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POLICY BRIEF

Congress and CDC Overreach

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Citing section 361(a) of the 1944 Public Health Service Act (PHSA), the federal Centers for Disease Control and Prevention (CDC) unilaterally imposed a nationwide eviction moratorium in September 2020 for the purpose of helping control the spread of COVID-19. Though arguably well intentioned, the CDC's dictate was the most expansive invocation of the law to date and stoked a debate over emergency powers during a public health crisis. The Supreme Court ultimately overturned the CDC's unilateral action. However, concerns that unelected officials will capitalize on future emergencies to expand federal control remain.

Certainly, seeking expanded power during emergencies is nothing new, as shown in economist Robert Higgs's seminal work, *Crisis and Leviathan*, which details the federal government's history of using emergencies (real or perceived) to justify expansions of power.[1] Higgs demonstrates that after the emergency recedes, policymakers tend to retain their enhanced authority. It is in light of this ratcheting effect that the CDC's assertion of authority to abrogate private contracts between property owners and tenants in the name of disease mitigation is so concerning. If such abrogation is within the CDC's authority, then what future aspects of daily life could be considered outside its control? Before these limits are tested by the next public health emergency, we recommend that Congress thoroughly evaluate and clarify of the scope of section 361 authority, giving particular focus to the appropriateness of federal intervention in complex matters outside of the agency's traditional responsibilities.

The federal government has only the powers enumerated by the Constitution, whereas the state governments possess *police power*, or the authority to establish any public health and safety laws as long as those laws do not violate the Constitution. Indeed, the COVID-19 pandemic saw states use their public health authority to implement various policies, including lockdowns, business

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closures, quarantine requirements for out-of-state travelers, and eviction prohibitions. The federal government, as expected, regulated international travel and immigration, but it also provided financial and technical assistance to the states, provided financial support to individuals and other private entities, and helped foster the development of vaccines.[2]

This brief begins with a short history of section 361's creation and usage and the shifting balance of power between the federal government and the states in responding to disease outbreaks. It then discusses the attendant matters of federalism and bureaucratic expertise. It concludes by recommending that Congress conduct oversight of the CDC's attempted regulatory overreach, analyze federal versus state responses to the COVID-19 pandemic, and consider revisiting section 361 to establish clearer boundaries for federal public health interventions going forward.

BACKGROUND

The federal government did not pass its first quarantine law until 20 years after the American Revolution, and it allowed the president to assist in executing state quarantines and only at the request of a state.[3] The 19th century saw the outbreak of numerous infectious diseases including yellow fever, cholera, smallpox, and typhus. With these diseases came a shift from state and local responsibility for prevention and containment to federal responsibility. Following the large loss of life during the Civil War from infectious diseases, subsequent outbreaks, and the federalization of immigration in 1875, Congress passed—and the Supreme Court upheld—laws allowing for greater federal involvement in disease containment.

In 1890, Congress passed legislation "permitting previously unknown federal power over interstate quarantine" and three years later "gave the federal government the predominant right of quarantine."[4] Several years after that, the Supreme Court "held as unquestionable the authority of Congress to establish quarantine regulations as respects its commerce from contagious and infectious diseases," although it did not invalidate state regulations.[5] In fact, the law "had conditioned [the federal government's] regulatory power on the nonexistence or inadequacy of state and local regulations while also requiring that the federal regulations be uniform."[6] By 1921, the federal government had assumed control of all quarantine stations in the country, with the states apparently happy to be rid of the responsibility.

The incremental growth in federal authority culminated in the PHSA, which consolidated and clarified over 60 years of existing statues and created little in the way of new laws. However, section 361 removed the provision in existing law that federal intervention was conditioned by the lack or inadequacy of state and local efforts. The legislation's drafters viewed the removal of the provision as "nothing of substance" because the states had already "wholly withdrawn" from quarantine of travelers from abroad, and regarding interstate quarantine, federal law would be "confined to matters pertaining to the interstate movement of people or things over which the States have both constitutional and practical difficulties in achieving effective control."[7]

In the decades following the enactment of the PHSA, federal quarantine and preventive efforts were relaxed as medical advances and vaccines mitigated the spread of communicable diseases. Invocations of section 361 since have included the creation of the voluntary Vessel Sanitation Program in 1975, a ban on the sale and distribution of small turtles carrying salmonella, the listing of diseases that would allow for quarantine, and the listing of diseases that would disqualify an applicant for immigration.[8] The quarantining of individuals has been rare. An international traveler suspected of carrying a virulent form of tuberculosis was quarantined under the CDC's section 361 authority in 2007—the first such quarantine since 1963. And "since 2007, the CDC has, on average issued one isolation order per year, mostly for travelers who are known or suspected of being infected with drug resistant tuberculosis."[9] Even the CDC's initial response to COVID-19 was relatively restrained. It used its authority to quarantine travelers from China for 14 days, required airlines to provide additional information on travelers, later required airlines to verify that passengers are either vaccinated or healthy, and mandated masks for all travelers on common carriers.[10] All of these mandates, though potentially controversial, were well within the agency's public health jurisdiction. However, a nationwide eviction ban moved well beyond public health, placing health considerations above all other considerations in the complex issue of rental relations. Were health officials really best equipped to weigh these economic and legal issues nationwide?

THE CDC'S EVICTION MORATORIUM

The federal government's initial legislative response to the COVID-19 outbreak was the Coronavirus Aid, Relief, and Economic Security (CARES) Act, signed into law March 27, 2020. The act included a relatively narrow eviction moratorium, lasting 120 days and applying only to rental properties receiving federal assistance and financing. States and local governments had started instituting their own eviction moratoriums and would continue to do so.[11] Shortly after the federal provision expired, the CDC unilaterally instituted a nationwide eviction moratorium in September 2020. Before the CDC's moratorium expired, Congress extended it until the end of January 2021.

Naturally, there were legal challenges to the CDC's order from realtor associations and rental property owners and managers. But the government argued that the CDC possesses such discretionary power under section 361(a), which reads as follows:

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.[12]

In essence, the government argued that the first sentence gives the CDC the authority to do basically whatever it wants in attempting to mitigate the spread of COVID-19. This belief was visible in the CDC's actions, which the Congressional Research Service succinctly characterizes: "The CDC's actions, which followed an Executive Order directing it to consider such measures, are unprecedented, both in terms of the breadth of the agency's use of this public health authority and its reach into what is traditionally state and local governance of landlord-tenant law."[13]

The CDC proceeded to extend the ban without congressional approval three more times, the final time stating that "absent an unexpected change in the trajectory of the pandemic, CDC does not expect to extend the Order further (beyond July 31, 2021)."[14] On June 29, 2021, the Supreme Court allowed the moratorium to remain in place; however, the deciding justice, Justice Kavanaugh, explicitly stated that he only supported doing so because the moratorium was already set to expire in a few weeks. Kavanaugh wrote, "In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."[15] Three days after the moratorium expired, the CDC ignored what could be viewed as a warning from Kavanaugh and extended the moratorium yet again. Predictably, on August 26, 2021, the Supreme Court issued an order vacating a ruling by a federal appeals court to uphold the eviction moratorium.

In the per curiam decision issued by the Supreme Court, the majority stated that the CDC's "claim of expansive authority under §361(a) is unprecedented," noting that "since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."[16] According to the justices, "the Government's read of §361(a) would give the CDC a breathtaking amount of authority." The justices added, "it is hard to see what measures this interpretation would place outside the CDC's reach."[17]

FEDERALISM, CDC OVERREACH, AND EXPERT FAILURE

Although the eviction moratorium was blocked by the Court, it is nonetheless useful to briefly consider a couple of fundamental issues with the CDC's attempted overreach in this case. Namely, it undermined federalism by encroaching on powers and responsibilities reserved to the states, and it empowered unelected federal health officials to issue dictates on matters beyond the CDC's scope of authoritative expertise.

Since the nation's founding, responsibility to control the spread of infectious diseases has largely belonged to the states under their respective police powers. The proceeding centuries saw a gradual shift in the balance of responsibility toward the federal government. However, policymakers and the courts have continually recognized the states' leading role on mitigating the spread of infectious diseases, with the federal government generally providing support. With exceptions—notably the CDC's eviction moratorium and the Occupational Safety and Health Administration's attempt to require private-sector workers to be vaccinated (similarly halted by the

Supreme Court)—the federal government has indeed played a largely supportive role to the states during the COVID-19 pandemic.

The beauty of American federalism is that it allows states to take various approaches to complicated policy matters that reflect their different economic, political, and social preferences. This was readily observed in the different strategies for COVID-19 containment pursued by each state. Although virtually all started out with lockdowns and restrictions, each state altered policy in response to conditions on the ground and public sentiment. State and local governments implemented their own restrictions, including eviction moratoriums and other housing-related measures. Most landlord–tenant laws are appropriately the states' domain. For the federal government to suddenly jump in with its own on-the-fly rules and regulations was a recipe for confusion, costly litigation, and longer-term housing problems.

A further problem for proponents of a federal top-down approach to COVID-19 mitigation who have an expansive view of section 361 is that the CDC has done an inadequate job just handling its core responsibilities. Although an in-depth discussion of the CDC's shortcomings is beyond the scope of this brief, there is much to criticize: bungled communication to the public, botched COVID-19 test development, the creation of a disease forecasting center almost two years into the pandemic, and a lack of consideration for tradeoffs when issuing guidance. That last criticism includes the CDC's failure to appreciate the societal toll school closures took on student mental health and learning, the spike in substance abuse encouraged by lockdowns, and the enormous economic losses suffered by workers and businesses, including landlords hurt by the CDC's eviction moratorium.[18]

The failure to appreciate the tradeoffs to its recommended mitigation policies is a further reason why the agency should not be allowed to impose its will in major economic decisions. The problem of inadequate knowledge and information is a struggle in all complex policymaking,[19] but it is even worse when an agency stretches outside its recognized area of expertise. The CDC is certainly not an expert on landlord–tenant law and housing policy, and Americans should not expect it to be. And by spreading itself thin through mission creep, the agency is more likely to stumble when executing the functions that it is supposed to perform.

RECOMMENDATIONS

The Supreme Court may have put a stop to this particular CDC overreach, but many members of Congress, the current administration, and three sitting Supreme Court justices apparently see few, if any, limits to the agency's authority in the face of a pandemic. By essentially thumbing its nose at the Court following Kavanaugh's statement, the CDC demonstrated a defiant willingness to push the boundaries of its powers. Given that a future Court could be more accommodating, it would be prudent for concerned policymakers to act sooner rather than later to clearly define the delegated powers under section 361.

First, a thorough congressional evaluation of the CDC's actions should be conducted to understand how and why the agency used a nearly 80-year-old law to justify a breathtaking expansion of its authority. The stated reason—limiting the spread of COVID-19—is understandable but incomplete. Until 2020, the CDC had demonstrated relative restraint. Obtaining a clearer understanding of why that changed in 2020 and 2021 could prove illuminating.

Second, policymakers should consider tightening section 361's language to lessen any ambiguities. Allowing for regulatory flexibility in the statute is understandable, but an attempt to incorporate stronger safeguards against future overreach is warranted, considering the recent attempts by the CDC to grant itself power that it does not possess.

Third, policymakers should analyze and assess the impact on federalism of federal and state COVID-19 policies. Although it may be too early to draw a complete conclusion, the federal government attempted a broad incursion into what has long been considered state territory. Some states have been more successful than others in addressing the pandemic from both a health and economic standpoint. Understanding how different strategies met (or failed to meet) the needs of states' citizens is critical in preparing for future crises. Moreover, if the balance of power has shifted too far toward the federal government, as this brief contends, rectifying actions may be required, and knowing how best to rebalance will be essential.

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NOTES

1. Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oakland, CA: Independent Institute, 2012).
2. As will be discussed, at the outset of the pandemic Congress authorized a narrow eviction moratorium that only applied to certain rental properties receiving federal financial assistance.
3. Wen W. Shen, “Scope of CDC Authority under Section 361 of the Public Health Service Act (PHSA)” (report no. R46758, Congressional Research Service, Washington, DC, April 13, 2021), 8.
4. Katherine L. Vanderhook, “A History of Federal Control of Communicable Diseases: Section 361 of the Public Health Service Act” (third-year paper, Harvard Law School, 2002), 21, 25.
5. Vanderhook, “A History of Federal Control of Communicable Diseases,” 28.
6. Vanderhook, “A History of Federal Control of Communicable Diseases,” 58.
7. Shen, “Scope of CDC Authority,” 10.
8. Vanderhook, “A History of Federal Control of Communicable Diseases,” 70–72.
9. James J. Misrahi, “The CDC’s Communicable Disease Regulations: Striking the Balance between Public Health & Individual Rights,” *Emory Law Journal* 67, no. 3 (2018): 468–70. On average, one isolation order was issued per year from January 1, 2005, to May 10, 2016.
10. Shen, “Scope of CDC Authority,” 13.
11. “COVID-19 State Foreclosure Moratoriums and Stays,” National Consumer Law Center, accessed August 18, 2022, https://www.nclc.org/issues/foreclosures-and-mortgages/covid-19-state-foreclosure-moratoriums-and-stays.html.
12. Public Health Service Act § 361, 42 U.S.C. § 264 (2022). The authority granted to the surgeon general has since been transferred to the CDC and FDA.
13. Maggie McCarty, Libby Perl, and David H. Carpenter, “The CDC’s Federal Eviction Moratorium” (report no. IN11673, Congressional Research Service, Washington, DC, August 31, 2021), 1.
14. McCarty, Perl, and Carpenter, “The CDC’s Federal Eviction Moratorium,” 1.
15. Ala. Ass’n of Realtors v. Dep’t of Health and Human Services, No. 20A169, at *6 (S. Ct., June 29, 2021).
16. Ala. Ass’n of Realtors v. Dep’t of Health and Human Services, No. 21A23, at *6–7 (S. Ct., Aug. 26, 2021) (per curiam).
17. Ala. Ass’n of Realtors v. Dep’t of Health and Human Services, No. 21A23, at *6.
18. Brian J. Miller and Phillip Phan, “A Plan for CDC Reform Is Long Overdue,” *The Hill*, June 22, 2022.
19. Roger Koppl, *Expert Failure* (Cambridge, UK: Cambridge University Press, 2018).