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## **COVID-19 and American Democracy**

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# COVID-19 and American Democracy

Barry Sullivan\*

## Introduction

On Friday afternoon, January 17, 2020, the Centers for Disease Control and Prevention (“CDC”), an agency of the United States government, announced that the federal government would implement “enhanced health screenings” for travelers arriving at airports in Los Angeles, New York, and San Francisco, on flights from Wuhan, China.<sup>1</sup> Four days later, on January 21, the CDC announced the first confirmed case of COVID-19 infection in the United States.<sup>2</sup> Ironically, the CDC’s January 21 announcement came on the same day that the United States Senate began hearing arguments in the impeachment trial of President Donald J. Trump.<sup>3</sup> Within a couple of weeks, the Republican-dominated Senate would acquit the President, despite substantial evidence of abuse of power,<sup>4</sup> without calling any witnesses, and by a vote that fell almost entirely along party lines.<sup>5</sup> That would be the end of the impeachment story, which had commanded much of the nation’s attention during autumn 2019. But the story of COVID-19 in the United States was just beginning. After three years of creating problems that he could then solve simply by declaring them to have been solved, the President – and the nation – now faced a legitimate crisis that was beyond the possibility of solving by presidential *ipse dixit*.<sup>6</sup> The pandemic would pose a different kind of challenge for the President and his idiosyncratic style of governing. How would he and his administration deal with the pandemic and the economic dislocations that it would almost certainly

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<sup>1</sup> See Centers for Disease Control and Prevention, *Public Health Screening to Begin at 3 U.S. Airports for 2019 Novel Coronavirus (“2019-nCov”)*, Jan. 17, 2020, <https://www.cdc.gov/media/releases/2020/p0117-coronavirus-screening.html>.

<sup>2</sup> See Roni Caryn Rabin, *First Patient With Wuhan Coronavirus Is Identified In The US*, N.Y. Times, Jan. 21, 2020, <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html>.

<sup>3</sup> See Noah Weiland, *Impeachment Briefing: What Happened on Day 1 of the Trial*, N.Y. Times, Jan. 21, 2020, <https://www.nytimes.com/2020/01/21/us/politics/impeachment-briefing-what-happened-on-day-1-of-the-trial.html>.

The President may be removed from office only by impeachment. See U.S. Const., art. II, § 4. The House of Representatives has “the sole Power of Impeachment,” that is, the power to bring charges, see U.S. Const., art. I, § 2, cl. 5, and the Senate “has the sole Power to try all Impeachments.” *Id.*, art. I, § 3, cl. 6. Conviction by the Senate requires “the Concurrence of two thirds of the Members present. See generally FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (New York: Cambridge Univ. Press, 2019); CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK, NEW EDITION* (New Haven: Yale Univ. Press, 2018). President Trump was only the third president to be impeached. Like President Trump, Presidents Andrew Johnson and Bill Clinton were impeached by the House, but acquitted by the Senate. President Richard M. Nixon avoided impeachment by resigning from office. See JON MEACHAM, PETER BAKER, TIMOTHY NAFTALI & JEFFREY A. ENGEL, *IMPEACHMENT: AN AMERICAN HISTORY* (New York: Modern Library, 2018).

<sup>4</sup> See U.S. House of Representatives, Perm. Select Comm. on Intelligence, *The Trump-Ukraine Inquiry Report*, <https://intelligence.house.gov/report/>.

<sup>5</sup> See Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. Times, Feb. 5, 2020, <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html>.

<sup>6</sup> See Stephanie Sarkis, *Trump And Other Gaslighters/Narcissists Create Crises And Then Act Like they Solved Them*, Forbes, June 9, 2019, <https://www.forbes.com/sites/stephaniesarkis/2019/06/09/trump-and-other-gaslightersnarcissists-create-crises-and-then-act-like-they-solved-them/#a55e16560c29>.

cause? In broader terms, how would the challenges of this pandemic be met by a nation that had long been convinced that President Ronald Reagan was correct in thinking that, “Government is not the solution to our problem, government is the problem”?<sup>7</sup>

### The Pandemic Unfolds

On January 26, 2020, while the impeachment trial was still ongoing, Senator Chuck Schumer, the Senate minority leader, called on the Secretary of Health and Human Services to exercise his legal authority to declare a national public health emergency, which would unlock otherwise unavailable federal funds to fight the virus.<sup>8</sup> On January 29, the President announced the formation of a coronavirus task force to be led by the Secretary of Health and Human Services,<sup>9</sup> and, on January 31, the Secretary declared the national public health emergency suggested by Senator Schumer.<sup>10</sup> Also on January 31, the President issued a proclamation barring travelers from China, except for U.S. citizens, lawful permanent residents, and certain other classes of non-citizens, effective at the close of business on February 2.<sup>11</sup>

The President reportedly chose to downplay the challenge posed by the virus during February because he was concerned with the negative effect that emphasizing the danger might have on the stock market (the strength of which he believed critical to his re-election) and on U.S.-China relations.<sup>12</sup> On February 26, the President sought to ease criticism of the administration’s seemingly tepid response to the pandemic by naming Vice President Mike Pence to replace the Secretary of Health and Human Services as head of the task force, and the Vice President promptly announced that Ambassador Deborah Birx, a leading infectious disease expert, would serve as the nation’s coronavirus response coordinator.<sup>13</sup> On February 28, however, the President called the

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<sup>7</sup> See Ronald R. Reagan, *First Inaugural Address of Ronald Reagan*, Jan. 20, 1981, [https://avalon.law.yale.edu/20th\\_century/reagan1.asp](https://avalon.law.yale.edu/20th_century/reagan1.asp).

<sup>8</sup> See Daniel Cassidy & Jackie Salo, *Schumer calls on feds to declare outbreak a public health emergency*, N.Y. Post, Jan. 26, 2020, <https://nypost.com/2020/01/26/schumer-calls-on-feds-to-declare-coronavirus-outbreak-a-public-health-emergency/>.

<sup>9</sup> See The White House, *Statement from the Press Secretary Regarding the President’s Coronavirus Task Force*, Jan. 29, 2020, <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/>.

<sup>10</sup> See U.S. Department of Health and Human Services, *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, DHHS Press Release, Jan. 31, 2020, <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

<sup>11</sup> See Donald J. Trump, *Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, The White House, Jan. 31, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

<sup>12</sup> See Gabriel Sherman, *Inside Donald Trump and Jared Kushner’s Two Months of Magical Thinking*, Vanity Fair, Apr. 28, 2020, <https://www.vanityfair.com/news/2020/04/donald-trump-jared-kushners-two-months-of-magical-thinking>; Aaron Blake, *When Trump covered for China’s alleged coronavirus coverup*, Wash. Post, May 7, 2020, <https://www.washingtonpost.com/politics/2020/05/07/when-trump-covered-chinas-alleged-coronavirus-coverup/>; Yasmeen Abutaleb & Josh Dawsey, *Trump’s soft touch with China’s Xi worries advisors who say more is needed to combat coronavirus outbreak*, Wash. Post, Feb. 16, 2020, [https://www.washingtonpost.com/politics/trumps-soft-touch-with-chinas-xi-worries-advisers-who-say-more-is-needed-to-combat-coronavirus-outbreak/2020/02/16/93de385a-5019-11ea-9b5c-eac5b16dafaa\\_story.html#click=https://t.co/UYE06HYb4i](https://www.washingtonpost.com/politics/trumps-soft-touch-with-chinas-xi-worries-advisers-who-say-more-is-needed-to-combat-coronavirus-outbreak/2020/02/16/93de385a-5019-11ea-9b5c-eac5b16dafaa_story.html#click=https://t.co/UYE06HYb4i).

<sup>13</sup> See Adam Cancryn, et al., *After fumbled messaging, Trump gets a coronavirus czar by another name*, Politico, Feb. 27, 2020, <https://www.politico.com/news/2020/02/27/white-house-coronavirus-response-debbie-birx-117893>.

coronavirus “the Democrats’ ‘new hoax’”<sup>14</sup> – a claim that his son repeated on May 16, when he predicted that the virus would “magically vanish” after the 2020 election.<sup>15</sup> Eventually, the President came to believe in the strategic value of blaming the pandemic on China’s initial lack of transparency,<sup>16</sup> and he and other administration officials began referring to the virus as the “Chinese virus” or the “Wuhan virus.”<sup>17</sup>

On March 11, the President announced a ban on travel from Europe.<sup>18</sup> With no advance preparation, the ban produced chaos in U.S. and European airports, with people arriving at U.S. airports being packed together in close quarters for many hours waiting to be admitted to the country, which undoubtedly facilitated the spread of the virus.<sup>19</sup> Two days later, on March 13, the President officially proclaimed a national emergency,<sup>20</sup> and, shortly thereafter, he closed the Canadian and Mexican borders to non-essential traffic.<sup>21</sup> When asked about the government’s slowness in making tests available, the President disclaimed any responsibility: “No. I don’t take responsibility at all.”<sup>22</sup> Beginning with California’s declaration on March 19, many states instituted statewide lockdowns, which obviously had devastating effects on the economy.<sup>23</sup> By March 24, however, the President was calling for an end to the lockdowns, stating that he wanted

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<sup>14</sup> See Lauren Egan, *Trump calls coronavirus Democrats’ ‘new hoax,’* NBC News, Feb. 28, 2020, <https://www.nbcnews.com/politics/donald-trump/trump-calls-coronavirus-democrats-new-hoax-n1145721>.

<sup>15</sup> See Derek Hawkins, *Eric Trump claims coronavirus is Democratic hoax, will magically vanish after 2020 election*, Wash. Post, May 17, 2020, <https://www.washingtonpost.com/politics/2020/05/17/eric-trump-coronavirus/>.

<sup>16</sup> See Jonathan Martin & Maggie Haberman, *A Key G.O.P. Strategy: Blame China. But Trump Goes Off Message*, N.Y. Times, Apr. 18, 2020, <https://www.nytimes.com/2020/04/18/us/politics/trump-china-virus.html>.

<sup>17</sup> See Dan Mangan, *Trump defends calling coronavirus ‘Chinese virus’ – ‘it’s not racist at all,’* CNBC News, Mar. 18, 2020, <https://www.cnbc.com/2020/03/18/coronavirus-criticism-trump-defends-saying-chinese-virus.html>; Graig Graziosi, *Coronavirus: Mike Pompeo insists G7 use ‘Wuhan virus’ – but world officials refuse*, The Independent, Mar. 25, 2020, <https://www.independent.co.uk/news/coronavirus-g7-wuhan-virus-mike-pompeo-trump-a9426261.html>.

<sup>18</sup> See Andrew Restuccia, et al., *US to Bar Travel From Europe For 30 Days Due To Coronavirus*, Wall Street Journal, Mar. 11, 2020, <https://www.wsj.com/articles/coronavirus-outbreak-prompts-trump-to-question-europe-travel-restrictions-11583971156>.

<sup>19</sup> See James McAuley, *Chaos at European airports on eve of Trump’s travel ban*, Wash. Post, Mar. 13, 2020, [https://www.washingtonpost.com/world/chaos-at-european-airports-on-eve-of-trumps-travel-ban/2020/03/13/28ba7ef0-653e-11ea-845d-e35b0234b136\\_story.html](https://www.washingtonpost.com/world/chaos-at-european-airports-on-eve-of-trumps-travel-ban/2020/03/13/28ba7ef0-653e-11ea-845d-e35b0234b136_story.html); Greg Miller, et al., *One final viral infusion: Trump’s move to block travel from Europe triggered chaos and a surge of passengers from the outbreak’s center*, Wash. Post, May 23, 2020, [https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5\\_story.html](https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5_story.html).

<sup>20</sup> See Donald J. Trump, *Proclamation Declaring National Emergency Concerning The Novel Coronavirus Disease (COVID-19) Outbreak*, The White House, Mar. 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>21</sup> See Katie Zezima & Rick Noak, *Trump, Trudeau agree to close US-Canada border to ‘nonessential’ traffic*, [https://www.washingtonpost.com/world/the-americas/trump-trudeau-us-canada-border-coronavirus/2020/03/18/90a27da8-6924-11ea-b199-3a9799c54512\\_story.html](https://www.washingtonpost.com/world/the-americas/trump-trudeau-us-canada-border-coronavirus/2020/03/18/90a27da8-6924-11ea-b199-3a9799c54512_story.html); Jenni Fink, *Trump Closes Border With Mexico to Nonessential Travel to Limit Spread of Coronavirus*, Newsweek, Mar. 20, 2020, <https://www.newsweek.com/trump-closes-border-mexico-non-essential-travel-limit-spread-coronavirus-1493479>.

<sup>22</sup> See Caitlin Oprysko, *‘I don’t take responsibility at all’: Trump deflects blame for coronavirus testing fumble*, Politico, Mar. 13, 2020, <https://www.politico.com/news/2020/03/13/trump-coronavirus-testing-128971>.

<sup>23</sup> See Jeremy B. White, *Newsom orders all 40M Californians to stay home in nation’s strictest state lockdown*, Politico, Mar. 19, 2020, <https://www.politico.com/states/california/story/2020/03/19/newsom-orders-all-40m-californians-to-stay-home-in-nations-strictest-state-lockdown-1268248>.

to see the country “opened up” by Easter Sunday, which would fall on April 12.<sup>24</sup> Many of the President’s supporters echoed his calls for an end to the lockdowns, arguing that the lockdowns were causing too much harm to the economy. Some of the most extreme of his supporters even argued that “there are more important things than living,” and suggested that older Americans (who appeared to be among those most at risk) were (or should be) willing to die to protect the national economy.<sup>25</sup> On April 12, after several governors agreed on regional protocols for re-opening their states, the President asserted (incorrectly, as a matter of constitutional law) that the authority to determine the triggers for re-opening the states belonged to him, rather than to the state governors.<sup>26</sup>

Virtually from the beginning, it was clear that many of the areas (such as New York, whose officials had allegedly treated the President “very badly”)<sup>27</sup> and populations (such as poor people and people of color)<sup>28</sup> that would be hardest hit by the virus would be areas and populations that were not among the President’s favorites. They were not his voters or part of his “base.” Whether that fact had something to do with the lack of consistency, empathy, or sense of urgency that the President manifested in the face of the crisis remains to be seen. It may well be that. Alternatively, it may simply be a manifestation of administrative incompetence, indecisiveness, fear, or an abnormal detachment from reality. Or it may be the product of an idiosyncratic understanding of the presidency – one which sees the presidency, as some commentators have suggested, as an “expressive” role unencumbered by any sense of obligation to solve the public’s problems.<sup>29</sup> A seeming indifference to the solution of real problems should not be confused, of course, with an indifference to the accomplishment of ideological objectives. While many were distracted by the

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<sup>24</sup> See Annie Karni & Donald G. McNeil Jr., *Trump Wants U.S. ‘Opened Up’ By Easter, Despite Health Officials’ Warnings*, N.Y. Times, Mar. 24, 2020, <https://www.nytimes.com/2020/03/24/us/politics/trump-coronavirus-easter.html>.

<sup>25</sup> See Lois Bennett, *Older people would rather die than let Covid-19 harm US economy – Texas official*, The Guardian, Mar. 24, 2020, <https://www.theguardian.com/world/2020/mar/24/older-people-would-rather-die-than-let-covid-19-lockdown-harm-us-economy-texas-official-dan-patrick>; Alex Samuels, *Dan Patrick says “there are more important things than living and that’s saving this country,”* Tex. Tribune, Apr. 21, 2020, <https://www.texastribune.org/2020/04/21/texas-dan-patrick-economy-coronavirus/>. See also Benjamin Fearnow, *Brazilian President Bolsonaro Rejects Calls for Coronavirus Lockdown, Says “We’re All Going To Die One Day,”* Newsweek, Mar. 30, 2020, <https://www.newsweek.com/brazilian-president-bolsonaro-rejects-calls-coronavirus-lockdown-says-were-all-going-die-one-1495020>.

<sup>26</sup> See Jeremy B. White, *Trump claims ‘total authority’ over state decisions*, Politico, Apr. 13, 2020, <https://www.politico.com/states/california/story/2020/04/13/trump-claims-total-authority-over-state-decisions-1275506>; Brian Naylor, *Fact Check: Trump Doesn’t Have The Authority To Order States To ‘Reopen,’* NPR, Apr. 14, 2020, <https://www.npr.org/2020/04/14/834040912/fact-check-trump-doesnt-have-the-authority-to-order-states-to-reopen>.

<sup>27</sup> See Maggie Haberman, *Trump, Lifelong New Yorker, Declares Himself a Resident of Florida*, N.Y. Times, Oct. 31, 2019, <https://www.nytimes.com/2019/10/31/us/politics/trump-new-york-florida-primary-residence.html>.

<sup>28</sup> See Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post, Jan. 12, 2018, [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html); Ashley Parker & Josh Dawsey, *Trump pushes fights over racist legacy while much of America pushes in a different direction*, Wash. Post, June 11, 2020, [https://www.washingtonpost.com/politics/trump-pushes-fights-over-racist-legacy-while-much-of-america-moves-in-a-different-direction/2020/06/11/8d4398a4-abf5-11ea-9063-e69bd6520940\\_story.html?utm\\_campaign=wp\\_post\\_most&utm\\_medium=email&utm\\_source=newsletter&wpsrc=nl\\_most](https://www.washingtonpost.com/politics/trump-pushes-fights-over-racist-legacy-while-much-of-america-moves-in-a-different-direction/2020/06/11/8d4398a4-abf5-11ea-9063-e69bd6520940_story.html?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpsrc=nl_most).

<sup>29</sup> See SUSAN HENNESSEY & BENJAMIN WITTES, *UNMAKING THE PRESIDENCY: DONALD TRUMP’S WAR ON THE WORLD’S MOST POWERFUL OFFICE* (New York: Farrar, Strauss and Giroux, 2020).

public health and economic challenges posed by the COVID-19 pandemic, the Trump administration continued to roll back environmental protections, strengthen its anti-immigrant policies, decrease public aid for the poor, eliminate certain civil rights protections for transgender people, seize land for its border wall, appoint controversial federal judges, withdraw from the World Health Organization, announce its withdrawal from the Open Skies Treaty, impose sanctions on officials of the International Criminal Court, protect the President's friends from legitimate law enforcement activities, and encourage investigations into his "enemies," among other things.<sup>30</sup>

In any event, as time progressed, it became ever more obvious that the U.S. was ill-prepared for handling a pandemic.<sup>31</sup> Hospitals lacked adequate supplies of personal protective gear and respirators; states found themselves bidding against each other – and the federal government – for those items; and, while experts saw testing and contact tracing as critical to controlling the spread of the virus, neither an adequate number of tests nor the resources necessary for contact tracing were available.<sup>32</sup> National Pandemic Preparedness Plans existed, but they had been ignored.<sup>33</sup> More than three years into his own four-year term, President Trump blamed the shortages of essential supplies on the Obama administration.<sup>34</sup> The President also claimed that the Obama

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<sup>30</sup> See Nadja Popovich, et al., *The Trump Administration is Reversing 100 Environmental Rules. Here's the Full List*, N.Y. Times, May 20, 2020, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html>; Abby Vesoulis, *With Millions Out of Work, the Trump Administration Pushes to Limit Food Stamps*, Time, May 13, 2020, <https://time.com/5836504/usda-snap-appeal-rule-change/>; Margot Sanger-Katz & Noah Weiland, *White House Erases Transgender Civil Rights Protections in Medical Care*, N.Y. Times, June 13, 2020, <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html>; Zolan Kanno-Youngs & Maggie Haberman, *Trump Administration Moves to Solidify Restrictive Immigration Policies*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/2020/06/12/us/politics/coronavirus-trump-immigration-policies.html>; Zolan Kanno-Youngs, *Border Wall Land Grabs Accelerate as Owners Shelter from Pandemic*, N.Y. Times, May 29, 2020, <https://www.nytimes.com/2020/05/29/us/politics/border-wall-coronavirus.html>; Edward Luce, *Dropping Flynn case turns Bill Barr into Donald Trump's political sword*, Financial Times, May 7, 2020, <https://www.ft.com/content/5c5e6170-90b0-11ea-9b25-c36e3584cda8>; Matthew Daley, *Sen. Lindsey Graham Says He's Opening Inquiry into Russia Investigation, but Won't Call Obama*, Time, May 14, 2020, <https://time.com/5837251/lindsey-graham-russia-investigation-obama/>; Alika Radhakrishnan & Elena Sarver, *Trump's Chilling Blow to the ICC*, Foreign Policy, June 16, 2020, <https://foreignpolicy.com/2020/06/17/trumps-chilling-blow-to-the-icc/>; Brianna Ehley & Alice Miranda Ollstein, *Trump announces U.S. withdrawal from the World Health Organization*, Politico, May 29, 2020, <https://www.politico.com/news/2020/05/29/us-withdrawing-from-who-289799>; John Hudson & Paul Sonne, *Trump administration to withdraw from Open Skies Treaty in further erosion of arms control pacts with Russia*, Wash. Post, May 21, 2020, [https://www.washingtonpost.com/national-security/2020/05/21/882d460a-9b68-11ea-b60c-3be060a4f8e1\\_story.html](https://www.washingtonpost.com/national-security/2020/05/21/882d460a-9b68-11ea-b60c-3be060a4f8e1_story.html); Carl Hulse, *McConnell Nears His Benchmark*, N.Y. Times, June 18, 2020, <https://www.nytimes.com/2020/06/18/us/mcconnell-courts-justin-walker.html>.

<sup>31</sup> See Dan Balz, *Crisis exposes how America has hollowed out its government*, Wash. Post, May 16, 2020, <https://www.washingtonpost.com/graphics/2020/politics/government-hollowed-out-weaknesses/>.

<sup>32</sup> See Marla Bradfoot, *Coronavirus Test Shortages Trigger a New Strategy: Group Screening*, Scientific American, May 13, 2020, <https://www.scientificamerican.com/article/coronavirus-test-shortages-trigger-a-new-strategy-group-screening2/>; Chris Canipe & Travis Hartman, *The COVID-19 testing Challenge*, Reuters, May 13, 2020, <https://graphics.reuters.com/HEALTH-CORONAVIRUS/TESTING/azgvomklmvd/>.

<sup>33</sup> See Dan Diamond & Nahal Toosi, *Trump team failed to follow NSC's pandemic playbook*, Politico, Mar. 25, 2020, <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285>; Alice Ollstein, *5 ways the Trump administration fell short of its own pandemic goals*, Politico, Apr. 14, 2020, <https://www.politico.com/interactives/2020/trump-pandemic-goals/>.

<sup>34</sup> See Kathryn Watson, *Trump announces augmentation of National Strategic Stockpile*, CBS News, May 15, 2020, <https://www.washingtonpost.com/opinions/2020/06/10/here-is-trumps-speech-race-word-word-alas/>.

administration had left his administration with “broken” tests for COVID-19 – tests for a virus that was unknown until well after President Obama had left office.<sup>35</sup> We later learned that the early lack of tests was due, at least in part, to sloppy laboratory procedures at the CDC laboratories.<sup>36</sup>

State and federal government officials took what actions they could. As noted, state governments imposed state-wide lockdowns and federal public health authorities made various recommendations for mitigating the effects of the pandemic. In addition, Congress passed historic legislation to provide financial relief to companies and individuals who were harmed by the pandemic and by the measures that were undertaken to curtail its spread.<sup>37</sup> At the same time, the President continued to downplay the danger posed by the pandemic, sometimes comparing it to the flu, often stating that the pandemic was under control (when it was not), assuring the population that anyone who wanted to be tested could be tested (which was not the case), and predicting that the virus would just go away.<sup>38</sup>

Although the President had assembled a coronavirus task force, which included leading public health experts, in January, he made clear in the weeks that followed that he would not take seriously the advice his own public health experts gave to the public. For example, the CDC recommended that members of the public wear face masks and practice social distancing, but the President, even as he announced those recommendations to the public at a press briefing, indicated that he would not personally comply with the recommendation to wear a face mask.<sup>39</sup> The President later ridiculed people who followed the face-mask recommendation, accusing them of “political correctness.”<sup>40</sup> On one occasion, he traveled to Maine to visit a plant that produced badly-needed testing swabs, but the testing swabs produced during his visit reportedly had to be destroyed because of his refusal to comply with essential hygiene requirements.<sup>41</sup> The President also has touted controversial therapies, such as hydroxychloroquine, which he has taken himself, despite the absence of empirical evidence of efficacy and the possibility that it might actually be

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<sup>35</sup> See The White House, *Remarks by President Trump and Members of the Coronavirus Task Force in Press Briefing*, Apr. 18, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-members-coronavirus-task-force-press-briefing-2/>.

<sup>36</sup> See Sheila Kaplan, *C.D.C. Labs Were Contaminated, Delaying Coronavirus Testing, Officials Say*, N.Y. Times, Apr. 18, 2020, [https://www.nytimes.com/2020/04/18/health/cdc-coronavirus-lab-contamination-testing.html?utm\\_source=STAT+Newsletters&utm\\_campaign=87885314da-MR\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_8cab1d7961-87885314da-149553701](https://www.nytimes.com/2020/04/18/health/cdc-coronavirus-lab-contamination-testing.html?utm_source=STAT+Newsletters&utm_campaign=87885314da-MR_COPY_01&utm_medium=email&utm_term=0_8cab1d7961-87885314da-149553701).

<sup>37</sup> See Tom Spiggle, *What The \$2 Trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act Does For American Workers*, Forbes, Apr. 10, 2020, <https://www.forbes.com/sites/tomspiggle/2020/04/10/what-the-2-trillion-coronavirus-aid-relief-and-economic-security-cares-act-does-for-american-workers/#1685be3e3c12>.

<sup>38</sup> See Dan Goldberg, *‘It’s going to disappear’: Trump’s changing tone on coronavirus*, Politico, March 17, 2020, <https://www.politico.com/news/2020/03/17/how-trump-shifted-his-tone-on-coronavirus-134246>. See also Oliver Milman, *Seven of Donald Trump’s most misleading coronavirus claims*, The Guardian, March 31, 2020, <https://www.theguardian.com/us-news/2020/mar/28/trump-coronavirus-misleading-claims>.

<sup>39</sup> See Kristen Welker, et al., *CDC recommends people wear cloth masks in public – but Trump says he won’t*, NBC News, Apr. 2, 2020, <https://www.nbcnews.com/news/us-news/u-s-expected-recommend-masks-americans-coronavirus-hotspots-n1175596>.

<sup>40</sup> See Colby Itkowitz, *Trump calls mask wearing ‘politically correct,’ Biden calls him a ‘fool,’* Wash. Post, May 26, 2020, [https://www.washingtonpost.com/politics/trump-calls-mask-wearing-politically-correct-biden-calls-him-a-fool/2020/05/26/a58025e6-9f9c-11ea-81bb-c2f70f01034b\\_story.html](https://www.washingtonpost.com/politics/trump-calls-mask-wearing-politically-correct-biden-calls-him-a-fool/2020/05/26/a58025e6-9f9c-11ea-81bb-c2f70f01034b_story.html).

<sup>41</sup> See Julia Conley, *After Trump visits without a mask, medical supplier forced to throw away new testing swabs*, Salon, June 9, 2020, [https://www.salon.com/2020/06/09/after-trump-visits-without-a-mask-medical-supplier-forced-to-throw-away-new-testing-swabs\\_partner/](https://www.salon.com/2020/06/09/after-trump-visits-without-a-mask-medical-supplier-forced-to-throw-away-new-testing-swabs_partner/).

harmful to health.<sup>42</sup> Although the Food and Drug Administration initially granted emergency approval for the drug's use in controlled settings, the agency later determined that the drug's possible harms outweighed any possible benefits and withdrew that limited approval.<sup>43</sup> The President has also seemingly promoted the idea of injecting bleach into the human body as a possible therapy.<sup>44</sup>

In April, as people grew restive under the restrictive conditions that state officials had imposed pursuant to the directives of federal public health officials, the President sounded his support for demonstrators who were demanding an end to the lockdowns. By mid-April, the President was calling for the "liberation" of some states,<sup>45</sup> thereby giving encouragement to demonstrators, such as the heavily armed anti-lockdown activists who stormed the Michigan state capitol later that month.<sup>46</sup> Armed demonstrations may have provided the most dramatic evidence of a changing mood within the country, but support for the lockdowns was eroding in many places, due to a variety of factors, including the economic hardship that the lockdowns had caused, the fact that the lockdowns had resulted in the country's experiencing fewer deaths than were initially projected, the fact that some areas of the country had not yet been seriously affected by the pandemic, the general difficulty of living under lockdown conditions, and the libertarian ideology that shapes the views of many Americans. Also in mid-April, the President announced that 1,000 U.S. Military Academy graduating cadets, who had been sent home because of the pandemic, would have to return to West Point for an on-site graduation ceremony in June, simply because

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<sup>42</sup> See Caitlin Oorysko, *Trump says he's taking hydroxychloroquine, despite scientists' concerns*, Politico, May 18, 2020, <https://www.politico.com/news/2020/05/18/trump-says-hes-taking-unproven-anti-malarial-drug-265546>; U.S. Food & Drug Administration, *FDA cautions against use of hydroxychloroquine or chloroquine for COVID-19 outside of the hospital setting or a clinical trial due to risk of heart rhythm problems*, Apr. 30, 2020, <https://www.fda.gov/drugs/drug-safety-and-availability/fda-cautions-against-use-hydroxychloroquine-or-chloroquine-covid-19-outside-hospital-setting-or>; Denise Grady, *Malaria Drug Promoted By Trump Did Not Prevent Covid Infections, Study Finds*, N.Y. Times, June 3, 2020, <https://www.nytimes.com/2020/06/03/health/hydroxychloroquine-coronavirus-trump.html>. Based on the President's recommendation, the states and the federal government stockpiled the drug, creating a shortage of the drug for treating lupus, rheumatoid arthritis, and malaria. See Sheryl Gay Stolberg, *Mad Scramble to Stock Millions of Malaria Pills, Likely for Nothing*, N.Y. Times, June 16, 2020, <https://www.nytimes.com/2020/06/16/us/politics/trump-hydroxychloroquine-coronavirus.html>; Stephanie Sarkis, *Trump's Hydroxychloroquine Focus Causes A Shortage For Others*, Forbes, Apr. 13, 2020, <https://www.forbes.com/sites/stephaniesarkis/2020/04/13/trumps-hydroxychloroquine-focus-causes-a-shortage-for-others/#27bc7a59539e>.

<sup>43</sup> See Laurie McGinley & Carolyn Y. Johnson, *FDA pulls emergency approval for antimalarial drugs touted by Trump as covid-19 treatment*, Wash. Post, June 15, 2020, <https://www.washingtonpost.com/health/2020/06/15/hydroxychloroquine-authorization-revoked-coronavirus/>.

<sup>44</sup> See Katie Rogers, et al., *Trump's Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. Times, Apr. 24, 2020, <https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>.

<sup>45</sup> See Philip Bump, *The states that Trump wants to 'liberate' don't meet the benchmarks he himself set*, Wash. Post, Apr. 17, 2020, <https://www.washingtonpost.com/politics/2020/04/17/states-that-trump-wants-liberate-dont-pass-benchmarks-he-himself-set/>; Quint Forgy, *Trump breaks with his own guidelines to back conservative anti-quarantine protesters*, Politico, Apr. 17, 2020, <https://www.politico.com/news/2020/04/17/trump-states-stay-at-home-orders-192386>.

<sup>46</sup> See Andrew Solender, *Armed Protesters Storm Michigan State House Over COVID-19 Lockdown*, Forbes, Apr. 30, 2020, <https://www.forbes.com/sites/andrewsolender/2020/04/30/armed-protesters-storm-michigan-state-house-over-covid-19-lockdown/#261bc35c69b5>.



the President wanted to deliver a commencement address in person.<sup>47</sup> The cadets' families and friends were not allowed to attend because of the pandemic.<sup>48</sup>

In the first few days of May, the President decided to disband the task force on the ground that it had achieved its mission, but he later reversed that decision because he had not realized how “popular the task force is.”<sup>49</sup> However, the task force never regained its previous prominence, and it provided little guidance as the states faced difficult decisions in the process of moving away from lockdowns and opening up the economy.<sup>50</sup>

By early June 2020, when many states were beginning the process of “opening up,” “non-essential” segments of the economy had been shut down in most states for more than two and one half months, and the official unemployment count stood at about almost 13.3%.<sup>51</sup> “Essential” workers, a category that included grocery clerks and cashiers, care home workers, police and fire personnel, sanitation workers, and hospital cooking and cleaning staff, as well as physicians and nurses, were still required to work at their regular workplaces, thereby potentially exposing themselves to the virus.<sup>52</sup> Many businesses were shuttered or operating at greatly reduced capacity and had become unsustainable;<sup>53</sup> even hospitals, many of which were filled with patients, suffered huge losses because they were unable to treat non-emergency patients or performing elective surgeries.<sup>54</sup>

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<sup>47</sup> See Eric Schmitt & Annie Karni, *Trump Speech to Bring 1,000 Cadets Back to Campus*, N.Y. Times, Apr. 24, 2020, <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-west-point.html>.

<sup>48</sup> See Eric Schmitt & Michael D. Shear, *Graduating West Point Cadets Isolate for Two Weeks Ahead of Trump Speech*, Wash. Post, June 12, 2020, <https://www.nytimes.com/2020/06/12/us/politics/trump-west-point.html>.

<sup>49</sup> See Doyle McManus, *The short, unhappy life of Trump's coronavirus task force*, L.A. Times, May 10, 2020, <https://www.latimes.com/politics/story/2020-05-10/column-trumps-coronavirus-task-force-shows-his-inability-to-govern>; Noah Weiland, et al., *Administration to Phase Out Coronavirus Task Force*, N.Y. Times, May 5, 2020, <https://www.nytimes.com/2020/05/05/us/politics/coronavirus-task-force-trump.html?action=click&module=Spotlight&pgtype=Homepage>.

<sup>50</sup> See Jim Acosta, et al., *As US deaths top 100,000, Trump's coronavirus task force is curtailed*, CNN, May 28, 2020, <https://www.cnn.com/2020/05/28/politics/donald-trump-coronavirus-task-force/index.html>.

<sup>51</sup> See Anneken Tappe, *Nearly 43 million Americans have filed for unemployment benefits during the pandemic*, CNN, June 4, 2020, <https://www.cnn.com/2020/06/04/economy/unemployment-benefits-coronavirus/index.html>.

<sup>52</sup> See Nicola Dungca, et al., *On the front lines of the pandemic, grocery workers are in the dark about risks*, Wash. Post, May 24, 2020, <https://www.washingtonpost.com/investigations/2020/05/24/grocery-workers-coronavirus-risks/?arc404=true>; Suzy Khimm, *The forgotten front line: Nursing home workers say they face retaliation for reporting COVID-19 risks*, NBC News, May 19, 2020, <https://www.nbcnews.com/news/us-news/forgotten-front-line-nursing-home-workers-say-they-face-retaliation-n1209606>.

<sup>53</sup> See Reuters, *Fed Frets About Small Business Failures Amid 'Alarming' Data*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/reuters/2020/06/12/business/12reuters-usa-fed-smallbusiness.html?searchResultPosition=4>; Emily Pandise, *Which major retail companies have filed for bankruptcy since the coronavirus pandemic hit? Here's the list*, NBC News, May 12, 2020, <https://www.nbcnews.com/business/consumer/which-major-retail-companies-have-filed-bankruptcy-coronavirus-pandemic-hit-n1207866>.

<sup>54</sup> See Sarah Kliff, *Hospitals Knew How to Make Money. Then Coronavirus Happened*, N.Y. Times, May 15, 2020, <https://www.nytimes.com/2020/05/15/us/hospitals-revenue-coronavirus.html>; Lisa Schencker & David Heinzmann, *Illinois hospitals lose \$1.4 billion a month as coronavirus cancels surgeries*, Chicago Tribune, Apr. 17, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-hospitals-financial-damage-furloughs-20200417-w3mzywqx2vdprb5bj33h57clba-story.html>.

Most important, by mid-June, 2.2 million Americans had been infected with the virus, and almost 119,000 Americans had died.<sup>55</sup> The worldwide figures for infections and deaths were approximately 8.6 million and 457,000, respectively.<sup>56</sup> In other words, with only about 4% of the world's population,<sup>57</sup> the United States accounted for approximately 25% of the world's infections and deaths. The percentages were changing, of course, particularly as the pandemic shifted course towards the global south, with Brazil having overtaken the hardest hit European countries by mid-June.<sup>58</sup> For Americans, most of whom take pride in the belief that their country is the most powerful and technologically advanced in the world, these statistics were staggering. Moreover, U.S. infections and deaths were not evenly distributed across the population. Urban areas were affected much more greatly than rural areas, and the State of New York was more deeply affected than any other. Some states were hardly affected at all and were therefore particularly susceptible to claims that the pandemic was simply a hoax or that the government was grossly overreacting to what was a trivial danger at best.<sup>59</sup> People of color, Native Americans, the poor, prisoners, residents of care homes, people with pre-existing medical conditions, and the elderly were disproportionately represented in terms both of infections and of deaths.<sup>60</sup>

On May 25, as the pandemic seemed to be in retreat, and an increasing number of states were relaxing the restrictions they had imposed, the nation was shocked by a cellphone video that showed George Floyd, an unarmed African American man in Minneapolis, who allegedly had purchased cigarettes with a counterfeit \$20 banknote, being killed by a police officer. The cellphone video showed that the police officer had pinned Floyd to the ground and knelt on his neck for almost nine minutes, while Floyd repeatedly told the officer that he could not breathe.<sup>61</sup> Days of unrest followed, with the nation experiencing both peaceful protests and some destruction and theft of property. Some protesters wore masks and practiced social distancing, while others did not. There were many long-overdue conversations about structural racism, implicit bias, and the legacy of both *de facto* and *de jure* discrimination. On June 1, the Trump administration used

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<sup>55</sup> See Johns Hopkins University Coronavirus Research Center, COVID-19 Dashboard, <https://coronavirus.jhu.edu/map.html> (visited June 19, 2020).

<sup>56</sup> See *id.*

<sup>57</sup> See United States Census Bureau, U.S. and World Population Clock, <https://www.census.gov/popclock/>.

<sup>58</sup> See Johns Hopkins University Coronavirus Research Center, COVID-19 Dashboard, <https://coronavirus.jhu.edu/map.html> (visited June 19, 2020).

<sup>59</sup> See Derek Hawkins, *Eric Trump claims coronavirus Democratic hoax, will magically disappear after 2020 election*, Wash. Post, May 17, 2020, <https://www.washingtonpost.com/politics/2020/05/17/eric-trump-coronavirus/>; Chris McGreal, *'People are just panicking': Midwesterners unmoved over coronavirus outbreak*, The Guardian, Mar. 15, 2020, <https://www.theguardian.com/world/2020/mar/15/wisconsin-midwest-coronavirus-response>.

<sup>60</sup> See Marisa Kwiatkowski, et al., *'A national disgrace': 40,600 deaths tied to US nursing homes*, USA Today, June 1, 2020, <https://www.usatoday.com/story/news/investigations/2020/06/01/coronavirus-nursing-home-deaths-top-40-600/5273075002/>; Timothy Williams, et al., *Coronavirus Cases Rise Sharply in Prisons, Even as They Plateau Nationwide*, N.Y. Times, June 16, 2020, <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>; Aaron Williams & Adrian Blanco, *How the coronavirus exposed health disparities in communities of color*, Wash. Post, May 26, 2020, <https://www.washingtonpost.com/graphics/2020/investigations/coronavirus-race-data-map/>; Ed Pilkington, *As 100,000 die, the virus lays bare America's brutal fault lines – race, gender, poverty and broken politics*, The Guardian, May 12, 2020, <https://www.theguardian.com/us-news/2020/may/28/us-coronavirus-death-toll-racial-disparity-inequality>; Timothy M. Smith, *Why COVID-19 is decimating some Native American communities*, AMA, May 13, 2020, <https://www.ama-assn.org/delivering-care/population-care/why-covid-19-decimating-some-native-american-communities>.

<sup>61</sup> See Evan Hill, et al., *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. Times, May 31, 2020, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

teargas and rubber bullets to disperse a peaceful crowd of demonstrators gathered in a park in front of the White House for no apparent reason other than to facilitate a “photo opportunity” in front of a nearby church.<sup>62</sup>

On June 5, when the national unemployment statistics for May were released, showing a small, unanticipated drop in the unemployment rate, the President celebrated that development at an event in the Rose Garden of the White House.<sup>63</sup> Inexplicably, and particularly so in light of the ongoing unrest, the President observed in the course of his remarks that, "Hopefully George [Floyd] is looking down right now and saying this is a great thing that is happening for our country. This is a great day for him. It's a great day for everybody."<sup>64</sup> Just as the emergence of COVID-19 in the United States occurred in the midst of the impeachment inquiry, its initial easing was overshadowed by demonstrations and a renewed debate about the role of structural racism, justice, and racial inequality in American society. Whether it is reasonable to think that the end of the pandemic is really in sight at this point in time may depend on the adequacy of the precautions taken by those involved in demonstrations as well as those involved in the re-opening of the economy.

### American Federalism and Presidential Leadership

Even before the police killing of George Floyd, one well respected commentator had observed that Americans seemed to be “living in a failed state,” an observation that he based on the government’s response to the COVID-19 pandemic. George Packer wrote:

The [COVID-19] crisis demanded a response that was swift, rational, and collective. The United States reacted instead like Pakistan or Belarus – like a country with shoddy infrastructure and a dysfunctional government whose leaders were too corrupt or stupid to head off mass suffering. The [Trump] administration squandered two irretrievable months to prepare. From the president came willful, blindness, scapegoating, boasts, and lies. From his mouthpieces, conspiracy theories and miracle cures. A few senators and corporate executives acted quickly – not to prevent the coming disaster, but to profit from it. When a government doctor tried to warn the public of the danger, the White House took the mic and politicized the message.<sup>65</sup>

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<sup>62</sup> See Rebecca Tan, et al., *Before Trump vows to end ‘lawlessness,’ federal officers confront protesters outside White House*, Wash. Post, June 2, 2020, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

<sup>63</sup> See Eli Rosenberg & Heather Long, *Unemployment rate drops and 2.5 million jobs added, after states reopened*, Wash. Post, June 6, 2020, <https://www.washingtonpost.com/business/2020/06/05/may-2020-jobs-report/>. See also Ben Casselman, *No, The Jobs Report Wasn’t Rigged. Here’s What Happened*, Wash. Post, June 8, 2020, <https://www.nytimes.com/2020/06/08/business/economy/jobs-report-data.html>.

<sup>64</sup> See Brian Naylor, *Trump Says Strong Economy Will Bring Racial Justice*, NPR, June 5, 2020, <https://www.npr.org/2020/06/05/870617228/trump-says-strong-economy-will-bring-racial-justice>; Katie Rogers, *President Says Job Report Made It a ‘Great Day’ for George Floyd, Stepping on Message*, N.Y. Times, June 6, 2020, <https://www.nytimes.com/2020/06/05/us/politics/trump-jobs-report-george-floyd.html>.

<sup>65</sup> George Packer, *We Are Living In A Failed State*, The Atlantic, June 2020, <https://www.theatlantic.com/magazine/archive/2020/06/underlying-conditions/610261/>.

The COVID-19 pandemic presented great challenges for a country as large and diverse as the United States, and neither the formal governmental organization of the country nor the current state of political polarization made those challenges any easier to meet. Given the federal government's penchant for secrecy,<sup>66</sup> we may not know for many years the whole story behind government's failure to deal adequately with the COVID-19 pandemic.

Dealing with the pandemic was not, of course, an easy assignment for any government, but why has the United States done as badly as it has? It would be easy to lay the blame at the feet of the inconsistent and seemingly random leadership provided by the executive branch of the federal government during the time of the pandemic, and that is certainly an important factor to be considered. After all, how seriously can the average citizen be expected to take a government recommendation that she engage in social distancing and wear a mask when the President takes it upon himself to convey those recommendations personally, but announces at the same time that he personally does not intend to follow them? And how seriously can the average citizen take the advice of state and local officials when the President, having just announced a national emergency, begins to call for an end to lockdowns only ten days later? President Trump's shortcomings as a leader have long been obvious to all but his most ardent supporters. From the beginning of his term, he has seemed to prefer receiving the adulation of his supporters at mass rallies to the difficult and sometimes boring business of governing, and, unlike his predecessors, he has never stopped holding campaign rallies.<sup>67</sup> When the virus made campaign rallies impossible, he held daily "public health briefings" that seemed to be a substitute for the rallies. The President typically took center stage at these events, relegating public health officials, including Dr. Anthony Fauci, the country's leading expert on infectious diseases, and Ambassador Deborah Bix, the federal government's coronavirus coordinator, to the periphery.<sup>68</sup> But the daily briefings did afford these public health officials a national platform for talking directly to the American public about the pandemic, and an opportunity to emphasize the continued danger and need for continued vigilance. When the President's advisors convinced him that the daily briefings might actually be working to his political disadvantage, he discontinued them. That decision had the unintended consequence of lowering the visibility of the public health officials and their message, precisely at the same time that the nation was confronting new challenges relating to the opening-up of the economy.<sup>69</sup>

A recent *New York Times* commentary described the seeming mismatch between President Trump's gifts and the current needs of the country:

At a time when the country is confronting three overlapping crises – the coronavirus, an economic collapse and a reckoning with racism and injustice – Mr.

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<sup>66</sup> See Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 Md. L. Rev. 1 (2012).

<sup>67</sup> See David A. Graham, *Trump Never Stopped Campaigning Long Enough to Govern*, The Atlantic, June 18, 2019, <https://www.theatlantic.com/ideas/archive/2019/06/trump-cant-relaunch-a-campaign-that-never-stopped/591949/>.

<sup>68</sup> See David Smith, *Are Trump's coronavirus briefings the new 2020 campaign rallies?*, The Guardian, Mar. 24, 2020, <https://www.theguardian.com/us-news/2020/mar/24/donald-trump-coronavirus-briefings-2020-campaign-rallies>; Alison Durkee, *Report: Even Trump's Allies Are Fed Up With His Press Briefings*, Vanity Fair, Apr. 10, 2020, <https://www.vanityfair.com/news/2020/04/trump-allies-criticize-coronavirus-press-briefings>.

<sup>69</sup> See Sheryl Gay Stolberg, et al., *With the Federal Health Megaphone Silent, States Struggle With A Shifting Pandemic*, N.Y. Times, June 17, 2020, <https://www.nytimes.com/2020/06/17/us/politics/coronavirus-pandemic-federal-response.html>.

Trump’s inability to demonstrate empathy illustrates the limitations of his political arsenal. He is well-equipped to compete in a campaign where slashing negative attacks are the order of the day, and few salesmen speak in superlatives like the former hotel magnate. Yet when the moment calls for neither pugilism nor promotion, he has little to say.<sup>70</sup>

But there is much more to be considered than President Trump’s personal lack of leadership.

Any evaluation of the U.S. response to the COVID-19 pandemic must begin with a brief account of the formal organization of government in the U.S. and the theory of government that informs it. In simplest terms, the founders of the American government were suspicious of governmental power and therefore sought to “diffuse power the better to protect liberty.”<sup>71</sup> The founders intended that government in the U.S. should take the form of a federal republic, with the powers of government divided between the national government and the states. In addition, the national government was to be a government of limited and enumerated powers, though supreme within its proper sphere,<sup>72</sup> while the general or residuary powers of government would rest with the states.<sup>73</sup> In U.S. law, we refer to those general powers of government – the power to provide for the health, safety, and welfare – as the “police power.”<sup>74</sup> The police power belongs exclusively to the states.<sup>75</sup> The federal or national government, being a government of limited powers, has no police power.

Just as the founders intended to create a governmental structure in which the powers of government were divided between the states and the national government, the powers of government at both levels were to be distributed amongst legislative, executive, and judicial departments.<sup>76</sup> Despite these vertical and horizontal divisions of governmental power, the founders hoped that the governmental system that resulted would be one that not only protected individual liberty, but functioned efficiently and effectively as well. As Justice Robert H. Jackson famously observed in *Youngstown Sheet & Tube Co.*, in which the Court rejected President Truman’s seizure of the steel mills during the Korean War, on the ground that the President’s action lacked constitutional or statutory authorization: “While the Constitution diffuses power the better to secure liberty, it also

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<sup>70</sup> See Jonathan Martin, et al., *As Public Opinion Shifts on Racism, Trump Digs In*, N.Y. Times, June 11, 2020, <https://www.nytimes.com/2020/06/11/us/politics/trump-on-race.html>.

<sup>71</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also Barry Sullivan, *Democratic Conditions*, 51 Loy. U. Chi. L. J. 555, 578-82 (2019).

<sup>72</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.) (“If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action.”). See also John Minor Wisdom, *The Frictionmaking, Exacerbating Role of Federal Courts*, 21 Sw. L. J. 411, 411-12 (1967) (“These stresses and strains are peculiar to our unique form of government. They occur because, unlike other federalisms, in the American system states are neither administrative units of a national government nor members of a federated league. They are indestructible political entities having their own law, and own system of courts, but subordinate to the federal sovereignty in all matters of national concern.”).

<sup>73</sup> See U.S. Const., amend. x (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>74</sup> See *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (Rehnquist, C.J.) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”).

<sup>75</sup> See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (Marshall, C.J.) (“The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states.”).

<sup>76</sup> Federalist No. 47, [https://avalon.law.yale.edu/18th\\_century/fed47.asp](https://avalon.law.yale.edu/18th_century/fed47.asp).

contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>77</sup> Although Justice Jackson was speaking specifically about the necessary interdependence of the legislative and executive branches of the federal government, the same principle applies with respect to the interdependence of the state and national governments.

The states are primarily responsible for protecting the public health and have broad latitude in deciding how to discharge that responsibility.<sup>78</sup> At the same time, no state could possibly replicate the public health resources that the federal government has at its disposal, which include the staffs and facilities of the CDC, the U.S. Food and Drug Administration, and the U.S. Department of Health and Human Services. In addition, the federal government obviously has a national perspective that may be useful in dealing with public health and safety challenges that are national (and even international) in scope. And the federal government has always stood ready to assist the states when called upon in times of natural and man-made emergencies,<sup>79</sup> a function now performed by the Federal Emergency Management Administration.<sup>80</sup>

The point is that the division of authority contemplated by the design of the federal system requires a high degree of cooperation and coordination between the federal government and state officials if public health issues like the coronavirus pandemic are to be properly and effectively addressed in the contemporary world. In particular, it requires steady leadership and a spirit of cooperation on the part of the federal government. While the federal government, as a constitutional matter, may lack the constitutional power to command the states, it can exercise considerable persuasive power by choosing how and when to deploy (or withhold) the vast resources at its disposal.<sup>81</sup>

In the present crisis, the states have found only an erratic and inconsistent partner in the national executive. The President and the federal public health bureaucracy frequently have delivered conflicting messages about the pandemic, and the President’s own messages have not been consistent with each other. The states also have not agreed amongst themselves about what an appropriate policy might entail. That difference of opinion amongst the states is hardly surprising in a country as large and as diverse as the United States, and it is undoubtedly the product of several factors, including ideological differences as well as differences in objective circumstances. The differences in objective circumstances are clear. Some states, for example, did not initially perceive the coronavirus as a serious threat because they saw few, if any, cases, even as the pandemic began to ravage other states, such as New York, New Jersey, and Massachusetts.<sup>82</sup> Areas within states were subject to the same dynamic. In Illinois, for example, the pandemic has been felt most acutely in a few areas, such as the metropolitan Chicago area, with many fewer cases being reported in other parts of the state.<sup>83</sup>

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<sup>77</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>78</sup> *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 111 (1905) (Harlan, J.) (The police power encompasses the power to enact and enforce a compulsory vaccination law.).

<sup>79</sup> *See* An act for the relief of the sufferers by fire, in the Town of Portsmouth, 7<sup>th</sup> Cong., 2d Sess. (1803).

<sup>80</sup> *See* FEMA, <https://www.fema.gov/>.

<sup>81</sup> *See, e.g., Mark Seidenfeld, The Bounds of Congress’s Spending Power*, 61 *Ariz. L. Rev.* 1 (2019).

<sup>82</sup> *See* Robert Steuteville, *The State of Coronavirus in America*, Public Square, Apr. 3, 2020, <https://www.cnu.org/publicsquare/2020/04/03/state-coronavirus-america>.

<sup>83</sup> *See* Mark Maxwell, *Data shows COVID-19 engulfed Chicago largely spared downstate*, WCIA, June 18, 2020, <https://www.wcia.com/news/capitol-news/data-shows-covid-19-engulfed-chicago-largely-spared-downstate/>. That

The ideological differences are also obvious. The United States suffers today from strong political and cultural polarization.<sup>84</sup> Influenced by an ideology of minimalist government and “rugged individualism,” many Americans think they should always be able to act in whatever way they see fit. Taken to the limit, of course, that sentiment runs counter to the constitutional principle of “ordered liberty,” which holds that the state may legitimately limit individual liberty for the common good, as, for example, when the state mandates that citizens be vaccinated to prevent the spread of disease.<sup>85</sup> As a general matter, the ideology of minimalist government and “rugged individualism” seems to have more purchase in some parts of the country than in others,<sup>86</sup> reflecting a division that may date back to the earliest days of the country, when Americans in the North argued for a stronger national government and those in the South and West preferred stronger states and greater recognition of individual rights.<sup>87</sup> Those debates continue today, as grist for both constitutional litigation and cultural warfare;<sup>88</sup> they also figure in attitudes about expertise and anti-intellectualism.<sup>89</sup> Coincidentally, the states that largely escaped the early stages of the pandemic were among those in which the ideology of minimalist government and “rugged individualism” seems to have the most traction. Divergent state approaches to the pandemic reflect these ideological differences as well as differences in objective circumstances.

As Justice Jackson noted in the *Youngstown* case, the founders intended for each of the three branches of the national government to serve as a check on the others.<sup>90</sup> but the ability of one branch to check another depends on the relative power that each branch has, as a practical matter,

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led to conflict within states as state officials sought to formulate statewide policies. See Kavahn Mansouri, *Madison County Oks resolution outlining plan to reopen against Pritzker’s order*, Belleville News-Democrat, May 12, 2020, <https://www.bnd.com/news/local/article242685486.html>.

<sup>84</sup> See Thomas Carothers & Andrew O’Donohue, *How Americans Were Driven to Extremes*, Foreign Affairs, Sept. 25, 2019, <https://www.foreignaffairs.com/articles/united-states/2019-09-25/how-americans-were-driven-extremes>.

<sup>85</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (Harlan, J.), quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.”). At present, opposition to vaccination for the coronavirus has outstripped the development of a vaccine. See Nicholas Bogel-Burroughs, *Antivaccination Activists Are Growing Force At Virus Protests*, N.Y. Times, May 2, 2020, <https://www.nytimes.com/2020/05/02/us/anti-vaxxers-coronavirus-protests.html>.

<sup>86</sup> See PEW RESEARCH CENTER, *BEYOND RED VS. BLUE: POLITICAL TYPOLOGY*, May 4, 2011 at 19-44, <https://www.people-press.org/2011/05/04/beyond-red-vs-blue-the-political-typology/>.

<sup>87</sup> See, e.g., CAROL BERKIN, *A SOVEREIGN PEOPLE: THE CRISES OF THE 1790S AND THE BIRTH OF AMERICAN NATIONALISM* (New York: Basic Books, 2017).

<sup>88</sup> Chief Justice William H. Rehnquist was responsible for a resurgence of states’ rights in constitutional jurisprudence in the late twentieth century. See, e.g., Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002).

<sup>89</sup> See David Remnick, *What Donald Trump Shares with Joseph McCarthy*, New Yorker, May 17, 2020, <https://www.newyorker.com/magazine/2020/05/25/what-donald-trump-shares-with-joseph-mccarthy>. See also Jacqueline Howard & Veronica Stracqualursi, *Fauci warns of ‘anti-science bias’ being a problem in US*, CNN, June 18, 2020, <https://www.cnn.com/2020/06/18/politics/anthony-fauci-coronavirus-anti-science-bias/index.html>.

<sup>90</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J. concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”).

at any particular time.<sup>91</sup> During much of the nineteenth century, for example, the legislative branch was dominant over the executive.<sup>92</sup> That is not currently the case. As a practical matter, and for a variety of reasons, the power of the presidency expanded greatly during the twentieth century, a trend that continues today, and the legislative branch now seems incapable of serving as an effective check on executive power. Indeed, the Trump administration appears to have broken all records, not only with respect to its assertions of executive power, but also with respect to its refusal to recognize either the principle of executive accountability or the legitimacy of Congress's oversight authority.<sup>93</sup> The administration has repeatedly refused to make its personnel and records available to Congress.<sup>94</sup> It has even argued that Congress is constitutionally prohibited from auditing the administration's dispersal of the trillions of dollars that Congress allocated for COVID-19 stimulus relief.<sup>95</sup> And it has further insulated itself from meaningful review by systematically removing independent inspectors general charged with auditing the executive branch's activities.<sup>96</sup> Moreover, even before taking the oath of office, the President began referring to news reports concerning his activities as "fake news," thereby laying the groundwork for delegitimizing the press as a credible vehicle for holding the administration to account.<sup>97</sup>

The upshot is that the United States currently has a very powerful presidency that seems largely immune from meaningful oversight. Even if the President were to act competently, such a concentration of power would be a threat to liberty, as the founders recognized. However, when the President is not competent – or is simply indifferent to the problems the nation faces – a "workable government" is not possible. President Trump has long seemed uninterested in the actual task of governing.<sup>98</sup> Indeed, just as he portrayed himself as a "Washington outsider" during

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<sup>91</sup> See *id.* at 653-54 ("Subtle shifts take place in the centers of power that do not show on the face of the Constitution. ... [The Court] may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.").

<sup>92</sup> See, e.g., James T. Patterson, *The Rise of Presidential Power Before World War II*, 40 *Law & Contemp. Probs.* 39 (1976).

<sup>93</sup> See Philip Bump, *The key political fight of this era: Trump vs. accountability*, *Wash. Post*, May 18, 2020, <https://www.washingtonpost.com/politics/2020/05/18/key-political-fight-this-era-trump-vs-accountability/>.

<sup>94</sup> See Sueng Min Kim & Rachel Bade, *Trump's defiance of oversight presents new challenge to Congress's ability to rein in executive branch*, *Wash. Post*, Oct. 7, 2019, <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>.

<sup>95</sup> See Kyle Cheney, *Trump chips away at Congress' role in coronavirus relief oversight*, *Politico*, Mar. 27, 2020, <https://www.politico.com/news/2020/03/27/trump-congress-coronavirus-relief-oversight-152560>. See also Tom Hamburger, et al., *Inspectors general warn that Trump administration is blocking scrutiny of coronavirus rescue programs*, *Wash. Post*, June 15, 2020, <https://www.washingtonpost.com/business/2020/06/15/inspector-general-oversight-mnuchin-cares-act/>.

<sup>96</sup> See Michael Laris & Ian Duncan, *Transportation Secretary Elaine Chao's office says no 'nefarious motive' for replacing acting inspector general*, *Wash. Post*, May 21, 2020, <https://www.washingtonpost.com/nation/2020/05/21/transportation-secretary-elaine-chaos-office-says-no-nefarious-motive-replacing-acting-inspector-general/>.

<sup>97</sup> See Steve Coll, *Donald Trump's "Fake News" Tactics*, *New Yorker*, Dec. 4, 2017, <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>; Patrice Taddonio, *How a Fight Over Crowd Size Would Define Trump's Approach to the Presidency—and the Truth*, *PBS*, Jan. 13, 2020, <https://www.pbs.org/wgbh/frontline/article/how-a-fight-over-crowd-size-would-define-trumps-approach-to-the-presidency-and-the-truth/>.

<sup>98</sup> See Karen Tumulty, *When governing beckons, Trump keeps campaigning*, *Wash. Post*, Feb. 16, 2017, [https://www.washingtonpost.com/politics/when-governing-beckons-trump-keeps-campaigning/2017/02/16/376deb8e-f3b4-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/politics/when-governing-beckons-trump-keeps-campaigning/2017/02/16/376deb8e-f3b4-11e6-8d72-263470bf0401_story.html); Maggie Haberman & Annie Karni,



the 2016 presidential campaign, he has often continued to portray himself as an outsider as President – a critic standing outside a government that he is responsible for leading.<sup>99</sup> In doing so, he taps into an anti-government trope that President Reagan made popular when he famously pronounced that government was the problem, not the solution.<sup>100</sup>

President Trump has also followed President Reagan’s lead in embracing a policy of sweeping de-regulation and appointing agency leaders who are actively antagonistic to the missions of the agencies they lead.<sup>101</sup> In addition, however, President Trump has chosen to leave many government positions unfilled;<sup>102</sup> he has experienced a high rate of turnover in those that he has filled; and he has often chosen to name persons to serve in an “acting” capacity. He has claimed that that many of the vacant positions are unnecessary,<sup>103</sup> and that persons who serve in an “acting” officials are more responsive to his wishes than officials who have been appointed in compliance with constitutional requirements.<sup>104</sup> Agencies dealing with scientific issues have been particularly hard hit, with many vacancies remaining unfilled. In some instances, the Trump administration has encouraged whole groups of scientists to leave government service by re-locating their bureaus from the Washington area to far-away locations.<sup>105</sup> As the number of scientists in government decreases, the government’s ability to respond to crises requiring scientific knowledge also necessarily decreases; but vacancies of all kinds diminish the government’s ability to respond in a timely and decisive way to emergency situations. It seems likely that this will prove to have been the case with the Trump administration’s response to the COVID-19 pandemic.<sup>106</sup>

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*Does Trump Want to Fight for a Second Term? His Self-Sabotage Worries Aides*, N.Y. Times, June 17, 2020, <https://www.nytimes.com/2020/06/17/us/politics/trump-2020-election.html>.

<sup>99</sup> See Greg Sargent, *Trump’s entire reelection message amounts to an admission of failure*, Wash. Post, May 21, 2020, <https://www.washingtonpost.com/opinions/2020/05/21/trumps-entire-reelection-message-amounts-an-admission-failure/>; Jonathan Lemire & Zeke Miller, *Trump tests whether incumbent leader can tap outsider anger*, Star Tribune, May 21, 2020, <https://www.startribune.com/trump-tests-whether-incumbent-leader-can-tap-outsider-anger/570650832/>.

<sup>100</sup> See Ronald R. Reagan, First Inaugural Address of Ronald Reagan, Jan. 20, 1981, [https://avalon.law.yale.edu/20th\\_century/reagan1.asp](https://avalon.law.yale.edu/20th_century/reagan1.asp).

<sup>101</sup> See Lisa Friedman, *New Energy Secretary Fits Trend: Cabinet Dominated by Lobbyists*, N. Y. Times, Oct. 18, 2019, <https://www.nytimes.com/2019/10/18/climate/trump-cabinet-lobbyists.html>.

<sup>102</sup> See Lara Seligman & Robbie Gramer, *At Trump’s Pentagon, Empty Offices Are The New Normal*, Foreign Policy, Mar. 12, 2019, <https://foreignpolicy.com/2019/03/12/at-trumps-pentagon-empty-offices-are-the-new-normal-department-of-defense-mattis-resignation-vacancies-trump-administration-shanahan/>.

<sup>103</sup> See Philip Bump, *Out of curiosity, President Trump, which of these 360-plus positions aren’t worth filling?*, Wash. Post, Aug. 29, 2017, <https://www.washingtonpost.com/news/politics/wp/2017/02/28/out-of-curiosity-president-trump-which-of-these-500-plus-positions-arent-worth-filling/>; Ed Kilgore, *Trump Says He’s Deliberately Refusing to Fill Hundreds of Top Agency Jobs*, New York Magazine, Feb. 28, 2017, <https://nymag.com/intelligencer/2017/02/trump-says-hes-deliberately-not-filing-top-positions.html>.

<sup>104</sup> See Sabrina Siddiqui, *Donald Trump’s preference for ‘acting’ senior officials alarms experts and allies*, The Guardian, Apr. 10, 2019, <https://www.theguardian.com/us-news/2019/apr/10/donald-trump-acting-senior-officials-alarms-experts-allies>. Many executive positions require Senate confirmation. See U.S. Const., art. II, § 2, cl. 2.

<sup>105</sup> See Annie Gowen, et al., *Science ranks grow thin in Trump administration*, Wash. Post, Jan. 23, 2020, [https://www.washingtonpost.com/climate-environment/science-ranks-grow-thin-in-trump-administration/2020/01/23/5d22b522-3172-11ea-a053-dc6d944ba776\\_story.html](https://www.washingtonpost.com/climate-environment/science-ranks-grow-thin-in-trump-administration/2020/01/23/5d22b522-3172-11ea-a053-dc6d944ba776_story.html). See also Lisa Friedman, *A War Against Science, Waged by Washington’s Rank and File*, N.Y. Times, June 15, 2020, <https://www.nytimes.com/2020/06/15/climate/climate-science-trump.html>.

<sup>106</sup> See Joe Davidson, *Vacancies have hindered the Trump administration’s response to the coronavirus*, Wash. Post, Apr. 15, 2020, [https://www.washingtonpost.com/politics/vacancies-have-hindered-the-trump-administrations-response-to-the-coronavirus/2020/04/14/8c412180-7e94-11ea-8de7-9fdff6d5d83e\\_story.html](https://www.washingtonpost.com/politics/vacancies-have-hindered-the-trump-administrations-response-to-the-coronavirus/2020/04/14/8c412180-7e94-11ea-8de7-9fdff6d5d83e_story.html); Rudy Mehrbani, *Trump gutted his personnel office. Now it’s doomed to fail when we need it most*, Wash. Post, Apr. 7, 2020,

Long before he was a candidate for the presidency, President Trump proclaimed that climate change was a “hoax.”<sup>107</sup> After becoming President, he soon commenced what some have called a “war on science,”<sup>108</sup> rolling back a multitude of regulations that prevented many of his supporters from engaging in activities harmful to the environment, among other things.<sup>109</sup> President Trump has often denied the legitimacy of scientific or technical knowledge, and, in addition to referring to inconvenient facts as “fake news,” he has frequently claimed to know more than trained experts in any number of fields.<sup>110</sup> For example, he has often said that he understands military affairs better than his generals,<sup>111</sup> and he has regularly undercut his own public health officials, such as when he indicated that he would not personally follow their advice regarding masks and social distancing. This devaluation of expert knowledge has made it difficult for public health officials to persuade the public that the pandemic poses a serious threat or that appropriate precautions are necessary. But the strategy has played well politically with a substantial segment of the U.S. population. Wearing masks and social distancing are annoying. Most people would prefer to avoid them. But the President’s devaluation of expert knowledge resonates especially with those who believe (not without some justification) that experts and elites are to blame for various policy initiatives, such as various trade agreements, which have meant greater profits for the few and fewer jobs for blue-collar workers.<sup>112</sup> President Trump has also tapped into the discontent that some religious groups have felt.<sup>113</sup> Although his public health officials have continued to emphasize the dangers attendant upon large gatherings,<sup>114</sup> for example, the President has asserted that church groups should be exempt from state limitations on large gatherings,<sup>115</sup> and his Attorney General has intervened on behalf of churches in several lawsuits which sought, thus far unsuccessfully, to force states to permit large-scale church gatherings on First Amendment grounds.<sup>116</sup>

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<https://www.washingtonpost.com/outlook/2020/04/07/covid-19-white-house-personnel-fauci-birx-atkinson/>. See also Lisa Friedman, *A War Against Science, Waged by Washington’s Rank and File*, N.Y. Times, June 15, 2020,

<sup>107</sup> See Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But*, N.Y. Times, Nov. 19, 2016, <https://www.nytimes.com/2016/11/19/world/asia/china-trump-climate-change.html>.

<sup>108</sup> See Editorial Board, *President Trump’s War on Science*, N.Y. Times, Sept. 9, 2017,

<https://www.nytimes.com/2017/09/09/opinion/sunday/trump-epa-pruitt-science.html>.

<sup>109</sup> See Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 Conn. L. Rev. 1 (2020).

<sup>110</sup> See Shwana Chen, *Donald Trump, Expert*, Politico, Sept. 3, 2019,

<https://www.politico.com/magazine/story/2019/09/03/donald-trump-expert-227997>; Aaron Blake, *19 things Donald Trump knows better than anyone else, according to Donald Trump*, Wash. Post, Oct. 4, 2016,

<https://www.washingtonpost.com/news/the-fix/wp/2016/10/04/17-issues-that-donald-trump-knows-better-than-anyone-else-according-to-donald-trump/>.

<sup>111</sup> See Leo Shane III, *Trump blasted top military officials as ‘a bunch of dopes and babies’ according to book*, Military Times, Jan. 17, 2020, <https://www.militarytimes.com/news/pentagon-congress/2020/01/17/trump-blasted-top-military-generals-as-a-bunch-of-dopes-and-babies-according-to-new-book/>; Wesley Morgan & Nahal Toosi, *Trump again overrules top brass*, Politico, Apr. 8, 2019, <https://www.politico.com/story/2019/04/08/trump-iran-revolutionary-guard-pentagon-1261448>.

<sup>112</sup> See Barry Sullivan, *Democratic Conditions*, 51 Loy. U. Chi. L. J. 555 (2019).

<sup>113</sup> See Michael Gerson, *The Last Temptation*, The Atlantic, April 2018,

<https://www.theatlantic.com/magazine/archive/2018/04/the-last-temptation/554066/>.

<sup>114</sup> See CDC, *Considerations for Events and Gatherings*, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>.

<sup>115</sup> See Peter Baker, *Firing a Salvo in Culture Wars, Trump Pushes for Churches to Reopen*, N.Y. Times, May 22, 2020, <https://www.nytimes.com/2020/05/22/us/politics/trump-churches-coronavirus.html>.

<sup>116</sup> See Adam Liptak, *Supreme Court, in 5-4 Decision, Rejects Church’s Challenge to Shutdown Order*, N.Y. Times, May 30, 2020, <https://www.nytimes.com/2020/05/30/us/supreme-court-churches-coronavirus.html>. The CDC has

## Conclusion

In the third week of June 2020, the future of the pandemic in the United States remains uncertain. Testing has greatly increased in many states. The daily number of deaths has decreased substantially in the states that were the first to be hit hard, and all of the country is opening up. Many Americans have become fatigued by the lockdowns and are happy to see their relaxation. Many suffer severe financial distress. Many, particularly less well-off Americans, are either currently unemployed or fearful that they soon will be. The economic consequences of the pandemic are likely to be long-lasting, and they are likely to perpetuate festering inequalities.<sup>117</sup> Demonstrations in support of racial justice continue, but some predict that the pandemic may lead to even greater inequality.<sup>118</sup>

The President has announced that he will hold his first rally since March in Tulsa, Oklahoma, on June 20. There will be no social distancing, and masks will be optional. The rally will be held indoors in a large arena, which, according to public health officials, makes it even more dangerous. Participants must sign waivers freeing the Trump Campaign from liability if they contract the virus.<sup>119</sup> A few days before the rally, Tulsa officials announced 96 new coronavirus cases locally, the largest single-day number since March.<sup>120</sup> At the same time, many states that escaped the earliest impacts of the pandemic are experiencing the largest daily numbers of new infections since the pandemic began.<sup>121</sup> That was true of Arizona, Florida, Oklahoma, and South Carolina; and Texas, which has seen its cases double in the past month, has become the sixth state to exceed 100,000 known infections.<sup>122</sup> About 800 Americans are dying from the coronavirus every day, and the federal government's leadership "has so faded that state and local health officials have been left to figure out on their own how to handle rising infections and to navigate conflicting signals from the White House."<sup>123</sup> This week, the President seemed to suggest that the key to ending the

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altered its guidance on reopening churches, apparently at the insistence of the White House. See Charles Duncan, *CDC changes guidelines for reopening churches during pandemic. Here's what is different*, McClatchy, May 29, 2020, <https://www.mcclatchydc.com/news/coronavirus/article243089421.html>.

<sup>117</sup> See Dominic Rushe, *Coronavirus has widened America's vast racial wealth gap, study says*, The Guardian, June 19, 2020, <https://www.theguardian.com/us-news/2020/jun/19/coronavirus-pandemic-billioinaires-racial-wealth-gap>; Jeanna Smialek, *Fed Chair Powell Warns Pandemic Downturn Could Widen Inequalities*, N.Y. Times, June 16, 2020, <https://www.nytimes.com/2020/06/16/business/economy/coronavirus-jerome-powell-federal-reserve.html>.

<sup>118</sup> See Tim Wu, *How to Avoid a 'Rich Man's Recovery'*, N.Y. Times, June 18, 2020, <https://www.nytimes.com/2020/06/18/opinion/covid-economic-recovery-inequality.html>.

<sup>119</sup> See Oliver Milman, *Trump campaign asks supporters to sign coronavirus waiver ahead of rally*, The Guardian, June 12, 2020, <https://www.theguardian.com/us-news/2020/jun/12/trump-rally-supporters-sign-coronavirus-waiver>.

<sup>120</sup> See Annie Karni, *Tulsa Braces for Trump Rally's Health Threat as Virus Cases Rise*, N.Y. Times, June 17, 2020, <https://www.nytimes.com/2020/06/17/us/politics/tulsa-rally-trump.html>.

<sup>121</sup> See Holly Yan & Madeleine Holcombe, *10 states are seeing their highest average of daily new Covid-19 cases since the pandemic began*, CNN, June 17, 2020, <https://www.cnn.com/2020/06/17/health/us-coronavirus-wednesday/index.html>.

<sup>122</sup> See Julie Bosman, *W.H.O. Warns of 'Dangerous Phase' of Pandemic as Outbreaks Widen*, N.Y. Times, June 19, 2020, <https://www.nytimes.com/2020/06/19/us/coronavirus-new-dangerous-phase.html>.

<sup>123</sup> See Sheryl Gay Stolberg, et al., *With the Federal Health Megaphone Silent, States Struggle With a Shifting Pandemic*, N.Y. Times, June 17, 2020, <https://www.nytimes.com/2020/06/17/us/politics/coronavirus-pandemic-federal-response.html>.

pandemic was to stop testing: "If you don't test, you don't have any cases."<sup>124</sup> He also suggested that some Americans may be wearing masks, not to prevent spread of the coronavirus, but “as a way to signal disapproval of him.”<sup>125</sup> Meanwhile, the World Health Organization warned that the world had entered a “new and dangerous phase” of the pandemic.<sup>126</sup>

The groups that have been hit hardest – the poor, people of color, Native Americans, the elderly, prisoners – continue to be among the hardest hit. It is not clear whether we are finished with the first wave of infections, let alone whether there will be a second wave – a possibility that some epidemiologists have suggested.<sup>127</sup> Nor is it clear whether persons who have been infected with the virus will develop immunity.<sup>128</sup> Businesses are reopening. Many schools and universities will be reopening in the autumn. Whether people will continue to practice social distancing and wear masks remains to be seen. There is much talk that employees who want to return to work will be required to sign waivers, holding their employers harmless in the event that they contract the coronavirus. If so, the social costs of public health will fall, once more, on those least able to absorb them.

Chicago  
June 19, 2020

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<sup>124</sup> See Stephen Collinson, *Trump's wish for an end to the pandemic contradicts reality*, CNN, June 16, 2020; <https://www.cnn.com/2020/06/16/politics/donald-trump-coronavirus-politics-oklahoma-election-2020/index.html>. See also Philip Bump, *Trump claims the coronavirus pandemic is ending. Data and the experts disagree*, Wash. Post, June 18, 2020, <https://www.washingtonpost.com/politics/2020/06/18/trump-claims-coronavirus-pandemic-is-ending-data-experts-disagree/>.

<sup>125</sup> See Berkeley Lovelace Jr., *Trump says some Americans wear coronavirus masks 'to signal disapproval of him,'* CNBC, June 18, 2020, <https://www.cnbc.com/2020/06/18/trump-says-some-wear-coronavirus-masks-to-signal-disapproval-of-him.html>.

<sup>126</sup> See Julie Bosman, *W.H.O. Warns of 'Dangerous Phase' of Pandemic as Outbreaks Widen*, N.Y. Times, June 19, 2020, <https://www.nytimes.com/2020/06/19/us/coronavirus-new-dangerous-phase.html>.

<sup>127</sup> See Len Strazewski, *Harvard epidemiologist: Beware COVID-19's second wave this fall*, AMA, May 8, 2020, <https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall>; Edward Helmore, *Fauci says second wave of Covid-19 cases 'is not inevitable,'* The Guardian, June 12, 2020, <https://www.theguardian.com/us-news/2020/jun/13/anthony-fauci-second-wave-coronavirus-cases>.

<sup>128</sup> See Apoorva Mandavilli, *You May Have Antibodies After Coronavirus Infection. But Not For Long*, N.Y. Times, June 18, 2020, <https://www.nytimes.com/2020/06/18/health/coronavirus-antibodies.html>.