

the Congress, the courts of the United States, the governments of the territories or the possessions of the United States, the government of the District of Columbia, agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, courts martial and military commissions, military authority exercised in the field in time of war or in occupied territory[.]<sup>31</sup>

By this definition, any instrumentality of government that is not otherwise located in the legislative or judicial branch would seem to be an agency. Yet, what about an enterprise such as the Federal Agricultural Mortgage Corporation that is governed by a board in which two thirds of the members are selected by private shareholders rather than the President?<sup>32</sup> Even more difficult are cases where Congress has created private corporations or venture capital funds. They pursue public ends as private entities.

Courts have recognized that the APA's definition of agency is not entirely clear,<sup>33</sup> and there has been a substantial amount of litigation over which government entities fall within the APA's purview.<sup>34</sup> Since what constitutes an agency under the APA is governed on a case-by-case basis through litigation, there is no

31. 5 U.S.C. § 551(1) (2012). The definition also excludes functions performed as a result of mortgage insurance law.

32. See 12 U.S.C. § 2279aa-2(b)(2) (2012).

33. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (“The statutory definition of ‘agency’ is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.”).

34. Most of this litigation involves the Freedom of Information Act (FOIA) and the Government in the Sunshine Act. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (the President is not an “agency” subject to the provisions of the APA); *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009) (the Office of Administration within the Executive Office of the President is not an agency covered by FOIA); *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990) (the Defense Nuclear Facilities Safety Board is an “agency” within the meaning of the Sunshine Act); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038 (D.C. Cir. 1985) (the Council of Economic Advisers is not an “agency” for the purposes of FOIA or the Sunshine Act); *Nicholson v. Brown*, 599 F.2d 639 (5th Cir. 1979) (the definition of “agency” for the purposes of FOIA is broad enough to encompass military authority).

authoritative list of government agencies. Every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency.<sup>35</sup> This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 96 independent executive units and 220 components of the executive departments.<sup>36</sup> An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.<sup>37</sup>

When Congress creates programs, it most often delegates responsibility for these programs to a component of an executive department or independent agencies of various types. However, the recipient of delegated authority need not be a federal agency since Congress delegates authority to states, local governments, and private sector entities as well. States and local governments help implement key federal programs such as Medicaid and No Child Left Behind. Congress empowers private litigants to pursue a public function in the enforcement of federal laws by altering economic incentives for such behavior and opening up access to federal courts.<sup>38</sup> It is clear that state and local governments and private sector firms are not federal agencies, but since the 1960s, Congress has delegated authority to entities that are neither typical government agencies nor completely private organizations or local governments.<sup>39</sup> These entities take a

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35. Department of Justice, *Data*, available at <http://www.foia.gov/data.html>.

36. NARA, GOV'T MANUAL, *supra* note 10.

37. United States General Services Administration, *Federal Executive Branch*, available at <http://www.usa.gov/Agencies/Federal/Executive.shtml> (accessed July 10, 2012).

38. Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008).

39. The appeal of non-traditional agency structures stems from a number of factors. First, these agencies often have the patina of a private sector firm and the symbolic sense that they are somehow more efficient than a government agency. Their use is consistent with management trends popularized in the last two decades. Second, these structures avoid the existing rules and regulations attached to federal management and also limit presidential and congressional influence. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011) [hereinafter KOSAR, QUASI GOV'T].