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# The Need for a Strong and Stable Federal Public Health Agency Independent from Politicians

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**SUMMARY.** The COVID-19 pandemic has revealed the precariousness of federal public health institutions in the United States, and how disastrously things can go when those institutions are undermined by political forces. Such institutions can be disbanded, underfunded, populated with incompetent political hacks, manipulated, or sidelined. As a field, public health in particular needs some political space, given that it requires deep scientific expertise and needs to communicate to the public clearly, reliably, and with authority to engender trust. Key public health agencies, such as the Centers for Disease Control and Prevention (CDC) in particular, should be buttressed against future political encroachment, using legal mechanisms from administrative law, which are tried and true in other domains of governance. Models include the Federal Deposit Insurance Commission (FDIC) (created in 1933), the Federal Reserve System (1913), the Federal Trade Commission (FTC) (1914), and the National Labor Relations Board (NLRB) (1935). Key features of these agencies include having multi-member boards of qualified experts to lead them, enjoying independence from the president (not able to be fired without cause), and having statutory budgetary authority by not requiring congressional appropriation or allowing executive reallocation. We discuss the ways in which independence can increase deference accorded by the courts, as well as the risk that it may reduce political accountability.

## Introduction

We have three overarching concerns with the institutionalization of public health leadership and policy in the United States. The first is whether federal institutions are competent to make sound decisions and implement them reliably, with appropriate deference from the White House, Congress, and the judiciary. Second, is whether the American people trust those institutions that they rely on for key guidance in regulating their own behavior. Third, is for the optimal vertical distribution of authority between the states and federal government (Wiley, 2020).

### The Need for Stable Competence

In 2018, President Trump disbanded a national pandemic response team that had been created after the 2014 Ebola epidemic. As a result, no senior leader in the U.S. government was focused on global health preparedness. The Trump administration and the preceding Obama administration also failed to replenish the national stockpile of personal protective equipment (PPE), such that even a year after the pandemic began, shortages remained. The lack of systematic public health surveillance has caused academic and media organizations to try to cobble together their

own databases from local sources. These failures suggest a lack of stable and competent administration, in part due to short-sighted political interference.

### The Need for Public Trust

The politicization of the pandemic has also undermined the American public's trust in its own institutions, which is reflected in the lack of consensus about simple health precautions, such as mask wearing, and about whether the new vaccines are safe and effective. An independent federal public health agency would help communicate information to the public about the vaccines and other countermeasures and thereby help regain the trust of the public. One cannot blame the public for being confused and doubtful. They saw the Trump administration's surgeon general reverse his guidance as to masks, and saw the FDA first issuing and then reversing its emergency authorization for President Trump's pet drug (hydroxychloroquine), recognizing the lack of efficacy and cardiac safety concerns. Likewise, Americans saw the FDA commissioner publicly apologize after inflating the benefits of blood plasma in a White House press conference on the eve of the Republican National Convention.

In a remarkable inversion of foxes and henhouses, in September 2020 the leaders of nine pharmaceutical companies found it necessary to make a public pledge to “stand with science” (Thomas, 2020). In December 2020, President Trump threatened to fire the politically-appointed FDA Commissioner just as the agency was in final steps of issuing an Emergency Use Authorization for a COVID-19 vaccine, leaving some to wonder whether the agency’s decision would be driven by science. That same month, the editor-in-chief of the CDC’s weekly *Morbidity and Mortality Weekly Report* revealed that political appointees were interfering with the publication, and had instructed her to delete emails proving as much (Weiland et al., 2020).

In contrast, one consistent and trusted voice in all this chaos was Dr. Anthony Fauci. Even when temporarily sidelined by the Trump administration, as a career civil servant in the National Institutes of Health, Dr. Fauci was somewhat protected from being unilaterally fired by the president. That protection gave him the latitude to speak the truth and communicate the best available science, and it gave the public reason to trust him.

Of course, political manipulation of public health institutions was not invented just for the COVID-19 pandemic; it is rather endemic to the field (Bennett & DiLorenzo, 2000). In 2007, a bipartisan group of former surgeons general testified before Congress that, “the nation’s doctor has been marginalized and relegated to a position with no independent budget and with supervisors who are political appointees with partisan agendas” (Rovner, 2007). In 2017, officials from the Department of Health and Human Services instructed the staff of the CDC to not use seven words in its upcoming budget appropriation request: diversity, transgender, vulnerable, fetus, entitlement, evidence-based, and science-based (Gostin, 2018). Some have even argued that because public health is inherently political, such politicization is not a reason for concern (Goldberg, 2012). We believe that this concern is best addressed through careful institutional design, with a balance of political interests and scientific expertise, as we outline below.

### The Need for a Federal Power

Our primary focus is to protect public health agencies from horizontal threats from politicized federal actors in the White House, Congress, or the courts. However, this is also an opportunity to redistribute authority vertically, as between the federal and state governments.

As Lindsay Wiley argued in Volume I of the Policy Playbook, “federal-state conflicts have stymied efforts to ramp up and coordinate” the COVID-19 response (Wiley, 2020). Last year, for example, President Trump blamed states for the failure to reach his stated goal of distributing 20 million vaccines by the end of 2020, notwithstanding the federal government’s planning for such a need (Armstrong et al., 2020). Although state governments may be more politically accountable than federal actors, and have more granular local information and relationships, they lack the scale, infrastructure, expertise, power to compel production, and power to issue money and spend deficits, which are essential during a time of pandemic.

Traditionally, public health has been conceived as primarily a state responsibility that states fulfill by exercising their plenary police powers. However, Congress has already recognized that the profound effects on interstate commerce created by a public health emergency may require the exercise of broad federal powers as well. For example, 42 U.S.C. § 264 provides that the surgeon general and secretary of the U.S. Department of Health and Human Services are “authorized to make and enforce such regulations as in his judgment are necessary to prevent the spread of communicable diseases ... from one State or possession into any other State or possession.” So the potential role of the federal government in a public health crisis is broad, notwithstanding the Supreme Court’s concern in 2012 in *National Federation of Independent Business v. Sebelius* to “read carefully” the Commerce Clause and the Necessary and Proper Clause “to avoid creating a general federal authority akin to the [states’] police power.”

We believe that Congress and President Biden should create an independent public health agency that will insulate experts from partisan games and the whims of self-serving individuals. The agency should, moreover, engender public trust and consolidate sufficient federal power and information in order to create guidance and manage public health crises.

The scope of this independent public health agency (or agencies) is subject to debate. One could imagine a complete overhaul of the FDA, the CDC, and a range of other agencies that impact public health, not just in the times of pandemic but more generally (Weinstein et al., 2021). A more modest reform would focus on ensuring that the public and policymakers have curated, reliable public health information and formal guidance, free of political bias (Salwa & Robertson, 2021). The key role would be one of synthesis, whether compiling local public health surveillance data or synthesizing scientific research about the efficacy of therapeutics, beyond the FDA’s binary decision about whether to license the product.

### Models for the Independent Agencies

Regardless of the specific scope and mission of the independent public health agency, there are important precedents and models. The United States has dozens of independent agencies, from the Postal Regulatory Commission to the National Labor Relations Board – but virtually nothing for public health. Table 9.1 shows the design features of eight key independent agencies, out of about 100 in the federal system.

The Federal Reserve System (the Fed) presents one model for public health governance. The motivating problem of politicization is analogous: Congress recognized that if presidents could pump money into the U.S. economy whenever an election was coming, the economy could overheat and crash. To prevent such boom and bust cycles, Congress created the Fed, whose governors serve for 14-year terms. Bringing economic expertise, they can focus on market fundamentals, rather than the changing winds of politics. Not unlike his fierce attacks on other institutions, President Trump also pressured the Fed to boost the economy, but it largely withstood the pressure, due to its institutional features. Nonetheless, partisan political influences have crept

Table 9.1. Examples of Independent Federal Agencies. This table is adapted and expanded from Salwa and Robertson (2021).

AGENCY	MANDATE & ROLE	MEMBERSHIP CRITERIA
<b>Federal Trade Commission</b> (FTC)(1934)	To protect net neutrality and broadband privacy; regulates communications by radio, television, wire, satellite, and cable.	<ul style="list-style-type: none"> <li>• 5 commissioners</li> <li>• 5 year terms</li> <li>• only 3 can be members of the same political party</li> <li>• none can have financial interest in FCC related business</li> </ul>
<b>Federal Deposit Insurance Commission</b> (FDIC)(1933)	Provides deposit insurance to depositors in U.S. commercial and savings banks. In 2010, a new division, the Office of Complex Financial Institutions, was created to focus on assessment of risk in the largest, systemically important financial institutions.	<ul style="list-style-type: none"> <li>• 5 commissioners</li> <li>• 6 year terms</li> <li>• only 3 can be members of the same political party</li> <li>• 1 member needs to have State bank supervisory experience</li> </ul>
<b>Federal Reserve System</b> (The Fed)(1913)	Sets interest rates, and regulates banks. Also authorizes broad-based programs and financial assistance to individual institutions to stabilize financial markets.	<ul style="list-style-type: none"> <li>• 7 members</li> <li>• 14 year terms</li> <li>• for cause removal</li> </ul>
<b>Federal Trade Commission</b> (FTC)(1914)	Investigates fraud, identity theft, false advertising, and anticompetitive business practices. In 2013 it set standards for environmental marketing. It has also been active in the review of hospital mergers, with some notable successes in blocking or unwinding consolidations.	<ul style="list-style-type: none"> <li>• 5 commissioners</li> <li>• 7 year terms</li> <li>• only 3 can be members of the same political party</li> <li>• none can have financial interest in FCC-related business</li> </ul>
<b>National Labor Relations Board</b> (NLRB)(1935)	Enforces labor law in relation to collective bargaining and unfair labor practices. It supervises elections for union representation and can investigate and remedy unfair labor practices. Unfair labor practices may involve union-related situations or instances of protected concerted activity.	<ul style="list-style-type: none"> <li>• 5 board members</li> <li>• 5 year terms</li> </ul>
<b>Securities and Exchange Commission</b> (SEC)(1934)	Enforces federal securities laws, as well as proposes securities rules, and regulates the securities industry.	<ul style="list-style-type: none"> <li>• 5 commissioners</li> <li>• appointed by POTUS</li> <li>• advice and consent of the Senate</li> <li>• 5 year terms</li> <li>• only 3 can be members of the same political party</li> <li>• try to alternate which party appointees are from wherever practicable</li> </ul>
<b>Federal Election Commission</b> (FEC)(1975)	Enforces federal election law and campaign finance laws. Due to lack of a quorum the commission has not functioned since July 2020.	<ul style="list-style-type: none"> <li>• 8 commissioners</li> <li>• 6 appointed by POTUS</li> <li>• advice and consent of the Senate</li> <li>• 2 more commissioners: the Secretary of the Senate and the Clerk of the House of Representatives or their designees</li> <li>• 6 year terms</li> <li>• only 3 can be members of the same political party</li> <li>• the 6 members POTUS chooses must be chosen because of integrity and good judgement</li> </ul>
<b>Surface Transportation Board</b> (STB)(1996)	Regulates primarily freight rail and other modes of surface transportation.	<ul style="list-style-type: none"> <li>• 5 full time members</li> <li>• advice and consent of the Senate</li> <li>• POTUS appointed</li> <li>• 2 term limits</li> <li>• 5 year term</li> <li>• At least 3 members of the Board shall be individuals with professional standing and demonstrated knowledge</li> <li>• 2 members shall be individuals with professional or business experience</li> <li>• 2 term limit</li> </ul>

into the process of appointing new governors and public trust in the institution has dropped to worrisome levels, illustrating how any institutional design will remain contingent on the decisions of actors within and outside the institution (Quintyn, 2009).

### Design Features

There are several key aspects of independent agency design. These include protections for executives, the composition of the executives, budgetary authority, and deference from other government actors.

#### Executive Protection

To avoid undue political influence, agency leaders cannot be simply fired and replaced at will, as President Trump repeatedly threatened to do. Yet, there are constitutional limits to how Congress can create such protection. In 1935 in *Humphrey's Executor*, the Supreme Court distinguished quasi-judicial and quasi-legislative bodies, either of which could be given strong protections against political interference from the executive branch, from quasi-executive bodies, which cannot be completely insulated from politics. Accordingly, the Supreme Court has not found issue with the statutorily mandated removal criterion of "inefficiency, neglect of duty, or malfeasance in office" to give protection beyond the normal "at will" standard for firing a political appointee.

#### Multiple Confirmed Commissioners

In its 1976 decision of *Buckley v. Valeo*, the Supreme Court found that because the Federal Elections Commission performs executive functions, its members must be nominated and confirmed by the Senate, as per the procedures in Article II of the Constitution. The Supreme Court now requires that if an agency is to be independent, it must be led by a commission of multiple experts. In its 2020 decision of *Selia Law v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court held that having a single independent director was unconstitutional. Table 9.1 shows that agencies are often governed by five or more commissioners, and that the executive board is subject to the Senate's advice and consent.

#### Expertise

The governing statute can specify that officers are to be appointed based on their experience, as was the case in *Humphrey's Executor*. This standard has so far struck a decent balance, without unconstitutionally restricting the president's executive power. Accordingly, the law should require that the commissioners have relevant expertise, including advanced degrees in the relevant disciplines.

#### Partisanship

Expert leadership is not enough. Trust in experts has itself become a subject of partisan dispute, reflecting both a general populist cynicism about know-it-all elites and motivated reasoning about whether any particular expert opinion aligns with political preferences (a phenomenon known as "solution aversion")

(Campbell & Kay, 2014). There is some value in having the members reflect the democratic will of the people and both political parties, so we propose that the independent agency's board be balanced and staggered so that at least one seat opens within each four-year presidential term of office. Such a political balance would facilitate both sides working to design solutions that may align with diverse ideologies, thereby increasing confidence in and compliance with those policies.

#### Budget

Another key feature of agency independence is financial. If either Congress or the White House can threaten to, or actually, eviscerate an agency budget, the agency may succumb to political pressures. An independent public health agency might be created with dedicated tax revenues related to public health, including new taxes on cigarettes, alcohol, legalized marijuana, or low-value health care. Marijuana may present the greatest opportunity, as it presently not taxed by the federal government. Federal legalization could dramatically drive down prices, which would create a substantial opportunity to raise tax revenues, which could then be put into a public health trust fund (Gravelle & Lowry, 2014). Analogously, the FDA already receives some of its money from fees.

#### Judicial Deference

Beyond independence from the political branches, an effective public health agency also needs to receive deference from the courts. Yet, during the pandemic, courts struck down several public health measures.

Public health issues often intersect with key cultural and political identities. In November 2020, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the court struck down a state order that limited capacity in churches to 25 people, but made no limits on capacity for even certain non-essential businesses (2020). Rather than deferring to an expert agency's sound discretion, the Supreme Court perceived that state governors (i.e., partisan politicians) had made invidious distinctions along religious lines. A standing federal expert agency may be better able to earn judicial respect as it navigates around privacy and liberty interests.

Even where fundamental rights are not at stake, for an expert federal public health agency to have its decisions upheld, the questions will be (1) whether Congress acted under an enumerated power, (2) whether the delegation to the agency was legitimate and well-circumscribed, (3) whether the agency's action is within the scope of that delegation, and (4) finally, whether the agency exercised appropriate procedures (including allowing time for public comment) in making its decision. With regard to the second point in particular, Congress may not delegate its core lawmaking discretion to an independent agency. Thus, it should pass a statute that gives firm direction to an agency, clearly stating but circumscribing its authority. If the governing statute does not provide an intelligible principle, it will violate the non-delegation doctrine and be struck down, as was discussed by the Supreme Court in 2001 in *Whitman v. American Trucking*. The controversial language in that case pertained to the Environmental Protection

Agency's (EPA) power under the Clean Air Act to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of Section 108] and allowing an adequate margin of safety, are requisite to protect the public health" (42 U.S.C. §§ 7401). In the end, the Supreme Court rejected the claim that these words were an unconstitutional delegation of power.

However, even if the statute is broad (as many organic agency statutes are), the Supreme Court often interprets them narrowly to avoid non-delegation problems: For example, in *Industrial Union Department v. American Petroleum Institute* (2019), the statute required the Occupational Safety and Health Administration (OSHA) to create standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment ... to the extent feasible" (29 U.S.C. § 668). OSHA interpreted the statute in order to avoid harming American industry. The Supreme Court found issue with the overly broad language of the statute but found an intelligible principle that limited OSHA's power of interpretation. These cases were about executive agencies, and the conservative court may be more wary of building a bigger and less checked government by creating more independent agencies.

Non-delegation is a brewing issue. Wariness over non-delegation was expressed by Justices Alito and Gorsuch in 2019 in *Gundy v. United States*, which held that delegations are permissible if Congress gives implicit guidelines that agencies can use to set bounds of authority. The statutory language that the court interpreted in *Gundy* was that of the Sex Offender Registration and Notification Act: "the Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)" (18 U.S.C. § 2250). Justice Kagan found that because the attorney general was complying with the apparent purpose of the statute when he applied the requirements to all sex offenders he did not violate the statute and that because the statute had a clear apparent purpose that he must comply with the statute was not overly broad.

## Conclusion

When Congress considers how to buttress key public health functions of the federal government, it is not working from a blank slate. Several federal public health agencies already exist. For example, the CDC provides health information related to disease. The problem is that Americans do not often follow the technical work of agencies, instead they turn to public figures like Dr. Anthony Fauci, whose role as a leading scientist made him a trusted source, and helped turn the spotlight on him. Ensuring that those figures may not be fired at-will should give the agencies freedom to put out information that may be seen as controversial but is backed up by science.

At a minimum, one could imagine a limited independent agency in charge of some of CDC's current functions, curating health statistics and making health recommendations, both to the public

as to appropriate behaviors and to policymakers as to a united, and federal, plan of action. As part of the Affordable Care Act, Congress created the Independent Payment Advisory Board (IPAB) to recommend cuts to Medicare, which would go into place unless Congress overruled them by a majority vote. Although IPAB's authority was repealed in 2018, it does suggest a model – both of potential policymaking and political peril.

We have focused on the CDC as the best candidate for independence, but arguments could be, and have been, made for giving the FDA independence as well. In 2019, seven former commissioners called for the FDA to be converted into an independent agency (Califf et al., 2020). These calls are compelling, but the FDA already has robust processes of advisory boards and public oversight, as well as some budgetary independence from Congress, given its reliance on user fees, paid by industry. Moreover, recent years have shown industry actually acting to buttress the agency against political interference to maintain public confidence (though one must continue to worry about industry interference). Ultimately, perhaps some political accountability is appropriate for the FDA. Choices between faster and shorter drug approvals are matters of normative tradeoffs as much as they are technical decisions.

The CDC and FDA have been very salient during the coronavirus pandemic. But a different public health crisis, perhaps more like the industrial accident at Bhopal, India, would highlight the need to strengthen and protect the independence of other independent agencies, such as OSHA and the EPA. Frankly, lessons about the social determinants of health, suggest that just about everything is public health. Thus an ultimate "public health agency" could encompass many of the federal government functions. 🌱

# Recommendations for Action

- Congress should create an independent federal expert agency whose function, at the very least, is informational and advisory, for the public and policymakers to rely upon.
- The leadership of this agency should be subject to presidential nomination with Senate advice and consent.
- Congress should explicitly state expertise as a necessary qualification for the agency's leadership.
- Congress should ensure that commissioners can be fired only for "inefficiency, neglect of duty, or malfeasance."
- Congress should include in the statute staggered terms for the agency's leadership so that each president will typically nominate at least one commissioner.
- The independent agency's leadership should be made up of five to seven commissioners.
- The independent agency's leadership should be formally bipartisan.

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## References

- Armstrong D., Coppola G., & Tozzi J. (2020). U.S. Vaccinations at 200,000 a Day Run Far Short of 'Warp Speed.' *Bloomberg*.
- Bennett J. T., DiLorenzo T. J. (2000). *From Pathology to Politics: Public Health in America*. New Brunswick, NJ: Transaction Publishers.
- Califf, R. M., Hamburg, M., Henney, J. E., Kessler, D. A., McClellan, M., von Eschenbach, A. C., & Young, F. (2019). Seven former FDA commissioners: the FDA should be an independent federal agency. *Health Affairs*, 38(1), 84-86.
- Campbell, T. & Kay, A. (2004). Solution Aversion: On the Relation Between Ideology and Motivated Disbelief. *Journal of Personality and Social Psychology*, 107(5), 809-824.
- Goldberg, D. S. (2012). Against the very idea of the politicization of public health policy. *American Journal of Public Health*, 102(1), 44-49.
- Gostin, L. O. (2018). Language, Science, and Politics: The Politicization of Public Health. *JAMA*, 319(6), 541-542.
- Gravelle, J. & Lowry, S. (2014). Federal Proposals to Tax Marijuana: An Economic Analysis. *Congressional Research Service*.
- Rovner, J. (2007). Ex-Surgeon General Says Administration Interfered. *NPR*.
- Thomas, K. (2020). 9 Drug Companies Pledge to 'Stand With Science' on Coronavirus Vaccines. *The New York Times*.
- Quintyn, M. (2009). Independent agencies: more than a cheap copy of independent central banks? *Constitutional Political Economy*, 20(3), 267-295.
- Salwa, J., & Robertson, C. (2021). Designing an Independent Public Health Agency. *New England Journal of Medicine*.
- Weiland N., Stolberg S. G., & Goodnough, A. (2020). Political Appointees Meddled in C.D.C.'s 'Holiest of the Holy' Health Reports. *The New York Times*.
- Weinstein, J. N., Weeks, W. B., & Skinner, J. S. (2021). The Federal Health Authority, a Federal Reserve System for Health Care. *JAMA Health Forum*, 2(1).
- Wiley, L. (2020). Federalism in Pandemic Prevention and Response. In Burris, S., de Guia, S., Gable, L., Levin, D. E., Parmet, W. E., & Terry N. P. (Eds.), *Assessing Legal Responses to COVID-19* (pp. 65-70). Boston: Public Health Law Watch. Retrieved January 8, 2021, from <http://www.covid19policyplaybook.org>.