

# The Quasi-Government in America

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I regret that I am unable to attend this important gathering of scholars and officials. I would have enjoyed meeting with you, sharing what I have learned about the quasi government in the United States, and learning from you about similar Chinese institutions. Perhaps, one day a similar opportunity will arise. Inevitably, I do hope that you will consider contacting me should you wish to further discuss this subject.<sup>1</sup>

Here I will not reprise the paper “The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics.”<sup>2</sup> Rather, I will offer a few observations on how one might think about these variegated entities and their enduring appeal and challenges.

### **Understanding the Quasi Government**

To understand the quasi government in America, it is useful to think in terms of law, law being understood in its simplest sense—rules promulgated by government. Broadly put, in the United States there are two realms of law: public sector (or administrative law), and private sector law. The former realm of law applies to the actions of governmental bodies; the latter realm of law generally applies to private actors (individuals, corporations, etc.)<sup>3</sup>

To take this generalization a step further, public sector law serves to establish government agencies, and to authorize particular actions by them. For example, the U.S. Forest Service is charged with managing the well-being of America’s forests. Private sector law, meanwhile, tends to prohibit certain actions. Thus, for example, individuals or corporations may pursue profits but they may murder other persons while doing so.

Conceived under this schema, America then would have two types of entities and institutions: governmental entities that are created by government and private sector entities are established by private persons.

But such is not the case in fact. There also exist numerous quasi governmental entities, organizations that have been assigned by law, or by general practice, some of the legal characteristics of both the governmental and private sectors.

How can this be?

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<sup>2</sup> “The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics” (Congressional Research Service, Library of Congress, 2011).

<sup>3</sup> See Ronald C. Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Administration* (Jossey-Bass, 1997), pp. 41-58.

## Creating the Diverse American Quasi Government

With rare exception, quasi governmental entities are established by statute—that is, an elected body (U.S. Congress or sub-national legislature) enacts a statute to create the quasi governmental entity.

Because each quasi governmental entity is created (or chartered) by a separate law, and because these laws are crafted at differing moments in time and by differing legislators, each quasi governmental entity is unique.<sup>4</sup>

There are thousands of quasi governmental organizations in America, and they are extraordinarily diverse. There exist small, privately funded quasi governmental entities that serve to encourage fraternal or professional relations among individuals, such as the Foundation of the Federal Bar Association.<sup>5</sup> Oppositely, there are very large quasi governmental entities which serve a variety of governmental purposes, such as Federal National Mortgage Association (Fannie Mae), which has provided trillions of dollars in liquidity to the U.S. mortgage market.

The structures of quasi governmental entities varies greatly. In some instances, the chartering statute will grant a quasi governmental organization the authority to establish its own leadership structure. In other instances, the statute will explicitly establish the organization's various leadership positions and their respective authorities, and the means by which these leaders are selected. Usually, quasi governmental organizations are granted partial or full exemption from taxation. The tacit justification for tax exemption is that the organization was established by government to serve a governmental purpose.<sup>6</sup>

Quasi governmental organizations finance their operations in different ways. Some quasi governmental organizations are financially dependent upon the federal government or federal government business. The U.S. Institute for Peace, for example, relies heavily upon annual congressional appropriations. Other quasi governmental entities finance their activities either through charitable donations or by engaging in commercial activities. The Port Authority of New York and New Jersey was established through federal statute in 1921.<sup>7</sup> This agency funds itself

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<sup>4</sup> For an introduction to charters, see “Congressional or Federal Charters: Overview and Current Issues” (Congressional Research Service, Library of Congress, 2011).

<sup>5</sup> See the statute at <http://uscode.house.gov/download/pls/36C705.txt>.

<sup>6</sup> But the salaries earned by employees of quasi governmental organizations are taxed, just as the salaries of governmental and private sector employees are taxed.

<sup>7</sup> 42 Stat. 174.

by charging tolls on the bridges and tunnels that link New York and New Jersey, and through real estate activities.<sup>8</sup>

## **Government and the Quasi Government**

The relationship of American government—federal or sub-federal— to quasi governmental organizations varies widely. In some instances, the government has very little ongoing authority over the quasi governmental entity.

In most instances, the quasi governmental entity may be subject to a variety of governmental and legislative influences. These may include: (1) dependency on government for funding; (2) active oversight by both a government agency and the legislature; (3) appointment of senior officials; (4) requirements to publicly report its activities; and (5) auditing by Inspectors General and the U.S. Government Accountability Office.<sup>9</sup>

And it is important to note that because quasi governmental agencies are established by law, they may be altered or abolished by the legislature through enactment of a statute. For example, in 2007 the U.S. Congress amended the charter of the American National Red Cross, reducing its corporate board membership from 50 to 20 persons.<sup>10</sup>

## **Conclusion: The Enduring Appeals and Challenges of the Quasi Government**

U.S. legislatures have created quasi government agencies for a variety of motives. One of the arguments used in their favor is that some public problems or needs cannot be adequately solved by either wholly governmental or wholly private organizations. Hence, it is reasoned, a hybrid governmental-private organization is needed.<sup>11</sup> Additionally, legislators often see an appeal in

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<sup>8</sup> Quasi governmental organizations often are established to handle tasks that are viewed (at least at the time) as naturally monopolistic.

<sup>9</sup> On Inspectors General and the Government Accountability Office, see <http://www.ignet.gov/> and <http://www.gao.gov>.

<sup>10</sup> See <http://www.redcross.org/about-us/history/federal-charter>.

<sup>11</sup> The quasi government should be differentiated from public private partnerships. The latter involves a legal contractual relationship between governmental and private sector. The former involves establishing a separate organization with both governmental and private sector legal attributes.

being able to create an entity that does not have to follow the myriad laws that government agencies typically must follow, such as the Freedom of Information Act.<sup>12</sup>

If history is any guide, however, there exist at least three perennial challenges to the American quasi government:

(1) Incentives: By definition, quasi governmental entities have incentives that pull in opposite directions. They are created by statute to serve a public good, however, by virtue of their private attributes they seek their own good. When the public good and the good of the quasi government diverge, a not uncommon occurrence, the former may be sacrificed for the sake of the latter.

(2) Legal Peril: Because America's two realms of law assume an entity is either governmental or private, quasi governmental entities frequently encounter legal troubles. For example, AMTRAK, the entity that was created to operate a significant portion of passenger trains in the United States, was sued when it refused to allow one of its billboards to be used for a provocative advertisement. AMTRAK claimed it was not a governmental actor and did not have to respect this individual's First Amendment rights. The U.S. Supreme Court decided otherwise.<sup>13</sup>

(3) Politicization: Politicization can occur in two ways: either control of the quasi governmental organization itself falls into the hands of a particular group or party of politicians; or, the quasi governmental entity may enter politics for the sake of promoting its own well-being.<sup>14</sup> In either instance, politicization is problematic because it conflicts with a broadly accepted notion about government in America: while elected officials are expected to act politically, governmental agencies are not to engage in political activities.<sup>15</sup> Quasi-governmental agencies that behave politically risk being seen as violating this political norm. That said, quasi governmental agencies' charters do not prohibit them from engaging in political activities. However, other

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<sup>12</sup> See U.S. House of Representatives, Oversight and Government Reform Committee, "A Citizen's Guide to Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records" (U.S. Congress, 2012), at <http://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf>. More generally, see

<sup>13</sup> AMTRAK initially had both governmental and private sector shareholders, making it a quasi governmental entity. *Michael A. Lebron v. National Railroad Passenger Corporation*; 513 U.S. 374 (1995).

<sup>14</sup> By "entering politics" I mean using its revenues to support candidates for office, lobbying officials for preferred policy changes, etc.

<sup>15</sup> Hence, the President, presidential appointees (e.g., the Press Secretary and Secretary of Agriculture), and Members of Congress may behave as political actors, however governmental employees themselves may not. Civil service laws and other statutes curb politicking by government employees who are hired on the basis of merit not political identity.

statutes and regulations (such as those of the Internal Revenue Service) can limit how deeply a quasi governmental organization may enter politics.

I thank you for the opportunity to share these thoughts with you, and I hope they have been worthy of your time.