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What to do with a Problem like HHS? (Pt. 1)

Unwinding entrenched administrative agencies is hard, time consuming work

Robert W Malone MD, MS

Jul 6, 2022

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Keywords: administrative state(21), administrative law(5), administrative agency(4), inverted totalarianism(8), expedited pathways(3), regulatory capture(2), …



**Defining the Problem: HHS and The Administrative State**

Many have come to believe that if Dr. Anthony Fauci either resigns or is removed from his position as Director of the The National Institute of Allergy and Infectious Diseases (NIAID), then the whole COVIDcrisis problem of chronic, strategic and tactical administrative overreach, dishonesty, mismanagement and ethical breaches within the US Department of Health and Human Services (HHS) would be resolved. Under this theory, Dr. Fauci is responsible for **policies which were developed during the AIDScrisis and then flourished during the COVIDcrisis**, and once the tumor is removed the patient will recover. I strongly disagree with this magical thinking; I believe that Dr. Fauci represents a symptom, not the cause of the current problems within HHS. Dr. Fauci, who joined the HHS bureaucracy as a way to avoid the Viet Nam draft and personifies many of the administrative problems that have accelerated since that period, would merely be replaced by another NIAID Director who might even become worse. The underlying problem is a perverted bureaucratic system of governance which is completely insulated from functional oversight by elected officials.

The **“administrative state”** is a general term used to describe the entrenched form of government that currently controls almost all levers of federal power in the United States, with the possible exception of the Supreme Court of the United States (SCOTUS). The premature leaking of the SCOTUS majority decision concerning Roe v Wade to [corporate press allies](https://substack.com/redirect/edfd1227-b1e6-4859-9866-18e8afbd64a3?u=22978736) was essentially a preemptive strike by the administrative state in response to an action which threatened its power. The threat being mitigated was the constitutionalist logic upon which the legal argument was based, that being that authority to define rights not specifically defined in the US Constitution as being federally granted vests with individual states. Played out under the political cover of one of the most contentious political topics in modern US history, **Resistance to any form of control or oversight has been a consistent bureaucratic behavior throughout the history of the United States government, and this trend has accelerated since the end of the Second World War.** More recently, this somewhat existential Constitutionalist threat to the Administrative State was validated in the case of West Virginia vs The Environmental Protection Agency, in which the court determined that when federal agencies issue regulations with sweeping economic and political consequences the regulations are presumptively invalid unless Congress has specifically authorized the action. With this decision, for the first time in modern history boundaries have started to be imposed on the expansion of the power of unelected senior administrators within the Federal bureaucracy.

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**Legal underpinning for The Administrative State.**

“**[Nondelegation doctrine](https://substack.com/redirect/c82815dd-d13d-42bf-90e3-4f93af0dc0f4?u=22978736" \t "_blank)**”

Administrative law rests on two fictions.

The first, the nondelegation doctrine, imagines that Congress does not delegate legislative power to agencies. The second, which flows from the first, is that **the administrative state** thus exercises only executive power, even if that power sometimes looks legislative or judicial. These fictions are required by a formalist reading of the Constitution, whose Vesting Clauses permit only Congress to make law and the President only to execute the law. **This formalist reading requires us to accept as a matter of practice unconstitutional delegation and the resulting violation of the separation of powers, while pretending as a matter of doctrine that no violation occurs.**

The non-delegation doctrine is a principle in administrative law that Congress cannot delegate its legislative powers to other entities. This prohibition typically involves Congress delegating its powers to administrative agencies or to private organizations.

In [*J.W. Hampton v. United States*, 276 U.S. 394 (1928)](https://substack.com/redirect/a796ff73-58b1-47f8-828d-50cad05b72bc?u=22978736), the Supreme Court clarified that when Congress does give an agency the ability to regulate, Congress must give the agencies an "intelligible principle” on which to base their regulations. This standard is viewed as quite lenient, and has rarely, if ever, been used to strike down legislation.

In [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)](https://substack.com/redirect/676a8a06-fdae-45d8-ba63-9f1a7369d694?u=22978736), the Supreme Court held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

“[***Chevron*deference**](https://substack.com/redirect/9c19c26c-b8e0-459f-8483-e652841dbeae?u=22978736)”

One of the most important principles in [administrative law](https://substack.com/redirect/46afb32b-24b8-454c-9dee-dffde0017dea?u=22978736), The “Chevron deference” is a term coined after a landmark case, [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc](https://substack.com/redirect/5306056c-f280-420e-b878-50f936f391e1?u=22978736)., 468 U.S. 837 (1984), referring to the doctrine of judicial deference given to administrative actions.

In essence, the Chevron deference doctrine is that when a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency.  In other words, when the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s action was based on a permissible construction of the statute.

Generally, to be accorded Chevron deference, the agency’s interpretation of an ambiguous statute must be permissible, which the court has defined to mean “rational” or “reasonable.” In determining the reasonableness of a particular construction of a statute by the agency, the age of that administrative interpretation as well as the congressional action or inaction in response to that interpretation at issue can be a useful guide.

**Judicial Threats to the Administrative State**

None of the issues involved in current debates over these two core doctrines of administrative law has the power to fully deconstruct the administrative state. But current debates and decisions could contribute some constitutionally informed limits on the power, discretion, and independence of unelected administrators. Together, recent and pending Supreme Court might help reconstruct a constitutional state which is more closely aligned with the original intent and vision of the founders.

Very few appreciate that these issues underly recent decisions concerning who to appoint to the Supreme Court. Trump’s first two appointments to the high court—Neil Gorsuch and Brett Kavanaugh—were two of the nation’s leading judicial minds on administrative law, and White House Counsel Don McGahn made clear that this was no coincidence. So too with Trump’s appointments to the lower courts, which included administrative-law experts such as the D.C. Circuit’s Neomi Rao and Greg Katsas, and the Fifth Circuit’s Andrew Oldham.

**COVIDcrisis and the Administrative State**

The arc of the history of the COVIDcrisis encompasses

1. collusive planning between a wide range of corporate interests, globalists, and the administrative state ([Event 201](https://substack.com/redirect/ff9fb9e0-e598-4387-9a1d-3e4a34f2edea?u=22978736));
2. subsequent [efforts to cover up administrative state culpability](https://substack.com/redirect/b01db9c8-4d20-4b15-acaf-f0dc07e1e214?u=22978736) in creating the crisis;
3. followed by gross mismanagement of public health policies, decision making, and communication all acting in lockstep with the preceding planning sessions.

This dysfunctional planning-response coupling revealed for all to see that the US Department of Health and Human Services has become a leading example illustrating the practical consequences of this degenerate, corrupt and unaccountable system of government.

Across two administrations lead by presidents who have championed very different worldviews, HHS COVIDcrisis policies have continued with little or no change; one administration seemingly flowing directly into the next with hardly a hiccough. If anything, under Biden the HHS arm of the US administrative state became more authoritarian, more unaccountable, and more decoupled from any need to consider the general social and economic consequences of their actions. As this has progressed, the HHS bureaucracy has become increasingly obsequious and deferential to the economic interests of the medical-pharmaceutical industrial complex. This is most clearly evident in the maintenance of a state of medical emergency, which provides HHS bureaucrats with almost unlimited powers to bypass constitutional restrictions, despite the clear evidence that there is no longer any medical emergency. Maintaining the ruse of an official public health emergency has been necessary both to maintain power as well as US Government contract revenue for those corporations who have been making obscene profits from selling the “Emergency Use Authorized” medical countermeasures that have been allowed to bypass long-established regulatory, bioethical, and legal liability norms. A public-private partnership like nothing the US had ever seen before, making the [War Profiteering against which Harry Truman had campaigned](https://substack.com/redirect/fa11416a-5537-4657-8700-c317637e6fd2?u=22978736) look like child’s play.

There is an organizational paradox which enables immense power to be amassed by those who have risen to the top of the civilian scientific corps within HHS.  These bureaucrats have almost unprecedented access to the public purse, are technically employed by the executive, but are also almost completely protected from accountability by the executive branch of government that is tasked with managing them- and therefore these bureaucrats are unaccountable to those who actually pay the bills for their activities (taxpayers).  To the extent these administrators are able to be held to task, this accountability flows indirectly from congress.  Their organizational budgets can be either enhanced or cut during following fiscal years, but otherwise they are largely protected from corrective action including termination of employment absent some major moral transgression.  In a Machiavellian sense, these senior administrators function as The Prince, each federal health institute functions as a semi-autonomous city-state, and the administrators and their respective courtiers act accordingly.  To complete this analogy, congress functions similar the Vatican during the 16th century, with each Prince vying for funding and power by currying favor with influential archbishops.  As validation for this analogy, we have the theater observed on C-SPAN each time a minority congressperson or senator queries an indignant scientific administrator, such as has been repeatedly observed with Anthony Fauci’s haughty exchanges during congressional testimony.

In his masterpiece “[The Best and the Brightest: Kennedy-Johnson Administrations](https://substack.com/redirect/3b8931c2-0f69-4ec6-98c2-fc5d0a7cdf30?u=22978736)”, David Halberstam cites a quote from New York Times reporter Neil Sheehan to illustrate the role of the administrative state on the series of horrifically poor decisions which resulted in one of the greatest US public policy failures of the 20th century - the Viet Nam war. In retrospect, the parallels between the

1. mismanagement,
2. propaganda,
3. willingness to suspend prior ethical norms, and
4. chronic lies

which define that deadly fiasco are remarkably similar to those which characterize the COVIDcrisis response. And as in the present, the surreptitious hand of the US intelligence community was often in the background, always pushing the boundaries of acceptable behavior. Quoting from Halberstam and Sheehan;

“Since covert operations were part of the game, **over a period of time there was in the high levels of the bureaucracy, particularly as the CIA became more powerful, a gradual acceptance of covert operations and dirty tricks as part of normal diplomatic-political maneuvering; higher and higher government officials became co-opted** (as the President’s personal assistant, McGeorge Bundy would oversee the covert operations for both Kennedy and Johnson, thus bringing, in a sense, presidential approval). It was a reflection of the frustration which the national security people, private men all, felt in matching the foreign policy of a totalitarian society, which gave so much more freedom to its officials and seemingly provided so few checks on its own leaders. **To be on the inside and oppose or question covert operations was considered a sign of weakness.** (In 1964 a well-bred young CIA official, wondering whether we had the right to try some of the black activities on the North, was told by Desmond FitzGerald, the number-three man in the Agency, “Don’t be so wet”—the classic old-school putdown of someone who knows the real rules of the game to someone softer, questioning the rectitude of the rules.) It was this acceptance of covert operations by the Kennedy Administration which had brought Adlai Stevenson to the lowest moment of his career during the Bay of Pigs, a special shame as he had stood and lied at the UN about things that he did not know, but which, of course, the Cubans knew. **Covert operations often got ahead of the Administration itself and pulled the Administration along with them**, as the Bay of Pigs had shown—**since the planning and training were all done**, we couldn’t tell those freedom-loving Cubans that it was all off, could we, argued Allen Dulles. He had pulled public men like the President with him into that particular disaster. At the time, Fulbright had argued against it, had not only argued that it would fail, which was easy enough to say, but he had gone beyond this, and being a public man, entered the rarest of arguments, an argument against it on moral grounds, that it was precisely our reluctance to do things like this which differentiated us from the Soviet Union and made us special, made it worth being a democracy. “One further point must be made about even covert support of a Castro overthrow; it is in violation of the spirit and probably the letter as well, of treaties to which the United States is a party and of U.S. domestic legislation. . . . **To give this activity even covert support is of a piece with the hypocrisy and cynicism for which the United States is constantly denouncing the Soviet Union in the United Nations and elsewhere. This point will not be lost on the rest of the world—nor on our own consciences for that matter**,” he wrote Kennedy. But arguments like this found little acceptance in those days; instead the Kennedy Administration had been particularly aggressive in wanting to match the Communists at new modern guerrilla and covert activities, and the lines between what a democracy could and could not do were more blurred in those years than others.

These men, largely private, were functioning on a level different from the public policy of the United States, and years later when **New York Times reporter Neil Sheehan** read through the entire documentary history of the war, that history known as the Pentagon Papers, he would come away with one impression above all, which **was that the government of the United States was not what he had thought it was; it was as if there were an inner U.S. government, what he called “a centralized state, far more powerful than anything else, *for whom the enemy is not simply the Communists but everything else,***

***its own press,***

***its own judiciary,***

***its own Congress,***

***foreign and friendly governments***

***—all these are potentially antagonistic*. It had survived and perpetuated itself,**” Sheehan continued, “**often using the issue of anti-Communism as a weapon against the other branches of government and the press, and finally, *it does not function necessarily for the benefit of the Republic but rather for its own ends, its own perpetuation; it has its own codes which are quite different from public codes. Secrecy was a way of protecting itself, not so much from threats by foreign governments, but from detection from its own population on charges of its own competence and wisdom***.” Each succeeding Administration, Sheehan noted, was careful, once in office, not to expose the weaknesses of its predecessor. After all, **essentially the same people were running the governments, they had continuity to each other**, and each succeeding Administration found itself faced with virtually the same enemies. **Thus the national security apparatus kept its continuity, and every outgoing President tended to rally to the side of each incumbent President.**”

The parallels of organizational culture are uncanny, and as previously discussed, have flourished under the guise of the need to manage the national biodefense enterprise. Since the 2001 “[Amerithrax](https://substack.com/redirect/f5036ac4-072d-45ba-b9e5-8e9c9b714ef6?u=22978736" \t "_blank)” Anthrax spore “attacks”, [HHS has increasingly been horizontally integrated with the intelligence community](https://substack.com/redirect/0095f0c6-b5af-475e-9cd3-02bb533700ef?u=22978736) as well as with the [Department of Homeland Security](https://substack.com/redirect/9120ec74-f6fc-445d-bcf8-4b7f82f87e83?u=22978736) to form a health security state with enormous ability to shape and enforce “consensus” through

* widespread propaganda,
* censorship,
* “nudge” technology and
* intentional manipulation of the “Mass Formation” hypnosis process using modern adaptations of methods originally developed by [Dr Joseph Goebbels](https://substack.com/redirect/ba61fabe-cb9f-4b9e-9d5c-1c859a6790af?u=22978736" \t "_blank).

**The Administrative State and Inverted Totalitarianism**

The term “[inverted totalitarianism](https://substack.com/redirect/f2950651-1d3c-421c-a003-6809a9991bfb?u=22978736)” was first coined in 2003 by the political theorist and writer Dr. Sheldon Wolin, and then his analysis was extended by Chris Hedges and Joe Sacco in their 2012 book “[Days of Destruction, Days of Revolt](https://substack.com/redirect/8ba25a91-be7f-43e3-8d90-dd2326a60754?u=22978736)”. Wolin used the term "inverted totalitarianism" to illuminate totalitarian aspects of the American political system, and to highlight his opinion that the modern American federal government has similarities to the historic German Nazi government. Hedges and Sacco built upon Wolin’s insights to extend the definition of inverted totalitarianism to describe **a system where corporations have corrupted and subverted democracy,** and where macro-economics has become the primary force driving political decisions (rather than ethics, Maslow’s hierarchy of needs, or vox populi). **Under inverted totalitarianism, every natural resource and living being becomes**[**commodified**](https://substack.com/redirect/ec6b6cb2-4fb5-40bc-9bc4-92ddacd40844?u=22978736)**and exploited by large corporations to the point of**[**collapse**](https://substack.com/redirect/e87f9654-54b2-43be-93fa-094f81418a9e?u=22978736)**, as excess**[**consumerism**](https://substack.com/redirect/3eacaf9f-5ee5-473f-b6f8-eb46b31bb185?u=22978736)**and**[**sensationalism**](https://substack.com/redirect/630ec263-0d4e-4aa4-a34d-c21b4f63f369?u=22978736)**lull and manipulate the**[**citizenry**](https://substack.com/redirect/1bed7d39-a907-464b-acf7-3efe174caa14?u=22978736)**into surrendering their liberties and their participation in government**. ***Inverted totalitarianism*** is now what the government of the United States has devolved into, as Wolin had warned might happen many years ago in his book “[Democracy Incorporated](https://substack.com/redirect/232fba26-e2e5-4bba-8794-300a28eaa023?u=22978736)”. The administrative state has turned the USA into a “managed democracy” lead by a bureaucracy which cannot be held accountable by the elected representatives of the people. Sometimes called the 4th estate, this monster is also referred to as

* the “**deep state**”,
* the civil service,
* the centralized state,or
* the **administrative state**.

Political systems which have devolved into inverted totalitarianism do not have an authoritarian leader, but instead are run by a non-transparent group of bureaucrats. The “leader” basically serves the interests of the true bureaucratic administrative leaders. In other words, an unelected, invisible ruling class of bureaucrat-administrators runs the country from within.

**Corporatist (Fascist) partnering with the Administrative State**

Because

1. science,
2. medicine and
3. politics

are three threads woven into the same cloth of public policy, we have to work to fix all three simultaneously.  The corruption of political systems by global corporatists has filtered down to our science, medicine and healthcare systems. The perversion of science and medicine by corporate interests is expanding its reach; it is pernicious and intractable.  Regulatory capture by corporate interests runs rampant throughout our politics, governmental agencies and institutes.  The corporatists have infiltrated all three branches of government. Corporate-public partnerships that have become so trendy have another name, that name is **Fascism- the political science term for the fusion of the interests of corporations and the state.** Basically, the tension between the interest of the republic and its citizens (which Jefferson felt should be primary), and the financial interests of business and corporations (Hamilton’s ideal) has swung far too far to the interests of corporations and their billionaire owners at the expense of the general population.

Development of inverted totalitarianism is often driven by the personal financial interests of individual bureaucrats, and many western democracies have succumbed to this process. Bureaucrats are easily influenced and coopted by corporate interests due to both the lure of powerful jobs after federal employment (“revolving door”) and the capture of legislative bodies by the lobbyists serving concealed corporate interests.

In an investigative article published in the British Medical Journal entitled “[**From FDA to MHRA: are drug regulators for hire**](https://substack.com/redirect/2228e3e7-c45c-4c72-8f11-c2ed44c93913?u=22978736)**?”**, reporter Maryanne Demasi documents the processes which drive development of public-private partnerships between administrative state apparatchiks and the corporations which they are paid to regulate and oversee. Five different mechanisms driving the cooptation process were identified in virtually all of the six leading medical product regulatory agencies (Australia, Canada, Europe, Japan, the UK, and US):

**Industry Fees**. Industry money saturates the globe’s leading regulators. The majority of regulators’ budget—particularly the portion focused on drugs—is derived from industry fees. Of the six regulators, Australia had the highest proportion of budget from industry fees (96%) and in 2020-2021 approved more than nine of every 10 drug company applications. Australia’s Therapeutic Goods Administration (TGA) firmly denies that its almost exclusive reliance on pharmaceutical industry funding is a conflict of interest (COI).

An analysis of three decades of PDUFA in the US has shown how a reliance on industry fees is contributing to a decline in evidentiary standards, ultimately harming patients. In Australia, experts have called for a complete overhaul of the TGA’s structure and function, arguing that the agency has become too close to industry.

Sociologist Donald Light of Rowan University in New Jersey, US, who has spent decades studying drug regulation, says, “Like the FDA, the TGA was founded to be an independent institute. However, being largely funded by fees from the companies whose products it is charged to evaluate is a fundamental conflict of interest and a prime example of institutional corruption.”

Light says the problem with drug regulators is widespread. Even the FDA—the most well funded regulator—reports 65% of its funding for the evaluation of drugs comes from industry user fees, and over the years user fees have expanded to generic drugs, biosimilars, and medical devices.

“It’s the opposite of having a trustworthy organization independently and rigorously assessing medicines. They’re not rigorous, they’re not independent, they are selective, and they withhold data. Doctors and patients must appreciate how deeply and extensively drug regulators can’t be trusted so long as they are captured by industry funding.”

**External Advisors.** Concern over COIs is not just directed at those who work for the regulators but extends to the advisory panels intended to provide regulators with independent expert advice.A BMJ investigation last year found several expert advisers for covid-19 vaccine advisory committees in the UK and US had financial ties with vaccine manufacturers—ties the regulators judged as acceptable. See [here for further details](https://substack.com/redirect/b64b218c-d10a-4f54-9b8d-cf90d0578a68?u=22978736). A large study that investigated the impact of COIs among FDA advisory committee members over 15 years found that those with financial interests solely in the sponsoring firm were more likely to vote in favor of the sponsor’s product,**(see**[**here**](https://substack.com/redirect/75e496d0-6717-4875-94e5-dc07bac077e2?u=22978736)**)**and that people who served on advisory boards solely for the sponsor were significantly more likely to vote in favor of the sponsor’s product.

Joel Lexchin, a drug policy researcher at York University in Toronto, says, “People should know about any financial COIs that those giving advice have so that they can evaluate whether those COIs have influenced the advice they are hearing. People need to be able to trust what they hear from public health officials and a lack of transparency erodes trust.”

Of the six major regulators, only Canada’s drug regulators did not routinely seek advice from an independent committee and its evaluation team was the only one completely free of financial COIs. European, Japanese, and UK regulators publish a list of members with their full declarations online for public access, while the FDA judges COIs on a meeting-by-meeting basis and can grant waivers allowing participation of members.

**Transparency, conflicts of interest, and data.**Most regulatory agencies do not undertake their own assessment of individual patient data, but rather rely on summaries prepared by the drug sponsor. The TGA, for example, says it conducts its covid-19 vaccine assessments based on “the information provided by the vaccine’s sponsor.” According to a FOI request from last May, the TGA said it had not seen the source data from the covid-19 vaccine trials. Rather, the agency evaluated the manufacturer’s “aggregate or pooled data.”

Among global regulators, only two—the FDA and PMDA—routinely obtain patient level datasets. And neither proactively publish these data. Recently, a group of more than 80 professors and researchers called the Public Health and Medical Professionals for Transparency sued the FDA for access to all the data which the agency used to grant licensure for Pfizer’s covid-19 vaccine. (see [here](https://substack.com/redirect/e510c9bc-e067-4acf-b744-9514afeaa5f7?u=22978736))The FDA argued that the burden on the agency was too great and requested that it be allowed to release appropriately redacted documents at the rate of 500 pages a month, a speed that would take approximately 75 years to complete. In a win for transparency advocates, this was overturned by a US Federal Court Judge, ruling that the FDA would need to turn over all the appropriately redacted data within eight months. Pfizer sought to intervene to ensure “information that is exempt from disclosure under the FOI act is not disclosed inappropriately,” but its request was denied.

**Speedy approvals.** Following the AIDS crisis of the 1980s and 1990s, PDUFA “user fees” were introduced in the US to fund additional staff to help speed the approval of new treatments. Since then, there has been concern over the way it moulded the regulatory review process—for example, by creating “PDUFA dates,” deadlines for the FDA to review applications, and a host of “expedited pathways” for speeding drugs to market. The practice is now a global norm.

Today, all major regulators offer expedited pathways that are used in a significant proportion of new drug approvals. In 2020, 68% of drug approvals in the US were through expedited pathways, 50% in Europe, and 36% in the UK. Courtney Davis, a medical and political sociologist at the Kings College London, says that a general taxation or a drug company levy would be better options to fund regulators. “PDUFA is the worst kind of arrangement since it allows industry to shape FDA policies and priorities in a very direct way. Each time PDUFA was reauthorised, industry had a seat at the table to renegotiate the terms of its funding and determine which performance metrics and goals the agency should be evaluated by. Hence the FDA’s focus on making quicker and quicker approval decisions—even for drugs not judged to be therapeutically important for patients.”

**The regulator-industry revolving door.**Critics argue that regulatory capture is not only being baked in by the way in which agencies are funded, but also staffed. A “revolving door” has seen many agency officials end up working or consulting for the same companies they regulated.

At the FDA, generally regarded as the world’s premier regulator, nine out of 10 of its past commissioners between 2006 and 2019 went on to secure roles linked with pharmaceutical companies,and its 11th and most recent, Stephen Hahn, is working for Flagship Pioneering, a company that acts as an incubator for new biopharmaceutical companies.

***Having taken a shot at defining the problem of HHS as a leading branch of the Administrative State in Part 1, in Part 2 various actions designed to break the power of the Administrative State (attempted or are in progress) will be reviewed and summarized.***

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