

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 71-1732, 1733, 1734
and 71-1807

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs-Appellees,	)	On Appeal from the Judgment
	)	of the United States
vs.	)	District Court for the
	)	Northern District of
GEORGE W. ROMNEY,	)	Illinois.
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
CITY OF CHICAGO, CHICAGO	)	
HOUSING AUTHORITY and CENTRAL	)	
ADVISORY COUNCIL,	)	
	)	
Intervenor-Appellants.	)	

ANSWER OF THE CITY OF CHICAGO
TO PETITION FOR REHEARING
AND TO SUGGESTIONS FOR
REHEARING EN BANC

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PRELIMINARY STATEMENT

Because Judge Sprecher's order of March 28, 1972, refers not simply to a rehearing, but to a rehearing en banc, this Answer responds to the Suggestion as well as to the Petition for Rehearing itself.

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A R G U M E N T

I.

REHEARING EN BANC ON GROUNDS OF "EXCEPTIONAL IMPORTANCE" SHOULD NOT BE GRANTED WHERE THE ORIGINAL HEARING WAS NOT EN BANC.

Rule 35(a)(1) reads, in part:

Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Plaintiffs rely solely on the second ground for convening the Court en banc. The two grounds specified in the Rule are taken substantially from the several opinions filed in Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1952). There Mr. Justice Frankfurter wrote, concurring at p. 270-1,

Rehearing en banc by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings en banc may be a resort also in cases extraordinary in scale -- either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit.

A point not considered by decisions construing the Rule and its statutory authority, 28 U.S.C., sec. 46(c), concerns the question of when the suggestion for a hearing en banc should be made. Clearly, most cases that involve questions of "exceptional importance" can be so characterized before argument as well as after. In the matter now before the Court, nothing has intervened during the pendency of this appeal to make the case suddenly--after judgment--of exceptional importance. It is no more important now--except, perhaps, to the losing parties--than it was at the time it was first heard and taken under advisement. Plaintiffs might have asked that the cause be heard en banc in the first instance; they did not. Rather, they waited until after judgment by the panel until discovering the importance of their case. Clearly, the purpose of en banc hearings is not simply to provide an appeal, not statutorily provided for, between the three-judge Court of Appeals and the Supreme Court. As Mr. Justice Jackson, in dissent, observed (Western Pacific, supra, p.273)

A successful party has good cause for complaint if he is put through the added expenditure of this dilatory step except where public interest in the administration of justice requires it. Rehearings en banc are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to this Court.

It is clear, of course, that even if counsel fail to perceive the importance of their case--or choose to wager on the outcome--the three judges

...upon reflection, after fully hearing an appeal... may come to believe that the case is of such significance to the full court that it deserves the attention of the full court. (Western Pacific, supra, pp.263-4.)

Yet there is no reason why this decision may not be reached at some time before decision. In the instant case, even the dissenting judge apparently did not believe the matter one appropriate for en banc consideration prior to the entering of judgment.

It is presumably for reasons such as those set out above that the Sixth Circuit has followed the "uniform procedure" (N.L.R.B. v. Cambria Clay Products Co., 229 F.2d 433)

...that in cases where the appeal was heard, and the judgment or order complained of was decided, by a regular Court consisting of three judges only, a petition to rehear or to reconsider should not be considered by the Court en banc....

The City of Chicago believes that such a procedure is better designed to achieve the purposes of 28 U.S.C., sec. 46(c), than one which permits a party to take his chances on the outcome before a panel, with an opportunity in reserve for an unfair, time-consuming, "horizontal appeal" to the full court. Relying again upon Mr. Justice Frankfurter's concurrence in Western Pacific, supra, pp. 269-70, the City urges that

It is right to conclude that Congress left it to the courts of appeals to decide how they would exercise their discretionary power to sit en banc. But it is no less reasonable to conclude that the courts of appeals are to exercise their discretion so as to effectuate the purposes of the legislation.

II

THE JUDGMENT WAS CORRECT AND SHOULD NOT BE REHEARD

The Petition for Rehearing attacks Judge Duffy's majority opinion with the assertion that

It is incorrect to say there are no District Court findings that the Model Cities Program had been improperly administered, and that HUD was not found guilty in a court proceeding of wrongdoing in administering the Chicago Model Cities Program. (Petition, p.2.)

The quoted statement is then followed in the Petition by what must be a landmark in deft editing of statutory and other materials for the purpose of constructing a legal argument. Succinctly, the argument is that the Model Cities Statute provides for the relocation of displaced persons; that the letter of intent of May 12, 1971, established a requirement that all displaced persons be relocated; that all such persons were not so relocated; that, therefore, the Model Cities relocation requirement has not been met; and that Judge Austin so found.

The argument is nonsense. Most federal programs that may involve capital development, land acquisition or building

demolition also provide for relocation of persons displaced by such program, see, e.g., 42 U.S.C., sec. 1455(c)(1); 42 U.S.C., sec. 4601 et seq. Model Cities is such a program. The pertinent language is as follows:

A comprehensive city demonstration program shall include a plan for the relocation of individuals, families, business concerns, and non profit organizations displaced or to be displaced in the carrying out of such program.

Thus, the Model Cities relocation assistance is limited to those displaced "in the carrying out of such program." Other federal programs are limited in the same way. The slum clearance program has its requirement (42 U.S.C., sec. 1455(c)(1): "for each urban renewal project involving the displacement of individuals, families, and business concerns occupying property in the urban renewal area..."), as does the public housing program (42 U.S.C., sec. 1415(8): ("to an individual, family, business concern, or nonprofit organization displaced on or after January 27, 1964, from a low-rent housing project site as a result of the acquisition of real property by a public housing agency...."). In these programs, as in Model Cities, relocation is aimed at persons displaced by each program; it is not provided in each program for the relocation of all persons displaced in an entire city for any reason.

HUD's regulations, entitled "Policies and Requirements for Model Cities Relocation", (a copy of which appears as an

attachment to the Objections of Plaintiffs to Motion of Intervenor-Appellants to Suspend and Vacate an Order of the District Court) are drafted with the same limitation:

1. PURPOSE. This CDA letter describes the relocation policies which will govern displacement caused by activities included within a Comprehensive City Demonstration Program.

* * * * *

2.a. No family or individual may be displaced from its residence by a capital project or activity included in a Program until that individual or family has chosen and has acquired the present right to occupy suitable relocation housing or has refused a reasonable choice of identified suitable relocation housing.

* * * * *

f. ...All families or individuals displaced by projects or activities included in the Program must be offered housing available on a non-discriminatory basis within a broad choice of neighborhoods.

HUD regulations continue, page after page, always limiting the relocation requirements to those necessitated by the Model Cities Program. It is inexplicable, therefore, that plaintiffs nevertheless assert that, notwithstanding the statutory and regulatory directives, the Chicago Model Cities Program relocation requirements extend to all of the City of Chicago's housing needs, virtually none of which were the result of a Model Cities activity.

There was, of course, some "displacement caused by activities included within "the Model Cities program in Chicago.

The relocation required was principally due to one project, acquisition of land for a multi-purpose center, which called for the demolition of approximately 12 buildings. Approximately 60 families were affected by the demolition and were provided with relocation assistance by the City of Chicago (App., Vol. I, p. 206). As a result, the regional Model Cities officer for HUD observed that the City completely met its requirement for the second period of the Model Cities Program (App., Vol. I, pp. 164-6). There is no evidence to the contrary.

Plaintiffs suggest that the district court's "intention was to enforce compliance with the relocation requirements of the Model Cities Program itself" (Petition, p.4). They insist that the program was tainted, but concede that, even so, the taint was "not a racial discrimination taint". The difficulty with this argument is that Gautreaux v. Romney, 71-1073, pursuant to which the district court purported to act, involves not the Model Cities Program, not relocation, not a review of any HUD administrative decision--it involves, as everyone should know by now, racial discrimination in the placement of public housing. Plaintiffs thus admit that the order of injunction is directed at matters beyond the scope of the pleadings in Gautreaux v. Romney, beyond the subject matter before the court, and so beyond the scope of relief available to the district court.

Plaintiffs, identifying the "requirement" that the injunction "explicitly enforces", refer to the "provisions of the letter of intent of May 12, 1971." Thus they put aside and ignore the explicit provisions of the Model Cities statute and the administrative regulations issued thereunder. (Plaintiffs, in a footnote to their Petition (p.4), declare that "Once announced, rules, regulations, procedures, policies, etc. of an administrative agency, whether or not compelled by statute and whether or not discretionary, may not blithely be ignored by it" [citing cases]. Apparently plaintiffs have no difficulty in blithely ignoring this principle when they find it inconvenient.) Thus they twist a letter of intention--a title deliberately chosen by the signatories (App., Vol. I, p.210)--into a kind of "regulation" that evades the parent statute and the formal regulations issued by HUD. Yet even if this were so, there is nothing in the letter to indicate that its purpose was to cut off Model Cities funds if the City of Chicago failed to immediately provide 4300 housing units to meet a city-wide deficiency even if the displacement caused by Model Cities was satisfied. The Regional Administrator of HUD made it clear

that our approval of the second year Model Cities Funding Program had nothing to do with the City's performance in all of these other areas at that particular time. We were not weighing the program acceptability in relationship to the housing programs of the City of Chicago. (App., Vol. I, p. 111.)

Further example of plaintiffs' capacity for distorting logic and fabricating issues may be found at page 6 of the Petition where it is asserted that HUD "announced a new theory of the case" at oral argument. HUD thereallegedly asserted that it had changed its interpretation of Model Cities relocation plan requirements. The City does not remember any such announcement of a new theory. It is not one that appears in HUD's brief. Nevertheless, plaintiffs take up this issue, created out of thin air, suggest that it is "the unstated premise of the majority opinion", and proceed to devote nearly half of their Petition's argument to its embellishment and analysis. It should be clear, however, that Chief Judge Swygert and Judge Duffy did not leave unstated any premise in explaining their judgment. They were entirely correct in stating that the Model Cities Program had not been found to be improperly administered, as we have shown above. Moreover, they demonstrated far more sensitivity to the will of Congress and to the needs of the 150,000 direct beneficiaries of the Model Cities Program than did the court below.

CONCLUSION

For all of these reasons, the judgment filed on March 8, 1972--one similar to that reached by the Fourth Circuit in Board of Education of Taylor County, Fla. v. Finch, 414 F.2d 1068-- is correct and should not be reheard.

Respectfully submitted,

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PROOF OF SERVICE

Daniel Pascale, one of the attorneys for the City of Chicago, certifies that on April 7, 1972, he caused two copies of the attached Answer of the City of Chicago to Petition for Rehearing and to Suggestions for Rehearing En Banc to be served upon counsel for each party separately represented.

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