THE ADMINISTRATIVE STATE AND ITS CONSTITUTIONAL LEGITIMACY:
AN ANALYSIS OF THE USA PATRIOT ACT OF 2001 IN THE CONTEXT OF
ROHR’S CONSTITUTIONAL FRAMEWORK OF THE ADMINISTRATIVE STATE

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DEDICATION

To my husband, Farid, for your understanding, encouragement, and support.

To my sons, Omar, and Osman for your patience, understanding, and love.

To my extended family, Rashid, and Kasha for your friendship and faith.

To my mother, Anwar Begum Hashmi, for your love and prayers.

To my sister, Shahana, for your unconditional love.

To my brothers, Faizan and Zeeshan for your love, support and encouragement.

In memory of my father, Akhtar Hashmi, and my brother Ahsan Hashmi, for inspiring the love of education in me.

My enduring love,

Ghazala
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GHAZALA ULVI

ABSTRACT

American Public Administration has identified more closely with management than with governance. Therefore, its constitutional legitimacy is often questioned. Many of the current scholars emphasize the importance of the legitimacy of the administrative state from a constitutional perspective. John Rohr has authored both the pioneering and the standard setting work in this area. Rohr attempts to legitimate the administrative state in terms of a comprehensive constitutional perspective based on the founding of the American Republic. This study examines Rohr’s constitutional philosophy of the administrative state and tests its usefulness to public administrators. The study looked at the administrative agencies created by the USA Patriot Act of 2001 and their compatibility with Rohr’s constitutional framework. The major research question posed: Is the USA Patriot Act of 2001 legitimate within Rohr’s framework of the administrative state? Specifically, does the USA Patriot Act create and empower executive agencies beyond the pale of separation of powers as developed by Rohr?

This study has utilized an interpretive methodology situated within the qualitative method of inquiry. Methodologically, the first part of this study attempts to comprehend the history of the administrative state and its legitimacy...
from a constitutional perspective. Secondly, this study re-examine Rohr’s constitutional framework. Finally, this study’s methodology seeks to transform the meaning of Rohr’s conceptual framework by incorporating it into the practical sphere. For the purpose of this study, a comprehensive database of the statute was created. From this database, four provisions were selected that most clearly raise the issue of separation of powers.

The study concluded that selected provisions from the statute are problematic in terms of their compatibility with the constitutional traditions and regime values as defined by Rohr. However, to successfully use the framework, American public administration must address issues of structure and authority. One, high-level civil servants must possess sufficient discretionary power. They must be able to say “no” to political leaders. Second, they must possess working legal knowledge of the Constitution and understand the core values embedded in our constitutional traditions of democratic governance.
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1.1 Introduction

The legitimacy of the administrative state is one of the long-standing questions of the field of public administration. The dilemma of the legitimacy of the administrative state is how to effectively integrate public administration into the Constitution. As John Rohr (1982) noted about this issue, “Central to the problem of the administrative state is the perennial question of its legitimacy and this question is rooted in the fact that the institutions and norms of the administrative state are strangers to our constitutional designs,” (p. 429). David Rosenbloom (1983) argued that the rise of the administrative state has placed great strain upon the design of the constitutional principle of the separation of powers. He believes, “it has shifted representation away from elected officials and toward its own bureaus” (p.28).
An important stream of literature in Public Administration aims at making the administrative state legitimate from a constitutional perspective. Rosenbloom argued that the big question for the United States government is how to retrofit, or integrate, the administrative state into the constitutional scheme (Rosenbloom, 2000). He further noted that one of the great administrative developments of this century is the extent to which Congress and the federal judiciary have responded to the rise of the administrative state by infusing it with constitutional tradition and applying the separation of powers principles (2000). Richard T. Green, Lawrence F. Keller and Gary L. Wamsley (1993) argued that because “governance is political. It demands normative, constitutional, and rhetorical competence,” (p. 5230). They believe that the concept of professionalism should tie public administration to our constitutional traditions rather than emphasize specialized managerial knowledge. Similarly John Rohr (1986) argues that public administrators “should certainly use their discretion to favor those polices that they think are most likely to promote the public interest but they should assess the public interest against the broad background of constitutional principles” (p. 183). This argument highlights the obligation of all government officials to favor and adhere to the constitutional traditions as a whole and keep the public interest in mind.

The tragic terrorist attacks on the United States on September 11, 2001, presented a particular additional challenge to public administration. Many antiterrorist laws and institutions have emerged to tackle the war on terrorism.
One of the major pieces of legislation, the *Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism* (H.R. 3162, the “USA Patriot Act”) came following legislative proposals in response to the terrorist attacks of September 11, 2001. They were introduced less than a week after the attacks. President George Bush signed the final bill, the USA Patriot Act, into law on October 26, 2001. This bill was introduced in great haste and passed with little debate and without a House, Senate, or conference report. As a result, it lacks the typical legislative background that is very helpful to public administration (Chang, 2002). These antiterrorist initiatives have major consequences for individuals, societies and nations all over the world. However, there have been controversies with regard to the implications of counter terrorist measures for people’s basic rights and how well these measures fit within constitutional traditions.

The purpose of this study is to examine John Rohr’s constitutional philosophy of the administrative state and to explore the contributions his thoughts can make to the constitutional structures and processes of the administrative state. The resulting framework may help to evaluate the provisions of the USA Patriot Act of 2001 in terms of their effects on these governmental structures and processes. This study will analyze selected provisions of the USA Patriot Act 2001 by applying Rohr’s theory of the administrative state. Rohr develops criteria for a constitutionally legitimate administrative state. For Rohr, the American ‘regime’ is the “fundamental political order established by the Constitution of 1789” (1989,
Rohr links the idea of tradition, the Constitution, and the regime values by exploring the close relationship between the individual and the administrative state. This study plans to apply these criteria to selected provisions of the USA Patriot Act of 2001. The study will conclude by detailing the necessary changes in public administration to put Rohr’s constitutional framework into action.

1.2 Statement of the Problem

The field of public administration is swamped with debates about the legitimacy crisis. Legitimacy has been a big and lively issue, centering on whether the configuration of the administrative state is constitutional. Many current scholars emphasize the importance of the legitimacy of the administrative state from a constitutional perspective. They believe that traditional democratic values are the grounding principles that have given public administration and the American society a unique type of governance. They include but are not limited to the idea of individual freedom, property, equality, justice, and natural rights (see Rohr, 1978; Gawthrop, 1984; Fredrickson and Hart, 1985 and 1989; Denhart, 1988; Cooper, 1991). Rohr, a leading administrative scholar, grounds the legitimacy discussion of public administration in the U.S. Constitution. In his book, To Run A Constitution (1986) Rohr argues that the administrative state is ‘here to stay’. In so doing, he offers variant views on a particular question of whether the administrative state can be justified in terms of the American constitutional tradition. He bases his idea on the debates of the Founding Fathers and looks at both the Federalist and Anti Federalist arguments in detail. He structured his
argument in three major periods of American history. In part I, he reviews the framing of the Federal Republic 1787-1788; in part II the founding of the administrative state in words from 1887-1900 (founders in speech); and finally the New Deal period (founders in deed) and the efforts made to square administrative innovations with founding principles of the Republic.

Rohr argues that current problems about the legitimacy of the administrative state stem from the way in which Woodrow Wilson, Frank Goodnow, and many of the New Deal reformers distorted the principles of the Founding Fathers. Rohr believes that reformers of public administration theory went wrong and caused the field to be perceived as constitutionally illegitimate. For example, Wilson attacked on the constitutional separation of powers and rejected the framer’s vision. Wilson approached public administration with a parliamentary form of government in mind rather than a regime founded on three separate and equal branches of government. For Wilson, an effective public administration required changing how the country is governed. In essence, Wilson placed public administration outside of the Constitution and the resulting regime values.

Rohr (1978) adds to the tradition of individual rights and natural law by putting forward his notion and application of regime values. His framework of the administrative state encourages administrators to look to the values found in the Constitution. He provides a formula for examining future public administration issues. According to Rohr, public administrators who possess professional
competence and can develop a “sense” of what is constitutionally appropriate must study policy questions (p. 193). By using the Constitution as a founding document for guidance and direction, administrators could now tie their governing power to the purpose of the state. Rohr clarifies his reasoning by saying that the “choice was defended on the grounds that American bureaucrats have taken an oath to uphold the constitution of the United States and that such an act should have a moral character about it that creates a moral community” (p. 238).

Drawing on Rohr’s framework of the administrative state, this study examines the legitimacy of the USA Patriot Act of 2001 in terms of its administrative configuration within the contemporary administrative state. This study plans to analyze the USA Patriot Act based on Rohr’s philosophical framework of public administration. Thus, this is not a legal analysis of its constitutionality. A philosophically based model is developed and applied to selected provision of the USA Patriot Act of 2001.

Based on Rohr’s framework, if the administrative state is to be legitimate then the USA Patriot Act must not violate its underlying structure. Therefore, attempts will be made to explore and investigate the extent to which the USA Patriot Act of 2001 interfaces with or overshadows constitutional traditions, as detailed by Rohr. In other words, this study raises the question: Is the USA Patriot Act of 2001 legitimate within Rohr’s framework of the administrative state?
This question becomes a more specific one, one that can begin operationalizing Rohr’s framework.

- Does the USA Patriot Act of 2001 create and empower executive agencies beyond the pale of separation of powers as developed by Rohr?

1.3 Research Significance

This study attempts to understand the history of the administrative state and its legitimacy from a constitutional perspective. Although many scholars have debated how to legitimize the administrative state, one clear aspect from the debate is that many scholars believe the legitimacy of the administrative state is of principal importance for the stability of American constitutional democracy. Therefore, if the administrative state is to be constitutional, then laws and administrative process must not violate its underlying legal and philosophical structure.

The contribution of this study is to provide and enhance an understanding of Rohr’s framework regarding the constitutional legitimacy of the administrative state. This study not only examines Rohr’s constitutional theory of the administrative state, it operationalizes his framework of the administrative state. As the success of this operationalization can only be tested by its implementation, this study attempts to analyze the selected provisions of the USA Patriot Act of 2001.
The major contribution of this study is to transform the meaning of Rohr’s conceptual framework of the administrative state by incorporating it into the practical sphere of public administration by analyzing selected provisions of the significant statute. In operationalizing Rohr’s framework, this study will only look at his views on separation of powers out of his four principles. This principle is the most relevant as the selected sections of the provisions of the USA Patriot Act empower administrators. In addition, the study examines necessary changes in contemporary public administration if the resulting operationalized framework is to be put into action.

1.4 Organization of the Study

This dissertation consists of six chapters. The objective of Chapter one is to, introduce the reader to the issue of the legitimacy of the administrative state, state the research question and discuss the research significance. The aim of the Chapter two is to discuss the literature relevant to the struggle of the nature of the administrative state, the rise of a Constitutional perspective on the administrative state, the Constitutional nature of the administrative state, and a brief introduction to the USA Patriot Act of 2001 history and development. Chapter three discusses the research design and methodology of this study. Chapter four presents John Rohr’s Constitutional framework of the administrative state. Chapter five discusses the USA Patriot Act 2001 and its provisions, and
the extent to which the USA Patriot Act is compatible with Rohr’s constitutional framework of the administrative state. Finally, Chapter six calls attention to how public administration must be structured for the application of Rohr’s model and recommendation for future research in the field of public administration.

1.5 Conclusion

In sum, one of the major issue in contemporary public administration has been the administrative state from a constitutional perspective. Many scholars such as David Rosenbloom and others have approached the administrative state from the constitutional perspective. However, this study examines Rohr’s framework of the administrative state. Rohr provides the most comprehensive framework rooted in the founding of the nation and is the best framework for guiding public administration. He articulates regime values that must guide the institutions and profession of public administration.

As stated earlier, the contribution of this study certainly will provide and enhance an understanding of Rohr’s framework regarding the constitutional legitimacy of the administrative state and act as a test of the utility of Rohr’s framework in the most important context constitutionality of a very significant statute, the USA patriot Act 2001. Moreover, the study notes how the institutions and profession may need to change to implement Rohr’s philosophy effectively.
CHAPTER II
LITERATURE REVIEW

2.1 Introduction

The literature for this study covers five sections. The first section deals with the struggle over the nature of the administrative state. The second section examines the rise of constitutional perspectives on the administrative state and John Rohr’s views regarding the constitutional roots of the administrative state. Finally, the fourth and fifth sections discuss the issue of the Constitutional nature of the administrative state, a brief overview of the USA Patriotic Act of 2001 history, and development, and politics.

2.2 The Struggle over the Nature of the Administrative State

The state is an ancient human institution dating back thousands of years (Fukuyama, 2004 p.1). The main functions of the state are the ability to provide order, security, law, and property rights. As societies became more complex, the
more they use administration in governance. Therefore, one can agree that an administrative state has been part of our governing system since the founding of the country. The First Congress of the United States, in 1789, authorized administrative officers to estimate taxes on imports and to adjudicate claims to military pensions (Freeman 1978). As Woodrow Wilson stated in his 1887 essay, The Study of Public Administration, “Administration is the most obvious part of government in action, it is the executive, the operative, the most visible side of government and it is as old as government itself” (1887, 14).

Earlier this century, modern public administration was in its infancy. It was not quite yet defined. No adequate definition of the administrative state is available in the literature. Rohr (1986) note he could not find an adequate definition of the administrative state (p. 217). Rohr further states that Ralph Chandler, the coeditor of a distinguished public administration dictionary, provided him with the following definition:

The administrative state is that set of institutional arrangements which make a working system out of a regime’s needs for hierarchical organization, rational decision making, rule of law, written producers and records, and sufficient public funds to support a technology of public service (p.217).

However, Rohr disagrees with this definition and believes Chandler may have defined the “state” rather than the administrative state. Rohr (1986) defines
administrative state as a “political order” that came into existence during the New Deal and still dominates our politics (p. Xi). Rohr cites Dwight Waldo (1948) in defining the administrative state and agrees with him:

Its hallmark is the expert agency tasked with important governing functions through loosely drawn statutes that empower unelected officials to undertake such important matters as preventing “unfair competition,” granting licenses as “the public interest, convenience or necessity” will indicate, maintaining a “fair and orderly market,” and so forth (p. xi).

He suggests that the administrative state is not confined to regulating industry rather its order runs to defense, diplomatic policy, institutions of mass justice that manage programs in public assistance, public housing, public education and health, disability benefits, food stamps and so forth.

To trace the historical development of the American public administrative state, David Rosenbloom (1997) argues that the central problem of contemporary public administrative theory is that it is derived from three separate approaches. He emphasizes, “Each of these approaches has a respected intellectual tradition, emphasizes different values, promotes different types of organizational structure and views individuals in markedly distinct terms” (p. 432). He labeled these approaches as “managerial, “political, and “legal.” Rosenbloom argues that the managerial approach is tied to the executive branch, the political approach to the legislative branch, and the legal to the judicial branch. These approaches have
become especially significant with the full development of the modern administrative state.

Despite the historical roots of the administrative state, its legitimacy has been constantly questioned. Dwight Waldo (1948) argues in his book, *The Administrative State* that democratic states have base under debate since the rise of professional and political bureaucracies. He believes that the implementation of scientific management with its emphasis on efficiency should not be the core idea of government bureaucracy; rather service to the public should be emphasized. Waldo notes that efficiency along with effectiveness and economy had grown to the point that they had “assimilated or overshadowed other values” and that “events came to be degraded or exalted according to what was assumed to be its dictate” (p. 19-20).

Legitimacy in this context does not simply mean legal. Instead the legitimacy that is in question here is, as Spicer notes, “conformity to the broadly accepted principles or rules and customs of political social order” (Spicer, 1995, p. 2). Thus, legitimacy refers to the broad acceptance of the administrative state in constitutional values and traditions. Rohr (1986) observes legitimacy as more than the “grudging acceptance of the inevitable” (p. X). He explains that legitimacy suggests respect, confidence, and warm affection in well-administered government. Rohr further defines legitimacy by citing Alexander Hamilton’s notes from Federalist 27. To Hamilton, legitimacy means “sound connection between
public administration and widespread popular support” by this Hamilton means that “the well–administered government would win the affection of the people”. Therefore, Rohr argues that the governmental institution with weak legitimacy would not be well-administered (p. X).

Two schools of thought have put forward the argument of the legitimacy of the administrative state: the professionalism or expertise school and the constitutional school. Before discussing the argument of the constitutional school, it is important to have an overview of the professionalism or expertise school.

From the time that the American administrative state began to develop in earnest (1880s), the field has identified more closely with management than with governance, with the result that most of the field’s prescriptions, theories, and values fundamentally challenge those of U.S. constitutionalism. Thus, the first textbook *Introduction to the Study of Public Administration* by Leonard White (1926) argued for the primacy of management over law. Woodrow Wilson and his successors had a profound influence on the development of the American administrative state. Unfortunately, they paid more attention to the necessity of running a Constitution than the Constitution itself. They developed a theory of administration that was at odds with the theory of the constitution. As David Rosenbloom (1983) has argued, “the administrative state places great power in the hands of administrative agencies and their personnel” (p.18). This is
especially, true in bureaucratic administration. Here the granted authority appears to exceed constitutional limitations.

The major tenets of the early approach (professionalism) emphasized a value-free system of administration, one that is based on rationalism and technical expertise. As politics were considered to belong in a separate sphere than administration, business administration principles became the driving force for public administration theories. Woodrow Wilson’s essay, which first claims a professional place for public administration as a field of study, also considered public administration a field of business removed from politics. In Wilson’s words, the field of administration is a field of business. It is removed from the hurry and strife of politics. It is a part of political life only as methods of a counting house are a part of the life of society; only as machinery is part of the manufactured product (p.20).

Like Wilson, Frank Goodnow (1900) in his book, Politics and Administration offered the politics-administration dichotomy. Goodnow’s political philosophy led him to express the process in terms of two basic governmental operations that constitute “the action of the state as a political entity: 1) the expression of the will of the state and 2) the execution of the will of the state (Goodnow, pp. 17-26). Rohr (1986) argued, Wilson favored profound changes in American government that would alter or avoid the constitutional separation of powers. For Wilson, it
was a desire for a “parliamentary-like” cabinet, for Goodnow it was via strengthened political parties and a parliamentary character (pp. 87-8).

Wilson’s separation of administration from politics, his search for a science of administration, and his assertion that business techniques are applicable in the public sector all became the foundation of the dominant image of public administration in the classical period. This image became known as the orthodoxy. Furthermore, Wilson proposed a search for a science of administration, and this was further developed by many subsequent theorists, such as Taylor (1912), Luther Gulick (1937), Henri Fayol (1949) in the form of the Scientific Management Movement, and, more recently, in the Reinventing Government Movement (Osborn and Gaebler 1992). The efficiency-based approach continues in contemporary public management.

The terms “public management” and “public administration” are both concerned with implementing policies and programs arranged through the authoritative institution of government. However, it is important to understand the difference between the two terms. Public management emphasizes methods of organizing for internal control and direction for maximizing effectiveness, whereas public administration addresses a broader range of civic and social concerns. Comparing public management with public administration, one can see that public management deals with the more technical training of public officials, budgetary matters, ethics, conflict management, strategic plan and several other
specific elements. It falls under the larger umbrella of public administration.

Public administration drives public management like theory drives practice.

Management is simply coordinating activities in an efficient manner and is driven by the goals of an organization, whereas, public administration focuses on governance. From this perspective, along with other political actors, human beings must be considered; and public administrators are responsible for the common good of these individuals.

In contrast to Wilson and other major orthodoxy proponents, Dwight Waldo (1984), Paul Appleby (1945), and Robert Dahl (1947) among others brought back the political side of the equation to public administration. This made it increasingly difficult to exhort and apply business principles. Waldo placed public administration within the context of the democratic government process and emphasized the discrepancy between the western democratic values and business principles (Waldo, 1984). Appleby (1945) raised serious issues regarding the public interest and public responsibility, neither of which had any serious place in the techniques of the business world. Dahl (1947) questioned the desirability of the value of efficiency because the ethical and moral questions were missing from the debate. In essence, there was call for a change from a normative managerial approach to a set of more political, value-driven principles.

In contrast to professionalism and expertise, proponents of constitutional thought advocate that the proper bases for the legitimacy of the administrative state must
be founded in the constitutional traditions. They believe that American constitutionalism advocates a different set of values than does the professional and expertise version of public administration. They built upon Waldo and others who questioned the management focus of the field. The next section will cover the theories of legitimacy of the administrative state from a constitutional perspective.

2.3 Rise of a Constitutional Perspective on the Administrative State

Many scholars such as David Rosenbloom and Rosemary O’Leary (1996) and John Rohr (1986) and his colleagues who developed the Blacksburg perspective (Gary Wamsley, et al. 1990), have sought to approach the administrative state from a constitutional perspective. They suggest that the US Constitution legitimizes the administrative state as public administration is situated within the framer’s vision, fulfilling a constitutional obligation to protect the rights of its citizens through administrative functions that are subordinated to the constitutionally established powers within the legislative, executive, and judicial branches.

David Rosenbloom and Rosemary O’Leary (1997) argue that U.S administrative operations have been complicated seriously by the development of a dominant public administrative theory that does not readily fit constitutionalism. American constitutionalism is based on classical liberal theory, which holds that the
purpose of government is to preserve natural rights and to protect individual liberty. To prevent abuse of power, the founders of the Constitution established a network of internal and external controls that tend to frustrate efficient-minded, managerially oriented public administrators (Rosenbloom, p.9). Proponents of constitutionalism, however, accept such controls as due process and equal protection as fundamental values.

David Rosenbloom (1983) argues, “The conflict between bureaucratic power and democratic constitutionalism is highly pronounced” (p. 20). He believes, “this is a result of bureaucracy implementing a public administrative theory that generally stresses dehumanization or impersonality to deal uniformity among the individuals, the constitutional theory promotes diversity among the citizenry” (p.20). The disagreement within this group is over exactly which constitutional principles legitimate the administrative state. He further notes the administrative theory has placed great strains on the separation of powers and on the related representational scheme of government. In this regard, the conflict between constitutional government and the administrative state is one of both organization and values. The administrative theory from professionalism and expertise often combines the elements of legislative, executive, and judicial powers, whereas constitutionalism keeps them apart.

Michael Spicer (1995) cites David Hart’s views on constitutional traditions. Hart sees the Constitution as promoting an ethos of “civic humanism,” based on love
of others. In Hart’s view, civil servants should take moral leadership in establishing a “partnership in virtue among all citizens.” He believes that the Founders’ work implies an obligation for public administrators “to persuade both citizens and colleagues to do the right” and to act themselves as exemplars of civic virtue and courage (Spicer, p.6).

Another viewpoint within the constitutional school of thought is that of Michael Spicer and Larry D. Terry (1993). Spicer and Terry also look to the logic of the Constitution in general. Spicer and Terry argue that public administration may be legitimated in the “logic of a constitution in general that pertains to the checking of power” (p.239). They believed that the logic of a constitution is, “about restraining discretionary power,” and furthermore, an active role for public administration may be justified provided it serves that purpose” (p.244). Spicer and Terry argue for the logic of a constitution as a basis for the legitimacy of a constrained discretionary public administration.

It is clear from this administrative legitimacy debate that consensus exists, as many scholars believe that the legitimacy of the administrative state process is an important condition in stabilizing constitutional democracy. As Spicer (1995) notes, “attempts to legitimate public administration must draw on rather than ignore the cultural and political history of the nation” (p.7). He further suggests that, “the Constitution helps establish the “rules of the game” by which Americans conduct their public affairs” (7). Therefore, scholars in public administration need
to think, talk, and write about public administration in a way that is consistent with our constitutional traditions.

Rohr, a leading administrative scholar, grounds the legitimacy discussion in the U.S. Constitution. In his book, *To Run A Constitution* (1986) he argued that the administrative state is “here to stay”. In so doing, he offers a comprehensive and historically informed view on the question of whether the administrative state can be justified in terms of the American constitutional tradition. He bases his framework on the debates of the Founding Fathers and looks at both the Federalist and Anti Federalist arguments in detail. He structures his argument in three parts. In part I, he reviews early American history (1787-1788), focusing on the framing of the Federal Republic. Next he examines the period of 1887-1900 and the founding of the administrative state in words (founders in speech), and finally the New Deal period (founders in deed).

In Rohr’s view, current problems around legitimacy of the administrative state stem the way in which the reform movements of Woodrow Wilson and Frank Goodnow, and the New Deal period distorted the principles of the framers of the Constitution. He believes that the effects of these reform periods have caused a decline in governmental legitimacy. He develops a robust view of how the administrative state can and to an extent does fulfill the vision of the founding era. Finally, Rohr concludes with his normative constitutional theory of public administration with the discussion of the oath of office and the idea that the oath
legitimizes the degree of professional autonomy for administrators. Therefore, this study attempts to use Rohr’s framework of the administrative state to analyze the USA Patriot Act of 2001. The details of the framework will be developed fully in a later section. The next section looks at the constitutional nature of the administrative state.

### 2.4 Constitutional Nature of the Administrative State

Discussing the history of the United States Constitution is far beyond the scope of this paper. The Constitution was not the result of completely creative thinking. Many of its provisions were grounded in contemporary political philosophy. The delegates to the Constitutional Convention in 1787 brought with them two important sets of influences: their political culture and their political experience. As Rohr states, there could be no theory of the Constitution during the convention, just certain principles guided the framers, such as popular government, individual rights, federalism, separation of powers, republican institutions, bicameralism, and efficient administration (1986, p. 77).

The term “founders” generally refers the Federalist papers and the Constitution. While the Federalist papers represent the Populists: Alexander Hamilton, John Jay and James Madison, the Constitution includes ideas and concepts of both the Federalist and the Anti-Federalist papers. As Herbert Storing notes, “to make only the most obvious case, the Constitution that came out of the deliberations of
1787 and 1788 was not the same Constitution that went in; for it was accepted subject to the understanding that it would be amended immediately to provide for a bill of rights” (1985). As this implies, the Constitution addresses both the Federalist and the Anti-Federalist views.

Separation of powers at the national level is the hallmark of the republican government that the founders envisioned. The founders agreed on adopting a system of government built on a republican form that would protect liberty and property without imposing tyrannical rule. The notion of separation of powers and checks and balances are basic principles of a republican government. The Constitution remains as tangible evidence of this history. The first three articles of the Constitution are the Congress-legislative, the Presidency-executive and the judiciary-judicial. These three branches make up the government. As Levine and Cornwell (1983) define constitutional authority, “Congress legislates within the broad scope of Article I, Presidents act in the authority of Article II, and Courts lean on Articles III and V” (1983, p.2).

Therefore, the Constitution has become the symbol of the nation’s legal and political unity by ironically separating powers and creating checks and balances among the main actors. The historic principles of the constitutional system are federalism, separation of powers with accompanying checks and balances, judicial review, and the Bill of Rights.
A. Public Administration and The Constitution

As stated earlier, from the time the American administrative state began to develop, the field of public administration has identified more closely with management than governance, with the result that most of the field’s prescriptions, theories, and values fundamentally challenge those of U.S. constitutionalism. Rosenbloom (1983) argues, “The rise of the administrative state has placed great strains on the separation of powers and on the related representational scheme of the government” (p.21). He further argues, “The government of the United States is one which relies on a system of far reaching separation of powers in order to prevent the concentration of official authority in the hands of one group or a single political institution” (p.21). The administrative state has shifted representation away from elective officials and towards to its own bureaus. He argues that the administrative state has violated the principle of separation of powers by blending all three governmental functions of government into the administrative branch. David H. Rosenbloom and James D. Carroll (1990) illustrate this point by arguing that “administrative interests in efficiency, standardization, economy, and effectiveness, can interfere with [an] individual’s substantive rights, such as free exercise of religion, their procedural rights to fair process when their liberty or property interests are being infringed on, and their equal protection rights under the constitution” (p.9).
Along these lines, Vincent Ostrom (1974) argues the American system is not an error or a misunderstanding on the part of the Founders, but rather a system that is based upon a distinct constitutional theory. Ostrom argues, “Practitioners and students of public administration will need to rethink both the theory and practice of their science of administration” (p.131). He finds that this has important implications from the standpoint of administrative ethics. He believes public administrators have a responsibility to disobey unlawful efforts to exploit the citizenry or violate the rights of individuals.

Many scholars have paid attention to the significance of public administration based on from the constitutional traditions and values. They believe that the traditional democratic values are the grounding principles that have given public administration and the American society a unique type of governance. These include but are not limited to the idea of individual freedom, property, equality, justice, and natural rights (see Rohr, 1978; Gawthrop, 1984; Fredrickson and Hart, 1985 and 1989; Denhart, 1988; Cooper, 1991). Rohr (1978) argues that the concept of “regime values has great potential for informing the conduct of administrators as citizens of a republic.” According to Rohr, regime values are the values of the American republic that came into existence with the ratification of the Constitution. He suggests that the task for public administrators is twofold: first, identify American constitutional traditions, regime values; and second, look for meaningful statements about them. Rohr argues that administrators will have to make decisions about which ones they will take seriously.
B. Rohr as the Most Useful Institutionalist

After examining many scholars on the issue of the legitimacy of the administrative state, this study selected Rohr for several reasons. First, his analysis is grounded in the founding of the republic. Second, he looks at both the Federalists and the AntiFederalists, combining both of the major views of our founding. Third, he develops basic notions of the structures, values, and processes of the federal government. Fourth, he then uses this knowledge to create a structural, functional analysis of the design of government that is focused on administrators and their roles in governance if the founders design is to be realized. In sum, Rohr provides the most comprehensive framework rooted in the founding of the nation and thus is the best framework for guiding public administration.

Rohr has provided an elaborate theory of the administrative state from the logic of our constitutional traditions. He begins with a relaxed, pragmatic view of the separation of powers held by the framers of the constitution and then draws out the political and ethical responsibilities engraved in the constitutional traditions.

In response to the argument of the blending of powers in the administrative agencies, Rohr (1986) finds that the framers of the Constitution were very pragmatic about blending powers among the branches of government. They
knew that the danger of tyranny existed when one branch was capable of exercising the “whole power” of another branch. However, they also understood that a partial blending of the powers would be necessary to make the government work at all. Rohr notes that Madison agreed with Hamilton that a “partial intermixture” of the departments’ powers is at times a good thing (p. 19). That is, each branch should possess some of the powers of the other branches in order to permit cooperation among the branches and thus govern effectively. Therefore, Rohr notes, for the framers the blending of powers is the best way to preserve their sensible and effective separation. He uses the clauses on the Senate as textual evidence that the “framers were quite willing to place all three powers of government in one institution where circumstance so required” (Rohr 1986, 18). Rohr also indicates that the framers had the vision of a relaxed sense of separation of powers rather than a rigid sense of powers. We will discuss Rohr’s framework of the administrative state in chapter four of this study.

2.5 The USA Patriot Act: Brief Introduction

The tragic terrorist attacks on the United States on September 11, 2001, presented a particular challenge. Many antiterrorist laws, polices, and institutions have emerged to fight the war on terrorism. One of the major pieces of legislation, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (H.R. 3162, the “USA Patriot Act”), was passed soon after the September 11, 2001, terrorist attacks. Attorney
General John Ashcroft described the Act as “package of ‘tools’ urgently needed to combat terrorism” (McGee 2001). These antiterrorist initiatives encompass major consequences for individuals, societies, and nations all over the world. However, there have been growing controversies with regard to the implications of counter terrorism measures for people’s basic rights and constitutional traditions.

Here is a brief overview of the USA Patriot Act. The Department of Justice’s first priority is to prevent future terrorist attacks. The primary purpose of the Act is to protect Americans from the deadly plans of terrorists. The USA Patriot Act allows investigators to use tools that were already available to investigate organized crime and drug trafficking. These include surveillance, following terrorists and conducting investigations without anyone’s knowledge. It also allows investigators to obtain court orders for records. Another important feature is that it allows governmental agencies to share information.

This is a brief overview of the USA Patriot Act of 2001. However, there are many views and opinions on the USA Patriot Act. The next section discusses the politics of the USA Patriot Act.
2.6 The Issue of the USA Patriot Act within the Administrative State

Regarding the content of the Act, Charles Doyle (2002) has noted that the Congress passed the USA Patriot Act following the terrorist attacks of September 11. He enumerated the following:

1). The Act gives federal officials greater authority to intercept communications for law enforcement and foreign intelligence gathering goals,

2). It vests the Secretary of the Treasury with regulatory powers to combat corruption in foreign money laundering purposes;

3). It enables authorities to close our borders to foreign terrorists and to detain and remove those associated with terrorism within our borders; and

4). It creates new procedural efficiencies for use against domestic and international terrorists. Doyle argues that although it is not without safeguards, critics contend some of its provisions go too far (Doyle).

In some provisions, the USA Patriot Act gives sweeping search and surveillance power to domestic law enforcement and foreign intelligence agencies and eliminates checks and balances that previously gave courts the opportunity to ensure that those powers were not abused.
The chief concerns with the USA Patriot Act of 2001 include:

- Expanded surveillance with reduced checks and balances. The Act expands all three traditional tools of surveillance used by law enforcement—wiretaps, search warrants, and subpoenas.
- Several provisions of the Act have no apparent connection to preventing terrorism. Government can add samples to the DNA database for individuals convicted of “any crime of violence.” Governments spying on suspected computer trespassers (not just terrorist suspects) require no court order.
- Foreign and domestic intelligence agencies can more easily spy on Americans (EFF, 2003).

The literature related to the USA Patriot Act of 2001 is diverse and interesting. While some see the USA Patriot Act as legitimate, constitutional, and reinforcing the administrative state, others consider it as a threat to our civil rights. However, this study will present both sides of the debate to raise the question of whether or not the USA Patriot Act partly or wholly empowers executive agencies beyond the separation of powers from a philosophical framework based on Rohr’s constitutional perspective of the administrative state.
Proponents of the USA Patriot Act claim that it provides needed security and protection during a time of war. Some proponents base their argument on the fact that there is a relationship between the growths of the executive branch of government in times of national crisis. They argue that only this branch of government is effectively prepared to deal with national crises such as war. This highlights the dilemma of the founders in balancing a strong defense and sovereign executive with their fear of the executive branch. That is why the founders considered the executive department to be “very justly regarded as the source of danger” (Federalist # 48).

Michael W. Spicer (2002) states in his article, “The War on Terrorism and the Administration of the American State,” that war created for a “purposive State.” A purposive state is “one in which the state is seen as organized and directed around the effective and efficient pursuit of some coherent set of substantive ends or purpose and in which the engagement of government is recognized as that of a “manager” of a collective enterprise that is focused on such ends” (p.63). A purposive state, as promoted under war conditions, limits individual freedom, and restricts liberty in the name of pursuing a coherent set of national security polices. There is a thin boundary between a purposive state and a dictatorial state, a purposive state “might be thought of as entailing a highly authoritarian form of government or even a dictatorship” (p.63). A purposive state often increases the authority of the executive branch in times of war. He also points out civil association is always there; loyal opposition to the nation’s
political leaders and their policies is considered wholly acceptable in democratic governance.

Anthony Lewis (2002) argues that civil liberties have been suppressed in the interest of U.S. national security in the history of this Republic. He explains, “What history tells me is that this is an extraordinarily resilient country. We are subject to excess of zealotry in times of fear.” He further says, “but in time, we turn back to our better angel–our constitutional angel” (Lewis, p.62).

A trade off between liberty and security is inherent in the task of combating terrorism. It is a risk that needs to be managed in a time of crisis. Writing about emergency management, Waugh and Hy (1990) argues that “one of the more telling applications of the fundamental values of a society can be found in how that society responds to risk, particularly risk that may result in major losses of human life and/or property” (p. 1-10). Therefore, the U.S. government’s immediate statutory response is an especially important formal indicator of the current and prospective redress between liberty and security.

However, many consider the implication of the USA Patriot Act is problematic. Several scholars and advocacy groups have challenged many provisions of the Act. For them these provisions threaten constitutional rights guaranteed by the First Amendment of freedom of speech, Fourth Amendment dealing with privacy issues, Fifth and Fourteenth Amendments regarding due process, and Sixth
Amendment rights of citizens and non-citizens alike. Three advocacy groups, the American Civil Liberties Union (ACLU), the Electronic Privacy Information Center, and the American Booksellers Foundation for Free Expression Filed a Freedom of Information Act (FOIA) request in August 2002, seeking information on 14 categories of agency records (Vanzi, 2004).

Civil rights are challenged by the USA Patriot Act of 2001 as the Act grants to the executive branch certain unparalleled powers of “surveillance, including gathering sensitive personal records, tracking e-mail and internet usage, monitoring financial transactions, practicing sneak and peak searches, and using roving wiretaps” (Haque, 2002 p. 173). Similarly, Chang argues that the Act sacrifices our political freedom in the name of national security and expands executive branch powers (Chang, 2002). Lisa Nelson’s (2002) analysis the impact of new technology explains why current Forth Amendment interpretation is a weak barrier to increased government surveillance of individuals and their electronic communication. She raises the fundamental issue of whether “the rhetoric of public policy solutions post–September 11 may be inconsistent with the philosophical and legal framework of American democracy; and while serving as a solution today, may pose a devastating blow to the balance of individual privacy and common good essential to the preservation of freedom” (Nelson, 2002, p. 69).
To address people’s political rights, critics argue that the USA Patriot Act represents a danger to political rights. Levy (2001) has argued that the Act has negatively affected the protection of due process under the Fifth Amendment. Similarly, Nancy Chang (2001) has expressed concerns that the Act compromises political freedom and freedom of speech. Chang also argues, “The Act erodes the due process rights of non-citizens by allowing the government to place them in mandatory detention” (Chang, 2002). Elaine Cassel (2004) also argues that anti-terror measures such as significant sections of this Act have trampled on the Bill of Rights, particularly the First, Fourth, Fifth, Sixth, and Eighth Amendments. In regards to social rights, Haque argues people’s rights and involvement in overall governance of public services did suffer under the Act (Haque, 2002).

In essence, opponents’ view of the USA Patriot Act is that it has violated constitutional tradition in terms of individual rights and separation of powers. In so doing, the Act has also violated what Rohr terms “the Oath of office” that justifies the legitimacy of these non-elected ‘high level civil servants.” As Rohr states, the Constitution is the law that orders all other laws. It creates the polity and sustains it in being.

If the administrative state is constitutional, then its laws must not violate its underlying philosophical structure. If there is to be any meaning to this perspective, then laws that violate the structure must be considered
unconstitutional in a basic philosophical sense. This dissertation is an exploratory work in this vein. The goal is to examine the USA Patriot Act of 2001 in terms of its constitutionality based on its institutional effects on government and the constitutional tradition. This analysis will unlikely develop hard and fast frames. Rather, it will create somewhat fluid boundaries that can vary to some extent. However, if these frames are to have any power then they should help determine if some polices and laws are beyond the boundaries and are thus incompatible with constitutional traditions that should govern the administrative state.

2.7 Conclusion

In this chapter, two key approaches to the administrative state have been identified. The first approach, referred to in the struggle over the nature of the administrative state, is the professional and expertise school. The second approach, referred to as the rise of the constitutional perspective on the administrative state, reflects a variety of themes adopted by constitutional scholars on the administrative state. Most notable is Rohr, who is the main source in providing a framework of the administrative state engraved in the constitutional traditions. In addition, this chapter discussed the history and development of the USA Patriot Act of 2001.
3.1 Introduction

The objective of this chapter is to present the methods and procedures that will be utilized to collect and analyze relevant data to address the question posed by the study. More specifically, this chapter develops the research design and overview of the research methodology.

3.2 Research Design

This study is situated within the normative tradition of the qualitative method of inquiry. In order to examine the philosophy of John Rohr and to explore what contribution his framework of the administrative state can make to American public administration, these studies utilize an interpretive methodology. Rohr as an institutionalist suggests how the system should operate within the
constitutional traditions. The USA Patriot Act of 2001 is critically examined in light of the constitutional traditions. The Patriot Act is an illustration of the need for Rohr’s framework, as many individual rights were lost in its passage. Therefore, this study intends to analyze the USA Patriot Act of 2001. This study does not intend to do a legal analysis of the statute. In contrast, the study operationalizes Rohr’s framework of the administrative state and applies it to the statute. The objective ascertains the utility of Rohr’s philosophy for evaluating legislative proposals in terms of his development of constitutional traditions that should guide the administrative state.

As such, the qualitative tradition of inquiry is the most effective method of conducting this research. Qualitative research differs from quantitative research in many fundamental ways. Qualitative research is not based on a single, unified theoretical concept, nor does it follow a single methodological approach. Rather, it is a mixture of many theoretical approaches and methods (Flick, 1999, p.625-629). One common goal of this approach is to understand the events, circumstances, and phenomena in terms of how they were perceived.

Creswell (1994) identified five differences between quantitative and qualitative approaches, based upon these five philosophical foundations: ontology (researcher perception of reality); epistemology (roles of the researcher); axiological assumptions (researcher’s values); rhetorical tradition (the style of
language used by the researcher); and methodological approaches (approaches taken by the researchers).

The differences identified by Creswell are summarized and presented in table 3.1 (Creswell 1994, p. 5).

Table 3.1
Quantitative and Qualitative Paradigm Assumption

<table>
<thead>
<tr>
<th>Philosophical Foundations</th>
<th>Qualitative Research</th>
<th>Quantitative Research</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ontology</strong> (Researcher perception of reality)</td>
<td>Researcher assumes that multiple, subjectively derived realities can coexist.</td>
<td>Researcher assumes that a single objective world exists.</td>
</tr>
<tr>
<td><strong>Epistemology</strong> (roles for the researcher)</td>
<td>Researcher commonly assumes that they must interact with their studied phenomena.</td>
<td>Researcher assumes that they are independent of the variables under study</td>
</tr>
<tr>
<td><strong>Axiological</strong> (Researchers' values Used by researcher)</td>
<td>Researcher overtly acts in a value-laden and biased fashion</td>
<td>Researcher overtly acts in a value-free and unbiased manner.</td>
</tr>
<tr>
<td><strong>Rhetoric</strong> (The style of language)</td>
<td>Researcher often uses personalized, informal, and context-laden language.</td>
<td>Researcher often uses impersonal, formal, and rule based text.</td>
</tr>
<tr>
<td><strong>Methodology</strong> (approaches taken by researchers)</td>
<td>Researcher tends to apply induction, multivariate, and multi-process interactions, following context-laden methods</td>
<td>Researcher tends to apply deduction and limited cause and effect relationships with context-laden methods</td>
</tr>
</tbody>
</table>

(Creswell 1994, p. 5)

Broadly speaking, there are three types of qualitative designs. These are explanatory, interpretive, and critical designs (White 1999,). These three
approaches have recently expanded the horizon of public administration theory. They incorporate a number of different ways of asking questions and understanding the role of government. White (1999) further notes, “the logic of these research designs has emerged through a series of debates across scientific disciplines, philosophical traditions, and the humanities” (p. 43).

Social science theorists who have been influenced by interpretative logic regard theory as primarily interpreting social reality. A more robust interpretation leads to a better understanding and a more adequate description. Critical theorists represent a contrast to interpretivists. They focus on understanding phenomena in terms of power and authority. The understanding can change beliefs and actions. Postmodernism questions the rationality and objectivity of knowledge, the process of constructing knowledge and the politics surrounding knowledge (White, 1999).

This study is employed under an interpretive research design. Interpretive research seeks an understanding of social events in order to expand their meaning to our lives. This method not only looks beyond the surface of the incident to discover the meanings but also accepts the presence of certain values. Here, the participants who are observed play the main active role, as the analysis is based on their version and their values. The admittance of values was one of the most important contributions of the Marxist school to social theory. In
this domain, action is not value free, it is grounded in and circumscribed by normative principles of actions or to be precise, ‘values’ (Hassard 1993, p.21-22).

White (1999) further defines such research: interpretive research seeks to understand the meaning of social artifacts, meaningful events, and intentional human actions (p. 8). According to White, interpretive research is important for the study of government organizations and agencies as these deals with values (White 1999). He further notes that interpretive research is concerned with the meanings that people attach to the norms, rules, and values that regulate their interactions. The focus of interpretive research is not only to impose a previous understanding of norms, rules, and values on others but also to understand their beliefs and actions from their point of view. Similarly, Brian Fay suggests that the interpretation involves both inquiry and presentation. Methodological standards support each phase of interpretive research. In the process of inquiry, interpretation requires communicative interaction: the achievement of a successful dialogue between the researcher and the actors (Fay 1975, 82).

This study is driven by three interconnected research objectives. The first one seeks to understand the extent and struggle over the nature of the administrative state. The second one is to examine the rise of constitutional perspective on the administrative state, focusing explicitly on Rohr’s views regarding the constitutional roots of the administrative state. The final objective is to analyze
the USA Patriot Act of 2001 within the constitutional traditions based on Rohr’s frame of the legitimacy of the administrative state.

The primary techniques employed to achieve these objectives are a hybrid between historical and philosophical scholarship. The research builds upon the institutional analysis developed by John Rohr in his classic work *To Run a Constitution*. Constitutional structures, values and processes are the foundation for the American Republic. Rohr develops a structural analysis of the constitution and from that creates a functional analysis. This approach highlights the critical foundation of the Constitution. It is based on basic values, and these values directly legitimate the administrative state. In essence, Rohr uses a critical interpretative approach to connect the notion of regime values to our constitutional values. Using Rohr’s theoretical framework, this study will analyze the USA Patriot Act of 2001.

The analysis focuses on whether parts of the Act are compatible with the constitutional traditions as highlighted by Rohr. The purpose of this study is not to summarize Rohr’s theory of the administrative state. Rather, selective dimensions of his work serve as an indispensable groundwork for understanding and situating this study. The focus here is on the application of Rohr’s framework to a particular statute in terms of its constitutional legitimacy in the administrative state.
Utilizing the normative philosophy of Rohr through an interpretative approach, the USA Patriot Act of 2001 is analyzed in terms of its institutional effects and thus its constitutionality. As with any complex statute or law, not all of it may be assessed similarly. Three to five provisions of the USA Patriot Act of 2001 will be analyzed to test if Rohr’s framework is sufficiently robust to assess their applicability to and compatibility with constitutional traditions.

3.3 Method of the Study

All qualitative research approaches involve three basic components: 1) collection of data, 2) analysis and interpretation of that data, and 3) communicating research findings in one or more communication media, such producing a written report. In collecting qualitative data, the major methods include: 1) participation in a group activity, 2) interviewing, 3) observation, and 4) documentation and cultural artifact analysis.

The data collection methods in this study consisted of historical analysis and textual analysis. The historical analysis is the main method of collecting the data as it involves observing and analyzing the literature. Therefore, the data collection methods are based on documentation and cultural artifact analyses. Books, articles, reports, and many written documents and supporting literature are the cornerstones of this study.
A. Historical Analysis

Different authors have identified many different purposes for the literature review. According to Arlene Fink (998), the process has been defined as “a systematic, explicit, and reproducible method for identifying, evaluating, and interpreting the existing body of recorded work produced by researchers, scholars, and practitioners” (Fink, p.3). The literature review is not intended to be just a summary of the articles and books that were read. An effective literature review has a greater purpose; it is a source of data in its own right (Denscombe 1998). Similarly, Spicer has defined the historical approach in this manner. He noted that in order to uncover the categories that we use in thinking about public administration and governance, we can draw upon three sources, namely what people have said about these things, what they have written about these things, and how they have practiced these things. (2005, p. 685).

This study bases its argument on historical formation of the constitutional theory of the administrative state. This tool is based on a literature review of the two schools of thought of the administrative state’s legitimacy: the professionalism or expertise school and the constitutional school. In order to examine Rohr’s constitutional framework of the administrative state, this study discusses his philosophy and constitutional theory of the administrative state in detail. Out of his framework, there emerge four principles that can be used to operationalize
his framework. The study intends to analyze the USA Patriot Act by applying these principles.

Rohr’s framework of the constitutional theory of administrative state will serve as a lens through which the USA Patriot Act can be systematically analyzed. However, this study does not base its analysis on the legality of the statue. Rather, the study is looks at both the administrative agencies and processes created by the Patriot Act of 2001 and their compatibility with constitutional traditions.

The four principles of Rohr’ framework are summarized in table 3.2.

### Table – 3.2 Four principles of Rohr’ framework

<table>
<thead>
<tr>
<th></th>
<th>Rohr’s constitutional theory of administrative state</th>
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<tbody>
<tr>
<td>Separation of Powers</td>
<td>Constitutional powers are separated, checked, and balanced to protect the individual rights. Rohr believes that an administrator should learn to think like judges, as well as like legislators and executives, because they are all three of these. In this, kind of regime administrators must do the work of public officials.</td>
</tr>
<tr>
<td>The Senate</td>
<td>“The Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p. 182)</td>
</tr>
<tr>
<td>Objective of the Oath</td>
<td>“The role of the public administration is to fulfill the objective of the oath of office to uphold the Constitution of the U.S. This means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights” (p. 181)</td>
</tr>
<tr>
<td>Administrative Behavior</td>
<td>Rohr’s normative theory encourages administrators and the public to think about administrative behavior in constitutional terms. They should use their discretion to favor those polices that they think are most likely to promote the public interest.</td>
</tr>
</tbody>
</table>
Rohr developed an elaborate theory of the administrative state from the logic of our constitutional system. From his theory emerged the four principles summarized in table 3.2. His conceptual framework will be discussed in chapter four.

B. Textual Analysis

According to McNabb (2002), in public administration and nonprofit organization research, library-based research draws on documents of all types as the source of data (p. 309). He further cite Denscombe (1998), who believes that library or desk research are common in such fields of inquiry as philosophy, social theory, law, and history, which rely almost exclusively upon documents as their key sources (p. 309).

McNabb (2002) notes the most of the researcher view that literature or documentary research can be grouped into three key classes. The first is the traditional literature review that is or should be a part of all scientific research. The second stage is called archival studies. The archival study draws upon public and private formal documents, records, and other material of a historical nature for data. The third approach is known as meta-analysis design. This is a quantitative technique for summarizing the other investigators’ research.
This study intends to base the data analysis on the literature review and archival studies. The textual analysis of the USA Patriot Act of 2001 attempts to identify some dominant patterns and distinguishing features of the statute with the purpose of interpreting the administration of the agencies and the processes created by this statue. This statute is 342 pages long and has approximately one thousand sections. The raw data has been collected through summarizing the document and supplementing it through the United States Code. The United State Code is the codification by subject matter of the general and permanent laws of the United States based on what is printed in the states at large. It is divided by broad subject into 50 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives (GPO Access).

However, this study does not intend to do a legal analysis of the statue. Rather, the objective here is to understand and enhance Rohr’s constitutional framework of administrative state. In order to test the utility of Rohr’s framework, this study plans to take three to five provisions of this statute as the unit of analysis. These will then be analyzed in terms of the administrative agencies and processes created and the extent to which these agencies and processes are compatible with Rohr’s constitutional framework of the administrative state.

The Four core principles emerged in examining Rohr’s constitutional philosophy of the administrative state and from which the research question of this study can be addressed. For operationalizing Rohr’s framework, this study will only look at
his views on separation of powers principles. The separation of powers principle is the most relevant as the selected section of the provisions of the USA Patriot Act empower administrators. Therefore, based on the research questions posed by this study, only the separation of powers principle will be used.

Separation of powers is the hallmark of the republican government that the founders envisioned. In his analysis, Rohr finds that the framers of the Constitution were very pragmatic about blending powers among the branches of government. They knew that the danger of tyranny existed when one branch was able to take over the whole power of another branch. That would upset the constitutional balance of powers and thereby weaken the system. Rohr further argues that the framers also understood that a partial blending of the powers would be necessary to make the government work at all. He notes that the "constitution wisely preserves its intended balance by an elaborate series of "checks" which allow one branch to exercise in part the powers of another" (Rohr 1986,p.19), which permits cooperation among the branches for the sake of governing effectively. Therefore, this study uses the tradition of the separation of powers to analyze the USA Patriot Act of 2001 in order to find out the applicability of Rohr's framework of the administrative state.

A subsequent chapter will be devoted to developing a framework of Rohr’s philosophy of constitutional theory. Chapter five of this study will be devoted to applying the research question: Is the USA Patriot Act of 2001 legitimate within
Rohr’s framework of the administrative state? This question generates the sub-question: Does the USA Patriot Act create and empower executive agencies beyond the separation of powers as that concept is developed by Rohr? Finally, this study will seek to examine the utility of Rohr’s constitutional philosophy and its compatibility with constitutional traditions.

3.4. Conclusion

In summary, this study will use a qualitative approach rooted in interpretive methodology to examine the constitutional philosophy of Rohr’s administrative state and to see what he has to say for the issue of the administrative state’s legitimacy to modern public administration. Developing four core principles will preface a general overview and specification of his work. The most useful of these principles for public administration is the separation of powers principle that will be operationalized. The operationalized framework will then be applied to the statute to ascertain the applicability of his work. If Rohr can be so developed and applied, future issues in the public administration can then be examined as suggested by Rohr.
CHAPTER IV
ROHR’S FRAMEWORK OF THE ADMINISTRATIVE STATE

4.1 Introduction

Rohr has provided a framework for examining the constitutional issues of public administration. This chapter briefly introduces Rohr as a distinguished scholar and explores in detail his most useful constitutional framework of the administrative state. After introducing the history of his framework, this chapter discusses four core principles of Rohr’s normative theory of the administrative state. These principles include: 1) Separation of power, 2) The Senate, 3) Objective of the Oath, and 4) Administrative behavior.

John A. Rohr is a professor of public administration at the Center for Public Administration and Policy at Virginia Polytechnic Institute and State University in Blacksburg, Virginia. In addition to his doctorate in political science from the University of Chicago, Rohr holds graduate degrees in philosophy and technology from Loyola and Georgetown Universities, respectively. He has
written and lectured extensively on the constitutional foundations of public administration and on ethical issues that confront the career civil servant. He is the author of seven books and more than 100 articles and reviews. In 1988, he received the Distinguished Research Award, presented jointly by the American Society for Public Administration and the National Association of Schools of Public Affairs and Administration (NASPAA). In 2001, he received the Dwight Waldo Award from the Journal of Public Administration Review for outstanding contributions to the literature and leadership of public administration through an extended career (PAR, 2001).

As discussed earlier Rohr, a leading administrative scholar, grounds the legitimacy discussion of public administration in the U.S. Constitution. In his book, To Run A Constitution (1986) he argued that the administrative state is ‘here to stay’. In so doing, he offers variant views on whether the administrative state can be justified in terms of American constitutional tradition. He bases his idea on the debates of the Founding Fathers and looks at both the Federalist and Anti Federalist arguments in detail. He structures his argument in three major periods of American history. In part I, he reviews the framing of the Federal Republic (1787-1788); in part II the founding of the administrative state in words from 1887-1900 (founders in speech); and finally the New Deal period (founders in deed) and the efforts made to square administrative innovations with the founding principles of the republic. Rohr concludes his normative constitutional
theory of public administration with a discussion of the oath of office and the idea that the oath legitimates a degree of professional autonomy for administrators.

In order to understand his administrative theory we will discuss these periods in brief. Rohr argues current that problems of legitimacy of administrative state stem from the way in which Woodrow Wilson, Frank Goodnow, and the New Deal period distorted the principles of the Founding Fathers. Rohr believes that reformers of public administration theory went wrong and caused the field to be perceived as constitutionally illegitimate because of Wilson’s attack on constitutional separation of powers and rejection of the framer’s vision. Wilson approached public administration with a parliamentary form of government in mind rather than a regime founded on three separate and equal branches of government. Rohr (1986) supports this view when he writes:

Despite the richness of Wilson’s understanding of administration, as a practical matter his views were doomed at the outset because he wrote with a parliamentary form of government in mind. Parliamentary administration, which rests on the foundation of legislative supremacy, cannot achieve legitimacy in a regime founded on three separate and equal branches of government (p. 75).

Rohr (1986) also noted that Wilson’s approach is similar to Goodnow’s philosophy. Goodnow spoke in terms of two basic governmental operations that constitute “the action of the state as a political entity”: 1) the expression of the will
of the state, and 2) the execution of the will of the state (p.85). This instrumental view, which Wilson also held, was intended to strengthen public administration by removing it from politics. For them, public administration forms part of the executive function of government that serves in a subordinate role to the legislative authority. The legislative body expresses the will of the people, and the administration carries it out efficiently.

Rohr notes that the instrumentalist view of both Wilson and Goodnow was intended to strengthen public administration by removing it from politics. According to Rohr, however, the field of public administration is an, “instrument of the constitution itself, rather than simply of the officers who are elected according to constitutional prescription” (p.89). This means administrators become active and legitimate participants in the struggle for control of public administration. Rohr emphasizes, “a purely instrumental profession is no profession at all” (p. 89). He believes that without some sort of principled autonomy, professionalism in public administration can never be taken seriously.

Rohr then discusses the New Deal period (founders in deed). Rohr criticizes the New Deal's expansion of presidential power. He believes that the primary task of the New Dealers was to establish the centralized government that is a precondition of an administrative state: to make the federal government supreme over the nation’s economy and to make the executive branch supreme over Congress and the federal courts.
Rohr believes that judicial decisions during that period, in interpretations of the Commerce Clause, General Welfare Clause, and Necessary and Proper clause, further distorted the Founding Fathers’ [intentions] as argued by both Federalist and Anti-Federalists (Rohr 1986, pp. 117-132). He argues that the Commerce Clause gave broad powers, hence, supporting the centralized economic power demanded by the new administrative state. The General Welfare Clause gave Congress the power to tax and spend for the general welfare. Broad interpretation of the Necessary and Proper Clause allowed New Dealers to expand the boundaries of the Commerce and the General Welfare clauses. This expansion meant that the federal government could reach activities freshly drawn within the expanded sphere of the General Welfare and Commerce Clause and that they could pass laws necessary and proper for carrying into effect the powers gained over the newly acquired activities.

The new dealers, according to Rohr drew, on the ideas of Hamilton and the framers in acquiring these powers. The importance of construction of the General Welfare Clause was its endless possibilities for federal regulation through the court’s generous reading of the Necessary and Proper Clause. “The upshot of marrying such indefinite terms as “general welfare, necessary, and proper was a solid constitutional foundation for the administrative state” (129).
Rohr then discusses the New Dealer’s attempts to establish executive supremacy.

He discusses the 1937 Brownlow Committee’s report and its major findings. These finding were that the President should be the sole executive officer and that exclusive presidential control over the executive branch would make the President accountable to Congress. The Committee was chaired by Louis Brownlow, a firm supporter of executive power (Brownlow, 1949) and composed of Luther Gulick and Charles Merriam. As Gulick explained: “A workman subject to orders from several superiors will be confused, inefficient, and irresponsible; a workman subject to orders from but one superior; may be methodical, efficient, and responsible” (Gulick 1937: p.43). Rohr (1986) argued, “at the heat of the [committee’s] doctrine is a fundamental error that transforms the President from chief executive officer into sole executive officer” (139).

In Rohr’s views, the Brownlow Committee and the expansion of the managerial control of government by the Executive Branch are at odds with constitutional design. This explains the change in American political attitude from 1787 to 1937 that has undermined governmental legitimacy (Rohr, 1986, p.146). Rohr believes the cumulative effects of these government reform periods have caused the decline in governmental legitimacy.
Rohr’s Constitutional Framework of the Administrative State

After making a case for a legitimate administrative state that is consistent with constitutional principles, Rohr offers his constitutional theory of public administration. Under Rohr, the most significant components of the administrative state are those in which the administrator fulfills critical constitutional functions that are not fulfilled by the entities originally designed for that purpose.

For example, he sees the administrative state curing the constitutional defect of representation. The defect has to do with inadequate representation that one Constitution provides. The Constitution originally provided no more than one representative per 30,000 inhabitants in the House of Representatives. This would enlarge the House too much to achieve that standard. Thus, the members of citizens represented by each member of Congress rose to over 520,000 by the last consensus. The AntiFederalists called for the representatives to be close to and resemble the people they represent, but the small number of representatives in today’s Congress made this impossible. The Federalists were aware of this argument. They wanted locally representations voices to be restrained and tempered by concern for broader interests. According to Rohr these contrasting view of representation have never been reconciled and neither has met expectations (1986, p.44).
However, in contrast to the original criteria, now representation is more than 500,000 per congressional district. This has many consequences. One, the districts are so large and diverse that representatives cannot get a sense of how individuals feel, that is “their opinions.” Two, representatives are politicians and thus they may not be demographically similar to many of the citizens of the district.

The answer, according to Rohr, was a representative bureaucracy with the image of a governing institution (because of discretion) whose personnel distribution is closer to representative. Rohr noted, “The administrative state offers millions of its employees the opportunity to fulfill the aspirations of citizenship –to rule and be ruled” (p.53). He suggests that these employees more closely approximate the microcosm envisioned by the AntiFederalists. This “defect of representation is healed via the mass participation in government that the administrative state brings in its train”-street level bureaucrats (p.40). They are from local communities.

Thus, Rohr links the ideas of tradition, the Constitution, and regime values by exploring the close relationship between the individual and the administrative state. He identifies freedom, property, and equality as core values of the American constitutional state. These values have been central themes upon which the United States has built its notion of individual rights.

According to Rohr:
What freedom, equity, and property have in common is a focus on individual rights. The preservation of individual rights is, of course, a political principle of enormous significance in the American tradition. The Declaration of Independence affirms that the Creator has endowed every person with certain inalienable rights, mentions three of them specifically, and goes on to proclaim that ‘to secure these rights governments are instituted among men…. Thus according to The Declaration of Independence, the very purpose of government is to secure individual rights. This principle is the taproot of the American political culture (Rohr 1989, p. 285).

This study has summarized Rohr’s constitutional philosophies of the administrative state into four core theme or principles. These principles will help as a guiding tool to understand his contribution to the administrative state. We will discuss these principles further in this chapter.
Table-4.1 summarizes the major components of the Rohr’s theory.

Table - 4.1 Rohr’s constitutional theory of the administrative state

<table>
<thead>
<tr>
<th>Separation of Powers</th>
<th>Rohr’s constitutional theory of the administrative state</th>
</tr>
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<tbody>
<tr>
<td>Constitutional powers are separated, checked, and balanced to protect individual rights. Rohr believes that an administrator should learn to think like judges, as well as like legislators and executives, because they are all three of these. In this kind of regime, the administrator must do the work of public officials.</td>
<td></td>
</tr>
<tr>
<td>The Senate</td>
<td>“The Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p. 182)</td>
</tr>
<tr>
<td>Objective of the Oath</td>
<td>“The role of the public administration is to fulfill the objective of the oath of office to uphold the Constitution of the U.S. This means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights” (p. 181)</td>
</tr>
<tr>
<td>Administrative Behavior</td>
<td>Rohr’s normative theory encourages administrators and the public to think about administrative behavior in constitutional terms. They should use their discretion to favor those polices that they think are most likely to promote the public interest.</td>
</tr>
</tbody>
</table>

4.2 Separation of Powers

Separation of power is the hallmark of the republican government that the founders envisioned. The founders agreed to adopt a system of government built on a republican form that would protect liberty and property without imposing tyrannical rule. The traditions of separation of power and checks and balances are at the national level a core principle of a republican government. The Constitution is tangible evidence of this history.
The concept of separation of powers is two folds: one is separation of powers within the three branches of government; the second is separation of powers between national and state governments. Rohr finds that the framers of the constitution were very pragmatic about the blending powers among the branches of government. They knew that the danger of tyranny existed when one branch was capable of taking over the Whole power of another branch. That would upset the constitutional balance of powers.

Rohr believes that the administrative state is capable, in principle, of being integrated into the sort of polity that the framers envisioned. He does not see the combination of powers in administrative agencies as violating the principle of separation of powers. In making this argument, Rohr first looks to the text of the Constitution. He points to the fact that the Senate has judicial powers (try impeachment), obvious legislative, and executive powers (where it advises and consents to treaty). Hence, “the mere presence of all three powers of government in one agency is not itself constitutionally suspect” (p. 18). Rohr turns to the founders to support his argument. The Federalist Papers show that the framers had in mind a relaxed sense of separation of powers. The chief concern for the federalist was where the “whole power of one department is exercised by the same hands which possess the whole power of another department” (p. 19). The concern was to prevent the tyrannical government. This is not the concern for the administrative agencies, according to Rohr, because the administrative
powers are always “partial” never “whole” (p. 27). He believes they are partial because they are exercised over a narrow scope of governmental activity—for example, TV licensing, railroad rates, and food stamps. He argues that these powers are not like those of Congress, the president, and the court—they are formally subordinated exclusively or jointly to one or another of the traditional constitutional branches.

Rohr (1986) seeks to demonstrate that the Constitution wisely preserves its balance through the “checks,” which allow one branch to exercise in part the powers of another; such as the president’s legislative power of veto over acts of Congress. The Senate exercises executive power through the advise-and-consent clause on appointments and treaties and serves as a judicial body to try impeachments of the president. Therefore, Rohr argues that blending of powers is the best way to preserve their sensible and effective separation. He notes that the founders intended a sharing of powers rather than a rigid separation of powers. He support this by using the clauses on the Senate as textual evidence that the “framers were quite willing to place all three powers of government in one institution where circumstances so required” (p. 18).

Rohr further argues,” if administrative agencies were spared the sort of attack that questions their legitimacy, they might be as successful in providing good government as they are in avoiding tyranny” (27).
Finding that the administrative state does not violate the principle of separation of powers, Rohr then turns his attention to the Senate as an executive establishment. This principle further enhances Rohr’s constitutional theory of the administrative state.

4.3 The Senate

Both the Federalist and AntiFederalists agreed that the Senate must become a "permanent body constantly in session" in order to collaborate with the executive branch in complex development and in coping with emergency conditions such as wars and depressions (Rohr 1986, 35). According to Rohr, the Senate’s role as an executive body failed to reach its desired potential. Very early in history it reverted to its role “almost exclusively as a second legislative chamber” (Rohr 1986, 39).

Rohr believes that the administrative state fulfills crucial designs of the framers. The functions of the higher reaches of today’s career civil servant are, on broad terms, a reasonable approximation to what the framers envisioned as the functions of the Senate in their proposed regime. The framers envisioned the Senate as a part of the executive establishment rather than simply a legislative body. The executive character of the Senate was an integral part of the constitutional plan.
In support of this point, Rohr draws on the attributes of the Senate. The first is the duration, expertise, and stability of the Senate. Even though some Senators have held “lifelong” term, because the Senate never achieved its potential as an executive institution, today the career civil service is the institution most likely to fulfill the founder’s vision of achieving executive competence and stability via a lifelong tenure. Finally, the framers viewed the Senate as providing a “due sense of national character” (p.37). In Rohr’s view, this is the function fulfilled by the upper levels of the civil service in the modern administrative state.

Therefore, Rohr believes, “the Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p. 182). Public administration, however, is subordinate; it must conform to the other three. “It does this by choosing which of its constitutional masters it will favor at a given time on a given issue” (p.181). The senior civil servants would choose their constitutional masters. He suggests that the civil service roles would include blending legislative, executive, and judicial powers, becoming part of the executive, and working with and checking the president. He further emphasizes that the senior civil service role also includes performing long terms of public service; maintaining wisdom and expertise greater than the House of Representatives; resisting popular whims; remaining in constant session; conducting affairs outside of the legislative chamber; supervising personnel matters; and expressing the permanent will and national character of the American people (Rohr, p. 38). Rather than captured by
whichever branch of the government has the upper hand at particular moments in history, Rohr promotes and expands the position, roles, and responsibilities of the senior administrator.

4.4 Objective of the Oath

Rohr argues that the role of the public administration is to fulfill the objective of the oath of office to uphold the Constitution of the United States. By this, he means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights, (p.181). Congress, the courts and the president are to do this as well. Rohr notes that,

This unity of purpose is as it should be, because the Public Administration, like Congress the president and the courts, is an institution of government compatible with the constitutional design of the framers. Congress, the President and the judiciary, taken discretely, either constitute or head one of the three great branches of government (p.181).

Public administration is subordinate to all three.

Rohr provides a formula for examining future public administration issues. He believes that administrators should use their discretion to favor those polices that they think are most likely to promote the public interest but they should assess the public interest against the broad background of constitutional principle. The link between subordination to the constitutional master and freedom to choose among them preserves both the instrumental character of public administration and the autonomy necessary for professionalism. Public administration is political
and administrative, but it has a distinctive style. Rohr concludes his theory with the discussion of the oath of office and the idea that the oath legitimates the degree of professional autonomy for the administrator. The objective of the oath, the Constitution itself, keeps this autonomy within acceptable bounds.

If we can think in terms of the Constitution not simply as a command but also as a covenant, symbol, conclusion-and-premise-of public-argument, expression-and–creation-of community, and so forth, we may begin to make more sense out of ‘fidelity to the constitutional heritage’ than the legal positivist would allow (p.192).

4.5 Administrative Behavior

Rohr has provided us a most scholarly theory of administration and well thought argument for its foundation. He suggests a normative theory that deals directly with attitudes as well as behavior. He proposes a normative theory that intended to encourage administrators and the public to think in constitutional terms. They should use their discretion to favor those polices that they think are most likely to promote the public interest. He suggests that grounding public administration thinking in the Constitution would help to transform obstructionists and whistle blowers into administrative public officials (183).
According to Rohr’s framework, professional administrators have three choices to keep up with the constitutional traditions to exercise his or her professional autonomy. An administrator has three possibilities to deal with questionable activity: resist, support or ignore. He suggests that the careful study of each of the situation will provide the administrator with the professional competence to have a sense of what is constitutionally appropriate. Rohr further emphasize that this constitutional competence should not be confused with the lawyers' competence in constitutional law, which must be focused on advocacy. He suggests, public administrator as a constitutionalist, “deals more with history than present, with insight rather than advocacy, with argument rather than law” (Rohr 1986, 193). This dissertation is building an argument based on Rohr’s philosophy.

Rohr’s constitutional theory of the administrative state provides for the public administrators to serve as a balance wheel among the superior braches of government as they compete for control over public policy. His theory provides much greater discretionary power for the administrator through the object of the oath of office.

Rohr links the ideas of tradition, the Constitution, and regime values by exploring the close relationship between the individual and the administrative state as it has evolved over the past quarter century. The relationship between the
governing bodies, the Constitution, and the sense of tradition that guides public administration are centered on the rights of the individual.

4.6 Conclusion

This chapter has introduced Rohr as a distinguished scholar and explored in detail his most useful constitutional framework of the administrative state. This chapter has discussed four core themes or principles of Rohr's normative theory of administrative state. These principles include: 1) Separation of power, 2) The Senate, 3) Objective of the Oath, and 4) Administrative behavior.

In summary, Rohr offers us a conceptual framework for legitimizing the administrative state. As discussed in this chapter, Rohr argues that the administrative state is legitimate because it upholds core constitutional values such as separation of powers, which other branches of government have failed to do. The next chapter of this study sets out to operationalize Rohr's framework of the administrative state through analyzing the USA Patriot Act of 2001. In order to test the utility of Rohr's framework of the administrative state this study will apply separation of powers principle out of his four principles to analyze the USA Patriot Act 2001. This Act has made sweeping governmental changes, which have caused significant changes in governmental structure.
CHAPTER V
THE USA PATRIOT ACT OF 2001

5.1. Introduction

This chapter briefly introduces USA Patriot Act of 2001 history and development. Three to five provisions of the USA Patriot Act are selected for analysis with Rohr’s conceptual framework of the administrative state. As discussed earlier there emerge four principles or categories that can be used to operationalize his framework. This chapter discusses four core principles of Rohr’s constitutional theory of the administrative state with the selected provisions of the USA Patriot Act of 2001. These principles include: 1) Separation of power, 2) The Senate, 3) Objective of the Oath, and 4) Administrative behavior. To test the utility of Rohr’s constitutional framework of the administrative state, this study takes the principle of separation of powers and applies it to analyze selected provisions of the USA Patriot Act of 2001, since it is most relevant to public administration and there is need for checks and balances.
The notion of separation of powers and checks and balances are the principles of republican government. The founders agreed on adopting a system of government built on a republican form that would protect liberty, property without imposing a tyrannical rule. The principle of separation of powers has two folds: one is separation of powers within the three branches of government; the second is separation of powers between national and state governments with reserved powers to each other. The system of checks and balances is only feasible under the form of separation of powers. The founders envisioned reducing the power of each branch of government by incursion of the other powers, which in return, would create a counter-incursion from those powers. James Madison notes that “this policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be check on the other” (#51). The public administration in large part is dependent upon law as its basis for performing necessary functions. The Constitution provides the foundation for government’s organization, through the principles of separation of powers and checks and balances.

The USA Patriot Act of 2001 was selected for analysis not because it is a long and complex statute rather; this legislation is broad and changes certain laws. It has created new offices as well as expanded the authority of existing offices.
This statute gave sweeping new powers to both domestic law enforcement and international intelligence agencies. It has made sweeping governmental changes, which has caused significant changes in governmental structure. The USA Patriot Act is an illustration of the need for a Rohr-like constitutional framework for public administration as it has been debated that individual rights were lost in its passage. Rohr (1978) adds to the tradition of individual rights by putting forward his notion and application of regime values. His constitutional framework of the administrative state encourages administrators to look to the values found in the Constitution and interpreted in Supreme Court opinions for guidance in their action. Therefore, since the USA Patriot Act empowers administrators, it is an appropriate statute for an analysis.

The research question addressed by this study asks: is the USA Patriot Act of 2001 legitimate within Rohr’s framework of the administrative state? More specifically: Does the USA Patriot Act create and empower executive agencies beyond the separation of powers as Rohr develops that concept? To answer this question, this chapter analyzes the USA Patriot Act by applying selected provisions to the principle of separation of powers based on Rohr’s constitutional philosophy of the administrative state. As discussed earlier this study does not base its analysis on the legality of the statute. Rather this study looks at both the administrative agencies and processes created by the USA Patriot Act of 2001 and their compatibility with constitutional traditions as Rohr’s framework of administrative state defines them.
5.2. The USA Patriot Act Of 2001 Summary

The attack on September 11, 2001, sent the United States into mass confusion. The immediate damage included destruction of the World Trade Center and a wing of the Pentagon, as well as the deaths of thousands of people. Since that time, the national government has adopted a series of anti-terrorist measures. One of the most important legal laws is the USA Patriot Act of 2001.

_The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism_ Act of 2001 (H.R. 3162, the “USA Patriot Act”) signed into law on October 26 came following legislative proposals in response to the terrorist attacks of September 11, 2001. This legislation provided significantly increased surveillance and investigative powers to law enforcement agencies. This bill is 342 pages long and consists more than one thousand sections. Regarding the content of the Act as listed earlier, Charles Doyle (2002) has noted that Congress passed the USA Patriot Act following the terrorist attacks of September He enumerated the following:

1). The Act gives federal officials greater authority to intercept communications for law enforcement and foreign intelligence gathering goals,

2). It vests the Secretary of the Treasury with regulatory powers to combat corruption in foreign money laundering purposes;

3). It enables authorities to close our borders to foreign terrorists and to detain and remove those associated with terrorism within our borders; and
4). It creates new procedural efficiencies for use against domestic and international terrorists. Doyle argues that although it is not without safeguards, critics contend some of its provisions go too far (Doyle, 2002).

In summary, the USA Patriot Act of 2001 defines terrorism and focuses upon enhancing domestic security by implementing legislations involving, among other things, computer privacy, electronic surveillance, warrants to trap and trace, no knock searches and extra-territorial search warrants.

In some provisions, the USA Patriot Act gives sweeping search and surveillance to domestic law enforcement and foreign intelligence agencies and eliminates checks and balances that previously gave courts the opportunity to ensure that those powers were not abused. As it shows in Section 203 Title II Enhanced Surveillance Procedures of the statute.

**Section 203. Authority to share criminal investigative Information.**

**Focus** – for interception of communications under chapter 119 USC, and grand Jury procedures under Rule 6(e) of the Federal Rules of Criminal Procedure to authorize disclosure of foreign intelligence information obtained by such interception.

The Section 203(a) of the bill would permit the wide sharing of sensitive information gathered in criminal investigations by law enforcement agencies with intelligence agencies including the Central Investigation Agency (CIA) and other federal agencies. For example, Section 203(a) of the statute would permit law
enforcement agents to provide to the CIA foreign intelligence and
counterintelligence information revealed to the grand jury. No court order would
be required. This section of the statute permits more liberal sharing of information
about U.S. Citizens.

The next sections 5.4 and 5.5 of this study discuss the administrative agencies
and processes created by the USA Patriot Act and their compatibility with
constitutional traditions as Rohr defines it.

5.3 Critiques on the USA Patriot Act of 2001

Jaeger, McClure, Bertot, and Snead (2004) in their article emphasized about the
Act has amended many statutes. They note that the Patriot Act is one of the most
dramatic pieces of legislation because it modifies much other legislation. Such as
the Foreign Intelligence Surveillance Act, the Family Education Rights and
Privacy Act, the Right to Financial Privacy Act, the Electronic Communications
Privacy Act, the Cable Communications Policy Act, the Federal Wiretap Statue,
the Federal Pen Register and Trap and Trace Statue, and many other laws and
Statutes (Jaeger, McClure, Bertot, and Snead, p. 100).

The USA Patriot Act of 2001 was signed by President George Bush on October
26, 2001. This bill was introduced in great haste and passed with little debate,
and without a House, Senate, or conference report. As a result, it lacks the
typical legislative background (Chang, 2002). This Act enhances the government’s authority and capacity to redefine terrorism, conduct surveillance, gather intelligence, determine crimes and penalties, detain immigrants for significant periods, and verify financial transactions and accounts (Chang, 2001; White House 2002a). According to Chang (2001), the Act violates the First Amendment of freedom of speech, the Fourth Amendment dealing with privacy issues, and the Fourteenth Amendment regarding due process. These are the roots of many of the individual liberties that Rohr calls upon administrators to defend.

Similarly, according to Gould (2002), among its several provisions, the USA Patriot act specifies that:

- The standards for wiretapping may be lowered. Whereas previously, the FBI could order wiretapping only if its “primary purpose” was to gather intelligence. The new law permits wiretaps if “a significant purpose” involves intelligence gathering. As a result, people merely suspected of working with terrorists or spies may be wiretapped.
- The FBI may share sensitive grand jury and wiretap information with intelligence agencies without judicial review or any safeguards limiting its future use, so long as the information concerns foreign intelligence or international terrorism.
• Law enforcement may access an individual’s internet communications if an official can certify in court that the information is relevant to an ongoing criminal investigation. This standard is much lower than the showing of probable cause required for most search warrants.

• Financial institutions will be required to closely monitor daily financial transactions and share information with government intelligence services. The law also allows law enforcement agencies secret access to an individual’s credit report without judicial review.

• A new crime of domestic terrorism is created, covering conduct that “involves acts dangerous to human life.” Presumably, members of Operation Rescue or Greenpeace would be covered under this definition, permitting the FBI to wiretap the homes of individuals who provide lodging or other assistance to activists.

• Non-citizens facing deportation may be held indefinitely on the attorney general’s certification that an individual endangers national security.

Gould in his article “Playing with Fire: “The Civil liberties Implications of September 11th noted that the USA Patriot Act of 2001 “raises domestic intelligence gathering to an unprecedented level”. He further argues that antiterrorism measures such as USA Patriot Act “sow the seeds for greater detachment from and dissatisfaction with government as the public becomes increasingly separated from the workings and operations of public policy” (2002). Similarly, Al Gore (2007) in his book The Assault on Reason sees the United
States as using emotional politics and eschewing reason. He argues that there is a trend in U.S. politics towards ignoring facts and analysis when making policy decisions. He notes,

for the first time in American history, the executive branch of our government has not only condoned but actively promoted the treatment of captives in wartime that clearly involves torture, thus overturning a prohibition established by General Washington during the Revolutionary war (Al Gore, p.1).

He further questions that in the regime of separation of powers, checks, and balance where we have free speech and free press, have they all failed us.

CNN/Law Center has done a good job in explaining and summarizing the USA Patriot Act of 2001. According to its summary, the major provisions of the USA Patriot Act include:

- Relaxed restrictions on information sharing between U.S. law enforcement and intelligence officers about suspected terrorists, and makes it illegal to knowingly harbor a terrorist.

- Authorization of “roving wiretaps,” so that law enforcement officials can get court orders to wiretap any phone a suspected terrorist would use. The provision was needed, advocates said, with the advent of cellular and disposable phones.

- Allowing the federal government to detained non-U.S. citizens suspected of terrorism for up to seven days without specific charges.
• Allowing law enforcement officials greater subpoena power for e-mail records of terrorist suspects.

• Tripling the number of Border Patrol, Customs Service Inspectors and Immigration and Naturalization Service inspectors at the northern border of the United States and providing $100 million to improve technology and equipment on the U.S. border.

• Expanding measures against money laundering by requiring identification of account holders.

• Eliminating the statute of limitations for prosecuting the most egregious terrorist acts but maintaining the statute of limitation on most crimes at five to eight years (CNN, 2002).

The provisions of the USA Patriot Act 2001 expand government-investigating authority in the power and discretion of intelligence and law enforcement agencies. Indeed, the USA Patriot Act enables many surveillance and intelligence-gathering activities that address issues that are complex and associated with fundamental constitutional protection of individual liberty. In sum, the USA Patriot Act enables the executive branch access to citizens e-mails accounts and any internet related use, personal records, monetary transactions, phone calls, and search procedures. These changes affect numerous types of organizations, from trucking companies to Internet service providers to every single library in the United States.
So far, we have discussed a brief history and development of the USA Patriot Act. Next section we will discuss the four principles of Rohr’s Conceptual Framework of the administrative state by applying certain provisions of The USA Patriot Act. This discussion will further enhance the information about the USA Patriot Act and will help to evaluate the provisions of the USA Patriot Act in terms of their effects on these governmental structures and processes.

5.4 Rohr’s Constitutional Framework of the Administrative State and the USA Patriot Act Of 2001

Rohr developed an elaborate theory of the administrative state from the logic of our constitutional system. From his theory, four principles emerged. This section will discuss these four principles with certain provisions of the USA Patriot Act in order to enhance a better understanding of the statute.

A. Separation of Powers

As discussed in chapter four, Separation of powers is the hallmark of the republican federal government that the founders envisioned. The Constitution of the United States separates the federal government into three distinct branches and provides a system of “checks and balance” that protect liberty and property without imposing a tyrannical rule. Rohr (1998) seeks to demonstrate that the Constitution wisely preserves its balance through the “checks” which allow one
branch to exercise, in part, the powers of another. He believes constitutional powers are separated, checked, and balanced to protect the individual rights. The relationship between the governing bodies, the Constitution, and the sense of tradition that guides public administration are centered on the rights of the individual.

Rohr (1998) believes that administrators should learn to think like judges, as well as like legislators and executives, because they are all three of these. He further notes that in a regime that separates powers, administrators must do the work of public officials who are “stewards” of the Constitution and that the Constitution is steward to the American people (p.91). His constitutional administrative framework encourages administrators to look to the values found in the Constitution and interpreted in Supreme Court opinions for guidance in their actions.

Rohr (1978) stated that “regime values refer to the values of that political entity that were brought into being by the ratification of the constitution that created the present American republic” (p. 59). He goes on to say that “the method of regime values proposed the constitution of the United States as the most appropriate focal point for normative reflection by American bureaucrats” (238). The Founding Fathers placed the Bill of Rights into our constitution to insure that the rights of liberties of our citizens would not be abridged by the potential insatiable desire of the federal government for limitless power.
The USA Patriot Act of 2001 has significant consequences. This Act grants unprecedented powers to the executive branch to conduct surveillance, including gathering sensitive personal records, tracking email and internet usage, monitoring financial transactions, practicing sneak-and-peak searches, and using roving wiretaps (Chang 2001). This legislation broadly expands the powers of federal law enforcement agencies to gather intelligence and investigate anyone it suspects of terrorism. The most disturbing aspect of the government’s actions has been its potential effects on the Bill of Rights, the very cornerstone of our American democracy. As discussed earlier, this statute has raised critical issues about the First Amendment right to freedom of speech, the Fourth Amendment right to privacy and the Fourteenth Amendment regarding due process rights of citizens and non-citizens alike. From the USA Patriot Act’s very broad definition of domestic terrorism to the Federal Bureau of Investigation (FBI)’s new powers of search and surveillance to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously questioned.

The focus of this study is whether these provisions from the USA Patriot Act contravene our constitutional traditions and regime values as defined by Rohr. As discussed earlier, to test the utility of Rohr’s constitutional framework of the administrative state, this study takes the separation of powers principle. We will analyze further the principle of separation powers as Rohr has discussed by
applying the selected provisions of the USA Patriot Act of 2001. Next, we will discuss Rohr’s second principle, the Senate then the objective of the oath and finally, administrative behavior with certain provision of the USA Patriot Act. These are the core of Rohr’s constitutional framework of administrative state.

B. The Senate

The Senate is one of the two chambers of the United States Congress, the other being the House of Representatives. In the Senate, two members represent each State. As a result, the total membership of the body is 100. Senators serve for six-year terms. The Senate is regarded as a deliberative body than the House of Representatives, the Senate is smaller and its members serve longer terms, allowing for a more collegial and less partisan atmosphere that is somewhat more insulated from public opinion than the House. The Senate has several exclusive powers enumerated in Article 1 of the United States Constitution.

Ball and Dagger (1999) cite the Greek historian Polybius, who declared that the key to Roman success was its mixed government because neither one person, nor the few, nor the many held exclusive power. The Roman Republic divides the power among three. This way people as a whole exercised some control over policy making through their assemblies and so did the aristocrats, who controlled the senate. In place of a monarch, the republic relied on consuls to put polices into effect. In this way, Polybius said, no group was able to pursue its own
interest at the expense of the common good (Ball and Dagger, p. 25). The
Roman Senate (Latin: Senatus) was the main governing council of both the
Roman Republic, and the Roman Empire. The word Senatus is derived from the
Latin word “senex”, meaning old man or elder.

Rohr (1986) noted that “the Senate is part of the legislative branch, but the
nature of the Senate’s legislative power is somewhat different from that of the
House” (29). He further argues that bicameralism did not simply mean that one
house would check the other; rather the executive character of the Senate was to
be the executive checking branch of the legislature. The president has a
conditional veto power over both houses. Similarly, the Senate exercises
executive power through the advise and consent clauses on appointments and
treaties and serves as a judicial body to try the impeachment of the President
(29-30). Rohr (1986) uses the clauses on the Senate as textual evidence that
the “framers were quite willing to place all three powers of government in one
institution where circumstances so required” (p.18). In earlier drafts of the
constitution, the Senate was given exclusive power over many of these matters.
Both Federalists and AntiFederalists agreed that the Senate must become a
“permanent body in session” in order to collaborate with the executive in complex
policy development, and coping with emergency conditions such as wars and
depression (p.35).

Rohr (1986) noted nine characteristics of the Senate:
1. executive and judicial powers are combined
2. functions as part of an executive establishment, working with the president and checking him as well
3. members will serve for a long period and possibly for life or during good behavior
4. members are expected to have wisdom and expertise not found in the House of Representatives
5. members will have the institutional support to resist popular whims of the moment
6. could be constantly in session
7. may conduct its affairs in a place other than the legislative chamber
8. expresses some supervisory power over federal personnel and related matters
9. expresses the permanent will and national character of American people

Rohr (1986) suggests that these characteristics can be found in the great normative act of the founding of the Republic (pp. 38-39). He noted the adoption of the Seventeenth Amendment in 1916 (direct election of Senators) has formalized the role of Senate as being almost exclusively a second legislative chamber. He further noted that today's Senate is not an executive council in any sense; its judicial powers are hardly exercised; it is not constantly in session; and relatively few of its members serve for more than twenty years. He believes that
today’s Senate hardly resembles the institution envisioned in the debate of 1787-88 as the Federalists wanted and Anti Federalists feared (39).

Rohr (1986), believes that the functions of the higher reaches of today’s career civil servant, if properly structured, could be in broad terms a reasonable approximations to what the framers envisioned as the functions of the Senate in their proposed regime. The framers envisioned the Senate as a part of the executive establishment rather than simply a legislative body. The executive character of the Senate was an integral part of the constitutional plan (pp.29-35).

Therefore, Rohr believes, “the Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p.82). He noted that the Senate, “like today’s civil service, was likely to be a permanent body, constantly in session” (35).

Rohr believes that the senior civil administrators can provide the long duration, stability, and expertise of the original senatorial role needed for complex policy formulation and implementation while respecting individual liberty. He suggests, that the civil service roles would include blending legislative, executive, and judicial powers; becoming part of the executive, working with and checking the president; and expressing the permanent will and national character of the American people (Rohr, p. 38). Rohr promote and expands the position, roles, and responsibilities of the senior administrators. He suggests that administrators
should base their decisions on a careful interpretation of the constitution and its traditions. For that reason, this study has detailed the characteristics of the Senate as these relate to how public administration is to be. This study attempts to do first that and thus conceptually operationalizes Rohr’s precepts. As the success of this operationalization can only be tested by its implementation, the operationalized framework will be applied to analyze the USA Patriot Act.

One of the striking features of the USA Patriot Act of 2001 is the lack of debate surrounding its introduction. Several members of Congress expressed concern about its size, about its lack of debate, and the suspension of normal Congressional processes. Because of these concerns, USA Patriot Section 224 was added. This section, titled “Sunset,” set an expiration date of December 31, 2005 for several of the surveillance provision of this law. The sunset provisions were intended to give Congress and the public a chance to evaluate how law enforcement exercised some of its broad new powers. With these minor changes in the House, the bill was passed 357 votes to 66 in the House while the Senate vote was 98-1 and became a public law on October 26, 2001 (Chang 2001).

Thus, the USA Patriot Act of 2001 amended many important statutes and significantly expanded government’s investigative authority. The USA Patriot Act did not provide for the system of checks and balance that traditionally safeguard civil liberties in the face of such legislation. The Act does contain a sunset
provision that will terminate several of the sections that enhance law enforcement
search and electronic surveillance authority. The Congress understood that
sunset provisions would provide an opportunity to review the most extreme of the
government’s new investigative powers at a later, less chaotic time. As
Washington Post journalist, Robert O’Harrow Jr. has reported:

Giving criminal investigators unchecked access to the Foreign Intelligence
Surveillance Act (FISA) powers could break down constitutional
safeguards against unreasonable searches and seizures, leading to
abuses against U.S. citizens. Dick Armey, one of the most conservative
members in Congress…was already discussing a “sunset” provision to the
new law, placing time limits on how long parts of it would remain in effect.
A sunset provision would guarantee that Congress would revisit some
troubling new powers, giving lawmakers an important check on executive
authority.

The 9/11 Commission recommended in its final report that the burden of proof for
showing that Congress should renew USA Patriot Act powers subject to sunset
should be on President Bush. Specifically, the president must show that each
power actually materially enhances security and that there is adequate
supervision of the use of such powers to ensure that civil liberties are protected.
If the power is granted, the Commission emphasized, there must be adequate
guidelines and oversight to properly confine its use. The Commission further
stated, “[b]ecause of concerns regarding the shifting balance of power to the government, we think that a full informed debate on the Patriot Act would be healthy” (*Newsday*, Dec. 9, 2003).

Growing public concern about the impact of the USA Patriot Act, many members of Congress are reassessing the constitutional implication of other surveillance activities, particularly as they affect the free expression and privacy of Americans. Congress has received two *Justice Department Inspector Generals* reports that identify dozens of cases in which department employees, as well as the offices of the Drug Enforcement Administration and the Immigration and Naturalization Service have been accused of serious civil liberties violations involving enforcement of the USA Patriot Act. The July document reported that the Inspector General’s office had received 34 complaints that it considered credible in the six-month period that ended on June 15, 2003. The June document found broader problems in the department’s treatment of hundreds of illegal immigrants rounded up after the terrorist attack of September 11, 2001 (*JDIG Report*). Both reports brought widespread bipartisan criticism of the Justice Department by members of Congress.

This study have discussed characterizes of the Senate in detail as these relates to how public administration is to be. Based on Rohr’s framework, this is requires that the administrators should use political judgment to know how a statute fits or does not fit our constitutional traditions.
C. Objective of the Oath

As discussed earlier, Rohr (1986) argues that the role of the public administration is to fulfill the objective of the oath of office to uphold the Constitution of the United States. By this, he means, “administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights,” (p.181). Congress, the courts and the president are to do this as well. Rohr suggests that senior civil servants would become the stewards of the American people, not the president (p.185). He believes that civil servants retaining professional autonomy in choosing among constitutional masters while staying focused on the constitutional principles would keep that autonomy within acceptable bounds. He suggests that the administrator would require human activity of the highest order as expressed by the oaths of office leading to a profound moral commitment (187-190).

Under the USA Patriot Act of 2001, we shall see what kind of power is granted. On the other hand, what provision expands the authority and power of different offices? To use these powers constitutionally, administrators must be normative agents and stewards of the Constitution.

According to the U.S. Department of Justice’s July 2004 report, the USA Patriot Act of 2001 equips federal law enforcement and intelligence officials with
enhanced and vital new tools to bring terrorist and other dangerous criminals to justice.

The USA Patriot Act permits the wide sharing of sensitive information gathered in criminal investigations by law enforcement agencies with the Central Intelligence Agency (CIA) and National Security Agency (NSA) and other federal agencies. As it shows in Section 203 Title II Enhanced Surveillance Procedures of the statute.

Section 203. Authority to share criminal investigative Information.

Focus – for interception of communications under chapter 119 USC, and grand Jury procedures under Rule 6(e) of the Federal Rules of Criminal Procedure to authorize disclosure of foreign intelligence information obtained by such interception.

Process – officer applies to court for warrant to intercept

Section 203 creates an exception for intelligence matters. It covers information: (1) related to the protection of the United States against a foreign attack or other foreign hostile action, against sabotage or international terrorism by a foreign power or its agents, or against foreign clandestine intelligence activities; (2) concerning a foreign power or territory related to the national defense, security, or foreign affairs activities of the United States; or (3) constituting foreign intelligence or counterintelligence as defined in section 3 of the National Security Act of 1947 (that is, (a) “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign person” or (b) “information gathered and activities, sabotage, or
assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, “50 U.S.C. 401a(2), (3) (Doyle, CRS Report, 2001).

According to the analysis conducted by Senator Patrick Leahy of Vermont, both the House and Senate bills included provisions amending the criminal procedures for interception of communications under chapter 119 of title 18, United States Code, and grand jury procedures under Rule 6(e) of the Federal Rules of Criminal Procedures. To authorize disclosure of foreign intelligence information obtained by such interception or by a grand jury to any federal law enforcement, intelligence, national security, national defense, protective or immigration personnel to assist the official receiving that information in the performance of his official duties (Leahy, 2001).

Similarly in, Section 215 Access to records and other items under the Foreign Intelligence Surveillance Act (FISA)

Both the House and Senate bill included this provision to remove the “agent of a foreign power” standard for court-ordered access to certain business records under FISA and expands the scope of court orders to include access to other records and tangible items. The authority may be used for an investigation to protect against international terrorism or clandestine activities or to obtain foreign intelligence information not concerning U.S. persons. An investigation of a United States person may not be based solely on activities protected by the First
Amendment. The final version was narrower than the original Administration proposal, which would have removed requirements of court order and the “agent of a foreign power” showing (Leahy).

Section 901 Responsibilities of Director of Central Intelligence regarding foreign intelligence collected under the Foreign Intelligence Surveillance Act of 1978.

Both the House and Senate bills included this provision to clarify the role of the Director of Central Intelligence (“DIC”) with respect to the overall management of collection goals, analysis, and dissemination of foreign intelligence gathered pursuant to the Foreign Intelligence Surveillance Act in U.S. In order to ensure, that FISA is properly and efficiently used for foreign intelligence purposes It requires the DCI to assist the Attorney General in ensuring that (FISA) efforts are consistent with constitutional and statutory civil liberties (Leahy).

D. Administrative Behavior

As we have discussed in Chapter 4, Rohr has provided us a most scholarly theory of administration and a well thought out argument for its foundation. He suggests a normative theory that deals directly with attitudes and behavior. He proposes a normative theory that is intended to encourage administrators and the public to think in constitutional terms.
Therefore, Rohr’s constitutional theory of administrative state provides for public administrators to serve as a balance wheel among the superior branches of government as they compete for control over public policy. His theory provides much greater discretionary power for administrators through the object of the oath of office.

Looking at the last principle of Rohr’s constitutional theory we will discuss what kind of ethics or accountability are provided under the USA Patriot Act 2001. The administrators must be able to provide checks and balances not simply follow the orders of the president and his appointees.

Under the USA Patriot Act of 2001, the power of law and order bureaucracy has increased considerably. As discussed earlier, the USA Patriot Act enhances the government’s authority and capacity to redefine terrorism, conduct surveillance, gather intelligence, determine crimes and penalties, detain immigrants for lengthy periods, and verify financial transactions and accounts (Chang 2001; Whitehouse 2002a).

Under section 213 of the Act, the sneak-and-peek searches of physical property can be conducted as normal criminal investigations without prior knowledge of the property owner (Levy 2001). Similarly, under Section 215, sensitive personal records can be obtained by certifying their relevance to the investigation of international terrorism. The scope of such investigation may cover American
citizens and permanent residents, and the provisions can apply to nonterrorist activities such as drug cases, tax fraud, and other federal crimes (Dempsey 2001)

In order to test the utility of Rohr’s constitutional framework of the administrative state, the next section analyzes the principle of separation of powers in detail with selected provisions of the USA Patriot Act 2001. As discussed in chapter 3, this study intends to base the data analysis on the literature review and archival studies. The textual analysis of the USA Patriot Act 2001 attempts to identify some dominant patterns and distinguishing features of the statute with the purpose of interpreting the administration of the agencies and the processes created by this statute. This statute is 342 pages long and contains about one thousand sections. This Act is very long and complex. Thus, it is necessary to select a few of the most appropriate provisions.

For the purpose of this study, a comprehensive database was created. All sections of the USA Patriot Act were analyzed and detailed. For example, the USA Patriot Act amends many statutes. The database included each of the amended sections. The raw data was collected through summarizing the document and supplementing it through the United States Code. However, this study does not intend to do a legal analysis of the statute. Rather, the objective here is to understand and enhance Rohr’s constitutional framework of the administrative state. From this database, four provisions were selected that most
clearly raise the issue of the separation of power. The provisions were selected from the database by searching for provisions that either created an executive office or added additional authority to an existing office. The criteria used in the selection of these provisions are: 1) the provision that most correctly affects the individual liberties and 2) the provisions, that allows the executive branch to affect individual liberties without being checked or partially checked.

5.5 Principle of Separation of Powers and USA Patriot Act: Selected Provisions

The separation of powers is a method of removing the power from any one group’s hands, making it more difficult to abuse. Rohr finds that the founders agreed on adopting a system of government built on a republican form that would protect liberty and property without imposing a tyrannical rule. They knew that the danger of tyranny existed when one branch of government was able to take over the whole power of another branch. That would upset the constitutional balance of powers and thereby weaken the system. Rohr further argues that the framers also understood that a partial blending of the powers would be necessary to make the government work at all. He notes that the “Constitution wisely preserves its intended balance by an elaborate series of “checks” which allow one branch to exercise, in part, the powers of another” and permit cooperation among the branches for the sake of governing effectively (Rohr 1986,p.19).
This study uses the tradition of separation of powers to analyze the USA Patriot Act of 2001 in order to find out the applicability of Rohr's framework of the administrative state. As stated earlier, this study does not intend to do a legal analysis of the statue. Rather the objective here is to understand and enhance Rohr’s constitutional framework of the administrative state. In order to test the utility of Rohr’s framework, this study plans to take four provisions of this statute as the unit of analysis. The provisions were selected from the database created for this study by searching for provisions that either created an executive office or added additional authority to an existing office. The criteria used in the selection of these provisions are: 1) the provision that most directly affect the individual liberties and 2) the provision, which allows executive branch to affect individual liberties without being checked or partially checked.

These will then be analyzed in terms of the administrative agencies and processes created and the extent to which these agencies and processes are compatible with Rohr’s constitutional framework of the administrative state.

This section attempts to compare and contrast Rohr’s constitutional framework of the administrative state with the selected provisions of the statute in order to comprehend the difference and the consequent effects of each of these provisions. The objective here is to find out whether results from the statute are contravening with constitutional traditions and regime values as Rohr defines it.
This is best accomplished by summarizing Rohr’s framework and comparing it with selected provisions of the statute in a table than spelling it out in detail.

The table 5.1 on the next page is a summary of the Rohr’s model and selected provisions of the USA Patriot Act 2001.

### Table 5.1  The USA Patriot Act Provisions and Rohr’s Framework:

**Differing Influences**

<table>
<thead>
<tr>
<th>Provision Type of Authority</th>
<th>Provision Content</th>
<th>Core Action</th>
<th>Democratic Values Bill of Rights related to Provisions</th>
</tr>
</thead>
</table>
| **Sec. 215**: Access to records and other items under the Foreign Intelligence Surveillance Act (FICA) | **Focus** is to expand the court order to include access to other records, and tangible authority may be used for an investigation to protect against international terrorism or covert activities. An investigation of United States citizens may not be based solely on activities protected by the First Amendment. | Puts people at risk for exercising their free speech right to read, and recommend or discuss a book. | Amendment I
“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.” |

| **Sec. 203**: Type of Authority- to share criminal investigative information | **Focus** – for interception of communications under chapter 119 USC and grand Jury procedures under Rule 6(e) of the Federal Rules of Criminal Procedure to authorize disclosure of foreign intelligence information obtained by such | No court order is required. CIA may share the information with other agencies and with foreign governments. | Amendment IV
“The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable
interception.  
**Process**—officer applies to court for warrant to intercept searches and seizors, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"

<table>
<thead>
<tr>
<th>Sec. 411: Type of Authority – Definition relating to terrorism</th>
<th>Focus – is to amend the definition of “Engage in Terrorist Activity” to clarify that an alien who solicits funds or membership or provides material support to a certified terrorist organization is inadmissible and removable.</th>
<th>Lowers standards for terrorist designation.</th>
<th>Amendment IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sec. 412: Type of Authority – Mandatory detention of suspected terrorism; habeas corpus; judicial review</td>
<td>Focus – to permit the Attorney General to detain alien terrorist suspects for up to seven days, § 11826a. The Attorney General’s determination are subject to review only under writs of habeas corpus issued out of any federal district court but Appeal able only to the United States Court of Appeals for the District of Columbia.</td>
<td>Deprives immigrants of “liberty… without due process”</td>
<td>Amendment V</td>
</tr>
</tbody>
</table>

“No person shall be held to answer for …crime, unless on a presentment or indictment of a Grand Jury..., nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”

Table 5.1 summaries the differing influences of Rohr’s model and selected provisions of the USA Patriot Act 2001. This study will further discuss these provisions in order to find out the differing purposes of the USA Patriot Act provisions and Rohr’s constitutional framework of the administrative state. Rohr’s
notion is that administration must protect the liberty of the people that is best stated in the Bill of Rights.

According to Rohr (1978), regime values are the values of the American republic, which came into existence with the ratification of the Constitution. He identifies freedom, property, and equality as core values in the American Constitution. Constitutional powers are separated, checked, and balanced to protect the individual rights. These values have been central themes upon which the United States has built its notion of individual rights.

The USA Patriot Act expands the surveillance powers of the federal government, and some have argued that it violates the civil liberties granted by the Bill of Rights. One of the most important parts of the United States Constitution are the first ten amendments, which are collectively known as the Bill of Rights. Chang (2002) noted that the “first ten amendments to the Constitution which collectively comprise the Bill of Rights guarantee Americans the political freedom and individual liberties essential to an open society” (p.20). Chang argued that the USA Patriot Act stands out as radical in its design. It sacrifices political freedom in the name of national security and consolidates new powers in the executive branch. The Act has compromised the First Amendment of freedom of speech, Fourth Amendment dealing with privacy issues, the Fifth and Fourteenth Amendments regarding due process and Sixth Amendment rights of citizens and non-citizens alike.
Rohr’s notion is that public administration must protect the liberty of the people, which is best stated in the Bill of Rights. In the next section, this study will discuss the different provisions from table 5.1.

The First Amendment

The First Amendment to the Constitution guarantees, among other things, the right of every individual to freely express his or her ideas and peaceably assemble in order to convey those ideas to others. Before the USA Patriot Act, FISA allowed the FBI the ability to request orders to access business records. These requests had to include “specific and articulable facts giving reason to believe the person to whom the record pertain [was] a foreign or an agent of a foreign power” (50 U.S.C. § 1862(b) (2)).

Sec. 215: Access to records and other items under the Foreign Intelligence Surveillance Act (FICA) Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1862 et seq.) by striking sections 501 through 503 (H.R. 3162)

Section 215 expands this authority, now including any tangible item, regardless of who is holding it and now only requires that the FBI by seeking records relevant to an investigation of foreign intelligence or terrorist activities. This
section permits the FBI director to seek records from bookstores and libraries of books that a person suspected of terrorism has purchased or read, or of his or her activities on a library’s computer. It also places a gag order to prevent anyone from disclosing that they have been ordered to produce such documents. This section permits FBI to compel production of any record or item without a showing of “probable cause” (the existence of specific facts to support the evidence of crime). However, the requirement that access to records must be granted by court order remains in effect.

Under section 215, of the act, the concern is it can be misused. Under this section, sensitive personal records can be obtained by certifying their relevance to the investigation of international terrorism. It puts people at risk for exercising their free speech rights to read, recommend, or discuss a book or to write an e-mail. It also denies booksellers and library personnel the free speech right to inform anyone, including an attorney that the FBI has asked for someone’s reading list. According to Dempsey (2002), the scope of such an investigation may cover American citizens and permanent residents, and provisions can apply to nonterrorist activities such as drug cases, tax fraud, and other federal crimes (Dempsey 2002).
The Fourth Amendment

“The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (Rohr, p.195).

The Fourth Amendment protects against unreasonable searches and seizures, and requires law enforcement officers to obtain a warrant from a judge certifying that there is probable cause to believe that criminal activity has taken place before any search.

SEC. 203: Authority to share criminal investigative information

(a) Authority to share grand jury information

(b) Authority to share electronic, wire, and oral interception information

(c) The Attorney General shall establish procedures for the disclosure of information

(d) Foreign Intelligence Information (H.R. 3162)

Section 203 of the USA Patriot Act authorizes the disclosure, without judicial supervision, of certain criminal and foreign intelligence information to officials of
the FBI, CIA, and INS as well as other federal agencies where receipt of the information will “assist the official…in the performance of his official duties.” (18 U.S.C. § 203(a) (1), (b) (2) (c), and (d) (2)).

Section 203 (a) of the bill would permits law enforcement agents to provide to the CIA foreign intelligence and counter-intelligence information revealed to a grand jury. No court order would be required. According to the Electronic Frontier Foundation, analysis of the USA Patriot Act directly breaks down many of the barriers that had previously prevented sharing of foreign and domestic surveillance information. It also adds a new category of information that may be shared, called Foreign Intelligence Information. Nevertheless, there is no provision for the intelligence agencies or domestic law enforcement to report Congress about how much and what type of information sharing is actually done under this new law (EFF, 2001). Therefore, under section 203 lacks the necessary checks and balances required by our constitutional traditions according to Rohr, since no court order is required. The CIA may share the information with other agencies and with foreign governments.

Section 411 of the USA Patriot Act amends the definition of “Engage in Terrorist Activity” to clarify that an alien who solicits funds or membership or provides material support to a certified terrorist organization is inadmissible and removable. Under this new power, the Secretary of State could designate any group that has ever engaged in violent activity a “terrorist organization.”
The USA Patriot Act also allows for detention and deportation of individuals who provide lawful assistance to groups that are not designated as terrorist organizations. It then requires the immigrant to prove a negative: that he did not know, and should not have known, that his assistance would further terrorist activity (Section 411, amending INA section 212(a)(3)(B)).

Section 411 of the USA Patriot Act can possibly be misused as checks and balances are minimal. Under this section, people can be deported regardless of whether they knew of the designation and regardless of whether their assistance has anything to do with a group’s alleged terrorist activity.

**The Fifth Amendment**

“No person shall be held to answer for...a crime, unless on a presentment or indictment of a Grand Jury..., nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law” (Rohr 1986, p.202). The Fifth Amendment protects residents of the United States from criminal punishment without basic protections. The due process of the Fifth Amendment is in many ways the heart of the rights guaranteed by the constitution.
Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, (8 U.S.C. § 11826a) and gives the Attorney General broad powers to certify immigrants as risks. The Attorney General is not required to share the evidence on which detention is based with the detainee, and as result the detainee is not in a position to dispute that evidence. Under this section, there is possibility of misuse, since it reduces previous standard form “probable cause.” Again, no checks and balances as judicial power getting an authority is denied.

In the field of public administration, constitutional governance requires political and administrative accountability that can be realized through legal and political means. This includes legislative and judicial processes, administrative means and the media. Many critics charge that the USA Patriot Act of 2001 has seriously affected the authority to enforce public accountability, especially because of the rise of executive power challenging the powers of other branches of the national government. This statute was introduced and adopted without sufficient public hearing, debate, and committee reporting and lacks juridical and legislative oversight (Chang, 2001). Its passage in many ways was a failure in those checks and balances so critical to constitutional actions.
5.6 Conclusion

This chapter has provided a brief introduction of the USA Patriot Act’s history and development. We have discussed Rohr’s conceptual framework of the administrative and compared with the selected provisions of the USA Patriot Act in order to have an overview of the statute. This chapter has analyzed the principle of Separation of Powers with the USA Patriot Act’s selected provisions, which raises the serious issue of disturbing the principle of Separation of Powers. This study found that sections of the statute are problematic with our constitutional traditions and regime values as defined by Rohr. However, the ability to evaluate these provisions in this manner demonstrates that Rohr’s framework is useful and Rohr can be operationalized and applied. His constitutional framework can indeed help administrators to decide what raises constitutional issues about which they must be concerned. His constitutional philosophies are helpful. Moreover, proposals for government action can be evaluated with his framework. If there is, a proposal pending his framework can be applied to determine the useful outcome.

Rohr offers us a conceptual framework for legitimizing the administrative state. As discussed in the chapter, Rohr (1998) believes that administrators should learn to think like judges, as well as like legislators and executives, because they are all three of these. He further notes that in a regime with a separation of powers, administrators must do the work of public officials who are the
“stewards” to the Constitution and the Constitution is steward to the American people (p.91). His constitutional administrative framework encourages administrators to look to the values found in the Constitution and interpreted in Supreme Court opinions for guidance in their actions.

The next chapter of this study will discuss the potential contribution of Rohr’s framework of the administrative state. In addition, we will address the implication of his work for the education and roles of public administrators.
6.1. Introduction

This final chapter reviews the research questions and examines them in light of the findings. In chapters four and five, the specific objectives of the study were to address Rohr’s potential contribution to public administration by exploring the following research questions: Is the USA Patriot Act of 2001 legitimate within Rohr’s framework of the administrative state? More specifically, in order to operationalize Rohr’s framework of the administrative state, this study addresses the question: Does the USA Patriot Act create and empower executive agencies beyond the separation of powers as developed by Rohr?

To answer this question, chapter five analyzes the USA Patriot Act by applying selected provisions to the principle of separation of powers based on Rohr’s constitutional philosophy of the administrative state. As discussed earlier, this study does not base its analysis on the legality of the statute. Rather the study looks at both the administrative agencies and processes created by the USA
Patriot Act of 2001 and their compatibility with constitutional traditions as Rohr’s framework of administrative state defines it. The sections that were examined were problematic in their compatibility with Rohr’s constitutional traditions.

This final chapter addresses three issues. First, it summarizes the main findings as they relate to the study’s questions. Second, it addresses the implications of the findings on a broader level of public administration. Third, it outlines the implications of this study and Rohr’s contribution to the field of public administration.

6.2. Summary

This study has utilized an interpretive methodology situated within the normative tradition of the qualitative method of inquiry. Methodologically, the first part of this study attempts to comprehend the history of the administrative state and its legitimacy from a constitutional perspective of the administrative state. To that end, the literature for this study covers five sections. The first section deals with the struggle over the nature of the administrative state. The second section examines the rise of constitutional perspectives on the administrative state and John Rohr’s views regarding the constitutional roots of the administrative state. Finally, the fourth and fifth sections discusses the issue of the constitutional nature of the administrative state, a brief overview of the USA Patriotic Act of
2001's history, and development and the politics. Chapter three of this study discusses the research design and methodology of this study.

The second step in this study's methodology was to reexamine Rohr's constitutional framework of the administrative state within the context of a framework that could serve as a useful lens for examining issues in public administration. As stated earlier, Rohr develops a structural analysis of the constitution and from that creates a functional analysis. This approach highlights the critical foundation of the Constitution. It is based on basic values, and these values directly legitimate the administrative state. In essence, Rohr uses a critical interpretative approach to connect the notion of regime values to our constitutional values. He develops an elaborate theory of administrative state from the logic of our constitutional system.

In order to examine Rohr's constitutional framework of the administrative state, this study discussed his philosophy and constitutional theory of the administrative state in chapter four. Out of his framework, there emerge four principles, which were helpful to operationalize his framework.

The four principles of Rohr's framework are summarized in table 6.1
Table – 6.1.

<table>
<thead>
<tr>
<th>Separation of Powers</th>
<th>Rohr’s constitutional theory of the administrative state</th>
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<tbody>
<tr>
<td>Constitutional powers are separated, checked, and balanced to protect individual rights. Rohr believes that administrators should learn to think like judges as well as like legislators and executives because they are all three of these. In this kind of regime, administrators must do the work of public officials.</td>
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| The Senate | “The Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p. 182) |

| Objective of the Oath | “The role of the public administration is to fulfill the objective of the oath of office to uphold the Constitution of the U.S. This means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights” (p. 181) |

| Administrative Behavior | Rohr’s normative theory encourages administrators and the public to think about administrative behavior in constitutional terms. They should use their discretion to favor those polices that they think are most likely to promote the public interest. |

The third step of this study’s methodology sought to transform the meaning of Rohr’s conceptual framework of the administrative state by incorporating it into the practical sphere of public administration by analyzing a significant statute.

The principle of separation of powers most relevant to public administration is applied to analyze the selected provisions of the USA Patriot Act of 2001. The public administration in large part is dependent upon law as its basis for performing necessary functions. The Constitution provides the foundation for government’s organization through the principles of separation of powers and checks and balances.

Based on Rohr’s framework, this study contends that practical knowledge is the type of knowledge most helpful to public administrators. His framework of the
administrative state encourages administrators to look to the values found in the
Constitution. As discussed in chapter five, Rohr provides a formula for examining
future public administration issues. He believes that administrators should learn
to think like judges as well as like legislators and executives because they are all
three of these. He further notes that in a regime of a separation of powers,
administrators must do the work of public officials who are the “stewards” of the
Constitution while the Constitution is steward to the American people. His logic
is, if administrations are to be judicial, legislatives, and executives, they must
have a framework or frameworks to use in the tasks.

6.3 Findings on the Broader Level of Public Administration

According to Rohr, regime values are the values of the American republic. He
identified freedom, property, and equality as core values in the American
Constitution. Constitutional powers are separated, checked, and balanced to
protect the individual rights. The purpose of this study was to compare and
contrast Rohr’s constitutional framework of the administrative state with the
selected provisions of the statute in order to comprehend the difference and the
consequent effects of each of these provisions.

The findings reveal that, selected provisions from the statute are problematic in
terms of our constitutional traditions and regime values as defined by Rohr. First,
the Statute itself expands the surveillance powers of the federal government. The Constitution of the United States separates the national government into three distinct branches and provides a system of “checks and balance” that protect liberty and property without imposing tyrannical rule. As stated earlier, Rohr seeks to demonstrate that the Constitution wisely preserves its balance through the “checks,” which allow one branch to exercise in part the powers of another. He believes Constitutional powers are separated, checked, and balanced to protect individual rights. The relationship between the governing bodies, the Constitution, and the sense of tradition that guides public administration are centered on the rights of the individual.

Under the USA Patriot Act, the executive branch, by using Executive Orders and emergency interim agency regulations as its tool for combating terrorism, has used the strategies that are insulated from legislative and judiciary oversight. The implementation of the USA Patriot Act accentuated some of its inherent confusions and conflicts regarding constitutional traditions and regime values. Moreover, the use of these tools directly affects individual liberties, the liberties Rohr sees as the core focus of a constitutionally based public administration.

Second, in constitutional governance, political and administrative accountability and responsibility are important, that can be realized through legal and political means (including the legislative and judicial processes) concern for accountability of administrators underlines much of Rohr’s analysis. Under this statute, the
authority of people to enforce public accountability has been seriously affected
due to the expansion of the executive power over other branches of the national
government. Moreover, the USA Patriot Act stresses more bureaucratic secrecy
than transparency. State agencies, especially those related to law enforcement,
have more access to information about people than people information about
these agencies. In this kind of atmosphere, public participation in public polices
and decision is limited. Nigro and Richardson (1990) among others observe that
the issue of legitimacy often depends on how public officials promote broadly
based public participation.

Similarly, Camilla Stivers and Cheryl Simrell-King (1998) have argued that the
promotion of active citizen participation in public administration requires the
formation of some new “habits of mind” for administrators. These habits of mind
include seeing citizens as citizens (not customers); sharing authority; reducing
personal and organizational control, and so on. They further argue that the
significance of citizen participation goes to the “very heart of governance in the
United States – to the question of who rules” (Simrell-King & Stivers, pg. 200).
According to Stivers and King the conception of citizen collaboration with public
administrators does not mean that the administrator surrendering their authority
or responsibility. Rather, administrators as officials of the government they retain
a special function within the process. Moreover, the USA Patriot Act stresses
more bureaucratic secrecy than transparency. Agencies need to provide citizens
with as much information as possible.
Third is Rohr’s notion is that public administration must protect the liberty of the people, which is stated best in the Bill of Rights. The implementation of the USA Patriot Act has had a critical impact on people’s civil rights especially rights to privacy, freedom of speech and due process.

Based on this study’s findings, the difference is conceptual. The goal was to find the links between Rohr’s constitutional framework of the administrative state and the USA Patriot Act process. The result from this study shows that the statute’s selected provisions are contravening with our constitutional traditions and regimes values as conceptualized by Rohr. They raise the serious issues about the regime values and traditions. However, his framework is useful. His philosophies are helpful for senior civil administrators. In the next section we will discusses his contribution to the field of public administration and the implications of this study.

6.4 Rohr’s Contribution to the Field of Public Administration

The overall picture that arises from this analysis of the statute supports the contentions advanced earlier in the study that we should expand our understanding and conceptualization of the traditional values and practices as defined in the Constitution of the United States. This study attempts to comprehend the history of the administrative state and its legitimacy from a
constitutional perspective. Many scholars believe the legitimacy of the administrative state is of principal importance for the stability of American constitutional democracy. However, Rohr has provided the most useful framework for legitimizing the administrative state from the constitutional perspective. As discussed earlier, in his classic book *To Run a Constitution* (1986), Rohr attempts to legitimate the administrative state in terms of a comprehensive constitutional perspective. He believes that we need to legitimate the administrative state because it is perceived as illegitimate. Therefore, if the administrative state is to be constitutional, then laws and the administrative process must not violate its underlying legal and philosophical structure.

As discussed in chapter two, from the time that the American administrative state began to develop in earnest (1880s), the field has identified more closely with management than with governance, with the result that most of the field’s prescriptions, theories, and values fundamentally challenge those of U.S. constitutionalism. Rohr (1986) argues that Woodrow Wilson and his successors had a profound influence on the development of the American administrative state. Unfortunately, they paid more attention to the necessity of running a constitution than the Constitution itself. They developed a theory of administration that was at odds with the theory of the Constitution. Similarly, David Rosenbloom (1983) has argued, “the administrative state places great power in the hands of administrative agencies and their personnel” (p.18). This is especially true in bureaucratic administration. The major tenets of the early
approach management and expertise (professionalism) emphasized a value–free system of administration, one that is based on rationalism and technical expertise.

Rohr believes that reformers public administration theory went wrong and caused the field to be perceived as constitutionally illegitimate because of Wilson’s attack on the constitutional separation of powers and rejection of the framers vision. Wilson approached public administration with a parliamentary form of government in mind rather than a regime founded on three separate and equal branches of government. He also emphasized that the New Deal period distorted the principles of the Founding Fathers. Professionalism and the narrow definitions of the technical expertise school still prevail.

In essence, Rohr suggests that a combination of powers in public agencies is commonplace; his analysis shows that the Constitution both permits and legitimates this practice. His constitutional framework of the administrative state requires public administration to serve as a balance wheel among the superior branches of government as they compete for control over public policy. According to Rohr (1986), public administrators, who possess professional competence and can develop a “sense” of what is constitutionally appropriate, must study policy questions (p. 193). He provides a framework for the senior administrators to follow. He observes that by pacing the Constitution as a founding document for guidance and direction, administrators can now tie their
governing power to the purpose of the state. Rohr clarifies his reasoning by saying that the “choice was defended on the grounds that American bureaucrats have taken an oath to uphold the Constitution of the United States and that such an act should have a moral character about it that creates a moral community” (p. 238). His constitutional framework of the administrative state suggests that career public officials should resist actions by any superior branch of government that threatens the balance of powers among all three. His framework suggests much greater discretionary power because the United States Constitution permits it.

As noted earlier, Rohr (1978) stated that “regime values refer to the values of that political entity that were brought into being by the ratification of the constitution that created the present American republic” (p. 59). He suggests that “the method of regime values proposed in the Constitution of the United States as the most appropriate focal point for normative reflection by American bureaucrats” (238). The Founding Fathers placed the Bill of Rights into the Constitution to insure that the rights and liberties of the citizens would not be abridged by the potential insatiable desire of the federal government for limitless power.

Rohr (1986) suggests that the administrators a legitimate and distinctive constitutional role to fulfill. That means they cannot be sole instrument of any
single branch, rather they need to choose sides. If they are instruments at all, they are an “instrument of the constitution” (p.89).

An other point Rohr makes in his framework of the administrative state is that “the Senate, as it was originally intended by the framers, is the constitutional model for public administration as a balance wheel, because the Senate, like public administration, was intended to exercise all three powers of government” (p. 182). However, he believes that today’s Senate hardly resembles the institution envisioned in the debate of 1787-88 as the Federalists wanted and Anti Federalists feared (39). He noted that the Senate, “like today’s civil service, was likely to be a permanent body, constantly in session” (35).

As noted earlier Rohr believes that the senior civil administrators can provide the long duration, stability and expertise of the original Senatorial role needed for complex policy formulation and implementation. He suggests, that the civil service roles would include blending legislative, executive and judicial powers; becoming part of the executive, working with and checking the president; and expressing the permanent will and national character of the American people (Rohr, p. 38). Rohr promote and expands the position, roles and responsibilities of the senior administrators. He suggests that administrators should base their decisions on a careful interpretation of the constitution and its traditions.
Much of the present chapter has discussed that Rohr’s constitutional framework of the administrative state is useful, since it is based on our republican governing values and traditions.

6.5 Conclusion and Implementation of Rohr’s Philosophy

This final chapter addresses three issues. First, it summarizes the main findings as they relate to the study’s questions. Second, it addresses the implications of the findings on a broader level of public administration. Third, it outlines the implications of this study and Rohr’s contribution to the field of public administration.

If the administrative state is to be constitutional then laws and the administrative process must not violate the underlying legal and philosophical structure of our constitutional governance. Rohr’s constitutional framework of the administrative state and an analysis of the USA Patriot Act provide logic to conclude that this statute the USA Patriot Act, is a continuation of the managerial professional expertise school. Moreover, this study has also enhanced Rohr’s constitutional framework of the administrative state. His framework provides rationales for separating from partisan politics. However, this does not mean Rohr’s framework suggests that the public administration is apolitical. Rather, his constitutional framework suggests that administrative state has its own political characteristics, embedded in the constitutional traditions or “fidelity to the constitutional heritage.”
As Rohr (1986) notes “the oath to uphold the Constitution can then be seen not simply as a pledge to obey but also as an institution into a community of disciplined discourse, aimed at discovering, renewing, adapting, and applying the fundamental principles that support our public order” (p. 192). Rohr promote and expands the position, roles, and responsibilities of the senior administrators. He suggests that administrators should base their decisions on a careful interpretation of the Constitution and its traditions. He also suggests administrators should see the oath as an act of civility rather than submission. Thus, the word “civility” suggests both independence and self-restraint.

Rohr offers us a conceptual framework for legitimizing the administrative state. According to Rohr (1986), the field of public administration is an “instrument of the Constitution itself, rather than simply of the officers who are elected according to constitutional prescription” (p. 89). This means that administrators become active and legitimate participants in the struggle for control of public administration. Rohr emphasizes, “a purely instrumental profession is no profession at all” (p. 89) as it is been emphasized from the technical professional expertise school. He believes that without some sort of principled autonomy, professionalism in public administration can never be taken seriously. As discussed earlier, Rohr criticizes the New Deal’s expansion of presidential power. He believes that the primary task of the New Dealers was to establish the centralized government that is a precondition of an administrative state: to make the federal government supreme over the nation’s economy and to make the
Executive Branch supreme over Congress and the federal courts. Rohr disagrees with the New Deal, expansion of presidential powers.

As discussed in chapter five, Rohr (1998) believes that administrators should learn to think like judges as well as like legislators and executives because they are all three of these. He further notes that in a regime with a separation of powers, administrators must do the work of public officials, who are the “stewards” to the Constitution and the Constitution is steward to the American people (p. 91). His constitutional administrative framework encourages administrators to look to the values found in the Constitution and interpreted in Supreme Court opinions for guidance in their actions. Rohr (1986) also suggests that among the skills and knowledge of professional administrator should be based on constitutional heritage. He further argues, “This should not be confused with the lawyer’s competence in constitutional law, which must be up to date and focused on advocacy. The case for the administrator as constitutionalist deals more with history than with present, with insight rather than advocacy, with argument rather than law” (p.193).

In summary, to follow Rohr’s constitutional framework of the administrative state at the national level as shown by an analysis of the USA Patriot Act of 2001 will require major educational initiatives. As the analysis shows, Rohr’s framework of the administrative state is useful. However, it requires two steps. One, we need to structure our government so that high-level civil servants have discretionary
power. They will need to say “no” to the political leaders in order to keep the balance between the constitutional values. Two, high-level civil administrators should be educated on both a political philosophy and professional level. Their education has to be rooted on Federalist and AntiFederalist arguments and constitutional traditions and values rather than technical managerial knowledge.

Rohr’s constitutional framework of the administrative state suggests that career public officials should resist actions by any superior branch of government that threatens the balance of power among all three. Rohr (1986) also suggests that the administrators who are steeped in the constitutional traditions of this sort will have a profound sense of professional propriety. They will have a principled basis and, above all, a “sense for when to bend and when to hold firm” (p.194). His framework suggests much greater discretionary power because the United States Constitution permits it and the constitutionally based administrative state demands it.


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