

FEE Foundation *for* Economic Education

On Eviction Moratorium, Progressives' Beef Is With the Constitution—Not the Supreme Court

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The Supreme Court and the White House appear headed for a showdown.

On Tuesday, the Centers for Disease Control and Prevention (CDC) announced it would renew a moratorium on evictions, a policy that was set to expire and end a 15-month ban — flouting the Supreme Court and contradicting claims from the Biden Administration that it could not act without Congress.

The move, which revised and extended the moratorium to October 3, probably pleased the folks at Slate who ran a recent article with the headline “The Supreme Court Caused the Looming Eviction Disaster. Why Won’t Democrats Say So?” A tweet that appeared alongside it said that Democrats had not yet learned to explain that the Supreme Court routinely crushes their policies.

The article focused on Congressional Democrats’ failed efforts to extend the federal eviction moratorium legislatively, which the US Supreme Court recently signaled would be necessary after July 31.

The Policies of the Past 15 Months

Since the beginning of the pandemic, a mixture of federal policies have allowed people to stay in their rentals without paying rent. Landlords who violated the moratorium faced hefty fines and even potential jail time.

The scheme started with Congress in March of 2020 when the legislature passed an eviction ban that expired in August of the same year. Politicians had shut down businesses and forced people out of work, they reasoned, so it wasn’t right to kick them out of their homes if they couldn’t pay rent.

When that legislation expired, then president Trump issued an executive order asking the CDC to take action under an obscure law that says the CDC director “may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”

And in September of 2020, the CDC did just that, despite concerns expressed from some corners.

“[The policy] essentially nationalizes millions of private rental properties and strips landowners of their basic rights” FEE’s Brad Polumbo wrote at the time.

This move concerned anyone with even the faintest respect for our institutions, the rule of law, and property rights. Unelected bureaucrats should not set national policy—especially one that essentially nationalizes people’s private property.

Constitutional law professor and Cato Institute scholar Josh Blackman blasted the move at the time writing, “All of these measures are localized, and limited to prevent the spread of an infection in a single building or location. None of these examples are even remotely close to a nationwide moratorium on evictions. This action is far beyond the scope of delegated authority.”

Senator Pat Toomey (R-PA) said, “If the CDC has the authority to force landlords to effectively give away their product for free, I don't know where that ends. Can General Motors be forced to give people cars unless they otherwise crowd into subways?”

Senator Rand Paul (R-KY) said, “It's dangerous precedent and bad policy,” while Rep. Thomas Massie, a libertarian-leaning Republican from Kentucky, blasted the CDC in a series of tweets:

The CDC’s initial order expired at the end of 2020, but Congress rallied to pass an extension through the end of January 2021. Since then, the agency has continued to issue other extensions, pushing the moratorium out to July 31, and now October 3.

The Court

Property owners have been left with little recourse throughout this ordeal and little hope that their elected leaders would stand up for the rule of law or their rights. Many turned to the final branch of government with the authority to step in: the courts.

A group of landlords mounted a legal challenge, arguing the CDC’s order exceeded its authority. That case was the one that began to gain traction out of thousands, and it eventually worked its way up to the US Supreme Court on appeal. Upon review, four of the justices sided with the plaintiffs and agreed the ban should be overturned, five voted to keep it in place with one (Justice Brett Kavanaugh) stating he believed an act of Congress would be required to extend it past the July expiration.

Biden’s White House indicated they were not interested in challenging the court on this and urged Congress to act. But it would seem there was a change of heart at the eleventh hour.

Recent remarks made by Biden indicate that he *knows* the renewal will not stand up in court, but excuses it on the grounds that it will buy renters some time until it is struck down.

"Constitutionally, the bulk of the constitutional scholarship says that it's not likely to pass constitutional muster," Biden admitted Tuesday.

What Comes Next

And so we find ourselves 15-months into an eviction ban, during which time it must be said tenants have had ample opportunity to replace income streams—especially considering the millions of unfilled jobs at the moment.

The eviction moratorium was always very bad public policy that eroded property rights, destabilized the housing market, and stood on very shaky legal ground. It has also hurt a lot of people who still have to pay their mortgages despite a loss of rental income over those 15 months.

And yet there are many, including the author of the aforementioned Slate article, who believe voters should be outraged over the Supreme Court's attempt to enforce the Constitution.

From the article: “This refusal to criticize the court is nothing new for Democrats. While Trump spent four years bashing an array of judges, Democratic presidents take pains to avoid overtly condemning the federal judiciary. Their hesitation to take on the courts has created a political hazard: Democratic voters do not appear to understand that the Supreme Court routinely quashes their preferred policies.”

Hear me out here. Maybe the Democrats' “preferred policies” are blatantly unconstitutional and undemocratic.

A Civics Review

The Supreme Court's primary function is to act as a check and balance on the other two branches of government, the executive and the legislative. This is to ensure that our fundamental rights are not violated by those in power and government does not exercise powers it does not possess. When the executive branch is directing its unelected agencies to take actions that violate the rights of millions of people, even after the Supreme Court indicated it would be unlawful, it is imperative that the legislature and/or courts step in to right the wrong.

The CDC is accountable to none of us. We cannot vote them out. We cannot petition them. And our lawmakers have proven time and again that they are uninterested in actually carrying out the duties of Congress to act as a check on unbridled power. The judiciary is the only branch of our federal government still operating in some semblance of its mandated role, and it ought to react swiftly to the Biden Administration and the CDC so blatantly flouting our rule of law. A legal challenge rapidly responding to the renewal offers an opportunity to do so. As *The Wall Street Journal* reports:

“A group of property managers and realtors lodged objections in a Washington federal court to the new moratorium late Wednesday. The same plaintiffs, supported by the National Association of Realtors, challenged the previous moratorium, alleging the Centers for Disease Control and Prevention lacked legal authority to issue it.

Rather than file a fresh lawsuit challenging the new moratorium, the plaintiffs submitted an emergency motion in their previously filed case, asking a judge to apply a ruling against the last eviction ban to the new CDC effort.”

If Democrats realize the Supreme Court regularly overturns their major policies it ought to be a wake up call that the party and its leaders are trying to operate outside the confines of their Constitutional authority and trample the rights of the people. These are the same people who claim to love democracy, yet what they are actually seeking to do with the reinstatement of the eviction moratorium is overturn our democratic processes.

Their problem is with the Constitution, not the Supreme Court.