

Management of the Administrative State

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Management of the administrative state involves the formulation of the principles which govern not only how decisions are made but also which decisions are made and who makes them. Consequently, the focus is beyond the techniques of benefit-cost analysis, centralized regulatory review, and judicial review. An ancillary issue is whether the economic and legal professions have the capacity and interest in pursuing the development of the said principles. A new discipline could emerge dedicated to management of the administrative state as opposed to its operation or, alternatively, a refocusing of the agendas of the political science/public administration communities could occur.

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General Framework

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 (Tozzi et al. 2020a). The

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resultant comments establish the foundation for a deliberative discussion on the future managerial mandates for OIRA (Office of Information and Regulatory Affairs- Executive Office of the President of the United States) and the principles that are to govern the management of the administrative state (Behr 1981).

By management of the administrative state we mean the *principles* which not only govern *how* decisions are made but also the principles 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 (Social Science Research Network 2020 hereafter SSRN)." What better foundation is there than political science for developing the principles to govern the management of the administrative state?

Consequently, one 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 state (Center for Regulatory Effectiveness 2017b; hereafter CRE). 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 administrative 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 (Tucker and Nayak 2020). The aforementioned proposal has been reinforced by several other recently released studies by other political scientists (Hill 2019; Potter 2019; Rudalevige 2020; Weinberg 2020). The forcefulness of the studies demonstrates that, if 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.

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 administrative state (Tozzi 2016b). The CRE's actions were reinforced by complementary actions taken by many legal professionals; culminating in the publication of a White Paper for the Southeastern Association of Law Schools' 2017 SEALS Annual Conference (CRE 2017a; Tozzi 2017). 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" are far too important to be addressed by anything less than a multitude of disciplines (Levenson 2014).

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 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 library of readily available historical information 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 (OIRA Reference Library 2020; Tozzi 2011).

The history of the development of centralized regulatory review, and the resultant management of the administrative state, spans the past half-century (CRE 2017b). 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.

Historical Managers of the Administrative State

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 principles, which govern *how* decisions are made, and the principles 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, (2) benefit-cost analysis, (3) centralized regulatory review and, (4) implementation of a regulatory budget, 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 (CRE 2015; CRE 2017c; Kirschten 1983; CRE 2020b). Additionally, these process changes have been augmented by select accomplishments of the incumbent Administration (CRE 2019).

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), these disciplines have largely been bystanders in *initiating* managerial process changes within the administrative state. Likewise, to date the political science community appears to be focused on leaving its mark in academia but not in OIRA or other Executive Branch organizations dealing with the management of the administrative state.

Recommendations

A Candidate for Management of the Administrative State

The paper titled *OIRA Past, Present and Future* 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 (Tozzi 2019a). 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 (Tozzi 2019a, 10–12).

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 (Tozzi 2019b).

Based upon an extensive review of their publications to date, it is not obvious that either the economic or legal profession 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 (Kwak 2019) (CRE 2017d).

Successful economic 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 and assessing their effectiveness once implemented. Successful members of the legal academy possess a detailed, but contrasting 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 key operating components of the administrative state such as 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 (CRE 2018). This shortsightedness occurs because of the failure to recognize that, in the absence of civil service entrepreneurs 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 (Tozzi 2018).

The above description argues that the Captain in the cockpit of the administrative state should be located in OIRA and (1) be sensitive to instituting long term changes, (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 (CRE 2017b) and (3) be an accomplished social entrepreneur who appreciates the contribution that the political science/public administration communities could bring to the management of the administrative state. To this end and in keeping with the mandate of OIRA’s parent institution OMB, OIRA was established, among other things, to assess the merits of proposed regulations but never to serve as the administrative court for the Executive Branch.

A Starting Point

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 Center for Regulatory Effectiveness (CRE) website (CRE 2007). The middle column under the title *Management Principles 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 homepage 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 (CRE 2007).

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.

The CRE has, for a considerable period, focused on the preservation and enhancement of OIRA (Tozzi 2016a). 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 administrative state.

There are signs of the beginning of an enlightened era of scholarship regarding the management of the administrative state. This beginning is exemplified by these precedential publications which constitute candidate processes for the management of the administrative state (Tucker and Nayak 2020; Weinberg 2020). These proposals are refreshing because the essence of OIRA's present management of the administrative state remains what it was some forty years ago, OIRA review of the benefit-cost analyses of a select number of rules. During this forty year span lawyers and economists were primarily at the helm of OIRA. That said OIRA did initiate a game changing event that set the stage for developing a government-wide regulatory program—the implementation of a regulatory budget (Tozzi 2020b).

The CRE will continue to make its website available to interested practitioners and academicians and, within resource limitations, continue to answer their questions and assist in disseminating information to federal officials. (CRE 2007). 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 may continue to contact the Center for Regulatory Effectiveness by utilizing the information on its website.

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 challenged "economic efficiency" as the paramount goal of public administration (Tozzi and Office of the Secretary of the Army 1969). 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 principles by incorporating them into the mechanisms used to manage the administrative state recognizing that that in the long run hopefully the relevance of the analyses will outweigh academic considerations of rigor (Desch 2019).

Therefore, in order to jump start the strategy outlined herein, one or more of the findings made by political scientists, so identified herein or elsewhere, should be reviewed by professional organizations to form a basis for developing the standards for the management of the administrative state. (CRE 2020a). The end result is to provide a modus operandi for noteworthy scholarship to transcend academia and enter the policy apparatus of the United States Government. Initial steps would include:

(1) having a political scientist appointed as the Administrator of the Office of Information and Regulatory Affairs,

(2) having political scientists appointed to the Administrative Conference of the United States (ACUS) whose responsibilities would include participating in the formulation of those recommendations proposed by ACUS which address the management of the administrative state,

(3) conducting online symposia dedicated to venting the principles which are to govern the management of the administrative state and

(4) having professional organizations sponsor conferences, whose attendance would include federal policymakers, dedicated to developing the principles which are to govern the management of the administrative state (CRE 2007; CRE 2017d; CRE 2020a).

Based upon discussions with members of the political science profession, it is doubtful whether the profession in total is ready to move from the deliberative nature of academia to the savagery

inherent in the management of the administrative state.

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