The CDC's Eviction Moratorium Is Unconstitutional

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During the pandemic, many states halted residential evictions. Texas did not. The Lone Star State allowed landlords to use the legal eviction process to remove nonpaying tenants—until the federal government intervened. The Trump Administration, and now the Biden Administration, criminalized eviction. Yes, the Center for Disease Control and Prevention (CDC) made it a federal offense for a landlord to use the legal eviction process in state court.

That unprecedented executive action was premised on an inferential house of cards: if people are evicted, they will live in closer quarters, potentially spreading COVID-19. To avoid that speculative problem, the government banned landlords nationwide from using legal processes to remove tenants. The government literally made it a crime to file a petition in state court.

Lauren Terkel, a landlord in East Texas, challenged the CDC's edict. And a federal judge declared that this action went beyond the scope of Congress's enumerated powers. Cato agrees. We filed an amicus brief supporting Terkel before the U.S. Court of Appeals for the Fifth Circuit, joined by Professor Randy Barnett and the Reason Foundation, Individual Rights Foundation, and Independence Institute.

This case involves constitutional structures of vital importance to individual liberty: federalism and the separation of powers. The federal government simply lacks the power to regulate the process of eviction in state courts.

Under modern Supreme Court jurisprudence, Congress can rely on the implied power to regulate intrastate *economic* activity that, in the aggregate, has a substantial effect on interstate commerce. That so-called substantial effects test, however, does not apply to *noneconomic* activity. The Court has upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

The legal process of eviction is not economic in nature. An eviction cannot be produced, distributed, or consumed. It cannot be sold, exchanged, or bartered on any marketplace. Indeed, it would be insulting to describe a judicial process as having an "apparent commercial

character." You can buy wheat and weed, but you can't buy a writ of possession. Congress lacks the power to criminalize this legal process of eviction, which is not an "economic activity."

Moreover, the Necessary and Proper Clause doesn't empower Congress to criminalize the legal process. This regulation of intrastate noneconomic activity must be both a necessary and a proper exercise of federal power. As Chief Justice John Roberts wrote in *NFIB v. Sebelius* (the first Obamacare case), the Constitution "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."

Accordingly, the unprecedented moratorium is not proper because it denies access to the state courts, intrudes on the sovereignty of state judiciaries, and distorts political accountability. This federal order cannot be saved by the Necessary and Proper Clause, what Justice Antonin Scalia called "the last, best hope of those who defend *ultra vires* congressional action."

Despite the federal government's never-ending quest to aggrandize its own authority at the expense of state autonomy, there still exists a line, as the Supreme Court put it 25 years ago in the seminal federalism case *United States v. Lopez*, "between what is truly national and what is truly local." The legal process of eviction in state court is deeply rooted on the "truly local" side of that line.

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