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Boundary Institutions

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This paper examines federal boundary institutions, as a static and dynamic matter. Such institutions include any entity not squarely in one branch of the federal government but with some roots in the federal system. Thus, an agency at the border of the legislative and judicial branches would be a boundary institution for purposes of this paper, as would an institution at the edge of the federal government and private sector, of the federal government and the states, or of the federal government and foreign countries. The variety, frequency, and importance of these institutions greatly complicate the classic image of the federal administrative state – that of a bureaucracy consisting almost entirely of executive agencies and independent regulatory commissions. While widening the lens on the administrative state, the paper tries to retain some tractability. Most simply, the paper classifies some of the missing federal bureaucracy, along the borders of more conventional categories. That classification exercise is mostly a static one – where those missing parts currently reside in the bureaucratic map – but it also considers movement to and from the center of these categories. In addition, the paper theorizes about these missing components, specifically why political actors would create such institutions. It also considers whether their creation serves social welfare or democratic legitimacy objectives, suggesting that efficiency may not always be trumping accountability in these alternative agency structures. Finally, the paper examines the "law" surrounding these other entities and how these entities might shape already established law and governance of federal agencies.

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> I'm sorry, Jim [Lehrer]. I'm going to stop the subsidy to PBS. . . . I like PBS. I love Big Bird. I actually like you too. But I'm not going to — I'm not going to keep on spending money on things to borrow money from China to pay for it. That's number one.
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> Governor Mitt Romney, First Presidential Debate of the 2012 Election[1]

Big Bird, the Acela, and the Saturday mailperson seem to be everywhere, and nowhere. On one hand, they are popular objects of ridicule and adoration. Many Republicans claim their price tag is too high. Big Bird is not alone on the cutting block. The 2012 Republican platform offers up Amtrak as well: "It is long past time for the federal government to get out of the way and allow private ventures to provide passenger service."[2] By contrast, many Democrats view them as critical government investments. Vice President Joe Biden, who has reportedly racked up more than 7,000 roundtrips on Amtrak, argues: "Support for Amtrak must be strong – not because it is a cherished American institution, which it is – but because it is a powerful and indispensable way to carry us all into a leaner, cleaner, greener 21st century."[3]

It is not just money – direct funding or subsidies – tying the Corporation of Public Broadcasting (which funds PBS), the National Railroad Passenger Corporation (known as Amtrak), and the United States Postal Service to the federal government. Senate-confirmed presidential appointees direct their boards.[4] The latter two, as government-controlled corporations, take Freedom of Information Act requests.[5] Although Congress declared that Amtrak was not a federal agency, the Supreme Court limited that exemption to the Administrative Procedure Act and similar statutes, holding that Amtrak was part of the United States "for the purpose of individual rights guaranteed against the Government by the Constitution."[6] The Court's reasoning arguably applies to

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[1] Commission on Presidential Debates, Transcript, The First Obama-Romney Debate, Oct. 3, 2012.
[2] National Republican Party, 2012 Republican Platform: We Believe in America, at 6 (available at: http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf). The Republican-controlled House, however, "in June boosted Amtrak's overall funding by $384 million, offsetting reductions in operating subsidies with new money to repair bridges and tunnels." Josh Lederman, Amtrak Funding in Crosshairs in Presidential Race, Associated Press, Sept. 10, 2012.
[3] Joe Biden, Why America Needs Trains, Arrive, Jan./Feb. 2010, at 36.
[4] Nine Senate-confirmed appointees, each traditionally selected to a six-year term, comprise the CPB's Board of Directors. 47 U.S.C. § 396(c). Seven Senate-confirmed appointees, each usually to a five-year term, make up the National Railroad Passenger Corporation's Board of Directors. 49 U.S.C. § 24302. Nine Senate-confirmed appointees, each generally given a seven-year term, select the Postmaster General; the ten then select the Deputy Postmaster General. All eleven comprise the Board of Governors for the postal service. 39 U.S.C. § 2002.
[5] Office of Government Information Services, What Entities are Subject to FOIA, Nov. 27, 2011 (available at: https://ogis.archives.gov/Page54.aspx?SourceId=1&ArticleId=384). See also http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241267362261; http://about.usps.com/who-we-are/foia/welcome.htm.
[6] Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

the CPB, a non-profit corporation created by Congress, as well.[7] The Postal Service follows the Constitution and the APA.[8] All face congressional oversight.

On the other hand, they are largely missing from discussions of the modern bureaucracy. Governor Romney, in the first presidential debate, implicitly distinguished PBS and the CPB (his "number one" in his spending cuts list) from his plan to "make government more efficient, and to cut back the number of employees, combine some agencies and departments" (his "number three").[9] The words "agency" and "department" do not appear in their names. They are run not by Secretaries or Administrators, but by Presidents or Chief Executive Officers (or, in the case of the USPS, the Postmaster General). None has a .gov website address.[10]

These three entities may appear to be perplexing institutions, straddling the public-private boundary. But that is not the only boundary in the administrative state populated with institutions. There are entities at the edge of the federal government and the states, of the federal government and Native American tribes, and of the federal government and foreign countries. Within the federal government, there are agencies in the interstices of any two branches and among all three. This paper examines federal boundary institutions. It takes what appears to exist on the margins, literally and figuratively, and makes it more central to the modern bureaucracy.

Administrative law scholars generally ignore such entities, except for fleeting references or particular categories in isolation.[11] There is a cottage industry about independent regulatory commissions and boards, such as the Federal Trade Commission and the National Labor Relations Board, which exist at the boundary of the executive branch (or, according to some, at the boundary between the executive and legislative branches).[12] There is also some attention paid to government corporations at the public-private border.[13] More recently, there has been increasing focus on institutions from different sides of a boundary working together – for instance, executive agencies

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[7] 513 U.S. at 400 ("We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").
[8] Id.; Top Choice Distributors, Inc. v. United States Postal Service, 138 F.3d 463 (2d Cir. 1998) (assessing whether USPS action was a final action under the APA).
[9] Commission on Presidential Debates, supra note 1.
[10] Though www.usps.gov will redirect the user to the correct site.
[11] But see Jonathan G.S. Koppell, The Politics of Quasi-Government: Hybrid Organizations and the Dynamics of Bureaucratic Control (2003) (focus on public-private entities); Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111 (2000) (some attention to public-private institutions); Hari M. Osofsky & Hannah J. Wiseman, Hybrid Energy Governance (working draft, Sept. 17, 2012) (focus on entities in energy policy), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147860.
[12] For the most recent treatments, see Rachel E. Barkow, Insulating Agencies: Avoiding Capture through Institutional Design, 89 Tex. L. Rev. 15 (2010), and Lisa Schultz Bressman & Robert B. Thompson, The Future of Agency Independence, 63 Vand. L. Rev. 599 (2010). For a classic treatment in law, see Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 592 (1984), and in political science, see David E. Lewis, Presidents and the Politics of Agency Design (2003).
[13] See, e.g., Jack M. Beermann, The Reach of Administrative Law in the United States, in The Province of Administrative Law 171 (Michael Taggart, ed. 1997); A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543; Paul E. Lund, Federally Chartered Corporations and Federal Jurisdiction, 36 Fl. State U. L. Rev. 317 (2009).

and private firms in the new governance literature[14] and separate federal and state agencies in federalism work.[15] There is little, however, on *institutions* at various boundaries, more broadly.

The lack of systematic attention may result from a variety of reasons. To start, these entities may not be as familiar as other agencies. The most unusual characteristic of the CPB, Amtrak, and the USPS may be their recognition. Unlike many similar institutions at the public-private border, such as the Export-Import Bank or the Overseas Private Investment Corporation, many have heard of all three.

In addition, their prevalence may be underestimated. The U.S. Government Manual dedicates three of its seven categories to boundary institutions: Independent Agencies and Government Corporations; Quasi Official Agencies; and International Organizations.[16] Aside from classic independent agencies such as the FTC and NLRB, the current edition of the Manual lists more than a dozen other independent agencies and government corporations, including the USPS and OPIC. The Smithsonian and three other bodies make up the four quasi-official institutions; the United Nations and the International Monetary Fund are two of the thirteen primary international organizations.

These three categories even understate the prevalence of boundary institutions because these entities lurk in the remaining four categories as well, such as the Government Accountability Office in the Legislative Branch grouping and the United States Sentencing Commission in the Judicial Branch section. Finally, the Manual maintains a separate list of "boards, commissions, councils, etc. not listed elsewhere in the Manual, which were established by congressional or Presidential action, whose functions are not strictly limited to the internal operations of a parent department or agency and which are authorized to publish documents in the Federal Register." That list contains 49 entities, including the National Indian Gaming Commission.[17]

Finally, the inattention may stem from the mistaken perception that many of these institutions are new. To be sure, as issues become more complicated and citizens more leery of centralized governmental remedies, such institutions, particularly at the public-private border, presumably will proliferate. But these institutional forms are not modern creations. The First Bank of the United States, one of the first institutions at the public-private edge, was established in 1791.[18] The National Guard, at the federal-state border, goes back to the American colonies. The Smithsonian dates to 1846; the GAO to 1921.

Not only are these often longstanding institutions numerous and diverse in structure, many also play critical roles in the administrative state. The wide scope of authority delegated to

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[14] See e.g., Kenneth A. Bamberger, Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, 56 Duke L.J. 377 (2006); Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minnesota L. Rev. 342 (2004).

[15] See, e.g., Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534 (2011); Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698 (2011).

[16] US Government Manual.

[17] U.S. Government Manual, Boards, Commissions, and Committees.

[18] Osborn v. Bank of the United States 9 Wheat. (22 U.S.) 738, 860 (1824) ("The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes.").

independent regulatory commissions is well recognized. But the less discussed border agencies also have considerable power. The GAO, for instance, regularly rules on multi-million dollar government procurement disputes. The National Guard staffs response teams to state and national emergencies, including natural disasters, and contributes personnel to armed conflicts overseas. The Export-Import Bank finances over $24 billion in loan guarantees and insurance annually, with its authority recently increased to $120 billion.[19]

The variety, frequency, and importance of these institutions greatly complicate the classic image of the federal administrative state – that of a bureaucracy consisting almost entirely of executive agencies and independent regulatory commissions. It might be simplest, yet still of interest, to think about these other institutions as helping us better analyze the standard players in the modern bureaucracy. After all, we tend to define independent commissions in opposition to executive agencies. What would happen if we view independent commissions (and executive agencies) in comparison to institutions perceived to be less central to the executive branch? This paper takes up that question. It also considers why these boundary institutions exist, both as a positive and normative matter.

These inquiries are static. In other words, they assume agencies are of a particular type, neither moving toward the center nor toward the boundary. Agencies, however, do move. It may be most common for agencies to migrate from the center to the boundary over time. The USPS, for example, had been a cabinet department for nearly 150 years (and, before that, was a core executive agency). Movement can also occur toward the White House. Research that considers agency design dynamically typically examines the creation and destruction of bureaucratic institutions[20] or the consolidation of agencies.[21] This paper targets a related, but distinct, question. Why, again as a positive and normative matter, do and should agencies shift form? This paper examines the centripetal and centrifugal forces on agency design once agencies have been established as well.

The paper proceeds as follows. In Part I, I classify boundary institutions along three dimensions – within the federal government, across levels of government, and between the federal government and the for-profit and non-profit sectors – and provide examples. I also define dynamic categories, corresponding to centralizing and diverging shifts in agency form and offer some recent cases. I then turn in Part II to the heart of the paper: positive and normative theories for the creation of boundary institutions and their movement over time. By positive, I mean a theory that explains why politicians create such entities. Political science has focused on the quest for political control, but political control over an institution does not bring only benefits. It is also not the only driver of agency design. By normative, I offer two different theories, one that analyzes when such institutions promote social welfare and one that examines when these entities foster democratic legitimacy. I suggest that efficiency may not always be dominating accountability in these boundary institutions; in some cases, there might not be a trade-off at all between the two goals, including because both are sacrificed.

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[19] Shayerah Ilias, Congressional Research Service, Export-Import Bank: Background and Legislative Issues, CRS Report No. 98-565, Feb. 9, 2011, at 9; David Nakamura, Obama Emphasizes Campaign Message on Economy while Renewing Export-Import Bank, Wash. Post, May 30, 2012 (its authority will increase to $140 billion).

[20] See, e.g., David E. Lewis, The Politics of Agency Termination: Confronting the Myth of Agency Immortality., 64 J. Pol. 89 (2002).

[21] See, e.g., Mariano-Florentino Cuéllar Governing Security: The Hidden Origins of American Security Agencies (forthcoming); Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 California Law Review 1655 (2006).

In Part III, I consider the legal implications, both as a matter of constitutional and statutory law, as well as the governing ramifications of boundary institutions. These institutions raise complicated constitutional and statutory issues. At best, the legal patchwork suggests inconsistency and confusion; at worst, it hints at illegitimacy. In addition, I use boundary institutions as a lens to reexamine some classic administrative law doctrines about more centrally located agencies. Those doctrines are premised in part on a fictional administrative state, limited to executive agencies and independent regulatory commissions. Finally, as its financial losses mount, I conclude by suggesting some politically feasible proposals to improve the functioning of one boundary agency, the USPS.

I. Types and Examples of Boundary Institutions

This paper examines boundary institutions, where one category is some part of the federal government. Almost all of these institutions look, at least partially, like agencies. Not all entities that have bureaucratic elements fall, however, under this definition. Because, for my purposes, the institution has to have federal ties, entities at the border of local governments and private business, such as Business Improvement Districts, do not qualify. These ties also cannot be entirely contractual or funding based. Thus, purely private entities that have been delegated work by the government even if that work is inherently governmental in nature, such as privately run prisons for defendants convicted of federal crimes, do not fit.[22] Although institutions like the Downtown Berkeley BID and the Taft Correctional Institution in the San Joaquin Valley raise a number of fascinating issues, including some that overlap with the ones this paper tackles, I do not address those types of entities. The institution need exist at only one border, but could function at more.[23]

Institutions here are defined primarily by structural attributes, including agency design and assigned functions. Of course, leaders matter.[24] History and practice matter.[25] I limit the focus to gain some descriptive and predictive traction. Structure is less subjective than other agency characteristics, and therefore provides workable distinctions in defining institutional forms. Most critically, political scientists have concluded that agency structure has "serious implications for policy outputs."[26] Other efforts to classify bureaucratic institutions therefore also rely on structure.[27]

In this Part, I describe three categories of federal boundary institutions: those located entirely within the federal government but not fitting squarely in only one of its branches; those tied closely to the federal government but spanning another type of government or sovereign, including states, foreign countries, and Native American tribes; and those connected to the federal

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[22] There is fascinating work on this question. See, e.g., Laura A. Dickinson, Privatization and Accountability, 7 Annual Rev. Soc. Sci. 101 (2011); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000); Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229 (2003).

[23] Cf. Osofsky & Wiseman, supra note 11, at 13 (defining "a model of hybrid institutions that include both private and public actors from state, local, and federal levels; that typically exist within a regional space between these governance levels; and that allow a number of stakeholders to participate in decisionmaking processes in meaningful ways").

[24] See Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (2001).

[25] Example of Federal Reserve.

[26] Amy B. Zegart, Flawed by Design: The Evolution of the CIA, JCS, and NSC 1 (1999).

[27] Ronald C. Moe, Congressional Research Service, The Federal Executive Establishment: Evolution and Trends, CRS Report No. 79-255, at 42 (October 16, 1979) ("[T]here is an underlying assumption motivating this taxonomic exercise; namely, that the organizational behavior of units of Government may be partially explained by their structural characteristics.").

government but operating in the private (including non-profit) sector. I also detail two dynamic narratives about changing agency form: moving toward and away from these types of boundaries. The purpose is descriptive; I take up questions of creation, desirability, and legality in later parts.

A. Within the Federal Government

As every school child (hopefully) knows, there are three branches of the federal government: the legislative branch, the executive branch, and the judicial branch. Each has its main players – the House and the Senate, the President, and the Supreme Court, respectively. Each has its supporting entities – for example, the Congressional Budge Office, the cabinet departments, and the lower courts. In addition, institutions exist at each of the boundaries. This section provides some key examples.

1. Legislative-Executive Border

Starting with Article I, the legislature's boundaries house several powerful institutions, particularly at the legislative-executive border. The Government Accountability Office, for example, is a key player in the administrative state. Created in 1921 and strengthened after Watergate, the GAO monitors agency action on its own initiative, by legislative mandate, and at the request of congressional committees and individual members of Congress. When working at the request of individual members, it engages in what McCubbins and Schwartz term "fire alarm" oversight, examining projects that have been called to its attention. When performing periodic and legally mandated studies, the GAO functions more as a "police patrol" of the bureaucracy.[28]

Its structure has particular complexities. At the GAO's helm is the Comptroller General. The leader is appointed by the President – from a list of at least three names provided by a congressional commission including, among others, the Speaker of the House and the President pro tempore of the Senate – and confirmed by the Senate.[29] The Comptroller General serves for fifteen years and may not be appointed to a second term; he or she can be removed only for impairment or ineptitude, by a joint resolution of Congress.[30] By contrast, the President does not select the leaders of many other congressional support agencies. The Director of the CBO is appointed by the Speaker of the House and President pro tempore of the Senate, after receiving recommendations from their Budget committees, and serves a four year term. The Librarian of Congress selects the Director of the CRS for what is a civil service position. Prior to 1995 when Congress terminated the Office of Technology Assessment, a special congressional board appointed the Director of the OTA for a six-year term.[31]

The appointments provision for the GAO's head (but not the removal one) roughly parallels executive branch entities, though the President is generally not restricted to picking officials from a list.[32] But the GAO is not squarely in the executive branch, in part because of the removal aspect. The Supreme Court ruled that the GAO's removal provision for the Comptroller General prevented

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[28] Mathew McCubbins and Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols versus Fire Alarms, 28 Am. J. Pol. Sci. 165 (1984).
[29] 31 U.S.C. § 703(a)(2).
[30] 31 U.S.C. § 703(e)(1). No Comptroller General has been removed.
[31] James A. Thurber, The Evolving Role and Effectiveness of the Congressional Research Agencies, in The House at Work (eds. Cooper and Mackenzie) 313 (1981).
[32] Cf. Intelligence Reform and Terrorism Prevention Act of 2004, § 1014, 50 U.S.C. § 403-6.

the delegation of "executive powers."[33] In addition, when Congress created the GAO, Congress established it as "an instrumentality of the United States Government independent of the executive departments."[34] The GAO, however, does not sit squarely in the legislative branch either. To be certain, Congress has repeatedly declared that the GAO is "a part of the legislative branch" (and the U.S. Government Manual lists the GAO as a legislative agency),[35] and journalists usually refer to it as the "nonpartisan investigative arm of Congress."[36] But, as noted above, unlike many other congressional agencies, the President chooses its leader. Moreover, the GAO views itself as an independent watchdog agency.

There are other institutions at the legislative-executive border. Since 1957, the U.S. Commission on Civil Rights has performed executive functions with some of its leaders selected only by Congress. The Commission, among other duties, investigates voting rights discrimination; studies legal developments in equal protection and the efficacy of federal laws to protect civil rights; and serves as a "national clearinghouse" for civil rights information.[37] The agency has eight commissioners, each of whom is appointed to a six-year term – four selected by the President alone, two selected by the President pro tempore of the Senate (from recommendations of the majority leader and the minority leader of the chamber), and two selected by the Speaker of the House of Representatives (also from the recommendations of the majority leader and the minority leader of the chamber).[38] The congressional appointments are constrained by party balancing requirements.[39] Only the President can remove a commissioner (no matter which institution selected the commissioner).[40]

Although not a separate agency, Inspectors General, who are Senate-confirmed presidential appointees supposedly selected on expertise and without regard to partisanship, also function at the boundary between these two branches.[41] Most notably, IGs "are among the few presidential officers in government who report to both Congress and the president . . . ."[42]

At the edge of the executive branch sit the much discussed independent regulatory commissions and boards such as the FTC and NLRB. Some commentators place them at the border with the legislative branch;[43] others situate them at (or over) the outer edge of the executive branch but not merging into another branch of the federal government.[44] Their most noticed features generally include a multi-member leadership structure, removal of those members only for good cause, and protection from certain obligations under Executive Orders, including centralized

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[33] Bowsher v. Synar, 478 U.S. 714, 732 (1986).
[34] 31 U.S.C. § 702(a)
[35] 59 Stat. 616; 63 Stat. 205. Cited in Bowsher.
[36] See, e.g., Eric Lipton, Investigators Criticize Response to Hurricane, N.Y. Times, Feb. 2, 2006, at A19.
[37] 42 U.S.C. § 1975a(a).
[38] 42 U.S.C. § 1975(b). The agency does not appear to exercise significant authority – for instance, although it can hold a hearing, any subpoena to testify can be enforced only by the Attorney General.
[39] 42 U.S.C. § 1975(b)(2)-(3).
[40] 42 U.S.C. § 1975(e).
[41] See Paul C. Light, Monitoring Government 3 (1993); see, e.g., 22 U.S.C. § 3929 (State Department IG); 50 U.S.C. § 403q (CIA IG).
[42] Light, supra note 41, at 3.
[43] See, e.g., Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889 (2008).
[44] See, e.g., Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008).

regulatory review.[45] These features contrast with those of a typical executive agency, which is run by a single administrator, serving at the pleasure of the President, and subject to more obligations from the White House.[46] In other words, independent regulatory commissions and boards are structurally designed (at least in theory) to have more independence from the President than executive agencies. This independence from the President, in one view, gives Congress more control because such agencies have less protection from the White House.[47] In another view, this independence does not necessarily shift these agencies toward Congress but rather promotes autonomy from any overseer.[48]

Somewhere in between the classic independent regulatory commission and the classic executive agency, the border and the center, are mixtures of both. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act recently created the Financial Stability Oversight Council, which is charged with determining and responding to risks to financial stability, and the Bureau of Consumer Financial Protection, which is tasked with regulating consumer financial products and services. The Council's voting members are the heads of executive and independent financial regulatory agencies.[49] The Bureau is run by a director who serves a five-year term and can be removed only for cause.[50] More longstanding and likely equally unconventional are the independent commissions that sit within executive agencies, such as the Federal Energy Regulatory Commission in the Department of Energy.[51]

2. Executive-Judicial Border

Institutions also exist at the boundary between the executive and judicial branches. Specifically, the United States Sentencing Commission, which was established in 1984 as "an independent commission in the judicial branch of the United States," performs tasks similar in function to other executive agencies.[52] The Commission issues guidelines for sentencing in the federal criminal system and assesses the efficacy of those guidelines in decreasing variation in sentencing.[53] It, however, has an unusual leadership structure. There are seven voting members

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[45] See Barkow, supra note 12, at 26-41 for a nice summary of these classic attributes.
[46] Id.
[47] See FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction."); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 592 (1984) ("[A]s a former FTC Chairman recently remarked, the independent agencies 'have no lifeline to the White House. [They] are naked before Congress, without protection there,' because of the President's choice not to risk the political cost that assertion of his interest would entail."); Barry R. Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765, 792 (1983) (finding that "the FTC [an independent agency] is remarkably sensitive to changes in the composition of its oversight committee and in its budget caseload reveals substantial congressional influence"); Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 1 (Stanford Law School Working Paper, 2007), available at: http://dho.stanford.edu/research/partisan.pdf (concluding that congressional "partisan requirements [on the appointment of FCC commissioners] may have considerable effects on substantive policy outcomes").
[48] See Cristina M. Rodriguez, Constraint through Delegation: The Case of Executive Control over Immigration Policy, 59 Duke L.J. 1787, 1826 (2010) ("In other words, though complete insulation from political control may be unattainable (and probably also undesirable because it would eliminate accountability), the structure of an independent agency at least enables tensions between political actors to keep politically motivated decisionmaking at bay.").
[49] 12 U.S.C. § 5321(b).
[50] 12 U.S.C. § 5491.
[51] Paul Verkuil, The Purposes and Limits of Independent Agencies, 1988 Duke L.J. 257, 268-69.
[52] 28 U.S.C. § 991(a).
[53] 28 U.S.C. § 991(b).

selected by the President and confirmed by the Senate to a six-year term, removable only for cause. At least three have to be federal judges (likely from a list of six judges recommended by the Judicial Conference of the United States) and no more than four can be members of the same political party.[54] The Attorney General, or someone the AG designates, serves as an ex officio nonvoting member.[55]

There are also critical positions (as opposed to agencies) at the border between the White House and the courts, notably, administrative law judges. Like IGs, many agencies have ALJs.[56] Unlike IGs, ALJs in agencies do not report to both branches. ALJs do, however, perform judicial functions. In formal proceedings under the Administrative Procedure Act, these judges, among other duties, "administer oaths and affirmations; issue subpoenas authorized by law; rule on offers of proof and receive relevant evidence; take depositions or have depositions taken . . .; regulate the course of the hearing; hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution . . . ; dispose of procedural requests or similar matters; [and] make or recommend decisions . . . ."[57] While ALJ decisions do not generally garner the same attention as IG reports, there are far more ALJs and decisions by them. Indeed, agency adjudicators issue ten times as many decisions in adversarial proceedings than do Article III judges in a given year.[58]

3. Legislative-Judicial Border

The last border within the federal government, of the legislative and judicial branches, is far less populated with boundary institutions. The GAO, in addition to sitting at the border of the legislative and executive branches, also has judicial functions. The agency presently adjudicates bidding disputes over the awarding of *any* procurement contract by a federal agency, whether military or civilian.[59] If the GAO decides that the issuing agency did not comply with federal procurement law and regulations, it will recommend that the agency take appropriate action. Although the GAO cannot force the agency to comply with any decision and must rely on Congress to take action – the agency only has to tell the GAO whether it will comply – the bid protest process is taken seriously by bidders and agencies for several reasons. Any protest filed with the GAO requires an automatic stay of the contract's implementation; a sizeable number of claims are formally sustained or receive corrective action before a decision; and the cost to filing at the GAO is less than

[54] 28 U.S.C. § 991(a).
[55] 28 U.S.C. § 991(a).
[56] Stephen G. Breyer et al., Administrative Law and Regulatory Policy 514 (7th ed. 2011) (noting that approximately 30 agencies have them). About 85 percent of ALJs work for the Social Security Administration. Richard J. Pierce, Jr., What Should We Do About Administrative Law Judge Disability Decisionmaking?
[57] 5 U.S.C. § 556(c) (numbers eliminated).
[58] Anne Joseph O'Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Cal. L. Rev. 913, 936 (2009).
[59] See Kate M. Manuel & Moshe Schwartz, Congressional Research Service, GAO Bid Protests: An Overview of Time Frames and Procedures, CRS Report No. 40228, June 30, 2011, at 1; Kate M. Manuel, Congressional Research Service, Competition in Federal Contracting: An Overview of the Legal Requirements, CRS Report No. 40516, June 30, 2011, at 3 n.11. The GAO's authority has expanded over time.

litigating in the Court of Federal Claims.[60] In addition, the courts almost always defer to agency action that relies on a GAO decision.[61]

The GAO's bid protest work is significant, in number and scope. In the last fiscal year, over 2,300 cases were filed.[62] Some of these disputes involve big-ticket items. In 2008, for instance, the GAO agreed with a protest filed by Boeing challenging the awarding of a $35 billion contract for the KC-X aerial tanker to a team led by Northrop Grumman.[63] Before the mid-1990s, the GAO also dealt with the settlement of claims against the United States in a range of cases, including military and civilian employees' salary and allowances (payment for special needs).[64]

In sum, although commentators have remarked that administrative agencies often combine functions of all three branches of government and thus do not fit easily into the executive branch because of non-executive functions, they generally are not thinking about the boundary institutions above (except for independent regulatory commissions). The lack of easy fit therefore is even more prevalent than typically assumed in the federal government.

B. Across Levels of Government

The previous section is limited to intra-federal government boundaries. This section turns to inter-government ones. Agencies exist at the border of the federal government and the states, of the federal government and foreign countries, and of the federal government and Native American tribes. To be certain, considerable attention has been paid to each "pair" of governments. Within administrative law commentary, that attention has generally focused on members of each pair as separate actors. Outside of administrative law, there has been more attention to institutions straddling the pair. This section provides some boundary examples from the perspective of administrative law.

1. Federal-State Border

The most populated border in this inter-government category is the one between the federal government and the states. The oldest institution may be the state-level National Guard (there is also a National Guard of the United States, which is a completely federal institution). Each state (and D.C. and Puerto Rico) has a National Guard, which is "commanded by [state] governors, except on rare occasions when it is called into federal service."[65] Not only does the federal government recognize, regulate, and fund the state National Guard, the President can also press the members into service.

The distribution of government benefits often depends on federal and state offices within a particular statutory scheme. For instance, the Social Security Administration, the largest dispenser of

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[60] See I Beg to Differ: The US GAO's Bid Protest Process, Defense Industry Daily, April 22, 2010; GAO, Annual Report to Congress on Bid Protests, GAO Report No. 58629, November 15, 2011, at 3 (chart showing in the last five fiscal years, the lowest annual rate of claims upheld was 16 percent and the highest was 27 percent in cases that received a merits decision).

[61] But see Turner Construction Co. v. United States, 645 F.3d 1377 (Fed. Cir. 2011).

[62] GAO, supra note 60, at 3. The number has been increasing in recent years. Id.

[63] I Beg to Differ, supra note 60.

[64] Pub. L. No. 104-53, 109 Stat. 514, 535 (1995); Pub. L. No. 104-316, 110 Stat. 3826, 3845-46 (1996).

[65] John G. Kester, State Governors and the Federal National Guard, 11 Harv. J. L. & Pub. Pol'y 177, 183 (1988).

federal benefits,[66] manages federal and state employees. For its disability assistance program, individuals seeking payments typically file a claim in a field office of the SSA, which is staffed by federal employees. Once the field office verifies that the claimant has met the non-medical eligibility requirements, it then sends the claim to a state office to determine whether the claimant is disabled. This state office – called Disability Determination Services (DDS) – is staffed by state employees but funded by the federal government. The DDS then submits its finding to the federal field office. If the DDS finds the claimant disabled, the field office makes the appropriate payments. If not, the claimant can appeal within the SSA.[67]

There are also agencies that have federal and state representatives performing the same tasks at the same time, typically in response to some regional issue. For example, the Metropolitan Washington Airports Authority operates Ronald Reagan Washington National Airport and Washington Dulles International Airport. It leases both airports from the Department of Transportation.[68] The MWAA was created by the federal government, the state of Virginia, and the District of Columbia; the last two entered into an interstate compact that Congress approved.[69] Currently, thirteen members comprise the authority's Board of Directors. The governor of Virginia appoints five; the mayor of D.C. selects three; the governor of Maryland picks two; and the President chooses three.[70] Congress recently enacted legislation to increase the size of the board, but Virginia and D.C. also need to pass similar statutes.[71] In addition to running the airports, the authority is in charge of capital improvements at both airports and maintains the Dulles Toll Road. Like OPIC and the Export-Import Bank, discussed in the next section, it is self-supporting.[72]

There are other hybrid federal-state agencies formed by similar compacts. The Delaware River Basin Commission was founded in 1961 to manage the water resources of the Delaware River Basin.[73] The governors of Delaware, New Jersey, New York, and Pennsylvania, and the Division Engineer of the North Atlantic Division of the U.S. Army Corps of Engineers each select one member to serve on the DRBC, which makes decisions by majority vote.[74] In 2010, the agency "proposed a sweeping set of regulations to address nearly every stage of anticipated gas development [including hydraulic fracturing] within the watershed."[75] The Susquehanna River Basin Commission is another such agency.

Finally, there are federal agencies with state representatives in leadership roles. For example, as part of President Johnson's War on Poverty, Congress created the Appalachian Regional

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[66] See Martha Derthick, Agency Under Stress: The Social Security Administration in American Government 5 (1990).
[67] Social Security Administration, Disability Determination Process, available at: http://www.socialsecurity.gov/disability/determination.htm.
[68] MWAA v. Citizens for Abatement of Airport Noise, Inc. 501 U.S. 252, 261 (1991).
[69] 1985 Va. Acts, ch. 598; 1985 D.C. Law 647; 49 U.S.C. § 1743; see also Hechinger v. MWAA, 36 F.3d 97, 98 (D.C. Cir. 1994).
[70] Memorandum from Jenner & Block to MWAA, November 11, 2011, at 7-8, available at: http://www.mwaa.com/file/MWAA__Legislation__Memorandum.pdf.
[71] Memorandum from Jenner & Block to MWAA, supra note 70, at 1. The authority originally had a Board of Review, which oversaw the Board of Directors. After federal courts struck down two versions of the Board of Review as unconstitutional, it was eliminated. Metropolitan Washington Airports Amendments Act of 1996, Pub. L. No. 264, 110 Stat. 3213, 3275 (1996).
[72] MWAA, About the Authority, available at: http://www.metwashairports.com/263.htm.
[73] Delaware River Basin Compact, available at: http://www.state.nj.us/drbc/regs/compa.pdf.
[74] Id.; DRBC, About DBRC, available at: http://www.state.nj.us/drbc/about/.
[75] Osofsky & Wiseman, supra note 11, at 23.

Commission (as well as the Economic Development Administration, which allowed the Secretary of Commerce to create additional regional planning agencies).[76] The President chooses (with Senate confirmation) one member and the Governors of the thirteen Appalachian states each select one member.[77] The ARC is run by two co-chairmen, the federal member and one elected from the state representatives.[78] Using federal money, the agency largely funds projects aimed at helping the region economically.[79] Any decision must be supported by the federal member and a majority of the state members.[80]

2. Federal-Foreign Border

States are not the only governments interconnected with the federal government in various agency structures. Foreign countries and Native American tribes also interact with the federal bureaucracy in interesting ways. The U.S. Government Manual has a separate category for primary international organizations of which the federal government is a part.[81] These thirteen organizations, which range from the United Nations to the African Development Bank, typically are made up of member countries, often with some subset wielding more authority. For example, the International Bank for Reconstruction and Development, known as the World Bank, has 187 country members.[82] A board of executive directors manages the Bank for all the members. Five countries – France, Germany, Japan, the United Kingdom and the United States – each select an executive director; twenty more are elected, in various ways, by the other members.[83] These directors officially select the president of the Bank; in practice, however, the President of the United States has always chosen the president of the World Bank, with European acquiescence.[84]

Each of the international organizations listed in the Manual involves a number of countries. There are also bilateral organizations in which the United States works with either Mexico or Canada on mutually beneficial topics. For example, the federal government and Mexico participate in the International Boundary and Water Commission and the Border Environment Cooperation Commission, and the federal government and Canada are part of the International Joint Commission and the Permanent Board on Defense.[85]

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[76] Moe, supra note 27, at 127-28; see also Appalachian Regional Development Act of 1965, 79 Stat. 5; Public Works and Economic Development Act of 1965, 79 Stat. 551.
[77] 40 U.S.C. § 14301 (b)(1)-(2).
[78] 40 U.S.C. § 14301 (b)(3).
[79] 40 U.S.C. § 14303; Moe, supra note 27, at 128-29. More specifically, the goals of these projects are to: "[i]ncrease job opportunities and per capita income in Appalachia to reach parity with the nation;" "[s]trengthen the capacity of the people of Appalachia to compete in the global economy;" "[d]evelop and improve Appalachia's infrastructure to make the Region economically competitive;" "[b]uild the Appalachian Development Highway System to reduce Appalachia's isolation." ARC, About ARC, available at: http://www.arc.gov/about/index.asp.
[80] 40 U.S.C. § 14302 (a).
[81] The Manual also keeps another list of dozens of "other international organizations in which the United States participates." U.S. Government Manual, Other International Organizations. A good number are subsidiaries of some of the organizations in the original category, such as the World Health Organization, which falls under the United Nations. Id.
[82] World Bank, International Bank for Reconstruction and Development, available at: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/.
[83] China, the Russian Federation, and Saudi Arabia each elect one director.
[84] Howard Schneider & Zachary Goldfarb, Jim Yong Kim, Dartmouth College president, tapped by Obama to head World Bank, Wash. Post, March 23, 2012.
[85] U.S. Government Manual, Selected Bilateral Organizations.

3. Federal-Tribal Border

Although the U.S. Government Manual does not place organizations linking the federal government and Native American tribes in a separate category, several such entities exist. For instance, the National Indian Gaming Commission, established in 1988 within the Department of Interior, regulates – through rulemaking and enforcement actions – gaming on tribal lands.[86] The Chairman is appointed by the President and confirmed by the Senate; the Secretary of the Interior selects the other two commissioners, all for three-year terms.[87] Like many independent agencies, party balancing requirements prevent more than two of the three being from the same political party; unlike those agencies, at last two of the three leaders must be enrolled members of a federally recognized tribe.[88]

Other organizations have less formal ties to Native American tribes. The Indian Arts and Crafts Board, another agency within the Interior Department, "promote[s] the economic welfare of the Indian tribes and Indian individuals [and Alaska natives] through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship."[89] None of the uncompensated (but for expenses) five members, selected by the Secretary of Interior, has to be a tribal member.[90] Nevertheless, four of the current five officials are such members.[91]

In short, we see a range of institutions at the boundary of the federal government and other governments or sovereigns. These inter-governmental bodies perform tasks common to classic administrative agencies as well as less typical duties.

C. Between the Federal Government and the Private Sector

The previous two sections focus on agencies on the boundaries between governmental institutions. This section turns to entities on the boundary between the federal government and the non-governmental (or non-sovereign) sectors, most commonly the private, for-profit sector. These diverse organizations can be divided into purely governmental and quasi-governmental agencies. The first category covers federal government corporations. The second encompasses seven different types of institutions — quasi official agencies, government-sponsored enterprises, federally funded research and development centers, agency-related non-profit organizations, venture capital funds, congressionally chartered non-profit organizations, and instrumentalities of indeterminate character. There is no settled official division of these institutions; indeed, lists by various governmental organizations differ.[92] I directly follow here the classification of these agencies by the CRS.[93]

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[86] Indian Gaming Regulatory Act of 1988, Pub. L. No. 00-497, 102 Stat. 2475; 25 U.S.C. § 2706.
[87] 25 U.S.C. § 2704(b)(1).
[88] 25 U.S.C. § 2704(b)(3).
[89] 25 U.S.C. § 305a.
[90] 25 U.S.C. § 305.
[91] Indian Arts and Crafts Board, Commissioners Biographical Information, available at: http://www.iacb.doi.gov/commissioners.html.
[92] Cf. GAO and CRS.
[93] Kevin R. Kosar, Congressional Research Service, Federal Government Corporations: An Overview, CRS Report No. 30365, June 8, 2011; Kevin R. Kosar, Congressional Research Service, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics, CRS Report No. 30533, June 22, 2011.

1. Government at the Private Border

There is not a settled definition of a government corporation in federal law; sometimes the corporation has to be entirely owned by the United States, other times just partially owned will qualify.[94] The CRS defines the form as follows: "a federal government corporation is an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product of service and is intended to produce revenue that meets or approximates its expenditures."[95] As of 2011, there are seventeen organizations that meet this definition, including Amtrak and the USPS discussed in the introduction.[96] It is a longstanding agency form, with full government ownership of a corporate firm first occurring in 1903 with the purchase of the Panama Railroad Company.[97] Generally, a government corporation is headed by a CEO and a Board of Directors; the leaders then report to the President or an executive agency head.[98] The most well-known government corporations are likely Amtrak and the USPS, along with the Federal Deposit Insurance Corporation and the Tennessee Valley Authority.

Some, such as Amtrak, take direct government funding. Others started with congressional appropriations but are now self-sustaining, or have been self-sustaining the whole time. The Export-Import Bank, for instance, has returned money to the Treasury since Fiscal Year 2008.[99] OPIC must run on a "self-sustaining basis."[100] Many, including the USPS, benefit from government granted monopolies.

2. Quasi Government at the Private Border

The remaining sets of entities are less governmental in nature but still straddle the public-private boundary. Quasi official agencies, a category of the U.S. Government Manual, are arguably the most governmental of these other categories. The Manual lists four such institutions: the Legal Services Corporation, the Smithsonian Institution, the State Justice Initiative, and the United States Institute of Peace.[101] These entities have some classic governmental duties, most critically, that they have to publish information on their activities in the *Federal Register*.[102] But they are not considered to be executive agencies as that term is defined in federal law.[103] Thus, for example, they are not subject to FOIA.

As with government corporations and quasi official agencies, there is no settled definition of government-sponsored enterprises.[104] GSEs generally have the following attributes: they are privately owned and run by a board of directors; they make loans or loan guarantees for purposes

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[94] Kosar, Government Corporations, supra note 93, at 2.
[95] Id.
[96] Id., at 15.
[97] Id., at 3.
[98] Moe, supra note 27, at 92. There are some exceptions, such as the St. Lawrence Seaway Development Corporation, which is headed by an Administrator. Id., at 94.
[99] Ilias, supra note 19, at 2.
[100] Shayerah Ilias, Congressional Research Service, The Overseas Private Investment Corporation: Background and Legislative Issues, Report No. 980567, Dec. 1, 2009, at 5.
[101] U.S. Government Manual, Quasi Official Agencies.
[102] Kosar, Quasi Government, supra note 93, at 6.
[103] 5 U.S.C. § 105 ("For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment.").
[104] Kosar, Quasi Government, supra note 93, at 7. See also 2 U.S.C. § 622(8)(defining GSE for budgetary purposes).

determined by Congress and face limited competition; they cannot exercise government powers or commit the government financially, and their employees are not paid by the government; and their obligations are implicitly guaranteed by the government.[105] As to the first characteristic, investors are supposed to own three of the five existing GSEs; their borrowers are designed to own the other two. The Federal Agricultural Mortgage Corporation (Farmer Mac); the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal National Mortgage Association (Fannie Mae) make up the first group; the Farm Credit System and the Federal Home Loan Bank System constitute the second.[106]

Federally funded research and development centers have fewer governmental connections than the preceding two categories. Instead of sharing a profit motive with GSEs, FFRDCs are non-profit corporations. They receive federal funds to do work for particular government agencies, mostly defense related; they typically do not have to compete for the money.[107] Agencies, according to the Federal Acquisition Regulation, can use FFRDCs only for "some long-term research or development need [that] cannot be met effectively by existing in-house or contractor resources."[108] Some FFRDCs are restricted from taking non-federal money.[109] The Department of Defense sponsors ten such organizations, including the National Defense Research Institute (part of RAND Corporation) and the Lincoln Laboratory (part of Massachusetts Institute of Technology).[110] The Department of Energy funds sixteen organizations, including many national laboratories such as Lawrence Livermore, Los Alamos and Oak Ridge. In Fiscal Year 2010, the government spent $16.8 billion on these FFRDCs; this included over $1 billion from the American Recovery and Reinvestment Act of 2009.[111] This funding made up 97.3 percent of these entities' expenditures in the same period.[112]

Other non-profit corporations exist at the border of the federal government. The category of agency-related non-profit corporations captures these entities. Although all of the included entities have some sort of a legal connection with a traditional federal agency, that connection can vary widely. [113] The CRS therefore breaks this category into three groups: adjunct organizations under a federal agency's control; organizations independent of, but dependent upon, a federal agency; and non-profit organizations voluntarily affiliated with a federal agency.[114]

Congress creates (or permits an agency to create) entities in the first group, adjunct organizations under a federal agency's control, to "perform functions the [agency] itself finds difficult to integrate into its regular policy and financial processes," such as accepting charitable donations.[115] The National Park Foundation is one example; established by Congress in 1967, it is "the only national charitable nonprofit whose sole mission is to directly support the National Park

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[105] Kosar, Quasi Government, supra note 93, at 7-8.
[106] Id., at 8.
[107] Id., at 10-11.
[108] FAR, 35.017.
[109] Ronda Britt, National Science Foundation, ARRA Funding Raises R&D Expenditures within Federally Funded R&D Centers 11% to $16.8 Billion in FY 2010, NSF Report No. 12-315, at 2 n.3 (March 2012).
[110] National Science Foundation, Master Government List of Federally Funded R&D Centers (FFRDCs), available at: http://www.nsf.gov/statistics/ffrdclist/agency.cfm.
[111] Britt, supra note 109, at 1.
[112] Id.
[113] Kosar, Quasi Government, supra note 93, at 12.
[114] Id.
[115] Id., at 14-15.

Service."[116] The Secretary of the Interior, the Director of the National Park Service (ex officio), and at least six private individuals chosen by the Secretary sit on the Foundation's board.[117] The Public Company Accounting Oversight Board, incorporated under D.C. law as a non-profit corporation, is another example.[118] The removal restrictions on the members of PCAOB generated considerable discussion, and a Supreme Court case striking them down.[119] Very little attention was paid to the non-profit corporate structure, however. Indeed, commentators often treated PCAOB as an independent regulatory commission sitting inside another such commission.

Congress also creates (or again allows an agency to create) members in the second group, organizations independent of, but dependent upon, a federal agency. Unlike the first group, the federal agency has far less control over these entities. Most notably, there are over 85 (across 41 states) of these organizations tied to the Department of Veterans Affairs, called non-profit research and education corporations. The Secretary of Veterans Affairs, by statute, can "authorize the establishment at any Department medical center" of an NPC "to provide a flexible funding mechanism for the conduct of approved research and education at the medical center."[120] The government retains some control over the NPC. The Secretary appoints the NPC's board, which has to include the director of the medical center.[121] The NPC can be investigated by the Department's Inspector General. [122] In addition, the NPC is bound by "[f]ederal laws, regulations, and executive orders and directives [that] apply generally to private nonprofit corporations," such as conflict of interest mandates.[123]

The last group of agency-related non-profit corporations encompasses non-profit organizations that affiliate with a federal agency. Unlike the organizations in the other two groups, these entities are not created under federal law. Rather they are created entirely under state (or D.C.) law.[124] For instance, Congress tasked the National Park Foundation to "assist in the creation of local nonprofit support organizations."[125] Congress specifically intended that these "Park Partners" would affiliate voluntarily.[126] Under my definition of boundary institutions, these organizations do not qualify.

The federal government also funds or supports venture capital vehicles. Enterprise funds – which have been established for Poland and Hungary in 1989 – are "designated by the President pursuant to law and governed by a Board of Directors, which undertake loans, grants, equity investments, feasibility studies, technical assistance, training, and other forms of assistance to private

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[116] National Park Foundation, About Us, available at: http://www.nationalparks.org/about-us.
[117] 16 U.S.C. § 19f.
[118] 15 U.S.C. § 7211(b) ("The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.").
[119] Free Enterprise Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138 (2010).
[120] 38 U.S.C. § 7361(a).
[121] Kosar, Quasi Government, supra note 93, at 17-18.
[122] Id., at 18.
[123] 38 U.S.C. § 7361(a); Kosar, Quasi Government, supra note 93, at 17-18.
[124] Kosar, Quasi Government, supra note 93, at 18.
[125] 16 U.S.C. § 19o.
[126] 16 U.S.C. § 19o(f)(2)("An affiliation with the Foundation shall be established only at the discretion of the governing board of a nonprofit organization."); Kosar, Quasi Government, supra note 93, at 18.

enterprise activities in the Eastern European country. . . ."[127] The federal government pays for these funds, which were established as private non-profit corporations under Delaware law.[128] Investment funds, by contrast, are not paid for by the federal government but rely on government guarantees. Specifically, OPIC guarantees loans made to "private, profit-seeking corporate investment funds" that invest in particular developing countries.[129] These venture capital vehicles involve billions of dollars.[130]

The next category has far less financial and governmental import. Congressionally chartered non-profit organizations, known as title 36 corporations, are private entities "with a patriotic, charitable, historical, or educational purpose."[131] Part II of Title 36 currently lists 94 such entities, including Boy Scouts of America, Little League Baseball, and the National Academy of Sciences. These entities often operate under federal and state charters.[132] The federal part, however, is typically honorific: they "do not receive direct appropriations, they exercise no federal powers, their debts are not covered by the full faith and credit of the United States, and they do not enjoy original jurisdiction in the federal courts."[133] Typically, the only federal mandate faced by these organizations is an independent annual audit, the results of which must be given to Congress.[134] A few entities, including the National Academy of Sciences, face other requirements.[135]

Some organizations do not fit into the previous six categories of quasi-governmental entities. The CRS has a catchall category for them, instrumentalities of indeterminate character. Three examples are the American Institute in Taiwan, the National Endowment for Democracy, and U.S. Investigation Services.[136] Each has a range of attributes. The NED, for example, was established under D.C. law to operate in countries where the U.S. was prevented by law from giving direct foreign aid. The federal government funds the NED. The NED, in turn, must meet various federal mandates, including being subject to FOIA.[137]

In short, the range of governmental-nongovernmental entities is vast. As with the intergovernmental organizations in the previous section, these organizations have traditional agency attributes along with non-agency characteristics.

D. Movement

The previous three sections describe federal boundary institutions statically – those *currently* completely within in the federal government but not centrally in just one branch, those *currently* connected to the federal government and another governmental or sovereign structure, such as states, foreign countries, and Native American tribes, and those *currently* linked to the federal government and the non-profit or profit sectors. This section looks at these entities dynamically.

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[127] 22 U.S.C. § 5401(c)(5); Kosar, Quasi Government, supra note 93, at 19.
[128] Kosar, Quasi Government, supra note 93, at 19.
[129] Id., at 20.
[130] Id.
[131] Id., at 22.
[132] Id., at 23.
[133] Id.
[134] 36 U.S.C. § 10101.
[135] Kosar, Quasi Government, supra note 93, at 24.
[136] Id., at 26-31.
[137] Id., at 27.

Specifically, it describes movement to the boundary as well as movement to the center. As with the static components, this effort is only descriptive. Later parts of the paper take up related explanatory, normative, and legal questions.

All agencies are created. Some die. And some change form. Some of these changes in structure can shift an agency within a particular category. For instance, an executive agency can be elevated to a cabinet department, as the Veterans Affairs Administration was in 1989. The Food, Drug, and Insecticide Administration, within the Department of Agriculture, became the Food and Drug Administration, within the then Department of Health, Education, and Welfare, in 1953. Because this paper centers on boundary institutions, I describe shifts only from the center to the boundary, or to the center from the boundary.

1. Movement toward the Boundary

There are centrifugal examples – agencies that started more centrally within the executive branch and formally moved to a boundary with another federal branch, governmental entity, or the private sector. Movement in this vein within the federal government generally transforms an executive agency into an independent regulatory commission, or something close. In the 1990s, for instance, the Federal Aviation Administration, Internal Revenue Service, and the Social Security Administration became more independent. Prior to the late 1990s, each agency largely functioned as a classic executive agency, with a Senate-confirmed administrator who served at the pleasure of the President. At various points in the 1990s, Congress passed legislation to make the top position in each agency a term appointment.[138] Although still selected by the President and confirmed by the Senate, each agency's administrator now can be removed only for cause.

Congress has also shifted federal entities toward other governments. These moves generally involve sections of federal agencies being moved into newly created mixed-governmental structures. For instance, the Department of Transportation, through the FAA, used to own and operate Ronald Reagan Washington National Airport and Washington Dulles International Airport.[139] Those airports were then transferred to the MWAA, which also took over their operation. Thus, in some sense, part of the FAA moved to the border between the federal government and certain states. Similarly, nineteen federal agencies gave up their authority over the Delaware River Basin when the DRBC was created.[140]

Finally, classic executive agencies have been restructured to look more like private entities. The most notable such move involves the postal service. The postal service is the second oldest agency of the federal government.[141] Its leaders were purely "executive officers."[142] In 1971, the

[138] The Federal Aviation Administration Authorization Act of 1994; the IRS Restructuring and Reform Act of 1998; the Social Security Independence and Program Improvements Act of 1994.
[139] Metropolitan Washington Airports Act of 1986, § 6005(a), Public Law No. 99–500, 100 Stat. 1783–375, Public Law No. 99–591, 100 Stat. 3341–378; MWAA, About the MWAA, History, available at: http://www.metwashairports.com/263.htm.
[140] Delaware River Basin Compact.
[141] The Department of War, now part of the Department of Defense, was the first agency.
[142] Myers v. United States, 272 U.S. 52, 52 (1926); see also Richard R. John, Spreading the News: The American Postal Service from Franklin to Morse (1995).

longstanding executive agency became an "independent establishment."[143] Since the change, the agency has functioned as a government corporation, run by a Board of Governors (akin to a Board of Directors). The President selects, with Senate confirmation, nine members of the Board, who in turn appoint a Postmaster General who also becomes a member of the Board; those ten members then select a Deputy who likewise becomes a Board member.[144]

2. Movement toward the Center

There are centripetal examples as well – agencies that moved from a boundary with another federal branch, government or tribe, or nongovernmental space toward the center of the executive branch – though such moves seem rarer. Within the federal government, these shifts generally happen when agencies are demolished or combined. For instance, by the time the Civil Aeronautics Board, an independent regulatory commission, ceased to exist in 1984, some of its duties had been transferred to the FAA.[145] To create the Federal Housing Finance Agency, an executive agency, in 2008, Congress merged the Office of Federal Housing Enterprise Oversight and the independent Federal Housing Finance Board.[146]

President Obama recently asked Congress for power to consolidate six agencies assigned business and trade duties into an executive agency: the relevant components of the Commerce Department and all of the Small Business Administration, the Office of the U.S. Trade Representative, the Export-Import Bank, the OPIC, and the U.S. Trade and Development Agency.[147] This proposal would move two government corporations into a larger cabinet department.[148]

Federal agencies have also taken over tasks once managed by a mix of federal and state authorities. For instance, the states (and localities) used to completely control education at the start of the United States, with increasing federal funding over time. The organizational structure "evolved from a 'layer cake' into a 'marbled cake'" with state and federal entities wielding overlapping authority.[149] The federal government then consolidated certain functions when it created the Department of Education in 1980.

Lastly, the federal government has "nationalized" entities at the public-private border. The FHFA, discussed above, also received regulatory authority over Fannie Mae and Freddie Mac.[150] This move "place[d] Fannie Mae and Freddie Mac back in direct federal control."[151]

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[143] The Postal Reorganization Act of August 12, 1970, Public Law No. 91-375, 84 Stat. 719; 39 U.S.C. § 201 (change took effect in 1971).
[144] 39 U.S.C. § 202.
[145] Edmund Preston, The Federal Aviation Administration and Its Predecessor Agencies, available at: http://www.centennialofflight.gov/essay/Government_Role/FAA_History/POL8.htm. The CAB had earlier gained duties from the Civil Aeronautics Authority, a stand-alone executive agency, which even earlier had taken responsibilities from Department of Commerce. Id.
[146] The Housing and Economic Recovery Act of 2008, Public L. No. 110-289, 122 Stat. 2654; 12 U.S.C. § 4511.
[147] Sean Reilly, Administration to push bill for fast-track reorganization authority, Fed. Times, Jan. 31, 2012.
[148] Id.
[149] Larry C. Rampp et al., An Administrative History of the Creation of the U.S. Department of Education 16 (1998).
[150] 12 U.S.C. § 4511(b)(2).
[151] Bressman & Thompson, supra note 12, at 608 n.34.

In sum, institutions do not always stay at the border, or in the center. Thus, it is important to think about border institutions statically as well as dynamically. The next part takes up positive and normative theories for their creation and movement.

II. Theories of Boundary Institutions

As the last Part demonstrates, boundary institutions help form the federal administrative state. They populate the borders among the branches of the federal government; they live at the borders between the federal government and the states (as well as between the federal government and other sovereigns); and they sit, in a multitude of forms, at the borders between the federal government and the private (both profit and non-profit) sector. Their prevalence raises critical positive and normative questions about their creation and movement.

This Part attempts to provide some answers. The first section advances a theory for why politically savvy federal actors – Congress and the White House – establish such institutions. This theory is explanatory (and predictive). It is not, however, a defense of these institutions as a matter of social welfare or democratic legitimacy. The second section turns to these questions of desirability, taking each goal in turn. The third section briefly considers both the positive and normative questions in a more dynamic setting.

A. Positive Theory

I advance here a theory for why rational political actors would create boundary institutions. The rough intuition comes from microeconomics. If each side of the boundary – federal government and private sector, for example – represents a "corner" solution to some maximization problem of agency design, boundary institutions are "interior" solutions. Corner solutions are either rare or uninteresting, as a general matter. It would therefore not be surprising to see many interior solutions or boundary institutions.

But what is the maximization problem? First, we need a few assumptions. I presume that the President and Congress are jointly deciding on the agency's form.[152] In other words, I am not considering the preferences of interest groups or the agencies themselves, except as they are manifested in the preferences of the President and Congress. I treat each as a single player. To be sure, Congress is a "they", not an "it."[153] In addition, I assume that these political actors are creating one agency for a particular problem. This means that the actors have already decided to delegate authority to another institution.[154] It also means that the actors cannot create multiple institutions.[155] It is possible, of course, for two institutions, one of each side of a particular boundary, for example, to function like one institution at the boundary. The choice this paper examines is what form that one agency should take.

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[152] Though Presidents unilaterally create agencies, they tend not to establish boundary institutions, but rather agencies under their direct control. See William G. Howell & David E. Lewis, Agencies by Presidential Design, 64 J. Pol. 1095 (2002) (finding that Presidents created no government corporations in a 50-year period).

[153] Think congressional majority when you see Congress; some of the intra-institution dynamics will be touched on below.

[154] David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers (1999).

[155] O'Connell, supra note 21.

In recent work in political science on agency design, most notably by Terry Moe and David Lewis, the President and Congress care most about political control. Specifically, Presidents prefer agencies under their direct supervision (defined typically as cabinet departments and executive agencies). What members of Congress want depends on how similar their interests are with the President's preferences. When preferences diverge, they prefer agencies more insulated from the President (defined typically as independent regulatory commissions and boards). This assessment of preferences occurs at the point of agency formation, with members of Congress also assessing expected divergence in the future. If members of Congress have trouble reaching consensus, the President is more likely to get a less insulated agency.[156]

Even assuming that these political actors care only about political control, the prevalence of boundary institutions suggests that the choice is not necessarily between a cabinet department or executive agency, on one hand, and an independent regulatory commission or board, on the other. To the extent that the latter functions to give members of Congress more control, the choice has a zero sum nature to it. Boundary institutions may, however, allow both the President and Congress to commit credibly to having the same amount of control. That level could be high or more typically low.

Other research does not assume political control brings only benefits. Stephane Lavertu posits that Presidents, at least, care about "the political and policy uncertainty associated with conflict-ridden policy issues."[157] In other words, Presidents may want to avoid being blamed for bad policies in certain areas and therefore prefer more insulated agencies. For Lavertu, that insulation is from all political actors. The sharing of political control between two political actors can also decrease this risk.[158] Matthew Stephenson suggests that political principals may prefer less uncertain but more biased outcomes, in other words, trading off control for expertise.[159] More anecdotally, it seems that both the President and Congress care about the political repercussions of their agency design choices. It is more than a dislike for uncertainty and blame if outcomes are poor. These days, it seems politically unwise to propose expanding the size of the federal government.

To capture some of these complexities in a more systematic fashion, I propose the following "model" to explain the creation (and movement) of boundary institutions. Recall that I am taking much as given – that one agency is to be created, that the President and Congress are the institutions forming that agency; and that the task the agency will perform is defined – to focus on what agency structure will be chosen. That structure will, of course, vary depending on the characteristics of these given items such as the party affiliation of the political institutions, the presence (or absence) of divided government, and the type of task. In this model, the agency creators – the President and Congress – care about two dimensions: political control and competence. Let me explain each in turn.

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[156] Lewis, supra note 12, at 30-32.
[157] Stephane Lavertu, Issue-Specific Conflict and Presidential Demand for Politically Exposed Agencies (Jan. 16, 2010), at 1.
[158] Jide O. Nzelibe & Matthew C. Stephenson, Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design, 123 Harv. L. Rev. 617, 622 (2010); see also Bressman & Thompson, supra note 12, at 630.
[159] Matthew Stephenson, Optimal Control of the Bureaucracy, 107 Mich. L. Rev. 53 (2008).

1. Political Control

Political control of the agency depends, at least in part, on form. The President has more control over cabinet departments, for example, than independent regulatory commissions with the latter category's leaders typically having removal protections, for instance. Congress has more control over the GAO than a GSE because Congress funds the GAO's budget and plays a substantial role in picking its leader.

Political scientists tend to emphasize the benefits of political control.[160] Under this view, bureaucracies can help implement policies that generate electoral support. Thus, in a benefit-only or benefit-dominant perspective, Presidents want agencies under their control and Congress wants agencies under or closer to their control. Divided government exacerbates this tension. What follows then is a zero-sum quality to agency creation between the two branches. An agency more under the President's control is an agency less under Congress's control. It can make both institutions worse off: Congress may provide fewer resources to an agency more under the President's control.[161] If the institutions could make credible commitments about post-creation or post-appointment behavior, such as the White House being unable to replace certain agency leaders because of removal restrictions, they would both benefit.[162]

Political control can have other costs as well. Unpopular agency actions may generate blame and electoral backlash for those politicians too closely affiliated to the institutions. For instance, members of Congress like their lack of control over the Defense Base Closure and Realignment Commission so that when the Commission effectively closes a military base, the state's legislators have the necessary distance from the decision. More generally, adding to the classic administrative state can be deeply unpopular, for Democrats and Republicans alike. Less political control may permit an agency to be "off budget," which generates its own electoral benefits. Alternatively, politicians may realize that greater control may undermine the agency expertise needed in a highly uncertain and important policy area.

In short, the President and Congress have to consider the benefits and costs of political control in deciding what form the agency should take. The benefit-cost analysis may differ for each institution. This one dimension generates several propositions:

> Proposition 1: If the benefits to political control exceed the costs, the President prefers more control over the agency. If the costs to political control dominate the benefits, the President prefers less control over the agency.
>
> Proposition 2: As with the President, if the benefits to political control exceed the costs, Congress prefers more control over the agency. If the costs to political control dominate the benefits, Congress prefers less control over the agency.
>
> Proposition 3: Assuming the benefits to political control exceed the costs, in unified government (where the same party controls both Congress and the White House), Congress

[160] See Bressman & Thompson, supra note 12, at 601.
[161] Nolan McCarty, The Appointments Dilemma, 48 Am. J. Pol. Sci. 413 (2004).
[162] Id., at 414; see also Mathew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989).

is more willing to let the President have more control over the agency. If, however, the durability of the President's party's dominance is shaky, Congress is less willing to let the President have more control over the agency.

Proposition 4: Assuming the benefits to political control exceed the costs, in divided government, the President and Congress have to compromise on control of the agency. If the costs to political control dominate the benefits, however, the President and Congress both prefer less control. If one institution views the net benefits as positive (benefits exceeding costs) and the other as negative, the former institution faces no opposition in getting more control.

Considering only political control, the political branches often create boundary institutions when the costs to such control dominate the benefits. They may also form such entities during periods of divided government. Boundary institutions can be a second-best outcome for each branch: unlike some agency structures that give the White House more power (and Congress less) or vice-versa, some boundary institutions give little control to either branch.

Partisanship may also factor into preferences on political control. Republicans, given their stated preferences for states rights, may see more benefits to giving control to entities at the federal-state border (than to institutions entirely at the federal level); whereas, Democrats, given their preferences for international organizations, may see more benefits to allocating authority to institutions at the federal-foreign border. Nevertheless, partisanship seems secondary compared to institutional priorities on the political control dimension, unlike on the competence dimension.

2. Competence

Political control – particularly the benefits of – receives considerable attention in political science. Thinking more seriously about the electoral costs of control is a helpful complication. But it is not enough, especially in trying to explain a wide variety of agency forms. Consider the federal courts and agency-related non-profit corporations (such as PCAOB). The President and Congress have some political control over both (mainly through the appointment of judges and SEC members, who then choose PCAOB members, respectively), but both operate largely independently of the two elected branches. Yet, the institutions are quite different: the courts are classic public entities; agency-related non-profit corporations have state charters and freedom from many traditional government restrictions. For instance, PCAOB members have higher salaries than the President of the United States.

Agency competence – as viewed by the political actors – tries to capture some of these distinctions. Competence here reflects the ability to perform the delegated task, which, to repeat, is taken as given. Ability generally reflects some notion of efficiency, but it could also reflect democratic legitimacy or some other characteristic, so long as that characteristic is not the same as political control. Competence is not measured in quantity – more competent, less competent. Rather, competence is measured along a private-public metric. The most competent entity to conduct criminal trials is arguably purely public. The most competent entity to build a courthouse is likely purely private, through a government contract.

The President and Congress therefore have preferences along this private-public metric as to the best performance of the delegated task. In contrast to political control, where the focus is on the

institution's interests as opposed to a political party's interests, competence may reflect more partisan than institutional preferences. Conservatives lean toward the private sector; liberals emphasize the public, at least when there are market imperfections.

Because the President and Congress are assumed to want the agency to perform the task well, this construction of competence does not easily encompass Terry Moe's theory that political actors seek certain agency structures to prevent the agency from carrying out intended tasks.[163] For instance, Moe suggests that conservatives in Congress favored an independent regulatory commission structure (with multiple decision-makers, party balancing requirements, and removal restrictions) for the Consumer Product Safety Commission, where industry groups would find it easier to slow down agency enforcement.[164] For such circumstances, this second dimension could be viewed as recording preferences for incompetence for some actors and competence for others. This complicates how the two actors negotiate both dimensions, and I do not consider it further.

In sum, the President and Congress have to assess competency in performing the delegated task in figuring out what structure the agency should take. The assessment may differ for each political party and perhaps for each institution. This second dimension, in isolation, generates two propositions:

> Proposition 5: Republicans generally believe more private organizations are better at performing the delegated task than more public ones.
>
> Proposition 6: Democrats generally believe more public organizations are better at performing the delegated task than more private ones.

Considering only competence, as measured on this private-public dimension, when Republicans control the White House and Congress, they are more likely to create boundary institutions for delegated tasks than if the Democrats have such control. In addition, the President and Congress may compromise on boundary institutions during periods of divided government.

3. Putting Political Control and Competence Together

Even with just two dimensions – political control and agency competence – and two designers – the President and Congress – decisions over agency structure can become quite complicated. The objective here is to explain when these designers will choose to create boundary institutions. The Figure (at the end of the paper) roughly illustrates the placement of a variety of entities, including boundary institutions, along these dimensions. The political control dimension, represented on the vertical axis, captures presidential control at the top and congressional control at the bottom. Entities toward the center face little congressional or presidential control or can place both overseers in conflict to gain independence. (This creates some complexities as entities firmly under congressional control do not necessarily confront less presidential control than some entities closer to the origin, removed from both presidential and congressional control.) The competence dimension, represented on the horizontal axis, moves from purely private structures on the left to purely public ones on the right.

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[163] Terry M. Moe, The Politics of Bureaucratic Structure, in Can the Government Govern? 267 (John E. Chubb & Paul E. Peterson eds., 1989).
[164] Id.

Some spaces in this two dimensional model do not house institutions. The Constitution rules out some locations. The next Part takes up legal constraints in more detail. In addition, purely private entities do not face any meaningful presidential or congressional control, for instance. By contrast, other spaces hold many institutions. Mixed public-private entities crowd along the horizontal axis, for example. The placements are relative. A line of public entities is at the right. In that line, cabinet departments face the most presidential control. The courts and institutions at the boundary of the legislative and executive branches face little or opposing amounts of presidential and congressional control. Congressional support agencies, such as the CBO and Library of Congress, and institutions at the border of the legislative and judicial branches face more congressional control than presidential control. The preferences of the President and Congress are not marked; I consider them more systematically below.

In certain contexts, the agency designers face trade-offs between their preferences on political control and those on agency competence. Specifically, if the benefits to political control exceed the costs, Republican Presidents and Congresses confront conflict between their desire for political control and their desire for private institutions (see Propositions 1, 2, and 5); Democratic Presidents and Congresses, however, do not face such a conflict as they are assumed to prefer public institutions. If the costs to political control dominate the benefits, Democratic Presidents and Congresses face a choice between their desire to avoid control and their desire for public institutions (see Propositions 1, 2, and 6); Republican Presidents and Congresses do not confront a conflict in this circumstance as they are assumed to prefer private entities. For those economically inclined, think of the trade-off as a two-good consumer utility model. If the consumer is Republican, the vertical axis measures political control, and the horizontal axis measures extent of privatization (so the origin is roughly no control and no private component).

In addition to considering the connection between the two dimensions in particular contexts for a specific actor, to say anything about what institutional structures are chosen we have to consider how the preferences of the President and Congress interact. Consider five cases: (1) divided government; benefits to political control exceed costs for both actors; (2) divided government; costs to political control dominate benefits for both actors; (3) divided government; benefits to political control exceed costs only for Democrats; (4) unified government; benefits to political control exceed costs; and (5) unified government; costs to political control dominate benefits. Relevant party variations are considered in each case.

In the first case, both Republicans and Democrats see the benefits to political control as exceeding the costs. Because of divided government, the actors here are at odds – a Republican President and Democratic Congress (or Democratic President and Republican Congress) disagree on political control and agency competency. The outcome depends on bargaining strength but likely rests in the middle area of both of the two dimensions. (If the Republican institution trades off between political control and agency competence in the classic consumer utility diagram, the Democratic player acts as the budget constraint, pushing in toward the origin.)

In the second case, both Republicans and Democrats view the costs to political control as dominating the benefits. The actors are less at odds than the first case, but some conflict remains. A Republican President and Democratic Congress (or Democratic President and Republican Congress) have more similar views on political control, but still clash on agency competency. The result is

similar to the first case, probably somewhere in the middle area of both of the two metrics. The difference is that the parties want to relinquish political control (as opposed to a zero sum game).

In the third case, Republicans see the costs of political control as dominating the benefits but Democrats view the benefits of political control as exceeding the costs. Neither party therefore faces any trade off on its own preferences concerning political control and agency competence. With a Democratic President and Republican Congress, both favor presidential control and have to compromise on agency competency. Thus, the institutions in the upper two quadrants on the figure are possible outcomes. With a Republican President and Democratic Congress, both favor congressional control and have to compromise on agency competency. Therefore, the institutions in the lower two quadrants on the figure are possible outcomes.

In the fourth case, as with the first, both Republicans and Democrats see the benefits to political control as exceeding the costs. Unlike the first case, however, the same party controls the White House and Congress. Under Democratic control, a classic executive agency structure (a cabinet department or free standing executive agency, for example) is an expected result. Under Republican control, the desire for political control is tempered by the desire for privatized structures, making boundary institutions (perhaps with more presidential appointments) plausible outcomes.

In the fifth case, as with the second, both Republicans and Democrats view the costs to political control as dominating the benefits. Unlike the second case, however, the same party controls the White House and Congress. Under Republican control, an agency structure with considerable connections to the private sector is anticipated. Under Democratic control, the preference for public structures and lack of control may yield boundary institutions within the federal government.

B. Normative Theories

The previous section illustrates why politicians may want to establish boundary institutions. This section evaluates whether these institutions are desirable, in terms of social welfare and democratic legitimacy. Commentators often presume, explicitly or implicitly, some tradeoff between these two goals.[165] Just as boundary institutions may balance competence and responsiveness concerns of political actors, they may also finely balance these normative objectives. Assuming these objectives are worthwhile and achievable, that balance will be optimal in a number of contexts.

1. Social Welfare

A social welfare planner cares about the public's economic interest. Compared to other entities, boundary institutions, particularly those at the public-private border, may promote that interest for a variety of reasons. First, such institutions may be more flexible, both in terms of policy mechanisms and objectives. In addition, they may adapt to changing circumstances more quickly

[165] See, e.g., Kosar, Quasi Government, supra note 93, at 4 ("The term 'quasi governmental' began to appear in legislation [in the 1960s], and unusual structures would be constructed to promote 'flexibility,' even when flexibility sometimes resulted in less accountability."); Moe, supra note 27, at 90 ("Administrative integration through overhead control, though supportive of the object of agency political accountability to the President and Congress, does tend to inhibit administrative flexibility and innovation.").

than purely governmental entities. This flexibility may come from freedom from restrictions that other federal agencies face. Alternatively or in combination, it may result from market or other pressures to innovate. Second, border agencies may be more insulated from special interests, whether of public or private actors. By definition, special interests are assumed to diverge from the public interest. This insulation may result from no institution on either side of the boundary holding sufficient authority over the hybrid agency. Third, if there are externalities or informational asymmetries in the market, boundary institutions may produce more efficient outcomes than purely private actors. Similarly, many of these institutions are not lines in the federal budget, requiring governmental outlays; rather, they are self-supporting and often produce revenues for the government. Finally, boundary institutions may have more expertise. For some entities unconstrained by federal hiring rules, this expertise may derive from higher employee salaries (or in some cases by greater turnover at particular levels).

The social welfare story of boundary institutions is easy to tell. Indeed, it is the story often told about many of these institutions, such as government corporations.[166] But it may not be true in particular contexts. First, such institutions may get stuck in particular modes of acting. More public actors may be entrepreneurial; it may be easier to shift one side of the border than both sides. Also, purely private entities may have even more flexibility that quasi private ones. Second, the power vacuum that creates certain insulation for border agencies may also produce opportunities for non-public behavior by such entities, either because they have special interests of their own or because other institutions on neither side of the border may be better able to "capture" them. Third, in the face of market failures, purely public entities may outperform partially private ones. In addition, even if the institutions are self-supporting or bring in money for the government, on net, they often still impose some costs. Finally, boundary institutions may have less expertise. Broader and more central agencies may entice more talented workers, for instance.

In short, boundary institutions have tremendous potential in terms of social welfare. But they are not guaranteed to serve the public's economic interest better than other entities.

2. Democratic Legitimacy

A proponent of democratic legitimacy desires, at least in part, accountability. Compared to other entities, boundary institutions may suffer on this dimension. First, such institutions may be less transparent. This opacity may come from not being subject to governmental disclosure requirements, such as FOIA. Or it may result from not being subject to information mandates on private entities, such as SEC requirements. Second, border agencies may face fewer overseers. Alternatively, the lines of accountability may be fuzzier. In other words, it may be easier to evade attention at the boundary. Finally, boundary institutions may confront less severe consequences for misbehavior. These diminished consequences may result from fewer overseers or from each overseer having less authority or willingness to punish wayward actions.

As with the promotion of social welfare story, the unaccountable narrative is straightforward to recount. It is also commonly recounted.[167] Yet, the reality may be quite different, or at least more complicated, for boundary institutions. To begin, some boundary institutions are subject to governmental disclosure requirements. And others face considerable media attention. Second,

[166] See Moe, supra note 27, at 44.
[167] See id., at 44-45.

boundary institutions may confront more scrutiny. Even if they report to fewer overseers, those overseers may be more vigilant if they are less willing to free ride off the efforts of others. In addition, being at the boundary may create more oversight as both sides of the boundary may take an active role in supervising the entity. Third, border institutions could face greater repercussions for bad actions. Each side of the boundary may exact particular penalties. It may also be easier to terminate a boundary institution than a core executive agency.

In sum, entities at the boundary may raise serious democratic concerns. They are not, however, automatically less accountable than more traditional institutions because of their structural attributes.

These normative goals are often in tension – social welfare may trade off against democratic legitimacy.[168] In the conventional story of public-private entities, economic objectives trump democratic ones. The goals are not, however, necessarily in tension. Boundary institutions can be designed to promote efficiency and accountability. They can also operate in a manner that promotes neither goal.

C. Dynamic Theories

These theories, positive and normative, also apply to the movement of agencies. On the positive side, agencies, to the extent they shift structure, tend to move from the center to the boundary. Any such shift in this direction likely reflects changes in preferences on both the political control and competency dimensions. On political control, the costs to more political control increase relative to the benefits. In times of fiscal constraint, for example, the desire to push an agency off budget literally decreases the costs of political control. On competence, changing party control of the political branches may increase support for more private agency structures, though there are considerable transaction costs for restructuring agencies that already exist.[169] Typically, there needs to be something more – perhaps an incident of political mismanagement in a particular area to spur a shift away from political actors, no matter which party is in control.

In addition, agencies move from the boundary to the center. Such a change also indicates shift on these two dimensions. On political control, the benefits to more political control increase compared to the costs. This could be the result of some crisis where voters will reward political actors from taking charge. On competence, as with movement in the other direction, changing party control may generate support for restructuring. An incident of mismanagement – at the boundary – could help overcome transaction costs.

As with the creation of an agency, any movement may foster (or undermine) social welfare and democratic legitimacy. All of these theories – positive and normative – implicitly assume the legality of boundary institutions. The next Part takes up that topic.

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[168] Karen M. Hult, Agency Merger and Bureaucratic Redesign 3 (1997) ("Only rarely are these standards completely congruent.").

[169] See James G. March & Johan P. Olson, Organizing Political Life: What Administrative Reorganization Tells Us About Government, 77 Am. Pol. Sci. Rev. 281, 281 (1983) (finding a number of piecemeal changes to agencies and very little comprehensive reorganization).

III. Legal Implications of Boundary Institutions

These "other" agencies are everywhere in the administrative state. Some look, at first, very much like the core executive branch departments or even the independent regulatory commissions and boards we pay so much attention to in administrative law, but they turn out to have significant ties to another branch, to another sovereign, or to the market. Others do not look much at all like the agencies we tend to focus on. The preceding parts examined the scope of these entities and proposed some positive and normative theories about their creation and movement. This Part turns to the legal implications, using the traditional administrative agencies as guides.

In short, what becomes clear rather quickly is the lack of clarity. These boundary institutions are not easily defined in the law – an agency for constitutional purposes does not match an agency for statutory purposes, and an entity can be an agency under one statute but not another. They also display some variation in how they are governed outside of constitutional and statutory obligations, in terms of executive and congressional oversight. Because the labels have consequences, the authority to label can be significant. But with Congress labeling agencies for many statutory commands, the courts determining constitutional status, and the White House marking executive obligations, the result is often a confusing list of legal attributes for any given boundary institution.

Take the Smithsonian Institution. Courts have ruled it is a federal agency for purposes of the Federal Tort Claims Act[170] but not a federal agency for purposes of the Privacy Act.[171] It appears it is an agency for the Federal Property and Administrative Services Act but not an agency under the APA.[172] It does not have to meet state insurance and licensing requirements in seeking annuities.[173] The Office of Legal Counsel has concluded that because of its "unique" nature, its status should be determined statute by statute.

The Smithsonian is not unique, as far as boundary institutions go. The FDIC acts in various capacities, including as an insurer, regulator, receiver, and purchaser.[174] In 1994, the Supreme Court ruled that the FDIC, as a receiver, could not rely on federal common law. In that decision, the Supreme Court remarked that the "FDIC is not the United States."[175] Some lower courts have simply applied that statement directly so long as the FDIC is functioning as a receiver. Other lower courts have rejected such a broad reading of the statement. The result: "the farrago of decisions regarding the FDIC's identity – even without *O'Melveny*'s statement – are not conducive to distillation of any coherent rule."[176]

Most recently, the Delaware River Basin Commission has generated some important legal challenges. After the National Environmental Policy Act, which requires federal agencies to assess environmental consequences of their actions, took effect in 1970, the DRBC issued regulations to follow it. A decade later, the DRBC suspended its regulations for budgetary reasons, relying instead on traditional federal agencies to perform analyses for its projects, before formally repealing the

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[170] Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 566 F.2d 289, 296 (D.C. Cir. 1977).
[171] Dong v. Smithsonian Institute, 125 F.3d 877 (D.C. Cir. 1997).
[172] OLC Memo.
[173] Id.
[174] Adam Shajnfeld, An Identity in Disarray: The Federal Deposit Insurance Corporation's Government-Agency Status, 128 Banking L.J. 36, 37-38 (2011).
[175] O'Melveny & Myers v. Federal Deposit Insurance Corporation, 512 U.S. 79, 85 (1994).
[176] Shajnfeld, supra note 174, at 41.

regulations in 1997. In late September, the Eastern District of New York ruled that although the APA did not cover the DRBC, the APA's waiver of sovereign immunity did. By finding the plaintiffs lacked standing, the court did not have to "address multiple difficult issues, including: (1) whether NEPA can be enforced through a cause of action other than the APA; (2) whether the DRBC is a federal agency; (3) and whether, even if not, the presence of a federal officer on the DRBC, and the support and assistance federal agencies give to the DRBC, are sufficient to 'federalize' the DRBC's actions."[177] These are indeed difficult issues.

This Part proceeds as follows. I consider first the constitutional and common law of boundary entities. I examine their legality as well as their obligations and defenses. I then examine the most relevant statutes to these entities, including those governing jurisdiction in the federal courts and those targeting agency action. Finally, I use these boundary agencies to reconsider some classic issues in administrative law.

A. Constitutional and Common Law Implications

The constitutional status of a federal agency, whether located centrally within the executive branch or more peripherally, depends on several core doctrines. The positive authority for creation is typically straightforward but that authority must not infringe on the separation of powers, the non-delegation doctrine, the Appointments Clause and the President's take care and vesting mandates, and the reservation of certain adjudicatory authority in the federal courts. These constraints operate in conventional as well as surprising ways for boundary institutions.

The constitutional obligations pressed on and the defenses raised by governmental entities do not vary much by type of agency, except for those involving states. The tension is instead over whether such obligations and defenses apply to boundary institutions at all.

1. Legality of Boundary Institutions

Under the Necessary and Proper Clause, Congress has the "power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[178] In other words, Congress can enact laws needed to carry out its legislative powers, which include the delegation of intelligible tasks to the administrative state. Specifically, Congress can create a range of agencies, including those at the federal government's boundaries, to carry out these tasks.[179] There are, however, constitutional limits on this power. I focus here on general separation of powers principles as well as constraints in the Appointments Clause.

Under separation of powers principles, no single branch can aggrandize its power beyond the Constitution. Relatedly, no branch can encroach on the authority of another branch. These principles are more relevant to boundary institutions at the interstices of the branches of the federal

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[177] New York v. U.S. Army Corps of Engineers, No. 11-CV-2599, at 28 (E.D.N.Y. Sept. 24, 2012).
[178] U.S. Const. art I, § 8, cl. 18.
[179] See McCulloch v. Maryland, 17 U.S. 316, 316 (1819) ("The power of establishing a corporation is not a distinct sovereign power or end of Government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union, it may be exercised by that Government."); see also Osborn v. Bank of the United States 9 Wheat. (22 U.S.) 738 (1824).

government than to entities at inter-government borders or the public-private divide. Indeed, many important separation of powers cases involve boundary institutions entirely within the federal government.[180]

Institutions at one of the legislative branch's borders seem to face the most skepticism. The original structure of the FEC and the MWAA, for instance, did not survive because of improper connections to Congress. More recently the OLC has warned that requirements that entities concurrently report to the president and Congress "impair the Constitution's 'great principle of unity and responsibility in the Executive Department.'" [181] Obligations to multiple branches, particularly where one of those branches is Congress, could therefore impermissibly weaken another branch's authority.

Removal restrictions imposed by statute on less conventional agencies have run into difficulty as well. The Supreme Court struck down the bar on the Secretary's removal authority over PCAOB members.[182] The D.C. Circuit recently severed the for cause restriction on the Librarian of Congress's power to remove judges on the Copyright Royalty Board, an institution at the border of the legislative and executive branches.[183]

It is sometimes in one branch's interest to place a boundary entity squarely in another branch. For example, the OLC, which sits within the Department of Justice, recently emphasized that the GAO was a legislative branch agency to argue that Congress had acquiesced to certain recess appointments. Specifically, the Comptroller General had ruled that the Pay Act permits the compensation of those appointed "during periods when the Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date."[184] The OLC, by placing the GAO in the legislative branch, equated that Pay Act ruling with congressional acceptance of intra-session recess appointments.[185]

The Appointments Clause is another constraint. It mandates that Presidents nominate, with Senate confirmation, all principal officers and allows Congress to alter this for inferior officers, by assigning appointment power in "the President alone, in the Courts of Law, or in the Heads of Departments."[186] Boundary institutions highlight some critical questions about the Appointments Clause.

First, boundary entities make prominent disagreements about who qualifies as an officer. There is consensus that the exercise of significant federal authority is a necessary condition. But what happens when that authority is wielded by a state or private official? On one view, propounded by the Clinton administration, "[t]he Appointments Clause simply is not implicated when significant

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[180] See, e.g., Mistretta v. United States, 488 U.S. 361 (1989) (Sentencing Commission); Bowsher v. Synar, 478 U.S. 714 (1986) (GAO).
[181] 20 Op. O.L.C. 124 (Dellinger Memo) (quoting Myers v. United States, 272 U.S. 52, 131 (1926)).
[182] Free Enterprise Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138 (2010).
[183] Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board (D.C. Cir. July 6, 2012).
[184] Appointments-Recess Appointments, 28 Comp. Gen. 30, 37 (1948).
[185] Office of Legal Counsel, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, at 7 (Jan. 6, 2012).
[186] U.S. Const. art II, § 2, cl. 2.

authority is devolved upon non-federal actors."[187] These non-federal actors could be state officials or private parties. On another view, propounded by the George H.W. Bush and George W. Bush administrations, the Clause could come into play. Specifically, "any position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'"[188]

Under the Clinton view, the Ninth Circuit correctly ruled that state officials on the Pacific Northwest Electric Power Conservation Planning Council, an institution formed by an interstate compact, are not officers, even if they exercise federal power.[189] Similarly, "members of multinational or international entities who are not appointed to represent the United States" are not officers.[190] Under the Bush view, some of these officials, if they apply federal law, would be officers.[191]

Additional questions arise with boundary institutions when it is not clear the officials are federal actors. As discussed below, if Amtrak or any other entity is seen as part of the federal government for the Bill of Rights, it should also be seen as part of the federal government for structural mandates.[192] Thus, even under the Clinton view of what counts as an office, federal actors exercising significant authority at the boundary must meet the requirements of the Appointments Clause.

Second, boundary institutions raise questions about what counts as a department under the Appointments Clause. Departments in this context must be executive in nature. The D.C. Circuit recently ruled that judges on the Copyright Royalty Board are proper inferior officers if the Librarian of Congress, who appoints them, can remove them at will.[193] Although the decision focused on the statutory removal restriction, which it struck down, it also relied on a determination that the Librarian of Congress was a proper head of a department who could appoint an inferior officer. The Library of Congress, however, is not listed as part of the executive branch in any official classification. Many, including the OLC, label the Library of Congress a legislative agency.[194]

To reach its holding that the Librarian was a proper head of a department under the Appointments Clause, the Court reasoned as follows:

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[187] 20 Op. O.L.C. 124 (Dellinger Memo).
[188] OLC Memo, 2007 WL 1405459 (2007).
[189] Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council, 786 F.2d 1359, 1364-6 (9th Cir. 1986). Other circuits have found institutions formed under interstate compacts sufficiently federal to be sued under the APA. American Trucking Association, Inc. v. Delaware River Joint Toll Bridge Commission, 458 F.3d 291 (3d Cir. 2006); Heard Commissioners, Inc. v. Bi-State Development Agency 18 Fed. Appx. 438 (8th Cir. 2001) (unpublished).
[190] 20 Op. O.L.C. 124 (Dellinger Memo).
[191] See Jim C. Chen, Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States-Canada Free Trade Agreement, 49 Wash. & Lee. L. Rev. 1455, 1483 (1992); John C. Yoo, The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause, 15 Const. Commentary 87 (1998).
[192] 20 Op. O.L.C. 124 (Dellinger Memo) ("Ultimately, we can conceive of no principled basis for distinguishing between the status of a federal entity vis-à-vis constitutional obligations related to individual rights and vis-à-vis the structural obligations that the Constitution imposes on federal entities.").
[193] Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board (D.C. Cir. July 6, 2012).
[194] 20 Op. O.L.C. 124 (Dellinger Memo).

> Despite our language in *Keeffe*, the Library of Congress is a freestanding entity that clearly meets the definition of "Department." To be sure, it performs a range of different functions, including some, such as the Congressional Research Service, that are exercised primarily for legislative purposes. But as we have mentioned, the Librarian is appointed by the President with advice and consent of the Senate, 2 U.S.C. § 136, and is subject to unrestricted removal by the President. Further, the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a "component of the Executive Branch."[195]

The Court has to rely on classifying functions: an agency can, in this view, be an executive department for some purposes but not for others.

The movement of an agency may raise issues as well under the Appointments Clause. Specifically, if Congress imposes considerable new duties on an office, the Constitution likely requires a new appointment.[196]

2. Obligations and Defenses of Boundary Institutions

Many constitutional obligations apply only to state actors. All-government institutions, whether boundary institutions or not, easily qualify as state actors. An executive agency, an agency at the border of the executive and legislative branches, and an agency at the border of the federal government and the states all function similarly for this legal analysis. Only boundary institutions at the government-non government divide present challenges. The primary question for boundary institutions at the public-private border therefore is whether they are sufficiently public to fall under the obligations imposed on and defenses provided to government actors.

These cases are not easy and usually are not unanimous. The Supreme Court, for example, split as to whether the United States Olympic Committee, a Title 36 organization described in Part I, was covered by the Equal Protection Clause.[197] In that case, the majority ruled that the boundary institution was not a government actor under the Constitution.[198]

In *Lebron v. National Railroad Passenger Corporation*, a divided Supreme Court ruled that Amtrak was an instrumentality of the United States for "for the purpose of individual rights guaranteed against the Government by the Constitution."[199] This holding conflicted with the statute creating Amtrak that explicitly stated that Amtrak was not a government agency. The Court recounted the history of government corporations, concluding that these entities had been considered to be part of the government.[200] With respect to Amtrak, the Court noted a series of factors that tied the boundary institution to the government, for constitutional purposes. First, it was created by special statute explicitly to further federal governmental objectives.[201] Second, its leadership structure has considerable ties to the executive branch. At that time, the president directly appointed, with Senate

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[195] Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, at 16 (D.C. Cir. July 6, 2012)(citations omitted).
[196] Shoemaker v. United States, 147 U.S. 282, 301 (1893).
[197] San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987).
[198] Id.
[199] Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 394 (1995).
[200] Id. at 387-94.
[201] Id. at 397.

confirmation, six of the eight external directors of the board. One of the two remaining directors was the Secretary of Transportation, another presidential appointee; the last was the President of Amtrak, who is chosen by the other directors. [202] Although Congress did impose restrictions on the president's selections, the Court held that the restrictions do not establish "an absence of control by the Government as a whole, but rather constitute a restriction imposed by one of the political branches upon the other."[203] In sum, "where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[204]

This decision raises several interesting issues. Most important, it emphasizes that the Court, and not Congress, gets to determine a boundary institution's status for constitutional obligations. Congress can assign statutory obligations. The result, therefore, is that Amtrak is an agency for the First Amendment but not for the APA. If Congress does not expressly exclude a boundary institution from the APA or similar statute, however, the institution's constitutional status as a government agency generally determines its statutory status as well. In addition, it theoretically allows boundary institutions to be subject to certain constitutional obligations to individuals but not more structural obligations. Unlike the leaders of independent regulatory commissions, the directors of Amtrak are neither removable for cause by the President nor impeachable by Congress.[205]

On the flip side of these obligations, boundary institutions present interesting questions about governmental defenses. Such defenses include immunity from suit (and from state law obligations) and special protections, such as deliberative process, within litigation.

B. Statutory Implications

The statutory landscape for classic executive agencies and independent regulatory commissions is clear. To put it simply, they are federal agencies under most any statutory definition of an agency. Thus, they are federal agencies able to sue in federal court; they are federal agencies subject to the APA (and FOIA). The picture for boundary institutions is anything but clear. In a report on government corporations and some other boundary entities, for example, the GAO needed four pages of charts, with abbreviations, to report which of fifteen statutes the entities complied with. More striking, the GAO relied on self-reports (through a survey) by these entities to figure out which statutes they followed, as opposed to analyzing the relevant statutes themselves.[206]

1. Federal Court Jurisdiction

Under 28 U.S.C. § 1345, "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." Boundary institutions have generated a number of cases about the applicability of this provision, including in the past several years.[207]

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[202] Id. at 397.
[203] Id. at 397-98.
[204] Id. at 400.
[205] Id. at 398.
[206] GAO, Government Corporations, Report No. GGD-96-14, at 34-37 (1995).
[207] Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc., 2010 WL 5394742 (N.D. Cal. 2010).

Whether a boundary institution can sue under section 1345 depends on whether that institution is "expressly authorized to sue and be sued,"[208] as well as whether that institution "satisfies the definition of agency provided by section 451."[209] Under section 451, "[t]he term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." It is, therefore, not necessary for Congress to label a boundary institution an "agency" in order for that institution to invoke jurisdiction under section 1345.[210]

Additionally, the phrase "'corporation in which the United States has a proprietary interest'" includes governmental corporations whether or not stock is issued, and excludes those in which the government's interest is merely "custodial or incidental."[211] Some courts have considered whether 28 U.S.C. § 1349 limits section 1345 jurisdiction and therefore, whether the government must "own[] more than one-half of [a corporation's] capital stock" in order to have the requisite proprietary interest.[212] Several courts, however, have ruled that "section 1349 does not affect any jurisdictional grant other than that provided by 28 U.S.C. § 1331(a)."[213]

In short, whether a boundary institution such as a government corporation in which stock has not been issued is entitled to invoke section 1345 jurisdiction generally depends on the nature of the government's interest, a determination that is based on an analysis of that institution's "functions, financing, and management."[214] The Ninth Circuit has a six factor test for this analysis.[215] An entity does not, however, become a governmental agency for section 1345 "simply because it is federally chartered and regulated."[216]

The amorphous analytical framework and the prevalence of boundary institutions have combined to produce a number of cases on the applicability of this jurisdictional statute. One of the most recent is a 2010 Northern District of California decision. In *Federal Home Loan Bank of San*

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[208] Fed. Sav. & Loan Ins. Corp. v. Ticktin, 490 U.S. 82, 85 (1989).
[209] Gov't Nat'l Mortg. Ass'n v. Terry, 608 F.2d 614, 616 (5th Cir. 1979).
[210] Gov't Nat'l Mortg. Ass'n, 608 F.2d at 616. See also, Acron Investments, Inc. v. Fed. Sav. & Loan Ins. Corp., 363 F.2d 236, 239 (9th Cir. 1966) ("An 'independent agency' is no less an 'agency' in the ordinary sense of the word whether it is described in § 451 or not" because "§ 451 is not an all-embracing definition.").
[211] Acron Investments, Inc., 363 F.2d at 239 (citing 80th Congress House Report No. 304); Terry, 608 F.2d at 618.
[212] 28 U.S.C. § 1349 ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.").
[213] See, e.g., Terry, 608 F.2d at 620. See also, Rauscher Pierce Refsnes, Inc. v. F.D.I.C., 789 F.2d 313 (5th Cir. 1986); Federal Land Bank v. Cotton, 410 F. Supp. 169, 170-71 (N.D. Ga. 1975) (noting that "federally-chartered corporations cannot sue or be sued in federal court merely because they are federally chartered, unless the United States government owns 51% of the capital stock"); Acron Invs., Inc., 363 F.2d at 240.
[214] Id.
[215] In re Hoag Ranches, 846 F.2d 1225, 1227-28. The six factor test includes: (1) the extent to which the alleged agency performs a governmental function; (2) the scope of government involvement in the organizations management; (3) whether its operations are financed by the government; (4) whether persons other than the government have a proprietary interest in the alleged agency and whether the government's interest is merely custodial or incidental; (5) whether the organization is referred to as an agency in other statutes; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act." In re Hoag Ranches, 846 F.2d at 1227-28.
[216] Id. at 1227.

Francisco v. Deutsche Bank Securities, Inc., the District Court rejected that the FHLB-SF was a federal agency for section 1345.[217] In that case, the defendants had sought to remove the litigation to federal court, relying on the FHLB-SF being an agency under section 1345. Using the six-factor framework of *In re Hoag Ranches*, the Court determined that although the FHLB-SF arguably served a governmental interest and is treated as an arm of the federal government for purposes of the APA, other considerations weighed against treating the Bank as an agency. Specifically, "the government has very little involvement in the FHLB-SF's management"; the Bank "receives no government money"; the Bank "is privately owned and capitalized only by its members"; and there is an "absence of any reference to the Banks as agencies in any statute."[218]

2. APA and FOIA

The APA and FOIA also refer to agencies, as a general category. The APA defines "agency" as any "authority of the Government of the United States, whether or not it is within or subject to review by another agency."[219] The APA does exclude "the Congress; the courts of the United States; the governments of the territories or possessions of the United States; the government of the District of Columbia" entirely and "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; functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641 (b)(2), of title 50, appendix" in part.[220] Obligations under FOIA apply to any "agency as defined in [the APA] includ[ing] 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."[221] Congress can exempt an institution that would otherwise fall under one of these statutes in specific legislation governing that institution.

Congress has often been more explicit about which boundary institutions are subject to each of these statutes than to section 1345. Most government corporations, for example, are subject to FOIA.[222] Fewer such corporations must follow the APA.[223] Congress's directions, therefore, create fewer cases about these statutes' applicability than section 1345. Institutions, formed by interstate compacts, have generated a number of cases, however. To determine whether the APA applies to such entities, courts have typically weighed three factors: "(1) whether the originating compact is governed, either explicitly or implicitly, by federal procurement regulations; (2) whether a private right of action is available under the compact; and (3) the level of federal participation."[224] The ultimate result for all these statutes, however, is similar: no bright lines for boundary institutions.

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[217] 2010 WL 5394742, *8-11.
[218] Id.
[219] 5 U.S.C. § 551.
[220] Id. (numbers omitted).
[221] 5 U.S.C. § 552(f).
[222] Craig D. Feiser, Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Public Law, 52 Fed. Comm. L.J. 21 (1999); Beermann, supra note 13, at 176.
[223] Breger & Edles, supra note 11, at 1229 n.616.
[224] New York v. Gutierrez, 623 F. Supp. 2d 301, 308-09 (E.D.N.Y. 2009) (quotation marks and citations omitted).

C. Reconsidering "Classic" Agencies

Administrative law depends, at least implicitly, on a cramped view of the administrative state, full of executive agencies and independent regulatory commissions. Recent work does suggest that the administrative state cannot be divided neatly into these two categories. For instance, Kirti Datla and Richard Revesz argue that "all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent." [225] In other words, this work sees a horizontal continuum of agencies along the political control dimension. But political control could also function vertically, between federal and state actors or between federal and foreign players. There are other dimensions as well that drive agency structure. By viewing boundary institutions as important parts of the bureaucracy, this section reconsiders several core issues of bureaucratic politics and administrative law.

Deference doctrines in administrative law do not explicitly depend on the type of agency. In *Mayo Foundation for Medical Education and Research v. United States*, the Court unanimously rejected that the Treasury Department should face less deference for its interpretation of an ambiguous statute in its notice and comment tax law rulemaking: "[W]e have expressly '[r]ecognize[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'"[226] Some members of the Court have suggested that independent regulatory commissions might receive less deference under "arbitrary and capricious" review of section 706(2)(A) of the APA, because of their apparent distance from politics.[227] The proposition has gained traction, however, only (slightly) in the academic commentary and was forcefully rejected by the Court's majority.

Instead, deference doctrines draw largely from the perceived institutional characteristics of agencies, notably their accountability and expertise, at least relative to the courts. *Chevron* deference rests mostly on political accountability;[228] *Skidmore* deference draws primarily on expertise.[229] To the extent that the former is more forgiving to agency action than the latter, we see again the allure of political control.

Boundary institutions suggest more encompassing notions of both accountability and expertise. On the former, if classic agencies are accountable to the President, entities at the federal-state border are accountable arguably to more political actors, whose jobs depend on voters. Other boundary institutions get created because the political branches do not want to exercise control.

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[225] See, e.g., Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), at 1 (working draft 2012). They include some boundary institutions described in Part I but exclude many of them from their analysis. See id. at 17 n.87.

[226] 562 U.S. __ (2011).

[227] Federal Communications Commission v. Fox Television Stations, Inc., 556 U. S. 502 (2009) (Breyer, J,., dissenting) ("But [the FCC]'s comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons.").

[228] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

[229] Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) ("Pursuit of [the agency official's] duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution.").

Those institutions are probably less accountable to political actors. On the latter, if agencies are created in part for political reasons, agency structures of all kinds cannot be removed from politics. In other words, agencies may become experts in particular policy areas but they are not designed by technocrats. Boundary institutions may make these partisan preferences more visible on a range of agency structures.

In addition, current deference doctrines heavily weight procedure. To qualify for *Chevron* deference for an interpretation of an ambiguous statute, an agency, assuming it has been delegated the authority to act with the force of law, must actually use that authority.[230] In other words, since the Supreme Court's 2001 decision in *United States v. Mead Corporation*, notice and comment rulemaking essentially guarantees *Chevron*, as opposed to *Skidmore*, deference, if the statute does not compel a particular interpretation. Procedure has become the manifestation of congressional intent. Boundary institutions demonstrate how tenuous this congressional intent can be. In the end, boundary institutions may encourage more attention to the match between structure and delegated authority as well as to the procedures used to complete the delegated task.

IV. Conclusion

The federal bureaucracy is not confined to the cabinet departments and free standing agencies in the executive branch. The remainder is not, however, stuffed into a "Headless Branch," as *Time* magazine suggested nearly fifty years ago.[231] There are federal agencies in each of the three branches as well as at the interstices between any two branches and even among all three. There are agencies straddling the federal government, on one hand, and foreign countries, states, localities, or tribes, on the other. And there are bureaucratic institutions that have both a public and private side. The complex map of the administrative state is not new. Some of these hybrid structures date back to the founding of the country; many others precede the APA.

Notwithstanding this longstanding architecture of the bureaucracy, administrative law almost entirely trains on the components directly under the President and on the regulatory commissions in that no man's land between the President and Congress. Such a focus creates a number of problems. To start, it constructs a fictional organizational chart. It also prevents systematic consideration of large and important swaths of the administrative state. Relatedly, it restricts the analysis of those swaths that do appear on the artificial chart. Despite these problems, the focus survives. By establishing a dichotomy of executive agencies and regulatory commissions (or in some recent work, a continuum of independence along one dimension), it provides tractability to consider complicated questions of institutional design and policy selection.

The paper here tries to retain some tractability while widening the lens on the administrative state. Most simply, the paper classifies some of the missing federal bureaucracy, along the borders of more conventional categories. That classification exercise is mostly a static one – where those missing parts currently reside – but it also considers movement to and from the center of these categories. In addition, the paper theorizes about these missing components, specifically why political actors would create such institutions. It also considers whether their creation serves efficiency or democratic legitimacy objectives, suggesting that social welfare may not always be trumping accountability in these alternative agency structures, and that in some cases there might

[230] United States v. Mead Corp., 533 U.S. 218 (2001).
[231] The Headless Branch, Time Mag., July 31, 1964. The article covered independent regulatory commissions and boards.

not be a trade-off at all between the two (including because both are sacrificed). Finally, the paper examines the "law" surrounding these other entities and how these entities might shape already established law and governance of federal agencies.

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The USPS is the nation's second oldest agency, after the Army. Indeed, the Continental Congress named Benjamin Franklin Postmaster General in 1775. He was still in the position when the Declaration of Independence was signed, making him the country's first head of the posts. The Post Office continued uninterrupted under the Constitution. For close to 150 years, the agency even had cabinet status, though many (but not all) of its leaders were less familiar to the contemporaneous public than Franklin. One leader used the job as a stepping stone to the Supreme Court. Until 1971, it was the classic executive agency with "purely executive officers," [232] whom the president could remove at will. In administrative law, its pre-1971 form serves as a benchmark from which to measure the FTC and other independent regulatory commissions.

Even the pre-1971 postal service was not a simple legal construct. Established because of political necessity (the Continental Congress needed to communicate with the men fighting for independence), the agency operated in a deeply political context. Leadership positions became desired objects of political patronage. The line employees comprised a significant chunk of the federal workforce.[233] The agency was enmeshed in the federal bureaucracy. The ties also ran vertically. With locations in towns across the country, the local post office – staffed by nearby residents – functioned as a town hall, allowing the transmission of news both through the mails and through the people who gathered there as part of their daily chores. At least in its first century, historian Richard John argues, "that for the vast majority of Americans the postal system *was* the central government."[234]

Just as politics propelled its creation, politics drove its structural shift to a government corporation. In October 1966, approximately ten million pieces of mail became stuck in the Chicago Post Office. The Postmaster General at the time detailed the horrifying scene:

> The sorting room floors were bursting with more than 5 million letters, parcels, circulars, and magazines that could not be processed. Outbound mail sacks formed small grey mountain ranges while they waited to be shipped out. Our new and beleaguered Chicago postmaster summed it up pretty well when he said: "We had mail coming out of our ears."[235]

Congressional hearings and a presidential commission soon followed, laying bare the "little centralized control, tangled finances, outmoded facilities and unhappy workers."[236]

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[232] Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).
[233] John, supra note 142, at 3-4 ("In 1831, the postal system, with more than 8,700 postmasters, employed just over three-quarters of the *entire* federal civilian work force, mostly as part-time postmasters in villages and towns scattered through the countryside. The federal army, in contrast, consisted of a mere 6,332 men, most of whom were located at isolated army posts in the transappalachian West.").
[234] John, supra note 142, at 4.
[235] USPS, The United States Postal Service - An American History 1775 – 2006 (2007).
[236] Ben White, Getting the Lowdown on the People Who've Got Mail, Wash. Post, Aug. 27, 2001, at A13.

The Commission on Postal Reorganization, established by President Johnson, called for the postal service to be refashioned as a government owned corporation, rejecting both minor modifications to its current cabinet department form (because of the mission of the agency) as well as complete privatization (because of the financial consequences).[237] In the midst of legislative negotiations over the Commission's proposals, over 150,000 postal employees in nearly 700 locations stopped working, forcing the President to order the original recipients of the mails, the Army, to step in.[238] The employees went back to work with a promised pay increase, and more to come if parties agreed on a reorganization plan.

Several months later, President Nixon signed the Postal Reorganization Act of 1970, which transformed the cabinet department into a government corporation. Nine Senate-confirmed presidential appointees serve as postal governors, who in turn select the Postmaster General; all ten then select the Deputy. The USPS has to maintain "universal service" – that is, it must deliver mail to every address in the country – without any direct congressional appropriations (except for services for the blind and overseas military personnel), though it can borrow funds from the Treasury Department. It does, however, continue to benefit from a government granted monopoly on first-class letters. It also "pays no state or federal taxes and does not have to license or tag its huge fleet of trucks."[239] Its employees are federal government workers. The Act also established "a collective bargaining structure with binding arbitration to banish potentially crippling strikes."[240] The 1970 legislation also created another agency, the Postal Rate Commission, to help set postal rates; the PRC considers proposals from the postal service and makes recommendations, but the USPS ultimately makes the call, though under considerable constraints.[241] In 1996, Congress assigned the USPS an Inspector General (chosen by the Governors but with reporting obligations to Congress).

The USPS may no longer be a cabinet department, but it remains a critical component of the federal administrative state. It is still "the only federal agency with which most people directly interact almost every day, both as senders and receivers of mail."[242] Yet, the USPS, in its current manifestation, is largely absent from administrative law. The change in structure from a cabinet department to a government corporation is also largely missing, though most agency movement, save for some agency creation and some agency termination, is generally hidden in our static take on the bureaucracy.

If the USPS were not missing (or pushed to the margins), we could have more discussion about why the political branches create government corporations as well as richer discussion about why they have executive agencies (or independent regulatory commissions). We might focus less on the benefits of political control and more on other factors. In addition, we could have more analysis of the efficiency and legitimacy of government corporations, and, again, fuller analysis of the social

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[237] The President's Commission on Postal Organization, Towards Postal Excellence, at 1-2 (1968).
[238] USPS, supra note 235.
[239] White, supra note 236, at A13.
[240] Id.
[241] Id. (The governors "can vote to accepts the rates suggested by the commission, they can accept the rates 'under protest' and ask the commission to reconsider, or they can reject the decision and vote [if unanimous] to impose whichever rates they want.").
[242] R. Richard Geddes, Policy Watch: Reform of the U.S. Postal Service, 19 J. Econ. Perspectives 217, 218 (2005). To be sure, with electronic communication, texting, social media and on-line bill paying as partial substitutes, we send and receive less mail nowadays. Ron Nixon, As Default Looms, Postal Service Sees Deeper Woes, N.Y. Times, July 31, 2012 (noting six year decline in mail volume).

welfare and accountability of executive agencies. We could also better assess how the Constitution and agency statutes justify and govern agency action, of all kinds.

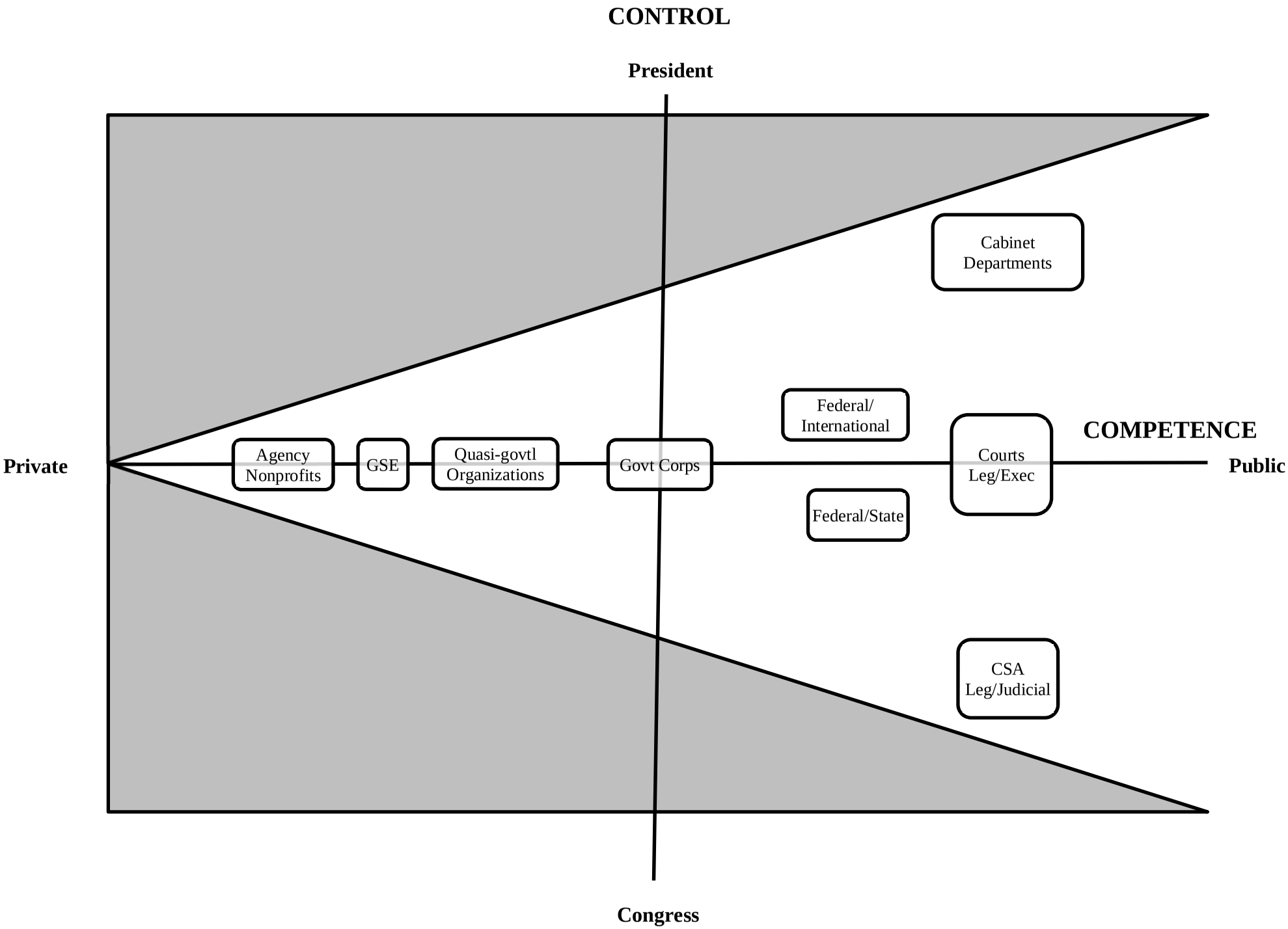
Finally, we could potentially contribute to the current debate about the USPS in less conventional ways. Peter Orszag, President Obama's former director of the Office of Management and Budget, has called for it to be completely privatized.[243] If institutional design were simply a question of economics, we could balance the benefits and costs of privatizing the USPS, which is running – quickly – out of cash.[244] Even that analysis proves more complex than it might first appear, with the USPS serving as the nation's second largest employer in an economic climate where unemployment is teetering around eight percent.[245]

Institutional design is not, however, at base a question of economics; it is a question of politics. The USPS wants to get back overpayments it has made into employee pensions. It also wants to cut hours, employees, and offices. But it cannot do almost any of that (or expand into new businesses such as banking or telecommunications) without Congress's acquiescence. Those employees make up a powerful interest group (and they have certain guarantees in their labor contracts). And many members of Congress represent small towns, whose residents rely on the universal service mandate and on their local post office for personal and business communications. These Members benefit from acting as overseers and suffer if they close offices.

What to do? Congress could establish an independent commission, like the Defense Base Closure and Realignment Commission, to make service reduction and closure decisions. As with shutting military bases, such a commission would help soften the political consequences. Congress also could make it easier for the leaders of the USPS to set rates, either by drawing leaders of the PRC from the USPS or by permitting the USPS to overrule PRC recommendations by majority (as opposed to unanimous) vote. Within the constraints of what is politically feasible, we might be able to get past the assumed tradeoff between the efficiency of the private sector and the democratic legitimacy of the government.

In some sense, the current postal service is the paragon boundary institution – a less conventional structural form but central to the administrative state. We could benefit from thinking more about it and similar entities.

[243] Peter Orszag, Best Fix for Postal Service Is to Take It Private, Bloomberg View, July 24, 2012.
[244] The USPS recently defaulted on a $5.6 billion loan payment for future retiree health benefits. Ron Nixon, Distress Deepening, Postal Service Defaults on $5.6 Billion Benefits Payment, N.Y. Times, Oct. 1, 2012.
[245] Mike Tae & Adam LaVier, How to Save the U.S. Postal Service, Wash. Post, Aug. 10. 2012.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