# A Better Response to COVID-19


**Polly J. Price***


The next presidential term will commence exactly one year after the first confirmed U.S. case of COVID-19. The U.S. has since recorded the highest number of COVID-19 deaths and infections in the world. Because an estimated ninety percent of Americans remain vulnerable to infection, the next administration will continue to face the greatest public health threat in more than a century, even if a vaccine does become widely available.[1]

Shamefully, COVID-19 has devastated nursing homes and has disproportionately harmed Blacks, Latinos, and Native Americans. The U.S. failed to respond adequately in the early stages of the coronavirus pandemic despite ample warning and the observed experience of other countries. It has continued to fail: Nursing homes and other long-term care facilities have experienced preventable deaths long after we have known how to protect their residents.[2]

Clearly, a state-by-state, piecemeal approach doesn't work, especially with uneven resources for reliable and affordable testing and contact tracing, a continuing and increasingly severe shortage of personal protective equipment (PPE), and the varying political will of state and local elected leaders regarding proven social distancing measures. Controlling a pandemic would never have been easy, but this is especially true in one of the most fragmented public health systems of any nation. In the U.S., control of contagious disease threats is divided among

---


* Asa Griggs Candler Professor of Law, Professor of Global Health, Emory Law School.


[1] *See* Shuchi Anand et al., *Prevalence of SARS-CoV-2 Antibodies in a Large Nationwide Sample of Patients on Dialysis in the USA: A Cross-Sectional Study*, Lancet (Sept. 25, 2020).

[2] *See* Priya Chidambaram et al., *Racial and Ethnic Disparities in COVID-19 Cases and Deaths in Nursing Homes*, Kaiser Health News (Oct. 27, 2020).

more than 2,500 state, local, and tribal public health departments. Many of these are underfunded and understaffed in normal times and lack the scientific expertise to advise state governors and coordinate an effective response.

But it is not too late to implement a robust national strategy to save lives. The administrative apparatus of the federal government should be used immediately to frame a national response centered around three policy priorities: (1) ensure sufficient medical supplies, especially PPE, for medical providers, nursing home, and assisted living staff; (2) establish a national testing policy, providing greater immediate testing capability to state and local governments; and (3) restore the credibility of the lead federal agencies for pandemic response—the FDA and CDC—without which the public may not be willing to accept a vaccine.

## Use the Federal Government's Purchasing and Contacting Authority to Ensure an Adequate, Affordable, and Properly Distributed Supply of Critical Medical Supplies, Especially PPE

Critical medical supplies such as personal protective equipment are still scarce. Pre-existing scarcities and a lack of central coordination have left state and local governments and private entities scrambling for critical medical supplies and equipment. Competition for such supplies has driven costs up precisely when the groups seeking to buy them are suffering pandemic-driven financial constraints. The consequent shortages have led to a higher number of preventable deaths, particularly among the elderly and most vulnerable populations.

Existing federal executive authority should be used to coordinate the production, acquisition, and distribution of critical supplies and equipment. Federal agencies routinely invoke the Defense Production Act for critical military equipment purchases and in disaster response following hurricanes. But this option has been barely used for critical medical supplies despite widespread shortages driving up prices for all healthcare providers. As one report noted, "The federal response to COVID-19 shortages has been a surprising and tragic example of . . . executive underreach."[3]

Federal authority and purchasing power should be used to encourage production of needed materials by guaranteeing payment to the producers and orchestrating allocation of supplies to the states, possibly by deploying state health departments to distribute materials. These federal executive powers should also be used to restore, enhance, and administer the depleted national stockpile of emergency supplies.

[3] Evan Anderson and Scott Burris, *Assuring Essential Medical Supplies During a Pandemic: Using Federal Law to Measure Need, Stimulate Production, and Coordinate Distribution*, 173, *in* Pub. Health L. Watch, Assessing Legal Responses to COVID-19 (August 2020).

## The Nation Needs a Coherent Testing Policy, With Widely Available Rapid Tests

The capacity to conduct widespread tests with rapid results is slowly improving, but many experts believe the U.S. requires far more testing, with quicker turn-around, to control outbreaks and inform targeted quarantine. This is essential to keep schools and workplaces open.

Lack of a coordinated testing policy has left nursing homes, for example, forced to pay for tests that are markedly less accurate than lab-based diagnostics.[4] In communities with high rates of infection, a typical nursing home requires hundreds of tests a week. To make matters worse, state agencies responsible for protecting nursing home residents seem to be failing at the job, while the Center for Medicare and Medicaid Services could do far more to ensure safety.[5] Add to this the burden of new federal reporting rules, which sometimes conflict with state and local health agency mandates, and the difficulty is only enhanced.

A testing policy coordinated at the federal level, ideally by the CDC, would make the most reliable rapid tests available at fixed, predictable cost to the highest priority users. The CDC should also use its public health emergency authority to coordinate reporting requirements among the several levels of government, with the objective of imposing a single clear set of standards that will generate clear, consistent, and useful disease data.

## Restore Confidence in American Scientific Expertise Through Coordinated Messaging

Since the beginning of the pandemic, the presentation of scientifically sound information to the public has been systematically undercut in the service of political agendas. The jumbled messaging eroded the public's confidence in what the experts have to say. Whether the public will accept an eventual vaccine is largely dependent upon public trust in the FDA, as is public willingness to follow CDC recommendations for limiting the spread of COVID-19. We need a massive advertising campaign to instill trust in a COVID-19 vaccine, one that is especially targeted toward communities where vaccine skepticism is long-standing.

The Executive Branch must assume responsibility for designating a single, scientifically-qualified national voice on public health policy and use its resources to build public confidence in that voice. That voice should originate from the CDC, which has the statutory mandate to respond to and communicate about infectious disease. Coordinating testing, supply management, and public presentation under the CDC's auspices would

[4] *See* Andrew Jacobs, *Testing Hell: Gift of Devices to Nursing Homes Brings New Problems*, N.Y. Times (Sept. 29, 2020).
[5] *See* Carrie Teegardin, *Report Reveals Testing Botched, No Hand Soap During Deadly Outbreak at Georgia Nursing Home*, Atlanta Journal-Constitution (Nov. 13, 2020).

be optimal, as would the consistent support of the President to develop a coordinated national effort.

While historically state and local health departments took the leading role in contagious disease outbreaks, modern conditions mandate a far greater federal role. Congress never intended that the federal government should sit on its hands during a pandemic crisis while delegating all critical response functions to state and local governments. Material development and distribution, testing resources and regulation, and message coordination are three areas in which the Executive Branch must assume its responsibility for development of the necessary nationwide pandemic response.[6]

[6] For additional priorities for the federal branch and state governments, see the recommendations of leading legal experts in Pub. Health L. Watch, Assessing Legal Responses to COVID-19 (August 2020).



*Shaping* **DEBATE**, *Building* **NETWORKS**, *Making a* **DIFFERENCE**. **ACSlaw.org** AMERICAN CONSTITUTION SOCIETY