REMAPPING DEBATE
Asking "Why" and "Why Not"

No negotiating with those who take constitutional authority hostage

Commentary | By Craig Gurian | Civil Rights, Federalism, Housing

December 21, 2010 — Opposition to lawful federal authority has had a long and ugly history, from South Carolina's secession 150 years ago this week, to massive resistance to integration in modern day America — in both the South and the North. The resistance is almost always framed in the language of a group whose rights are under siege, though, most frequently, the rights involved are actually nothing more than the desire to continue to exploit or abuse other Americans.

Calls to limit the power of a "usurping" federal government have grown in recent years in both frequency and intensity, but media coverage of these movements rarely takes a serious substantive look at the plain import of the doctrines being espoused. Instead, we're often treated to a description of the enthusiasm of "real" Americans who want to "bring some balance" back to American life. Perhaps, we're told, we're just witnessing harmless nostalgia for the "good old days."

But the consequences are very real. A government cannot function when there is open, deliberate, and organized violation of law. It ceases to be a government. Thus, it wasn't "just symbolic" when, in 1957, Arkansas Governor Orval Faubus questioned the authority of the federal courts and the legitimacy of desegregation. If President Eisenhower had not directed the deployment of more than 1,000 federal troops to escort nine African-American children to school — children whose attendance so deeply threatened the existing segregated order of Southern society — the white South would have been able to continue its domination of African-American citizens (thereby reprising its post-Reconstruction victory in the war it had originally lost to the Union), and the authority of federal courts would have been in tatters.

Can't happen now, right?

Well take a look at Westchester County — one of the official poster children for limousine liberalism — and it turns out that there is open, deliberate, and organized violation of a lawful desegregation order right now. And the Obama Administration is not lifting a finger.

From 2000 to 2006, the County received over $50 million in federal housing funds that were conditioned on Westchester's analyzing, identifying, and taking the appropriate steps to overcome barriers to fair housing choice.

But despite Westchester's representations to the federal government, the County, as a matter of policy, had done none of these things. ADC sued Westchester under the federal False Claims Act, a Civil War

era statute that was enacted to protect the federal government from fraud committed by its contractors (the provision is generally associated in the public mind with Medicaid fraud, but all contractor fraud is covered).

In 2009, a federal judge found for ADC, ruling as a matter of law that Westchester had "utterly failed" to meet its obligations to affirmatively further fair housing, and that every one of more than 1,000 representations of compliance had been "false or fraudulent."

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Westchester was (and is still) deeply residentially segregated. According to American Community Survey data released last week, 35 percent of the census tracts in Westchester have African-American populations of less than 3 percent (19 percent of the total have African-American populations of less than 1 percent). On the other hand, 11 percent of the tracts have African-American populations of more than 40 percent.

The 46 census tracts in Westchester with fewer than 3 percent African-Americans and fewer than 7 percent Latinos have a total population of approximately 220,000 people — almost a quarter of the County's total. Instead of the overall countywide composition of 13 percent African-American and 19 percent Latino, these enclaves combined have an African-American population of 1 percent and a Latino population of 6 percent.

This segregation was created through intentional conduct by a variety of actors in both the public and private sectors, and is maintained today by artificial zoning barriers that hinder the ability of developers to construct affordable housing. The heart of resistance? Local municipalities.

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The consent decree was designed to confront these powerful and continuing structures of segregation. At its core was a requirement to have as a goal in all its housing programs the ending of de facto residential segregation throughout the County. In terms of specific housing units that Westchester is obliged to have developed, these units are supposed to be selected for maximum desegregation potential, and Westchester must use the powerful tools it has at its disposal to confront and overcome local resistance.

Shortly after the entry of the consent decree, it became apparent that Westchester — then led by Democrat Andrew Spano — was going to deny, delay, and evade as much as it could. The federal government — and the monitor it selected — did nothing.

After Republican Rob Astorino became County Executive in 2010, resistance to the consent decree became more brazen. Contrary to the consent decree, the County did not (and still has not) submit-

ted an implementation plan that even comes close to being compliant. And the County Executive has repeatedly and publicly said flat out that he will not fulfill the consent decree obligation to sue resistant municipalities to force them to relax their exclusionary zoning policies. The federal government — and the monitor it selected — did nothing.

Actually, worse than nothing. For the last several months, Westchester and its municipalities have been playing a not very subtle game: how can we get housing units to "count" towards the consent decree requirement *without* making any structural change whatsoever. Let's make sure it's housing on land that abuts railroad tracks, hugs major highways, or is contaminated.

Let's try to say that housing is being developed on a block that has desegregation potential because it has no African-Americans or Latinos residents, but let's ignore the fact that the demographic composition is a function of there being *no residents on the block* (of any race or ethnicity) who are not living in what the Census Bureau describes as group quarters (a term that includes hospitals and other institutional facilities).

Let's try to get exceptions to the consent decree rules so that previously approved housing can be counted. Let's try to get around the consent decree's limitations on age-restricted units by announcing that housing that was in fact developed for seniors is now open to everyone (but let's not alter the design of any units to permit families with children).

And, most important, let's not acquire an interest in land so we can avoid being in a position to challenge municipal zoning restrictions. After all, if barriers to affordable housing development were to fall, the impact of the consent decree would be multiplied, and private sector affordable housing developers would want to develop even more such housing in what are currently the whitest areas of the County.

County Executive Astorino — following a long tradition in Westchester politics — even refuses to recognize the demographic reality of residential segregation that the County was forced to acknowledge in the consent decree.

It sounds like Alice in Wonderland, but we're talking about the processes of constitutional government being taken hostage. The Obama Administration and its monitor, sad to say, have chosen to negotiate, ignoring the first rule of federal court orders: orders are there to be obeyed, not massaged, altered, or ignored.

This negotiating with hostage takers has got to stop.

This content originally appeared at http://remappingdebate.org/article/no-negotiating-those-who-take-constitutional-authority-hostage