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The Guru Is In

After the Eviction Moratorium

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MAY 28, 2021 5 MIN READ

Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not.

– US District Court for the District of Columbia, May 5, 2021

When the Centers for Disease Control and Prevention (CDC) announced last August that it was declaring a nationwide moratorium on all rental evictions, not just those in federally subsidized properties, I instantly thought, *That's unconstitutional. Somebody will sue the government and it'll get overturned*. Sure enough, on May 5, 2021 the U.S. District Court for the District of Columbia (DC for DC) did just that, and a good thing too, because well-met laws intended to offer short-term relief frequently do long-term damage – as I know from personal experience.

On the last day of the 1987 legislative session, Congress accepted a last-minute amendment to the Emergency Low Income Housing Preservation Act (ELIHPA) that prohibited owners of Department of Housing & Urban Development (HUD) affordable multifamily rental housing from prepaying their mortgages. Doing so would automatically cancel their regulatory agreements and enable them to charge market rents. Shortly thereafter, ELIHPA was slurped as a separate title into an otherwise uncontroversial Housing and Community Development Act, and signed into law on February 5, 1988.

When I heard about this, I said instantly, "That's unconstitutional."

I'd first written about the inherent economic residual value of existing affordable housing, and in 1981 published an article laying out how to use this to revitalize properties. Over the next two years, I developed resyndication (as I dubbed it) into a business, and in 1983 and 1984, the syndicator where I was the youngest partner did a large volume of quality resyndications, helping refresh properties that needed facelifts or personality transplants. ELIHPA's conversion moratorium breached those HUD contracts on the grounds of a 'national emergency' shortage of affordable housing, offering a procedural remedy with no new money to fund it, no guarantee of equitable treatment, and no way out.

Executive branches tend to respond to real or perceived emergencies with sweeping executive action, and without the courts to curtail the overreach, the emergency can become permanent. In

1935, for instance, the Supreme Court declared unconstitutional Franklin D. Roosevelt's signature New Deal legislation, the National Industrial Recovery Act of 1933, and with it the National Recovery Administration.

Though ELIHPA's advocates observed that the prepayment moratorium was time-limited, my experience living in Cambridge belied that. The citywide rent control enacted in 1970 as a 'temporary, emergency measure' in 1970 had, far from fading away, by 1987 progressively tightened its strangler-fig grip on the market. It showed no signs of leaving, acting instead as a neck tourniquet on Cambridge's housing supply and becoming an unending political bruise that raised tensions and killed innovation or reform.

Relying on ELIHPA to sunset was naïve, I told a 1988 San Diego affordable housing national conference, whereupon someone in the audience said loudly, "Somebody ought to sue the government." That is what I did, and 23 years later, on November 20, 2020, that's what two property owners did as well.

Though only a district court, DC for DC is the venue of choice for challenging regulatory overreach, and Judge Dabney L. Friedrich's 20-page decision was written in anticipation of both its national significance and the potential for appeals. A cogent primer on the relevant constitutional jurisprudence surrounding regulatory takings, it's also a convincing demonstration that the CDC's moratorium was unconstitutional and hence had to be overturned. The judge rejected the CDC's arguments with both careful reading of its range of authority under §361 of the Public Health Service Act of 1944 and a common-sense public-policy rebuttal:

[A] nearly unlimited grant of legislative power to the Secretary would raise serious constitutional concerns. …Under [the CDC's] reading, so long as the Secretary can make a determination that a given measure is 'necessary' to combat the interstate or international spread of disease, there is no limit to the reach of his authority.

Though as I've previously written, eviction is a terrible thing, to be avoided whenever possible, overreach to protect often causes unintended damage. For every small-rental household who was helped by the pandemic moratorium, there was a small-owner-landlord who was harmed. Far from being fat cats, these small landlords (34 percent of them over 65), who comprise nearly 47 percent of all multifamily units nationwide, often mirror their tenants, as shown by an Urban Institute August 2020 study: "Small rental units have the largest share of owners of color…13 percent Black, 15 percent Hispanic."

As the court has now concluded, that is a taking of private property rights without due process or just compensation, and more relevantly for us, it is bad policy, because eviction freeze for tenants conveys no mortgage-payment freeze for owners, penalizing them for something they had no hand in causing.

If Congress concludes renters need relief, Congress should fund that relief, not foist it via ukase onto those who are in financial peril themselves. Compensating small landlords for their documented losses from eviction deferral is the least the Administration and Congress should do.