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# THE WORLD HEALTH ORGANIZATION: A WEAK DEFENDER AGAINST PANDEMICS

*Chenglin Liu* *

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# THE WORLD HEALTH ORGANIZATION: A WEAK DEFENDER AGAINST PANDEMICS

Chenglin Liu

*Why did the World Health Organization (WHO) not act in a timely fashion to declare the coronavirus outbreak a Public Health Emergency of International Concern (PHEIC)? If it had done so, could the United States have heeded the warning and controlled the spread of the virus? Is the WHO's delay a factual cause of the calamities that the United States has suffered? This article addresses these questions. Part I examines the development of the WHO and its governance mechanism, major powers and limits, and past achievements and failures. It also explores how the WHO responded to the COVID-19 pandemic and what could have been done—but was not done—in the early stages. Part II analyzes why the United States failed to effectively respond to the COVID-19 public health crisis. Part III concludes that the WHO did not, and in the future will not, have the power and courage to make a prompt PHEIC declaration because of institutional constraints. However, the WHO's delay in acting was not a factual cause of the harm suffered in the United States because the Trump Administration would not have acted differently even if the WHO issued the PHEIC warning swiftly.*

## INTRODUCTION

Why did the World Health Organization (WHO) not act in a timely fashion to declare the coronavirus outbreak a Public Health Emergency of International Concern (PHEIC)? If it had done so, could the United States have heeded the warning and controlled the spread of the virus? Is the WHO's delay a factual cause of the calamities that the United States has suffered? This article addresses these questions. Part I examines the development of the WHO and its governance mechanism, major powers and limits, and past achievements and failures. It also explores how the WHO responded to the COVID-19 pandemic and what could have been done—but was not done—in the early stages. Part II analyzes why the United States failed to effectively respond to the COVID-19 public health crisis. Part III concludes that the WHO did not, and in the future will not, have the power and courage to make a prompt PHEIC declaration because of institutional constraints. However, the WHO's delay in acting was not a factual cause of the harm suffered in the United States because the Trump Administration would not have acted differently even if the WHO issued the PHEIC warning swiftly.

## I. THE DEVELOPMENT OF THE WORLD HEALTH ORGANIZATION

### *The International Sanitary Conferences*

The establishment of the World Health Organization ("WHO") in 1946 was the culmination of 120 years of strenuous efforts to control and eliminate infectious diseases that devastated European countries.[1] The thriving international trade in the 19th century did not just produce wealth for European countries, but also deadly pathogens.[2] In order to combat infectious diseases while keeping the trade routes open, these countries strived to harmonize various quarantine rules and took coordinated actions.[3] The early efforts to set up a framework for intergovernmental communications led to the first International Sanitary Conference ("ISC") in 1851.[4] Even though the ISC did not produce any concrete results in the first seven sessions, the forum played a vital role in bringing the member countries together to exchange ideas about how best to combat the diseases.[5]

During the early ISCs, member countries debated the divergent rules on quarantine that were based on their contrasting views of disease transmission.[6] For example, the French, British, and Austrian delegates believed quarantine was ineffective for cholera because it was caused by "atmospheric, climatic, and soil conditions" rather than physical contact with an infected individual.[7] On the other hand, the Italian delegates insisted that quarantine was the only way to prevent cholera.[8] Spain was more concerned that quarantine obstructed trades and caused economic loss to the country.[9] Nevertheless, at the seventh ISC in 1892, members finally agreed to create "an international treaty of very limited scope governing maritime quarantine regulations relating to cholera and only to westbound shipping from the East."[10] At the 1893 Conference, the German delegation complained about the disastrous impact of maritime

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[1] NORMAN HOWARD-JONES, THE SCIENTIFIC BACKGROUND OF THE INTERNATIONAL SANITARY CONFERENCES, 1851–1938, at 7 (1975), https://apps.who.int/iris/bitstream/handle/10665/62873/14549_eng.pdf?sequence=1&isAllowed=y.

[2] *Id.* at 9.

[3] *See id.*

[4] *Id.*

[5] *Id.* at 22 ("In the space of nine years, the first two International Sanitary Conferences had involved a total of eleven months of fruitless discussions. Nevertheless, an important precedent had been set. In future years, an ever-increasing number of nations were to realize that an ever-increasing number of health problems called for agreement at the international level."). *See also id.* at 9, 77.

[6] *Id.* at 12.

[7] *Id.*

[8] *Id.* at 13.

[9] *Id.* at 13–14 ("...time is money").

[10] *Id.* at 65.

quarantine measures on their trade and proposed to replace quarantine with medical inspection.[11] It serves as a vivid reminder that the delicate balance between disease control and international trade advancement has been in controversy for centuries during public health crises. In addition, the members agreed to explore the possibility of establishing a notification system by which members would be informed of cholera cases.[12]

Another enduring legacy of the ISC was the creation of a permanent office for coordinating international efforts for infectious disease control and prevention.[13] At the 11th ISC, the French Government gained consensus among the member States for its proposal to establish the Office International d'Hygiène Publique ("OIHP") in 1907.[14] In 1946, the WHO incorporated the OIHP and other major international health institutions within its governance structure.[15] The ISC provided a template for the world on how to take concerted efforts to protect public health while preserving international trade. The institutional structure that grew out of these conferences laid a foundation for the WHO's development. While the WHO owed its success to the ISC, it also inherited the forebearer's fundamental weaknesses, including the lack of an enforcement system.

### *The Birth of the WHO*

In 1941, President Franklin D. Roosevelt envisioned the creation of the United Nations ("UN") to maintain post-war order.[16] A few weeks after Roosevelt's death, the founding members—United States, China, United Kingdom and Russia ("USSR")—invited 50 nations to attend the San Francisco Conference on International Organization, at which the UN

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[11] *Id.* at 69.

[12] *Id.* at 70.

[13] *Id.* at 86.

[14] *Id.*

[15] Benjamin Mason Meier, *Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Right to Health for Public Health Advancement*, 46 STAN. J. INT'L L. 1, 5 (2010). *See also* INTERNATIONAL HEALTH CONFERENCE, SUMMARY REPORT ON PROCEEDINGS MINUTES AND FINAL ACTS 5 (June 1948), https://apps.who.int/iris/bitstream/handle/10665/85573/Official_record2_eng.pdf?sequence=1&isAllowed=y; Lawrence O. Gostin & Eric A. Friedman, *Towards a Framework Convention on Global Health: A Transformative Agenda for Global Health Justice*, 13 YALE J. HEALTH POL'Y, L. & ETHICS 1, 21 n.73 (2013); Leonard J. Nelson, *International Travel Restrictions and the AIDS Epidemic*, 81 AM. J. INT'L L. 230, 233 (1987); Yanbai Andrea Wang, *The Dynamism of Treaties*, 78 MD. L. REV. 828, 857 (2019).

[16] Office of the Historian: Bureau of Public Affairs, *The United States and the Founding of the United Nations, August 1941–October 1945* (Oct. 2005), https://2001-2009.state.gov/r/pa/ho/pubs/fs/55407.htm.

Charter was signed.[17] During the initial deliberation process, there was no plan to create an international health organization.[18] However, the course of history changed during a "medical lunch" attended by Dr. Szeming Sze, an aid to the Chinese foreign minister, Dr. Karl Evang of Norway, and Dr. Geraldo De Paula Souza of Brazil.[19] At this lunch, Dr. Sze proposed the creation of a new health organization within the UN structure, which was instantly supported by Dr. Evang and Dr. Paula Souza.[20] Afterwards, Dr. Sze drafted a declaration to hold an international health conference, ultimately leading to the creation of the WHO. Dr. Sze's declaration was adopted during the San Francisco Conference after "vigorous intervention" from Chinese and Brazilian delegates.[21]

### *The WHO Constitution*[22]

From June to July of 1946, representatives from 61 countries attended the first international health conference ("IHC") in New York, which adopted the WHO Constitution.[23] The Constitution set the basis for the WHO to function as a special agency under the auspices of the UN.[24]

The WHO Constitution was enacted one year after the end of World War II, which took up to sixty million lives. [25] The world's life expectancy in 1950 was only 45.7 years.[26] Like the UN Charter, the WHO

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[17] *The History of the United Nations*, UNITED NATIONS, https://www.un.org/en/about-us/history-of-the-un (last accessed Aug. 7, 2021).

[18] *Id.*

[19] *Szeming Sze; World Health Organization Co-Founder*, L.A. TIMES (Nov. 9, 1998), https://www.latimes.com/archives/la-xpm-1998-nov-09-mn-41002-story.html.

[20] *Id.*

[21] *Id. See also* WORLD HEALTH ORGANIZATION, THE BEGINNINGS OF INTERNATIONAL ACTIVITIES, https://apps.who.int/iris/bitstream/handle/10665/126402/1947.pdf.

[22] Constitution of the World Health Organization, July 22, 1946, 62 U.S.T. 2679, 14 U.N.T.S. 185 [hereinafter *WHO Constitution*].

[23] U.S. DEP'T OF STATE, INTERNATIONAL HEALTH CONFERENCE: NEW YORK, N.Y., JUNE 19 TO JULY 22, 1946: REPORT OF THE UNITED STATES DELEGATION INCLUDING THE FINAL ACT AND RELATED DOCUMENTS v (1947), https://books.google.com/books?id=o4QN_rEtM9MC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[24] *Id.* at 1.

[25] John Graham Royde-Smith, *World War II: Costs of the War*, BRITANNICA (May 15, 2021), https://www.britannica.com/event/World-War-II/Costs-of-the-war.

[26] Max Roser et al., *Life Expectancy*, OUR WORLD IN DATA (Oct. 2019), https://ourworldindata.org/life-expectancy#life-expectancy-has-improved-globally.

Constitution strikes an uplifting tone[27] setting the organization's goal as "the attainment by all peoples of the highest possible level of health."[28] It declares that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[29] It defines health in the broadest terms as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[30]

To achieve these aspirational goals, the Constitution grants the WHO a broad mandate, *inter alia*, to "act as the directing and co-ordinating authority on international health work."[31] The Constitution sets forth the governance structure of the WHO: The World Health Assembly (WHA) is the highest level of decision-making body which consists of delegates from Members.[32] The Executive Board (Board) is responsible for carrying out the WHA's decisions.[33] On the nomination of the Board, the WHA appoints the Director-General ("DG"), the public face of the WHO. [34]

### *Members and the World Health Assembly (WHA)*

As a special agency of the UN Economic and Social Council,[35] the WHO currently has 194 Member States.[36] Members of the UN may join the WHO either by signing or accepting the WHO Constitution.[37] Other countries may be admitted to the WHO "when their application has been approved by a simple majority vote of the Health Assembly."[38] In addition, the WHO may admit territories or groups of territories as Associate Members.[39]

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[27] Sandra Knispel, *Has the World Health Organization Measured up?*, UNIV. OF ROCHESTER (May 22, 2019), https://www.rochester.edu/news-center/has-the-world-health-organization-measured-up-381282/.

[28] *WHO Constitution*, *supra* note 22, at art. 1.

[29] *Id.* at pmbl.

[30] *Id.*

[31] *Id.* at art. 2(a).

[32] *Id.* Ch. V.

[33] *Id.* at art. 28.

[34] WHO, BASIC DOCUMENTS: RULES OF PROCEDURES OF THE WORLD HEALTH ASSEMBLY 173 (49th ed. 2020), https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf.

[35] U.N. ECON. & SOC. COUNCIL, SYSTEM, https://www.un.org/en/ecosoc/about/pdf/ecosoc_chart.pdf (last visited June 19, 2021).

[36] WHO, BASIC DOCUMENTS: MEMBERS OF THE WORLD HEALTH ORGANIZATION, annex 1 at 227 (49th ed. 2020), https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf.

[37] *WHO Constitution*, *supra* note 22, at art. 4.

[38] *Id.* at art. 6.

[39] *Id.* at art. 8.

The WHA is "the supreme decision-making body" of the WHO.[40] It is composed of delegates from Members,[41] each of whom is entitled to send no more than three delegates to the WHA.[42] In addition to meeting in regular annual sessions, the WHA conducts special sessions upon the request of either the Board or a majority of the Members.[43] The WHA plays a key role in the WHO governance.

Internally, the WHA appoints the DG and the Board members and determines the policies of the WHO.[44] Furthermore, the WHA has the power to review and approve reports, the activities of the Board and the DG,[45] and supervise the WHO's annual budget and financial policies.[46] More importantly, the WHA is the legislative body of the WHO. It has the authority to adopt conventions or agreements by a two-third vote.[47] In addition, it has the authority to adopt regulations concerning requirements for sanitation and quarantining, nomenclature of diseases, standards for diagnostic procedures, and standards for the safety, purity, and potency of biological and pharmaceutical products.[48]

Externally, the WHA has a wide range of powers and responsibilities. For example, the WHA can instruct the Board and DG to communicate important health-related matters with Members, international organizations, and non-governmental organizations.[49] It also considers recommendations on health policies from the UN General Assembly, the Economic and Social Council (ECOSOC), and other international organizations.[50] In addition, it reports the work of the WHO to the ECOSOC pursuant to any agreements between the UN and the WHO.[51]

*Executive Board*

As the executive organ of the WHO, the Board is responsible for carrying out the WHA's decisions and policies.[52] Based on equitable geographical distribution, the WHA selects 34 members, each of which is entitled to designate a qualified person to serve on the Board for a term of

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[40] WHO, *Governance*, https://www.who.int/about/governance (last visited June 19, 2021).
[41] *WHO Constitution*, *supra* note 22, at art. 10.
[42] *Id.* at art. 11.
[43] *Id.* at art. 13.
[44] *Id.* at art. 18(a)–(c).
[45] *Id.* at art. 18(d).
[46] *Id.* at art. 18(f).
[47] *Id.* at art. 19.
[48] *Id.* at art. 21.
[49] *Id.* at art. 18(g).
[50] *Id.* at art. 18(i).
[51] *Id.* at art. 18(j).
[52] *Id.* at art. 28.

three years with the possibility of renewal.[53] Currently, eight Board members are from Europe, seven from Africa, six from the Americas, five from the Western Pacific, five from the Eastern Mediterranean, and three from South-East Asia.[54] The Board meets twice a year and follows its own rules of procedures.[55] The major functions of the Board include advising the WHA, making proposals to the WHA, and preparing the agenda for the WHA.[56] Most importantly, the Constitution authorizes the Board to "take emergency measures within the functions and financial resources of the [WHO] to deal with events requiring immediate action."[57] It also requires the DG and Board to coordinate in creating measures to combat epidemics, provide relief, and conduct research.[58]

*The Director ("DG") and the Secretariat*

The DG and the technical and administrative staff form an important branch of the WHO governance called the Secretariat.[59] The Constitution mandates that the DG and the staff work for the WHO, independent from influences of their home countries.

> In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organization on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them.[60]

The Constitution grants the DG the title of chief technical and administrative officer of the WHO with limited powers. These limited powers include drafting the financial statement and budget estimates of the WHO,[61] proposing the establishment of committees as he or she deems necessary,[62]or appearing in court on behalf of the WHO.[63] In practice, however, the DG is the most influential position in the WHO's

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[53] *Id.* at art. 24–25.

[54] WHO, *Composition of the Board*, https://apps.who.int/gb/gov/en/composition-of-the-board_en.html (last visited June 19, 2021).

[55] *Id.* at arts. 26–27.

[56] *Id.* at art. 28

[57] *Id.* at art. 28(i).

[58] *Id.*

[59] *Id.* at art. 30.

[60] *Id.* at art. 37.

[61] *Id.* at art. 34.

[62] *Id.* at art. 38.

[63] *Id.* at art. 77.

governance.[64] In addition to shaping agenda and directing resources, the DG also has access to the UN Secretary General, heads of states, prominent politicians, and business leaders across the world.[65] During pandemics, the DG commands public attention by promulgating the protocols for diagnosis, treatment, quarantine and isolation, social distancing guidelines, and travel restrictions.[66]

The DG is appointed by the WHA upon the Board's nomination for a renewable three-year term.[67] While the heated competition for the DG position rarely appears in the news headlines, the nomination process can be highly political.[68] Such a process is fraught with political maneuvering, horse trading, and corruption.[69] For example, during the reelection of Dr. Hiroshi Nakajima as the head of the WHO in 1992, the United States Department of State accused the Japanese government of threating to "cut off fish imports from the Maldives and coffee imports from Jamaica if those countries did not support Dr. Nakajima."[70] Laurie Garrett vividly recounted how Japanese diplomats attempted to bribe an African delegate for her vote for Dr. Nakajima. The African delegate burst out of the conference room and shouted, "You think you can buy my vote with a rug? Do you think I am that cheap?"[71]

In May 2017, the WHA chose Dr. Tedros Adhanom Ghebreyesus over the other finalists.[72] Significantly, Dr. Tedros became the first non-physician to lead the WHO in its 72-year history.[73] Dr. Tedros received a Doctorate of Philosophy ("Ph.D.") in Community Health from the University

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[64] Pien Huang, *Explainer: What Does the World Health Organization Do?*, NPR, (Apr. 28, 2020), https://www.npr.org/sections/goatsand-soda/2020/04/28/847453237/what-is-who-and-what-does-it-do.

[65] *Id.*

[66] *Id.*

[67] WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS 9–10 (49th ed. 2020) (citing *WHO Constitution*, *supra* note 22, at arts. 31–37).

[68] *The Candidates Running for WHO Director General*, BRIT. MED. J., https://www.bmj.com/who-dg (last visited June 26, 2021).

[69] Laurie Garrett, *Secret Vote on WHO Bodes Ill for Future of Global Health*, HUMANOSPHERE (May 23, 2016), https://www.humanosphere.org/world-politics/2016/05/secret-vote-on-who-bodes-ill-for-future-of-global-health/.

[70] Douglas Martin, *Hiroshi Nakajima, Leader of W.H.O., Dies at 84*, N.Y. TIMES (Jan. 28, 2013), https://www.nytimes.com/2013/01/29/world/asia/hiroshi-nakajima-leader-of-world-health-organization-dies-at-84.html?_r=0.

[71] Garrett, *supra* note 69.

[72] *Id.* (the other candidates' biographical information).

[73] Stephanie Nebehay, *Dr Tedros: The WHO Chief Leading the Fight Against the Pandemic*, REUTERS (Mar. 12, 2020), https://www.reuters.com/article/us-health-coronavirus-who-tedros/dr-tedros-the-who-chief-leading-the-fight-against-the-pandemic-idUSKBN20Z1WP.

of Nottingham, UK.[74] Before assuming the WHO's leadership role, Dr. Tedros was a career politician serving in Ethiopia's government as Minister of Health and Minister of Foreign Affairs for a decade.[75] "Dr. Tedros's time as health minister the government failed to honestly and openly report several cholera outbreaks, despite United Nations confirmation of the disease."[76]

According to the job qualifications for the DG position, medical training is not specifically required.[77] The criteria reflects that the WHO expects the DG to be a polished communicator, manager, and diplomat. However, there is not an emphasis on characteristics usually required of public officials in democratic countries, such as integrity, honesty, trustworthiness, and accountability. Thus, like other international organizations, the WHO suffers from a democratic deficit.[78] Some argue that the DG is accountable to the 194 Members of the WHO while others maintain that the DG is directly responsible to the seven billion people of the WHO member countries.[79] In fact, the DG has no obligation to report its work

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[74] *Biography: Dr Tedros Adhanom Ghebreyesus*, WHO, https://www.who.int/director-general/biography (last visited June 26, 2021).

[75] *Id.*

[76] Lawrence O. Gostin, *The World Health Organization's Ninth Director-General: The Leadership of Tedros Adhanom*, 95 MILBANK Q. 45, 459 (2017).

[77] World Health Organization 65th W.H.A Res. 65.15, at 23–25 (May 2012) (describing the qualifications of the DG: (1) A strong technical background in a health field, including experience in public health (2) Exposure to, and extensive experience in, international health; (3) Demonstrable leadership skills and experience (4)Excellent communication and advocacy skills; (5) Demonstrable competence in organizational management; (6)Sensitivity to cultural, social, and political differences; (7)Strong commitment to the mission and objectives of WHO; (8)Good health conditions required of all staff members of the organization; (9) Sufficient skill in at least one of the official working languages of the Executive Board and the Health Assembly).

[78] Upasana Singh, *The Role of Rule of Law in Democratization of the World Health Organization*, https://www.iuscommune.eu/html/activities/2020/2020-11-26/workshop_5b_Singh.pdf (last visited June 26, 2021). *See also* Andrew Moravcsik, *Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis*, *in* GOVERNMENT AND OPPOSITION 337, 338 (2004), https://www.princeton.edu/~amoravcs/library/framework.pdf; Klaus Dingwerth, *Global Democracy and the Democratic Minimum: Why a Procedural Account Alone is Insufficient*, 20 EUR. J. OF INT'L RELS. 1124, 1127 (2014); Kim R. Holmes, Asst. Sec. for Int'l Org. Affairs, Democracy and International Organizations, Remarks to the World Federalist Association and Oxfam (Dec. 5, 2003); Eugenia C. Heldt & Henning Schmidtke, *Global Democracy in Decline? How Rising Authoritarianism Limits Democratic Control over International Institutions*, 25 GLOBAL GOVERNANCE 231, 254 (2019); Magdalena Bexell et al., *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 GLOBAL GOVERNANCE 81, 101 (2010).

[79] Ilona Kickbusch et al., *How to Choose the World's Top Health Diplomat*, 355 BRIT. MED. J. (2016).

to the people of the world even though their decisions have serious impacts on global health. On the surface, the DG is elected by the 194 Members, however, many of these Members are under no obligation to explain their decision to their people. Furthermore, the 194 WHO Members vote in secret, thus the opaque system makes it even more difficult for the public to know their governments' position on the DG selection process. The lack of transparency is one of the fundamental flaws that place the legitimacy and credibility of the WHO in question. Without accountability, communication skills mean nothing if the DG does not have the courage to tell the truth to the world.

*The Budget*

The WHO's budget in 2021 is $5.84 billion,[80] which accounts for 0.365% of the United States Department of Health and Human Services' annual budget of $1.6 trillion.[81] In comparison, the Texas Health Department operates on an $87 billion annual budget, 14 times that of the WHO.[82] Even Rhode Island, the smallest state in the U.S.,[83] spends $4.2 billion on health.[84] Despite its ambition to defend the global health, the WHO can only afford to spend 75¢ annually on each of 7.8 billion people in the world.[85]

The WHO's meager budget derives from two sources: (1) assessed contributions that are mandatory membership fees based on each country's Gross Domestic Product ("GDP") and population. The WHA

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[80] World Health Organization, *Budget*, WHO https://www.who.int/about/accountability/budget (last visited June 26, 2021).

[81] *HHS FY 2022 Budget in Brief*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/budget/fy2022/index.html (last visited June 26, 2021).

[82] Eli Kirshbaum, *Health Funding in Texas's Developing FY 2022-2023 Budget*, STATE OF REFORM (May 4, 2021), https://stateofreform.com/featured/2021/05/health-funding-in-texass-developing-fy-2022-2023-budget/. California health budget is $26 billion. *The 2019-20 Budget: California Spending Plan-Health and Human Services (HHS)-Spending Plan*, LAO (Oct. 17, 2019), https://lao.ca.gov/Publications/Report/4104. Florida spends $37 billion on health. *Governor's 2020-2021 Proposed State Budget*, FLA. ASS'N OF CNTYS. (Nov. 18, 2019), https://www.fl-counties.com/governors-2020-2021-proposed-state-budget.

[83] *Fun Facts & Trivia*, R.I., https://www.ri.gov/facts/trivia.php (last visited June 26, 2021).

[84] *Fiscal Year 2021 Budget Proposal*, R.I. DEP'T OF HEALTH & HUM. SERVS., http://www.omb.ri.gov/documents/Prior%20Year%20Budgets/Operating%20Budget%202021/BudgetVolumeII/0_Complete%20Volume%20II%20-%20Health%20and%20Human%20Services.pdf (last visited June 26, 2021).

[85] *Current World Population*, WORLDOMETER, https://www.worldometers.info/world-population/ (last visited June 26, 2021).

approves the amounts that each member must pay.[86] The assessed contributions account for 20% of the WHO's budget.[87] In the past decade, the United States has paid an average of $110 million each year, making up for one fifth of all member state assessed contributions;[88] (2) voluntary contributions account for nearly 80% of the WHO's total budget,[89] which are donated by member states and WHO's partners.[90] Through various accounts,[91] the United States made $300 million in voluntary contributions in 2019.[92] In addition to the U.S. government, the Bill and Melinda Gates Foundation plays a crucial role in funding the WHO through voluntary contribution. The Foundation contributed to 13% of the WHO's total budget during the 2016-2017 period.[93] After President Trump threatened to halt the U.S. government funding to the WHO, the Gates Foundation increased its pledge to the WHO from $100 million to $250 million in 2020.[94]

Depending on whether the donors set restrictions on spending, the voluntary contributions can be subdivided into three categories:[95] (a) Core voluntary contributions ("CVC") make up 3.9% of all voluntary contributions. Donors of CVC give the WHO full discretion on how the donations

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[86] *How WHO is Funded*, WHO, https://www.who.int/about/funding (last visited June 26, 2021).

[87] *Id.*

[88] *The U.S. Government and the World Health Organization*, KAISER FAM. FOUND., (Jan. 25, 2021), https://www.kff.org/coronavirus-covid-19/fact-sheet/the-u-s-government-and-the-world-health-organization/.

[89] *Id.* at Figure 2.

[90] *How WHO is Funded*, *supra* note 86.

[91] LUISA BLANCHFIELD & TIAJI SALAAM-BLYTHER, CONG. RSCH. SERV., IN11369, U.S. FUNDING TO THE WORLD HEALTH ORGANIZATION 2 (Apr. 30, 2020), https://fas.org/sgp/crs/row/IN11369.pdf ("The United States provides voluntary contributions to WHO for specific activities through several accounts, including USAID's Global Health Programs and International Disaster Assistance accounts, the Department of Health and Human Services (HHS)/Centers for Disease Control and Prevention's Global Health account, and the State Department's Migration and Refugees account. Congress appropriates overall funding for each of these accounts, while the executive branch determines how the funds are allocated based on global health needs and U.S. policy priorities. In recent years, the majority of funding has been allocated through USAID and HHS-related accounts for activities focused on infectious disease control, malaria control, and emergency response, among others.").

[92] *The U.S. Government and the World Health Organization*, *supra* note 88, at Figure 2.

[93] Deidre McPhillips, *Gates Foundation Donations to WHO Nearly Match Those From U.S. Government*, USNEWS (May 29, 2020), https://www.usnews.com/news/articles/2020-05-29/gates-foundation-donations-to-who-nearly-match-those-from-us-government.

[94] *Id.*

[95] *How WHO is Funded*, *supra* note 86.

are used for its programs. However, only very limited number of donors are willing to provide the WHO with free rein on how to use the funds.[96] (b) Thematic and strategic engagement funds ("TSEF") represent 6% of total voluntary contributions. Donors of TSEF provide the WHO with some degree of flexibility in allocating the funds. After meeting the donors' requirement for reporting and accountability, the WHO has discretion in choosing effective and efficient means to carry out the donors' priorities.[97] (c) Specified voluntary contributions ("SVC") are tightly earmarked funds, which account for 90.1% of the total voluntary contributions. The WHO must use the funds within the designated programmatic or geographical locations and within designated the time frames.[98]

*Major Achievements*

Despite budget constraints and lack of enforcement power, some of the WHO's achievements on disease prevention and control are remarkable. Its most notable success is the eradication of Smallpox, a devastating viral disease that had been inflicting enormous pain and sufferings for at least 3,000 years.[99] In the 20th century alone, approximately 300 million people died of Smallpox.[100] In 1959, the WHO launched a campaign for the eradication of smallpox in the world. [101] Due to lack of funds, personnel, and sufficient vaccine doses, the WHO failed to achieve the ambitious goal.[102] In 1967, the WHO resumed the eradiation campaign by focusing on disease surveillance, nonmedical intervention, and vaccination.[103] Its strenuous pursuit of the virus for more than two decades finally paid off. On May 8, 1980, the WHO declared that Smallpox was successfully eradicated.[104]

In addition, the WHO's continuous efforts to provide treatment of less known communicable diseases have saved lives and improve life quality.[105] For example, the WHO has made progress in treating Tuberculous

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Commemorating Smallpox Eradication – A Legacy of Hope, for COVID-19 and other Diseases*,

News Release, WORLD HEALTH ORG., (May 8, 2020), https://www.who.int/news/item/08-05-2020-commemorating-smallpox-eradication-a-legacy-of-hope-for-covid-19-and-other-diseases.

[100] *Id.*

[101] *History of Smallpox*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/smallpox/history/history.html (last reviewed Feb. 20, 2021).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

(TB), often known as a silent killer.[106] Coordinating with member countries and partners, the WHO extended TB care to 14 million people in 2018 and 2019.[107]

Equally important, the WHO has acted as an indispensable leader in global health through exercising its unique power in "shar[ing] data between countries including standards, guidelines, and key health information."[108] Based on the idea of using national institutions for international purposes, the WHO has designated more than 800 Collaborating Centers in over 80 countries.[109] These centers focusing on a wide range of health issues: nursing, occupational health, communicable diseases, nutrition, mental health, chronic diseases and health technologies.[110] "There are 8,106 (plus 1,927 consultants and 3,606 special service agreements) working for WHO around the world; many of these are US nationals."[111] Through the Collaborating Centers, the WHO "is able exercise leadership in shaping the international health agenda."[112] In return, the countries that host these centers can also provide expertise to the WHO and shape its decision making processes. There are 82 WHO Collaborating Centers in the United States, 21 of which are at the CDC. For example, the CDC's World Health Organization (WHO) Collaborating Center for Surveillance, Epidemiology and Control of Influenza plays a crucial role in pandemic prevention.[113]

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[106] Jezza Neumann & Rebecca Stewart, *TB Silent Killer, Frontline S2014 Ep17* (Mar. 25, 2014) (transcript on file with PBS), https://www.pbs.org/wgbh/frontline/film/tb-silent-killer/transcript/.

[107] WORLD HEALTH ORGANIZATION, GLOBAL TUBERCULOSIS REPORT v (2020), https://apps.who.int/iris/bitstream/handle/10665/336069/9789240013131-eng.pdf.

[108] Devi Sridhar & Lois King, *US Decision to Pull Out of World Health Organization*, 370 BRIT. MED. J. (2020), https://www.bmj.com/content/370/bmj.m2943.

[109] *Collaborating Centres*, WHO, https://www.who.int/about/partnerships/collaborating-centres.

[110] *Id.*

[111] Amanda Glassman & Brin Datema, *What is World Health Organization Without the United States?*, CTR. FOR GLOB. DEV., (May 26, 2020), https://www.cgdev.org/blog/what-world-health-organization-without-united-states.

[112] *Collaborating Centres*, *supra* note 109.

[113] *CDC's World Health Organization (WHO) Collaborating Center for Surveillance, Epidemiology and Control of Influenza*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/weekly/who-collaboration.htm (last reviewed Dec. 6, 2019).

*The International Health Regulations*

The Constitution authorizes the WHA to regulate various important issues on global health matters.[114] State Parties are given ample opportunities to transform the WHO regulations into domestic legal systems.[115] While issuing regulations, the WHO notifies Members of a time frame in which they can object or make reservations to the regulations. If Members do not respond to the WHO's notice, the regulations take effect automatically.[116] For Members who have made reservations, the regulations may still become effective if the reservations do not conflict with the overall purpose of the regulations.[117] For Members who have timely made reservations, the regulations could still come into effect if the reservations do not conflict with the overall purpose of the regulations.[118] Unfortunately, the WHO has not fully utilized such powerful authorization. During its 75-year history, it has issued only a few regulations, including the International Health Regulations ("IHR").

In 1969, the Assembly adopted the IHR to replace the International Sanitary Regulations of 1951.[119] Initially, the 1969 IHR covered six "quarantinable diseases," but the scope of the coverage was reduced to only three diseases: cholera, plague, and yellow fever.[120] Under the 1969 IHR,

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[114] *WHO Constitution*, *supra* note 22, at art. XXI. (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

[115] *Emergencies: Ten Things you need to do to Implement the International Health* Regulations, WHO (May 26, 2014), https://www.who.int/news-room/q-a-detail/emergencies-ten-things-you-need-to-do-to-implement-the-international-health-regulations ("An adequate legal framework to support and enable all of the varied IHR State Party activities is needed in each country. In some countries, giving effect to the IHR within domestic jurisdiction and national law requires that the relevant authorities adopt implementing legislation for some or all of the relevant rights and obligations for States Parties . . . . States Parties to the IHR should consider assessing their relevant existing legislation to determine whether they may be appropriate for revision in order to facilitate full and efficient implementation of the Regulations.").

[116] WORLD HEALTH ORGANIZATION, BASIC DOCUMENTS 7 (49th ed. 2020) (citing *WHO Constitution*, *supra* note 22, at art. XXII).

[117] L.O. Gostin et al., *The Normative Authority of the World Health Organization*, 129 PUBLIC HEALTH 854, 856 (2015).

[118] *Id.*

[119] Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264, 266 (2016).

[120] *Id.*

if one of the listed diseases occurred, Members were obligated to notify the WHO.

*The 2005 IHR*

The purpose of the IHR is to "prevent, protect against, control and provide a public health response to the international spread of disease."[121] To fulfill this purpose, the IHR calls for a balanced approach to address the tension between disease control and international trade. Thus, disease control measures should be commensurate with the public risks posted by the spread of disease as to "avoid unnecessary interference with international traffic and trade."[122]

The guiding principle for implementing the IHR is to respect "the dignity, human rights and fundamental freedom of persons"[123] and to protect "all people of the world from the international spread of disease."[124] While member countries have the sovereign rights to enact public health laws, they should abide by the principles of international law, specifically the UN Charter while implementing their regulations.[125]

*National IHR Focal Points*

The SARS epidemic exposed the serious flaws in the IHR and prompted the WHO to revisit its approach to international health emergencies.[126] "When WHO needed to reach the global community to alert it to the emergence of SARS, it needed to hold a press conference on a Saturday morning. No mechanism was in place for communicating with member States in a timely fashion."[127]

To avoid information blockage, the revised IHR instituted both IHR Focal Points in each State Party and WHO IHR Contact Point ("WCP") in each of the six WHO's regional offices. The purpose was to provide an additional channel for the WHO to monitor outbreaks of diseases and have State Parties implement the IHR in real time. Being fully sensitive to national sovereignty concerns, the IHR require each State Party either to designate an existing office as a National IHR Focal Point ("NFP") or to establish an office for the same purpose. NFPs are by no means WHO's field offices or embassies in member countries. Instead, they are points of

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[121] International Health Regulations, art. 2, May 23, 2005, 2509 U.N.T.S. 79.

[122] *Id.*

[123] *Id.* at art. 3.

[124] *Id.*

[125] *Id.*

[126] Isabelle Nuttall & Christopher Dye, *The SARS Wake-Up Call*, 339 SCI. 1287–88 (2013).

[127] Rebecca Katz, *Use of Revised International Health Regulations During Influenza A (H1N1) Epidemic, 2009*, 15 EMERGING INFECTIOUS DISEASES 1165, 1169 (2009).

communication for the WHO to interact with State Parties in real time, especially during crises. "Many NFPs either are not well trained in IHR implementation or—more often—are not properly tasked to routinely communicate with WHO headquarters"[128] In addition, since the NFPs are an integral part of the host countries' government apparatuses, they are unlikely to act independently and provide objective and accurate information to the WHO when the national interests conflict with those of the global health.

*Surveillance*

The IHR require State Parties to "develop, strengthen and maintain" core capacities to "detect, access, notify and report events no later than five years after the regulations take effect on June 15, 2007."[129]

A public international law usually sets a general goal and allows countries to choose suitable means to achieve the mandates.[130] The IHR, however, take a hands-on approach in terms of mapping out what State Parties must accomplish to comply with these regulations. The Annex not only enumerates core capacities that State Parties must have, but it also provides detailed guidelines for each of the three levels of heath administrations to follow.

At the local community level, the IHR demands medical workers or institutions have the capacity to "detect events involving disease or death above levels for the particular time and place in all areas within the territory of the State Party."[131] Then, the medical workers or institutions should immediately "report all available essential information" to healthcare officials at the next level or to the national health authorities.[132] The essential information includes "clinical descriptions, laboratory results, sources and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed."[133] Upon finding the event, the medical workers or institutions must have the capacity to take "preliminary control measures immediately."[134]

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[128] Gostin & Katz, *supra* note 119, at 270.

[129] International Health Regulations, *supra* note 121, at art. 5.

[130] The European Union uses directives to lay down certain results that must be achieved but each Member State is free to decide how to transpose directives into national laws. *Difference Between a Regulation, Directive and Decision*, U.S. MISSION TO THE EUR. UNION, https://www.usda-eu.org/eu-basics-questions/difference-between-a-regulation-directive-and-decision/ (last modified Dec. 21, 2016).

[131] International Health Regulations, *supra* note 121, at annex 1, art. 4.

[132] *Id.*

[133] *Id.*

[134] *Id.*

The health administration must have the capacity to confirm the status of the events reported from the local level or to take additional control measures to prevent the spread of the disease. Furthermore, the health administration must have the capacity to promptly evaluate the reported events. If it is deemed urgent, the local-level health administration must make a report to the national health administration. The report must specify the serious health impacts and/or unusual or unexpected nature of the disease's high potential for spread.[135]

Upon receiving the reports from the lower levels, the national health administration must have the capacity to evaluate the reported events within 48 hours.[136] The IHR provides a four-factor test for the national health administration to analyze the situation and decide whether to make a report to the WHO immediately:

> Is the public heath impact of the event serious?
>
> Is the event unusual or unexpected?
>
> Is there a significant risk of international spread?
>
> Is there a significant risk of international travel or trade restrictions?

As the following illustration shows,[137] when the national health administration determines that the event meets any of the four factors (the decision instrument), it must report the event to the NFP within 24 hours "through the most efficient means of communication."[138] Essentially, the IHR entrusts the national health administration with making a preliminary assessment whether the reported event constitutes a public health emergency of international concern ("PHEIC").[139] Although the national health administration does not have the authority to declare a PHEIC, the first hand materials it provides would facilitate accurate evaluation of the event by the WHO.

In fact, the IHR innocently assumes that the national health administration will timely provide the WHO with "all relevant public health information."[140] The information includes "case definitions, laboratory results, source and type of the risk, number of cases and deaths, [and] conditions affecting the spread of the disease and the health measures employed; and report."[141] In addition, the IHR anticipates that there are situations where the national health administration may face challenges in controlling the spread of the public health emergency. Therefore, the IHR

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[135] *Id.* at annex 1, art. 5.
[136] *Id.*
[137] *Id.* at annex 2.
[138] *Id.* at art. 6.
[139] *Id.*
[140] *Id.* at art. 7.
[141] *Id.* at art. 6 (2).

requires the State Parties to report its difficulties so that the WHO can timely provide support.[142] The IHR expects the national health administration to provide the WHO with evidence of the impact of the event. In addition, the IHR encourages State Parties to communicate with the WHO even if there is insufficient information to meet any factor of the four-factor test. State Parties may also seek the WHO's assistance in dealing with an event that occurred in its territory.[143]

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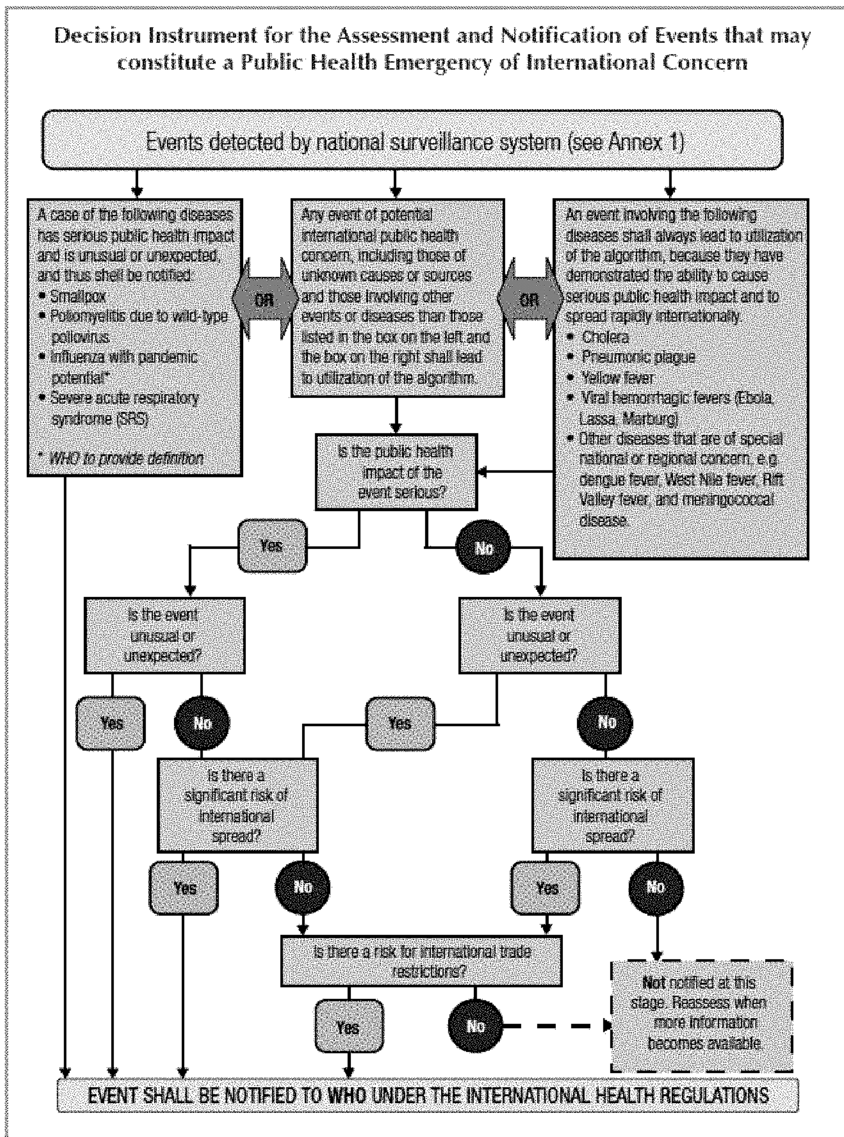
[142] *Id.*
[143] *Id.* at art. 8.




By designing the reporting mechanism, the IHR drafters assumed the State Parties would provide the WHO with prompt, accurate and complete information about the public health emergencies occurring within their territories. However, the drafters also anticipated that some State Parties may not be willing to report public health emergencies to the WHO for fear of trade and travel embargos by other countries resulting from negative publicity. As a result, the drafters designed another channel for the WHO to gather necessary information even if State Parties refused to fulfil their duty to report. Under the title of "Other Reports," the IHR include sources other than official notifications or consultations made by the State

Party.[144] Once the WHO obtains the unofficial information about the occurrence of a PHEIC, it proactively contacts the State Party requesting it to verify whether a PHEIC indeed occurred.[145] The State Party is obligated to respond to the WHO's verification request within twenty-four hours.[146] In its response, the State Party must provide "available public health information on the status of events referred to in WHO's request" and a preliminary assessment of whether the event referred to in the unofficial report could constitute a PHEIC.[147] Through this innovative provision, the IHR opened the door to collect information from non-state actors such as medical workers, non-governmental organizations ("NGOs"), and even the general public. The provision makes it difficult for State Parties to hide valuable information regarding public health emergencies. It will play an increasingly important role in collecting information about PHEICs in the age of social media. Nevertheless, the authoritarian regimes can still bypass this provision by censoring social media, punishing whistleblowers, controlling NGOs, and monitoring the public.

In summary, the WHO can gather further information about a possible PHEIC either through official notification from the State Party (Articles 6–8), or through unofficial channels, such as social media or whistle blowers (Article 9). Then, will the WHO immediately announce the information to all State Parties and the public? How will it use the information? These are complicated questions to answer. It would set an undesirable precedent for the WHO to release all the reports immediately when some could turn out to be false alarms. The negative impact on trade and national image associated with the WHO announcement would be devastating and irreversible for the reporting State Party. No State Party would have an incentive to comply with the IHR in future health crisis. In addition, false alarms would damage the WHO's reputation as the trusted guardian of global health. Within their constraints, the IHR walks a fine line between encouraging the State Party at issue to immediately report its material information to the WHO and avoiding being perceived as handling the information at the expense of the reporting Party while striving to protect global health. Thus, it is understandable that Article 11 devotes several subsections to vacillating between the no-release-without-consent principle and exceptions to it.

As a principle, Article 11(2) requires the WHO to use the information it receives "for verification, assessment and assistance purposes."[148] Without the consent from the reporting State Party, the WHO is not permitted to "make this information generally available to other States [sic]

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[144] *Id.* at art. 9.
[145] *Id.* at art. 10.
[146] *Id.*
[147] *Id.*
[148] *Id.* at art. 11(2).

Parties."[149] However, the subsections lay out several exceptions to the no-release-without-consent principle: (a) when the DG has determined that the reported event constitutes a PHEIC; (b) when the WHO has confirmed that the reported event causes the international spread of an infection or contamination; (c) when because of the nature of the event, the measures to control the situation can only be successful with the release of the information; (d) when the reporting State Party is incapable of carrying out necessary measures to bring the spread under control; or (e) when the magnitude of the infection or contamination warrants the release of the information to avert serious damage to international trade and travel. If one of the exceptions apply, the WHO may share the reported information with other State Parties. If the information has already become publicly available, the WHO may release it to the public as well.[150]

How will the WHO use the information? The IHR obligate the WHO to collaborate with the State Party in assessing whether the event can spread widely, causing interruption of international traffic, and whether the measures that have been taken are adequate to control the event. In some situations, the State Party and the WHO are incapable of controlling the potential spread without enlisting international assistance. However, not every State Party welcomes such assistance because the unwanted international attention can cause negative publicity and produce a stigmatizing effect. To preserve the State Party's incentive for cooperation, Article 10(3) of the IHR conditions the WHO's offer of assistance upon the State Party's request. In other words, the State Party can choose to reject the WHO's support.

The IHR does provide an option for the WHO to intervene if the State Party refuses international assistance. Article 10(4) permits the WHO to share information with other State Parties if the event poses serious public health risk. The conundrum is that without the opportunity to enter the affected area and provide assistance, the WHO is unable to follow the situation in real time. Thus, even with the option to inform other State Parties, in such a case the WHO simply has nothing further to share. For example, in 2007, Indonesia health officials refused to share H5N1 bird flu samples with the WHO, which substantially diminished the organization's capacity to monitor the virus's mutations.[151] The Indonesian government said that it withheld the samples to extract a concession from the WHO, that it would provide affordable vaccines to the country.[152]

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[149] *Id.*

[150] *Id.* at art. 11(4).

[151] Peter Gelling, *Indonesia Defiant on Refusal to Share Bird Flu Samples*, N.Y. TIMES (Mar. 26, 2007), https://www.nytimes.com/2007/03/26/world/asia/26cnd-flu.html.

[152] *Id.*

*The PHEIC Determination*

After receiving the reports from a State Party (or from other sources), the most important step the WHO will take is to determine whether the reported event constitutes a PHEIC. A PHEIC is "an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response."[153] The IHR provides two ways for the DG to initiate the procedure for the PHEIC determination according to Article 49.[154] First, if the DG has reached a preliminary conclusion based on the IHR criteria that a PHEIC is occurring, the DG will consult with the State Party to seek their agreement about the preliminary determination. With the State Party's consent, the DG will convene the Emergency Committee to review the information regarding the event according to the procedures set forth in Article 49. If the DG and the State Party fail to reach an agreement within forty-eight hours, the DG will activate the Article 49 procedure. The DG plays a crucial role in reaching a preliminary decision, negotiating with the State Party, and initiating the Article 49 procedure.

*The Emergency Committee*

After receiving the information from the State Party, and if the DG believes that a PHEIC is occurring, the DG will select experts from the IHR's expert roster[155] and form an Emergency Committee ("EC").[156] The DG will then set the agenda for the EC meeting and provide it with the information on the event gathered from the State Party and the DG's temporary recommendation. During the EC meeting, the State Party at issue is given a chance to present its view of the situation, but it does not have the right to postpone the process. After the deliberation, the EC will present its assessment and recommendations to the DG, who will make the final decision on whether the reported event constitutes a PHEIC. Then, the DG will inform the State Parties of his or her final decision, including

[153] International Health Regulations, *supra* note 121, at art. 1.

[154] *Id.* at art. 12.

[155] *Id.* at art. 48(2).

[156] *Id.* ("The Emergency Committee shall be composed of experts selected by the Director-General from the IHR Expert Roster and, when appropriate, other expert advisory panels of the Organization. The Director-General shall determine the duration of membership with a view to ensuring its continuity in the consideration of a specific event and its consequences. The Director-General shall select the members of the Emergency Committee on the basis of the expertise and experience required for any particular session and with due regard to the principles of equitable geographical representation. At least one member of the Emergency Committee should be an expert nominated by a State Party within whose territory the event arises.").

recommendations the DG puts together with the views of the EC. This occurs before the information is made available to the public.

In determining whether an event constitutes a PHEIC, the DG considers the following factors:[157]

> (a) information provided by the State Party;
>
> (b) the decision instrument contained in Annex 2 [the Four-Factor Test];
>
> (c) the advice of the Emergency Committee;
>
> (d) scientific principles as well as the available scientific evidence and other relevant information; and
>
> (e) an assessment of the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic.

If the DG has determined that a PHEIC has occurred, he or she will issue temporary recommendations to prevent or reduce the spread of the disease from the State Party at issue to other countries. Depending on the nature of the emergency, the temporary recommendations may include health measures that will have substantial impact on international travel and trade.[158]

*Relationship Between IHR and National Health Measures*

The IHR does not preclude State Parties from taking health measures based on their own national health laws if the measures can "achieve the same or greater level of health protection than WHO recommendations."[159] The national measures should "not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection."[160]

Under Article 43 of the IHR, States Parties implementing additional health measures that significantly interfere with international traffic (refusal of entry or departure of international travelers, baggage, cargo, containers, conveyances, goods, and the like, or their delay, for more than twenty-four hours) are obliged to send to WHO the public health rationale and justification within forty-eight hours of their implementation. WHO will review the justification and may ask countries to reconsider their measures. WHO is required to share with other State Parties the information about measures and the justification received.[161]

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[157] *Id.* at art. 12(4).
[158] *Id.* at art. 15(2).
[159] *Id.* at art. 43(1)(a).
[160] *Id.* at art. 43(1).
[161] *Id.* at art. 43.

*The WHO's Delayed PHEIC Declaration During the COVID-19 Pandemic*

On December 30, 2019, Dr. Li Wenliang, an ophthalmologist at the WCH, sent a picture of a lab report to a group of friends through WeChat, the most popular social media platform in China. [162] He wrote "Seven SARS cases have been confirmed. All the cases have connections with the Huanan Fruit and Seafood Market. The patients are treated in isolation at the WCH's Houhu campus."[163] Four days later, the police arrested Dr. Li, along with seven other doctors, for spreading false information and disturbing the social order.[164] The police issued an official warning that Dr. Li would face serious criminal penalties if he refused to cooperate with the police.[165]

On December 31, 2019, WHO's Country Office in China noticed a "media statement by the Wuhan Municipal Health Commission from their website on cases of 'viral pneumonia' in Wuhan."[166] It immediately alerted WHO's IHR Focal Point in the West Pacific Regional Office of the development. On the same day, WHO's Epidemic Intelligence from Open Sources ("EIOS") platform was alarmed by a media report on ProMED hosted by the International Society for Infectious Diseases about the same cluster of unknown pneumonia cases found in Wuhan.[167] The Country Office alerted the IHR Focal Point in the WHO Western Pacific Regional Office of the new development.[168]

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[162] *"Chuanyao" Bei Xunjie Yisheng: Wo Renwei Wo Bu Shuyu Chuanyao Woshi Zai Tixing ("传谣"被训诫医生:我认为我不属于传谣 我是在提醒) [The disciplined doctor said, "I did not spread false information. I just wanted to sound an alarm"]*, Xinjing Bao (新京报) [Beijing News] (Jan. 31, 2020), https://news.163.com/20/0131/15/F47QPEJM0001899O.html

[163] *Id.*

[164] Paul Mozur, *Coronavirus Outrage Spurs China's Internet Police to Action*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/business/china-coronavirus-internet-police.html; Alice Su, *A doctor was arrested for warning China about the coronavirus. Then he died of it*, L.A. TIMES (Feb. 6, 2020), https://www.latimes.com/world-nation/story/2020-02-06/coronavirus-china-xi-li-wenliang.

[165] *"Chuanyao"*, *supra* note 162.

[166] WHO, *Timeline: WHO's COVID-19 Response*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-0 (click on Dec. 31, 2019).

[167] Yicai Dazheng (一财大政), *Wuhan Buming Yuanyin Feiyan Yi Geli Jiance Jieguo Jiang Diyi Shijian Gongbu (武汉不明原因肺炎已隔离 检测结果将第一时间公布) [A case of unexplained pneumonia is treated in isolation in Wuhan, the test result will be released soon]*, YICAI.COM (财网) (Dec. 31, 2019), https://finance.sina.cn/2019-12-31/detail-iihnzahk1074832.d.html.

[168] WHO, *supra* note 166.

On January 1, 2020, the WHO asked the Chinese health authorities to explain the reported cluster of atypical pneumonia cases.[169] The Chinese government confirmed the report on January 3, 2020[170] The United States CDC received the information about the outbreak on the same day.[171] The WHO claimed that it shared the information through Event Information System on January 5, 2020, but that the system was inaccessible to the public.[172]

On January 22, 2020, a day before the lockdown in Wuhan, the DG called the first EC meeting to discuss whether the WHO should declare the event a PHEIC.[173] By that time, the number of cases had increased to 557, and the virus had been identified in other countries, including Japan, Thailand, and Korea.[174] The Committee warned that "cases may appear in any [other] countries."[175] The EC urged China to "provide more information on cross-government risk management measures" and to "continue to share full data on all cases."[176] The committee did not advise the DG to declare the event a PHEIC. It reasoned:

> In the face of an evolving epidemiological situation and the restrictive binary nature of declaring a PHEIC or not, WHO should consider a more nuanced system, which would allow an intermediate level of alert. Such a system would better reflect the severity of an outbreak, its impact, and the required measures, and would facilitate improved international coordination, including research efforts for developing medical counter measures.[177]

On January 30, 2020, the DG called the second EC meeting in Geneva. [178] The Committee lauded China for "the leadership and political

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[169] *Id.*

[170] *Id.*

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

[172] *Listings of WHO's response to COVID-19*, WHO (Dec. 28, 2020), https://www.who.int/news/item/29-06-2020-covidtimeline.

[173] *Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, WHO (Jan. 23, 2020), https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus*

commitment of the very highest levels of Chinese government, their commitment to transparency, and the efforts made to investigate and contain the current outbreak."[179] The Committee believed it was "still possible to interrupt virus spread, provided that countries put in place strong measures to detect disease early, isolate and treat cases, trace contacts, and promote social distancing measures commensurate with the risk."[180] At the end of the report, the Committee recommended that the DG declare a PHEIC. In reaching this conclusion, the Committee sounded profusely apologetic by characterizing the declaration as being "in the spirit of support and appreciation for China, its people, and the actions China has taken on the front lines of this outbreak."[181] On the same day, the DG officially declared the outbreak of the coronavirus in China a PHEIC after he praised China for its commitment to transparency.[182]

## II. THE WHO'S DELAYED RESPONSE NOT A CAUSE FOR THE DEVASTATING RESULTS IN THE UNITED STATES

While the WHO's delay in declaring the outbreak of the coronavirus in Wuhan a PHEIC is indefensible, the U.S. government's response to the pandemic has also been extremely reckless. To deflect from the criticism of his handling of the health crisis, President Trump blamed the WHO for conceding to China and causing the United States to miss the early signs of the pandemic. After cutting funding for the WHO, the Trump Administration declared in July 2020 that the United States would withdraw from WHO membership.[183] The withdrawal declaration instantly prompted a backlash from U.S. public health experts and law professors, who claimed

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*(2019-nCoV)*, WHO (Jan. 30, 2020), https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, WHO (Jan. 30, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov).

[183] Scott Neuman, *In U.N. Speech, Trump Blasts China And WHO, Blaming Them For Spread Of COVID-19*, NPR (Sept. 22, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/09/22/915630892/in-u-n-speech-trump-blasts-china-and-who-blaming-them-for-spread-of-covid-19; Thomas J. Bollyky & Jeremy Konyndyk, *It's not the WHO's fault that Trump didn't prepare for the coronavirus*, WASH. POST (Apr. 14, 2020), https://www.washingtonpost.com/outlook/2020/04/14/trump-who-coronavirus-response/; Donald G. McNeil Jr. & Andrew Jacobs, *Blaming China for Pandemic, Trump Says U.S. Will Leave the W.H.O.*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/health/virus-who.html.

the move was not only unconstitutional but could also threaten the health and security of Americans. Scholars argued that the health and safety of Americans depends on whether the global health can be well maintained because viruses know no borders.[184]

The United States has the highest per capita expenditure on health care in the world.[185] Equipped with the most advance technology and expertise, the United States Centers for Disease Control and Prevention ("CDC") set gold standards for creating tests and designing therapeutics in the previous pandemics. After the 2012 outbreak of Middle East Respiratory Syndrome ("MERS"), the CDC helped developing nations "improve disease surveillance, build better laboratories and train epidemiologists."[186] When the WHO declared an outbreak of the novel coronavirus as a public health emergency of international concern on January 31, 2020, health experts perceived the United States to be the most prepared nation in the world—one that did not need any assistance.[187] This aura of invincibility also grew among the President and his public health officials as they watched the virus spreading rapidly in China and other countries. When the reality set in by early March 2020, the American public and medical professionals quickly came to terms with the fact that the U.S. healthcare system was not as prepared for the pandemic as those of other developing countries. As of this writing, 16% of the 3.7 million world's total COVID-19 related deaths occurred in the United States, which has only 4% of the world's population.[188] The United States disproportionally bears the impact of the pandemic.

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[184] Lawrence O. Gostin et al., *Letter to Congress on WHO Withdrawal from Public Health, Law and International Relations Leaders*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. (June 30, 2020), https://oneill.law.georgetown.edu/letter-to-congress-on-who-withdrawal-from-public-health-law-and-international-relations-leaders/.

[185] Rabah Kamal et al., *How does health spending in the U.S. compare to other countries?*, HEALTH SYS. TRACKER (Dec. 23, 2020), https://www.healthsystemtracker.org/chart-collection/health-spending-u-s-compare-countries/#item-start.

[186] Betsy McKay & Phred Dvorak, *A Deadly Coronavirus Was Inevitable. Why Was No One Ready?*, WALL. ST. J. (Aug. 13, 2020), https://www.wsj.com/articles/a-deadly-coronavirus-was-inevitable-why-was-no-one-ready-for-covid-11597325213.

[187] Betsy McKay, *How Coronavirus Overpowered the World Health Organization*, WALL. ST. J. (Aug. 28, 2020), https://www.wsj.com/articles/the-who-was-built-to-guard-global-health-it-was-too-weak-for-coronavirus-11598625537.

[188] *Coronavirus Research Center*, JOHNS HOPKINS UNIV., https://coronavirus.jhu.edu/ (last visited June 5, 2021). *See also* Scottie Andrew, *The US has 4% of the world's population but 25% of its coronavirus cases*, CNN (June 30, 2020), https://www.cnn.com/2020/06/30/health/us-coronavirus-toll-in-numbers-june-trnd/index.html.

On January 3, 2020, the U.S. CDC alerted Mr. Alex Azar, the secretary of the Health and Human Services ("HHS") of the coronavirus threat.[189] On January 20, 2020, three days before the Wuhan lockdown,[190] the CDC identified the first COVID-19 case in the State of Washington.[191] In the United States, as of this writing, there are 33 million confirmed COVID-19 cases and nearly 600,000 deaths attributed to this devastating virus.[192] The WHO's delayed action was not a factual cause of the devastating consequences experienced in the United States.[193]

Even if the WHO had declared the virus a PHEIC at an earlier stage, President Trump would not have heeded the warning nor taken effective measures to mitigate the pandemic. On January 29, 2020, Peter Navarro, President Trump's economic advisor, warned his colleagues in the White House that "the novel coronavirus could take more than half a million American lives and cost close to six trillion dollars."[194] On February 23, Peter Navarro again alerted the President to the devastating consequences of the virus: "There is an increasing probability of a full-blown COVID-19 pandemic that could infect as many as 100 million Americans, with a loss of life of as many as 1-2 million souls."[195] Despite the urgent warnings, President Trump deliberately downplayed the severity of the pandemic and falsely claimed it to be comparable to the flu.[196]

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[189] Ballhaus & Armour, *supra* note 171,

[190] *Wuhan coronavirus: From silent streets to packed pools*, BBC (Aug. 18, 2020), https://www.bbc.com/news/world-asia-china-53816511.

[191] *See* Jennifer Harcourt et al., *Severe Acute Respiratory Syndrome Coronavirus 2 from Patient with Coronavirus Disease, United States*, CDC (June, 2020), https://dx.doi.org/10.3201/eid2606.200516; *Coronavirus outbreak: doctors use robot to treat first known US patient*, THE GUARDIAN (Jan. 22, 2020), https://www.theguardian.com/us-news/2020/jan/22/coronavirus-doctors-use-robot-to-treat-first-known-us-patient; *see also* Nicole Chavez & Nadia Kounang, *A man diagnosed with Wuhan coronavirus near Seattle is being treated largely by a robot*, CNN (Jan. 23, 2020), https://www.cnn.com/2020/01/23/health/us-wuhan-coronavirus-doctor-interview/index.html.

[192] *Coronavirus Research Center*, *supra* note 188.

[193] VINCENT JOHN & CHENGLIN LIU, STUDIES OF AMERICAN TORTS LAW 410 (6th ed. 2018) (". . . the issue of causation involves a two-step inquiry. The first step asks whether in fact there was a connection between the allegedly tortious conduct and the plaintiff's injury. One way (but not the only way) to meet this requirement is to show that 'but for' the defendant's conduct the harm would not have occurred.").

[194] Jonathan Swan & Margaret Talev, *Navarro memos warning of mass coronavirus death circulated in January*, AXIOS MEDIA (Apr. 7, 2020), https://www.axios.com/exclusive-navarro-deaths-coronavirus-memos-january-da3f08fb-dce1-4f69-89b5-ea048f8382a9.html.

[195] *Id.*

[196] *See* Rebecca Shabad, *Fresh out of Walter Reed, Trump compares Covid to the flu. Experts say he's flat wrong*, NBC NEWS (Oct. 6, 2020),

During an interview with Bob Woodward, the President revealed:

> ". . . [S]ome startling facts came out. It's not just old, older, young people too, plenty of young people [who are vulnerable to the disease]..."[197] "I wanted to always play it down, I still like playing it down because I don't want to create a panic.""I wanted to always play it down, I still like playing it down because I don't want to create a panic."[198]

President Trump's top priority then was on how to get reelected, not on seriously fighting the virus. The President worried that openly admitting to the existence of a pandemic would send the stock market to a free fall, which would hurt his job performance ratings. In addition, the President initially did not want to irritate China, which had just reluctantly agreed to purchase farm products in a trade deal. Mr. Trump viewed the trade deal as his signature accomplishment that he heavily relied on for his reelection.[199] He feared that pressing China for cooperation on the pandemic could cause it not to honor the trade deal.[200]

The President's cavalier attitude toward the pandemic permeated the administration and exerted deep influence on his supporters and the general public.[201] The disregard of science, infectious disease experts, and even the daily tally of confirmed COVID-19 cases, greatly undermined any effort to contain the pandemic.[202] For example, when Dr. Robert Redfield, director of the CDC, recommended that people wear masks or face coverings in the public, the President said he would not do so.[203]

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https://www.nbcnews.com/politics/donald-trump/trump-compares-covid-flu-experts-say-he-s-flat-wrong-n1242258.

[197] Aishvarya Kavi, *5 Takeaways From 'Rage,' Bob Woodward's New Book About Trump*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/us/politics/woodward-trump-rage-takeaways.html.

[198] *Id.*

[199] Christina Wilkie, *Trump Pulls Punches And Clings To His China Trade Deal As Backlash Against Beijing Grows*, CNBC (Apr. 25, 2020), https://www.cnbc.com/2020/04/24/coronavirus-trump-clings-to-china-trade-deal-as-beijing-backlash-grows.html.

[200] *Id.*

[201] Ashley Parker et al., *How Trump's erratic behavior and failure on coronavirus doomed his reelection*, WASH. POST (Nov. 7, 2020), https://www.washingtonpost.com/elections/interactive/2020/trump-pandemic-coronavirus-election/.

[202] Libby Cathey, *With string of attacks on doctors and experts, Trump takes aim at science: analysis*, ABC NEWS (Aug. 6, 2020), https://abcnews.go.com/Politics/string-attacks-doctors-experts-trump-takes-aim-science/story?id=72170408.

[203] *See* Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public*, NPR (Apr. 3, 2020), https://www.npr.org/sections/coronavirus-live-

Undermining his own medical experts became the President's hallmark at the Coronavirus Task Force briefings.[204] During the unprecedented health crisis, it is understandable that the President was eager to find a solution.[205] However, from suggesting the injection of disinfectants to promoting the use of unproven therapeutics, such as antimalarial drug hydroxychloroquine, as treatments of the coronavirus,[206] the President emboldened his political base to resist scientifically proven mitigation measures.[207]

Further, to sideline Dr. Anthony Fauci, who was unwilling to support the President's baseless claims, President Trump added Dr. Scott Atlas, a neuroradiologist and a Fox News commentator, to the Coronavirus Task Force.[208] Immediately upon his appointment, Dr. Atlas made it his priority to dismiss the effectiveness of wearing masks and social distancing measures, both of which he blamed for disrupting businesses and the economy.[209] Moreover, he embraced the controversial theory of "herd immunity," which could be achieved by encouraging young and healthy people to be exposed to the virus.[210] Furthermore, Dr. Atlas called for people in

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updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public.

[204] *See* Kevin Liptak & Nick Valencia, *Trump now in open dispute with health officials as virus rages*, CNN (July 8, 2020), https://www.cnn.com/2020/07/08/politics/trump-fauci-cdc-redfield-experts-coronavirus/index.html.

[205] *See* Jennifer Jacobs & Drew Armstrong, *Trump's "Operation Warp Speed" Aims to Rush Coronavirus Vaccine*, BLOOMBERG (Apr. 29, 2020), https://www.bloomberg.com/news/articles/2020-04-29/trump-s-operation-warp-speed-aims-to-rush-coronavirus-vaccine.

[206] *See* Nicholas Wu & John Fritze, *From malaria drugs to disinfectant: Here are some of Trump's claims about the coronavirus*, USA TODAY (Apr. 24, 2020), https://www.usatoday.com/story/news/politics/2020/04/24/coronavirus-trumps-claims-chloroquine-disinfectant-draw-rebukes/3018924001/.

[207] *See* Allyson Chiu et al., *Trump claims controversial comment about injecting disinfectants was "sarcastic"*, WASH. POST (Apr. 24, 2020), https://www.washingtonpost.com/nation/2020/04/24/disinfectant-injection-coronavirus-trump/.

[208] *See* Jill Colvin, *Meet Scott Atlas, Trump's new doctor on the coronavirus task force, a Fox News regular who happens to agree with the president on the pandemic*, CHI. TRIB. (Aug. 16, 2020), https://www.chicagotribune.com/coronavirus/ct-nw-trump-scott-atlas-coronavirus-20200816-kp5mmxr2ibfqppquppxtb3kko4-story.html.

[209] *See* Nancy Cook, *Trump elevates Scott Atlas, a doctor with a rosier coronavirus outlook*, POLITICO (Aug. 17, 2020), https://www.politico.com/news/2020/08/17/trump-scott-atlas-coronavirus-doctor-396741.

[210] *See* Sheryl Gay Stolberg, *White House embraces a declaration from scientists that opposes lockdowns and relies on "herd immunity"*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/world/white-house-embraces-

Michigan to "rise up" against the COVID-19 restrictions Governor Whitmer imposed to combat the resurgence of new cases.[211]

President Trump's reckless attitude and approach toward the coronavirus proved to be contagious. For example, in the early stages of the pandemic and despite strong recommendation from health officials such as Dr. Fauci, the President downplayed the effectiveness of the use of masks in combatting the spread of the coronavirus.[212] Many Republican leaders followed the President's lead, refusing to wear masks or socially distance, despite increases in coronavirus cases.[213] In fact, Senator Rand Paul, while waiting for his coronavirus test results, used the gym at Capitol Hill and attended group lunches with colleagues.[214] He was the first senator to test positive for the coronavirus.[215] Dan Patrick, the Republican lieutenant governor of Texas, uttered the most blunt argument for resisting the restrictive measures: "There are more important things than living, and that's saving this country."[216]

In early July, shortly after the President held a campaign rally in Tulsa, Oklahoma, the state experienced a drastic surge in coronavirus cases.[217] Tulsa Health Department officials attributed the surge to the rally, where

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a-declaration-from-scientists-that-opposes-lockdowns-and-relies-on-herd-immunity.html.

[211] *Id.*

[212] *See* Daniel Victor et al., *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html.

[213] *See* Andrew DeMillo, *Many GOP lawmakers shrug off Statehouse mask-wearing rules*, ABC NEWS (Nov. 22, 2020), https://abcnews.go.com/Politics/wireStory/gop-lawmakers-shrug-off-statehouse-mask-wearing-rules-74335643.

[214] *See* Sen. Paul, *Why I didn't quarantine after getting tested*, USA TODAY (Mar. 24, 2020), https://www.usatoday.com/story/opinion/todaysdebate/2020/03/24/rand-paul-why-no-quarantine-after-getting-tested-editorials-debates/2912183001/; *see also* Edward-Isaac Dovere, *Rand Paul Has More Than a Cold*, THE ATLANTIC (Mar. 23, 2020), https://www.theatlantic.com/politics/archive/2020/03/rand-paul-coronavirus-test-reckless/608593/ ("The senator from Kentucky was worried enough to get tested. But while he waited for the results, he kept going to work, the gym, and the pool.").

[215] *See* Phil Mattingly et al., *Rand Paul is first senator to test positive for coronavirus*, CNN (Mar. 23, 2020), https://www.cnn.com/2020/03/22/politics/rand-paul-coronavirus/index.html.

[216] Alex Samuels, *Dan Patrick Says "There are More Important Things Than Living and that's Saving this Country"*, TEX. PUB. RADIO (Apr. 21, 2020), https://www.tpr.org/texas/2020-04-21/dan-patrick-says-there-are-more-important-things-than-living-and-thats-saving-this-country.

[217] Maggie Astor & Noah Weiland, *Coronavirus Surge in Tulsa "More Than Likely" Linked to Trump Rally*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/politics/coronavirus-tulsa-trump-rally.html.

most attendees did not wear masks.[218] Herman Cain, a staunch ally of the President, died of coronavirus after attending the rally.[219]

The negative consequences of the President's reckless attitude were not limited to his political followers. The President himself, along with White House staff, allies, and campaign staff, contracted the coronavirus one after another.[220] Tellingly, Senator Mitch McConnell, the Senate Majority Leader, refused to go to the White House due to its lack of appropriate safeguards to protect against the spread of coronavirus.[221]

*Science Drowned Out by Misinformation*[222]

On January 29, 2020, the WHO recommended the use of medical masks in communities, homes, and health care facilities to prevent the spread of the coronavirus.[223] In March 2020, the WHO joined forces with the government of the United Kingdom to launch a global campaign to fight against misinformation regarding the COVID-19 pandemic.[224] It also collaborated with 40 tech companies to stem the spread of false

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[218] *See id.*

[219] Aimee Ortiz & Katharine Q. Seelye, *Herman Cain, Former C.E.O. and Presidential Candidate, Dies at 74*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/07/30/us/politics/herman-cain-dead.html.

[220] Oma Seddiq & Sawyer Click, *We made a graphic to show just how bad the COVID-19 outbreaks in Trump's circle are*, BUS. INSIDER (Dec. 7, 2020), https://www.businessinsider.com/org-chart-white-house-coronavirus-trump-inner-circle-2020-11.

[221] Dominic Torres & Clare Foran, *McConnell says he hasn't been to White House since August, citing COVID-19 protocols*, CNN (Oct. 8, 2020), https://www.cnn.com/2020/10/08/politics/mcconnell-white-house-coronavirus/index.html.

[222] *See Doctors, Nurses Face Harassment, Firing for Self-Care Amid COVID-19 Coronavirus*, MEDICINENET (Mar. 30, 2020), https://www.medicinenet.com/script/main/art.asp?articlekey=229571.

[223] *Advice on the use of masks in the community, during home care and in health care settings in the context of the novel coronavirus (2019-nCoV) outbreak*, WORLD HEALTH ORG. (Jan. 30, 2020) https://apps.who.int/iris/bitstream/handle/10665/330987/WHO-nCov-IPC_Masks-2020.1-eng.pdf?sequence=1&isAllowed=y.

[224] *Countering misinformation about COVID-19*, WORLD HEALTH ORG., https://www.who.int/news-room/feature-stories/detail/countering-misinformation-about-covid-19.

information and misleading posts,[225] which undermined the response efforts.[226]

During the COVID-19 pandemic, the CDC was quickly relegated to an insignificant role in the pandemic response due to political pressure from the Trump Administration.[227] The flood of misinformation rendered the CDC powerless in delivering science-based messages to the public. This is a stark contrast to the crucial role that the CDC historically played during the previous health crises.[228] For example, in dealing with the Ebola cases in 2014, the CDC took a lead role conducting new routine briefings and instituting effective measures to prevent the further spread of the virus in the United States and in the world.[229]

In late February of 2020, leading experts at the CDC and NIH came to consensus that "the coronavirus was most likely spreading silently."[230] On February 25, Dr. Nancy Messonnier, director of the National Center for Immunization and Respiratory Diseases at the CDC, warned that the American public should "prepare for the expectation that this is going to be bad."[231] She predicted that community spread of the virus was inevitable.[232] Upon the public announcement, the stock market plunged more than 3%.[233] When President Trump learned about the news on the way

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[225] Malaka Gharbie, *WHO Is Fighting False COVID Info on Social Media. How's That Going?*, NPR (Feb. 9, 2021), https://www.npr.org/sections/goatsandsoda/2021/02/09/963973675/who-is-fighting-false-covid-info-on-social-media-hows-that-going.

[226] *Immunizing the public against misinformation*, WORLD HEALTH ORG., (Aug. 25 2020), https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation.

[227] *See* Oliver Milman, *Where is the CDC? How Trump Sidelined the Public Health Agency in a Pandemic*, THE GUARDIAN (May 14, 2020), https://www.theguardian.com/world/2020/may/14/where-is-the-cdc-trump-covid-19-pandemic; Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html.

[228] Rebecca Ballhaus et al., *A Demoralized CDC Grapples with White House Meddling and its Own Mistakes*, WALL ST. J. (Oct. 15, 2020), https://www.wsj.com/articles/a-demoralized-cdc-grapples-with-white-house-meddling-and-its-own-mistakes-11602776561.

[229] *Id.*

[230] Aylin Woodward, *A New Documentary Shows How a Top CDC Official Who Warned Americans About the Coronavirus Promptly Vanished from Public View*, Bus. Insider (Oct. 20, 2020), https://www.businessinsider.com/cdc-official-warned-us-coronavirus-was-silenced-documentary-2020-10.

[231] *See* Pippa Stevens, *Trump is Reportedly Furious that the Stock Market is Plunging on Coronavirus Fears*, CNBC NEWS (Feb. 25, 2020), https://www.cnbc.com/2020/02/25/trump-is-reportedly-furious-with-the-plunging-stock-market-due-to-coronavirus-fears.html.

[232] *Id.*

[233] *Id.*

back from India, he immediately called Alex Azar and asked,[234] "Did you know Nancy Messonnier had scared the sh—out of people?"[235] The President, who often took credit for the stock market's rise,[236] threatened to fire Dr. Messonnier.[237]

The next day, President Trump replaced Secretary Alex Azar with Vice President Mike Pence to lead the White House Coronavirus Task Force.[238] One of the first steps that the Vice President took was to control the "messaging" around the virus.[239] He required that top health officials seek clearance before making any public statement about the virus.[240] The restriction was intended not only to prevent Dr. Messonnier from speaking again, but also to muzzle Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases ("NIAID"), who publicly called out the President's baseless claims about the virus.[241] Previously, Dr. Fauci had predicted that it might be impossible to contain the virus while the President claimed that the coronavirus would disappear by summer.[242]

Political interference also forced the CDC to align its guidelines and reports with the President and his party's misperception of the pandemic.[243] Michael Caputo, the assistant secretary of HHS for Public

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[234] Woodward, *supra* note 230.

[235] *Id.*

[236] William Cummings, *Trump Has Often Taken Credit for the Stock Market's Climb. Will He Own the Drops Too?*, USA TODAY (Feb. 5, 2018), https://www.usatoday.com/story/news/politics/onpolitics/2018/02/05/trump-stock-market-credit/308627002/.

[237] Woodward, *supra* note 230.

[238] On January 29, President Trump announced the formation the Coronavirus Task Force, which consisted of Secretary Alex Azar, Department of Health and Human Services; Robert O'Brien, Assistant to the President for National Security Affairs; Dr. Robert Redfield, Director of the Centers for Disease Control and Prevention; Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health, and official for other parts of the government. Alex Azar was the head of the Task Force. *See* Press Release, Statement from the Press Secretary Regarding the President's Coronavirus Task Force (Jan. 29, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/.

[239] Tom Porter, *Trump Administration Briefly Barred a Top US Disease Expert from Speaking Freely to the Public After He Warned the Coronavirus Might Be Impossible to Contain*, BUS. INSIDER (Feb. 28, 2020), https://www.businessinsider.com/coronavirus-anthony-fauci-trump-admin-stops-discussion-2020-2.

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] Dan Diamond, *Trump Officials Interfered with CDC Reports on COVID-19*, POLITICO (Sept. 11, 2020), https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809.

Affairs, played a key role in overriding CDC scientists' professional judgments.[244] As a political operative for the Trump campaign, Caputo had no background in either science or medicine.[245] It was his loyalty to the President and the party that put him at the top of the HHS leadership.[246] During a Facebook live event, Caputo accused CDC scientists of "sedition" because they undermined President Trump by emphasizing the severity of the pandemic.[247]

CDC's Morbidity and Mortality Weekly Report ("MMWR") Series is a world-renowned scientific journal that provides healthcare professionals and academics with "timely, reliable, authoritative, accurate, objective, and useful public health information and recommendations."[248] Health professionals often regard the journal as "the voice of CDC."[249] Soon after being appointed at the HHS in April 2020, Caputo aggressively targeted the MMWR because he viewed the journal as a platform for the "deep state" scientists to undercut the President's optimism about coronavirus.[250] He brought his own science advisor, Paul Alexander, who was a part-time faculty member at Macmaster University in Canada specializing in research methods.[251] He demanded that all future MMWR reports be subject to his review and revision before publication.[252] In addition, he requested retroactive revision of journal articles that were deemed inconsistent with the President's view of the pandemic.[253]

While CDC officials resisted the political interference, they did allow Alexander to review the reports, revise the wording, and delay publication on occasion.[254] In one example of this review process, the CDC held back the report on the effectiveness of hydroxychloroquine, an anti-malarial drug vigorously promoted by President Trump as a cure to the

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[244] Brian Naylor, *HHS Official Michael Caputo Admits Warning Of 'Sedition' At CDC, Riots If Trump Wins*, NPR (Sept. 15, 2020), https://www.npr.org/2020/09/15/913114446/michael-caputo-hhs-official-acknowledges-warning-of-sedition-and-violence.

[245] Diamond, *supra* note 243.

[246] Maggie Haberman et al., *Loyal Trump Backer Is Now a Face of the Administration's Virus Response*, N.Y. TIMES (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/us/politics/michael-caputo-hhs.html.

[247] Naylor, *supra* note 244.

[248] CENTERS FOR DISEASE CONTROL, ABOUT THE MORBIDITY & MORTALITY WEEKLY REPORT (MMWR) SERIES, https://www.cdc.gov/mmwr/about.html.

[249] *Id.*

[250] Diamond, *supra* note 243.

[251] Noah Weiland, *Emails Detail Caputo, Alexander Efforts to Silence CDC and Question Its Science*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/us/politics/trump-cdc-coronavirus.html.

[252] *Id.*

[253] *Id.*

[254] *Id.*

pandemic.[255] The belated report showed that "the potential benefits of these drugs [hydroxychloroquine] do not outweigh their risks."[256] In June, the Food and Drug Administration (FDA) retracted the emergency COVID-19 use approval for hydroxychloroquine because it did not find the malarial drug was effective in treating the coronavirus.[257]Alexander accused the CDC scientists of using the MMWR report to undermine the President's credibility.[258]

On March 10, 2020, a superspreading event took place during a church choir practice in Skagit Country, Washington, where one symptomatic person infected 53 members, 87% of the 61 members who were in attendance.[259] Of the three choir members who were hospitalized, two died.[260] On May 12, the CDC reported the incident in an MMWR article, which claimed that "[t]he act of singing, itself, might have contributed to transmission through emission of aerosols, which is affected by loudness of vocalization."[261] When the CDC used the same claim in its initial guidelines for reopening houses of worship, [262] White House officials summoned Dr. Redfield to go over the guidelines line-by-line with them.[263] The final version of the guidelines eliminated the language involving the aerosols created by singing.[264]

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[255] *Id.*

[256] *Id.*

[257] Thomas M. Burton & Jared S. Hopkins, *FDA Pulls Emergency COVID-19-Use Approval for Hydroxychloroquine, Taken by Trump*, WALL. ST. J. (June 15, 2020, 11:02 PM), https://www.wsj.com/articles/fda-withdraws-emergency-use-authorization-for-hydroxychloroquine-for-covid-19-11592238129?mod=article_inline ("Agency says 'it is no longer reasonable to believe' the malaria drug is effective in treating the virus.").

[258] *Id.*

[259] Lea Hamner et. al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington*, CDC (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm (note that there are discrepancies regarding the time, place, and number of deaths of this superspreading event between the CDC MMWR article and Rebecca Ballhaus); Ballhaus et al., *supra* note 231 (the author in this article used the version appeared in the MMWR report).

[260] *Id.*

[261] *Id.*

[262] Ballhaus et al., *supra* note 228.

[263] *Id.*

[264] Lena H. Sun & Josh Dawsey, *White House and CDC remove coronavirus warnings about choirs in faith guidance*, WASH. POST (May 29, 2020, 8:07 PM), https://www.washingtonpost.com/health/white-house-and-cdc-remove-coronavirus-warnings-about-choirs-in-faith-guidance/2020/05/28/5d9c526e-a117-11ea-9590-1858a893bd59_story.html.

In the same way, the CDC softened warnings and restrictions in the guidelines for reopening schools.[265] In late June, a superspreading incident took place at a youth summer camp in Georgia, where more than half of the 597 camp attendees were infected with COVID-19.[266] The median age of 346 campers was 12; the median age of 251 staff members was 17.[267] The attendees, who tested negative before entering the site, engaged in indoor activities including frequent singing and cheering without social distancing or masks.[268] The MMWR report concluded "that SARS-CoV-2 spread efficiently in a youth-centric overnight setting, resulting in high attack rates among persons in all age groups, despite efforts by camp officials to implement most recommended strategies to prevent transmission."[269] As the data on the transmission of coronavirus among youths were limited, the summer camp outbreak offered useful lessons for school safety during the pandemic.[270] However, Paul Alexander accused scientists of exaggerating the risk of COVID-19 among children to undermine President Trump's push to reopen schools.[271] He further claimed that the "CDC tried to report as if once kids get together, there will be spread and this will impact school re-opening . . . . Very misleading by CDC and shame on them. Their aim is clear."[272] Under pressure, Dr. Redfield agreed to postpone publication of the report to avoid direct conflict with President Trump.[273] Fully appreciating the damage to the CDC, Dr. Redfield ordered a staff member to delete Paul Alexander's emails.[274]

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[265] Abby Goodnough, *C.D.C. Calls on Schools to Reopen, Downplaying Health Risks*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/health/cdc-schools-coronavirus.html.

[266] Christine M. Szablewski et. al., *SARS-CoV-2 Transmission and Infection Among Attendees of an Overnight Camp — Georgia, June 2020*, CDC (Aug. 7, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6931e1.htm.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] Diamond, *supra* note 243; *See also* Lena H. Sun, *Trump officials seek greater control over CDC reports on coronavirus*, WASH. POST (Sept. 12, 2020, 7:30 PM), https://www.washingtonpost.com/health/2020/09/12/trump-control-over-cdc-reports/.

[272] Diamond, *supra* note 243.

[273] *Id.*

[274] Stephanie Armour, *House Panel Accuses Trump Administration of Concealing Evidence in CDC Coronavirus Probe*, WALL. ST. J. (Dec. 10, 2020, 2:35 PM), https://www.wsj.com/articles/house-panel-accuses-trump-administration-of-concealing-evidence-in-cdc-coronavirus-probe-11607614200.

*Hospital Infections*

In 2016, the WHO issued a guideline on infection prevention and control in healthcare facilities.[275] It specifically urged hospitals to keep adequate personal protection equipment ("PPE") and maintain isolation facilities to prevent cross infection.[276] In March 2020, the WHO issued a stern warning to State Parties that they would be putting lives at risk if they could not provide frontline health workers with adequate PPE.[277] In another warning, the DG pleaded for countries to act quickly because "[n]o country, hospital or clinic can keep its patients safe unless it keeps its health workers safe." [278] Without an effective enforcement mechanism, however, the WHO guidelines and warnings are often ignored in practice.

Due to hospitals' recklessness and shortage of PPE, American medical workers were vulnerable to the coronavirus.[279] By June 2020, nearly 75,000 health care workers had contracted the coronavirus.[280] Numerous doctors and nurses have left the profession under enormous stress of the pandemic.[281] According to a Nurse Union report, "More than 1,700 healthcare workers have died of COVID-19 since the pandemic began."[282] As a result, more than 20% of hospitals have reported shortages of medical

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[275] *Guidelines on Core Components of Infection Prevention and Control Programmes at the National and Acute Health Care Facility Level*, WHO (2016), https://www.who.int/gpsc/core-components.pdf.

[276] *Id.* at 71.

[277] *Shortage of personal protective equipment endangering health workers worldwide*, WHO (Mar. 3 2020), https://www.who.int/news/item/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-world-wide.

[278] *Keep health workers safe to keep patients safe: WHO*, WHO (Sept. 17, 2020), https://www.who.int/news/item/17-09-2020-keep-health-workers-safe-to-keep-patients-safe-who.

[279] *See* Brian Mann, *Nurses Left Vulnerable to COVID-19: 'We're Not Martyrs Sacrificing Our Lives'*, NPR (May 2, 2020), https://www.npr.org/2020/05/02/848997142/nurses-left-vulnerable-to-covid-19-we-re-not-martyrs-sacrificing-our-lives.

[280] *See* Tina Reed, *More than 1,700 U.S. healthcare workers have died from COVID-19, nurses' union says*, FIERCE HEALTHCARE (Sept. 28, 2020), https://www.fiercehealthcare.com/practices/report-how-many-u-s-healthcare-workers-have-died-from-covid-19-contracted-job.

[281] *See* Reed Abelson, *Doctors are Calling it Quits under Stress of the Pandemic*, N.Y. TIMES (Nov. 15, 2020), https://www.nytimes.com/2020/11/15/health/Covid-doctors-nurses-quitting.html; *see also* Gabrielle Masson, *Nurses say changing guidelines, unsafe conditions are pushing them to quit*, BECKER'S HOSP. REV. (May 12, 2020), https://www.beckershospitalreview.com/nursing/nurses-say-changing-guidelines-unsafe-conditions-are-pushing-them-to-quit.html.

[282] Reed, *supra* note 280.

staff.[283] Even though the pandemic plan drafted by the Bush Administration required the federal government to maintain the strategic national stockpile ("SNS") of PPE and other medical devices, there was no legal mandate to replenish the stockpile after it became deflated. During the 2009 H1N1 flu pandemic, the SNS made "the largest deployment [of PPE] in the SNS history."[284] Once the crisis was over, Congress did not appropriate funds to refill the stockpile because it was no longer on a budgetary priority.[285] The Trump Administration had no choice but to push states to acquire PPEs on their own.[286]

Furthermore, American medical workers and health administrators face similar challenges when they speak up about the virus.[287] In March 2020, Tonya Randolph, a nurse, discovered that her employment contract was terminated prematurely by the Lake Granbury Medical Center ("LGMC") in Dallas, Texas simply because she wore facemasks during her rounds.[288] Like the Wuhan Central Hospital, LGMC was concerned that allowing medical workers to wear masks at work would cause public panic and hurt profit.[289] Ms. Randolph recounted her experience at the LGMC saying, "I was told very angrily that I needed to take my mask off immediately."[290]

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[283] *See* Stephanie Ebbs, *Hospitals Nationwide Face Shortage of Medical Staff amid Spike in COVID-19 Cases*, ABC NEWS (Nov. 21, 2020), https://abcnews.go.com/Politics/hospitals-nationwide-face-shortage-medical-staff-amid-spike/story?id=74319020.

[284] ANNA NICHOLSON ET AL., THE NATION'S MEDICAL COUNTERMEASURE STOCKPILE, 11–12 (2016), https://www.ncbi.nlm.nih.gov/books/NBK396382/pdf/Bookshelf_NBK396382.pdf. *See also* Patrice Taddonio, *Depleted National Stockpile Contributed to COVID PPE Shortage: 'You Can't Be Prepared If You're Not Funded to Be Prepared'*, PBS (Oct. 6, 2020), https://www.pbs.org/wgbh/frontline/article/depleted-national-stockpile-contributed-to-covid-ppe-shortage/.

[285] *See* Taddonio, *supra* note 284.

[286] *Id.*

[287] *See* Noam Scheiber & Brian M. Rosenthal, *Nurses and Doctors Speaking Out on Safety Now Risk Their Job*, N.Y. TIMES (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/business/coronavirus-health-workers-speak-out.html.

[288] Brian Kirkpatrick, *Nurse Claims North Texas Hospital Fired Her Because She Wanted To Wear a Medical Mask*, TEX. PUB. RADIO (Mar. 31, 2020), https://www.tpr.org/news/2020-03-31/nurse-claims-north-texas-hospital-fired-her-because-she-wanted-to-wear-a-medical-mask.

[289] *See id.*; *see also* Matt Richtel, *Frightened Doctors Face Off with Hospitals over Rules on Protective Gear*, N.Y. TIMES (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/hospitals-coronavirus-face-masks.html (discussing how various hospitals bar doctors and other staff members from wearing protective masks in public areas).

[290] Kirkpatrick, *supra* note 288.

Dr. Henry Nickicicz, an anesthesiologist at the University Medical Center in El Paso, Texas, nearly lost his job after being caught wearing a respirator facemask in the hospital's hallway.[291] His supervisor blamed him for overreacting to the virus and causing panic by wearing his mask.[292] Dr. Nickicicz was suspended from work after he argued that his age and physical condition made him vulnerable to the coronavirus.[293] Only after media intervention, did the hospital reinstate Dr. Nickicicz and allow him to wear masks.[294]

Dr. Ming Lin, an emergency doctor at PeaceHealth St. Joseph Medical Center ("PeaceHealth"), Washington, was fired for criticizing the hospital's inaction in preventing the spread of the coronavirus.[295] Asked about why he decided to voice his concerns, he replied: "I do fear for my staff. . .. Morally, when you see something wrong, I think you have to speak out."[296] In response to PeaceHealth's decision to fire Dr. Lin, the spokeswoman for the Washington Nurses Association stated, "Hospitals are muzzling nurses and other health-care workers in an attempt to preserve their image [...] it's outrageous."[297]

*The CDC's Test Failures*

On January 17, 2020, the WHO issued a guideline for laboratory testing of the novel coronavirus and published a protocol created by German researchers for countries to construct their own coronavirus tests.[298] By February 5, 2020, the WHO had "shipped 250,000 tests to more than 70 laboratories around the world" and trained their lab workers on how to use them.[299] Knowing that the United States is always self-sufficient for

[291] Richtel, *supra* note 289.

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] Richard Read, *Doctor Fired after Criticizing his Hospital for Coronavirus Response*, L.A. TIMES (Mar. 3, 2020), https://www.latimes.com/world-nation/story/2020-04-03/fired-coronavirus-doctor.

[296] *Id.*

[297] Olivia Carville et al., *Hospitals Tell Doctors They'll Be Fired If They Speak Out About Lack of Gear*, BLOOMBERG NEWS (Mar. 31, 2020), https://www.bloomberg.com/news/articles/2020-03-31/hospitals-tell-doctors-they-ll-be-fired-if-they-talk-to-press.

[298] Victor Corman et. al., *Diagnostic detection of 2019-nCoV by real-time RT-PCR*, WHO (Jan. 17, 2020), https://www.who.int/docs/default-source/coronaviruse/protocol-v2-1.pdf?sfvrsn=a9ef618c_2. *See also*, Arman Azad, *WHO and CDC never discussed providing international test kits to the US, global health agency says*, CNN (Mar. 18, 2020, 6:13 PM), https://www.cnn.com/2020/03/18/health/who-coronavirus-tests-cdc/index.html.

[299] *WHO Director-General's opening remarks at the media briefing on 2019 novel coronavirus*, WHO (Feb. 6, 2020), https://www.who.int/director-

diagnostics, the WHO distributed the tests exclusively among middle or low-income countries. Instead of following the WHO protocols, the CDC decided to create its own tests, which ended disastrously.[300]

The CDC maintained a track record in developing pathogenic tests for state and local public health laboratories during previous health crises.[301] On January 7, 2020, Dr. Stephen Lindstrom and his team at the CDC planned to create a test for the coronavirus.[302] Dr. Lindstrom was the right choice for this task because he and his team overcame technical and regulatory obstacles to create a test within two weeks during the 2009 H1N1 pandemic.[303] In addition, Dr. Lindstrom had a sense of urgency that was lacking among the CDC leadership at the time.[304]

Dr. Lindstrom did succeed in creating the test at the CDC with which the first U.S. COVID-19 case was confirmed on January 20, 2020.[305] However, the test could only be used at the CDC's lab in Atlanta. Because of this technicality, states had to send specimens to the CDC for testing, which made the capacity of the CDC lab extremely limited.[306] Therefore, to enable public health labs to perform tests locally, Dr. Lindstrom created a three-prong test kit, which received an Emergency Use Authorization ("EUA") from the FDA on February 4.[307] Four days later, state and local health officials discovered that the CDC test kits produced inaccurate results.[308] Subsequent investigation revealed that the third prong of the test kits might have been contaminated due to either design defects or manufacturing defects.[309] The CDC was not able to repair the faulty test kits until February 29.[310]

While the CDC was struggling with rolling out its defective test kits, the community transmission of the coronavirus went undetected in New

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general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-2019-novel-coronavirus.

[300] Stephanie Armour et al., *What Derailed America's Covid Testing: Three Lost Weeks*, WALL ST. J. (Aug. 18, 2020, 12:20 PM), https://www.wsj.com/articles/us-coronavirus-covid-testing-delay-11597267543.

[301] Shawn Boburg et al., *Inside the Coronavirus Testing Failure: Alarm and dismay among the scientists who sought to help*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/investigations/2020/04/03/coronavirus-cdc-test-kits-public-health-labs.

[302] *Id.*

[303] Bandler et al., *Inside the Fall of the CDC*, PROPUBLICA (Oct. 15, 2020, 1:12 PM), https://www.propublica.org/article/inside-the-fall-of-the-cdc.

[304] Boburg et al., *supra* note 301 ("He told public health officials that the CDC's aim was to 'plan for the worst, hope for the best.'").

[305] Bandler et al., *supra* note 303.

[306] Boburg et al., *supra* note 301.

[307] *Id.*

[308] *Id.*

[309] Bandler et al., *supra* note 303.

[310] *Id.*

York, Seattle, Boston and other densely populated cities.[311] For example, approximately 300,000 coronavirus cases worldwide were linked to a single superspreading event during an international biotech conference in Boston in late February 2020.[312] An accurate test would have enabled health departments to take decisive actions to prevent such superspreading events in the early stage of the outbreak.[313] Professor Ashish Jha of the Harvard Global Health Institute believed that accurate testing would have made lockdowns more targeted and less disruptive to the public.[314]

*Administrative Hurdles for Creating Tests at Labs Outside of the CDC*

In addition to the CDC's failure to produce a reliable test, Secretary Alex Azar's public health emergency order unwisely created administrative hurdles for public health labs, universities, and commercial entities to develop their own tests.[315] Under Section 319 of the Public Health Service Act ("PHSA"), the HHS secretary has the authority to declare a public health emergency if the Secretary determines "a disease or disorder presents a public health emergency . . . including significant outbreaks of infectious diseases or bioterrorist attacks."[316] Upon the declaration, the Secretary is authorized to take actions to respond to the emergency. These actions range from mobilizing funds, materials, and health professionals to "*supporting investigations into the cause, treatment, or prevention of a disease*. . . ."[317] (emphasis added). However, PHSA does not specify the measures the Secretary can take in support of finding the causes, treatment, and prevention of the disease during a health emergency.[318] This gap is filled by the Food, Drug, and Cosmetics Act ("FDCA") Section 564, under which the Secretary has the power to issue an EUA for

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[311] Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, CDC (June 5, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6922e1.htm.

[312] Morgan Gstalter, *Boston conference in February linked to as many as 300,000 coronavirus cases worldwide*, THE HILL (Dec. 11, 2020, 8:41 AM), https://thehill.com/homenews/state-watch/529788-boston-conference-in-february-linked-to-as-many-as-300000-coronavirus. The original data appeared in Jacob Lemieux et. al., *Phylogenetic analysis of SARS-CoV-2 in Boston highlights the impact of superspreading events*, SCI. MAG. (Feb. 5, 2021), https://science.sciencemag.org/content/sci/371/6529/eabe3261.full.pdf.

[313] Amesh A. Adalja & Eugene Shapiro, *Limited COVID-19 testing capacity has US physicians 'flying blind'*,

HEALIO (Mar. 13, 2020), https://www.healio.com/news/infectious-disease/20200313/limited-covid19-testing-capacity-has-us-physicians-flying-blind.

[314] *Id.*

[315] Armour et al., *supra* note 300.

[316] 42 U.S.C. § 247d

[317] *Id.*

[318] *Id.*

unapproved drugs, devices, or biological products or for unapproved use of approved products.[319]

It would appear that an emergency declaration would make it easier for public health, academic, and commercial labs to create their own tests because they are only required to apply for an EUA rather than formal approval from the FDA.[320] This is not the case, however, because these labs are usually subject to only minimal federal regulation absent an emergency.[321] After Secretary Azar issued a public health emergency declaration on January 31, 2020, these labs suddenly faced stricter FDA scrutiny because they had to apply for an EUA.[322] As a result, several prominent labs, including the University of Washington's clinical virology lab, could not develop the tests in their labs because they could not get through the bureaucratic process for an EUA application.[323] On February 24, 2020, the Association of Public Health Laboratories ("APHL") urged the FDA to remove the EUA requirement for developing new pathogenic tests.[324] Scott Becker, chief executive of the APHL wrote, "We are now many weeks into the response with still no diagnostic or surveillance test available outside of C.D.C. for the vast majority of our member laboratories . . . . We believe a more expeditious route is needed at this time."[325] More than 100 lab directors across the United States asked Congress to support laboratory-developed tests.[326] Dr. Anthony Fauci also strongly advocated for the HHS to expand testing. On February 29, 2020, the FDA finally relaxed the requirements for the labs to conduct coronavirus tests.[327]

## CONCLUSION

Based on over a century of experience in collaboration on controlling the spread of infectious diseases, the WHO inherited its institutional structure from the International Sanitary Conferences and other international organizations. Because there is no strong enforcement mechanism, generations of WHO leaders have been fully aware of the institution's limits when confronting resistance from State Parties in a public health crisis.

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[319] 21 U.S.C. § 360bbb–3(a)(1)

[320] *Id.*

[321] Michael D. Shear et al., *The Lost Month: How a Failure to Test Blinded the U.S. to COVID-19*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html.

[322] *Id.*

[323] Boburg et al., *supra* note 301.

[324] *Id.*

[325] *Id.*

[326] Alexander L. Greninger & Keith R. Jerome, *The First Quarter of SARS-CoV-2 Testing: The University of Washington Medicine Experience*, J. OF CLINICAL MICROBIOLOGY (July 23, 2020), https://jcm.asm.org/content/jcm/58/8/e01416-20.full.pdf.

[327] Boburg et al., *supra* note 301.

The asymmetry of information is greatest in the authoritarian states where media is censured and dissidents' voices are suppressed. Even equipped with the most sophisticated disease surveillance networks, the WHO can still be kept in the dark when national governments withhold critical information for combating pandemics. In addition, a few states hold enormous influence over the WHO's budget and DG appointment. Because of this, the WHO has become increasingly vulnerable to political manipulation by State Parties. The tension between the WHO and State Parties makes the PHEIC declaration process extremely painstaking. Even though the WHO has been a weak institution, a PHEIC declaration could substantially affect the flow of international trade and travel at the expense of concerned State Parties. From this perspective, it is not difficult to understand why the DG spared no effort to lavish praises on China for its commitment to transparency despite the fact that they declared the spread of coronavirus a PHEIC a full month after learning of the outbreak. In the next crisis, there is no reason to expect that the WHO will act differently because it can only act within its tightly constrained boundaries.

The Trump Administration's blame on WHO's inaction was misplaced. Both the WHO and the United States CDC learned of the outbreak in Wuhan, China on January 3, 2020. While an early WHO declaration of PHEIC could have facilitated international coordinated efforts, it was unlikely to stem the flow of trade and traffic. Several weeks after the WHO declaration, Dr. Nancy Messonnier nearly lost her job by telling Americans that the wide spread of coronavirus was inevitable in a public statement, which sent the stock market into a free fall. It was the Trump Administration's cavalier approach to the COVID-19 pandemic, and not the WHO's inaction, that caused the wide spread of the illness in the United States.

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