variations in the timing of and approach to compliance within appropriate parameters, proportional to the degree of hardship or potential program failure among affected communities.

5. Finally, it is of overriding importance that every mandate be accompanied by financial aid sufficient to achieve compliance. The aggregate tax-levy resources which must be committed to all of the federal and state mandates presently imposed on the City amount to $938 million at a time when we must identify $299 million in net-expense budget reductions for fiscal year 1981.

Throughout its history, this nation has encouraged local independence and diversity. We cannot allow the powerful diversity of spirit that is a basic characteristic of our federal system to be crushed under the grim conformity that will be the most enduring legacy of the mandate millstone.

30. THE FAILURE OF FEDERAL ENFORCEMENT OF CIVIL RIGHTS REGULATIONS IN PUBLIC HOUSING, 1963-1971: THE CO-OPTATION OF A FEDERAL AGENCY BY ITS LOCAL CONSTITUENCY

Frederick Aaron Lazin

. . . During the 1960s both the President and Congress acted to ban racial discrimination in Public Housing. Executive Order 11063, Title VI and Title VIII of the 1964 and 1968 Civil Rights Acts, respectively, made it illegal for a local agency to operate its federally funded Public Housing program in a racially discriminatory manner. Yet these Acts did not end racial discrimination in Public Housing.[1] A recent study by this author of CHA [Chicago Housing Authority] site selection and tenant assignment policies from 1963 through June 1971 found that CHA operated its federal programs in a racially discriminatory manner. A careful examination of CHA operation of the programs, the federal role and regulations and *Gautreaux v. CHA* yielded the following findings.[2]

First, the CHA administered regular (for families), elderly and Section 23 (leasing) Public Housing to keep blacks from living in white communities of Chicago. It placed Regular Public Housing in black ghetto-areas to reduce the number of black persons displaced by slum clearance and related programs being relocated in white areas. Quotas kept the number of black tenants at zero or at a minimum level in the four projects located in white neighborhoods. In Public Housing exclusively for the elderly, tenant assignment policies insured that projects in white neighborhoods had mostly white tenants. Only blacks chose to live in ghetto projects. Consequently integrated projects, that is, those with the second racial group constituting more than 10%, were found only in racially changing neighborhoods. In the latter cases both the neighborhoods and the projects eventually became all black. The same pattern existed with leased housing. CHA delegated its authority to select tenants to the landlords. It gave them the right to reject tenants on the basis of "undesirability." Moreover CHA permitted landlords to

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choose tenants outside the almost all-black waiting list. As intended, most units in white neighborhoods were leased to white elderly tenants. Most blacks in the leasing program were placed in ghetto-rehabilitation projects.

Second, federal civil rights laws and regulations were meaningless. HUD officials were fully aware that CHA operations violated HUD regulations designed to implement and enforce constitutional executive, legislative and judicial bans on racial discrimination.[3] In these matters HUD chose to serve rather than regulate the local constituency. The few cases of federal intervention on civil rights matters were exercises in public relations. HUD would hold up funds and investigate. Upon receipt of an official commitment from CHA that it would desist from discrimination, it would release the funds. Unofficially, however, HUD would agree to let CHA continue its original discriminatory practices.[4]

Third, judicial redress proved equally ineffective. Having realized the futility of administrative redress, opponents of CHA policy filed a suit in U.S. District Court in August 1966 charging CHA with intent to discriminate against blacks.[5] In February 1969 the judge found the CHA guilty. Five months later he issued an order designed to foster integration and construction of Public Housing in white areas. But CHA refused to abide by the court's directives and HUD refused to use its resources to enforce compliance.

How and why the civil rights legislation proved so ineffective a curb on discrimination in Public Housing is worth considering in more detail. Central to the entire case is the fact that HUD operates within a federal system: it is responsible to Congress, which represents local interests. Consequently the administrative ideology of HUD holds that administrators must get local support to administer their programs successfully. Accordingly they are encouraged to serve rather than regulate. Both the Johnson and Nixon administrations reinforced this ideology.

Regardless of the attitudes of federal administrators toward Civil Rights and racial discrimination, the President and Congress forced them to confront the issue during the 1960s. President Kennedy's November 20, 1962, Executive Order 11063 and Title VI of the 1964 Civil Rights Act required federal agencies to issue regulations banning racial discrimination in site selection and tenant assignment policies.[6] While these acts provided the basis for challenges through administrative and judicial redress, they did not lead to federal enforcement. Instead HUD established a system of discretionary justice in which the administrator (the "judge and jury") was already committed to the principle that in matters of race, the program would be run locally without federal interference.

The Civil Rights Orders and Acts are very general and do not define key provisions and terms.[7] Executive Order 11063 and Title VI prohibit racial discrimination in Public Housing without defining what constitutes "racial discrimination." Title VIII of the 1968 Civil Rights Act directs the Secretary of HUD to affirmatively administer his programs to foster the goals of non-discrimination on the basis of race.[8] The Act does not define "affirmative action" and "racial discrimination." While HUD regulations established to comply with these Acts might be expected to clarify the terms, they do not.

Moreover most HUD regulations issued to bring about local compliance with Executive Order 11063 and Title VI are not binding. They permit exemptions which are not explicitly defined. The revised HUD site selection regulations issued in February 1967 are a good example.[9] They were designed to provide greater choice to minority families and to prevent concentration of Public Housing in the ghetto areas. The regulation reads in part:

> Any proposal to locate housing only in areas of racial concentration will be prima facie unacceptable and will be returned to the local authority for further consideration and submission of either (1) alternative or additional sites in other areas, so as to provide a *more balanced* distribution of the proposed housing, or (2) a clear showing *factually substantiated*, that *no acceptable sites are available outside the areas of racial concentration*. . . (emphasis added) [10]

The regulation may make ghetto concentration of Public Housing sites *prima facie* unacceptable, but it does not make it unlawful. If the local housing authority made "strenuous efforts" to build in non-ghetto areas and failed, it could concentrate sites in the ghetto.[11] All of the above emphasized words and phrases are not defined.

Therefore a federal administrator investigating a complaint against a local housing authority is not in a position to regulate even if he wants to. There is no explicit regulation or binding rule to enforce. The process of enforcement becomes arbitrary with primary responsibility placed on the individual administrator who must make a discretionary judgment. He must first determine what constitutes a violation in each particular case, and then whether the practice in question violates the newly established conditions. Most important, this system of enforcement provides the federal administrator with the legal option of non-enforcement.

In addition the Acts and subsequent regulations encourage informal bargaining rather than regulation and enforcement. In the case of a complaint or dispute the laws and regulations call for informal resolution between HUD and the local agency. Legal action where

provided for is suggested only as a last resort.[12] Therefore HUD regulations instruct the administrator not to use his legal authority and power in dealing with alleged violations. A more arbitrary and discretionary arrangement is preferred.

A further element in the mechanism of civil rights enforcement was HUD's standard for compliance by the local authority. As proof of compliance HUD required that the local authority submit a resolution passed by the Board of Commissioners stating compliance. HUD's concern was with this formal evidence and not with actual CHA practices. Accordingly CHA passed appropriate resolutions stating compliance with Title VI. HUD accepted this despite its knowledge that CHA practices violated the law, HUD and even CHA regulations.[13]

This concern for formal compliance made several cases of federal intervention in local matters ludicrous. Typical incidents were the proximity rule in elderly Public Housing and the controversy over tenant assignment—"freedom of choice versus first come first served." In the first, CHA granted neighborhood residents a priority in tenant assignment over applicants on the waiting list. PHA held that this practice was unlawful. However, PHA wanted CHA to remove the rule from its regulations and nothing more.[14] In exchange for a promise to do so, it let the CHA continue to operate the rule which it had previously argued violated HHFA regulations and Executive Order 11063. In the second example HUD carried on a two-year battle with CHA to have it adopt a "first come first served" tenant assignment policy in the interest of integration. CHA eventually complied by formally adopting the recommended policy.[15] However, it continued to operate its program in violation of the federal guidelines and its newly adopted policy. HUD knew of this but remained satisfied that the approved policy was officially adopted. Therefore the only effect of the regulations was to place CHA practices in violation of official CHA policies.

Another aspect of civil rights enforcement was the response of HUD to complaints charging the CHA with racial discrimination. HUD's commitment to support CHA and HUD's lack of concern with actual practices resulted in justification for CHA policies. There was no real investigation in response to complaints.[16] This was evident in a complaint in 1965 charging that CHA's 1965 sites violated Title VI, 11063 and HHFA regulations.[17]

PHA did not investigate the charges.[18] Instead it defended CHA's actions. It justified CHA's choice of ghetto sites by arguing that CHA complied with federal regulations implementing Executive Order 11063. "... affording the greatest acceptability to eligible applicants." [19] Moreover it supported the CHA position that it could find no alternative sites outside the ghetto because of City Council opposition. PHA knew that the City Council rejected other sites because of racial considerations.[20]

Finally PHA's argument that CHA did not discriminate but operated with discriminatory boundaries made Title VI ineffective.[21] Therefore the West Side Federation (WSF) complaint bolstered CHA's choice of sites in the ghetto *vis-à-vis* the 1964 Civil Rights Act and Executive Order 11063. After receipt of PHA's letter absolving it, CHA publicly announced that the federal government in two separate legal opinions had "concluded that CHA had not violated the Civil Rights Act." [22]

In summary, HUD chose to supervise CHA using its own discretion. In doing so HUD supported the local constituency whenever it deemed propitious regardless of civil rights laws and federal regulations. In the light of HUD's ideology of supporting the local constituency, this was most of the time.

This same position persisted throughout the Gautreaux case almost without exception. While HUD did not defend CHA, it sought to retain its authority to determine what constitutes a violation rather than have the court set down guidelines. It preferred to negotiate with the CHA rather than to enforce a spelled-out order.

During the negotiations over the final order from February to June 30, 1969, HUD and the U.S. Department of Justice participated.[23] The important issue at this time was whether HUD would commit itself to the judge's final order.

In late April a Washington conference was held between HUD and the Justice Department. Jerris Leonard (Justice) and [Richard C.] Van Dusen (HUD) recommended a federal commitment to an order along the lines of the plaintiff's proposals which would require CHA to build a percentage of future units in white neighborhoods. HUD General Counsel Sherman Unger opposed this position. He did not want to establish a precedent (for HUD in court) order to integrate.[24]

Several times in May and June the judge asked HUD for its comments on the proposals. HUD stalled until the judge had already reached a decision.[25]

HUD delivered its brief on the proposed order the evening before the judge issued the final binding order. It was too late to be of considerable aid and too late to make HUD a party to it. While supporting the principles of the judge's February decision, the HUD-Justice brief was critical of many of the proposed elements of the order. Many of the doubts and criticisms were of a technical nature.

One participant in the HUD-Justice negotiations said of the HUD-Justice document that it allowed all sides to read into it what they wanted. He interpreted the document as committing HUD to the order. Therefore, he suggested that HUD would comply with it and even aid in its implementation. Yet most significantly, it was not HUD's order. HUD did not write it. HUD was not an official party to it. The memorandum had put HUD on record as being critical of parts of the decree. Therefore HUD retained its powers of discretion. To have supported the order would have denied it this course of action.

The July 1969 final order in the Gautreaux case was both similar to and different from previous federal regulations banning racial discrimination in Public Housing. While it too banned discrimination, it defined and made exclusive its key terms and requirements. It was designed to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selections and tenant assignment procedures. It required CHA to build 700 family units in the white areas of Chicago. The order defined white and non-white areas of the city as follows: Non-white areas (LPHA) are areas lying within "census tracts of the U.S. Bureau of the Census having 30% or more non-white population, or within a distance of one mile from any point on the outer perimeter of any such census tract" and white areas (GPHA) as all others.[26] Thereafter for each unit built or leased in the LPHA, CHA had to build and lease three in GPHA.[27] The order permitted the placement of units in the suburbs; of three units constructed and leased after the original 700 not more than one-third of the regular and one-third of the leased required for the white areas of the city of Chicago may "at the option of the CHA, be located in the white areas of Cook County provided that the units are available to Chicago residents who applied to CHA for housing."[28]

Several provisions were designed to win community acceptance for Public Housing to be built in white communities. One limited project size to 120 persons.[29] Another prohibited the placement of additional Public Housing in a census tract if Public Housing would constitute more than 15% of the total number of apartments and single residences on the tract. A third prohibited the placement of families with children above the third story except in the case of leasing.[30] A later court-approved tenant assignment plan gave neighborhood residents a priority over applicants on the waiting list for 50% of the new units.[31]

Despite the definition of key terms and the specific and explicit requirements, HUD had no statutory directive to enforce the order. Again the question of whether or not to enforce was an arbitrary one—one of discretion. In light of its past record, CHA critics sought in a companion suit filed against HUD to direct the courts to order HUD to

desist from support of CHA's racially discriminatory policies.[32] In the spring of 1968 the judge stayed the suit pending outcome of *Gautreaux v. CHA*. In October 1969 the plaintiffs filed for summary judgment in *Gautreaux v. HUD*. They asked the judge to issue an order to involve HUD in enforcement of the Gautreaux order.[33]

HUD opposed this. It held that such an order would infringe on its legitimate constitutional right to discretionary powers. It argued that the 1968 Civil Rights Act enjoined the Secretary of HUD, not the courts, to:

> administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.[34]

The Secretary could do it best and not the court. It was clearly within his legal realm:

> The determination of which powers and programs to bring to bear upon the admittedly unsatisfactory housing situation in the City of Chicago belongs to the defendant (HUD) (and not to the court).[35]

Moreover, the objectives of the plaintiffs, HUD argued, would be "more readily achieved by the *voluntary* efforts of the defendants than by the coercion of a judicial decree."[36] Finally HUD emphasized that by congressional design "maximum responsibility for the administration of the program must be vested in the local authority."[37]

When the judge ruled on September 1, 1970, that "the government must be permitted to carry out its findings unhampered by judicial intervention," he foreclosed on possible HUD enforcement of the Gautreaux order.[38] In effect he freed HUD to practice its own system of discretionary justice designed to serve the political interests of its constituency.[39]

In June 1971 HUD released Model Cities funds for Chicago in exchange for the Mayor's commitment to provide low-income housing. Significantly many of the Public Housing units involved violated the Gautreaux order. HUD had *decided not to enforce* the order.

Notes

1. National Committee Against Discrimination in Housing, *How the Federal Government Builds Ghettos* (New York: NCADH, 1968).
2. *Gautreaux v. CHA*, 296 F. Supp. 907 (N.D. Ill., 1969).
3. Throughout this paper the term "HUD officials" refers to personnel of the U.S. Department of Housing and Urban Development and its

predecessor agencies before 1965—the Housing and Home Finance Agency (HHFA) and the Public Housing Administration (PHA).

4. See discussion below on the Elderly Proximity Rule.
5. *Gautreaux v. CHA.*
6. Executive Order 11063 "Equal Opportunity in Housing"; Title VI (1964) Public Law 88-352, 78 Stat. 241, 42 U.S.C. 20002; Title VIII (1968) Public Law 90-284, 82 Stat. 73.
7. "Otherwise they might not have been passed," Alexander R. Polikoff, Esq., Interview, Chicago, Ill., April 1971.
8. Title VIII Sec. 808 (e) (5).
9. U.S. Department of Housing and Urban Development, Housing Assistance Administration, *Low Rent Housing Manual*, Transmittal Number 490 (Washington, D.C.: mimeograph, February 28, 1967).
10. *Ibid.*, p. 7.
11. *Ibid.* According to the *New York Times*, the intent of this directive was to change the disposition to place sites only in the ghetto.
12. Title VI, Secs. 602, 603.
13. Chicago Housing Authority, Resolution 65 CHA 50 (April 22, 1965), and Resolution 68 CHA 232 (November 14, 1968). HUD Regional Office, Chicago, Ill.: Interviews with several staff members, 1970-1971.
14. PHA feared that other local housing authorities, especially in the South, would adopt similar policies to insure segregation. Also it charged CHA with adopting the policy, which would give white-neighborhood residents priority over blacks on the waiting list in order to get City Council approval for sites. CHA policies had the effect of making tenancy in projects for the elderly in white areas all-white. Interviews with Marie McGuire, U.S. Public Housing Commissioner (Washington, D.C., January 1971); Charles Swibel, Chairman, Board of Commissioners of the CHA, 1970-1971. Letter and Supporting Brief from PHA to CHA December 11, 1963.
15. CHA Resolution 68 CHA 232 (November 14, 1968).
16. A qualified exception to this was HUD's pressuring CHA in November 1966 to drop several of its 12 ghetto sites on the grounds that they violated Title VI and they caused considerable neighborhood opposition. HUD conducted an investigation independently of CHA assistance. A compromise package was arrived at. However the compromise sites were also in violation of Title VI. HUD probably took this action because of suits filed in August 1966 (see below).
17. Letter from the West Side Federation to HHFA, August 26, 1965. The complaint was filed by the West Side Federation, an umbrella group encompassing black organizations in the West Side Ghetto of Chicago. The Chicago Urban League originally decided to appeal to HHFA. Urban League Staff wrote the letter to HHFA and had the WSF submit it.
18. Letter from PHA Commissioner McGuire to PHA Regional Administrator Bergeron, September 8, 1965.

19. Letter from PHA to WSF, October 14, 1965.
20. *Ibid.*
21. *Ibid.* PHA argued that the CHA was the sole recipient of funds and not the City Council under the terms of Title VI. Therefore *only* the actions of the CHA were subject to administrative redress under Title VI. Also see Chicago Urban League Memorandum, Harold Baron to Edwin Berry, November 5, 1965.
22. Statement by CHA, September 1965.
23. The Justice Department provided counsel for HUD and the U.S. Government.
24. The U.S. Departments of HUD and Justice, Washington, D.C., Chicago, Ill., and Cincinnati, Ohio, interviews with present (and former) staff, 1970-1972. One former Justice official claims that the Civil Rights Division of the Justice Department supported the "commitment" to improve its Civil Rights image.
25. *Ibid.* Some argue that HUD-Justice did not intentionally delay submission of their comments. They suggest that negotiations over positions and wording took until late June to satisfy all parties.
26. *Judgement Order, Gautreaux v. CHA*, 304 F. Supp. 736 (N.D. Ill., 1969). Article I (D), III (B). In the interest of de-politicizing the order, the parties agreed to refer to white and non-white areas as General Public Housing Area and Limited Public Housing Area, respectively.
27. *Ibid.*, III (C).
28. *Ibid.*, III (E).
29. *Ibid.*, IV. If impossible to comply with and if in the interest of the order, a project can contain 240 persons. This is one of the few provisions providing for discretion in enforcement.
30. *Ibid.*, III (C).
31. Order approving CHA Tenant Assignment Plan, *Gautreaux v. CHA*, No. 66C 1459 (N.D. Ill. November 27, 1969).
32. *Gautreaux v. HUD.* Filed in U.S. District Court (N.D. Ill.), August 1966.
33. *Ibid.*
34. See Frederick Aaron Lazin, "Public Housing in Chicago, 1963-1971" (unpublished Ph.D. dissertation, University of Chicago, 1972).
35. *Ibid.*
36. Emphasis added.
37. Defendant's Answering brief at 18, *Gautreaux v. HUD.*
38. *Order and Memorandum Gautreaux v. HUD.*
39. The Plaintiffs appealed. In February 1971 "The U.S. Court of Appeals found that HUD violated the Civil Rights of Negroes by funding CHA construction of public housing almost entirely in the ghetto." *Chicago Sun Times*, February 2, 1971. See also *Gautreaux v. Romney*, 448F. 2 cl. 731 (1971); *Gautreaux v. Romney*, 21, 457F. 2 cl. 124 (1972).