

**On the Unconstitutionality of Executive Order 20-11**

**Date: March 24, 2020**

**Is Executive Order 20-11 an unconstitutional taking under the fifth amendment?**

Probably yes. Although Executive Order 20-11 does not mandate that landlords cannot evict tenants from the premises, it does prohibit law enforcement officers from acting upon any termination of a rental agreement. Therefore, Executive Order 20-11 destroys the possessory interests of the landowner, which constitutes a physical taking.

**ISSUE**

Executive Order 20-11 prohibits law enforcement officer from serving, acting on any notice, or any equivalent judicial action for any residential eviction that relates to nonpayment for 90 days starting on March 22, 2020. Plaintiffs seek to challenge Executive Order 20-11 for effecting an impermissible taking of their property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. In determining whether there was a taking requiring just compensation, the court must determine whether there is a physical invasion or a deprivation of any economic use.

**RULE**

In determining whether an impermissible taking has occurred, “the court must resolve two questions:

(1) Did the governmental action amount to a taking of property? *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984); *see also Lucas v. S.C. Coastal Council*, 505 US 1003, 1015 (1992).

(2) Was there just compensation? *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

Under the first prong, the Supreme Court in *Lucas* observed that takings claims fall into two distinct categories: The first “encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. Generally . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.” *Lucas v. S.C.*

*Coastal Council*, 505 US 1003, 1015 (1992). The second is where regulation denies all economically beneficial or productive use of land. *Lucas v. S.C. Coastal Council*, 505 US 1003, 1015 (1992) (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987)).

The government effects a physical taking when it requires a landowner to submit to the physical occupation of his or her property. *Yee v. City of Escondido, Cal.*, 503 US 519, 527 (1992). “[T]he element of required acquiescence is at the heart of the concept of occupation.” *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Moreover, to constitute a physical taking, the occupation need not be by the government, but may be an occupation by third parties under its authority. *Loretto*, 458 U.S. at 432-33 n.9. The Supreme Court in *General Motors Corp* outlined the three property rights in a physical object that a permanent physical occupation destroys “the rights to possess, use, and dispose of it.” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Therefore, if a permanent occupation destroys an owner’s “right to possess the occupied space himself, and also the power to exclude the occupier from possession and use of the space, then it denies an owner the “power to control the use of the property” and obtain a profit from it. *Loretto*, 458 U.S. at 436.

### ANALYSIS

Generally, a lease will focus on breach by the tenant. Events of default include, but are not limited to, the failure to pay rent or other amounts due under the lease. Most default provisions specify that written notice is required and that a breach will only be elevated to default status if the tenant fails to perform the required activity within a specified time.

This procedure ensures that the owner of the premises retains the right to possession of the property when a breach has occurred. Furthermore, this process protects the owners right to exclude tenants from the property if they do not fulfill their end of the bargain. Yet, Executive Order 20-11 allows a tenant to remain living in the residence for 90 days, regardless of whether they have paid their rent, fees, or overdue fees. As such, Executive Order destroys the possessory right held by the owner and is an unconstitutional taking under a physical invasion theory, unless just compensation is afforded.

The unconstitutionality of Executive Order 20-11 is supported by *Ross v. City of Berkeley*. In this case the court found that a Berkeley ordinance that prohibited owners from evicting tenants to obtain possession of their commercial property for their own use constituted a permanent physical

occupation.” *Ross v. City of Berkeley*, 655 F Supp 820, 837 (ND Cal 1987) (emphasis added.) The *Ross* Court relied upon *Loretto*, which distinguished valid landlord-tenant regulations from those which prohibit property owners from repossessing their property. “In none of these cases, however, did the government authorize the permanent occupation of the landlord’s property by a third party.” *Loretto*, 458 U.S. at 440. *Ross* noted that “[t]he *Loretto* Court therefore did not foreclose the possibility that a particular eviction control regulation could constitute a taking if it authorized a permanent occupation of the rented premises.” *Ross*, 655 F.Supp. at 837 n.17.

*Ross* holds that a physical invasion is present when a landlord is unable to evict a tenant from the owners’ premises. *Ross*, 655 F Supp 820, 839 (plaintiffs have suffered a taking through defendant lessees’ state-authorized permanent occupation of their property, and are thus due just compensation.). Here, Executive Order 20-11 states that law enforcement officers are prohibited from serving, acting on any notice, or any equivalent judicial action for an eviction that relates to nonpayment in a residential setting. Much like the holding in *Ross*, the Executive Order is an impermissible taking through a physical invasion because it removes the owners right to repossess their property.

The unconstitutionality of Executive Order 20-11 is further supported by *Seawall Associates v. City of New York*, where the court held that a New York ordinance requiring a property owner to rehabilitate and rent out “single-room occupancy” properties was both a *per se* physical and *per se* regulatory taking. 544 N.Y.S. 2d 542 (1989). The court further held that “the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a *per se* physical taking.” *Id.* at 104. The Court also noted that, “[b]y any ordinary standard, such interference with an owner’s rights to possession and exclusion is far more offensive and invasive than the easements in *Kaiser Aetna* or *Nollan* or the installation of the CATV equipment in *Loretto* . . . .” *Id.* at 104. The restrictions under this Executive Order are even more stringent than those employed in *Seawall*. The New York restriction in *Seawall* established a five-year moratorium on conversion, alteration and demolition of single-room occupancy housing and required owners to restore all units to habitable condition and lease them at controlled rents for indefinite period. Much like this moratorium, the Executive Order 20-11 not only requires law enforcement officer to halt any judicial action, but also forbids any cancelation of a rental agreement based on nonpayment. This blanket prohibition removes the right to exclude from the owner’s hands and places it in the tenants’ hands. As such, this is rendered a *per se* physical taking under a *Seawall* analysis.

Lastly, the unconstitutionality of Executive Order is supported by *Rivera v. R. Cobian Chinae & Co.* This case involved a Puerto Rico law that prohibited landlords “from recovering possession of their properties from tenants . . . when they desired possession solely for their own use and not for the purpose of re-renting to another tenant” and was held to be an unconstitutional taking. 181 F.2d 974, 978 (1st Cir. 1950), overruled in part, but not on takings issue, in *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991).

*Cobian Chinae* holds that a landlord can recover possession of their property regardless of whether they do so for personal purposes or re-renting to other tenants. At the core of this case, is the principle that a landlord is free to exclude a tenant from the property. As such, a restriction on this right is an unconstitutional taking. In Executive Order 20-11, law enforcement officers are prohibited from acting upon any eviction action, and more importantly, landlords are not able to terminate a rental agreement based on a nonpayment of rent. Their right to exclude a tenant from the premises is greatly burdened by the inability to terminate a rental agreement based on a material breach of the lease contract. Therefore, the removal of such right is going to be deemed as a taking under a *Cobian Chinae* analysis.

### CONCLUSION

Executive Order 20-11 removes all rights to possess, use, and dispose, because it does not allow an owner or a landlord to forcibly remove a tenant off of the premises even though they are in default of their lease. They no longer have the right to possess the property because they no longer have the ability to remove the tenant off of the premises and re-possess the property. Additionally, Executive Order 20-11 has removed the right to use the property from the landowner because they no longer have the ability to use the property as they see fit. Albeit a case by case situation, as *Cobain Chinae* demonstrates, a landlord can recover the premises for personal uses; thus, rendering any restriction of the right to use the property is in violation of the Takings Clause. Lastly, Executive Order 20-11 removes the right to dispose of the property because the landlord no longer has the ability to resell the property to other tenants during the 90 period because of the holdover problem. Tenants are not going to leave the property, even if in default. Landlords are then unable to resell the property to interested renters. This, in effect restricts the ability of the landlord to dispose of the property as they see fit.