

The Breakfast Club

Constitutional Minute for 7 September 2021

Can the Federal Government Impose a Moratorium on Evictions?

In case you don't want to read to the end, the answer is no, not constitutionally. But let's be sure we know why.

First the background: In March of 2020, Congress passed the *Coronavirus Aid, Relief, and Economic Security Act* (The CARES Act), a \$2.2 trillion "economic stimulus" bill. It was signed into law by President Donald Trump on March 27, 2020. Most people focused on the \$1200 per person one-time payments to be given to every taxpayer (more to families with children). Buried deep in the bill was an ordered moratorium on foreclosures of defaulted federally-backed mortgages and a moratorium on evictions from any rental properties that participated in federal assistance programs, or had a federally backed mortgage or multifamily mortgage loan. One estimate concluded that the eviction moratorium covered 28% of all rental units in the United States. The moratoriums were for designated periods of 180 days (mortgages) and 120 days (rental evictions). Mortgage holders and rental owners objected, as they should. Nowhere in the Constitution is Congress given the authority to infringe on private contracts (which both mortgages and rental agreements are). This lack of authority obviously didn't deter Congress.

After the moratoriums expired, the CDC took up the baton. It issued an order entitled "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19." The order imposed a broader eviction moratorium than even that of Congress, one that prohibited eviction of all "covered persons" without regard to whether the rental property in question relied on federal funds or loans. This halt was effective through December 31, 2020. The CDC's rationale was that the order was necessary to facilitate self-isolation, support state lockdown orders, and prevent evicted citizens from congregating in homeless shelters, etc.

The CDC claimed its authority was found in the Public Health Service Act of 1944,¹ which authorized the Secretary of Health and Human Services to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." Under the Act, the Secretary can "provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." See anything about eviction moratoriums there? I didn't think so.

¹ 42 U.S.C. § 264(a).

Tiger Lily, LLC, a company that owns and manages rental properties, filed suit in district court and easily won. The court found that 42 USC §264(a) does not authorize the CDC to implement a nationwide eviction moratorium. The Court ordered the CDC to halt “The Halt.” The government immediately appealed and requested the appeal court issue an emergency stay pending the appeal. The stay was denied. About the same time, the Alabama Association of Realtors filed suit against HUD, which was enforcing The Halt. The District Judge for the District of Columbia reached a similar conclusion: the law in question did not give the CDC the power to order an eviction moratorium. But notice that the cases did not ask a constitutional question, only whether the law in question provided the CDC the power they employed. The Alabama Association of Realtors decision was appealed and that appellate court, although agreeing with the decision, issued a stay which allowed the moratorium to remain in place pending the appeal. The Supreme Court was asked to vacate the stay and declined.

The MSM and commentators claimed that the Supreme Court “ruled” that the moratorium was unconstitutional. They did no such thing, their decision simply affirmed that the CDC did not have the power they claimed the law gave them. But the Court declined to stop the moratorium on the preposterous basis that it was due to expire in a few weeks. Justice Brett Kavanaugh, writing for the court, stated: *“In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.”* Really? Congress can give HHS a power the Constitution itself does not give it?

Two Constitutional questions could have been raised: the “Takings” clause of the 5th Amendment and the “Due Process” clause of the 5th Amendment. Anytime someone is deprived of the use of their property as they see fit, it has essentially been taken from them. But the “takings” clause only covers property taken for a public use; this “taking” was not for that purpose. But the mortgage and rental owners were definitely deprived of due process — there was none at all; they (and the other plaintiffs) were deprived of the use of their property simply by the CDC ordering that they could evict no one who failed to pay them rent.

The biggest disappointment in all this was that the Supreme Court punted and missed the perfect opportunity they had to announce that the moratorium was unconstitutional under the Due Process Clause of the 5th Amendment. Part of the blame probably sits on the plaintiffs, who based their complaint on the limits of the 1944 law and not the Constitution.

Sometimes you have to ask the right question to get the right answer.

Note: I am indebted to Paul Engel of [The Constitution Study](#) for the initial exploration of this issue.

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