

Analysis: Judge or Legislator?

SUMMARY:

Last week, the Supreme Court issued an order related to an eviction moratorium put in place by the United States Department of Health and Human Services (HHS) in response to the COVID-19 pandemic. The order was a technical procedural issue, and was issued amidst a number of other decisions coming from the Supreme Court, so it managed to go largely unnoticed. But the outcome—more specifically Justice Kavanaugh’s stated reasons for reaching that outcome—could be read as a sharp break from how judges are supposed to conduct their business.

BACKGROUND:

Last year, HHS issued an order prohibiting nearly every landlord in the country from evicting tenants, claiming that evictions would contribute to the spread of COVID-19. Two landlords affected by this moratorium and two trade associations sued the government, arguing, among other things, that in issuing the order HHS exceeded authority given to it by Congress. The district court agreed. But the district court left the HHS order in place, on the theory that, where the government is involved, stays should be issued where the case involves “a serious legal question.” The plaintiffs appealed the stay, but the appeals court declined to lift it. Importantly, it did not decline to lift the stay because the case involved a serious legal question, but because it thought the district court got the issue wrong, and that the CDC order was legal.

That decision was then appealed to the Supreme Court. By a vote of five to four, the Supreme Court declined to lift the stay, with Chief Justice Roberts and Justice Kavanaugh voting with the justices appointed by Democratic presidents.

Justice Kavanaugh is the only Justice who wrote a statement explaining his decision. He agreed “that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium.” But he still chose to leave the stay in place. In Justice Kavanaugh’s thinking, this outcome was supported by policy reasons, mainly that keeping the stay in place would allow time for certain rental assistance funds to be distributed, and the moratorium was set to expire in a few weeks anyway.

ANALYSIS:

Put simply, Justice Kavanaugh was acting like a legislator, not a judge. Once he determined that HHS was acting outside of its authority, that should have ended the

inquiry. The district court's stay was based on the fact that the case raised a serious question of law. Implicit in issuing a stay in that circumstance is that the ruling may be reversed on appeal, including by the Supreme Court. But the trick with being a Supreme Court justice is that you cannot be reversed on appeal. Once Justice Kavanaugh determined that HHS acted illegally, and that the party seeking the stay would suffer injury if the government continues to act illegally, the matter should have been over.

What's worse, his decision, *and the fact that he explained it this way*, does harm beyond those who are adversely affected by the moratorium. Justice Kavanaugh undermined the authority of the court by exposing it as a body that weighs policy considerations when reaching legal conclusions. That balancing is left to the political branches of government for good reason, in part because there is no limiting principle. Taking policy into account opens the door to all kinds of judicial mischief. Nothing will stop a future court from using Justice Kavanaugh's reasoning to bless future illegal action by the government because acting illegally will further some other policy goal that the judge or justice finds important.

And, his decision directly undermines the rule of law by allowing to continue an act he has determined is illegal. The more courts refuse to enforce legal limits, the less power those legal limits have. Plus, there is little doubt that the government is being treated differently than a private citizen would be, making a mockery of the notion of equal justice before the law. If the landlords were illegally withholding taxes from the government the court would not—and should not—bless that because the landlords promised to pay in a few weeks and were putting the money to good use in the meantime. Illegal conduct is illegal conduct, and the judicial system should put a stop to it when it can.

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