

Management of the Administrative State

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Abstract

This article focuses on the management of the administrative state. By management of the administrative state, we mean the processes which not only govern how decisions are made but also the processes governing which decisions are made and who makes them including the most appropriate institution(s) to house the aforementioned activities. Emphasis is not placed on the techniques used to operate the administrative state such as benefit-cost analysis, centralized regulatory review, or judicial review, but instead on an identification of acceptable processes for the management of the administrative state. An ancillary issue is whether the economic and legal professions have the capacity and interest in pursuing the development of the said principles and procedures and whether a greater role should be accorded to social scientists, particularly political scientists. What could emerge is a new discipline dedicated to the management of the administrative state as opposed to its operation or in the alternative, refocus the agenda of the political science/public administration communities.

Keywords: Management of the Administrative State; Political Scientists; Office of Information and Regulatory Affairs; OIRA; OMB, Center for Regulatory Effectiveness, Dwight Waldo

1. General Framework

1.1 Previous Studies on Improving the Management of the Administrative State

The *Journal of Benefit-Cost Analysis* held a forum where a unique group of leading authorities expressed their precedent-setting comments on a recommended plan for moving forward on improving the management of the administrative state.² The resultant comments establish the foundation for a deliberative discussion on the future managerial mandates for OIRA³ (Office of

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² Symposium, *The Office of Information and Regulatory Affairs: Past, Present, and Future* 11 JNL. BEN-COST ANALYSIS (2020), <https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/issue/FEF31134CBB73FAF3AF93346D9BC9624>.

³ Peter Behr, *If There's a New Rule, Jim Tozzi has Read It*, THE CRE.COM (July 10, 1981), https://thecre.com/pdf/20160228_tozzi.pdf.

Information and Regulatory Affairs- Executive Office of the President of the United States) and the resultant management of the administrative state.

By management of the administrative state we mean the *processes* which not only govern *how* decisions are made but also the processes governing *which* decisions are made and *who* makes them; including the most appropriate institution(s) to house the aforementioned activities. The panoptic deliberations envisioned herein differ from the ongoing inquiries of the legal and economic professions in that the former are more akin to an Act III of Dwight Waldo's landmark book titled *The Administrative State* which was published two years subsequent to the enactment of the Administrative Procedure Act. The SSRN Political Science Network states: "Political Science is concerned with how power is distributed and wielded at every level, from the household to globally, and everywhere in between."⁴ What better foundation is there than political science⁵ for developing the principals to govern the management of the administrative state?

Consequently, the purpose of this article is to encourage individuals in the political and social sciences to promote research and to provide the necessary political acumen needed to enhance the management of the administrative state⁶. The resultant enhancement of the management of the administrative state will occur when political scientists provide the multidisciplinary mandates which are to govern the actions of OIRA to the relevant reviewing authorities and then promote them in leading academic journals.

As a result of the breadth and depth of the comments rendered by the nationally recognized leaders in the *Journal of Benefit-Cost Analysis*, coupled with their compelling and judicious challenges, there is a need for the adoption of encyclopedic mandates by OIRA, an institution which serves as the fulcrum for managing the regulatory state. Therefore, practitioners and scholars in public policy, history, government, philosophy, public administration, political science, business, related fields and, last but not least, *science policy*—(heretofore collectively identified as the “silent disciplines”) have an open invitation to initiate a nationwide and public campaign for the creation and implementation of a new charter into the rubric of OIRA. The new charter will transcend the current process of managing the administrative state by the isolated review of a very select number of rules on a rule-by-rule basis.

To this end, a political scientist has proposed to unleash the inherent strength of OIRA by instituting a *proactive* regulatory mode of action, in addition to the established *reactive* mode of action, for OIRA.⁷ The aforementioned proposal has been reinforced by several other recently released studies by other political scientists.⁸ The forcefulness of the studies demonstrates that, if

⁴ Political Science Network, SSRN, <https://www.ssrn.com/index.cfm/en/psn/> (last visited May 29, 2020).

⁵ Jim Tozzi, *Political Science, OIRA, and the Presidency*, THE CRE.COM (May 10, 2020), <https://www.thecre.com/forum8/?p=4567>.

⁶ *Management of the Administrative State: The Fifty Year Record*, THE CRE.COM (Sept. 29, 2017), <https://www.thecre.com/forum8/?p=1092>.

⁷ Todd N. Tucker & Rajesh D. Nayak, *OIRA 2.0: How Regulatory Review Can Help Respond to Existential Threats*, GREATDEMOCRACYINITIATIVE.ORG 1 (Apr. 2020), https://greatdemocracyinitiative.org/wp-content/uploads/2020/04/OIRA_Final.pdf.

⁸ Todd N. Tucker & Rajesh D. Nayak, *OIRA 2.0: How Regulatory Review Can Help Respond to Existential Threats*, GREATDEMOCRACYINITIATIVE.ORG 1 (Apr. 2020), https://greatdemocracyinitiative.org/wp-content/uploads/2020/04/OIRA_Final.pdf; Adam Weinberg, *We need a new Framework to Solve Problems in the Wake of COVID-19*, THE HILL: OPINION (June 2, 2020, 4:30 PM), <https://thehill.com/opinion/healthcare/500679-we-need-a-new-framework-to-solve-problems-in-the-wake-of-covid-19>; Rachel Augustine Potter, *Bending the Rules: Procedural Politicking in the Bureaucracy* (2019), <https://www.goodreads.com/book/show/41591096-bending-the-rules>; Andrew Rudalevige, *Central Clearance as Presidential Management*, CTR. STUD. ADMIN. ST. 1 (Feb. 6, 2020), <https://administrativestate.gmu.edu/wp->

OIRA is going to conquer new frontiers, its activities must be both promoted and supported by the “silent disciplines,” and responsible organizations inside and outside the federal government should solicit their active participation in the regulatory process.

Not only is there a stark difference of opinion on how to resolve several of the most significant supervisory issues affecting the management of the administrative state but there are also disagreements concerning the degree to which the legal and economic professions can continue to make worthwhile contributions to an expanded multidisciplinary mandate for OIRA. Notwithstanding their laudatory participation to date, it is doubtful whether legal academicians, whose primary interest is the judicial review of agency actions, or whether the economic profession, whose primary interest is the perfection of the methodologies for conducting benefit-cost analyses, can address in a holistic manner, and on a continuous basis, the increasingly contentious issue of OIRA’s role in managing the administrative state.

1.2 CRE Study of the Management of the Administrative State

The CRE has engaged in a multiyear effort to encourage established legal institutions to address several critical issues concerning management of the regulatory state.⁹ The CRE’s actions were reinforced by complementary actions taken by many legal professionals;¹⁰ culminating in the publication of a White Paper for the Southeastern Association of Law Schools’ 2017 SEALS Annual Conference.¹¹ The White Paper was nevertheless rejected in a number of fora and, therefore, created a pressing need to pursue other avenues for the enhancement of the management of the administrative state. A lack of resources precluded undertaking a similar effort involving the economic profession.

Even if the legal and economic professions did initiate the relevant research, it is imperative that new disciplines capable of effectuating “discipline diversity” participate in discussions governing the management of the administrative state. This would ensure that the aforementioned professions are no longer the sole participants in the debate. With the advent of the “muscular presidency” the processes which govern the actions of the “most powerful office you never heard of”¹² are far too important to be addressed by anything less than a multitude of disciplines.

It has been said that over a lifetime career academicians and practitioners can play a significant role in the activities of the administrative state but, at any particular point in time, they are standby equipment. Indeed, the decrees of the federal employees who manage the administrative state

[content/uploads/sites/29/2020/02/Rudalevige-Central-Clearance-as-Presidential-Management.pdf](https://www.thecre.com/content/uploads/sites/29/2020/02/Rudalevige-Central-Clearance-as-Presidential-Management.pdf); Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOV. ACCT. REV. 25 (2019), <https://law.emory.edu/ecgar/documents/volumes/6/1/hill.pdf>.

⁹ Jim Tozzi, CRE Letter to the President of the American Bar Association, THE CRE.COM (Aug. 30, 2016), <https://www.thecre.com/forum8/?p=271>.

¹⁰ *Leading Actions to Revise Law School Curricula*, THE CRE.COM (Jan. 25, 2017), <https://www.thecre.com/forum8/?p=447>.

¹¹ Jim Tozzi, *Social Entrepreneurs and the Management of the Regulatory State: The Latent Need for an Updating of Law School Curricula*, SE. ASS’N L. SCHS. (Aug. 4, 2017), <https://www.thecre.com/forum8/wp-content/uploads/2019/06/White-Paper.pdf>.

¹² Adam Levenson, OMB: *The Most Powerful Office in Washington That You’ve Never Heard Of*, UNC: SCHOOL OF GOVERNMENT (Jul. 11, 2014), <https://onlinempa.unc.edu/office-of-management-and-budget/>.

dictate prevailing management principles. To improve the management of the administrative state, practitioners and academicians must become acquainted with the historical culture that defines the incentives, and guides the actions, of these federal employees.

Hopefully, this unmatched library¹³ of readily available historical information¹⁴ on centralized regulatory review will serve as an incentive for a battery of new entrants, with a wide range of backgrounds, to address the managerial mandates applicable to OIRA.

2. Background

2.1 Defining Management of the Administrative State

The history of the development of centralized regulatory review, and the resultant management of the administrative state, spans the past half-century.¹⁵ *The bottom line is that publicly available information demonstrates that, as a result of decisions made by OMB Directors over a period of forty years, OIRA's staff has been reduced by 50% from the level it had at its inception. The market is signaling a need for OIRA to expand both its product line and its constituent and analytical base.*

Historically, three disciplines have studied the functioning of the administrative state: law, economics, and political science/public administration. Unfortunately, none of these disciplines have continually focused on the management of the administrative state. Here, management of the administrative state refers to the *processes*, which govern *how* decisions are made, and the processes governing *which* decisions are made and *who* makes them.

To date the management of the administrative state has been largely defined by four actions: (1) the passage of the Administrative Procedure Act,¹⁶ (2) benefit-cost analysis,¹⁷ (3) centralized regulatory review¹⁸ and, (4) implementation of a regulatory budget,¹⁹ each of which provide a mechanism for expanding OIRA's mandates. These process changes are controversial, and they continue to be the subject of review by the aforementioned professions. Additionally, these process changes have been augmented by select accomplishments²⁰ of the incumbent Administration.

With the exception of the work of the legal profession on the Administrative Procedure Act, and the work of the economics profession on perfecting the methodologies for conducting benefit-cost analysis (but not the requirement to perform benefit/cost analyses), the three

¹³ OIRA Reference Library, THE CRE.COM, <https://www.thecre.com/forum2/?p=820> (last visited July 6, 2020).

¹⁴ Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37, 37-38 (2011), https://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf.

¹⁵ *Management of the Administrative State: The Fifty Year Record*, THE CRE.COM: REGULATORY PACESETTERS (Sept. 29, 2017), <https://www.thecre.com/forum8/?p=1092>.

¹⁶ *Regulatory Transactions: History of the APA and OIRA Review*, THE CRE.COM (Aug. 16, 2015) (contains several documents expounding on the history and impact of the APA), https://www.thecre.com/oira_reg/?p=7481.

¹⁷ *The Evolution of Benefit-Cost Analysis into Federal Rulemaking*, THE CRE.COM: REGULATORY PACESETTERS (Aug. 16, 2017), <https://www.thecre.com/forum8/?p=724>.

¹⁸ Dirk Kirschten, *Focuses- The 20 Years War*, NAT'L J. (June 11, 1983), http://thecre.com/pdf/20_Years_War.pdf.

¹⁹ *Controlling the Cumulative Cost of Regulations: Regulatory Budget: Optimal Delegation Theory Justification*, THE CRE.COM: THE OIRA MODULE, <https://www.thecre.com/forum2/?p=939> (last visited June 2, 2020) (collects articles and public comments on the cost of regulations in a single forum).

²⁰ *The Four Major Contributions of the Trump Administration to the Management of the Administrative State*, THE CRE.COM: REGULATORY PACESETTERS (May 9, 2019), <https://www.thecre.com/forum8/?p=3478>.

aforementioned disciplines have largely been bystanders in *initiating* managerial process changes within the administrative state.

2.2 Recommended Managerial Changes to the Governance of the Administrative State

The paper titled *OIRA Past, Present and Future*²¹ recommends three managerial changes to the governance of the administrative state: (1) the declaration of a select group of existing executive orders as “iconic” so as to require a higher burden of analysis prior to their possible revocation by an incoming Administration, (2) improving a decades old executive order which places OMB at the helm of the interagency review process for both the issuance of new executive orders and the revocation of existing executive orders dealing with regulatory matters by delineating a specific role for OIRA in the interagency review process and (3) the initiation of a public debate on the continuance of a mechanism which would allow policymakers to control the size of the administrative state through the use of a regulatory budget. *A regulatory budget, particularly, allows OIRA to become proactive instead of reactive by developing a government-wide program to address a specific problem such as a pandemic.*²²

2.3 Candidate Processes for the Management of the Administrative State

After working years on the formulation and implementation of the fiscal budget, as is also the case with the regulatory budget, one soon recognizes that a budget is as much a management mechanism as it is a control mechanism. Centralized regulatory review began in 1971 with the Quality of Life Review which consisted of two basic components, performing benefit-cost analysis of regulations and OMB review of the resultant analyses. During the past half-century, these two components continue to be the mainstay of the management of the administrative state. It is time to move on.²³

Based upon extensive review²⁴ of their publications to date, it is not obvious that any of the professions, which traditionally have emphasized the study of the *operations*– in contrast to the *management*– of the administrative state, have a membership who are either fully equipped or interested in addressing managerial issues.

Successful regulatory practitioners possess an intricate knowledge of the management of the administrative state through interactions with federal agencies as a result of commenting on proposed rules. Successful members of the legal academy possess a detailed, but contrasting,

²¹ Jim Tozzi, *OIRA Past, Present, and Future*, J. BEN-COST ANALYSIS 1, 1 (2019), <http://www.thecre.com/forum8/wp-content/uploads/2019/06/OIRA-Past-Present-and-Future....pdf>.

²² *Id.* at 10-12.

²³ Jim Tozzi, *Public Comment on Agency Economists Project*, ACUS.GOV (Oct. 4, 2019), https://www.acus.gov/sites/default/files/documents/Jim%20Tozzi%20Public%20Comment%20on%20Agency%20Economists%20Project_0.pdf.

²⁴ *The OIRA Hall of Fame Library: Introductions by Political Scientists, Historians, Economists and Sociologists*, THE CRE.COM: THE OIRA MODULE, <https://www.thecre.com/forum2/?p=1914> (June 2017) (collecting the historical work of practitioners among these professions).

knowledge of management of the administrative state through in-depth penetrations of agency operations through interactions with the judiciary. Notwithstanding the laudable contributions of these two groups, they have not participated to a noticeable degree in developing management mechanisms for the administrative state.

The failure to emphasize the importance of understanding and appreciating the historical development of centralized regulatory review is apparent when political appointees to executive branch agencies from either of the aforementioned professions believe that the signing of an Executive Order in itself will result in meaningful improvements.²⁵ This shortsightedness occurs because of the failure to recognize that, in the absence of civil service entrepreneurs²⁶ who have a passion for constructing and installing the supporting modular building blocks on a continual basis over an extended period of time, an executive order will not be institutionalized in the administrative state. A prime example can be found in the description set forth in the first four paragraphs of “OIRA’S Lineage and Enforcement Responsibilities” published in the Yale Journal of Regulation’s Notice & Comment Blog.²⁷

The above description argues that the Captain in the cockpit of the regulatory state (OIRA) should (1) be sensitive to instituting long term²⁸ changes and (2) be focused on utilizing a managerial mechanism which maximizes the net social benefits of a *government-wide* regulatory program rather than one focused on the review of a limited number of individual regulations on a regulation-by-regulation basis.

In order to acquaint those interested in participating in the development of mechanisms to manage the administrative state we call particular attention to the homepage of the CRE website.²⁹ The middle column under the title *Management Principals for the Administrative State* contains a written description of the particular phenomena which characterize the managerial challenges facing those vested with the responsibility for managing the administrative state. The aforementioned descriptions are limited to two dozen and are presented in the middle column of the homepage³⁰ in decreasing order of significance. Substitutions to those descriptions are made when, with the passage of time, historical reviews demand that different actions be recognized and placed on the homepage.

Each entry is not, in itself, a management principle. But collectively, they allow each reader to develop his or her own set of principles depending on their personal assessment of each entry presented therein.

3. Candidates for Management of the Administrative State

²⁵ *A Library of Selected Works Which Provide a Basis for the Retention of an Executive Order Based on a Retrospective Review of Executive Order 12291*, THE CRE.COM: REGULATORY PACESETTERS, (Sept. 4, 2018) (containing articles discussing Executive Order 12291), <https://www.thecre.com/forum8/?p=2726>.

²⁶ James Kwak, *The Economists Turned All of Society into a Market*, THE CRE.COM: REGULATORY PACESETTERS (Sept. 24, 2019), <https://www.thecre.com/forum8/?p=3792>.

²⁷ Jim Tozzi, *OIRA’s Lineage and Enforcement Responsibilities*, YALEJREG.COM: NOTICE & COMMENT (Jan. 2, 2018), <https://www.yalejreg.com/nc/oiras-lineage-and-enforcement-responsibilities-by-jim-tozzi/>.

²⁸ *Management of the Administrative State: The Fifty Year Record*, THE CRE.COM: REGULATORY PACESETTERS (Sept. 29, 2017), <https://www.thecre.com/forum8/?p=1092>.

²⁹ *Center for Regulatory Effectiveness*, THE CRE.COM, <https://www.thecre.com/index.html> (last visited June 2, 2020).

³⁰ *Id.*

The CRE has, for a considerable period, focused on the preservation and enhancement of OIRA.³¹ Through its endeavors, the CRE has had the privilege of working with individuals in a wide range of disciplines possessing varying degrees of experience in the management of the regulatory state.

There are signs of the beginning of an enlightened era of scholarship regarding the management of the administrative state. This beginning is exemplified not only by a recent publication,³² but also by these precedential publications which constitute candidate processes for the management of the administrative state.³³

The CRE will continue to make its website available to interested practitioners and academicians and, within resource limitations, continue to answer their questions. Recognizing that a very substantial number of its readers are involved in regulatory compliance, they are also encouraged to participate in this initiative. All parties can continue to contact the CRE by utilizing the information on its website.³⁴

In order to jump start the recommendations set forth herein, one or more of the recommendations made by political scientists³⁵ should be reviewed for implementation in CY 2021.

In the parlance of the political science profession, Waldo Act I was the publication of Dwight Waldo's classic work, the *Administrative State* in which he challenged³⁶ "economic efficiency" as the paramount goal of public administration. Waldo Act II is characterized by the revisiting of Waldo's original writings and assessing their relevance to current events; Waldo Act III would be a commitment by the political science profession to institutionalize Waldo's principals by incorporating them into the mechanisms used to manage the administrative state.³⁷

³¹ Jim Tozzi, *A Syllabus on OIRA*, YALEJREG.COM: NOTICE & COMMENT (Dec. 2, 2016), https://thecre.com/pdf/20161209_oira.pdf.

³² Andrew Rudalevige, *Central Clearance as Presidential Management*, CTR. STUD. ADMIN. ST. 1 (Feb. 6, 2020), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Rudalevige-Central-Clearance-as-Presidential-Management.pdf>.

³³ Todd N. Tucker & Rajesh D. Nayak, *OIRA 2.0: How Regulatory Review Can Help Respond to Existential Threats*, GREATDEMOCRACYINITIATIVE.ORG 1 (Apr. 2020), https://greatdemocracyinitiative.org/wp-content/uploads/2020/04/OIRA_Final.pdf; Adam Weinberg, *We need a new Framework to Solve Problems in the Wake of COVID-19*, THE HILL: OPINION (June 2, 2020, 4:30 PM), <https://thehill.com/opinion/healthcare/500679-we-need-a-new-framework-to-solve-problems-in-the-wake-of-covid-19>; Rachel Augustine Potter, *Bending the Rules: Procedural Politicking in the Bureaucracy* (2019), <https://www.goodreads.com/book/show/41591096-bending-the-rules>; Andrew Rudalevige, *Central Clearance as Presidential Management*, CTR. STUD. ADMIN. ST. 1 (Feb. 6, 2020), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Rudalevige-Central-Clearance-as-Presidential-Management.pdf>; Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOV. ACCT. REV. 25 (2019), <https://law.emory.edu/ecgar/documents/volumes/6/1/hill.pdf>.

³⁴ *Contact CRE*, THE CRE.COM, <https://www.thecre.com/contact.html> (last visited June 2, 2020).

³⁵ *Influential Articles on the Management of the Administrative State*, THE CRE.COM (May 1, 2020), <https://www.thecre.com/forum8/?p=4357>.

³⁶ Tozzi, Jim (1969), *Establishing Priorities for Public Investments (Interim Report)*, Office of the Secretary of the Army, Systems Analysis Group (Civil Functions), <https://apps.dtic.mil/docs/citations/AD0689513>.

³⁷ Michael Desch, *How Political Science Became Irrelevant*, CHRONICLE.COM (Feb. 27, 2019), <https://www.chronicle.com/article/How-Political-Science-Became/245777>.