IN THE SUPREME COURT OF THE UNITED STATES

CARLA A. HILLS, Secretary of Housing and Urban Development, Petitioner, v. DOROTHY GAUTREAUX, et al., Respondents.	No. 74-1047

Washington, D.C.

Tuesday, January 20, 1976.

The above-entitled matter came on for argument at 10:43 o' clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

ALEXANDER POLIKOFF, ESQ., 109 North Dearborn Street, Chicago, Illinois 60602; on behalf of the Respondents.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 1047, Hills against Gautreaux.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BORK: Mr. Chief Justice, may it please the Court:

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

The history of this litigation is rather complex, but I think the facts that need to be stated for purposes of his review are stated rather briefly. Respondents are six black residents in CHicago, who brought this action in 1966 against a department, and agency of the Department of Housing and Urban Development, on behalf of a class of black tenants in and applicants for public housing projects in Chicago.

Their claim, which was subsequently upheld by the courts, was that HUD aided public housing through financial assistance to the Chicago Housing Authority, and that when it made that financial aid it knew that members of the Chicago City Council were blocking the efforts of the Chicago Housing Authority to place this housing in white residential neighborhoods, thus reinforcing patterns of residential segregation.

And most of the tenants and applicants here were black.

It should be said in this case, by the way, I think it's of some interest that when we -- as this case has developed, the phrase, "a black residential neighborhood," or "a limited housing neighborhood", means one with more than 30 percent blacks. So it can be 30 percent black and 70 percent white and still, for purposes of this case, be described as a black neighborhood. Or it can be within one mile of any such Census Tract and still be described as a black neighborhood.

Respondents brought a companion suit against the Chicago Housing Authority, and the court found that that authority had in fact engaged in the discriminatory practice. It issued an injunction, among the terms of which were an order to halt the practices, to build the next 700 dwelling units in the substantially, or over 70 percent, white residential areas of Chicago, and to locate at least -- well, at least three-fourth of those units were to be in those neighborhoods.

Now, in the parallel action against HUD, the Court of Appeals for the Seventh Circuit reversed the district court's dismissal of the complaint and held that HUD's knowing acquiescence in CHA's -- Chicago Housing Authority's admittedly discriminatory housing program brought HUD into violation of the Fifth Amendment and of Section 601 of the Civil Rights Act of 1964.

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

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

At that point in the district court, the actions against HUD and CHA were consolidated. The district court did enter a best efforts clause, and there was still outstanding, of course, --against HUD-- and there was still outstanding, of course, the relief against the Chicago Housing Authority.

The district court specifically rejected plaintiffs' proposal for hearings to develop a plan of metropolitan relief for the areas surrounding the City of Chicago. Upon appeal, a wholly new panel of the Seventh Circuit, with one judge dissenting, reversed and remanded for consideration of a comprehensive metropolitan area plan. And that is the order --

QUESTION: Mr. Solicitor General, in the district court, did the plaintiffs' request for a metropolitan remedy -- was it accompanied by a prayer to join the outlying housing authorities?

MR. BORK: I don't recall whether there was a prayer at that stage. There was a prayer which was granted in the district court after the remand from the Court of Appeals.

QUESTION: I mean before the Court of Appeals.

MR. BORK: Well, I would have to -- I believe there was a request -- yes, there was. I believe there was a request to join them in the prospect, in the district court before the appeal so that a metropolitan area plan could be drawn up. But the Court of Appeals order that a comprehensive metropolitan area plan be now considered is what is at issue here.

Meanwhile, the district court has permitted respondents to file a supplemental complaint, to add as parties defendant the eleven local housing authorities outside the City of Chicago, as well as the Illinois Housing Development Housing Authority, the Northeastern Illinois Planning

Commission. and the director of the Illinois Department of Local Government Affairs. And respondents' current assertion in this Court is that housing in six Illinois counties, Cook--a part of which is the City of Chicago, much of which is not--DuPage, Kane, Lake, McHenry, and Will; those counties, which contain twelve local housing authorities and over three hundred cities, villages, and townships are the area which should be swept into this case and put under judicial supervision and used as a remedy, to remedy an act of segregation that occurred entirely within the City of Chicago.

Now, none of these counties or housing authorities or municipalities has been in this case previously; none of them has been found to have committed any act of discrimination, much less any act of discrimination related in any way to what happened in Chicago. The objection of the Secretary of the Department of Housing and Urban Development to the judgment of the Court of Appeals is precisely this: This Secretary of HUD will be required to impose obligations upon communities that are without fault, in order to achieve a remedy for respondents that runs contrary to her statutory obligations, and a remedy that is premised entirely upon wrongdoing in Chicago.

THE COURT: Well, are you arguing, in the sense, in the absence of indispensable parties?

MR. BORK: Not actually, Mr. Justice Rehnquist. I'm arguing that this case is like Milliken v. Bradley in the sense that the District Court is being directed, in effect, by the Court of Appeals to exceed the scope of allowable equitable remedies, and I'm arguing also that the Swann case has something to say here, about this case.

I think--

THE COURT: Do you defend the District Court's refusal to permit the joining of these outlying distrcits for the purpose of offering proof?

MR. BORK: No, no, if the--I think if the plaintiffs--I think this case is very much like Milliken. If the plaintiffs allege and prove an interdistrict violation, we would have a different case. But that is not the posture this case is in now. And I think, as this Court said in Milliken, the controlling principle, which has consistently been stated in the holdings of this Court, is that the scope of the remedy is determined by the nature and the extent of the violation. And, as the concurring opinion put it there, the courts there were in error for the simple reason that they thought what the--the remedy they thought necessary was simply not commensurate with the constitutional violations fund. And that is what I think is the difficulty here.

I want to discuss Milliken, but I first want to develop a point which is not fully developed in our brief, although it's present, and which, in and of itself, seems to me fully dispositive of this case. As I said, respondents here proved a violation which was entirely within the City of Chicago. And relief was ordered there, quite properly. And on this last appeal, the majority of the Court of Appeals ordered consideration of metropolitan relief.

Now, it gave a couple of reasons why it thought metropolitan relief was essential. One was that intra-city relief had become less valuable while the case was pending, because the number of neighborhoods with fewer than 30 percent black, or outside of one mile within a Census Tract of less than 30 percent black residents, had declined, so that there was difficulty getting sites to put enough public housing in areas with more than 70 percent white population.

Well, I think it's important to ask why that is true. And it's true not because of any action by any governmental unit, it's true because of demographic shifts, shifts in residential patterns in the Chicago area. Thousands of individuals and families made personal choices, which they are legally free to make, and, as a result, we are told, the Federal courts must pursue those demographic shifts into outlying cities and townships and municipalities. The court is not pursuing governmental action, nor even connected with governmental action; they are pursuing populations and demographic shifts.

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

The remedy, in short, is actually addressed to a predicted de facto segregation and not to the limited, proven de jure segregation in public housing in Chicago. I happen to think that the sociological and demographic predictions made by the Court of Appeals are not accurate; and if sociology were relevant to this case, I would think that the remedy chosen to deal with sociological trends is the worst possible remedy one could choose. But that is not the point.

Chasing demographic shifts and attacking purely de facto living patterns, I think, is not a proper remedial function of courts; and I think this Court recognized that fact in Swann v. Charlotte-Mecklenburg, and that seems to me sufficient to require reversal of the Court of Appeals here. But, aside from the principle of Swann, there is the holding of Milliken v. Bradley. This violation took place, as I have said repeatedly, within the City of Chicago and it is therefore inappropriate to frame

relief in an area that encompasses three hundred other governmental units, more than three hundred--three hundred other towns and villages that are complete strangers to the action and to the violation.

Now, respondents' attempted answer to this is that this is not interdistrict relief in the Milliken sense, because it is not interdistrict relief as to HUD, since HUD may operate over metropolitan areas. Well, that's fallacious. That answer is fallacious for two reasons:

The first is that this remedy, even if it is nominally directed, or actually directed only against HUD in a legal sense, will actually destroy the autonomy and some of the political processes of the cities and housing authorities who have no connection with the violation in Chicago.

And, secondly, I think it's irrelevant--it's a fallacious answer because the remedy would compel HUD--and this cannot be gotten around-- this remedy would compel HUD to ignore obligations placed upon it by Congress.

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

THE COURT: With what geographical restrictions, if any?

MR. BORK: Well, I think they may--they may deal with private developers; I don't think they--you're supposed to comply with the zoning ordinances, and so forth, of the city you're in.

THE COURT: That would--within a given metropolitan community, or--

MR. BORK: Oh, yes. Oh, yes. Well, they deal with private developers in any particular community, but under certain limitations. But my first point is that even if those limitations weren't present in the statute about what HUD may do, it is wrong to say that these communities are not being involved in this lawsuit, because the result would still

be that communities that have done nothing wrong whatever, and that neither need nor want public housing, would have public housing placed upon them by court order.

THE COURT: Does HUD have authority of eminent domain, to condemn land itself, or must it operate through state and local housing authorities?

MR. BORK: It must operate through community, state or local housing auhtorities, or with private developers under certain limitations. But it doesn't--HUD does not build these--currently HUD is not building anything and is not seizing property. It is subsidizing rental.

THE COURT: Well, some Federal agencies do have the power of eminent domain; is that not true?

MR. BORK: I believe that's true.

THE COURT: But HUD--you represent to us that they do not have that power?

MR. BORK: That is correct. They do not.

THE COURT: Would HUD have authority, in your view, to enter into a contract with a private builder, to erect a housing project contrary to local zoning laws?

MR. BORK: No.

THE COURT: Doesn't the decree of the--doesn't the final paragraph in the opinion of the Court of Appeals, in effect, mandate that?

MR. BORK: Well, I think what's going to happen--in effect mandates it to work; but respondents say that the decree does not allow them to, nor do they wish to, override local zoning ordinances. Now, what's going to happen, as a practical matter, in the area around Chicago is that zoning changes are going to have to be requested to put up multi-family dwellings of this size. And it has to be at least of a certain size, fifty to one hundred families, to make it economically feasible.

THE COURT: But since the local agencies, the local housing authorities and the local governmental bodies were not parties to the case, what sanction will there be to compel them to comply with this--

MR. BORK: Well, I assume, Mr. Justice Powell, that either in this case or in a separate case, we will then have a series of litigations about whether refusal to make zoning changes or variances was discriminatory. I think that's the way it would have to work out.

THE COURT: But certainly Judge Austin, if he's still sitting on the case, or if his successor, might well feel that the issue of the availability of a metropolitan remedy would be foreclosed in favor of a metropolitan remedy by the Court of Appeals opinion here; might he not?

MR. BORK: Oh, I think that Judge Austin, if--with the direction in that opinion, in that order, is bound to feel that he has to enter some kind of a metropolitan remedy.

THE COURT: That's right.

MR. BORK: But my point is that quite aside from the limitations placed upon HUD--and I think this is an important point, about dealing with local communities, if it were true--which it is not--if it were true that HUD could deal with private developers and ignore the local community, those local communities would have public housing they don't need, they don't want. They've committed no constitutional violation, and they are going to have to provide the services: the police protection, the fire protection, the additional schooling for families with children--to benefit citizens of Chicago. But--and I want to say this: My point is not merely that that is not a proper equitable remedy; my point is that a rather extraordinary legal principle is being formulated here.

Well, remember what happened in this case. The Chicago Housing Authority was held responsible because of the acts of the Chicago City Council. HUD was then held responsible because of the acts of the CHicago Housing Authority. And now, wholly uninvolved town governments are to be held responsible because HUD can reach them. That's all. HUD is to be made into a conduit, through which the impact of local violations flows outward to other--all other governments in the area that respondents or the District Court think it useful to reach.

Now, I say that's an extraordinary legal principle because, as Federal assistance and Federal authority increase--not only in this field, but in all kinds of fields--that principle would expand the equitable powers of district courts to unheard of dimensions. In this very case, I think it's clear that this Court has been pushed from performing a traditional judicial function of framing an equitable remedy into a position where it's going to become, necessarily, a metropolitan-wide land use and social planning agency, on a continuing basis.

Now, I think all of that would be bad enough, but it's also true--and respondents' brief, I think, obscures this fact--that metropolitan relief would require HUD to violate limitations built into its authority by Congress. Now, it's all very well-I think respondents' counsel say that Congress contemplated metropolitan planning, and that HUD officials endorse metropolitan planning. And that is entirely true. HUD does that, and HUD will continue to think and plan in metropolitan terms, regardless of the outcome of this case. But it is also true that in metropolitan planning, Congress has placed limitations and processes that must be observed, and that a court order would have to sweep away. And the relief proposed here, I think, would reverse the congressional thrust in the 1974 Amendments, the 1974 Housing Act, to return more decision-making to local communities.

Let me indicate briefly a couple of examples of how coercion would be necessary, or how violation of HUD's statutory mandate would be necessary.

One example: a community which receives funding from HUD for community development activities under the block grant program, which is Title I of the 1974 Act, is required to prepare a housing assistance plan of its own housing needs in that community as part of its application. Now, the statute requires, or it is required that that housing assistance plan must be prepared by citizen participation, including two public hearings for the citizens. And it must be later reviewed and commented upon by the relevant area-wide planning agencies for the state and for the locality.

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

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

That is all built into the 1974 Act. Any community--and a number of these communities do--that has the block grant program and a housing assistance program, all of this would have to be swept away if you're talking about HUD dealing with a private developer without interfering with the community. If a town is not a participant in that plan, then

Section 213(c) of Title II applies, the Secretary consults with the town. And of course the town's wishes have influence, but the Secretary shall not approve a proposal there, even from a private developer, unless she determines that there is need for Federally assisted public housing, taking into consideration the applicable State plans, and finding that there is, or will be available in the area, public facilities and services adequate to service the proposed development.

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

THE COURT: Mr. Solicitor General, what if there has been, as there wasn't before the Court of Appeals ruling, a hearing in the District Court after a complaint in which all of the outlying authorities had been joined, and there had been a finding by the District Court of inter-district violations on the part of all? Wouldn't that put the case in a somewhat different posture?

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

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

Now, there is Exhibit 11, which has been offered in this case and which is a map that's at the back of respondents' brief. And I must say that that Exhibit 11 does not prove anything. It doesn't prove segregation. It doesn't even raise a prima facie case of segregation in any outlying city, and it certainly doesn't prove any causation between what happened in public housing in Chicago and the situation in any outlying city. Remember that these

shaded areas, these limited housing areas, they get shaded if they are more than 30 percent black. Those aren't solid black communities--or they get shaded if they're within one mile of a 30 percent black Census Tract.

THE COURT: How did this come into the record?

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

THE COURT: Well, how was it authenticated?

MR. BORK: I don't believe--I'm subject to correction; but I don't believe it is authenticated. I think it was drafted by respondents' counsel as an illustration and put in.

THE COURT: Was it admitted in evidence in some factual proceeding in the District Court?

MR. BORK: No, I think it's just submitted. I don't think it's been--I don't think there's been any testimony taken about how this was drawn, or the lines, or anything else. But let me make a point about it:

If one looks at this rather large area with two close-together dots for hou ing areas here, right below the City of Chicago--

THE COURT: Right.

MR. BORK: --that's the Robbins. That's the town of Robbins.

Now, that looks like somebody has placed housing in the middle of a black area, and maybe that's supposed to be segregatory. It is worth noting that the town of Robbins itself is 98.1 percent black, and that this Census Tract, upon which that public housing is located, is 94.4 percent black, so that there is no way for the town of Robbins to put up any public housing that is not in a black area. So that doesn't show segregation.

THE COURT: Does Robbins have its own housing authority?

MR. BORK: Well, it has its own government. I don't know whether it has a housing authority, because many of these communities don't have housing authorities.

THE COURT: Yes, I know that.

MR. BORK: It's handled--I don't know if Robbins has a housing authority, or whether it operates through its City Council. The answer, I take it, is no.

Directly below that one will see a black area with six black dots. The three to the right, to the east, are in the city of East Chicago Heights. That city is 98.2 percent black, and the public housing happens to be in a Census Tract which is 80 percent black. There is, again, no possibility that any public housing could be put up in those two cities that was not in a black Census Tract. So this map, if it showed it, does not even raise a prima facie case of segregation in the suburbs. If it did show a prima facie case of segregation in the suburbs, it would certainly not show that there was any connection between what happened in Chicago and that--I take it back. I'm told that the map is not Exhibit 11. It's just an exhibit in the brief; just an attachment in the brief.

Milliken v.--

THE COURT: Just offered as a visual aid? Is that what it is?

MR. BORK: Well, I didn't--the respondents offered it. Mr. Chief Justice, and I guess it's offered as an indication of what they regard as prima facie evidence. I don't think it's prima facie evidence of anything.

Our final submission is that Milliken v. Bradley governs this case. The faults of one locality are being made a jurisdictional predicate for are-wide social planning on communities that are in no way involved. And I think Swann suggests that judicial attempts to follow demographic shifts

that are not due to any constitutional violation really involves a court in doing little more than requiring racial balance as a constitutional mandate, where no constitutional violation has occurred.

Thank you.

MR.CHIEF JUSTICE BURGER: Mr. Polikoff.

ORAL ARGUMENT OF ALEXANDER POLIKOFF, ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. POLIKOFF: Thank you, Mr. Chief Justice, and may it please the Court:

I wish to make two basic points this morning. The first is that a remedial order confined to HUD and extending throughout the HUD-defined Chicago housing market area is a practical option open to the district judge. It would be an appropriate order in this case, and it would not be an inter-district order under Milliken. And, incidentally, it would not be an order that answers to the description that the Solicitor General gave you, of the order that was entered by the Court of Appeals. I have the feeling that we are addressing two different cases here this morning. The Solicitor General's view of what is mandated by the Court of Appeals, as I will show in a moment, is not my view of what that Court has mandated or, indeed, of what would be proper under equitable principles the Solicitor General and I, I am sure, share.

THE COURT: Would the power of eminent domain have to be exercised by someone to implement this decree?

MR. POLIKOFF: It would have to be exercised by--

THE COURT: Who would do that?

MR. POLIKOFF: --by private developers or by local housing authorities, and not by HUD. HUD has never exercised that power of eminent domain in the

operation of these programs. And the exercise of that power presents no problem, no obstacles in framing equitable relief here. Where a developer, public or private, has acquired land, it then applies to HUD for funds to promote a subsidized housing project on that land. If it has not acquired the land, it never comes to HUD for the money in the first place.

We have never contended in this case, and we do not contend now, that the zoning power is at issue. The decree which the Solicitor General suggests mandates a judicial supervision of the exercise of zoning powers by local communities is not the decree we envision; and it is not, in our opinion, the decree compelled by the Court of Appeals order in this case. I think the suggestion--and it's one of many similar suggestions in the government's brief and in the argument here this morning--that a parade of horrors will be the result of implementation of a metropolitan remedial plan at the District Court level is simply inaccurate.

As our brief indicates, and we've cited cases and HUD regulations to this effect, subsidized housing is required to comply with local zoning and other land-use control regulations, and nothing we have proposed in this case to date and nothing said by the Court of Appeals, in our judgment, changes that fact. And on remand before the District Court we would not propose anything different than I'm saying here right now.

THE COURT: Mr. Polikoff, what--as you conceive the decree that would be required under the remand of the Court of Appeals, what effect would it have on the local authorities who weren't previously parties?

MR. POLIKOFF: It might have none, Your Honor. But--

THE COURT: Well, but might it have some?

MR. POLIKOFF: It might have an indirect impact--and one of the problems is, we can't know. Because as my first of two points--and I haven't even told you yet what the second is. My first of two points was that an order might be confined to HUD alone, if the District Court--in its judgment

on remand--did confine such an order to HUD alone, it would have no direct impact upon local housing authorities. They would not be decretally involved. The order would not run against them at all. They would only be indirectly involved in the following way:

If and when a local housing authority voluntarily chose to apply for HUD subsidy funds in order to develop some housing--a choice, I repeat for emphasis, would be voluntarily made on its part; there would be no impact if it chose not to do so--it would then be subject to the conditions that HUD imposed on the use of Federal funds offered to applying housing authorities. In our view, as indicated in the Appendix to our brief, one conceivable remedial decree might be a direction to HUD to impose two additional conditions on the use of Federal funds in the Chicago housing market area by those who apply for such funds.

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

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

Now--

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

MR. POLIKOFF: We don't. We don't suggest that the imposition of that condition should be imposed against persons who have not had an opportunity to litigate. That was the inherent implication in your question of the Solicitor

General. And I would like to advise Your Honor that the Solicitor General was correct.

Before the District Court, long before the case reached the Court of Appeals, we did request the District Court to enter an order, I'll call it a Milliken type order, if you will, in which he determined that it would be appropriate under the circumstances of the case to consider housing market area relief. But, we said, before doing so, it would be necessary to add the governmental parties, not the local communities that the Solicitor General talks about in the scores and in the hundreds, because they don't provide housing. Robbins does not provide housing. It is the Cook County Housing Authority which does. We suggested that before the District Court embarked on a consideration of metropolitan relief and because of the dictates of Milliken, the appropriate affected parties should be added.

We suggested to the District Court which parties we would suggest adding: the State of Illinois and the housing authorities in the housing market area potentially to be affected.

We suggested that the District Court should direct HUD and CHA to indicate what additional parties, if any, ought to be added. And only at that stage, we said to the District Court, should you consider to--should you proceed to consider a metropolitan plan.

Indeed, Mr. Justice Rehnquist, we submitted a proposed order in connection with that motion to the District Court, in which we specifically said the court is not now called upon to decide whether to order metropolitan relief, but only that for the consideration of such relief it's appropriate to add these parties. That motion was denied, and--

THE COURT: Does this argument suggest that perhaps it's premature for us to grapple with the issues involved there?

MR. POLIKOFF: I think it does, Your Honor. And as--

THE COURT: Because what you've been saying, I gather, is that there is no order yet. None of us knows what the contours will be. None of us knows the impact on the outlying municipalities, indeed, even the impact on HUD.

MR. POLIKOFF: That's exactly correct. And as Mr. Justice Blackmun said, speaking for the Court in the recent case of Wheeler v. Barrera, the case involving teaching in parochial schools by publicly paid teachers, the order before the Court--in that case it was a statute, but I'm drawing an analogy--did not mandate on-the-premises parochial school instruction. So that issue was not yet presented, and that if on remand, Missouri and its State agencies chose to opt for that form of instruction, Mr. Justice Blackmun said, the range of possibilities was still very broad and the First Amendment implications of such a plan would vary depending on what was adopted.

THE COURT: Are you familiar with our recent summary affirmance in the Delaware school desegregation case?

MR. POLIKOFF: I am, Your Honor.

THE COURT: Well, you recall there it was proposed that the District Court consider a metropolitan remedy in a school desegregation case--

MR. POLIKOFF: That's correct.

THE COURT: --but had not, in fact, entered a decree providing a metropolitan remedy. And we summarily affirmed--it was an appeal of course. Does that--is that like this situation?

MR. POLIKOFF: I think that emphasizes the prematurity. Indeed, the second point--which I haven't yet had the opportunity to tell Your Honors about--was precisely this: that the issue of a remedial decree that embraced, if it did--and we don't know whether it would or not--but that embraced local housing authorities is premature at this point,

because we don't have the shape of that decree before us, let alone knowing for sure that such a decree would be entered.

THE COURT: Yet, don't you have to say that the Court of Appeals then, too, was premature in saying that there should be--as it did--that there should be a metropolitan remedy?

MR. POLIKOFF: I do, Your Honor. And I must say, with deference to the Court of Appeals, that I am not here defending that opinion, per se. A remand--I'm defending the result; I think the result is sound. But I think the language is overly broad and, as this Court knows, a remand to the District Court would be in compliance with whatever this Court said in its opinion, not with what the Court of Appeals said.

I think that on remand, with the proper parties added, it would be open to the District Court in theory. I think it's very unlikely, as a matter of fact, for reasons I'll come to. I think it would be open to the District Court, in theory, to decide against the metropolitan plan. And I don't think, without having joined the appropriate parties to be joined and having heard them, a final determination can be made with respect to that matter, either.

THE COURT: In this respect, isn't this case in very much the same posture that the Milliken case was when it came here?

MR. POLIKOFF: Not at all, Your Honor. The government's brief--its reply memorandum, rather, makes the flat-out statement that this case is at the same stage that Milliken was when this Court granted certiorari. I differ with that view.

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

It talked about the equalization of facilities between school districts, the financial arrangements to be made between them, and a number of other particulars. And only after it was clear in Milliken, as a result of the entry of that order--even though the Court of Appeals sent it back in some particulars, it essentially affirmed the District Court's basic approach in dealing with those matters, and involving the local districts--then it came to this Court.

THE COURT: But the Court of Appeals affirmed an approach, though.

MR. POLIKOFF: It affirmed an approach, but with a clear indication that in--it was a long Court of Appeals opinion, Your Honor will recall--

THE COURT: That it was.

MR. POLIKOFF: --in a number of specifics that the District Court had indicated, that was the right way to go. Now, we don't have that here. We don't have anything like that here. We haven't even heard at the lower court levels, let alone at this Court level, from the parties who might be affected. And therefore, it is not even clear, Your Honor, and it was clear in Milliken--it is not even clear here that the District Court would enter an order that would involve local housing authorities at all.

THE COURT: You mean--you don't mean--you mean out of Chicago?

MR. POLIKOFF: Out of Chicago.

THE COURT: Yes.

MR. POLIKOFF: That it would involve them at all. I wish--

THE COURT: Just what was the Court of Appeals talking about?

MR. POLIKOFF: The Court of Appeals was talking, Your Honor, about the desirability, on the record made in this case, of area-wide, but not multi-district relief:

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

That's a quotation, I believe, from a phrase that appears in Your Honor's--Mr. Chief Justice Burger's--opinion in Milliken. And what that phrase meant in Milliken was that the relief envisioned by the lower court and the Court of Appeals in that case necessarily involved what Your Honor called "included districts," decrees that ran--a decree that ran against local governmental entities, discreet autonomous units, and required them to do something. They were decretal parties. In this case, the Court of Appeals' direction to be metropolitan area-wide in scope, need not involve the decretal provisions that require the inclusion of additional parties.

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

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

It does so because HUD's regulations say that in the real world, housing is not like schools. Children are assigned to schools within a discreet geographic area, and they have to go there, they can't go anywhere else if they live within that area. HUD says, that by contrast in the housing situation, people look for housing in terms of how far they are from jobs--commuting distances. What the market for housing is is deter-

mined by HUD to be a specific geographic area that crosses the boundary lines of local political jurisdictions.

THE COURT: But even if those housing authorities aren't, as you say, decretally involved, if HUD is to be enjoined by the court to treat them in a manner otherwise than it would voluntarily treat them, ought they not to have had an opportunity to be heard on that question?

MR. POLIKOFF: We insist that they should, and I've been agreeing with you, Mr. Justice Rehnquist, that that should have been the procedure followed. It was the procedure we requested the District Court to follow. It was aborted because the District Court denied our motion to that effect. And, indeed, the notice of appeal to the Court of Appeals was an appeal, not from the entire judgment order entered by the District Court, but only from that portion of the order that denied the motion you and I have just been talking about. The rest of the judgment order was a general summary judgment against HUD. We didn't appeal from that, HUD filed a cross-appeal from that portion of the order and later abandoned it, and rightly so, because of the order they, themselves, proposed.

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

We believe that's not so, also. The cases cited in our brief show that in the administration of Federal programs, Federal courts have a number of times--in food stamp cases, in employment services cases--confined relief to the Federal administering agency in connection with a joint federally-locally administered program. The courts have said that's

proper. The indirect impact on the states is something that's mandated by Federal law.

But even beyond that, the major current form of federally subsidized housing activities doesn't necessarily involve local housing authorities at all. HUD's current program is primarily a private developer program, not a local housing authority program. HUD's dealings are primarily with private developers, and with respect to that kind of low of federally subsidized activities, the local jurisdictional boundary lines are completely irrelevant. Housing authorities may, but need not, enter into the program. It's a matter of their own voluntary choice.

In sum,--

THE COURT: What would you do with this?

MR. POLIKOFF: There are two alternatives, it seems to me. One is to dismiss the writ as improvidently granted, because the whole thing appears premature.

THE COURT: Well, one of the difficulties with that, if I may suggest it, is what you just said to us: you don't agree that the--you do think that the opinion, at least, sweeps over-broadly, from the Court of Appeals.

MR. POLIKOFF: Correct, I do.

THE COURT: So a dismissal leaving that stand probably would not be the--

MR. POLIKOFF: All right. The second alternative--and in my view, by far the preferable one, because this has been a long-lasting litigation and clarity is desirable--the second would be to recognize the force, as I see it--and I hope you do--of my point number one. That on any view--giving the most weight and strength to the Milliken considerations--on any view, a decree limited to HUD, not running against local housing authorities or other governmental entities, would be an appropriate order in this case and would not be inter-district under Milliken.

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

THE COURT: Well, affirmed with the limitation that you--

MR. POLIKOFF: With the limitation that I--well, what I'm suggesting is a limitation as to an appropriate order that might be entered by the District Court; but the District Court would not be confined to that.

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

THE COURT: Well, this strikes me rather more like modification of the remand of the Court of Appeals to the District Court than it does an affirmance, Mr. Polikoff.

MR. POLIKOFF: I agree with that, Your Honor.

THE COURT: It's an affirmance in that you think that we ought to agree that the case ought to be remanded to the District Court?

MR. POLIKOFF: Yes, That's correct. That's correct. But I--

THE COURT: Not just to issue an order.

MR. POLIKOFF: Pardon me?

THE COURT: You want the District Court to hold a hearing, you don't want them just to issue an order.

MR. POLIKOFF: That's correct. We think the next step--and indeed what we asked for in our motion below that was denied--was the holding of hearings.

THE COURT: But you've said, as I understand it, that when it got to the District Court, the District Court could say--would be free to say if it so concluded--that under Milliken he could not go beyond the boundaries of Chicago.

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

THE COURT: What kind of an order would go to HUD, to say: Exercise your--to the Secretary--to say: Exercise your discretion according to the following guidelines?

MR. POLIKOFF: Not quite that way. We have an order in Chicago, Your Honor, to illustrate--and I'm not--I'm answering your question in terms of what the District Court might do, what one of the options would be--we have an order in CHicago that essentially imposes two requirements on HUD. It says that Federal housing subsidy funds henceforth flowing into Chicago should meet two criteria--if they're to be used in Chicago--in addition to all of your other criteria. And those two criteria are: first, the predominance in white, rather than black neighborhoods; and, second, availability of some of the housing to the plaintiff class.

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

THE COURT: What is the authority of a Federal district judge to tell the Executive Branch how to exercise its discretion?

MR. POLIKOFF: The authority--I would say the duty, stems from the adjudication of liability against HUD. The Federal Executive Branch is obligated to remedy its constitutional and statutory wrongs just as much as state and local governments are; and cases without number have imposed restrictions and limitations on Federal agencies, requiring them to remedy their own wrongs.

THE COURT: What wrong do you identify here, when you refer to that--

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

THE COURT: But all of that relates simply to the Chicago Housing Authority, as I understand it. It isn't just that the local authorities haven't had an opportunity to litigate factually in a district court their activities in the area outside of Chicago, but I gather there's been no factual hearing on HUD's activities outside of the Chicago Housing Authority area.

MR. POLIKOFF: That's correct. Your Honor.

In our view, housing market area relief against HUD would not be dependent upon such a factual hearing, because the Chicago--the City of Chicago is located with the Chicago housing market area, an administrative area that HUD defines and uses as the appropriate area for a number of purposes, particularly and specifically including--and I'm now quoting

from a HUD regulation--"decreasing the effects of past housing discrimination."

THE COURT: But your theory in the District Court, which was upheld by the Court of Appeals on the first appeal, was that HUD's violations had been secondary as a result of pressure from Chicago aldermen. Now, it seems to me, that when you get outside of the City of Chicago, you would have to make some sort of a new showing that HUD had engaged in similar violations; the fact that it had responded to pressures from Chicago aldermen, would not necessarily mean that Joliet aldermen or Elgin aldermen would have put the same pressures on HUD.

MR. POLIKOFF: I think not. It's important to distinguish between what's necessary to demonstrate at the liability of the case and what's appropriate for an equity court to consider at the remedial stage of the case.

If we assume, for the moment--and I'm not arguing it here; I'm certainly not waiving it, I'll come to it shortly if there's time--but if we assume--the suburban discrimination aspect of the case--but if we assume for a moment that the wrongs were confined to the City of Chicago, nonetheless, residents of the City of Chicago seek housing, as HUD itself says, not within the boundaries of the City of Chicago, but within the housing market area. They seek it throughout that entire area. HUD constantly administers its programs with respect to that broader area.

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

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

Well, the answer is, unlike the situation with schools, housing is sought by the persons in Chicago, including the wronged persons, within the housing market area. It's therefore possible for HUD to provide relief for those persons in accordance with its normal administrative activities, as indicated by its own regulations, where there is a realistic geographic area with respect to housing. It wouldn't be with respect to schools.

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

THE COURT: It wasn't that the school districts were geographic units, they were political units.

MR. POLIKOFF: Both. That's correct, Your Honor.

THE COURT: And here, too, you have political units.

MR. POLIKOFF: And the political unit that's relevant with respect to HUD is, of course, the entity--the Department of Housing and Urban Development--which has chosen an administrative area that expands beyond the boundaries of the local housing authorities--who may not even be participants at all in a part of the remedial scheme we're talking about. One of the anomalies--

THE COURT: But in Milliken, you had the State of Michigan with an over-all regional educational policy and powers.

MR. POLIKOFF: That's correct. Not being exercised--it had a potential or latent power--

THE COURT: Unh-hunh.

MR. POLIKOFF: --to compel the consolidation of local school districts in that case. Here, we don't have a potential or latent power on the part of HUD to compel anybody to do anything, we're not talking about compelling, we are talking about an order confined to HUD that's a practical option to the District Court that wouldn't compel anybody, other than HUD, to do anything.

There would, of course, be indirect impacts on housing developers, private developers, as well as public developers, who chose voluntarily to apply for the housing. But those indirect impacts are no ground for refusing or denying the relief against HUD that plaintiffs are entitled to, as a remedial matter.

I guess my time has expired. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

REBUTTAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BORK: Mr. Chief Justice, members of the Court:

Let me address the question of the remand, because I think that would be totally improper in this case. A remand would send this case back, under respondents' counsel's theory, to consider metropolitan-wide relief, which we think can be shown now, and we think we have shown now, as a matter of law, to be improper.

Secondly, in answer to the question by Mr. Justice Rehnquist: I think it would do no good, Mr. Justice Rehnquist, to bring in local communities for a hearing about a remedy. They might be heard about a remedy, they might prevail, or they might be overridden, but they are being subjected to hearings

and a possible remedy when they have committed no violation.

THE COURT: Well, my question suggested not a hearing about a remedy, but a question about whether there had been an initial wrong, and then, presumably, if a finding of a wrong, a remedy.

MR. BORK: Oh, I quite agree in that case. If the respondents' counsel wants to file a new case or amend this case and start a new lawsuit about an inter-district violation in effect, of course. Now, this talk about ordering HUD alone--and this not being inter-district as to HUD--is a semantic game that really ought not to go on unchallenged.

The truth is, as I stressed in my opening statement, there will be an enormous practical impact on innocent communities who have to bear the burden of this housing, who will have to house a plaintiff class from Chicago, which they wronged in no way, whose political processes, which are respected by Congress, will be overridden; and there is no way that this is not an inter-district remedy even though you use HUD as the conduit.

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

THE COURT: Mr. Solicitor, I understand the position to be that the Court might not issue any decree at all.

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

THE COURT: Well, the proposal was that it would be modified.

MR. BORK: Well,--

THE COURT: And, secondly, as I understand what they're saying, is not that HUD makes any county, district or anything do anything, but that HUD studies it.

MR. BORK: Oh, well, HUD does study it, Mr. Justice Marshall.

THE COURT: Well, that's what they're asking for, to see whether or not there isn't some relief that HUD could give.

MR. BORK: Well, that's--

THE COURT: Not that HUD must do it.

MR. BORK: I think that's a different lawsuit, Mr. Justice Marshall. If the question were: Is HUD adequately exercising its discretion under its statute--

THE COURT: Unh-hunh.

MR. BORK: That would be a totally different statute--lawsuit. This isn't that lawsuit. This is a constitutional violation in Chicago, with no allegation that HUD is acting improperly anywhere else, but HUD is to be used because it has wide jurisdiction as a conduit to take the Chicago violation out and bring somebody else in for a remedy.

Now, on a remand, I think it's improper because HUD is going to have to litigate something that I think is improper to begin with. These communities are going to be required to litigate it. We've got eleven housing authorities in there who are not even alleged to have done anything wrong. So that a remand, I think, would be quite wrong. HUD's widespread jurisdiction was not intended to wip out the local political units that are supposed to make these decisions for their community.

THE COURT: Well, doesn't HUD consider it as a region, and wipe out the lines when they consider it?

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

THE COURT: You mean that HUD doesn't look at five, six or more counties surrounding the city,--

MR. BORK: Well, HUD may do that.

THE COURT: --and look at it as a unit without regard to district lines?

MR. BORK: HUD looks at it for planning purposes, but--

THE COURT: That's what I thought.

MR. BORK: But when it is finished planning, it does not implement a plan which is inconsistent with the local community's housing assistance plan, for example. The local community participates politically in this, and has a number of checks upon this. But what is obviously inevitable here is that in some form that local autonomy is going to be overriden or bypassed, and we're going to wind up with effective remedies in towns that have done nothing wrong.

THE COURT: Well, would you think that an injunction against HUD is generally saying quit cooperating in unconstitutional site selections?

MR. BORK: Well,--

THE COURT: In the Chicago area.

MR. BORK: No. The order against HUD entered by the District Court, Mr. Justice White, was a best-efforts order, and HUD is cooperating in the Chicago area and will use its best efforts--

THE COURT: Well, I know, but let's just--I ask you again, what about that injunction applied to the Chicago housing area as required by law?

MR. BORK: Oh, yes. I'm sorry, I'm sorry. And--

THE COURT: Now, just that kind of an order.

MR. BORK: A best-efforts order?

THE COURT: Yes. In the Chicago--in the entire area. Just don't--don't cooperate in any more--whatever you were found guilty of doing in Chicago, you ought to quit it and quit it in the Chicago housing area.

MR. BORK: I don't see the legal predicate for an order against HUD in the CHicago housing area any more--because it did something wrong in Chicago; and in--

THE COURT: Wouldn't that kind of order presuppose something that is not in the record in this case? That is, if someone is beating his wife, and therefore stop beating your wife?

MR. BORK: I think it would, Mr. Chief Justice. In fact, I think that if, to be consistent,--

THE COURT: Well, it's nothing like the--apparently you don't challenge--at least here in this lawsuit--the constitutional violation by HUD in Chicago. You don't mind being ordered to stop that in Chicago?

MR. BORK: That is quite correct, Mr. Justice White. However, I certainly would object--

THE COURT: But you do mind being ordered to stop violating the Constitution in the Chicago housing area?

MR. BORK: HUD has not been shown to, and does not, to the best of my knowledge, violate the Constitution in any way in the Chicago housing area, and is not doing it in the City of Chicago.

THE COURT: So your answer is, yes, you do object to it; is that right?

MR. BORK: I certainly do, Mr. Justice White, and let me explain why. I would object to it if the request for relief in this case were that HUD has been found to have acquiesed in the acts of the Chicago Housing Authority, and therefore, we're going to order HUD to stop it in New York, Detroit, Los Angeles and San Diego. HUD hasn't done anything like that, and I think it ought not be subjected to an order which is the equivalent of that.

THE COURT: Well, if the same people who are operating in the Chicago housing area, that operate inside Chicago--then we do have an issue posed; and I guess that's what the lawsuit is all about.

MR. BORK: Well, I must say, Mr. Justice White, that there has been no showing of a predisposition on the part of HUD to do this. In fact, all of the courts agreed that HUD opposed what was happening in Chicago--made some progress in opposing it--but ultimately acquiesced and financed things they shouldn't have because of the desperate need for housing. And plaintiffs' affidavits about the kind of housing they were living in before HUD put up this public housing in Chicago illustrates the desperate need for public housing, that existed at that time.

THE COURT: What was the basis for the Court od Appeals' remarks that at least HUD initially thought that a district-wide remedy was a--a metropolitan remedy--was approriate?

MR. BORK: Well, HUD does think that it ought to work, as its statuatory mandate requires, throughout the metropolitan area. It does not think it ought to be subject to a court order which is going to change its statutory mandate throughout that area when it has done nothing wrong in that area.

THE COURT: So you think the Court of Appeals misread whatever it was that HUD had represented--

MR. BORK: Oh, I think--I think the Court of Appeals did, Mr. Justice White, and I think respondents' counsel does. HUD keeps saying that it is important to work in the metropolitan area and that it will do so as its statute allows. And the statute allows that, encourages that, but it does place limitations, and there is no reason to destroy those limitations when nothing wrong has been done in that area.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

(Whereupon, at 11:45 o'clock, a.m., the argument in the above-entitled matter was concluded.)