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Lessons of the Plague Years

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Lessons of the Plague Years

Barry Sullivan*

The COVID-19 pandemic has challenged governments of every description across the globe, and it surely would have tested the mettle of any American administration. But the pandemic appeared in the United States at a particularly inopportune time. January 2020 marked the beginning of a presidential election year in a deeply polarized country. President Donald Trump was a controversial figure, beginning the fourth year of a highly idiosyncratic administration. He was both a candidate for re-election and the subject of an ongoing impeachment proceeding. In these circumstances, the pandemic quickly became politicized.

President Trump's response to the COVID-19 pandemic has often been faulted for his lack of leadership, and for his refusal to "follow the science." During the 2020 election, the Democrats sought to portray themselves as the "party of science," touting their willingness to "follow the science," and distinguishing themselves in that way from President Trump—whom they portrayed as someone who did not "believe in science." That portrayal was not entirely fanciful. President Trump had long pursued policies that evidenced a disregard for science and other forms of expert knowledge, and he sometimes publicly and peremptorily rejected the advice of his scientific advisors during the pandemic. As this Article shows, however, the issue was more complicated than "following the science" or not.

The president failed to demonstrate the leadership that the situation called for, and he seemingly lost all interest in the pandemic after he failed to win

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re-election—even as the infection and death counts spiraled out of control. But the story of the federal government’s missteps is about more than one man’s vanity or even his attitudes towards science, governing, or electoral defeat. It also involves the government’s scientific bureaucracy, and its relationship to the president and other political actors—matters that transcend the personalities or particularities of any specific administration. From the beginning of the pandemic, government scientists purported to speak with great authority, but their pronouncements were far from consistent. They instructed the public not to wear masks in the strongest possible terms, for example, and then reversed course with little explanation. They also failed in other tasks; they produced defective COVID-19 tests and then resisted making adjustments that would have produced accurate results. They were subjected to intense political pressures, and they sometimes gave in.

The federal government’s response to the pandemic involves failures by scientists and politicians, and implicates some of the most fundamental aspects of our constitutional system. First, the primary responsibility for public health rests with the states in our federal system, but the national government is constitutionally authorized to act in a national public health emergency. At the end of the day, however, the effectiveness of federal action may depend as much on the quality of the president’s leadership and relationships with state officials (and, at least in times of extreme partisanship, on whether the president and state officials belong to the same political party), as on any specific constitutional or legal authority. Second, it is a commonplace that Congress makes the laws, while the president’s role is to “take Care that the Laws be faithfully executed.” For the federal government to respond effectively to a national health crisis, Congress must grant the president the legal authority to act, and the president must be willing to exercise the authority that Congress has given. That too depends on presidential leadership, and, at least in times of extreme partisanship, it may also depend on the respective party affiliations of the president and congressional majorities. Third, in several recent cases, the Supreme Court has enthusiastically endorsed the so-called “unitary executive” theory, which holds that the president must have strong chain-of-command authority over all administrative decisionmakers, regardless of how technical or inappropriate for resolution by short-term political calculation their work may be. On the other hand, governmental transparency and sound policy demand that policymakers and the public be able to recognize where scientific expertise ends, and politics begins. Finally, given the date currently set for presidential elections, the Twentieth Amendment ensures that a defeated or otherwise retiring president will retain all the power of the presidency for approximately ten weeks after a new president has been elected, regardless of how much political support or interest in governing the incumbent president may have.

This Article explores the effects that each of these constitutional principles and understandings has had on the government’s efforts to combat the COVID-19 pandemic, as well as the effect that the government’s performance with respect to the pandemic should have on how we think about these principles and theories. Those inquiries are particularly appropriate now, when the problems posed by political polarization, unconventional political leaders, and the public’s need for the best available science are unlikely to disappear.

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INTRODUCTION

As recently as December 2019, many Americans would have agreed that the United States is a medical research and healthcare powerhouse—perhaps the foremost such powerhouse in the world—and that no conceivable communicable disease could seriously affect its fortunes.¹ That

1. See, e.g., Gemma Conroy, *These Are the 10 Best Countries for Life Sciences Research*, NATURE (Jan. 20, 2020), <https://www.nature.com/nature-index/news-blog/ten-best-countries-life-sciences-research-rankings> [<https://perma.cc/CE3G-9RJS>] (noting that the U.S. dominates in life sciences

thought could not reasonably have been entertained, however, by anyone who was privy to the results of the government's 2019 "Crimson Contagion" simulation exercise. That exercise, which took place over the course of several months, involved numerous federal government agencies, many medical centers and non-governmental organizations, and twelve state governments that purported to respond to a scenario in which fictitious travelers returned to the United States after being infected with a novel influenza virus in China.² The scenario assumed that there was no vaccine available to protect against infection, and no anti-viral drug to treat infected individuals.³ The simulation therefore presented the most difficult problem that public health authorities ever face: "How do you save lives in a pandemic before you have the drugs and vaccines to do it?"⁴ The results of the exercise—which the government did not disclose

research). Although studies show that the American healthcare system is more expensive, less effective, and more unequal than those of most peer countries, public confidence remains high. *See, e.g.*, Ezekiel J. Emanuel et al., *Comparing Health Outcomes of Privileged US Citizens with Those of Average Residents of Other Developed Countries*, JAMA INTERNAL MED. (Dec. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2774561> [<https://perma.cc/5YAB-8P3GJ>] ("The US health care system appears to underperform on nearly every metric," but "US politicians, the public, and even physicians seem complacent, often proclaiming that the United States has 'the best health care system in the world.'"); *but see* CARLY FUNK ET AL., PEW RSCH. CTR., *Americans' Views about Public Health and Health Studies in the News*, in VAST MAJORITY OF AMERICANS SAY BENEFITS OF CHILDHOOD VACCINES OUTWEIGH RISKS 1, 20–25 (2017), <https://www.pewresearch.org/science/2017/02/02/americans-views-about-public-health-and-health-studies-in-the-news/> [<https://perma.cc/F6ST-U8S3>] ("Overall, asked whether public health is better, worse or stable over the past few decades, Americans tilt toward viewing health outcomes in the U.S. as declining compared with 20 years ago."). In addition, the public health infrastructure has been chronically underfunded. *See, e.g.*, Bryan Walsh, *The World Is Not Ready for the Next Pandemic*, TIME (May 4, 2017), <https://time.com/magazine/us/4766607/may-15th-2017-vol-189-no-18-u-s/> [<https://perma.cc/8XEE-JP6C>] ("[E]xperts warn we aren't ready to keep America—and the world—safe from the next pandemic."); *see also* RHEA K. FARBERMAN ET AL., TRUST FOR AMERICA'S HEALTH, *THE IMPACT OF CHRONIC UNDERFUNDING OF AMERICA'S PUBLIC HEALTH SYSTEM: TRENDS, RISKS, AND RECOMMENDATIONS* (2020) (discussing how the pandemic exposed the underfunding issues of public health system).

2. *See* David E. Sanger et al., *Before Virus Outbreak, A Cascade of Warnings Went Unheeded*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/us/politics/trump-coronavirus-outbreak.html> [<https://perma.cc/J39Q-MH7Y>] ("The simulation's sobering results—contained in a draft report dated October 2019 that has not previously been reported—drove home just how underfunded, underprepared and uncoordinated the federal government would be for a life-or-death battle with a virus for which no treatment existed. The draft report, marked 'not to be disclosed,' laid out in stark detail repeated cases of 'confusion' Federal agencies jockeyed over who was in charge. State officials and hospitals struggled to figure out what kind of equipment was stockpiled or available. Cities and states went their own ways on school closings.").

3. *Id.*

4. MICHAEL LEWIS, *THE PREMONITION: A PANDEMIC STORY* 77 (2021); *see also* LAWRENCE WRIGHT, *THE PLAGUE YEAR: AMERICA IN THE TIME OF COVID* 50 (2021) (noting the George W. Bush administration's efforts to formulate a "comprehensive pandemic preparedness plan" and "figure out how to manage the early waves of a hypothetical pandemic that has no medical solutions.").

to the public—were not encouraging. If the simulation had been real, the virus would have killed 586,000 Americans in a matter of weeks.⁵

Among other things, the Crimson Contagion exercise shed light on the danger posed by a possible gap between “a society’s reputation and its performance”⁶—a gap that the federal government’s response to COVID-19 would soon confirm. But the existence of that gap should not have surprised anyone. As the historian Jennifer Klein has observed, the previous three decades in the United States had been dominated by an ideology that championed the privatization of public services and benefits, as well as “the privatization and individuation of risk.”⁷ The “stubborn fact,” Professor Klein further suggested, is “that risk is social as well as individual. [And] the privatization of risk had left the American population in a distinctly vulnerable position to meet the major social crisis of a new pathogen, as a generation of marketization brought us . . . dismantled public health systems, delayed routine medical care, degraded schools and housing, and overcrowded prisons. It even left us bereft of the ability to act and argue for a common public good or public interest.”⁸

5. See Sanger et al., *supra* note 2 (noting that by the time a pandemic was declared for Crimson Contagion, forty-seven days after it was detected, “110 million Americans were expected to become ill,” 7.7 million would be hospitalized, and 586,000 would be dead).

6. See LEWIS, *supra* note 4, at xv; see also Lisa Monaco & Vin Gupta, *The Next Pandemic Will Be Arriving Shortly*, FOREIGN POLICY (Sept. 28, 2018), <https://foreignpolicy.com/2018/09/28/the-next-pandemic-will-be-arriving-shortly-global-health-infectious-avian-flu-ebola-zoonotic-diseases-trump/> [<https://perma.cc/45EC-4EUV>] (“[T]he financial commitments to the [global health security] agenda have been dramatically reduced under Trump, leaving us all vulnerable to an unparalleled array of emerging health threats the likes of which we haven’t seen since 1918, when . . . [the] ‘Spanish flu’ killed nearly 50 million people globally. In the face of clear signs that the world is unprepared for the next outbreak, that devastating epidemics are a flight away, and that funding to combat these realities has been significantly cut back, the failure to take this crisis seriously is potentially deadly.”); Kevin T. Kavanagh et al., *COVID-19 Lessons Learned: A Global Perspective*, 10 ANTIMICROBIAL RESISTANCE INFECTION CONTROL 125 (2021), <https://aricjournal.biomedcentral.com/articles/10.1186/s13756-021-00992-x> [<https://perma.cc/YK3T-PCHA>] (“Of all of the industrialized nations, the United States appeared to have one of the most substantive deficits in how the public healthcare system was able to address the pandemic . . .”).

7. Jennifer Klein, *Inoculations: The Social Politics of Time, Labor, and Public Good in COVID-America*, 99 INT’L LAB. & WORKING-CLASS HIST. 30, 34 (Spring 2021) (“Both shifts rested on the tenets that markets more effectively distribute resources, that regulations impeded flexible adaptation and innovation, and so individuals should see themselves as consumers whose needs can be met through private markets and the family. Individuals should work, save, compete, and embrace ‘personal responsibility’ for one’s own education, housing, medical care, safety, disability, and long-term security. Although plenty of Americans lived a reality that hardly matched these claims, the fantasy and powerful hold of the ideology tenaciously hung on.”).

8. *Id.*; see also Helidah Didi Ogude, *An Unethical, Minimal, and Cruel Welfare State: COVID-19 and the Makings of a Demoralized U.S. Citizenry*, GLOB. POL’Y (June 8, 2020), <https://www.globalpolicyjournal.com/blog/08/06/2020/unethical-minimal-and-cruel-welfare-state>

The similarities between the results of the government's 2019 simulation and the reality of what happened when COVID-19 reached the United States are striking. To be sure, the pandemic has challenged governments across the globe. For much of the pandemic, however, the United States accounted for a greatly disproportionate share of the world's infections and deaths; it certainly did not lead the world in terms of the effectiveness of its response.⁹ By the time that President Trump left office in January 2021, approximately twenty-four million Americans had been infected with the virus, and more than 400,000 people had died.¹⁰ The number of infections and deaths has continued its climb since the end of the Trump administration. By the beginning of June 2022, for example, more than eighty-two million Americans had been infected with the virus, and more than one million people had died.¹¹ People of color, indigenous people, the poor, the elderly, and those with pre-existing

-covid-19-and-makings-demoralized-us [https://perma.cc/DD9X-GU6V] ("COVID-19 has laid bare the economic fragility of so many. Yet, it is neoliberalization that enabled this fragility in the first place. Its roots are in a demoralized citizenry, misguided policymakers, and a market-based system that primarily sustains the capital of the elite class, while the pervasively touted benefits and pursuit of the American Dream are used to intellectually and politically pacify the public."); see WRIGHT, *supra* note 4, at 15 ("The only thing that kept democracy from winding up in a suicidal brawl of self-interest was a sense of common purpose, but the pandemic exposed that the United States no longer had one.").

9. In April 2021, for example, the United States accounted for only about 4 percent of the world's population, but 23 percent of COVID infections and 20 percent of COVID deaths. Alexandra Ellerbeck, *The Health 202: Here's How the U.S. Compares to Other Countries on the Coronavirus Pandemic*, WASH. POST (Apr. 12, 2021, 7:52 AM), <https://www.washingtonpost.com/politics/2021/04/12/health-202-here-how-us-compares-other-countries-coronavirus-pandemic/> [https://perma.cc/EQG8-AUAT]; see Fred Lipfert & Sheldon Linsky, *COVID-19 Is Down, but Not Yet Out*, AM. COUNCIL SCI. & HEALTH (July 13, 2021), <https://www.acsh.org/news/2021/07/13/covid-19-down-not-yet-out-15660> [https://perma.cc/H2KZ-SSZW] (reporting that COVID infections and deaths in the United States decreased after vaccines became widely available in early 2021). The downward trend in infections and deaths was later reversed, however, with the arrival of the Delta Variant and a substantial decrease in the number of new vaccinations. Rich Mendez, *Covid Deaths on the Rise Again in the U.S. after Weeks of Decline, CDC Says*, CNBC NEWS (July 16, 2021), <https://www.cnbc.com/2021/07/16/covid-deaths-on-the-rise-again-after-weeks-of-decline-cdc-says.html> [https://perma.cc/8Y4F-NSMD]. In May 2022, WHO announced that the worldwide number of COVID deaths was probably more than twice the number that had been officially reported. See Benjamin Mueller & Stephanie Nolen, *Death Toll during Pandemic Far Exceeds Totals Reported by Countries, W.H.O. Says*, N.Y. TIMES (May 6, 2022), <https://www.nytimes.com/2022/05/05/health/covid-global-deaths.html> [https://perma.cc/AQ5M-QT7R] ("In the United States, the W.H.O. estimated that roughly 930,000 more people than expected had died by the end of 2021, compared with the 820,000 Covid deaths that had been officially recorded over the same period.").

10. Carolyn Crist, *U.S. Surpasses 400,000 COVID-19 Deaths*, WEBMD (Jan. 20, 2020), <https://www.webmd.com/lung/news/20210119/u-s-surpasses-400-thousand-covid-19-deaths> [https://perma.cc/J4M5-Z6T3].

11. *COVID-19 United States Cases by County*, JOHNS HOPKINS UNIV. & MED.: CORONAVIRUS RSCH. CTR., <https://coronavirus.jhu.edu/us-map> [https://perma.cc/GW8C-ZJPK] (last visited Feb. 4, 2022).

health conditions were more likely than others to become sick and more likely than others to die.¹² The pandemic thereby illuminated the nation's pre-existing web of social ills. As Catherine Powell, the human rights law scholar and former Obama administration official, has written, "Even as COVID-19 . . . unmasked deeply embedded structural inequalities, this moment of interlinked pandemics of coronavirus, inequality, and economic precarity affects us all, albeit disparately, and has torn at the very fabric of the social contract we owe one another and, in fact, depend upon."¹³ In addition, many of those who managed to survive COVID-19 illnesses have continued to suffer from a variety of sometimes debilitating symptoms that have been called "long COVID."¹⁴ Many others were

12. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, HEALTH EQUITY CONSIDERATIONS AND RACIAL AND ETHNIC MINORITY GROUPS (Jan. 25, 2022), <https://public4.pagefreezer.com/browse/CDC%20Covid%20Pages/22-06-2022T15:09/https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [https://perma.cc/CC9F-MWD8] ("The COVID-19 pandemic has brought social and racial injustice and inequity to the forefront of public health. It has highlighted that health equity is still not a reality as COVID-19 has unequally affected many racial and ethnic minority groups, putting them more at risk of getting sick and dying from COVID-19."); see Ed Pilkington, *Black Americans Dying of Covid-19 at Three Times the Rate of White People*, GUARDIAN (May 20, 2020, 12:50 PM), <https://www.theguardian.com/world/2020/may/20/black-americans-death-rate-covid-19-coronavirus> [https://perma.cc/K8Z4-EKJZ] (explaining that racial minority groups have been disproportionately affected by COVID-19); Judith Graham & Kaiser Health News, *Most Seniors Who Died of Covid-19 Lived Outside Nursing Homes*, CNN HEALTH (Aug. 5, 2021), <https://www.cnn.com/2021/08/05/health/seniors-covid-19-deaths-partner/index.html> [https://perma.cc/NS2P-UYQU] (explaining that the elderly have been hit hardest by the pandemic); Nina Lakhani, *Exclusive: Indigenous Americans Dying from Covid at Twice the Rate of White Americans*, GUARDIAN (Feb. 4, 2021, 3:00 PM), <https://www.theguardian.com/us-news/2021/feb/04/native-americans-coronavirus-covid-death-rate> [https://perma.cc/9DDV-P624] ("Covid is killing Native Americans at a faster rate than any other community in the United States, shocking new figures reveal."); see also ORG. FOR ECON. COOP. & DEV., *First Lessons from Government Evaluations of COVID-19 Responses: A Synthesis* 31 (Jan. 21, 2022), https://read.oecd-ilibrary.org/view/?ref=1125_1125436-7j5hea8nk4&title=First-lessons-from-government-evaluations-of-COVID-19-responses [https://perma.cc/76BL-E2TX] (noting that the pandemic's "adverse effects" had been felt more strongly across the OECD countries in "vulnerable social groups," such as people living in poverty, the elderly, children and young people, and people who lack adequate housing).

13. Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1, 4 (2021).

14. See CTRS. FOR DISEASE CONTROL & PREVENTION, LONG COVID OR POST-COVID CONDITIONS (July 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> [https://perma.cc/M9FE-5Q4D] (describing health conditions associated with long COVID); see also Pam Belluck, *More Than 1 in 5 Adult Covid Survivors in the U.S. May Develop Long Covid, a C.D.C. Study Suggests*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/24/health/long-covid-infections.html> [https://perma.cc/63PT-AGKS] (examining the symptoms of long Covid); Ariana Eunjung Cha, *Vaccines May Not Prevent Many Symptoms of Long Covid, Study Suggests*, WASH. POST (May 25, 2022, 11:25 AM), <https://www.washingtonpost.com/health/2022/05/25/long-covid-vaccines-slight-protection/> [https://perma.cc/3ZUP-KQMN] (discussing the efficacy of vaccines against long COVID symptoms).

indirectly affected by the pandemic when they experienced serious mental health issues including social isolation, feelings of anxiety, depression, and other emotional responses to the pandemic.¹⁵ Instances of domestic abuse also increased throughout the world, and the United States was no exception.¹⁶

On the other hand, safe and effective vaccines were developed, and almost half the United States population had been vaccinated by August 2021.¹⁷ By then, however, the United States had entered a new phase of the pandemic, which was fueled by the more contagious Delta variant, and by the continued refusal of many Americans to be vaccinated or take other steps to mitigate the spread of the disease, such as masking and social distancing.¹⁸ By June 1, 2022, 89 percent of Americans over the

15. See, e.g., Alison Abbott, *COVID's Mental-Health Toll: How Scientists Are Tracking a Surge in Depression*, NATURE (Feb. 3, 2021), <https://www.nature.com/articles/d41586-021-00175-z> [<https://perma.cc/53T8-3FCS>] (examining changes in mental health associated with the pandemic); see generally Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/> [<https://perma.cc/GC6D-2JXN>].

16. Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html> [<https://perma.cc/2DAR-CCNA>]; see Megan L. Evans et al., *A Pandemic within a Pandemic—Intimate Partner Violence during Covid-19*, 383 NEW ENG. J. MED. 2302 (Dec. 10, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2024046> [<https://perma.cc/Y4GZ-JSEL>] (“This pandemic has reinforced important truths: inequities related to social determinants of health are magnified during a crisis, and sheltering in place does not inflict equivalent hardship on all people.”); see generally *Impact Report: Covid-19 and Domestic Violence Trends*, COUNCIL ON CRIM. JUST. (Feb. 23, 2021), <https://counciloncj.org/impact-report-covid-19-and-domestic-violence-trends/> [<https://perma.cc/GQN5-TVE2>].

17. COVID-19 United States Cases by County, *supra* note 11; see CTRS. FOR DISEASE CONTROL & PREVENTION, COVID-19 VACCINATIONS IN THE UNITED STATES (Aug. 18, 2022), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> [<https://perma.cc/MYY3-3Z2C>] (reporting that by June 1, 2022, 82.8 percent of the population aged five years and older had received at least one dose of a vaccine).

18. See, e.g., Dominick Mastrangelo, *Opposition to Vaccine, Mask Mandates Mainly Limited to Republicans: Poll*, HILL (Aug. 11, 2021, 7:41 AM), <https://thehill.com/policy/healthcare/public-global-health/567295-opposition-to-vaccine-mask-mandates-mainly-limited-to/> [<https://perma.cc/N3FU-UPW9>] (“GOP support came in slightly higher for mask mandates, the poll found, but a majority of Republican respondents still expressed opposition, while majorities of Democrats and independents in the poll indicated they supported mandatory face covering measures.”); see Timothy Bella, *Ted Cruz Calls for ‘Zero’ Coronavirus Mandates, While Rand Paul Urges Defiance amid Delta Variant Surge*, WASH. POST (Aug. 10, 2021, 9:11 AM), <https://www.washingtonpost.com/politics/2021/08/10/cruz-paul-mandates-mask-vaccine/> [<https://perma.cc/GLY4-5QD2>] (statement of Ted Cruz) (“There should be no mandates—zero—concerning covid That means no mask mandates, regardless of your vaccination status. That means no vaccine mandates. That means no vaccine passports.”); see also Linus Chua, *Austin Sounds ‘Dire’ Covid Emergency as Available ICU Beds Drop*, BLOOMBERG NEWS (Aug. 7, 2021, 11:56 PM), <https://www.bloomberg.com/news/articles/2021-08-08/austin-with-just-six-icu-beds-left-warns-of-dire-covid-state> [<https://perma.cc/2ZCT-CHF5>] (discussing the shortage of medical supplies in Texas despite rising Covid infections).

age of eighteen had received one dose of a vaccine, 76 percent had been fully vaccinated, and 50 percent had also received the recommended booster.¹⁹ However, high-ranking public officials led the opposition to vaccination and other mitigation strategies in some areas of the country.²⁰

Whether one was willing to be vaccinated or abide by other restrictions on individual liberty often became a marker of party affiliation, with each side blaming the other and signifying little interest in finding common ground for formulating an effective response to the pandemic.²¹ For example, an August 2021 poll showed that a majority of Americans favored mandatory vaccination and indoor masking requirements, but only 35 percent of Republicans favored mandatory vaccination, compared to approximately 80 percent of Democrats and more than 50 percent of independent voters.²² While Republican support for mask mandates was slightly higher than it was for mandatory vaccination, the poll showed that a majority of Republicans nonetheless opposed mask mandates.²³ On

19. See generally COVID-19 VACCINATIONS IN THE UNITED STATES, *supra* note 17.

20. See, e.g., Shane Goldmacher, *G.O.P. Governors Fight Mandates as the Party's Covid Politics Harden*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/08/31/us/politics/republican-governors-covid-19.html> [<https://perma.cc/7P8N-74EY>] (“As a new coronavirus wave accelerated by the Delta variant spreads across the United States, many Republican governors have taken sweeping action to combat what they see as an even more urgent danger posed by the pandemic: the threat to personal freedom.”); see also Dave Montgomery, *Gov. Greg Abbott Bars Mandates for Vaccinations and Masks in Texas*, N.Y. TIMES (Oct. 30, 2021), <https://www.nytimes.com/2021/07/31/world/greg-abbott-mask-vaccine-mandate.html> [<https://perma.cc/Q9FZ-F6F8>] (“In an executive order issued on Thursday, Gov. Greg Abbott, the Republican governor of the nation’s second-largest state, prohibited local governments and state agencies from mandating vaccines, saying that protection against the virus should be a matter of personal responsibility, not forced by a government edict.”); Richard Fausset, *As Virus Cases Spike in Arkansas, the Governor Backtracks on Masks*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/03/us/covid-arkansas-mask-mandate.html> [<https://perma.cc/ZC75-HWBZ>] (“In recent days, as coronavirus cases fueled by the highly contagious Delta variant have skyrocketed in Arkansas, Mr. Hutchinson has backtracked, and is now urging state legislators to undo part of the law so school districts may adopt mask mandates before students return to their classrooms en masse.”).

21. See, e.g., Christos A. Makridis & Jonathan T. Rothwell, *The Real Cost of Political Polarization: Evidence from the COVID-19 Pandemic*, 34 COVID ECON. 50, 51 (2020) (“[A]ccording to Gallup in late May 2020, 79% of Republicans reported that the coronavirus situation was getting better, compared to 22% of Democrats. Moreover, these individual partisan differences have real economic effects: they correspond with meaningful institutional differences across states.”); DEBORAH LUPTON, COVID SOCIETIES: THEORIZING THE CORONAVIRUS CRISIS 92–99 (2022) (examining key sociocultural theories and their role in the pandemic); see also Moises Velasquez-Manoff, *The Anti-Vaccine Movement's New Frontier*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/magazine/anti-vaccine-movement.html> [<https://perma.cc/43MJ-DLH2>] (“Political affiliation may be an important factor behind what [pediatrician] Froehle and others are experiencing.”).

22. See COVID-19 VACCINATIONS IN THE UNITED STATES, *supra* note 17 (showing breakdown of groups favoring or disfavoring mandatory vaccinations and mask requirements).

23. *Id.*

the other hand, the poll showed that nearly all Democrats and a majority of independents were in favor.²⁴ The situation on the ground improved during fall 2021, but deteriorated once more with the arrival of the less lethal but more contagious Omicron variant in late 2021.²⁵ Omicron sub-variants, which quickly became the dominant forms of COVID-19, caused another upsurge of infections—but not of hospitalizations or deaths—in spring 2022.²⁶ By Memorial Day 2022, the number of new COVID-19 cases in the United States was five times the number it had been a year earlier.²⁷

The economic consequences of the pandemic have been devastating for many Americans. Much of the economy was shut down during the worst of the pandemic, with unemployment reaching 14.8 percent in March 2020—the highest rate registered since the government first compiled such statistics in 1948.²⁸ That aspect of the pandemic response also

24. *Id.*; see also Dan Caputo, *Poll: Majorities Support Vaccine, Mask Mandates—But Not Republicans*, POLITICO (Aug. 11, 2021, 6:01 AM), <https://www.politico.com/news/2021/08/11/majorities-support-vaccine-mask-mandates-republicans-503506> [<https://perma.cc/87SB-KMT4>] (“According to the poll, more than 8 in 10 Democrats and at least half of independent voters want to require vaccinations for all Americans (except those with medical conditions), for employees who work in their area and those who go to gyms or entertainment venues.”).

25. See, e.g., Campbell Robertson et al., *The U.S. Faces Another Covid Christmas as Omicron Fuels a Rise in Cases*, N.Y. TIMES (Dec. 20, 2021), <https://www.nytimes.com/2021/12/20/us/us-holidays-omicron-cases.html> [<https://perma.cc/X6EH-EUPD>] (“On Monday, the Centers for Disease Control and Prevention reported that Omicron, which accounted for less than 1 percent of new Covid-19 cases in the United States as December began, now accounts for nearly three-quarters of new cases, underlining how stunningly infectious it is.”); see also CTRS. FOR DISEASE CONTROL & PREVENTION, *OMICRON VARIANT: WHAT YOU NEED TO KNOW* (July 29, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> [<https://perma.cc/7J7C-LUVX>] (“The Omicron variant spreads more easily than earlier variants of the virus that cause COVID-19, including the Delta variant. CDC expects that anyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others. Data suggests that Omicron can reinfect individuals, even if they have recently recovered from COVID-19.”).

26. See, e.g., Jennifer Rigby, *WHO Says That It Is Analysing Two New Omicron COVID Sub-variants*, REUTERS (Apr. 11, 2022, 8:43 AM), <https://www.reuters.com/business/healthcare-pharmaceuticals/who-says-it-is-analysing-two-new-omicron-covid-sub-variants-2022-04-11/> [<https://perma.cc/9RNJ-WERQ>] (“[Omicron] now represents nearly 94% of all sequenced cases and is more transmissible than its siblings, but the evidence so far suggests it is no more likely to cause severe disease.”); see Benjamin Mueller & Eleanor Lutz, *During the Omicron Wave, Death Rates Soared for Older People*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/health/omicron-deaths-age-65-elderly.html> [<https://perma.cc/QN8N-DD6M>] (demonstrating that the Omicron variant was particularly lethal among the elderly).

27. Fenit Nirappil et al., *Covid Was Vanishing Last Memorial Day. Cases Are Five Times Higher Now*, WASH. POST (May 28, 2022, 8:16 AM), <https://www.washingtonpost.com/health/2022/05/28/covid-memorial-day-surge/> [<https://perma.cc/3UFZ-KLJ2>] (“And public health authorities are bracing for Memorial Day gatherings to fuel another bump in cases, potentially seeding a summer surge.”).

28. GENE FALK ET AL., CONG. RSCH. SERV., R46554, *UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 2 (2021)* (showing statistics on unemployment rates during the pandemic).

seems to have been deeply affected by political partisanship: Republican-dominated state governments generally preferred economic considerations to public health concerns, while Democratic states tended to be more conservative, taking steps to protect public health, even when the economic costs were clear.²⁹ While the unemployment rate decreased substantially in 2021, the economy still had 5.7 million fewer jobs in August 2021 than in February 2020.³⁰ Moreover, the burden of unemployment fell heaviest on lower-wage workers in industries that suddenly found little or no demand for their goods or services, such as hotels and restaurants.³¹ While many white-collar and professional workers were

29. See, e.g., Sean McMinn & Liz Crampton, *Covid's Deadly Trade-Offs, by the Numbers: How Each State Has Fared in the Pandemic*, POLITICO (Dec. 15, 2021, 4:00 AM), <https://www.politico.com/interactives/2021/covid-by-the-numbers-how-each-state-fared-on-our-pandemic-scorecard/> [<https://perma.cc/T2DE-5XRS>]. The study showed that 8 of the 10 states with the best performing economies were led by Republican governors and voted for President Trump in 2020, while all 10 of the worst performing states voted for Vice President Biden. *Id.* On the other hand, states with the best health outcomes were led by Democratic or moderate Republican governors and supported Vice President Biden in the 2020 election. *Id.*

30. Paul Wiseman, *US Jobless Claims Hit a Pandemic Low as Hiring Strengthens*, CHI. TRIB. (Aug. 19, 2021), <https://www.chicagotribune.com/business/ct-biz-jobless-pandemic-hiring-20210819-b5uif7ab7jdgjm5vklp6y2x4y-story.html> [<https://perma.cc/7VHJ-CUJ6>] (providing statistics on unemployment rates during the pandemic); see also Abha Bhattarai, *Job Openings in April Remain Near Record Highs, U.S. Employers Report*, WASH. POST (June 1, 2022, 1:16 PM), <https://www.washingtonpost.com/business/2022/06/01/jolts-job-quits-april/> [<https://perma.cc/59GX-D9SX>] (“In all, the labor market has added more than 6.5 million jobs in the past year and is on pace to return to pre-pandemic levels this summer.”).

31. See Chun-Chu (Bamboo) Chen & Ming-Hsiang Chen, *Well-Being and Career Change Intention: COVID-19's Impact on Unemployed and Furloughed Hospitality Workers*, 33 INT'L J. HOSP. MGMT. 2500, 2500 (2021) (noting that unemployment among hospitality workers reached 37.3 percent in April 2021); see also Michael Sainato, *'It's a Minefield': US Restaurant Workers Leave Industry over Covid*, GUARDIAN (May 14, 2021, 5:30 AM), <https://www.theguardian.com/us-news/2021/may/14/us-restaurant-workers-covid-pandemic-labor-shortages> [<https://perma.cc/NLR9-KTYF>] (noting that “exploitive practices” and lack of COVID safety precautions deterred many from working in the restaurant industry). According to a report published by One Fair Wage and the UC Berkeley Food Labor Research Center in May 2021, 53 percent of workers in the restaurant industry have considered leaving their job since the pandemic started, with low wages and tips, safety concerns, and harassment from customers as the primary reasons provided by workers. IT'S A WAGE SHORTAGE, NOT A WORKER SHORTAGE, ONE FAIR WAGE & UC BERKLEY FOOD LAB. RSCH. CTR. 5 (2021), https://onefairwage.site/wp-content/uploads/2021/05/OFW_WageShortage_F.pdf [<https://perma.cc/JHY9-SCLJ>]; see also Powell, *supra* note 13, at 44 (“[W]hile some workers can do their jobs from the relative safety of home, others cannot. It is time we stop treating essential workers and the unemployed as ‘disposable’ people and start developing an improved law and politics of inclusion that better supports all of us—regardless of race, gender, and class.”); Klein, *supra* note 7, at 39–40 (“Amid the pandemic, who works and who doesn’t, or who works in a safe or unsafe place, lays bare . . . ‘the relationship of domination and submission that is authorized by the waged labor contract and that shapes labor’s exercise.’ . . . The managerial response to COVID-19 ratcheted up management’s ability to compel those in their employ to work continuously.”).

able to work from home,³² those who provided “essential services,” including such diverse groups as medical providers, first responders, and grocery store workers, could not avoid their workplaces or the virus.³³ Many businesses remain shuttered with little hope that they will ever return.³⁴ The pandemic also generated supply-chain failures that increased

32. See Elise Gould & Jori Kandra, *Only One in Five Workers Are Working from Home Due to COVID*, Economic Policy Institute, Working Economics Blog (June 2, 2021), <https://www.epi.org/blog/only-one-in-five-workers-are-working-from-home-due-to-covid-black-and-hispanic-workers-are-less-likely-to-be-able-to-telework/> [<https://perma.cc/KHQ9-B3DC>] (providing statistics on those with the ability to “telework” amid the pandemic); Meera Jagannathan, *It’s Important to Keep in Mind Who Has Been Most Shielded from the Economic and Health Devastation of the Pandemic Recession*, MKT. WATCH (June 6, 2021, 12:02 PM), <https://www.marketwatch.com/story/offices-are-negotiating-a-return-to-work-but-many-people-never-left-their-workplace-during-the-pandemic-11622752482> [<https://perma.cc/6MN9-3CX8>] (“Just one in five U.S. workers are able to work remotely due to the pandemic, according to a report from the left-leaning Economic Policy Institute, which analyzed U.S. Bureau of Labor Statistics data from May 2020 to April of [2021].”); see also Edward Lempinen, *After COVID-19, Work Will Never Be ‘Normal’ Again*, BERKELEY NEWS (Mar. 9, 2021), <https://news.berkeley.edu/2021/03/09/after-covid-19-work-will-never-be-normal-again/> [<https://perma.cc/V5LX-E3MD>] (“White-collar workers have the freedom to work at home . . .”).

33. See Adriana Belmonte, *Blue-Collar Workers Hit Harder Than White-Collar Ones during Pandemic: Survey*, YAHOO! MONEY (Mar. 13, 2021), <https://money.yahoo.com/blue-collar-workers-hit-hard-during-pandemic-135956953.html> [<https://perma.cc/F4SN-H2SY>] (“Blue-collar workers faced bigger health risks and fewer opportunities to minimize their exposure . . . only 16% are still working remotely compared to 49% of white-collar workers.”); Kate Gibson, *Once Viewed as Essential, Grocery Workers Now Treated as “Expendable,” Union Chief Says*, CBS NEWS (Feb. 23, 2021, 6:06 PM), <https://www.cbsnews.com/news/grocery-workers-expendable-covid-vaccine-union/> [<https://perma.cc/FRB2-RF6Y>] (“Once lauded as essential and deserving of ‘hazard pay’ for working during the coronavirus pandemic, grocery store employees are now treated as ‘expendable’, according to the head of the union that represents them.”); Abha Bhattarai, *Grocery Workers Say Morale Is at an All-Time Low: ‘They Don’t Even Treat Us Like Humans Anymore.’*, WASH. POST (Aug. 12, 2020, 7:00 AM), <https://www.washingtonpost.com/business/2020/08/12/grocery-workers-coronavirus/> [<https://perma.cc/BE8Y-JBDQ>] (“Grocery workers across the country say morale is crushingly low as the pandemic wears on with no end in sight.”). See also Talia Soglin et al., *Chicago Is Seeing a Wave of Union Activity. Among the Reasons: Workers “Saw the Willingness of Their Bosses to Let Them Die.”* CHI. TRIB. (June 2, 2022), <https://www.chicagotribune.com/business/ct-biz-pandemic-labor-resurgence-20220602-k6jrbz6bcfgwtje2et6ue7ifcm-story.html> [<https://perma.cc/CT6F-VF9L>] (“Workers, labor organizers and academics say the COVID-19 pandemic accelerated an existing trajectory set in motion by low wages, income inequality, poor working conditions and a pervasive feeling among workers that they lack a voice on the job. And from hospitals to grocery stores, many workers took note of how their workplaces failed to protect them from the virus.”); Klein, *supra* note 7, at 39 (“What has been revealed about being an essential worker or being labeled as such by opportunistic employers is the inability to say ‘no.’ Being essential meant risk of exposure to health and bodily threats was bound up with risk of exposure to economic insecurity.”).

34. See Chris Nichols, *Fact-Check: Have One-Third of US Small Businesses Closed During Pandemic?*, AUSTIN AM.-STATESMAN (June 8, 2021), <https://www.statesman.com/story/news/politics/politifact/2021/06/08/kamala-harris-small-business-closures-covid-fact-check/7602531002/> [<https://perma.cc/U7SZ-FL7L>] (discussing closures at small businesses like hotels, restaurants, and cafes); Iman Ghosh, *34% of America’s Small Businesses Are Still Closed Due to COVID-19.*

inflation and disproportionately harmed those with the fewest resources.³⁵ This unequal allocation of burdens, loss of life, and economic devastation resulted from a failure to contain or mitigate the effects of the virus, as well as from an ingrained societal indifference, perhaps, to the interests of those who would inevitably suffer most from the pandemic.³⁶ More recently, continued supply-chain failures and other disruptions in trade, including those caused by the war in Ukraine and widespread COVID-19 lockdowns in China, have further increased inflation and economic hardships.³⁷

Here's Why It Matters, WORLD ECON. F. (May 5, 2021), <https://www.weforum.org/agenda/2021/05/america-united-states-covid-small-businesses-economics/> [<https://perma.cc/AXX3-RFG2>] (noting that approximately one third of small businesses in the U.S. had closed since December 2020); see also Greg Hinz, *A Third of Illinois' Small Businesses Closed or Still Closed a Year into COVID*, CRAIN'S CHI. BUS. (Mar. 30, 2021, 12:01 AM), <https://www.chicagobusiness.com/greg-hinz-politics/third-illinois-small-businesses-closed-or-still-closed-year-covid> [<https://perma.cc/2THQ-AE2W>] (reporting the number of small business shutdowns in Illinois).

35. See Jen Kirby, *Inflation Isn't Just a US Thing*, VOX (Nov. 24, 2021, 2:41 PM), <https://www.vox.com/2021/11/24/22799217/global-inflation-us-eu-germany-uk> [<https://perma.cc/E9RG-A4Q5>] (discussing supply chain disruptions).

36. See, e.g., Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555, 562–63 (2019) (discussing seeming indifference of governing elites to the needs and plight of the disadvantaged and stating that the situation would have been much worse if Congress had not appropriated funds to create a safety net); see Tara Siegel Bernard & Ron Lieber, *The Pandemic Safety Net Is Coming Apart. Now What?*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/07/18/your-money/coronavirus-relief-expiration.html> [<https://perma.cc/G7BH-KNQL>] (“One by one, pandemic relief programs that financially supported millions of Americans are going away.”).

37. See, e.g., Lauren Gambino, *Joe Biden Calls Inflation His 'Top Domestic Priority' But Blames Covid and Putin—as It Happened*, GUARDIAN (May 10, 2022, 5:05 PM), <https://www.theguardian.com/us-news/live/2022/may/10/joe-biden-inflation-ukraine-republicans-democrats-us-politics-live> [<https://perma.cc/M4RU-C6B8>] (“I want every American to know that I’m taking inflation very seriously and it’s my top domestic priority,” Biden said.); Michelle Toh, *How China's Lockdowns Are Taking a Toll on Global Companies*, CNN BUS. (May 10, 2022, 12:48 PM), <https://www.cnn.com/2022/05/10/business/china-covid-lockdowns-impact-global-business-intl-hnk/index.html> [<https://perma.cc/Q64V-ED4G>] (“The combination of [the pandemic and the war in Ukraine] has created a staggering one-two punch for multinational corporations, such as Estee Lauder (EL), which said last week that the ‘two significant headwinds’ forced it to slash its outlook for the year.”); see also Paul A. London, Opinion, *Managing the Covid/Ukraine Inflation*, HILL (Mar. 24, 2022, 3:00 PM), <https://thehill.com/blogs/congress-blog/economy-budget/599608-managing-the-covid-ukraine-inflation/> [<https://perma.cc/J292-4UX8>] (“U.S. inflation has surged since COVID-19 loosened its grip in mid-2021 and the war in Ukraine is making it worse. The key economic question is how to get inflation under control and hopefully come out the other end with a more prosperous, stronger, and less vulnerable economy.”); Jeanna Smialek, *Fed Officials Are on the Defensive as High Inflation Lingers*, N.Y. TIMES (May 6, 2022), <https://www.nytimes.com/2022/05/06/business/economy/fed-inflation-waller.html> [<https://perma.cc/22GD-PWYD>] (“The Fed is raising interest rates, and on Wednesday lifted them by the largest increment since 2000.”); Steven Harras, *Powell Says Fed 'Widely Underestimated' Rise in Inflation*, ROLL

Devising effective strategies for the containment or mitigation of a highly contagious virus requires imagination, social understanding, and political will, as well as technical expertise. Implementation of such strategies requires strong political leadership, a willingness to acknowledge the seriousness of the threat that the country faces, and an ability to articulate thorough explanations of what needs to be done and why. The latter is particularly important in the fluid circumstances of a pandemic, where both the virus and scientific understanding of it may be subject to rapid change, and where government officials will therefore need to maintain public confidence while acting decisively under conditions of uncertainty. An effective response also requires strong coordination between the federal government and the states.³⁸

The United States failed miserably in all of these respects. Government scientists were inconsistent in their messaging,³⁹ and President Trump repeatedly told the American people that the virus was not serious and would soon disappear, even though he privately acknowledged the seriousness of the situation as early as the beginning of February 2020.⁴⁰

CALL (Mar. 21, 2022, 5:35 PM), <https://rollcall.com/2022/03/21/powell-says-fed-widely-underestimated-rise-in-inflation/> [<https://perma.cc/BP3Q-G29K>] (“Speaking Monday at the National Association for Business Economics’ annual conference in Washington, Powell said forecasters—including those at the U.S. central bank—‘widely underestimated’ the severity and persistence of supply-chain challenges created by the pandemic and accompanying shutdowns. He said these developments, when combined with strong demand, especially for durable goods, ‘produced surprisingly high inflation.’”).

38. The need for coordination in a federal system may seem obvious, but the problem of coordination between governmental center and periphery also challenges other systems. In Italy, for example, “[m]anagement of health policy is divided between central government (which has responsibility for overarching legislation and the allocation of funding) and the regions, which are largely autonomous in managing the health services in their areas. This means not just a considerable variation in the provision of those services, but also that the central government is largely dependent upon the regions to implement its provisions, in terms of regulatory and legislative action.” Martin Bull, *The Italian Government Response to Covid-19 and the Making of a Prime Minister*, 13 CONTEMP. ITALIAN POL. 149, 157 (2021).

39. YASMEEN ABUTALEB & DAMIAN PALETTA, NIGHTMARE SCENARIO: INSIDE THE TRUMP ADMINISTRATION’S RESPONSE TO THE PANDEMIC THAT CHANGED HISTORY 179 (2021) (“The task force had a number of libertarians who were opposed to encouraging people to wear masks, and they immediately pounced on Redfield’s wishy-washy explanation. . . . Even Trump’s counselor Kellyanne Conway, who wasn’t on the task force but had caught wind of the mask debate, entered the room and argued about the communications mess it was creating. She believed this was a medical issue—not a political one—but the doctors themselves had been inconsistent about the efficacy of masks.”).

40. Quint Forgy & Matthew Choi, *This Is Deadly Stuff: Tapes Show Trump Acknowledging Virus Threat in February*, POLITICO (Sept. 9, 2020, 12:50 PM), <https://www.politico.com/news/2020/09/09/trump-coronavirus-deadly-downplayed-risk-410796> [<https://perma.cc/QJ48-GTU2>] (“President Donald Trump acknowledged the ‘deadly’ nature of the coronavirus earlier this year in a series of recorded interviews with The Washington Post’s Bob Woodward, even as Trump publicly sought to dismiss the disease’s threat to Americans.”). Even after he contracted the virus

On the other hand, industry scientists, building on the work of scientists at the National Institutes of Health (NIH),⁴¹ and with an extraordinary level of federal financial support, quickly succeeded in developing several safe and efficacious vaccines;⁴² and almost 165 million people—or slightly more than 50 percent of the population—had been vaccinated by August 1, 2021.⁴³ Indeed, the speed with which the vaccines were developed and manufactured was unprecedented. The fact that only about half the population had been fully vaccinated by early August 2021 was largely due to inadequate distribution strategies, rather than to any scarcity of supply.⁴⁴ An even more important factor, perhaps, was the lack of urgency felt among some demographic groups and the intractable opposition to vaccination among others.⁴⁵ In that respect as well, the United

and recovered from it—having received treatments that would not be available to ordinary Americans—he continued to say that the virus was not dangerous. See, e.g., Peter Baker & Maggie Haberman, *Trump Leaves Hospital, Minimizing Virus and Urging Americans ‘Don’t Let It Dominate Your Lives,’* N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/05/us/politics/trump-leaves-hospital-coronavirus.html> [<https://perma.cc/ZWN9-2GLD>] (“The president’s dismissal of a virus that in recent weeks has been killing another 700 people each day in the United States set off alarm bells among health specialists who worried that it would send the wrong message to the public.”); Gina Kolata & Roni Caryn Rabin, *‘Don’t Be Afraid of Covid,’ Trump Says, Undermining Public Health Messages,* N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/05/health/trump-covid-public-health.html> [<https://perma.cc/GR5S-P4QL>] (discussing President Trump’s downplaying of the danger presented by the COVID pandemic and the response of public health experts).

41. See, e.g., WRIGHT, *supra* note 4, at 30–37 (detailing the work of government scientists who developed the modified spike protein given to Moderna on January 13, 2020).

42. See, e.g., Riley Griffin & Drew Armstrong, *Pfizer Vaccine’s Funding Came from Berlin, Not Washington,* BLOOMBERG (Nov. 9, 2020, 1:26 PM), <https://www.bloomberg.com/news/articles/2020-11-09/pfizer-vaccine-s-funding-came-from-berlin-not-washington> [<https://perma.cc/RP3B-AJTT>]. Pfizer, which was the first firm to receive emergency use authorization for its vaccine, partnered with the German firm BioNTech and declined to accept funds from the United States government at the vaccine development stage. *Id.*

43. *COVID-19 United States Cases by County*, *supra* note 11.

44. See James G. Hodge Jr., *National Legal Paradigms for Public Health Emergency Responses*, 71 AM. U. L. REV. 65, 104 (2021) (noting “log jams” in the distribution of vaccines created by the Trump administration’s policy of deference to the states); *id.* at 81 (“[M]ultiple states crafted variable priorities for the allocation [of vaccines] notwithstanding explicit federal guidance. Florida Governor Ron DeSantis prioritized specific populations (e.g., seniors not living in long-term care facilities) well ahead of schedule and allowed allocations of federal vaccine supplies to largely Republican-centered counties to the exclusion of counties with larger Democratic bases.”).

45. See Elaine Kamarck, *COVID-19 Is Crushing Red States. Why Isn’t Trump Turning His Rallies into Mass Vaccination Sites?*, BROOKINGS: FIXGOV (July 29, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/29/covid-19-is-crushing-red-states-why-isnt-trump-turning-his-rallies-into-mass-vaccination-sites/> [<https://perma.cc/EHL6-SJHA>] (“Polling has shown that the anti-vaccine message is especially popular among Republicans.”); Dan Goldberg & Rachel Roubein, *States Have a New Covid Problem: Too Much Vaccine*, POLITICO (Apr. 21, 2021, 4:30 AM), <https://www.politico.com/news/2021/04/21/states-covid-vaccine-problem>

States failed miserably.⁴⁶

These two facts—the successful development and manufacture of several safe and effective vaccines, on the one hand, and the failure to contain the virus or mitigate its effects, or to plan for delivering the available vaccines to more Americans more quickly, on the other hand—well illustrate the extent of the federal government’s successes and failures in the fight against COVID-19. In fact, the speedy development and manufacture of safe and efficacious vaccines—which was aided by “Operation Warp Speed”⁴⁷—may have been the Trump administration’s greatest accomplishment, as well as the one bright spot in its pandemic response. Although the speedy development of the vaccines was an unparalleled achievement, the massive undertaking that was responsible for it nonetheless failed to give President Trump what he most desired: a fully approved vaccine that was available to the public in time to ensure his re-

-483872 [<https://perma.cc/7779-SMRJ>] (explaining that the supply of COVID-19 vaccines exceeded demand in many rural areas and big cities). *But see* Eduardo Medina, *Demand for Shots Is Increasing in Less-Vaccinated States Under Siege from the Delta Variant*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/07/31/world/less-vaccinated-covid-shots.html> [<https://perma.cc/3JK3-FSHD>] (explaining that vaccination rates were rising in states where rates had previously been lagging). Of course, many Americans had long opposed vaccination in other contexts. *See, e.g.*, Peter J. Hotez, Opinion, *How the Anti-Vaxxers Are Winning*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/opinion/how-the-anti-vaxxers-are-winning.html> [<https://perma.cc/U2GF-N7W9>] (describing the progress made by the anti-vaccination movement during several measles outbreaks in 2017); Chris Mooney, *The Biggest Myth about Vaccine Deniers: That They’re All a Bunch of Hippie Liberals*, WASH. POST (Jan. 26, 2015, 10:28 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2015/01/26/the-biggest-myth-about-vaccine-deniers-that-theyre-all-a-bunch-of-hippie-liberals/> [<https://perma.cc/X2S5-MAZL>] (“[T]he really big contributor to distrusting or disliking vaccines was not political ideology . . . at all, but rather, having a conspiratorial mindset, which can occur on both the left and the right.”). *See also* Eoin Higgins, *Not Getting Vaccinated to Own Your Fellow Libs*, ATLANTIC (Sept. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/what-do-lefty-anti-vaxxers-do-now/620092/> [<https://perma.cc/YJ3X-3BNP>] (noting that certain groups of Americans have long opposed vaccines).

46. *See COVID-19 United States Cases by County*, *supra* note 11 (providing details of COVID-19 cases in United States). By June 1, 2022, 75.1 percent of Americans twelve years of age or over were fully vaccinated, while only 48.6 percent had received the recommended booster. *Id.*

47. *See, e.g.*, Arthur Herman, *Why Operation Warp Speed Worked: The Successful Vaccine Program Followed the Model of U.S. Mobilization in World War II*, WALL ST. J. (Feb. 1, 2021, 6:28 PM), <https://www.wsj.com/articles/why-operation-warp-speed-worked-11612222129> [<https://perma.cc/7PZN-CKTB>] (“[Operation Warp Speed] is the most remarkable achievement in modern medicine . . .”). The distribution stage was less successful. *See* Dan Diamond, *The Crash Landing of ‘Operation Warp Speed’*, POLITICO (Jan. 17, 2021, 7:00 AM), <https://www.politico.com/news/2021/01/17/crash-landing-of-operation-warp-speed-459892> [<https://perma.cc/3JA7-Y7JH>] (explaining that the “Warp Speed” effort was not as successful as imagined after initial supplies ran out).

election.⁴⁸ Moreover, by publicly (albeit unsuccessfully) pressuring regulators to grant pre-election approval, he helped undermine public confidence in the vaccines when they ultimately became available.⁴⁹

During the two-and-one-half month period between the election and President Biden's inauguration, an additional fifteen million Americans were infected, and 173,327 more Americans died from the disease.⁵⁰ However, President Trump was "just done with covid," as one of his aides acknowledged in late December 2020.⁵¹ During that two-and-one-half

48. See, e.g., Philip Rucker et al., *Trump Fixates on the Promise of a Vaccine—Real or Not—as Key to Reelection Bid*, WASH. POST (Sept. 5, 2020, 5:02 PM), https://www.washingtonpost.com/politics/trump-vaccine-election/2020/09/05/c0da86d6-edf5-11ea-99a1-71343d03bc29_story.html [<https://perma.cc/WQK9-NMEB>] (arguing that President Trump's push to deliver a vaccine was part of campaign efforts to improve his popularity with voters who otherwise disapproved of his handling of the pandemic).

49. See, e.g., Sarah Oweremohle, *Outgoing FDA Chief: The Agency Fought 'Substantial' Pressure under Trump*, POLITICO (Jan. 19, 2021, 1:59 PM), <https://www.politico.com/news/2021/01/19/fda-trump-pressure-coronavirus-vaccine-460402> [<https://perma.cc/C96Z-M9ST>] ("By [Election Day], public confidence had plummeted: Nearly two-thirds of Americans believed that FDA would speed decisions because of Trump's pressure . . ."). During the 2020 presidential campaign, the Democratic vice-presidential candidate also undermined public confidence in the vaccine. See Evan Semones, *Harris Says She Wouldn't Trust Trump on Any Vaccine Released Before Election*, POLITICO (Sept. 5, 2020, 2:18 PM), <https://www.politico.com/news/2020/09/05/kamala-harris-trump-coronavirus-vaccine-409320> [<https://perma.cc/N5D5-PNEH>] ("Asked in an upcoming interview with CNN if she planned to get a vaccine potentially distributed ahead of November, Harris demurred."); Aaron Blake, *What Andrew Cuomo and Kamala Harris Said About Vaccine Skepticism*, WASH. POST (Mar. 18, 2021, 11:40 AM), <https://www.washingtonpost.com/politics/2021/03/18/what-andrew-cuomo-kamala-harris-said-about-vaccine-skepticism/> [<https://perma.cc/4K45-LYFT>] (describing comments made by Vice President Kamala Harris expressing distrust about the Trump administration's handling of vaccine development). This, of course, was the vaccine that the Biden administration later encouraged people to take. See Maegan Vazquez & Nikki Carvajal, *Biden Offers Rare Praise of Trump during Covid Speech*, CNN (Dec. 22, 2021, 1:27 PM), <https://www.cnn.com/2021/12/21/politics/biden-trump-covid-vaccine-booster/index.html> [<https://perma.cc/62RD-MV3G>]; Sinéad Baker, *Biden Acknowledged Trump's Role in the Vaccine Rollout as He Urged Skeptics to Get the Shot*, BUS. INSIDER (June 3, 2021, 3:55 AM), <https://www.businessinsider.com/biden-acknowledges-trump-role-coronavirus-vaccine-rollout-2021-6> [<https://perma.cc/VNQ8-UKPY>].

50. See *Federal COVID Data*, ATLANTIC: COVID TRACKING PROJECT, www.covidtracking.com [<https://perma.cc/NQR8-MKDS>] (showing the number of Americans who were infected with COVID-19 between Election Day and President Biden's inauguration) (last visited Aug. 17, 2022).

51. See Yasmeen Abutaleb et al., *The Inside Story of How Trump's Denial, Mismanagement and Magical Thinking Led to the Pandemic's Dark Winter*, WASH. POST (Dec. 19, 2020), <https://www.washingtonpost.com/graphics/2020/politics/trump-covid-pandemic-dark-winter/> [<https://perma.cc/J7G9-CDH3>] ("The president by then had abdicated his responsibility to manage the public health crisis and instead used his megaphone almost exclusively to spread misinformation in a failed attempt to overturn the results of the election he lost to President-elect Joe Biden."); Dan Diamond, *Trump's Election Challenges Distracted from Covid Response, White House Adviser Told Colleagues*, WASH. POST (Sept. 23, 2021, 9:00 PM),

month period, President Trump's attention was mainly focused on overturning the 2020 election.⁵² Even then, however, he continued to dictate the terms of the nation's response to the pandemic. By continuing to insist that he had won the election, President Trump delayed the presidential transition process and prevented the new administration from gaining access to information that would have been helpful in ensuring a smooth roll-out of the vaccines, among other things.⁵³

<https://www.washingtonpost.com/health/2021/09/23/trump-election-challenge-covid-response/> [<https://perma.cc/4JXG-MKHH>] (explaining that White House officials prioritized President Trump's challenges to the election results over managing the pandemic response).

52. See, e.g., Kyle Cheney, *Eastman Provides New Details of Trump's Direct Role in Legal Effort to Overturn Election*, POLITICO (May 20, 2022, 6:26 AM), <https://www.politico.com/news/2022/05/20/eastman-trump-role-legal-overturn-election-00034023> [<https://perma.cc/72FL-3L98>] (detailing John Eastman's communications with President Trump leading up to the January 6 attack on the Capitol); Tom Dreisbach, *Trump 'Likely' Committed Crime Trying to Stay in Power, Judge Says in Records Dispute*, NPR (Mar. 28, 2022, 5:06 PM), <https://www.npr.org/2022/03/28/1089253473/trump-likely-committed-crime-trying-to-stay-in-power-judge-says-in-records-dispu> [<https://perma.cc/4LCM-7A5K>] (describing a federal judge's determination that President Trump "more likely than not" violated the law in his attempts to overturn the 2020 election); Maggie Haberman, *Text from Donald Trump Jr. Set Out Strategies to Fight Election Outcome*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/us/politics/donald-trump-jr-meadows-text-message.html> [<https://perma.cc/UM3Y-BD6L>] (describing text messages that President Trump's eldest son sent to the White House chief of staff two days after Election Day in 2020); David E. Sanger, *Trump's Attempts to Overturn the Election Are Unparalleled in U.S. History*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/11/19/us/politics/trump-election.html> [<https://perma.cc/INJ6-SJAM>] (comparing President Trump's efforts to overturn the 2020 election results with actions taken after the 1876 presidential election); Matthew Rosenberg & Jim Rutenberg, *Key Takeaways from Trump's Effort to Overturn the Election*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/us/politics/trump-election-results.html> [<https://perma.cc/6QRP-H5V4>] (outlining the efforts taken by President Trump and those around him to overturn the 2020 election results in the period between the election and President Biden's inauguration). See generally Norman Eisen et al., *Trump on Trial: A Guide to the January 6 Hearings and the Question of Criminality*, BROOKINGS (June 6, 2022), <https://www.brookings.edu/wp-content/uploads/2022/06/Trump-on-Trial.pdf> [<https://perma.cc/KQ55-R9L7>]; Peter Baker, *Trump Is Depicted as a Would-Be Autocrat Seeking to Hang onto Power at All Costs*, N.Y. TIMES (June 11, 2022), <https://www.nytimes.com/2022/06/09/us/politics/trump-jan-6-hearing.html> [<https://perma.cc/TR8A-4SFR>].

53. See, e.g., Katherine Eban, *"There Is No Communication, No Emails, Nobody Called": How the Delayed Transition Kneecapped Biden's COVID Task Force*, VANITY FAIR (Nov. 24, 2020), <https://www.vanityfair.com/news/2020/11/how-the-delayed-transition-kneecapped-bidens-covid-task-force> [<https://perma.cc/YMG7-ZG3A>] (describing how the lack of communication during the executive transition impeded President Biden's COVID response efforts); Russell Brandom, *Trump's Post-Election Tantrum Is Holding Up Federal Vaccine Planning*, VERGE (Nov. 18, 2020, 8:24 AM), <https://www.theverge.com/2020/11/18/21573041/coronavirus-vaccine-trump-transition-problems-concede-election-results> [<https://perma.cc/TCA4-4D3K>] ("Two weeks after Election Day, President Trump has yet to acknowledge that he lost the election—and the consequences of that pettiness have effectively frozen the work that would normally be done by the incoming Biden administration."). President Trump has continued to assert that he won the 2020 election. See, e.g., Luke Broadwater, *House Finds Bannon in Contempt for Defying Jan. 6 Inquiry Subpoena*, N.Y. TIMES (Jan. 6, 2022) <https://www.nytimes.com/2021/10/21/us/politics/bannon-contempt-jan->

But the question remains: Why did the Trump administration do so well in supporting the development of safe and effective vaccines while seeming to fumble virtually every other aspect of pandemic response? During the 2020 election cycle, many Democrats had a simple explanation for the Trump administration's failures: the administration did not believe in science, and, unlike the Democrats, President Trump was not willing to follow the science.⁵⁴ That might explain some of the Trump administration's failures; it does not explain all of them, and it certainly cannot explain the administration's success with the initial stages of Operation Warp Speed. As with much else, President Trump may have "believed in science" insofar as he thought that it could serve his own interests. Alternatively, President Trump's seeming disbelief in science, like other aspects of his presidency, may have been merely performative.⁵⁵

6-subpoena.html [https://perma.cc/L22L-8MHD] (describing statements made by President Trump after the attack on the Capitol calling the election he lost "a crime").

54. See, e.g., Lydia Smith, *Nancy Pelosi Says 'Data, Evidence, Science' Will Determine When Coronavirus Lockdown Ends and Economy Opens Up*, NEWSWEEK (Apr. 10, 2020, 9:01 AM), <https://www.newsweek.com/nancy-pelosi-data-evidence-science-coronavirus-lockdown-economy-1497236> [https://perma.cc/CD8W-B2RX] (stating that Democratic leaders were relying on science and data when developing responses to the pandemic while President Trump declined to comment on his administration's strategies). The suggestion was not implausible, given the Trump administration's disregard for scientific knowledge in other areas. See, e.g., Melissa L. Kelly et al., *Safeguarding Against Distortions of Scientific Research in Federal Policymaking*, 51 ENV'T L. REP. 10014, 10014 (2021) ("Donald Trump's Administration [engaged in] unprecedented efforts to sideline scientists, defund and disregard research, and dismantle the institutional means by which science can inform government policy."); Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1 (2020) (describing the Trump administration's approach to the administrative state as one that dismissed expert analysis and scientific evidence). But see Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395, 2395 (2011) ("[President Obama] contrasted his approach with that of the previous administration . . . [H]e lamented that 'we . . . watched as scientific integrity has been undermined and scientific research politicized in an effort to advance predetermined ideological agendas.'"); *id.* at 2410 ("[T]he Obama Administration, like past administrations, is not immune to the pull to control scientific information, or to leave open avenues and legal justifications for so doing.").

55. President Trump affirmed his belief in science in a post-presidency interview. See CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 516 (2021) (describing President Trump's comments about his views on science). See also David A. Graham, *Trump's Performative Presidency*, ATLANTIC (Feb. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trumps-performative-presidency/516531/> [https://perma.cc/5VC3-8YLS] ("As news broke over the weekend that North Korea had launched a ballistic missile, President Trump was dining at the club with Japanese Prime Minister Shinzo Abe, and some people present in the dining room got to see a crisis unfolding. From one perspective, this is a dangerous breach of security and protocol. From another, it's a performative model of the presidency, though one that owes more to reality TV than to Sorkin's *The West Wing*."). See also Lee Keeling, *Guest Column Performative Politics Are on the Rise*, VICTORIA ADVOC. (Sept. 29, 2022), <https://www.victoriaadvocate.com/opinion/guest-column-performative-politics-are-on->

There is much blame to be laid at the feet of President Trump and his political advisors, but the government's scientific bureaucracy and the more general structures and arrangements of American government also contributed to the government's poor response. Indeed, some of the problems that surfaced during the Trump administration, such as the often-fraught relations between the scientific bureaucracy and the political leadership, did not leave government with President Trump. They remain today, albeit in possibly milder or less obvious forms.⁵⁶ In other words, important aspects of the problem go far beyond the vanities and frailties of one individual, or the hapless performance of a team of seemingly underqualified political appointees facing a unique and demanding challenge; they are systemic and warrant an examination into some of our most fundamental governmental arrangements. But it is also good to remember that the constitutional and legal provisions underlying our governmental arrangements, including, most notably, federalism and separation of powers, were not meant to abolish politics or to settle the substance of policy. They were intended only to provide a framework within which questions of policy could be discussed, debated, and decided.⁵⁷ Significantly, the framers of the Constitution did not anticipate the rise of political parties, or the effect that political parties might have on the governmental arrangements they created; but political parties and party competition soon came to dominate the work of government at both the state and federal levels.⁵⁸ Indeed, one cannot now begin to think

the-rise/article_4c16ca70-04d9-11ec-b894-63d804ba499f.html [https://perma.cc/ZZ2V-AVFY] (“Unsurprisingly, modern politicians sat up and took notice. Knowing actual progress on an issue is difficult, and requires a lot of time and energy just to end up with a compromise that nobody is really thrilled about, and recognizing our diminished desire to engage in deep thinking when, instead, we could have a bunch of drama—why not just produce the illusion of governing if the electorate will sit still for it? And it certainly appears that we will.”).

56. See Katherine Eban, *The Biden Administration Rejected an October Proposal for “Free Rapid Tests for the Holidays”*, VANITY FAIR (Dec. 23, 2021), <https://www.vanityfair.com/news/2021/12/the-biden-administration-rejected-an-october-proposal-for-free-rapid-tests-for-the-holidays> [https://perma.cc/HA4A-ZQP8] (describing the Biden administration's uneven efforts to make more COVID tests readily available); Philip Krause & Luciana Borio, *The Biden Administration Has Been Sidelining Vaccine Experts*, WASH. POST (Dec. 16, 2021, 8:19 AM), <https://www.washingtonpost.com/outlook/2021/12/16/vaccines-fda-cdc-boosters-expert-panel/> [https://perma.cc/X7CR-K9N6] (“The U.S. government, over the past few weeks, has made three important decisions on vaccines without consulting independent panels of experts.”).

57. The Constitution is “made for people of fundamentally differing views,” as Justice Oliver Wendell Holmes noted in *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). See also HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 3 (1981) (“The Constitution *did* settle many questions, and it established a lasting structure of rules and principles But it did not settle *everything* The political life of the community continues to be a dialogue”).

58. See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE*

about how the machinery designed by the framers works in practice without also thinking about political parties and the role that they play. What the president can or cannot do, particularly in times of extreme political polarization, may ultimately depend on the respective political allegiances of senators and representatives, and on whether those who control the state governments are members of the president's party. Similarly, whether Congress can be productive in times of extreme polarization also depends on the political composition of each House.⁵⁹

In Part I of this Article, we review four constitutional principles, or understandings, that are relevant to the way in which the government's approach to the pandemic played out. The first of these principles is federalism. As Chief Justice Marshall wrote in *McCulloch v. Maryland*,⁶⁰ "the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled."⁶¹ As a constitutional matter, the states, not the federal government, are primarily responsible for protecting the public health. On the other hand, the federal government has significant tools at its disposal, under both the Commerce Clause⁶² and the Spending Clause,⁶³ for coordinating the nation's response to a broad-based public health crisis—if it chooses to use them. What the federal government cannot mandate under the Commerce Clause, it may accomplish by fiscal persuasion under the Spending Clause.⁶⁴ The scope of the

OPPOSITION IN THE UNITED STATES, 1780–1840 8 (1969) ("The Federalists and Republicans did not think of each other as alternating parties in a two-party system. . . . [E]ach side hoped to attach the stigma of foreign allegiance and disloyalty to the intractable leaders of the other, and to put them out of business as a party."); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 120 (2018) ("It took several decades for this hard-edged quest for permanent victory to subside. The demands of everyday politics and the rise of a new generation of career politicians helped lower the stakes of competition."). See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

59. The picture is further complicated in the Senate, in which sixty votes, rather than a bare majority, are normally required to pass legislation. See, e.g., Alex Tausanovitch & Sam Berger, *The Impact of the Filibuster on Federal Policymaking*, CTR. AM. PROGRESS 16 (Dec. 2019), <https://americanprogress.org/wp-content/uploads/2019/12/Impact-Of-Filibuster.pdf> [<https://perma.cc/V8SV-PRZQ>] ("[T]he lion's share of legislation still must cross the filibuster's 60-vote threshold.").

60. 17 U.S. 316, 400 (1819).

61. *Id.* at 405.

62. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . .").

63. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

64. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987); *United States v. Butler*, 297 U.S. 1 (1936).

President's authority thus depends on the proper distribution of state and federal powers, and on the federal government's determination to exercise its available powers of leadership and coordination. In addition, the COVID-19 pandemic presented a situation more complex and challenging than most public health emergencies or natural disasters that require state and local cooperation and coordination. While emergencies requiring such coordination typically are limited in scope—requiring the federal government to work with one or a few states at a time—the COVID-19 pandemic required coordination with each of the states, the territories, and the Indian tribes, as well as with foreign nations and international organizations.⁶⁵

The second relevant principle is the separation of powers. In simplest terms, Congress makes the laws, and the President must “take Care that the Laws be faithfully executed.”⁶⁶ As Justice Frankfurter noted in *Youngstown Sheet & Tube Company v. Sawyer*, the Founders recognized the need for “limitations on the power of governors over the governed,” and therefore “rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.”⁶⁷ With respect to the President's Take Care duty, Justice Frankfurter further observed that, “The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. ‘The duty of the President to see that the laws be executed does not go beyond the laws or require him to achieve more

65. Juliette Kayyem recently wrote the following:

In my field, we define a crisis as a consequential disruption—such as a hurricane, an earthquake, or an oil spill—that comes as a surprise and requires immediate steps to protect the general public. In most disasters, the United States follows a simple template: Local authorities are the first to arrive; the state coordinates how people and resources are used; the federal government supports those efforts as needed. This reflects our constitutional design. The Tenth Amendment gives the powers not expressly delegated to the federal government—powers that include public safety and public health—to the states, which then delegate many of those to localities. The virus upended this pattern as it swept across the nation, creating our first 50-state disaster.

Juliette Kayyem, *Biden Is Rightsizing the COVID Crisis*, ATLANTIC (May 2022), <https://www.theatlantic.com/ideas/archive/2022/05/biden-covid-policy-individual-preferences/629751/> [<https://perma.cc/6LCH-QZ9KJ>]. See also U.S. DEP'T OF INSULAR AFFS., FEDERAL ASSISTANCE TO THE U.S. TERRITORIES AND FREELY ASSOCIATED STATES DURING THE CORONAVIRUS DISEASE 2019 (COVID-19) PANDEMIC, <https://www.doi.gov/oia/covid19> [<https://perma.cc/NLD8-4P6L>] (last visited Dec. 26, 2022); INDIAN HEALTH SERV., CORONAVIRUS (COVID-19), FAQs—FEDERAL RESPONSE IN INDIAN COUNTY (Sept. 20, 2022), <https://www.ihs.gov/coronavirus/faqs-federal-response-in-indian-country/> [<https://perma.cc/72XS-ZRU3J>].

66. U.S. CONST. art. II, § 3.

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

than Congress sees fit to leave within his power.”⁶⁸ The president’s ability to respond to a pandemic thus depends on the tools that Congress has provided.

The third relevant principle or understanding involves the so-called “unitary executive” theory, which holds, as Chief Justice John Roberts recently put it, that “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”⁶⁹ According to this theory, presidents must have a strong grip, through political appointees who serve at their pleasure, on every facet of federal administration, no matter how technical or ill-suited the particular field may be for political decision-making based on possibly short-term, self-interested, or purely partisan considerations. On this view, there is little room for agency independence, no matter how technical the agency’s portfolio may be. In recent years, the Supreme Court has invalidated several statutory provisions on the ground that they impermissibly limited presidential control of administration.⁷⁰ In its strongest form, the “unitary executive” theory would preclude Congress from delegating any final discretionary decision-making authority to any executive official; the president, according to this strong version, must always have the power to overrule such decisions or terminate and replace the offending official.⁷¹ That might be consistent with the president’s duty to “take care that the laws be faithfully executed,” but it may well conflict with Congress’s plenary power concerning the design and structure of the executive branch.⁷² It would also invite the president—or members of his staff—to overrule expert decisions that might be existentially important on purely partisan grounds or for the stake of short-term political advantage.

Finally, the Twentieth Amendment bears on the federal government’s failure to respond appropriately to the pandemic between the date of President Biden’s election and the date on which he took office. The Twentieth Amendment moved the date of the presidential inauguration from

68. *Id.* at 610 (quoting *Myers v. United States*, 272 U.S. 52, 295 (1926) (Holmes, J., dissenting)).
69. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (citing U.S. CONST. art. II, § 1, cl. 1).

70. *Id.* at 2204. *See also* *Free Enter. Fund, LLP v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

71. Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 8–9 (1994) (citing Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–96 (1987)).

72. *See, e.g.*, Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022) (showing that arguments based on the Take Care Clause fall short).

March 4 to January 20.⁷³ In 1933, when that amendment was adopted, the nation had been suffering through the Great Depression for more than four years, and it was thought that the prescribed interval between the election and the inauguration of a new president was too long to satisfy the demands of governing under modern conditions. The Trump administration's activities between November 3, 2020, and January 20, 2021, including its failure to deal aggressively with the pandemic, suggest that the change wrought by the Twentieth Amendment may no longer be sufficient to ensure the continuity of strong, engaged leadership that modern conditions require. The events that followed the 2020 election suggest that the nation is not well-served by leaving all the power of government for so long a period in the hands of a leader who may have become self-absorbed, disengaged, and disinterested in meeting whatever challenges the nation may face.⁷⁴ The seriousness of the problem is clear. In this instance, the president showed indifference towards the national suffering caused by the COVID-19 pandemic. In other circumstances, the president might be too distracted, disinterested, or disaffected to respond even to possible aggressive acts by a hostile power. Whether such a change is politically possible in the current environment, in which so little trust exists with respect to the proper administration of elections, is an important question, and all the more so because of the magnitude of the interests at stake.

Part II rehearses the beginnings of the pandemic and the Trump administration's response to it during 2020—an unusual election year that began with the third presidential impeachment trial in American history.⁷⁵

73. U.S. CONST. amend. XX, § 1.

74. See, e.g., *Trump v. Vance*, 140 S. Ct. 2412, 2441–42 (2020) (Alito, J., dissenting) (“Without a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate, and the country would be at risk The [Twenty-fifth] Amendment has been explicitly invoked on only two occasions, each time for a period of about two hours. This mechanism reflects an appreciation that the Nation cannot be safely left without a functioning President for even a brief time.”); see also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) (“Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people . . .”).

75. See U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6 and 7; art. II, § 4 (describing the procedure for impeachment of a sitting president). At the beginning of 2020, many observers thought that the impeachment of President Trump by the House of Representatives was futile because the Senate, as then constituted, would never vote to convict him, whatever the evidence might be. See, e.g., Ezra Klein, *Donald Trump Will Be Acquitted. American Politics Will Be Convicted*, VOX (Feb. 3, 2020, 8:40 AM), <https://www.vox.com/2020/2/3/21117024/trump-impeachment-acquittal-senate-republicans> [<https://perma.cc/BFT9-SWXV>] (arguing that President Trump “was never really on trial” because the Senate Republicans were aligned with him throughout the proceedings). Given the robust economy, the President's re-election also seemed likely. See, e.g., Philip Klein, *It's*

This narrative focuses on four topics: the federal government's success in advancing the development of vaccines, its unsuccessful efforts to inhibit the spread of the virus through masking, its failure to develop a reliable testing program to determine the prevalence of the virus in the population, and its failure to do much of anything as the virus spiraled out of control in the weeks following the 2020 election.⁷⁶ As this Part shows, the president, his political advisors, and government scientists share responsibility for the failures that will be considered, but there were

Looking More Like Trump Will Be Reelected in 2020, WASH. EXAM'R (Jan. 16, 2020, 4:00 PM), <https://www.washingtonexaminer.com/opinion/columnists/its-looking-more-like-trump-will-be-reelected-in-2020> [<https://perma.cc/2QVV-952H>] (stating that the low unemployment rate throughout Trump's presidency made it harder for Democratic candidates to run campaigns against him).

76. It would be impossible to consider all aspects of the government's response, disentangling such factors as the relative importance of law, personality, and ideology. Some of these factors were obviously crucial, such as White House Chief of Staff Mike Mulvaney's libertarianism and a general lack of respect for HHS Secretary Alex Azar, who oversaw four of the most relevant expert agencies, but ceded much of his power to the White House. See, e.g., YASMEEN ABUTALEB & DAMIAN PALETTA, NIGHTMARE SCENARIO: INSIDE THE TRUMP ADMINISTRATION'S RESPONSE TO THE PANDEMIC THAT CHANGED HISTORY 28–35 (2021) (describing Mike Mulvaney's "libertarian instincts"); *id.* at 15–16, 28, 79, 277–89 (describing Secretary Azar's role in the COVID response efforts). Likewise, this Article will not probe deeply into the work of the Coronavirus Task Force (led in turn by Secretary Azar and Vice President Mike Pence), which frequently worked without presidential support. See Yasmeen Abutaleb et al., *Trump's Den of Dissent: Inside the White House Task Force as Coronavirus Surges*, WASH. POST (Oct. 19, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trumps-den-of-dissent-inside-the-white-house-task-force-as-coronavirus-surges/2020/10/19/7ff8ee6a-0a6e-11eb-859b-f9c27abe638d_story.html [<https://perma.cc/9L37-BCW8>] (describing President Trump's relationship and communication with the Coronavirus Task Force); Jim Acosta et al., *As US Deaths Top 100,000, Trump's Coronavirus Task Force Is Curtailed*, CNN: POLITICS (May 29, 2020), <https://edition.cnn.com/2020/05/28/politics/donald-trump-coronavirus-task-force/index.html> [<https://perma.cc/4EGD-UBFK>] (“The task force has essentially been sidelined by Trump, said senior administration officials and others close to the group, who described a greatly reduced role for the panel created to guide the administration's response to the pandemic.”). Nor will this Article consider President Trump's use of the Task Force's daily briefings as a substitute for his rallies. See Kayla Epstein, *Trump Can't Hold His Massive Rallies Because of Coronavirus, So He's Moved His Act to the Briefing Room*, BUS. INSIDER (Mar. 20, 2020, 4:37 PM), <https://www.businessinsider.com/coronavirus-trumps-press-briefings-bear-similarities-to-his-rallies-2020-3> [<https://perma.cc/7NZZ-BDNR>] (stating that President Trump's appearances in the briefing room sounded similar to his campaign rallies). Finally, this Article will not systematically assess the Supreme Court's various interventions, which changed dramatically after the death of Justice Ruth Bader Ginsburg. See, e.g., Brendan Pierson, *How COVID and Shadow Docket Exploded SCOTUS' Scope of Religious Freedom*, REUTERS (June 17, 2021, 3:33 PM), <https://www.reuters.com/legal/government/how-covid-shadow-docket-exploded-scotus-scope-religious-freedom-2021-06-16/> [<https://perma.cc/SJ94-5JSM>] (discussing the Supreme Court's “shift” in ideological balance to the right that seemingly resulted from the death of Justice Ruth Bader Ginsburg and her replacement by Justice Amy Coney Barrett); Stephen Wermiel, *On the Supreme Court's Shadow Docket, the Steady Volume of Pandemic Cases Continues*, SCOTUSBLOG (Dec. 23, 2020, 3:16 PM), <https://www.scotusblog.com/2020/12/on-the-supreme-courts-shadow-docket-the-steady-volume-of-pandemic-cases-continues/> [<https://perma.cc/5F9L-C8YF>] (discussing the Supreme Court's handling of emergency requests relating to COVID, crowd-restriction orders, and prisoners).

achievements as well, particularly with respect to the development of vaccines, which was materially assisted by government research and the president's willingness to invest resources in the project.

The government's approaches to masking and testing were problematic from the start. The government's public health experts were initially adamant in recommending that the general population did not need to wear masks. When the government's experts eventually changed their advice and recommended that everyone wear masks, the President stated unequivocally that he would not wear a mask—which encouraged others to do likewise.⁷⁷ But the government's public health officials also caused confusion: they spoke authoritatively and unequivocally about masking, but the advice they gave was not consistent over time, and they failed to offer a coherent explanation for why they changed their recommendations.⁷⁸ The situation with respect to testing was also problematic. The Centers for Disease Control (CDC) tried to develop its own test, rather than accept those developed by others,⁷⁹ but a faulty design and substandard laboratory hygiene prevented the agency from producing reliable tests in the numbers required.⁸⁰ On the other hand, President Trump asserted that testing was undesirable because there would be no infections if there were no tests.⁸¹ In other words, some of the problems were due to the

77. See WRIGHT, *supra* note 4, at 243 (“By his words and his example, the president became not a leader but a saboteur.”).

78. See Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public*, NPR (Apr. 3, 2020, 5:49 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public> [https://perma.cc/MJ8L-5YAS] (discussing the CDC's change in messaging regarding mask-wearing).

79. See Joanne Kenen, *How Testing Failures Allowed Coronavirus to Sweep the U.S.*, POLITICO (Mar. 6, 2020, 6:35 PM), <https://www.politico.com/news/2020/03/06/coronavirus-testing-failure-123166> [https://perma.cc/AC8K-UPS7] (“Why the United States declined to use the WHO test, even temporarily . . . remains a perplexing question and the key to the Trump administration's failure to provide enough tests to identify the coronavirus infections before they could be passed on . . .”).

80. *Id.* (“[N]either the CDC nor the coronavirus task force . . . would say who made the decision to forgo the WHO test.”). See also Emily Anthes, *C.D.C. Virus Tests Were Contaminated and Poorly Designed, Agency Says*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/health/cdc-covid-tests-contaminated.html> [https://perma.cc/CK24-3DBP] (describing the flaws and contamination of the test kits developed by the CDC); Sheila Kaplan, *C.D.C. Labs Were Contaminated, Delaying Coronavirus Testing, Officials Say*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/04/18/health/cdc-coronavirus-lab-contamination-testing.html> [https://perma.cc/R4R9-CTQQ] (“Sloppy laboratory practices at the Centers for Disease Control and Prevention caused contamination that rendered the nation's first coronavirus tests ineffective . . .”).

81. See, e.g., Aaron Rupar, *Trump Seems to Think There'd Be No Coronavirus If There Was No Testing. It Doesn't Work Like That*, VOX (May 15, 2020, 12:20 PM), <https://www.vox.com/2020/15/15/21259888/trump-coronavirus-testing-very-few-cases> [https://perma.cc/L3Y9-393X]

shortcomings of government science, while others were due to the Trump administration's peculiar approach to leadership and policy development, and to the efforts of both political appointees and career civil servants to humor a highly unusual chief executive, who was mercurial, inexperienced, and sometimes vengeful.⁸²

The imminence of the 2020 election deeply influenced President Trump's pandemic response. Wearing a mask might be advisable from a public health perspective, but it was not consistent with the president's "brand." It would make him—and his followers—look weak.⁸³ Similarly, testing would produce statistics, which would almost certainly show that the pandemic was getting worse. That would not be good news for his campaign. On the other hand, the search for a vaccine might cost a great deal of money, but it was not something to which his political opponents would likely object, and it would occur largely out of sight in any event. Whatever failures there might be along the way would not be grist for the twenty-four-hour news cycle. Moreover, finding a vaccine overnight was not something that anyone could reasonably expect, so there was little downside. And there was immense upside: having a vaccine before Election Day almost certainly would guarantee the President's re-election.

Part III discusses the constitutional issues more thoroughly in light of the narrative developed in Part II. In one sense, the Trump administration's failures and successes may bear the same explanation: the president's actions were dictated by his single-minded focus on remaining in power.⁸⁴ But the lessons to be drawn from the administration's performance may be more profound and more lasting than that. The fact that

("Trump tried to downplay the severity of the US's coronavirus outbreak by arguing the country wouldn't be leading the world in cases if it weren't for the fact that so much testing is being done here . . .").

82. The problem was exacerbated by the President's obsession with personal loyalty. See WRIGHT, *supra* note 4, at 198 ("[Trump] had assumed office with little understanding or interest in governing; he demanded loyalty above all, and filled . . . government with people whose sole mission was to please him. They became a kind of occupying army to subjugate what Trump called the Deep State. Suspicious of experts, the president relied on his 'instincts,' which allowed him to entertain alternative realities and convenient delusions."). See also Kathryn Dunn Tenpas, *Why Is Trump's Staff Turnover Higher Than the 5 Most Recent Presidents?*, BROOKINGS (Jan. 19, 2018), <https://www.brookings.edu/research/why-is-trumps-staff-turnover-higher-than-the-5-most-recent-presidents/> [<https://perma.cc/6LAN-6GZV>] ("Trump's turnover is record-setting, more than triple that of Obama and double that of Reagan . . . I argue [that it is because] he has valued loyalty over qualifications . . .").

83. See, e.g., LEONNIG & RUCKER, *supra* note 55, at 226–27 (describing President Trump's unwillingness to wear a mask).

84. See Philip Bump, *Blaming Alleged Fraud Was Always Trump's Central Campaign Strategy*,

some of the problems perceived during the Trump administration remained problems under a new administration suggests that they may be related as much to the structure of government as to more transient issues of personality or political inexperience. The founders designed the institutions of government to protect liberty and make it difficult for tyranny to take hold, but also to ensure that government could meet the challenges, both internal and external, that nations regularly face.⁸⁵ As Justice Jackson wrote in *Youngstown*, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁸⁶ That is true of separation of powers, and it is equally true of federalism. Government requires separation, but also cooperation, not paralysis. On the other hand, government cannot function properly when the president is all-powerful, but seemingly uninterested in solving the public’s problems. Nor can government function properly when past and present political interventions have rendered its scientific experts fearful, timid, politicized, demoralized, and ineffectual. In some ways, these failures may be attributable to the very organization and structure of the government.

I. THE CONSTITUTIONAL BACKGROUND

This Section will discuss the constitutional background against which the Trump administration’s pandemic response played out. The major features are federalism and separation of powers, the current Court’s fixation on the so-called “unitary executive” theory,⁸⁷ and the Twentieth

WASH. POST (June 13, 2022), <https://www.washingtonpost.com/politics/2022/06/13/blaming-alleged-fraud-was-always-trumps-central-campaign-strategy/> [https://perma.cc/TAN3-A9MD] (asserting that President Trump had long feared losing the election and settled on a strategy of preemptively challenging the legitimacy of the election months before it was held).

85. See, e.g., STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3, 22 (Alfred A. Knopf, 1st ed. 2005) (“The United States is a nation built upon principles of liberty. That liberty means not only a freedom from government coercion but also the freedom to participate in the government itself. . . . An important imperative modified but also re-enforced this right [to participate in government], namely the need to protect individual liberty The right was also subject to an important constraint, namely the need for workable government.”). See generally Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* 309, in BENJAMIN CONSTANT, POLITICAL WRITINGS (Biancamaria Fontana, ed. 1988).

86. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

87. Roughly speaking, the “unitary executive” theory posits that the president must have absolute control over all aspects of the federal government’s execution of the laws, either through the power to overrule decisions, regardless of their technical or scientific subject matter or susceptibility to partisan abuse, or through the power to terminate and replace the official who made the decision with which the president disagrees. On a strict application of the “unitary executive” theory, the

Amendment, which creates a gap of ten weeks between the election and inauguration of a new president.

A. Federalism

In the United States, the powers of government are divided between the federal or national government on the one hand, and the state governments on the other hand. The national government is a government of limited and enumerated powers,⁸⁸ whereas the state governments retain all the general powers of government that the Constitution has not vested in the national government.⁸⁹ “[T]he American . . . states are neither administrative units of a national government nor sovereign members of a federated league. They are indestructible political entities having their own law, own authority, and own system of courts, but subordinate to the federal sovereignty in all matters of national concern.”⁹⁰ Thus, Chief Justice Marshall described the state licensing laws that were at issue in *Gibbons v. Ogden* as laws that “form[ed] a portion of that immense mass of legislation which embraces every thing within the territory of a State, not surrendered to the general government”⁹¹ The Chief Justice continued: “No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.”⁹² In contemporary parlance, we typically refer to the states’ power to make such laws

president would have absolute control over the Federal Reserve, but the relevant statute substantially insulates it from presidential control, so that monetary policy will depend on the governors’ best professional judgment about long-term policy goals, rather than the short-term partisan interests of an incumbent president, Congress, or interest groups. See, e.g., Gyung-Ho Jeong et al., *Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System*, 25 J.L. ECON. & ORG. 472, 492 (2008) (“Political compromise created an institution that no group alone could control.”); see also Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 512–38 (2000) (discussing independence and competence of the Federal Reserve).

88. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06 (1819) (“[T]he government of the Union, though limited in its powers, is supreme within its sphere of action.”).

89. 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.”); see also Sarah H. Gordon et al., *What Federalism Means for the US Response to Coronavirus Disease*, JAMA HEALTH F. (May 8, 2020), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2766033>[<https://perma.cc/8G76-LTG6>] (discussing federalism in public health context).

90. John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411, 412 (1967).

91. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

92. *Id.* “It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.” *Id.* at 204. But state and federal actions may

as the “police power,” the inherent power of government that belongs to the states, and not to the national government,⁹³ and consists of the power “to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”⁹⁴

The Supreme Court elaborated on the police power as it relates to public health in *Jacobson v. Massachusetts*.⁹⁵ The *Jacobson* Court upheld a state statute that permitted local health officials to require vaccination during a multi-state smallpox epidemic. In his opinion for the Court, Justice John Marshall Harlan wrote that the Court, “has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description’ According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁹⁶

In *Zucht v. King*, the Court held that public-school officials could require students to be vaccinated, even absent a public health emergency.⁹⁷ Some have questioned the continued vitality of *Jacobson* and *Zucht*,⁹⁸ at

conflict, and “the question respecting the extent of the powers actually granted [to the national government], is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *McCulloch*, 17 U.S. at 405.

93. See, e.g., *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 657 (1995)) (“The States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’ . . . The Federal Government, by contrast, has no such authority”); see also Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 320 n.1 (2007) (“The federal government . . . must rest its criminal-law making on other grounds, most notably the power to regulate interstate commerce.”).

94. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); accord *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 392–93 (1926) (describing the inherent power belonging to states). See generally *Manigault v. Springs*, 199 U.S. 480 (1905) (concerning a state’s powers over its navigable waters); *Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140, 150 (1855) (“There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state”); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *U. MIAMI L. REV.* 471 (2004).

95. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

96. *Id.* at 25.

97. See generally *Zucht v. King*, 260 U.S. 174 (1922).

98. See, e.g., Samuel A. Alito, *Address to the Federalist Society on the Declination of Individual Liberty* (Nov. 12, 2020), <https://www.americanrhetoric.com/speeches/samuelalitifederalistsociety.htm> [<https://perma.cc/22EM-WXNN>] (ridiculing *Jacobson*). See also *Rom. Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (distinguishing *Jacobson*); see generally Larry O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 *AM. J. PUB. HEALTH* 576 (2005); George Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 *N. ENG. J. MED.* 1337 (2002); Note, *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 *HARV. L. REV.* 1820 (2008).

least in part because the Court now takes a somewhat more robust view of individual rights than it did in the early years of the twentieth century.⁹⁹ Even so, individual rights are not unqualified; the liberty we possess is not an absolute liberty, but an aspect of “ordered liberty.”¹⁰⁰

Notwithstanding whatever legislation a state may have enacted under its police power, Congress may legislate—and authorize executive action—under its power to regulate interstate commerce, so long as the subject involves “commerce” and “concerns more States than one.”¹⁰¹ In addition, Congress may influence (but not dictate) a state’s exercise of its police power through the federal government’s spending power.¹⁰² The important point is that Congress may authorize the federal government to expend funds in aid of the “general welfare” even when Congress would lack the constitutional power to accomplish the same purpose through direct legislation.¹⁰³ In other words, Congress may use its power under

99. Compare *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220 (1892) (Holmes, J.) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”), with *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990) (recognizing right to refuse medical treatment).

100. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

101. U.S. CONST. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. 1, 241–42 (1824) (“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”); *United States v. Lopez*, 514 U.S. 549, 553 (1995); *United States v. Morrison*, 529 U.S. 598, 618 (2000) (discussing scope of Commerce Clause); *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (discussing scope of Commerce Clause). See generally Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934). Of course, executive action in aid of interstate commerce requires congressional authorization. See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Serv.*, 141 S. Ct. 2485 (2021) (holding that the CDC lacked statutory authority to declare a national eviction moratorium).

102. See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”). See generally Mark Seidenfeld, *The Bounds of Congress’s Spending Power*, 61 ARIZ. L. REV. 1 (2019).

103. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); Cf. *Printz v. United States*, 521 U.S. 898 (1997) (“The federal government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.”). The Biden administration has conditioned Medicaid and Medicare payments to nursing homes on their requiring employees to be vaccinated. See generally Ruben Castaneda, *What You Need to Know about the Federal Nursing Home Vaccine Mandate*, U.S. NEWS & WORLD REP. (Nov. 5, 2021), <https://health.usnews.com/best-nursing-homes/articles/vaccine-mandates-in-nursing-homes> [<https://perma.cc/GG2B-UZZE>]; Sharon LaFraniere et al., *Biden Ramps Up Virus Strategy for Nursing Homes and Schools, and Urges Booster Shots*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/18/us/politics/biden-schools-nursing-homes-booster.html> [<https://perma.cc/VR49-3FP5>]. President Biden has also directed the Secretary of Education to take appropriate action against the governors of states that have forbidden local school officials from requiring students to wear masks in school. See generally Collin Binkley, *States Banning*

the Spending Clause to persuade the states to act in a way that Congress would have no authority to require or order them to do. The Commerce and Spending Clauses therefore provide the federal government with powerful tools for dealing with a national public health crisis. Moreover, as the Obama administration noted in its *Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents*, which it left for the Trump administration: “[w]hile States hold significant power and responsibility related to public health response outside of a declared Public Health Emergency, the American public will look to the U.S. Government for action when multi-state or other significant public health events occur.”¹⁰⁴

But much depends on federal leadership and state-federal cooperation. With strong federal leadership, effective policies may be implemented at the national level to respond to a national or multi-state public health emergency, notwithstanding the theoretical constraints of federalism. For example, the federal government may use its spending power to promote cooperation in purchasing needed resources and avoid price increases resulting from competition among the states for needed resources. Absent such federal leadership, the states will go their own ways.¹⁰⁵ Not all states will be affected equally or at the same time, and some states may perceive the same public health threat as more serious or more immediate than others.¹⁰⁶ In the absence of federal leadership, some states may attempt a robust response to the public health emergency within their

Mask Mandates Could Face Civil Rights Probes, AP NEWS (Aug. 18, 2021), <https://apnews.com/article/joe-biden-health-coronavirus-pandemic-5943b43e54f61861e65d8cb74f3a68f1> [<https://perma.cc/ZX5Q-N88H>].

104. See WRIGHT, *supra* note 4, at 16 (quoting *Playbook*). The federal government declared a public health emergency on January 31, 2020. See Allison Aubrey, *Trump Declares Coronavirus a Public Health Emergency and Restricts Travel from China*, NPR (Jan. 31, 2020), <https://www.npr.org/sections/health-shots/2020/01/31/801686524/trump-declares-coronavirus-a-public-health-emergency-and-restricts-travel-from-c> [<https://perma.cc/XA8H-LCYX>] (providing a timeline and background on the federal government’s response to the outbreak).

105. See Jillian Stern, *The COVID-19 Pandemic and the Defense Production Act: Government Misuse and Failures*, 51 PUB. CONT. L.J. 323, 340 (2021) (“This lack of data compromises national interests when accompanied by the urgent need for supplies in a pandemic setting. Procurement is more vulnerable to fraud, corruption, and mismanagement when the government must spend more money. For example, without federal coordination in the early phases of the United States’ pandemic response, states were receiving offers directly from unknown suppliers and, out of desperation, bought fraudulent items, resulting in wasted money and unusable products.”).

106. See, e.g., Lauren Leatherby & Rich Harris, *States That Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/interactive/2020/11/18/us/covid-state-restrictions.html> [<https://perma.cc/2T79-J7CA>] (“Without strong national guidance, states’ containment policies have varied widely. Since the spring, Maine mandated masks and had strict travel restrictions for out-of-state visitors; South Dakota, meanwhile, has never had a mask mandate and welcomed nearly half a million people to the Sturgis motorcycle rally, as well as its state fair, which attracted more than 100,000 visitors.”).

own borders, while others may do nothing, or settle on measures that actually endanger the health and safety of their own citizens, as well as those of other states and nations. States that respond to the emergency may be tempted to hoard more supplies than they need, and interstate governmental competition for scarce goods may drive up prices.¹⁰⁷

B. Separation of Powers

The Supreme Court has frequently emphasized that separation of powers is critical to the protection of liberty.¹⁰⁸ At one level, separation of powers (like federalism) protects individual liberty by diffusing governmental power. At another level, the separation of powers (together with other constitutional features, including bicameralism and the executive veto) protects individual liberty in a more general way, simply by making it more difficult to enact laws. Whether the principle of separation of powers works in exactly the way that the founders anticipated is open to question.

In *Federalist 47*, Madison discusses the separation of powers, noting that, “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny.”¹⁰⁹ Invoking Montesquieu, Madison explains that separated powers does “not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROUL over the acts of each other. [Montesquieu’s] meaning . . . can amount to no more than this, that where the WHOLE power of the department is

107. Even without federal intervention, however, some states may choose to join forces, as some states did in responding to the COVID pandemic. Some adjoining states, for example, cooperated in purchasing and policy development. See generally Caroline Linton, *Cuomo Announces 7-State Coalition for Purchasing Medical Equipment*, CBS NEWS (May 4, 2020), <https://www.cbsnews.com/news/andrew-cuomo-ppe-medical-equipment-coronavirus-7-state-coalition/> [<https://perma.cc/X54U-XPDF>]; Aziz Huq, *States Can Band Together to Fight the Virus—No Matter What Trump Does*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/outlook/2020/04/15/states-coronavirus-agreements-reopen/> [<https://perma.cc/QN8D-HLV3>]; but see James G. Hodge Jr., *National Legal Paradigms for Public Health Emergency Responses*, 71 AM. U. L. REV. 65, 103 (2021) (noting limitations of interstate agreements compared to federal action in health emergencies).

108. See, e.g., *Clinton v. New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”). See also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43 (2015) (Thomas, J., concurring) (“At the center of the Framers’ dedication to the separation of powers was individual liberty.”); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J. dissenting) (“The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”).

109. See THE FEDERALIST NO. 47, at 323 (James Madison) (Jacob E. Cooke, ed., 1961) (discussing the separation of powers under the proposed constitution).

exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.”¹¹⁰ In *Federalist 51*, Madison further qualifies that principle, explaining that the three great departments of government “should be as little dependent as possible on . . . the others, for the emoluments annexed to their offices. . . . [Otherwise,] their independence in every other [way] would be merely nominal.”¹¹¹ Madison continues:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.¹¹²

In other words, senators and members of the House of Representatives together will jealously guard the prerogatives of the legislative branch against incursions by the executive, and vice versa, because the personal interests of all will be tied to the institutional interest of the branch in which they serve. The theory also posits that the members of one House will jealously guard the prerogatives of their Chamber against perceived incursions by the other.

Clearly, the occupants of each branch will want to maximize their own individual influence but insisting on “the rights of the place” may not always advance that goal. To start, it is not clear what the distinct and respective “interests” of the branches might be, let alone why they would be sufficiently strong to constitute the primary focus of an office-holder’s affection and allegiance. And the model does not account for the pull of sectional interests, which were important from the beginning,¹¹³ or for the role of political parties, which emerged shortly after the adoption of the Constitution.¹¹⁴ Richard Hofstadter has observed that, “While most

110. *Id.* at 325–26; *see also* *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (“[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government.”).

111. THE FEDERALIST NO. 51, at 348–49 (James Madison) (Jacob E. Cooke, ed., 1961).

112. *Id.* at 349. Madison concludes this portion of *Federalist 51* with the well-known observation that, “In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.” *Id.*

113. *See generally* GARY J. KORNBLITH, *SLAVERY AND SECTIONAL STRIFE IN THE EARLY AMERICAN REPUBLIC, 1776–1821* (2009); GORDON S. BROWN, *TOUSSAINT’S CLAUSE: THE FOUNDING FATHERS AND THE HAITIAN REVOLUTION* (2005); LAURENT DUBOIS, *AVENGERS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION* (2004).

114. *See, e.g.*, RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840* 52 (1969) (“[T]he counterpoises upon which [the Founders] were disposed to rely for liberty and stability, were still embodied not in the mutual

of the Fathers did assume that partisan oppositions would form from time to time, they did not expect that valuable permanent structures would arise from them which would have a part to play in the protection and exercise of liberties or in reconciling the stability and effectiveness of government with the exercise of popular freedoms . . . The Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties.”¹¹⁵ Political parties had begun to form during President Washington’s administration and soon became a central, permanent feature of American government.¹¹⁶

Particularly in times of extreme political polarization, the pull of branch loyalty that Madison thought indispensable to the proper functioning of government may be negligible. In the case of divided government, where the presidency is in the hands of one party, and the other party holds substantial majorities in one or both Houses of Congress, the principle of separation of powers may work, at least to some extent, in the way that Madison anticipated. But even then, it will most likely work because of the pull of an official’s identification with party, not because of any abstract allegiance to their respective branch. Moreover, the danger in that situation is that the government may be incapable of governing, or, at least, of legislating and executing laws in the manner contemplated by the Constitution.¹¹⁷ Congress may be incapable of passing

checks of political parties but . . . in the mutual checks of the houses of legislature, or in the checks entered upon each other by the executive and the legislature, and in that exerted by the judiciary over the other two. Checks were to be built into planned constitutional forms instead of being left to the hurly-burly of politics.”).

115. *Id.* at 53.

116. *See id.* at 91–92 (“[W]ithout ever giving up his conception of himself as a man above party, [Washington] became a strong partisan of the views of the Hamiltonian Federalists By July 1795, when Jefferson’s retirement to private life and the forced resignation of Edmund Randolph had created a Cabinet of entirely Hamiltonian persuasion, and when he had ceased altogether to consult men of a different cast of mind, [Washington] still thought of himself as entirely above party.”). *See generally* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

117. Above all, the Constitution necessarily contemplates the creation of a government that works. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”). Significantly, the framers had the experience of living under a government that did not work. *See, e.g.*, GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 245–78 (2017) (describing governance issues at the time of the founding); *see also* DAVID O. STEWART, *THE SUMMER OF 1787* 18–24 (2007) (providing additional historical context for past governmental failures and flaws); Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, 150 *DAEDALUS*

laws, for example, and the president may believe that there is no alternative but to govern through unilateral presidential directives.¹¹⁸ And Madison's principle is unlikely to have any appreciable effect where there is an undivided government with strong majorities, relatively strong intra-party solidarity, and strong inter-party polarization.¹¹⁹ In those circumstances, the president and Congress will act in concert, and, given the power of the modern presidency, the president's views are likely to be dominant.¹²⁰

J. AM. ACAD. ARTS & SCI. 49 (Summer 2021) ("By focusing on the content of the laws passed, this essay shows that in the era of divided polarization, Congress has actually enacted an ever-growing volume of significant regulatory policy—packaged into fewer laws—increasingly employed implementation designs intended to limit bureaucratic and presidential subversion of legislative preferences, and legislated regulatory policy substance in greater detail when relying on litigation and courts as a supplement or alternative to bureaucracy.").

118. See also Greg Weiner, *This Is No Way to Rule a Country*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/opinion/biden-pelosi-congress-eviction-jan-6.html> [<https://perma.cc/PT8M-UL3Q>] ("The underlying constitutional derangement [concerning the federal eviction moratorium] pertained to the way members of Congress and the president were eager to endorse each other's authority without exercising their own."); *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Mr. Goodlatte) ("President Obama took these [allegedly unconstitutional] actions [on deferred action] despite having stated over 20 times in the past that he didn't have the constitutional power to take such steps on his own. As the *Washington Post's* own 'FactChecker' concluded, 'Apparently, he's changed his mind.'"). See generally GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS (2013).

119. See generally Levinson & Pildes, *supra* note 58.

120. See generally GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010); see also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) ("In the post-New Deal world, however, the framers' factual assumptions have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked."). A peculiar dynamic may exist when there is extreme political polarization and the president's party controls only one house of Congress. If the president's party controls only the House of Representatives, the president may find it impossible to enact legislation. The same will be true if the president's party controls only the Senate. However, control of the Senate will allow the president to fill judicial vacancies and engage in foreign policy initiatives that require the Senate's approval, but not that of the House. Without the ability to pass legislation, presidents may be emboldened to push the limits of presidential power, knowing that they may be immune from impeachment, if their party controls the House, but not the Senate, and are unlikely to be convicted if their party controls the Senate, but not the House. See, e.g., Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 723, 730–33 (2021) (clarifying the roles of the branches of government and describing the complexities of such relationships). The House impeached President Trump twice in his last thirteen months in office, but the Senate acquitted him on both occasions. Senate Majority Leader Mitch McConnell's actions are instructive. Far from epitomizing the Madisonian leader of a co-ordinate branch jealous of its prerogatives, McConnell actively assisted the president's defense team in the first impeachment. See generally Kevin Liptak & Kaitlan Collins, *Trump Plots His Defense Following the Historic Rebuke He Hopes to Foil*, CNN: POLITICS (Dec. 14, 2019, 11:19 AM), <https://www.cnn.com/2019/12/14/politics/donald-trump-impeachment-mitch-mcconnell/index.html> [<https://perma.cc/3X5Q-MRXY>]; Kelsey Snell, *McConnell: "I'm Not Impartial" about Impeachment*, NPR (Dec. 17, 2019), <https://www.npr.org/2019/12/17/788924966/mcconnell-i-m>

C. The Unitary Executive

A third feature of contemporary American government is relevant to the Trump administration's COVID-19 response: the newly orthodox, but still controversial, view that the principle of separation of powers requires that the president have control over every aspect of "executive" policy-making. On this view, the president must have an unqualified power to remove virtually all those "officers of the United States" who make final decisions on behalf of the United States, or the power to overrule their decisions.¹²¹ According to the present Court, the founders intended that those who make such decisions must stand in a direct chain of command with the president, answerable to the president, and removable at will. But the constitutional text makes no direct mention of the removal power, let alone the notion of a "unitary executive." In addition, recent scholarship casts considerable doubt on the historical accuracy of the originalist claim.¹²²

The Constitution contemplates the creation of departments and offices within the executive branch. For example, the Opinions Clause provides that the president may "require the Opinion, in writing, of the principal Officer in each of the executive Departments,"¹²³ and the Appointments Clause distinguishes those "officers of the United States" who must be

not-impartial-about-impeachment [<https://perma.cc/CGG9-SAJ3>]. In the second impeachment, he neither joined the president's defense team nor treated the Senate's vote as a matter of party discipline. See generally Jennifer Jacobs, *McConnell Signals Trump Conviction Is a GOP Conscience Vote*, MSN (Feb. 10, 2021), <https://www.msn.com/en-us/news/politics/mcconnell-signals-to-gop-trump-impachment-is-a-conscience-vote/ar-BB1dyhgi> [<https://perma.cc/A9JD-5RNH>]. After the storming of the Capitol on January 6, 2021, he expressed some disapproval of the president, but whipped votes to prevent a bipartisan inquiry into those events. See generally Nicholas Fandos, *Democrats Failed to Get Enough Votes for an Independent Inquiry into the Jan. 6 Riot*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/us/politics/capitol-riot-commission.html> [<https://perma.cc/V5YC-NYWL>]. The Republican National Committee has recently characterized the assault on the Capitol as "legitimate political discourse." See generally Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse'*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/P8JK-L5EB>].

121. See generally *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *United States v. Arthrex*, 141 S. Ct. 549 (2021); *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (holding those who make final decisions on behalf of the United States must be nominated by the president and confirmed by the Senate). In *Seila Law*, the Court identified (but did not attempt to theorize) two exceptions. See *Seila Law*, 140 S. Ct. at 2189–90, 2192, 2199–2200.

122. See generally Chabot, *supra* note 72; Jed Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Administrative Agencies*, 96 NOTRE DAME L. REV. 1 (2020) [hereinafter *Is the Federal Reserve Constitutional?*]; A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994).

123. U.S. CONST. art. II, § 2, cl. 1.

appointed by the president “with the advice and consent of the Senate” from those whose power of appointment Congress may place in “the [p]resident alone, in the Courts of Law, or in the Heads of Departments.”¹²⁴ The Take Care Clause also presumes that the laws will be enforced by others, at least in the first instance.¹²⁵ But the Constitution itself creates no such departments, and it creates no executive officers other than the president and the vice president (whose principal constitutional duty, ironically, is to preside over the Senate and cast the deciding vote in the case of a tie).¹²⁶ The Constitution therefore leaves to Congress, subject only to whatever limitations may exist by virtue of the principle of separation of powers, all decisions relating to the architecture of the executive branch. Congress is empowered by the Necessary and Proper Clause¹²⁷ to create executive departments and offices, prescribe their duties, apportion responsibilities among them, set qualifications for “officers of the United States,” and provide for the method of their selection, consistent with the requirements of the Appointments Clause. Congress may also create civil service positions for “employees” who are not “officers of the United States.” Most of those who work for the federal government are “employees,” rather than “officers;” they lack the formal power to make final decisions on behalf of the United States and have security of position under civil service laws that are meant to insulate them from political pressures.¹²⁸

124. U.S. CONST art. II, § 2, cl. 2.

125. See U.S. CONST art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed, and Shall Commission all the Officers of the United States.”).

126. See U.S. CONST art. I, § 3, cl. 4. In addition, of course, the vice president is responsible for opening the certificates transmitted by the Electors of each state, U.S. CONST art. II, § 1, cl.3, succeeds to the presidency in the event that the president is removed, dies, or otherwise becomes unable to discharge his duties, U.S. CONST amend. xxv, § 1, and participates in determining whether the president is disabled from performing the duties of his office. *Id.* § 4.

127. See U.S. CONST art. I, § 8, cl. 18.

128. See *id.* Near the end of his term, President Trump issued an Executive Order purporting to remove security of position protections from many federal employees. Exec. Order No. 13957, 85 Fed. Reg. 67, 631 (Oct. 26, 2020); see also Donald P. Moynihan, Viewpoint Article, *Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2022) (discussing President Trump’s Schedule F Executive Order and its implications on U.S. civil service); Lisa Rein, *Trump Moves to Strip Job Protections from White House Budget Analysts as He Races to Transform Civil Service*, WASH. POST (Nov. 27, 2020), https://www.washingtonpost.com/politics/trump-moves-to-strip-job-protections-from-white-house-budget-analysts-as-he-races-to-transform-civil-service/2020/11/27/d04f6eba-2e69-11eb-96c2-aac3f162215d_story.html [<https://perma.cc/4AAQ-NJB3>] (discussing President Trump’s Schedule F Executive Order); Lisa Rein et al., *Trump’s Historic Assault on the Civil Service Was Four Years in the Making*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/politics/trump-federal-civil-service/2020/10/23/02fbf05c-1549-11eb-ba42-ec6a580836ed_story.html [<https://perma.cc/FRA2-AJEV>] (explaining the Trump Administration’s four-year plan to change

As a practical matter, recent presidents have exercised more centralized control over the various elements of the federal government through the Office of Management and Budget¹²⁹ and the Executive Office of the President, which now number their personnel in the thousands.¹³⁰ Few of those officials hold positions that are subject to the advice and consent of the Senate, but some wield at least as much power as department

civil service); Natalie Alms, *Trump Order Creates Schedule F, to Speed Hiring and Firing in Key Positions*, FCW (Oct. 21, 2020), <https://fcw.com/articles/2020/10/21/trump-schedule-f-civil-service.aspx> [<https://perma.cc/W3G7-GGGM>] (explaining President Trump's Schedule F Executive Order and its implications). The Biden administration revoked that Executive Order (and related Trump era executive orders) and restored the protections that were otherwise available. Exec. Order No. 14003, 86 Fed. Reg. 7,231 (Jan. 27, 2021). See Beatrix Haddon, *President Biden Revokes Schedule F*, GOV'T MATTERS (Jan. 28, 2021), <https://govmatters.tv/president-biden-revokes-schedule-f/> [<https://perma.cc/W8GP-BNDT>] (discussing the Executive Order signed by President Biden to revoke Schedule F); see generally JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45630, MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW (2019); *The Civil Service: Opinion of Attorney-General Akerman on the Civil Service Commission*, N.Y. TIMES (Sept. 8, 1871), <https://timesmachine.nytimes.com/timesmachine/1871/09/08/78773216.html> [<https://perma.cc/3ALF-TL22>]; see also H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 57–79 (2008) (discussing Akerman's opinion).

129. See Budget and Accounting Act of 1921, Pub. Law 67-13, 42 Stat. 20 (1921). In 1921, Congress created the Bureau of the Budget, which centralized Executive Branch fiscal management. Before 1921, the executive departments had submitted individual budget requests. See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2021), Section 15—Basic Budget Laws (explaining how the Executive Branch submits budget requests). In 1971, Congress created the Office of Management and Budget (OMB), as a successor agency. CONG. BUDGET OFF., HISTORY, <https://www.cbo.gov/about/history> [<https://perma.cc/DH8W-2V2U>] (last visited Oct. 14, 2022). OMB now controls both the budgetary and legislative requests of federal agencies, including the independent agencies. OFF. OF MGMT. & BUDGET, WHITE HOUSE <https://www.whitehouse.gov/omb/> [<https://perma.cc/6MPT-ZCRR>] (last visited Oct. 14, 2022); see also Brad Patterson, *American Governance: The Role of the White House Staff*, in TRANSFORMING AMERICAN GOVERNANCE: REBOOTING THE PUBLIC SQUARE 274 (Alan P. Balutis et al., eds. 2011); James Pfiffner, *Cabinet Secretaries Versus the White House Staff*, BROOKINGS: FIXGOV, <https://www.brookings.edu/blog/fixgov/2015/03/24/cabinet-secretaries-versus-the-white-house-staff/> [<https://perma.cc/E7TJ-UZ9E>] (last visited Jan. 4, 2023) (“Cabinet secretaries naturally resent being overshadowed by White House staffers, who are usually younger than they are and are often seen as political loyalists rather than policy experts. Staffers have access to the president and seem to impose their personal preferences on the cabinet. President Obama's cabinet secretaries did not appreciate chief of staff Rahm Emanuel treating them as his ‘minions.’”).

130. The U.S. Office of Personnel Management (OPM) tracks the number of civilians employed by the Executive Branch. According to the most recent data available on OPM's website, the Obama Administration employed more than 2,000 employees in the Executive Office of the President in 2014. U.S. OFF. OF PERS. MGMT., POLICY, DATA, OVERSIGHT: EXECUTIVE BRANCH CIVILIAN EMPLOYMENT SINCE 1940, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> [<https://perma.cc/hZ4e-WJPZ>] (last visited Oct. 14, 2022).

heads.¹³¹ In addition, presidents have broad authority to organize the Executive Office of the President as they see fit, which means that the president may simply abolish positions or functions, as President Trump did, for example, with respect to the global health security directorate within the National Security Council.¹³² Moreover, since the Reagan administration, presidents have inserted political appointees into lower-ranking positions that previously would have been filled by career civil servants.¹³³ Such pervasive political domination does not simply affect indi-

131. See generally Harlow v. Fitzgerald, 475 U.S. 800 (1982); SEYMOUR M. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE (1983); see also David Stout, *William P. Rogers, Who Served as Nixon's Secretary of State, Is Dead at 87*, N.Y. TIMES (Jan. 4, 2001), <https://www.nytimes.com/2001/01/04/us/william-p-rogers-who-served-as-nixon-s-secretary-of-state-is-dead-at-87.html> [<https://perma.cc/CPF4-QA5U>] (“As Mr. Nixon’s chief national security adviser, Mr. Kissinger all but supplanted Mr. Rogers. And when Mr. Rogers departed, Mr. Kissinger became secretary of state in name as well.”).

132. See LEONNIG & RUCKER, *supra* note 55, at 34 (“‘This could cost us the election,’ [Domestic Policy Council Director Joe] Grogan said. ‘Look, guys, one of the criticisms we’re getting on the left on Twitter is that we eviscerated the NSC because [former national security advisor John] Bolton shut down the global health security directorate, and that is true.’”); see also LEWIS, *supra* note 4, at 163 (“[O]n April 9, 2018, Trump hired John Bolton as his national security adviser, and the next day, Bolton fired [Chief Homeland Security Advisor] Tom Bossert, and demoted or fired everyone on the biological threat team. From that moment on, the Trump White House lived by the tacit rule . . . [that] the only serious threat to the American way of life came from other nation-states. The Bush and Obama administrations’ concern with other kinds of threats was banished to the basement.”); Mark Landler, *Thomas Bossert, Trump’s Chief Adviser on Homeland Security, Is Forced Out*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/tom-bossert-trump-homeland-security.html>. [<https://perma.cc/T2HU-A4FS>] (discussing President Trump’s national security advisor’s impact on the Department of Homeland Security).

133. See, e.g., JOHN DI IULIO, JR. ET AL., IMPROVING GOVERNMENT PERFORMANCE: AN OWNER’S GUIDE 57 (1993) (arguing number of lower-level quasi-political appointees should not be decreased); see Title IV of the Civil Service Reform Act of 1978, Pub. Law 95-454, 92 Stat. 1154 (codified at 5 U.S.C. § 3131, 3132, *et seq.*) (describing changes to civil service); accord B. Guy Peters, *Searching for a Role: The Civil Service in American Democracy*, 14 INT’L POL. SCI. REV. 373, 377–79 (1993) (discussing political pressure associated with civil service). See also Kathleen Doherty et al., *Executive Control and Turnover in the Senior Executive Service*, 29 J. PUB. ADMIN. RES. & THEORY 159 (2019) (discussing conflict between career executives and presidents); OFF. OF THE VICE PRESIDENT, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REINVENTING HUMAN RESOURCE MANAGEMENT—ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW 73 (1994) (“About 700 [of the 8,200 SES positions that have been filled] were filled by political appointees. The political appointees provide the necessary policy controls, while the career SES managers provide a politically neutral, responsive, skilled group of managers and leaders.”); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 261–62 (1989) (“[President Reagan] made political use of the Senior Executive Service (SES), removing certain career officials and replacing them, as he is entitled to do, with more partisan managers. The Reagan administration had more success than almost any preceding administration in shaping the leadership of the bureaucracy, but even so found that it had appointed many people who proved to be deficient in either conservatism or competence or both.”). See generally David E. Lewis & Richard W. Waterman, *The Invisible Presidential Appointments:*

vidual decisions or outcomes; it may also affect an entity's decision-making processes and its ability to perform the functions for which it was created.¹³⁴

Since at least the late nineteenth century,¹³⁵ Congress has created independent regulatory agencies overseen by "officer[s] of the United States" who hold their positions for specific terms of years and are subject to removal only for "good cause," "neglect of duty," malfeasance, or the like.¹³⁶ The point of such provisions is to ensure some degree of independence for those who perform functions or make decisions with respect to which it is thought that political considerations should not be paramount.¹³⁷ Beginning with its 2010 decision in *Free Enterprise Fund v.*

An Examination of Appointments to the Department of Labor, 2001–11, 43 PRES. STUD. Q. 35 (2013), <https://onlinelibrary.wiley.com/doi/abs/10.1111/psq.12002>. [<https://perma.cc/VP3M-5YGP>]; Patricia W. Ingraham et al., *Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government?*, 55 PUB. ADMIN. REV. 263 (1995).

134. See, e.g., HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 235 (3rd ed. 1976) ("[C]orrecting the decisional processes of the subordinate which lead to wrong decisions is [ordinarily] more important than the correcting of wrong decisions.").

135. See, e.g., Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2020) (arguing that, although many have identified the Interstate Commerce Commission, created in 1887, as the first established independent agency, independent agencies have existed, in one form or another, since the beginning of the Republic); see generally Interstate Commerce Act, Pub. L. 49-304, 24 Stat. 379; Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 122.

136. See, e.g., 5 U.S.C. § 1202(d) (Merit Systems Protection Board) (displaying how the "cause" required is variously described in the relevant statutes). See *id.* (illustrating that a typical formulation provides for removal only "for inefficiency, neglect of duty, or malfeasance in office."); see also Manners & Menand, *supra* note 122, at 4 (noting that several relevant statutes refer simply to "for cause" as the basis for removal, but "most laws specify three causes: inefficiency, neglect of duty, and malfeasance in office").

137. See *Collins v. Yellen*, 141 S. Ct. 1761, 1803–04 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("Congress has identified particular officers who, because of the nature of their office, require a degree of independence from Presidential control. . . . Often, Congress has granted financial regulators such independence . . . to bolster public confidence that financial policy is guided by long-term thinking, not short-term political expediency."). Thus, the seven governors of the Federal Reserve System are appointed by the president, with the advice and consent of the Senate; serve 14-year terms; and may be removed only for cause. 12 U.S.C. §§ 241, 242; see also Scott A. Wolla, *Independence, Accountability, and the Federal Reserve System*, PAGE ONE ECON. (May 2020), <https://research.stlouisfed.org/publications/page1-econ/2020/05/01/independence-accountability-and-the-federal-reserve-system> [<https://perma.cc/QV7S-B48K>] (describing the role of previous chair of the Board of Governors of the Federal Reserve System). President Trump considered removing Jerome Powell as Chair of the Federal Reserve Board, even if he could not remove him from the Board. See Jeanna Smialek, *Trump Says He Could Demote Fed Chair Powell, Risking More Market Turmoil*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/business/economy/trump-powell-fed-chair.html> [<https://perma.cc/ZAT2-7EKF>] (discussing the potential implications if President Trump were to remove Jerome Powell as Chair of the Federal

Public Company Accounting Oversight Board,¹³⁸ the Supreme Court increasingly has questioned Congress's constitutional authority to limit the president's removal power in this way.

In 2020, Chief Justice Roberts summarized the Court's approach with stark simplicity. In *Seila Law LLC v. Consumer Financial Protection Bureau*,¹³⁹ the Chief Justice observed that, "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"¹⁴⁰ Without "the authority to remove those who assist him in carrying out his duties," the Chief Justice continued, "the [p]resident could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."¹⁴¹

Seila Law involved a constitutional challenge to Congress's grant of "for-cause" removal protection to the director of the Consumer Finance Protection Bureau (CFPB), a single-member independent regulatory agency responsible for ensuring the safety and transparency of consumer debt products.¹⁴² The Court narrowly construed its prior jurisprudence which upheld Congress's power to create positions whose occupants were "officers" of the United States, but not removable at will. Chief Justice Roberts wrote:

Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.¹⁴³

The Chief Justice did not explain the theoretical or constitutional basis for these two "exceptions." A multi-member agency might lessen the probability of tyranny because it presumably could not act without the agreement (or at least the acquiescence) of a majority of its members; but even that protection against tyranny is relative and far from absolute.

Reserve Board). See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 n.8 (2020) (providing an example of Chief Justice Roberts's acknowledgment that the Federal Reserve Board might have "a special historical status," which would save its constitutionality, notwithstanding the general rule announced in that case).

138. 561 U.S. 477 (2010).

139. 140 S. Ct. 2183 (2020).

140. *Id.* at 2191 (citing U.S. CONST. art. II, § 1, cl. 1).

141. *Id.*

142. *Id.*

143. *Id.* at 2192.

Moreover, a multi-member agency that does not stand in a direct chain-of-command relationship with the president hardly satisfies the Court's concern with democratic accountability any better than a single-member agency would. If the objection is that an agency's independence necessarily interferes with the president's duty "to take Care that the Laws be faithfully executed," or with his power to see that the laws are executed according to his priorities, given limited resources and in the absence of clear congressional direction,¹⁴⁴ it makes no difference whether the agency has one member or several. In any event, the Court held that the "precedents [creating these] exceptions [should not be extended] to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met."¹⁴⁵

The organizational structures of the CDC and the Food and Drug Administration (FDA)—the federal agencies most deeply involved in the federal government's response to the COVID-19 pandemic—raise no concern for those who subscribe to the "unitary executive" theory. Neither is an "independent" regulatory agency insulated from presidential control. Both are component parts of the Department of Health and Human Services (HHS) and subject to the control of the secretary, who is removable at will by the president. In addition, the heads of both agencies—the director of the CDC and the FDA commissioner—are currently political appointees who are also subject to removal. There is no question that the current organizational structures of these two agencies meet the requirements of the Supreme Court's recent jurisprudence. Nonetheless, there are substantial questions that warrant consideration: whether these

144. See, e.g., Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (discussing the need for presidential discretion in setting enforcement priorities in the absence of congressional direction).

145. *Seila Law*, 140 S. Ct. at 2192. The Court held that Congress's structural choice violated the separation of powers, but that the agency could continue to operate with the director serving at the pleasure of the president. *Id.* The Court later held in *Collins v. Yellen* that the structure of the Federal Housing Finance Agency was unconstitutional because it also is a single-member agency whose director is removable only for cause. 141 S. Ct. 1761 (2021). In *Collins*, Justice Alito emphasized that, in *Seila Law*, "We did 'not revisit our prior decisions allowing certain limitations on the President's removal power,' but we found 'compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.'" *Id.* at 1783. Justice Kagan concurred in *Collins* but complained that the Court had "gratuitous[ly]" abandoned the important "significant executive power" limitation stated in *Seila Law*: "Without even mentioning *Seila Law*'s 'significant executive power' framing, the majority announces that, actually, 'the constitutionality of removal restrictions' does not 'hinge[]' on 'the nature and breadth of an agency's authority.' Any 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal." *Id.* at 1801 (Kagan, J., concurring in part) (internal citation omitted).

organizational structures, which clearly conform to the Supreme Court's jurisprudence, contributed to the government's failed response to the pandemic; whether those structures are constitutionally necessary or wise; and whether the Supreme Court's recent case law may pose an obstacle to necessary reforms.

In a larger sense, the Court's recent jurisprudence is relevant because of the foundational idea that it incarnates: namely, that the president must have absolute control over all aspects of federal administration, through chain-of-command control over all government officials who make decisions on behalf of the United States—even when those decisions should obviously be made, as a normative matter, on grounds other than short-term partisan advantage or the president's personal political interests. To say that Congress is constitutionally prohibited from legislating in such a way as to prevent the president from making decisions about the money supply,¹⁴⁶ or the census,¹⁴⁷ or the public health based on his personal political interests; that such decisions cannot be committed to any officials who are not subject to presidential removal or to the president's chain-of-command direction with respect to the decisions they make; or that the only possible response to such self-interested presidential actions is impeachment or potential defeat at the ballot box, comes close to making the Constitution into a "suicide pact."¹⁴⁸

146. See generally *Collins v. Yellen*, 141 S. Ct. 1761 (2021). In *Collins*, Justice Alito implicitly left open the possibility that the Court might uphold the constitutionality of some multi-member regulatory bodies that were not entirely beyond the president's control. See *id.* at 1785 n.19 ("[The agencies at issue in *Seila Law*] are materially different because neither of them operated beyond the President's control."). In discussing the Sinking Fund Commission that Congress created after the Revolutionary War, Justice Alito emphasized that it was unlike the Federal Housing Finance Agency because it was "run by a 5-member Commission, three [of whom] were part of the President's Cabinet and therefore removable at will." *Id.* As Professor Chabot has pointed out, Justice Alito appears to have conceded, at least implicitly, that total presidential control is not necessary. See generally Chabot, *supra* note 72; Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 122.

147. See Michael Wines, *Census Memo Cites 'Unprecedented' Meddling by Trump Administration*, N.Y. TIMES (Jan. 15, 2022), <https://www.nytimes.com/2022/01/15/us/2020-census-trump.html>. [<https://perma.cc/638D-H9UX>] ("The census officials' memorandum pushed back especially forcefully, complaining of 'direct engagement' by political appointees with the methods that experts were using to find and count unauthorized noncitizens.").

148. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). In *Collins*, Justice Alito stated the various legal fictions upon which the unitary executive theory rests: "[B]ecause the President, unlike agency officials, is elected, this control [through removal] is essential to subject Executive Branch actions to a degree of electoral accountability. [According to Madison,] [a]t-will removal ensures that 'the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.' . . . These purposes are implicated whenever an agency does important work . . ." 141 S. Ct. at 1784; see also *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting) ("The majority offers the civics class version

The federal government's response to the COVID-19 pandemic raises significant questions about the appropriate degree of political control that should be exercised over the CDC and the FDA. As early as May 2020, the editors of the *Lancet* faulted the CDC's leadership for the government's inadequate response to the pandemic: "The CDC needs a director who can provide leadership without the threat of being silenced and who has the technical capacity to lead today's complicated effort."¹⁴⁹ This criticism is interesting, of course, because the very point of the unitary executive theory is that the president has an absolute right to "silence" — or terminate — political appointees, and both the FDA commissioner and the CDC director are political appointees. If a greater degree of independence is deemed desirable with respect to these agencies, the Court's recent jurisprudence necessarily will become relevant.

D. The Twentieth Amendment

Finally, the Twentieth Amendment features at the center of the story. From George Washington's second inauguration in 1793 until 1933, the inauguration of the president occurred on March 4 of the year following a presidential election.¹⁵⁰ In 1933, the people adopted the Twentieth Amendment, which moved the date of the president's inauguration from March 4 to January 20, because the original arrangements relating to the timing of the inauguration no longer seemed necessary or prudent. In the late eighteenth and early nineteenth centuries, travel was difficult, and it took a long time for the Electoral College results to reach the seat of the national government; it also took a long time for elected officials to reach

of separation of powers—call it the Schoolhouse Rock definition of the phrase."). In *Collins*, Justices Kagan and Sotomayor both pointed out that the Court was encroaching on Congress's constitutional power to determine the design of the Executive Branch. 141 S. Ct. at 1800 (Kagan, J., concurring in part and dissenting in part) ("The right way to ensure that government operates with 'electoral accountability' is to lodge decisions about its structure with . . . 'the branches accountable to the people.'"); *id.* at 1804 (Sotomayor, J., concurring in part and dissenting in part) ("[The Court's recent decisions] have . . . largely ignor[ed] the Court's own encroachment on Congress' constitutional authority to structure the Executive Branch as it deems necessary."). It also comes close to endorsing the view that President Richard M. Nixon instructed his attorney to convey to the judiciary, namely, that the president "is as powerful a monarch as Louis XIV, only four years at a time." See TIM WEINER, *ONE MAN AGAINST THE WORLD: THE TRAGEDY OF RICHARD NIXON* 94 (2015).

149. Editorial, *Reviving the US CDC*, *LANCET* (May 16, 2020). The editorial further stated that, "Americans must [elect] a president . . . who will understand that public health should not be guided by partisan politics." *Id.*

150. See generally JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <https://www.inaugural.senate.gov/inaugural-address/> [<https://perma.cc/9CAK-73H5>] (last visited Dec. 12, 2021).

the capital.¹⁵¹ By 1933, however, those conditions no longer applied: communications could be almost instantaneous, and even train travel from coast to coast took only a few days.¹⁵² Moreover, there was a sense that circumstances were moving more quickly, and the long wait between the November election and the March inauguration was a luxury that the nation could no longer afford. The country was in the middle of the Great Depression, and aggressive action by a new administration was thought necessary to deal with it.¹⁵³

During the interval between the 2020 election and President Biden's inauguration, the pandemic remained the most pressing problem facing the nation. Almost fifteen million additional Americans became infected during that period, and an additional 173,327 Americans died.¹⁵⁴ President Trump showed no interest in dealing with the pandemic during that period. Indeed, on December 19, 2020, the *Washington Post* reported on the President's thinking: "'I think he's just done with covid,' said one of Trump's closest advisers who . . . spoke on the condition of anonymity to candidly discuss internal deliberations and operations. 'I think he put it on a timetable and he's done with covid. . . . It just exceeded the amount of time he gave it.'"¹⁵⁵

151. Tim Clary, *Why Does Inauguration Day Fall on January 20?*, HISTORY, <https://www.history.com/news/why-does-inauguration-day-fall-on-january-20> [https://perma.cc/T2ZP-PDWV] (Jan. 20, 2021).

152. See *id.* ("As technological advances greatly reduced the times to tabulate votes, report the results and travel, such a long lame-duck period was no longer logistically necessary.").

153. See, e.g., Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 732 (2012):

[Although Senator Norris] feared that the Amendment might falter because proponents had not yet focused on lobbying the states to ratify it. Support for the Amendment, however, was so prevalent that it secured the requisite approval in less than a year. As economic conditions worsened in the early 1930s, much of the impetus for ratification came from a widely shared desire to bring in new national leadership as soon as possible—a sense that was exasperated to near panic proportions during the banking crisis of early 1933 as the public waited anxiously until March for President-elect Franklin Roosevelt to replace President Herbert Hoover. Thus, despite the focus during the congressional debates on accelerating turnover in Congress, when pundits and commentators referred to the Twentieth Amendment as “the ‘lame duck’ Amendment,” they likely had Herbert Hoover—and not defeated members of Congress—at the forefront of their minds. They wanted the new Democratic President to take office sooner; the House of Representatives was already under Democratic control.

Id. See also HAROLD HOLZER, LINCOLN PRESIDENT-ELECT: ABRAHAM LINCOLN AND THE GREAT SECESSION WINTER 1860–1861 2 (2008) (“[D]uring [the Great Secession Winter of 1860–61] the country could more accurately be said to have had no president than to have had two. The incumbent was paralyzed, and his successor powerless.”).

154. See McMinn & Crampton, *supra* note 29 (comparing and contrasting COVID's impact on each state).

155. Abutaleb et al., *supra* note 51.

Instead of addressing the pandemic, the president chose to focus his energies on efforts to discredit and overturn the election results.¹⁵⁶ Perhaps the interval between the election and the inauguration should be further shortened. That could be accomplished, as in 1933, through the adoption of a constitutional amendment that alters the date of the president's inauguration. It could also be accomplished by statute, without a constitutional amendment, as Sanford Levinson has noted, because one of the two relevant dates — the date of the presidential election — is not set by the Constitution, but by an Act of Congress, and Congress could therefore change it.¹⁵⁷ In other words, Congress could shorten the period between the election and the inauguration by moving the date of the election, rather than that of the inauguration. The adoption of either solution, however, would require better methods for counting votes accurately and efficiently, the development of greater public confidence in the integrity of the electoral process, and a willingness on the part of candidates to forbear bringing spurious legal contests. In addition, candidates would clearly need to pay attention to planning for their transitions well before the election.

II. HOW THE PANDEMIC UNFOLDED AND HOW THE GOVERNMENT RESPONDED

A. *The Beginnings of the Pandemic*

In December 2019, as Lawrence Wright recounts in *The Plague Year*, significant numbers of healthcare providers and patients in Wuhan, China began to fall ill with unfamiliar pneumonias, at least some of which occurred in circumstances that indicated the likelihood of human-to-human

156. See, e.g., Aaron Blake, *Timeline: Trump's Pressure Campaign to Overturn the 2020 Election*, WASH. POST (Aug. 12, 2021), <https://www.washingtonpost.com/politics/2021/08/06/trumps-brazen-attempt-overturn-2020-election-timeline/> [<https://perma.cc/DT8A-68KN>] (detailing President Trump's efforts to overturn the 2020 election); see also Jim Rutenberg et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [<https://perma.cc/HFD3-32PR>] (examining President Trump's efforts to overturn the 2020 election in the seventy-seven days between the 2020 election and inauguration).

157. See Sanford Levinson, *Presidential Elections and Stupidities*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 62 (William N. Eskridge Jr. & Sanford Levinson eds., 1998) (“Consider first the easier (and far more common) case: the defeat of an incumbent, followed by a ten-week hiatus in which the repudiated administration continues to possess the full legal powers of the modern American presidency. George [H.W.] Bush, the most recent such repudiated president, illustrated the range of these powers by sending troops abroad (to Somalia) and by pardoning criminals (Elliot Abrams) and possible collaborators in arguably illegal conduct (Caspar Weinberger).”).

transmission.¹⁵⁸ By the end of December, Chinese medical professionals knew the illness was caused by a coronavirus, although they initially thought it was SARS.¹⁵⁹ The Chinese government attempted to suppress that information for another month and directed Chinese hospital workers not to wear masks in an apparent effort to prevent panic.¹⁶⁰ The Chinese government's efforts to suppress the news were only partially successful. On December 30, 2019, proMED, an online publication of the International Society for Infectious Diseases, reported on a suspicious pneumonia outbreak in Wuhan that was possibly linked to a seafood market. ProMED further reported that the outbreak did not seem to involve human-to-human transmission, that it had not been determined whether it was SARS, and that there was no reason to panic.¹⁶¹ But on January 23, 2020, the Chinese government placed Wuhan in quarantine, and, within a few days, the government had extended the quarantine to fifteen other cities, so that approximately fifty million people were being quarantined in China.¹⁶²

CDC Director Robert Redfield read the proMED report on New Year's Eve and discussed it with George Fu Gao, his Chinese counterpart, as early as January 3, 2020. Dr. Redfield offered to send a team of American health officials to China, and Dr. Gao was initially receptive to that offer, but he apparently lacked the authority to approve the visit, and other Chinese officials rebuffed Dr. Redfield's efforts.¹⁶³ By January 3, the virus had already reached the United States, although it would not be detected until January 20, when the first case of COVID-19 was diagnosed in a

158. See WRIGHT, *supra* note 4, at 4 (providing (i) examples of Chinese patients exhibiting flu-like symptoms and (ii) evidence that medical tests revealed to doctors some form an unknown pneumonia-like infection in these patients).

159. *Id.* at 7. Severe acute respiratory syndrome (SARS or SARS-CoV) is a rapidly progressing respiratory coronavirus that spreads through small droplets of saliva that can cause fever, chills, headache, coughing, shortness of breath, low blood oxygen levels, and, ultimately, pneumonia. SARS emerged in mainland China in 2002, spread to other parts of Asia in 2003, and then quickly spread to more than twenty-five countries before the global outbreak was contained. The virus is part of the coronavirus family and therefore shares some similarities with COVID-19. Coronaviruses are single-stranded-RNA viruses that can cause disease in humans and animals. See generally Joseph S.M. Peiris et al., *The Severe Acute Respiratory Syndrome*, 349 *NEW ENG. J. MED.* 2431 (2003).

160. WRIGHT, *supra* note 4, at 7–9.

161. *Id.* at 11.

162. See generally Aylin Woodward & Rosie Perper, *Wuhan, China, and at Least 15 Other Cities Have Been Quarantined as China Attempts to Halt the Spread of the Coronavirus. That's About 50 Million People on Lockdown*, *BUS. INSIDER* (Jan. 28, 2020), <https://www.businessinsider.com/wuhan-coronavirus-officials-quarantine-entire-city-2020-1> [<https://perma.cc/33UU-87R8>]. Eventually, “about 650 million people, nearly half the population of China, were placed in quarantine.” WRIGHT, *supra* note 4, at 10.

163. WRIGHT, *supra* note 4, at 11–12.

U.S. resident who had visited Wuhan.¹⁶⁴ On January 5, scientists at Fudan University in Shanghai defied their government and submitted the genome to the NIH GenBank.¹⁶⁵ On January 17, it was announced that persons traveling from Wuhan to the United States would be screened for the virus at New York, Los Angeles, and San Francisco airports.¹⁶⁶ The first Senate hearings on the pandemic occurred on January 24. Dr. Redfield reassured the senators that, “We are prepared for this.”¹⁶⁷ At about the same time, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, said in a radio interview that the virus was not “something the American people need to be worried or frightened by,” although he acknowledged that the situation was evolving and that “[e]very day, we have to look at it very carefully.”¹⁶⁸

The magnitude of the challenge became clearer by the end of February. On February 29, Washington Governor Jay Inslee declared an emergency in his state.¹⁶⁹ By March 8, New York, California, and Oregon had followed suit,¹⁷⁰ and by April 22, “316 million people in at least 42 states, three counties, ten cities, the District of Columbia, and Puerto Rico” were being told to stay at home by state and local officials.¹⁷¹ State and local governments were at the forefront of fighting the pandemic. As one commentator noted in March 2020, “[I]f this crisis is highlighting our weaknesses as a nation, it is also bringing out some of our greatest strengths. In the absence of competent national leadership, others are stepping up. Governors and mayors, business owners, university presidents, philan-

164. *Id.* at 14.

165. *Id.* at 8.

166. Denise Grady, *Three U.S. Airports to Check Passengers for a Deadly Chinese Coronavirus*, N.Y. TIMES, <https://www.nytimes.com/2020/01/17/health/china-coronavirus-airport-screening.html> (Jan. 21, 2020) [<http://perma.cc/39WR-ZP6J>].

167. WRIGHT, *supra* note 4, at 41.

168. *Id.*

169. Mike Baker et al., *Washington State Declares Emergency Amid Coronavirus Death and Illnesses at Nursing Home*, N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/us/coronavirus-washington-death.html> [<http://perma.cc/9YTM-R8N5>].

170. Jason Horowitz et al., *In U.S., Cases of Coronavirus Cross 500, and Deaths Rise to 22*, N.Y. TIMES, <https://www.nytimes.com/2020/03/08/world/coronavirus-news.html> (Mar. 25, 2020) [<http://perma.cc/J88N-Z8DL>].

171. Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<http://perma.cc/B5JF-KMRV>]; accord James Glanz et al., *Where America Didn't Stay Home Even as the Virus Spread*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/interactive/2020/04/02/us/coronavirus-social-distancing.html> [<http://perma.cc/XF4X-ZZW3>] (comparing the states and cities that directed people to stay at home with changes in the amount of travel occurring).

thropists, pastors and nonprofit groups of all kinds have taken the initiative to mobilize, guide and protect those they lead and serve.”¹⁷² But not all states were marching in lockstep. Officials in some parts of the country were less willing to impose restrictions or take other steps to fight the virus.¹⁷³ For example, Florida Governor DeSantis initially refused to close the state’s beaches despite the massive influx of college students during Florida’s spring break in March 2020.¹⁷⁴

The United States and other countries were initially handicapped in responding to the virus, not only by the Chinese government’s secrecy and obfuscations,¹⁷⁵ but also by the apparent willingness of the World

172. Anne-Marie Slaughter, *Forget the Trump Administration. America Will Save America*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/opinion/Sunday/coronavirus-governors-cities.html> [<http://perma.cc/H4UN-PX62>].

173. See Elisha Fieldstadt, *Coronavirus Comes for Spring Break: Local Officials Close Florida Beaches after Governor Refuses To*, NBC NEWS, <https://www.nbcnews.com/news/us-news/coronavirus-comes-spring-break-locals-close-florida-beaches-after-governor-n1163741> (Mar. 20, 2020, 6:19 AM) [<http://perma.cc/KFS4-T5UQ>] (explaining that Florida Governor Ron DeSantis refused to close beaches amid the outbreak, leaving local officials in Florida towns and cities to take it upon themselves to close their beaches during spring break); see also Patrick Svitek, *Gov. Greg Abbott Resists Calls for Statewide Shelter-in-Place; Moves to Expand Hospital Capacity*, TEXAS TRIB. (Mar. 22, 2020, 6:00 PM), <https://www.texastribune.org/2020/03/22/texas-shelter-in-place-coronavirus-cases/>. [<http://perma.cc/DVT2-9GHX>] (discussing Texas Governor Greg Abbott’s refusal to issue a statewide shelter-in-place order).

174. See Aris Folley, *Florida Governor Refuses to Close Beaches as Coronavirus Cases Rise*, HILL (Mar. 18, 2020, 4:16 PM), <https://thehill.com/homenews/state-watch/488302-florida-governor-refuses-to-close-beaches-amid-covid-19-outbreak/> [<http://perma.cc/K4GR-Y5R4>] (explaining DeSantis’s stance that beaches will follow CDC guidelines but not shut down); Anthony Faiola et al., *Operation Cancel Spring Break: Floridians Fret over Coronavirus as Young Revelers Try to Keep the Party Going*, WASH. POST (Mar. 19, 2020, 6:11 PM), https://www.washingtonpost.com/national/coronavirus-florida-cancel-spring-break/2020/03/19/113f466c-69f7-11ea-abef-020f086a3fab_story.html. [<http://perma.cc/5TB9-4URV>] (describing Floridians’ concerns over young people traveling to Florida for spring break). In March 2021, shortly before college students descended on Florida for spring break, Governor DeSantis banned the imposition of fines for violations of COVID-19 regulations and prohibited officials from collecting fines that had already been levied. See Arek Sarkissian, *DeSantis Erodes Florida’s COVID Rules—and Spring Breakers Go Wild*, POLITICO (Mar. 23, 2021, 6:05 PM), <https://www.politico.com/states/florida/story/2021/03/23/desantis-erodes-floridas-covid-rules-and-spring-breakers-go-wild-1369291> [<http://perma.cc/5VFG-C66P>] (explaining DeSantis’s abolition of fines for violating pandemic orders in an effort to increase tourism); see also Lisa J. Huriash & Wells Dusenbury, *Gov. DeSantis Cancels COVID-19 Fines. Now Communities Work around the Governor to Enforce the Rules*, S. FLA. SUN SENTINEL (Mar. 11, 2021, 5:55 PM), <https://www.sun-sentinel.com/coronavirus/fl-ne-governor-dismisses-fines-covid-20210311-if5g73lcsz3tpref4fb3rinee-story.html> [<http://perma.cc/8PBM-WF4Q>] (“Gov. Ron DeSantis just wiped away any COVID-19 related fines against people and businesses over the past year . . .”).

175. Lawrence Wright argues that the first of three distinct opportunities “to curb the Covid contagion before it got out of hand” was lost when Chinese authorities “rejected U.S. offers to send a team of disease detectives to investigate the outbreak in Wuhan.” WRIGHT, *supra* note 4, at 59. A U.S. team in China might have learned that one of its key assumptions about the virus—that it was only moderately contagious—was wrong. The virus was highly contagious and spread largely by asymptomatic transmission. *Id.* at 58. The “testing fiasco” was the second lost opportunity. *Id.* See *supra* notes 117, 138, 148, and accompanying text.

Health Organization to take the Chinese government at its word.¹⁷⁶ In early 2020, however, the United States also faced some unique challenges in formulating a coherent response to the pandemic.

B. *The President, the Agencies, and the Election Year*

January 2020 marked the beginning of a highly unusual presidential election year. In early 2020, President Trump was widely favored to win the November general election,¹⁷⁷ but he also had been impeached for allegedly pressuring a foreign leader to help him undermine the credibility of a potential Democratic opponent in the election.¹⁷⁸ He was now facing a trial in the Senate, but would likely prevail because his party controlled the Senate, and the vote would almost certainly be along party lines.¹⁷⁹ On February 5, the Senate would indeed acquit him, with only Senator Mitt Romney breaking ranks with his party on one of the two counts contained in the bill of impeachment.¹⁸⁰ Much of President

176. See LEONNIG & RUCKER, *supra* note 55, at 65 (“[T]he WHO had also become increasingly sensitive to not alienating the Chinese government, which had dramatically increased its funding . . . in recent years. . . . The WHO had publicly . . . praised the ruling Communist Party leadership . . . even amid growing evidence [that it] was concealing information . . .”).

177. See, e.g., Sigal Samuel et al., *19 Big Predictions about 2020, from Trump’s Reelection to Brexit*, VOX (Jan. 13, 2020, 9:00 AM), <https://www.vox.com/future-perfect/2020/1/13/21055740/trump-reelection-biden-nomination-brexit-2020-predictions> [http://perma.cc/U688-G2QD] (predicting a 55 percent chance President Trump would win re-election).

178. See *Trump Impeachment: The Short, Medium and Long Story*, BBC NEWS (Feb. 5, 2020), <https://www.bbc.com/news/world-us-canada-49800181> [http://perma.cc/9EHD-F4NT] (describing allegations that President Trump improperly sought help from Ukraine to boost his chances of re-election); see also Brian Naylor, *Impeachment Timeline: From Early Calls to a Full House Vote*, NPR (Dec. 17, 2019, 5:00 AM), <https://www.npr.org/2019/12/17/788397365/impeachment-timeline-from-early-calls-to-a-full-house-vote> [http://perma.cc/6Z2F-AP67-4TYU] (detailing President Trump’s call to Ukrainian President Volodymyr Zelenskyy asking him to “look into” activities by potential 2020 opponent Joe Biden and his son Hunter in Ukraine).

179. See, e.g., Brendon O’Connor & Daniel Cooper, *Donald Trump Has Become the Third President in US History to Be Impeached. He’s Unlikely to Be Convicted*, CONVERSATION (Dec. 18, 2019, 10:29 PM), <https://theconversation.com/donald-trump-has-become-the-third-president-in-us-history-to-be-impeached-hes-unlikely-to-be-convicted-128302> [http://perma.cc/JD4A-WDDW] (“[Impeachment] requires a majority in the House of Representatives and a two-thirds supermajority in the Senate Republicans control the Senate 53-45 That makes the likelihood of achieving 67 votes required for a conviction unlikely.”).

180. See Tom McCarthy, *The Great Escape: How Donald Trump Survived Impeachment*, GUARDIAN (Feb. 5, 2020, 4:34 PM), <https://www.theguardian.com/us-news/2020/feb/05/how-donald-trump-got-acquitted-after-impeachment> [http://perma.cc/E39C-6M9S] (“A more likely explanation for Trump’s survival was the unchanging opposition of the Republican base to removal. The proportion of Republicans favoring removal fluctuated between 8% and 10% . . .”).

Trump's attention in February would be focused on celebrating his acquittal and exacting revenge against those who testified against him.¹⁸¹

One problem that dogged the government's efforts to respond to the pandemic was a lack of competent leadership, not only from the President, but also from other federal officials—both presidential appointees and career civil servants. There were many aspects to this lack of leadership, and it existed at many levels. During his first three years in office, President Trump demonstrated little interest in governing, mastering the details of government, or solving the nation's problems—beyond the dismantling of regulatory programs that he had promised to dismantle.¹⁸² His “management style [was] as chaotic as it was theatrical, one that quickly had pundits across the political spectrum comparing the White House to a reality television show. He pioneered a new form of presidential communication with the public—the unfiltered Twitter tantrum—in which he lashed out in highly personal terms and often with malicious

181. See Martin Pengelly, *Trump Quotes Emerson: 'When You Strike at the King, You Must Kill Him,'* GUARDIAN (Feb. 15, 2020, 3:51 PM), <https://www.theguardian.com/us-news/2020/feb/15/donald-trump-new-york-times-grievance-persecution-resentment-daytona-500> [http://perma.cc/R3XE-DBY4] (explaining President Trump's attitude after his acquittal); see also Joanna Walters et al., *Trump Fires Key Impeachment Witnesses Vindman and Sondland,* GUARDIAN (Feb. 7, 2020, 5:22 PM), <https://www.theguardian.com/us-news/2020/feb/07/alexander-vindman-fired-trump-impeachment-white-house> [http://perma.cc/2ZYE-3L9V] (discussing President Trump's attempts at revenge against government employees who provided damaging testimony during the impeachment inquiry); accord Martin Pengelly, *Trump Reportedly Calls John Bolton a 'Traitor' and Wants to Block His Book,* GUARDIAN (Feb. 22, 2020, 10:21 AM), <https://www.theguardian.com/us-news/2020/feb/22/trump-john-bolton-traitor-book-marie-yovanovitch> [http://perma.cc/TB5V-5LL9] (highlighting President Trump's retaliation efforts against John Bolton).

182. See, e.g., Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List,* N.Y. Times (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [https://perma.cc/CX8B-L6UK] (detailing discontinued environmental programs); PHILIP RUCKER & CAROL LEONNIG, *A VERY STABLE GENIUS: DONALD J. TRUMP'S TESTING OF AMERICA* 4 (2020) (“Trump's ego prevented him from making sound, well-informed judgments. He stepped into the presidency so certain that his knowledge was the most complete and his facts supreme that he turned away the expertise of career professionals upon whom previous presidents had relied. This amounted to a wholesale rejection of America's model of governing, which some of his advisers concluded was born of deep insecurity. ‘Instead of his pride being built on making a good decision, it's built on knowing the right answer from the outset,’ a senior administration official said.”). See also Grace Segers, *Bolton Says Russia Controversy Highlights Trump's "Lack of Interest in Intelligence,"* CBS NEWS (July 1, 2020, 2:28 PM), <https://www.cbsnews.com/news/john-bolton-russia-bounties-trump-lack-of-interest-in-intelligence-the-takeout/> [http://perma.cc/SC68-33SR] (detailing John Bolton's critiques of President Trump's apparent lack of interest in intelligence briefings). Indeed, even on June 1, 2020, when Lafayette Square was cleared so that he could hold up a bible in front of Saint John's Church, “It was crystal clear Trump had no understanding of how the various departments of his administration worked, or of how civilian and military roles diverged at the Pentagon, or even of the sacred importance of the First Amendment. A president could not merely do away with [the First Amendment] to impress some foreign leaders [as he had expressed the need to do].” LEONNIG & RUCKER, *supra* note 55, at 164. On the other hand, President Trump had been remarkably successful at “willing away” the problems he faced. See *infra* note 187.

lies at . . . anyone who angered him.”¹⁸³ The president took little responsibility for the actions of his government. His greatest pleasure seemed to come from the trappings of office¹⁸⁴ and from the adulation of his followers at campaign-style “monster rallies,”¹⁸⁵ where he continued to speak as if someone else were in charge. According to two students of the Trump presidency, “In elevating the expressive, vanity-plate dimensions of the office and making it a personal vehicle for the public self-expression of the officeholder, [Trump] proposes sublimating nearly all other traditional features of the presidency: its management functions, its

183. SUSAN HENNESSEY & BENJAMIN WITTES, UNMAKING THE PRESIDENCY: DONALD TRUMP’S WAR ON THE WORLD’S MOST POWERFUL OFFICE 10 (2020).

184. See, e.g., Dareh Gregorian, *How Will Trump’s Display Measure Up? A Look at Huge Military Parades Around the Globe*, NBC NEWS (July 3, 2019, 5:40 AM), <https://www.nbcnews.com/politics/donald-trump/how-will-trump-s-display-measure-look-huge-military-parades-n1026001> [<http://perma.cc/H6HU-7SJH>] (describing President Trump’s enthusiasm for a military parade). For example, President Trump was deeply impressed by the 2017 Bastille Day celebration in Paris and wished to replicate the French military parade in Washington. *Id.* The president also found ways for the government to enrich his businesses. See Joe Walsh, *Report: U.S. Government Paid \$2.5 Million to Trump Businesses*, FORBES (Oct. 27, 2020, 3:20 PM), <https://www.forbes.com/sites/joewalsh/2020/10/27/report-us-government-paid-over-25-million-to-trumps-businesses/> [<http://perma.cc/5WUW-Z554>] (analyzing U.S. taxpayer money going into businesses owned by President Trump).

185. See Richard Wolffe, *Don’t Call It a Comeback: Trump’s Tulsa Rally Was Just Another Sad Farce*, GUARDIAN (June 20, 2020, 10:41 PM), <https://www.theguardian.com/commentisfree/2020/jun/20/donald-trump-tulsa-rally-crowd-empty-seats> [<http://perma.cc/RJ6B-WR2W>] (“As Trump likes to say: Pretty much, that’s it. At least it is for everyone grifting at the Trump campaign. Especially Brad Parscale, the Ferrari-driving [2020 campaign] manager who went from website builder to social media genius in 2016 but who now faces an imminent return to his website-building career, after predicting a monster rally in Tulsa.”). President Trump continued to hold campaign-style rallies throughout his presidency. See Vann R. Newkirk II, *Donald Trump’s Eternal Campaign*, ATLANTIC (Jan. 22, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-campaign-continues-presidency/514073/> [<http://perma.cc/7WSN-W7HQ>] (stating President Trump’s “famed rally-centered style” would continue while he was in office); see also David A. Graham, *Trump Never Stopped Campaigning Long Enough to Govern*, ATLANTIC (June 18, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/trump-cant-re-launch-a-campaign-that-never-stopped/591949/> [<http://perma.cc/33LF-K846>] (“Not only is today not the first time Trump has said he was starting his campaign, but he never really stopped campaigning in the first place.”); accord Kethevane Gorjestani, *Trump Repeats Claim of 2020 Election Fraud at Campaign-Style Rally in Ohio*, FRANCE 24 (June 27, 2021, 8:34 AM), <https://www.france24.com/en/americas/20210627-trump-repeats-claim-of-election-fraud-at-first-large-campaign-style-rally-since-biden-inauguration> [<http://perma.cc/E23X-CEBJ>] (describing President Trump’s first “campaign-style rally” after leaving the White House). The term “monster meeting” is often used to describe the mass political meetings organized by the nineteenth-century Irish statesman Daniel O’Connell. See, e.g., DECLAN KIBERD, INVENTING IRELAND: THE LITERATURE OF THE MODERN NATION 20–21 (1995) (discussing Daniel O’Connell’s political meetings with thousands of attendees); see also R. F. FOSTER, MODERN IRELAND 1600–1972 313 (1988) (describing O’Connell’s adoption of “monster meeting[s]”); see also LAWRENCE J. McCAFFREY, DANIEL O’CONNELL AND THE REPEAL YEAR 53 (1966) (“[O’Connell’s] outdoor demonstrations [were described] as ‘Monster Meetings.’”).

expectations of good-faith execution of law; its expectation of ethical conduct, truthfulness, and service. This vision of the presidency thus unsurprisingly produces a genuinely novel set of deployments of the executive's traditional powers"¹⁸⁶

President Trump's approach to political leadership may have been unusual by American standards, but it resonated with the recent experience of some other countries.¹⁸⁷ As Masha Gessen has written, "the world's antipolitical leaders," including President Trump, "campaign on voters' resentment of elites for ruining their lives, and they continue to traffic in this resentment even after they take office—as though someone else, someone sinister and apparently all-powerful, were still in charge, as though they were still insurgents. The very institutions of government—their own government now—are the enemy."¹⁸⁸ Thus, "Trump went on to denigrate the intelligence services, rage against the Justice Department, and issue humiliating tweets about officials in his own administration."¹⁸⁹ He seems to have had little interest in governing beyond enforcing his will with respect to a limited menu of marquee issues, such as the southern border wall, tax cuts, and deregulation, as well as satisfying his personal interests.¹⁹⁰ He also seems to have perceived the problems of government mainly as public relations problems to be finessed, rather than

186. HENNESSEY & WITTES, *supra* note 183, at 13.

187. See, e.g., ABUTALEB & PALETTA, *supra* note 76, at 4 ("Ever since Trump had heard about the coronavirus in January, he had been determined to will it away, as he had—often successfully—willed away so many other problems in his presidency."); see also Stephanie Sarkis, *Trump and Other Gaslighters/Narcissists Create Crises and Then Act Like They Solved Them*, FORBES (June 9, 2019, 5:48 PM), <https://www.forbes.com/sites/stephaniesarkis/2019/06/09/trump-and-other-gaslightersnarcissists-create-crises-and-then-act-like-they-solved-them> [<http://perma.cc/64RH-BT9E>] (noting that President Trump created many of the "problems" he "solved"). But President Trump's politics had deep roots in American political history. See Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG. (Nov. 1964), <https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/> [<http://perma.cc/365Y-WB6T>] (discussing the "paranoid style" and "angry minds" in American political history).

188. MASHA GESSEN, SURVIVING AUTOCRACY 17–18 (2020).

189. *Id.* at 18. The president also seemed to enjoy firing people (often by tweet), so that the bench was quite depleted by 2020. See, e.g., Daniel Villarreal, *40% of Top Pentagon Positions Empty after Donald Trump's Firing of Mark Esper*, NEWSWEEK (Nov. 20, 2020, 10:16 PM), <https://www.newsweek.com/40-top-pentagon-positions-empty-after-donald-trumps-firing-mark-esper-1549175> [<http://perma.cc/24PG-L3SD>] (discussing empty positions in the Pentagon); see also Nancy Cook, *Trump's Staffing Struggle: After 3 Years, Unfilled Jobs across the Administration*, POLITICO (Jan. 20, 2020, 8:13 AM), <https://www.politico.com/news/2020/01/20/trumps-staffing-struggle-unfilled-jobs-100991> [<http://perma.cc/LN43-GZUV>] (noting existence of 170 empty positions for which no one had been nominated).

190. See, e.g., Fiona Hill, *The Kremlin's Strange Victory: How Putin Exploits American Dysfunction and Fuels American Decline*, FOREIGN AFFS. (Nov./Dec. 2021), <https://www.foreignaffairs.com/articles/united-states/2021-09-27/kremlins-strange-victory> [<http://perma.cc/K7VQ-TRVH>];

policy problems to be solved.¹⁹¹ Moreover, if he refused to take responsibility for solving problems, he could not fail, and his “brand” would not be damaged.¹⁹² In this way, he could also take credit for success, but

Trump . . . admired Putin for his presumed wealth and for the way he ran Russia as if it were his own private company. . . . [Trump] wanted to do the same thing. He saw the United States as an extension of his other private enterprises: the Trump Organization, but with the world’s largest military at its disposal. . . . Trump also aped Putin’s willingness to abuse his executive power by going after his political adversaries. . . . And Trump imported Putin’s style of personalist rule, bypassing the professional civil servants . . . to rely instead on the counsel and interventions of cronies.

See also Michael J. Klarman, *The Supreme Court, 2019 Term: Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 23–32 (2020) (discussing President Trump’s demands for personal loyalty and use of office for personal gain). Professor Klarman argues that President Trump emerged from his first impeachment with a new sense of invincibility. *Id.* at 89. Among other things, President Trump extended Secret Service protection for six months for thirteen family members, costing the government \$1.7 million, some of which was spent at Trump properties. See Lexi Lonas, *Trump Extended Secret Service Protection for Family Members in Final Days in Office: Report*, HILL (Jan. 20, 2021, 4:11 PM), <https://thehill.com/policy/national-security/535085-trump-extended-secret-service-protection-for-family-members-in-final> [<http://perma.cc/Z9D7-W2HC>] (detailing President Trump’s extended secret service protection and its cost to taxpayers); see also Josh Marcus, *Trump Order Let Family and Ex-Officials Spend \$1.7m on Secret Service Protection after Leaving Office, Report Says*, INDEP. (Sept. 17, 2021, 7:52 PM), <https://www.independent.co.uk/news/world/americas/us-politics/trump-family-secret-service-protection-b1922335.html> [<http://perma.cc/64CF-JJZK>] (explaining the cost of the extended Secret Service protection).

191. See ABUTALEB & PALETTA, *supra* note 76, at 57–60 (describing President Trump’s desire to keep anyone infected with COVID-19 from entering the United States). The debate over the fate of infected Americans stranded on cruise ships was indicative of the problem. President Trump did not want them to return to the United States because that would increase the number of infections in the United States, making his administration look bad. The president even considered sending the passengers, many of whom were elderly and in bad health, to Guantanamo Bay to “keep down the numbers.” *Id.* Also, when President Trump officially announced Operation Warp Speed, he attempted to dissuade the other participants from wearing masks to the launch because he did not like “the look.” See LEONNIG & RUCKER, *supra* note 55, at 142 (detailing President Trump’s directive for principals to take their masks off before the event). He also transferred \$300 million from the CDC to the HHS Public Affairs Office, to be used “for a public relations campaign ‘to defeat despair and inspire hope’ about the virus, ahead of the election”—a campaign for which the CDC was not asked to provide scientific expertise. *Id.* at 274. As early as March 2020, President Trump thought that “the coronavirus mess was more of a messaging problem than anything else, an assessment that [Vice President Mike] Pence’s team and [White House Chief of Staff Mark] Meadows shared.” ABUTALEB & PALETTA, *supra* note 76, at 115.

192. See, e.g., Michael Corkery & Annie Karni, *Trump Administration Restricts Entry into U.S. from China*, N.Y. TIMES (Feb. 10, 2020) <https://www.nytimes.com/2020/01/31/business/china-travel-coronavirus.html> [<http://perma.cc/AY55-RYPC>] (discussing travel restrictions announced by HHS Secretary Alex Azar). President Trump delegated to others the responsibility for announcing initiatives that might fail or prove unpopular. ABUTALEB & PALETTA, *supra* note 76, at 41 (“[Trump] authorized the [China] travel ban, but he . . . [didn’t] stick around to announce it. He wanted political cover in case it went awry, and he did not want to be visibly part of the announcement. He instructed Azar to announce it”); *id.* at 220 (“The news media were obsessively covering the lack of coronavirus tests, and everyone was blaming Trump. The CDC should never

blame the “Deep State” for failures.¹⁹³ Ironically, when President Trump ran for election in 2016, his supporters thought that his greatest strength was his decisiveness.¹⁹⁴ Even when he took responsibility for making decisions in response to the pandemic, however, he proved anything but decisive. Within days of deciding to shut down the country, for example, he began arguing that it should be re-opened,¹⁹⁵ and that states governed by Democratic governors should be “liberated.”¹⁹⁶ For at least a few of his supporters, liberation included plans to kidnap those governors.¹⁹⁷

President Trump also “chose people [for his cabinet] who were opposed to the work, and sometimes to the very existence, of the agencies they were appointed to lead.”¹⁹⁸ Some had a more general hostility to government,¹⁹⁹ while others simply lacked qualifications for the positions they held.²⁰⁰ They showed little interest during the presidential transition

have been involved, Trump [told Azar]. . . . ‘This was gross incompetence to let CDC develop a test,’ Trump seethed. Azar had been yelled at by Trump plenty, but this was a new level of anger.”).
 193. See, e.g., Matt Bai, Opinion, *Trump’s Novel Reelection Strategy? Running against His Own Government*, WASH. POST (May 28, 2020, 2:59 PM), <https://www.washingtonpost.com/opinions/2020/05/28/trumps-novel-reelection-strategy-running-against-his-own-government/> [<http://perma.cc/V2V4-R29Z>] (describing President Trump’s blaming of the Justice Department and “deep state” for coronavirus missteps).

194. See Emily Swanson, *AP-GfK Poll: High Marks for Trump on Decisiveness*, AP NEWS (Dec. 11, 2015), <https://apnews.com/article/bbb0b57c3c5a4365a5ec83e5ea1473d7> [<http://perma.cc/6Z2F-2HXQ>] (“Republicans don’t see Donald Trump as likable or compassionate, but he’s viewed . . . as their party’s most decisive, most competent and most electable candidate . . .”).

195. See ABUTALEB & PALETTA, *supra* note 76, at 128–33, 146–49 (describing President Trump’s insistence that the country re-open after meeting with economic advisors).

196. See *id.* at 199–205 (describing protests in states with stay-at-home orders and President Trump’s encouragement of those who sought to protest them).

197. See, e.g., Neil MacFarquhar, *Defendant in Plot to Kidnap Michigan Governor Is Sentenced to Six Years*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/us/gretchen-whitmer-kidnapping-plot-michigan.html> [<http://perma.cc/VM4F-SNBH>] (“Ty G. Garbin . . . was the first defendant to be sentenced for what prosecutors have described as an extremist plot driven by anger at the governor’s efforts to slow the spread of the coronavirus.”).

198. GESSEN, *supra* note 188, at 1; see also Sullivan & Chabot, *supra* note 54 (detailing appointees’ hostility to agencies’ statutory mandates).

199. See, e.g., Michael Lewis, *Why the Scariest Nuclear Threat May Be Coming from Inside the White House*, VANITY FAIR (July 26, 2017), <https://www.vanityfair.com/news/2017/07/department-of-energy-risks-michael-lewis> [<https://perma.cc/L986-3ENC>] (“According to a former Obama official, [the transition team for the Department of Energy] was replaced by a handful of young ideologues who called themselves ‘the Beachhead Team.’ . . . ‘There was a mentality that everything that government does is stupid and bad and the people [in it] are stupid and bad,’ says another. . . . ‘These people were insane,’ says the former DOE staffer. ‘They weren’t prepared. They didn’t know what they were doing.’”).

200. See, e.g., MICHAEL LEWIS, *THE FIFTH RISK* 110–11 (2018) (noting, for example, that the Trump administration appointed Sam Clovis, who had a Ph.D. in public administration, as Chief Scientist of the U.S. Department of Agriculture).

in learning how their agencies worked.²⁰¹ They were committed to certain objectives, such as repealing environmental regulations, for example, without regard to the reality of climate change or public health,²⁰² and they had little interest in fact-based decision-making—which prompted some of their critics to characterize the administration’s approach to governing as a “war on science.”²⁰³ Several specific decisions also had left the administration ill prepared to deal with the pandemic: The Trump administration had abandoned the Obama administration’s *Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents*,²⁰⁴ abolished the office that President George W. Bush created for dealing with such threats,²⁰⁵ and failed to replenish the National Stockpile.²⁰⁶

Likewise, the reputation of the government’s public health professionals greatly exceeded their ability to take decisive action in the face of

201. See *id.* at 40 (stating that staff at the U.S. Department of Energy became “accustomed” to not understanding what the department “actually did”).

202. See, e.g., Popovich, *supra* note 182 (discussing the Trump administration’s roll back of climate change rules); see also Cayli Baker, *The Trump Administration’s Major Environmental Deregulations*, BROOKINGS: UP FRONT (Dec. 15, 2020), <https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/> [<http://perma.cc/25VA-3X8S>] (describing some of the Trump administration’s most consequential environmental deregulatory initiatives).

203. See Editorial Board, *President Trump’s War on Science*, Editorial, N.Y. TIMES (Sept. 9, 2017), <https://www.nytimes.com/2017/09/09/opinion/sunday/trump-epa-pruitt-science.html> [<http://perma.cc/62ZV-MC4V>] (describing the Trump administration’s attitude towards climate change); Editorial Board, *The Trump Administration’s War on Science*, Editorial, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/opinion/the-trump-administrations-war-on-science.html> [<http://perma.cc/S6WY-ZJB3>] (discussing cuts to scientific research budgets and personnel vacancies in government science programs); but see Jeffrey Mervis, *Trump Has Shown Little Respect for U.S. Science. So Why Are Some Parts Thriving?*, SCI. (Oct. 14, 2020), <https://www.sciencemag.org/news/2020/10/trump-has-shown-little-respect-us-science-so-why-are-some-parts-thriving> [<http://perma.cc/J7SR-Q7HV>] (discussing success of scientific research despite President Trump’s seeming disdain for science).

204. WRIGHT, *supra* note 4, at 17.

205. See, e.g., LEONNIG & RUCKER, *supra* note 55, at 34, 59–61 (describing Tom Bossert, who helped write a pandemic response strategy during George W. Bush’s presidency, and his frustrations related to getting in contact with the Trump administration to discuss the pandemic); see also LEWIS, *supra* note 4, at 114, 163 (noting that President George W. Bush created a White House office that “did nothing but worry about pandemics,” that President Obama thought it unnecessary, and that President Trump abolished it).

206. See WRIGHT, *supra* note 4, at 119 (explaining that after the 2009 H1N1 flu pandemic the Strategic National Stockpile’s reserve of N95 masks was never replenished).

uncertainty,²⁰⁷ and they seemed more focused on facilitating the development of drugs and vaccines than on developing mitigation strategies.²⁰⁸ More fundamentally, critics perceived long-standing problems within the various federal public health agencies. For example, some suggested that a culture of timidity existed at the CDC, arguably rooted in the blame it had taken for advocating an aggressive response to the swine flu threat; that no one wanted to take action for which they might be blamed; and that one's status at the CDC came from having their name on scholarly papers, rather than from solving actual public health problems.²⁰⁹ The CDC sometimes was thought to want to "learn from" a public health emergency, whereas the principal goal of local public health officials was to "stop it."²¹⁰ Indeed, one close observer concluded that, although the CDC theoretically stood at the apex of the United States public health system, the truth was that the United States had no real "system," just "five thousand dots, [with] each one of those dots serv[ing] at the will of an elected official."²¹¹

President Trump's denigration of those responsible for running the government—and for solving its problems—was a particularly dangerous strategy to adopt, especially in times of stress, when the people needed the government to function effectively, and the government needed the people to have confidence in its competence. After all, if the intelligence services were not worthy of belief, why should anyone believe public

207. In 1976, the federal government embarked on a swine flu vaccination program that was ended later in the year, after the projected pandemic failed to materialize and an increased incidence of Guillain-Barré syndrome was attributed to the vaccine. The CDC director was fired. See Walter R. Dowdle, *The 1976 Experience*, 176 J. INFECTIOUS DISEASES S69, S69 (Aug. 1997) (describing the chronology of the 1976 Swine Influenza Immunization Program); see also David J. Sencer & J. Donald Millar, *Reflections on the 1976 Swine Flu Vaccination Program*, 12 EMERGING INFECTIOUS DISEASES 29, 32 (2006) (explaining the 1976 Swine Influenza Immunization Program and its aftermath). The position was later recategorized from civil service to political appointment. See e.g., LEWIS, *supra* note 4, at 288–89 ("The CDC Director was then a career civil servant, and when Jimmy Carter was replaced by Ronald Reagan, [the CDC Director] remained in his job. . . . [But the White House] meddled in science that conflicted with the interests of Reagan's base and his financial backers. . . . [In 1983,] the White House converted [the Director's] position . . . from career civil servant to presidential appointee.").

208. See Jean-Louis Excler et al., *Vaccine Development for Emerging Infectious Diseases*, 27 NATURE MED. 591, 591–600 (2021) (discussing the history of and strategies behind vaccine development for emerging infectious diseases).

209. See LEWIS, *supra* note 4, at 36, 40, 98, 126, 196, 281–90 (describing problems that keep the CDC from proactively responding).

210. *Id.* at 40 (observations of Dr. Charity Dean) ("They wanted to learn from this meningitis outbreak, and I wanted to stop it. . . . They wanted to observe it as if it were a science experiment on how meningitis moves through a college campus. And I was like, 'Are you kidding me: a kid just lost his feet.'").

211. *Id.* at 36, 131 (observations of Dr. Charity Dean). A Polish-born professional thought that the public health system in the United States functioned like Poland before the fall of Communism. *Id.* at 255. "Poland now is more functional. . . . [T]hese are the symptoms of a failed state." *Id.*

health officials? And, at least in some respects, the public health establishment provided the public with good reasons for not believing in them.

C. Masking

Perhaps the most long-standing—and most highly politicized—controversy of the pandemic has been the debate over masks. Masking has been recognized as an appropriate public health response to respiratory diseases for more than a century.²¹² In the time of COVID-19, however, masking (or not) has become a political litmus test. Indeed, masking may be a metaphor for the whole pandemic. One of the earliest proponents of masking was Matthew Pottinger, President Trump’s deputy national security advisor. Pottinger had been a *Wall Street Journal* reporter in China during the SARS epidemic and had developed good relationships with several Chinese medical professionals.²¹³ As early as January 24, 2020, Pottinger convened two high-level interagency meetings to discuss the threat posed by the virus.²¹⁴ On the following day, he learned from one of his Chinese medical informants that “transmission was so widespread that contact tracing was no longer possible . . . People were getting sick and there was no way to know how or where the infection happened”²¹⁵ When Pottinger asked his informant whether the virus would be as bad as SARS, the informant replied, “Don’t think SARS, 2003. Think flu, 1918”²¹⁶

The difference between SARS and the new virus, Pottinger’s informant suggested, was asymptomatic transmission. With SARS, only one case in 9,600 was shown to be the result of asymptomatic transmission, whereas “50 percent of the cases of this new disease [in China] are asymptomatic.”²¹⁷ Because of the possibility of transmission by asymptomatic individuals—people who did not appear “sick” or know they were infected—Pottinger thought that the United States should shut down travel from China. The government’s public health experts disagreed, in

212. See, e.g., Nicole C. J. Brienen et al., *The Effect of Mask Use on the Spread of Influenza during a Pandemic*, 30 RISK ANALYSIS 1210, 1210 (2010) (discussing the traditional use of face masks throughout history); see also Lindsey Bever, *Masks Have Stopped Disease Spread for Centuries. Here’s Why They May Catch on in the U.S.*, WASH. POST (June 3, 2021, 2:07 PM), <https://www.washingtonpost.com/lifestyle/2021/06/03/coronavirus-pandemic-future-masks/> [https://perma.cc/8JJ7-53NF] (explaining that masks were first used to prevent respiratory transmission of infectious illnesses in the early 1900s).

213. See WRIGHT, *supra* note 4, at 12–13 (describing Pottinger’s history as a journalist in China).

214. *Id.* at 41, 43–44.

215. *Id.* at 44.

216. *Id.*

217. *Id.* at 44–45.

part because they did not believe in the possibility of asymptomatic transmission.²¹⁸ In addition, the idea of airborne transmission was considered “heretical” because “‘it implied a whole different approach to infection control’—one in which masks played a central role, especially indoors.”²¹⁹ Drs. Fauci and Redfield thought that the government’s response should be guided by the data, but, as Pottinger pointed out, the data they were getting from official Chinese sources was unreliable.²²⁰ Others disagreed with Pottinger for economic reasons.²²¹ Also on January 25, National Security Advisor Robert O’Brien told President Trump that, “This will be the biggest national security threat you face in your presidency.”²²²

In February, Pottinger reported to the Coronavirus Task Force that his Chinese contacts had found face coverings to be an effective means of limiting the spread of the virus, but the federal government’s public health officials doubled down on their attempts to dissuade the public from wearing masks.²²³ Government health experts encouraged hand washing and social distancing, but not mask-wearing. For example, Dr. Fauci stated in an interview that was published on February 17 that, “there is absolutely no reason whatsoever to wear a mask.”²²⁴ Dr. Fauci also said that the risks posed by the virus were “minuscule,” but acknowledged that that could change.²²⁵ And on February 27, Surgeon General Jerome Adams “tweeted an even more emphatic message: ‘Seriously people—STOP BUYING MASKS! They are NOT effective in preventing general public from catching #Coronavirus, but if healthcare providers can’t get them to care for sick patients, it puts them and our communities at risk!’”²²⁶ Vice President Mike Pence, who led the Task Force,²²⁷

218. WRIGHT, *supra* note 4, at 45 (“[According to Dr. Fauci,] ‘It would be unusual for asymptomatic persons to drive the epidemic in a respiratory disorder.’”).

219. *Id.* at 67. It was the Biogen meeting in Boston, at which 100 of 175 employees eventually tested positive for the virus, together with a study that the same researchers undertook at a nursing home in Boston, where 85 percent of the residents and 37 percent of the staff tested positive, that suggested the need for thinking differently about the problem. They also began to see the possibility that one person could transmit the disease to many others, thereby geometrically increasing the number of infected individuals. *Id.* at 66–68.

220. *Id.* at 45.

221. *Id.*

222. *Id.*

223. See, e.g., ABUTALEB & PALETTA, *supra* note 76, at 175–80 (discussing the effectiveness of masks in limiting the spread of COVID-19).

224. *Id.* at 177.

225. *Id.*

226. *Id.*

227. See Matthew Choi, *Trump Puts Pence in Charge of Coronavirus Response*, POLITICO (Feb. 26, 2020, 9:11 PM), <https://www.politico.com/news/2020/02/26/trump-puts-pence-in-charge-of->

seconded the Surgeon General's advice: "Let me be very clear—and I'm sure the physicians who are up here will reflect this as well—the average American does not need to go out and buy a mask."²²⁸

It was not clear whether these apparently unequivocal recommendations were based on a professional judgment that the public was not in danger, a professional judgment that masks were ineffective, a pragmatic recognition that there were not enough masks, or some other fact or feeling. Presidential Counselor Kellyanne Conway asked, "Why should some people wear masks and others not? Did masks work or not? Yes or no?"²²⁹ CDC Director Redfield was unable to answer the question.²³⁰ "Did he really know whether masks would work? And if he wasn't being straight with them on masks, what else might he—and the other doctors—be misleading [the non-physicians on the Task Force] about?"²³¹ According to two close observers, the government scientists were "completely unprepared as they wrestled with the decision of whether to mandate mask wearing or not, one that likely altered the course of U.S. history."²³² They did not know whether cloth masks would assist in preventing transmission and "still did not appreciate the role that asymptomatic transmission played in the spread of the virus, something that was unprecedented."²³³ They "had no idea that at least half of transmissions were occurring from an asymptomatic person to an uninfected person. Based on how previous coronaviruses behaved, they still believed the role of asymptomatic transmission was relatively small."²³⁴ But what they did know and were actively "concealing . . . from the American people" was a critical fact: "the United States did not have nearly enough N95 masks to protect healthcare workers throughout a sustained public health crisis."²³⁵

coronavirus-response-117790 [https://perma.cc/HWK8-SJ5F] (describing the appointment of Vice President Pence as leader of the coronavirus task force).

228. ABUTALEB & PALETTA, *supra* note 76, at 178.

229. *Id.* at 179.

230. *Id.*

231. *Id.* Redfield admitted that government health officials did not understand that asymptomatic individuals could transmit the virus until mid-March. WRIGHT, *supra* note 4, at 149.

232. ABUTALEB & PALETTA, *supra* note 76, at 178.

233. *Id.* at 179. See also Deborah Netburn, *A Timeline of the CDC's Advice on Face Masks*, L.A. TIMES (July 27, 2021, 4:47 PM), <https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic> [https://perma.cc/MY4V-3NM3] (describing the CDC's advice on masking throughout the pandemic).

234. ABUTALEB & PALETTA, *supra* note 76, at 179–80.

235. *Id.* at 180. The national stockpile had not been replenished substantially since 2009, and both the Obama and Trump administrations had chosen to stockpile drugs and vaccines rather than

Curiously, President Trump knew by February 7, 2020, “that the coronavirus could be transmitted through the air, that it was very dangerous and that it would be difficult to contain.”²³⁶ He continued, of course, to say publicly that the virus posed no serious threat and would “just disappear.”²³⁷ In addition, “[d]espite his apparent understanding of the severity of the disease and its method of transmission, over the next month, in five cities around the country, Mr. Trump held large indoor rallies, which were attended by thousands of his supporters.”²³⁸ In March 2020, President Trump stopped holding the rallies for several weeks, but he resumed them in June.²³⁹ He continued to discourage the wearing of masks, and he mocked those who did wear them.²⁴⁰

masks. The Trump administration had further depleted the supply of N95 masks by sending them to China in January 2020. *Id.* at 182–83. That decision “infuriated US health care workers, who by March were being advised to reuse N95 masks as much as possible and to use homemade bandanas if they could not get medical-grade masks.” *Id.* at 183. In January 2022, the CDC acknowledged that the cloth masks frequently worn by Americans do not offer as much protection as surgical masks or respirators. See CTRS. FOR DISEASE CONTROL & PREVENTION, TYPES OF MASKS AND RESPIRATORS (Jan. 28, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html> [<https://perma.cc/ZDS2-B3Z2>] (describing the different types and purposes of protective masks).

236. Editorial Board, Opinion, *Mr. Trump Knew It Was Deadly and Airborne: He Lied About the Coronavirus Anyway*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/opinion/trump-bob-woodward-coronavirus.html> [<https://perma.cc/8BMZ-MQLM>] (critiquing President Trump’s failure to disclose the fact the virus was transmissible by air). Woodward did not disclose the substance of his February and March conversations with the president until September 2020, when he published them in a book. See Margaret Sullivan, *Should Bob Woodward Have Reported Trump’s Virus Revelations Sooner? Here’s How He Defends His Decision*, WASH. POST (Sept. 9, 2020, 6:13 PM), https://www.washingtonpost.com/lifestyle/media/should-bob-woodward-have-reported-trumps-virus-revelations-sooner-heres-how-he-defends-his-decision/2020/09/09/6bd7fc32-f2d1-11ea-b796-2dd09962649c_story.html [<https://perma.cc/29K5-DRYD>] (discussing the ethical implications of Woodward’s waiting to disclose President Trump’s statements regarding the virus until he published his book).

237. Daniel Wolfe & Daniel Dale, *‘It’s Going to Disappear’: A Timeline of Trump’s Claims That COVID-19 Will Vanish*, CNN (Oct. 31, 2020), <https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker/> [<https://perma.cc/VH22-68YJ>] (detailing President Trump’s claims throughout the pandemic); see also Amanda Terkel, *Trump Said Coronavirus Would ‘Miraculously’ Be Gone by April. Well, It’s April*, HUFFPOST (Apr. 2, 2020) https://www.huffpost.com/entry/trump-coronavirus-gone-april_n_5e7b6886c5b6b7d8095959c2 [<https://perma.cc/UUZ5-MDPK>] (discussing President Trump’s claims about the virus).

238. Editorial Board, *supra* note 236.

239. See Cecelia Smith-Schoenwalder, *Trump Announces Plan to Resume Campaign Rallies*, U.S. NEWS & WORLD REP. (June 10, 2020), <https://www.usnews.com/news/politics/articles/2020-06-10/trump-announces-plan-to-resume-campaign-rallies> [<https://perma.cc/G774-HZPS>] (describing President Trump’s plan to resume holding campaign rallies during the pandemic).

240. See, e.g., Maanvi Singh, *Crowds Eschew Masks at Trump Rally as President Mocks Biden Over Social Distancing*, GUARDIAN (Sept. 8, 2020, 8:46 PM), <https://www.theguardian.com/us-news/2020/sep/08/trump-rally-north-carolina-mask?ref=hpver.com> [<https://perma.cc/AT68-CV8V>] (describing President Trump’s comments at campaign rallies mocking Vice President Biden and masks); see also Chris Sommerfeldt, *Trump Says He Wants to ‘Kiss Everyone’ During*

By March, it was clear that asymptomatic transmission was real, and that ordinary cloth masks could reduce the likelihood of transmission.²⁴¹ On March 8, however, Dr. Fauci reiterated that, “people should not be walking around with masks . . .”²⁴² Moreover, in late March, the Surgeon General stated on Fox & Friends that wearing masks could actually increase the risk of infection if you are not a healthcare provider.²⁴³ Robert Kadlec, the assistant secretary of Health and Human Services for Preparedness and Response, who was in charge of the national stockpile, had proposed sending masks to every American household, but the Task Force was not ready to recommend mask-wearing because of opposition from libertarians, including White House Chief of Staff Mark Meadows.²⁴⁴ By the time Pottinger began wearing a mask to work at the White House in mid-March, “Masks had become a political litmus test, with many conservatives condemning mask mandates as infringements on liberty, and wearing one in Trump’s White House seemed borderline treasonous, as well as a risky career move. Pottinger was shocked to learn that, in any case, the White House had no ready supply of masks.”²⁴⁵

On April 3, 2020, President Trump announced the CDC’s guidelines, which included a recommendation that people wear masks. At the same time, President Trump announced that he would not comply with the recommendation.²⁴⁶ As Lawrence Wright has observed, “the President was

Unhinged First Rally since COVID-19 Diagnosis, N.Y. DAILY NEWS (Oct. 12, 2020, 8:08 PM), <https://www.nydailynews.com/news/politics/us-elections-government/ny-coronavirus-trump-election-2020-campaign-20201013-jw33615re5ckli4xqds17oauie-story.html> [<https://perma.cc/GX6Y-SEYX>] (discussing President Trump’s comments undermining guidance from federal public health agencies at campaign rallies); ABUTALEB & PALETTA, *supra* note 76, at 367 (discussing President Trump and top political officials encouraging the public to live their lives and not put in place restrictions and mitigating measures).

241. See ABUTALEB & PALETTA, *supra* note 76, at 184 (discussing the public health officials’ growing understanding that the virus could be transmitted asymptotically and their growing support for the wearing of cloth masks).

242. WRIGHT, *supra* note 4, at 152.

243. See Talia Kaplan, *Surgeon General: Data Doesn’t Back Up Wearing Masks in Public Amid Coronavirus Pandemic*, FOX NEWS (Mar. 31, 2020, 10:37 AM), <https://www.foxnews.com/media/surgeon-general-explains-masks-public-coronavirus> [<https://perma.cc/6HFQ-YPM7>] (discussing the U.S. Surgeon General’s claims regarding the ineffectiveness of mask-wearing as a way of protecting the general public).

244. See ABUTALEB & PALETTA, *supra* note 76, at 187 (discussing the intragovernmental dispute about sending masks to households).

245. See WRIGHT, *supra* note 4, at 149 (discussing Pottinger’s decision to wear a mask while working in the Trump White House).

246. See David Smith, *‘I’m Not Going Do It’: Trump Rejects His Own Administration’s Advice on Masks*, GUARDIAN (Apr. 3, 2020, 9:02 PM), <https://www.theguardian.com/world/2020/apr/03/im-not-going-to-do-it-trump-refutes-his-own-administrations-advice-on->

making a powerful statement, far more dangerous than his idle speculation about injecting disinfectant.”²⁴⁷ Wright further noted that, “Some anti-maskers called the coronavirus a hoax; others believed it wasn’t all that dangerous. But the image of the maskless president animated his base. Maskless, he appeared defiant, masculine, invulnerable, whereas to wear a mask would be caving in, being weak; it might ‘send the wrong message’ and hurt his chances for re-election. Eventually, he would come to believe that people wore masks to show their disapproval of him. And yet, from his perspective, exposing himself to microbes that could readily kill him must have seemed heroic.”²⁴⁸ Millions of people followed the President’s example and eschewed the wearing of masks; that increased the vulnerability of additional communities to COVID-19, caused additional families to be exposed to the virus, endangered the health of additional healthcare professionals and first responders, exacerbated and prolonged unemployment, delayed re-opening the economy, and caused an additional untold number of avoidable illnesses and deaths.²⁴⁹

The president’s statement further politicized the CDC’s masking advice and guaranteed that masks would remain an important symbol in the culture wars. Shunning masks became a litmus test of discipleship. While President Trump’s disdain for masks may have been a matter of aesthetics, personal vanity, or election strategy,²⁵⁰ it soon became a symbol of the unlimited liberty with which many of his followers thought that the Constitution endowed them.²⁵¹ President Trump ridiculed those who

masks [<https://perma.cc/P8SE-HXFD>] (discussing President Trump’s refusal to follow CDC guidelines).

247. WRIGHT, *supra* note 4, at 151. President Trump even toured a mask factory without wearing a mask. *Id.*

248. *Id.* at 151–52 (“And yet, from his perspective, exposing himself to microbes that could readily kill him must have seemed heroic.”).

249. *Id.*

250. See Cheyenne Haslett, *Trump, Other Top Officials Yet to Don Masks in Public Despite Announcing CDC Guidelines*, ABC NEWS (Apr. 6, 2020, 4:40 PM), <https://abcnews.go.com/Politics/trump-top-officials-don-masks-public-announcing-cdc/story?id=70000312> [<https://perma.cc/A6BU-ZF7H>] (“‘Somehow sitting in the Oval Office behind that beautiful Resolute Desk, the great Resolute Desk, I think wearing a face mask as I greet presidents, prime ministers, dictators, kings, queens, I don’t know, it somehow, I don’t see it for myself,’ Trump said.”).

251. See *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (“[T]he liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint.”); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“[T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”); Janelle Bouie, *If You*

wore masks,²⁵² and he actively discouraged his followers from wearing them, even at the crowded rallies that he resumed in June 2020.²⁵³ When President Trump debated former Vice President Biden in Cleveland in September 2020, the Trump family refused to wear masks,²⁵⁴ despite the fact that the President had tested positive for the virus a few days before.²⁵⁵ The President continued to mock people who wore masks even

Skip the Vaccine, It Is My 'Damn Business,' N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2021/08/13/opinion/covid-vaccine-freedom.html> [<https://perma.cc/7AHV-DEYV>] (discussing the widespread perception that choosing whether to get vaccinated is a “personal and private” decision).

252. See, e.g., Daniel Victor et al., *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html> [<https://perma.cc/PP7G-VUSY>] (documenting President Trump’s comments regarding masks and their effectiveness throughout the pandemic); see also Robin Givhan, *Trump’s Refusal to Wear Face Masks Turned Them Into a Sad National Symbol*, WASH. POST (Oct. 3, 2020, 8:39 AM), <https://www.washingtonpost.com/nation/2020/10/03/trumps-refusal-wear-face-masks-turned-them-into-sad-national-symbol/> [<https://perma.cc/UYY8-YJTE>] (describing President Trump’s ridiculing of Biden for wearing “the biggest mask” Trump had ever seen); Teo Armus, *A GOP County Chair Asked Trump to Wear a Mask to His Rally. Instead, Trump Mocked Pandemic Restrictions*, WASH. POST (Sept. 9, 2020, 6:47 AM), <https://www.washingtonpost.com/nation/2020/09/09/trump-rally-masks-nc/> [<https://perma.cc/R66W-R977>] (discussing President Trump’s rally in Winston-Salem, North Carolina, where he appeared without a mask).

253. See, e.g., Eric Lach, *Donald Trump’s Campaign Rallies Are Now Confirmed Public-Health Hazards*, NEW YORKER (Oct. 10, 2020), <https://www.newyorker.com/news/campaign-chronicles/donald-trumps-campaign-rallies-are-now-confirmed-public-health-hazards> [<https://perma.cc/L37Y-JR7Q>] (“President [Trump] . . . has already been at the center of at least one superspreader event [and is] actively hosting other potential superspreader events.”); see also Zeeshan Aleem, *Trump Falsely Suggests Wearing a Mask at His Tulsa Rally Could Be Harmful: He Anticipated a “Wild Evening” Where “People Do What They Want.”* VOX (June 22, 2020, 2:30 PM), <https://www.vox.com/2020/6/20/21297693/trump-rally-tulsa-masks> [<https://perma.cc/FMH9-A6NH>] (referring to President Trump’s comments at campaign rallies about the harmfulness of masks).

254. See Benjamin Siegel, *Trump Family Members Flout Rules, Go Maskless at 1st Presidential Debate*, ABC NEWS (Oct. 2, 2020, 7:23 PM), <https://abcnews.go.com/Politics/trump-biden-campaigns-responsible-testing-ahead-1st-debate/story?id=73397960> [<https://perma.cc/DK9J-765F>] (noting that a medical doctor approached President Trump at the first presidential debate and asked him to wear a mask, but he refused).

255. See Ashley Parker et al., *Trump Tested Positive for Coronavirus before First Debate with Biden, Three Former Aides Say*, WASH. POST (Dec. 1, 2021, 4:05 PM), https://www.washingtonpost.com/politics/trump-tested-positive-for-coronavirus-before-first-debate-with-biden-former-chief-of-staff-says/2021/12/01/a728d080-52b7-11ec-8769-2f4ecd7a2ad_story.html [<https://perma.cc/DB6K-7K47>] (disclosing that President Trump had tested positive for the virus days before he shared the debate stage with former Vice President Biden). Mrs. Trump and members of the White House staff would also test positive a few days later. Siegel, *supra* note 254. See William Saletan, *All the Places Trump Went after Secretly Testing Positive for COVID*, SLATE (Dec. 1, 2021, 10:12 PM), <https://slate.com/news-and-politics/2021/12/where-trump-went-secret-covid-test.html> [<https://perma.cc/4AWR-SFBQ>] (noting that a White House physician had asked Mark Meadows to stop the president from going to Joint Base Andrews after testing positive).

after he had contracted the virus and recovered from it,²⁵⁶ and he flamboyantly posed, stripping off his mask, as he returned from the hospital to the White House.²⁵⁷ Shortly after the President's hospitalization, it was reported that the White House had blocked the CDC from requiring mask-wearing on public transportation.²⁵⁸

Most important, those libertarian sentiments continued to guide public policy, as some governors and state legislatures sought to outlaw masking, testing, and vaccination mandates, notwithstanding the high incidence of infections with new and more aggressive viral variants.²⁵⁹ In

256. See Eliza Relman, *Trump Mocks Fox News Host Laura Ingraham for Wearing a Mask at His Campaign Rally and Calls Her 'Politically Correct'*, BUS. INSIDER (Oct. 30, 2020, 3:15 PM), <https://www.businessinsider.com/trump-mocks-fox-news-host-laura-ingraham-face-mask-rally-2020-10> [<https://perma.cc/B5NW-N8TW>] ("President Donald Trump . . . made fun of the Fox News host Laura Ingraham for wearing a face mask at a campaign event . . ."); see also 'Largest Mask I've Ever Seen': *Trump Mocks Reporter for Wearing Face Mask*, NBC NEWS (Oct. 23, 2020), <https://www.nbcnews.com/video/trump-mocks-reporter-for-wearing-face-mask-in-oval-office-94509637924> [<https://perma.cc/X2KV-PKF5>] (recording of President Trump mocking a reporter in the Oval Office).

257. See John T. Bennett, *Trump Rips Off Mask as He Arrives Back at White House after Checking Himself Out of Hospital*, INDEP. (Oct. 6, 2020), <https://www.independent.co.uk/news/world/americas/us-election/trump-coronavirus-covid-walter-reed-white-house-return-discharge-b817876.html> [<https://perma.cc/3A7U-HL8Y>] (describing President Trump's dramatic taking off of his mask as soon as he arrived back at the White House after being treated for COVID-19); see also Dhruv Khullar, *The Recklessness of Trump's Return to the White House*, NEW YORKER (Oct. 5, 2020), <https://www.newyorker.com/science/medical-dispatch/the-real-recklessness-in-trumps-discharge-from-the-hospital> [<https://perma.cc/96MP-HK4S>] (describing President Trump's posing without a mask on his return to the White House and stating that he felt better after recovering from COVID-19 than he had twenty years before).

258. See Sheila Kaplan, *White House Blocked C.D.C. from Requiring Masks on Public Transportation*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/health/coronavirus-covid-masks-cdc.html> [<https://perma.cc/PTJ6-Z2AD>] (discussing two federal public health officials' claims that the White House blocked an order requiring passengers and employees to wear masks on public and commercial transportation).

259. See, e.g., Jenni Fink, *Mandating Masks Is Banned in These States Despite Updated CDC Guidance*, NEWSWEEK (July 28, 2021, 11:54 AM), <https://www.newsweek.com/mandating-masks-banned-these-states-despite-updated-cdc-guidance-1613976> [<https://perma.cc/E2CW-LHML>] (stating that governors in Arizona, Arkansas, Florida, South Carolina, Tennessee, and Texas restricted the implementation of mask mandates despite high rates of transmission); see also Jacqueline Howard & Deidre McPhillips, *Some States Banning Mask Mandates in Schools Also Have Fewest Teens Vaccinated*, CNN (Aug. 5, 2021, 3:56 PM), <https://www.cnn.com/2021/08/05/health/covid-19-vaccinations-for-teens-state-rankings-analysis/index.html> [<https://perma.cc/4AP6-BTQY>] ("As kids head back to school this month, vaccination rates among adolescents tend to be lower in states that have banned mask mandates in schools than in states that will require masks . . ."); Jemima McEvoy, 'Unconscionable': *Trump Surgeon General Slams States Banning Mask Mandates in Schools*, FORBES (Aug. 10, 2021, 10:16 AM), <https://www.forbes.com/sites/jemimamcevoy/2021/08/10/unconscionable-trump-surgeon-general-slams-states-banning-mask-mandates-in-schools/> [<https://perma.cc/58M3-U8C6>] (explaining that some "Republican-led states" enacted bans that prohibited schools from imposing mask mandates). In early October, President Biden asked OSHA to undertake a rulemaking aimed at requiring vaccination or weekly testing at

some states, local officials, particularly school districts, pushed back against state prohibitions of mandatory masking.²⁶⁰

At the same time, it must be recognized that the CDC and other federal public officials did not help their cause. Although they were dealing with a very fluid situation, they often chose to speak with a degree of certainty that the state of their knowledge could not justify. That was the case, for example, when Dr. Anthony Fauci pronounced on February 17 that “there is absolutely no reason whatsoever to wear a mask,”²⁶¹ and when Surgeon General Adams tweeted emphatically in all capital letters that people should not buy masks on February 27.²⁶² When Dr. Robert Redfield, the CDC director, testified in Congress, also on February 27, he was asked whether healthy people should wear a face covering and responded with a stark, unexplained “no.”²⁶³ On March 8, Dr. Fauci reiterated that advice: “There’s no reason to be walking around with a mask. When you’re in the middle of an outbreak, wearing a mask might make people feel a

companies that employ more than one hundred workers. *See, e.g.,* Lauren Hirsch, *Companies Face Pressure to Act on Vaccine Mandates Even as They Wait for Clear Rules*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/10/07/business/biden-oshavaccine-mandate.html> [<https://perma.cc/9R3E-5ZNS>] (discussing challenges to employer vaccine mandates). In response, Texas Governor Greg Abbott issued an executive order banning mandatory vaccinations in Texas. *See* Ethan Hauser & Azi Paybarah, *The Governor of Texas Bars Covid Vaccine Mandates*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2021/10/11/us/texas-governor-covid-vaccine-mandates.html> [<https://perma.cc/5UNC-HW8G>] (describing contents of the Texas governor’s order). The OSHA vaccination rule was promulgated, but the United States Supreme Court effectively struck it down. Nina Totenberg, *Supreme Court Blocks Biden’s Vaccine-or-Test Mandate for Large Private Companies*, NPR (Jan. 13, 2022, 6:30 PM), <https://www.npr.org/2022/01/13/1072165393/supreme-court-blocks-bidens-vaccine-or-test-mandate-for-large-private-companies> [<https://perma.cc/Y3BT-V4AR>].

260. *See* Sharon Bernstein, *Florida, Texas Schools Defy Governors’ Bans on Mask Mandates as COVID Cases Soar*, REUTERS (Aug. 10, 2021, 8:27 PM), <https://www.reuters.com/world/us/florida-texas-schools-defy-governors-bans-mask-mandates-covid-cases-soar-2021-08-10/> [<https://perma.cc/BC3H-BW82>] (noting that school staff in Dallas threatened to quit if a mask mandate was not implemented to protect them).

261. ABUTALEB & PALETTA, *supra* note 76, at 177. *See* Darragh Roche, *Fauci Said Masks ‘Not Really Effective in Keeping Out Virus,’ Email Reveals*, NEWSWEEK (June 2, 2021, 4:59 AM) <https://www.newsweek.com/fauci-said-masks-not-really-effective-keeping-out-virus-email-reveals-1596703> [<https://perma.cc/W3GN-ZTJ6>] (reporting on February 5, 2020, correspondence from Dr. Fauci to former HHS Secretary Sylvia Burwell, recommending against mask-wearing).

262. ABUTALEB & PALETTA, *supra* note 76, at 177 (describing Surgeon General Adams’ tweet); *see also* Maria Cramer & Knvl Sheikh, *Surgeon General Urges the Public to Stop Buying Face Masks*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2020/02/29/health/coronavirus-n95-face-masks.html> [<https://perma.cc/K9UL-TDRP>] (“‘Seriously people—STOP BUYING MASKS!’ the Surgeon General, Jerome M. Adams, said in a tweet . . .”).

263. *U.S. House of Representatives Hearing on Coronavirus Response, User Clip: Dr. Robert Redfield Says Healthy People Should Not Wear Masks*, C-SPAN (Feb. 27, 2020), <https://www.c-span.org/video/?c4919124/user-clip-dr-robert-redfield-healthy-people-wear-masks> [<https://perma.cc/BC48-C8M4>].

little bit better and it might even block a droplet, but it's not providing the perfect protection that people think that it is. And, often, there are unintended consequences—people keep fiddling with the mask and they keep touching their face.”²⁶⁴ In addition, they often did not clearly communicate the reasons for their recommendations, let alone the reasons for changing their recommendations.²⁶⁵ For example, were the federal public health officials' anti-masking recommendations based on a professional judgment about the efficacy of masks, or were they based on their desire to conserve a scarce supply of masks?

D. Testing

A similar story may be told with respect to the Trump administration's record on testing—a record that also does not reflect well on the public health bureaucracy or the political leadership. To ascertain the nature and extent of the pandemic, it was imperative that people be tested. A German company quickly developed a test for detecting the presence of the virus, as did several entities in the United States, but the FDA did not approve their use.²⁶⁶ Consistent with past practice, the CDC undertook the task of developing an effective diagnostic test.²⁶⁷ The FDA provisionally approved the CDC's test, which was sent to a number of state public health laboratories, but the state laboratories quickly discovered that the test was defective.²⁶⁸ It was later reported that the CDC knew that the tests were defective when they were shipped to the states,²⁶⁹ but

264. Reuters Staff, *Fact Check: Outdated Video of Fauci Saying “There’s No Reason to Be Walking Around with a Mask,”* REUTERS (Oct. 8, 2020, 10:31 AM), <https://www.reuters.com/article/uk-factcheck-fauci-outdated-video-masks/fact-checkoutdated-video-of-fauci-saying-theres-no-reason-to-be-walking-around-with-a-mask-idUSKBN26T2TR> [<https://perma.cc/93NP-9K4L>].

265. See, e.g., Ryan Bourne, Commentary, *Fauci’s Mistake on Masks Was Driven by Bad Economics, Not Uncertain Science*, CATO INST. (Apr. 13, 2021) <https://www.cato.org/commentary/faucis-mistake-masks-was-driven-bad-economics-not-uncertain-science> [<https://perma.cc/3MKL-GKNQ>] (discussing Dr. Fauci’s reasoning behind his changing mask recommendations).

266. See, e.g., Peter Whoriskey & Neena Satija, *How U.S. Coronavirus Testing Stalled: Flawed Tests, Red Tape and Resistance to Using the Millions of Tests Produced by the WHO*, WASH. POST (Mar. 16, 2020, 6:30 PM), <https://www.washingtonpost.com/business/2020/03/16/cdc-who-coronavirus-tests/> [<https://perma.cc/NS9V-W9FM>].

267. *Id.*

268. See WRIGHT, *supra* note 4, at 60 (“Almost immediately, public health labs realized something was wrong [T]he tests were turning up false positives at an alarming rate.”). State laboratories discovered an easy work-around, but the CDC refused to authorize it. See Whoriskey & Satija, *supra* note 266 (discussing the CDC’s hesitation to cooperate with other entities, such as academic institutions and private companies).

269. See Dina Temple-Raston, *CDC Report: Officials Knew Coronavirus Test Was Flawed but Released It Anyway*, NPR (Nov. 6, 2020, 5:06 AM), <https://www.npr.org/2020/11/06/929078678/cdc-report-officials-knew-coronavirus-test-was-flawed-but-released-it-anyway> [<https://perma.cc>

that CDC Director Redfield and HHS Secretary Alex Azar had kept the information to themselves.²⁷⁰ The CDC also failed to recognize that it did not have the manufacturing capacity to produce tests in the quantities that would be required.²⁷¹ As Matthew Pottinger put it, “The CDC . . . was like a microbrewery—they’re not Anheuser-Busch.”²⁷² But the scale of the problem required Anheuser-Busch. “[T]esting was initially limited to symptomatic patients who had come from China or who had been in close contact with an infected person. Even healthcare workers who’d fallen ill with Covid-like symptoms . . . had trouble getting tests, because the CDC’s capacity was so limited. For people who could get the test, the results took as long as two weeks to be processed.”²⁷³ But the most disturbing part of the story was yet to be uncovered.

When the FDA realized that it was not getting reliable information from the CDC, Dr. Timothy Stenzel, director of the FDA’s Office of In Vitro Diagnostics and Radiological Health, was sent to Atlanta, tasked with discovering what was going on with the test kits. According to Lawrence Wright, “Stenzel instantly detected the problem: In one of the [CDC] labs, researchers were analyzing patient samples in the very same room where testing ingredients were assembled. . . . [T]he lab was processing specimens from all over the country, many of which were positive, while also creating the primers and probes for the test. It was clear to Stenzel that no one was in charge of the process. One FDA official described the lab as ‘filthy,’ and said he would have closed it down if it

/UX6S-VKYY] (explaining that the initial tests were known by the CDC to have a 33 percent fail rate but were nevertheless released).

270. See ABUTALEB & PALETTA, *supra* note 76, at 64 (“Within days of the CDC distributing the initial tests . . . on February 6, problems emerged. The [state] labs were getting false-positive results on control samples. . . . [I]t soon became clear that it was more than a small hiccup Days turned into weeks. Azar and Redfield kept the problem under wraps in the hope that things would turn around quickly. Others on the task force were mostly in the dark about what was going on.”).

271. See Robert P. Baird, *What Went Wrong with Coronavirus Testing in the U.S.*, NEW YORKER (Mar. 16, 2020), <https://www.newyorker.com/news/news-desk/what-went-wrong-with-coronavirus-testing-in-the-us> [<https://perma.cc/U5AV-SYST>] (“The void created by the C.D.C.’s faulty tests made it impossible for public-health authorities to get an accurate picture of how far and how fast the disease was spreading.”); see also Whoriskey & Satija, *supra* note 266 (“Moreover, while FDA and CDC officials have attributed some of the testing delays to their determination to meet exacting scientific standards they said were needed to protect public health, the government effort was nevertheless marred by a widespread manufacturing problem that stalled U.S. testing for most of February.”).

272. WRIGHT, *supra* note 5, at 59.

273. *Id.*

had been any other lab.”²⁷⁴ The problems with the CDC’s test were exacerbated by the government’s initial refusal to let other laboratories use their own tests.²⁷⁵

Whether there were enough tests was also unclear. On March 6, 2020, Vice President Mike Pence admitted that the government lacked a sufficient number of tests to meet the expected demand, but President Trump contradicted him the next day, stating that there was a test available for anyone who wanted to be tested.²⁷⁶ A nationwide testing strategy was desperately needed, but the Trump administration never succeeded in developing one.²⁷⁷ “As for a national testing strategy, that remained a no-go for Trump. He didn’t want to admit that there was a problem and he didn’t want to own it. At the same time, he blustered about exerting federal control over state reopening plans.”²⁷⁸ As time went by, President Trump’s opposition to testing hardened and became more irrational—a fact captured by his assertion that the country would have “very few” cases of COVID-19 if we did not test for them.²⁷⁹

The CDC’s testing problems continued. In May 2020, for example, Alexis C. Madrigal and Robinson Meyer, the *Atlantic* journalists who co-founded the magazine’s COVID Tracking project, reported that the CDC was “conflating the results of two different types of coronavirus tests, [thereby] distorting several important metrics and providing the country

274. *Id.* at 64. See also ABUTALEB & PALETTA, *supra* note 76, at 80–81 (discussing the FDA’s evaluation of the CDC’s testing lab).

275. See, e.g., Steven D’Souza, ‘We’re Just Lost’: Why the U.S. Still Lags on COVID-19 Testing, CBC NEWS (Mar. 7, 2020, 4:00 AM), <https://www.cbc.ca/news/world/we-re-just-lost-why-the-u-s-still-lags-on-covid-19-testing-1.5488886> [<https://perma.cc/VKK6-F7G6>] (reporting on the government’s failure to allow testing by other laboratories).

276. See Lauren Hirsch, *Trump Says, ‘Anybody Who Wants a Test Gets a Test’ after Pence Says US Can’t Meet Coronavirus Testing Demand*, CNBC (Mar. 6, 2020, 8:12 PM), <https://www.cnbc.com/2020/03/06/trump-anybody-who-wants-a-test-gets-a-test-amid-shortage-for-coronavirus.html> [<https://perma.cc/LE8V-US8U>] (noting President Trump’s and Vice President Pence’s conflicting comments concerning the availability of tests).

277. See ABUTALEB & PALETTA, *supra* note 76, at 83 (discussing the lack of national testing strategy).

278. *Id.* at 199.

279. Sonam Sheth, *Trump Says That ‘If We Stop Testing Right Now, We’d Have Very Few Cases’ of the Coronavirus*, BUS. INSIDER (June 15, 2020, 3:40 PM), <https://www.businessinsider.com/trump-stop-coronavirus-testing-right-now-have-very-few-cases-2020-6> [<https://perma.cc/CJ7Q-6RLV>]; see also Mike Murphy, *Trump Calls Coronavirus Testing ‘Overrated,’ Claims U.S. Would Have ‘Very Few’ Cases If No Testing*, MARKET WATCH (May 14, 2020, 10:52 PM), <https://www.marketwatch.com/story/trump-says-coronavirus-testing-overratedclaims-fewer-cases-if-no-testing-2020-05-14> [<https://perma.cc/PC3Y-QXGR>]; Bruce Y. Lee, *Trump: without Coronavirus Testing ‘We Would Have Very Few Cases,’ Here Is the Reaction*, FORBES (May 15, 2020, 1:57 AM), <https://www.forbes.com/sites/brucelee/2020/05/15/trump-without-doing-covid-19-coronavirus-testing-we-would-have-very-few-cases-here-is-the-reaction> [<https://perma.cc/YR53-4JJG>].

with an inaccurate picture of the state of the pandemic.”²⁸⁰ The CDC’s error was “at best, a debilitating mistake: combining test results that diagnose current coronavirus infections with test results that measure whether someone has ever had the virus.”²⁸¹ By “mixing the results of viral and antibody tests, even though the two tests reveal different information and are used for different reasons,” Madrigal and Meyer wrote, “the government’s disease-fighting agency is overstating the country’s ability to test people who are sick with COVID-19.”²⁸² Madrigal and Meyer emphasized the practical importance of this error, namely, that state governments had relied on these flawed data points as a basis for developing quantitative guidelines for use in determining when it would be safe and appropriate to re-open their economies.²⁸³ In addition, the Trump administration issued new testing guidelines in August, advising that persons who had been exposed to infected individuals should not be tested unless and until they manifested symptoms.²⁸⁴ These guidelines which were prepared by White House staff, rather than by the CDC, were later retracted.²⁸⁵

The most damaging aspect of the Trump’s administration’s approach to testing and data-reporting may have been its insertion into HHS of certain political appointees whose mission was to control the content and tone of CDC’s scientific communications, including the highly respected and influential *Morbidity and Mortality Weekly Report*. Their task was

280. Alexis C. Madrigal & Robinson Meyer, ‘How Could the CDC Make That Mistake?’, ATLANTIC (May 20, 2020), <https://www.theatlantic.com/health/archive/2020/05/cdc-and-states-are-misreporting-covid-19-test-data-pennsylvania-georgia-texas/611935/> [<https://perma.cc/JV9R-QLX9>].

281. *Id.*

282. *Id.*

283. *Id.*

284. See Helen Branswell & Kate Sheridan, *New Covid-19 Testing Guidelines, Crafted at the White House, Alarm Public Health Experts*, STAT (Aug. 26, 2020), <https://www.statnews.com/2020/08/26/new-covid19-testing-guidelines-crafted-at-white-house-alarm-public-health-experts/> [<https://perma.cc/ZAA5-8WJW>] (discussing the White House’s preparation of testing guidelines that normally would have been prepared by the CDC); see also Kate Sheridan, *CDC Director Attempts to Clarify Controversial Covid-19 Testing Guidelines*, STAT (Aug. 27, 2020), <https://www.statnews.com/2020/08/27/redfield-clarify-controversial-testing-guidelines/> [<https://perma.cc/JE6D-94JK>] (describing the CDC’s updated testing guidance).

285. See Apoorva Mandavilli, *C.D.C. Reverses Testing Guidelines for People without Covid-19 Symptoms*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/health/coronavirus-testing-cdc.html> [<https://perma.cc/6K2A-YGLK>] (describing the CDC’s reversal of the White House’s testing recommendation and its own recommendation that individuals who had had close contact with an infected person should be tested).

to conform the content of these scientific communications to the president's pandemic messaging.²⁸⁶ Those efforts seriously compromised the CDC's credibility and that of its director.²⁸⁷

E. Drug Therapies and Vaccines

At some point, President Trump recognized that something more than “magical thinking”²⁸⁸ about the inevitable disappearance of the virus would be necessary for him to win the 2020 election. As Yasmeen Abu-taleb and Damian Paletta have written, “While [his medical and political] aides battled over the virus's lethality, the president knew that there was

286. See Noah Weiland et al., *Political Appointees Meddled in C.D.C.'s 'Holiest of the Holy' Health Reports*, N.Y. TIMES (Sept. 12, 2020), <https://www.nytimes.com/2020/09/12/us/politics/trump-coronavirus-politics-cdc.html> [<https://perma.cc/6TTJ-YJNG>] (discussing political appointees' efforts to undermine reports thought to be unflattering to the Trump administration); see also Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sept. 11, 2020, 10:25 PM), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809> [<https://perma.cc/7YVQ-7A6S>] (“[Politically-appointed] communications aides . . . openly complained that the agency's reports would undermine [the President's] optimistic messages about the outbreak,” and while “CDC officials have fought back against the most sweeping changes, [they] have increasingly agreed to allow the political officials to review the reports and, in a few cases, compromised on the wording . . .”); Dan Diamond, *Trump Official Pressured CDC to Change Report on Covid and Kids*, POLITICO (Oct. 5, 2020, 4:30 AM), <https://www.politico.com/news/2020/10/05/trump-cdc-coronavirus-report-change-425538> [<https://perma.cc/7XS3-KVT7>] (“[A]s many school districts were still deciding whether to hold in-person classes, the [CDC] altered the title of a scientific report . . . and removed words like ‘pediatric’ from its text, days after a Trump administration appointee requested similar changes . . .”).

287. See, e.g., Helen Branswell, *As Controversies Swirl, CDC Director Is Seen as Allowing Agency to Buckle to Political Influence*, STAT (Sept. 16, 2020), <https://www.statnews.com/2020/09/16/as-controversies-swirl-cdc-director-is-seen-as-allowing-agency-to-buckle-to-political-influence/> [<https://perma.cc/EAP4-5HP4>] (“‘A reputation that takes 75 years to build can be destroyed in four months. That's horrifying,’ said [Mark] Rosenberg . . .”); *CDC's Politicization 'Extremely Dangerous' for Americans, Says Its Former Head*, PBS NEWS HOUR (July 14, 2020, 6:40 PM), <https://www.pbs.org/newshour/show/cdcs-politicization-extremely-dangerous-for-americans-says-its-former-head> [<https://perma.cc/P4UT-4K6X>] (transcript of interview with former CDC acting director Dr. Richard Besser) (noting that the politicization of the CDC raised questions about its credibility).

288. See, e.g., Eugene Robinson, *Opinion, 80,000 Americans Have Died. Trump Is Still Engaged in Magical Thinking*, WASH. POST (May 11, 2020, 5:14 PM), https://www.washingtonpost.com/opinions/covid-19-has-invaded-the-white-house-trumps-response-is-more-magical-thinking/2020/05/11/6c26dc56-93ba-11ea-9f5e-56d8239bf9ad_story.html [<https://perma.cc/SV7N-X7GG>] (stating that President Trump encouraged others to “embrace his oblivious[] and careless[]” response to COVID-19); Heather Digby Parton, *The Year of Dark Magical Thinking: Trump's Petty Revenge Fantasies Have Killed Thousands*, SALON (July 31, 2020, 9:41 AM), <https://www.salon.com/2020/07/31/the-year-of-dark-magical-thinking-trumps-petty-revenge-fantasies-have-killed-thousands/> [<https://perma.cc/67G8-3SYQ>] (stating that President Trump's response to the pandemic had shown his inability to handle a crisis—the “single most important duty” of a president).

only one way for him to be reelected: he would have to deliver a vaccine.”²⁸⁹ But President Trump’s aides had emphasized that developing a fully approved vaccine before the election was virtually impossible.²⁹⁰ Presumably for that reason, the president initially focused his attention on pushing federal officials to approve various unproven drug treatment therapies.²⁹¹ Based on testimonials given by lay friends and acquaintances, the president lobbied federal officials incessantly to approve certain specific therapies without further investigation or clinical trials.²⁹² In January 2020, however, the genome had become available and pharmaceutical companies had begun researching possible vaccines.²⁹³ Within six weeks, Moderna created a vaccine that was ready for first phase clinical trials.²⁹⁴ “Trump had been sidelining government health

289. ABUTALEB & PALETTA, *supra* note 76, at 369.

290. At a March 3, 2020, roundtable discussion with vaccine makers, for example, Dr. Fauci corrected President Trump’s estimate of how long the development and proper clinical testing of a vaccine might take, with Dr. Fauci arguing that the process would take at least one to one and one-half years. *See, e.g., id.* at 165–66. In fact, Dr. Fauci was wrong. *See id.*

291. *See* WRIGHT, *supra* note 4, at 126–28 (discussing President Trump’s obsession with chloroquine and hydroxychloroquine and his efforts to fast-track FDA approval of a drug treatment that he learned about from Fox News); *see also* Michael Brady, *Trump Wrongly Claims That FDA Approved COVID-19 Drug*, MOD. HEALTHCARE (Mar. 19, 2020, 4:23 PM), <https://www.modernhealthcare.com/politics-policy/trump-wrongly-claims-fda-approved-covid-19-drug> [<https://perma.cc/CQ96-ZKXX>] (noting President Trump’s false statement that the FDA had approved hydroxychloroquine to treat patients suffering from coronavirus); Rebecca Speare-Cole, *Donald Trump Hails Two Drugs as Possible ‘Game-Changers’ in Covid-19 Fight*, EVENING STANDARD (Mar. 19, 2020), <https://www.standard.co.uk/news/world/donald-trump-fda-coronavirus-drugs-hydroxychloroquine-remdesivir-a4392346.html> [<https://perma.cc/52FZ-F4L5>] (discussing President Trump’s claim that hydroxychloroquine and remdesivir could be “game-changer[s]” in fighting coronavirus”). *See generally* ABUTALEB & PALETTA, *supra* note 76, at 217–49.

292. *See, e.g.,* ABUTALEB & PALETTA, *supra* note 76, at 220–21 (“[One of the president’s supporters] had called [him] to tout remdesivir, a drug designed to treat Ebola that the NIH was studying to see if it could help treat coronavirus patients, the president said. Trump [told HHS Secretary Azar] that Ellison was one of the smartest people on the planet. ‘Larry Ellison called me and said remdesivir works,’ he said. ‘I’m ordering you to have FDA approve it today.’”).

293. *See* WRIGHT, *supra* note 4, at 8, 36–37 (noting the January release of the genomic sequence of the virus to be the “starting gun” for creating and testing a vaccine); *see also* *Novel Coronavirus Complete Genome from the Wuhan Outbreak Now Available in GenBank*, NAT’L CTR. BIOTECHNOLOGY INFO. INSIGHTS (Jan. 13, 2020), <https://ncbiinsights.ncbi.nlm.nih.gov/2020/01/13/novel-coronavirus/> [<https://perma.cc/YZ79-P4CH>]; Y. Zhang et al., *Wuhan Seafood Market Pneumonia Virus Isolate Wuhan-Hu-1, Complete Genome*, NAT’L CTR. BIOTECHNOLOGY INFO. (Jan. 12, 2020), <https://www.ncbi.nlm.nih.gov/nuccore/MN908947.1> [<https://perma.cc/K2CZ-Z3EX>] (original full-genome sequencing data); F. Wu et al., *Severe Acute Respiratory Syndrome Coronavirus 2 Isolate Wuhan-Hu-1, Complete Genome*, NAT’L CTR. BIOTECHNOLOGY INFO. (Jan. 17, 2020), <https://www.ncbi.nlm.nih.gov/nuccore/MN908947.3> [<https://perma.cc/A9M6-5P73>] (updated COVID-19 full-genome sequencing data).

294. ABUTALEB & PALETTA, *supra* note 76, at 370.

experts for months. Now everything hinged on them. And pharmaceutical companies, which he had once said were ‘getting away with murder,’ were the only ones that could pull off the speedy development of a vaccine. From the start, some of them had been moving through clinical trials with breathtaking speed.”²⁹⁵

On February 9, 2020, Peter Navarro, an economist and aide to the president,²⁹⁶ prepared a memorandum on vaccine development that he shared with other White House officials. Navarro’s memorandum urged that the processes for developing a vaccine be dramatically accelerated and that multiple trials should be launched simultaneously.²⁹⁷ The memorandum called for creating a program like the Manhattan Project to spur vaccine development.²⁹⁸ Navarro, who was a controversial figure in the White House, knew nothing about vaccine development.²⁹⁹ Initially, no one else on the White House staff took Navarro’s suggestion seriously,³⁰⁰ but the idea eventually garnered support. More people in the Trump administration began to worry that the virus “wasn’t going to just go away,” and to think that a “vaccine looked increasingly like the only way to stop it.”³⁰¹ Indeed, “[a]s the crisis deepened, Trump tried to have it both ways, brushing aside concerns about the virus’s impact while breathing down the neck of virtually everyone around him to make sure that needles were jammed into arms before the election.”³⁰² It would be several months, however, before President Trump committed his administration to financing a “Manhattan Project” for vaccine development, and only after seeing some unexpectedly impressive results would he embrace it fully as the

295. *Id.* at 369–70.

296. *See* WRIGHT, *supra* note 4, at 217–18 (describing Navarro’s background).

297. ABUTALEB & PALETTA, *supra* note 76, at 370.

298. *Id.* *See also* Jon Cohen, *The Pandemic Whistleblower*, 375 SCI. 16, 18 (Jan. 6, 2022) (discussing Rick Bright, a former head of the Biomedical Advanced Research and Development Authority and Trump administration whistleblower with respect to the administration’s early COVID-19 response, who lobbied Navarro to launch an aggressive, Manhattan-Project-like “crash program” to accelerate vaccine development. Navarro recommended the concept in a February 9, 2020, memorandum, and HHS endorsed it two months later).

299. *See* ABUTALEB & PALETTA, *supra* note 76, at 370 (noting that Navarro alienated aides with his rants about how China was using the virus to destroy the United States). *See also* Jonathan Swan, *Scoop: Inside the Epic White House Fight over Hydroxychloroquine*, AXIOS (Apr. 5, 2020), <https://www.axios.com/2020/04/05/coronavirus-hydroxychloroquine-white-house> [<https://perma.cc/8R2A-NPGU>] (recounting a heated argument between Dr. Fauci and Navarro over the efficacy of hydroxychloroquine); Doina Chiacu, *White House, Experts Clash over Use of Drug for Coronavirus*, REUTERS (Apr. 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-navarro/white-house-experts-clash-over-use-of-drug-for-coronavirus-idUSKBN21O1ZA> [<https://perma.cc/RWN3-BYT6>] (“While acknowledging he has no scientific background, Navarro said he believed the hydroxychloroquine studies done so far were convincing.”).

300. ABUTALEB & PALETTA, *supra* note 76, at 370.

301. *Id.*

302. *Id.*

key to prolonging his rule.

In March 2020, several pharmaceutical companies were progressing with the development of their respective vaccines, but they thought that the vaccines would not be available for use until summer 2021 or later.³⁰³ That was a matter of deep concern to the Trump administration, which desperately wanted a vaccine before Election Day; but Navarro had no actual plan for expediting the development of vaccines, and neither did President Trump. However, others did have a plan for expediting the process, if not necessarily for accomplishing a roll-out before Election Day.

Peter Marks, the FDA's top vaccine regulator, reached out to Robert Kadlec, HHS's assistant secretary for preparedness and response.³⁰⁴ One way to expedite the process was for the pharmaceutical companies to manufacture doses of their vaccines even before it was possible to know whether the vaccines would be approved. But that plan would involve staggering costs and put the pharmaceutical companies at great financial risk. If the FDA ultimately found that the vaccines were not "safe and effective," the pharmaceutical companies might lose millions or billions of dollars. That risk of loss was not something that the companies would likely undertake on their own. But Marks had an idea about how the desired result might be accomplished: "[W]hat if the federal government were to pay for the doses now, taking away any risk? What if the government were to throw money at the companies to move as fast as possible? The FDA would also be in constant communication with them, helping them design their clinical trials and making sure they knew what benchmarks they needed to meet."³⁰⁵

HHS Secretary Alex Azar was receptive to the idea. In addition to the public health and economic benefits that would accrue domestically from the early development of a vaccine, Azar thought that the proposal made sense in geopolitical terms. If the United States lost the "vaccine race" to China or Russia, that would adversely affect American prestige overseas.³⁰⁶ Marks and Kadlec's proposal required betting on several companies, with the hope that one or two would be successful in bringing a

303. *Id.* at 372.

304. See Yasmeen Abutaleb et al., *How the 'Deep State' Scientists Vilified by Trump Helped Him Deliver an Unprecedented Achievement*, WASH. POST (Dec. 14, 2020), <https://www.washingtonpost.com/health/2020/12/14/trump-operation-warp-speed-vaccine/> [https://perma.cc/RG7R-LH7M] (discussing how Peter Marks and Robert Kadlec had teamed up to prepare a proposal outlining the process from screening potential vaccine candidates to distributing the final vaccines).

305. ABUTALEB & PALETTA, *supra* note 76, at 373.

306. See Michael Safi & Milivoje Pantovic, *Vaccine Diplomacy: West Falling Behind in Race for*

vaccine to market. The scheme would require billions of dollars and full support from the White House.³⁰⁷ As Abutaleb and Paletta note, “The overall concept was based on World War Two’s Manhattan Project, a highly focused, tightly managed, and generously resourced effort to build the atomic bomb. If Marks and Kadlec’s proposal was successful, they thought the development and production of safe and effective vaccines could have the same global impact.”³⁰⁸

Because Azar knew that he was “on the outs with the White House and needed political cover to make it all work,”³⁰⁹ he sought to enlist the help of Jared Kushner, the president’s son-in-law and a key advisor. That was a wise decision because Marks was hammered by Meadows and Ambassador Deborah Birx, the White House Coronavirus Response Coordinator, when he presented the plan to the Task Force on April 29,³¹⁰ and neither FDA Commissioner Stephen Hahn nor Secretary Azar stepped in to defend him. Several attendees remarked afterward that it was one of the most uncomfortable, unprofessional displays they had ever seen.³¹¹

But Kushner and some other officials were persuaded. According to Carol Leonnig and Philip Rucker, President Trump was not immediately

Influence, GUARDIAN (Feb. 19, 2021), <https://www.theguardian.com/world/2021/feb/19/coronavirus-vaccine-diplomacy-west-falling-behind-russia-china-race-influence> [<https://perma.cc/ZM9J-WL7S>] (explaining how vaccine nationalism in the West allowed countries like China and Russia to establish geopolitical power by making deals to supply vaccines to forty-one other countries); see also Elizabeth Ralph, *What Happens If China Gets the COVID-19 Vaccine First?*, POLITICO (Aug. 31, 2020), <https://www.politico.com/news/magazine/2020/08/31/china-covid-19-vaccine-first-401636> [<https://perma.cc/9VPV-5WRR>] (describing the race to develop the vaccine as an old-fashioned nationalistic competition for power and prestige).

307. See Stephanie Baker & Cynthia Koons, *Inside Operation Warp Speed’s \$18 Billion Sprint for a Vaccine*, BLOOMBERG BUSINESSWEEK (Oct. 29, 2020), <https://www.bloomberg.com/news/features/2020-10-29/inside-operation-warp-speed-s-18-billion-sprint-for-a-vaccine> [<https://perma.cc/RK9Y-LYLT>] (detailing how Operation Warp Speed awarded more than \$12 billion in vaccine-related contracts); see also David Adler, *Inside Operation Warp Speed: A New Model for Industrial Policy*, AM. AFFAIRS J. (Summer 2021), <https://americanaffairsjournal.org/2021/05/inside-operation-warp-speed-a-new-model-for-industrial-policy/> [<https://perma.cc/26F2-7LT6>] (discussing the vaccines that resulted from public-private partnerships and an investment of billions of dollars).

308. ABUTALEB & PALETTA, *supra* note 76, at 373. As Secretary of HHS, Azar was ultimately responsible for the management of the FDA, the CDC, and the NIH, as well as the Biomedical Advanced Research and Development Authority, which is a component of the HHS Office of Preparedness and Response, for which Kadlec was directly responsible as assistant secretary for preparedness and responsiveness. Azar was, therefore, well placed to coordinate the nation’s response to the pandemic, but the president and his staff lacked confidence in him. See, e.g., LEONNIG & RUCKER, *supra* note 55, at 25–27, 32–36, 87–88, 119–23. See also ABUTALEB & PALETTA, *supra* note 76, at 373 (“Azar’s critics and allies both said he saw an opportunity to improve his reputation and standing by helping to deliver a vaccine.”).

309. ABUTALEB & PALETTA, *supra* note 76, at 374.

310. *Id.* at 374–76.

311. *Id.* at 376.

receptive to the idea of Operation Warp Speed and it took a great deal of convincing to get him committed to the project. “Kushner told [the President], ‘Look, I really believe this is smart. I know there’s a chance we’ll lose twelve billion dollars, but if it hits, this will be the best investment you’ll make. . . . And if it doesn’t work, I think we’ll be glad we tried.’”³¹² Trump was persuaded, and he proceeded to announce the program at a Rose Garden event at which most of the participants appeared without masks, as the President wished.³¹³ “Several of the doctors advising the president believed that Kushner was a force for good when it came to vaccines and tried to steer the president in a helpful direction. When he entered a meeting, Kushner listened for a while as the group debated why something wouldn’t work, and then asked the critical question: What do we need to make it work?”³¹⁴

According to Abutaleb and Paletta, key White House aides were convinced the administration’s future depended on developing a vaccine, but President Trump still did not believe in mid-May that a vaccine could be developed within a few months.³¹⁵ Thinking that a vaccine was “too pie in the sky,” he seemed more focused on the possible efficacy of therapies (such as hydroxychloroquine and remdesivir), and he questioned Moncef Slaoui about them, even as he was officially installing Slaoui and Gustavo Perna as the leaders of Operation Warp Speed.³¹⁶ However, Trump’s attitude concerning the vaccine changed over the next several months, as his poll numbers continued to decline and it became obvious that something dramatic would be needed if he was to win the election.³¹⁷ In addition, “By mid-summer, it looked as though Pfizer and Moderna would soon begin phase 3 clinical trials, the final step before applying for emergency-use authorization A vaccine might really be available by the end of the year.”³¹⁸ The vaccine no longer seemed “pie in the sky;” it was an “escape hatch” from the pandemic, and the Trump administration

312. LEONNIG & RUCKER, *supra* note 55, at 142.

313. *Id.* at 142–43.

314. *Id.* at 143.

315. ABUTALEB & PALETTA, *supra* note 76, at 377–78.

316. *Id.* at 378.

317. *Id.* at 379.

318. *Id.* Pfizer did not take any research and development money from Operation Warp Speed but agreed to sell doses to the government if its vaccine were approved. *Id.* at 380. Pfizer worked in partnership with BioNTech, a German company. See WRIGHT, *supra* note 4, at 232 (discussing the development of the Pfizer and Moderna vaccines).

became obsessed with being able to announce its success in time to influence the 2020 election.³¹⁹

But President Trump's attention did not shift entirely to the goal of developing vaccines to protect against infection; he also remained focused on promoting possible therapies for treating persons who were already infected. With respect to both subjects, he was convinced that the medical part of the "Deep State"³²⁰ was purposefully trying to sabotage his re-election. In August 2020, for example, the President reached out to NIH Director Dr. Francis Collins, telling him that "[y]ou doctors are killing me," and accusing Drs. Collins and Fauci of blocking the FDA's approval for convalescent plasma treatment, which, the president said, "everybody knows" is a life-saving therapy.³²¹ Drs. Collins and Fauci thought that there was not yet enough data to justify approval, but the president kept hammering away and the FDA announced its emergency-use authorization at a celebratory event at the White House on the eve of the Republican National Convention. The evidence of efficacy was thin at best,³²² and the White House presentation contained important methodological errors.³²³

319. See ABUTALEB & PALETTA, *supra* note 76, at 377, 379 (discussing the Trump administration's all-consuming obsession with delivering a vaccine before the election to show Americans that the pandemic was coming to an end).

320. See Seth Cohen, *Is Fauci a "Deep State" Doctor? The Conspiracy Theory That Is Sickening America*, FORBES (July 14, 2020), <https://www.forbes.com/sites/sethcohen/2020/07/14/is-fauci-a-deep-state-doctor> [<https://perma.cc/BE37-6JQ7>] ("Deep State" [is] a term used by many of the President's supports [sic] and other anti-government groups to represent what they [saw] as a bias against Trump in the federal government."); see also Martin Pengelly, *Trump's Obsession with Deep State Conspiracy 'Delusional,' John Boehner Says*, GUARDIAN (Apr. 6, 2021), <https://www.theguardian.com/us-news/2021/apr/06/john-boehner-book-trump-obsession-deep-state-conspiracy> [<https://perma.cc/5R7N-HLAG>] ("Donald Trump's . . . Deep State conspiracy theory . . . holds that a permanent secret government of bureaucrats and intelligence officials existed to thwart his agenda in office . . .").

321. LEONNIG & RUCKER, *supra* note 55, at 244–45. Dr. Collins also reminded the president of the hydroxychloroquine situation earlier in the year when the FDA was required to revoke its emergency use authorization. *Id.* at 87–88, 109–11, 180–82. President Trump had touted the drug, even after the FDA had withdrawn its approval. See WRIGHT, *supra* note 4, at 126–28, 191.

322. LEONNIG & RUCKER, *supra* note 55, at 246. At the time, no robust, randomized trial had shown any benefit from being treated with convalescent plasma. The FDA said that the studies made it "reasonable to believe" that the treatment "may be effective" in "some hospitalized patients." Sharon LaFraniere et al., *F.D.A. Allows Expanded Use of Plasma to Treat Coronavirus Patients*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/2020/08/23/us/politics/fda-plasma-coronavirus.html> [<https://perma.cc/Z3Y3-KWTN>]. However, in an appearance at the White House, President Trump "stripped away the agency's nuanced language," declaring that the treatment had been "proven to reduce mortality by 35%." *Id.*

323. LEONNIG & RUCKER, *supra* note 55, at 244–49. "'I watched this in horror,' Eric Topol, an expert on clinical trials and the influential director of the Scripps Research Translational Institute, told the *Washington Post* after watching Trump's announcement with [FDA Commissioner] Hahn

Once the president became convinced that a vaccine could be developed before the election, he pursued that goal relentlessly.³²⁴ The president's previous interactions with the FDA had not only been fraught, but they had also undermined the agency's credibility. That was also true with respect to the president's interactions with the CDC.³²⁵ Given the president's unremitting pressure on the FDA to provide an emergency-use authorization before the election, FDA Commissioner Hahn worried about preserving the FDA's reputation. In September, for example, the president loudly and publicly complained that the FDA's standards were too high and threatened the goal of securing vaccine approval; that the agency was acting for political reasons; and that he had the power to approve the vaccines if the agency would not.³²⁶ Hahn and others worried that the president's very public show of political pressure could undermine public confidence in whatever vaccine might ultimately be approved. If public confidence was the goal, the president's actions were

at his side. 'These are basically just explanatory analyses that don't prove anything. It's just extraordinary to declare this as a breakthrough.' Other health professionals decried what they saw as the FDA's manipulation of science to fit the president's political messaging." *Id.* at 248. The FDA faced intense criticism, and the FDA commissioner apologized for overstating the evidence about twenty-four hours later. *Id.*

324. See generally Rucker et. al., *supra* note 48.

325. See SELECT SUBCOMM. ON CORONAVIRUS CRISIS, *Select Subcommittee Releases New Evidence of Trump Administration's Political Meddling in Coronavirus Guidance, Testing and Treatments* (Feb. 8, 2021), <https://coronavirus.house.gov/news/press-releases/select-subcommittee-releases-new-evidence-trump-administration-s-political> [<https://perma.cc/K4RE-8AVC>] (releasing evidence of the Trump administration's weakening of CDC guidance to hide positive tests, manipulating a CDC report, and pressing the FDA to approve treatments over scientists' objections); see also Sandy Fitzgerald, *Redfield, Hahn Accuse Former HHS Chief Azar of Political Interference*, NEWSMAX (Mar. 29, 2021), <https://www.newsmax.com/politics/redfield-hahn-azar-cdc/2021/03/29/id/1015553/> [<https://perma.cc/BFY3-UGUQ>] (detailing Azar's interference with the CDC and the FDA, including pressure to change the content of the Morbidity and Mortality Weekly Report).

326. See, e.g., Paul LeBlanc, *Trump Claims White House Can Overrule FDA's Attempt to Toughen Guidelines for Coronavirus Vaccine*, CNN: POLITICS (Sept. 23, 2020), <https://edition.cnn.com/2020/09/23/politics/trump-fda-coronavirus-vaccine/index.html> [<https://perma.cc/RL8W-2QMR>] (discussing concerns that political pressure could compromise the vaccine's safety and effectiveness following President Trump's claim that he could overrule the FDA's new vaccine authorization guidelines); see also Laura McGinley et al., *Trump, White House Demand FDA Justify Tough Standards for Coronavirus Vaccine, Raising Concerns of Political Interference: Some Worry the Move Is an Attempt to Speed a Vaccine Before Election Day, Which the President Has Tied to His Reelection Prospects*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/politics/2020/09/25/coronavirus-vaccine-trump-interference/> [<https://perma.cc/88N9-GHNF>] ("The White House's involvement appears to go beyond the perfunctory review that agency officials had expected, and is likely to reinforce public concerns that a vaccine may be rushed to benefit the president's reelection campaign. Polls show that the number of people who say they're willing to take a coronavirus vaccine if it were available today has nosedived from 72 percent in May to 50 percent as of early this month, according to Pew Research Center, largely because of concerns that politics, rather than science, is driving the process.").

counterproductive.

In the summer, Peter Marks, chief of FDA's Center for Biologics Evaluation and Research, had informed the various companies engaged in vaccine research that the issuance of an emergency-use authorization would depend upon the researchers' following the clinical trial participants for at least two months after receiving their second dose to guard against any abnormal side effects or complications.³²⁷ The FDA had not initially intended to publicize that guidance, which effectively moved the date for possible vaccine approval beyond the election, but it decided to do so in light of the apparent erosion of the public's interest in being vaccinated. Between May and September, the number of people who said they would be vaccinated if a vaccine were available had dropped from 70 percent to about 50 percent, a decrease that caused alarm among the government's public health officials.³²⁸ The reaction from the White House was predictable. "Several aides, including [Mark] Meadows, were now convinced that FDA bureaucrats were intentionally trying to derail Trump's reelection. Meadows called [FDA Commissioner] Hahn in a fury . . ."³²⁹ President Trump criticized the FDA's new guidance on Twitter.³³⁰ Marks and Hahn had agreed that they would not cave in to pressure; Marks and some members of his team agreed that "they would quit if they came under any undue pressure on the vaccine, which would have been a public relations disaster."³³¹ Marks also continued to reassure the public that the approval process was not being compromised, and that any vaccine approved under an emergency-use authorization would be safe and effective.³³²

According to Yasmeeen Abutaleb and Damian Paletta, "Trump was so fixated on having a vaccine before the election that it came up in almost every meeting, whether [the meeting] was about the vaccine or not."³³³ Moreover, "As November approached, the White House's anger with Hahn boiled over, culminating in a series of screaming phone calls from Meadows to Hahn, Trump to Azar, [and] Meadows to anyone he believed

327. ABUTALEB & PALETTA, *supra* note 76, at 385.

328. *Id.* at 386.

329. *Id.*

330. *Id.*

331. *Id.* at 386–87. See also Meet FDA's Peter Marks, 'The Single Most Critical Figure in the [Covid-19] Vaccine Decision,' ADVISORY BD. (Aug. 26, 2020), <https://www.advisory.com/daily-briefing/2020/08/26/marks> [<https://perma.cc/22FH-WRXV>] (reporting that Marks had said that he would resign if an insufficiently tested vaccine were approved).

332. See ABUTALEB & PALETTA, *supra* note 76, at 387 (explaining the vaccine development process through the eyes of White House officials).

333. *Id.*

had a role in getting a vaccine before November 3.”³³⁴

F. *The Interregnum and Beyond*

As the election approached, President Trump renewed his efforts to downplay the seriousness of the pandemic. On October 27, 2020, the President claimed that the “fake news media” were focusing on the pandemic to undermine his re-election. He tweeted in all uppercase letters: “All The Fake News Media Wants To Talk About IS COVID, COVID, COVID. On November 4th, You Won’t Be Hearing So Much About It Anymore. We Are Rounding The Turn!”³³⁵ When Operation Warp Speed failed to deliver an approved vaccine before the 2020 election, President Trump accused the pharmaceutical industry and the “Deep State” of conspiring against him.³³⁶ His sense of injury seems to have been entirely personal; he gave little indication of having grasped the reality of the human consequences that flowed from the government’s numerous failures over the course of the pandemic.³³⁷ All that President Trump seemed to regret was losing his best chance to win re-election; the illnesses and deaths caused by the government’s ineptitude were not themselves noteworthy.

Following the election, the FDA approved the first of the vaccines for “emergency use,” and the president quickly claimed credit for developing the vaccine—if only to prevent his successor from doing so.³³⁸ But he

334. *Id.* at 388.

335. Tommy Beer, *Trump Predicted ‘Covid, Covid, Covid’ Would End After the Election. It’s Worse Than Ever*, FORBES (Nov. 11, 2020, 3:20 PM), <https://www.forbes.com/sites/tommybeer/2020/11/11/trump-predicted-covid-covid-covid-would-end-after-the-election-its-worse-than-ever> [https://perma.cc/UA2C-V3T2].

336. See Laurie McGinley et al., *Trump Rails against ‘Medical Deep State’ after Pfizer Vaccine News Comes after Election Day*, WASH. POST (Nov. 11, 2020, 7:08 PM), <https://www.washingtonpost.com/politics/2020/11/11/trump-angry-about-pfizer-vaccine/> [https://perma.cc/FXN9-JAWZ] (“The @US_FDA and the Democrats didn’t want to have me get a Vaccine WIN, prior to the election . . . !”); Laurie McGinley et al., *Trump without Evidence Accuses ‘Deep State’ at FDA of Slow-Walking Coronavirus Vaccines and Treatments*, WASH. POST (Aug. 22, 2020, 4:35 PM), <https://www.washingtonpost.com/health/2020/08/22/trump-without-evidence-accuses-deep-state-fda-slow-walking-coronavirus-vaccines-treatments/> [https://perma.cc/7W6C-M47M] (“President Trump on Saturday baselessly accused the Food and Drug Administration of impending enrollment in clinical trials for coronavirus vaccines and therapeutics for political reasons . . .”).

337. See Chuck Todd et al., *As Trump Rages over Election Results, Coronavirus Rages across the Country*, NBC NEWS (Nov. 11, 2020, 7:41 AM), <https://www.nbcnews.com/politics/meet-the-press/trump-rages-over-election-results-coronavirus-rages-across-country-n1247383> [https://perma.cc/8TXT-5ASQ] (detailing increased number of COVID cases and lack of action by the Trump administration after the election).

338. See Abutaleb et al., *supra* note 304 (“As it became clear that vaccines would be a shining

did little thereafter to encourage his followers to become vaccinated,³³⁹ and he seemed to lose any interest in fighting the virus. For the most part, his silence was deafening. As one reporter noted a week after the election, “In the seven days since Nov. 4, there has been an average of 123,315 new cases per day (a total of 863,205), which is the highest daily average ever recorded in any nation, and an increase of 69% from the

success in an otherwise calamitous pandemic response, [President Trump] wanted to make sure his administration . . . got credit for an unprecedented scientific achievement.”). See also Bess Levin, *Donald Trump Demands Americans Picture His Face While COVID Vaccine Enters Their Bodies*, VANITY FAIR (Mar. 11, 2021), <https://www.vanityfair.com/news/2021/03/donald-trump-covid-vaccine-credit> [<https://perma.cc/389V-P5VN>] (highlighting instances in which President Trump took full responsibility for development of the COVID-19 vaccine); Bess Levin, *Donald Trump: If COVID-19 Kills Another 1.8 Million People in the U.S. We Won't Even Need a Vaccine*, VANITY FAIR (Dec. 8, 2020), <https://www.vanityfair.com/news/2020/12/trump-vaccine-summit-herd-immunity> [<https://perma.cc/QUP4-UXL3>] (“Later, Trump claimed that before he came on the scene, practically no vaccines had ever been created . . .”). President Trump even claimed credit for the vaccine that Pfizer developed without the assistance of Operation Warp Speed. See, e.g., Hope Yen & Luran Neergaard, *AP FACT CHECK: Trump Wrongly Takes Full Credit for Vaccine*, ABC NEWS (Nov. 13, 2020, 6:04 PM), <https://abcnews.go.com/Business/wireStory/ap-fact-check-trump-wrongly-takes-full-credit-74200837> [<https://perma.cc/J2R5-95T6>] (noting that Pfizer did not accept government money under Operation Warp Speed despite President Trump’s contrary claims).

339. See Meridith McGraw, *Trump Encourages Americans to Get the Covid Vaccine*, POLITICO (Mar. 16, 2021, 8:42 PM), <https://www.politico.com/news/2021/03/16/trump-americans-covid-vaccine-476479> [<https://perma.cc/J9MW-8FXE>] (“Former President Donald Trump . . . recommended Americans get vaccinated to help fight the Covid pandemic, engaging on the issue after months of relative silence.”). President Trump was vaccinated before he left office, but he did so quietly. See Jemima McEvoy, *Trump Vaccinated in January after Claiming That He Was ‘Immune’ to Covid-19*, FORBES (Mar. 1, 2021, 3:37 PM), <https://www.forbes.com/sites/jemimamcevoy/2021/03/01/trump-vaccinated-in-january-after-claiming-he-was-immune-to-covid-19> [<https://perma.cc/5D4A-GGQ8>] (noting that the former president was vaccinated at the White House in January but was “notably absent” from the group of officials who received the vaccine after it was first approved); Dartunorro Clark & Monica Alba, *Trump, Former First Lady Quietly Received Covid Vaccine in January*, NBC NEWS (Mar. 1, 2021, 3:36 PM), <https://www.nbcnews.com/politics/donald-trump/trump-former-first-lady-quietly-received-covid-vaccine-january-n1259196> [<https://perma.cc/R28K-A3HV>] (reporting that President Trump and his wife had been vaccinated without any press coverage). By contrast, Vice President Pence was vaccinated on live TV. See Annie Karni, *Pence Will Be Vaccinated on Live TV, Adding to Administration’s Mixed Virus Message*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/us/politics/pence-trump-coronavirus-vaccine.html> [<https://perma.cc/G38P-E468>] (“Vice President Mike Pence will roll up his sleeve to receive the coronavirus vaccine . . .”). In addition, former presidents Jimmy Carter, Bill Clinton, George W. Bush, and Barack Obama appeared in advertisements encouraging Americans to be vaccinated. Carol E. Lee & Monica Alba, *Ex-Presidents Club (Mostly) Comes Together to Encourage Vaccinations*, NBC NEWS (Mar. 10, 2021, 11:00 PM), <https://www.nbcnews.com/politics/politics-news/ex-presidents-club-mostly-comes-together-encourage-vaccinations-n1260496> [<https://perma.cc/GGD7-6DDR>]. The crowd at a December 2021 rally booed President Trump when he acknowledged that he had received a vaccine booster shot, but the crowd cheered when he stated his continued opposition to vaccine mandates. Sonam Sheth, *Trump Tells His Supporters Not to Boo after Revealing He Got a Booster Shot and Is Pro-Vaccination*, BUS. INSIDER (Dec. 20, 2021, 9:12 AM), <https://www.businessinsider.com/trump-supporters-jeered-when-he-announced-booster-pro-vaccination-2021-12> [<https://perma.cc/98BF-XEFN>].

average just two weeks earlier.”³⁴⁰ That reporter further noted that, “Trump has tweeted 149 times since Nov. 3 but has not once mentioned Covid, Covid-19, or the coronavirus. Nor has he offered an update to U.S. citizens on how the federal government plans to counteract this most recent nationwide outbreak.”³⁴¹ On November 14, a team of journalists at the *Washington Post* reported that, “Since Election Day and for weeks prior, Trump has all but ceased to actively manage the deadly pandemic, which so far has killed at least 244,000 Americans, infected at least 10.9 million and choked the country’s economy.”³⁴² In addition, according to those journalists, a senior administration official had acknowledged that the president had not attended a coronavirus task force meeting for “at least five months.”³⁴³ That would remain the case for the rest of President Trump’s time in office.

The numbers of new infections and deaths continued to break records in the weeks following the election, but President Trump quickly shifted his attention to overturning the election results and dispensing pardons to

340. Beer, *supra* note 335. See also Todd et al., *supra* note 337 (“Since Election Day, in fact, the United States has seen 878,000 new Covid-19 cases, 20,000 hospitalizations and nearly 8,000 deaths.”).

341. Beer, *supra* note 335. See also Todd et al., *supra* note 337 (“[T]here’s no urgency coming from the White House.”).

342. Ashley Parker et al., *Trump Tunes out Pandemic Surge as He Focuses on Denying Election Loss*, WASH. POST (Nov. 14, 2020, 7:43 PM), https://www.washingtonpost.com/politics/trump-coronavirus-response/2020/11/14/61137f4c-25cb-11eb-8599-406466ad1b8e_story.html [<https://perma.cc/CBT9-P5YJ>]. See also Chuck Todd et al., *Trump Spends Post-Election Week Spreading Misinformation and Chaos as Virus Rages On*, NBC NEWS (Nov. 13, 2020, 7:47 AM), <https://www.nbcnews.com/politics/meet-the-press/trump-spends-post-election-week-spreading-misinformation-chaos-virus-rages-n1247678> [<https://perma.cc/U32H-4UL8>] (“You have little to no president-ing going on. . . . The coronavirus—and the federal government’s response to it, or lack thereof—represents arguably the biggest American public policy failure since Vietnam.”).

343. Parker et al, *supra* note 342 (internal quotations omitted).

political allies and others,³⁴⁴ rather than dealing with the pandemic.³⁴⁵ As President Trump continued to claim that he had won the election, the administration continued to deny the Biden transition team access to materials that it would need to govern, including information about what the outgoing administration's plans for rolling out the vaccine might entail.³⁴⁶

344. See, e.g., Diamond, *supra* note 51 (“White House officials prioritized President Donald Trump’s attempt to challenge the election over the pandemic response last winter . . .”); Rosalind S. Helderman et al., *Trump Grants Clemency to 143 People in Late-Night Pardon Blast*, WASH. POST (Jan. 20, 2021, 1:42 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/7653bd12-59a2-11eb-8bcf-3877871c819d_story.html [<https://perma.cc/NY7A-8ZWQ>] (“President Trump . . . granted clemency to 143 people, using a final act of presidential power . . .”); Aaron Blake, *Trump’s Swampiest Pardons, Ranked*, WASH. POST (Jan. 20, 2021, 11:58 AM), <https://www.washingtonpost.com/politics/2021/01/20/trumps-swampiest-pardons-ranked/> [<https://perma.cc/VM5W-27JE>] (discussing the pardons that President Trump granted as he prepared to leave the White House); Matt Zapposky et al., *Trump Pardons Charles Kushner, Paul Manafort, Roger Stone in Latest Wave of Clemency Grants*, WASH. POST (Dec. 23, 2020, 8:57 PM), https://www.washingtonpost.com/national-security/charles-kushner-paul-manafort-roger-stone-trump-pardons/2020/12/23/05cf013a-456d-11eb-975c-d17b8815a66d_story.html [<https://perma.cc/JA2X-R2U5>] (reporting on an additional twenty-nine pardons that President Trump granted before leaving office).

345. See, e.g., Philip Bump, *‘The Coup Didn’t Work’ Is Not a Reassuring Argument*, WASH. POST (Oct. 4, 2021, 10:43 AM), <https://www.washingtonpost.com/politics/2021/10/04/trump-coup-arguments/> [<https://perma.cc/EQ29-8G6C>] (“[I]t was apparently more important for him to try to challenge the voters’ preferred outcome than to, say, actively fight the coronavirus.”); Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, WASH. POST (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html> [<https://perma.cc/UY52-BRPS>] (providing background on President Trump’s efforts to pressure Vice President Pence to refuse to certify election results). See also Spencer Bokot-Lindell, *Opinion, Will 2024 Be the Year American Democracy Dies?*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/opinion/american-democracy-2024.html> [<https://perma.cc/DKC9-5KF5>] (highlighting the many public officials and attorneys involved with President Trump in plotting to overturn the 2020 election); Reid J. Epstein & Nick Corasaniti, *‘Stop the Steal’ Movement Races Forward, Ignoring Arizona Humiliation*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/us/politics/arizona-election-audit-analysis.html> [<https://perma.cc/SHF4-7MRB>] (“Former President Donald J. Trump and his loyalists redoubled their efforts to mount a full-scale relitigation of the 2020 election.”).

346. See, e.g., Eban, *supra* note 53 (“President-elect Joe Biden’s COVID-19 task force has waited weeks in a postelection cone of silence, unable to talk to government counterparts while pandemic cases skyrocket, as a previously obscure bureaucrat at the General Services Administration, Emily Murphy, essentially held vaccine-distribution planning hostage. She refused to take the technical step of ‘ascertaining’ a Biden win, which would allow the outgoing administration to share plans with the incoming one. . . . Now, over two weeks late, comes the most consequential executive transition in modern American history, as the nation barrels into another deadly month battling the COVID-19 pandemic with cases skyrocketing.”); Ashley Collman, *Trump Officials Say the President’s Refusal to Admit Defeat to Biden Could Slow Down a Vaccine Rollout, According to Report*, BUS. INSIDER (Nov. 12, 2020, 8:02 PM), <https://www.businessinsider.fr/us/trump-refusal-concede-could-slow-vaccine-rollout-prolong-pandemic-report-2020-11> [<https://perma.cc/FF7R-YKX5>] (highlighting President Trump’s refusal to collaborate with the new administration to continue the momentum of vaccine production and distribution); Peter Baker, *How Jared Kushner Washed His*

And it is far from surprising, given President Trump's constant and full-throated attacks on the "Deep State" throughout his presidency, that it was some of his followers who demonstrated the greatest skepticism concerning the safety of the vaccines and the most implacable opposition to vaccination.³⁴⁷ Over time, the former president moved from touting the vaccines as a singular triumph of his administration to a position of tepid support for the vaccines to one of outright skepticism, perhaps as a way of keeping faith with his followers.³⁴⁸ When he pivoted again, vouching for the efficacy of the vaccines at a political rally in August 2021, some of his followers booed him.³⁴⁹ Among President Trump's

Hands of Donald Trump before Jan. 6, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/us/politics/jared-kushner-trump-jan-6.html> [<https://perma.cc/WV9N-FHLR>] (noting Jared Kushner's efforts to assist in some aspects of the transition).

347. See Elizabeth Dvoskin & Josh Dawsey, *The Trump Administration Wants to Take Credit for a Covid Vaccine. Trump Supporters are Undermining It*, WASH. POST (Dec. 24, 2020, 1:23 PM), <https://www.washingtonpost.com/technology/2020/12/24/trump-vaccine-misinformation/> [<https://perma.cc/GBX7-Q2H5>] ("President Trump and his allies have spent years stoking disinformation and doubt in official accounts about the election, the coronavirus, and other topics. Now those efforts are making it harder to rally support around his administration's vaccine push. . . . Some of Trump's most high-profile allies, including his former attorney Sidney Powell, for example, have pushed misleading claims that the government will force people to receive a vaccination or use the vaccine to conduct surveillance of the population."); Yamiche Alcindor, *Why 41 Percent of Republicans Don't Plan to Get the COVID Vaccine*, PBS NEWS HOUR (Mar. 19, 2021, 6:30 PM), <https://www.pbs.org/newshour/show/why-41-percent-of-republicans-dont-plan-to-get-the-covid-vaccine> [<https://perma.cc/6MVC-T64F>] (noting that Republicans as a group were among those most likely to choose not to be vaccinated against COVID-19); Joanne Kenen, *Vaccine-Skeptical Trump Country Poses Challenge to Immunization Push*, POLITICO (Mar. 8, 2021, 4:30 AM), <https://www.politico.com/news/2021/03/08/coronavirus-vaccine-rural-america-473940> [<https://perma.cc/Y3GL-KXHR>] ("[R]eaching the most vaccine skeptical in those communities—which polls regularly find are white, Republican and under 50 . . .").

348. See, e.g., Philip Bump, *Trump Follows His Base Toward Rationalized Vaccine Skepticism*, WASH. POST (July 19, 2021, 10:58 AM), <https://www.washingtonpost.com/politics/2021/07/19/trump-follows-his-base-toward-rationalized-vaccine-skepticism/> [<https://perma.cc/ZHR3-PJ92>] (noting President Trump's change in views of the vaccine). But see Carly Roman, *Sarah Huckabee Sanders Encourages Arkansans to Consider Getting 'Trump Vaccine'*, WASH. EXAM'R (July 25, 2021, 5:14 PM), <https://www.washingtonexaminer.com/news/sarah-huckabee-sanders-encourages-trump-vaccine> [<https://perma.cc/R4PP-E5MD>] ("Former White House press secretary Sarah Huckabee Sanders said she got the 'Trump vaccine' and urged others to contemplate following suit as Arkansas experiences skyrocketing rates of COVID-19."). Ironically, former Trump administration official Larry Kudlow has called on Twitter and Facebook to restore President Trump's accounts so that he can promote vaccination. Andre J. Ellington, *Larry Kudlow Calls on Twitter, Facebook to Lift Trump Ban So He Can Promote COVID Vaccine*, NEWSWEEK (July 27, 2021, 9:28 PM), <https://www.newsweek.com/larry-kudlow-calls-twitter-facebook-lift-trump-ban-so-he-can-promote-covid-vaccine-1613754> [<https://perma.cc/JRS3-F5ST>].

349. See Aaron Blake, *Trump and Top Ally Get Booed by the Monster Trump's GOP Created*, WASH. POST (Aug. 23, 2021, 11:40 AM), <https://www.washingtonpost.com/politics/2021/08/23/trump-booed-gop-vaccines/> [<https://perma.cc/3CNZ-6ENR>] (reporting that crowd

followers, the vaccines seem to be the unwanted orphans of his presidency.

III. SOME CONSTITUTIONAL CONSEQUENCES

One might be tempted to interpret the foregoing narrative as a unique chapter in our national history—simply the story of a singularly vain and inexperienced president who operated mainly on the basis of personal and political self-interest, with an uncanny ability to exploit the grievances, fears, and insecurities of others. Or one might be tempted to see it as the story of such a person who was assisted by an unusual group of similarly self-interested political advisors and a few hapless government scientists, all of whom were confronted with an extraordinary challenge that was too great for them to handle. But there is far more to the story than that; and there is far more to be learned from this narrative about the nature of our constitutional system and the ways in which it does or does not work.³⁵⁰ There may also be something to be learned about our public values, and what the consequences are of treating the president as if they were a king, based on the fiction that the president alone is accountable to all the people; of treating certain aspects of individual liberty as absolute; and of always treating government as the problem, rather than as part of the solution.³⁵¹

A. Federalism

As we have seen, the primary responsibility for protecting the public health rests with the states because the police power belongs to the states,

booed in response to President Trump's support for vaccines). But President Trump also has criticized booster shots as simply a drug industry scam to make money. See Steve Benen, *Despite a Good Start, Trump's Stance on Vaccines Gets Much Worse*, MSNBC (Aug. 19, 2021, 7:42 AM), <https://www.msnbc.com/rachel-maddow-show/despite-good-start-trump-s-stance-vaccines-gets-much-worse-n1277144> [<https://perma.cc/N9ER-FR7H>] (reporting that Trump referred to booster shots as a "moneymaking operation"). He was later booed when he disclosed that he had been boosted. See Jill Colvin, *Trump Reveals He Got COVID-19 Booster Shot to a Booing Crowd*, PBS NEWS HOUR (Dec. 20, 2021, 3:38 PM), <https://www.pbs.org/newshour/politics/trump-reveals-he-got-covid-19-booster-shot-to-a-booing-crowd> [<https://perma.cc/JR43-G3AW>] ("Trump made the disclosure [in Dallas] . . . during the final stop of 'The History Tour,' a live interview show he [had] been doing with former Fox News host Bill O'Reilly.").

350. See generally Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), <https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [<https://perma.cc/VAR5-GVNN>].

351. See Ronald R. Reagan, *Inaugural Address* (Jan. 20, 1981), <https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981> [<https://perma.cc/YH5C-ZQND>] ("In this present crisis, government is not the solution to our problem; government is the problem."). As a scholar, Justice Elena Kagan endorsed the view that concentrated power in the presidency was justified based on the president's unique accountability to all the people. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001).

and safeguarding the public health falls within the police power.³⁵² As we have also seen, some states responded swiftly to the threat posed by the COVID-19 pandemic, while others did not.³⁵³ In any event, individual states are not well equipped to respond to a public health emergency of national, let alone global, dimensions. Pandemics do not respect political boundaries. The national government has an important role to play in responding to public health threats that are international, national, or multistate in scope, or that have the potential to become so; these are the kinds of problems that necessarily require a national response.³⁵⁴ The national government has no police power, but its power to act when the public health is threatened nationally may be found in its enumerated powers, such as the Spending Clause and the Commerce Clause, and by virtue of the Supremacy Clause.³⁵⁵ The line between state and national power is not always clear, however, and, as in other areas of law and government, law cannot always settle everything.³⁵⁶ What the national government can hope to accomplish in its interactions with the states must sometimes depend on moral leadership, collaboration, and persuasion, rather than diktat.³⁵⁷ The federal government succeeds, at least in part, by persuading the states that the threat is serious and national in

352. This authority rests with the states because the police power belongs exclusively to the states; the federal government has no police power. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24–25 (1905).

353. See Mervosh, *supra* note 171 (chronological listing of state pandemic response orders).

354. That is particularly true where the President and Congress act in concert. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (noting the different degrees of presidential powers depending on whether the president acts in concert with Congress or contrary to the will of Congress).

355. See Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 20 (2005) (“The application of police power has traditionally implied a capacity to (1) promote the public health, morals, or safety, and the general well-being of the community; (2) enact and enforce laws for the promotion of the general welfare; (3) regulate private rights in the public interest; and (4) extend measures to all great public needs.”).

356. See, e.g., Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018) (noting that President Trump disregarded numerous norms and conventions during his presidency); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 ILL. L. REV. 1847 (2013) (discussing constitutional conventions and norms). See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 97–117 (2018).

357. Richard Neustadt has argued that “despite [the president’s] status, he does not get action without argument. Presidential power is the power to persuade.” RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 11 (1990). If that is true generally, as Professor Neustadt thought, it is particularly true with respect to the president’s interactions with state officials.

scope, affecting not just one or a few states, but the whole nation.³⁵⁸

Dealing with public health threats on a national scale through moral leadership and persuasion is difficult, in part because a threat is not likely to be felt in the same way or to the same extent throughout the country at the same time. Moreover, in a culturally diverse and politically polarized country, people in different regions and with different backgrounds will necessarily approach problems from many different perspectives.³⁵⁹ That was true of COVID-19. It did not ravage all parts of the country at the same time or to the same degree, and the states responded accordingly. The states that were the hardest hit earliest on tended to take the threat most seriously; they were most likely to look to the federal government for leadership; and they were most vocal in calling for federal action. Those that were not seriously affected at the beginning of the pandemic initially saw little need for governmental action, whether state or federal.³⁶⁰ Coincidentally, the states that were hardest hit early on were states with large numbers of Democratic voters, who were, perhaps, more predisposed than others to look favorably on federal action.³⁶¹

The pandemic also arrived at a particularly inopportune time. When President Trump came to power, large numbers of Americans already

358. To say that the national government must make all the states understand the seriousness of the threat posed by a pandemic does not, of course, mean that the same rules must be applied throughout the country, without regard to the degree of danger felt in various parts of the country at a particular time; but the response must be coordinated.

359. See generally COLIN WOODARD, *AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2011).

360. See David A. Lieb, *Federal Helping Hand Slapped Away*, SUNDAY CAP. (June 4, 2022), <https://www.pressreader.com/usa/the-capital/20220604/page/5> [<https://perma.cc/F5W4-A6EB>] (explaining that some units of local government declined to accept federal funding or other forms of federal assistance during the pandemic for fear of becoming subject to relevant federal regulations); Andy Sullivan, *COVID-19 Still Rages, but Some U.S. States Reject Federal Funds to Help*, REUTERS (Nov. 2, 2021, 3:32 PM), <https://www.reuters.com/world/us/covid-19-still-rages-some-us-states-reject-federal-funds-help-2021-11-02/> [<https://perma.cc/44MU-ZPZ3>] (“The state’s Republican-led legislature this year voted down \$40 million in federal aid available for COVID-19 testing in schools. Another \$1.8 billion in pandemic-related federal assistance is sitting idle in the state treasury, waiting for lawmakers to deploy it.”).

361. See Elliott Davis Jr., *Study: COVID-19 Deaths Concentrated in Urban Areas Represented by Democrats*, U.S. NEWS & WORLD REP. (May 29, 2020), <https://www.usnews.com/news/cities/articles/2020-05-29/report-covid-19-takes-greater-toll-on-urban-areas-represented-by-democrats> [<https://perma.cc/N2GJ-HPWT>] (“The places hardest hit by COVID-19 are largely represented by congressional Democrats . . .”).

distrusted the federal government.³⁶² In fact, President Trump had campaigned against the federal government in the 2016 election³⁶³ and had spent his first three years in office continuing to attack it.³⁶⁴ Many Americans were convinced that the federal government was bent on taking away their liberty (which many believed to be absolute), and it was to that group that President Trump looked for much of his support.³⁶⁵ In addition, a strong anti-vaccination movement had taken hold in the country long before Donald Trump had won the presidency—a fact that would become salient with the arrival of the pandemic and the development of vaccines to fight it.³⁶⁶

While some states eagerly looked to the federal government for leadership in the early stages of the pandemic, President Trump was not in-

362. See generally Barry Sullivan, *Democratic Conditions*, 51 LOY. U. CHI. L.J. 555, 570 (2019) (“[A] constitutional democracy cannot exist indefinitely—let alone flourish—when a substantial number of citizens lack trust or confidence in government.”).

363. See Mona Vakilifathi, *Why Trump Is Trying to Reduce the Status of the Department of Education*, BROOKINGS (July 16, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/07/16/why-trump-is-trying-to-reduce-the-status-of-the-department-of-education/> [<https://perma.cc/MR3V-5QWQ>] (“In the 2016 presidential election, then-candidate Trump campaigned to terminate Common Core and the Department of Education to restore local control in education.”).

364. See Lisa Rein et al., *How Trump Waged War on His Own Government*, WASH. POST (Oct. 29, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed_story.html [<https://perma.cc/W5EE-L8N6>] (listing the different government officials who were discredited by President Trump during his time in office); Amy Fried & Douglas B. Harris, *Conservatives Have Long Stoked Distrust in Government—and Now We’re Paying for It*, WASH. POST (Oct. 12, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/12/conservatives-have-long-stoked-distrust-government-now-were-paying-it/> [<https://perma.cc/9G8F-X9GH>] (“[A]nti-government rhetoric has been the central strategy of the contemporary Republican Party and the glue that most reliably bound together its coalition dating back to Barry Goldwater and the rise of the conservative movement within the GOP.”).

365. See Fried & Harris, *supra* note 364 (“Trump created GOP unity and resolve by tapping into extant distrust, rousing restive grass-roots conservatives who disliked establishment Republicans and using conservative media to spew an overtly racialized and xenophobic version of the GOP’s now-standard message.”). See also Sabrina Tavernise, *First They Fought about Masks. Then Over the Soul of the City*, N.Y. TIMES (Dec. 26, 2021), <https://www.nytimes.com/2021/12/26/us/first-they-fought-about-masks-then-over-the-soul-of-the-city.html> [<https://perma.cc/XNL5-V7VK>] (“From lockdowns to masks to vaccines to school curriculums, the conflicts in America keep growing and morphing, even without Donald Trump, the leader who thrived on encouraging them, in the White House.”); PAUL A. OFFIT, *DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL* (2015 ed.) (detailing the rise of the anti-vaccination movement and its consequences, including the return of serious, preventable diseases).

366. See Fried & Harris, *supra* note 364 (“Not only has distrust in government contributed to vaccine hesitancy, but following a script too long in the making, many Republican leaders have encouraged citizens to see mitigation methods—like mask and vaccine mandates—as driven by malevolent motives.”).

clined to respond by invoking the formal powers of the federal government. For example, instead of using the spending power to coordinate the acquisition of much-needed personal protective equipment and ventilators, as several states implored him to do, the president told the states that they were on their own. That caused the states to compete for scarce resources against each other (and the federal government), thereby undermining the effectiveness of the nation's pandemic response and adding substantially to its costs.³⁶⁷ President Trump's approach to the federal role in vaccine development was quite different. His commitment to vaccine development involved massive amounts of federal funds, but it did not create the same occasion for presidential accountability that undertaking a strong coordinating role would have entailed. Vaccine development was not something that would be immediately transparent or amenable to reporting on the twenty-four-hour news cycle. It would involve scientists quietly working away in laboratories; it would have few public relations implications unless and until it was successful.

President Trump also had little appetite for accomplishing state-federal coordination through moral leadership and persuasion. After attacking the "Deep State" year after year, as both candidate and president, how

367. See WRIGHT, *supra* note 4, 117–19 (emphasizing the lack of action by the federal government and the reaction of local leaders); LEONNIG & RUCKER, *supra* note 55, at 85 (“Rhode Island governor Gina Raimondo, a Democrat, later recalled. ‘Like, wow, we’re really on our own here.’”); LEWIS, *supra* note 4, at 251–55 (discussing the scarcity of medical supplies such as testing swabs); Jacob Knutson, *Illinois Governor: States Are “Competing against Each Other” for Medical Supplies*, AXIOS (Mar. 22, 2020), <https://www.axios.com/illinois-gov-states-competing-medical-supplies-822678c5-4301-4c4c-a5a5-887da539b63f.html> [<https://perma.cc/5YUC-J9AL>] (“We’re all competing against each other. This should have been a coordinated effort by the federal government, and the National Defense Authorization that the president has to essentially push this manufacturing really hasn’t gone into effect in any way. . . . [W]e are overpaying . . .”); Lauren Feiner, *States Are Bidding against Each Other and the Federal Government for Important Medical Supplies—and It’s Driving up Prices*, CNBC (Apr. 11, 2020, 8:22 AM), <https://www.cnbc.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html> [<https://perma.cc/B4KF-TEZ6>] (“States are bidding against the federal government to buy personal protective equipment (PPE) for medical staff. Low supplies and the existence of multiple bidders has made it difficult for states to get enough protective equipment for medical staff.”). Even some federal officials recognized the inadequacy of the federal response and urged some state officials to formulate a national response. See LEWIS, *supra* note 4, at 183–84 (“The goal was to find at least one state to take the lead and roll out an aggressive response to the virus, introduce the social interventions outlined in the pandemic plan [that the Trump administration would not follow], and create a domino effect.”); *id.* at 225–26 (Acting DHS Deputy Secretary Ken Cuccinelli thought California should take the lead in “do[ing] the right thing.”). In fact, federalism allowed some states to frame a more aggressive response to the pandemic, even if their efforts were hampered by a relative lack of resources. See Ashish Jha, *One Virus, Two Americas*, FOREIGN AFFS. (Sept. 22, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-09-22/coronavirus-one-virus-two-americas> [<https://perma.cc/6HPZ-CG2H>] (“Federalism, in other words, at least partially insulated some states from the most irresponsible decisions of federal leaders, allowing them to act independently to bring the virus under control.”).

could he credibly urge his followers to collaborate with it? From that perspective, President Trump's announcement that he would not follow the CDC's mask recommendation, the dramatic tearing-off of his mask after his release from Walter Reed, his indoor monster rallies, and his ridiculing of Joseph Biden and others for wearing masks, all make perfect sense. Of course, President Trump's disdain for masks also buttressed the image of a certain kind of manliness that he sought to convey,³⁶⁸ and it was one that resonated with the libertarian views and distrust of experts and elites that marked many of his followers.³⁶⁹ His approach to testing—asserting that we would not have any cases of COVID-19 if we did not test people for the virus—was of a piece with his attitude towards masking. When the president left office, he left behind a country that was deeply split over masking, social distancing, and vaccination, among other things, and highly vulnerable to virus mutations that were likely to develop and subsequently did.

The president seems not to have wanted to encourage the states to cooperate with the federal government. If he wanted to do so, he would have had to convince the states of both the seriousness and the commonality of the threat they faced. But he did the opposite. He went to extraordinary lengths to downplay the significance of the pandemic, repeatedly telling the public that the virus was not dangerous and would just

368. See, e.g., Megan Garber, *The 'Pussy' Presidency*, ATLANTIC (Jan. 17, 2021), <https://www.theatlantic.com/culture/archive/2021/01/donald-trump-pussy-presidency/617699/> [<https://perma.cc/LDU5-JKD>] ("It elevated an extremely mild inconvenience—the wearing of a face mask—into an alleged infringement of Americans' rights. It ratified one of the basest assumptions of Trumpism: that freedom is, in its essence, manly. And that the common good, by contrast, carries the stain of femininity. *Patriot or pussy*. That false choice is killing people."); Claire Cain Miller & Alisha Haridasani Gupta, *What Makes a Man Manly? Trump and Biden Offer Competing Answers*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/10/30/upshot/trump-biden-masculinity-fatherhood.html> [<https://perma.cc/MZL9-MHEU>] ("President Trump, in his personality and policies, has presented himself as hypermasculine: tough, plain-spoken, the patriarch who is unafraid to offend and unapologetic when he does.").

369. See generally Eric Merkley & Peter John Loewen, *Anti-Intellectualism and the Mass Public's Response to the COVID-19 Pandemic*, 5 NATURE HUM. BEHAV. 706 (June 2021), <https://www.nature.com/articles/s41562-021-01112-w> [<https://perma.cc/4ABV-VQSL>] (concluding that anti-intellectualism, a generalized distrust of experts and intellectuals that is popular with ideological conservatives, populists, and religious fundamentalists, is related to a reduced fear of COVID-19 and reduced compliance with masking); Michael Scherer, *Trump's Mockery of Wearing Masks Divides Republicans*, WASH. POST (May 27, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trumps-mockery-of-wearing-masks-divides-republicans/2020/05/26/2c2bdc02-9f61-11ea-81bb-c2f70f01034b_story.html [<https://perma.cc/ZVC6-BRKN>] ("Male Republicans, a key part of Trump's base, were more skeptical of mask wearing than other groups . . .").

disappear.³⁷⁰

Federalism need not have posed any serious obstacle to formulating an effective national response to COVID-19. The federal government had more than enough formal and informal authority to accomplish that goal, but President Trump did not use the tools he had available. Instead, he effectively sabotaged the country's response by acting, not as the federal government's leader, but as its leading critic. Although testing for the virus was essential for its containment, the president discouraged testing.³⁷¹ When the president sent mixed messages about compliance with federal recommendations concerning masks, some states were emboldened to resist compliance. Of course, the federal public health officials' failure to create reliable tests and their inconsistent messages about the benefits of masking did not help. In any event, opposition to masking, social distancing, and vaccination hardened, not only among individuals, but often as a matter of official state policy.³⁷² Some political figures in those states had been emboldened by President Trump's example and adopted counterproductive policies. Some states became hotbeds for infections that obviously could not be contained within their own borders.

The situation changed with respect to federalism after the election of a new president. States that opposed strong measures against the pandemic were largely led by Republican officials who had little incentive for cooperating with the new administration. Many states challenged the Biden administration's various initiatives in the name of individual liberty and states' rights.³⁷³ Given President Trump's success in altering the composition of the federal judiciary, those states anticipated that their challenges

370. After being released from Walter Reed, the president emphasized again that people should not let the virus affect the way they lived. Toluse Olorunnipa & Josh Dawsey, *Trump Returns to White House, Downplaying Virus That Hospitalized Him and Turned West Wing into a 'Ghost Town,'* WASH. POST (Oct. 5, 2020, 7:22 PM), https://www.washingtonpost.com/politics/trump-walter-reed-discharge-mask/2020/10/05/91edbe9a-071a-11eb-859b-f9c27abe638d_story.html [<https://perma.cc/QM4G-5SCR>]. The president clearly undercut the government's public health experts, but, as we have seen, they undercut themselves with their own early stumbles. See Quint Forgey, *'Everyone Is Lying': Trump Undercuts Public Health Officials in Fresh Attacks,* POLITICO (July 13, 2020, 8:56 AM), <https://www.politico.com/news/2020/07/13/trump-questions-public-health-experts-twitter-359388> [<https://perma.cc/76NU-EF94>] ("Trump has continued to express public dissatisfaction with [Dr.] Fauci for his dire assessments of the outbreak . . .").

371. See Sheth, *supra* note 279 (providing examples of President Trump's discouragement of testing with the aim of having fewer reported COVID-19 cases).

372. See Jack Brewster, *19 States Still Don't Mandate Masks. 18 Are Run by Republican Governors,* FORBES (July 24, 2020, 5:51 PM), <https://www.forbes.com/sites/jackbrewster/2020/07/24/19-states-still-don-t-mandate-masks-18-are-run-by-republican-governors/?sh=226967806243> [<https://perma.cc/UPM3-JJGJ>] (discussing increased opposition to COVID-19 protocols).

373. See David A. Lieb, *11 States File Suit against Biden's Business Vaccine Mandate,* PBS

would find a receptive judicial audience, and some did.³⁷⁴

B. Separation of Powers

For the federal government to deal effectively with public health challenges that are national in scope, Congress must have enacted legislation authorizing executive action, and the executive must be both capable and willing to act in accordance with that authority. In this instance, the executive was empowered to act by existing legislation, as well as by additional legislation that Congress enacted specifically to meet the challenges created by the Covid-19 pandemic, but, as we have seen, the executive did not exercise that authority in a consistent, credible, and effective way. By and large, the principle of separation of powers posed few theoretical or practical obstacles to strong executive action. But the executive did not make effective use of the tools that Congress had provided. The president refused to take responsibility and told the states that they were largely on their own.

We usually think of separation of powers in Madisonian terms, with each of the branches pressing against the others, jealously guarding their respective institutional powers, and jousting for any powers that may be contested. The separation and balancing of powers are meant to protect liberty and prevent tyranny, but the Constitution also contemplates—and requires—a government that works. As Justice Jackson wrote in *Youngstown*, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”³⁷⁵ One possible barrier to the achievement of a workable government is gridlock, that is, where the

NEWS HOUR (Nov. 5, 2021, 8:29 AM), <https://www.pbs.org/newshour/health/11-states-file-suit-against-bidens-business-vaccine-mandate> [<https://perma.cc/G7KU-XFZX>] (discussing suit filed by eleven states challenging President Biden’s business vaccination or test mandate for businesses employing one hundred or more workers); David A. Lieb, *States Challenge Biden’s Vaccine Mandate for Health Workers*, U.S. NEWS & WORLD REP. (Nov. 10, 2021), <https://www.usnews.com/news/health-news/articles/2021-11-10/states-challenge-bidens-vaccine-mandate-for-health-workers> [<https://perma.cc/S5BG-NJFJ>] (discussing lawsuits filed by ten states to challenge President Biden’s vaccine mandate for health care workers).

374. See Morgan Chalfant, *Trump Haunts Biden Vaccine Mandate in Courts*, HILL (Dec. 5, 2021, 6:11 AM), <https://thehill.com/homenews/administration/584306-trump-haunts-biden-mandate-in-courts> [<https://perma.cc/4HXP-6CXB>] (discussing role of federal courts as an obstacle to the implementation of President Biden’s vaccine mandates); see also *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (staying implementation of OSHA rule requiring vaccination as a matter of workplace safety); *Biden v. Missouri*, 142 S. Ct. 647 (2022) (staying injunction against enforcement of healthcare worker rule).

375. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (discussing the separation of powers).

legislative branch (whether because of disagreements within and between the components of the legislative branch or for other reasons) declines to give the executive branch the tools it needs to make the government work. Another less obvious barrier to the achievement of a workable government is the executive branch's lack of interest in using the tools that Congress has provided.

There was significant legislation already on the books, such as the Defense Production Act,³⁷⁶ the Pandemic and All-Hazards Preparedness Act of 2006,³⁷⁷ and the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019.³⁷⁸ But Congress also enacted new legislation, such as the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020,³⁷⁹ the Families First Coronavirus Response Act, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, all of which were enacted in March 2020, as well as various paycheck protection laws that were enacted in April, June, July, and December.³⁸⁰ As this list of legislative initiatives suggests, Congress proved to be an enthusiastic partner, rather than a jealous coequal branch of government, in terms of responding to the pandemic.³⁸¹ Taken together, the new and existing legislation gave President Trump substantial authority to ameliorate the effects of the pandemic; but he was sometimes reluctant to exercise that authority. For example, he delayed making use of the Defense Production Act, saying that he considered its use a "worst case scenario."³⁸² The President did not always exercise the powers that Con-

376. See generally 50 U.S.C. § 4501 *et seq.*

377. See generally Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417, 120 Stat. 2831 (2006).

378. See generally Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019, Pub. L. No. 116-22, 133 Stat. 905 (2019).

379. See generally Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020).

380. See generally Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641; Act of July 4, 2020, Pub. L. No. 116-147, 134 Stat. 660 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182.

381. See, e.g., Sarah A. Binder & David Dollar, *The Politics of Congress's COVID-19 Response*, BROOKINGS: DOLLAR & SENSE PODCAST (Apr. 20, 2020), <https://www.brookings.edu/podcast-episode/the-politics-of-congress-covid-19-response/> [<https://perma.cc/F5XJ-L9ZN>] (discussing Congress's response to COVID-19).

382. See Yelena Dzhanova, *Trump Compelled These Companies to Make Critical Supplies, but Most of Them Were Already Doing It*, CNBC (Apr. 3, 2020, 1:21 PM), <https://www.cnbc.com/2020/04/03/coronavirus-trump-used-defense-production-act-on-these-companies-so-far.html> [<https://perma.cc/48XB-PVKN>] ("But he put off invoking [the Defense Production Act], saying in a March 18 tweet that he would only use it 'in a worst case scenario.'"); Jillian Stern, *The COVID-19 Pandemic and the Defense Production Act: Government Misuse and*

gress intended for him to deploy for the common good, and that was particularly obvious in the period between the election and the inauguration, when he simply left the field as the casualties mounted.³⁸³

One particular point of contention was President Trump's effort to avoid any oversight of his administration's spending of the \$2.2 trillion authorized by the CARES Act.³⁸⁴ Although the Act included specific provisions relating to oversight,³⁸⁵ the president announced in a signing statement that the provisions were unconstitutional, and that he would not comply with them.³⁸⁶ Between April 1 and May 15, 2020, the president also dismissed five inspectors general, the non-partisan officials charged with ferreting out waste, fraud, and abuse in federal agencies.³⁸⁷ One of

Failures, 51 PUB. CONT. L.J. 323, 339–40 (2021). Stern also noted the absence of an appropriate level of record-keeping and oversight with respect to the Trump administration's use of the Defense Production Act. *Id.* at 340.

383. See ABUTALEB & PALETTA, *supra* note 76, at 450. Problems of presidential power are perceived more often when presidents have exceeded (rather than underutilized) the powers that the Constitution and laws have granted them. See generally, e.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

384. See generally *Coronavirus Aid, Relief, and Economic Security ("CARES") Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020).

385. See Richard Blumenthal & Josh Chafetz, *Trump Is Already Trying to Get Around CARES Act Oversight*, SLATE (Apr. 16, 2020, 5:53 PM), <https://slate.com/news-and-politics/2020/04/richard-blumenthal-trump-cares-act-oversight.html> [<https://perma.cc/4F66-ET6V>] ("Most centrally, it created both a special inspector general for pandemic recovery and a Pandemic Relief Accountability Committee, both of which are charged with detecting and preventing fraud, waste, abuse, and mismanagement of the money appropriated by Congress The committee is made up of inspectors general— independent watchdogs— from different departments within the federal government. Importantly, both the committee and the special inspector general are required to make reports to Congress, as well as to the president and the secretary of the treasury.").

386. See Charlie Savage, *Trump Suggests He Can Gag Inspector General for Stimulus Bailout Program*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/trump-signing-statement-coronavirus.html> [<https://perma.cc/585F-J2LA>] (discussing President Trump's refusal to incorporate certain provisions into an economic stabilization package); Courtney Bubl , *Trump Objects to Pandemic Spending Oversight, but Congress and IGs Still Have Authority*, GOV'T EXEC. (Mar. 30, 2020), <https://www.govexec.com/oversight/2020/03/trump-objects-pandemic-spending-oversight-congress-and-igs-still-have-authority/164219/> [<https://perma.cc/8UY8-4XN4>] (discussing President Trump's refusal to enforce certain oversight provisions in the CARES Act); Andrew C. Brunsten, *Inspectors General and the Law of Oversight Independence*, 30 WM. & MARY BILL RTS. J. 1, 30–34 (2021) (discussing President Trump's unprecedented removal of inspectors general).

387. See Aaron Blake, *Trump's Slow-Motion Friday Night Massacre of Inspectors General*, WASH. POST (May 18, 2020, 8:35 AM), <https://www.washingtonpost.com/politics/2020/05/16/trumps-slow-moving-friday-night-massacre-inspectors-general/> [<https://perma.cc/GQL3-MJ73>] (discussing President Trump's removals of several inspectors gen-

the dismissed inspectors general was Glenn Fine, who had been slated to oversee spending under the CARES Act as head of the Pandemic Response Accountability Committee;³⁸⁸ another was Christi Grimm, who had called attention to severe shortages of testing kits and personal protective equipment.³⁸⁹ It was later disclosed that the federal government also lost billions of dollars in federal funds because of fraud.³⁹⁰

During the Trump administration, the most serious separation of powers controversies arose at the state level, with some state courts holding that governors had overstepped their bounds by acting in the absence of

eral). Interestingly, Congress created several inspector general positions in the aftermath of Watergate, and the Office of Legal Counsel initially concluded that they were unconstitutional. *See generally* BEN WILHELM, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT (2019); TODD GARVEY, CONG. RSCH. SERV., R46762; CONGRESS'S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL (2021); Bruce A. Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 671, 688–90 (2021) (providing an overview of the inspector generals' role); *see generally* Inspector Gen. Legis., 77-8 Op. Att'y Gen. 16 (1977).

388. *See* Ellen Nakashima, *Trump Removes Inspector General Who Was to Oversee \$2 Trillion Stimulus Spending*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/national-security/trump-removes-inspector-general-who-was-to-oversee-2-trillion-stimulus-spending/2020/04/07/2f0c6cb8-78ea-11ea-9bec-c5bf9d2e3288_story.html [<https://perma.cc/4NXL-6NX5>] (discussing President Trump's removal of the chair of the federal panel that Congress created to oversee the government's coronavirus stimulus spending).

389. *See* Lisa Rein, *Trump Replaces HHS Watchdog Who Found 'Severe Shortages' at Hospitals Combating Coronavirus*, WASH. POST (May 2, 2020), https://www.washingtonpost.com/politics/trump-replaces-hhs-watchdog-who-found-severe-shortages-at-hospitals-combating-coronavirus/2020/05/02/6e274372-8c87-11ea-ac8a-fe9b8088e101_story.html [<https://perma.cc/S33P-WV8R>] (discussing President Trump's anger occasioned by a negative report issued by Christi Grimm, a principal deputy inspector general who was acting as the HHS inspector general, and his attempted replacement of her); *see also* Amy Goldstein, *HHS Watchdog Finds Severe Hospital Shortages in Combating Covid-19*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/national/health-science/hhs-watchdog-agency-finds-severe-hospital-shortages-in-combating-covid-19/2020/04/06/2906af7e-7811-11ea-a130-df573469f094_story.html [<https://perma.cc/99PU-5AAH>] (discussing the HHS inspector general's report that angered President Trump and caused him to seek the removal of Christi Grimm).

390. *See, e.g.*, Tony Romm & Yeganeh Torbati, *'A Magnet for Rip-Off Artists': Fraud Siphoned Billions from Pandemic Unemployment Benefits*, WASH. POST (May 15, 2022), <https://www.washingtonpost.com/us-policy/2022/05/15/unemployment-pandemic-fraud-identity-theft/> [<https://perma.cc/5A75-HJ45>] (discussing fraud in the pandemic unemployment benefits program); Ayman Peacock, *Author Uncovers Fraud in Trump Admin's COVID Aid Deals*, MSNBC (Apr. 15, 2022), <https://www.msnbc.com/ayman-peacock/watch/author-uncovers-fraud-in-trump-admin-s-covid-aid-deals-137835590001> [<https://perma.cc/A7UB-QVDM>] (discussing David McSwane's book concerning President Trump and fraud in pandemic relief programs); Ken Dilanian & Laura Strickler, *'Biggest Fraud in a Generation': The Looting of the Covid Relief Plan Known as PPP*, NBC NEWS (Mar. 28, 2022), <https://www.nbcnews.com/politics/justice-department/biggest-fraud-generation-looting-covid-relief-program-known-ppp-n1279664> [<https://perma.cc/Q3KT-TMX8>] (discussing fraud in pandemic relief programs); Eamon Javers & Scott Zamost, *Criminals Have Stolen Nearly \$100 Billion in Covid Relief Funds, Secret Service Says*, CNBC (Dec. 21, 2021), <https://www.cnbc.com/2021/12/21/criminals-have-stolen-nearly-100-billion-in-covid-relief-funds-secret-service.html> [<https://perma.cc/N35U-WXXA>] (discussing the massive amount of fraud involved in the pandemic relief program).

legislation.³⁹¹ As President Biden has adopted more aggressive policies to curb the spread of the virus and deal with its economic consequences, such questions have arisen more frequently at the federal level, and the Supreme Court has now struck down one of those initiatives.³⁹²

C. The Unitary Executive

In May 2020, the editors of the British medical journal the *Lancet* published a scathing appraisal of the CDC's role in the federal government's response to COVID-19. The editors wrote: "The CDC needs a director who can provide leadership without the threat of being silenced and who has the technical capacity to lead today's complicated effort."³⁹³ This criticism is interesting because the very point of the unitary executive theory is that the president, subject to two perhaps fragile and undertheorized exceptions,³⁹⁴ should have the absolute right to "silence"—or terminate—any political appointee. Chief Justice Roberts has summed up the unitary executive theory in the simplest terms: "the 'executive Power'—all of it—is 'vested in a President.'"³⁹⁵ In other words, the president incarnates the executive power, and all those who make executive decisions must stand within a chain-of-command that begins with the president; all must be accountable to the president; and all must be removable at will by the president or by someone who reports to the President.

This principle, as well as its two exceptions, are apparently agnostic with respect to subject matter. Regardless of how technical or ill-suited to partisan decision-making the subject matter may be, the president's

391. See Daniel Goldberg, *The Consequences of Public Health Law Vacuums*, PETRIE-FLOM CTR. HARV. L. SCH.: BILL OF HEALTH (Jan. 25, 2021), <https://blog.petrieflom.law.harvard.edu/2021/01/25/public-health-law-vacuum-covid-19/> [<https://perma.cc/4YL4-R46Q>] (discussing state court cases that rejected the claimed legal authority of state governors to respond to the pandemic).

392. See generally *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022).

393. Editorial, *supra* note 149.

394. See *supra* pages 140–41 (discussing Chief Justice Roberts's opinion in *Seila Law*, in which he restates the law in a way that makes *Myers* a statement of the general principle, with *Humphrey's Executor* and *Morrison* providing the only two narrow, untheorized exceptions to it).

395. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020). President Andrew Jackson held this view. See *President Jackson's Message of Protest to the Senate* (April 15, 1834), https://avalon.law.yale.edu/19th_century/ajack006.asp [<https://perma.cc/X9KU-KSQL>] (explaining removal of Treasury Secretary William J. Duane); see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 82 (4th ed. 1957) (summarizing the Jacksonian conception of the presidency); see generally LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861*, 34–40 (3d ed. 1963).

will must be effectuated.³⁹⁶ That principle controls, whether the decision relates to the money supply, the census, the public health, or any other possible governmental concern. Thus, the Office of Legal Counsel (OLC) of the Department of Justice opined in 1988 that a statutory provision delegating to the CDC director sole discretion with respect to the content of a mass mailing pertaining to AIDS was unconstitutional because it violated the unitary executive principle.³⁹⁷ The provision required that the CDC director “shall cause to be distributed without necessary clearance of the content by any official, organization, or office, an AIDS mailer to every American household by June 30, 1988.”³⁹⁸ OLC summarized its analysis: “In short, the President has complete constitutional authority to supervise the Director of the CDC (a subordinate executive branch officer) in connection with the dissemination of AIDS fliers to the general public (an executive function). Accordingly, by preventing the President from supervising the CDC Director in this regard, the Continuing Resolution provision at issue . . . unconstitutionally infringes upon the President’s exercise of that authority.”³⁹⁹ OLC further observed that, “it matters not at all that the information in the AIDS fliers may be highly scientific in nature. The President’s supervisory authority encompasses *all* of the activities of his executive branch subordinates, whether those activities be technical or non-technical in nature. This necessarily follows from the fact that the Constitution vests ‘[t]he entire Executive Power,’ without subject matter limitation, in the President.”⁴⁰⁰

This understanding of the president’s power is justified, the theory goes, because the president is the only federal official (apart from the vice president) who is elected by all the people; the president must therefore have total control over—and be accountable for—all aspects of administration. If the president abuses any aspect of that awesome and far-reaching bundle of powers, the only remedy is impeachment or electoral

396. *Cf. Wiener v. United States*, 357 U.S. 349, 353 (1958) (“[Absent specific statutory language,] the most reliable factor for drawing an inference regarding the President’s power of removal . . . is the nature of the function that Congress vested in the . . . Commission.”). *But see United States v. Arthrex, Inc.* 141 S. Ct. 1970 (2021) (holding that administrative patent judges’ adjudicatory power, the exercise of which was judicially reviewable, but not administratively reviewable by any higher executive official, was incompatible with their status as inferior officers appointed by the secretary of commerce, rather than by the President with the advice and consent of the Senate).

397. *Statute Limiting the President’s Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. O.L.C. 47 (Mar. 11, 1988).

398. *Id.*

399. *Id.* at 56.

400. *Id.* at 57.

defeat.⁴⁰¹ As we have seen, the unitary executive theory purports to rest on original understanding, but many scholars have shown that there is good reason to doubt that justification. Moreover, as a matter of policy, it seems disastrous to make protection of the public health depend on the willingness of government public health experts to fall on their swords for the sake of science, day in and day out, or for as many days as their employment continues.⁴⁰²

The former president was single-mindedly focused on doing what he deemed necessary to win re-election, and the decisions he made with respect to the pandemic seem to have been made mainly with that goal in mind. Certainly, he lost any interest in fighting the pandemic once he had lost the election and turned his attention to finding ways to remain in power.⁴⁰³ During 2020, President Trump did many things that were

401. In some circumstances, the legal responsibility for administrative decision-making may technically rest with a lower ranking officer. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 149 (1803) (“[A]s a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions . . . [the secretary of state] is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws.”); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) (“[I]t would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”). If Congress has assigned a particular decision to a lower-ranking official, the president cannot personally make the decision, but the president may appoint (subject to Senate confirmation if required) and remove a series of officers until finding one who will do as directed. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 142 (2008) (“[T]he fact that appointees can be removed . . . at any time for any reason makes them more responsive than their careerist counterparts, who are protected from removal by procedural rights and appeals.”). A high-ranking government official who objects to a presidential decision or policy may also choose to resign. See, e.g., John M. Goshko, *Vance Formally Resigns, Citing Raid Opposition*, WASH. POST (Apr. 29, 1980), <https://www.washingtonpost.com/archive/politics/1980/04/29/vance-formally-resigns-citing-raid-opposition/c5b47496-1152-4cd0-8806-e1eb5e541b79/> [<https://perma.cc/4XZ5-J6BS>] (discussing Secretary of State Cyrus Vance’s decision to resign from the Carter administration because of his principled opposition to President Carter’s decision to undertake a military operation in Iran to rescue American hostages).

402. See, e.g., Nicholas Fandos, *Brother of Impeachment Witness Says His Firing Was a Whistle-Blower Reprisal*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/yevgeny-vindman-whistleblower-complaint.html> [<https://perma.cc/YW9A-ELJ2>] (discussing the whistleblower complaint filed by a career army officer who was fired from the White House national security staff following his allegations of ethical and legal wrongdoing against the national security advisor).

403. See, e.g., Abutaleb et al., *supra* note 51 (discussing President Trump’s general mismanagement during the pandemic); Diamond, *supra* note 51 (discussing President Trump’s prioritization of re-election over the pandemic response); Parker et al, *supra* note 342 (highlighting President Trump’s disregard for the effects of COVID-19).

counterproductive in terms of containing the spread of the virus, beginning with his consistent assurances that the virus was not serious and would “just disappear.”⁴⁰⁴ He repeatedly contradicted his scientific advisors and made false and misleading statements, often in their presence, which made it appear that they agreed with him.⁴⁰⁵ Perhaps the most serious damage he did, however, was to the credibility of the government’s public health agencies. He bullied them, manipulated them, and treated them—at times very publicly—as if their main function were to do what was necessary to secure his re-election, as opposed to doing what the public health required. For example, he placed political operatives with no scientific training into the CDC to re-write the time-honored *Mortality and Morbidity Weekly Report* for the purpose of painting a rosier picture than what the data supported.⁴⁰⁶ He pushed HHS Secretary Azar to exercise his legal authority to overrule agency experts and approve drugs that had not been vetted by the FDA, but were recommended to the president by his “very smart” friends.⁴⁰⁷ He also asserted that he had the power personally to approve vaccines if the FDA would not.⁴⁰⁸ In addition, when the president began to think that an approved vaccine might actually be possible before the election, he publicly—and relentlessly—pressured the FDA to cut corners and make that happen.⁴⁰⁹ The FDA ultimately resisted that pressure, but the damage was done. A strong general anti-vaccination movement already existed,⁴¹⁰ and the president’s insistent, if unsuccessful interference in the FDA’s processes surely strengthened the hand of those who would question the integrity of any

404. See Wolfe & Dale, *supra* note 237 (discussing President Trump’s claims that the pandemic will disappear).

405. See Forgey, *supra* note 370; see also Anne Gearan & Lena H. Sun, *Trump Contradicts Health Advisers on Coronavirus Vaccine Timetable as Death Toll Mounts*, WASH. POST (Sept. 17, 2020, 8:16 PM), https://www.washingtonpost.com/politics/trump-redfield-vaccine-timetable/2020/09/17/155ce8ce-f90f-11ea-a275-1a2c2d36e1f1_story.html [<https://perma.cc/NT9C-YBVV>] (discussing President Trump’s contradiction of scientific advisors).

406. See Diamond, *Trump Official Pressured CDC to Change Report on Covid and Kids*, *supra* note 286 (indicating President Trump’s push to change COVID data to show less harm than existed).

407. See ABUTALEB & PALETTA, *supra* note 76, at 221 (““These are very smart people, Larry Ellison and Laura Ingraham, and they say they work, so just approve them.””).

408. See LeBlanc, *supra* note 326 (“President Donald Trump claimed . . . that the White House could override the US Food and Drug Administration if the agency released tougher standards for the authorization of a Covid-19 vaccine”). That view would be consistent, of course, with the 1988 OLC Opinion. See 12 Op. O.L.C. 47, *supra* note 397.

409. See ABUTALEB & PALETTA, *supra* note 76, at 387–88, 394–95 (emphasizing President Trump’s efforts to rush a solution to the COVID-19 pandemic).

410. See David Frum, *Vaccinated America Has Had Enough*, ATLANTIC (July 23, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/vaccinated-america-breaking-point-anti-vaxxers/619539/> [<https://perma.cc/6TBQ-JKNA>] (asserting that the longevity of the pandemic was attributable to the actions of President Trump’s supporters).

COVID-19 vaccine that might ultimately be approved.

What effect is presidential bullying or “direction” likely to have? That depends on several factors, including who the objects of the bullying are, what their legal and political relationships to the administration are, and what kind of security of position they have. At present, the FDA commissioner and the CDC director are both political appointees. The position of FDA commissioner requires Senate approval,⁴¹¹ while the position of CDC director does not.⁴¹² The latter is a senior executive service position, which may be held by either a career civil servant or a political appointee.⁴¹³ Among other things, using the senior executive service designation for political appointees allows an administration to have a deeper and more pervasive control of an agency than would be the case if political appointees were present only at the highest levels.⁴¹⁴ Although the CDC position was previously classified as a civil service position, in which the occupant was entitled to the security of position commensurate with that classification, it was apparently re-classified during the Reagan administration so that it could be held by a political appointee who serves

411. See generally FDA Act of 1988, 21 U.S.C. § 393(d)(1).

412. See Courtney Bublé, *Republican Senators Look to Make CDC Director a Senate-Confirmed Position*, GOV'T EXEC. (Sept. 15, 2021), <https://www.govexec.com/management/2021/09/republican-senators-look-make-cdc-director-senate-confirmed-position/185376/> [<https://perma.cc/GN25-TZGF>] (“The CDC director ‘surprisingly’ does not require Senate confirmation, despite the agency being one of the ‘major’ components of [HHS], said a fact sheet accompanying the bill.”).

413. See COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., POLICY AND SUPPORT POSITIONS, S. PRT. 114–26, at vi, 68 (2nd Sess. 2016) (discussing the legal status of the director of the Centers for Disease Control and Prevention, which is classified as a senior executive service position); U.S. OFF. OF PERS. MGMT., POLICY, DATA, OVERSIGHT: SENIOR EXECUTIVE SERVICE, <https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history/> [<https://perma.cc/M4DV-U5FQ>] (last visited Sept. 6, 2022) (explaining the process for making appointments to senior executive service positions).

414. See, e.g., Doherty et al., *supra* note 133 (finding that “presidential marginalization” as well as “strategic exit[s]” drives senior executive turnover); JOHN DI IULIO, JR. ET AL., *supra* note 135, at 57 (1993) (“Constant turnover at the top and close to the top of the federal personnel structure robs agencies of continuity and subjects the career work force to enormous uncertainty There is no reason, however, why many of the billets occupied by lower-level quasi-political appointees . . . should not be converted to slots for career members of the senior executive service.”); *Reinventing Human Resource Management: Create a System That Is Self-Renewing and Continually Improving*, NAT’L PERFORMANCE REV. (1994) (“About 700 [of the 8,200 SES positions that have been filled] were filled by political appointees. The political appointees provide the necessary policy controls, while the career SES managers provide a politically neutral, responsive, skilled group of managers and leaders.”). See also B. Guy Peters, *Searching for a Role: The Civil Service in American Democracy*, 14 INT’L POL. SCI. REV. 373, 377–79 (1993) (discussing complex and ambiguous role of the civil service in American government).

at the pleasure of the president.⁴¹⁵ Since that time, the position has regularly been held by a political appointee. Because the position is classified as one that may be filled by either a career civil servant or a political appointee, however, it does not require Senate confirmation.⁴¹⁶ The CDC director and the FDA commissioner both serve at the pleasure of the president, and the job of both is to do whatever the president wishes them to do, within the prescribed scope of their authority, however much the president's directions might conflict with their expert judgments or their interpretations of legal requirements. That being the case, it is far from surprising that one often cannot tell the extent to which an agency's decision is based on science as opposed to politics. Nor is it surprising that the processes of such agencies have been weakened over time by having the agencies' scientific decisions overruled, often without explanation.⁴¹⁷

The fact that the CDC director may be removed for any reason or no reason at all obviously influenced the CDC's performance during the pandemic, and the extent to which the CDC was susceptible to political pressure raises serious questions about the possible need for structural reform.⁴¹⁸ The same may be said of the FDA.⁴¹⁹ In fact, Stephen Hahn,

415. See Lewis, *supra* note 4, at 289. The CDC position was a particularly easy target for transformation into a political position because the performance of the CDC's leadership with respect to the 1976 swine flu threat had been the subject of a scathing (if arguably ill-informed) report that Richard Neustadt had prepared during Carter administration for HEW Secretary Joseph A. Califano Jr. The report was later published as a book. *Id.* at 281–92; see generally RICHARD E. NEUSTADT & HARVEY V. FINEBERG, *THE SWINE FLU AFFAIR: DECISION-MAKING ON A SLIPPERY DISEASE* (1978).

416. See Reagan, *supra* note 351. President Reagan famously said that “government is not the solution to our problem; government is the problem” *Id.* The re-classification apparently occurred as part of the Reagan administration's largely successful effort to decrease the influence of civil service employees. One strategy for accomplishing that goal was to replace civil servants with political appointees who shared President Reagan's desire to curb the influence of the civil service. The idea was to insert political appointees throughout the levels of bureaucracy (rather than just at the top) to ensure greater political responsiveness. See, e.g., Patricia W. Ingraham et al., *Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government?*, 55 PUB. ADMIN. REV. 263 (1995). Some Republican senators have recently introduced legislation to require Senate confirmation for the director of the CDC. See, e.g., Bubl , *supra* note 412 (reporting on the introduction of the Restoring Trust in Public Health Act as a response to “politically motivated decision-making”).

417. See Brad Plumer & Coral Davenport, *Science under Attack: How Trump Is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html> [<https://perma.cc/3SYW-GS58>] (“Political appointees have shut down government studies, reduced the influence of scientists over regulatory decisions and in some cases pressured researchers not to speak publicly.”).

418. See, e.g., Dorit Rubinstein Reiss, *Institutionalizing the Centers for Disease Control and Prevention's Independence*, 12 CONLAWNOW 107 (2020) (proposing the restructuring of the CDC to provide additional layers of protection from political pressures).

419. See 21 U.S.C. § 393(d)(1) (“There shall be in the Administration a Commissioner of Food and Drugs . . . who shall be appointed by the President by and with the advice and consent of the Senate.”).

who was FDA commissioner during the Trump administration, has argued that the FDA needs more independence.⁴²⁰ President Trump used his authority over these agencies to badger them constantly throughout 2020, and particularly in the run-up to the election, when he pressured them to short-circuit their normal procedures for vaccine approval.⁴²¹ He also exercised his authority over the agencies to prevent officials from testifying in Congress.⁴²²

The degree to which the Trump administration attempted to influence the FDA and CDC for political reasons may have been extreme, but the often fraught and confused relationship between the nation's public health officials and an administration's political leadership did not arrive with the Trump administration and it did not leave with them. It is baked into the system, due in part at least to the difficulty of disaggregating the "scientific" and the "political."⁴²³ This uneasy and opaque relationship

420. See, e.g., Matthew Perrone, *Former FDA Chief on the Case for a More Independent Agency*, U.S. NEWS & WORLD REP. (Aug. 16, 2021, 9:53 AM), <https://www.usnews.com/news/business/articles/2021-08-16/former-fda-chief-on-the-case-for-a-more-independent-agency> [https://perma.cc/2VYG-UH8M] ("I believe we should take a very hard look at putting in place a structure for an independent FDA. Now, let me give one caveat: I do not believe that any federal agency is above oversight. But because the FDA has such an important role, because its decisions are life and death ones for Americans, and because it's considered the gold standard around the world, I believe there has to be some mechanism in place for independent, scientific decision-making. I'm sure there are different ways to do that.").

421. See Jonathan Lemire et al., *Pushed to Rush, FDA Head Says Feds Will Get Vaccine 'Right'*, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/election-2020-donald-trump-mark-meadows-coronavirus-pandemic-elections-d93bd92727e89e451a2be73ec3de8ede> [https://perma.cc/R79Q-VT4F] ("Trump has been livid with the FDA for not moving faster to approve the shots, blaming the fact that a vaccine was not available ahead of the Nov. 3 election in part for his loss. He also has leveled unfounded claims that drug companies deliberately delayed vaccine development to hinder his reelection chances, though there is no evidence to suggest that took place.").

422. See, e.g., Brett Samuels, *Trump Won't Allow Fauci to Testify before House Because It's 'a Bunch of Trump Haters'*, HILL (May 5, 2020, 11:02 AM), <https://thehill.com/homenews/administration/496133-trump-wont-allow-fauci-to-testify-before-house-because-its-a-bunch-of> [https://perma.cc/B7FY-Q4ME] (reporting on President Trump's statement that the Dr. Fauci would be testifying before the Senate but not the House); see Matthew Daly, *Democrats Say White House Blocking CDC Head from Testifying*, PBS NEWS HOUR (July 17, 2020, 6:09 PM), <https://www.pbs.org/newshour/politics/democrats-say-white-house-blocking-cdc-head-from-testifying> [https://perma.cc/5X87-STP5] ("House Democrats are criticizing the White House for blocking the head of the Centers for Disease Control and Prevention from testifying at a public hearing on safely reopening the nation's schools."); see also David Lim, *White House Blocked FDA Commissioner Testifying to House Panel*, POLITICO (Sept. 18, 2020, 4:07 PM), <https://www.politico.com/news/2020/09/18/white-house-blocked-fda-hahn-417831> [https://perma.cc/2Y2G-6FVX] ("The White House has blocked FDA Commissioner Stephen Hahn from testifying to a House committee about his agency's pandemic response, angering the panel's top Democrats who said they have pressing questions about political interference at the agency.").

423. See, e.g., Holly Fernandez Lynch et al., Correspondence, *The Limits of Acceptable Political*

has bedeviled the formulation of sound public health policy for many years over many administrations.⁴²⁴ It now affects the Biden administration's efforts both to control the COVID-19 pandemic and to communicate a consistent message about it, as the *New York Times* showed in a retrospective of President Biden's first year.⁴²⁵

The full story of the Biden administration's early response to the pandemic remains to be written, but the administration's policies have proved to be less than a total success.⁴²⁶ From the perspective of credibly responding to the coronavirus, the Biden administration's first missteps occurred during the 2020 campaign. As candidates during the 2020 presidential campaign, President Biden and Vice President Harris contributed to vaccine hesitancy⁴²⁷ by expressing their skepticism about any vaccine that President Trump might introduce before the election.⁴²⁸ On the other

Influence over the FDA, 27 NATURE MED. 188, 189-90 (2021) ("Taken together, these considerations suggest that an ideal arrangement would ensure that the FDA's decisions remain accountable to public values while limiting the extent to which inexpert or conflicted political actors can influence those decisions. The most promising way to satisfy these aims is through a division of labor: the FDA's career scientists should make unencumbered decisions about particular product applications, whereas elected and appointed officials should have a role in setting broader policies to guide those staff decisions. In all cases, application-level and policy-level decisions must align with the best available scientific evidence, incorporate necessary expertise, be transparent, and advance the FDA's public-health mission.").

424. See, e.g., LEWIS, *supra* note 4, at 281-92 (discussing the conflict between the HHS secretary and CDC with respect to the 1976 swine flu threat and resulting administrative changes); WRIGHT, *supra* note 4, at 28-30 (attributing the birth of the modern anti-vaccination movement to CDC's response to the swine flu threat in 1976); Peter Nicholas, *How Delta Beat Biden*, ATLANTIC (Sept. 8, 2021, 1:40 PM), <https://www.theatlantic.com/politics/archive/2021/09/how-delta-beat-biden-covid-pandemic/620003/> [<https://perma.cc/S6PE-75GU>] (reporting on former HHS Secretary Sebelius's response to the White House's interference with CDC recommendations during the Obama administration); see also Velasquez-Manoff, *supra* note 21 (discussing how the misinformation campaign that was waged against the COVID-19 vaccines also appears to have undermined the public's trust in ordinary childhood immunizations).

425. Michael D. Shear et al., *Biden's Pandemic Fight: Inside the Setbacks of the First Year*, N.Y. TIMES (Jan. 23, 2022), <https://www.nytimes.com/2022/01/23/us/politics/biden-covid-strategy.html> [<https://perma.cc/3JWL-LSA3>].

426. See EXEC. OFF. OF PRESIDENT, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS (Jan. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf> [<https://perma.cc/YJ9L-G8UT>] (issuing a COVID-19 response plan at the outset of the administration); but see *National COVID-19 Preparedness Plan*, WHITE HOUSE, <https://www.whitehouse.gov/covidplan/> [<https://perma.cc/S8UD-RX77>] (last visited Sept. 7, 2022) (omitting some features of the 2021 plan, such as the objective of restoring trust in the government's work, presumably because the administration believed that those objectives had been achieved).

427. See Andrew C. McCarthy, Opinion, *Guess Who Undermined Public Confidence in Vaccines?*, HILL (July 20, 2021), <https://thehill.com/opinion/white-house/563771-guess-who-undermined-public-confidence-in-vaccines/> [<https://perma.cc/4EXW-7K58>] (highlighting Kamala Harris's opposition to the Trump administration's efforts for Operation Warp Speed).

428. See Evan Semones, *Harris Says She Wouldn't Trust Trump on Any Vaccine Released before*

hand, President-Elect Biden made distribution of the Trump vaccine a centerpiece of his plan for defeating the pandemic, promising to vaccinate one hundred million Americans in the first one hundred days of his administration.⁴²⁹ During the Biden administration's first year, the administration also de-emphasized the need for an aggressive testing program (which President Trump's Democratic critics and public health officials had deemed indispensable during the Trump administration)⁴³⁰ in favor of a mass vaccination policy.⁴³¹ The administration did so despite the known danger of asymptomatic transmission,⁴³² and despite the headwinds that a policy centered on vaccination would likely face from the

Election, POLITICO (Sept. 5, 2020, 2:18 PM), <https://www.politico.com/news/2020/09/05/kamala-harris-trump-coronavirus-vaccine-409320> [<https://perma.cc/DB9K-8FPH>] (“‘I will say I would not trust Donald Trump’ on the reliability of a vaccine, Harris said.”).

429. See Robert Hart, *Biden Promises 100 Million Covid-19 Vaccinations in First 100 Days, Warning That Trump’s Approach Would Take ‘Years’*, FORBES (Dec. 29, 2020, 4:54 PM), <https://www.forbes.com/sites/roberthart/2021/12/29/biden-promises-100-million-covid-19-vaccinations-in-first-100-days-warning-that-trumps-approach-would-take-years>

[<https://perma.cc/Q298-VSSA>]; Nicholas Florko, *Biden Will Mobilize FEMA, the National Guard, and Pharmacies to Ramp up Vaccine Distribution*, STATNEWS (Jan. 15, 2021), <https://www.statnews.com/2021/01/15/biden-mobilize-fema-national-guard-ramp-up-vaccines/>

[<https://perma.cc/RQ6H-PVCX>] (explaining the details of President Biden’s plan to combat the virus outbreak in his first one hundred days); see also Brian Naylor, *Biden Says Goal of 200 Million COVID-19 Vaccinations in 100 Days Has Been Met*, NPR (Apr. 21, 2021, 2:39 PM ET), <https://www.npr.org/2021/04/21/989487650/biden-says-goal-of-200-million-covid-19-vaccinations-in-100-days-has-been-met> [<https://perma.cc/DCR7-WWHF>].

430. See Clark Mindock, *‘Testing, Testing, Testing’: Pelosi Introduces ‘Evidence Based’ Coronavirus Response Just before Trump Speech*, INDEPENDENT (Mar. 13, 2020, 19:19), <https://www.independent.co.uk/news/world/americas/us-politics/coronavirus-trump-speech-to-day-pelosi-press-conference-covid-19-tests-a9401621.html> [<https://perma.cc/8U83-YD7C>] (discussing the importance of mass testing in a proposed bill); see also Emma Farge & John Revill, *‘Test, Test, Test’: WHO Chief’s Coronavirus Message to World*, REUTERS (Mar. 16, 2020, 11:15 AM), <https://www.reuters.com/article/us-healthcare-coronavirus-who/test-test-test-who-chiefs-coronavirus-message-to-world-idUSKBN2132S4> [<https://perma.cc/A2LF-UKC9>] (discussing WHO director general’s message concerning the urgency of mass testing).

431. See Bill Bostock, *Biden Admin Abandoned Work on a Mass COVID-19 Testing Plan Because It Thought It Could Vaccinate Its Way Out of the Pandemic, Report Says*, BUS. INSIDER (Dec. 24, 2021, 6:17 AM), <https://www.businessinsider.com/biden-admin-dropped-mass-covid-testing-plan-relied-vaccines-report-2021-12> [<https://perma.cc/X835-L7RT>] (highlighting the shortcomings of President Biden’s plan to reduce mass testing to focus resources on increased vaccination); Annie Linskey, *Inside the Administration’s Failure to Avert a Covid Testing Shortfall*, WASH. POST (Dec. 23, 2021, 5:29 PM), https://www.washingtonpost.com/politics/biden-covid-test-shortfall/2021/12/23/aca925a0-629d-11ec-a7e8-3a8455b71fad_story.html [<https://perma.cc/FRP7-9HF7>] (criticizing the Biden administration’s policy of reducing mass testing and discussing the government’s complacency in dealing with the pandemic).

432. See also Jennifer Henderson, *Most COVID Transmission Is Still Asymptomatic*, ABC NEWS (May 11, 2022, 8:58 AM), <https://abcnews.go.com/Health/covid-transmission-asymptomatic/story?id=84599810> [<https://perma.cc/M6ZX-DMJ9>] (emphasizing that over 60 percent of COVID-19 transmissions are from people who are asymptomatic). See generally Monica Gandhi

anti-vaccination movement.⁴³³ In an October 2021 interview, Dr. Francis Collins, the outgoing director of the NIH, said he regretted that the NIH and President Biden had “dramatically underestimated” vaccine hesitancy in the rush to get an approved vaccine, and that he wished that they “had somehow seen that coming and come up with some kind of a myth-buster approach.”⁴³⁴ But the administration should have been able to see this coming. Former President Trump had spent much of the 2020 campaign convincing his supporters to trust him and no one else, and, as his supporters began to express doubts about the safety of the vaccines, he did little to champion them, even though the speedy development of safe and efficacious vaccines was one of the great achievements of his administration.⁴³⁵ Trust and distrust of the vaccines fell largely along partisan lines. By October 2021, the extent of vaccine politicization was clear—of the 27 percent of the population that remained unvaccinated, 60 percent identified as Republican or Republican-leaning, and only 17 percent

et al., *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19*, *NEW ENGLAND J. MED.* (May 28, 2020), <https://www.nejm.org/doi/10.1056/NEJMe2009758> [<https://perma.cc/B8M5-WEDH>]; Michael A. Johansson et al., *SARS-CoV-2 Transmission from People without COVID-19 Symptoms*, *JAMA NETWORK OPEN* (Jan. 7, 2021), https://jamanetwork.com/journals/jamanetworkopen/articlepdf/2774707/johansson_2021_oi_201061_1612890816.17333.pdf [<https://perma.cc/58GA-LGRD>].

433. See, e.g., Berkeley Lovelace Jr., *Biden's Next Fight: Anti-Vaxxers Jeopardize Plans to Protect U.S. against COVID*, *CNBC* (Feb. 10, 2021, 6:30 AM), <https://www.cnbc.com/2021/02/10/biden-covid-vaccine-anti-vaxxers-us.html> [<https://perma.cc/3QZA-3A2V>] (discussing the anti-vaccination movement's impact on the Biden administration's efforts); see Katherine Eban, *The Biden Administration Rejected an October Proposal for "Free Rapid Tests for the Holidays,"* *VANITY FAIR* (Dec. 23, 2021), <https://www.vanityfair.com/news/2021/12/the-biden-administration-rejected-an-october-proposal-for-free-rapid-tests-for-the-holidays> [<https://perma.cc/CZ3V-8THG>] (analyzing the Biden administration's decision to reject a proposal to ramp up mass testing before the holiday season).

434. Ali Velshi, *Outgoing NIH Director Francis Collins: "We Underestimated Vaccine Hesitancy,"* *MSNBC* (Oct. 17, 2021), <https://www.msnbc.com/ali-velshi/watch/outgoing-nih-director-francis-collins-we-underestimated-vaccine-hesitancy-123784773830> [<https://perma.cc/9NLE-UPK2>]; see Erika Edwards, *A Major Threat to the Next Pandemic: Vaccine Hesitancy*, *NBC NEWS* (May 2, 2022, 3:22 PM), <https://www.nbcnews.com/health/health-news/major-threat-pandemic-vaccine-hesitancy-rcna25460> [<https://perma.cc/ZJ3G-5ZE4>] (discussing the impact of vaccine hesitancy on the return to normalcy in 2022); see also Peter Jamison & Ellie Silverman, *Anti-Vaccine Activists See D.C. Rally as a Marker of Recent Gains*, *WASH. POST* (Jan. 22, 2022, 5:38 PM), <https://www.washingtonpost.com/dc-md-va/2022/01/21/anti-vaccine-dc-rally-covid-mandates/> [<https://perma.cc/8A75-5UY8>] (discussing the growth of the anti-vaccination movement across the United States); see generally Ed Pilkington, *Robert F. Kennedy Jr 'Exploited Tragedy' of Nazism in Anti-Vax Speech, Says Auschwitz Memorial*, *GUARDIAN* (Jan. 24, 2020), <https://www.theguardian.com/us-news/2022/jan/24/robert-f-kennedy-jr-anti-vax-speech-anne-frank-auschwitz-memorial> [<https://perma.cc/7FTL-2MVQ>].

435. See Abutaleb et al., *supra* note 304 (“A \$14 billion partnership between government and industry is spurring the quickest vaccine development in U.S. history.”).

identified as Democrats.⁴³⁶

It is not clear whether the Biden administration's decision to emphasize vaccinations over testing was based on scientific evidence, on political considerations, or on some combination of both.⁴³⁷ The emphasis on domestic vaccination seemed to work until more threatening variants appeared during 2021; but the emergence of such variants was clearly foreseeable, particularly so long as large segments of the world population remained unvaccinated.⁴³⁸ In a largely interconnected world, new variants are only a plane ride away, but President Biden and Vice President Harris maintained that no one had anticipated the emergence of the Delta

436. See Ashley Kirzinger et al., *KFF COVID-19 Vaccine Monitor: The Increasing Importance of Partisanship in Predicting COVID-19 Vaccination Status*, KAISER FAM. FOUND. (Nov. 16, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/importance-of-partisanship-predicting-vaccination-status/> [<https://perma.cc/HE3Y-MNBS>] (discussing findings with respect to the degree of vaccine politicization among Republicans and Democrats).

437. See Linskey, *supra* note 431 (discussing the consequences of Biden administration's policies to de-emphasize mass testing and focus on increasing vaccination rates). As vaccine producers and government sources boasted of a 94–95 percent efficacy rate during spring 2021, vaccination rates rose and the demand for testing declined. See Mark W. Tenforde et al., *Effectiveness of Pfizer-BioNTech and Moderna Vaccines against COVID-19 among Hospitalized Adults Aged ≥ 65 Years—United States, January–March 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 647, 674 (May 7, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7018e1.htm> [<https://perma.cc/SHH9-544K>] (summarizing vaccination rates and demand for testing); Sheri Fink, *Maker of Popular Covid Test Told Factory to Destroy Inventory*, N.Y. TIMES (Aug. 20, 2021), <https://www.nytimes.com/2021/08/20/us/abbott-covid-tests.html> [<https://perma.cc/DYY7-CW5U>] (reporting that a manufacturer received orders to destroy its COVID-19 tests); see also Kevin Liptak & Jeremy Diamond, *Biden Vowed to Fix Testing. But He Didn't Plan for Omicron*, CNN (Jan. 11, 2022, 5:00 PM), <https://www.cnn.com/2022/01/11/politics/covid-19-testing-joe-biden-administration/index.html> [<https://perma.cc/E8WR-T9S8>] (discussing the effects of Biden's failure to plan for increased mass testing in response to the spread of the Omicron variant); Allan Smith, *DeSantis Confirms as Many as 1 Million Covid Tests Expired in State Stockpile*, NBC NEWS (Jan. 7, 2022), <https://www.nbcnews.com/politics/politics-news/desantis-confirms-many-1-million-covid-tests-expired-state-stockpile-n1287174> [<https://perma.cc/L4XQ-RMPP>] (reporting that Florida governor allowed 1 million tests in a state stockpile to expire due to “inadequate demand”).

438. See, e.g., Andrew Gregory, *Reckless to Leave 3bn Unvaccinated While Easing England Rules, Experts Say*, GUARDIAN (Jan. 27, 2022), <https://www.theguardian.com/world/2022/jan/28/uk-covid-vaccine-stance-global-vaccination-levels-reckless-experts> [<https://perma.cc/L4XQ-RMPP>] (criticizing Boris Johnson for lifting COVID-19 restrictions in England while a majority of the world's population remained unvaccinated); see Maggie Fox, *Unvaccinated People Are 'Variant Factories,' Infectious Diseases Expert Says*, CNN: HEALTH (July 3, 2021), <https://www.cnn.com/2021/07/03/health/unvaccinated-variant-factories/index.html> [<https://perma.cc/6RN8-ENQS>] (highlighting the dangers posed by the unvaccinated population); see also Holly Ellyatt, *'The Next Variant Is Just around the Corner': Experts Warn the World's at Risk until All Are Vaccinated*, CNBC (Jan. 6, 2022), <https://www.cnbc.com/2022/01/06/new-covid-variants-are-a-danger-until-the-whole-world-is-vaccinated.html> [<https://perma.cc/U9BY-YNE6>] (explaining that new COVID-19 variants are likely to mutate and spread until a significant part of the world's population has been vaccinated against the virus).

or Omicron variants. For example, President Biden asserted in an interview with ABC News that, “Nobody saw it coming. . . . Nobody in the whole world. Who saw it coming?”⁴³⁹ In fact, of course, many people saw it coming. Dr. Anthony Fauci, the Biden administration’s chief medical advisor, warned in February 2021 that variants were likely, and that people should not let down their guard.⁴⁴⁰ Likewise, Dr. Ashish Jha, dean of the Brown University School of Public Health, and subsequently President Biden’s pandemic response coordinator, told CNN in January 2022, that, “Everybody saw it coming. We knew we needed more tests.”⁴⁴¹

Another aspect of the Biden administration’s pandemic response was to require vaccination or weekly testing and masking for workers in businesses with at least one hundred workers, mandatory vaccination for healthcare workers, and mandatory vaccination for federal employees, federal contractors, and military personnel.⁴⁴² The Supreme Court effec-

439. Ben Gittleston, *White House Defends Biden’s Handling of COVID Tests after David Muir Interview*, ABC NEWS (Dec. 23, 2021), <https://abcnews.go.com/Politics/white-house-defends-bidens-handling-covid-tests-david/story?id=81921963> [<https://perma.cc/GBV6-UGA4>] (statement of President Biden); see also Noah Bierman, *Kamala Harris, in Interview, Says Administration Did Not Anticipate Omicron Variant*, L.A. TIMES (Dec. 17, 2021, 4:47 PM), <https://www.latimes.com/politics/story/2021-12-17/kamala-harris-in-interview-says-administration-did-not-anticipate-omicron-variant> [<https://perma.cc/JL8A-K2E2>] (“Vice President Kamala Harris said Friday that the administration failed to anticipate the variants that have prolonged and worsened the COVID-19 pandemic and that she underestimated the role misinformation would play in prolonging the disease that has killed 800,000 Americans.”).

440. See Margaret Talev, *Fauci: Americans Shouldn’t Let Down Their Guard about Virus Variants*, AXIOS (Feb. 15, 2021), <https://www.axios.com/2021/02/15/fauci-covid-pandemic-biden-teachers-vaccines> [<https://perma.cc/G2FL-NH3M>] (explaining Dr. Fauci’s statements about the possibility of COVID-19 variants).

441. Liptak & Diamond, *supra* note 437.

442. COVID-19 Vaccination and Testing: Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (to be codified at 29 C.F.R. Parts 1910, 1915, 1917, 1918, 1926, & 1928); see also Exec. Order No. 14,043, 86 Fed. Reg. 50989 (Sept. 14, 2021) (“I have determined that to promote the health and safety of the Federal workforce and the efficiency of the civil service, it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law.”); *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, WHITE HOUSE (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> [<https://perma.cc/7AH2-CDCE>] (analyzing the details of new vaccination policies for OSHA and CMS); Jennifer Steinhauer, *As Biden Moves to Vaccinate Federal Workers, Troops Get a Pass*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/07/29/us/politics/biden-military-vaccine-mandate.html> [<https://perma.cc/6FQN-X3J4>] (discussing the effects of new vaccine rules on federal workers and military personnel); Dan Lamothe, *Pentagon Moves to Mandate Coronavirus Vaccination for All Troops*, WASH. POST (Aug. 9, 2021), <https://www.washingtonpost.com/national-security/2021/08/09/pentagon-covid-vaccine-mandate/> [<https://perma.cc/9UPP-XNP6>] (“Defense Secretary Lloyd Austin will seek to mandate coronavirus vaccination for all U.S. service members by mid-September and could begin requiring inoculation even sooner if a vaccine receives full approval from the Food and Drug Administration, the Pentagon said Monday.”).

tively struck down the vaccination or weekly testing mandate for the general workforce, but the Court upheld the rule relating to healthcare workers.⁴⁴³ The mandates with respect to federal employees, federal contractors, and military personnel have not reached the Supreme Court, but the mandate for federal employees has been upheld thus far.⁴⁴⁴ On the other hand, lower courts have invalidated the mandate as it applies to federal contractors and subcontractors,⁴⁴⁵ and they have split on the legality of the mandate as it applies to military personnel.⁴⁴⁶

443. See *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (staying OSHA rule on the peculiar ground that OSHA lacked authority to act against a workplace hazard that could also exist outside the workplace); *Biden v. Missouri*, 142 S. Ct. 647, 652–55 (2022) (allowing enforcement of healthcare worker rule and repeatedly referring to the rule as the “vaccination rule,” although the rule provided that employers could also comply with the rule by mandating masking and weekly testing, rather than requiring vaccination); *but see id.* at 660 (Alito, J., dissenting) (referring to vaccination as an “[i]rreversible medical treatment.”); see also *Dr. A. v. Hochul*, 142 S. Ct. 552, 556–59 (2021) (denying application for injunction based on challenge to New York’s failure to provide a religious exemption to mandatory vaccination requirement for health care workers).

444. See *Feds for Med. Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022), *reh'g en banc granted*, 37 F.4th. 1093 (5th. Cir. 2022) (vacating and remanding district court’s order that granted an injunction against enforcement of Executive Order 14043); see also *Church v. Biden*, 573 F. Supp. 3d 118 (D.D.C. 2021) (dismissing federal employees’ First Amendment and Religious Freedom and Restoration Act claims); *N.J. State Policemen’s Benevolent Ass’n v. Murphy*, 271 A.3d 333 (N.J. Super. Ct. App. Div. 2022) (upholding New Jersey Governor’s executive order mandating vaccination for high-risk workers).

445. Compare *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021), *denying stay*, 23 F.4th 585 (6th. Cir. 2022) (enjoining enforcement of vaccination mandate for federal contractors or subcontractors in Kentucky, Ohio, Tennessee), and *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021) (enjoining enforcement of vaccination mandate for federal contractors or subcontractors in any U.S. state), with *State v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (enjoining enforcement of vaccination mandate for federal contractors or subcontractors in Florida).

446. See, e.g., *Air Force Officer v. Austin*, 588 F. Supp. 3d 1338 (M.D. Ga. 2022) (enjoining enforcement of Department of Defense and Air Force mandates requiring COVID-19 vaccination); see *Doster v. Kendall*, 596 F. Supp. 3d 995 (S.D. Ohio 2022) (enjoining enforcement of Air Force vaccination mandate based on religious objection); *but see Church*, 573 F. Supp. 3d at 148 (dismissing federal employees’ First Amendment and Religious Freedom and Restoration Act claims); compare *Navy SEAL 1 v. Austin*, No. 22-0688, 2022 WL 1294486 (D.D.C. Apr. 29, 2022) (denying injunction against vaccination mandate on religious grounds), and *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822 (N.D. Tex. 2022) (entering an order staying the government’s personnel action with respect to certain Navy Seals who raised religious objections to the vaccination mandate), with *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (denying the government’s subsequent motion for a partial stay of the district judge’s order), and *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1301 (2022) (“The district court’s January 3, 2022 order, insofar as it precludes the Navy from considering respondents’ vaccination status in making deployment, assignment, and other operational decisions, is stayed pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.”).

The Biden administration's messaging also has been erratic.⁴⁴⁷ As in the Trump administration, various officials have delivered inconsistent messages. Early in March 2021, President Biden identified July 4, 2021, as the day on which the United States would be back to some sort of normal, despite the difficulty of making such a prediction so far in advance; and he stuck with that prediction, even as the resistance to vaccination continued to grow and a more deadly variant appeared in the spring and early summer.⁴⁴⁸ Just a few days after President Biden made his July 4 prediction, however, CDC Director Rachel Walensky articulated a feeling of "impending doom,"⁴⁴⁹ and by the end of March, the president was calling on the states to impose mask mandates.⁴⁵⁰ In mid-May, President Biden and the CDC reversed course, advising the public to stop wearing masks outdoors and lifting all restrictions on vaccinated persons (presumably to encourage vaccination), despite the emergence of "breakthrough cases," and contrary to the advice offered by many scientists and public health experts.⁴⁵¹ In late July, the CDC changed course again, urging vaccinated Americans to mask.⁴⁵² In the meantime, President Biden had hosted a Fourth of July party on the South Lawn of the White House, at which he had mingled with the crowd, unmasked, shaking hands, and signing autographs. He was careful not to declare outright victory, but

447. Among other things, Biden's Secretary of Health and Human Services (like Trump's) seems only a peripheral player. See Dan Diamond et al., *White House Frustrations Grow over Health Chief Becerra's Handling of Pandemic*, WASH. POST (Jan. 31, 2022), <https://www.washingtonpost.com/politics/2022/01/31/becerra-hhs-pandemic-response-leadership/> [<https://perma.cc/Y3ZN-NMSA>].

448. See, e.g., Anthony Zurcher, *Covid Pandemic: Biden Eyes 4 July as 'Independence Day' from Virus*, BBC (Mar. 12, 2021), <https://www.bbc.com/news/world-us-canada-56368328> [<https://perma.cc/FZ3E-737C>] ("A recent opinion poll showed that nearly half of Republicans are sceptical of the vaccine. If their doubt becomes inaction, Mr Biden's promises—widespread school openings, an ability to travel and Independence Day celebrations—will go unrealised .").

449. Sharon LaFraniere & Sheryl Gay Stolberg, *Biden Pushes Mask Mandate as C.D.C. Director Warns of 'Impending Doom'*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/29/us/politics/biden-virus-vaccine.html> [<https://perma.cc/5F2P-VK68>].

450. *Id.*

451. See Nicholas, *supra* note 424 (discussing President Biden's failure to adhere to the CDC's recommendations for handling the COVID-19 pandemic).

452. Yasmeen Abutaleb et al., *'The War Has Changed': Internal CDC Document Urges New Messaging, Warns Delta Infections Likely More Severe*, WASH. POST (July 29, 2021), <https://www.washingtonpost.com/health/2021/07/29/cdc-mask-guidance/> [<https://perma.cc/LD64-D9CR>] (discussing CDC's shift towards persuading the public to mask up again—including the vaccinated population); see Nicholas, *supra* note 424 (outlining changing policies on masking); see also Quint Forgey, *'The CDC Hasn't Changed': Biden's Top Health Officials Try to Sell New Masking Guidance*, POLITICO (July 28, 2021), <https://www.politico.com/news/2021/07/28/biden-health-officials-masking-guidance-501227> [<https://perma.cc/PAF6-C69F>] ("Across several morning media appearances, the government's most senior scientists defended the decision . . . by the Centers for Disease Control and Prevention to recommend that people wear masks indoors again regardless of vaccination status, particularly in crowded indoor settings.").

he came very close.⁴⁵³

The mixed messages continued. On August 18, 2021, President Biden announced a plan to give booster shots to individuals who were already vaccinated, beginning the week of September 20, but Dr. Walensky and the acting FDA commissioner indicated that their agencies did not have data to support such a roll-out.⁴⁵⁴ In fact, decision makers in both agencies had recently voted against recommending boosters for everyone.⁴⁵⁵ Two senior officials reportedly took early retirement to protest the administration's disregard for evidence-based decision-making, and, together with seventeen other scientists, they published a paper showing that the data was then insufficient to support such a move.⁴⁵⁶ Brett Giroir, who headed the coronavirus testing program in the Trump administration "posed a thought experiment: What would have been the reaction if Trump had done something similar, say by laying out a vaccine program months before the FDA had even approved a vaccine? Answering his own rhetorical question, Giroir said there would have been 'outrage over political pressure on FDA.'"⁴⁵⁷ Based on the assumption that some vaccine hesitancy might be because the vaccines were being administered

453. See Nicholas, *supra* note 424 (referencing President Biden's Fourth of July party, where he pushed for a return to normalcy following the COVID-19 pandemic).

454. See *id.* ("Biden announced a plan to give booster shots to those who have been fully vaccinated, starting the week of September 20. Last week, [CDC director Rochelle] Walensky and the Food and Drug Administration's acting commissioner, Janet Woodcock, quietly went to the White House and told officials they wouldn't have the data needed to approve a booster program on the scale and timetable Biden envisioned.")

455. See Michael D. Shear & Benjamin Mueller, *Biden Promised to Follow the Science. But Sometimes, He Gets Ahead of the Experts*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/us/politics/biden-science-boosters-vaccine.html> [<https://perma.cc/VY59-A3HV>] (addressing Biden's plan in rolling out the booster shot to some vaccinated groups despite the lack of sufficient data from the FDA and the CDC).

456. Philip R. Krause et al., *Considerations in Boosting COVID-19 Vaccine Immune Responses*, 398 LANCET 1377 (Oct. 9, 2021) (discussing the benefits and risks of a booster shot); see, e.g., Nicholas, *supra* note 424 (explaining that many officials believed a booster could not be rushed); Sarah Oweremohle, *Biden's Top-Down Booster Plan Sparks Anger at FDA*, POLITICO (Aug. 31, 2021), <https://www.politico.com/news/2021/08/31/biden-booster-plan-fda-508149> [<https://perma.cc/FG6B-9EHX>] ("The Biden administration's decisions over when to administer coronavirus vaccine boosters are triggering turmoil within the Food and Drug Administration, frustrating regulators and sparking fear that political pressures will once again override the agency's expertise. FDA officials are scrambling to collect and analyze data that clearly demonstrate the boosters' benefits before the administration's Sept. 20 deadline for rolling them out to most adults. Many outside experts, and some within the agency, see uncomfortable similarities between the Biden team's top-down booster plan and former President Donald Trump's attempts to goad FDA into accelerating its initial authorization process for Covid-19 vaccines and push through unproven virus treatments.").

457. Nicholas, *supra* note 424.

under emergency-use authorizations, the Biden administration also pressured the FDA to grant full approval to the vaccines, despite the fact that the agency had not reached the point where it thought that that move would be justified.⁴⁵⁸ In December 2021, just as the new Omicron variant was beginning to make headway, the CDC shortened the recommended isolation period for asymptomatic individuals from ten days to five days, indicating that the change was based on new scientific evidence about likely transmission schedules.⁴⁵⁹ Almost immediately, Dr. Walensky conceded that the decision was largely based on the need to keep the economy moving and on what the agency thought that Americans would be willing to tolerate.⁴⁶⁰ Angela Rasmussen, a Canadian virologist, pointed out that people might have appreciated it if Dr. Walensky “had said this clearly at the start, and [had] stated that it was a trade-off of risks.”⁴⁶¹ Dr. Rasmussen further observed: “Don’t say you’re following the science when you can’t point to the evidence.”⁴⁶²

Finally, recognizing that the low level of vaccinations in less wealthy countries presented a global health risk, the administration pledged that the United States would provide 1.2 billion vaccines, and the administration called on other nations to contribute seven billion dollars in 2022 for “financing for vaccine readiness and administration, combating [vaccine] hesitancy, and producing ancillary supplies.”⁴⁶³ The importance of these

458. See Owerhohle, *supra* note 456.

459. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC UPDATES AND SHORTENS RECOMMENDED ISOLATION AND QUARANTINE PERIOD FOR GENERAL POPULATION, (Dec. 27, 2021), <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html> [<https://perma.cc/5G4C-BTN9>] (“The change is motivated by science demonstrating that the majority of SARS-CoV-2 transmission occurs early in the course of illness, generally in the 1–2 days prior to onset of symptoms and the 2–3 days after.”).

460. Jeff Tollefson et al., *Has Biden Followed the Science? What Researchers Say*, 601 NATURE 491, 492 (2022) (“[CDC Director Rochelle] Walensky clarified that the choice was based on what the agency felt people would ‘tolerate,’ and on a need to keep the country running in the face of an unprecedented surge in COVID-19 infections.”).

461. *Id.*

462. *Id.*

463. U.S. DEPT. OF STATE, COVID-19 VACCINE DONATIONS, (June 6, 2022), <https://www.state.gov/covid-19-recovery/vaccine-deliveries> [<https://perma.cc/E8TL-RKG5>]; Kevin Liptak, *Biden to Call on World Leaders to Commit to Vaccinating 70% of World by Next Year*, CNN (Sept. 14, 2021), <https://www.cnn.com/2021/09/14/politics/joe-biden-vaccinating-the-world/index.html> [<https://perma.cc/5KNS-6NA3>] (internal quotations omitted). It is thought that mutations may be more likely to occur in circumstances in which there are low levels of vaccination and surveillance. See, e.g., Nurith Aizenman, *The Mystery of Where Omicron Came from—and Why It Matters*, NPR, (Dec. 1, 2021), <https://www.npr.org/sections/goatsandsoda/2021/12/01/1055803031/the-mystery-of-where-omicron-came-from-and-why-it-matters> [<https://perma.cc/UZA8-TX76>] (analyzing various hypotheses about the origins of the Omicron variant); see Smriti Mallapaty, *Where Did Omicron Come From? Three Key Theories*, NATURE (Jan. 28, 2022), <https://www.nature.com/articles/d41586-022-00215-2#ref-CR1> [<https://perma.cc/W2UV-GVK4>]

initiatives is obvious. While 79 percent of the population of North America, Oceania, and Asia have received at least one dose, only 27.3 percent of the African population have received one dose—which is more than forty points below the global vaccination rate of 69.5 percent.⁴⁶⁴ More generally, the vaccination rate across low-income countries is 22 percent.⁴⁶⁵ By mid-June 2022, the administration had shipped only 550 million doses—fewer than half the number that President Biden had pledged to provide.⁴⁶⁶ As one former Biden administration official observed, “There’s no question that the U.S. is doing more than anybody else. I think the question . . . is if there’s a difference between doing more and doing enough Right now, the world is not doing enough to outpace the virus.”⁴⁶⁷ But the fact remains that President Biden decided to make a third booster available to all Americans, contrary to the advice of his scientific experts, before he began providing needed first doses to less wealthy countries, and Congress has balked at providing additional funding.⁴⁶⁸

As previously noted, the Biden administration decided to prioritize vaccination over testing,⁴⁶⁹ but, with the rise of seemingly more danger-

(identifying three theories concerning the emergence of the Omicron variant); *see also* DARREN P. MARTIN ET AL., SELECTION ANALYSIS IDENTIFIES UNUSUAL CLUSTERED MUTATIONAL CHANGES IN OMICRON LINEAGE BA.1 THAT LIKELY IMPACT SPIKE FUNCTION, *BIORXIV* (Jan. 18, 2022) (highlighting key scientific information about the Omicron variant).

464. Josh Holder, *Tracking Coronavirus Vaccinations Around the World*, *N.Y. TIMES* (Aug. 15, 2022), <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> [<https://perma.cc/V5Z9-64LK>] (examining the stark gap in vaccination rates among countries).

465. *Id.*

466. COVID-19 VACCINE DONATIONS, *supra* note 463.

467. Erin Banco, *Biden’s New Global Vaccine Push Is Running Out of Funds*, *POLITICO* (Feb. 17, 2022, 11:00 AM), <https://www.politico.com/news/2022/02/17/bidens-new-global-vaccine-push-is-running-out-of-funds-00009588> [<https://perma.cc/2BUF-JT3B>] (highlighting the primary issues that the Biden administration faced during the global vaccination push).

468. *See id.*; *see also* Sheryl Gay Stolberg, *Romney Accuses White House of Deception on Covid Aid Amid Pleas for More*, *N.Y. TIMES* (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/politics/mitt-romney-covid-aid-whitehouse.html> [<https://perma.cc/6VZM-UGUY>] (“Senator Mitt Romney, Republican of Utah, said during a heated Senate health committee hearing that he was stunned last week when White House officials announced they would repurpose \$10 billion in federal Covid-19 meant for virus testing and protective gear and instead spend the money on antiviral drugs and vaccines.”).

469. *See* Exec. Order No. 13996, 86 Fed. Reg. 7197 (Jan. 21, 2021) (issuing an executive order to create a COVID-19 Pandemic Testing Board). Among other things, the Board was meant to establish a national COVID-19 public health workforce strategy, expand the supply of tests, enhance laboratory testing capacity, and ensure clarity for the messaging about the use and costs of tests, but “a year later . . . the group [had] put out no press releases, held no hearings and made no announcements” Bianca Fortis, *Whatever Happened to Biden’s Pandemic Testing Board?*,

ous variants in 2021 and 2022, it became clear that more testing was required. On October 22, 2021, a group of experts presented President Biden with a ten-page plan to overhaul the country's approach to testing and facilitate the delivery of 732 million tests per month; the experts also recommended a nationwide testing surge to prevent a COVID-19 spike during the then-upcoming holiday season.⁴⁷⁰ President Biden rejected the advice, and, when the decision proved to be wrong, as the nation was facing a new surge in December, he told David Muir of ABC News that, "he 'wished' he had thought about ordering [500 million at-home tests] two months ago."⁴⁷¹ Of course, the experts had recommended just that, but the holidays had now begun, and there was no way to manufacture the necessary number of tests, let alone deliver them to American households before the holidays. When the administration decided to provide tests in the post-holiday season, it initially decided to do so through an insurance reimbursement program, but that would have left many people without the tests they needed.⁴⁷² The administration also announced a plan to distribute tests by mail to anyone who wanted them, which reached more people more easily, but that plan was hampered by a lack

PROPUBICA (Feb. 16, 2022, 5:00 AM), <https://www.propublica.org/article/whatever-happened-to-bidens-pandemic-testing-board> [<https://perma.cc/GK9J-XSF8>].

470. See Eban, *supra* note 53 (providing that the plan contained a provision for every American household to receive free rapid tests for the holidays); see also *National Routine Testing Strategy: Supply and Demand Analysis and Proposed Regulatory Solutions* (Oct. 2021), <https://drive.google.com/file/d/1Inp4fjOnjDw2RlmVZxKA5kkCGc4CR1kT/view> [<https://perma.cc/6BG2-HSXA>] ("Every American Household To Receive Free Rapid Tests for the Holidays/New Year."); see also Mark McClellan et al., *Legislative and Regulatory Steps for a National COVID-19 Testing Strategy*, DUKE UNIV. MARGOLIS CTR. HEALTH POL'Y (Aug. 5, 2020) (emphasizing the need for increased testing on a national scale).

471. Alex Thompson, 'Nothing's Been Good Enough': Biden Admits Covid Testing Has Fallen Short, POLITICO (Dec. 22, 2021, 7:54 PM), <https://www.politico.com/news/2021/12/22/biden-covid-testing-526029> [<https://perma.cc/85U4-UUFF>] ("[The president] said his administration has now ordered half a billion tests to send to people across the country but acknowledged that he 'wished' he had thought of ordering them two months ago, before the contagious Omicron variant emerged.").

472. See, e.g., David Lim, *Biden Administration Lays Out Rules for Reimbursing At-Home Covid Tests*, POLITICO (Jan 10, 2022, 6:14 PM), <https://www.politico.com/news/2022/01/10/biden-administration-at-home-covid-tests-reimbursement-526853> [<https://perma.cc/Z4VV-BJ45>] ("Under the plan, private insurers can set up programs at preferred pharmacies or retailers where the upfront cost of home tests is covered for beneficiaries. A family of four would be able to have 32 home tests covered by their health plan each month."); Zeeshan Aleem, *Opinion, Biden's Free Covid Test Plan through Private Insurers Is a Mess*, MSNBC (Jan. 18, 2022, 3:21 PM), <https://www.msnbc.com/opinion/biden-s-free-covid-test-plan-through-private-insurers-mess-n1287661> [<https://perma.cc/HKA7-RY3F>] ("Hesitation about speed of reimbursement is not an unreasonable concern. According to The New York Times, some insurance companies are openly admitting that they're not yet ready to enact Biden's plan, and that they're manually processing reimbursement claims. One health insurance broker described fear that it could be a 'six-month nightmare trying to get reimbursed' for a test that's been paid for. Some people are not going to take that financial risk.").

of tests, and, by the time many Americans had received their tests in the mail, the Omicron spike had subsided.⁴⁷³

Finally, on March 1, 2022, the Biden administration announced a “Test to Treat” program, which allowed Americans to go to a pharmacy, be tested for COVID, and immediately receive free antiviral pills (Paxlovid or Molnupiravir) if they tested positive.⁴⁷⁴ As of early June 2022, the administration had opened 2,500 test-to-treat sites, but some providers have been reluctant to prescribe the pills because of uncertainty (in the absence of clear guidance from FDA, CDC, and NIH)⁴⁷⁵ about interactions with other drugs and the application of risk factors, and because of

473. See Noah Weiland et al., *Biden Promised 500 Million Free Covid Tests. Then He Had to Find Them*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/us/politics/biden-covid-tests.html> [<https://perma.cc/WD4M-JG5H>] (“Testing shortages have bedeviled the government since the beginning of the pandemic, and the resurgent supply of at-home tests, which deliver results in about 15 minutes, may be coming too late, given that the Omicron variant has already peaked in many regions. But the home deliveries, and broadened access to tests overall, represent a striking turnaround for an administration that had struggled to meet demand as it focused largely on vaccination.”); see also Alisa Chang et al., *2 Months Ago, He Said the Omicron Surge Could Fade Fast. To His Surprise, It Has*, NPR (Mar. 6, 2022, 4:21 PM), <https://www.npr.org/2022/03/08/1085248156/2-months-ago-he-said-the-omicron-surge-could-fade-fast-to-his-surprise-it-has> [<https://perma.cc/2MM5-FEB4>] (statement of Dr. Bob Wachter) (“There’s still COVID there. There are still people who are pretty sick with it. But it is nowhere near what we were seeing a couple of months ago.”); Amelia Young, *USPS Helps Deliver More Than 270 Million Free COVID-19 Tests*, WTVF (Mar. 6, 2022, 10:01 AM), <https://www.newschannel5.com/news/usps-helps-deliver-more-than-270-million-free-covid-19-tests> [<https://perma.cc/2Z5A-NNGR>] (“The United States Postal Service said it’s delivered test kit packages to 68 million households across the country. In each kit were four tests totaling 270 million tests that were sent out. Even when the big January surge was starting to come down, people continued to request the free tests.”); Sheryl Gay Stolberg, *As Poor Nations Seek Covid Pills, Officials Fear Repeat of AIDS Crisis*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/08/us/politics/covid-pills-global-aids-hiv.html> [<https://perma.cc/73X4-5ML2>] (quoting Dr. Bruce Alyward) (“What really worries me is the testing part of this . . . If you’re not testing, you can’t sequence, you can’t isolate, you can’t treat. Everything else unravels.”).

474. Nandita Bose, *Biden Announces New COVID Initiative That Gives Americans Free Pills*, REUTERS (Mar. 1, 2022, 9:53 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/biden-announces-new-covid-initiative-that-gives-americans-free-pills-2022-03-02/> [<https://perma.cc/R7LG-JJMU>] (“U.S. President Joe Biden on Tuesday said his administration has launched a new initiative that will allow Americans to get tested for COVID-19 at a pharmacy and immediately receive free pills if they test positive.”).

475. Celine Castronuovo, *Pfizer Covid Pill Access Stymied by ‘Vague’ Prescribing Guidance*, BLOOMBERG L. (June 3, 2022, 4:35 AM), <https://news.bloomberglaw.com/health-law-and-business/pfizer-covid-pill-access-stymied-by-vague-prescribing-guidance> [<https://perma.cc/R7LG-JJMU>] (“More than 2,500 Test-to-Treat sites are set up across the country where patients can get tested and prescribed Pfizer Inc.’s Paxlovid or Merck & Co.’s molnupiravir by a health provider at a single location. But some providers are reluctant to prescribe the pills due to uncertainty over how they interact with other drugs, how to apply the risk factors that qualify people for the treatment, and limited awareness on available supply.”).

limited awareness as to the availability of supplies.⁴⁷⁶ Of the 2.7 million doses of Paxlovid ordered, fewer than 50 percent of the courses of treatment had been administered by June 1, 2022, and only about 15 percent of the Molnupiravir courses of treatment had been administered.⁴⁷⁷ In addition, the federal government had committed to purchasing twenty million courses of treatment, and making them available to the states, but the states had not ordered the full supply that was made available to them.⁴⁷⁸

D. The Twentieth Amendment

The Twentieth Amendment sets January 20 as the date on which presidents of the United States take office every four years.⁴⁷⁹ The Constitution does not specify the date on which the members of the Electoral College are to be selected, but Title 3, Section 1 of the United States Code provides that the presidential electors shall be chosen in each state on the Tuesday following the first Monday in November.⁴⁸⁰ In other words, approximately ten weeks now separate the presidential election from the inauguration. As Sanford Levinson has pointed out, Americans routinely refer to the president of the United States as the most powerful person on the planet, but we leave a defeated or retiring president in charge of the government, with all the awesome power that the modern presidency entails, for ten weeks after we have elected someone else to serve in that office.⁴⁸¹ Professor Levinson also points out that some progress was achieved by the adoption of the Twentieth Amendment, which moved up

476. Yasmeen Abutaleb, *Biden Administration Boosts Access to Antivirals as Covid Cases Rise*, WASH. POST (Apr. 26, 2022, 6:15 PM), <https://www.washingtonpost.com/health/2022/04/26/paxlovid-availability-expansion/> [<https://perma.cc/5B78-MTH9>] (statement of Abraar Karan, an infectious-disease physician at Stanford University) (“It really speaks to this huge problem of implementation and all the hurdles of bringing in something new to our very messy health-care system It has to be orchestrated quite well, and we’re seeing in real time all the things that can go wrong with this. There are so many parts that need to be improved for this to have the kind of effect we’re looking for.”).

477. Castronuovo, *supra* note 475 (citing U.S. DEP’T HEALTH & HUMAN SERVS., ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, COVID-19 THERAPEUTICS THRESHOLDS, ORDERS, AND REPLENISHMENT BY JURISDICTION).

478. Stolberg, *supra* note 473. It is unclear whether the wealthiest nations will make these antiviral pills available to the poorest nations. *See id.* (stating that antiviral pills are “scarce overseas” and global efforts to expand access have faced obstacles).

479. *See* U.S. CONST. amend. XX, §1 (“The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.”).

480. 3 U.S.C. § 1 (1948) (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”).

481. Levinson, *supra* note 157, at 62–63.

the date of the inauguration from March 3 to January 20 in 1933. No longer must the country wait until March for the inauguration of a new president, as we did, most consequentially perhaps, in the transitions from President James Buchanan to President Abraham Lincoln and from President Herbert Hoover to President Franklin D. Roosevelt.⁴⁸²

Even in the ten-week hiatus that now exists between Election Day and the inauguration, the outgoing (and sometimes repudiated) president can do much harm, not only by taking action, but also by failing to take action. Writing in 1998, Professor Levinson observed that President George Herbert Walker Bush, “the most recent[ly] . . . repudiated president, illustrated the range of the[] powers [retained by a lame-duck President] by sending troops abroad (to Somalia) and by pardoning criminals (Elliot Abrams) and possible collaborators in arguably illegal conduct (Casper Weinberger).”⁴⁸³ We now have the additional example of President Trump’s final ten weeks in office. Like the first President Bush, President Trump made liberal use of his pardon power, including pardons for his son-in-law’s father (a convicted fraudster) and for close associates who had refused to testify against him.⁴⁸⁴ During the period between the

482. See Amy McKeever, *A Brief History of Some of America’s Most Fraught Presidential Transitions*, HISTORY (Jan. 15, 2021), <https://www.nationalgeographic.com/history/article/history-fraught-presidential-transitions-united-states> [<https://perma.cc/U5ED-ECW8>] (comparing the transition between Presidents Trump and Biden to other presidential transitions).

483. Levinson, *supra* note 157, at 62.

484. See Azmi Haroun, *Trump Pardoned Jared Kushner’s Dad Charles, Who Was Convicted of Tax Crimes, Witness Tampering, and Illegal Campaign Contributions*, BUS. INSIDER (Dec. 23, 2020, 9:11 PM), <https://www.businessinsider.com/trump-pardoned-charles-kushner-jared-father-crimes-2020-12> [<https://perma.cc/L45D-VCJM>] (“President Donald Trump continued his pardon spree on Wednesday, and alongside allies and former campaign officials, he pardoned Charles Kushner, the father of White House senior advisor Jared Kushner, who is also Trump’s son-in-law. The elder Kushner was convicted in 2005 for preparing false tax returns, witness retaliation, and making false statements to the Federal Election Commission. He pleaded guilty and served 2 years in prison.”); see also *Trump Pardons Dozens in Final Hours, Including Ex-Aid Steve Bannon*, BBC NEWS (Jan. 20, 2021), <https://www.bbc.com/news/world-us-canada-55729221> [<https://perma.cc/8BBR-5QAF>] (“In the final hours of his presidency, Donald Trump has pardoned 73 people, including his former adviser Steve Bannon, who is facing fraud charges. Another 70 people had sentences commuted, ahead of Joe Biden’s inauguration at noon.”); Ron Kampeas, *Jared Kushner and Ivanka Trump Said They Privately Accepted Donald Trump’s Loss*, JERUSALEM POST (June 11, 2022) <https://www.jpost.com/american-politics/article-709131> [<https://perma.cc/D9SN-7YN2>] (“Jared Kushner, in a video excerpt, said he was too busy organizing presidential pardons to pay attention to threats by the White House counsel, Pat Cipollone, and others to resign because of Trump’s efforts to stay in power based on his false claims he won the election.”); Nicholas Reimann, *Jan. 6 Hearings: Trump Advisor Eastman Asked for Pardon after Riot*, FORBES (June 16, 2022, 4:10 PM), <https://www.forbes.com/sites/nicholasreimann/2022/06/16/jan-6-hearings-trump-advisor-eastman-asked-for-pardon-after-riot/?sh=5e26ec8beee5> [<https://perma.cc/6B4S-5TLF>] (“Right-wing legal scholar John Eastman, who backed former President Donald Trump’s

election and the inauguration, the most pressing problem the nation faced continued to be the COVID-19 pandemic, but the president lost whatever interest he might have had in fighting the virus. He was “done with that,” as one close aide put it,⁴⁸⁵ even as the number of infections and deaths skyrocketed.⁴⁸⁶ Instead, he became obsessed with finding a way to overturn the election results, and that is how he spent much of his time between Election Day and President Biden’s inauguration.⁴⁸⁷ By denying that he lost the election, President Trump also prevented the newly elected administration from gaining access to the information they would need for an orderly transition of power, including the roll-out of the vaccines.⁴⁸⁸

In some democracies, the transition of power follows immediately upon the announcement of the election results. That may be too difficult a change for the United States to negotiate, given the fact that we have no “shadow government” ready to take charge. But American presidential candidates now put transition teams in place well before Election Day,⁴⁸⁹ and additional advance planning could facilitate a shortening of the time necessary for a new administration to take control of the government. If that were to happen, candidates might be persuaded to announce the members of their cabinets and the identities of other important officials

claims of fraud in the 2020 election, was among a group that asked for pardons after rioters stormed the Capitol on January 6, 2021, according to an email obtained by the House committee investigating the riot, but the requested pardons were never issued.”); Hugo Lowell, *Capitol Attack Pardon Revelations Could Spell Doom for Trump and Allies*, GUARDIAN (June 12, 2022), <https://www.theguardian.com/us-news/2022/jun/12/us-capitol-attack-panel-hearings-trump-allies-trouble> [<https://perma.cc/V2NJ-P3GG>] (“The news that multiple House Republicans asked the Trump White House for pardons—an apparent consciousness of guilt—was one of three revelations portending potentially perilous legal and political moments to come for Trump and his allies.”).

485. Abutaleb et al., *supra* note 51, at 424.

486. *See id.* (“[A] month later, the number of coronavirus cases in the United States is reaching records daily.”).

487. *See* Gregory Krieg, *Trump’s Attempt to Steal the Election Unravels as Coronavirus Cases Surge*, CNN (Nov. 22, 2020, 6:20 PM), <https://www.cnn.com/2020/11/22/politics/trump-election-results-coronavirus/index.html> [<https://perma.cc/PPJ7-UCQC>] (describing the various legal challenges to the election results that President Trump and his allies mounted in key swing states).

488. *See* Eban, *supra* note 53 (explaining how the Trump administration thwarted the new administration’s efforts to address the pandemic).

489. *See* CTR. FOR PRESIDENTIAL TRANSITION, PRESIDENTIAL TRANSITION GUIDE 11 (4th ed. 2020), <https://presidentialtransition.org/wp-content/uploads/sites/6/2018/01/Presidential-Transition-Guide-2020.pdf> (“In 2016, Donald Trump named his transition chair during the first week of May, and the pre-election transition effort was launched in June with about eight staffers. Hillary Clinton’s campaign planned her transition strategy during the early summer months, but did not officially announce transition leaders until after the Democratic National Convention. In 2012, Mitt Romney’s team began planning in June, although some initial planning took place in April and May. In 2008, Barack Obama’s transition team began its preliminary work in April and formal planning in May.”).

such as the White House Chief of Staff before the election; such an announcement would provide voters with additional relevant and valuable information and greater insight into how one candidate or the other would govern the country if elected. Moreover, if President Trump could publish a list of potential Supreme Court nominees six months before the election, announcing a roster of executive branch officials shortly before the election would not seem beyond the realm of possibility.⁴⁹⁰

If the events that occurred in the aftermath of the 2020 presidential election are any indication of what the future holds, it seems clear that reaching a consensus on the need to shorten the interval between the election and the inauguration would not be easy. On the one hand, the reform might be attractive to both parties if they each assume that they would be the party that prevails in the presidential election. If the party already controls the White House, shortening the time between the election and the inauguration would not seem problematic for them, and, if the prevailing party is not the party that already controls the White House, that party might see a real benefit in being able to take control of the government as soon as possible. On the other hand, there is widespread distrust of the electoral process, as demonstrated by the persistent belief among many of former President Trump's supporters that President Biden did not win the November 2020 election,⁴⁹¹ despite the absence of any evidence to support that view—and despite scores of judicial findings to the contrary.⁴⁹² Indeed, some of the judges who presided over those cases

490. See Alan Rappoport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> [<https://perma.cc/R5DT-EBGV>] (“Donald J. Trump, the presumptive Republican presidential nominee, released a list of potential Supreme Court nominees on Wednesday as part of an effort to quell concerns that he would not select conservative jurists.”).

491. See, e.g., Jon Greenberg, *Most Republicans Still Falsely Believe Trump's Stolen Election Claims*, POLITIFACT (June 14, 2022), <https://www.politifact.com/article/2022/jun/14/most-republicans-falsely-believe-trumps-stolen-ele/> [<https://perma.cc/NN6F-NEGW>] (stating that around 70 percent of Republican voters suspected election fraud); see David Siders, *Why Many Republicans Believe the Big Lie*, POLITICO (June 9, 2022, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2022/06/09/why-many-republicans-believe-the-big-lie-00036384> [<https://perma.cc/KF3S-YV4H>] (identifying factors that led Republican voters to suspect election fraud); see also Amy Gardner & Isaac Arnsdorf, *More Than 100 GOP Primary Winners Back Trump's False Fraud Claims*, WASH. POST (June 14, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/06/14/more-than-100-gop-primary-winners-back-trumps-false-fraud-claims/> [<https://perma.cc/LWM9-PX5Y>] (“About a third of the way through the 2022 primaries, voters have nominated scores of Republican candidates for state and federal office who say the 2020 election was rigged, according to a new analysis by The Washington Post.”).

492. See, e.g., Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More Than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed*, BUS. INSIDER (Feb. 22, 2021, 4:03 PM), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11>

have found the former President's claims frivolous and have sanctioned the lawyers who brought them.⁴⁹³

Moreover, there now seems to be a belief in the country that elections are over, not when the last vote is cast, but when the final lawsuit is decided. Shortening the time between the election and the inauguration would, of course, shorten the time for satellite litigation, and that would be objectionable to many who do not credit the fairness of elections. It is easy to respond to that objection by saying that the electoral process should be reformed, and that public confidence in the electoral process should be restored. But that, too, requires hard work, and there is good ground for pessimism that either can be accomplished in the short term, given the degree of polarization in Congress and in the country. Indeed, there are several factors—the proliferation of state laws aimed at making it more difficult to vote,⁴⁹⁴ Congress's recent failure to enact meaningful voting rights legislation,⁴⁹⁵ and the efforts of some who believe the 2020 was stolen to capture the offices responsible for overseeing elections⁴⁹⁶—

[<https://perma.cc/7NLR-6SJV>] (“[T]he Trump campaign, Republican allies, and Trump himself had mounted at least 42 legal challenges since Election Day. They’ve won zero.”); see Amy Sherman & Miriam Valverde, *Joe Biden Is Right That More Than 60 of Trump’s Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), <https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-/> [<https://perma.cc/8XHK-UMWP>] (“More than 60 lawsuits brought by Trump and his allies failed because they were unable to prove their allegations. Some lawsuits were dismissed due to errors in the filings and other procedural issues.”); cf. Russell Wheeler, *Trump’s Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS: FIXGOV (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> [<https://perma.cc/8AZ7-3D6Y>] (“One sign of a healthy democracy is a judiciary that applies the law independently, even in cases involving powerful partisan interests. When President Donald Trump tried to enlist the courts in his campaign to overturn the results of the election, state and federal judges applied the law as they understood it. . . . [D]espite Trump’s history of lashing out at judges who crossed him during his 2016 campaign and later.”).

493. See Jennifer Rubin, Opinion, *Finally, an Initiative to Hold Trump’s Lawyers Accountable*, WASH. POST (Mar. 7, 2022, 7:45 AM), <https://www.washingtonpost.com/opinions/2022/03/07/trump-lawyers-election-misconduct-initiative-to-discipline/>

[<https://perma.cc/BLZ7-KF7Q>] (“Other lawyers, including Sidney Powell and L. Lin Wood, were sanctioned by a federal judge in Michigan for their frivolous suits. A federal judge in Colorado sanctioned two lawyers for bringing their meritless actions.”).

494. See Elena Mejia & Alex Samuels, *Has Your State Made It Harder To Vote?*, FIVETHIRTYEIGHT (June 16, 2022, 6:00 AM), <https://projects.fivethirtyeight.com/voting-restrictions-by-state/> [<https://perma.cc/2GRU-F7GD>] (detailing state level changes in voting laws).

495. See Richard Cowan & Moira Warburton, *U.S. Senate Democrats Fail in Bid to Pass Voting Rights Bill*, REUTERS (Jan. 20, 2022), <https://www.reuters.com/world/us/voting-rights-brawl-takes-center-stage-us-senate-2022-01-19/> [<https://perma.cc/FZ3N-6E89>] (“President Joe Biden and congressional Democrats suffered twin legislative defeats late on Wednesday in their push to toughen voting rights protections in the run-up to this November’s mid-term elections that will determine control of Congress in 2023.”).

496. See, e.g., Reid Epstein & Nick Corasaniti, *Far-Right Republicans Press Closer to Power*

that do not augur well for reforming the system or for re-building public confidence in the electoral system. But reforming the system and re-building trust in it are essential prerequisites for engaging in any serious conversation about possible solutions to the critical problem of maintaining effective presidential leadership in the interval between the election and inauguration of a new president. And that leadership is essential for protecting the nation from all threats, foreign or domestic, biological, chemical, economic, or military. In that sense at least, Justice Alito was correct when he recently wrote that, “Constitutionally speaking, the President never sleeps. The President must be ready, at a moment’s notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people.”⁴⁹⁷ More fundamentally, perhaps, it is also essential for preserving the ideal—and securing the reality—of a “government [that] proceeds directly from the people; is ‘ordained and established’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty”⁴⁹⁸

CONCLUSION

Many circumstances converged to create the United States’ haphazard and inadequate response to the COVID-19 pandemic. The virus arrived while the president, who was politically inexperienced, uninterested in governing, and suspicious of expert knowledge, was the subject of an impeachment proceeding. To complicate matters, 2020 was an election year, and many of the president’s followers admired him for the very qualities that made it difficult for him to respond responsibly to the pandemic. His refusal to wear a mask emboldened these followers, and although facilitating the development of vaccines may have been his administration’s greatest achievement, his tireless and very public efforts to persuade government scientists to speed up vaccine approval to guarantee his re-election, may well have encouraged already rampant vaccine skept-

Over Future Elections, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/15/us/politics/election-deniers-midterms.html> [<https://perma.cc/SJK5-M3Z7>] (“As the halfway point nears of a midterm year that is vastly friendlier to Republicans, the party’s voters have nominated dozens of candidates for offices with power over the administration and certification of elections who have spread falsehoods about the 2020 presidential contest and sowed distrust in American democracy.”).

497. *Trump v. Vance*, 140 S. Ct. 2412, 2441 (2020) (Alito, J. dissenting) (quoting Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995)).

498. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–04 (1819).

ticism. Moreover, as the president's term ended, and the pandemic worsened, the president's attention was not focused on the nation's problems, but on finding some way to cling to office.

Much responsibility for the inadequate response must be attributed to President Trump and his efforts to use the public health agencies for his own political purposes. But it is good to recall the devastating results of the "Crimson Contagion" exercise.⁴⁹⁹ Presumably, the organizers of that exercise did not factor in the consequences of ill-advised presidential action. Yet the result of the simulation was not very different from what happened during the plague years of 2020–21. While President Trump may not have been bullying the science agencies in the Crimson Contagion simulation, those agencies already had been hollowed out by the phenomena identified with the unitary executive theory. And the Biden administration has also suffered from many missteps. It has long been obvious that we need to find better ways to ensure democratic control while respecting scientific expertise, without conflating the two.⁵⁰⁰ The government's public health agencies, such as the FDA and the CDC, must be politically accountable, but their mission is to protect the public health, not simply to do whatever the president's political advisors think helpful

499. The Crimson Contagion exercise was a broad-based simulation exercise, which the Trump administration undertook in 2019, with the cooperation of state and private partners to gauge the nation's ability to deal with the onset of a novel coronavirus for which there was no known vaccine or cure. See Sanger et al., *supra* note 2.

500. See EXEC. OFF. OF THE PRESIDENT, PROTECTING THE INTEGRITY OF GOVERNMENT SCIENCE: A REPORT BY THE SCIENTIFIC INTEGRITY FAST-TRACK ACTION COMM. OF THE NAT'L SCI. & TECH. COUNCIL 11 (Jan. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting_the_Integrity_of_Government_Science.pdf [<https://perma.cc/ZK43-8HGW>] ("Inherent in efforts to protect scientific integrity is the need to navigate the interface between science and policy, more accurately between scientific (and technical) research and policy-related decision-making. Scientific information can and does inform decision-making, and decision-making can and does raise questions that scientific research can address or inform. This interplay is inherent in notions of evidence-based policymaking. However, policymaking requires consideration of factors beyond scientific data alone. Difficulties arise when the distinctions between research and decision-making are unclear, poorly understood, or ignored."); Melissa L. Kelly et al., *Safeguarding against Distortions of Scientific Research in Federal Policymaking*, 51 ENV'T. L. REP. 10014, 10018 (2021) ("Policy matters and values should not dictate scientific research outcomes. Similarly, science can inform, but cannot answer, questions of precisely how much risk to human and environmental health should be permissible. . . . [T]here must be 'barriers between political appointees who view their mission as the single-minded advancement of the President's policy agenda and career employees charged with providing scientific advice or analysis.'"); Barry Sullivan, *Democracy, Bureaucracy, and Science: Making the Trains Run on Time*, 89 NW. U. L. REV. 166, 189 (1994) ("[T]he most important problems do not admit of a purely technical solution. In these circumstances, the way in which we organize the work of our communities is critical; the legitimacy of our outcomes depends on the quality of our processes. We cannot abandon our commitment to consent because that is the only possible strategy for resolving the issues at hand, but we may need to devise new strategies for invoking principles of consent."); see generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

to the president's political fortunes. It is one thing for the Supreme Court to pronounce that "the executive power—all of it—belongs to the [p]resident." To what extent, as a matter of constitutional law, such a broad and categorical statement can be justified by text, historical practice, and sound constitutional policy, remains to be seen. Time will tell. In practice, there may be some questions that are simply too important to be decided by those guided by partisan and short-term interests. At the very least, such decisions must be made in a way that makes clear where science ends and policy begins, as well as where policy ends and partisan politics begins. As this Article has shown, however, there are other institutional arrangements that also require hard thinking. It is imperative, for example, that serious consideration be given to ensure the continuity of active, responsible government in the interval between the presidential election and inauguration. As the COVID-19 pandemic showed, threats to the nation do not evaporate simply because the president is "done" with them.⁵⁰¹

501. See Abutaleb et al., *supra* note 51 ("President Trump was 'just done with COVID,' as one of his aides acknowledged in late December 2020.").

