May 26, 2022

MEMORANDUM

TO: Jordan Sekulow
FROM: Bob Burkett
RE: WHO and Biden Administration Efforts to Undermine U.S. Sovereignty

Executive Summary

Under consideration by the World Health Organization (WHO) are two problematic sets of health proposals concerned with "Strengthening WHO preparedness for and response to health emergencies." One is a proposal by the Biden Administration to amend the International Health Regulations (2005). These amendments, *inter alia*, cede American liberties and sovereignty to the WHO; empower the WHO to finance surveillance measures in countries around the world; share unverified health information reported by potentially malicious or self-interested third parties; grant sweeping powers to the WHO's Director-General to declare "potential or actual" public health emergencies; and significantly shorten the length of time to consider and adopt the amendments.

Because the proposed amendments to IHR (2005), if adopted, will most likely become part of the originally ratified IHR (2005), their implementation may not require the ratification of a new treaty. However, U.S. reservations and understandings expressed during ratification of the original IHR (2005) would also most likely apply to the amendments and limit their implementation in the United States. The U.S. reservations and understandings state that the United States "reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism" and the U.S. Constitution. This would potentially limit the amendments' domestic enforceability even if they are adopted. However, absent intervention by Congress or a case challenging the legality of the proposed IHR (2005) amendments, these proposals could potentially take effect within six months[1] of adoption. Our leaders must recognize the serious and problematic nature of these proposals before it is too late to prevent them from harming the American public.

The other set of proposals is an aggregation of recommendations from the Working Group on WHO Preparedness and Response (WGPR) for strengthening the WHO.[2] The proposals include a global digital surveillance regime, individual digital vaccine passports, and the creation of a transnational disinformation board. The WHO has partnered with the telecommunications industry and efforts are currently underway for electronic vaccination certificates to be adopted and used around the world. According to the WGPR, many of the other WGPR recommendations, however, will require States Parties to adopt a new international

[1] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_18-en.pdf
[2] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_17-en.pdf

instrument for them to be implemented. This will likely require the approval of a treaty, such as the discussed International Treaty on Pandemic Prevention, Preparedness, and Response in May 2024 at the 77th World Health Assembly. ACLJ Action understands the importance of this issue and will continue to monitor it as it develops.

Overview

The World Health Organization (WHO) will hold the upcoming 75th World Health Assembly (WHA) in Geneva from May 22-28, 2022.[3] One of the key themes of the upcoming WHA is "strengthening preparedness for and response to health emergencies."[4] While the plenary agenda lists a variety of health proposals, some of the most problematic are provisional agenda item 16.2, Document A75/18[5] and Document A75/17,[6] both entitled "Strengthening WHO preparedness for and response to health emergencies."

On January 18, 2022, the Biden Administration through the Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva transmitted Document A75/18, as a set of amendments to the International Health Regulations (IHR) (2005).[7] The IHR (2005) are intended "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with traffic and trade."[8] In accordance with Article 55(1) and Article 55(2) of the IHR (2005), in January 2022, the United States submitted these proposed amendments for consideration at the convening of the WHA this week.[9] Included with the proposed amendments was a letter from U.S. Department of Health and Human Services Assistant Secretary of Global Affairs Loyce Pace "reiterating the critical importance of strengthening the IHR (2005) along with other efforts to strengthen the ability of the WHO and Member States to prevent, detect, and respond to future public health emergencies of international concern."[10]

Document A75/17 is the final "Report of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the Seventy-Fifth World Health Assembly." The final report is a compilation of recommendations from the Working Group on WHO Preparedness and Response (WGPR) concerned with strengthening the WHO and was submitted to fulfill the mandate "to submit a report with proposed actions for the WHO Secretariat, Member States, and non-State actors, as appropriate, for consideration by the Seventy-Fifth World Health Assembly" including considerations for onward work to address

[3] https://www.who.int/about/governance/world-health-assembly/seventy-fifth-world-health-assembly
[4] Ibid.
[5] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_18-en.pdf

[6] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_17-en.pdf

[7] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_18-en.pdf
[8] International Health Regulations (2005). Third Edition. World Health Organization.
[9] Ibid.
[10] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_18-en.pdf

"critical gaps that remain in health emergency prevention, preparedness, and response, including for pandemics."[11]

Analysis of the Biden Administration's Proposal to Amend IHR (2005), Document A75/18

The Biden Administration's proposed amendments to IHR (2005)[12] submitted at the WHO in Document A75/18 make numerous significant changes in the IHR (2005) that curtail American rights and liberties, including the following:

- In *Article 5: Surveillance*, adding language to help a State Party "identify resource constraints and other challenges in attaining" capacity to "detect, assess, notify, and report" events, defined as "diseases or occurrences creating a potential for disease." WHO further can "assist in mobilization of financial resources to develop, strengthen or maintain such capacities" upon the request of a State Party and "shall develop early warning criteria for…national, regional, or global risk posed by an event."
    - Allowing the WHO to offer financial support to strengthen surveillance measures on domestic populations threatens individual freedom and privacy rights, and allowing international bureaucrats to establish criteria to assess U.S. public health risks usurps U.S. sovereignty in determining a public health crisis.
- In *Article 9: Other reports*, allowing the WHO to consider reports from sources other than through notifications from, or consultations with, the State Party in whose territory an event is allegedly occurring. The WHO is no longer required to consult with, or obtain verification from, a State Party prior to taking action on these reports. The WHO shall make the information available to States Parties and maintain confidentiality of these sources unless "duly justified." The information can also be used based on the procedure set forth in Article 11.
    - This allows the WHO to consider and act on confidential reports without verifying information with a State Party in whose territory an event has occurred, including potentially malicious or self-interested actors that could weaponize or manipulate public health measures for their own ends.
- In *Article 10: Verification*, setting a strict 24–72-hour timeline during which a State Party must verify reports with the WHO and choose to accept or reject a WHO offer of collaboration. Upon a State Party's refusal to collaborate, the WHO "shall, when justified by the magnitude of public health information" share with other State Parties the information it has available while asking the original State Party to accept the offer of collaboration.
    - This would grant the WHO the discretion to share alleged or provided public health information "when justified by the magnitude of public health information"

[11] Ibid.
[12] Ibid.

with other States Parties to pressure the United States into accepting the WHO collaborative measures or recommendations.

- In *Article 11: Provision of Information by WHO,* obligating the WHO to share information with State Parties in certain instances, and granting the WHO broad discretion in determining the necessity of sharing information. The WHO "shall" share public health information, newly including information "available in the public domain" and communicate information to other States Parties to help prevent similar incidents. Furthermore, the WHO shall share notifications from, or consultations with, a State Party or reports from other sources in Article 9, with other States Parties when the "WHO determines it is necessary that such information be made available to other States Parties to make informed, timely risk assessments" unless otherwise agreed with involved States Parties. Finally, an annual report is required to the WHA including the sharing of information on events allegedly occurring.

- In *Article 12: Determination of a public health emergency of international concern,* updating the title to include "public health emergency of regional concern, or intermediate health alert." The WHO Director-General (DG) is granted sweeping authority to "notify all State Parties and seek to" consult with a State Party in whose territory the event occurs in light of a "potential or actual" public health emergency of international concern (PHEIC). Further, if the DG determines an event constitutes a PHEIC, the DG may use the procedure in Article 49 and seek the views of Article 48's "Emergency Committee" to make temporary recommendations. Even if criteria for a PHEIC is not met, but the DG determines it "requires heightened international awareness and a potential international public health response" the DG may issue "an intermediate public health alert to States Parties." Finally, a Regional Director[13] can determine an event constitutes a "public health emergency of regional concern" and provide guidance to regional States Parties "either before or after notification of an event that may constitute a PHEIC is made."

    - This would grant the DG sweeping authority to notify other States Parties when considering "potential or actual" PHEICs, which are vaguely worded enough to declare climate change[14] or racism[15] a PHEIC in the United States.

    - Similarly, this would allow the DG to make temporary or intermediary recommendations about a PHEIC or potential PHEIC in the U.S. as well as Regional Directors to declare regional public health crises, even if these designations do not fit the definition of a PHEIC or conflict with a U.S. assessment.

- In *Article 13: Public health response,* outlining procedures according to which WHO shall offer help to a State Party. A State Party can accept or reject any offer of assistance

[13] One of six Directors of WHO regional offices. https://www.who.int/about/who-we-are/regional-offices
[14] Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health | NEJM
[15] https://www.cdc.gov/healthequity/racism-disparities/index.html

within 48 hours, providing a rationale for the rejection to be shared with other States Parties. A State Party "shall make reasonable efforts to facilitate short-term access to relevant sites" and "shall provide its rationale for denial of access."

- In *Article 18: Recommendations with respect to persons, baggage, cargo, containers, conveyances, goods, and postal parcels*, obligating the DG to consult with international agencies "to avoid unnecessary interference with international travel and trade, as appropriate." This includes recommendations geared towards appropriate exemptions minimizing the impacts of travel restrictions on health workers; trade restrictions and supply chains for medical equipment and supplies; and timely repatriation of travelers.
    - This seems to limit consultation with international agencies to only recognize impacts on health workers and medical supply chains, rather than maximizing the freedom and rights of broader populations, contrary to IHR (2005) Article 3.

- In *Article 48: Terms of reference and composition*, amending Emergency Committee membership to include Regional Directors from impacted regions. Furthermore, it establishes "age" and "gender" as new categories to ensure equitable participation in the Emergency Committee alongside inclusion of experts nominated by relevant State Parties.
    - The addition of "age" and "gender" as categories to be considered to increase equitable representation on Emergency Committees distracts from choosing representation based on personnel skill and experience.

- In *Article 49: Procedure*, allowing members of the Emergency Committee to express dissenting views in an individual or group report and ensuring all reports and shared with Member States. Affected States Parties are also able to present their views to the Emergency Committee and propose the termination of a PHEIC.

- In *Article 53 bis-quater: The Compliance Committee,* outlining the establishment, authorization, and business of the Compliance Committee (CC). The CC will monitor and assist State Parties in compliance with obligations under the IHR (2005), including through the submission of an annual report to the WHA. It is authorized to gather information in certain territories with the consent of the relevant State Party; consider relevant information submitted; seek experts and advisers; and make recommendations to a State Party and/or the WHO about improving compliance. The CC "strives to make recommendations on the basis of consensus" and prepares a report for each session with the CC's views and advice to be submitted to all State Parties, the DG, and other relevant international institutions.

- In *Article 59: Entry into force, period for rejection or reservations*, adding "for rejection of, or reservation to, an amendment to these Regulations…six months from the date of notification by the DG of the adoption of an amendment to these Regulations by the [WHA]." Amendments will enter into force six months from the date of notification.

- This threatens American sovereignty by significantly shrinking the timeline for rejecting or adopting an amendment from 18 months, as provided in the WHO Constitution Article 20,[16] to six months.

Final WGPR Report on Strengthening WHO Preparedness and Response in Document A75/17 Analysis

Of the 131 recommendations made and compiled in Document A75/17,[17] the adoption of certain recommendations below would grant intrusive surveillance powers that infringe on fundamental rights and liberties, including privacy rights, free speech, and national sovereignty:

Digital Global Surveillance

- According to *Digitalization and Communication: 8.1*, the WHO should "develop standards for a digital version of the International Certificate of Vaccination and Prophylaxis," the WHO's version of a vaccine passport, while consulting with States Parties and partners.

- *Digitalization and Communication: 8.2* recommends the WHO "develop norms & standards for digital technology applications relevant to international travel" which "may include the development of digital technologies for contact tracing in the international context, as well as options for the digitalization of all health forms in the IHR."

- Independent Panel for Pandemic Preparedness and Response (IPPPR_15) recommends that the WHO "establish a new global system for surveillance based on full transparency by all parties, using state-of-the-art digital tools to connect information centres around the world and include animal and environmental health surveillance, with appropriate protections of people's rights."

    - These recommendations threaten world freedoms and sovereignty by creating a global surveillance system using state-of-the-art digital tools with the potential to significantly restrict freedom of movement and condition travel and other fundamental rights on compliance with a global biosecurity regime. In fact, the WHO has already contracted with T-Systems to introduce digital vaccination certificates with QR codes to be checked across national borders.[18]

WHO International Misinformation Capacity

- The Independent Oversight and Advisory Committee for the WHO Health Emergencies Program (IOAC) recommends in IOAC_09 that the WHO "build capacity to deploy proactive countermeasures against misinformation and social

[16] https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=1
[17] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_17-en.pdf
[18] https://www.telekom.com/en/media/media-information/archive/covid-19-who-commissions-t-systems-648634

media attacks" and "invest in public information and risk communication" to best prepare for the next pandemic.

  - This threatens free speech by encouraging the development of a WHO apparatus to combat "misinformation," which could provide the WHO cover to engage in viewpoint discrimination or censor inconvenient facts.

Expedited Timeline for Adoption

- IPPPR_2 recommends "adopting a pandemic framework convention within the next 6 months, using the powers under Article 19 of the WHO Constitution[19], and complementary to the IHR, to be facilitated by WHO and with the clear involvement of the highest levels of government, scientific experts and civil society."
  - This threatens American sovereignty by significantly shrinking the timeline for adopting a convention or agreement from 18 months, as provided in the WHO Constitution Article 20[20], to six months.

Effect of Adoption of Document A75/17 and/or Document A75/18, "Strengthening WHO Preparedness for and response to health emergencies"

Many have expressed concerns that the adoption of either the proposed WGPR recommendations in A75/17 or of the amendments to IHR (2005) contained in "Strengthening WHO Preparedness and response to health emergencies" would usurp federal law and override the Constitution.[21] It is important to note the United States joined the WHO via Congressional adoption of a joint resolution in 1948. Congress allowed President Truman to join the WHO "with the understanding that nothing in the Constitution of the [WHO] in any manner commits the United States to enact any specific legislative program regarding any matters referred to in said Constitution."[22]

If adopted, the proposed amendments to IHR (2005) may not require the ratification of a new treaty to come into effect since they would amend already ratified IHR (2005). However, U.S. reservations and understandings filed when ratifying the original IHR (2005) may also apply to the amendments.

The United States filed one reservation and three understandings when ratifying the IHR (2005). The "reservation" states that the IHR "shall be implemented by the Federal Government or the state governments as appropriate and in accordance with our Constitution."[23] While the

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[19] Article 19 of the WHO Constitution provides that "A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with constitutional processes."
[20] https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=1
[21] https://www.conservativereview.com/horowitz-states-must-nullify-who-regulations-2657328780.html and https://brownstone.org/articles/the-who-treaty-is-tied-to-a-global-digital-passport-and-id-system/
[22] https://catalog.archives.gov/id/299858
[23] https://2001-2009.state.gov/s/l/2007/112669.htm

"as appropriate" seems to give broad discretion to the CDC as the federal body that implements the IHR (2005), the "in accordance with our Constitution" language also seems to give the federal government power not to implement any provision of the IHR (2005) contrary to our Constitution. Furthermore, the reservation also states that the United States government has "the right to assume obligations under [the IHR] in a manner consistent with the fundamental principles of federalism…to the extent such obligations come under the legal jurisdiction of the state governments, the Federal Government shall bring such obligations with a favorable recommendation to the notice of the appropriate state authorities."[24] Therefore, the federal government may not impose IHR (2005) on various states, but can only make recommendations as long as state governments have jurisdiction over those matters.

If the proposed amendments to the IHR (2005) are adopted as is (depending on their final language and the U.S. vote), the United States would be bound internationally by the amendments to IHR (2005) *vis-à-vis* our international partners. Domestic implementation by the CDC under the Public Health Services Act, however, would most likely be subject to the fundamental principles of federalism and whether the amendments are consistent with the Constitution. Furthermore, if the amendments go beyond the scope of what the Senate agreed to when giving its advice and consent, it would be a matter of dispute between the legislative and executive branches. For example, Congress could pass a law limiting or preventing objectionable portions of the amendments from implementation.[25]

The WGPR recommendations offered to strengthen the WHO in Document A75/17 include a global digital surveillance regime; individual digital vaccine passports; and the creation of a transnational disinformation board. The WHO has partnered with the telecommunications industry and efforts are currently underway for electronic vaccination certificates to be used around the world. While some recommendations can be implemented currently, others will require State Parties to approve a treaty or agreement for recommendations to take effect.[26] Many of these recommendations will likely require the approval of a treaty, such as the discussed International Treaty on Pandemic Prevention, Preparedness, and Response (ITPPPR) in May 2024 at the 77th World Health Assembly.[27] Adoption of a new treaty by the United States would be subject to the advice and consent of the Senate.[28]

Conclusion

The proposed amendments demonstrate the Biden Administration's willingness to sacrifice American sovereignty while preserving and empowering ineffective supranational institutions. Similarly, the WGPR recommendations to concentrate digital surveillance and a transnational information board at WHO legitimize international bureaucrats' arbitrary and sweeping powers to determine matters of "public health." Both the U.S. proposed amendments and WGPR recommendations pose a grave threat to American citizens' fundamental freedoms

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[24] Ibid.
[25] https://crsreports.congress.gov/product/pdf/RL/RL32528
[26] https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_17-en.pdf. See Appendix 2.
[27] https://www.who.int/news/item/01-12-2021-world-health-assembly-agrees-to-launch-process-to-develop-historic-global-accord-on-pandemic-prevention-preparedness-and-response
[28] U.S. Const. art. II, §2, cl. 2

and privacy protections. Ceding authority to an unaccountable international bureaucracy is a dangerous step toward international intrusion on American sovereignty. While legal protections do exist in case these amendments conflict with our Constitution, our leaders must recognize their serious and problematic nature of granting sweeping powers to WHO before it is too late to prevent them from harming the American public.

ACLJ Action understands the importance of this issue and will continue to closely monitor the situation as it develops.