JUDICIAL REVIEW OF PUBLIC HOUSING ADMISSIONS

In *Holmes v. New York City Housing Authority*,[1] applicants for public housing brought a class action in federal district court under § 1983 of the Federal Civil Rights Act[2] and the federal Constitution, challenging the procedures employed by the defendant New York City Housing Authority in admitting tenants to low-rent housing projects managed by the Authority and financed by either state or local funds.[3] The facts as alleged indicated that the regulations governing admission policies and procedures were not made available to prospective tenants either by publication and distribution or by posting. "Applications received by the Authority [were] not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable and systematic manner."[4] These procedural deficiencies were alleged to have deprived applicants of due process of law in violation of the fourteenth amendment, since the alleged "defects increased the likelihood of favoritism, partiality, and arbitrariness on the part of

1. 398 F.2d 262 (2d Cir. 1968).

2. 42 U.S.C.A. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Jurisdiction of the district court was based on 28 U.S.C.A. § 1343, which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance . . . of any right, privilege, or immunity secured by the Constitution of the United States or by act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

3. In federal-aided projects the Authority was required to allocate available housing in accordance with an objective scoring system. 398 F.2d at 264-65.

4. 398 F.2d at 264. The court specifically found that the allegations evidenced these procedural defects: "All applications, whether or not considered and acted upon by the Authority, expire automatically at the end of two years. A renewed application is given no credit for time passed, or precedence over a first application of the same date. There is no waiting list or other device by which an applicant can gauge the progress of his case and the Authority refuses to divulge a candidate's status on request. Many applications are never considered by the Authority." *Id.*

the Authority [and thereby deprived] plaintiffs of a fair opportunity to petition for admission to public housing . . . ."[5]

The district court denied defendant's motion to dismiss the complaint for failure to state a claim within the court's civil rights jurisdiction, and also refused to abstain from deciding the case. The Second Circuit affirmed, holding: (1) since "due process requires that selection among applicants [for public housing] be made in accordance with 'ascertainable standards,' "[6] plaintiffs had stated a claim for relief under the Civil Rights Act; (2) "[a]s applicants for public housing, [plaintiffs were] immediately affected by the alleged irregularities in the practices of the Authority"[7] and therefore had standing to raise their due process objection; and (3) plaintiffs' case was a proper one for the exercise of jurisdiction by a federal district court.

I. Federal Claim Under the Civil Rights Act (42 U.S.C. § 1983)

Two elements must be present in order to establish a claim under § 1983 of the Federal Civil Rights Act. First, the activity complained of must have been conducted under color of state law. Second, such activity must have subjected plaintiffs to the deprivation of the rights, privileges, or immunities secured by the Constitution.[8]

A person's conduct is considered to be under color of state law if he was "clothed with the authority of the state and [was] purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law."[9] An allegation of a purpose to discriminate or to deprive one of any federal right is not essential to the statement of a claim under the statute which is predicated on an alleged violation of the due process clause.[10]

5. *Id.* The constitutional claims in the complaint were directed at local regulations (or lack thereof) issued by the Authority, and not toward any provision of the New York Public Housing Law.

6. *Id.* at 265.

7. *Id.*

8. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962); Monroe v. Pape, 365 U.S. 167 (1961); Roberts v. Trapnell, 213 F. Supp. 49 (E.D. Pa. 1962).

9. Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962). *See* Classic v. United States, 313 U.S. 299 (1941); Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1912); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945).

10. Monroe v. Pape, 365 U.S. 167 (1961). *See* Cohen v. Morris, 300 F.2d 24 (9th Cir. 1962), interpreting Snowden v. Hughes, 321 U.S. 1 (1943), as requiring an allegation of clear and intentional discrimination under § 1983 only in the case of a denial of equal protection of the laws and not in the case of a denial of due process of law. The dissenting opinion in *Holmes* argued that a previous Second

A plaintiff need only show that a deprivation of some right secured by the Constitution has occurred.[11]

Plaintiffs in *Holmes* established that the defendant Authority was proceeding under color of state law, due to the fact that the Authority was created by New York statute[12] and was authorized to make rules and regulations concerning the admission of tenants to public housing.[13] With respect to the statutory requirement that plaintiff allege a deprivation of a constitutional right, the court adopted the reasoning of the Fifth Circuit in *Hornsby v. Allen*,[14] which also involved a proceeding under the Civil Rights Act. That case held due process to require city liquor licensing officials to conform to "ascertainable standards"[15] in their selection procedures, since due process requires that "every applicant should be apprised of the qualifications necessary to obtain a license . . . ."[16] The *Holmes* court reasoned that since due process required the Authority to make selections in accordance with "ascertainable standards," plaintiffs' allegation of deficient selection procedures within the Authority stated a sufficient cause of action under the Civil Rights Act.

Circuit case, Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965), required an allegation of intentional and purposeful deprivation of constitutional rights, but that case is distinguishable in that the plaintiff claimed a denial of equal protection and not due process of law.

11. Anderson v. Haas, 341 F.2d 497 (3rd Cir. 1965); Roberts v. Trapnell, 213 F. Supp. 49 (E.D. Pa. 1962); Stinger v. Dilger, 313 F.2d 536 (10th Cir. 1963).

12. N.Y. PUB. HOUSING LAW § 30 (McKinney 1955). Due to the fact that a governmental agency was involved in *Holmes*, the issue of the Authority proceeding under color of state law was not contested by defendants.

13. N.Y. PUB. HOUSING LAW § 37(1)(W) (McKinney 1955).

14. 326 F.2d 605 (5th Cir. 1964).

15. *Id.* at 612.

16. Hornsby v. Allen, 330 F.2d 55, 56 (5th Cir. 1964) (on petition for rehearing). In reviewing licensing cases, the federal courts adhere to the rule that an opportunity to a hearing "is required on issues of adjudicative facts when important interests are at stake . . . . " However, courts, particularly state courts, are often confused by the "privilege" concept, which involves the rule that "due process protects only 'life, liberty or property' and not privileges [as distinguished from rights] and that courts therefore are not called upon to require fair hearings when nothing more than privileges are at stake." K. DAVIS, ADMINISTRATIVE LAW §§ 7.11 & 7.18 (1959). In *Holmes*, the court reasoned that the deficient selection procedures deprived plaintiffs of a constitutional *right*, as distinguished from a privilege, and therefore plaintiffs were entitled to a trial under the Civil Rights Act.

II. STANDING

Norwalk C.O.R.E. v. Norwalk Redevelopment Agency[17] involved a class action by persons asserting that they had been subjected to discrimination in connection with a city urban renewal project. The project allegedly displaced persons within the renewal area without making adequate provisions for low income housing elsewhere. The Second Circuit held plaintiffs had standing to sue since their stake in the outcome of the case was "immediate and personal, and the right which they alleged [had] been violated."[18] In *Holmes,* the Second Circuit reasoned that plaintiffs, as applicants for public housing, were "immediately affected by the alleged irregularities in the practices of the Authority . . . ,"[19] and were thus deprived of a fair opportunity for admission to public housing. Therefore, plaintiffs had standing to raise their due process objections.[20] Thus, *Holmes* involved an application of *Norwalk C.O.R.E.* by providing an opportunity for housing applicants to contest deficient tenant selection procedures.

III. ABSTENTION

The doctrine of abstention concerns the circumstances in which a federal court may decline to proceed though it has jurisdiction under the Constitution and the federal statutes.[21] It "allows a federal court whose jurisdiction has been properly invoked to postpone decision, pending trial in a state court, when the result might turn on issues of state law."[22] In *Monroe v. Pape,*[23] an action charging a city police officer with violating plaintiff's civil rights during an allegedly unreasonable search and seizure, the Supreme Court held that the federal and state remedies in civil rights cases were supplementary, and that a state remedy "need not be first sought and refused before the

17. 395 F.2d 920 (2d Cir. 1968).

18. *Id.* at 927.

19. Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968).

20. *See* Banks v. Housing Authority of City and County of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668 (Cal. Dist. Ct. App. 1953); Thomas v. Housing Authority of City of Little Rock, 282 F. Supp. 575 (E.D. Ark. 1967).

21. C. WRIGHT, LAW OF FEDERAL COURTS § 52 (2d ed. 1970); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction,* 59 COLUM. L. REV. 749 (1959).

22. Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L. REV. 604, 607-11 (1966).

23. 365 U.S. 167 (1961).

federal one [under 42 U.S.C. § 1983] is invoked."[24] The Supreme Court reaffirmed this decision in *McNeese v. Board of Education*,[25] involving a suit by Negro public school pupils for equitable relief from school segregation, where it held that the Civil Rights Act vested the federal claimant with a right of immediate access to the federal courts, regardless of whether state remedies existed.

Defendant in *Holmes* argued for abstention by contending that federal intervention would result in interference with problems of uniquely local concern and would disrupt a complex state regulatory system. Since plaintiffs had stated a claim for relief under the Civil Rights Act, the court could have dismissed the abstention argument by citing *Monroe* and *McNeese*. It chose instead to face the issue squarely.

The court reasoned that the complaint waged only a very limited attack on the admission procedures of the Authority and "in no sense [sought] to interpose the federal judiciary as the arbiter of purely local matters."[26] Plaintiffs were asserting a "narrow group of constitutional rights based upon overriding federal policies, and ask[ed] federal involvement only to the limited extent necessary to assure that state administrative procedures comply with federal standards of due process."[27] Federal involvement, the court continued, would not disrupt the state regulatory process since the case arose as a result of a *total lack* of any reasonable system for selecting public housing applicants. The court concluded that since plaintiffs' remedy in the state courts—mandamus—was "dubious at the very best,"[28] the federal district court was not required to abstain from deciding the case.[29]

Conclusion

In *Gautreaux v. Chicago Housing Authority*,[30] Negro applicants for public housing brought suit under the Civil Rights Act alleging that

24. *Id.* at 183. *See* McNeese v. Board of Education, 373 U.S. 668 (1963); Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967).

25. 373 U.S. 668 (1963).

26. Holmes v. New York City Housing Authority, 398 F.2d 262, 266 (2d Cir. 1968).

27. *Id.*

28. *Id.* at 267. *See* Gimprich v. Board of Education, 306 N.Y. 401, 118 N.E.2d 578 (1954); Grand Jury Ass'n v. Schweitzer, 202 N.Y.S.2d 375 (1960).

29. *See* Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

30. 296 F. Supp. 907 (N.D. Ill. 1969).

the Chicago Housing Authority had intentionally chosen sites and adopted tenant assignment procedures for public housing for the purpose of maintaing existing patterns of residential segregation, thereby depriving plaintiffs of equal protection of the laws. The court held that plaintiffs were entitled to relief under § 1983. The element of racial discrimination so important in *Gautreaux* is lacking in *Holmes*, which established that an allegation of discrimination is not necessary for a claim under § 1983—selection procedures are reviewable on federal constitutional grounds and must conform to the due process requirement of "ascertainable standards."

The Second Circuit's refusal to abstain in *Holmes* is significant in the context of the great demand for public housing. While abstention may result in piecemeal adjudication, thereby delaying a decision on the merits,[31] the result in *Holmes* will assure a prompt decision in the federal courts for those applying for the scarce supply of public housing.

John F. Birath, Jr.

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31. *See* Bagget v. Bullitt, 377 U.S. 360 (1964); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959).