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COMMENTS

INTRAGOVERNMENTAL POWER RELATIONS IN THE EXPENDITURE OF FEDERAL FUNDS THROUGH LOCAL GOVERNMENTAL BODIES: THE PUBLIC HOUSING AUTHORITY DILEMMA UNDER THE BROOKE AMENDMENTS

I. INTRODUCTION

Revenue sharing, the concept that local operations could be funded through federally collected monies, was initiated 35 years ago through the creation of local housing authorities (LHA's) under the United States Housing Act of 1937. When viewed as a precursor to the modern approach to revenue sharing, the contract mechanism provided for in the Act is woefully deficient, for many LHA's are faced with serious financial difficulties. In 1969, the first Brooke amendment to the Housing Act placed a rent ceiling on the LHA's restricting rental charges to 25 per cent of a tenant's family income. Although later Brooke amendments appropriated funds to help the LHA's reduce operating deficits, the LHA's contend that the United States Department of Housing and Urban Development (HUD) has not distributed these funds. Consequently, LHA deficits have increased, causing the LHA's to consume their reserve funds and approach bankruptcy. Although these deficits may be attributable to many sources including inadequate congressional appropriations, executive impoundment of funds, and unjustified LHA expenditures, a number of LHA's have initiated suit against the federal government to compel complete subsidy payment, or alternatively, to enjoin application of the rent ceiling. The purpose of this Comment is fourfold: (1) to explore the rights of the parties to the LHA contracts to maintain a suit against HUD; (2) to analyze the Housing Act to ascertain the present responsibility of, and authorization for, HUD to meet the LHA's operational needs.

3. 42 U.S.C. § 1410(a) (1970) permitted the subsidies to be used: (1) to assure the low-rent character of the housing projects involved, and (2) to maintain adequate operating and reserve funds.
4. See notes 19-20 infra.
5. NAHRO, an association of public housing administrators, has combined with several other LHA's in bringing a suit for declaratory and injunctive relief to force HUD to provide full operating subsidies. NAHRO v. HUD, Civil No. 2080-72 (D.D.C., filed Oct. 16, 1972). Cf. Norfolk Redev. & Housing Authority v. HUD, Civil No. 298-72-N (E.D. Va., filed June 13, 1972).

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deficits; (3) to study the power of the executive branch to impound funds once authorized; and (4) to suggest that the problems in the public housing area reflect the problems of all federal-state revenue sharing relationships, particularly those that are intertwined with economic and social problems of national scope.

Immediately following its opening session, the 93rd Congress launched into a dispute with the President and executive agencies over monies withheld from congressionally created categorical grants-in-aid programs. This Comment assumes that the public housing program is representative of many categorical grant-in-aid programs, notwithstanding the existence of some provisions affording the program unusual protections. Its effectiveness as a mechanism for implementing governmental objectives will therefore be viewed as means through which to analyze basic intergovernmental relations when disputes arise over compliance with congressional intent. Because, however, the Congress and the President have also initiated a new program of federal revenue sharing, the 1972 Act for Federal Assistance to State and Local Governments (Revenue Sharing Act), this Comment will also explore the mechanism contemplated for its administration with a view to determining whether funds may be withheld under that program as they have been withheld in categorical grant-in-aid programs.

One caveat must be included with respect to the complex circumstances surrounding the public housing authority dilemma. Because it has involved human services in a highly political climate, HUD's response to local housing authorities has changed on a daily basis. This Comment merely attempts to sketch a broad picture with reference to data available at a fixed point in time. In addition, the administrative mechanics of the

6. Throughout this Comment impoundment will be used to refer to any means by which funds authorized and appropriated for an annual period by Congress are not expended during that period. In the public housing program, such withholding can occur from mandate by the President, control by the Office of Management and Budget, or at the various levels of administration within the Department of Housing and Urban Development. See notes 126-30 infra. For an examination of the impoundment problems of other federal programs, see Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 STAN. L. REV. 1240, 1244 (1970), wherein Senator Church discusses impoundment problems arising in defense projects and civilian spending. The impoundment issue has become particularly critical to local governments within the last year. See, e.g., Wall Street Journal, Dec. 15, 1972, at 1, col. 5, which notes that several governors and mayors have attacked President Nixon's recent impoundment of highway, pollution, and welfare appropriations.


9. HUD's data comes from the LHA's which are already overworked with the compilation of data and enumerable day-to-day management problems. Rental income figures and operational costs fluctuate widely depending on tenant responsiveness, vandalism, the need for specialized social services, and utility costs. Consequently, cost and income estimates are rapidly outdated, and data which one authority considers essential may be ignored by other authorities. Telephone interview with John Shaw, Chief of Financial Management Branch, Program Services Division, U.S. Dept of Housing and Urban Development, Washington, D.C., Sept. 7, 1972 [hereinafter cited as Shaw Interview].

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Revenue Sharing Act are, as yet, largely undefined, but the Act does establish the limits within which local governmental units are entitled to federal dollars, and sets forth the remedies and procedures for enforcing the federal obligations. This Comment assumes that analysis of the LHA-HUD controversy establishes a context in which to determine the future balance of power in federal-state revenue sharing programs.

II. THE PUBLIC HOUSING AUTHORITY IN THE FEDERAL CONTEXT: A FACTUAL DESCRIPTION

In recognition of the national need for increased low-income housing, Congress passed the 1968 Housing and Urban Development Act which adopted a ten-year national housing goal of constructing or rehabilitating 26 million housing units, of which 6 million were intended for low and moderate income families. Of the 26 million units established as a goal, 1,226,000 were to be new units of public housing, a figure exceeding the total public housing units in operation in 1971. Although sometimes criticized, public housing units have constituted a substantial part of the federal housing program concept since the initial authorization of $5 million was established in the 1937 Act. During the 1960's the LHA's experienced the pinch of wage and price increases, as well as a substantial increase in vandalism. Representative William F. Ryan of New York, speaking in support of the 1970 Housing

12. See id. § 1441a. The House report noted that at the time the Act was adopted there were 6 million families living in substandard housing. See U.S. Code Cong. & Ad. News 2900 (1968). The report also noted: [A]pplications for public housing, in terms of number of units, are being submitted by local housing agencies at an increasing rate, demonstrating that the demand for public housing units will be great and continuing during the next decade. HUD reports that the number of units in the status of applications pending has grown from about 35,000 in February 1966, to 68,000 in February 1967, to 125,000 in February 1968. Applications for additional units are being submitted at an annual rate of about 14,000 units. Id. at 2901.
13. Genung, Public Housing — Success or Failure?, 39 GEO. WASH. L. REV. 734, 745-46 (1971). See Franklin, Federal Power and Subsidized Housing, 3 URBAN LAW. 61, 62 (1971), wherein the author notes that the national commitment is not achieving results since the second report on the national housing goals showed a delayed start-up requiring a greater number of total units than required by the national goal to be built in the later years.
15. See, e.g., 116 Cong. Rec. 694 (1970) (remarks of Representative Rarick that federal expenditures for public housing accommodated social "parasites" at the expense of the working man).
16. See Act of Sept. 1, 1937, ch. 896, § 10(e), 50 Stat. 888. See also Senate Comm. on Banking and Currency, Congress and American Housing, S. Doc. No. 89-102, 90th Cong., 2d Sess. 5-7 (1968), which provides a history of annual contribution contract authorizations through 1967. The total federal housing program includes a large number of separate programs administered by the Federal Home Loan Bank Board, the Federal Housing Administration, the Urban Renewal Board, and the Federal National Mortgage Association. Id.
and Urban Development Act, which increased authorizations for annual contribution contracts, noted:

Public housing costs have been rising rapidly in recent years, and rental income has been running well below operating costs for many local housing authorities, the agencies that manage federally supported public housing. With federal government payments restricted until late 1969 to capital costs (and small supplementary payments for the elderly and a few other groups), the result has been a rapid growth in operating deficits. "Crisis" is not too strong a word to describe the situation.17

In addition, public housing remains torn between serving those persons most in need of public services — who are also most likely to default in rent payments — and selecting tenants who are more likely to make regular payments.18 Further, management and service costs attendant to the provision of housing for the most troubled of the poor tend to exacerbate the LHA's financial crisis.

17. 116 CONG. REC. 39,468, 39,472 (1970), citing F. DE LEEuw, OPERATING COSTS IN PUBLIC HOUSING — A FINANCIAL CRISIS (1970). de Leeuw concluded "that the gap between costs and rents almost certainly will continue to emerge and grow for many local housing authorities in the near future, certainly so long as prices and wages continue to rise." Id. See Genung, supra note 13, at 755.

Representative Ryan also asserted that while there were almost 500,000 people seeking public housing accommodations, fiscal shortages threatened new construction. 116 CONG. REC. 39,472 (1970). The proposed legislation would have appropriated $150 million for fiscal 1971, $275 million for 1972, $300 million for 1973, and $330 million for 1974. This was a noticeable increase over the previous subsidies of $75 million in 1969 and $75 million in 1970 (plus $35 million for special family subsidies). Id. An estimated 100,000 units were constructed annually in 1968, 1969, and 1970. Genung, supra note 13, at 756.

The public housing crisis has also been influenced by such diverse problems as inadequate technological capabilities, increased land costs, and exclusionary zoning patterns. See 116 CONG. REC. 3984 (1970) (remarks of Representative Halpern).

Special efforts have been undertaken by HUD, the Executive, and Congress to eliminate management problems. See U.S. DEp't of Housing and Urban Development, Circular HM 4381.2, app. 4, Jan. 7, 1972 (pre-feasibility criteria of management contracts) (hereinafter cited as Circular HM 4381.2); Exec. Order No. 11668, 37 Fed. Reg. 8057 (1972) (providing for a national center for housing management); Letter from Julian Lowe, Research & Technology Division, U.S. DEp't of Housing and Urban Development, July 28, 1972 (special projects authorized by Congress in thirteen cities for experiments in LHA management).


There are also potential pressures from private landlords who oppose the competition from public housing operations for the most desirable of low income tenants. Interview with Robert Embry, Jr., Director of Baltimore Housing and Redevelopment Authority, in Baltimore, Aug. 10, 1972 (hereinafter cited as Embry Interview).

The growth of management problems is the most significant problem in the current administration of public housing. To curb such problems, HUD issued a special transmittal notice covering detailed stipulations as to management contracts for both subsidized and non-subsidized housing units. Interview with Mr. Anthony Gilespi, Director of Philadelphia Area Office, U.S. DEp't of Housing and Urban Development, in Philadelphia, Mar. 23, 1972 (hereinafter cited as Gilespi Interview). See Circular HM 4381.2, supra note 17. See also Mulvihill, Problems in the Management of Public Housing, 35 TEMP. L.Q. 163 (1962).
Information distributed by the National Association of Housing and Redevelopment Officials (NAHRO) shows that, as of December 31, 1971, eighty-one (81) housing authorities were running monthly deficits of from $1.39 per unit to $38.20 per unit, with Chicago, San Francisco, and Washington, D.C., posting the largest deficits. NAHRO estimated that the total aggregate deficit for all LHA's at the end of fiscal 1971 was $44 million, and that the surplus appropriation authorization available to HUD to offset this deficit was $130 million.

There has been continual disagreement between LHA's and HUD over whether such operational deficits are caused by uncontrollable wage-price increases or poor local management. The Brooke amendment, placing a ceiling on rental charges at 25 per cent of the tenant's family income, brought the financial crisis into dramatic focus. The president of NAHRO described the problem in detail, concluding that the Senate committee was properly concerned over the "lax management in many housing projects that has led to high operating costs, deterioration of property, and an intolerable environment for the families who live there." Despite its recognition of local management problems, NAHRO nevertheless took exception to HUD's implementation of the initial Brooke amendment. Among several disputed points, NAHRO expressly opposed:

The policy decision to condition assistance on standards of management practice and tenant responsibility apparently to be determined solely by HUD and without reference to some of the present circumstances not related to either of these matters. This is somewhat like those who are ill demonstrating good health before they can receive medical treatment.

19. NAHRO, Major Size LHA's with Serious Financial Problems, July 11, 1972
20. Id. Cities with highest monthly per unit deficits were Chicago ($38.20), San Francisco ($35.58), Washington ($34.92), St. Louis ($29.52), Boston ($28.93), Detroit ($26.80), Portland ($26.23), Baltimore ($26.10), Seattle ($24.70), Newark ($23.58), and New York ($21.70). Id.
21. Telephone interview with Mary Nenno, Associate Director for Program and Policy Research, NAHRO, Washington, D.C., Sept. 22, 1972 [hereinafter cited as Nenno Interview]; Telephone interview with Herbert Pensil, Acting Director of the Division of Program Budget Development, U.S. Dep't of Housing and Urban Development, Washington, D.C., Sept. 25, 1972 [hereinafter cited as Pensil Interview]. According to Mr. Pensil, the total surplus appropriation authorization should also include $8,900,000 not committed for 1973. An additional request in the amount of $150,000,000 is presently before Congress. See 117 Cong. Rec. 21167 (daily ed. Dec. 10, 1971).
22. See Genung, supra note 13, at 743-49.
25. Genung, Where We Have Come with the "Brooke Amendment", 27 J. Housing 232, 234 (1970). The author quoted another NAHRO statement: We view the conference language as a directive by the Congress to local housing authorities, tenants, and HUD to develop a concept of a sound physical and social environment in public housing and to utilize some of the assistance provided to develop management and maintenance practices that will produce such an environment. This is not an easy task that can be solved by any one of these three parties independently, or that can be approached from a viewpoint solely of cutting back funds for current practices.

Id. Other points of disagreement included: (1) HUD's view that the subsidy formula was only connected to the rent ceiling rather than in general support of the total
Housing authorities, already in financial straits, were placed on the brink of bankruptcy. As a result of HUD's demanding improved management techniques before approving new operational subsidies and its narrow reading of the congressional intent to make subsidies generally available, the annual contribution contracts, designed to eliminate the deficits created by the 1969 rent ceiling, were not fully implemented. Congressman Ryan noted this problem:

The other example of administrative hostility to public law was demonstrated this year by the implementation of the so-called Brooke amendment, which was incorporated in section 213 of the Housing and Urban Development Act of 1969. This was aimed at providing additional funds for local public housing authorities so that they would neither have to raise rentals nor sacrifice needed services. The regulations issued by the Department of Housing and Urban Development clearly demonstrated a posture of antipathy toward this amendment by their restrictive language and by the bars they erected to a straightforward— not to mention generous—interpretation of legislative intent.

The consequence has been that the Senate, in the version of the Housing and Urban Development Act which it passed on September 23—S. 4368— included new provisions which will require that the intent of the Brooke amendment is realized.26

The policy of providing aid to low-income tenants was jeopardizing the LHA's, and Senator Brooke attempted to clarify his intended effect. In a letter published in the NAHRO Journal, Senator Brooke set out the need for additional Housing Act amendments:

Last year, Congress enacted Section 213 of the housing act which set a ceiling of 25 percent on the rent which public housing tenants were required to pay and provided funding to improve the level of operating and maintenance services and reserve funds. While the rent ceiling went into effect, Congressional intent was not carried out with respect to providing funds for improving operating and maintenance services and adequate reserves. Accordingly, Section 210 of the 1970 act was proposed and enacted, thus resolving any uncertainties regarding this matter.27

Continuing his commitment to effectuate a workable public housing program, Senator Brooke, along with Senator Mondale, has since introduced amendments to the 1971 Housing Bill in S.2049 which calls for standardization of the housing subsidy requirements and a single flexible subsidy and

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income formulation. 28 The proposed subsidy formula purports to cover the difference between the total cost of maintaining a LHA — including debt service, management, maintenance, operational costs, real estate taxes, and tenant services — and the amount of rents and other income. 29 The only amendments passed, however, provided for the application of the rent ceiling to welfare recipients, and that their welfare payments should not be reduced because of the rent ceiling. 30

In 1972, Senator Brooke again addressed himself to LHA's, emphasizing his commitment to full implementation of the authorized operational subsidies to relieve LHA's from the financial squeeze created in part by the rent ceilings. 31 In an address on the floor of the Senate, he stated his view of the enactments:

It is the clear intent of the 1969 legislation that the Secretary of Housing and Urban Development make annual contribution payments pursuant to rent reductions under Section (2)(1) of the United States Housing Act of 1937 without delay, and without other administrative qualifications, in order that local housing agencies can continue their operations without curtailment of services. 32

Assistant Secretary Watson of HUD similarly assured the LHA's and NAHRO:

HUD appreciates and understands the uncertainties and changes that have been created by recent legislative actions. We want to cooperate and work as closely as possible with the LHAs to make sure that the low-rent public housing program is administered and funded to provide maximum possible benefit for the residents the program is intended to serve. 33

Despite these good intentions, the stubborn problems of contract renegotiations, administrative modifications, and policy determination conflicts still left an estimated aggregate deficit of $44 million at the end of fiscal 1972, with a remaining surplus of authorized appropriations of $138 million. 34 Consequently, some LHA's initiated court action to obtain those funds which continued administrative negotiation and legislative action had failed to produce. 35

III. RIGHTS OF THE PARTIES FOR A HEARING ON THE MERITS

Under the amendments to the 1937 Housing Act, 36 the bulk of financing for local public housing is provided through the long-term capital in-

29. Id.
31. Senator Edward W. Brooke, HUD Assistant Secretary Norman V. Watson, Explain How New Public Housing Rent Deductions and Operating Subsidies Will Be Funded by HUD, 29 J. Housing 69, 71 (1972) [hereinafter cited as Brooke & Watson].
32. Id.
33. Id.
34. See Pensil Interview, supra note 21.
vestment of private funds in tax-free bonds\(^{37}\) which are guaranteed by the federal government.\(^{38}\) The bonds are secured by a first lien on HUD’s annual contributions to the LHA,\(^{39}\) as well as on the rents, revenues, fees, and other income in excess of the operating expenditures of the LHA.\(^{40}\) The Act provides for the termination or reduction of an annual contribution contract upon the breach of certain conditions, including a change in the low-rent character of the project,\(^{41}\) an insufficient local contribution,\(^{42}\) or destruction of the facilities.\(^{43}\) The long-term success of the funding mechanism, at least in concept, depends more on the stability of the LHA’s and the federal contributions contracts than on the availability of adequate security upon default. An early commentator on the federal public housing program remarked:

> In view of the fact that the annual contributions constitute the basic source of security for the bonds, and in view of the foregoing circumstances under which these annual contributions may be reduced or terminated, it is a tribute to the investment banking fraternity that a large and growing market for these obligations has been developed . . . .\(^{44}\)

[1]It is obviously of the utmost legal and financial significance that these annual contributions be continued as long as the obligations which they secure are outstanding.\(^{45}\)

State law authorizes the public housing agency,\(^{46}\) and further provides for the sale of bonds to finance construction of low-income housing\(^{47}\) and the negotiation of annual contributions contracts with the federal government.\(^{48}\) Additionally, state law articulates limits on the enforcement of such

\(^{37}\) Id. § 1405(d).

\(^{38}\) Id. § 1421a(c). This pledge is reproduced on the face of the bond and signed by the Secretary of HUD. Interview with Dudley Finch, Secretary-Treasurer of the Wilmington Housing Authority, in Wilmington, Del., Sept. 11, 1972 [hereinafter cited as Finch Interview]. For an examination of short-term notes as used in other aspects of LHA financing, see Miller, Public Housing and Its Financing, in ABA Public Housing 6 (1946).


\(^{40}\) Id. § 1421a(c).

\(^{41}\) Id. § 1415(3).

\(^{42}\) Id. § 1410(h).

\(^{43}\) Id. §§ 1413, 1414. The Act also provides for termination of the contract if a third party acquires the project. Id. §§ 1410(1), 1413(a). See Miller, supra note 38, at 13.

\(^{44}\) Miller, supra note 38, at 14. The land values on all Wilmington projects certainly exceed the outstanding obligation on the bonds. Finch Interview, supra note 38.

\(^{45}\) See Miller, supra note 38, at 13.

\(^{46}\) 42 U.S.C. § 1402(11) (1970). As an example of a state law which grants the local public housing authority the necessary power to effectuate the purposes of the public housing law, see PA. STAT. tit. 35, § 1550 (1964). See also Berwick Lumber & Supply Co. v. Harrisburg, 52 Dauphin 275 (C.P. Pa. 1942) (housing authority possesses no powers, privileges, or immunities other than those given to it by the state).

\(^{47}\) See, e.g., PA. STAT. tit. 35, § 1557 (1964).

\(^{48}\) Id.
bonds or obligations, and usually limits liability for such bonds to the public housing authority, which can itself sue or be sued.\(^{49}\)

Notwithstanding provisions at the state and federal level protecting all persons, corporations, and governmental units that have a financial interest in the operation of the LHA, Congress intended the primary beneficiaries to be those persons of low income who would otherwise be unable to afford adequate housing.\(^{51}\) The statement of purpose in the Act specifically enumerates a priority in serving urban, rural, non-farm, and Indian families, with particular emphasis on large families\(^{52}\) and the elderly.\(^{53}\) The language of the Revenue Sharing Act, by contrast, does not enumerate its purposes, but merely lists a priority of expenditures.\(^{54}\) Consequently, the only parties entitled to sue under the Revenue Sharing Act are the local, state and federal governmental units.\(^{55}\)

This section of the Comment assumes that the growing financial crisis in the local public housing authorities puts in jeopardy the interests of present and future tenants, as well as those economically associated with LHA’s. The following subsections analyze whether HUD is vulnerable to legal action by any of these parties. The capacity of the parties to vindicate their interests under the public housing law reflects the dilemma of all those who rely on obligations of the federal government growing out of congressional legislation. Because of the representativeness of the issues, the questions of sovereign immunity and standing will be examined and the reviewability of the contract relationships under the Housing Act standards will also be explored.

**A. HUD’s Vulnerability to Suit**

It would appear that Congress specifically intended to give the parties to the HUD annual contribution contracts and the beneficiaries thereof the right to sue HUD upon breach of its obligations thereunder. Jurisdiction for such claims is found under 28 U.S.C. §§ 1331,\(^{56}\) 1361\(^{57}\) and

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\(^{49}\) See, e.g., id. The statute provides that liability for the bonds cannot extend to persons who are members or officers of the LHA, nor to the state or local governments. The statute also specifically precludes the use of state or local governmental revenues to satisfy the bonds. Id.

\(^{50}\) See, e.g., id. § 1550(1).


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) See Act of Oct. 20, 1972, Pub. L. No. 92-512, § 103(a), 86 Stat. 919. Priority expenditures include expenses for public safety, environmental protection, public transportation, health, recreation, libraries, social services for the poor or aged, financial administration, and ordinary capital expenses. Id.

\(^{55}\) Id. §§ 143, 6363.

\(^{56}\) 28 U.S.C. § 1331(a) (1970) provides:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

\(^{57}\) Id. § 1361 states that:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.
The Housing Act provides that the "United States Housing Authority may sue and be sued only with respect to its functions under this chapter . . . ."60 The frequent use of similar language by Congress in conjunction with many quasi-independent corporations specially created to administer governmental business affairs led the Supreme Court over 30 years ago to presume an amenability to suit where it was not specifically provided.61 In determining whether the agency is immune to suit the courts generally look to whether it is acting as an agent for the United States in carrying out the purposes of a congressionally authorized program. For example, in National State Bank v. United States,62 the court found the Federal Housing Authority to be just such an agency when the bank sued under surety provisions analogous to those provided for in public housing contracts.62 Similarly, in Powelton Civic Home Owners Association v. HUD,63 the lower court held that HUD was susceptible to suit by residents significantly affected by its actions, basing its decision on a broad reading of the Administrative Procedure Act64 favoring HUD's vulnerability to suit and the specific inclusion of the to sue and be sued clause in HUD's authorizing legislation.65 Finally, the fact that Congress

58. Id. § 2201 provides that:
In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
Cf. id. § 1491 which vests the Court of Claims with jurisdiction when "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." However, the claim may not be maintained simultaneously in both the Court of Claims and the district court. See, e.g., National State Bank v. United States, 337 F.2d 704, 707 (Ct. Cl. 1966).
60. Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939). The Keifer Court found that all the circumstances surrounding the formation of the defendant corporation manifestly demonstrated a congressional intention to make it subject to suit. Id. at 392. The Court specifically included the United States Housing Authority in its list of congressionally created corporations which were susceptible to private suit. Id. at 391 n.3. The amenability to suit of HUD and any other federal agency may, however, be limited by the Tort Claims Act, 28 U.S.C. § 1346 (1970). See, e.g., United States v. Delta Indus., Inc., 275 F. Supp. 934 (E.D. Ohio 1966).
61. 357 F.2d 704 (Ct. Cl. 1966).
62. Id. at 712. The court upheld jurisdiction even though a finding for plaintiffs would require funds to be taken "out of any money in the Treasury not otherwise appropriated." Id. See 42 U.S.C. § 1410(e) (1970).
63. 284 F. Supp. 809 (E.D. Pa. 1968), wherein the court held that judicial review of a HUD denial of a hearing to residents of an urban renewal project area was provided by statute. See 5 U.S.C. § 702 (1970).
65. 284 F. Supp. at 834. Alternatively, the court held that HUD had waived immunity, citing the Act. Id. The Act specifically provides that:
In the performance of, and with respect to, the functions, powers, and duties vested in [the HUD Secretary] by this sub-chapter, [§§ 1450 et seq.] the Administration, notwithstanding the provisions of any other law, may — (1) sue and be sued . . . .
42 U.S.C. § 1456(c) (1970). It is not clear whether the Secretary would be immune from suit if he were acting under presidential, rather than congressional, mandate. See notes 142-45 and accompanying text infra.
specifically exempted HUD from taxes under its public housing provisions but failed to specifically immunize HUD from suit, indicated that Congress intended to subject HUD to liability for defaults in its contractual obligations.66

However, the question of the standing of the parties to sue for enforcement of HUD's obligations under the Housing Act, and particularly the standing of the tenants and bondholders, is more difficult to resolve than the question of HUD's immunity. In Association of Data Processing Service Organizations, Inc. v. Camp,67 the Supreme Court held that a private data processing business had the requisite standing to sue the Comptroller of the Currency in order to determine the validity of that officer's policy determination that national banks could offer data processing services to customers and other banks as incidental to other banking services. The Court first noted that, in order to satisfy the constitutional mandate of a case and controversy as required by article III, there must be sufficient adversity to guarantee proper illumination of the issues.68 The measure of this adversity was "whether the plaintiff [alleged] that the challenged action has caused him injury in fact, economic or otherwise."69 The Court then concluded that "the interest sought to be protected by the complainant [was] arguably within the zone of interests to be protected or regulated by the statute . . . in question," and consequently, the requisite standing was established.70

Under the tests delineated in Data Processing, it is clear that the LHA's have standing to bring suit against HUD. First, the requisite economic injury is presented by the threat of bankruptcy and loss of funds to which the LHA's are entitled under the provisions of the Housing Act as amended.71 Second, the Act specifically authorizes HUD to establish annual contribution contracts with the LHA's for a fixed period of years, thereby bringing the parties and beneficiaries of those contracts within the zone of interest protected by the statute.72

Even under the legal interest test in use prior to Data Processing, the LHA's would be deemed to have standing. According to the rationale

68. Id. at 151-52. The Court cited Flast v. Cohen, 392 U.S. 83, 101 (1968), as authority for this constitutional aspect of the standing test. Id. at 151.
69. Id. at 152.
70. Id. at 153. See 5 U.S.C. § 702 (1970) which provides standing to any person "aggrieved by agency action within the meaning of a relevant statute." The Data Processing rule has been followed subsequently. See, e.g., Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours v. Camp, 400 U.S. 45 (1970). Mr. Justice Harlan dissented in Investment Co. Institute and emphasized that the zone of interest test should be satisfied only when the statute explicitly demonstrated, in specific terms, a congressional intention to protect the plaintiff's interest. 401 U.S. at 641.
71. See note 20 and accompanying text supra.
72. 42 U.S.C. § 1410(a) (1970). For a more specific analysis of the statutory terms establishing standards for the annual contribution contracts, see notes 119-26 and accompanying text infra.
articulated in *Tennessee Electric Power Co. v. TVA*, an aggrieved party could not sue:

[U]nless the right invaded [was] a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.

Therefore, since the LHA is a party to the annual contributions contract with HUD, even this more rigid "legal interest" test for standing is met.

As to the tenants, however, application of the two-pronged *Data Processing* test is less certain in its effect. If the LHA's attempted to have the 25 per cent income-rental ceiling lifted, the tenants would meet the economic injury test because such action would double their rents. In challenging HUD's refusal to provide full operating subsidies, the interests of the tenants and the LHA's coincide. HUD's failure to subsidize the LHA's injures the tenants economically because it reduces the monies available for maintenance and other tenant services, and jeopardizes the quality of public housing. Thus, although the tenants enjoy no specific legal interest arising out of contract or tort, they may, nonetheless, come within the test of injury in fact.

In *Barlow v. Collins*, certain tenant farmers were granted standing to challenge a regulation of the Secretary of Agriculture which enlarged the scope for which assignment of benefits could be made under the Food and Agriculture Act of 1965. The regulation at issue allowed landlords to require assignment of the future benefits under the Act as a guarantee of rent, thereby forcing the tenants to obtain all their advances for other farm needs from the landlord. This economic dependence on the landlord inhibited the formation of cooperatives and created the economic injury. The *Barlow* court looked to the Act and interpreted specific references to the tenant farmers' interests, as placing the farmers within the zone of protection provided by Congress.

In *Hahn v. Gottlieb*, the rationale of *Data Processing* and *Barlow* was applied to tenants in a federally financed housing project who were

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73. 306 U.S. 118 (1939).
74. Id. at 137–38 (footnote omitted). This standard for determining standing has been commonly referred to as the "legal interest" test. In an opinion concurring in the results of *Data Processing* and its companion case, *Barlow v. Collins*, 397 U.S. 159 (1970), Mr. Justice Brennan rejected the legal interest test because he felt that it went to the merits and not to the question of standing. Id. at 167–73 (concurring in part and dissenting in part). Cf. *National State Bank v. United States*, 357 F.2d 704 (Ct. Cl. 1966).
77. Prior to the 25 per cent income-rental ceiling, it was very common for low-income housing tenants to spend over 50 per cent of their income on rent. Removal of the ceiling would surely reinstitute such prohibitive rates. See Genung, supra note 25, at 232.
78. See Genung, supra note 13, at 747–48.
81. 397 U.S. at 164.
82. Id. at 164–65.
83. 430 F.2d 1243 (1st Cir. 1970).
objecting to rent increase allowances by HUD in their negotiation with the project's owners. The First Circuit found the plaintiffs' allegation that rental limits and other tenant rights protected under the Housing Act were in jeopardy was adequate to permit standing. The fact that the Act was not primarily intended to protect the tenants was not deemed crucial. The United States Housing Act declares "families of low income," particularly "larger families" and "families consisting of elderly persons" as its primary beneficiaries, and specifically protects the rights of tenants against exclusion from LHA board membership. The Brooke amendments establish a rent ceiling which must be individually applied and cannot, under usual circumstances, be exceeded by the LHA. Consequently, the interest of the public housing tenants is closely analogous to the tenant interests in Hahn and Barlow. If the rationale of these cases were followed, the tenants could demonstrate a cognizable economic injury in fact, and a congressional intent to protect their interests sufficient to provide them with standing to sue HUD for withholding operating subsidies from the LHA units in which they reside.

84. Id. at 1246-47.
85. Id. at 1246 n.3. See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). Norwalk CORE was decided prior to Data Processing and held that persons displaced from an urban renewal area had standing. Cf. McKinney v. Washington, 442 F.2d 726 (D.C. Cir. 1970).

See Talbot v. Romney, 334 F. Supp. 1074, 1078-80 (S.D.N.Y. 1971), where the court found that under Data Processing a resident in the local urban renewal area had standing, but could not prevail. The Talbot court found a logical nexus between the type of claim asserted and the party raising it, and therefore, concluded that the plaintiff had standing even though she could not demonstrate a legal interest which was protected under the Act. Id. at 1079. But see Gart v. Cole, 263 F.2d 244 (2d Cir. 1959). In Gart, the Second Circuit denied standing to residents living adjacent to an urban renewal site because the plan had an impact of a general, public nature and an insufficient effect on individual interests to give the residents standing. Id. at 250. Compare the duties owed to off-site residents with the duties imposed by the Housing Act toward persons already in public housing as discussed in notes 86-88 and accompanying text infra.

88. See Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir. 1963), in which the court held that area residents did not have standing to challenge the relocation plans of the HUD Secretary and the local redevelopment agency. In Johnson, there was no allegation of discrimination, nor was there any indication that Congress intended to protect the interests of this class of plaintiffs. Id. at 874. The court rejected the plaintiffs' claim that, under the Act, they were third-party beneficiaries of the contract between HUD and the local agency:

The federal courts have consistently held that those not parties to a contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement. Id. at 874, citing Gart v. Cole, 263 F.2d 244 (2d Cir. 1959). But see Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).

There may also be an additional problem of jurisdiction for the tenants, as the amount in controversy must exceed $10,000 under 28 U.S.C. § 1331. In Hahn, the First Circuit noted this potential barrier:

[F]laintiffs' claim against their landlord [to reform the lease] must be based on 28 U.S.C. § 1331, which requires a jurisdictional amount of $10,000. Plaintiffs cannot aggregate their claims to meet this amount unless they assert a common and undivided interest. Snyder v. Harris, 394 U.S. 332 (1969). In this case, the rights of the plaintiffs "appear to arise only from the status of each as individual lessee of a portion of the project premises." Potrero Hill Community Action
Although the bondholders are given certain protections under the Act\(^89\) which might, arguably, bring them within the zone of interest test, it is likely that the deferred nature of their interests\(^90\) and the protections provided in the event of default\(^91\) would induce courts to deny review for lack of ripeness, if not for lack of standing.\(^92\) However, a policy argument can be advanced that requiring bondholders to wait until default increases the risk potential of the investment in LHA bonds, and may decrease the marketability of the bonds. This effect would, in turn, jeopardize the capacity of LHA's to raise capital for construction.\(^93\)

B. Reviewability of HUD's Administration of the Housing Act

Once it is assumed that one or more of the plaintiffs has standing to sue HUD, there is the need for a further determination of whether or not the administration of the Act has been made reviewable. Along with the more liberal test of standing developed in *Data Processing*,\(^94\) the Court therein also favored a presumption of reviewability. Noting its reservations on nonreviewability, the Court stated:

There is no presumption against judicial review and in favor of administrative absolutism (see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140), unless that purpose is fairly discernible in the statutory scheme. Cf. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297.\(^95\)

After resolving the question of standing in favor of the plaintiffs, the *Data Processing* Court considered the issue of reviewability and looked

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89. 42 U.S.C. § 1414 (1970) provides that the annual contribution contracts may not be amended or superseded in any manner which would impair the rights of the bondholders.

90. The payment of the face value of the bonds is not due until maturity, and any sale of the local units must first satisfy the obligations on the bonds. In most cases, it has been estimated that the value of the land, and the improvements thereon, would meet the obligations of the bonds. Finch Interview, *supra* note 38. For a historical discussion of the bondholder interests, see Miller, *supra* note 38, at 7–13.


93. For an analysis of the market for such securities during the early years of the Act, see Miller, *supra* note 38, at 13–17.

94. See notes 67–70 and accompanying text *supra*.

95. 397 U.S. at 157. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), the Court held that regulations established by the Food and Drug Administration were subject to pre-enforcement review. The Court found that the congressional fear of placing unfettered discretion in executive department officials had prompted the inclusion of provisions for review despite Justice Department opposition. *Id.* at 143. In *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), the Court found an implied congressional intent to preclude judicial review and thereby avoid potential disputes which might endanger the peaceful nature of labor negotiation. *Id.* at 302-04.
to the Administrative Procedure Act which provided for judicial review “except to the extent that — (1) statutes preclude judicial review or (2) agency action is committed to agency discretion by law.” The Court concluded that neither exception was applicable, and since the enabling statute did not specifically preclude judicial review, held that the rulings of the Comptroller were reviewable.

The most recent Supreme Court pronouncement on reviewability was made in *Citizens to Preserve Overton Park, Inc. v. Volpe*. In rejecting the Government’s argument that the second exception to the Administrative Procedure Act made the questioned agency action unreviewable because it was committed to agency discretion by law, the Court concluded:

This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’

In *Norwalk CORE v. Norwalk Redevelopment Agency*, the Second Circuit held that residents displaced from an urban renewal area could obtain review of HUD’s contract agreement with the local agency under section 1455(c) of the 1965 Housing and Urban Development Act, which required the local authority to provide for the relocation of families dis-

97. 397 U.S. at 157. A similar application of the Administrative Procedure Act was made in *Barlow v. Collins*, 397 U.S. 159, 166 (1970). The *Barlow* Court held that the construction of a statutory term was a matter for judicial determination and not within the special expertise of the Secretary. Mr. Justice Brennan would have permitted review of administrative actions whenever the legislative history of the enabling statute evidenced even the slightest indication that Congress intended to place the plaintiff in the statutorily protected class. *Id.* at 174-75 (Brennan, J., concurring).
100. 401 U.S. at 410. The standard fails to define those instances when the statutory terms will be so broad that there is "no law to apply." The phrase may refer to situations where the applicable standards are so technical as to be necessarily delegated to administrative authorities. See, e.g., *Panama Canal Co. v. Grace Line*, Inc., 356 U.S. 309, 318-19 (1958). *But see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935), which suggests that any delegation where there is "no law to apply" might be void as an invalid delegation of legislative authority.

In *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), the Second Circuit set out the following test for determining the reviewability of administrative decisions that involve complex urban renewal projects:

We cannot doubt the necessity of discretionary decision making in urban renewal planning. This necessity would render unfit for judicial decision many questions concerning urban renewal. . . . This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary, with due regard for the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal.

*Id.* at 929 (emphasis added). One of the standards noted by the *Norwalk* court was "decent, safe and sanitary dwellings." *Id.* This is a standard similar to that used in the *Housing Act*. See 42 U.S.C. § 1401 (1970). The court went on to make a specific analysis of the class of plaintiffs identified in the statute, and found adequate statutory standards to provide for judicial review. See note 102 and accompanying text infra.

101. 395 F.2d 920 (2d Cir. 1968).

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placed by the urban renewal project. The court applied three criteria to determine whether HUD's action was reviewable: (1) an assessment of the plaintiffs' legal rights as individuals under the Act, or as "private attorneys general;" (2) the presence of adequate standards for review of the substance of the agency's determination; and (3) the absence of any congressional intent to deny review. The court concluded that the plaintiffs came within the statutory zone of interest (merging a standing test into reviewability); that the relocation regulation provided an adequate standard for review; and that Congress did not intend to preclude judicial review. Consequently, the agency action was deemed reviewable. The dissent voiced a theme which reappears in arguments over judicial intervention in administrative actions. Citing the policy of Decatur v. Paulding against judicial interference with actions of the executive department, the dissent asserted that such intervention would thrust the judiciary into administration of the housing program.

In contrast to the Norwalk court, the First Circuit, in Hahn v. Gottlieb, held that public housing tenants were not entitled to review of the rent increases negotiated between the Federal Housing Administration and the private builder. The Hahn court, sounding the theme of the Norwalk dissent, denied review to the tenants because it felt granting review would undermine the efficient administration of the Act. The appropriateness of the issues for judicial review was another determinative factor noted by the court:

103. 395 F.2d at 933–34. The court found that Congress intended to protect this specific class of persons since one of the larger goals of the Act was the elimination of slum conditions. Id.
104. A recent case somewhat advancing the private attorney general doctrine is Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), cert. denied, 400 U.S. 949 (1970), where the Second Circuit granted standing to certain conservationist groups as persons sufficiently affected by the governmental action. 105. 395 F.2d at 935. The court stated specifically that it was not dealing with the planning of urban renewal programs, nor with the relocation standard set by Congress. Instead, it was dealing only with the procedural rights of the complaining parties. Id. at 936. This should be contrasted with the claims of the LHA's which are both procedural and substantive.
106. Id. at 935.
107. Id. at 929.
108. 39 U.S. (14 Pet.) 497 (1840). The Decatur Court suggested:
The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief. . . .
Id. at 516.
109. 395 F.2d at 938.
110. 430 F.2d 1243, 1251 (1st Cir. 1970). Under the procedures of the housing program considered in Hahn, the private builder and owner had to apply to HUD for rental increases. The housing program provides below-market federal loans and insurance to the builder. Id. at 1245.
112. 430 F.2d at 1249–50. In Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958), shippers initiated suit to oppose the toll rates established by the congressionally created Panama Canal Corporation. In reviewing the agency's annual budget, the Comptroller General recommended a downward revision of the tolls. Based on this
Courts are ill-equipped to superintend economic and managerial decisions of the kind involved here. This is not a case which can be resolved by "judicial application of canons of statutory construction." In denying review, the Hahn court indicated, however, that its decision did not necessarily preclude future review of questions related to the administration of housing programs. Applying the rationales of Hahn and Norwalk to the annual contribution contracts between the LHA's and HUD, it is clear that certain aspects of the statutory obligation between the parties are more likely to be subject to review than others. Hahn demonstrated that where detailed managerial considerations are in question, the courts will probably not enter into the quagmire of attempted judicial review. For example, the administration of the annual contribution contracts may include difficult managerial questions such as the computation of subsidy requirements, or require resolution of the dispute over the costs of services which the LHA deems essential, but which HUD views as luxuries.

Recommendation, the shippers brought suit to have the tolls reduced. The Supreme Court, per Justice Douglas, held, inter alia:

[T]he present conflict rages over questions that at heart involve problems of statutory construction and cost accounting; whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the canal for purpose of the toll formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice which require the exercise of informed discretion.

Id. at 317.

113. 430 F.2d at 1249. The court enumerated the substantive issues as including an estimate of the cause of cost increases, the causes of tenant vacancies, the reasonableness of managerial expenses, and the proper computation of "reasonable return" and concluded that "[u]nder these circumstances, we willingly confess our incapacity to contribute intelligently to the general course of decision on rents and charges." Id.

114. Id. at 1251.

115. See Baker v. Carr, 369 U.S. 186, 266, 283, 289 (1962) (Frankfurter, J., dissenting), wherein Justice Frankfurter opposed the Supreme Court's excursion into the complex statistical question of apportionment.

116. See Genung, supra note 25, at 235, wherein the author outlines the problems of managerial interpretation arising after the first Brooke amendment concerning such issues as recording of subsidy determinations to the nearest dollar, recomputation of the "in lieu of taxes" share of the local authority, and application of income formulas to families in marginal situations.

117. See Brooke & Watson, supra note 31, at 70-71, wherein HUD Assistant Secretary Watson described how LHA's should compute their operating subsidy needs: This will entail a careful distinction between (1) the amounts needed to compensate for rental revenue loss and normal increases in operating costs occasioned by inflation and other factors and (2) requests to improve levels of maintenance and operating services. We will also have to consider the efficiency of the LHAs management operations to ensure that they are maximizing their income potential and getting maximum benefits for each dollar spent. . . . At the same time, we hope the LHAs will cooperate in refraining from the temptation to submit larger budget requests than are actually necessary, in order to establish a better "bargaining" position with the area offices. Those LHAs that are tempted in this manner will only make it more difficult to make a convincing case of what the actual need is.

Id. In late November, after NAHRO brought suit against HUD, HUD issued a circular providing for a limited operating subsidy. See U.S. Dep't of Housing and Urban Development, Circular HM 7475.12, Nov. 28, 1972. The circular assumed additional monies would have to be raised by the states themselves if needed.
Notwithstanding such detailed managerial considerations, the LHA’s contend that there are certain fundamental statutory standards, confirmed by contract, that require HUD to provide total operational subsidies and maintain adequate reserves.118 Those standards of the Act which are probably capable of judicial review include the following:

(1) The requirement of the Housing Act that “decent, safe, and sanitary dwellings for families of low income by construction of public housing”119 be financed through annual federal contributions.

(2) The requirement that the LHA’s (a) “assure the low-rent character of the projects involved,” and (b) “achieve and maintain adequate operating services and reserve funds including payment of outstanding debts.”120

(3) The provision that annual contributions be pledged to aid the LHA’s and the concomitant appropriation “in each fiscal year, out of any money in the Treasury not otherwise appropriated, the amounts necessary to provide for such payments.”121 This provision may be interpreted to mean that the Act and the contracts authorized by the Act obligate HUD to meet the total operation subsidy needs of the LHA.

(4) The requirement that HUD work through, and place primary responsibility in, the LHA’s in order “to assist the several States and their political subdivisions” in achieving the purposes of the Act,122 by vesting “in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements.” Therefore, the Act may be read as precluding unilateral determinations of rent ceilings,124 income calculations,125 and limits on operating reserves126 by HUD or Congress.

118. The LHA’s require reserve funds to insure that adequate cash is available for current needs. Without such reserves, short delays in LHA receipt of revenue result in late payments on bills, including wages, or necessitate the borrowing of funds. Finch Interview, supra note 38.


120. Id. §§ 1410(a)(1) & (2). The Act limits the fixed contribution payable annually to “a sum equal to the annual yield, at the applicable going Federal rate plus 1 percentum, upon the development or acquisition cost of the low-rent housing or slum-clearance project involved.” Id. § 1410(b). This limitation was eliminated by a Joint House Resolution of Oct. 18, 1972. See U.S. Dep’t of Housing and Urban Development, Circular HM 7475.12, Nov. 28, 1972.

121. 42 U.S.C. § 1410(c) (1970). In addition, section 1414 provides for the modification of annual contribution contracts to promote economies and protect the low-rent character of the projects. The Act restricts such modifications, however, where the bondholder interests may be adversely affected. Id. § 1414. See notes 89-93 supra.


123. Id. See id. § 1410(a) (requiring the cooperation of the local political subdivision); id. § 1410(g) (requiring the promulgation of the admission criteria, income standards, and procedures used by the LHA).


125. U.S. Dep’t of Housing and Urban Development, Circular HM 7465.10, Mar. 16, 1971. This circular sets forth a definition of income, and deductions for certain support payments, medical expenses, certain occupational expenses, dependent allowances, and certain non-recurring income. The circular is outdated to the extent that
The essential unanswered question is whether such standards can provide an adequate basis for judicial review under the reviewability concepts delineated in Hahn, Norwalk, Data Processing, Barlow, and the Administrative Procedure Act. Absent a finding that such standards are justiciable, the congressional mandate obligating HUD to pay full operational subsidies is unenforceable.

The remainder of this Comment will consider whether the courts could apply these standards to compel HUD to distribute funds authorized under the Act and to prevent HUD from superseding the present LHA mechanism. The annual contribution contracts represent one of the earliest revenue sharing mechanisms and, as such, provide an excellent framework for the analysis of federal-state-local power relations in the provision of federally funded local services.

IV. VIABILITY OF THE FEDERAL EXECUTIVE OBLIGATION TO MAINTAIN THE LOCAL HOUSING AUTHORITY

Under our form of government, the President serves as the nation's chief executive officer and has primary responsibility for executing the laws, preparing the annual budget recommendations, and planning the most effective allocation of expenditures and reserves. President Nixon, through his creation of the Office of Management and Budget, sought to go beyond the limited concept of budget control and to evaluate governmental services against clearly defined criteria. In his report to Congress concerning the new office, the President noted its benefits:

The new Office of Management and Budget will place much greater emphasis on the evaluation of program performance: on assessing the extent to which programs are actually achieving their intended results, and delivering the intended services to the intended recipient. This is needed on a continuing basis, not as a one-time effort. Program evaluation will remain a function of the individual agencies.

It provides that the rental ceiling does not apply to persons on welfare. See U.S. Dep't of Housing and Urban Development, Circular HM 7465.13, Jan. 18, 1972 (provides that the rental ceiling shall be applicable to welfare recipients).

126. U.S. Dep't of Housing and Urban Development, Circular HM 7475.8, Jan. 27, 1972. This circular limited the LHA's operating resources and established "forward funding" procedures to permit advanced budget planning which, in turn, was to insure that federal subsidies would arrive in advance of monthly expenditures to eliminate certain cash flow problems. See note 118 supra.

127. U.S. CONST. art. II, § 3.

128. 31 U.S.C. § 16 (1970). The Office of Management and Budget is controlled by the President and is responsible for overseeing the appropriation requests of each agency.

129. Id. § 665(c). The statute specifically authorizes the President to apportion funds in order to avoid deficits. Id. § 665(c)(1). This section also provides for planned periodic distribution of funds over the calendar year, a minimum of quarterly review, and the creation of reserves. Id.

as it is today. However, a single agency cannot fairly be expected to judge overall effectiveness in programs that cross agency lines — and the difference between agency and Presidential perspectives requires a capacity in the Executive Office to evaluate program performance whenever appropriate.\textsuperscript{131}

Under the Constitution, however, Congress — not the President — has the power to legislate. In addition, the Constitution denies the President the power to exercise an item veto on legislation, and permits a two-thirds vote of Congress to override the President.\textsuperscript{132} If, however, categorical impounding is upheld or ignored by the courts, then the President can achieve the item-veto effect and be beyond congressional control merely by impounding the appropriated funds.\textsuperscript{133}

Since courts are generally reluctant to limit the powers of the Executive, they will probably not interpret bare congressional appropriations as mandates for executive department expenditures.\textsuperscript{134} Substantial precedent supports this view, as prior cases have held that where a congressional act merely provides for a general expenditure of funds under a broad congressional purpose, the authorization is only permissive.\textsuperscript{135} In \textit{San Francisco Redevelopment Agency v. Nixon},\textsuperscript{136} a California

\begin{itemize}
\item \textsuperscript{132} U.S. CONST. art. I, §§ 1, 7.
\item \textsuperscript{134} See Church, supra note 6, at 1249-53; Davis, supra note 133, at 50-56.
\item \textsuperscript{135} See McKay v. Central Elec. Power Cooperative, 223 F.2d 623 (D.C. Cir. 1955), wherein the court determined, in effect, that appropriations by Congress for flood control and electric power did not require that contracts \textit{already established} for the lease of power producing facilities be honored. The court of appeals, per Chief Judge Bazelon, dismissed the suit although it concluded that the Interior Department could use the funds for the contract purposes:

\textit{The Act is permissive only. It does not impose upon appellants a clear affirmative duty to use the funds for that specific purpose. At least so much is essential as a bar to effective relief in the nature of a mandamus on specific performance. Id. at 625 (emphasis added). The court went on to note that any determination of damages sustained by the contracting power company should await an action in the Court of Claims for breach of contract. Id. at 625-26. For a discussion of remedies for governmental breach of contract in relation to the question of governmental immunity, see note 59 and accompanying text supra.}

\textit{Cf. Craig v. Commissioners of District of Columbia, 112 F.2d 205 (D.C. Cir. 1940) (courts have only limited power to compel the Attorney General to make payments to a discharged prisoner, even though such payments are provided under congressional legislation); Cipriano Campagna v. United States, 26 Ct. Cl. 316 (1891) (longevity pay provided by legislation was contingent and variable and, therefore, not mandatory). Cf. Aleut League v. AEC, 337 F. Supp. 534 (D. Alas. 1971) (plaintiffs had no right to enjoin detonation of nuclear device).}
\item \textsuperscript{136} 329 F. Supp. 672 (N.D. Cal. 1971).
\end{itemize}
federal district court recently dismissed a suit to compel expenditure of appropriated funds, stating:

Counsel for plaintiffs and the Court have been unable to find authority for the proposition that a United States District Court may compel the head of the Executive Branch of government to take any action whatsoever. No decided cases since Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803) have even contemplated this question. It is clear, therefore, that a longstanding policy, if not a positive rule, has avoided such an intra-governmental confrontation. If impounding is viewed as an act of executive discretion, rather than an act of a quasi-independent corporation, it presents a direct confrontation between Congress and the Executive which is not likely to be resolved by a court. To sidestep these political implications, the LHA’s must contend that a breach of the annual contribution contracts constitutes a violation of congressional guidelines by an administrator serving in a ministerial capacity. The Act explicitly authorizes enforcement of the annual contribution contracts since they are guaranteed by the United States, and since Congress has “authorized to be appropriated in each fiscal year, out of money in the Treasury not otherwise appropriated, the amounts necessary to provide for such payments.” The Act provides only minor restrictions on enforcement of the contribution contracts, which are the primary means to accomplish the basic purposes of the Act. As a result, impoundment of funds which would jeopardize the vitality of the LHA’s frustrates the congressional purpose behind the Housing Act.

Beginning with Marbury v. Madison, the Supreme Court articulated the constitutionally imposed separation of powers. In Marbury, after concluding that a mandamus order was appropriate to compel the executive branch to act, Chief Justice Marshall distinguished between officers acting within the political sphere of the presidential authority

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137. Id. at 672. The court was acting on a motion to quash service and dismiss the President as a party to the action.
138. See notes 36-43 and accompanying text supra.
139. For the purposes of the Act, see notes 86-87 and accompanying text supra.
141. Id. §§ 1410(c), 1410(g), 1414, 1415 (1970). See notes 41-43 and accompanying text supra.
142. 5 U.S. (1 Cranch) 137 (1803).
143. Id. at 158. The Court did, however, hold the ministerial acts of an executive officer subject to judicial scrutiny, concluding:

*He acts, in this respect . . . under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law and is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

Id. at 158, 166 (emphasis added). The Court specifically described the determination of whether a right had vested as a judicial question. Id. at 166. For a further discussion
and those acting under some other authority. In order to be subject to court order under the *Marbury* test, the administrative actions must be ministerial in nature and affect vested rights. To enforce the rights of the LHA's under this test, the courts must determine whether the rights they assert have become vested legal rights.

To analyze properly when a congressional mandate will control agency administrators, it is helpful to examine cases in which the courts have found statutes to be sufficiently definite in that they create vested rights and thereby take the acts of the governmental officers out of the political and economic spheres exclusively committed to the President. In *Kendall v. United States*, the Court held that a federal statute which required the Solicitor General to determine the amount to be awarded persons under contract with the Postmaster General was a definite law, making the actions of the Postmaster General ministerial, and hence enforceable by a mandamus action. The Postmaster General in *Kendall* argued that the determination of proper credits and allowances was within the political sphere of the President, since the officer's acts were done on the President's behalf and would affect the credit of the nation. Although the *Kendall* Court disavowed any intention to challenge the power of the executive branch, it did reassert certain congressional powers, concluding:

"[I]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which

of vesting in relation to congressionally created programs, see notes 156–58 and accompanying text infra. The Court stated also, however, that where the officer is acting under presidential order in political spheres fully delegated to him by the Constitution, his discretionary acts are not subject to judicial review:

In such cases, [his] acts are [the President's] acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. 5 U.S. at 164. See Kranz, A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions, 11 Am. U.L. Rev. 48, 51–52, 63–67 (1962).

144. The view that administrators of congressionally created agencies may be independently accountable to standards of the enabling statute was implicitly supported by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), wherein the Court held that the President did not have the power to seize industrial property without a specific congressional authorization. Id. at 589. Characterizing the limits on executive power, Justice Jackson wrote:

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."

Id. at 637–38 (Jackson, J., concurring).

145. See notes 143–44 supra.


147. Id. at 609–13.

148. Id. at 551–52. See Griffin v. Cochran, 5 Binn. 87, 105 (Pa. 1814) (if the officer's act entails taking money from the public treasury, it cannot be enforced by mandamus).
is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.\textsuperscript{149}

In \textit{United States v. Price},\textsuperscript{150} Congress had authorized the Secretary of the Treasury to pay specific monies to several named persons.\textsuperscript{151} The Court held that the congressional act was explicit in its direction, and compelled the Secretary by writ of mandamus to pay the designated amount.\textsuperscript{152} In contrast, the Court of Claims in \textit{Compagna v. United States}\textsuperscript{153} held that the petitioner was not entitled to funds claimed to be due under an appropriation act of Congress, offering the following distinction:

Frequently there is coupled with an appropriation a legislative indication that the designated amount shall be paid to a person or class of persons, and from such an appropriation a statutory right arises upon which an action may be maintained.\textsuperscript{154}

\textit{Compagna} left unresolved the question of what would constitute a sufficient class designation short of the specification by name held to be adequate in \textit{Price}. If the doctrine espoused by \textit{Kendall} and \textit{Price} remains viable, congressionally created rights may require an accountability of the governmental officer to Congress, rather than to the President for purposes of requiring funds to be expended.

In 1967, Ramsey Clark, then United States Attorney General, advised the Secretary of Transportation that a congressional appropriation of highway funds was merely permissive in character\textsuperscript{155} because:

\[\text{[T]he Secretary [had] the power to defer the availability to the states of those funds authorized and apportioned for highway construction which have not, by the approval of a project, become the subject of a contractual obligation on the part of the Federal Government in favor of a state.}\textsuperscript{156}\]

It is approval of a project under that section [23 U.S.C. 106(a)] which constitutes the contractual obligation of the United States.

\begin{thebibliography}{153}
\bibitem{149} 37 U.S. at 610. The Court also stated:
\begin{quote}
To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.
\end{quote}
\textit{Id.} at 613.
\bibitem{150} 116 U.S. 43 (1885).
\bibitem{151} \textit{Id.} at 43–44.
\bibitem{153} 26 Ct. Cl. 316 (1891). \textit{See note 135 supra.}
\bibitem{154} 26 Ct. Cl. at 317.
\bibitem{156} \textit{Id.} at 4 (emphasis added.)
\end{thebibliography}
No provision of the act gives any state a *vested* right to the apportioned funds prior to such approval.\(^{157}\)

Under this rationale, the established contracts of approved LHA's would be *vested* rights to apportioned funds.\(^{158}\) The Act might then be viewed as sufficient to provide direct control over the acts of administrative officers, creating a nonpolitical sphere of agency action under congressional aegis. In a recent decision, *State Highway Commission v. Volpe*,\(^{159}\) a federal district court found that the language of the Transportation Act\(^{160}\) specifically limited the discretion of the Secretary of Transportation.\(^{161}\) The court ordered the Secretary to obligate the apportionment of trust fund monies provided under this Act for Missouri highway construction.\(^{162}\) The court noted specifically the language of this Act which required that "no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been appointed pursuant to the provisions of this title shall be impounded" except for expenses of administering the fund.\(^{163}\)

Although several commentators point out that control over the executive branch may be exercised by impeachment or bargaining for legislation,\(^{164}\) it is unlikely that these methods can effectively protect those in a position comparable to that of the LHA's. The cases holding that congressionally created public law can establish standards under which the beneficiaries of congressional programs will have vested rights once initial contract obligations have been agreed upon suggest a more viable mechanism.\(^{165}\) The increasing incidence of executive impoundment of congressional appropriations may require the development of such an alternative, particularly in light of the movement toward decentralized federal spending through revenue sharing. Projects of extended duration

157. *Id.* at 7–8 (emphasis added).
158. *See* note 121 *supra*. During his testimony before a 1971 congressional committee, HUD Secretary Romney stated:

> The table [low rent Public Housing Program] also reflects a total of $112 million in set-asides for operating funds not used in 1971. We do expect — and the Budget so reflects — that the $37 million balance of the operating subsidy set-aside provided in the Housing and Urban Development Act of 1969 will be used in 1972. The fact that it is reflected as unused at the end of 1971 is merely a matter of timing in the anticipated use of subsidy funds.

1971 *Housing Hearings, supra* note 133, at 167. Secretary Romney also described the financial plight of the LHA's and the uncertainties attendant to exact calculation of the subsidy need. Noting the additional appropriation of $75 million in 1970, he concluded:

> We do not look upon the additional authorization as a mandate to use that amount whether or not needed, but as an authority which can be used if the facts warrant it. In short, the additional $75 million is available for use if needed. Our current estimates, however, do not indicate that need arising until after fiscal year 1972. If it should be necessary to use the authorization, it will be used.

*Id.* at 168.
162. *Id.*
164. *See* Church, *supra* note 6, at 1252; Davis, *supra* note 133, at 56.
165. *See* notes 146–52 and accompanying text *supra*.
by their nature require the continued availability of funds.\textsuperscript{166} Although noncategorical revenue sharing by-passes the question of federal flexibility by locating such flexibility at the local government level, new issues associated with impoundment may emerge. The present Revenue Sharing Act would base the standard of review on an allocation formula alone,\textsuperscript{167} except for the broad discretion given to the Secretary of the Treasury to establish regulations to see that all funds are expended for priority expenditures under the Act.\textsuperscript{168} Whether such discretion to withhold by the Secretary will be exercised to reassert federal control over the actual expenditure of tax dollars sent back to the states remains to be seen. If it is, the only workable method of implementing the Revenue Sharing Act may be through court action similar to that instituted by the LHA's.

\section*{V. The Questioned Necessity of the Use of Local Political Sub-Divisions to Implement the Low-Rent Public Housing Program}

The LHA's\textsuperscript{169} contend that since it is the declared policy of the United States Housing Act to provide low-income public housing through state-created LHA's,\textsuperscript{170} HUD must maintain those units in a viable form. Additionally, the LHA's urge that because of their established contracts, Congress and HUD are barred from unilaterally imposing rent ceilings\textsuperscript{171} and establishing new standards for maintaining financial re-

\begin{itemize}
  \item \textsuperscript{166} Effective long-range program development is closely connected to the total concept of the Program Evaluation Review Techniques used so effectively by Department of Defense Secretary MacNamara in the development of the atomic submarine. This concept requires the definition of \textit{events, activities, time,} and \textit{resources} necessary to final achievement of any project insofar as possible at the outset of the task. Efficient management will necessarily depend on bringing the proper resources to bear at the most advantageous time. For example, the ten-year goal of reaching the moon necessarily required the allocation of key resources throughout the term of the project. One year without development resources may significantly affect the achievement of interim events crucial to the accomplishment of the final goal. This is particularly important when the federal role moves from a concept of \textit{demonstration project} funding to one of providing resources for \textit{on-going operations}. For a general introduction to the Program Evaluation Review Techniques, see \textit{Federal Electric Corporation, A Programmed Introduction to PERT} (1967). See also \textit{Cahn, New Sovereign Immunity}, 81 Harv. L. Rev. 929 n.65 (1968), where the author examines the use of planning-programming-budgeting systems to specify management responsibilities in federal program administration.

  \item At the same time, however, there is the danger that excessive long-term contract commitments to local governments may so commit governmental funds to past priorities that new needs cannot be adequately met. This problem has similarities to the debt-equity problems of corporations, where excessive debt structures leave little room for absorbing lean periods in the corporate income cycle and necessarily limit the capacity of the corporation to use unobligated capital to take on new ventures for which debt obligations may not be practicable. See 42 Op. Att'y Gen. No. 32, at 8 (1967).


  \item Id. § 123.


\end{itemize}
serves, and selecting tenants. Further, because the rent ceilings are causing many LHA's to become insolvent, the LHA's contend that the ceilings are confiscatory and in violation of the fifth amendment.

In considering the fifth amendment claims of the LHA's, it is important to note that the imposition of a rent ceiling is consistent with the purposes of the Housing Act to maintain the low-income character of the housing projects. Rent ceilings, income deductions, and admission criteria are merely regulatory and only indirectly affect the LHA property. Consequently, the courts are not likely to label them direct takings by the federal government.

After the Supreme Court decision in Block v. Hirsh, most courts have applied three factors to uphold the regulation of income or business operations: (1) where the control is temporary; (2) where the control is required by an emergency; or (3) where the control is related to a genuine governmental interest. Nebbia v. New York extended the Block rationale by holding that private property could be regulated — even though its value would diminish — provided a bona fide governmental interest was sought to be protected. The Nebbia Court upheld a New York statute regulating milk prices, even though the controls were to be in effect for a long

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172. U.S. Dep't of Housing and Urban Development, Circular HM 7475.8, at 5, Jan. 27, 1972. The notice provides for reduction of cash reserves to 40 per cent of the authorized maximum. Id.

173. U.S. Dep't of Housing and Urban Development, Circular HM 7465.10, Mar. 16, 1971. The definition of what constitutes income has a significant effect on actual revenues due the LHA. The transmittal notice from HUD provided for deductions, including a five per cent standard deduction, medical expenses, occupational expenses, non-recurring income and personal exemptions. Id.

174. 42 U.S.C. § 1410(g) (1970). The statute now requires relocation services by the LHA for persons who no longer qualify and emphasizes the requirements for a hearing if eligibility is to be determined. Id.

175. Id. §§ 1410(a), (b). If the operating deficits that result from the reduced rental income are made up by federal subsidies, the rent for public housing subsidies will never exceed more than 25 per cent of the income of qualifying persons. Embry Interview, supra note 18. However, the rental cost to tenants prior to the ceiling had sometimes reached 50 per cent of their total income. Id.

176. Cf. California Teachers Ass'n v. Newport Mesa School Dist., 333 F. Supp. 436 (C.D. Cal. 1971). In this case, certain California teachers sought to enjoin the application of the 1970 Economic Stabilization Act to wage increases negotiated before the Act "froze" wages. The court rejected the argument that imposition of the freeze would constitute an illegal confiscation and upheld the application of the Act. In reviewing the petitioners' fifth amendment challenge, the court noted that "[w]hile [the fifth amendment] does forbid the taking of property or the deprivation of it without due process, the prohibition refers only to direct appropriation of an individual's property." Id. at 443. The court also held that the indirect contract impairment was valid, since it was balanced by a legitimate and overriding governmental objective in controlling inflation. Id. at 444.

177. 256 U.S. 135 (1921).

178. The Block decision was made in the aftermath of World War I, and the emergency legislation placing rent ceilings on properties in Washington, D.C. was limited to a two-year period. The Court characterized the governmental interest as important enough to justify some degree of public control. Id. at 156. The Court found that the statute did not "go too far" in that "[m]achinery is provided to secure the landlord a reasonable rent." Id. at 156-57. See Comment, Residential Rent Control in New York City, 3 COLUM. J.L. & Soc. PROB. 30 (1967).

period of time and were not in response to any particular emergency. In holding that the statute was not confiscatory, the *Nebbia* Court concluded:

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute... Equally fundamental with the private right is that of the public to regulate it in the common interest.\(^{180}\)

After one accepts the right of the government to intervene in the public interest, the major issue in regulation is a determination of the limits within which this control may be exercised. The courts have repeatedly found ways to rationalize forms of governmental regulation even where financial injury would inure to the regulated party. In *Bowles v. Willingham*,\(^{181}\) the Court upheld certain rent control provisions of the Emergency Price Control Act of 1942\(^ {182}\) and concluded:

A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power.

\[\text{W}e\] need not determine what constitutional limits there are to price fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort... A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.\(^ {183}\)

Since *Bowles*, several courts have examined the effect of rent control legislation which has severely limited the extent of the landlord’s return, and the courts have consistently upheld their constitutionality,\(^ {184}\) even though the rent ceiling might have forced the landlord to operate at a loss.\(^ {185}\)

In applying prior case law to the constitutional claims of the LHA's, it must be remembered that although these claims arise during an economic crisis\(^ {186}\) and that the governmental restrictions imposed by the Housing Act are in the public interest,\(^ {187}\) the contended effect of the ceiling is

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180. *Id.* at 523.
183. 321 U.S. at 518–19.
185. *See* Treal Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884 (1950). The *Treal* court found that since a rent control act was enacted during a period of emergency, it could remain in operation after the emergency ceased, even though it forced the landlord to operate at a loss. *Id.* at 352, 93 N.E.2d at 890. *See* Comment, *supra* note 178, at 39–40 & nn.107–14.
not simply a reduction of income, but the creation of insolvency. There has been no indication that the rent ceiling is temporary, and its effects are not limited to a few members of the affected class, but extend to approximately 250,000 of the 1,000,000 units now operating.\textsuperscript{188} The present application of the rent ceiling to LHA's without the provision of subsidies, arguably, goes beyond prior court holdings since it threatens the survival of the LHA's, the very means chosen by Congress to achieve the legislative purpose of low-income housing. The irony is that when combined with adequate subsidies, the rent ceiling supports the purpose of making housing available to the lowest income groups.\textsuperscript{189} Consequently, to the extent the LHA's seek removal of the ceiling to remain solvent, the interests of low-income housing tenants conflict with those of the LHA.

Even if the effects of the rent ceiling do not give the LHA's a basis for having that portion of the Act declared unconstitutional as confiscatory, it may provide additional leverage to force HUD to meet the entire subsidy needs as occasioned by the effects of the rental ceiling.\textsuperscript{190} Absent an infusion of adequate funds within a reasonable period of time, it is likely that operational deficiencies\textsuperscript{191} will engulf the LHA's.

The LHA's dilemma is increased significantly by attempts of the federal government to impose regulations and procedures which it feels the public interest demands. Many of these regulations have at least an indirect impact on the operating costs of the local authority.\textsuperscript{192} In \textit{Thorpe v. Housing Authority},\textsuperscript{193} the Court upheld the validity of a HUD circular requiring certain eviction procedures, including notice, private conferences, and record keeping, because it felt that such practices had a "minimal effect" on the local authority's operation.\textsuperscript{194} The Court concluded, however, that any HUD directives which derogated \textit{substantial} contract rights would be invalid.\textsuperscript{195} The \textit{Thorpe} Court found that under the questioned circular, the respective obligations of both HUD and the housing authority under the annual contribution contract remained

\textsuperscript{188} Telephone interview with Alex Hewes, Staff Member of the Senate Committee of Banking, Housing and Urban Affairs, Washington, D.C., Sept. 21, 1972.

\textsuperscript{189} See text accompanying note 51 \textit{supra}.

\textsuperscript{190} See notes 19-21 & 34 and accompanying text \textit{supra}.

\textsuperscript{191} Such operational deficiencies may also arise from a reduced market for LHA bonds, reluctance of local political subdivisions to maintain former levels of "in lieu payments," and reduced maintenance and upkeep. See Rapaport, \textit{The Housing Crisis}, 26 Record of N.Y.C.B.A. 440 (1971); Rosenn, \textit{Controlled Rents and Uncontrolled Inflation: The Brazilian Dilemma}, 17 Am. J. Comp. L. 239 (1969) (examines the difficulties in eliminating rent controls once instituted); Comment, \textit{The Rent Restriction Law of Northern Ireland}, 22 N. In. L.Q. 99 (1971).

\textsuperscript{192} See, e.g., U.S. Dep't of Housing and Urban Development, Circular HM 7465.6, Aug. 10, 1970, in which HUD required the elimination of certain clauses thought to overreach the rights of tenants, including exculpatory clauses and waivers of the right to appeal.

\textsuperscript{193} 393 U.S. 268 (1969).

\textsuperscript{194} \textit{Id.} at 278-79.

\textsuperscript{195} \textit{Id.} at 279.
essentially unchanged, and refused to enjoin the application of the circular to the LHA. The implication of the Court that direct changes in the contribution contracts by the administrative agency would be invalid is important to the LHA. Unless this implication in *Thorpe* is valid, HUD can directly affect the survival of LHA's by indirect means, including regulation of income computation, reserve accumulations, and admission criteria. Consequently, if the courts refuse to limit HUD's unilateral imposition of new conditions on the annual contribution contracts, the statutory mandate of local control seems, at best, the worst part of an illusory contract.

Notwithstanding the language of the Act placing reliance on local control, the rationale underlying the commitment to local control in the Housing Act is probably no longer valid. Prior to 1937, lower federal courts uniformly held that the federal government had no right of eminent domain within the states for the purpose of low-income public housing. In *United States v. Certain Lands in City of Louisville*, the Sixth Circuit held that, although the National Industrial Recovery Act attempted to foster low-cost housing and slum clearance, it did not authorize the federal government to exercise eminent domain. The Sixth Circuit also noted the possible invalidity of the Act as an unconstitutional delegation of the legislative power because there were no adequate standards to control federal land acquisition. The reasoning of the dissent in that case foretold developments which are beginning to emerge today in the LHA controversy. It stated that the standards in the Act were sufficient; that Congress had the power of taxation to provide for the general welfare within article I; that the goals of slum clearance and provisions of low-cost housing were of national scope; and that the existence of a similar power in the states did not preclude the

196. *Id.* at 277-78. The Court noted:
A far different case would be presented if HUD were a party to this suit arguing that it could repudiate its obligation under the annual contributions contract because the Authority had failed to apply the circular.

197. *Id.* at 279 n.33. *Cf.* Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).

198. *See* United States v. Certain Lands in City of Louisville, 78 F.2d 684 (6th Cir. 1935); United States v. Certain Lands in City of Detroit, 12 F. Supp. 345 (E.D. Mich. 1935). *See also* Franklin, *supra* note 13, at 63, wherein the author stated that the initial undercutting of federally built and operated public housing caused the Government to abandon plans for such construction until initiating temporary federal efforts during the war.

199. 78 F.2d 684 (6th Cir. 1935).

200. Act of June 16, 1933, ch. 90, §§ 201-20, 48 Stat. 200. The Act authorized the presidential appointment of an administrator to develop low-cost housing and to participate in slum clearance either by cooperation with local political subdivisions or through federal construction, including utilization of the power of eminent domain.

201. 78 F.2d at 687. "In the exercise of its police power a state may do those things which benefit the health, morals, and welfare of its people. The federal government has no such power within the states." *Id.*

extension of such power to the federal government under the general welfare provision in the Constitution.\textsuperscript{203}

Although the administrative pattern for public housing had already been established, the later case of \textit{In re United States}\textsuperscript{204} distinguished \textit{Louisville} and concluded that the \textit{Louisville} decision turned on the indefiniteness of the plan for slum clearance. The court relied on two landmark Supreme Court cases, \textit{Steward Machine Co. v. Davis},\textsuperscript{205} and \textit{Helvering v. Davis},\textsuperscript{206} decided subsequent to \textit{Louisville}, and upheld the power of Congress to tax for the general welfare where that welfare involved national as well as local problems.\textsuperscript{207} The court adopted the presumption created in \textit{Helvering} that the definition of the general welfare is entrusted to the discretion of Congress and is presumed correct "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."\textsuperscript{208} In light of the present day presumptions in favor of the congressional power to determine what is a permissible public purpose for governmental intervention, it is almost certain that if Congress declared that the low-cost public housing objectives of the Housing Act could best be achieved by the use of federally controlled projects, the courts would uphold that power. In fact, the first steps to accomplish such intervention were taken by certain proposed modifications to the Housing Act in 1971. As set forth by Senator Brooke, these modifications would:

[\textit{P}]ut in motion a program to identify "housing emergency areas" and provide direct Federal provision of housing in these areas. These "housing emergency areas" would thereafter be defined as areas where a substantial number of low- and moderate-income families reside or work, who need housing, and where there is no sponsor willing to provide such housing.\textsuperscript{209}

It has been suggested that such centralized administration would: (1) permit allocation of low-income public housing units on the basis of need

\textsuperscript{203} 78 F.2d at 689 (Allen, J., dissenting). The dissent cited Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and the position taken therein that a congressionally declared public purpose is to be narrowly reviewed by the courts. 78 F.2d at 690. The dissent went on to cite other uses of the power of eminent domain which had been permitted to the federal government, including the taking of land for irrigation and construction of an aerial tramway. \textit{Id. See} Keyes v. United States, 119 F.2d 444, 448 (D.C. Cir. 1941), which upheld the power of the federal government to undertake slum clearance, assuming that it exercised the powers of a state within the District of Columbia.

\textsuperscript{204} 28 F. Supp. 758 (W.D.N.Y. 1939). \textit{See} Oklahoma City v. Sanders, 94 F.2d 321, 327 (10th Cir. 1938), which held that the federal taking of public lands for low-cost housing was a public use, a finding in opposition to that in \textit{Louisville} on similar facts.

\textsuperscript{205} 301 U.S. 548 (1937).

\textsuperscript{206} 301 U.S. 619 (1937).

\textsuperscript{207} 28 F. Supp. at 764.


rather than local political receptivity;\textsuperscript{210} (2) circumvent certain local social pressures; and (3) reduce administrative overhead.\textsuperscript{211} Certainly, administrative centralization would reduce certain double management systems required when both local and federal authorities try to administer the projects. Similarly, the establishment of a definite system for funneling tax revenue would reduce administrative waste by giving total control to the local authority.\textsuperscript{212} Thus, a justification could be made for a shift in congressional focus to supplant the LHA as a means of achieving the goals of low-income public housing and to reformulate the Housing Act's approach by vesting primary responsibility in regionalized authorities operated by the federal government. All of these steps are arguably achievable under the police power of Congress and under its constitutional powers to tax and spend for the benefit of the general welfare of the nation.\textsuperscript{213} Yet, the whole concept of federal revenue sharing stands in stark contrast to the efficiencies of federal regionalization of local housing authorities. Although the Revenue Sharing Act provides for reallocation of federal monies where a state government assumes local governmental expenditures\textsuperscript{214} and where governmental reorganization occurs,\textsuperscript{215} its entitlement mechanisms favor local splinter attacks on problems rather than attacks encompassing larger geographic areas. Observing the history of the LHA as a mechanism for problem solving, it is conceivable that major conflicts will arise as regional and national solutions for problem solving collide with locally controlled programs under the new federalism.

VI. Conclusions

This Comment's analysis of the intragovernmental power relationships under the current public housing law began with a recognition that the LHA's can obtain court enforcement of the annual contributions contracts only after a determination is made that some party has the requisite standing to be heard in court, that sovereign immunity does not bar the suit, and that the disputed contracts and their statutory authorizations are reviewable by a court and are not solely within agency discretion. As examined, the local housing authority dilemma draws attention to the processes required to set judicial action in motion when the acts of federal

\textsuperscript{210} See Franklin, supra note 13, at 70 n.11.

\textsuperscript{211} Id. at 77 n.23. The author noted that recently in England several thousand authorities were consolidated into less than one hundred with substantial cost savings and administrative efficiencies. Id.

\textsuperscript{212} See text accompanying notes 122-23 supra. The requirements for supervising a national information system to provide data on mobility, characteristics, numbers of tenants occupying units, and service needs, are distinctly different from the data required for day-to-day management decisions in the local authority. Consequently, data collection in HUD, which depends on information received through local authorities, is grossly inadequate to meet the larger needs of HUD and Congress for national planning. Shaw Interview, supra note 9.

\textsuperscript{213} See U.S. Const. art. I, § 8.


\textsuperscript{215} Id. § 108(d) (6).
officials are being reviewed by federal courts. The complexities of obtaining remedies are heightened by the interplay of the rights of low-income tenants and bondholders who are affected by the federal-local contracts — this is particularly true where the larger objectives of the federal program depend on maintaining public confidence in the continuity of federal support allocated to it.

In reviewing the power of the executive branch to exert control and formulate policy by withholding appropriated funds, this Comment has acknowledged those cases which hold that Congress has the power to create laws which expressly authorize governmental officials to serve as “congressional” agents. Those cases indicate that such congressional delegations, when not within the political sphere of action specifically reserved to the President, require that the governmental officer be held accountable to the statutory mandate. Although primitively defined, this concept assumes that the strength of congressional policy making and program development must depend on more than the impractical powers of impeachment or political negotiation.

Since the creation of the Housing Act of 1937, the actions of courts and Congress portend direct governmental intervention to resolve national housing problems. At the same time, however, Congress and the President have undertaken massive efforts to share the federal revenues with local governments. Although the Revenue Sharing Act uses more specific allotment formulae to establish entitlement than the Housing Act language used to mandate operational subsidies, the difficulty of finding reviewable standards for detailed federal-state contracts controlling the administrative agency authorized to administer the funds is the same. The response of the courts to the appeals of the LHA's may play a significant role in establishing important ground rules for the allocation of intergovernmental power in future federal revenue sharing and other congressionally created programs. The judicial response is, however, of significant immediate concern. It will determine whether low-income tenants, already facing a housing crisis, will see the dissolution of present public housing accommodations despite the declared purpose and intent of Congress to meet their housing needs.

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216. See notes 112–17 and accompanying text supra.
217. See notes 85–88 and accompanying text supra.
218. See notes 89–91 and accompanying text supra.
219. See notes 142–45 and accompanying text supra.
220. See notes 143–49 supra.
222. Id. §§ 106-08.