REMAPPING DEBATE
Asking "Why" and "Why Not"

Foreclosure relief programs didn't have to be "just voluntary"

Commentary | By Craig Gurian | Banking, Housing, Regulation

June 8, 2011 — As most recently reported in The New York Times, the Obama Administration's foreclosure prevention effort "does include programs to help unemployed homeowners, but they have been plagued by delays, dubious benefits and abysmal participation." James Parrot, a senior advisor at the White House's National Economic Council, is quoted as saying, "We as an administration have limited levers." Saying that the decision as to whether to help was ultimately that of mortgage servicers and investors, Parrot explained that the government could only push those servicers and investors "on the margins."

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What the Administration won't say (and the article didn't say) is that a purely voluntary program was not the only way to go. Indeed, back in Nov. 2008, as was widely reported, "Frustrated federal lawmakers lashed out at financial companies" at a Senate Banking Committee hearing, and "threatened to impose greater restrictions on government aid."

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The idea that aid comes with conditions is hardly novel. Indeed, a day doesn't go by without calls for enforced austerity. Domestically, those calls are currently holding hostage a needed increase in the debt limit; internationally, austerity is invariably made a condition for the receipt of aid. In Portugal, for example, election results "giving the next government a strong mandate to enact a tough austerity program in return for [an] international bailout" were "expected to be welcomed by international creditors."

And the idea that the Treasury would require banks to implement foreclosure relief as a condition of receiving federal assistance was very much in the air as the Obama Administration took office. For example, a Jan. 9, 2009 report by the Congressional Oversight Panel — an entity established in the wake of the 2008 financial meltdown and headed by Elizabeth Warren — found the Treasury to be remarkably unresponsive when it came to questions of how to help homeowners.

Among the questions that the Oversight Panel had asked the Treasury Department were, "Why has Treasury not generally required financial institutions to engage in specific mortgage foreclosure mitigation plans as a condition of receiving taxpayer funds?" and "Why has Treasury required Citigroup to enact the FDIC mortgage modification program, but not required any other bank receiving TARP funds

to do so?” The Panel reported that Treasury offered no response.

In the spring of 2009, the House of Representatives approved legislation that would have permitted judicial modification of mortgages in the bankruptcy process, but the measure died in the Senate, with 12 Democrats joining all Republicans in bowing to the pressure of the bank industry.

Even without legislation, of course, an Administration has tremendous power through regulatory measures to exert very significant influence when it wishes to — especially on a highly regulated business sector.

And isn’t deploying leverage a basic principle of capitalism, taught every day, and enforced, for example, by the International Monetary Fund? Mightn’t more have been asked of the banks who were invited by the Fed to make a ton of money by coming to its discount window and carting away — virtually for free — billions and billions to invest for private gain?

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Yes, but.

In the end, the Administration doesn’t really want to use its leverage to require an effective response from the financial sector. It’s a principle akin to that dreamt up by the Supreme Court in its “federalism” jurisprudence. Though not found in the Constitution, a Supreme Court majority — ignoring the federal supremacy clause — invented a magical doctrine to limit the ability of individuals to seek relief against states who have violated federally-protected rights. It would be, the majority says, an affront to state “dignity” and “sovereignty” if the states were susceptible to suit.

All too many in Washington balk at effective regulation of the financial sector for equivalent reasons: forcing financial institutions to modify mortgages would be an affront to the dignity and sovereignty of banks. Bank sovereignty? That, too, is not in the Constitution, but we live with it every day.

Just ask the Administration.

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