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# **Administrative Law Primer: Statutory Definitions of “Agency” and Characteristics of Agency Independence**

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## Summary

Congress has created a variety of federal agencies to execute the law. To this end, agencies may adopt rules to implement laws and adjudicate certain disputes arising under such laws. As such, agencies enjoy considerable power to regulate different industries and affect the legal rights of people. In order to control the manner in which agencies operate, Congress has passed numerous statutes that impose procedural requirements on federal agencies. The Administrative Procedure Act, for example, dictates the procedures an agency must follow to establish a final, legally binding rule. Other statutes govern how agencies must operate internally with respect to hiring and labor practices, the maintenance of federal records, financial management, and a diverse range of other topics.

However, Congress has not provided one definition of an agency. Rather, the term “agency” can mean different things in different contexts, depending on which statute is at issue. In order to understand how different statutes operate, therefore, one must know to which entities these laws actually apply. Aside from judicial and legislative branch agencies, most agencies can be broadly divided into two general categories—executive agencies and independent agencies. The former are considered to be under direct presidential control, and the latter are designed to be comparatively more independent from the President. To ensure this level of independence, Congress often provides an independent agency with structural characteristics designed to protect it from presidential interference. This report will first examine six common indicia of independence that such agencies often have in common.

Next, the report will explore several important statutes that regulate agencies and these statutes’ respective definitions of “agency.” These statutes include the Administrative Procedure Act, the Freedom of Information Act, the Federal Records Act, statutes governing federal employees, and the Paperwork Reduction Act. In interpreting the reach of these statutes, courts have sometimes limited their application based on an agency’s operational proximity to the President, or how much control the executive branch has over the entity.

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Federal agencies adopt rules to implement statutes that Congress has enacted.<sup>1</sup> These rules, although established by an administrative agency, maintain the force of law.<sup>2</sup> As such, agencies have considerable power to establish and interpret federal law. However, for an agency to promulgate rules, Congress must first grant that agency the power to do so through statute.<sup>3</sup> To control the process by which agencies create these rules, Congress has enacted statutes such as the Administrative Procedure Act (APA)<sup>4</sup> that dictate what procedures an agency must follow to establish a final, legally binding rule. Other statutes govern issues such as how agencies must operate internally with respect to hiring and labor practices, the maintenance of federal records, financial management, and a diverse range of other topics.

In order to understand these statutes, one must know to which entities these laws actually apply. Congress has not provided one all-encompassing definition of an agency. Instead, the term “agency” can mean different things in different contexts, depending on what statute is at issue. For example, the definition of agency under the APA differs from its definition under the Freedom of Information Act (FOIA).<sup>5</sup> Furthermore, some statutes and executive orders distinguish between executive agencies and “independent agencies.” This report will explain the differences between executive agencies and independent agencies, briefly discuss legislative and judicial agencies, and explore various statutory definitions of “agency.”

## Executive Agencies and Independent Agencies

Federal agencies in the executive branch may be divided into two broad categories, executive agencies and independent agencies. Generally speaking, executive agencies are subject to direct presidential control, while independent agencies are typically designed by statute to be comparatively free from presidential control. Typically, to ensure this level of independence, Congress provides the independent agency with certain structural characteristics that limit the President’s control over the agency’s actions.<sup>6</sup> While there is no strict definition of what qualifies an agency as “independent,”<sup>7</sup> this section looks at six indicia of independence that independent

<sup>1</sup> For more information on the rulemaking process, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by (name redacted) and (name redacted); CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by (name redacted).

<sup>2</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

<sup>3</sup> See *Brannan v. Stark*, 342 U.S. 451, 462-65 (1952).

<sup>4</sup> Administrative Procedure Act of 1946, P.L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§551 *et seq.*).

<sup>5</sup> 5 U.S.C. §552.

<sup>6</sup> While this report focuses on agency independence from presidential influence, Congress also may provide an agency with independence from congressional influence, for example, by making an agency “self-funding” instead of reliant on appropriations. For instance, the Consumer Finance Protection Board (CFPB) is not funded by appropriations, but instead is funded from “the combined earnings of the Federal Reserve System” in an “amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau.” 12 U.S.C. §5497(a)(1)-(2).

<sup>7</sup> It is worth noting that the Paperwork Reduction Act, 44 U.S.C. §§3501 *et seq.*, defines the term “independent regulatory agency” by listing specific agencies that Congress has designated as “independent” and also by including “any other similar agency designated by statute as a Federal independent regulatory agency or commission.” 44 U.S.C. §3502(5) (stating “the term ‘independent regulatory agency’ means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National (continued...)”).

agencies often have in common: (1) for cause removal protection; (2) multi-member board or commission structure; (3) exemption from Office of Management and Budget (OMB) legislative clearance requirements; (4) exemption from presidential review of agency rulemaking procedures; (5) direct or concurrent budget submissions to Congress; and (6) independent litigating authority. Importantly, as will be shown throughout this section, while many independent agencies share many of these characteristics, an agency need not possess all of these characteristics to be considered independent.

## For Cause Removal Protection

One of the characteristics that often indicates agency independence from executive control is the President's ability to remove the head of an independent agency only "for cause." Therefore, unlike the heads of a typical executive agency—who serve at the pleasure of the President<sup>8</sup>—the President may only remove the head of an independent agency for some form of misconduct. The Supreme Court has upheld such restrictions on the President's authority to remove officers.<sup>9</sup>

For example, many statutes that establish independent agencies provide that the head of the agency shall serve a fixed term and may only be removed for "inefficiency, neglect of duty, or malfeasance in office."<sup>10</sup> Other statutes simply state that the agency head is removable "for cause."<sup>11</sup> Courts have not clearly established the threshold for removing an agency head for cause;<sup>12</sup> however, Congress has indicated that removal for cause must be predicated on "some type of misconduct," as opposed to merely having policy disagreements with the President or refusing to take action that the President thinks is most prudent.<sup>13</sup> This removal protection, at least in theory, gives the independent agency more flexibility when making decisions because the President cannot remove the agency head simply because he disagrees with the agency's policy choices.

The Supreme Court has held that some officers enjoy "for cause" removal protection even if the statute is silent on removal procedures. In *Wiener v. United States*,<sup>14</sup> the Court held that the structure of the War Claims Commission (WCC),<sup>15</sup> specifically that the members of the

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Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission"). Certain statutes may reference this definition when distinguishing between independent agencies and executive agencies.

<sup>8</sup> *Keim v. United States*, 177 U.S. 290, 293-294 (1900) ("In the absence of a specific provision to the contrary, the power of removal is incident to the power of appointment.").

<sup>9</sup> *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>10</sup> *See, e.g., 42 U.S.C. §7171(b)* (providing that commissioners on the Federal Energy Regulatory Commission "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

<sup>11</sup> *See, e.g., 12 U.S.C. §242* (Federal Reserve).

<sup>12</sup> *Morrison*, 487 U.S. at 692 ("Although we need not decide in this case exactly what is encompassed within the term 'good cause' under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for 'misconduct.'").

<sup>13</sup> *Id.*; *see also* S.Rept. 100-123, Independent Counsel Reauthorization Act of 1987, at 1-3 (1987).

<sup>14</sup> *Wiener v. United States*, 357 U.S. 349 (1958).

<sup>15</sup> The War Claims Commission was created by the War Claims Act of 1948. P.L. 80-896, 62 Stat. 1240 (1948).

commission served for a specific term of office, and the WCC's role as a quasi-judicial entity<sup>16</sup> prevented President Eisenhower from removing members of the WCC at will despite the lack of specific for cause removal protection in the statute.<sup>17</sup> These features prompted the Court to note that the War Claims Commission was similarly situated to other entities, such as the Federal Trade Commission, that enjoy for cause removal protection. The Court determined that Congress did not intend for the President to be able to remove these members without good cause.<sup>18</sup> Lower courts, after following rationales similar to *Wiener*, have indicated that the commissioners of the Securities and Exchange Commission (SEC), the Federal Election Commission (FEC), and the members of the National Credit Union Administration (NCUA) Board all enjoy for cause removal protection despite statutory silence regarding removal.<sup>19</sup> Ultimately, numerous agency administrators, commissioners, and board members enjoy for cause removal protection, which may be the most notable characteristic of an independent agency.

The Supreme Court has established some limits on removal protections. Notably, the removal protection must not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.”<sup>20</sup> Under such an analysis, the Court has held that a double layer of for cause protection is *per se* unconstitutional—that is, an inferior officer may not enjoy for cause removal protection if the principal officer in charge of him has for cause removal protection from the President.<sup>21</sup>

## Board or Commission Structure

Another characteristic of independent agencies is that the agency may be directed by a multi-member board or commission, rather than a single administrator.<sup>22</sup> Arguably, if an agency is led by a single administrator that the President appoints, the agency head will likely have policy preferences that reflect the views of the appointing President. Therefore, in order to curb the amount of influence that one administrator may have upon an agency, Congress may provide that an independent agency be administered by a multi-member board. In this manner, multiple views may be voiced on particular policy decisions.<sup>23</sup>

<sup>16</sup> *Wiener*, 357 U.S. at 354 (“The Commission was established as an adjudicating body ...”).

<sup>17</sup> *Id.* at 356.

<sup>18</sup> *Id.* (“Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”).

<sup>19</sup> *Sec. & Exch. Comm’n v. Blinder*, 855 F.2d 677, 681 (10<sup>th</sup> Cir. 1988) (“[F]or the purposes of this case, we accept appellants’ assertions in their brief, that it is commonly understood that the President may remove a commissioner [of the SEC] only for ‘inefficiency, neglect of duty or malfeasance in office.’”); *Swan v. Clinton*, 100 F.3d 973, 981-83 (D.C. Cir. 1996) (holding that while holdover NCUA board members do not have protection from removal, there is “evidence indicating that Board members enjoy removal protection during their appointed terms.”); *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (“The [Federal Election] Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission’s structure and mission as well as the commissioners’ terms. We think the Commission is likely correct ...”).

<sup>20</sup> *Morrison*, 487 U.S. at 693.

<sup>21</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. \_\_\_; 130 S. Ct. 3138 (2010).

<sup>22</sup> *See, e.g.*, 15 U.S.C. §78d (Securities and Exchange Commission).

<sup>23</sup> Although having a multi-member board may provide an opportunity for minority opinions to be heard, some commenters note that an agency with a single administrator may be more efficient in making decisions. *See* Marshall Breger and Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin L. Rev.* 1111, 1181 (2000).

In addition to having a multi-member agency head, Congress sometimes places additional restrictions on the composition of a commission or board. For example, Congress often requires a board to have no more than a simple majority from one political party serving on the commission.<sup>24</sup> In this manner, Congress seeks to ensure that the minority party has a voice in the agency's decision-making process. Furthermore, officers' terms are often staggered in order to prevent multiple vacancies arising at one time.<sup>25</sup>

Although many independent agencies share these structural characteristics, some independent agencies are headed by a single administrator. Examples include the Social Security Administration,<sup>26</sup> the U.S. Office of Special Counsel,<sup>27</sup> and the Consumer Financial Protection Bureau.<sup>28</sup>

## Bypass of Office of Management and Budget Legislative Clearance

A presidential order requires agencies to submit their legislative proposals, congressional testimony, and comments on proposed legislation that will be presented to Congress to the Office of Management and Budget (OMB), which is within the Executive Office of the President, for review.<sup>29</sup> This process is known as "legislative clearance," and allows the President to ensure that agency communications to Congress reflect the President's priorities. The Obama Administration has stated that this requirement "[h]elps the agencies develop draft bills that are consistent with and that carry out the President's policy objectives."<sup>30</sup> In some instances, Congress may exempt certain agencies from having to undergo OMB legislative clearance prior to submitting their views or proposals to Congress. For example, one such statute provides that

No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Housing Finance Board, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.<sup>31</sup>

<sup>24</sup> See, e.g., 15 U.S.C. §78d (requiring the Securities and Exchange Commission to be composed of five members, no more than three can "be of the same political party").

<sup>25</sup> See, e.g., *id.*

<sup>26</sup> 42 U.S.C. §902(a) ("There shall be in the Administration a Commissioner of Social Security who ... shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof.").

<sup>27</sup> 5 U.S.C. §1211 (There is established the Office of Special Counsel, which shall be headed by the Special Counsel.").

<sup>28</sup> 12 U.S.C. §5491 ("There is established the position of the Director, who shall serve as the head of the Bureau.").

<sup>29</sup> OMB Circular A-19, Legislative Coordination and Clearance, Revised (Sept. 20, 1979), available at [http://www.whitehouse.gov/omb/circulars\\_a019/](http://www.whitehouse.gov/omb/circulars_a019/).

<sup>30</sup> Memorandum from Jeffrey D. Zients, Acting Director, OMB, to the Heads of Departments and Agencies on Legislative Coordination and Clearance (April 15, 2013), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-12.pdf>.

<sup>31</sup> 12 U.S.C. §250.

This exemption from OMB legislative clearance requirements arguably may provide an agency with greater independence from the President by allowing the agency to express its own view on a certain policy or program without the President's input.<sup>32</sup> However, if a statute does not specifically exempt an agency from the legislative clearance process, the agency is generally expected to comply, as OMB Circular A-19 provides that the term "agency" includes "[a]ny executive department or independent commission, board, bureau, office, agency ... including any regulatory commission or board."<sup>33</sup>

## Exemption from Centralized Review of Agency Rulemaking

Independent agencies also are exempt from centralized review of agency rulemaking under Executive Order 12866.<sup>34</sup> Executive Order 12866, promulgated by President Clinton in 1993, requires executive agencies to submit their proposed and final "significant" regulations to the Office of Information and Regulatory Affairs (OIRA) within OMB for approval prior to publication in the *Federal Register*.<sup>35</sup> The agency's submission must include, among other things, an assessment of the costs and benefits of the regulation, an explanation for the need of the regulation, and a statement explaining how the regulation "promotes the President's policy priorities."<sup>36</sup>

When OIRA reviews an agency's proposed significant regulation, OIRA must "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in [the] Executive order."<sup>37</sup> Therefore, one of OIRA's functions is to help ensure that regulations promulgated by federal agencies promote the Administration's policy priorities.

However, pursuant to Executive Order 12866, independent agencies—as defined by the Paperwork Reduction Act<sup>38</sup>—are not required to submit their proposed and final regulations for centralized review.<sup>39</sup> This exemption arguably further insulates independent agencies from

<sup>32</sup> Notably, while no officer may *require* an independent agency from submitting their proposals to OMB, independent agencies are not prohibited from complying with the OMB policy if they so choose.

<sup>33</sup> OMB Circular A-19, Legislative Coordination and Clearance, Revised (Sept. 20, 1979), *available at* [http://www.whitehouse.gov/omb/circulars\\_a019/](http://www.whitehouse.gov/omb/circulars_a019/).

<sup>34</sup> Most of the characteristics of independent agencies that have been discussed in this report are established by Congress. However, the exemption from centralized review of agency rulemaking is unique in that the *President*, as opposed to Congress, has established the policy of permitting independent agencies to bypass certain requirements under Executive Order 12866.

<sup>35</sup> Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993). Although Executive Order 12866 is currently in effect, President Reagan originally established the practice of centralized review of agency regulations with Executive Order 12291. *See* 46 Fed. Reg. 13193 (Feb. 19, 1981). Under Executive Order 12866, a "significant" regulation is defined as a "rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." 58 Fed. Reg. at 51735.

<sup>36</sup> 58 Fed. Reg. at 51741.

<sup>37</sup> 58 Fed. Reg. at 51742.

<sup>38</sup> *See infra* "Paperwork Reduction Act."

<sup>39</sup> 58 Fed. Reg. at 51737 ("Agency," unless otherwise indicated, means any authority of the United States that is an (continued...))



presidential influence because OIRA does not necessarily have the opportunity to suggest changes to proposed regulations in order to bring those rules into conformance with the President's policy priorities. Notably, it is by the terms of the Executive Order, not by statute, that independent agencies are exempt from these review procedures.<sup>40</sup> Therefore, independent agencies may elect to have their rules reviewed by OIRA if they so choose. Furthermore, other provisions of the order are applicable to the independent agencies. For example, independent agencies are required to submit to OIRA a "regulatory plan" that outlines the "most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter."<sup>41</sup>

## Budget Submission Requirements

Another characteristic that may indicate the level of an agency's independence is how the agency's budget requests are submitted to Congress. Generally, agencies do not directly submit their budget proposals to Congress. Instead, most agencies are required to submit their budget proposals to OMB.<sup>42</sup> The President, through OMB, may modify such requests prior to submitting them to Congress.<sup>43</sup> Therefore, the President's budget does not necessarily reflect the agencies' budget proposals, but, instead, reflects the President's policy priorities.

However, Congress has prohibited OMB and the President from revising the budget requests of certain agencies. For example, the Social Security Act provides that the "Commissioner shall prepare an annual budget for the [Social Security] Administration, which shall be submitted by the President to the Congress without revision, together with the President's annual budget for the Administration."<sup>44</sup> Such a provision allows the agency to appeal directly to Congress for its budget priorities and arguably provides the agency with some insulation from the President's influence during the appropriations process.

In other statutes, Congress has authorized certain agencies to submit their budget requests directly to Congress and OMB at the same time—a practice known as concurrent budget submission.<sup>45</sup>

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'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).")

<sup>40</sup> There has been debate about whether the President could require independent agencies to comply with the requirements of centralized review without consent from Congress. For a discussion regarding whether the President has inherent authority to require independent agencies to comply with centralized review requirements see CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by (name redacted) and (name redacted).

<sup>41</sup> 58 Fed. Reg. at 51738.

<sup>42</sup> 31 U.S.C. §1108(b)(1); see also OMB Circular A-11, Preparation, Submission, and Execution of the Budget (Aug. 7, 2009), available at [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc/](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/).

<sup>43</sup> 31 U.S.C. §1108(b)(1); see also OMB Circular A-11, Preparation, Submission, and Execution of the Budget (Aug. 7, 2009), available at [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc/](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/).

<sup>44</sup> 42 U.S.C. §904(b)(1)(A).

<sup>45</sup> See, e.g., 2 U.S.C. §437d(d) ("Whenever the [Federal Election] Commission submits any budget estimate or request to the President or the [OMB], it shall concurrently transmit a copy of such estimate or request to the Congress."); 7 U.S.C. §2(a)(10) ("Whenever the [Commodity Futures Trading] Commission submits any budget estimate or request to the President or the [OMB], it shall concurrently transmit copies of that estimate or request to the House and Senate Appropriations Committees and the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry.")

This provides Congress with the opportunity to hear directly from the agency while still allowing OMB to review and revise the proposal prior to inclusion in the President's budget. Congress, therefore, can see what the agency directly requested along with the President's request for the same agency.

## Independent Litigating Authority

An agency's ability to litigate independently from the Department of Justice (DOJ) also may provide the agency with some insulation from presidential influence. Unless otherwise provided by statute, the DOJ is responsible for conducting litigation on behalf of the federal agencies.<sup>46</sup> This allows the President, through the Attorney General, to control the litigation positions of agencies generally. The Attorney General may choose when to file claims or defend agency policies.

However, Congress has provided some agencies with varying degrees of independent litigating authority. For example, the Executive Director of the Architectural and Transportation Barriers Compliance Board is permitted to "appear for and represent the Access Board in any civil litigation" except for cases before the Supreme Court.<sup>47</sup> Other agencies only have independent litigating authority with respect to certain types of cases. For example, the NCUA may litigate independently of the DOJ only when it is seeking to dissolve a federal credit union.<sup>48</sup>

Likewise, although the Solicitor General handles most litigation on behalf of the United States in front of the Supreme Court, Congress has enabled some agencies to represent themselves before the Supreme Court under certain circumstances. For example, the Federal Trade Commission (FTC) may represent itself before the Supreme Court if the Solicitor General authorizes the FTC to do so or if the Solicitor General refuses to represent the Commission.<sup>49</sup> Again, this provision permits the FTC to litigate its position on a case without necessarily relying on the President for legal representation.

## Judicial and Legislative Branch Agencies

While most federal agencies can be divided into two broad categories—executive agencies and independent agencies—there are also agencies within the legislative and judicial branches. As a general matter, legislative agencies, such as the Government Accountability Office (GAO) and the Architect of the Capitol, are distinct from executive branch agencies in that they aid Congress in its legislative capacity, and do not "execute the laws."<sup>50</sup> Likewise, judicial agencies, such as the Administrative Office of the United States Courts and the Sentencing Commission, neither execute the laws nor promulgate laws that "regulate the primary conduct of the public."<sup>51</sup> Instead,

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<sup>46</sup> "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. §516; *see generally* 28 U.S.C. §§516-519.

<sup>47</sup> 29 U.S.C. §792(e).

<sup>48</sup> 12 U.S.C. §1782(f).

<sup>49</sup> 15 U.S.C. §56(a)(3)(A).

<sup>50</sup> *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

<sup>51</sup> *Mistretta v. United States*, 488 U.S. 361, 395 (1989).

judicial agencies usually engage in functions that are “attendant to a[n] ... element of the historically acknowledged mission of the Judicial Branch,”<sup>52</sup> such as issuing sentencing guidelines for the federal courts.

## Definitions of “Agency” in Selected Statutes

### Administrative Procedure Act

Perhaps the most important definition of “agency” is found in the Administrative Procedure Act (APA).<sup>53</sup> This is because the APA provides the “default” procedures that agencies must follow when conducting rulemaking and adjudications—that is, unless an agency’s organic statute provides for other procedures, the agency must follow the requirements in the APA.<sup>54</sup> The APA also provides standards for judicial review of agency actions.<sup>55</sup> It is, therefore, arguably the most important statute to understand in administrative law. Furthermore, the definition of “agency” provided in the APA is often referenced in other statutes that govern the rulemaking process. For example, the Negotiated Rulemaking Act,<sup>56</sup> the Regulatory Flexibility Act,<sup>57</sup> and the Congressional Review Act<sup>58</sup> all define agency by reference to the APA’s definition.

The APA states that

“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
  - (B) the courts of the United States;
  - (C) the governments of the territories or possessions of the United States;
  - (D) the government of the District of Columbia;
- or except as to the requirements of section 552 of this title—
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

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<sup>52</sup> *Id.* at 396.

<sup>53</sup> 5 U.S.C. §§551 *et seq.*

<sup>54</sup> 5 U.S.C. §559. For example, under the Clean Air Act, Congress removed certain Environmental Protection Agency (EPA) rulemaking activities from the APA’s coverage and instead established a separate set of similar procedures that the agency must follow in promulgating specific rules and regulations. 42 U.S.C. §7607(d)).

<sup>55</sup> 5 U.S.C. §§551 *et seq.*

<sup>56</sup> 5 U.S.C. §562.

<sup>57</sup> 5 U.S.C. §601.

<sup>58</sup> 5 U.S.C. §804.

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory.<sup>59</sup>

The APA definition of agency includes all executive branch agencies, including the independent regulatory agencies,<sup>60</sup> but specifically excludes Congress and the judiciary, as well courts martial, military commissions, and military authorities in time of war or in the field.<sup>61</sup> Aside from these exceptions, all “authorities” of the federal government are apparently included, even those that are within or under another authority or agency. For example, the DOJ is an agency composed of a number of subunits, such as the Drug Enforcement Administration, the Federal Bureau of Investigation, and the Federal Bureau of Prisons. Each of these divisions is an agency insofar as it is an “authority” of the government.

### What Is an “Authority” of the Government?

Exactly what an “authority” is, however, is not defined. A legislative report released before the passage of the APA described the term as “any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority.”<sup>62</sup> Courts have given this language a “broad, inclusive reading” to apply the APA to both executive agencies and independent agencies;<sup>63</sup> and have generally interpreted the APA definition of agency to include “any administrative unit with substantial independent authority in the exercise of specific functions.”<sup>64</sup> The relevant test is “whether the arm [of government] has the authority to act with the sanction of the Government behind it.”<sup>65</sup> Accordingly, even though “the primary purpose of the APA is to regulate the processes of rule making and adjudication ... even those administrative entities that perform neither function”<sup>66</sup> can be considered agencies if they enjoy “substantial independent authority in the exercise of specific functions.”<sup>67</sup> In this vein, an entity with purely advisory functions—such as a panel of nongovernmental consultants who advise an agency but do not make binding decisions—would not qualify as an authority.<sup>68</sup> Given the wide variety of organizational structures in the government, whether an agency enjoys the necessary “authority” to qualify is largely a question of fact.<sup>69</sup>

For example, the President-elect’s transition staff is not an agency because it is, by definition, outside the control of the sitting President, and therefore incapable of exercising government

<sup>59</sup> 5 U.S.C. §551(1).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> S.Doc. No. 248, 79<sup>th</sup> Cong., 2d Sess. 13 (1945).

<sup>63</sup> *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1111 (D.C. Cir. 1974). *See also* KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* (2008).

<sup>64</sup> *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

<sup>65</sup> *Ellsworth Bottling Co. v. United States*, 408 F. Supp. 280, 282 (W.D. Ok. 1975); *see* *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9<sup>th</sup> Cir. 1949); *Kam Koon Wan v. E. E. Black, Ltd.*, 188 F.2d 558 (9<sup>th</sup> Cir. 1951).

<sup>66</sup> *Koden v. U.S. Dep’t of Justice*, 564 F.2d 228, 232 (7<sup>th</sup> Cir. 1977).

<sup>67</sup> *Id.* (quoting *Soucie*, 448 F.2d at 1073) (quotations omitted).

<sup>68</sup> *Washington Research Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974).

<sup>69</sup> *Id.* at 246-47.

authority.<sup>70</sup> In the same way, the National Academy of Sciences, while responsible for conducting investigations for the government, only enjoys authority derived from “a respect for the qualifications of the members of the Academy rather than on any delegation of federal authority.”<sup>71</sup> As such, it is not an agency for the purposes of the APA.<sup>72</sup> Likewise, the APA does not apply to state-level agencies,<sup>73</sup> or a private firm that provides services to a federal agency,<sup>74</sup> because these entities do not exercise the power of the federal government.

It is worth mentioning that Congress may establish entities that are explicitly not “agencies” exercising the power of the federal government, such as the Legal Services Corporation.<sup>75</sup> In addition, Congress may establish entities that exercise government authority and are subject to constitutional constraints, but are not agencies for the purposes of the APA. For example, the Public Company Accounting Oversight Board is subject to the Constitution’s Appointments Clause, but is not a government agency “for statutory purposes.”<sup>76</sup> In contrast, Congress can direct an entity otherwise not subject to the APA to comply with its provisions. For example, while most entities in the judicial branch are not agencies for the purposes of the APA,<sup>77</sup> pursuant to statute, the United States Sentencing Commission, an independent agency in the judicial branch, must comply with the APA when it promulgates sentencing guidelines for federal judges.<sup>78</sup>

Finally, entities that might appear at first glance to operate somewhat independently of the federal government can sometimes fall within the APA’s definition of agency. For example, even though the Federal Reserve Banks “are independent, privately owned and locally controlled corporations,”<sup>79</sup> because they “perform[] important governmental functions and exercise[] powers entrusted to it by the United States government,” some courts have held that they are agencies for purposes of the APA.<sup>80</sup> Likewise, the Board of Governors of the Federal Reserve System, though somewhat insulated from political influence as it receives no funding through the congressional appropriations process, must comply with the APA when it imposes civil penalties on private parties<sup>81</sup> or promulgates certain regulations.<sup>82</sup>

<sup>70</sup> *Ill. Institute for Continuing Legal Educ. v. U.S. Dep’t. of Labor*, 545 F. Supp. 1229 (N.D. Ill. 1982).

<sup>71</sup> *Lombardo v. Handler*, 397 F. Supp. 792, 795 (D.D.C. 1975) *aff’d.*, 546 F.2d 1043 (D.C. Cir. 1976).

<sup>72</sup> *Id.* at 796.

<sup>73</sup> *Southwest Williamson Cnty. Cmty. Ass’n v. Slater*, 173 F.3d 1033, 1035 (6<sup>th</sup> Cir. 1999).

<sup>74</sup> *Perry v. Delaney*, 74 F. Supp. 2d 824 (C.D. Ill. 1999).

<sup>75</sup> *Reg’l Mgmt. Corp., Inc. v. Legal Servs. Corp.*, 186 F.3d 457, 462 (4<sup>th</sup> Cir. 1999).

<sup>76</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010). See 15 U.S.C. 7211(b) (“The Board shall not be an agency or establishment of the United States Government.”).

<sup>77</sup> See *In re Fidelity Mortg. Investors*, 690 F.2d 35, 39 (2d. Cir. 1982).

<sup>78</sup> 28 U.S.C. §994(x). See *United States v. Berberena*, 694 F.3d 514, 526 (3d Cir. 2012).

<sup>79</sup> *Lewis v. United States*, 680 F.2d 1239, 1241 (9<sup>th</sup> Cir. 1982).

<sup>80</sup> *Flight Int’l Group v. Fed. Reserve Bank*, 583 F. Supp. 674, 678 (N.D. Ga. 1984). See *Jet Courier Servs., Inc. v. Fed. Reserve Bank of Atlanta*, 713 F.2d 1221, 1224 (6<sup>th</sup> Cir. 1983); *Lee Const. Co., Inc. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 179 (D. Md. 1982). In addition, government corporations can sometimes be subject to the APA. See *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

<sup>81</sup> See *Burke v. Bd. of Governors of Fed. Reserve Sys.*, 940 F.2d 1360, 1365 (10<sup>th</sup> Cir. 1991); *Am. Bancorporation, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 509 F.2d 29, 33 (8<sup>th</sup> Cir. 1974).

<sup>82</sup> See *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 13-5270, 2014 WL 1099633 (D.C. Cir. Mar. 21, 2014).

## The President and the Executive Office of the President

As explained above, generally speaking, if an agency exercises the authority of the federal government, it qualifies as an agency under the APA. However, at least one major exception applies. The Supreme Court has held that the President is not an “agency” under the APA.<sup>83</sup> In *Franklin v. Massachusetts*, the Commonwealth of Massachusetts brought a claim under the APA’s abuse of discretion standard<sup>84</sup> against, *inter alia*, the President, challenging the apportionment of congressional seats.<sup>85</sup> Reviewing the APA’s definition of agency, the Court noted that while the President was not “explicitly included” in the statutory definition, he was “not explicitly excluded, either.”<sup>86</sup> Therefore, “out of respect for the separation of powers and the unique constitutional position of the President,” the Court ruled that the absence of language either way was not sufficient to subject the President to the APA.<sup>87</sup>

Nevertheless, entities within the Executive Office of the President can qualify as agencies under the APA.<sup>88</sup> For example, the OMB is an agency under the APA because although its central duty is advising the President, it also functions as an “instrument of presidential and policymaking control over the executive bureaucracy,” and has various “management, coordination, and administrative functions.”<sup>89</sup>

## Freedom of Information Act

Another important definition of agency is found in the Freedom of Information Act (FOIA), which provides the public with access to certain agency records.<sup>90</sup> Unless a request for information falls under one of FOIA’s nine exemptions,<sup>91</sup> an “agency,” under the act, must provide the requesting party with the relevant records.<sup>92</sup> FOIA’s current definition of an agency was intended to be broader than the APA’s. It covers “each authority of the Government of the United States,” including “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>93</sup>

<sup>83</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

<sup>84</sup> See 5 U.S.C. §706.

<sup>85</sup> *Id.* at 790.

<sup>86</sup> *Id.* at 800.

<sup>87</sup> *Id.* However, the Court ruled that the President was still subject to constitutional claims arising outside of the APA. *Id.* at 801.

<sup>88</sup> *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

<sup>89</sup> *Meyer v. Bush*, 981 F.2d 1288, 1300 (D.C. Cir. 1993) (quoting *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978)); see *Swann v. Walters*, 620 F. Supp. 741 (D.D.C. 1984); *United States v. Wall*, 670 F.2d 469 (4<sup>th</sup> Cir. 1982).

<sup>90</sup> 5 U.S.C. §552. See CRS Report R41406, *The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws*, by (name redacted).

<sup>91</sup> 5 U.S.C. §552(b).

<sup>92</sup> 5 U.S.C. §552.

<sup>93</sup> 5 U.S.C. §552(f)(1).

FOIA does not, however, apply to Congress, the courts, or the government of United States territories.<sup>94</sup> Accordingly, the “entire legislative branch” and the “entire judicial branch” are “exempted.”<sup>95</sup> Nevertheless, the legislative history accompanying amendments to FOIA in 1974 indicated that Congress aimed to “expand” upon the definition of agency in the APA.<sup>96</sup> Congress intended the definition to include government corporations like the Tennessee Valley Authority, government-controlled corporations like the National Railroad Passenger Corporation (Amtrak), and “other establishments” like the U.S. Postal Service.<sup>97</sup> The language was also meant to include “functional entities” in the Executive Office of the President, such as OMB.<sup>98</sup> Congress did not intend corporations that receive federal funds but are not chartered or controlled by the government, such as the Corporation for Public Broadcasting, to be covered under the statute.<sup>99</sup> However, records located at certain “government owned contractor operated” (GOCO) entities can be subject to FOIA if an agency—otherwise subject to FOIA—effectively controls those records.<sup>100</sup>

Despite its broad scope, this definition of agency also has limits. Even though the statute specifically mentions the “Executive Office of the President,” the Supreme Court has determined that the term agency does not include “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.”<sup>101</sup> Accordingly, in *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court ruled that Henry Kissinger’s telephone records while he served as an assistant to the President did not qualify as agency records subject to FOIA.<sup>102</sup> In this vein, circuit courts have found that entities that only act in an advisory role to the President, like President George H. W. Bush’s Task Force on Regulatory Relief,<sup>103</sup> the White House Counsel’s Office,<sup>104</sup> the National Security Council,<sup>105</sup> and the Council of Economic Advisers,<sup>106</sup> are not agencies subject to FOIA. In contrast, entities within the Executive Office of the President that have “power to issue formal, legally authoritative commands to entities or persons within or outside the executive branch” are agencies under the act.<sup>107</sup>

<sup>94</sup> 5 U.S.C. §551(1).

<sup>95</sup> *Mayo v. U.S. Gov’t Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993). See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 145 (1980); *Dockery v. Gonzales*, 524 F. Supp. 2d 49, 53 n.1 (D.D.C. 2007); *United States v. Casas*, 376 F.3d 20, 22 (1st Cir. 2004); *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1416 n. 15 (D.C. Cir. 1985).

<sup>96</sup> H.Rept. 93-876, at 8 (1974).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> H.Rept. 93-1380, at 14-15 (1974) (Conf. Rep.).

<sup>100</sup> *In Def. of Animals v. Nat’l Institutes of Health*, 543 F. Supp. 2d 83, 100 (D.D.C. 2008).

<sup>101</sup> *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting S.Rept. 93-1200, at 15 (1974)). The Senate report pointed to *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), for this distinction.

<sup>102</sup> *Kissinger*, 445 U.S. at 155.

<sup>103</sup> *Meyer v. Bush*, 981 F.2d 1288, 1297-98 (D.C. Cir. 1993).

<sup>104</sup> *Nat’l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990).

<sup>105</sup> *Armstrong v. Exec. Office of the President*, 90 F.3d 553 (D.C. Cir. 1996).

<sup>106</sup> *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038 (D.C. Cir. 1985).

<sup>107</sup> *Meyer*, 981 F.2d at 1297-98 (D.C. Cir. 1993). See, e.g., *Rushforth v. Council of Econ. Advisers*, 246 U.S. App. D.C. 131, 636 F.2d 1259 (D.C. Cir. 1980).

Finally, courts have found that certain entities, even if established by Congress, may not be agencies for the purposes of FOIA because the government does not exercise sufficient control over the establishment. For example, the American National Red Cross, which has a number of its governors appointed by the President, operates under a congressional charter, and is subject to federal financial reporting and audit requirements, is not an agency for FOIA purposes because it is “not subject to substantial federal control or supervision.”<sup>108</sup> Likewise, the National Academy of Sciences, though established by an act of Congress<sup>109</sup> and paid by the government to conduct research, is not an agency because it is a private entity that “merely contract[s] with the government to conduct studies,” rather than participating in a government function.<sup>110</sup>

## Federal Records Act

A somewhat broader definition of agency can be found in the Federal Records Act (FRA).<sup>111</sup> Congress enacted the FRA to create “standards and procedures to assure the efficient and effective” management of federal agency records.<sup>112</sup> The act applies to federal agency records made or received under federal law or connected to public business.<sup>113</sup> Government records subject to the statute are eventually sent to the Archives.<sup>114</sup> The FRA defines the term “federal agency” as “any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol).”<sup>115</sup>

The statute, in turn, defines the term “executive agency” as

(A) an executive department or independent establishment in the executive branch of the Government; and

(B) a wholly owned Government corporation.<sup>116</sup>

In contrast to FOIA’s scope, therefore, the FRA covers not only executive agencies, but also entities in the legislative branch and the lower federal courts. However, just as FOIA’s reach does not extend to executive branch units close to the President who only engage in an advisory role,<sup>117</sup> the FRA’s coverage of executive branch agencies does not extend to units that simply advise the

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<sup>108</sup> *Irwin Mem’l Blood Bank of San Francisco Med. Soc. v. Am. Nat. Red Cross*, 640 F.2d 1051, 1057 (9<sup>th</sup> Cir. 1981).

<sup>109</sup> *See* An Act to Incorporate the National Academy of Sciences signed by President Lincoln on March 3, 1863, 12 Stat. 806, 36 U.S.C. §251 et seq.

<sup>110</sup> *Lombardo v. Handler*, 397 F. Supp. 792, 802 (D.D.C. 1975) *aff’d*, 546 F.2d 1043 (D.C. Cir. 1976).

<sup>111</sup> 44 U.S.C. §2902.

<sup>112</sup> *Id.* For more information on the FRA, *see* CRS Report R43072, *Common Questions About Federal Records and Related Agency Requirements*, by (name redacted).

<sup>113</sup> 44 U.S.C. §3301.

<sup>114</sup> *Id.*

<sup>115</sup> 44 U.S.C. §2901(14).

<sup>116</sup> The Federal Records Act, 44 U.S.C. §2901(13), defines “executive agency” by referencing 40 U.S.C. Section 102(4).

<sup>117</sup> *Kissinger*, 445 U.S. at 156.



President and do not enjoy independent authority.<sup>118</sup> Such records are instead subject to the Presidential Records Act.<sup>119</sup>

## Government Employees

A number of statutes concerning personnel laws for the civil service define “agency” by reference to 5 U.S.C. Section 105.<sup>120</sup> Section 105 of Title 5 of the *United States Code* defines the term “Executive agency” as an “Executive department, a Government corporation, and an independent establishment.” The same chapter of the *United States Code* defines each of those terms, in turn. In other words, an entity within the scope of Sections 101, 103, or 104 is an executive agency for the purposes of Section 105.<sup>121</sup> The definition appears to exclude agencies located in the judicial branch.<sup>122</sup>

First, Section 101 defines “Executive departments” as the cabinet level departments.<sup>123</sup> Courts have interpreted this particular provision to not include independent establishments like the Atomic Energy Commission,<sup>124</sup> the Federal Reserve Banks,<sup>125</sup> and the Postal Service,<sup>126</sup> or entities *within* an executive department, like the Internal Revenue Service, which is located inside the Treasury Department.<sup>127</sup>

Section 103 defines a government corporation as “a corporation owned or controlled by the government of the United States.”<sup>128</sup> For example, the Pension Benefit Guaranty Corporation, a government-controlled corporation within the Department of Labor,<sup>129</sup> and the Federal Prison Industry, a government-owned corporation created to provide work for federal inmates,<sup>130</sup> are both government corporations and are, therefore, considered an “Executive agency” for the purposes of 5 U.S.C. Section 105.

Section 104 defines “independent establishment” as an “establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an

<sup>118</sup> *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 567 (D.C. Cir. 1996). *See Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993).

<sup>119</sup> 44 U.S.C. §2201.

<sup>120</sup> *E.g.*, 42 U.S.C. §2000e; 5 U.S.C. §306(f).

<sup>121</sup> Notably, the term “executive agency” in 5 U.S.C. Section 105 does not apply to “military departments,” which are covered by Section 102. 5 U.S.C. §§102, 105; *see also Reed v. Franke*, 297 F.2d 17 (4<sup>th</sup> Cir. 1961). Therefore, a statute that refers to the term “agency” as defined in 5 U.S.C. Section 105, but fails to mention Section 102, will not apply to the departments of the Army, Navy, or Air Force. *See Johnson v. Alexander*, 572 F.2d 1219 (8<sup>th</sup> Cir. 1978).

<sup>122</sup> *See Bisom v. United States*, 5 Cl. Ct. 454 (Fed. Cl. 1984).

<sup>123</sup> 5 U.S.C. §105. The Executive departments are the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security. *Id.*

<sup>124</sup> *Nanfelt v. United States*, 1 Cl. Ct. 223 (1982).

<sup>125</sup> *See Flight Int’l Group v. Fed. Reserve Bank*, 583 F.Supp. 674 (N.D. Ga. 1984).

<sup>126</sup> *Horner v. Schuck*, 843 F.2d 1368 (Fed. Cir. 1988).

<sup>127</sup> *Hancock v. Egger*, 848 F.2d 87, 88 (6<sup>th</sup> Cir. 1988).

<sup>128</sup> 5 U.S.C. §103.

<sup>129</sup> *Pension Benefit Guar. Corp.—Court Admission Fees*, B-289219, 2002 US Comp Gen LEXIS 260 (Oct. 29, 2002).

<sup>130</sup> *Galvan v. Fed. Prison Indus.*, 199 F.3d 461 (D.C. Cir. 1999).

Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and ... [the] Government Accountability Office.”<sup>131</sup>

Some courts have interpreted this provision to mean that if an entity is contained *within* an “Executive department,” then Section 104 does not apply to it.<sup>132</sup> One practical result of this distinction is that some statutes regulating the civil service will not be enforceable, at least in some jurisdictions, against the immediate “agency” employing a claimant. For example, under 5 U.S.C. Section 7114(a)(2), which entitles federal employees to the presence of a union representative when being questioned on disciplinary matters, one court ruled that because the statute’s definition of agency incorporated 5 U.S.C. Section 105, the relevant defendant was not the Defense Logistics Agency, but the Department of Defense as a whole.<sup>133</sup> Similarly, under the Federal Labor-Management Relations Act,<sup>134</sup> one court ruled that the appropriate defendant is the Department of Justice, rather than the Department’s Office of Inspector General.<sup>135</sup>

## Paperwork Reduction Act

Congress enacted the Paperwork Reduction Act to reduce the paperwork burden for individuals and businesses resulting from the collection of information by or for the federal government.<sup>136</sup> Whenever an agency requests information from 10 or more nonfederal persons, an agency must get approval from OIRA before putting out the request for information.<sup>137</sup> The Paperwork Reduction Act defines the terms “agency” and “independent regulatory agency.”<sup>138</sup> Other statutes and executive orders define “agency” or “independent regulatory agency” by referencing the definitions provided in the Paperwork Reduction Act.

The term “agency” is defined as

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include—

(A) the Government Accountability Office;

(B) Federal Election Commission;

(C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or

<sup>131</sup> 5 U.S.C. §104.

<sup>132</sup> *See, e.g.,* Def. Criminal Investigative Serv. (DCIS), Dep’t of Def. (DOD) v. Fed. Labor Relations Auth., 855 F.2d 93, 98 (3d Cir. 1988); *Hancock v. Egger*, 848 F.2d 87, 89 (6<sup>th</sup> Cir. 1988); *Stephenson v. Simon*, 427 F. Supp. 467 (D.D.C. 1976). *But see* U.S. Dep’t of Justice v. Fed. Labor Relations Auth., 39 F.3d 361, 365 (D.C. Cir. 1994) (“The Inspector General’s Office plainly qualifies as an ‘agency’ because it is an ‘independent establishment’ and ‘not an Executive department.’”).

<sup>133</sup> *Defense*, 855 F.2d at 98-100.

<sup>134</sup> 5 U.S.C. §7101.

<sup>135</sup> *Federal Labor Rels. Auth. v. U.S. Dep’t of Justice*, 137 F.3d 683, 157 (2d Cir. 1997).

<sup>136</sup> *See* 44 U.S.C. §§3501 *et seq.*

<sup>137</sup> *Id.*

<sup>138</sup> 44 U.S.C. §3502.

(D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities<sup>139</sup>

The term “independent regulatory agency” is defined by listing 19 agencies and including “any other similar agency designated by statute as a Federal independent regulatory agency or commission.”<sup>140</sup>

The scope of the definition of “agency” under the Paperwork Reduction Act appears to be broad, but, by its terms, limited to the executive branch. Indeed, one commenter notes that the statute “applies to virtually the entire executive branch.”<sup>141</sup> Nevertheless, the United States Court of Appeals for the Tenth Circuit, after reviewing the structure and purpose of the U.S. Postal Service (USPS), determined that the USPS is not an agency for the purposes of the Paperwork Reduction Act.<sup>142</sup>

## Executive Order 12866

President Clinton promulgated Executive Order 12866—which remains in effect today—to “reform and make more efficient the regulatory process.”<sup>143</sup> The Executive Order contains numerous guidelines and procedures that agencies are expected to follow during the rulemaking process. The Order defines “agency” as follows: “Agency,” unless otherwise indicated, means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).”<sup>144</sup>

Thus, Executive Order 12866 defines “agency” by referencing the definition provided in the Paperwork Reduction Act, described above. The independent regulatory agencies, listed in the Paperwork Reduction Act, are excluded from the definition. However, some provisions of the Executive Order, such as the requirement to submit planned regulations for publication in the *Unified Agenda*, specifically are made applicable to both independent regulatory agencies and executive agencies.<sup>145</sup> Notably, the Executive Order states that it “does not create any right or benefit ... enforceable at law or equity”—thus, judicial review is not available for actions taken pursuant to the Order.<sup>146</sup> Therefore, there are no judicial decisions that determine the scope of the term “agency” for the purposes of Executive Order 12866.

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<sup>139</sup> 44 U.S.C. §3502(1).

<sup>140</sup> 44 U.S.C. §3502(5).

<sup>141</sup> JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 159 (2006).

<sup>142</sup> *Shane v. Buck*, 817 F.2d 87 (10<sup>th</sup> Cir. 1987); *see also Kuzma v. U.S. Postal Service*, 798 F.2d 29 (2d Cir. 1986).

<sup>143</sup> 58 Fed. Reg. 51735. Although Executive Order 12866 is currently in effect, President Reagan originally established the practice of centralized review of agency regulations with Executive Order 12291. *See* 46 Fed. Reg. 13193 (Feb. 19, 1981).

<sup>144</sup> 58 Fed. Reg. at 51737.

<sup>145</sup> *Id.* at 51738.

<sup>146</sup> *Id.* at 51744.

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