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Lessons for the Law from COVID-19: Alternative Histories to Define the Roles of Politics and Expertise in the Administrative State

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Lessons Learned from COVID-19



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Lessons for the Law from COVID-19:

*Alternative Histories to Define the Roles of Politics
and Expertise in the Administrative State*

E. Donald Elliott¹

Abstract

This paper argues that confusion over the proper roles of scientific expertise and politics hampered the U.S. response to COVID. Almost everything was unduly politicized due to the 2020 presidential election. On the other hand, some issues that arguably should have been decided by democratically-elected politicians were made by administrative experts that the politicians appear to have been afraid to overrule. The paper argues that this confusion is a symptom of a deeper unresolved problem that is attributable to the fact that the U.S. created the administrative state thru the legal fiction of the delegation doctrine which leaves the boundaries of the respective domains of expertise and politics unclear. The paper uses the method of alternative histories to try to clarify what types of decisions should be made by experts and which by politicians.

Author's Note: In my teaching and academic writing, I have tried to steer clear of current events, particularly those that are intertwined with electoral politics. I have done so not only out of cowardice but also because I find that most of us do not learn as much from discussions of current events as from history. A wise student of human frailty, Jesus of Nazareth, once observed that people see small flaws in others but not large ones in themselves.² The problem that aspect of human nature presents for this paper is that a similar problem occurs in American politics. Most of us tend to identify with one political party or the other and only to see the errors of our political opponents, not those of "our side." That is particularly so today: voters either love Donald Trump or they hate him. Joe Biden is somewhat less of a polarizing figure, but there too, his supporters find it difficult to acknowledge his mistakes and see most of them as somehow Trump's fault. However, as the topic of this paper is how political and scientific issues became confused during the recent pandemic and how that malady can be avoided in the future, it is unavoidable to discuss the behavior of both Trump and Biden. I urge the reader to try their best

¹ Distinguished Adjunct Professor, Antonin Scalia Law School, George Mason University.

² "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" Matthew 7:3-5 (King James Version),
<https://www.biblegateway.com/passage/?search=Matthew%207%3A3-5&version=KJV>

to put aside his or her political allegiances; the point is not which political party was to blame for what happened. The important issues are (1) how it happened, and (2) how to prevent something similar in the future.

* * *

Virtually every fact relating to the COVID-19 virus³ was distorted by politics.

Remember the chyrons at the bottom of every show on CNN showing the daily numbers of new cases, and rising death tolls and how they went away as soon as Joe Biden took office? Recall also the daily televised briefings by then President Trump and his grimacing scientific advisers, most prominently Dr. Anthony Fauci?



Analyses are beginning to appear contending that maybe the pandemic wasn't really the once in a lifetime crisis that we were led to believe. For example, a recent article by Deane

³ Medical professionals call the virus that caused the coronavirus pandemic "SARS-CoV-2," but to the press and public it is COVID-19 or just COVID and we follow that convention in this paper.

Waldman, a medical doctor and Distinguished Senior Fellow on Health Care Policy at the Texas Public Policy Foundation,⁴ argues that⁵

“Washington fabricated misleading numbers to exaggerate health dangers. Daily reporting of COVID *cases* implies seriously sick or dying people. In fact, a “case” refers to a person, usually asymptomatic, who has the viral antigen in their blood. Cases does not include tens of millions of healthy Americans who had or have COVID, were not tested, recovered from the infection, and now have immunity. [For more data on these groups of people, look at these studies [here](#) and [here](#).]

“Deaths” are people who also test positive, [most](#) of whom died [with](#) the virus but not [because](#) of it. The majority of deaths were people who succumbed to their [pre-existing conditions](#) such as immune deficiency, [diabetes](#), chronic lung disease, heart or kidney failure, and age over 75 years. A report from Italy showed that only [12 percent](#) of COVID deaths were actually *because of* viral infection. Recall the motorcycle [crash victim](#) who was listed as a COVID death because there was antigen in his blood.”

Regardless of whether one agrees or disagrees with Dr. Waldman, it is a sad sign of the politicization of virtually everything relating to COVID that we can’t even agree on how many people it killed. A generation ago, Senator Daniel Patrick Moynihan famously said, “You are entitled to your opinion. But you are not entitled to your own facts.”⁶ How old-fashioned that sounds today.

⁴ <https://www.texaspolicy.com/about/people/dr-deane-waldman/>

⁵ Deane Waldman MD, The Three Great Tragedies of COVID: The COVID tragedies aren't just the consequences of a deadly virus. THE AMERICAN SPECTATOR August 25, 2021, <https://spectator.org/three-tragedies-covid/>

⁶ <https://www.goodreads.com/quotes/63402-you-are-entitled-to-your-opinion-but-you-are-not>

One of the most thoughtful journalists writing today, Holman W. Jenkins Jr. of *The Wall Street Journal*, contends this kind of politicizing the data about COVID was inevitable: “Politics is how we govern ourselves, so don’t imagine Covid data could ever have been unpoliticized.”⁷ Nice line Holman, but is that really so? Isn’t it a little glib to assert that because “politics is how we govern ourselves,” medical data must inevitably be politicized? Let’s not give up on the Enlightenment vision of an objective reality -- or the administrative state -- so easily.

Admittedly, “following the science” – giving expertise its proper due -- never really happened regarding COVID, but the question this paper explores is whether politicizing the science was inevitable or merely a contingent effect of mistakes that could have been prevented. Hopefully we will clarify the proper domains of politics and expertise and avoid similarly politicizing the science the next time we have a pandemic or other public policy issue for which medical science or some other form of expertise should be important, but not necessarily the only determinant of policy.

By “politicizing” I mean that questions of science and medicine that should have been decided by the consensus of experts based on scientific evidence have instead become topics of partisan political debate by ill-informed politicians on both sides of the aisle. But it is also arguable that some issues that should have been decided by politicians were inappropriately left to medical experts. I take as a starting point that this muddle concerning the proper roles of politics and expertise was harmful. It led many Americans to make decisions based on the positions advocated by politicians of their political party rather than advice from medical experts.

⁷ Holman W. Jenkins Jr, Delta’s Gift Is Hybrid Immunity: One senator at a time, a new variant is bracing up our vaccinated immune systems against new Covid, THE WALL STREET JOURNAL, August 21, 2021, <https://www.wsj.com/articles/covid-19-coronavirus-delta-hybrid-natural-immunity-vaccine-breakthrough-cases-11629492042?page=1>

Distorting science for political gain also warps our policy process. The key reason for creating “the administrative state” was to provide a larger role for expertise in making public policy. This is not to say that experts alone should make decisions. Rather, the genius of the administrative state when it functions properly is to blend expertise with other policy considerations. This requires mutual respect among disciplines, which broke down badly in recent years, especially during the recent election.

At the end of this article, I suggest that the distortion of medical and scientific facts by politics is not unique to COVID, but a symptom of a deeper pathology in our polity which has not yet developed a consensus on the proper roles of expertise and politics in making public policy.⁸

How the Triumph of Politics⁹ Happened.

The response to COVID-19 was the most important issue in the 2020 election. One of Joe Biden’s top political advisers, Anita Dunn, reportedly said that “COVID is the best thing that ever happened to him [Biden].”¹⁰ Before COVID, Trump seemed like a shoe-in for re-election.¹¹

A recent retrospective analysis on CNN puts it this way:

⁸ For another example, see MICHAEL A. LIVERMORE AND RICHARD L. REVESZ, *REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH* (Oxford University Press, 2021), DOI:10.1093/oso/9780197539446.001.0001 (describing how the Trump EPA turned benefit-cost analysis into a “charade”). *Accord* Richard D. Morgenstern, *How Economics Has Contributed to EPA in FIFTY YEARS AT THE US ENVIRONMENTAL PROTECTION AGENCY: PROGRESS, RETRENCHMENT, AND OPPORTUNITIES* 393-441 (Lanham, MD: A. James Barnes, John D. Graham, David M. Konisky, 2021). *See also* E. Donald Elliott, *Why this is still an important book after the 2020 elections*, YALE.J.REG (forthcoming).

⁹ Apologies to David Stockman for borrowing the title of his 1986 book about why, in his view, the Reagan Revolution failed.

¹⁰ <https://thehill.com/homenews/campaign/541005-lucky-adviser-described-covid-19-as-best-thing-that-ever-happened-to-biden>

¹¹ *See, e.g.* Jeff Cox, *Trump is on his way to an easy win in 2020, according to Moody’s accurate election model*, CNBC (Oct. 15, 2019), <https://www.cnbc.com/2019/10/15/moodys-trump-on-his-way-to-an-easy-2020-win-if-economy-holds-up.html>

The coronavirus pandemic, for example, had been one of Biden's best issues. He was trusted more than former President Donald Trump to handle it in poll after poll during last year's election. Trump likely would have won in 2020 had people trusted him more [to manage the pandemic].¹²

As a result, pretty much *everything* about COVID was politicized.¹³ Does hydroxychloroquine work to treat COVID? If Trump says so, according to the media, it must not be true.¹⁴ What about wearing masks? Democrats generally act as if wearing a mask is the be all and end all of preventing the spread of the virus, while Republicans do not.¹⁵ Candidate Biden even showed up for the second presidential debate twirling a mask around his finger for no evident purpose other than to remind 60 million viewers that he wore a mask religiously, while Trump did not.

A month before the election, then vice presidential candidate Kamala Harris stated during the nationally televised vice-presidential debate that she would not get vaccinated if it were recommended by Donald Trump, although she did add that she would take it if public health officials, including Dr. Fauci, said the vaccine was safe.¹⁶ Candidate Biden also stated that we should not trust a vaccine if it were recommended by his opponent and raised the specter that

¹² Harry Eaton, It is not just Afghanistan – Americans are Losing Faith in Biden on Many Issues, CNN (August 28, 2021), <https://www.cnn.com/2021/08/28/politics/biden-afghanistan-polling-analysis/index.html>

¹³ <https://www.cnn.com/2021/09/10/opinions/republicans-weaponized-covid-19-pandemic-ghitis/index.html>

¹⁴ <https://www.statnews.com/2020/04/06/trump-hydroxychloroquine-fact-check/>

¹⁵ For divergent opinions about the efficacy of masks to prevent the spread of COVID, *compare* <https://pubmed.ncbi.nlm.nih.gov/33431650/> with <https://www.city-journal.org/do-masks-work-a-review-of-the-evidence>. For a review of the evidence, see J.Howard *et al*, An evidence review of face masks against COVID-19, PNAS Jan. 26, 2021 118 (4) e2014564118; <https://doi.org/10.1073/pnas.2014564118> <https://www.pnas.org/content/118/4/e2014564118>

¹⁶ COVID vaccine: Amid growing distrust, Kamala Harris says she won't take it if it has President Trump's support, <https://www.masslive.com/politics/2020/10/covid-vaccine-amid-growing-distrust-kamala-harris-says-she-wont-take-it-if-it-has-president-trumps-support.html>

Trump might pressure the FDA to approve an unsafe vaccine in order to gain electoral advantage. As reported by *The Washington Post*,

“Joe Biden on Wednesday expressed reservations about whether a coronavirus vaccine approved by the Trump administration would be safe, raising doubts about the president’s ability to put the health of Americans before politics.

“Biden said Americans should trust a coronavirus vaccine developed under the Trump administration only if the president gives ‘honest answers’ to questions about its safety, effectiveness and equitable distribution. ‘I trust vaccines. I trust scientists. But I don’t trust Donald Trump,’ Biden said. ‘And at this point, the American people can’t, either.’

“Biden also raised the possibility of President Trump pressuring agency officials to sign off on a vaccine that scientists are not yet confident in, to gain an electoral advantage.”¹⁷

It is hard to know to what extent these comments may have stoked fears about the safety of the vaccine, but we do know that today, blacks still lag far behind the general population in rates of vaccination – but so too do Republicans.¹⁸

Perhaps Biden and Harris had been tipped off that Trump was trying to pressure the FDA to announce the existence of an effective vaccine prior to the election. We do know that a “preliminary report” that the Moderna vaccine was safe and effective in small scale trials was published on line in a scientific journal in mid-July, 2020, almost four months prior to the

¹⁷ Sean Sullivan, Biden questions whether a vaccine approved by Trump would be safe, THE WASHINGTON POST, September 16, 2020 https://www.washingtonpost.com/politics/biden-trump-coronavirus-vaccine/2020/09/16/2ffbea6a-f831-11ea-a275-1a2c2d36e1f1_story.html

¹⁸ Joseph Goldstein and Matthew Sedacca, Why Only 28 Percent of Young Black New Yorkers Are Vaccinated, THE NEW YORK TIMES Aug. 12, 2021 <https://www.nytimes.com/2021/08/12/nyregion/covid-vaccine-black-young-new-yorkers.html>

November 7 election.¹⁹ However, that information was not widely covered in the popular press and electronic media and the announcement that effective vaccines had been developed was delayed until a week after the election.²⁰

Even what we call the damn thing was politicized. Although scientists call the coronavirus “SARS-CoV-2,” Donald Trump tried to use it for political purposes by calling it the “Wuhan virus” or the “China virus.”²¹ Instead the media generally call it COVID-19 or just COVID.²²

Perhaps the acme of absurdity in politicizing scientific and medical questions was a recent commentary by Fox News personality Greg Gutfeld attacking *Rolling Stone* for a story about people using ivermectin to treat or prevent COVID.²³ How do either *Rolling Stone* or Greg Gutfeld qualify to advise the public on whether ivermectin is or is not an effective treatment for COVID?

The starting point for this article is the conclusion that the politicization of the U.S. response to COVID during the run up to the 2020 presidential election did not serve us well, as I have written in other places.²⁴ Chinese commentators also argue that the U.S. political system

¹⁹ Lisa A. Jackson *et al.*, An mRNA Vaccine against SARS-CoV-2 — Preliminary Report, *N ENGL J MED* 2020; 383:1920-1931, DOI: 10.1056/NEJMoa2022483,

<https://www.nejm.org/doi/full/10.1056/nejmoa2022483> The editor’s note to the print version is particularly important: “Editor’s Note: This article was published on July 14, 2020, at NEJM.org.”

²⁰ E. Donald Elliott, How the 2020 Pandemic Election Cost Lives: Presidential politicking and FDA recalcitrance may have killed more vulnerable Americans than Gov. Cuomo did, *THE AMERICAN SPECTATOR* (MARCH 14, 2021) <https://spectator.org/2020-election-voting-covid-19/>

²¹ <https://theconversation.com/donald-trumps-chinese-virus-the-politics-of-naming-136796>

²² We follow that convention in this article.

²³ Gutfeld rips *Rolling Stone* over Ivermectin false reporting https://www.foxnews.com/opinion/greg-gutfeld-rolling-stone-days-respected-over?cmpid=prn_newsstand For additional background on the ivermectin controversy, see Peter G. Lurie, Ivermectin for Covid-19: abundance of hype, dearth of evidence *STAT* Aug. 25, 2021, <https://www.statnews.com/2021/08/25/ivermectin-for-covid-19-abundance-of-hype-dearth-of-evidence/>

²⁴ E. Donald Elliott, *supra* note 19 <https://spectator.org/2020-election-voting-covid-19/>; E. Donald Elliott, Summary Report to the Global Pandemic Network Concerning Responses to COVID-19 in the USA

showed itself incapable of handling a 21st century crisis such as the pandemic; they claim that China did better because its autocratic political system that was able to act decisively based on science to squelch the spread of the virus within China.²⁵

I will not rehearse the arguments here about why politicizing the science was bad; that should be obvious; this article starts from the premise that politicizing COVID to gain political advantage was undesirable and asks whether, and how, things might have gone better if we had behaved differently. But at the same time, not every issue should be decided by medical experts.²⁶ Some issues, even with regard to a pandemic, raise broader questions of policy and the trade-offs among competing values on which medical experts have no particular expertise. They may even have a professional bias in favor of maximizing the values of their profession to the detriment of other competing values. Those broader issues of public policy should be decided by democratically-elected politicians rather than scientists.

The Argument for Alternative Histories.

Harvard philosopher George Satayana famously said, “Those who do not remember the past are condemned to repeat it.”²⁷ He did not claim the converse, however, that those who *do* remember history are NOT also condemned to repeat it, although some may assume that was his

(June 6, 2021). Available at

SSRN: <https://ssrn.com/abstract=3919845> or <http://dx.doi.org/10.2139/ssrn.3919845>

²⁵ <https://www.nytimes.com/2020/12/14/world/asia/china-nationalists-covid.html>

²⁶ I do recognize that the “experts” have changed their advice of COVID repeatedly as the situation evolved. *See, e.g.* COVID-19 Why Following Experts and Leaders Who Depend On Them Can Be Wrong, <http://changeschool.org/why-do-leaders-and-experts-get-it-wrong/>; C. Brandon Ogbunu, Scientists Need to Admit What They Got Wrong About COVID: Over the last year, the scientific community has been reluctant to openly discuss its missteps. But coming clean could help prevent the next pandemic. WIRED April 1, 2021, <https://www.wired.com/story/scientists-need-to-admit-what-they-got-wrong-about-covid/>

²⁷ <https://www.nwfdailynews.com/story/opinion/2020/06/11/letter-dont-make-me-repeat-myself-history/41983691/>

implication. Churchill got it right, however; he said: “those who fail to *learn* from history are condemned to repeat it.”²⁸

Merely “remembering” history, as opposed to analyzing it critically and learning from it, does not help much. It is not enough to remember that Neville Chamberlain caved into Hitler in the Munich Agreement of 1938; to be wise, one must learn the larger lesson that appeasing tyrants only whets their appetite and makes things worse in the long run.

Aphorisms aside, this article maintains that limiting the study of history to what actually happened is paralyzing to critical thought. We are all blinded by what happened. A central problem to be overcome in analyzing historical events is that the analyst does not have access to counterfactuals for comparison purposes. We know what happened – to the extent that fallible human beings can ever really “know” anything about a reality that is far more complex than our brains -- but we do not know what might have happened but did not, or how events could have unfolded differently if something were changed. Recently, some historians have created a method called “alternative history” to try to reduce this epistemological problem.

The quote that “History does not repeat itself, but it does rhyme,” is often attributed to Mark Twain, although it is dubious whether he ever actually said or wrote it.²⁹ Whoever said it, the point is well taken. If we are to learn from past mistakes, we have to understand not only what did happen, but how things might have worked out if different choices had been made.

Alternative history, a technique increasingly used by a number of modern historians,³⁰ is one method for learning from the past. The central premise for doing alternative history is to try

²⁸ Ibid.

²⁹ <https://quoteinvestigator.com/2014/01/12/history-rhymes/>

³⁰ See, e.g. NIALL FERGUSON, *VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS* (2000); *WHAT'S IF? OF AMERICAN HISTORY: EMINENT HISTORIANS IMAGINE WHAT MIGHT HAVE BEEN* (New York: Putnam, ed. Robert Cowley, 2003).

to imagine how things would have been different if a crucial factor were changed: for example, how would World War II have played out if Pickett had not charged at Gettysburg and the South had won the civil war.³¹ The central idea is to try to unpack the consequences of pivotal decisions by spelling out their consequences. This aspect of alternative history bears a family resemblance to the way that we lawyers change the facts thru a series of hypotheticals to clarify which values drive our shared sense of a just outcome. Alternative history amounts to “scenario analysis” but applied to the past rather than the future.³² The central tenet of alternative history is to only change one thing to try to see how that factor affected events. For example, if one is trying to understand the implications of Operation Warp Speed to develop a vaccine, one should not also change the personality or politics of Dr. Fauci to avoid muddling the analysis.

In what follows, I imagine several alternative scenarios and explore whether they might have changed the relative roles of politics and expertise in the government’s response to COVID-19.

Scenario I: Postpone the 2020 Presidential Election.

SUPPOSE that President Trump had issued an Executive Order purporting to postpone the 2020 presidential election. In prior work, I have detailed the politicization of what should have been scientific issues during the 2020 presidential election and asked:

What can we learn from this catastrophe? The main thing is not to schedule a U.S. presidential election in the midst of a pandemic. Electoral competition between our two political parties short-circuits rational thought for most of us; in the run-up to an election,

³¹ MACKINLAY KANTOR, *IF THE SOUTH HAD WON THE CIVIL WAR* (1961).
https://en.wikipedia.org/wiki/If_the_South_Had_Won_the_Civil_War

³² Adam Hayes, Scenario Analysis, Investopedia
https://www.investopedia.com/terms/s/scenario_analysis.asp (“Scenario analysis is the process of estimating the expected value of a portfolio after a given period of time, assuming specific changes in the values of the portfolio's securities or key factors take place, such as a change in the interest rate.”)

Democrats and their media allies are against anything that a Republican president does, and vice versa. Even issues of science like wearing masks and social distancing or testing and taking vaccines get politicized, and most of us believe what “our side” believes.³³

My conclusion in that article was that “We need to learn as a country that holding an election in the midst of a pandemic is not only silly but costs lives.”³⁴

A few months prior to the November 2020 election, President Trump actually floated the idea of postponing the election until after COVID had passed.³⁵ The trial balloon was met with universal disapproval. Many reports pointed out that he lacked the constitutional authority to postpone an election on his own, and that never in American history had something like that been done, not even during World War II or the civil war.³⁶

Let’s take the constitutional question out of the equation by supposing that instead of acting unilaterally President Trump had asked Congress – or possibly individual states³⁷ -- to pass legislation postponing the election due to COVID?

As far as I have been able to determine, no one in public life – not even members of his own political party – supported the idea of postponing the election. That indicates that it would have been impractical for Trump to postpone the election, particularly if he had tried to do so on his own. That would likely have provoked a constitutional crisis and possibly his impeachment. In my judgment, a Supreme Court that held that the CDC lacked authority to impose a freeze on

³³ E. Donald Elliott, How the 2020 Pandemic Election Cost Lives: Presidential politicking and FDA recalcitrance may have killed more vulnerable Americans than Gov. Cuomo did, THE AMERICAN SPECTATOR March 14, 2021, <https://spectator.org/2020-election-voting-covid-19/>

³⁴ *Ibid.*

³⁵ Rebecca Shabad, Trump floats delaying the election, but he can't do that: While states have the authority to delay their primary elections, only Congress can change the date of the presidential election, NBC News July 30, 2020, <https://www.nbcnews.com/politics/2020-election/trump-suggests-delaying-2020-election-n1235300>

³⁶ *Ibid.*

³⁷

evictions due to COVID without explicit authorization from Congress³⁸ would have been unlikely to uphold a president postponing an election without specific authorization from Congress, which does not appear to have been plausible.

But if it had somehow happened magically, would it have been a good thing? Many constitutional systems in other advanced democracies including the UK and Germany do give the chief executive discretion to adjust the dates of elections.³⁹ Many localities in the U.S. also have similar provisions. For example, then New York Governor George Pataki postponed primary elections throughout the state in the wake of the 9/11 attacks,⁴⁰ and nobody claimed that was the first step toward dictatorship.

Postponing the 2020 elections might have resulted in less political posturing about COVID, but at the price of undermining the perceived legitimacy of elections if incumbents are perceived as adjusting their dates for political reasons. On balance, probably not worth it unless we had a pre-existing standard enforced by a neutral arbiter such as the courts.

Scenario II: Stay Off of Live TV.

*SUPPOSE that Donald Trump had been able to resist the impulse to go on national television daily to show he was “in command” of the COVID situation? His daily press conferences caused him to “own” the issue. They also gave Dr. Fauci a platform from which to express his disapproval of Trump and made him an international celebrity, and hero to many. Of course, it didn’t help Trump that he could not resist *ad-libbing* on live TV about subjects he*

³⁸ *Alabama Association of Realtors. v. Department of Health and Human Services*, On application to vacate stay (U.S.S.C. No. 21A23 August 26, 2021),

https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf

³⁹ Elliott, *supra* note 32.

⁴⁰ Adam Nagourney, A DAY OF TERROR: THE ELECTIONS; Pataki Orders Postponement Of Primaries Across State, THE NEWS YORK TIMES (Sept. 12, 2001),

<https://www.nytimes.com/2001/09/12/us/day-terror-elections-pataki-orders-postponement-primaries-across-state.html>

didn't understand; for example, when he was told – apparently for the first time on live television -- that there was evidence that ultra violet light and disinfectants killed the coronavirus, he couldn't resist wondering out loud whether this might eventually lead to treatments. Here is a account of what happened from CBS news, which accords with what I remember from watching that press conference live:

During a briefing in which the White House pitched "emerging" research on the [benefits of sunlight and humidity in diminishing the threat of the coronavirus](#), President Trump wondered aloud about the possibility of injecting disinfectants into patients. Mr. Trump remarked at Thursday's White House briefing that he's seen that disinfectant "knocks it ([COVID-19](#)) out in a minute. And is there a way you can do something like that by injection inside or almost a cleaning? As you see, it gets in the lungs and it does a tremendous number on the lungs -- so it'll be interesting to check that. ... It sounds interesting to me."⁴¹

Trump missed the point of what he was being told and asked the wrong question. At the time, most medical experts were advising people to stay indoors at home, which was exactly the wrong thing to do, because sunlight kills the virus and thus it is much less likely to be transmitted outdoors, as we now understand.

A few weeks later in a speech, his opponent, Joe Biden stated flatly that Trump had recommended that people should drink bleach, which he never actually said.⁴² An article in *Politico* states that “It quickly came to symbolize the chaotic essence of his presidency and his handling of the pandemic,” and that “the infamous bleach press conference became a literal

⁴¹ <https://www.cbsnews.com/news/coronavirus-trump-injecting-disinfectant-covid-19/> ; <https://www.logically.ai/factchecks/library/677338a2>

⁴² <https://www.politifact.com/factchecks/2020/jul/11/joe-biden/no-trump-didnt-tell-americans-infected-coronavirus/>

rallying cry for Trump’s opponents, with Biden supporters dotting their yards with “He Won’t Put Bleach In You” signs.”⁴³

It didn’t help that the day after Trump’s question on national TV, the maker of Lysol – probably afraid of product liability lawsuits -- came out with a cautionary statement that people should not ingest or inject its products to prevent or treat COVID.⁴⁴ The false claim that Trump had recommended drinking bleach was repeated over and over and many people now believe that Trump actually recommended drinking bleach.⁴⁵

Could this self-inflicted wound have been prevented? Any time a president appears unscripted on national television, there is a risk of saying something untoward. This did not have to happen. By meeting daily live with the press, President Trump made defeating COVID the single most important issue in the 2020 presidential election and undermined public confidence in the government’s ability to manage the situation. Eventually cooler heads in the White House prevailed and persuade him to stop this self-inflicted wound.

This contrasts sharply with President Obama’s much more successful handling of the Ebola virus, which was handled primarily through facts sheets issued by the Centers for Disease Control (CDC).⁴⁶ Admittedly, the two situations are different in some important ways. Ebola was much more lethal than COVID, with 90% of those dying from it according to some estimates, but the Ebola virus was largely contained in Africa and never inflicted thousands in the U.S. But we have had other “pandemics” in the U.S. that were not accompanied by daily presidential press conferences. For example, in 1949-1952, polio was rampant in the U.S. and

⁴³ <https://www.politico.com/news/2021/04/23/trump-bleach-one-year-484399>

⁴⁴ <https://www.cnn.com/2020/04/24/business/lysol-disinfectant-trump-coronavirus/index.html>

⁴⁵ <https://spectator.org/joe-biden-art-political-lying-elliott/>

⁴⁶ <https://www.wgbh.org/news/politics/2020/03/13/how-obamas-handling-of-ebola-compares-with-trumps-handling-of-coronavirus>

killed or paralyzed tens of thousands of children. “In the 1952 season, of the 57,628 cases reported, 3,145 died and a shocking 21,269 experienced paralysis.”⁴⁷ But neither President Truman nor President Eisenhower assumed personal responsibility for preventing every single case of polio by holding daily press conferences about what they were doing to defeat the polio virus. By contrast, both NY governor Andrew Cuomo⁴⁸ and then-candidate Joe Biden⁴⁹ claimed publicly that Donald Trump was personally responsible for every single death due to COVID.

One lesson that might be learned is that in the middle of a presidential election, in which your opponent and the media are likely to put the worst possible construction on any slip of the tongue, a sitting president might be wiser not to “own” the issue of a spreading pandemic by holding daily televised press conferences live. And on the rare occasions that he or she does go on live TV, career staff should thoroughly brief and script the president in advance so that there are no slip-ups like Trump’s great bleach debacle of 2020.

Some have criticized Joe Biden for being carefully scripted when he appears on television,⁵⁰ but that’s smart and in fact it is the way that most presidents prior to Trump have handled live TV appearances.

Scenario III: Make Someone Else Responsible.

How could a sitting president avoid responsibility for a pandemic on his or her watch? By putting someone else in charge. *SUPPOSE that Donald Trump had put his surgeon general in charge of combatting COVID-19? Or Francis Collins, the career head of NIH, or another*

⁴⁷ https://www.aier.org/article/no-lockdowns-the-terrifying-polio-pandemic-of-1949-52/?gclid=EAIaIQobChMI8IuDs8HR8gIVDLLCh3iRQjkEAAAYASAAEgLfm_D_BwE

⁴⁸ <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-coronavirus-trump-cuomo-covid-death-20201020-3cvjtfremzf35l2nii6k46uvf4-story.html>

⁴⁹ <https://www.politifact.com/factchecks/2020/sep/18/joe-biden/joe-biden-wrongly-claims-trump-couldve-prevented-e/>

⁵⁰ <https://www.foxnews.com/politics/biden-scripted-answers-press-conference-fleischer>

career expert. That is probably what Hillary Clinton would have done if she had been elected in 2016, as democrats generally have greater trust in the administrative state than do Republicans.

In fact, the official national plan for dealing with a pandemic under the 2006 Pandemic Preparedness Act called for putting the Assistant Secretary for Pandemic Preparedness and Response of the Department of Health and Human Services in charge of the government-wide response.⁵¹ He was a well-qualified career expert, having spent 20 years as an Air Force physician, then was staff director of a subcommittee on bioterrorism in the Senate, director of biodefense on Homeland Security Council and a special assistant to the President.⁵² You can always fire your surgeon general or your Assistant Secretary for Pandemic Preparedness and Response and get a new one when things go wrong. That's one of the main purposes of having "experts" in government: politicians can blame them when things go wrong.

Whatever else you may think of him, Joe Biden is a master politician, and we can learn a lot about the craft of politics by watching him. On what some are saying was the worst day of his presidency (so far), when 13 American soldiers and upwards of 90 Afghan civilians were killed in a suicide bombing at the Kabul airport, Biden skillfully deflected responsibility by claiming that he had followed the advice of his military commanders.⁵³ Ever wonder why Biden

⁵¹ Judge Glock, "Why Two Decades of Pandemic Planning Failed," *Medium*, April 9, 2020, <https://medium.com/cicero-news/why-two-decades-of-pandemic-planning-failed-a20608d05800>.

⁵² *Ibid.* ("It may surprise the reader to know that, at least according to the 2006 Pandemic Preparedness Act, someone named Robert Kadlec, the Assistant Secretary for Pandemic Preparedness and Response, is supposed to "coordinate the Federal interagency response to a pandemic." Kadlec seems like a qualified individual. He spent 20 years as an Air Force physician, and was a staff director of a subcommittee on bioterrorism in the Senate, and a director of biodefense on Homeland Security Council from 2002 to 2005, before becoming special assistant to the President from 2007 to 2009. His name, or even existence, however, may surprise the public, because they haven't heard a word from him in the three weeks since the HHS said they were delegating him to lead the response, at least at their own department, seemingly counter to the express words of the statute putting him in charge across all agencies." (footnotes omitted).)

⁵³ <https://www.foxnews.com/opinion/biden-excuse-making-james-jay-carafano>

put his Vice President in charge of the southern border rather than take on the immigration issues himself?⁵⁴ Or why she repeatedly denied having been given that role?⁵⁵ And rather than taking questions live from the press about the details of the government’s response to COVID, as Trump did, Biden wisely sent his surgeon general for long interviews with Fox News, which resulted in no significant controversy.⁵⁶

Unlike Donald Trump, Joe Biden was masterful in putting others “in charge” of the response to COVID. As a result, even though hospitalization from COVID are now breaking records⁵⁷— and some ICUs are having to turn away seriously ill patients for lack of beds – a situation that never happened under Trump, to the best of my knowledge, not many are blaming President Biden for the resurgence of COVID “on his watch.” The media generally blames “anti-vaxers,” which they imply are mostly conservative Republicans, even though Afro-Americans, a group that over-whelming supported Biden in the last election, has the lowest vaccination rate of any demographic.⁵⁸

Admittedly, Biden’s approval ratings in the polls for handling the coronavirus are down substantially from their high of 69% approval in April, 2021 to only 53% approval in August, 2021, but COVID is still one on his strongest issues, with much lower approval number for other

⁵⁴ <https://www.cnn.com/2021/03/24/politics/kamala-harris-immigration-central-america/index.html>; Kevin D. Williamson, Kamala Harris Was Set Up to Fail as Biden’s ‘Border Czar’ NATIONAL REVIEW, Sept 22, 2021, https://www.nationalreview.com/2021/09/kamala-harris-was-set-up-to-fail-as-bidens-border-czar/?utm_source=Sailthru&utm_medium=email&utm_campaign=WIR%20-%20Sunday%202021-09-26&utm_term=WIR-Smart

⁵⁵ <https://www.cnn.com/2021/06/01/politics/harris-immigration/index.html>

⁵⁶ <https://www.foxnews.com/health/vivek-murthy-surgeon-general-covid-coronavirus-vaccines-delta-variant>

⁵⁷ <https://www.cnn.com/2021/09/05/health/us-coronavirus-sunday/index.html>

⁵⁸ See Nambi Ndugga *et al.*, Latest Data on COVID-19 Vaccinations by Race/Ethnicity KFF (Sept. 22, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/>

issues such as Afghanistan and the economy, according to an NBC news poll as of August 14, 2021.⁵⁹

Q6 Now, for each of the following please tell me if you approve or disapprove of President Biden's handling of each item. (ROTATE FIRST TWO, ALWAYS READ AFGHANISTAN ITEM LAST)

TABLE RANKED BY % WHO SAY APPROVE

	Approve	Disapprove	No Opinion (VOL) ¹	Not Sure
The coronavirus				
August 2021.....	53	44	2	1
April 2021.....	69	27	3	1
The economy				
August 2021.....	47	49	2	2
April 2021.....	52	43	2	3
The situation in Afghanistan				
August 2021.....	25	60	6	9

The purpose of the preceding observations is not to criticize President Biden but to praise him as a master politician. After a life in politics, Biden knows when to take credit for popular actions (*e.g.* keeping people who can't pay their rent in their apartments) and when to shift responsibility for unpopular decisions to others (*e.g.* making people get vaccinated who don't want to).⁶⁰ There are plenty of "no win" situations in politics, and master politicians are usually wise enough to make others responsible for them. The skill of career politicians at ducking

⁵⁹ <https://www.nbcnews.com/politics/meet-the-press/biden-s-job-ratings-decline-amid-covid-surge-afghanistan-withdrawal-n1277368> See also <https://www.foxnews.com/politics/biden-poll-numbers-nosedive-afghanistan-exit-covid-surge> ("One of the issues that vaulted Biden to the presidency was the coronavirus, the worst pandemic to sweep the globe in a century. Biden vowed to do what Trump seemingly couldn't do – get COVID cases under control, bring back a sense of normalcy to Americans and boost an economy that was severely battered by the pandemic. But the late-summer COVID surge due to the Delta variant is another gut punch to the president. Biden's approval rating on handling the coronavirus in the new ABC News/Washington Post poll stands at 52%-41%. The president's approval is down 10 points from June, when Biden stood at 62%-31%.")

⁶⁰ See generally Gerard Baker, *Does Joe Biden Have Any Core Principles? Leadership hasn't been a hallmark of his long political career. His real talent is following the herd.* THE WALL STREET JOURNAL Sept. 6, 2021 <https://www.wsj.com/articles/president-joe-biden-ethics-principles-democratic-party-social-policy-leftist-abortion-six-week-ban-texas-pro-choice-catholicism-11630943345>

issues was immortalized in parody by Charles Durning's famous Sidestep Scene from the movie, *The Best Little Whorehouse in Texas*.⁶¹

Donald Trump had not spent his life in politics, and he made a crucial mistake by taking public ownership of the government's response to COVID. That's the kind of thing a CEO might do, but it was fatal to his presidency. He might have lost anyway,⁶² but the perception that he had mishandled COVID was a major factor in his defeat at the polls in 2020. And more importantly, by making himself the target in an election year, Trump guaranteed that everything about COVID would be subsumed in electoral politics.

Scenario IV: Mandate a Single National Policy.

Some have argued that Trump should have done even more to own the COVID issue by mandating a centralized national response to COVID.⁶³ *SUPPOSE that the Trump Administration had prescribed a "one-size fits all" approach to managing COVID rather than leaving state governors with substantial discretion on closing businesses and mask mandates?*

Even leaving aside the constitutional question of presidential authority to mandate a single national approach, doing so clearly would have been unwise for two separate reasons: (1) it clearly would have increased the perception that Trump was personally responsible for everything that went wrong, and (2) a single national policy is better than a diversity of policies

⁶¹ That scene is available on *You Tube* a <https://www.youtube.com/watch?v=AALREbJZEZk>. I recommend that every reader interested in a chuckle take a minute or two to view it.

⁶² E. Donald Elliott, Why Trump Lost: Despite historic accomplishments, his personal style, the pandemic, and the media defeated him, *THE AMERICAN SPECTATOR* (Nov. 19, 2020), <https://spectator.org/why-trump-lost/>

⁶³ Alejandro E. Camacho and Robert L. Glicksman, Structured to Fail: Lessons from the Trump Administration's Faulty Pandemic Planning and Response, <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/02/Camacho-Glicksman-Structured-to-Fail.pdf>

only if it is the *right* policy (or more accurately, better than the weighted average of the diverse policies that are implemented instead).⁶⁴

When we are confronting an unusual situation and don't know what the right policy is, there is a lot to be said for diversification by playing a number of different strategies and seeing which work out better. That is what Justice Brandeis famously called "the laboratory of federalism."⁶⁵ Particularly in a huge country such as ours with a diversity of situations that affect the transmission of COVID, including population density, a single, "one size fits all policy" is unlikely to have been superior to Trump's approach of making scientific recommendations at the national level but giving governors substantial discretion to implement them in ways that they think make sense at the local level. Consider lockdowns. The current evidence is that states that locked down by shutting many businesses suffered the economic and social consequences but did not fare substantially better in preventing the transmission of the virus than those states that did not.⁶⁶

Scenario V: Order the FDA to Make a Vaccine Available Prior to the Election.

As noted above, small, preliminary studies were available several months prior to the election indicating that that some of the vaccines were safe and effective, but the data fell far short of what the FDA requires to approve a vaccine in normal times, even under its authority to

⁶⁴ E. Donald Elliott, *Why the United States Does Not Have a Renewable Energy Policy*, 43 ENVIRONMENTAL LAW REPORTER 10095 (Feb. 2013). Available at SSRN: <http://ssrn.com/abstract=1878616> or <http://dx.doi.org/10.2139/ssrn.1878616>

⁶⁵ "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁶⁶ Joie Walsh, Study Finds U.S. Lockdowns Didn't Make A Big Difference In Stopping Covid—But That Doesn't Mean They're Pointless, FORBES Mar. 25, 2021 <https://www.forbes.com/sites/joewalsh/2021/03/25/study-finds-us-lockdowns-didnt-make-a-big-difference-in-stopping-covid-but-that-doesnt-mean-theyre-pointless/?sh=7ec0eb8d329e>

issue “emergency use authorizations.”⁶⁷ There were rumors at the time that then-President Trump was pressuring the FDA to make the vaccines available prior to the election, which is probably why both Biden and Harris made public statements warning pre-emptively that they would not trust a vaccine if it were approved by Donald Trump rather than scientists including Dr. Fauci.⁶⁸ Trump publicly accused the agency of “slow walking” approval of the vaccines until after the election.⁶⁹ The day before Biden’s inauguration, the outgoing head of the FDA, Stephen Hahn, gave an exclusive interview to *Politico* in which he took credit for resisting “substantial pressure” from the White House to get the vaccines out sooner:

“The coronavirus pandemic revealed a “clash of cultures” between the White House pressing for faster progress on vaccines and treatments and the Food and Drug Administration’s efforts to stick to the science, outgoing Commissioner Stephen Hahn told POLITICO.

“I heard loud and clear from the White House — President Trump and others — that they wanted FDA to move faster,’ Hahn said in an interview Tuesday, less than 24 hours before President-elect Joe Biden is scheduled to take office.”⁷⁰

⁶⁷ In essence, an “emergency use authorization” allows FDA to permit the use of a drug or medicine that has not yet secured full FDA approval if a public health emergency has been declared. FDA, Emergency use Authorization, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#abouteuas>

⁶⁸ <https://www.flgov.com/2021/10/27/florida-reaches-lowest-case-rate-in-the-nation/>

⁶⁹ Dan Goldberg, Trump calls out FDA chief, suggests agency is slow-walking Covid clinical trials, POLITICO (Aug. 22, 2020) <https://www.politico.com/news/2020/08/22/trump-covid-clinical-trials-tweet-400183> (“President Donald Trump on Saturday suggested that his own FDA is making it difficult for drug companies to enroll people in clinical trials for vaccines and therapies to treat Covid-19, part of a “deep state” plot to hinder his re-election prospects.”)

⁷⁰ Sarah Owerhohle, Outgoing FDA chief: The agency fought ‘substantial’ pressure under Trump, POLITICO (JAN. 19, 2021), [HTTPS://WWW.POLITICO.COM/NEWS/2021/01/19/FDA-TRUMP-PRESSURE-CORONAVIRUS-VACCINE-460402](https://www.politico.com/news/2021/01/19/fda-trump-pressure-coronavirus-vaccine-460402)

SUPPOSE that President Trump had ordered the FDA to make a vaccine available on a limited basis prior to the election. For example, he might have ordered FDA to make the vaccine available to front line health care workers, many of whom were dying from COVID at the time, on a voluntary basis with informed consent. This would have been a logical extension of the Administration’s “Right to Try” policy that made experimental medicines not yet approved by the FDA to those with life-threatening illnesses.⁷¹ Moreover, making vaccines available after only very limited clinical trials would have paralleled the Russian and Chinese policies of making their vaccines available many months prior to the U.S. vaccines based on lesser evidence of safety and effectiveness than required by our FDA, presumably because they placed greater weight on getting the vaccines out early to try to stop the pandemic from spreading and less weight on insuring that there were no side effects.

As an illustration of the magnitude of the costs of delay while the FDA insisted on months of large clinical trials, between August 22, when Trump accused the FDA of slow-walking approval of vaccines, and November 9, 2020, when Pfizer finally announced that it had developed an effective vaccine,⁷² a period of roughly two and a half months, according to the official statistics 60,000 additional people died from COVID.⁷³ We now know that the Pfizer

⁷¹ FDA, Right to Try Fact Sheet, <https://www.fda.gov/media/133864/download>

⁷² Pfizer and Biontech Announce Vaccine Candidate Against Covid-19 Achieved Success In First Interim Analysis From Phase 3 Study, (November 09, 2020), <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-announce-vaccine-candidate-against>

⁷³ The official toll of “confirmed and probable” COVID deaths stood at 230,712 on November 9, when effective vaccines were announced, versus 168,361 on August 22, when Trump accused the FDA of slow-walking the vaccine, a difference of 62,351. <https://covidtracking.com/data/national> Even if we accept Dr. Waldman’s contention that only 12% of the people who died with the COVID virus in their bodies actually died *from* COVID rather than pre-existing conditions, *supra* text at note 5, that still works out to 7482 people who died from COVID while the FDA was delaying approval to look for possible side effects, which turned out to be infrequent and a lot less serious than death. Meanwhile, some of the companies took the risk of manufacturing supplies of the vaccines because they were confident that they would eventually be authorized by the FDA to distribute them. However, it is virtually certain that some people died unnecessarily because of the delay and that the electorate was in the dark about the imminent release of effective vaccines when they went to the polls.

vaccine was 97% effective at preventing “in preventing symptomatic disease, severe/critical disease and death,”⁷⁴ and had no serious side effects, although its efficacy may wane over time and may vary against some variants. Thus, getting the vaccines out earlier could have saved thousands of lives. Of course, that’s 20-20 hindsight, but one of the purposes of alternative histories is to try to get the benefit of 20-20 hindsight for the next time similar events occur.

It probably would have provoked a firestorm of criticism both legally and politically if Trump had over-ruled the FDA and ordered the vaccines to be made available prior to the election. We can certainly anticipate that several high-ranking FDA officials might have resigned, as two of them did recently when Biden’s CDC over-ruled the FDA’s expert panel on booster shots.⁷⁵ In addition, there almost certainly would have high profile lawsuits and outraged commentary in the press that Trump was over-ruling the scientific experts.

But was this really a purely scientific issue? Couldn’t Trump – or any other president for that matter – say to his medical experts “I hear you. I do appreciate what you say about the extent of the risks of side effects, but I as the chief executive have to balance the risks of side effects against the potential benefits of saving more lives by getting the vaccines out earlier in a grave national emergency.” In other words, was the timing of the authorization to use a vaccine really a question for science alone or were other legitimate considerations, including perhaps even providing relevant information to the electorate in the upcoming elections?

It is hard to say what the effect of more decisive action by the president to order the FDA to approve the vaccines sooner – or at the very least to require the CDC to announce publicly that the vaccines appeared to be safe and effective and would be available soon -- would have had on

⁷⁴ <https://www.pfizer.com/news/press-release/press-release-detail/real-world-evidence-confirms-high-effectiveness-pfizer>

⁷⁵ <https://www.businessinsider.com/2-top-fda-officials-resigned-biden-booster-plan-reports-2021-9>

the 2020 election. For whatever it may be worth, Trump now reportedly believes that unnecessary delay by the medical experts in approving, or even announcing, an effective vaccine was an important factor in his losing the 2020 presidential election: “Trump has been livid with the FDA for not moving faster to approve the shots, blaming the fact that a vaccine was not available ahead of the Nov. 3 election in part for his loss.”⁷⁶ That’s not exactly an admission by Trump that he made a mistake by deferring too long to the medical experts, but unlike the other examples in this paper that describe situations in which politics intruded into domains that should have been left to experts, this one is arguably the converse, a situation in which politicians should have made the final decision but were afraid to overrule the experts.

Rather than speculating on the electoral consequences, for our purposes perhaps it is more relevant to note that is also hard to say how the lawsuits would have come out if Trump had overruled the FDA and ordered it to get the vaccine out before the election. The statutory issues but not the constitutional ones are summarized in a recent blog post by two recent Yale Law graduates and their professor Amy Kapczynski.⁷⁷ They conclude that a court might have ruled that Trump had acted illegally if he had overruled the FDA, but they concede that it would have been difficult to find someone with standing to challenge such a decision in court, and that the result that they favor would be probable only if it were “obvious” that the decision was made for inappropriate reasons. Moreover, their analysis is limited to statutory construction and does not consider the possibility that the president has authority to overrule agencies for constitutional

⁷⁶ Jonathan Lemire, Jill Colvin, Matthew Perrone and Zeke Miller, Pushed to rush, FDA head says feds will get vaccine ‘right’ AP NEWS, December 1, 2020, <https://apnews.com/article/election-2020-donald-trump-mark-meadows-coronavirus-pandemic-elections-d93bd92727e89e451a2be73ec3de8ede>

⁷⁷ Brandon Willmore, Amy Kapczynski, John Langford, Can Trump Order the FDA to Approve a Treatment for Unscientific Reasons? Lawfare October 28, 2020, <https://www.lawfareblog.com/can-trump-order-fda-approve-treatment-unscientific-reasons> (hereafter, Willmore *et al.*)

reasons including the both Take Care Clause of the Constitution⁷⁸ and that the executive power of the federal government is vested in the president,⁷⁹ not the FDA or the Department of Health and Human Services.

One of the great unresolved controversies of the administrative state is whether the president, or the agency head to which the statute gives legal authority, gets the final say – an issue that Columbia Law School professor Peter Strauss has aptly described as the question of whether the president is an “overseer” of what the agencies decide or the “decider in chief” who is constitutionally empowered to overrule all decisions made in the executive branch.⁸⁰

Regardless of whether the president’s has authority to substitute his judgment for an agency’s in an individual decision, the president generally has does have uncontested authority to fire most officials in the executive branch if he or she disagrees with their actions. In fact, on December 11, 2020, after the election but before the inauguration of the new president, the White House Chief of Staff Mark Meadows reportedly told the FDA chief to approve the Pfizer vaccine by the end of the day or submit his resignation, but by that time, the FDA’s panel of outside experts had already voted 17 to 4 with one abstention to recommend an emergency use authorization.⁸¹ One

⁷⁸ U.S. Const., Art. II, §3.

⁷⁹ U.S. Const., Art. I, §1. For a review of the arguments for both narrow and broad interpretations of the vesting clause, see <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/347>

⁸⁰ Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. R. 696 (2007). An enormous literature exists debating this issue. See e.g. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995). *Contra* PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2016).

⁸¹ Berkeley Lovelace Jr., *White House threatens to fire FDA chief unless Pfizer Covid vaccine approved Friday, reports say*, CNBC (Dec. 11 2020), <https://www.cnn.com/2020/12/11/white-house-threatens-to-fire-fda-chief-unless-covid-vaccine-ok-ed-friday-report.html> See also <https://www.washingtonpost.com/health/2020/12/11/trump-stephen-hahn-fda-covid-vaccine/> (“Meadows’s threat followed months of efforts by FDA scientists to try to ward off President Trump’s importuning on the vaccine and keep the review process apolitical and transparent in hopes of boosting public confidence in the shots.”)

is left to wonder how history might have been different if Trump had acted before the election to order approval of the vaccines despite FDA's desire for further study of possible side effects.

In the next section, I suggest that one important lesson from COVID is that we as a society need to clarify whether the agencies or the president gets the final say on decisions that involve expertise, but also other considerations.

Conclusion: Why the U.S. Didn't "Follow the Science."

There are, of course, numerous lessons to be learned from our country's confrontation with COVID-19. This article focuses on one that has been overlooked elsewhere, how the proper roles of politics and expertise were confused. I leave to the reader's judgment how important that is, but I do assert that it is of particular relevance to the *Gray Center for the Study of the Administrative State* and it may have implications beyond responding to pandemics.

"[A]n often unstated purpose of any given law is essentially pedagogical: laws are enacted, among other things, to teach people which behaviors and activities are acceptable and which are not."⁸² This is sometimes called the "exemplary theory of law," and perhaps its clearest statement in U.S. law is Justice Brandeis's famous dissent in *Olmstead v. U.S.*⁸³:

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a

⁸² Andrew Little, *Law as a Teacher of Society: Reflections on Title VII After Fifty Years*, 33 J. Legal Stud. Education 71, 71 (2016), <https://doi.org/10.1111/jlse.12035>. See also Brian Burge-Hendrix, The Educative Function of Law, DOI:10.1093/acprof:oso/9780199237159.003.0013 in Law and Philosophy (ed. Michael Freeman and Ross Harrison, Oxford, 2007) ("Classical philosophers paid considerable attention to the connection between law and education. They held that one of the primary functions of a legal system is to make its subjects aware of the set of norms that structured social and political life, and to persuade them to follow those norms."); E. Donald Elliott, *Environmental TQM: A Pollution Control Program that Works!*, 92 MICH. L. REV 1840 (1994) (suggesting that one of the primary purposes of environmental law is to change norms and thereby promote voluntary initiatives to protect the environment).

⁸³ *Olmstead v. United States*, 277 U.S. 438, --- (1928) (Brandeis, J., dissenting), https://www.law.cornell.edu/supremecourt/text/277/438#writing-USSC_CR_0277_0438_ZD

lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”

Alexis de Tocqueville suggested that law was a particularly important way of developing shared social norms in the U.S. because, unlike some countries, we are all immigrants and come from a variety of cultures.⁸⁴

In an article that I wrote forty years ago, I opined that one of the adverse consequences of the way that our country legitimized administrative power through the legal fiction of the delegation doctrine rather than by constitutional amendment was that we lacked a separation of powers concept of what issues were appropriate for resolution by experts, rather than politicians and what role, if any, the president may play in supervising the agencies.⁸⁵ The argument of this paper is the failure of the U.S. to do a better job of dealing with the COVID pandemic is in part a consequence of our failure to develop a shared understanding that will be respected by politicians, as well as the press and the public, of what are appropriate questions for experts and what are appropriate questions for politicians. As one of America’s leading administrative law experts, Jerry Mashaw, Sterling Professor of Law Emeritus at Yale Law School, puts the problem this way: “a consistent general theory of administrative legitimacy still eludes us.”⁸⁶

The Administrative Procedure Act defines the respective roles of courts and agencies in judicial review.⁸⁷ We need a similar statute defining the respective roles of the president and agencies, including the so-called “independent agencies.” For my part, I believe that such a

⁸⁴ See generally Bruce Frohnen, *Tocqueville's Law: Integrative Jurisprudence in the American Context*, 39 THE AMERICAN JOURNAL OF JURISPRUDENCE 241–272 (1994), <https://doi.org/10.1093/ajj/39.1.241>

⁸⁵ E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125, 169-173 (1984), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=6113&context=fss_papers

⁸⁶ Jerry L. Mashaw, *Is Administrative Law at War with Itself?* 29 N.Y.U. ENV. L. J. 421, 421 (2021).

⁸⁷ 5 U.S.C. §706.

statute should declare that politicians should defer to experts on technical questions, but not necessarily when other counter-vailing policy questions are at issue. Admittedly, such a statute would not necessarily be decisive of the constitutional questions, but as it is difficult to get questions of this type up to the Supreme Court for a definitive ruling, a statute could be helpful to clarify the relative roles of the president and the administrative state.⁸⁸ If a statute had clearly empowered President Trump to overrule the FDA on the timing of emergency use authorization of a vaccine, he might not have hesitated to do so.

The history of the U.S. response to COVID-19 is a history of confusion, by both Republicans and Democrats, of which questions are appropriate for experts in the administrative state and which are appropriate questions for politicians. This is not some esoteric academic dispute; as a result of the failure of the U.S. legal and political system to distinguish properly between questions for politicians and questions for experts, thousands of our fellow citizens have died. A few examples follow:

- A sitting president tweets out a recommendation to his two million twitter followers recommending an anti-malaria drug, hydroxychloroquine, to treat those infected with COVID-19 despite FDA having previously revoked an emergency authorization for its use for that purpose.⁸⁹

⁸⁸ For an argument that the real issue underlying the first impeachment on President Trump was the relative authority of the president versus career officials in the administrative state, see E. Donald Elliott, What's Really Behind Impeachment: An alternative history of Trump's request to investigate corruption, THE AMERICAN SPECTATOR, Dec. 20, 2019, <https://spectator.org/whats-really-behind-impeachment/>

⁸⁹ <https://pharmaphorum.com/news/trumps-tweets-advocate-hydroxychloroquine-as-big-covid-19-vaccine-trials-start/> (“The president has continued to advocate using hydroxychloroquine despite concerns about its safety and efficacy from the mainstream scientific community. The FDA has also cautioned against using the drug against COVID-19 and last month revoked an Emergency Use Authorisation that allowed it to be used in hospitals to fight the pandemic. Trump's tweets point to studies and organisations that are suggesting using hydroxychloroquine as a prophylactic treatment, to ward off the virus in those who have not yet been exposed.”)

- Florida Governor “Ron DeSantis Was Right about Monoclonal-Antibody Therapy” for COVID-19 insists a headline in *National Review*,⁹⁰ after DeSantis was charged by the Associated Press with promoting that therapy to benefit a campaign contributor.⁹¹
- “Times Square [is] swarmed by hundreds protesting COVID vaccine mandate, chanting 'F--- Joe Biden',” part of a “World Wide Rally For Freedom.”⁹²
- Yard signs and billboards proclaiming “Gov. Lamont: Unmask our children” now dot yards and line I-95 in New Haven.
- The Republican National Committee runs a video advertisement “hammering” one of the federal government’s top doctors, Dr. Anthony Fauci, head of the Institute of Allergy and Infectious Diseases, for his “flip flops” on vaccine mandates.⁹³
- Meanwhile, a state-sponsored Israeli university awards Dr. Fauci a \$1 million prize for publicly contradicting President Trump during the pandemic, which they describe as “speaking truth to power.”⁹⁴

In my opinion, events like these reveal a governmental process that is seriously out of whack. Democracy can sometimes be untidy of course, but in my opinion these events represent a breakdown in the ability to our system of government to deal effectively not only with the

⁹⁰ <https://www.nationalreview.com/2021/09/ron-desantis-was-right-about-monoclonal-antibody-therapy/>

⁹¹ <https://www.nationalreview.com/news/desantis-ap-smear-piece-linking-covid-treatment-to-top-donor-will-cost-lives/>

⁹² Andrew Mark Miller, Times Square swarmed by hundreds protesting COVID vaccine mandate, chanting 'F--- Joe Biden' The event was part of the 'World Wide Rally For Freedom', Fox News <https://www.foxnews.com/politics/times-square-swarmed-by-hundreds-protesting-covid-vaccine-mandate>

⁹³ <https://www.foxnews.com/politics/fauci-vaccine-mandate-flip-flop-rnc-ad>

⁹⁴ E. Donald Elliott, Israel’s \$1 Million Payoff to Dr. Fauci Violates the Constitution: U.S. officials should not accept money from foreign sources for the positions they take in our government THE AMERICAN SPECTATOR, March 17, 2021, <https://spectator.org/fauci-israel-1-million-prize-constitution/>

pandemic but with other questions on which expertise should be paramount such as climate change or whether the tiny amounts of asbestos contamination in talc really do cause cancer.⁹⁵

There are of course many different lessons to be learned from our country's confrontation with COVID-19. One that is particularly relevant to the Gray Center for the Study of the Administrative State is the failure of the administrative state to win sufficient credibility with the public and politicians that it could accomplish one of its key objectives, which was to take some issues out of democratic politics so that experts could play a larger role in deciding them.⁹⁶ Or as James Landis, one of the "prophets" of the administrative state,⁹⁷ put it,

"The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power."⁹⁸

The vision of apolitical expertise articulated by the founders of the administrative state obviously did not happen during the COVID pandemic. And that was even before the Biden Administration got out in front of the FDA by announcing booster shots for everyone over 16, whereas 16 out of 18 experts on the FDA's advisory panel later recommended against that policy.⁹⁹ The Biden Administration's CDC then over-ruled the FDA's panel of outside experts,

⁹⁵ <https://www.asbestos.com/news/2021/02/24/johnsons-billions-talc-settlements/>

⁹⁶ Woodrow Wilson, *The Study of Administration*, 2 POLITICAL SCIENCE QUARTERLY (Jun., 1887), pp. 197-222, http://www.commentary.com/admin_thoughts_1887.pdf

⁹⁷ For an account of Landis's role in creating what we now call "the administrative state," which he called "the administrative process" or "the administrative" branch, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS LOUIS D. BRANDEIS JAMES M. LANDIS ALFRED E. KAHN* (Harvard, 1984).

⁹⁸ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (Oxford Univ. Press, 1938).

⁹⁹ Daniel Politi, F.D.A. Panel Rejects Biden's Push for Universal COVID-19 Booster Shots SLATE (Sept. 18, 2021) <https://slate.com/news-and-politics/2021/09/fda-panel-rejects-universal-covid-booster-shots.html> For commentary criticizing the Biden Administration for not following the science but over-ruling the scientists on booster shots for political reasons, see <https://www.foxnews.com/media/tucker-carlson-proof-biden-lackeys-media-lying-about-covid>

and two FDA officials resigned in protest of the administration not deferring to the administrative state on this issue.¹⁰⁰

No, I do not think that “experts” should make COVID policy on their own. “Everybody is ignorant, only on different subjects,” Will Rogers wisely observed.¹⁰¹ Expertise comes not only through education and training, but also through focus on one area of human endeavor to the exclusion of other “distractions.” In a sense, expertise is an helpful but imperfect solution to the problem of limited human cognitive capacity.¹⁰² But at the same time, the problem of single mission agencies that focus on one objective to the exclusion of giving appropriate weight to other policy considerations has long been understood, at least in the academic literature.¹⁰³ Good government policy depends on striking a delicate balance between medical and scientific knowledge and other forms of expertise on one hand and other legitimate competing policy goals on the other.¹⁰⁴

The key to doing better the next time is to develop a stronger social norm embodied in the law about which questions should be decided by politicians and which by experts.

¹⁰⁰ Ashley Collman, 2 top FDA officials resigned over the Biden administration's booster-shot plan, saying it insisted on the policy before the agency approved it, reports say BUSINESS INSIDER Sept. 1, 2021, <https://www.businessinsider.com/2-top-fda-officials-resigned-biden-booster-plan-reports-2021-9>

¹⁰¹ https://www.brainyquote.com/quotes/will_rogers_161235

¹⁰² See generally HERBERT SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1976).

¹⁰³ Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. (1975). Available at: <https://digitalcommons.law.yale.edu/ylj/vol84/iss7/1>

¹⁰⁴ For a description of how this delicate balance should work in a different context, see E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Re-Defined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (Spring 2005). See also Landis, *supra* note 66, at 152 (“Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide.” (emphasis in original).)