The Federal Response to COVID-19: Lessons from the Pandemic

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The best-laid schemes of mice and men
Go oft awry,
And leave us nothing but grief and pain

Robert Burns (1785)

When the first suspected human-to-human transmission of the novel coronavirus was reported in January 2020, the United States had in place an elaborate set of pandemic disaster and response plans that spanned hundreds of pages. The George W. Bush administration spearheaded national pandemic planning in 2005 as part of the post-September 11 efforts to modernize the country's disaster response capabilities. Subsequent administrations revisited and revised the various pandemic plans, including the Trump administration as recently as 2017 and 2018.

Despite these detailed plans, the Trump administration was slow to respond to the emerging public health crisis or implement any of the prescribed protocols. Federal officials lost valuable time as they downplayed the risk posed by COVID-19 and repeatedly assured the American people that the virus would simply "go away." By March 2020, a frightening spike in cases in the Northeast made the pandemic impossible to ignore. President Trump and other administration officials shifted tactics and began to characterize COVID-19 as the quintessential "black swan"—a threat that no one could have foreseen. President Trump repeatedly told the American people that "no one could have predicted something like this" even though official federal policy suggested a very different story. Far from being a black swan, the COVID-19 pandemic was widely anticipated and, according to many epidemiologists, inevitable.

This Article argues that our botched federal response was not so much a failure of policy per se, but rather a failure of political will. The federal government had a robust pandemic policy in place; it simply chose not to follow it. This failure of political will illustrates the dangers that arise when public health measures are politicized and weaponized for partisan advantage and demands strong interventions to ensure federal accountability and transparency. The first Part of this article outlines the evolution of our national pandemic plans within the broader context of disaster and response planning. The second Part explains the pandemic staging framework that is used to organize and coordinate decisionmaking within a pandemic. The third Part charts the federal response during the crucial first three months of the public health crisis, specifically identifying instances where the federal government failed to follow its own clearly articulated pandemic policy. The final Part outlines some lessons learned from the pandemic and proposes reforms to insulate public health measures from partisan wrangling and keep our federal government faithful to its foremost obligation; namely, to promote the general welfare.

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INTRODUCTION

When the first suspected human-to-human transmission of the novel coronavirus was reported in January 2020,[1] the United States government had in place an elaborate set of pandemic disaster and response plans that spanned hundreds of pages.[2] The George W. Bush administration spearheaded national pandemic planning in 2005 as part of the post-September 11 efforts to modernize the country's disaster response capabilities.[3] Subsequent administrations revisited and revised the various pandemic plans, including the Trump administration as recently as 2017 and 2018.[4]

The plans provide a multi-tiered approach to a pandemic that assumes a coordinated response by federal, state, and local authorities, as well as private sector involvement.[5] They accurately describe many of the challenges that we have faced during the COVID-19 pandemic, including the shortage of personal protective equipment (PPE) for health care workers, the importance of diagnostic testing, and the rush for a vaccine and other therapeutic treatments.[6]

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1. COVID-19 is an infectious disease caused by a newly discovered coronavirus. *See* WORLD HEALTH ORG., NOVEL CORONAVIRUS (2019-NCOV) SITUATION REPORT-1 1 (2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4 [hereinafter JAN. 21, 2020 SITUATION REPORT]. The virus and the disease were unknown until they were reported in Wuhan, China in 2019. *Id*; *see also Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited Jan. 3, 2022). Coronaviruses are a large family of viruses that cause illness in humans and animals. *Animals and COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/animals.html (last visited Jan. 3, 2022); NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES (U.S.): DIVISION OF VIRAL DISEASES, CORONAVIRUS DISEASE 2019 (COVID-19): SITUATION SUMMARY (2020), https://stacks.cdc.gov/view/cdc/87026.

2. *See, e.g.*, HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf [hereinafter NATIONAL STRATEGY]. Although COVID-19 belongs to the coronavirus family of viruses, the WHO and other national health agencies, including the U.S. Centers for Disease Control and Prevention (CDC) recommended that pandemic influenza contingency plans and their tools should be applied to the current pandemic because of the "clinical and epidemiological similarities between these respiratory viruses." André Ricardo Ribas Freitas, Marcelo Napimoga & Maria Rita Donalisio, *Assessing the Severity of COVID-19*, 29 EPIDEMIOL. SERV. SAUDE, BRASÍLIA 1 (2020), http://scielo.iec.gov.br/pdf/ess/v29n2/en_2237-9622-ess-29-02-e2020119.pdf.

3. IVO H. DAALDER, I. M. DESTLER, DAVID L. GUNTER, JAMES M. LINDSAY, MICHAEL E. O'HANLON, PETER R. ORSZAG & JAMES B. STEINBERG, PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON 1 (2003), https://www.brookings.edu/wp-content/uploads/2016/06/20030101-1.pdf ("Since the attacks of September 11, 2001, a good deal has been done to improve the safety of Americans, not only in the offensive war on terror abroad but in protecting the homeland as well.").

4. *See infra* text accompanying notes 61–71 (describing recent revisions of U.S. pandemic preparedness and response policy).

5. *See generally* HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION (2006), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf; *see also* NATIONAL BIODEFENSE STRATEGY 4 (2018), https://www.phe.gov/Preparedness/legal/boards/nbsb/meetings/Documents/National-Biodefense-Strategy-508.pdf.

6. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL PANDEMIC INFLUENZA PLANS: 2017 UPDATE 44 (2017), https://www.cdc.gov/flu/pandemic-resources/pdf/pan-flu-report-2017v2.pdf [https://perma.cc/RFE6-FGUR] [hereinafter "HHS 2017 UPDATE"].

The *US World Wide Threat Assessment* for 2019 contained a stark warning that the United States was vulnerable to "the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support."[7] That same warning had been included in the *Threat Assessment* for every year of the Trump Presidency.[8]

Despite these detailed plans and national security warnings, the Trump administration was slow to respond to the emerging public health crisis or implement any of the prescribed protocols. Federal officials lost valuable time as they downplayed the risk posed by COVID-19 and repeatedly assured the American people that the virus would simply "go away."[9] By March 2020, a frightening spike in cases in the Northeast made the pandemic impossible to ignore.[10] President Trump and other administration officials shifted tactics and began to characterize COVID-19 as the quintessential "black swan"—a threat that no one could have foreseen.[11] President Trump repeatedly told the American people that "no one could have predicted something like this" even though official federal policy suggested a very different story.[12] Far from being a black

7. DANIEL R. COATS, WORLDWIDE THREAT ASSESSMENT FOR THE U.S. INTELLIGENCE COMMUNITY 21 (2019), https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf. The Worldwide Threat Assessment is released each year by the National Security Director. Marty Johnson, *House Intelligence Briefing on Worldwide Threat Assessment Delayed*, THE HILL (Feb. 8, 2020, 6:18 PM), https://thehill.com/homenews/house/482189-house-intel-briefing-on-worldwide-threat-assessment-delayed. The 2020 Assessment was scheduled to be delivered to the House Intelligence Committee on February 12, 2020, but it was cancelled and then never delivered. John Walcott, *The Trump Administration Is Stalling an Intel Report That Warns the U.S. Isn't Ready for a Global Pandemic*, TIME (Mar. 9, 2020, 4:47 PM), https://time.com/5799765/intelligence-report-pandemic-dangers. Reports state that the 2020 Assessment would have contained the same warning regarding the threat of a worldwide pandemic. *Id.*

8. Walcott, *supra* note 7.

9. 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/.

10. Corinne N. Thompson, Jennifer Baumgartner, Carolina Pichardo, Brian Toro, Lan Li, Robert Arciuolo, Pui Ying Chan, Judy Chen, Gretchen Culp, Alexander Davidson, Katelynn Devinney, Alan Dorsinville, Meredith Eddy, Michele English, Anna Maria Fireteanu, Laura Graf, Anita Geevarughese, Sharon K. Greene, Kevin Guerra, Mary Huynh, Christina Hwang, Maryam Iqbal, Jillian Jessup, Jillian Knorr, Julia Latash, Ellen Lee, Kristen Lee, Wenhui Li, Robert Mathes, Emily McGibbon, Natasha McIntosh, Matthew Montesano, Miranda S. Moore, Kenya Nurray, Stephanie Ngai, Marc Paladini, Rachel Paneth-Pollak, Hilary Parton, Eric Peterson, Renee Poucher, Jyotsna Ramachandran, Kathleen Reilly, Jennifer Sanderson Slutsker, Gretchen Van Wye, Amanda Wahnich, Ann Winters, Marcelle Layton, Lucretia Jones, Vasudha Reddy & Anne Fine, *COVID-19 Outbreak—New York City, February 29–June, 1, 2020*, 69 MORB. MORTAL WKLY. REP. 1725, 1727 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6946a2-H.pdf.

11. John F. Murphy, Jerry Jones & James Conner, *The COVID-19 Pandemic: Is it a "Black Swan"? Some Risk Management Challenges in Common with Chemical Process Safety*, 39 PROCESS SAFETY PROGRESS 1–3 (Apr. 27, 2020), https://aiche.onlinelibrary.wiley.com/doi/10.1002/prs.12160 (concluding COVID-19 pandemic does not meet the definition of a "black swan" event because it was foreseeable).

12. Ian Schwartz, *Trump on Coronavirus: "Nobody Could Have Predicted Something Like This*," REALCLEAR POLS. (Mar. 30, 2020), https://www.realclearpolitics.com/video/2020/03/30/trump_on_coronavirus_nobody_could_have_predicted_something_like_this.html.

swan, the COVID-19 pandemic was widely anticipated and, according to many epidemiologists, inevitable.[13]

In the absence of a coherent federal response, the virus was able to rage unchecked across the country, as state and local officials attempted to stem the tide of a global pandemic with widely disparate regional solutions.[14] The spike in cases in the Northeast turned out to be a mild harbinger of later spikes that were driven by widespread and entrenched community spread in all fifty states.[15] By March 2021, nearly 30 million Americans had been infected and over 530,000 had died from COVID-19,[16] but the costs of the pandemic were not distributed equally across society.[17] Communities of color, vulnerable populations, and front line workers experienced a disproportionate share of cases, hospitalizations, and fatalities.[18]

The federal response to the COVID-19 pandemic represents a singular example of government failure—in both the colloquial and economic sense of the term.[19] Policy makers and scholars will doubtless spend years debating what could have caused such a massive government failure, how many lives it cost, and what could have been done to prevent it. There is already a growing body of literature that critiques existing public health policy through the lens of the

13. *See* Murphy et al., *supra* note 11, at 2 (noting that there were "multiple warnings from experts in epidemiology and related public health fields that a major pandemic is not a question of if, but only of when"). The annual *Worldwide Threat Assessment* also predicted that a pandemic could have devastating consequences. *See* COATS, *supra* note 7, at 21 (describing annual threat assessments regarding pandemics).

14. *See, e.g.*, Reuben Fischer-Baum, Daniela Santamariña & Juliet Eilperin, *What Counts as an Essential Business in 10 U.S. Cities*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/graphics/2020/national/coronavirus-esssential-businesses/.

15. Nic Querolo, *Covid Spike in U.S. South Dwarfs Past Regional Spikes*, BLOOMBERG (Jan. 5, 2021), https://www.bloomberg.com/news/articles/2021-01-05/covid-spike-in-u-s-south-dwarfs-all-earlier-regional-hot-spots. The COVID Tracking Project, *The Pandemic's Deadly Winter Surge is Rapidly Easing*, THE ATLANTIC (Feb. 11, 2021), https://www.theatlantic.com/health/archive/2021/02/the-pandemics-deadly-winter-surge-is-rapidly-easing/618005. During the height of the winter surge, an American was dying from COVID-19 every 33 seconds. Phillip Bump, *A Death Every 33 Seconds*, WASH. POST (Dec. 19, 2020, 7:00 AM), https://www.washingtonpost.com/politics/2020/12/19/death-every-30-seconds.

16. Ciara Linnane, *Coronavirus Tally One Year On: Global Cases Of COVID-19 Top 118 Million and U.S. Nears 530,000 Fatalities*, MARKETWATCH (Mar. 11, 2021, 6:41 AM), https://www.marketwatch.com/story/coronavirus-tally-one-year-on-global-cases-of-covid-19-top-118-million-and-us-nears-530000-fatalities-2021-03-11. In the face of such staggering loss, there were few signs of collective mourning, at least at the federal level. Ray Sanchez, *Few Signs of Collective Mourning as the US Tops 170,000 Coronavirus Deaths*, CNN (Aug. 16, 2020, 8:04 PM), https://www.cnn.com/2020/08/16/us/coronavirus-pandemic-national-mourning/index.html.

17. Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths are Even Bigger Than They Appear*, BROOKINGS INST.: BLOG (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear.

18. Aaron van Dorn, Rebecca E. Cooney & Miriam L. Sabin, *COVID-19 Exacerbating Inequalities in the US*, 395 THE LANCET: WORLD REP. 1243, 1243–44 (Apr. 18, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30893-X/fulltext.

19. In economics, government failure refers to the idea that "a government failure should call a government intervention into question when economic welfare is actually reduced or when resources are allocated in a manner that significantly deviates from an appropriate efficiency benchmark." CLIFFORD WINSTON, GOVERNMENT FAILURE VS. MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 3 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20061003.pdf.

pandemic.[20] This literature raises important and pressing points regarding the need to improve our readiness and preparedness policy, invest in public health initiatives, and reform our healthcare system.[21] However, we do not know whether the failed federal response to COVID-19 was actually a failure of policy because the pandemic plans were not implemented.[22] The failure cannot be explained solely in terms of a missed policy nuance, lagging appropriations, or an inequitable healthcare system. It was much more basic and, in many ways, more troubling. As the threat of COVID-19 loomed large in the early months of 2020, the federal government chose to disregard fifteen years of pandemic planning and stick its head in the proverbial sand. We will never know whether the federal pandemic plans would have successfully contained or slowed the virus because they were largely ignored.

The failed federal response to the COVID-19 pandemic was first and foremost a failure of political will. The distinction between a failure of policy and a failure of political will is extremely important as we begin to come to grips with the cost of our botched response to the pandemic because they raise different questions and demand different interventions. The most comprehensive and forward-looking public health policy is meaningless unless there is a commitment on the part of the government to implement the policy or there is a way to hold the government accountable for its maladministration. In the case of COVID-19, the lapse in political will also illustrates the dangers that arise when public health measures are politicized and weaponized for partisan advantage.[23]

This article details the disconnect between the actions of the federal government and the federal response as scripted in the pandemic plans. The first Part of this article outlines the evolution of our national pandemic plans within the broader context of disaster and response planning. The second Part explains the pandemic staging that is used to organize and coordinate decision making within a pandemic. Against that backdrop, the third Part charts the federal response during the crucial first three months of the public health crisis, specifically identifying instances where the federal government failed to follow its own clearly articulated pandemic policy and missed important triggers that should have initiated a federal response. The final Part outlines the lessons learned from the pandemic and proposes reforms to insulate public health measures from partisan wrangling and keep our federal government faithful to its foremost obligation; namely, to promote the general welfare.

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20. *See, e.g.*, David M. Frankford, *Sick at Heart: A Fundamental Reason the United States' Health Care System Was Unprepared for the COVID-19 Emergency*, 72 RUTGERS L. REV. 1337, 1341 (2020).

21. *Id.*

22. *See infra* text accompanying notes 165–79 detailing failure of the federal response to follow the pandemic intervals.

23. *See, e.g.*, Cailin O'Connor & James Owen Weatherall, *Hydroxychloroquine and the Political Polarization of Science*, BOSTON REV. (May 4, 2020), https://bostonreview.net/science-nature-politics/cailin-oconnor-james-owen-weatherall-hydroxychloroquine-and-political.

I. PANDEMIC PLANNING IN THE UNITED STATES

The September 11, 2001 terrorist attacks prompted a searching reappraisal of domestic security concerns, including incident preparedness and response protocols.[24] In the years immediately following the attacks, the federal government engaged in a massive overhaul of its national preparedness and response strategy, resulting in a comprehensive "all hazards" framework.[25] Planning specific to pandemics began in earnest in 2005 during the George W. Bush administration.[26] More recently, pandemic planning has also been included in broader protocols addressing biological threats.[27] Accordingly, national pandemic planning exists on three levels: (1) the umbrella "all hazards" framework that specifically includes a pandemic as an example of a type of "catastrophic incident," (2) the more focused plans dealing with bioincidents that include both man-made or naturally occurring incidents, such as pandemics, and (3) the pandemic-specific planning designed to address the unique threat posed by a novel virus. At each level of planning, it is assumed that the federal government will play a central role in preparedness and response.

This Part provides an overview of the U.S. preparedness and response policy that was in place in 2020 at the outset of the COVID-19 pandemic. The first Section explains the general framework of our national preparedness and disaster response policy with a special emphasis on "catastrophic incidents," such as pandemics.[28] The second Section outlines the planning regarding biological incidents that assumes a central role for the federal government because of the nature of the threat.[29] The final Section details the pandemic-specific plans and policies, including the Pandemic and All-Hazards Preparedness Act (PAHPA) of 2006.[30]

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24. *See* DAALDER ET AL., *supra* note 3, at 1 and accompanying text.

25. U.S. DEP'T OF HOMELAND SEC., THE NATIONAL RESPONSE FRAMEWORK 3 (4th ed., 2019) [hereinafter NRF], https://www.hsdl.org/?abstract&did=830753. "All-hazards" planning is designed to provide "an integrated approach to emergency preparedness planning that focuses on capacities and capabilities that are critical to preparedness for a full spectrum of emergencies or disasters, including internal emergencies and man-made emergencies (or both) and natural disasters." CTRS. FOR MEDICARE & MEDICAID SERVS., FREQUENTLY ASKED QUESTIONS EMERGENCY PREPAREDNESS REGULATION 1 (2017), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/FAQ-Round-Four-Definitions.pdf.

26. Matthew Mosk, *George W. Bush in 2005: 'If We Wait for a Pandemic to Appear, It Will be Too Late to Prepare*,' ABCNEWS (Apr. 5, 2020, 1:08 AM), https://abcnews.go.com/Politics/george-bush-2005-wait-pandemic-late-prepare/story?id=69979013.

27. *See* NRF *supra* note 25, at 4. Examples of catastrophic events requiring an enhanced federal response would include extreme and widespread natural disasters, such as Hurricane Katrina, terrorist attacks (especially those involving weapons of mass destruction), and pandemics. *Id.* at 4.

28. Catastrophic incidents assume a greater role for the federal government because they are not localized and can easily overwhelm state and local authorities. *Id.*

29. U.S. DEP'T OF HOMELAND SEC., BIOLOGICAL INCIDENT ANNEX TO THE RESPONSE AND RECOVERY FEDERAL INTERAGENCY OPERATIONAL PLANS FINAL vii (2017), https://www.fema.gov/sites/default/files/2020-07/fema_incident-annex_biological.pdf [hereinafter "BIOLOGICAL INCIDENT ANNEX"].

30. Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109–417, 120 Stat. 2831 (2006), https://www.govinfo.gov/content/pkg/PLAW-109publ417/pdf/PLAW-109publ417.pdf.

A. THE NATIONAL PREPAREDNESS AND RESPONSE FRAMEWORK

In 2002, Congress created the Department of Homeland Security to coordinate and unify domestic security efforts.[31] President George W. Bush issued a series of Presidential Directives to guide the agency in its policy development.[32] Of particular interest to pandemic planning was Homeland Security Presidential Directive #5 (HSPD-5) that instructed the Secretary of Homeland Security to establish a comprehensive national domestic incident management system.[33] Its stated goal was to establish a single, comprehensive approach to the domestic incident management system "to prevent, prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies."[34] HSPD-5 speaks of a *national* rather than a *federal* incident management system because state and local authorities, along with non-profit organizations such as the Red Cross, also play a vital role in disaster planning and incident management.[35]

The charge of HSPD-5 was a tall order because it envisioned the integration of all federal government domestic prevention, preparedness, response, and recovery plans into one "all-discipline, all-hazards plan."[36] This effort resulted in two key policy documents: the National Incident Management System (NIMS)[37] and the National Response Plan, now known as the National Response Framework (NRF).[38] NIMS was adopted in 2004 to provide a comprehensive national management system for responding to domestic incidents.[39] NIMS identifies the key incident management priorities: "saving lives, stabilizing the

31. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 6 U.S.C. § 101 (Nov. 25, 2002), https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf. The Department of Homeland Security opened for business on March 1, 2003. Andrew Glass, *Bush Creates Homeland Security Department, Nov. 26, 2002*, POLITICO (Nov. 26, 2018, 12:00 AM), https://www.politico.com/story/2018/11/26/this-day-in-politics-november-26-1012269.

32. There are a total of twenty-five Homeland Security Presidential Directives. *National Security Presidential Directives [NSPD] George W. Bush Administration*, FED'N AM. SCIENTISTS, https://fas.org/irp/offdocs/nspd/index.html (last visited Jan. 3, 2022). The first one was issued shortly after the September 11 terrorist attacks on October 29, 2001, and created the National Homeland Security Council that was the precursor to DHS. *Id.* The last one was issued in 2009 and dealt with arctic region policy. *Id.*

33. Homeland Security Presidential Directive (HSPD)-5 of February 28, 2003 (Management of Domestic Incidents), https://www.dhs.gov/sites/default/files/publications/Homeland%20Security%20Presidential%20Directive%205.pdf [hereinafter HSPD-5]. Section 1 of HSPD-5 sets forth the goal "[t]o enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system." *Id.*

34. *Id.*

35. *Id.* HSPD-5 also recognizes the important role of "the private and nongovernmental sectors." *Id.* Specifically, it states that these actors have a role to "play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies." *Id.*

36. *Id.*

37. FED. EMERGENCY MGMT. AGENCY, NATIONAL INCIDENT MANAGEMENT SYSTEM 3 (3d ed., 2017), https://www.fema.gov/media-library-data/1508151197225-ced8c60378c3936adb92c1a3ee6f6564/FINAL_NIMS_2017.pdf [https://perma.cc/5NGT-8Q8N] [hereinafter NIMS].

38. *See* NRF, *supra* note 25, at.1.

39. *See* NIMS, *supra* note 37, at iii.

incident, and protecting property and the environment."[40] NIMS takes a functional approach to incident management and establishes core concepts, principles, and terminology. Its aim is to help government at all levels (federal, state, local, and tribal) work together with the private sector and nongovernmental organizations (NGOs) to prepare for, prevent, respond to, recover from, and mitigate the effects of incidents regardless of the incident's cause, size, location, or complexity.[41] NIMS was revised after Hurricane Katrina in 2008 and then again most recently in 2017.[42] The NRF provides protocols for operating under different threats or threat levels.[43] It is designed to work as a "framework for all types of threats and hazards, ranging from accidents, technological hazards, natural disasters, and human-caused incidents."[44]

Both NIMS and the NRF adopt a functional approach to all-hazard planning in order to ensure interoperability across incidents and at all levels of government.[45] Central to this functional approach is the Emergency Support Functions (ESFs) that help organize the functional approach to all-hazards planning.[46] ESFs group governmental and some private sector capabilities into an organizational structure that categorizes the capabilities and services most likely to be needed when managing domestic incidents.[47] The most pertinent ESF for the response to the COVID-19 pandemic is *ESF-8 Public Health and Medical Services*.[48] The Department of Health and Human Services (HHS) is the lead federal agency for ESF-8.[49]

The NRF envisions that most incidents "begin and end locally."[50] State and local authorities are expected to take the lead in domestic localized emergencies, such as hurricanes and other mass casualty events. In such cases, the expectation is that the federal government will play more of a supporting role with respect

40. *Id*. at 3.

41. *Id.* at iii. *See* HSPD-5, *supra* note 33, at 3–4.

42. *See* NIMS, *supra* note 37, at 4.

43. *See* NRF, *supra* note 25, at 3. The NRF also advances progress under the National Security Strategy of the United States of America. *Id.* The Framework helps achieve the strategy's first pillar: to "protect the American people, the homeland, and the American way of life." *Id.*

44. *Id.*

45. *Id.* at 7.

46. *Emergency Support Functions*, PUB. HEALTH EMERGENCY, https://www.phe.gov/Preparedness/support/esf8/Pages/default.aspx#8 (last visited Jan. 3, 2022).

47. *See* NIMS, *supra* note 37, at 63.

48. ESF #8, titled Public Health and Medical Services, "[c]oordinates the mechanisms for assistance in response to an actual or potential public health and medical disaster or incident." NRF, *supra* note 25, at 40. The categories in the support function "include but are not limited to the following: Public Health; Medical Surge Support, including patient movement; Behavioral Health Services; Mass Fatality Management; and Veterinary, Medical, and Public Health Services." *Id.* at 40.

49. *Id.*

50. *Id.* at 6. The NRF is clear that an "optimal" incident response will be primarily led by state and local authorities "with private sector and NGO engagement throughout." *Id*. at 15.

to financial support and resources.[51] The goal is for these efforts to be federally supported, state run, and locally executed.[52]

However, the NRF classifies a pandemic as a "catastrophic incident" that necessitates a larger role for the federal government.[53] The NRF defines a catastrophic incident as "one of such extreme and remarkable severity or magnitude that the Nation's collective capability to manage all response requirements would be overwhelmed, thereby posing potential threats to national security, national economic security, and/or the public health and safety of the Nation."[54] Other examples of catastrophic incidents that would trigger an enhanced federal response include extreme and widespread natural disasters, such as Hurricane Katrina and terrorist attacks, especially those involving weapons of mass destruction.[55] By definition, a catastrophic incident is one that can quickly overwhelm the capacity of state and local governments and may require counter measures that are solely within the capacity of the United States government, such as global threat monitoring and vaccine development.[56]

The NRF places ultimate responsibility squarely on the President for the federal response to catastrophic incidents.[57] Specifically, it provides that "[r]egardless of the type of incident, the President leads the Federal Government response effort to ensure that the necessary resources are applied quickly and efficiently to large-scale and catastrophic incidents."[58] The NRF further provides that a national catastrophic incident would "require the extraordinary means of mobilizing and prioritizing national resources to alleviate human suffering; protect lives and property; reduce damage to natural, cultural, and historic resources; stabilize the Nation's economy; and ensure national security."[59] There can be no question that the COVID-19 pandemic was a catastrophic incident within the meaning of the NRF that should have triggered a strong federal response.

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51. *Id*. at 6.

52. *Id* at 7, 15.

53. The other example provided is a cyberattack. *Id.* at 6 n.13; *see also id.* at 19 ("When an incident occurs that exceeds or is anticipated to exceed local, state, tribal, territorial, or insular area resources or when an incident is managed by federal departments or agencies acting under their own authorities, the Federal Government may use the management structures described within the NRF.").

54. *Id*. at 4. It defines "catastrophic incident" by refence to the Post-Katrina Emergency Management Reform Act of 2006, which provides that the term "catastrophic incident" includes "any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area." 6 U.S.C. § 701(4).

55. *See* NRF, *supra* note 25, at 4.

56. *Id.* Although "[i]nitial responsibility for managing domestic incidents generally falls on State and local authorities," HSPD-5 provides that "[t]he Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved." HSPD-5, *supra* note 33, at ¶ 6.

57. Another example provided is a cyberattack. NRF, *supra* note 25, at 6 n.13.

58. *Id.* at 34.

59. *Id* at 4.

B. PLANNING FOR BIOLOGICAL INCIDENTS

The NRF includes a series of threat-specific appendices, including one that specifically addresses biological incidents.[60] The Annex on Biological Incidents (the Annex) was most recently revised in 2017.[61] It covers both naturally occurring biological incidents, such as pandemics, and human-made threats, as well as terrorist attacks and biological warfare.[62] The Annex recognizes that a biological incident has the potential to overwhelm state and local resources, and, therefore, requires strong federal intervention.[63] Specifically, the Annex outlines a number of competencies that are uniquely within the power of the federal government when preparing for and responding to a biological threat, including threat monitoring, operational coordination, public information, medical interventions, and modeling.[64]

In 2018, the Trump White House released the National Biodefense Strategy and the National Biodefense Strategy Implementation Plan.[65] Both documents specifically address the threat posed by pandemics.[66] As with the Annex, the National Biodefense Strategy and the National Biodefense Implementation Plan cover all biological agents whether they are naturally occurring, accidental, or intentional.[67] Goal 4 of the Implementation Plan outlines the importance of a "rapid response to limit the impacts of bioincidents."[68] The National Biodefense Implementation Plan clearly foregrounds the federal government as the key actor, noting that the "federal mission is contingent upon the coordination with and the success of the community response."[69] It also acknowledges the importance of international partnerships because "[i]nfectious disease threats do not respect borders."[70]

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60. *See* BIOLOGICAL INCIDENT ANNEX, *supra* note 29, at ii.

61. *Id.*

62. *Id*. at 13. The Annex provides that "[a] biological incident refers to the occurrence of cases or outbreaks involving an infectious agent that affects people, regardless of natural or deliberate cause, for which response needs have the potential to overwhelm state and local resources." *Id.* at vii.

63. *Id.* The reference to the "the potential to overwhelm state and local resources" references back to the definition of a "catastrophic incident" under the NRF. *See* NRF, *supra* note 25, at 4.

64. *See* BIOLOGICAL INCIDENT ANNEX, *supra* note 29.

65. *See* NATIONAL BIODEFENSE STRATEGY, *supra* note 5, at i. An accompanying presidential memorandum specifically provides that the National Biodefense Strategy supersedes certain prior biodefense policies announcements, but it does not mention the national pandemic planning documents. Memorandum from the Administration of Donald J. Trump, National Security Presidential Memorandum on Support for National Biodefense, (Sept. 18, 2018), https://www.govinfo.gov/content/pkg/DCPD-201800608/html/DCPD-201800608.htm.

66. *See* NATIONAL BIODEFENSE STRATEGY, *supra* note 5, at i. An accompanying Presidential memorandum specifically provides that the National Biodefense Strategy supersedes certain prior biodefense policy announcements, but it does not mention the national pandemic planning documents. National Security Presidential Memorandum, *supra* note 65.

67. *See* NATIONAL BIODEFENSE STRATEGY, *supra* note 5, at i.

68. *Id.* at 7.

69. *Id.* at 1.

70. *Id.* at 2.

C. PANDEMIC-SPECIFIC PLANNING

Pandemic-specific plans were first issued from the White House in 2005.[71] As the lead agency in the case of a pandemic, HHS also released its first pandemic plan in 2005.[72] Congress then passed the Pandemic and All-Hazards Preparedness Act in 2006.[73] Since these initial attempts to address the pandemic threat, the White House, HHS, DHS, and Congress have revisited pandemic-specific response plans numerous times.[74] The pandemic-specific plans and initiatives span hundreds of pages and had been revised under every administration since that of George W. Bush.

Table 1 provides a chronological overview of pandemic-specific planning.

TABLE 1: CHRONOLOGICAL OVERVIEW OF PANDEMIC-SPECIFIC PLANNING

Date	**Policy**	**Institution**
May 2005	National Strategy for Pandemic Influenza (17 pages)	White House Homeland Security Council
May 2005	HHS Pandemic Influenza Plan (396 pages)	HHS
May 2006	National Strategy for Pandemic Influenza Implementation Plan (233 pages)	White House Homeland Security Council
June 2006	HHS Pandemic Influenza Plan Update (19 pages)	HHS
September 2006	Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources (54 pages)	U.S. Department of Homeland Security
November 2006	HHS Pandemic Influenza Plan Update (16 pages)	HHS
December 2006	Pandemic and All Hazards Preparedness Act	Congress
January 2009	HHS Pandemic Influenza Plan Update (15 pages)	HHS
June 2017	HHS Pandemic Influenza Plan Update (52 pages)	HHS
June 2019	Pandemic and All-Hazards Preparedness and Advancing Innovation Act	Congress

Table 2 organizes the pandemic-specific initiatives by their institutional source and administration.

71. NATIONAL STRATEGY, *supra* note 2. *See* HOMELAND SEC. COUNCIL, *supra* note 5.

72. U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS PANDEMIC INFLUENZA PLAN (2005), https://www.cdc.gov/flu/pandemic-resources/pdf/hhspandemicinfluenzaplan.pdf [hereinafter HHS 2005 PLAN]

73. Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-17, 120 Stat. 2831 (2006).

74. As noted above, pandemic planning has also been explicitly covered in bioincident plans. *See* BIOLOGICAL INCIDENT ANNEX, *supra* note 29.

TABLE 2: PANDEMIC-SPECIFIC INITIATIVES
(BY INSTITUTIONAL SOURCE AND ADMINISTRATION)

Institution	**Policy**	**Administration**
Congress	Pandemic and All Hazards Preparedness Act (2006)	George W. Bush
Congress	Pandemic and All-Hazards Preparedness and Advancing Innovation Act (2019)	Donald Trump
White House Homeland Security Council (HSC)	National Strategy for Pandemic Influenza (2005)	George W. Bush
White House (HSC)	National Strategy for Pandemic Influenza Implementation Plan (2006)	George W. Bush
HHS	HHS Pandemic Influenza Plan (2005)	George W. Bush
HHS	HHS Pandemic Influenza Plan Update (2006)	George W. Bush
HHS	HHS Pandemic Influenza Plan Update (2009)	Barrack Obama
HHS	HHS Pandemic Influenza Plan Update (2017)	Donald Trump
DHS	Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources (2006)	George W. Bush

President George W. Bush took a special interest in pandemic planning after the September 11th attacks.[75] The White House released the first comprehensive pandemic plan in May 2005, known as National Strategy for Pandemic Influenza (National Strategy).[76] It was then followed a year later in 2006 by the much more comprehensive National Implementation Plan (National Implementation Plan) that spanned 233 pages.[77] The National Implementation Plan explains that "the overarching imperative is to reduce the morbidity and mortality caused by a pandemic."[78] To further this goal, the National Implementation Plan sought to "leverage all instruments of national power and ensure coordinated action by all segments of government and society, while maintaining the rule of law, and other basic societal functions."[79]

To support these pandemic planning efforts, Congress passed the Pandemic and All-Hazards Preparedness Act (PAHPA) of 2006, which appropriated over $7.1 billion for pandemic planning and related activities.[80] It expanded the preparedness and response activities of HHS and created the office of the

75. *See* Mosk, *supra* note 26.

76. *See* NATIONAL STRATEGY, *supra* note 2.

77. *See* HOMELAND SEC. COUNCIL, *supra* note 5.

78. *Id.* at 6

79. *Id.*

80. Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417 (2006). Previously, the Public Health Security and Bioterrorism Preparedness Act of 2002 gave funding to hospitals and health systems. Pub. L. No. 107-108, 116 STAT. 594 (2020). In 2004, the Project BioShield Act authorized the federal government to give incentives to the private sector to create drugs that could protect people from biological weapons and naturally occurring biological threats. Pub. L. No. 108-276, 118 STAT. 835 (2004).

Assistant Secretary for Preparedness and Response (ASPR).[81] The PAHPA was reauthorized in 2019 by the Pandemic and All-Hazards Preparedness and Advancing Innovation Act (PAHPAIA). Both bills passed easily with bi-partisan support.[82]

The initial HHS pandemic plans were even more detailed than those issued by the Bush White House. This makes sense given that HHS is the lead federal agency for all public health emergencies, including pandemics.[83]

All of these pandemic-specific plans remain current policy and are publicly available on the CDC website where they have been since the start of the pandemic.[84] The level of detail provided in these pandemic-specific plans directly disproves President Trump's repeated assertion that "[n]o one could have predicted something like this."[85] Read together, the plans accurately describe the trajectory of the COVID-19 pandemic using terms and concepts that are now all too familiar. They stress the importance of foreign containment to buy time for preparedness measures at home and the development of medical countermeasures, but openly acknowledge that containment will most likely not be effective.[86] When containment fails, the only option is mitigation and non-pharmaceutical interventions (NPI), such as social distancing and school closings.[87]

The plans explain that daily life will be disrupted for extended periods of time because a pandemic will present in waves that risk overwhelming our health systems.[88] Hospitals will need to extend their surge capacity and increase the number of ICU beds and ventilators.[89] There will be shortages of PPE, and new technologies will have to be developed to both make and sanitize PPE.[90] The plans describe the rush for diagnostic tests, effective treatments, and a vaccine. They note that these activities will require streamlined approval processes and distribution priorities.[91] They also provide sobering projections of the number of potential deaths and hospitalizations[92] and predict that there will be significant

81. Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417 (2006).

82. Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019, Pub. L. No. 116-22 (2019).

83. HHS 2017 UPDATE, *supra* note 6, at 5.

84. *Id.*

85. Schwartz, *supra* note 12.

86. *See* HOMELAND SEC. COUNCIL, *supra* note 5, at 6 ("While complete containment might not be successful, a series of containment efforts could slow the spread of a virus to and within the United States, thereby providing valuable time to activate the domestic response").

87. *See* HHS 2017 UPDATE, *supra* note 6, at 42

88. *Id.*

89. *See* HHS 2005 PLAN, *supra* note 72, at 18.

90. *Id.* at app. 2 (S4-7).

91. *See* HHS 2017 UPDATE, *supra* note 6, at 11.

92. For example, in the case of a pandemic that is classified as "very severe," the 2017 HHS Update projects close to 2 million deaths and 11.5 million hospitalizations in the United States alone. *See* HHS 2017 UPDATE, *supra* note 6, at 44

delays in processing bodies because mortuary services will be quickly overwhelmed.[93]

These plans make it clear that every administration going back to that of George W. Bush recognized the potential threat posed by a pandemic involving a novel virus. Moreover, these plans spell out clear preparedness goals and detail a robust pandemic response led by the federal government. In terms of readiness goals, the 2017 HHS Update specifically mentioned two potential crises that defined the early days of the COVID-19 pandemic in the United States—the shortage of N95 respirators and ventilators. The 2017 HHS Update called for "developing technology and processes that allow for rapid production of N95 respirators, to significantly increase respirator supply during an influenza pandemic."[94] It also suggested the development of "effective reusable respirators that will reduce the burden to produce and dispense large volumes of disposable respirators during an outbreak."[95] The 2017 HHS Update referred to plans to seek FDA approval for a "next-generation ventilator for all populations," including the development of interchangeable ventilator components."[96]

Needless to say, the readiness goals that were outlined in the 2017 HHS Update had not been met by the beginning of 2020 when the COVID-19 pandemic reached the United States. Additionally, many commentators were shocked when it came to light that the lauded National Stockpile did not have adequate supplies on hand to meet the demand.[97] It has been reported that the Assistant Secretary for Preparedness and Response did not prioritize pandemic planning because he was more interested in biodefense.[98] For example, his office discontinued the Obama-era $35 million initiative to develop a machine that would make 1.5 million N95 respirator masks in a day.[99] The capacity to

93. *Id*. at 40.

94. *Id.* at 24.

95. *Id.*

96. *Id*. at 24.

97. Michael Biesecker & the Assoc. Press, *U.S. Federal Stockpile of Medical Protective Gear is Almost Empty as Coronavirus Spreads*, FORTUNE (Apr. 9, 2020, 3:45 AM), https://fortune.com/2020/04/09/us-stockpile-medical-protective-gear-almost-empty-coronavirus.

98. Jon Swaine, Robert O'Harrow Jr. & Aaron C. Davis, *Before Pandemic, Trump's Stockpile Chief Put Focus on Biodefense. An Old Client Benefited.*, WASH. POST (May 4, 2020), https://www.washingtonpost.com/investigations/before-pandemic-trumps-stockpile-chief-put-focus-on-biodefense-an-old-client-benefited/2020/05/04/d3c2b010-84dd-11ea-878a-86477a724bdb_story.html. In testimony before Congress in 2011, the Assistant Secretary seemed to dismiss the potential threat of a pandemic when he said: "Quite frankly, Mother Nature is not a thinking enemy intent on inflicting grievous harm to our country, killing our citizens, undermining our government or destroying our way of life. Mother Nature doesn't develop highly virulent organisms that are resistant to our current stockpiles of antibiotics." *Bioterrorism Threats with Officials from Depts. of DHS, HHS & the FBI: Hearing Before the S. Homeland Security and Governmental Affairs Comm.*, 112th Cong. (Oct. 18, 2011) (statement of Robert Kadlec, M.D., Former Homeland Security Senior Director for Biosecurity Defense), https://www.c-span.org/video/?302149-1/us-bioterrorism-threats.

99. Swaine et al, *supra* note 98; *see also* Jon Swaine, *Federal Government Spent Millions to Ramp Up Mask Readiness, but That Isn't Helping Now*, WASH. POST, (Apr. 3, 2020, 1:27 PM), https://www.washingtonpost.com/investigations/federal-government-spent-millions-to-ramp-up-mask-

make that volume of N95 respirators would have greatly relieved the N95 respirator shortage that was so severe during the early days of the pandemic and continues to linger today.[100] In another move that may have compromised pandemic readiness, the Assistant Secretary moved the responsibility for the National Stockpile from the CDC to his office.[101]

The pandemic-specific plans accurately described the trajectory of the pandemic and recognized that it could be a multi-year event.[102] For example, the 2006 National Strategy for Pandemic Influenza Implementation Plan (National Implementation Plan) explained: "In terms of its scope, the impact of a severe pandemic may be more comparable to that of war or a widespread economic crisis than a hurricane, earthquake, or act of terrorism."[103] The plans also clearly established readiness goals that, as mentioned above, were not been met by the time COVID-19 made its way to the United States. Most importantly, the plans delineated a series of federal actions that should be taken at specific points during a pandemic. For example, the National Strategy states with assurance that "[o]nce health authorities have signaled sustained and efficient human-to-human spread of the virus has occurred, a cascade of response mechanisms will be initiated, from the site of the documented transmission to locations around the globe."[104] The next Part explains the different frameworks for pandemic staging and the various triggers for response actions.

II. PANDEMIC RISK ASSESSMENT: INTERVALS, PHASES, AND STAGES

Pandemic risk assessment is organized around the various intervals, phases, or stages of a pandemic. The staging of a pandemic allows policy makers and public health officials to evaluate the timing and sequence of preparedness and response actions. The WHO established its first set of pandemic phases in 1999 and encouraged countries to develop their own more specific breakdown

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readiness-but-that-isnt-helping-now/2020/04/03/d62dda5c-74fa-11ea-a9bd-9f8b593300d0_story.html (describing Obama-era initiative).

100. Yuki Noguchi, *Why N95 Masks Are Still in Short Supply in the U.S.*, NPR (Jan. 27, 2021), https://www.npr.org/sections/health-shots/2021/01/27/960336778/why-n95-masks-are-still-in-short-supply-in-the-u-s.

101. Swaine et al., *supra* note 98.

102. HOMELAND SEC. COUNCIL, *supra* note 5, at 1–2.

103. *Id.* at 2. The Implementation Plan provides that:

> In addition to coordinating a comprehensive and timely national response, the Federal Government will bear primary responsibility for certain critical functions, including: (1) the support of containment efforts overseas and limitation of the arrival of a pandemic to our shores; (2) guidance related to protective measures that should be taken; (3) modifications to the law and regulations to facilitate the national pandemic response; (4) modifications to monetary policy to mitigate the economic impact of a pandemic on communities and the Nation; (5) procurement and distribution of vaccine and antiviral medications; and (6) the acceleration of research and development of vaccines and therapies during the outbreak.
>
> *Id.* at 2.

104. NATIONAL STRATEGY, *supra* note 2, at 5.

of pandemic phases.[105] The WHO pandemic phases were most recently updated in 2013.[106] The various pandemic stages are not designed to predict what will occur during any particular pandemic nor are they necessarily linear.[107] For example, it is possible to identify a novel virus subtype in humans that does not progress to achieve sustained human-to-human transmission and, therefore, does not become a pandemic.

The initial 2005 HHS plan organized its preparedness and response actions around the WHO pandemic phases.[108] It provided fairly specific directions for each pandemic phase across six different areas: planning and coordination, surveillance and protective measures, vaccines and antiviral drugs, healthcare and emergency response, communications and outreach, and research.[109] The next year, the United States established its first domestic set of pandemic stages that were detailed in the National Implementation Strategy issued by the White House.[110] Once again, each pandemic stage was paired with concrete preparedness and response actions.[111] This process of pairing preparedness and response actions with specific stages of the pandemic has continued to the present day. The 2017 HHS Update incorporates CDC pandemic intervals that replaced the national pandemic stages and uses them to delineate the timing of pandemic preparedness and response actions.[112]

This Part explains the practical application of pandemic staging to policy development and pandemic risk management. It is important to remember that pandemic risk management will not stop a pandemic, but it can greatly mitigate its impact.[113] Table 3 provides a summary and comparison of the three major frameworks for pandemic staging.

105. THE WORLD HEALTH ORG., INFLUENZA PANDEMIC PREPAREDNESS PLAN: THE ROLE OF WHO AND GUIDELINES FOR NATIONAL AND REGIONAL PLANNING 7 (1999), https://apps.who.int/iris/handle/10665/66155 (last visited Jan. 3, 2022) [hereinafter WHO 1999 PLAN].

106. THE WORLD HEALTH ORG., PANDEMIC INFLUENZA RISK MANAGEMENT 14 (2017), https://apps.who.int/iris/bitstream/handle/10665/259893/WHO-WHE-IHM-GIP-2017.1-eng.pdf;jsessionid=FF0E44DE342CCEF9F0A31E1EFB14C8E8?sequence=1 [hereinafter WHO 2017 PLAN].

107. Rachel Holloway, Sonja A. Rasmussen & Stephanie Zaza, *Updated Preparedness and Response Framework for Influenza Pandemics*, 63 MORBIDITY & MORTALITY WKLY. REP. 5, 8 (2014), https://www.cdc.gov/mmwr/pdf/rr/rr6306.pdf.

108. HHS 2005 PLAN, *supra* note 72, at 33.

109. *Id.* at 33–34.

110. HOMELAND SEC. COUNCIL, *supra* note 5, at 32.

111. *Id.*

112. HHS 2017 UPDATE, *supra* note 6, at 47. First reported in 2005, the pandemic intervals were updated in 2012 to reflect the lessons of the 2009 H1N1 pandemic. *Id.* at 7–8.

113. "Management of risk does not imply an ability to prevent a pandemic, but rather to make best use of available resources to reduce the extent of disease, reduce the impact of secondary catastrophes, and to prevent panic from occurring in the population." WHO 1999 PLAN, *supra* note 105, at 31.

TABLE 3: THREE MAJOR FRAMEWORKS FOR PANDEMIC STAGING

WHO Pandemic Phases (2013)	National Implementation Plan (2006)	CDC Pandemic Intervals (2017)
Interpandemic phase: Period between pandemics 1. No new virus subtype in humans but may be present in animals. 2. Circulating new virus subtype in animals poses risk to humans. **Alert phase:** New virus subtype identified in humans 3. Human infection with new virus subtype, but no human-to-human transmission. 4. Small cluster(s) with limited human-to-human transmission. 5. Larger cluster(s), but still localized.	**Stage 0:** Animal outbreak overseas **Stage 1:** Suspected human-to-human outbreak overseas **Stage 2:** Confirmed human-to-human outbreak overseas	**Investigation:** A new type of virus is identified and investigated—in animals or humans anywhere in the world—that is thought to have implications for human health.
Pandemic phase: Global spread of human influenza caused by a new subtype 6. Increased and sustained transmission in the general population.	**Stage 3:** Widespread human-to-human outbreaks in multiple locations overseas	**Recognition:** Increased cases, or clusters of cases, are identified anywhere in the world, along with an increased potential for person-to-person transmission.
	Stage 4: First human case in North America	**Initiation:** Cases of the virus are confirmed anywhere in the world with both efficient and sustained person-to-person transmission.
	Stage 5: Spread throughout the United States	**Acceleration:** Consistently increasing rate of pandemic influenza cases identified in the United States, indicating established transmission.
	Stage 6: Recovery and Preparation for Subsequent Waves	**Deceleration:** Consistently decreasing rate of cases in the United States.
Transition phase: Reduction in global risk, reduction in response activities, recovery.		**Preparation:** Preparation for future pandemic waves with continued outbreaks possible in some jurisdictions.

A. THE WHO PANDEMIC PHASES

The WHO first issued its breakdown of pandemic phases over twenty years ago in 1999 with the publication of its Influenza Pandemic Plan (WHO Plan) that described the role of the WHO and provided guidelines for both national and regional planning efforts.[114] Recognizing the diverse history of worldwide pandemics in the twentieth century,[115] the WHO Plan was designed to provide a flexible framework to assist its member states in addressing planning for a pandemic.[116] It delineated six separate phases of a pandemic and provided detailed guidance regarding what actions the WHO should take at the various phases.[117] All but one phase focused on the pandemic.[118] Only Phase 0 dealt with pre-pandemic preparedness activities, although Phase 0 was divided into three levels of preparedness: Level 1 – new virus subtype in a human; Level 2 – confirmed human infection; and Level 3 – confirmed human-to-human transmission.[119] The WHO Plan urged countries to establish National Pandemic Planning Committees or similar appointed bodies to develop nation-specific pandemic plans guided by the WHO framework.[120]

The WHO revised its pandemic phases in 2013 by introducing a continuum of four pandemic phases.[121] Under the revised framework, only one phase takes place during the pandemic.[122] The two prior phases occur prior to a pandemic outbreak and one occurs after a pandemic or post-pandemic peak.[123] The phases are Inter-pandemic (preparedness and planning), Alert (emergency and pre-emptive response), Pandemic (minimizing impact), and Transition.[124]

The WHO pandemic phases are designed to "describe and communicate worldwide disease progression"[125] and provide a general view of the "emerging epidemiologic situation."[126] They are independent of whether the WHO declares

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114. WHO 1999 PLAN, *supra* note 105, at 1.

115. A later WHO document explains:

> There were three major pandemics in the 20th century, commonly referred to as the "Spanish flu" in 1918–1919, the "Asian flu" in 1957–1958, and the "Hong Kong flu" in 1968–1969. The most serious of these was the pandemic caused by the A(H1N1) virus in 1918–1919, which resulted in 20–50 million deaths, and had a particularly notable impact on mortality in young adults. The A(H2N2) pandemic in 1957–1958 and the A(H3N2) pandemic in 1968–1969 each caused around 1 million deaths worldwide.
>
> WHO 2017 PLAN, *supra* note 106, at 26.

116. *Id.* at 8.

117. WHO 1999 PLAN, *supra* note 105, at 8–16.

118. *Id.* at 10–12.

119. *Id.*

120. *Id.* at 21.

121. THE WORLD HEALTH ORG., PANDEMIC INFLUENZA RISK MANAGEMENT INTERIM GUIDANCE 6 (2013), https://www.who.int/influenza/preparedness/pandemic/GIP_PandemicInfluenzaRiskManagementInterimGuidance_Jun2013.pdf (last visited Jan. 3, 2022).

122. *Id.*

123. *Id.*

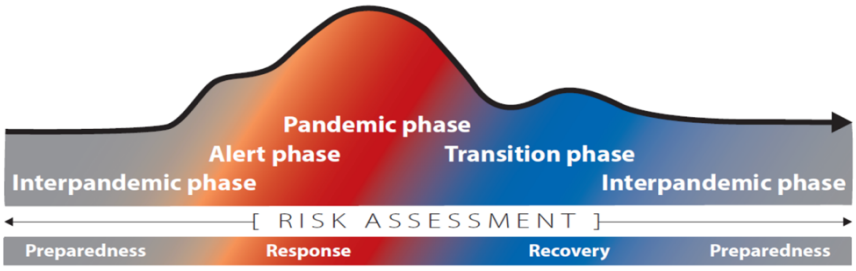
124. *Id.*

125. Holloway et al., *supra* note 107, at 3.

126. *Id.*

a PHEIC or a pandemic.[127] WHO encourages countries to de-couple their pandemic planning from the pandemic phases and create their own country-specific plans.[128] Figure 1 shows the current WHO pandemic phase continuum and reflects a global average of cases.[129]

FIGURE 1: WHO PANDEMIC PHASE CONTINUUM[130]



B. NATIONAL PANDEMIC STAGES

As explained earlier, the first pandemic plan in the United States was issued by the White House in 2005. It was a broad policy document organized around three "pillars": Preparedness and Communication; Surveillance and Detection; and Response and Containment.[131] The following year, the National Implementation Plan provided greater specificity regarding the role of the federal government in pandemic preparedness and response. The National Implementation Plan recognized the crucial role of preparedness, but also stressed that it was "important to show how this preparedness will translate to action in the period of time immediately before, during, and after the emergence of a pandemic."[132] In order to spell out the necessary steps at each phase of a pandemic, the National Implementation Plan adopts a seven-stage pandemic framework and identifies the required federal action for each stage.[133] This framework diverged considerably from the pandemic phases that the WHO was using at the time because its first four stages occur before the first human case appears in North America.[134]

Under the National Implementation Plan, the seven pandemic stages are:

127. WHO 2017 PLAN, *supra* note 106, at 14.
128. *Id.* at 13.
129. *Id.*
130. THE WORLD HEALTH ORG., GUIDANCE FOR SURVEILLANCE DURING AN INFLUENZA PANDEMIC 2017 UPDATE 13 (2017), https://www.who.int/influenza/preparedness/pandemic/WHO_Guidance_for_surveillance_during_an_influenza_pandemic_082017.pdf.
131. NATIONAL STRATEGY, *supra* note 2, at 7.
132. HOMELAND SEC. COUNCIL, *supra* note 5, at 30.
133. *Id.* at 31–32.
134. *Id.* at 32.

Stage 0: New Domestic Animal Outbreak in At-Risk Country
Stage 1: Suspected Human Outbreak Overseas
Stage 2: Confirmed Human Outbreak Overseas
Stage 3: Widespread Human Outbreaks in Multiple Locations Overseas
Stage 4: First Human Case in North America
Stage 5: Spread throughout United States
Stage 6: Recovery and Preparation for Subsequent Waves[135]

For each stage, the National Implementation Plan outlines specific (1) objectives; (2) immediate actions; (3) policy decisions; and (4) communications and outreach.[136]

To put this staging into perspective, the first case of COVID-19 in North America was reported in real time on January 21, 2020, in Washington state, although we now know that the novel coronavirus was circulating in the United States prior to that date.[137] The National Implementation plan notes that "the development of the first case anywhere in North America represents a significant threat to the entire continent, as for practical purposes it will be impossible to prevent completely the migration of disease across land borders."[138] Accordingly, the first human case in the United States should have triggered numerous actions by the federal government. The goals of the actions were three-fold: (1) contain the early cases to slow the first wave of the pandemic; (2) assess and develop medical countermeasures; and (3) implement the national response.[139] The immediate actions to be taken included (1) deploying stockpiled materials to the region; (2) limiting non-essential travel in the area; (3) instituting protective measures and social distancing; (4) supporting delivery of essential goods; (5) continuing work on the development of a pandemic vaccine, which should have started in Stage 2; (6) activating pandemic plans at all levels of government; (7) activating surge plans in the federal health system and requesting that state and local authorities do the same; (8) continuing the development and deployment of diagnostic reagents to all laboratories "with capability and expertise in pandemic influenza diagnostic testing"; and (9) developing antivirals.[140] All of these actions and more should have occurred under the direction of HHS, sometimes working in conjunction with DHS.[141]

135. *Id.*

136. *Id.* The pandemic stages "provided greater specificity for U.S. preparedness and response efforts than the WHO phases and facilitated initial planning efforts by identifying objectives, actions, policy decisions, and message considerations for each stage." Holloway et al., *supra* note 107, at 2.

137. The first COVID-19-related death in the U.S. was thought to be on February 26th, but subsequent testing has revealed that COVID-19 was spreading in the community much earlier, with the first death now documented on February 6th, 2020. Thomas Fuller, Mike Baker, Shawn Hubler & Sheri Fink, *A Coronavirus Death in Early February Was 'Probably the Tip of an Iceberg,'* N.Y. TIMES (Apr. 22, 2020), https://www.nytimes.com/2020/04/22/us/santa-clara-county-coronavirus-death.html.

138. HOMELAND SEC. COUNCIL, *supra* note 5, at 39.

139. *Id.* at 40.

140. *Id.*

141. *Id.*

The National Implementation Plan also includes clear guidelines on how to manage communications with state, local, and tribal authorities, institutions, the public, and global partners.[142] With respect to communications with the general public, the National Implementation Plan suggests a review of action to reduce the likelihood of infection, along with a recommendation to curtail non-essential travel and prepare for implementation of community disease containment measures as the virus spreads.[143] On January 22, 2020, a day after the first reported case in the United States, President Trump told CNBC in an interview from the World Economic Forum in Davos, Switzerland: "We have it totally under control. It's one person coming in from China. It's going to be just fine."[144]

C. PANDEMIC INTERVALS FRAMEWORK (PIF)

Our current pandemic preparedness and response policy is organized around the six pandemic intervals: Investigation, Recognition, Initiation, Acceleration, Deceleration, and Preparation. The pandemic intervals replaced the pandemic stages that were established by the National Implementation Plan in 2006.[145] The PIF was designed as a common framework to guide preparedness and response actions at the federal, state, and local level. Unlike the pandemic stages, the PIF does not assume that the pandemic originates outside the United States, thereby increasing its flexibility.[146] The PIF is also designed to cover moderate, as well as severe, pandemics[147] and recognizes that the progression of the pandemic will differ from jurisdiction to jurisdiction.[148]

142. HHS 2005 PLAN, *supra* note 72, at 9 ("During a pandemic, HHS will provide honest, accurate and timely information on the pandemic to the public. It will also monitor and evaluate its interventions and will communicate lessons learned to healthcare providers and public health agencies on the effectiveness of clinical and public health responses."); HOMELAND SEC. COUNCIL, *supra* note 5, at 40–41.

143. HOMELAND SEC. COUNCIL, *supra* note 5, at 40–41.

144. Mathew J. Belvedere, *Trump Says He Trusts China's Xi on Coronavirus and the US Has It 'Totally Under Control,'* CNBC (Jan. 22, 2020) https://www.cnbc.com/2020/01/22/trump-on-coronavirus-from-china-we-have-it-totally-under-control.html.

145. HHS 2017 UPDATE, *supra* note 6, at 46.

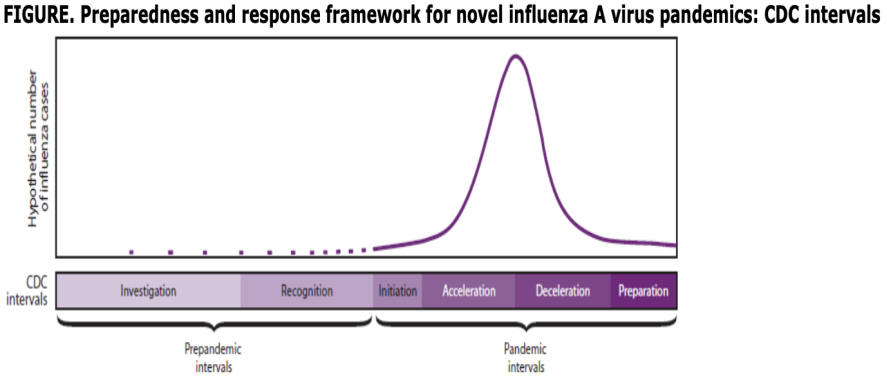
146. *Id.* at 7.

147. *Id.* at 3. HHS 2017 UPDATE explains:

> The 2005 Pandemic Influenza Plan and subsequent updates focused on planning for a severe pandemic with effects that would extend beyond health consequences to include social and economic disruption. By preparing exclusively for a very severe pandemic, the Plan did not include specific guidance for the type of pandemic we experienced in 2009, which was comparatively less severe. *Id.*

148. *Id.* at 42.

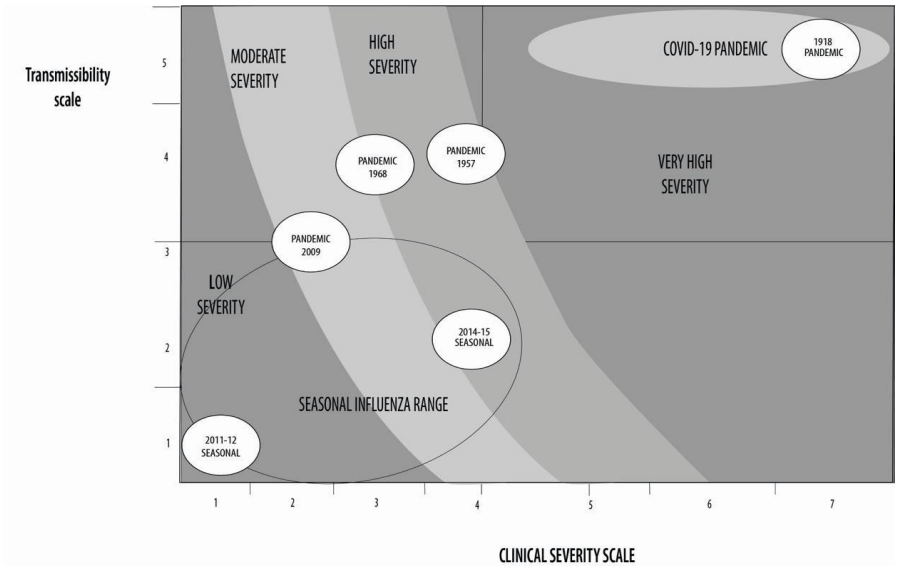
FIGURE 2: PREPAREDNESS AND RESPONSE FRAMEWORK FOR NOVEL INFLUENZA A VIRUS PANDEMICS (CDC INTERVALS)[149]



The PIF describes the progression of a pandemic along six intervals—two pre-pandemic and four during the pandemic.[150] As with the WHO pandemic phases, progression through the pandemic intervals is not necessarily linear and different parts of the country may be experiencing different intervals.[151] The PIF is designed to be used in conjunction with the Pandemic Risk Assessment Framework (PRAF) that helps evaluate the severity of a pandemic.[152] The PRAF measures viral transmissibility and clinical severity to estimate the potential impact of the virus.[153] The projected severity of a pandemic can help further inform decision making regarding preparedness and response actions.[154] Figure 3 scores the severity of the COVID-19 pandemic.[155] You can see that the COVID-19 pandemic ranks up there with the devastating Spanish Influenza pandemic of 1918 that resulted in an estimated 500,000 deaths in the United States at the time when the total population was only about 105 million.[156]

149. Holloway et al., *supra* note 107, at 4.
150. *Id.* at 46–47.
151. *Id.* at 47.
152. "The IRAT [Influenza Risk Assessment Tool] assesses the potential human pandemic risk of novel influenza A viruses to inform decisions regarding the development, manufacturing, use, and stockpiling of diagnostics, vaccines, and therapeutics." *Id.* at 12.
153. *Id.*
154. *Id.* at 51.
155. Freitas et al., *supra* note 2.
156. HHS 2017 UPDATE, *supra* note 6, at 42.

FIGURE 3: SEVERITY OF COVID-19 PANDEMIC[157]



The 2017 HHS Update directly engages the PIF across seven domains: (1) Surveillance, Epidemiology, and Laboratory Activities; (2) Community Mitigation Measures; (3) Medical Countermeasures; (4) Health Care System Preparedness and Response; (5) Communications and Public Outreach; (6) Scientific Infrastructure and Preparedness; and (7) Domestic and International Response Policy.[158] It provides detailed actions and recommendations for each pandemic interval across all seven domains.[159] For example, during the Initiation interval, HHS is directed to evaluate non-medical countermeasures, such as closures and social distancing.[160] It is also directed to "maintain situation-appropriate border and travelers' health measures."[161]

III. MAPPING THE FEDERAL RESPONSE: THE TIMELINE

COVID-19 is a novel coronavirus for which humans have no natural immunity.[162] When it first appeared in humans, there were no effective medical countermeasures (e.g., vaccine or treatment).[163] With a susceptible population

157. Freitas et al., *supra* note 2.

158. *Id.* at 5–6. "It serves as an Update of the 2005 HHS Pandemic Influenza Plan and its interim updates issued in June 2006, November 2006, and January 2009, and sets the course for the next decade." *Id.* at 8.

159. *Id.* at 13. The HHS 2017 Update provides: "Taken together, the updated domains reflect an end-to-end systems approach to improving the way preparedness and response are integrated across sectors and disciplines, while remaining flexible for the conditions surrounding a specific pandemic." *Id.*

160. Holloway et al., *supra* note 107, at 10, 15.

161. *Id.*

162. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

163. *Id.*

and global travel, the virus moved quickly from the first outbreaks in Wuhan, China in late December 2019 and early January 2020 to being declared a worldwide pandemic on March 11, 2020.[164] From the outset, it was clear that the pandemic was not going to be a discrete "incident" within the meaning of the federal preparedness and response plans. It was not a hurricane or terrorist attack. The waters would not recede nor would the perpetrators be identified and brought to justice. Instead, the COVID-19 pandemic promised to be a multi-year disaster that would unfold in waves with ever-increasing spikes in cases, hospitalizations, and deaths.

The pandemic plans discussed in Part I recognized that, because of globalization, "a human outbreak anywhere means risk everywhere."[165] Specifically, the 2017 HHS Plan provides that "[s]ustained human-to-human transmission anywhere in the world will be the triggering event to initiate a pandemic response by the United States."[166] Accordingly, the first three intervals described under the PIF (Investigation, Recognition, and Initiation) refer to events that could be taking place outside the United States.[167] In a little under two months from the time that the CDC became aware of the first human cases in China, the United States had initiated a pandemic wave and cases were accelerating exponentially. In this compressed timeline, the actions taken during the pre-pandemic intervals are crucial to containing or at least slowing the pandemic. Table 4 illustrates how quickly the United States progressed through the first intervals.

164. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

165. HHS 2005 Plan, *supra* note 72, at 20. The HHS 2017 Update replaced the earlier seven-stage pandemic model in the National Strategy with the Pandemic Intervals Framework. HHS 2017 UPDATE, *supra* note 6, at 46. It identifies six stages of a pandemic: two are pre-pandemic and represent a time of preparedness and readiness, two are during a pandemic wave, and one is the period of recovery where preparedness for the next wave begins. *Id.* at 46–47.

166. HHS 2005 Plan, *supra* note 72, at 20. The National Strategy referred to a "cascade" of federal action. NATIONAL STRATEGY, *supra* note 2, at 8.

167. HHS 2017 UPDATE, *supra* note 6, at 46.

TABLE 4: TIMELINE OF UNITED STATES PROGRESSION THROUGH THE FIRST INTERVALS

Pandemic Intervals	**COVID-19 Pandemic Timeline**
Investigation: risk assessment and monitoring.	**December 31, 2019** – CDC aware of human cases in China.[168]
Recognition: case-based control, treatment and isolation of ill persons, and voluntary quarantine of contacts.	**January 3, 2020** – CDC Director informed that a mysterious respiratory illness was *spreading* in Wuhan China.[169]
Initiation: routine personal protective measures (e.g., hand hygiene, social distancing, remote working (where possible)) is essential, as is enhanced surveillance for detecting additional cases (testing ability and analytical capacity).	**January 14, 2020 –** WHO warns of possible human-to-human transmission.[170] **January 20, 2020 –** Chinese authorities confirm human-to-human transmission.[171]
Acceleration: mitigation non-pharmaceutical interventions in the community (e.g., school and child-care facility closures, social distancing), as well as the use of medications and vaccines if available.	**January 20, 2020 –** first confirmed case in the United States.[172] **January 30, 2020 –** first case of human-to-human transmission confirmed in the United States.[173] **February 26, 2020** – community transmission in the United States.[174]

This Part describes the events of the first three months of 2020 and the accompanying messaging failures. It compares and contrasts the measures taken by the federal government to the actions prescribed in the pandemic plans. In some cases, it also discusses actions taken by state and local governments. It is

168. John S. Mackenzie & David W. Smith, *COVID-19: A Novel Zoonotic Disease Caused by a Coronavirus from China: What We Know and What We Don't*, MICROBIOLOGY AUSTL. (Mar. 17, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7086482.

169. *China Pneumonia Outbreak: Mystery Virus Probed in Wuhan*, BBC NEWS (Jan. 3, 2020), https://www.bbc.com/news/world-asia-china-50984025.

170. *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), https://www.who.int/news/item/29-06-2020-covidtimeline.

171. Lily Kuo, *China Confirms Human-To-Human Transmission of Coronavirus*, THE GUARDIAN (Jan. 20, 2020), https://www.theguardian.com/world/2020/jan/20/coronavirus-spreads-to-beijing-as-china-confirms-new-cases.

172. Michelle L. Holshue, *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. OF MED. 929, 929 (2020).

173. *CDC Confirms Person-to-Person Spread of New Coronavirus in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 30, 2020), https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html.

174. CDC COVID-19 Response Team, Michelle A. Jorden, Sarah L. Rudman, Elsa Villarino, Stacey Hoferka, Megan T. Patel, Kelley Bemis, Cristal R. Simmons, Megan Jespersen, Jenna Iberg Johnson, Elizabeth Mytty, Katherine D. Arends, Justin J. Henderson, Robert W. Mathes, Charlene X. Weng, Jeffrey Duchin, Jennifer Lenahan, Natasha Close, Trevor Bedford, Michael Boeckh, Helen Y. Chu, Janet A. Englund, Michael Famulare, Deborah A. Nickerson, Mark J. Rieder, Jay Shendure & Lea M. Starita, *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 683 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6922e1-H.pdf.

not meant to be a comprehensive overview of those frantic first months, but rather is designed to show the disconnect between policy and actions. For example, CDC guidance clearly states that NPIs should be introduced early during the Initiation and Acceleration period and that the scope of the NPIs should reflect the severity of the pandemic.[175] In the case of the COVID-19 pandemic, the CDC did not release social distancing guidelines until mid-March, despite the fact there was confirmed community transmission in mid-February.[176] As mentioned in a prior Part, the United States had not met its pandemic preparedness goals when the first confirmed cases of the novel coronavirus were reported in the United States in January 2020,[177] and this lack of preparedness certainly compromised the ability of the federal government to launch a robust pandemic response.[178] This Part focuses primarily on the federal pandemic response rather than its preparedness failures.

A. JANUARY 2020

The month of January started in the Investigation interval, but by the time it came to a close the United States was firmly in the Initiation interval and, with the first confirmed human-to-human transmission reported on January 30th, it was inevitably careening toward the Acceleration interval.[179] Accordingly, January should have been a month of extreme activity. The 2017 HHS Update promised that the first confirmed human-to-human transmission would trigger a cascade of federal actions, but the hesitancy of the administration to acknowledge the unfolding crisis squandered valuable time with respect to

175. Noreen Qualls, Alexandra Levitt, Neha Kanade, Narue Wright-Jegede, Stephanie Dopson, Matthew Biggerstaff, Carrie Reed & Amra Uzicanin, *Community Mitigation Guidelines to Prevent Pandemic Influenza — United States, 2017*, 66 MORBIDITY AND MORTALITY WKLY. REP. 1, 9 (2017), https://www.cdc.gov/mmwr/volumes/66/rr/pdfs/rr6601.pdf (noting each interval is associated with particular response activities, including implementation of select NPIs during the initiation and acceleration).

176. Dawn Kopecki, *CDC Recommends Canceling Events with 50 or More People for the Next Eight Weeks Throughout US*, CNBC (Mar. 15, 2020), https://www.cnbc.com/2020/03/16/cdc-recommends-the-cancellation-of-events-with-50-or-more-people-for-the-next-eight-weeks-throughout-us.html.

177. *See* COATS, *supra* note 7 (describing annual threat assessments).

178. The National Stockpile was not able to meet the demand for the life-saving PPE and ventilators that became so crucial as the pandemic accelerated because, *inter alia*, it had prioritized bioterrorism to the detriment of planning for naturally occurring bioincidents. Chris Hamby & Sheryl Gay Stolberg, *How One Firm Put an 'Extraordinary Burden' on the U.S.'s Troubled Stockpile*, N.Y. TIMES (Mar. 8, 2021), https://www.nytimes.com/2021/03/06/us/emergent-biosolutions-anthrax-coronavirus.html. Various pandemic preparedness initiatives had been discontinued by the Trump administration, which had also disbanded the White House National Security Council Directorate for Global Health Security and Biodefense and transferred the control of the National Stockpile from the CDC to a political appointee within HHS, the Assistant Secretary for Preparedness and Response. *Id*. Swaine et al, *supra* note 98 (describing transfer of Stockpile). Accordingly, although additional funding for the National Stockpile is important, Congress must consider ways to ensure that pandemic preparedness goals are prioritized and insulated from political considerations.

179. *See* CDC COVID-19 Response Team, *supra* note 174, at 682 (noting first confirmed case of human-to-human transmission); *see also* text accompanying *supra* notes 145–59 (explaining pandemic intervals).

testing, containment efforts, stockpile supplies, community mitigation measures, and messaging.[180]

The CDC started working on the coronavirus outbreak as soon as it was informed of the outbreak in Wuhan. Throughout January, the CDC and HHS took many of the incident management steps spelled out in the pandemic plans. CDC Director Robert Redfield notified the Secretary of HHS, Alex Azar, on January 3, 2020, and Secretary Azar passed the information on to the National Security Council.[181] Reports indicate that the developing situation was included in President Trump's daily briefings by early January.[182] On January 3rd, the CDC offered technical assistance to China and three days later it issued a travel advisory for the city of Wuhan.[183] That week, HHS convened an intra-agency task force and the CDC established a coronavirus incident task force.[184] The CDC issued its first public alert on January 8, 2020.[185]

On January 17th, the CDC dispatched public health experts to screen incoming passengers at the three main airports receiving passengers from China.[186] The next day, Secretary Azar briefed President Trump, who reportedly called Azar an alarmist.[187] On January 20th, China confirmed human-to-human transmission of the new virus and the United States saw its first confirmed case. On that same day, the CDC developed its test for COVID-19, but the test would prove to be defective and that failure would greatly compromise surveillance

180. *See* Holloway et al., *supra* note 107, at 27–29. Cameron Peters, *A Detailed Timeline of All the Ways Trump Failed to Respond to the Coronavirus*, VOX (June 8, 2020), https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response.

181. Michael D. Shear, Sheri Fink & Noah Weiland, *Inside Trump Administration, Debate Raged Over What to Tell Public*, N.Y. TIMES (Mar. 7, 2020), https://www.nytimes.com/2020/03/07/us/politics/trump-coronavirus.html.

182. *Id.*

183. Glenn Kessler, *Did Trump Offer Experts to China to Help with the Coronavirus?*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/politics/2020/04/03/how-much-pressure-did-trump-put-china-access-concerning-coronavirus.

184. CTRS. FOR DISEASE CONTROL AND PREVENTION, CORONAVIRUS DISEASE 2019 (COVID-19) SITUATION SUMMARY (Mar. 14, 2020), https://stacks.cdc.gov/view/cdc/85891 (CDC established a COVID-19 Incident Management System on January 7, 2020); SETH ABRAMSON, PROOF OF CORRUPTION: BRIBERY, IMPEACHMENT, AND PANDEMIC IN THE AGE OF TRUMP 464 (2021) (HHS began convening intra-agency task force by January 7, 2020).

185. CTRS. FOR DISEASE CONTROL & PREVENTION, OUTBREAK OF PNEUMONIA OF UNKNOWN ETIOLOGY (PUE) IN WUHAN, CHINA (Jan. 8, 2020, 4:15 PM), https://emergency.cdc.gov/han/HAN00424.asp.

186. Laura Santhanam, *CDC Confirms 2nd U.S. Case of Novel Coronavirus in Chicago*, PBS NEWSHOUR (Jan. 24, 2020), https://www.pbs.org/newshour/health/cdc-confirms-second-u-s-case-of-novel-coronavirus-in-chicago. The airport screening efforts were initially limited to the three U.S. airports receiving the highest volume of passengers arriving from Wuhan, China: Los Angeles International Airport, California; San Francisco International Airport, California; and John F. Kennedy International Airport, New York City, New York. Phillip Dollard, Isabel Griffin, Andre Berro, *Risk Assessment and Management of COVID-19 Among Travelers Arriving at Designated U.S. Airports, January 17–September 13, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1681, 1681 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6945a4-H.pdf. The CDC later determined that screening efforts at airports were ineffective. *Id.*

187. Rebecca Ballhaus & Stephanie Armour, *Health Chief's Early Missteps Set Back Coronavirus Response*, WALL ST. J. (Apr. 22, 2020), https://www.wsj.com/articles/health-chiefs-early-missteps-set-back-coronavirus-response-11587570514.

and containment efforts.[188] The CDC also started working with state and local governments to identify and monitor all persons who had close contact with confirmed patients.[189] On January 23rd, the CDC opened its emergency operations center.[190] It was the same day that China announced a lockdown of Wuhan, which is a city of 11 million people.[191] The lockdown would last for seventy-six days.[192]

On January 29th, the White House announced the creation of the White House Coronavirus Task Force that originally had a limited scope focusing on travel restrictions and getting U.S. citizens out of Wuhan.[193] President Trump's Trade Adviser, Peter Navarro, prepared a Memorandum for the President that outlined the potential risks posed by the coronavirus and presciently projected as many as a half a million deaths.[194] It said: "The lack of immune protection or an existing cure or vaccine would leave Americans defenseless in the case of a full-blown coronavirus outbreak on U.S. soil . . . . This lack of protection elevates the risk of the coronavirus evolving into a full-blown pandemic, imperiling the lives of millions of Americans."[195] That same day, Secretary Azar warned the President that there was a risk of a pandemic[196] and the WHO declared a Public Health Emergency of International Concern.[197] The WHO's statement accompanying the declaration urged the institution of community mitigation measures or NPIs: "The Committee believes that it is still possible to interrupt virus spread, provided that countries put in place strong measures to detect disease early, isolate and treat cases, trace contacts, and promote social

188. Michael D. Shear, Abby Goodnough, Sheila Kaplan, Sheri Fink, Katie Thomas & Noah Weiland, *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html.

189. Rachel M. Burke, Claire M. Midgley, Alissa Dratch, Marty Fenstersheib, Thomas Haupt, Michelle Holshue, Isaac Ghinai, M. Claire Jarashow, Jennifer Lo, Tristan D. McPherson, Sara Rudman, Sarah Scott, Aron J. Hall, Alicia M. Fry & Melissa A. Rolfes, *Active Monitoring of Persons Exposed to Patients with Confirmed COVID-19 — United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 245, 245–46 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6909e1-H.pdf.

190. *See* Shear et al., *supra* note 188.

191. Andreas Illmer, Yitsing Wang & Tessa Wong, *Wuhan Lockdown: A Year of China's Fight Against the Covid Pandemic*, BBC NEWSHOUR (Jan. 22, 2021), https://www.bbc.com/news/world-asia-china-55628488.

192. Talha Burki, *Journey to Wuhan During Its Lockdown*, 21 THE LANCET 613 (2021), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00166-3/fulltext.

193. For example, on February 5, 2020, the United States evacuated 350 U.S. citizens from Hubei province. Miriam Jordan & Julie Bosman, *Hundreds of Americans Were Evacuated from the Coronavirus Epicenter. Now Comes the Wait.*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/coronavirus-flights-wuhan.html.

194. Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti & Julian E. Barnes, *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (Apr. 11, 2020), https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html.

195. WORLD HEALTH ORG., *supra* note 164.

196. Lipton et al., *supra* note 194.

197. Merrit Kennedy, *WHO Declares Coronavirus Outbreak a Global Health Emergency*, NPR (Jan. 30, 2020, 2:59 PM), https://www.npr.org/sections/goatsandsoda/2020/01/30/798894428/who-declares-coronavirus-outbreak-a-global-health-emergency.

distancing measures commensurate with the risk."[198] Despite this warning, the federal government and individual states did not direct their populations to practice social distancing until March 15th.[199] On the last day of the month, HHS declared a public health emergency[200] and issued new travel restrictions, but by the time the restrictions took effect 300,000 persons had already traveled from China to the United States.[201] Over the course of January, the CDC had responded to clinical inquiries from state and local health officials regarding approximately 650 persons thought to be at risk for infection.[202] That number would grow exponentially in the months to come.

B. FEBRUARY 2020

February opened with new cases being reported throughout the county. By mid-February there was sustained human-to-human spread in multiple cities in the United States, which signals a switch to the Acceleration interval.[203] During the Acceleration interval, mitigation strategies or NPIs replace containment efforts in an attempt to flatten the pandemic curve.[204] The federal response, however, continued to focus exclusively on ineffective containment measures, such as travel restrictions and airport screenings, until the end of March.[205] Attempts to monitor and track the progression of the virus were severely hampered by compromised diagnostic testing and insufficient surveillance resources.[206]

198. *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov.

199. Kopecki, *supra* note 176.

200. *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, U.S. DEP'T HEALTH & HUMAN SERVS. (Jan. 31, 2020), https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html.

201. Yasmeen Abutaleb, Josh Dawsey, Ellen Nakashima & Greg Miller, *The U.S. was Beset by Denial and Dysfunction as the Coronavirus Raged*, WASH. POST (Apr. 4, 2020), https://www.washingtonpost.com/national-security/2020/04/04/coronavirus-government-dysfunction/?arc404=true.

202. Kristina L. Bajema, Alexandra M. Oster, Olivia L. McGovern, Stephen Lindstrom, Mark S. Stenger, Tara C. Anderson, Cheryl Isenhour, Kevin R. Clarke, Mary E. Evans, Victoria T. Chu, Holly M. Biggs, Hannah L. Kirking, Susan I. Gerber, Aron J. Hall, Alicia M. Fry & Sara E. Oliver, *Persons Evaluated for 2019 Novel Coronavirus — United States, January 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 166, (Feb. 7, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6906e1.htm.

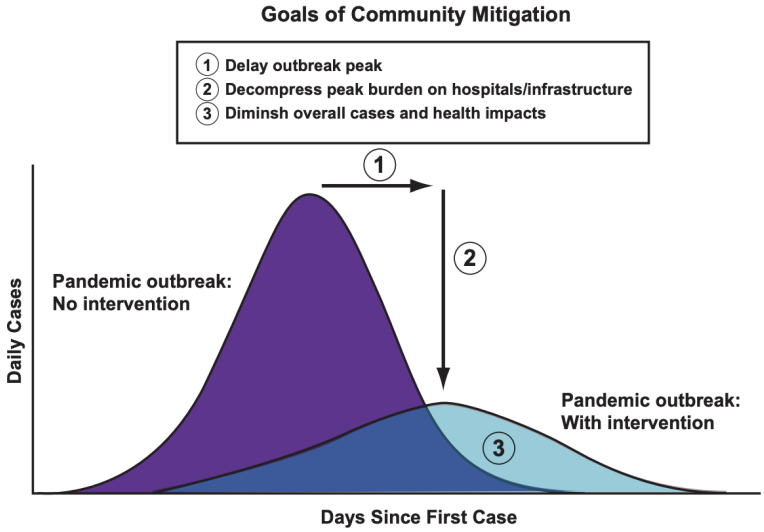
203. *See* CDC COVID-19 Response Team, *supra* note 174, at 680.

204. Qualls et al., *supra* note 175, at 8–9.

205. Shear et al., *supra* note 188.

206. *Id.*

FIGURE 4: GOALS OF COMMUNITY MITIGATION[207]



The United States continued to lose valuable time when it could have been preparing for the rapid spike in cases that occurred in March and April.[208] The National Stockpile was woefully undersupplied with the type of PPE and ventilators that would be in great demand during a pandemic wave, but purchase orders for additional material would not be processed until the following month.[209] Instead of urging social distancing and other community mitigation measures, as suggested by the WHO, President Trump amped up his misleading and false messaging that Americans had nothing to fear from the coronavirus and that it would just "go away."[210] He frequently contradicted members of his own administration and sometimes even contradicted himself. In interviews with the journalist Bob Woodward, that were not made public until September 2020, President Trump admitted that he knew the coronavirus was airborne and "deadly" in February, but he explained that, "I wanted to always play it down. I

207. CTRS. FOR DISEASE CONTROL & PREVENTION, INTERIM PRE-PANDEMIC PLANNING GUIDANCE: COMMUNITY STRATEGY FOR PANDEMIC INFLUENZA MITIGATION IN THE UNITED STATES – EARLY, TARGETED, LAYERED USE OF NONPHARMACEUTICAL INTERVENTIONS 18 (2007), https://www.cdc.gov/flu/pandemic-resources/pdf/community_mitigation-sm.pdf.

208. As former HHS Secretary Kathleen Sebelius stated: "We basically wasted two months." Michael Biesecker, *US 'Wasted' Months Before Preparing for Coronavirus Pandemic*, AP NEWS (Apr. 5, 2020), https://apnews.com/article/090600c299a8cf07f5b44d92534856bc.

209. *Id.*

210. On February 28, in a particularly memorable press conference, the President stated that, "It's going to disappear. One day, it's like a miracle, it will disappear." Katelyn Burns, *Trump's 7 Worst Statements on the Coronavirus Outbreak*, VOX (Mar. 13, 2020), https://www.vox.com/policy-and-politics/2020/3/13/21176535/trumps-worst-statements-coronavirus.

still like playing it down, because I don't want to create a panic."[211] Toward the end of the month, President Trump restructured the incident management of the pandemic response by sidelining HHS Secretary Azar and installing Vice President Pence as the head of the White House Coronavirus Task Force, presumably to better control the messaging.[212] These areas of deficiency—testing, supply shortages, misguided containment efforts, reluctance to institute community mitigation measures, and constant misleading and false messaging—would continue to plague the Trump administration's response to the pandemic until his last days in office.[213]

In many ways, the containment efforts were doomed from the beginning given the unavailability of a fast and reliable diagnostic test. In the absence of widespread testing, the United States was effectively flying blind because it had no idea how widespread the virus was within communities.[214] Initially, the CDC required all tests to be sent back to CDC headquarters in Atlanta, creating what members of Congress referred to in a letter to the head of the CDC as an "unsustainable bottleneck."[215] After receiving emergency use authorization from the FDA, the CDC sent diagnostic tests to state-run labs, but the tests proved defective.[216] Although other researchers developed a more reliable test, it did not receive FDA approval until mid-March.[217] The testing bottleneck intensified because tests were only being made available to people who were symptomatic and hospitalized, had relevant travel history, or confirmed exposure.[218] The CDC fixed its faulty test for COVID-19 by February 27th, but tests remained difficult to get because of the restrictive criteria.[219] Despite the obvious problems regarding testing, President Trump repeatedly denied that

211. *Trump Deliberately Played Down the Virus, Woodward Book Says*, BBC NEWS (Sept. 9, 2020), https://www.bbc.com/news/world-us-canada-54094559.

212. Lipton et al., *supra* note 194.

213. One ray of sunlight was that HHS was able to cement a number of vaccine partnerships with private firms during this period. *See, e.g.*, *HHS, Janssen Join Forces on Coronavirus Vaccine*, U.S. DEP'T HEALTH & HUMAN SERVS. (Feb. 11, 2020), https://www.hhs.gov/about/news/2020/02/11/hhs-janssen-join-forces-on-coronavirus-vaccine.html.

214. Carolyn Y. Johnson & Laurie McGinley, *What Went Wrong with the Coronavirus Tests in the U.S.*, WASH. POST (Mar. 7, 2020), https://www.washingtonpost.com/health/what-went-wrong-with-the-coronavirus-tests/2020/03/07/915f5dea-5d82-11ea-b29b-9db42f7803a7_story.html.

215. Letter from Members of the U.S. Congress to Dr. Redfield, Dir. Ctrs. for Disease Control and Prevention (Feb. 3, 2021), https://kilmer.house.gov/imo/media/doc/Letter%20to%20CDC%20Director%20Redfield%202.3.2020.pdf.

216. Johnson & McGinley, *supra* note 214.

217. *Id.*; News Release, U.S. Food and Drug Admin., Coronavirus (COVID-19) Update: FDA Issues First Emergency Use Authorization for Point of Care Diagnostic (Mar. 21, 2020), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-first-emergency-use-authorization-point-care-diagnostic.

218. Jessica Wang, Lindsay Huth & Taylor Umlauf, *How the CDC's Restrictive Testing Guidelines Hid the Coronavirus Epidemic*, WALL ST. J. (Mar. 22, 2020), https://archive.vn/20200322161141/https://www.wsj.com/articles/how-the-cdcs-restrictive-testing-guidelines-hid-the-coronavirus-epidemic-11584882001.

219. *Id.* (describing restrictive criteria); Rob Stein, *CDC Has Fixed Issue Delaying Coronavirus Testing In U.S., Health Officials Say*, NPR (Feb. 27, 2020, 10:01 AM), https://www.npr.org/sections/health-shots/2020/02/27/809936132/cdc-fixes-issue-delaying-coronavirus-testing-in-u-s (describing defective CDC test).

there was any difficulty, stating at the end of February that "we're testing everybody that we need to test. And we're finding very little problem. Very little problem."[220]

HHS Secretary Azar addressed the critical shortages in the National Stockpile beginning in late January and early February. On February 5th, he made a formal request to the Office of Management and Budget (OMB) for $2 billion of additional funding to purchase essential medical supplies for the National Stockpile.[221] *The Washington Post* reported that the request led to a shouting match between the Secretary and an OMB official.[222] Five days later, Secretary Azar took his case to Congress and testified before the Senate, reporting that the National Stockpile only had 30 million surgical masks and 12 million N95 respirators.[223] He estimated that an additional 300 million of each would be needed to protect health care workers.[224] Over a month later, Congress appropriated $8 billion to replenish the stockpile, but HHS did not place an order for N95 respirators until March 12th.[225] The delay meant that, by then, the United States was competing with other countries, and many crucial supplies ended up being backordered.[226] President Trump faced increasing calls from Governors to invoke the Defense Production Act in order to shore up the supply of life-saving PPE and ventilators, but he refused to exercise his authority to compel production until the end of March.[227] Instead of focusing on the National Stockpile, President Trump created a supply chain task force known as Air Bridge that was headed by his son-in-law and advisor, Jared Kushner.[228] Manned by twenty-something volunteers, the task force has been widely derided

220. *President Trump with Coronavirus Task Force Briefing*, C-SPAN (Feb. 26, 2020), https://www.c-span.org/video/?469747-1/president-trump-announces-vice-president-pence-charge-coronavirus-response.

221. Amy Goldstein, Lena H. Sun & Beth Reinhard, *Desperate for Medical Equipment, States Encounter a Beleaguered National Stockpile*, WASH. POST (Mar. 28, 2020), https://www.washingtonpost.com/national/health-science/desperate-for-medical-equipment-states-encounter-a-beleaguered-national-stockpile/2020/03/28/1f4f9a0a-6f82-11ea-aa80-c2470c6b2034_story.html.

222. Abutaleb et al., *supra* note 201.

223. Nsikan Akpan, *U.S. Has Only a Fraction of the Medical Supplies it Needs to Combat Coronavirus*, NAT'L GEOGRAPHIC (Mar. 3, 2020), https://www.nationalgeographic.com/science/article/us-america-has-fraction-medical-supplies-it-needs-to-combat-coronavirus.

224. *Id.*

225. Biesecker, *supra* note 208.

226. *Id.* Nagal Toosi, *'Lord of the Flies: PPE Edition': U.S. Cast as Culprit in Global Scrum Over Coronavirus Supplies*, POLITICO (Apr. 3, 2020), https://www.politico.com/news/2020/04/03/ppe-world-supplies-coronavirus-163955.

227. Maegan Vazquez, Kaitlan Collins, Sara Sidner & Jason Hoffman, *Trump Invokes Defense Production Act to Require GM to Make Ventilators*, CNN (Mar. 27, 2020), https://www.cnn.com/2020/03/27/politics/general-motors-ventilators-defense-production-act/index.html; Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html.

228. Kathryn Watson, *What is Project Airbridge?*, CBS NEWS (Mar. 30, 2020), https://www.cbsnews.com/news/coronavirus-what-is-project-airbridge.

as both chaotic and ineffective.[229] Its efforts also competed with other federal and state purchasing efforts.[230]

By February 14th, the CDC was working with local public health department networks of community-based influenza surveillance to aid in the detection of COVID-19, but the unavailability of a fast and reliable diagnostic test greatly hampered containment efforts, as did the lack of resources for surveillance operations.[231] In fact, the continued focus on containment efforts and travel restrictions seemed misplaced in light of confirmed human-to-human transmission in multiple cities.[232] Early in the public health crisis, the Chief Medical Officer of the Department of Homeland Security, Dr. Duane C. Caneva, organized a series of coronavirus e-mail chains among a group of infectious disease experts both in and out of government.[233] *The New York Times* reported that on February 17th, a participant observed that the conditions on a cruise ship were similar to the type of social gatherings that took place every day at malls, schools, and workplaces.[234] That same day, another participant noted it would be difficult for state and local officials to impose NPIs, such as school and business closures, without federal leadership given the potential political fallout.[235] By the following week, the group had "effectively concluded that the United States had already lost the fight to contain the virus, and that it needed to switch to mitigation" efforts such as NPIs.[236] For the group, the tipping point was the "realization that many people in the country were likely infected and capable of spreading the disease, but not showing any symptoms."[237]

Bolstering this conclusion was the fact that the CDC confirmed widespread community transmission on February 20th. At a briefing on February 25th, Director of the CDC's National Center for Immunization and Respiratory Diseases, Dr. Nancy Messonnier, stated that the coronavirus outbreak met two of the three required factors for a pandemic: illness resulting in death and

229. Nicholas Confessore, Andrew Jacobs, Jodi Kantor, Zolan Kanno-Youngs & Luis Ferré-Sadurní, *How Kushner's Volunteer Force Led a Fumbling Hunt for Medical Supplies*, N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/us/jared-kushner-fema-coronavirus.html.

230. Diana Falzone, *"Like a Bully at the Lunchroom": How the Federal Government Took Control of the PPE Pipeline*, VANITY FAIR (May 6, 2020), https://www.vanityfair.com/news/2020/05/how-the-federal-government-took-control-of-the-ppe-pipeline.

231. Johnson & McGinley, *supra* note 214.

232. We now know that there was community spread at least in the San Francisco Bay area by late January. *See* CDC COVID-19 Response Team, *supra* note 174, at 682.

233. Eric Lipton, *The 'Red Dawn' Emails: 8 Key Exchanges on the Faltering Response to the Coronavirus*, N.Y. TIMES (Apr. 11, 2020), https://www.nytimes.com/2020/04/11/us/politics/coronavirus-red-dawn-emails-trump.html.

234. *Id.*

235. *Id.*

236. *Id.*

237. This is referred to as asymptomatic or cryptic infection. In other words, by the time the United States announced the European travel ban on March 11, the group considered such containment steps ineffective. *Id.*

sustained person-to-person spread.[238] The only missing factor, she explained, was the worldwide spread that the WHO had still not verified despite mounting cases across the globe.[239] Dr. Messonnier warned that "disruption to everyday life might be severe."[240] It was reported President Trump was "furious" and threatened to fire Dr. Messonnier.[241]

The very next day, the CDC reported the first case of confirmed community transmission in the United States, but we now know that community transmission had begun as of late January.[242] That was the same day that President Trump appointed Vice President Pence to lead the Coronavirus Task Force.[243] After the installation of Vice President Pence, President Trump became a more frequent contributor to the briefings and, by March, monopolized them.[244] The briefings became an arena for President Trump to downplay the severity of the crisis, attack his critics, and spread false and misleading information.[245] Eventually, some news outlets stopped carrying the briefings in order to not amplify false information.[246]

On February 28th, the first death from COVID-19 in the United States was reported in real time in the Seattle area.[247] We now know that the earliest confirmed death from COVID-19 was February 6th in the San Francisco Bay

238. John Bacon & Kevin Alltucker, *Could a Coronavirus Pandemic be Stopped? US Warns of 'Severe' Disruptions*, USATODAY (Feb. 25, 2020, 10:38 AM), https://www.usatoday.com/story/news/nation/2020/02/25/coronavirus-pandemic-can-outbreak-still-be-stopped/4865934002.

239. *Why Is the WHO Not Calling the Coronavirus A Pandemic?* NPR: MORNING EDITION (Feb. 25, 2020), https://www.npr.org/2020/02/25/809182758/why-is-the-who-not-calling-the-coronavirus-a-pandemic.

240. Ryan Goodman & Danielle Schulkin, *How Trump and His Team Covered Up the Coronavirus in Five Days*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/opinion/coronavirus-trump-coverup.html.

241. J. Edward Moreno, *Trump Threatened to Fire CDC's Chief of Respiratory Diseases in February: Report*, THE HILL (Apr. 22, 2020), https://thehill.com/homenews/administration/494187-trump-threatened-to-fire-cdcs-chief-of-respiratory-diseases-in.

242. *See* CDC COVID-19 Response Team, *supra* note 174, at 682.

243. Michael D. Shear, Noah Weiland & Katie Rogers, *Trump Names Mike Pence to Lead Coronavirus Response*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/politics/trump-coronavirus-cdc.html.

244. Dareh Gregorian, *Trump Skips Questions at Coronavirus Briefing After Disinfectant Debacle*, NBC NEWS (Apr. 24, 2020), https://www.nbcnews.com/politics/donald-trump/trump-skips-questions-coronavirus-briefing-after-disinfectant-debacle-n1192341; *see also* Jonathan Martin & Maggie Haberman, *Trump Keeps Talking. Some Republicans Don't Like What They're Hearing.* (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/us/politics/trump-coronavirus-press-briefing.html?action=click&module=RelatedLinks&pgtype=Article.

245. Libby Cathey, *9 Controversial Moments That Led Trump to Stop His White House Coronavirus Briefings*, ABC NEWS (July 21, 2020), https://abcnews.go.com/Politics/controversial-moments-led-trump-stop-white-house-coronavirus/story?id=71899110.

246. Eric Wemple, *More News Outlets Are Bailing on Trump's Coronavirus Briefings*, WASH. POST (Apr. 16, 2020), https://www.washingtonpost.com/opinions/2020/04/16/more-news-outlets-are-bailing-trumps-coronavirus-briefings.

247. Nicole Acevedo & Minyvonne Burke, *Washington State Man Becomes First U.S. Death from Coronavirus*, NBC NEWS (Feb. 29, 2020), https://www.nbcnews.com/news/us-news/1st-coronavirus-death-u-s-officials-say-n1145931.

area.[248] On the last day of the month, the CDC began investigating an outbreak at an assisted living facility in Washington state, and the governor declared a state of emergency.[249] It was the first outbreak at a nursing home or similar facility—venues that would be hard hit by COVID-19 and become emblematic of the isolation experienced by many during the early months of the pandemic.[250] Eventually, all fifty states would declare a state of emergency due to COVID-19,[251] and every state in the union would be declared a federal disaster area.[252]

C. MARCH 2020

March 2020 was the month that America shut down—schools, universities, workplaces, houses of worship, major sports leagues, and all non-essential businesses.[253] It became increasingly clear that attempts at containing the virus had failed, as the United States earned the status as the country with the largest number of confirmed COVID-19 cases—a title that it would maintain throughout the pandemic.[254] With no approved medical countermeasures and a vaccine still far on the horizon, the only tools left were the type of mitigation measures and NPIs that the WHO had asked nations to consider at the end of January.[255] To quote Dr. Messonnier, the "disruption of daily life" would prove to be "severe."[256]

With a sudden cascade of closures and declarations, the shut-down of America seemed to happen swiftly, but the crisis had been months in the making. The United States had watched other nations, including China and Italy, impose harsh geographic quarantines, once communities had been seeded with the virus,

248. *See* CDC COVID-19 Response Team, *supra* note 174, at 680.

249. Acevedo & Burke, *supra* note 247.

250. Farah Stockman, Matt Richtel, Danielle Ivory & Mitch Smith, *'They're Death Pits': Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html.

251. Samuel Wonacott, *All 50 States Have Active Declared Emergencies Related to the Coronavirus Pandemic*, BALLOTPEDIA NEWS (July 29, 2020), https://news.ballotpedia.org/2020/07/29/all-50-states-have-active-declared-emergencies-related-to-the-coronavirus-pandemic.

252. Justine Coleman, *All 50 States Under Disaster Declaration for First Time in US History*, THE HILL (Apr. 12, 2020) (reporting that, within a twenty-two day period, President "Trump declared a major emergency in all 50 states and most territories").

253. Major sports leagues announced the suspension of their seasons that were already in progress, and Major League Baseball announced the cancellation of all remaining spring training games and delayed the start of the 2020 season. The NCAA canceled all postseason tournaments in their winter and spring sports, which included the men's and women's basketball tournaments, as well as the baseball and softball tournaments. *How the Coronavirus is Affecting Sports Leagues and Events*, LA TIMES (Mar. 30, 2020), https://www.latimes.com/sports/story/2020-03-09/coronavirus-latest-news-sports-world.

254. Donald G. McNeil Jr., *The U.S. Now Leads the World in Confirmed Coronavirus Cases*, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/health/usa-coronavirus-cases.html.

255. WORLD HEALTH ORG., *supra* note 170.

256. Brianna Abbott & Stephanie Armour, *CDC Warns It Expects Coronavirus to Spread in U.S.*, WALL ST. J. (Feb. 25, 2020), https://www.wsj.com/articles/cdc-warns-it-expects-coronavirus-to-spread-in-u-s-11582653829.

in an attempt to slow the progression of the pandemic.[257] The NPIs that were rolled out in March had been prescribed in the pandemic plans. They had been developed by the CDC in 2007 and tested by mathematical models, including reports from the earliest days of the health crisis in Wuhan.[258] However, there was one important difference: these rapidly cascading actions were being driven by state and local officials and the private actors.[259] The federal government remained largely focused on containment and continued to issue travel restrictions.[260]

In the first days of March, large tech firms, such as Microsoft, urged their employees to work from home beginning on March 3rd.[261] They were quickly joined by universities and colleges, as state and local officials started to issue stay-at-home orders.[262] The WHO finally declared a pandemic on March 11th, although some U.S. news outlets had already started calling it a pandemic.[263] Two days later, President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak and declared a national state of emergency.[264]

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257. Illmer et al., *supra* note 191.

258. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 207, at 7.

259. Dan Balz, *As Washington Stumbled, Governors Stepped to the Forefront*, WASH. POST (May 3, 2020), https://www.washingtonpost.com/graphics/2020/politics/power-to-states-and-governors-during-coronavirus/.

260. *Timeline of COVID-19 Developments in 2020*, AM. J. OF MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020. On August 6th, the U.S. Department of State lifted a Level 4 Global health travel advisory issued on March 19th, which advised all American Citizens to avoid all international travel. *Lifting of Global Level 4 Global Health*, U.S. EMBASSY & CONSULATES (Aug. 6, 2020), https://it.usembassy.gov/lifting-of-global-level-4-global-health-advisory.

261. For example, Microsoft asked its employees to work from home on March 3. Karen Weise, *Ahead of the Pack, How Microsoft Told Workers to Stay Home*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/technology/microsoft-coronavirus-response.html. The Seattle School District was the first major school district to announce a prolonged closure. Lauren Camera, *Seattle Public Schools Close Due to Coronavirus*, U.S. NEWS (Mar. 11, 2020), https://www.usnews.com/news/education-news/articles/2020-03-11/seattle-public-schools-close-due-to-coronavirus-first-major-system-to-announce-prolonged-closure.
Colleges and universities started sending their students home. Karen Weintraub & Susan Svrluga, *Harvard Tells Students to Move Out and Finish Classes Remotely after Spring Break in Response to Covid-19*, WASH. POST (Mar. 10, 2020), https://www.washingtonpost.com/education/2020/03/10/harvard-moves-classes-online-advises-students-stay-home-after-spring-break-response-covid-19.

262. Governors have the right to exercise their inherent police powers reserved to the states under the Tenth Amendment. U.S. CONST. amend. X. These reserved powers include the police power, which is the ability to regulate behavior and enforce order to further health, safety, and general welfare. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (defining "police powers" as "the authority to provide for the public health, safety, and morals"). According to most authorities, these powers include issuing stay-at-home orders, restrictions on gatherings, and closing private businesses. Thomas Johnson & Angela Fritz, *You're Under a Stay-at-Home Order? Here's What That Means in Your State*, WASH. POST (May 5, 2020), https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state. Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020) (316 million people in 42 states, two counties, ten cities, the District of Columbia, and Puerto Rico).

263. Sanjay Gupta, *Why CNN is Calling the Novel Coronavirus Outbreak a Pandemic*, CNN (Mar. 11, 2020), https://www.cnn.com/2020/03/09/health/coronavirus-pandemic-gupta/index.html.

264. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020), https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak. Brett Samuels & Morgan Chalfant, *Trump Declares National Emergency over*

After the CDC released its first social distancing guidance, President Trump increased the volume of his false and misleading communications regarding the pandemic: contradicting members of his own administration,[265] ignoring science,[266] touting unproven medical countermeasures,[267] and openly sparring with governors.[268] He started to appear at the daily White House Coronavirus Task Force press briefings where his unscripted remarks sometimes went on for an hour or more.[269] As mentioned earlier, some news outlets stopped airing the daily briefings because they did not want to spread the misinformation and false claims made by the President and members of his administration.[270]

Testing problems persisted throughout March. It was reported that fewer than 14,000 tests had been done in the first ten weeks since the United States learned about the virus.[271] By the week of March 25th, the United States was performing around 110,000 tests a day, but experts estimated that number should be between 500,000 and "millions" of tests a day.[272] There were various barriers to ramping up testing capacity, including labs that said they did not have enough swabs, test kits, reagents, PPE, staff, or machines to run the specific required tests.[273] On the brighter side, the Trump Administration secured public-private partnerships to open up drive-through testing collection sites and emergency approval for rapid coronavirus tests.[274]

Coronavirus, THE HILL (Mar. 13, 2020), https://thehill.com/homenews/administration/487473-trump-declares-national-emergency-over-coronavirus.

265. Moreno, *supra* note 241.

266. Aaron Blake, *Trump's Baffling Coronavirus Vaccine Event*, WASH. POST (May 3, 2020), https://www.washingtonpost.com/politics/2020/03/03/trumps-baffling-coronavirus-vaccine-event/.

267. Andrew Solender, *All the Times Trump Has Promoted Hydroxychloroquine*, FORBES (Mar. 22, 2020), https://www.forbes.com/sites/andrewsolender/2020/05/22/all-the-times-trump-promoted-hydroxychloroquine/?sh=5b4d6e814643. On March 21, President Trump tweeted about potential coronavirus treatments, specifying Hydroxychloroquine and Azithromycin. *Id.*

268. *See, e.g.*, Jeremy Diamond, *Trump Lashes out at Governors over Testing Shortfalls*, CNN (Apr. 18, 2020), https://www.cnn.com/2020/04/18/politics/trump-governors-testing/index.html; Matt Perez, *Trump Encourages Pence to Ignore Democratic Governors: 'If They Don't Treat You Right, I Don't Call,'* FORBES (Mar. 29, 2020), https://www.forbes.com/sites/mattperez/2020/03/27/trump-encourages-pence-to-ignore-democratic-governors-if-they-dont-treat-you-right-i-dont-call/?sh=fc2564e5a45c; Emma Tucker, *Trump to U.S. Governors: Get Your Own Ventilators*, DAILY BEAST (Mar. 16, 2020), https://www.thedailybeast.com/trump-to-us-governors-get-your-own-ventilators.

269. Cathey, *supra* note 245.

270. Wemple, *supra* note 246.

271. Shear et al., *supra* note 188 ("hospitals and clinics across the country still must deny tests to those with milder symptoms, trying to save them for the most serious cases, and they often must wait a week for results").

272. Dylan Scott, *America's Embarrassingly Mediocre Coronavirus Testing, in 2 Charts*, VOX (Apr. 16, 2020), https://www.vox.com/2020/4/15/21222375/coronavirus-covid-19-test-update-end-social-distancing.

273. *Id.*

274. *Id.*; Amy Goldstein, Laurie McGinley & Yasmeen Abutaleb, *Trump Says He Will Partner with Private Sector to Expand Coronavirus Testing but Details are Sketchy*, WASH. POST (Mar. 13, 2020), https://www.washingtonpost.com/health/under-heavy-fire-trump-administration-takes-steps-to-expand-coronavirus-testing/2020/03/13/f86b481e-6525-11ea-acca-80c22bbee96f_story.html.

As the scramble for PPE and ventilators intensified,[275] the Justice Department created a price gouging and hoarding task force to investigate and prosecute scams and other crimes related to the pandemic.[276] U.S. auto manufacturers were enlisted to make ventilators, with production starting the following month. [277] Five U.S. Army hospital units were deployed to New York and Washington State.[278] The Army Corps of Engineers and the National Guard built field hospitals in multiple cities, and the USNS Comfort sailed to New York City to assist local hospitals.[279] The following month would see federal mortuary services dispatched to numerous states as the rate of death overwhelmed local funeral homes.[280]

IV. LESSONS FROM THE PANDEMIC

National pandemic preparedness and response policy assumes a cross-institutional coordinated effort that is focused on a common goal, namely the containment, mitigation, and eventual end of a pandemic outbreak. Under all existing policies, a pandemic is a "catastrophic incident" within the meaning of our national preparedness and response policy that requires both swift federal action and leadership.[281] Accordingly, the federal government should play a pivotal role in this coordinated effort because a pandemic is not restricted to a particular geographical location, requires expertise and resources that are uniquely within the purview of the federal government, and has the potential to overwhelm the capacities of state and local authorities.[282] The enhanced role that the federal government is supposed to play in a pandemic recognizes both the nature of the threat and the magnitude of countermeasures that must be deployed.[283] In the case of the COVID-19 pandemic, the Trump administration failed to fulfill its most basic obligation to the American people to provide for

275. Clary Estes, *States Are Being Forced into Bidding Wars to Get Medical Equipment to Combat Coronavirus*, FORBES (Mar. 28, 2020), https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus/?sh=3d95e55a1cde.

276. *Justice Department Launches Probes into Hoarding as Coronavirus Cases Grow*, REUTERS (Mar. 23, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-hoarding/justice-department-launches-probes-into-hoarding-as-coronavirus-cases-grow-idUSKBN21A3TV.

277. Jay Ramey, *GM, Ventec Go from Drawing Board to Ventilator Production in Under a Month*, AUTOWEEK (Apr. 16, 2020), https://www.autoweek.com/news/industry-news/a32169651/gm-starts-ventilator-production-in-under-a-month.

278. Ellen Mitchell, *Pentagon to Deploy Field Hospitals to New York, Seattle*, THE HILL (Mar. 23, 2020), https://thehill.com/policy/defense/489079-pentagon-to-deploy-field-hospitals-to-new-york-seattle.

279. Michael Schwirtz, *The 1,000-Bed Comfort Was Supposed to Aid New York. It Has 20 Patients.*, N.Y. TIMES (Sept. 6, 2021), https://www.nytimes.com/2020/04/02/nyregion/ny-coronavirus-usns-comfort.html.

280. Cristian Radulescu & Chris Lancia, *Crisis Response, Mortuary Affairs, Troops Provide Support to Civil Authorities During COVID-19*, ARMY SUSTAINMENT (July 22, 2020), https://www.army.mil/article/237332/crisis_response_mortuary_affairs_troops_provide_support_to_civil_authorities_during_covid_19.

281. *See* NRF, *supra* note 25 at 4 (defining "catastrophic incident").

282. *Id.* (the three factors that define a catastrophic incident).

283. *Id.*

the common defense and promote the general welfare; both in terms of its pandemic preparedness and its pandemic response.

This massive government failure presents a challenge when attempting to evaluate the effectiveness of our pandemic policy because the federal government did not follow its own guidelines. Instead of hewing close to the pandemic plans and existing CDC guidance, the Trump administration popularized two key falsehoods about the COVID-19 pandemic. First, President Trump and members of his administration repeatedly told the American people that no one saw the pandemic coming.[284] Those claims are belied by the extensive pandemic planning that had been in place since 2005; plans that have been revisited by every president since George W. Bush.[285] They are also belied by the clear-eyed warnings contained in the annual threat assessments prepared by the National Security Director.[286] The pandemic might have been an unwelcome development, but it was certainly not a surprise. Second, President Trump and members of his administration consistently downplayed the severity of the situation and misrepresented the appropriate role of the federal government in a pandemic.[287] The first lie gave the administration cover for not being prepared for the pandemic threat, but the second lie directly impeded the pandemic response by delaying necessary actions, undermining mitigation efforts, and sowing doubt across a vast swath of the American population. The virus skepticism encouraged by the Trump administration then morphed into vaccine hesitancy.[288] Despite abundant supplies of highly effective vaccines, a large portion of the U.S. population continued to refuse to get vaccinated even in the face of new, highly contagious, and virulent variant strains of COVID-19.[289]

This Part explores what can be done to avoid a similar government failure going forward and recommends: (1) revisiting our pandemic policy; (2) enhancing government transparency and accountability; and (3) resisting the use of science as a partisan cudgel. It will most likely take years of commissions and investigations to understand fully what motivated federal officials to ignore well-established federal policy and place so many American lives and livelihoods in peril. As our public health experts begin to rewrite our pandemic policy, it is important to acknowledge that at the heart of the failed federal response to the COVID-19 pandemic was lack of political will, which cannot be

284. Schwartz, *supra* note 12.

285. Mosk, *supra* note 26.

286. *See* COATS, *supra* note 7, at 21 (explaining threat assessments).

287. Wolfe & Dale, *supra* note 9.

288. Caitlin Owens, *When Vaccine Hesitancy Becomes Political*, AXIOS (Apr. 19, 2021), https://www.axios.com/coronavirus-vaccine-hesitancy-politics-trump-biden-31b9eebb-8a6f-4b44-82d5-425dd966d5ef.html.

289. Erica Grieder, *Collision of Delta Variant, Widespread Vaccine Hesitancy Doesn't Bode Well for Texas*, HOUS. CHRON. (June 26, 2021), https://www.houstonchronicle.com/news/columnists/grieder/article/Collision-of-Delta-variant-widespread-vaccine-16275344.php.

remedied solely by a smarter, clearer, or better funded pandemic policy. The failed federal response was not simply the natural consequence of insufficient appropriations, underdeveloped models, or conflicting policy priorities. It was something much more fundamental and perhaps more difficult to address—our government failed to act. Accordingly, while public health experts re-evaluate our pandemic policy and funding levels, it will be up to legal experts to develop structural reforms and mechanisms to ensure that federal officials do not abdicate their responsibility to the American people. Until then, even the most enlightened and well-funded public health policy initiatives will not make the United States any safer the next time we are confronted with a novel virus.

A. REVISIONS TO PANDEMIC POLICY

National pandemic planning is constantly revised to incorporate insights gained from the last pandemic.[290] The COVID-19 pandemic will no doubt provide public health experts with a wealth of data to consider as they revisit pandemic preparedness and response policy. In addition to these new scientific insights, it is also possible to rework our pandemic policy in ways that would enhance transparency and accountability by reducing the discretion of government actors in favor of science-driven recommendations. Although this article focuses primarily on the failed federal *response* to COVID-19, it is now clear that the United States also failed to meet its pandemic preparedness goals. The failure to meet these goals was arguably due to the same types of issues that hamstrung the federal pandemic response: conflicting or mixed priorities, political pressure, and perhaps self-interest. Accordingly, this Section outlines ways that U.S. pandemic policy could be revised to hold future administrations accountable with respect to both pandemic preparedness and response goals.

1. Pandemic Preparedness

Throughout his time in office during the pandemic, President Trump asserted that no one could have foreseen the COVID-19 pandemic.[291] This patently false claim seemed tailor made to explain why the United States was so woefully unprepared to meet the challenges presented by the novel coronavirus. Take for example, the Strategic National Stockpile, which is the crown jewel of U.S. pandemic preparedness policy.[292] As explained in greater detail in Part III above, it turned out that the much lauded Strategic National Stockpile was severely under resourced and unable to meet the needs of desperate governors

290. *See* Lipton et al., *supra* note 194.

291. Aaron Blake, *Trump Keeps Saying 'Nobody' Could Have Foreseen Coronavirus. We Keep Finding Out About New Warning Signs*, WASH. POST (Mar. 19, 2020), https://www.washingtonpost.com/politics/2020/03/19/trump-keeps-saying-nobody-could-have-foreseen-coronavirus-we-keep-finding-out-about-new-warning-signs.

292. CONG. RSCH. SERV., NATIONAL STOCKPILES: BACKGROUND AND ISSUES FOR CONGRESS (2020), https://crsreports.congress.gov/product/pdf/IF/IF11574 (describing Strategic National Stockpile).

and mayors during those harrowing early months of the pandemic.[293] The lack of available resources was compounded by the very narrow view that the Trump administration took regarding the role that the federal government and the National Stockpile should play in state and local pandemic response efforts.[294]

Although hearings and investigations are necessary to determine exactly how and why the Trump administration failed to meet the pandemic preparedness goals, there are a number of widely reported instances where the Trump administration abandoned Obama-era pandemic preparedness initiatives.[295] For example, the Trump administration discontinued an initiative to rapidly manufacture N95 respirators—something that would have been quite useful during the PPE crisis in the beginning of the pandemic.[296] It also disbanded the White House National Security Council Directorate for Global Health Security and Biodefense[297] and transferred the control of the Strategic National Stockpile from the CDC to a political appointee within HHS, who reportedly prioritized bioterrorism over naturally occurring biological disasters.[298]

Securing sufficient funding from Congress for the Strategic National Stockpile has been a longstanding challenge for administrations.[299] However, additional funding alone will not ensure that the country is any more prepared for the next pandemic because HHS holds the discretion to set priorities.[300] Congress should consider ways to hardwire pandemic preparedness goals through appropriations in order to ensure that preparedness goals are prioritized and insulated from partisan or self-interested considerations.[301] For example, it has been reported that the political appointee in charge of the National Stockpile, the Assistant Secretary for Response and Preparedness, purchased vast amounts

293. Andrew Hay, *'On Our Own Now': U.S. Strategic Stockpile Empty of Medical Supplies*, REUTERS (Mar. 31, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-stockpile/on-our-own-now-u-s-strategic-stockpile-empty-of-medical-supplies-idUSKBN21I3FE.

294. Quint Forgey, *'We're Not a Shipping Clerk': Trump Tells Governors to Step up Efforts to Get Medical Supplies*, POLITICO (Mar. 19, 2020), https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-137658.

295. It bears mentioning that President Trump frequently claimed that the poor state of the National Stockpile was President Obama's fault. He made this claim, despite the fact that when the pandemic hit, President Trump was already three-quarters the way through his term in office. Jane C. Timm, *Fact Check: Trump Falsely Claims Obama Left Him 'Nothing' in the National Stockpile*, NBCNEWS (May 6, 2020), https://www.nbcnews.com/politics/donald-trump/fact-check-trump-falsely-claims-obama-left-him-nothing-national-n1201406.

296. Swaine et al., *supra* note 98.

297. Glen Kessler & Meg Kelly, *Was the White House Office for Global Pandemics Eliminated?*, WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/politics/2020/03/20/was-white-house-office-global-pandemics-eliminated.

298. Swaine et al., *supra* note 98.

299. *See, e.g.*, Richard Hall, *Obama Administration Asked for Funding to Tackle Future Pandemics but Republicans Refused*, INDEP. UK (Apr. 16, 2020), https://www.independent.co.uk/news/world/americas/obama-ebola-coronavirus-trump-congress-tea-party-a9469186.html.

300. *See* Blake, *supra* note 291.

301. CONG. RSCH. SERV., *supra* note 292 (explaining that some stockpiles are legislatively mandated).

of smallpox vaccine, which reflected his focus on bioterrorism.[302] Without guidance and direction from Congress, it is easy to see how additional funding could just translate into additional doses of smallpox vaccine, if left to the individual discretion of a political appointee. As discussed below in Subpart B, it would also be possible for Congress to revest authority over the Strategic National Stockpile with the CDC, thereby reducing the likelihood that the Strategic National Stockpile could become politicized.

2. Pandemic Response

With respect to the pandemic response plans, individual government actors are also entrusted with considerable discretion, which allowed the federal response to falter significantly during those key early months of the COVID-19 pandemic. It is also possible that the singularity of the COVID-19 pandemic was obscured, at least initially, by the all-inclusive and all-hazards approach adopted by U.S. preparedness and response policy. Arguably, broad policy documents designed to cover all circumstances could have left government officials without sufficiently clear direction to guide their decision making. These issues related to framing and discretion can be addressed within existing pandemic preparedness and response policy.

The extreme urgency of a "severe" or "very severe" pandemic, to use the ranking provided by the PRAF, could have been somewhat muted by the policy decision to produce plans that addressed a wide range of scenarios. For example, the first generation of pandemic plans released by the White House and HHS in 2005 and 2006 assumed a severe pandemic that was along the magnitude of the 1918 Spanish Flu pandemic.[303] The CDC later released very detailed guidance in 2007 regarding the implementation of NPIs in the case of a severe pandemic.[304] That guidance drew heavily from limited historical observations from the 1918 Spanish Influenza pandemic with respect to the efficacy of social distancing measures when used on a large scale.[305]

However, there was a shift of emphasis in the pandemic plans after the 2009 H1N1 pandemic, which was relatively mild compared to COVID-19.[306] The 2009 H1N1 pandemic highlighted the need to produce guidelines tailored for a less severe, but still quite serious, pandemic.[307] In 2017, both HHS and the CDC revised their pandemic guidance to cover a broad spectrum of pandemic scenarios, ranging from "mild" to "very severe" on the PRAF.[308] The adoption of these broader and intentionally more flexible plans, along with the introduction of the Pandemic Intervals, arguably diluted some of the specificity

302. Swaine et al., *supra* note 98.
303. HHS 2017 UPDATE, *supra* note 6, at 3.
304. *Id.*
305. *Id.*
306. *See id.*; Lipton et al., *supra* note 194.
307. HHS 2017 UPDATE, *supra* note 6, at 3–4, 11.
308. *Id.* at 4, 11, 52.

of the first-generation plans that often contained very clear triggers for federal response actions.[309] Going forward, it may be worthwhile to differentiate more clearly between plans for "severe" or "very severe" pandemics and those for more "mild" pandemics, such as the 2009 H1N1 pandemic.

The same can be said of our reliance on an "all-hazards" and "incident" management rubric that could potentially blunt the uniqueness of a "severe" or "very severe" pandemic.[310] Moreover, pandemic-specific plans are almost exclusively focused on pandemic influenza.[311] Although public health authorities early on determined that these pandemic influenza plans were applicable to the novel coronavirus, there are some differences that presumably should be taken into account in future policy planning and guidance.[312] For example, in the case of pandemic influenza, the development of an effective vaccine may take a shorter period of time because manufacturers can build on the existing vaccine methods that are used to produce the seasonal flu vaccines.[313] With the novel coronavirus, scientists had a very limited knowledge base.[314] Vaccines to protect against coronaviruses had been developed for domestic animals and livestock.[315] There had also been preliminary research regarding vaccines to protect against severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (MERS), both of which are caused by coronaviruses that are closely related to the COVID-19 virus, SARS-CoV-2.[316] Other than that, vaccine manufacturers were pretty much starting from scratch.[317] The delay in the development of an effective vaccine for the coronavirus that would then be widely available meant that NPIs would have to be in place for an extended period of time, including school closures and social distancing.

Finally, there is the question of how to strike the balance between the benefits of flexibility in application and the certainty of bright-line triggers that mandate particular response actions.[318] The current pandemic plans are designed to be flexible and adaptable to many different pandemic scenarios. They also stress that decision making should take into account a variety of considerations. Accordingly, much of the government action prescribed under our pandemic plans is discretionary. This includes the various emergency declarations that

309. *Id.* at 5.

310. *See generally* U.S. DEP'T OF HOMELAND SEC., *supra* note 25.

311. Freitas et al., *supra* note 2, at 1 (describing applicability of influenza plans to coronavirus).

312. *Id.*

313. *Fact Check: COVID-19 and Influenza Vaccines Too Different to Be Directly Compared*, REUTERS (Dec. 8, 2020), https://www.reuters.com/article/uk-factcheck-covid-influenza-vaccines/fact-check-covid-19-and-influenza-vaccines-too-different-to-be-directly-compared-idUSKBN28I2UE.

314. *Id.*

315. Ian R. Tizard, *Vaccination Against Coronaviruses in Domestic Animals*, VACCINE (July 14, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7284272.

316. *See* REUTERS, *supra* note 313.

317. *Id.*

318. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN L. REV. 577, 578 (1988).

make federal funds available,[319] as well as the application of the National Defense Production Act that forces private industry to produce necessary supplies to respond to the pandemic.[320] Even where the policy or plan states in the affirmative that a particular action will happen in response to a given trigger, there are no enforcement mechanisms. As explained below, these points of discretionary executive action are susceptible to partisan pressure and outright politicization.[321] The federal response to the COVID-19 pandemic could have benefitted from the enhanced accountability that would have resulted from bright-line pandemic policy triggers. These policy triggers or decision points could be drafted to require either a specific response action or a public statement as to why the government was choosing not to implement the response. Once embedded in the policy, these bright-line triggers could help guard against federal officials who might be vulnerable to partisan pressure or otherwise swayed by self-interest. The requirement that government officials make public their rationale for exercising their judgment contrary to the pandemic protocols would increase transparency and invite public oversight.

B. HOLDING THE GOVERNMENT AND ITS OFFICIALS ACCOUNTABLE

The federal response to the COVID-19 pandemic demonstrates how even the best laid pandemic plans will not protect the country from the nonfeasance or malfeasance of government officials, including the president. As a threshold matter, it is imperative for Congress to empanel a COVID-19 Commission to investigate how and why this failure of political will occurred and report its findings to the American people.[322] Pending the results of a congressional inquiry, it is important to consider structural reform to ensure that government actions are transparent and government officials remain accountable during a public health crisis.

When a "severe" or "very severe" pandemic threat looms, a swift science-driven government response is essential because lives hang in the balance.[323] Accordingly, the traditional sets of checks and balances that restrain executive action are ill-suited to address the demands of a public health crisis. Congressional oversight and judicial review both occur after the fact and will offer too little too late. Public watchdogs who rely on Freedom of Information

319. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, codified as amended at 42 U.S.C. §§ 5121-5206, and scattered sections of 12 U.S.C., 16 U.S.C., 20 U.S.C., 26 U.S.C., 38 U.S.C. (2002). Even once declared, the scope of the support and resources made available to the states continues to be discretionary.

320. Defense Production Act of 1950, 50 U.S.C. App. §§ 2061–2171 (2002). The DPA is the primary authority to ensure the timely availability of resources for national defense and civil emergency preparedness and response.

321. One option, also explained below, is to attempt to insulate the CDC and other public health functions structurally by creating an independent agency.

322. Legislation was introduced in the both the 116th and 117th Congress to empanel a COVID-19 Commission. National Coronavirus Act of 2021, H.R. 1306, 117th Cong. § 4(2)(S)(T) (2021).

323. It is also informed by the severity of the pandemic. *See* HHS 2017 UPDATE, *supra* note 6, at 43.

Act (FOIA) requests to monitor executive activity will be blindsided.[324] It is not sufficient to wait for a future administration to change course because the correction will necessarily occur after the damage has already been done. The fact that the Biden administration immediately reversed many of the measures taken by the Trump administration that compromised our pandemic preparedness and response does not mean that we are out of the woods.[325] The raging partisan divide over the role and reliability of science cautions against viewing President Trump as simply a rogue executive. To the contrary, the growing embrace of anti-science bias that is discussed below in Subpart C strongly suggests the need for hardwired standards and guidelines that mandate science-driven decision making when the public health is at stake. Accordingly, this Subpart identifies three potential areas where legislation can help hold the government and its officials accountable during a public health crisis: (1) whistleblower protections to empower individuals;[326] (2) transparency and reporting requirements to keep the public informed; and (3) safeguards to insulate public health decision making from partisan influence and pressure.

1. Whistleblower Protections

During the early days of the COVID-19 pandemic, individual government officials were often vilified by President Trump for speaking directly to the public or contradicting the spin that he was putting on the pandemic. As described above in Part III, Dr. Messonnier of the CDC drew the fury of the President when she warned the American people on February 25, 2020 to prepare for a pandemic and a "severe disruption of daily life."[327] As the pandemic progressed, numerous administration officials would stand silently at the daily Coronavirus Task Force briefing while the President made dangerous and unfounded claims, including speculating whether injecting disinfectants could kill the virus.[328] Dr. Deborah Birx, who served as the Coronavirus Response Coordinator in the Trump administration, was present at the briefing where President Trump extolled the virtues of disinfectants, but she did nothing to correct the alarming misinformation spread by the President.[329] When asked

324. The Freedom of Information Act (FOIA), 89-487, 80 Stat. 250, 5 U.S.C. § 552, at 5, 18.

325. It is important to note that the Biden administration has already reversed many of the measures taken by the Trump administration that compromised our pandemic preparedness and response. Mabinty Quarshie, *Biden's Wild Week of Executive Orders*, USATODAY (Jan. 28, 2021), https://www.usatoday.com/story/news/politics/2021/01/28/biden-reverses-trump-policies-healthcare-abortion-covid-19/4298282001.

326. The Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–1206).

327. *See* Abbott & Armour, *supra* note 256; *see also* Erika Edwards, *Senior CDC Official Who First Warned of COVID-19 Pandemic Resigns*, NBC NEWS (May 7, 2021), https://www.nbcnews.com/health/health-news/senior-cdc-official-who-first-warned-covid-19-pandemic-resigns-n1266680.

328. Meredith McGraw & Sam Stein, *It's Been Exactly One Year Since Trump Suggested Injecting Bleach. We've Never Been the Same.*, POLITICO (Apr. 23, 2021, 4:30 AM), https://www.politico.com/news/2021/04/23/trump-bleach-one-year-484399.

329. *Id.*

about her silence, Dr. Birx explained. "I didn't know how to handle that episode," and then added "I still think about it every day."[330]

President Trump was known for his threatening and bullying management style, and he was often publicly quite critical of his subordinates.[331] He specifically attacked whistleblowers and famously unmasked the national security whistleblower whose report led to President Trump's first impeachment inquiry.[332] The President's actions, along with those of some of his supporters on Capitol Hill, directly undercut the efficacy of the Whistleblower Protection Act of 1989 that extends certain protections to government employees who reveal activity that poses, *inter alia*, a "substantial and specific danger to public health and safety."[333]

The mistreatment of government officials and employees in the Trump administration underscores the importance of securing robust protections for federal whistleblowers who expose wrongdoing. For obvious reasons, these protections are especially crucial in areas such as national security and public health. The Whistleblower Protection Improvement Act of 2021 (WPIA) is a bipartisan effort to strengthen protections for federal whistleblowers and address many of the deficiencies in existing law.[334] First and foremost, it clarifies that no federal official, including the President and Vice President, can interfere with or retaliate against a whistleblower for sharing information with Congress.[335] It provides whistleblowers with a new legal remedy and expands the scope of the protections to cover more classes of government employees, including Public Health Service officers or applicants.[336] The WPIA also provides that every covered federal employee has a right to communicate directly with Congress by expressly providing the right to petition Congress, furnish information to Congress, or respond to requests from Congress.[337]

If enacted, the WPIA would represent the first change in federal whistleblowing protections since the Whistleblower Enhancement Act of 2012.[338] Although the WPIA proposes important safeguards, Congress should consider additional ways to both incentivize and streamline whistleblowing in

330. *Id.*

331. *Trump Is Bullying His Own People into Silence*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/opinions/trump-is-bullying-his-own-people-into-silence/2018/08/14/0d66beb4-9ff8-11e8-93e3-24d1703d2a7a_story.html.

332. Brian Stelter, *Trump Attacks Whistleblower in Tweetstorm Full of Rants and Conspiracies*, CNN (Dec. 28, 2019), https://www.cnn.com/2019/12/28/politics/trump-ukraine-whistleblower-twitter/index.html.

333. *See* Whistleblower Protection Act § 2302(b)(8).

334. The Whistleblower Protection Improvement Act of 2021, H.R. 2988, 117th Congress (2021).

335. *Id*. at Sec. 2(d).

336. *Id*. at Sec. 3(e).

337. *Id*. at Sec. 2(b)(1)(E) (amending 5 U.S.C. § 2302(b)(9) to include "'the exercise of any right protected under section 7211'").

338. The Whistleblower Enhancement Act of 2012, P.L. 112-199, 112th Cong. (2012).

the context of public health concerns. For example, the Dodd-Frank Act[339] enhanced protections for whistleblowers and incentivized whistleblowers to report information about federal securities laws violations and foreign corruption to the U.S. Securities and Exchange Commission (SEC) with a potential monetary reward.[340] A similar form of monetary incentive might be appropriate given the high potential for loss of life when matters of public health are involved, but the obvious sticking point would be to identify a source of funding because the SEC monetary rewards are funded by the penalties imposed on the wrongdoing.[341]

With respect to streamlining public health whistleblowing, the WPIA clarifies the right of covered federal employees to communicate directly with Congress, a member of Congress or a congressional committee, but it does not address the more typical way that federal employees report information about wrongdoing. The Inspector General of a federal agency has the authority to "receive and investigate complaints or information from an employee . . . concerning the possible existence of an activity constituting . . . abuse of authority or a substantial and specific danger to the public health and safety."[342] An Inspector General is required to "immediate[ly]" report to the head of the agency any "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations."[343] The agency head is then required to deliver the report to the appropriate congressional authorities within seven days.[344] Of course, in the case of a pandemic response or other catastrophic public health crisis, seven days can make all the difference.

The proposed IG Independence and Empowerment Act of 2021 seeks to respond to some of the abuses directed at Inspectors General under the Trump administration.[345] It provides enhanced reporting to Congress in certain instances and would be a good vehicle to streamline Inspector General reports in the context of public health emergencies. Currently, an Inspector General is required to take an intermediate step where they first must report to the political appointee who heads the agency. The agency head then has an additional seven

339. Section 922 of Dodd-Frank authorizes the SEC to pay eligible whistleblowers a percentage of any monetary recovery. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841(2010).

340. In the ten years since the enactment of Dodd-Frank, whistleblowers have been paid more than $500 million under the Dodd-Frank incentive program. Mary Jane Wilmoth, *Dodd-Frank Act: Ten Years Later and More Than $500 Million Paid to Whistleblowers*, NAT'L L. REV. (July 21, 2020), https://www.natlawreview.com/article/dodd-frank-act-ten-years-later-and-more-500-million-paid-to-whistleblowers.

341. Dodd-Frank Act § 922.

342. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (as amended through Pub. L. No. 114-317 (2016)). *Id.* at § 5(d) (duty to keep Congress informed).

343. *Id.* at § 5(d).

344. *Id.*

345. IG Independence and Empowerment Act, H.R. 2662, 117th Cong. (2021).

days to notify Congress. Rather than require this intermediate step, Congress could authorize Inspectors General to report directly to Congress upon receiving a credible report that federal authorities were not following pandemic policy or otherwise directly jeopardizing the health and safety of the public.

2. Transparency and Reporting Requirements

The proposed change in the Inspectors General reporting requirements described above is designed to keep Congress informed of wrongdoing in the executive branch. However, it is also important to keep the general public informed during a public health crisis. As noted earlier, the public watchdogs and the media often use FOIA requests to secure information regarding executive branch decision making, but FOIA requests are not a viable option when every moment counts. Accordingly, Congress should take steps to ensure that the general public has access to up-to-date and current information throughout the duration of a pandemic or other public health crisis.

In March 2020, as the pandemic was just gathering steam in the United States, the CDC came under intense criticism when testing data temporarily disappeared from its website.[346] The data disappeared at the same time there was a raging controversy about whether diagnostic tests were freely available.[347] In July 2020, a similar concern arose when the Trump administration stripped the CDC of its data collection role and directed hospitals to report COVID-19 statistics to HHS.[348] These statistics included the number of confirmed COVID-19 cases, as well as the availability of ICU beds, ventilators, and PPE.[349] All the previously collected data temporarily disappeared from the CDC website after the change was announced, but the information was quickly reposted in the wake of damning press coverage.[350] The change in data collection was roundly criticized in the press, and the data collection responsibility was eventually returned to the CDC a little over a month after the shift was announced.[351]

346. John Bonifield & Elizabeth Cohen, *Congressman Calls CDC's Plan to Report Number of US Coronavirus Tests 'Wholly Inadequate*,*'* CNN (Mar. 4, 2020, 7:15 AM), https://www.cnn.com/2020/03/04/health/cdc-website-coronavirus-testing/index.html.

347. *Id.*

348. "Since March, hospitals have reported daily information on the availability of hospital beds, ventilators, and personal protective equipment to an established data collection network run by CDC called the National Healthcare Safety Network or NHSN, which has operated for years." Pien Huang, *White House Strips CDC of Data Collection Role for COVID-19 Hospitalizations*, NPR (July 15, 2020, 1:31 PM), https://www.npr.org/sections/health-shots/2020/07/15/891351706/white-house-strips-cdc-of-data-collection-role-for-covid-19-hospitalizations.

349. *Id.*

350. Nathaniel Weixel, *Trump Administration Restores Some COVID-19 Hospitalization Data to CDC Website*, THE HILL (July 16, 2020), https://thehill.com/policy/healthcare/507696-trump-administration-restores-some-covid-hospitalization-data-to-cdc.

351. Robbie Whelan, *COVID-19 Data Will Once Again Be Collected by CDC, in Policy Reversal*, WALL ST. J. (Aug. 20, 2020), https://www.wsj.com/articles/troubled-covid-19-data-system-returning-to-cdc-11597945770.

These notable missteps undermined public confidence in the CDC and its ability to manage the pandemic response. Congress could address this lapse by expanding the public reporting responsibilities of the CDC. For example, the CDC is currently required by statute to report "national notifiable diseases."[352] Its reports are published and made public each week in the CDC's *Weekly Mortality and Morbidity Report*.[353] To the extent that public reporting requirements already exist, it should be relatively noncontroversial to expand these requirements to include statistics related to pandemics or other comparable public health emergencies. In addition to these statistics, the CDC could be required to report out the pandemic threat level using its various assessment tools, such as the PRAF.[354] Instead of a weekly publication, however, Congress should mandate a real-time dashboard that would track the progress of the pandemic and response efforts.[355] This legislative mandate would remove the possibility that the CDC could be sidelined by future administrations or succumb to partisan pressure to withhold vital public health information from the public.

In terms of communications, the current pandemic plans designate HHS as the lead agency, and stress that clear and accurate public health messaging is an essential part of a pandemic response.[356] During the COVID-19 pandemic, however, the Trump administration bypassed both HHS and the CDC in favor of the Coronavirus White House Task Force that was led by Vice President Pence.[357] President Trump also handled much of the messaging himself, speaking in ways that contradicted or undermined the recommendations of his own Task Force.[358] If Congress mandates a stronger public reporting role for the CDC, it could provide a counterweight for another administration bent on spreading disinformation. By hardwiring communications through a public reporting requirement, Congress would not be silencing the rest of the administration, but it would be able to help insulate the CDC and its important role from partisan influence.

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352. *National Notifiable Diseases Surveillance System* (NNDSS), CTRS. FOR DISEASE CONTROL & PREVENTION, https://wwwn.cdc.gov/nndss (last visited Jan. 3, 2022).

353. *Morbidity and Mortality Weekly Report* (MMWR), CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/mmwr/index.html (last visited Jan. 3, 2022).

354. *See* HHS 2017 UPDATE, *supra* note 6, at 12, 51–52; *see also supra* note 153 and accompanying text.

355. In the earliest days of the pandemic, Johns Hopkins University developed a real time dashboard that reflects worldwide cases and provides data visualization that is designed to increase transparency and help the public understand of the nature of the pandemic. Doug Donovan, *Map Tracks Coronavirus Outbreak in Near Real Time*, JOHNS HOPKINS UNIV. (Jan. 23, 2020), https://hub.jhu.edu/2020/01/23/coronavirus-outbreak-mapping-tool-649-em1-art1-dtd-health.

356. *See* NIMS, *supra* note 37, at 48; *see also supra* notes 46–49 and accompanying text (discussing role of HHS in ESF-8).

357. Rebecca Ballhaus, *Trump Announces Coronavirus Task Force*, WALL ST. J. (Jan. 30, 2020) (originally led by the Secretary of HHS, who was later replaced by Vice President Pence).

358. Andrew Solender, *Trump May Skip Daily Briefings as Polls Show Low Public Trust in White House COVID-19 Response*, FORBES (Apr. 25, 2020, 10:11 AM), https://www.forbes.com/sites/andrewsolender/2020/04/25/trump-may-skip-daily-briefings-as-polls-show-low-public-trust-in-white-house-covid-19-response/?sh=b8a25c4231b8.

3. Accountability and Independence

Whereas the first two Subparts considered ways to empower individuals and the general public, this Section asks how to demand accountability from government officials. In the case of a pandemic or other public health emergency, we cannot afford to demand accountability after the fact because the potential cost is too high. Instead, the challenge is to put in place safeguards that will make our government actors accountable in the first instance. The goal should be to prevent another failed federal response, rather than to hold people to account after it has occurred.

Given how the Trump administration degraded and politicized the role of the CDC during his tenure in office,[359] it would be prudent to consider legislation and other steps that could insulate the CDC from future administrations that might try to subvert its mission for partisan advantage. Currently housed under HHS, CDC directors serve at the pleasure of the President and do not require Senate approval.[360] In order to restore the authority of the CDC and importance of science-driven decision making, Congress should consider reconstituting the CDC as an independent agency.[361] A 2020 article in the *JAMA Health Forum* makes the case that such a move is not only necessary to restore public trust in the CDC public health policy decisions, but also to allow the CDC to make those policy decisions in the first place.[362]

Congress has a number of models to draw on for designing an independent agency structure for the CDC. The Federal Reserve Board is probably the best-known independent federal agency.[363] More recently, we saw the creation of the Consumer Financial Protection Bureau (CFPB) under the Dodd-Frank Act in the wake of the Great Recession.[364] There is also precedent for moving functions out of an existing agency to form an independent entity. In 1994, the Social Security Administration was moved out of HHS and reconfigured as an

359. Christopher Sellers, Leif Fredrickson, Alissa Cordner, Kelsey Breseman, Eric Nost & Kelly Wilkins, *Coronavirus and the Three-Year Trump Quest to Slash Science at the CDC*, EDGI (Mar. 23, 2020), https://envirodatagov.org/an-embattled-landscape-series-part-2a-coronavirus-and-the-three-year-trump-quest-to-slash-science-at-the-cdc.

360. Ed Yong, *Trump's Pick for CDC Director is Experienced but Controversial*, THE ATLANTIC (Mar. 22, 2018), https://www.theatlantic.com/science/archive/2018/03/trumps-pick-for-cdc-director-is-experienced-but-controversial/556202.

361. A similar argument could be made on behalf of the FDA. Garret Jones, *COVID-19 Failures Show Why the CDC and FDA Should Be More Independent*, DISCOURSE (Apr. 16, 2020), https://www.discoursemagazine.com/politics/2020/04/16/covid-19-failures-show-why-the-cdc-and-fda-should-be-more-independent.

362. Soleil Shah & Howard Forman, *The Case for Independent Centers for Disease Control and Prevention—Protecting Public Health from Politics*, J. AM. MED. ASS'N: HEALTH F. (Mar. 25, 2020), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2771202.

363. Amitrajeet A. Batabyal, *The CDC Needs to Be Independent Like the Federal Reserve*, GLOBE POST (Aug. 4, 2020), https://theglobepost.com/2020/08/03/cdc-independent (describing the virtues of an independent Federal Reserve).

364. *See* Dodd-Frank Act § 1011; *see also* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (striking restrictions on removal of single director of CFPB on separation of powers grounds but preserving agency structure).

independent federal agency.[365] The new agency could be further insulated from partisan influence by its governance structure. For example, the Director could be appointed by the President with Senate approval and serve for a term that extended beyond a single administration. A diverse governing board whose members have staggered terms would add another layer of independence. Ideally, the agency would be able to advance public health policy unhampered by the partisan pressures of any particular administration, just as the Federal Reserve Board is supposed to act in the best interest of the American public without regard to politics.[366] It would also be important to secure dedicated funding for the new agency to further enhance the CDC's autonomy, similar to the dedicated funding stream enjoyed by the CFPB.

In terms of the jurisdiction of the new agency, it could be given broad powers during a public health emergency. As the independent science-driven agency, it could assume some of the discretionary public health powers currently exercised by the President, such as the power to invoke the Defense Production Act, mobilize the medical reserve corps, and deploy federal medical stations.[367] It could also oversee the development of medical countermeasures, the production of diagnostic testing, and the management of the Strategic National Stockpile. It could serve as the scientific liaison to other government agencies, providing expert and independent scientific guidance. It could also be the primary source of government messaging regarding public health issues.

Although the creation of an independent public health agency with dedicated funding may not be politically attainable, at least at the present time, there are other ways that Congress can move to insulate pandemic policy from partisan influence. For example, President Biden reinstated the White House National Security Council Directorate for Global Health Security and Biodefense that had been disbanded under the Trump administration.[368] As noted earlier, however, these sorts of after-the-fact corrections by a subsequent administration are not a sufficient failsafe during a public health emergency when time is of the essence. Accordingly, Congress could amend the National Security Act of 1947 to mandate the creation of the Directorate for Global Health Security and Biodefense.[369] It could also mandate the return of the responsibility for the Strategic National Stockpile to the CDC, regardless of whether it was an independent agency. In the same legislation, it could also restructure the Office

365. Shah & Forman, *supra* note 362.

366. Batabyal, *supra* note 363.

367. Defense Production Act of 1950, 50 U.S.C. App. §§ 2061–71 (2002).

368. *National Security Memorandum on United States Global Leadership to Strengthen the International COVID-19 Response and to Advance Global Health Security and Biological Preparedness* (Jan. 21, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/21/national-security-directive-united-states-global-leadership-to-strengthen-the-international-covid-19-response-and-to-advance-global-health-security-and-biological-preparedness; *see also* Deb Riechman, *Trump Disbanded NSC Pandemic Unit That Experts Had Praised*, AP NEWS (Mar. 14, 2020), https://apnews.com/article/donald-trump-ap-top-news-virus-outbreak-barack-obama-public-health-ce014d94b64e98b7203b873e56f80e9a.

369. Kessler & Kelly, *supra* note 297.

of Assistant Secretary of Response and Preparedness in HHS that was created in 2006 under the original Bush-era pandemic legislation.[370]

C. CONFRONTING PARTISAN SCIENCE DENIAL

Pandemic preparedness and response are highly dependent on scientific projections and expertise.[371] There is a current strain in American politics that is at odds with accepted scientific views, as exemplified by the opposition to climate change initiatives.[372] Opinion polls show that science skepticism and outright denial may be minority views in the United States, but not within the Republican party.[373] Within the Republican party, there is also strong support for individual liberty and economic freedoms, which can be at odds with certain social distancing measures.[374] As a result, Republican control of Congress or the White House could amplify a minoritarian bias that is both distrustful of science and highly protective of individual liberty and economic freedoms.[375] In the case of the COVID-19 pandemic, the confluence of these two beliefs undermined and sometimes actively thwarted the pandemic response at all levels of government as Republican administrations were less likely to wage a full-throttle response to a pandemic threat based on scientific modeling of an "invisible enemy."[376]

In the case of the COVID-19 pandemic, the initial threat warnings were viewed through a partisan lens that labeled the novel coronavirus a "hoax" and just another attempt on the part of the Democrats to derail the Trump presidency.[377] As the stock market reached new heights in February 2020, administration officials continued to dismiss and downplay the threat of the novel virus even after the CDC confirmed the first human-to-human transmission and then community spread later in the month.[378] Many Republican governors adopted a similar stance.[379] Whistleblower reports have

370. Swaine et al., *supra* note 98.

371. *See generally* HHS 2017 UPDATE, *supra* note 6.

372. Brian Kennedy & Cary Funk, *Democrats and Republicans Differ over Role and Value of Scientists in Policy Debates*, PEW RSCH. (Aug. 9, 2019), https://www.pewresearch.org/fact-tank/2019/08/09/democrats-and-republicans-role-scientists-policy-debates.

373. *Id.*

374. *Id.*

375. Jeanine Santucci, *Partisan Divide over Social Distancing Narrows as States Ramp up Coronavirus Measures, Poll Finds*, USATODAY (Apr. 2, 2020, 1:23 PM), https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-social-distancing-gap-between-democrats-gop-narrows/5109621002.

376. Ronald Brownstein, *Red and Blue America Aren't Experiencing the Same Pandemic*, THE ATLANTIC (Mar. 20, 2020), https://www.theatlantic.com/politics/archive/2020/03/how-republicans-and-democrats-think-about-coronavirus/608395.

377. Bryan Sullivan, *Fox News Faces Lawsuit for Calling COVID-19 a 'Hoax,'* FORBES (Apr. 10, 2020, 7:32 PM), https://www.forbes.com/sites/legalentertainment/2020/04/10/covid-19-lawsuit-against-fox-news/?sh=7c5729ab5739.

378. Greg Miller & Ellen Nakashima, *President's Intelligence Briefing Book Repeatedly Cited Virus Threat*, WASH. POST (Apr. 27, 2020), https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101_story.html.

379. Cleve R. Wootson Jr. & Tim Craig, *Southern Governors Who Initially Downplayed Coronavirus Threat Ease into Reopening of Their States*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/

since come to light that allege officials in the Trump White House knowingly turned their back on science in favor of cronyism and a myopic focus on the economy.[380] President Trump himself said in interviews with journalist Bob Woodward that he intentionally misrepresented the extent of the threat to the American people.[381]

For legislators and policymakers, the pressing question is how to prevent this minoritarian anti-science bias from derailing future preparedness and response efforts. Our national preparedness and response plans all stress the importance of clear, consistent, and accurate communications with government and private sector partners, as well as with the general public.[382] For example, CDC guidance on the use of NPIs explains at great length how crucial it is to have community buy-in regarding the use of NPIs.[383] The same can be said regarding the efficacy and safety of vaccines.[384] However, the messaging from the Trump administration could not have been farther off the mark, especially in the crucial early days of the pandemic. President Trump made outlandish comments and projections, often via Twitter.[385] He also attacked members of his own administration.[386] As noted in the prior Subpart B.2, it may be possible to statutorily mandate communication channels, especially if the CDC were reconstituted as an independent agency that is not managed by the Executive Office of the President. Of course, it would be impossible to muzzle a sitting President, and communications protocols are not typically handled in statutes—but then these are not typical times.

CONCLUSION

Our national pandemic preparedness and response planning is predicated on a cross-institutional, coordinated effort that involves federal, state, local, and private actors, but it assumes that the federal government will play a pivotal role. This coordinated effort is organized around the common goals of the containment, mitigation, and eventual end of a pandemic outbreak. In the case of the COVID-19 pandemic, the federal government failed to step into its assigned role. Instead, it waged an aggressive disinformation campaign, bullied states and localities, and mocked the advice of its own infectious disease experts. The result was a chaotic and uneven state-driven pandemic response that varied

national/southern-governors-who-initially-downplayed-coronavirus-threat-ease-into-reopening-of-their-states/2020/04/29/92d9d122-8a3d-11ea-9dfd-990f9dcc71fc_story.html.

380. Eric Lutz, *Shocking: Jared Kushner's Young Consultant Army Was Clueless on Coronavirus*, VANITY FAIR (May 6, 2020), https://www.vanityfair.com/news/2020/05/shocking-jared-kushners-young-consultant-army-was-clueless-on-coronavirus.

381. *See* accompanying text, *supra* note 211 (describing interviews).

382. HOMELAND SEC. COUNCIL, *supra* note 5, at 40–41.

383. *See* Qualls et al., *supra* note 175, at 7–8 (describing community engagement).

384. *See* Kessler & Kelly, *supra* note 297.

385. Wolfe & Dale, *supra* note 9.

386. *See* Moreno, *supra* note 241.

greatly from state to state, resulting in a patchwork of divergent and conflicting orders and guidelines.

Policy makers and scholars will spend many years debating what caused this massive government failure, how many lives it cost, and what could have been done to prevent it. Hopefully, congressional hearings and FOIA requests will fill in many of the missing details as to how our federal response to the COVID-19 pandemic went off the rails and ultimately failed the American public. In the face of all the misinformation disseminated by the Trump administration, it is imperative that these inquiries be made with the understanding that the federal government had fair warning of the pandemic threat. It was not a "black swan," as Trump administration officials so often claimed. These inquiries must also be made with the understanding that it is not possible to actually judge the efficacy of our pandemic preparedness and response policy because the federal government failed to follow its own guidance. When faced with a novel virus that was both easily transmissible and clinically severe, the federal government chose to obfuscate rather than to act. This is a dangerous and troubling precedent that must be addressed.

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