

ADMINISTRATIVE & REGULATORY LAW NEWS

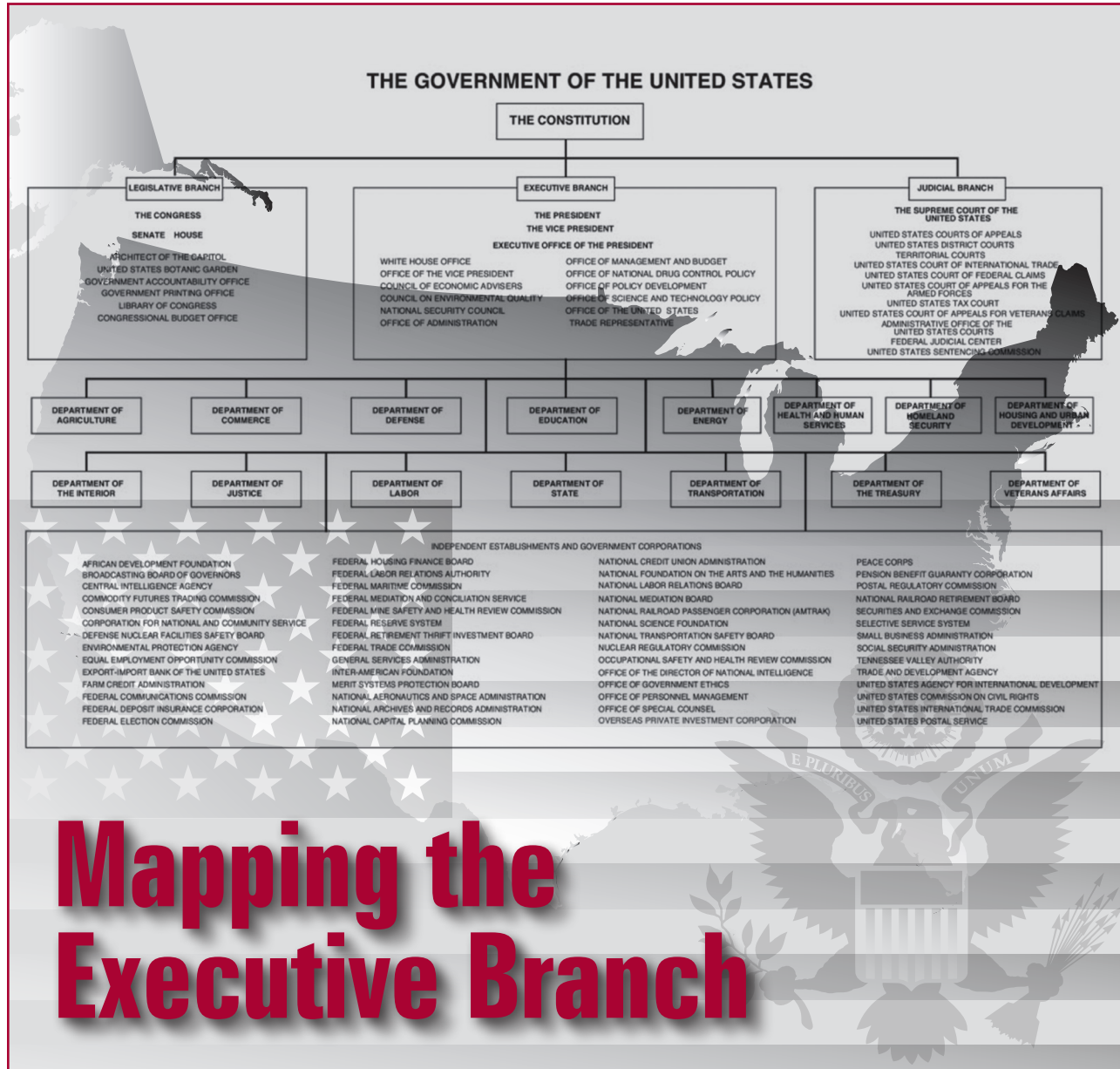


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Mapping the Executive Branch

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Mapping the Contours of the Federal Government

By John M. Kamensky*

President Obama has called several times for a “21st century government” and the need to reorganize: “We can’t win the future with a government of the past.”¹ But before policymakers reorganize, they need to understand how the government is currently organized and whether the original rationale behind that organizational construct still holds. Typically, the focus of policy makers is on the hierarchical structure of a department or agency. But many of the important elements of how an agency operates, and why, are below the surface. These elements include the interactions among agencies, their cultures, and an understanding of their existing forms. However, there is no comprehensive “map” of the federal government that covers all of these elements. But, courtesy of the Administrative Conference of the U.S., there is now an update of an earlier “map” originally created in 1980 by the Congressional Research Service.² This new *Sourcebook of United States Executive Agencies*³ was prepared by David E. Lewis and Jennifer L.

Selin, of Vanderbilt University and released in December 2012 by the Administrative Conference.

The *Sourcebook*, according to its authors, “describes the evolution of the current executive establishment, looks backward to understand what now exists, and analyzes trends to see what may be coming.”⁴ So it is not just a simple set of organization charts of various agencies, with statements of key missions and positions. Those exist in the annually prepared *United States Government Manual*⁵ and in the quadrennially prepared “Plum Book,”⁶ which lists all political and policy positions in the executive branch.

How Many Government Agencies Are There?

You would think there would be a simple answer. However, the authors note that “there is no authoritative list of government agencies”⁷ and that “many federal entities do not neatly reside in the executive branch.” They observe that the official *Government Manual* lists 96 independent executive units and 220 components of the executive departments, while the website USA.gov lists 137 independent executive agencies with 268 components. Other sources list different numbers. So the first section of the report addresses the question “What is a Federal Agency?” and comes to no real conclusion because “Congress defines what an ‘agency’ is in relation to

particular laws rather than provide one overarching definition.”⁸ For example, is the Federal Agricultural Mortgage Corporation a government agency? It is governed by a board in which two-thirds of the members are selected by private shareholders, not the President. What about venture capital funds, such as In-Q-Tel?

Not even the courts have offered a definitive answer; so, the authors developed their own definition so that they could provide a count. They define an agency as “a federal executive instrumentality headed by one or more political appointees nominated by the President and confirmed by the Senate (the instrumentality itself rather than its bureaus, offices or divisions).”⁹

The next section of the report describes those agencies, starting with the Executive Office of the President, the various executive departments, and the various independent agencies. It also provides an overview of the federal personnel system, since an understanding of how it evolved historically is important to interpreting the characteristics of the various alternative personnel structures that follow in the next section. This section includes the historical trend towards increased numbers of political appointees, the creation of personnel authorities for individual agencies that vary from the core civil service overseen by the Office of Personnel Management, and the rise in the use of contractors to deliver government services.

Characteristics of Federal Agencies

The heart of the *Sourcebook* is not a mere count of agencies or how many work for the government (a more problematic number, if you cannot count the number of agencies in the first place, but the authors say it stands at around 2.13 million or 2.85 million

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⁸ *Id.* at 13.

⁹ *Id.* at 16.

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¹ President Barack Obama, *State of the Union Address*, January 25, 2011. Available at: <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>

² Senate Committee on Governmental Affairs, 96th Congress, “The Federal Executive Establishment: Evolution and Trends” (Committee Print 1980). This report was authored by Ronald C. Moe of the Congressional Research Service.

³ Administrative Conference of the U.S. (2012) *Sourcebook of United States Executive Agencies* is available for free on the web at: <http://www.acus.gov/research-projects/federal-executive-establishment>. Alternatively, the *Sourcebook* can be purchased for \$16 in book form from the Government Printing Office.

⁴ *Id.* at 1.

⁵ National Archives and Records Administration, *United States Government Manual* (U.S. Superintendent of Documents: Washington, DC) 2012. Available at: www.usgovernment-manual.gov.

⁶ House Committee on Oversight and Government Reform, 112th Congress, 2nd Session, Committee Print, *United States Government Policy and Supporting Positions—2012* (U.S. Superintendent of Documents: Washington, DC) 2012.

⁷ *Sourcebook*, at 14.

civilians, depending on how you define federal employees).¹⁰ The value of this section of the report is in its exploration of the underlying characteristics of agencies, which are detailed in a series of tables that list all agencies (based on the authors' definition) and their associated acronyms and that provide answers to questions such as:

- How many agencies are inside the Executive Office of the President?
- How many appointees are in each of the Executive Departments?
- How many independent agencies are there?
- Which bureaus have chiefs appointed with fixed terms?
- What are the different agency-specific personnel systems?
- Which agencies are excluded from OMB review of their budgets, rule-making, and legislative proposals?
- Which agencies have statutes that provide monies other than through appropriations?
- Which agencies have adjudicatory authority? and
- Which Senate committees have jurisdiction over the confirmation of different agency nominees?

Each of the accompanying tables provides rich color to understanding the subtleties of various federal entities and how any reorganization might affect the balance of power between them and their political masters—either in Congress or the White House.

The *Sourcebook* ends with some insights about the creation and design of federal agencies, which could be useful context in discussions to create new agencies, or more importantly, in reorganization efforts, which could be on the agenda in coming years. While the default design approach is to create an agency and locate it within an existing department, there are times, the authors note, when “Congress and the President have chosen to deviate from this design and insulate agencies from the President and/or Congress.”¹¹ In some cases, this means insulating agencies from the President by limiting his or her appointment authority, creating multi-member bodies, requiring fixed term

appointments, and limiting the President's authority to remove agency officials. In other cases, it means limiting OMB review of agency budget submissions and/or proposed regulations, limiting agency communications with Congress; and/or permitting an agency to litigate independently of the Department of Justice. The *Sourcebook's* tables describe which agencies have these exceptions.

The authors also describe how some agencies are insulated from congressional influence by allowing them to collect and spend revenues outside the appropriations process.

Understanding these subtleties, and why they exist in the first place, are important in any effort to reorganize government. The authors provide a roadmap of where to find them. ○

NATIONAL ADMINISTRATIVE LAW JUDICIARY FOUNDATION



The National Administrative Law Judiciary Foundation (NALJF) is the public interest arm of the National Association of Administrative Law Judiciary (NAALJ). One of the Foundation's major purposes is to promote the study and research of administrative law and distribute this knowledge to the administrative judiciary and the public. To further this purpose, a Fellowship was endowed to encourage research and scholarship for improving administrative justice.

2013 FELLOWSHIP COMPETITION

NALJF is currently requesting applications for the 2013 Fellowship. The topic for 2013 is: “*The history of the Federal Administrative Procedure Act.*”

To be considered, each submission should propose, for approval by the Fellowship Committee, a scholarly review of the law on the above topic.

ONLY ONE fellowship proposal will be chosen for the Fellowship.

All applications for the 2013 Fellowship must be in electronic format (Word Format preferred) and must include the following documents: (1) an abstract or an introduction to the proposed article; (2) a detailed outline for the proposed article; (3) a writing sample; (4) curriculum vitae; and (5) a list of publications. All submissions must be sent by e-mail to naalj@naalj.org, with a cc to julian.mann@oah.nc.gov.

The deadline for all submissions is April 30, 2013.

The Fellowship Committee will review the submissions and select the Fellowship winner by May 31, 2013.

IMPORTANT NOTICE: Prior Fellowship winners, current members of the Fellowship Committee, current members of the NAALJ Journal Board of Advisors, and current members and officers of the NAALJ Board MAY NOT APPLY for the Fellowship.

The Fellow will prepare an original article for publication in the Journal of the National Association of Administrative Law Judiciary, and will deliver an oral presentation at the 2013 NAALJ Annual Conference in Chicago, Illinois, September 15-18, 2013. The final draft of the paper will be due January 1, 2014.

The Fellow will receive a \$1,500 cash stipend, as well as transportation, accommodations, and meals, at the 2013 NAALJ Annual Meeting and Educational Conference.

Applications and inquiries regarding the Fellowship should be submitted by e-mail to naalj@naalj.org, with a cc to the Hon. Julian Mann, Fellowship Committee Chair julian.mann@oah.nc.gov.

¹⁰ *Id.* at 12 n.27.

¹¹ *Id.* at 98.