the defendant to vacate
13 said premises not because she had engaged in efforts to organize
14 the tenants of McDougald Terrace, nor because she was elected
15 President of a group organized at McDougald Terrace, that these
16 were not the reasons that said notice was given and eviction
17 taken."

18 Q But the judgment says that that is immaterial.
19 It makes no difference. If the term has expired, she is there
20 illegally. I am reading from page 28:

21 "It is immaterial what may have been the reason for
22 the lessor's unwillingness to continue the relationship of
23 landlord and tenant after the expiration of the term as
24 provided in the lease."

25 A That, of course, if Your Honor pleases, is not

1 the opinion or not the judgment in the Trial Court. That is the
2 per curiam opinion of the Supreme Court of North Carolina as
3 it appeared when the case was first heard in that Supreme Court.

4 What I am saying is when it went back to the Supreme
5 Court of North Carolina --

6 Q Do you mean on remand?

7 A On your remand; yes, sir. They said not neces-
8 sarily a different thing, but they amplified what their meaning
9 was. When we were here before, my contention was that this
10 language in this per curiam decision meant only that it was im-
11 material under the showing and the evidence that was presented
12 there, what their reason might have been, because there was no
13 showing of any constitutional violation by the petitioner.

14 For that reason it became immaterial. But there was
15 no holding even then that she could not have the opportunity to
16 show that any constitutional right was violated.

17 When it went back to the Supreme Court of North Caro-
18 lina on rehearing, the court went further into that particular
19 point, on the finding that her First Amendment rights had not
20 been violated by the Trial Court, and said that since they were
21 based on competent evidence, those findings by the Trial Judge
22 which appear in Finding No. 10 should be sustained.

23 Q What is the finding in Muriel versus Palmer,
24 164 North Atlantic, which is cited by the Supreme Court for its
25 statement that I just read about the immateriality for the reason

1 for the ejection?

2 A That was just the ordinary landlord-tenant situa-
3 tion. No constitutional issue was raised in that case. They
4 just gave them notice and it was a normal eviction proceeding.
5 No governmental agency was involved in that case.

6 Q On the authority of that case, they said here
7 that it was immaterial what the reason was.

8 A I don't think when they say it is immaterial in
9 that first per curiam decision they are really stating out what
10 the court's view of the matter was. This was not the Trial
11 Court.

12 It would be the Supreme Court of North Carolina in
13 the per curiam decision in one sense that said, "Under the
14 findings that have come to us" --

15 Q It didn't say that.

16 A I am saying that is what it means. All it says
17 is that it is immaterial. But I think you have to construe what
18 you are talking about in terms of the case that was then before
19 them, which was a case that had come before them with a finding
20 of fact by the Trial Judge that First Amendment rights had not
21 been violated, and that there had been no request by the peti-
22 tioner for further exploration by the Trial Court to enter any
23 reason, and there had been no objection or exception taken to
24 any action by the Trial Court vis-a-vis any further exploration
25 of what the reasons might have been.

1 In that context, I take it that on appeal to the
2 Supreme Court of North Carolina it really was immaterial.

3 Q I thought the petitioners did take exception
4 to those things. There is Exception 1 on page 21, and Excep-
5 tion 2 on page 22, and 3, 4, and 5.

6 A The exceptions are on page 25, I think, of the
7 appendix, the grouping of exceptions and assignments of error.
8 What I am saying is that there was no exception taken to the
9 scope of the Trial Court's inquiry into the reasons because
10 there was no request made upon the Trial Court to broaden the
11 scope of this inquiry.

12 Therefore, there could be no exception taken to the
13 Trial Court, just confining itself to the evidence presented
14 by the petitioner, and her contentions, she said they were, in
15 the trial. There was no request to the judge in the trial ac-
16 tion to say "Make them come in and give us additional reasons."
17 They didn't ask that.

18 The fact that he didn't do it on his own motion was
19 not excepted to, either. When he went from the Trial Court to
20 the Supreme Court they didn't take exception to the failure
21 of the Trial Court on its own motion to make further inquiry
22 and broaden the scope of its inquiry into the reasons for the
23 eviction.

24 Q But if the North Carolina Court did have that
25 attitude that it is immaterial, I suppose you concede they may

1 be in error?

2 A If that language is literal, that is an error.

3 Q Or at least if the State refuses to make some
4 forum available as to constitutional rights. There is bound to
5 be some forum somewhere.

6 A That is correct. But I think what you are con-
7 fronted with here is you have the same thing as far as evidence
8 and findings are concerned that were before the Supreme Court
9 of North Carolina. You say on the basis of those findings and
10 that evidence that she had a fair trial in the Trial Court.

11 Q What is the Court here didn't agree with you that
12 the circular was, maybe we can call it, retroactive? At least
13 here came a circular from HUD before this case was finally dis-
14 posed of. It was on appeal here or somewhere when the circular
15 came out.

16 Why shouldn't the circular imply that the law
17 announced by that circular, if it is a law and binding, why
18 shouldn't that law determine the appeal, or why shouldn't the
19 appeal be determined by the circular? That would be the normal
20 rule, wouldn't it?

21 A It would be within the context of the generally
22 applicable rules, I think this Court would apply to other situa-
23 tions in which you have a procedural rule that has entered into
24 the picture between the trial and your final determination, and
25 you apply it.

1 Q If the Court thought this circular was to be
2 applied to pending cases, then what?

3 A We just lost the lawsuit, I reckon.

4 Q But do you think it is binding?

5 A I don't think it is binding.

6 Q Do we have to determine that?

7 A I think you have here a contractual situation.
8 You have a State agency, to be sure, but it is not a Federal
9 agency. The local housing authority is created under a State
10 statute and HUD doesn't have a vestige of authority over it
11 granted by any statute, except by virtue of entering into an
12 annual contributions contract with them and they sign on the
13 dotted line, HUD and the local authority.

14 Q I take it that you must get down to this, really.
15 The general rule would be that this is a binding rule of some
16 kind that really ought to apply to pending cases.

17 A I think so.

18 Q So really it is whether it is binding on all
19 the relations, whether this kind of circular is supposed to
20 determine your conduct.

21 A That is correct.

22 Q You suggest you are made apart from it now, al-
23 though you are complying with it, you could depart from it
24 without violating any kind of Federal law?

25 A I think so. I think you have to be very careful

1 about reviewing the content of the annual contributions contract,
2 which we have done, and can find nothing in it that gives HUD
3 the prerogative under the terms of that contract to say what
4 kind of lease we ought to have, whether it should be for six
5 months, one month, one year, or anything like that.

6 It doesn't give them any prerogative to say "You must
7 have an administrative hearing in advance."

8 Q Isn't that the real issue between you and Mr.
9 Nabrit?

10 A That is correct; whether the Constitution of
11 this country requires that there be an administrative hearing or
12 an administrative giving of the reason before the eviction.

13 Q Could I put one question?

14 Assuming your view is acceptable, I am not quite sure
15 I understand your view as to what would be your position if,
16 in a summary eviction proceedings, "I cannot be evicted because
17 I have received no reasons for my eviction." What would happen
18 if that were the defense?

19 A I would say that would not be a sufficient de-
20 fense, that "I cannot be evicted because I received no reasons."

21 Q Then suppose she said, "I want to prove by asking
22 questions of the authority as to why I was evicted."

23 A I think she would be entitled to do so.

24 Q But she has to make that assertion out of specu-
25 lation or suspicion. She cannot explore as to what the reasons

1 were, in fact?

2 A I think she could. I think she could insist upon
3 her right to examine the Executive Director of the Authority on
4 the stand there with regard to what reasons he had. He might
5 say, "I had no reason at all. I just wanted a vacant apartment
6 there."

7 We would say constitutionally that would be a con-
8 stitutionally acceptable answer, if he said, "I had no reason at
9 all. I just wanted a vacant apartment."

10 Q So she would have a right to hear the reasons;
11 at least that much?

12 A Yes.

13 Q I didn't understand that.

14 Q Where?

15 Q In the court.

16 A In the court.

17 Q That has been denied here.

18 A She has never asked in the Trial Court, if Your
19 Honor please, what the reasons were.

20 Q Now you are being technical. In North Carolina
21 she has asked.

22 A No, sir, she did not ask in the trial of this
23 action.

24 Q It is a point that should be decided.

25 A When the action was tried, when the matter was

1 before the Trial Court on finding the issues, the Trial Court
2 found that she contended her First Amendment rights had been
3 violated. Evidence was introduced on that point.

4 The Court found against her. There was no additional
5 question asked about what the reasons were in that trial of that
6 action.

7 Q Are there discovery proceedings in these pro-
8 cedures?

9 A There are.

10 Q The summary eviction is in what court?

11 A Superior Court.

12 Q In that court are there discovery proceedings?

13 A There are, indeed.

14 Q When she was served, it was possible to have
15 asked the question as to what was the reason, and so forth?

16 A She could have had pre-trial discovery by written
17 interrogatory, by pre-trial examination.

18 Q Doesn't this start before the Justice of the Peace?

19 A It starts before the Justice of the Peace, but
20 then it is de novo.

21 Q And then it is de novo in the Superior Court.

22 A Completely de novo, just like starting all over
23 again. She filed pleadings and affidavits as to what her con-
24 tentions were.

25 Q Is there a pre-trial proceeding as well as pre-

1 trial discovery available?

2 A Pre-trial discovery, but in an eviction proceed-
3 ing the normal course is before a Justice.

4 Q So you don't really get discovery proceedings
5 until you get to the Superior Court?

6 A Until she appeals from the Justice and then she
7 gets into it. It is de novo in the Superior Court, and before
8 she gets to that stage she does have discovery proceedings avail-
9 able.

10 Q Somewhere I was reading in here that one of the
11 officials of the Housing Authority actually appeared in court
12 before the Justice of the Peace.

13 A Right.

14 Q And then there was a stipulation about what his
15 testimony would be in the Superior Court.

16 A That is right.

17 Q Although they didn't need to sign that stipula-
18 tion, they could have had him there?

19 A They could have had him there and cross-examined
20 him and asked him any number of questions, as far as the record
21 is concerned they could have, because there was no question that
22 was asked that was denied by the court, no ruling of irrele-
23 vancy anywhere along the line by the Trial Court, and they made
24 no exception.

25 They didn't ask the Trial Court, "Will you expand this

1 hearing in this Trial Court to inquire into other reasons that
2 might have existed?" They didn't ask that.

3 Q It said it was immaterial, didn't it?

4 A No, sir; the Trial Court did not. It was never
5 said in the Trial Court that it was immaterial at any stage,
6 because the question was never asked in the Trial Court, never.

7 The language Your Honor is referring to appears for the
8 first time in the per curiam opinion of the Supreme Court of
9 North Carolina. That is the only place that that sentence has
10 ever appeared in this whole lawsuit from the beginning to the
11 end. That is the one place it has appeared.

12 Q It is a sentence that at least has a certain
13 amount of confusion in it.

14 A It has confusion; yes, sir.

15 MR. CHIEF JUSTICE WARREN: We will recess.

16 (Whereupon, at 12:00 Noon the Court recessed, to
17 reconvene at 12:30 p.m. the same day.)
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