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What to do with a Problem like HHS? (Pt. 2, treating the disease)

Unwinding entrenched administrative state agencies is hard, time consuming work

Robert W Malone MD, MS

Jul 7, 2022

 *Flag of the United States Senior Executive Service*

**Treating the Disease: HHS, The Administrative State, and Inverse Totalitarianism**

To help understand and prioritize the stack of possible responses to the advanced state of corruption within the US HHS, it is useful to think of a pyramid-shaped hierarchy of problems and issues. The origin of these issues and the overall Administrative State can be [traced to the Pendleton Act of 1883](https://substack.com/redirect/8c42f9a1-c6ae-4194-97e1-362bc8165efd?u=22978736), which was established to end the patronage system which had preceded it. Of necessity, this brief analysis will only highlight a few of the issues with a particular focus on the COVIDcrisis, as a comprehensive summary and action plan would require hundreds if not thousands of pages of texts, graphs and figures. Just to illustrate the size and scope of the overall problem, please see the [Biden-Harris Management Agenda Vision](https://substack.com/redirect/725d3567-2d52-45f7-8095-18125f50d5d4?u=22978736) statement, which represents how the Administrative State sees itself, its problems, and its proposed solutions.

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To provide context concerning the size of the HHS Administrative State, the President’s [FY 2022 HHS budget](https://substack.com/redirect/26d8c32b-ff28-4f9e-9d88-a7506aa96b1d?u=22978736) proposes $131.8 billion in discretionary budget authority and $1.5 trillion in mandatory funding. In contrast, President’s FY 2022 budget request for [DoD is $715 billion](https://substack.com/redirect/d5b1e478-0974-444b-ab14-f4554590029b?u=22978736). According to [Federal News Network](https://substack.com/redirect/a2b5e88c-95a0-4f8d-8fbe-f338406b4a2d?u=22978736), the [President’s Budget Request](https://substack.com/redirect/9a54d6ae-6b85-4ab9-92e3-1443400fd91a?u=22978736) included approximately $62.5 billion for NIH, compared to $42.9 billion the agency received in the 2022 continuing resolution, and $42.8 billion in the final 2021 budget. The request represents a 7.2% increase for research project grants, a 50% increase in the buildings and facilities appropriation, and a 5% increase for training. The [2023 proposal includes](https://substack.com/redirect/857b2fdb-6931-4e23-8a75-5e2744f3f746?u=22978736) $12.1 billion more for pandemic preparedness, and an additional $5 billion to stand up the new Advanced Research Project Agency for Health (ARPA-H). Based on 2022 numbers, the NIH budget (alone, not including ASPR/BARDA) represents 8.7% of the entire DoD budget.

**Stopping Administrative State COVIDcrisis Overreach**

The foundation of the HHS COVIDcrisis mismanagement is built upon the authorization that has allowed the HHS arm of the Administrative State to suspend a wide range of federal statutes and functionally bypass various aspects of the Bill of Rights of the US Constitution: the “[Determination that a Public Health Emergency Exists](https://substack.com/redirect/7253fe9e-beaa-4536-a4fb-cf32c41519ba?u=22978736)”. First signed by HHS Secretary Alex Azar on 31 January, 2020, it was then [renewed](https://substack.com/redirect/38c9d309-ed59-47d5-a6b8-d9d9a1f742b9?u=22978736) by Azar/Trump effective April 26, 2020, and [again on 23 July](https://substack.com/redirect/f772ea37-6e8e-4c8b-ada4-85036117c59e?u=22978736) (Azar/Trump), again on [October 02, 2020](https://substack.com/redirect/63f2a648-9c0d-4f77-8684-a19ec98341ba?u=22978736) (Azar/Trump), [January 07, 2021](https://substack.com/redirect/01cb5ff9-f8dd-412e-8092-a1f063a28f8c?u=22978736) (Azar/Trump), and then we switch Presidential administrations. The Biden administration did not miss a beat. On January 22, 2021, Acting HHS Secretary Norris Cochran [notified governors across the country](https://substack.com/redirect/c65c1ee8-96cf-4320-90e7-644f55b73ee6?u=22978736) of details concerning the ongoing public health emergency declaration for COVID-19. Among other things, the Acting Secretary Cochran indicated that HHS will provide states with **60 days notice prior to the termination** of the public health emergency declaration for COVID-19. HHS Secretary Xavier Becerra then began renewing the Determination that a Public Health Emergency Exists on [April  15, 2021](https://substack.com/redirect/0fa78052-4b7d-4276-89c9-3e99ea1aa3d6?u=22978736), renewed [July 19, 2021](https://substack.com/redirect/26bae101-9422-423d-bd7b-40397e33dabf?u=22978736); [October 15, 2021](https://substack.com/redirect/384242bc-1b65-4bdc-8b71-7e89e30638fb?u=22978736); [January 14, 2022](https://substack.com/redirect/3635e7e5-ee31-4ab6-855e-c974bb6695f1?u=22978736); and [April 12, 2022](https://substack.com/redirect/a3b02bb8-aff9-48d1-bf0a-59acc88ed50b?u=22978736). Based on this schedule, another renewal is due during the third week in July, 2022. **All of this is based upon the authority granted to the HHS arm of the Administrative State by Congress when it passed the**[**Pandemic and All Hazards Preparedness Reauthorization Act**](https://substack.com/redirect/c8b5af10-ad7b-484a-98e6-b9b25ef5eafb?u=22978736)**(PAHPRA) in 2013**.

[According to the Office of the Assistant Secretary for Preparedness and Response](https://substack.com/redirect/3426c2f5-2a2d-491f-8ad8-cf71fc4b7383?u=22978736), the [Pandemic and All Hazards Preparedness Reauthorization Act](https://substack.com/redirect/654ac546-b9f7-458a-b42a-1e38633649f2?u=22978736) (PAHPRA) amended section 564 of the Federal Food, Drug and Cosmetic (FD&C) Act, 21 U.S.C. 360bbb-3, to provide more flexibility to the Health and Human Services Secretary to authorize the U.S. Food and Drug Administration (FDA) to issue an [Emergency Use Authorization](https://substack.com/redirect/e6dcf7b7-cd66-4c4a-b52c-00a4d3b0c9cb?u=22978736) (EUA).  The Secretary is no longer required to make a formal determination of a public health emergency under section 319 of the Public Health Service Act, 42 U.S.C. 247d before declaring that circumstances justify issuing an EUA.  Under section 564 of the FFD&C Act, as amended, the Secretary now may determine that there is a public health emergency or significant potential for a public health emergency that affects, or has significant potential to affect, national security or the health and security of U.S. citizens living abroad and involves a biological, chemical, radiological, or nuclear agent or disease or condition that may be attributable to such agent(s).  The Secretary may then declare that the circumstances justify emergency authorization of a product, enabling the FDA to issue an EUA before the emergency occurs.

Based on my understanding of Federal Administrative Law, the PAHPRA is unconstitutional and should be immediately rescinded by the courts due to the nondelegation doctrine. **In my opinion, this is the first action which should be taken to dismantle the HHS overreach which has yielded the COVIDcrisis public health fiasco, and will not require a major electoral turnover before proceeding.** As previously discussed, the “nondelegation doctrine” is arguably the most significant Administrative State issue being actively considered within the current Supreme Court. The theory is predicated on the Constitution’s [Article I](https://substack.com/redirect/c2adc4e9-4bd4-4043-9f47-195cae8d0a1d?u=22978736), which provides that all legislative powers herein granted shall be vested in Congress. This grant of power, the argument goes, cannot be redelegated to the executive branch. If Congress grants an agency effectively unlimited discretion (as it has with PAHPRA), then it violates the constitutional “nondelegation” rule. If the PAHPRA is overturned, then the whole cascade of HHS Administrative State actions which have enabled bypassing of normal bioethical (see the “Common Rule” [**48 CFR § 1352.235-70 - Protection of human subjects**](https://substack.com/redirect/4b6aec6d-aa5e-4111-92df-3a784e193fbb?u=22978736)) and both normal drug and vaccine regulatory procedures. Furthermore, the PAHPRA is what enables [Emergency Use Authorization](https://substack.com/redirect/ada44c17-1932-4682-8292-5f6d0f290966?u=22978736) (EUA) of drugs and vaccines, and if overruled, the regulatory authorization for these unlicensed EUA-allowed would be jeopardized. In addition to challenging the legitimacy of the PAHPRA based on the nondelegation doctrine, similar challenges should be raised with the [**21st Century Cures Act**](https://substack.com/redirect/da917a95-015a-47ff-a153-ad0928b87962?u=22978736) (HR 34; PL: 114-255), and [**Public Law 115-92**](https://substack.com/redirect/cdd7688a-1d06-4544-95fd-a62a53373da5?u=22978736)**(HR 4374).**

**Dismantling The HHS Administrative State**

The leadership hierarchy of the US Federal Administrative State is structured along the [same lines as the military](https://substack.com/redirect/8efff65f-3d39-480e-93db-96946937cc61?u=22978736), with a progressive series of general service ranks (GS-1 through GS-15, with 15 being the most senior) which are lead by a separate leadership group called the [**Senior Executive Service**](https://substack.com/redirect/11ee1360-1565-4344-b931-0a97ae0dac97?u=22978736)**(**SES V through I, with SES I being most senior**)**, which oversees civilian government operations. According to the [Office of Personnel Management](https://substack.com/redirect/11ee1360-1565-4344-b931-0a97ae0dac97?u=22978736);

The Senior Executive Service (SES) lead America’s workforce. As the keystone of the Civil Service Reform Act of 1978, the SES was established to “...ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.” These leaders possess well-honed executive skills and share a broad perspective on government and **a public service commitment that is grounded in the Constitution**.

Members of the SES serve in the key positions just below the top Presidential appointees. SES members are the major link between these appointees and the rest of the Federal workforce. **They operate and oversee nearly every government activity in approximately 75 Federal agencies**.

The U.S. Office of Personnel Management (OPM) manages the overall Federal executive personnel program, providing the day-to-day oversight and assistance to agencies as they develop, select, and manage their Federal executives.

In general, the SES is the leadership of the Administrative state, but it is not the only category of employment which has amassed power. [Dr. Anthony Fauci](https://substack.com/redirect/e71652bf-9bfd-41ab-a356-1f118014fb82?u=22978736), one of the highest paid federal employees ($434,312 base salary), is [exempt from being a member of the SES](https://substack.com/redirect/6bd0f62e-6703-4523-bcdd-9ad0246b5c8e?u=22978736) but rather serves taxpayers as a [Medical Officer](https://substack.com/redirect/40ec60f9-7bf6-4c49-83f6-f8d414de9b37?u=22978736) at the National Institutes of Health in Bethesda, Maryland. Medical Officer was the [10th most popular job](https://substack.com/redirect/40ec60f9-7bf6-4c49-83f6-f8d414de9b37?u=22978736) in the U.S. Government during 2020, with **33,865** employed under this category. Anthony S. Fauci is employed at the highest medical officer rank of RF-00 under the employees appointed and compensated as [special consultants](https://substack.com/redirect/55656533-aa86-4ba9-ab4d-54197fc25283?u=22978736) under [42 u.s.c. 209(f)](https://substack.com/redirect/594c30a2-95bc-4d40-9256-f834f2d7ea1c?u=22978736).

Despite the fact that Dr. Fauci is a consultant, he is still subject to **42-160 Conduct Laws and Regulations** ["Title 42 employees"]**,**which states that Title 42 employees must comply with all ethical and conduct-related laws and regulations applicable to other Executive Branch employees. These include laws concerning [financial interests, financial disclosure](https://substack.com/redirect/c21a5fcb-c2ec-4bd1-ad25-7ba32d94cb8b?u=22978736), and conduct regulations promulgated by the Department, by the Office of Government Ethics, and other agencies. Discharge of Title 42 employees under the ethical and conduct-related laws and regulations applicable to Executive Branch employees, or to **42-140 Performance Management and Conduct**breaches (for example, [lying in sworn congressional testimony](https://substack.com/redirect/11e68c73-1999-44db-85e8-cec0d01b6e55?u=22978736)), often requires up to two years of legal processes, which gives rise to the common practice of assigning such personnel to a proverbial “broom closet” office without windows, telephone or assigned tasks.

Jeffrey Tucker of the Brownstone Institute has summarized one set of [strategies developed to dismantle the Administrative State](https://substack.com/redirect/5196212d-bff4-49bd-9981-3b1dac41b03f?u=22978736). President Trump tried to break the power of the SES using a [series of executive orders](https://substack.com/redirect/5196212d-bff4-49bd-9981-3b1dac41b03f?u=22978736) (E.O. 13837, E.O. 13836, and E.O.13839) that would have diminished the access of federal employees (including the SES) to labor-union protection when being pressed on the terms of their employment. **All three of these were**[**struck down**](https://substack.com/redirect/ac053068-b2fe-451b-9a40-f92615427b34?u=22978736)**with a decision by a DC District Court.** The presiding judge was Ketanji Brown Jackson, who was later rewarded for her decision with a nomination to the Supreme Court, which was affirmed by the US Senate. Jackson’s judgment was later reversed but Trump’s actions were embroiled in a juridical tangle that rendered them moot. However, in light of the recent Supreme Court decisions, it is possible that the structure of these executive orders may withstand future judicial action. Two weeks before the 2020 general election, on October 21, 2020, Donald Trump issued an [executive order](https://substack.com/redirect/a066842d-6c77-4280-8fe6-51dee3f896a3?u=22978736) (E.O. 13957) on “Creating Schedule F in the Excepted Service.” which was designed to overcome the prior objections and involved creation of **a new category of federal employment called Schedule F**. Employees of the federal government classified as Schedule F would have been subject to control by the elected president and other representatives, and these employees would have included:

“Positions of a confidential, policy-determining, policy-making, or policy-advocating character not normally subject to change as a result of a Presidential transition shall be listed in Schedule F. In appointing an individual to a position in Schedule F, each agency shall follow the principle of veteran preference as far as administratively feasible.”

The order demanded a thorough governmental review of what is essentially a reclassification of the SES.

“Each head of an executive agency (as defined in section 105 of title 5, United States Code, but excluding the Government Accountability Office) shall conduct, within 90 days of the date of this order, a preliminary review of agency positions covered by subchapter II of chapter 75 of title 5, United States Code, and shall conduct a complete review of such positions within 210 days of the date of this order.”

The Washington Post, which often functions as the official organ of the Administrative State, certainly appreciated the power of this approach when it was proposed, breathless[ly] posting an OpEd entitled “[Trump’s newest executive order could prove one of his most insidious](https://substack.com/redirect/a7327e6f-e156-47f8-bf65-72a9b7f719ed?u=22978736)”:

“The directive from the White House, issued late Wednesday, sounds technical: creating a new “Schedule F” within the “excepted service” of the federal government for employees in policymaking roles, and directing agencies to determine who qualifies. Its implications, however, are profound and alarming. It gives those in power the authority to fire more or less at will as many as tens of thousands of workers currently in the competitive civil service, from managers to lawyers to economists to, yes, scientists. **This week’s order is a major salvo in the president’s onslaught against the cadre of dedicated civil servants whom he calls the “deep state” — and who are really the greatest strength of the U.S. government.”**

[Jeffrey Tucker summarizes](https://substack.com/redirect/5196212d-bff4-49bd-9981-3b1dac41b03f?u=22978736) the subsequent cascade of events:

“Ninety days after October 21, 2020 would have been January 19, 2021, the day before the new president was to be inaugurated. The *Washington Post* commented ominously: “Mr. Trump will try to realize his sad vision in his second term, unless voters are wise enough to stop him.”

Biden was declared the winner due mostly to mail-in ballots.

On January 21, 2021, the day after inauguration, **Biden reversed the order. It was one of his first actions as president**. No wonder, because, as ***The Hill***[**reported**](https://substack.com/redirect/e9efa53e-2c3c-4e40-b117-215e15226e92?u=22978736)**, this executive order would have been “the biggest change to federal workforce protections in a century, converting many federal workers to ‘at will’ employment.”**

How many federal workers in agencies would have been newly classified at Schedule F? We do not know because only one completed the review before their jobs were saved by the election result. The one that did was the Congressional Budget Office. Its conclusion: fully 88% of employees would have been newly classified as Schedule F, thus allowing the president to terminate their employment.

This would have been a revolutionary change, a complete remake of Washington, DC, and all politics as usual.

If the HHS Administrative State is to be dismantled, so that it will become possible to manage the various Executive Branch agencies once again, Schedule F provides an excellent strategy and template to achieve the objective. If this most important of all tasks is not achieved, then we will remain at risk that HHS will once again attempt to trade our national sovereignty for additional power by aligning with the WHO, as was recently attempted in the case of the surreptitious January 28, 2022 [proposed modifications to the International Health Regulations](https://substack.com/redirect/c331ea2a-7f05-438f-82ba-cfb38b816823?u=22978736). These actions, which were not made public until April 12, 2022, clearly demonstrate that the HHS Administrative State represents a clear and present danger to the US Constitution and national sovereignty, and must be dismantled as soon as possible.

**Stopping Corporate-Administrative Collusion and Corruption**

The third[?] core problem which must be addressed involves the various laws, administrative policies, and surreptitious practices which have empowered the symbiotic (or is is parasitic?) alliance which has formed between

* the medical-pharmaceutical complex and
* the HHS Administrative State.

Once again, it is important to recognize the fundamental political structure which has been created; a Fascist Inverse Totalitarianism. The face of modern **fascism** is often stereotyped by the corporate press as a group of Tiki-torch waving Proud Boys in uniforms marching in Charlottesville and committing acts of violence in person with bats or via automobile. But this is not modern fascism, it is a group of mostly young men aping superficial features of the German Third Reich while wearing outdated uniforms and chanting repugnant slogans designed to provoke outrage. Fascism is a political system which is otherwise known as Corporatism, that being the fusion of corporate and state power. And as previously discussed, currently the real power of the US Government lies in the Fourth Estate, the Administrative State. To break up these “public-private partnerships” which compromise the ability of HHS to perform essential oversight duties and truly protect the health of American Citizens from the rapacious practices and disgusting ethics of the medical-pharmaceutical complex (in which they behave as predators, and we have become the prey), **we must sever the financial and organizational ties that bind the medical-pharmaceutical industrial complex to the HHS Administrative State**, and which have been incrementally developed and deployed over many decades.

To return balance and Congressionally intended function to the HHS, the following steps must be accomplished, none of which can be accomplished until the power of the HHS Administrative State has been broken and the SES has been brought to heel through combined efforts of the Supreme Court, and both a new Congress and a new Executive branch.

1. The **Bayh-Dole act must be modified**, administratively or legislatively, so that it no longer apply to federal employees. HHS scientists and administrators must not be receiving royalties from intellectual property licensed to the medical-pharmaceutical complex, as this creates multiple layers of both explicit and occult financial conflicts of interest.
2. The **congressional charters for the “F**[**oundation for the National Institutes of Health**](https://substack.com/redirect/5acacd50-ec5f-4268-b26c-f7d04b5cca7c?u=22978736)**” and the “**[**CDC Foundation**](https://substack.com/redirect/153a5800-ebe6-496d-bc22-3bb12847472f?u=22978736)**” must be revoked**. These public-private partnership organizations have created unaccountable slush funds which are exploited by the HHS Administrative State and SES to circumvent the will of Congress (by enabling activities neither funded nor authorized by Congress) and embody the fusion of interests between the medical-pharmaceutical complex and the HHS Administrative State.
3. **The regulator-industry revolving door.** The revolving door between HHS employees and medical-pharmaceutical complex must somehow be jammed shut. Mere awareness of the probability of lucrative employment by Pharma upon retirement or departure from HHS oversight roles already biases almost every action of FDA and CDC senior and junior staff. I do not know how to accomplish this from a legal standpoint, I just know that the task must be accomplished if the public interest is to be better served.
4. **Industry Fees.** The idea of forcing the medical-pharmaceutical complex to pay for the cost of regulation was naive, and this practice must also be halted. If the taxpaying citizens of the USA want safe and effective vaccines, then they need to pay for the cost to insure that Pharma is forced to play by the rules. And when it does not, the resulting actions and fines must be so powerful that they cannot just be written off as a cost of doing business.
5. **Vaccine liability indemnification** is another legislative strategy which has clearly failed to meet its intended purpose. The vaccine industry has become an unaccountable monster which is consuming both adults and children. The National Childhood Vaccine Injury Act (NCVIA) of 1986 (42 U.S.C. §§ 300aa-1 to 300aa-34) was signed into law by United States President Ronald Reagan as part of a larger health bill on November 14, 1986, and has created an incentive structure with the familiar problem of coupling private profit to public risk, and has resulted in widespread corruption of both FDA/CBER and CDC.
6. **Speedy approvals**. Yet another “innovation” developed by Congress with wide latitude for implementation by the Administrative State, the Prescription Drug User Fee Act (PDUFA) was a law passed by the United States Congress in 1992 which allowed the Food and Drug Administration (FDA) to collect fees from drug manufacturers to fund the new drug approval process. The inefficiency of the FDA regulatory process has lead (largely via administrative fiat) to a series of “expedited approval” pathways, which in turn have been amplified and exploited by [Pharma to advance its own objectives](https://substack.com/redirect/af5c0597-d954-4365-a4fc-c22a61a33d17?u=22978736), often at the expense of the public. Another case of unintended blowback in which the best laid plans have been twisted by the Administrative State to the point of no longer serving the original intent of Congress. This is another situation which deserves legal scrutiny in light of the revisitation of the nondelegation doctrine.
7. **External Advisors**. External advisors are often used to provide cover for bureaucrats, and particularly for SES staff, so that a carefully handpicked external committee can be relied upon to produce the intended result while allowing the administrator to avoid responsibility and maintain plausible deniability for decisions which may be unpopular with the citizenry but lucrative or otherwise beneficial for the medical-industrial complex. Once again, while the original intent may have been noble, in practice this has become just another tool which the Administrative State has bent to do its bidding as well as that of its corporate partners.
8. **Transparency, conflicts of interest, and data.** If we have learned anything from the COVIDcrisis, it is that the HHS Administrative State is quite willing to withhold data from both outside scientists and the general public. Clearly this must stop, and once again recent district court decisions kindle hope that forcing the SES and Administrative State to become more open and transparent is an achievable objective.

**Conclusions**

Many voices have been raised which advocate some combination of pitchforks and torches for what the COVIDcrisis has clearly revealed to be a politicized and corrupted HHS and its associated subsidiary agencies and institutes. It may be that it will be necessary to create a parallel organization, mature it to the point that it can assume the essential functions of the current HHS, and then demolish the (at that point) obsolete HHS structure. But in the interim, I am convinced that the reforms proposed above could certainly advance the ball downfield towards an HHS which would provide greater value to US taxpayers and citizens, and which could be more effectively controlled by Congress and the Executive rather than operating largely autonomously to serve the interests of the Administrative State itself.

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