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The fourth branch of government is on its way to evicting Congress

George F. Will

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Washington's NFL team, until recently known as the Redskins, is seeking a less insensitive name, one appropriate for the nation's capital. The name should be: the Continuing Resolutions.

The eight syllables are clunky, but so is the federal government, which finds a fundamental task of governing — passing a budget — too arduous to do more than intermittently. Such heavy legislative lifting is generally too much for an election year. Or a year before an election year. And those are the only kinds of years there are.

The Senate Appropriations Committee has passed none of this fiscal year's 12 funding bills, so, to prevent the unseemliness of a government shutdown as Election Day approaches and as the pandemic death toll approaches 200,000, a continuing resolution will probably be passed by Oct. 1, the beginning of the next fiscal year. Treasury Secretary Steven Mnuchin suggests a CR enabling the government to keep on keeping on with things as they are "through the beginning of December." Then there probably will be another CR, to get the country to the next one.

Elsewhere in today's improvisational government, the Centers for Disease Control and Prevention's behavior has become notcatobly muscular. The CDC's name denotes a specific mission that this agency cannot be entirely blamed for not having altogether mastered. Controlling diseases involves medicines, social protocols (e.g., "social distancing") and, suddenly, a sweeping excision from property rights: The CDC has this month asserted a power to prohibit — through the end of 2020, but actually for as long as the CDC deems "necessary" — the eviction of private tenants from privately owned residences because of unpaid rent. This, even though eviction levels have been below normal during the lockdown.

The CDC's order protects tenants earning up to \$99,000 — almost quadruple the official poverty line of \$26,200 for a family of four. Or, for those filing joint tax returns, tenants earning up to \$198,000, who are in the top quintile of U.S. households. Tenants must inform their landlords in writing that they have sought government assistance, that they have lost income or received substantial uncompensated medical expenses, and that eviction would render them homeless or would result in their living elsewhere "in close quarters." Noncompliant landlords can be fined up to \$100,000 and incarcerated for up to a year.

Congress is, as usual, a bystander. A regulation promulgated by the executive branch grants vast — almost limitless, the CDC clearly thinks — discretion to an executive branch bureaucrat, the

CDC director, when acting to contain *any* “communicable” disease, such as a seasonal flu, spread by “infectious agents.” If the director deems state regulations “insufficient,” he or she 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, if today’s director is correct, the director is authorized to curtail some property rights and abrogate some contracts nationwide, to suspend some state laws and strip state courts of jurisdiction in eviction cases. The authority for this regulation is presumably — this presumption is the foundation of constitutional government — somehow traceable back to an implied (it certainly is not explicit) constitutional delegation of power. But how does this empower an executive branch agency to overturn state laws governing contracts?

As Josh Blackman notes, the six categories of actions that are enumerated in the regulation (inspections, fumigations, etc.) are narrow policies targeting specific anti-infection measures “in a single building or location.” Blackman, professor at South Texas College of Law Houston and adjunct scholar at the Cato Institute, notes that the CDC has lunged far beyond such measures, and beyond the principles of the separation of powers in the federal government, and principles of federalism in the allocation of federal and state powers.

The CDC presents all this as just another anti-infection protocol. Try, however, to imagine an activity or legal arrangement that the CDC, citing the regulation, could not overturn by fiat in the context of even a seasonal infectious disease such as the flu. Ilya Somin, law professor at George Mason University and another Cato adjunct scholar, notes: “Pretty much any economic transaction or movement of people and goods could potentially spread disease in some way.”

Come January — unless the fourth branch of government, a.k.a. the CDC, wants to extend the eviction moratorium — back rent will presumably come due. Then Congress, remembering that it is technically one of the branches, might recompense tenants who owe five (or more) months’ rent. If this can be tacked onto a continuing resolution.