

INSTITUTIONALIZING THE CENTERS FOR DISEASE CONTROL AND PREVENTION'S INDEPENDENCE

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Abstract

The United States' response to the COVID-19 pandemic was sub-optimal. One problem in it was the politicization of the public health response. One aspect of that politicization was aggressive political intervention in the Centers for Disease Control and Prevention (CDC) efforts to provide guidance and help pandemic response. The concern was strong enough that four previous CDC Directors, in an unusual step, published an op-ed calling out political intervention in the CDC. This article proposes two changes to strengthen the CDC's institutional independence: codifying the CDC's role in preventing diseases and reducing harms in a statute, and restructuring the agency to be led by a multi-member board appointed for long times and with removal protections (along the lines of the Board of the Federal Reserve System). These changes can send a strong message that expert advice in public health should be science-based and less, rather than more, political. It can also protect CDC's long-standing independence, while preserving some political control.

Experts generally regard the United States' response to the COVID-19 pandemic as unsatisfactory.² One aspect of the problem—though by no

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2. John Kirlin, *COVID-19 Upends Pandemic Plans*, AM. REV. PUB. HEALTH, July 16, 2020, <https://journals.sagepub.com/doi/full/10.1177/0275074020941668>; Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—the U.S. Response to COVID-19*, 382 NEW ENG. J. MEDICINE e75 (2020); Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y (July 27, 2020),

means all of it—was the strong politicization of the response, including politicization of federal public health guidelines.³ Apparent political influence on guidance offered by the Centers for Disease Control and Prevention (CDC) has undermined the agency’s ability to provide data and recommendations that government leaders, private organizations, and the general public can trust to guide their actions. In a glaring example, after President Trump criticized previous CDC guidelines on the topic, the CDC released a document on schools reopening that experts say understated the risk of opening schools, clearly influenced by the White House.⁴ Even more concerning, the Trump Administration’s intervened – or at least attempted to intervene—in the CDC’s journal, the *Morbidity and Mortality Weekly Report*, traditionally a source of objective scientific information.⁵ The Trump administration has also acted to reduce the CDC’s ability to collect coronavirus data; this raises real concerns about the ability of the CDC to perform its role of providing expert guidance and helping to contain the pandemic.⁶ This situation creates concerns that the White House will try to interfere in CDC’s traditional role in recommending vaccines, or marginalize its committees in the process of overseeing COVID-19 vaccines in development.

The intensity of the COVID-19 crisis justifies reconsidering the governance of the CDC. I recommend that Congress act in two ways to

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599239; H. Daniel Xu & Rashima Basu, *How the United States Flunked the COVID-19 Test: Some Observations and Several Lessons*, AM. REV. PUB. ADMIN. (July 15, 2020), <https://journals.sagepub.com/doi/full/10.1177/0275074020941701>.

3. David P. Carter & Peter J. May, *Making Sense of the U.S. COVID-19 Pandemic Response: A Policy Regime Perspective*, 42 ADMIN. THEORY & PRACTICE 265, 266 (2020).

4. Barbara Sprunt & Cory Turner, *White House Stumbles Over How Best to Reopen Schools, as Trump Blasts CDC Guidance*, NAT’L PUB. RADIO (July 8, 2020), <https://www.npr.org/2020/07/08/888898194/trump-blasts-expensive-cdc-guidelines-for-reopening-schools>; Laura Meckler & Rachel Weiner, *CDC Director Concedes Schools in “Hot Spots” Face Tougher Call on Reopening*, WASH. POST, July 24, 2020; Caitlin McCabe & Leslie Brody, *CDC Issues Coronavirus Guidelines for Reopening Schools*, WALL ST. J., <https://www.wsj.com/articles/cdc-issues-coronavirus-guidelines-for-reopening-schools-11595612205> (last updated July 24, 2020); Tom Frieden, Jeffrey Coplan, David Satcher & Richard Besser, *We Ran the CDC. No President ever Politicized its Science the Way Trump Has*, July 14, 2020, available at: <https://www.washingtonpost.com/outlook/2020/07/14/cdc-directors-trump-politics/>

5. Amy Maxmen, *Why the United States is having a Coronavirus Data Crisis*, NATURE, Aug. 25, 2020, available at: <https://www.nature.com/articles/d41586-020-02478-z>; Dan Diamond, *Trump Officials Interfered with CDC Reports on COVID-19*, POLITICO, Sept. 11, 2020, available at: <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809>; Noah Weiland, Sheryl Gay Stolberg & Abby Goodnough, *Political Appointees Meddled in C.D.C.’s “Holiest of the Holy” Health Reports*, N.Y. TIMES, Sept. 12, 2020, available at: <https://www.nytimes.com/2020/09/12/us/politics/trump-coronavirus-politics-cdc.html>

6. Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, N.Y. TIMES, July 14, 2020.

increase CDC's ability to act independently to promote public health. First, Congress should codify CDC's functions in a statute that clearly gives it the responsibility to provide guidance, training and support during outbreaks, and second, Congress should reorganize the CDC as an independent agency and replace its director—appointed and removable at the President's discretion—with a board akin to Federal Reserve System's Board of Governors. At this point, CDC does not have direct, specialized statutory authority for its primary roles, and the CDC director is appointed by the President with no oversight and removable at will. This leaves the CDC with little formal defenses against administration efforts to interfere in its efforts to reduce diseases and harms, and can both undermine trust (necessary for CDC guidance to have an impact) and directly undermine public health.

The tension between politics and expertise is far from new. In public health policy, it is unavoidable. Public health policy is inherently political because it involves decisions about allocating resources and broad value judgments in which public health must be weighed against other policy concerns. Yet, public health policy determinations must be based on accurate and up-to-date data and evidence-based guidelines. Politicization of the data and public health recommendations that guide management of health threats undermines the effectiveness and accountability of the public health groups.

The relationship between assuring political responsiveness and providing good expertise is complex, and a full discussion of it is beyond the scope of this article.⁷ But one major concern in it is that politics may lead to distortion of scientific information; intervention in an agency whose main role is to advise, train, and provide information brings that concern to the forefront.⁸ This makes a very strong case for limiting direct political intervention in the daily functioning (as opposed to the broader framework) of an agency whose main role is providing surveillance, expert advice and guidance.

7. For several in-depth discussions, see Wendy E. Wagner, *A Place of Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2026-31 (2015); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L. J. 423, 430, 430 n.27 (2009); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 33-56 (2009); Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 921-31 (2004).

8. Wagner, *supra* note 7, at 2022-23; McGarity, *supra* note 7, at 897-900.

I. THE CDC'S ROLE GENERALLY

There is not a primary authorizing statute that created the CDC or assigned it roles, unlike, for example, the Food and Drug Administration (FDA). Specific statutes delegate specific duties to CDC, and the Public Health Service Act is regarded as creating authority for the federal government to act on infectious diseases generally, but the CDC was created by executive action, not statute.⁹ The Centers for Disease Control and Prevention started as a war-time agency in 1942, as the Office of Malaria Control in War Areas.¹⁰ It was established in Atlanta, GA because “the southeastern location represented the central point of endemic malaria in the United States at that time.”¹¹ After the war ended, officials in the United States Public Health Service supported the creation of a permanent expert organization to assist states in disease control by providing science, training, and epidemiologic investigation.¹² The CDC, therefore, was designed from the start to provide expert knowledge and support in responding to infectious diseases threats. It was designed as “several centers that would make available to the state health departments certain highly specialized competencies which few states could afford to maintain on their own staffs. Each center would concentrate on a broad segment of public health.”¹³ The CDC's scope has since expanded to cover a large variety of communicable and non-communicable disease threats, but its basic role has not changed.¹⁴

The CDC's main role is developing knowledge and providing expert guidance and assistance to others—at the local, state, federal and international level.¹⁵ This is reflected in the CDC's description of its “core capabilities,” including “develop [ing] and deploy[ing] world-class data and analytics,” “maintain[ing] state-of-the-art laboratory capacity,” providing “elite public health expertise,” and “quickly respond[ing] to outbreaks at their source.”¹⁶

9. ELIZABETH W. ETHERIDGE, *SENTINEL FOR HEALTH: A HISTORY OF THE CENTERS FOR DISEASE CONTROL* 16-17 (1st ed. 1992).

10. William H. Foege, *Centers for Disease Control*, 2 J. PUB. HEALTH POL'Y 8, 8 (1981).

11. *Id.* In a personal communication, Dr. Alan Hinman clarified that the Southern location was “also because there were many military training bases in the southeast. Although the army could handle malaria on-base, there was need to control malaria around the bases.” (Comments on a previous draft, sent via email, August 19, 2020).

12. *Id.* at 8-9.

13. *Id.* at 9.

14. ETHERIDGE, *supra* note 9, at 341-43.

15. *Id.*

16. *CDC Strategic Framework*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/about/organization/strategic-framework/index.html> (last visited July 8, 2010).

Congress has occasionally given the CDC specific authorities.¹⁷ The Secretary of Health and Human Services and the Surgeon General have also delegated the organization specific powers. Some of these powers are regulatory. It is through delegation, for example, that the CDC is in charge of issuing federal quarantine orders.¹⁸ CDC initially had regulatory authority over clinical laboratories, but this authority has since been reassigned to the FDA, with the CDC continuing to be involved primarily in an advisory and support capacity.¹⁹ The CDC also manages the Vaccines for Children program in a regulatory role, a federal program designed to provide vaccines at no cost to children who may have access barriers.²⁰

Although it also has regulatory responsibilities, the bulk of the CDC's work, as described above, is still as an expert body which collects, analyzes and disseminates data, provides support and advice to states and local bodies (and now, international bodies and other countries too²¹). This was its role in most of the major health problems in the United States, including the opioid crisis, lead paint, disease outbreaks, and now during the COVID-19 pandemic.²²

17. *E.g.*, Pandemic and All-Hazards Preparedness and Advancing Innovation Act (PAHPAIA), Pub. L. No. 116-22, § 319(c)-(d) (3)(b) (2019) (giving the CDC consulting authority in regional health care emergency preparedness).

18. 42 U.S.C. §§ 264-265 provided the initial power to the Secretary of Health. *See* Wendy E. Parmet & Michael Sinha, *COVID-19—The Law and the Limits of Quarantine*, 382 NEW ENG. J. MED. (2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2004211>; James J. Misrahi, *The CDC's Communicable Disease Regulations, Striking the Balance Between Public Health and Individual Rights*, 67 EMORY L. J. 463 (2018).

19. *Clinical Laboratory Improvement Amendments (CLIA)*, U.S. FOOD & DRUGS ADMIN., <https://www.fda.gov/medical-devices/ivd-regulatory-assistance/clinical-laboratory-improvement-amendments-clia> (current as of Feb. 25, 2020).

20. Jason Schwartz & James Colgrove, *The Vaccines for Children Program at 25—Access, Affordability, and Sustainability*, 382 NEW ENG. J. MED. 2277 (2020).

21. Joel M. Montgomery et al., *Ten Years of Global Disease Detection and Counting: Program Accomplishments and Lessons Learned in Building Global Health Security*, 19 BIOMED CENT. PUB. HEALTH 510 (2019), <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-019-6769-2>.

22. For example, CDC provides guidance and advice on opioids and lead paint, and advised, trained, and assisted in outbreak response in the United States and elsewhere. Joseph V. Pergolizzi, Melanie Rosenblatt & Jo Ann LeQuang, *Three Years Down the Road: The Aftermath of the CDC Guideline for Prescribing Opioids for Chronic Pain*, 26 ADVANCES IN THERAPY 1235 (2019) (opioids); Adrienne S. Ettinger, Monica L. Leonard & Jacquelyn Mason, *CDC's Lead Poisoning Prevention Program: A Long-Standing Responsibility and Commitment to Protect Children from Lead Exposure*, 25 J. PUB. HEALTH MGMT. & PRAC. s5 (2019) (lead paint); Gabrielle O'Meara et al., *Ensuring a Competent Public Health Responder Workforce: The CDC Experience*, 17 J. EMERGENCY MGMT. 199 (2019) (advice, training, and assistance). *See also* ETHERIDGE, *supra* note 9, at 341-43 (general summary and details).

II. THE CDC'S ROLE IN THE US RESPONSE TO THE CORONAVIRUS PANDEMIC, A SHORT PRIMER

In January 2020, in response to reports of a pneumonia outbreak in Wuhan, China caused by a novel coronavirus strain, federal officials initiated containment measures to prevent the epidemic from reaching the US. CDC instituted public health entry screening at major international airports in the US on January 17,²³ but there is no evidence that airport screening resulted in detection of any reported cases during the containment phase.²⁴ Two Americans who had recently returned from Wuhan tested positive for the novel coronavirus on January 21 and 24 after arriving at hospitals with symptoms; they were treated in isolation rooms.²⁵ CDC reported these cases to the public, along with recommendations about measures state and local governments, clinicians, and the general public should take in response.²⁶ On January 29, the State Department repatriated hundreds of Americans from Wuhan.²⁷ Under the first federal quarantine order issued in more than 50 years,²⁸ CDC ordered

23. *Public Health Screening to Begin at 3 U.S. Airports for 2019 Novel Coronavirus* (“2019-nCoV”), CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 17, 2020), <https://www.cdc.gov/media/releases/2020/p0117-coronavirus-screening.html>; *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (describing expansion of public health entry screening to additional airports); Lori Aratani & Miriam Berger, *Here Are the 20 U.S. Airports Where Health Officials Are Screening for Coronavirus*, WASH. POST, Jan. 30, 2020 (CDC announcing expansion of public health entry screening to cover a total of 20 airports on January 28).

24. Out of 256 individuals across 34 jurisdictions for whom CDC staff recommended testing in January 2020—at a time when testing was available solely through CDC—six were identified through airport screening. CDC did not specify whether any of the six identified through airport screening were among the 11 who tested positive in January. See Kristina L. Bajema et al., *Persons Evaluated for 2019 Novel Coronavirus—United States, January 2020*, 69 MORBIDITY & MORTALITY WEEKLY REP. 166 (2020).

25. *First Travel-Related Case*, *supra* note 23; *Second Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 24, 2020), <https://www.cdc.gov/media/releases/2020/p0124-second-travel-coronavirus.html>.

26. *First Travel-Related Case*, *supra* note 23; *Second Travel-Related Case*, *supra* note 25.

27. *HHS and CDC Receive Flight Carrying Repatriated US Citizens*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 29, 2020), <https://www.cdc.gov/media/releases/2020/s0129-repatriated-US-citizens.html#:~:text=This%20morning%2C%20the%20Department%20of%20Air%20Reserve%20Base%20in%20California>.

28. CDC is authorized to issue orders isolating individuals reasonably believed to be infected or quarantining individuals reasonably believed to have been exposed to any of the diseases listed in a standing Executive Order. The list includes severe acute respiratory syndrome, which officials determined was sufficient to encompass infection with the novel coronavirus strain. *Transcript for CDC Media Telebriefing: Update on 2019 Novel Coronavirus (2019-nCoV)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 31, 2020), <https://www.cdc.gov/media/releases/2020/t0131-2019->

the repatriated individuals to be held in government-provided facilities at March Air Reserve Base in California while being monitored for symptoms and tested for infection during a 14-day incubation period.²⁹ None tested positive.³⁰ On January 30, CDC reported the first instance of human-to-human transmission occurring within the US—between one of the first travel-acquired cases and a household contact.³¹

As part of its role in pandemic response, the CDC had to create test kits. Possibly due to time pressure to get tests out, the CDC sent tests where one of the components was contaminated in a way that made the results invalid to “33 states and 70 labs in 66 countries.”³² As a consequence, data from these states was unreliable.³³ It took the CDC several days to identify the problem and remove the contaminated component, and after discovery of the problem in February, it took until March 15, 2020 to receive a revised Emergency Use Authorization (EUA) from the Food and Drug Administration for a test without the problematic component.³⁴

By late February, the CDC realized that there were case of COVID-19 in individuals who had not travelled to China/had contact with a traveler.³⁵ Reports from China, Germany, and elsewhere indicated that asymptomatic or pre-symptomatic individuals were capable of transmitting infection to others, rendering guidance focused on people

novel-coronavirus.html (confirming that the last time a federal quarantine order—as distinct from an isolation order—was issued was in the 1960s for a smallpox evaluation).

29. *CDC Issues Federal Quarantine Order to Repatriated U.S. Citizens at March Air Reserve Base*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 31, 2020), <https://www.cdc.gov/media/releases/2020/t0131-2019-novel-coronavirus.html>.

30. Bill Chappell, *195 Americans Released from Coronavirus Quarantine at Southern California Air Base*, NAT'L PUB. RADIO (Feb. 11, 2020, 3:13 PM), <https://www.npr.org/sections/health-shots/2020/02/11/804915231/195-americans-are-released-from-coronavirus-quarantine-at-california-air-base>.

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

32. DEP'T OF HEALTH & HUMAN SERVICES, SUMMARY OF THE FINDINGS OF THE IMMEDIATE OFFICE OF THE GENERAL COUNSEL'S INVESTIGATION REGARDING CDC'S PRODUCTION OF COVID-19 TEST KITS (June 19, 2020), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/5610e9fa-86d7-4bd3-8b7a-f8df10c6fc9e/note/7331ef79-a672-4d2d-9eff-f8ce39c2e462.#page=1>; David Willman, *CDC Coronavirus Test Kits Were Likely Contaminated, Federal Review Confirms*, WASH. POST, June 20, 2020.

33. Willman, *supra* note 32.

34. *Id.*

35. *See CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S.*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 26, 2020), <https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html>; *CDC Announces Additional COVID-19 Presumptive Positive Cases*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 28, 2020), <https://www.cdc.gov/media/releases/2020/s0228-additional-COVID-19-cases.html>.

who were symptomatic inadequate to achieve containment.³⁶ Several countries ramped up widespread testing and contact tracing to contain or suppress the spread of asymptomatic infection. But in the US, these efforts were slow to start and were quickly outpaced by widespread community transmission. This was exacerbated by the fact that the FDA initially restricted testing to labs that had obtained special approval.³⁷ Early CDC guidelines directed health care providers to refer patients for testing only if they had a history of travel to China, exposure to a person known to have been infected, or were hospitalized for pneumonia or acute respiratory distress.³⁸ Testing supplies were in short supply.³⁹ Lack of access to testing left people unsure about whether they posed a risk of transmitting the virus to others, and left state and local leaders ill equipped to deploy targeted disease control strategies. The CDC guidelines coincided with contradictory statements from the President questioning the advisability of widespread testing.⁴⁰

36. Matt Apuzzo, Selam Gebrekidan, & David D. Kirkpatrick, *How the World Missed COVID-19's Silent Spread*, N.Y. TIMES, June 27, 2020.

37. *Lab Advisory: Reminder: COVID-19 Diagnostic Testing*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 18, 2020), https://www.cdc.gov/csels/dls/locs/2020/reminder_covid-19_diagnostic_testing.html (“Any laboratory that is not designated by CDC as a qualified laboratory and is implementing a COVID-19 diagnostic test other than the CDC EUA assay must contact the FDA to obtain an EUA before any COVID-19 diagnostic testing may be performed in their facilities.”).

38. *Update and Interim Guidance on Outbreak of 2019 Novel Coronavirus (2019-nCoV)*, CENTERS FOR DISEASE CONTROL AND PREVENTION: CDC HEALTH ALERT NETWORK–00427 (Feb. 1, 2020), <https://emergency.cdc.gov/han/HAN00427.asp> (“Clinicians should ask: Does the person have fever or symptoms of lower respiratory infection, such as cough or shortness of breath? AND Has the patient traveled to mainland China within 14 days of symptom onset? OR Has the patient had close contact1 with a person confirmed with 2019-nCoV infection?”); *Update and Interim Guidance on Outbreak of 2019 Novel Coronavirus (2019-nCoV)*, CENTERS FOR DISEASE CONTROL AND PREVENTION: CDC HEALTH ALERT NETWORK–00428 (Feb. 28, 2020), <https://emergency.cdc.gov/han/2020/HAN00428.asp> (expanding eligibility for testing to those with “[n]o identified source of exposure” only in the presence of “[f]ever with severe acute lower respiratory illness (e.g., pneumonia, ARDS (acute respiratory distress syndrome) requiring hospitalization and without an alternative explanatory diagnosis (e.g., influenza.)”); *Update and Interim Guidance on Outbreak of 2019 Novel Coronavirus (2019-nCoV)*, CENTERS FOR DISEASE CONTROL AND PREVENTION: CDC HEALTH ALERT NETWORK–00429 (Mar. 8, 2020), <https://emergency.cdc.gov/han/2020/HAN00429.asp> (Abandoning restrictive guidelines by indicating that “[c]linicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested.”).

39. Michael D. Shear et al., *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>.

40. Matt Wilstein, *Reporters Hammer Trump on Coronavirus Testing: Are you Being Selfish*, DAILY BEAST (Mar. 13, 2020), <https://www.thedailybeast.com/reporters-hammer-trump-on-coronavirus-testing-are-you-being-selfish>.

On March 12, the CDC put up a document with the title: “Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission.”⁴¹ Described as “a framework for actions which local and state health departments can recommend in their community to both prepare for and mitigate community transmission of COVID-19,” the document recommended that “actions should be guided by the local characteristics of disease transmission, demographics, and public health and healthcare system capacity.”⁴² The framework recommended that “[a]ll individuals should limit community movement and adapt to disruptions in routine activities (e.g., school and/or work closures) according to guidance from local officials” in places with “substantial” community transmission.⁴³ Substantial community transmission was defined as occurring when “healthcare staffing [is] significantly impacted [and there are] multiple cases within communal settings like healthcare facilities, schools, mass gatherings etc.”⁴⁴ The CDC framework additionally recommended that in periods of substantial community transmission, organizations should “cancel community and faith-based gatherings of any size.”⁴⁵

The White House issued competing guidance on March 16, 2020. The “15 Days to Stop the Spread” guidelines recommended that certain groups—people who feel ill, people who test positive for coronavirus and their family members, and people who are older or who have serious underlying health conditions that put them at increased risk—should stay at home. It also recommended that everyone should “avoid social gatherings in groups of more than 10 people,” “eating or drinking at bars, restaurants, and food courts,” and “discretionary travel, shopping trips, and social visits.”⁴⁶ With respect to closures, the guidelines noted that “[g]overnors in states with evidence of community transmission should close schools in affected and surrounding areas” and “[i]n states with evidence of community transmission, bars, restaurants, food courts, gyms,

41. CENTERS FOR DISEASE CONTROL AND PREVENTION: IMPLEMENTATION OF MITIGATION STRATEGIES FOR COMMUNITIES (Mar. 12, 2020) (on file with author).

42. *Id.* at 1.

43. *Id.* at 7.

44. *Id.* at 9.

45. *Id.*

46. *15 Days to Slow the Spread*, WHITEHOUSE.GOV (Mar. 16, 2020), <https://www.whitehouse.gov/articles/15-days-slow-spread>. *15 Days to Slow the Spread* was later revised and replaced with *30 Days to Slow the Spread, The President's Coronavirus Guidelines for America*, WHITEHOUSE.GOV (Mar. 30, 2020).

and other indoor and outdoor venues where groups of people congregate should be closed.”⁴⁷

In the latter half of March, state and local governments rapidly issued orders that exceeded the recommendations of the most well-vetted pre-pandemic plans and federal guidelines for COVID-19. The same day the White House issued its 15 Days Guidance, seven local health officers in the San Francisco Bay Area followed the examples set by China and Italy and issued mandatory shelter-in-place orders and prohibitions on all nonessential onsite business operations.⁴⁸ The Bay Area orders opened the flood gates. Within two weeks, the majority of state governors had followed their lead.⁴⁹

CDC’s guidance did not go as far. For large community events and mass gatherings CDC recommended cancellation of “gatherings of more than 10 people for organizations that serve higher-risk populations.”⁵⁰ Notably, even as nearly every state issued mandatory orders restricting the operation of commercial businesses, CDC’s only guidance for “keeping commercial establishments safe” recommended disinfection of surfaces, steps to stagger customer flow and frequent hand washing,⁵¹ and its website suggested that businesses “[c]onsider establishing policies and practices for social distancing . . . if recommended by state and local health authorities.”⁵² CDC also issued a series of guidance documents for specific localities and states, including the cities of Santa Clara, Seattle, and New Rochelle, and the states of Florida and Massachusetts. The CDC

47. *15 Days to Slow*, *supra* note 46, at 2.

48. See, e.g., CITY AND COUNTY OF S.F. DEP’T OF PUB. HEALTH, ORDER OF THE HEALTH OFFICER NO. C19-07 (Mar. 16, 2020), <https://sfgsa.org/sites/default/files/Document/OrderC19-07ShelterinPlace.pdf> [<https://perma.cc/QY48-MFZW>]; Julia Prodis Sulek, *Meet the Doctor Who Ordered the Bay Area’s Coronavirus Lockdown, the First in the U.S.*, MERCURY NEWS (Mar. 29, 2020), <https://www.mercurynews.com/2020/03/29/she-shut-down-the-bay-area-to-slow-the-deadly-coronavirus-none-of-us-really-believed-we-would-do-it> [<https://perma.cc/K4DH-QYG8>] (describing the events that led seven local jurisdictions to simultaneously issue shelter-in-place orders).

49. Jennifer Kates et al., *Stay-at-home Orders to Fight COVID-19 in the United States: A Scattershot Approach*, KAISER FAMILY FOUND. (Apr. 5, 2020), <https://www.kff.org/coronavirus-policy-watch/stay-at-home-orders-to-fight-covid19> [<https://perma.cc/WXK4-BCPU>]

50. *Considerations for Events and Gatherings*, CENTERS FOR DISEASE CONTROL AND PREVENTION: COMMUNITY, WORK & SCHOOL, <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html> (last updated July 7, 2020).

51. *What Every American and Community Can Do Now to Decrease the Spread of the Coronavirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf> (last visited April 4, 2020).

52. *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION: COMMUNITY, WORK & SCHOOL <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last updated May 6, 2020).

guidance for Santa Clara recommended “laser focused” and less restrictive interventions that were inconsistent with the county-wide shelter-in-place order the Santa Clara Health Officer had issued a day earlier.⁵³ CDC guidance for other locations similarly recommended less stringent measures than state and local authorities had already adopted. By the end of March, when the White House replaced its 15 Days guidance with “30 Days to Slow the Spread,” the majority of states had gone significantly further than the White House or CDC guidance recommended.

In April, CDC reversed its earlier guidance directing that masks should only be worn by health workers and people who are sick, and this change was described as an about face in the media.⁵⁴ Several state and local governments also issued mandatory face mask requirements, physical distancing requirements, and capacity or density limits to reduce the risk of transmission for essential workers and customers at essential businesses.⁵⁵ Like social distancing, mask mandates for the general public were based on the need to treat everyone as if they could be silently spreading the virus to others. The early guidance against masks for the general public would be widely reported as having been motivated by the need to conserve scarce supplies for health workers. But the mask guidance flip-flop was also driven by evolving understanding of the risk of asymptomatic or pre-symptomatic spread.⁵⁶

On April 16, the White House released its Guidelines for Opening Up America Again. The White House plan recommended, but did not require, a phased approach to resuming social gatherings and reopening schools and the types of businesses that the previous White House guidelines had recommended, but not required, should be closed

53. *CDC's Recommendations for 30 Day Mitigation Strategies for Santa Clara County, California*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/downloads/Santa-Clara_Community_Mitigation.pdf (last visited Apr. 4, 2020).

54. Matthew Keegan, *Do Masks Work to Fight Coronavirus? East Asia Says: “Yes.”* U.S. NEWS & WORLD REP., Apr. 7, 2020; *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION: YOUR HEALTH, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last updated Aug. 7, 2020) (later guidance).

55. Sophia Ankel & Connor Perret, *More than 20 US States are now Requiring Residents to Wear Face Masks when in Public*, BUSINESS INSIDER, July 11, 2020, available at <https://www.businessinsider.com/coronavirus-the-17-states-requiring-people-to-wear-masks-public-2020-6>; NASHP, *Chart: Each State's Covid-19 Reopening and Reclosing Plans and Mask Requirements*, (Oct. 2, 2020), available at <https://www.nashp.org/governors-prioritize-health-for-all>.

56. Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, U. CAL. S.F.: NEWS & MEDIA (June 26, 2020), <https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent>.

(including bars, restaurants, gyms, and other venues where groups of people gather).⁵⁷ Although the guidelines were reasonably cautious, they were met with widespread skepticism, particularly among Democratic governors, who announced they would develop their own plans for reopening. Ultimately, most states reopened gyms, bars, restaurants, and other higher-risk settings like movie theaters and bowling alleys in spite of the White House criteria in the guidance not being met. Some jurisdictions imposed requirements for the general public to wear face masks.

Also in April, in preparation for overseeing the vaccine development, the Advisory Committee for Immunization Practices (ACIP) created a workgroup to oversee the development of COVID-19 vaccines, and that work group reported to the full committee during its June 2020 meeting.⁵⁸ ACIP traditionally monitors vaccines in development once they reach an advanced stage: for routine vaccines, it usually creates a workgroup before licensure.⁵⁹

In June, cases surged in many places that had been largely spared during the spring.⁶⁰ State and local governments began what may ultimately prove to be the first of multiple phases of re-tightening. CDC continued to issue guidelines for various community settings, including businesses and schools. However, these guidelines were increasingly viewed as politicized, and media reports indicated that CDC statements were affected by non-CDC personnel.⁶¹ For example, was evidence a

57. Press Release, *President Donald J. Trump Announces Guidelines for Opening Up America Again*, WHITEHOUSE.GOV (Apr. 16, 2020), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-guidelines-opening-america>; *Guidelines: Opening Up American Again*, WHITEHOUSE.GOV (Apr. 16, 2020), <https://www.whitehouse.gov/openingamerica>.

58. Grace M. Lee, Beth P. Bell & Jose R. Romero, *The Advisory Committee on Immunization Practices and Its Role in the Pandemic Vaccine Response*, JAMA, July 22, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2768852>.

59. Jane Clare Smith, *The Structure, Role, and Procedures of the U.S. Advisory Committee on Immunization Practices (ACIP)*, 28 VACCINE A68, A72, A74-5 (2010).

60. Noah Higgins-Dunn, *U.S. Coronavirus Cases Surge By More than 45,000 in One Day, Total Surpasses 2.5 Million*, CNBC: HEALTH AND SCIENCE (June 27, 2020).

61. Tal Axelrod, *CDC Director Says Guidance Shelved by White House Was “in Draft Form,”* THE HILL (May 9, 2020), <https://thehill.com/homenews/administration/496937-cdc-director-says-guidance-shelved-by-white-house-was-in-draft-form>; *READ: The Full Draft CDC Guidelines on Reopening From Stay-at-Home Orders*, CNN, <https://www.cnn.com/2020/05/13/politics/cdc-draft-reopening-guidelines/index.html> (last updated May 14, 2020); Samantha Putterman, *Joe Biden Correct that Trump Administration Delayed, Scaled Back CDC Reopening Guidelines*, POLITIFACT (July 6, 2020), <https://www.politifact.com/factchecks/2020/jul/06/joe-biden/joe-biden-correct-trump-administration-delayed-sca/>; Lena H. Sun & Josh Dawsey, *The CDC Is Walking a Tightrope as the Coronavirus Pandemic Meets Politics*, PHILA. INQUIRER, July 10, 2020; Jill Colvin & Mike Stobbe, *Trump, Pence Remarks at Odds with Medical Consensus*, COLUMBIAN (July 10, 2020),

detailed CDC report on reopening business was “shelved” by the Trump administration.⁶² The agency has, apparently, been ordered to “rewrite guidance to reopen schools to ‘make it easier and cost less’.”⁶³ These events prompted four former CDC directors—Tom Frieden, Jeffrey Koplan, David Satcher, and Richard Besser—to pen an op-ed. They asserted that “over a period of more than 15 years, spanning Republican and Democratic administrations alike,” they could not recall a single time “when political pressure led to a change in the interpretation of scientific evidence.”⁶⁴

Revelations in August and September increased concerns about political intervention in CDC. In August 2020, the CDC revised its testing guidance to say that people without COVID-19 symptoms do not “necessarily need a test.”⁶⁵ In response, the Infectious Diseases Society of America published a statement calling for immediate reversal of the changes and criticizing it.⁶⁶

In late August 25, 2020, Amy Maxmen, a science writer with the prestigious peer reviewed journal *Nature*, wrote an article on data challenges in relation to the COVID-19 pandemic in the United States.⁶⁷ The article said:

Some speculate that because the pandemic is politically charged, data describing the situation are guarded closely by officials in the administration of President Donald Trump. Researchers say that investigation published in the CDC’s journal *Morbidity and Mortality Weekly Reports* have been thorough, but are published online long after they can influence outcomes. . . . Samuel Groseclose, a public-health specialist who retired from CDC in 2018, suggests that the reports are undergoing an unusual amount of review within the agency, and perhaps its parent agency, the US Department for Health and Human Services (HHS).⁶⁸

<https://www.columbian.com/news/2020/jul/10/trump-pence-remarks-at-odds-with-medical-consensus>.

62. Putterman, *supra* note 61.

63. Sun & Dawsey, *supra* note 61.

64. Frieden, et al., *supra* note 4.

65. Will Feuer, *CDC Quietly Revises Coronavirus Guidance to Downplay Importance of Testing Asymptomatic People*. CNBC (August 26, 2020) available at: <https://www.cnbc.com/2020/08/26/cdc-quietly-revises-coronavirus-guidance-to-downplay-importance-of-testing-for-asymptomatic-people.html>.

66. IDSA/HIVMA Statement on Changes to CDC Guidance, available at <https://www.idsociety.org/news—publications-new/articles/2020/idsahivma-statement-on-changes-to-cdc-guidance/>.

67. Maxmen, *supra* note 5.

68. *Id.*

More explicit coverage of political pressure on the Morbidity and Mortality Weekly Reports (MMWR)—which have traditionally been authored by career scientists and seen as a scientific source, and has traditionally not been subject to political interference – was published in the second week of September. Journalist Dan Diamond from *Politico* documented efforts both from the politically appointed CDC Director, Dr. Robert Redfield and from the Department of Health and Human Services’ spokesman, Michael Caputo, to influence the content of the reports.⁶⁹ The article described direct efforts to intervene in the content of the report, some of which had an effect.⁷⁰

Political interference in CDC guidance and efforts was not the main cause of the pandemic or of the failure to contain it. However, while some of the problems in CDC’s response (like the testing contamination) were internal, political intervention harmed CDC by undermining trust in it.⁷¹ The intervention also raises real concerns that the administration will try to undermine the traditionally independent process of making recommendations related to COVID-19 vaccines.⁷² The concern that the administration will directly intervene in CDC’s professional decisions is not a hypothetical concern: there is strong evidence that influence by the administration had a role in the FDA’s choice to give an emergency use authorization (EUA) to hydroxychloroquine.⁷³ The revelation of political intervention with the MMWR in CDC – a scientific source – also shows that this is already done, and is a real concern.⁷⁴ There is every reason to worry that there will be efforts to influence the vaccine recommendations.⁷⁵

69. Diamond, *supra* note 5.

70. *Id.*

71. Adam Cancryn, *Hundreds of Health Groups Petition Against Trump*, POLITICO: HEALTH CARE (July 7, 2020), <https://www.politico.com/news/2020/07/07/hundreds-health-groups-petition-trump-350154>; *CDC’s Politicization “Extremely Dangerous” for Americans, Says Its Former Head*, PBS (July 14, 2020), <https://www.pbs.org/newshour/show/cdcs-politicization-extremely-dangerous-for-americans-says-its-former-head>.

72. Lee, Bell & Romero, *supra* note 55.

73. Sarah Oweremohle, *FDA Ends Emergency Use of Hydroxychloroquine for Coronavirus*, POLITICO: HEALTH CARE (June 15, 2020), <https://www.politico.com/news/2020/06/15/fda-ends-emergency-use-of-hydroxychloroquine-319872>; Laurie McGinley & Josh Dawsey, *Touting Criticized Study, White House Presses FDA to Authorize Hydroxychloroquine—Again*, WASH. POST, July 10, 2020.

74. Diamond, *supra* note 5.

75. Ezekiel J. Emanuel & Paul A. Offit, Opinion, *Could Trump Turn a Vaccine into a Campaign Stunt?*, N.Y. TIMES, June 8, 2020.

III. CDC'S CURRENT GOVERNANCE STRUCTURE AND CONSTITUTIONAL CONSTRAINTS ON CHANGING IT

The Constitution addresses the appointment of federal officers in Article II, Section 2, referred to as “the Appointments Clause.”⁷⁶ Under the Appointment Clause, “Officers of the United States” should be nominated by the President, “with the Advice and Consent of the Senate,” but Congress has the authority to vest the appointment of inferior officers (which the clause does not define) “in the President alone, in the Courts of Law, or in the Heads of Departments.”⁷⁷ In practice, large segments of the administrative state are not appointed under the Appointment Clause, but serve as civil servants appointed through a merit system.⁷⁸

The line between those who must be appointed via the appointment clause and those who are not is blurry. The distinction is focused on the concept of “officers of the United States,” defined by the Supreme Court as those who “wield ‘significant authority.’”⁷⁹ There is conflicting jurisprudence on who, exactly, is an officer under that definition.⁸⁰ At least one author suggests that large swaths of our civil service are unconstitutionally appointed under the Clause, because of her analysis of the original meaning of the term “officer.”⁸¹ However, the dominant view in the legal community, drawing on non-originalist meanings—accepts that a substantial portion of the public service do not have to be considered “officers” for the purpose of the Appointment Clause.⁸²

76. Michael Devitt, *Coronavirus Remains Front and Center at June ACIP Meeting*, AM. ACAD. FAM. PHYSICIANS: NEWS, July 1, 2020, <https://www.aafp.org/news/health-of-the-public/20200701acipjunemtg.html>.

77. U.S. CONST. art. II, § 2, cl. 2.

78. Nina L. Mendelson, *The Uncertain Effects of Senate Confirmation Delay in the Agencies*, 64 DUKE L. J. 1571, 1582-86 (2015).

79. Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 447 (2018).

80. *Id.* at 447-49.

81. *Id.* at 449-55.

82. Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 76-89 (2007); Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 659 (2020). A detailed discussion of the scope of the appointment clause is more than is needed for this article, given its relatively simple proposal, but besides the sources above, extensive discussions of the Appointment Clause, in the wake of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), can be found at the following sources: *Symposium on Lucia v. SEC*, YALE J. ON REG.: NOTICE & COMMENT (2018), <https://www.yalejreg.com/topic/symposium-on-lucia-v-sec>; Samuel A. Shwartz, *Lucia v. SEC: The Ambiguity of the Appointments Clause Continues, Sending Tremors Throughout the Administrative State*, 14 J. BUS. & TECH. L. PROXY 1 (2019); Michael A. Sabino, “*Liberty Requires Accountability*”: *The Appointments Clause, Lucia v. SEC, and the Next Constitutional Controversy*, 11 WM. & MARY BUS. L. REV. 173 (2019-2020).

The other piece of the appointment puzzle is whether and when Congress can limit the President's ability to remove officers. Traditionally, the person who appointed an officer can remove her or him; in the case of principal officers, appointed by the President with the advice and consent of the Senate, that means the President.⁸³ There is an extensive jurisprudence on removal, but the most recent decision on the matter, the Supreme Court's decision in *Seila Law v. CFPB*, appears to have both simplified and restricted Congress' ability to limit removal.⁸⁴ In *Seila Law*, the Court made a strong statement in support of unlimited Presidential removal power, but acknowledged two historical exceptions are still valid – “one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.”⁸⁵ *Seila Law* certainly deserves in-depth, thoughtful treatment of its own, and raises questions for positions that do not fit the exceptions but have limits on removal. But since this paper proposes removal limits for multi-member boards with powers that are primarily non-executive removal, *Seila Law*'s main holding, which is about single-head agencies and expressly allows an exception for multi-member boards, is not a barrier.⁸⁶

At present, the CDC Director is appointed by the President without a requirement for the advice and consent of the Senate, and can be removed at will.⁸⁷ Administrative structures of appointment vary dramatically from position to position, but this specific arrangement offers almost no protection from the political executive. Further, other factors – like the agency's physical distance from other power centers in Washington DC and a culture of not playing politics – make the agency especially vulnerable in the face of an administration determined to

83. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VIRGINIA L. REV. 1779, 1783-84 (2006).

84. *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7, slip op. (U.S. June 29, 2020).

85. *Id.* at 16.

86. The decision is very recent. For an article already addressing it, see Jed Handelsman Shugerman, *The Decisions of 1789 Were Non-Unitary: Removal by Judiciary and the Imaginary Unitary Executive (Part II)*, FORDHAM L. SCH. LEGAL STUD. RES. PAPER SERIES (May 10, 2020), <https://ssrn.com/abstract=3597496>.

87. See, e.g., David Rosner & Linda P. Fried, *Traditions, Transitions and Transfats: New Directions for Public Health*, 125 PUB. HEALTH REP. 3, 3-4 (2010); see also COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS UNITED STATES SENATE, POLICY AND SUPPORTING POSITIONS, at 68 (Comm. Print 2016), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf> (CDC director is a non-career appointment, and no term limits exist).

interfere in its work.⁸⁸ The fact that the agency does not have a specific authorizing statute setting out its roles also means that the executive has more discretion to redefine or take over its role.

The solution is not for CDC to become more political. Given the CDC's special role—serving as a centralized platform for disease and injury surveillance and providing advice and guidance for how other agencies and actors respond to health threats—there are real benefits to its detachment from direct political struggles. An agency whose primary role is advising, providing guidance, and training should be more isolated from politics than agencies whose role is primarily regulatory. The best solution is restructuring the CDC to provide layers of protection between the agency and the administration, while maintaining some direct political accountability.

IV. THE FEDERAL RESERVE AS A MODEL

Completely detaching CDC leadership structure from politics is both undesirable (since public health is inherently political) and likely not constitutionally permissible. It is also not necessary. A model that provides some protection from political influence while maintaining a political role in guiding the agency offers a good balance, and a statute clearly codifying the CDC's role would protect its ability to provide expert guidance, give that guidance more prominence, and bring into sharp relief any effort by White House tries to bypass CDC by issuing its own guidance. Institutionalizing independence also signals to people inside the CDC and outside that independent guidance is, in fact, what is legally expected.

Congress should enact a statute doing two things. First, it should clearly define the CDC's role. The definition should state that the CDC is charged with providing expertise, guidance, and support (through training, research, directly assigning personnel and other ways) in preventing communicable and non-communicable diseases and injuries in the United States and abroad. The CDC is authorized to create and analyze expert knowledge, provide guidance, and provide assistant and support to local, state, federal and global actors dealing with diseases and enact rules and create guidance documents to fill these roles. The CDC already has authority to enact rules related to directly delegated regulatory duties, but such a statute could and should include an express delegation of

88. Nicholas Florko, *The CDC Has Always Been an Apolitical Island. That's Left it Defenseless Against Trump*, STAT (July 13, 2020), <https://www.statnews.com/2020/07/13/cdc-apolitical-island-defenseless>.

regulatory authority within the CDC's sphere of responsibility. Second, Congress should restructure the CDC's leadership along the lines of the Board of Governors of the Federal Reserve System (the Fed). This model has several benefits. First, it has a long history of acceptance, and is on solid ground constitutionally. Second, it provides real guarantees of independence while preserving a role for the President and the Senate in structuring the leadership.

One problem with moving to a Board is that the CDC's role in outbreaks means that it has to deal with emergencies practically every year. A board—where decision making may be slower than a single individual—may find such response more challenging. However, a potential alternative of making the Director only removable for cause appears foreclosed by *Selia Law*, while a multi-member board can constitutionally have removal protections. A potential solution is to provide for limited emergency decision making authority by the Chairman of the Board, potentially with the advice of the vice-chairs. While the President can appoint the Chair and remove the Chair from that position, the President cannot completely remove the person, and limits on authority—for example, a time limit—can prevent abuse.

In 1935, for a variety of reasons, Congress passed the Banking Act, which, among other things, changed the method of appointment and removal of the Board of Governors of the Federal Reserve System.⁸⁹ The Fed is the central banking system of the United States, whose role is “to provide financial services to depository institutions and the U.S. government, supervise and regulate certain types of financial institutions, set monetary policy, and maintain the stability of the financial system.”⁹⁰ One change was distancing the Fed from politics by “removing the Treasury Secretary and the comptroller of the currency from the directors' table” and lengthening the terms the governors serve to fourteen years.⁹¹

The focus of this article is not on whether this structure helped the Fed achieve its purposes or whether this is good public policy in the context of the Federal Reserve System.⁹² The structure of the federal

89. PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 29-30 (2017); ROGER LOWENSTEIN, *AMERICA'S BANK* 266 (2015).

90. *What is the Fed?*, FED. RES. BANK S.F.: EDUC., <https://www.fbsf.org/education/teacher-resources/what-is-the-fed> (last visited August 17, 2020).

91. LOWENSTEIN, *supra* note 89, at 266.

92. *See, e.g.*, Michael Wade Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking*, 34 *IND. L. REV.* 371, 381-90 (2000-2001); David Min, *Federalizing Bank Governance*, 51 *LOY. U. CHI. L. J.* 833 (2019-2020); CONTI-BROWN, *supra* note 89, at 105-373; Andrew Atkins, *The AIG Bailout: Constraining the Fed's Discretion*, 14 *N.C. BANKING INST.* 335, 350-60 (2010).

reserve board is, to my knowledge, the most rigorous set of institutional protections of independence that can survive constitutional muster and the CDC would benefit from a similar structure.

The board consists of seven members appointed by the President with the advice and consent of the Senate for fourteen years in staggered terms.⁹³ Members are only removable by the President for cause.⁹⁴ The Banking Act sets out some criteria for appointment, stating that, of the Governors,

[N]ot more than one [. . .] shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country. . . . the President shall appoint at least 1 member with demonstrated primary experience working in or supervising community banks having less than \$10,000,000,000 in total assets.⁹⁵

Aside from that, appointments are at the political branches' discretion, but the long terms and removal protection provide for at least some independence during service. The President appoints, with the advice and consent of the Senate, the Chair of the Board and two Vice Chairs for four years—but only out of the longer-termed board members. Members cannot be reappointed after serving a full term (but can be appointed for fourteen years if they came in to complete a term).⁹⁶

The structure of the Board of Governors is clearly constitutional. A recent book called into question the constitutionality of the structure of the Federal Open Market Committee (the Fed's monetary policy committee) because of the presence of the membership of Presidents of several Federal Reserve Banks on it—but contrasted it with the (clear) constitutionality of the appointment of Board Members.⁹⁷ In several cases, the D.C. Circuit refused to entertain challenges to FOMC's structure, seeing it as a question internal to the legislature.⁹⁸ But we found no one arguing that the structure of the Board of Governors of the Federal Reserve is unconstitutional, nor any valid legal challenges. In reality, the structure is well within constitutional principles. The Board members are appointed as principal officers under the appointment clause, and removal

93. 12 U.S.C. § 241.

94. 12 U.S.C. § 242.

95. 12 U.S.C. § 241.

96. 12 U.S.C. § 242.

97. CONTI-BROWN, *supra* note 89, at 112-15.

98. *See Melcher v. Federal Open Market Committee*, 644 F. Supp. 510, 563-65 (D.C. Cir. 1986) (summarizing that history).

limits are not unusual in multi-member agencies.⁹⁹ For that matter, multi-member boards with staggered terms are not unusual.¹⁰⁰ This structure led to some, though not unlimited, independence of the Fed from both Congress and the political executive.¹⁰¹

Congress should structure CDC's governance to have a seven-member board with similar long—12 or 14—years staggered terms, with a member replaced every two years, with board members only subject to removal for cause (While the meaning of for-cause removal has never been well-defined, and there is a risk of political firing under this rubric as well, historical experience suggests it is, in fact, a meaningful protection¹⁰²). Guidance for appointment should suggest drawing on expertise in the different areas of prevention the CDC covers—prevention of infectious diseases, non-infectious diseases, injuries and global health, at a macro level. A number of positions on board can be statutorily reserved for previous or sitting agency members. Modeled on the Banking Act, the statute can state that “the President shall appoint at least 1 member with demonstrated experience in running one of the CDC centers or units.”

A staggered, multi-members board with terms longer than the sitting President would limit presidential control. Allowing the President to appoint the Chairman of the board from among the governors will give a sitting President direct, though limited, influence on the leadership of the Board—and a two-years staggering will ensure that each President should have a chance to appoint one or two directors.

These changes will increase CDC's independence from politics, and also send a symbolic message, a message that Congress expects our public health guidance to be apolitical and science-based. It would not solve all or even most of the problems facing us in pandemics, but it will assure the existence of a body of experts with a defined role, a role that includes speaking up. It would not prevent the White House from issuing its own guidance—but it will be clear to observers that such guidance implies political rejection of expertise (which may in itself be a deterrence), and

99. Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1397 (2017).

100. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1112-14 (2000).

101. Richard Sylla, *The Autonomy of Monetary Authorities: The Case of the United States Federal Reserve System*, ch. 2 in CENTRAL BANKS' INDEPENDENCE IN HISTORICAL PERSPECTIVE 17, 24-37 (Gianni Toniollo ed. 2012).

102. Richard Rothman & Katelin Shugart-Schmidt, *Lying in Wait: How a Court Should Handle the Pretextual For-Cause Removal*, 86 GEO. WASH. L. REV. 1348, 1359-63 (2018).

it will reduce the direct pressure the White House can impose on the agency.

V. CONCLUSION

There are many changes we need to make to improve our pandemic preparedness going forward. But a positive step can be providing the CDC better defined institutional independence, as it acts as an important expert agency that guides and supports efforts at preventing disease. Political efforts to interfere in CDC's independence directly hurt its legitimacy. Without real, visible change, it will be hard for it to regain the public's trust. Both for real independence—and for protecting the CDC's image—we need to act.